STEPHEN J. FIELD AND PUBLIC LAND LAW DEVELOPMENT IN CALIFORNIA, 1850-1866: A CASE STUDY OF JUDICIAL RESOURCE ALLOCATION IN NINETEENTH-CENTURY AMERICA*

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The landmarks of California resource law were laid down within the turbulent context of "the stampede of 1849 and subsequent years."[1] From all over the world men came to seek fortune in that "glorious country," fully expecting government "to use its resources positively to enlarge their opportunities."[2] But federal policy was in a state of flux when gold was discovered on the public domain. Before 1846 mineral lands had been reserved from sale or pre-emption; federal authorities had attempted simultaneously to expedite development and to raise revenue through a complex set of leasing and regulatory arrangements with private firms. Several factors had impeded effective administration of the program, however, and in 1846 lead, copper, and iron lands had become subject to public sale.[3] The discovery of gold in California, then, found the federal government without an applicable policy and "at a loss for knowledge as how to act."[4] Public sale of gold-bearing tracts was impossible, given the time necessary for survey and classification. A handful of federal officials did submit—and even tried to secretly impose—various plans for reviving some form of federal intervention.[5]

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1. Rodman Paul, *California Gold: The Beginning of Mining in the Far West* 23 (1947).
2. Stephen J. Field, *Personal Reminiscences of Early Days in California* 7 (1893, reprinted 1968); Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* 6 (1956).
3. Curtis Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands*, I, 60-70 (3d ed., 3 vols. 1914), hereinafter Lindley *Mines*. For an important case study, see James E. Wright, *The Galena Lead District: Federal Policy and Practice, 1824-1847* (1966).
4. Joseph Ellison, "The Mineral Land Question in California, 1848-1866," 30 *S.W. Hist. Q.* 34 (1926).
5. See Samuel C. Weil, *Lincoln's Crisis in the Far West* (1949).

But Californians made it clear that they would stubbornly resist any program likely to forestall rapid exploitation of the public domain, and widespread recognition of the difficulties inherent in administering any policy that would conflict with local interests led to congressional unwillingness to take any action until 1866.[6] In the interim, the State of California deemed it advantageous to take the situation "precisely as it finds it . . . . It looks to the fact that the General Government permits [miners] to trespass on the public domain without complaint . . . [and] the State is not the steward, nor bailiff, of the General Government, having in charge the protection of the public property."[7]

Nevertheless, before 1851 there was no legal machinery, either state or federal, for protecting the rights of miners to their discoveries. Mexican law had provided certain possessory titles to mineral claimants, but in 1848 the military governor had summarily abolished the "Mexican laws and customs now prevailing in California, relative to the denouncement of mines."[8] The miners "were thus left to adjust their respective rights and claims as best they might."[9] Following a tradition of collective action on the mining frontiers of other continents, the miners formed districts, embracing from one to several of the existing "camps" or "diggings," and promulagated regulations for marking and recording claims.[10] The miners universally adopted the priority principle, which simply recognized the superior claims of the first-arrival. But the district assemblies imposed significant limitations on the rights of prior claimants because early prospectors had attempted "to own, hold, control, and rent to others" enormous mineral-bearing tracts.[11] Consequently the miners' codes defined the maximum size of claims, set limits on the number of claims a single individual might work, and established regulations designating certain actions—long absence, lack of diligence, and the like—as equivalent to the forfeiture of rights. A similar

6. Ellison, *supra*, note 4, at 34-55.
7. People v. Naglee, 1 Cal. 232, 244-45 (1850).
8. Gregory Yale, *Legal Titles to Mining Claims and Water Rights in California* 17 (1867), hereinafter Yale, *Legal Titles*. Mexican law is surveyed in Lindley, *Mines*, I, 27-35; the military governor's motives are examined in Wiel, *supra* note 5, at 3.
9. John Norton Pomeroy, "Introductory Sketch," in *Some Account of the Work of Stephen J. Field* 15 (Chauncey Black & Samuel B. Smith eds. 1881).
10. Yale, *Legal Titles* 59; Arthur S. Aiton, "The First American Mining Code," 23 *Mich. L. Rev.* 105 (1924); William E. Colby, "The Freedom of the Miner and its Influence on Water Law," in *Legal Essays in Tribute to Orrin Kip McMurray* 67 (Max Radin & A.M. Kidd eds. 1935).
11. Charles Howard Shinn, *Mining Camps: A Study in American Frontier Government* 109 (1884; reprinted 1965), hereinafter Shinn, *Mining Camps*.

body of district rules regulated the use of water flowing on the public domain.[12]

Since the publication of Charles Howard Shinn's *Mining Camps: A Study in Frontier Government* in 1884, historians have routinely lavished romantic praise upon the "sturdy self-reliance" and "fraternal co-operation" of the men who framed and administered California's mining codes.[13] What is not generally recognized, however, is that the miners' regulations were neither unprecedented nor self-executing. In Wisconsin, Iowa, and other Mississippi Valley states, similar "concentrations of trespassers and thieves" had "peopled and fertilized" the public domain, despite the "tardy movement of the [federal] government."[14] Public officials in those states had taken a *laissez faire* approach, and "claims clubs"—with rules and regulations comparable to the miners' codes—had protected the holdings of first-arrivals until the General Land Office completed its surveys and conferred fee-simple titles upon association members.[15] In California, however, the influx of population, and therefore the incidence of conflict, occurred on too large a scale to be ignored by formal authorities.

California's non-Indian population was only 15,000 in 1848.[16] By 1850, however, it had grown to an estimated 165,000 and in 1860 some 379,994 people competed for access to land and water within the state.[17] Thus miners squabbled among themselves over mining claims, water rights, and the applicability of district regulations. Summary justice meted out by extra-legal tribunals often left claimants dissatisfied, appeals to "brute force" proliferated, and a widely-shared aversion to the presence of "foreign" miners precipitated periodic mob action and the forcible ejection of non-Anglo-Americans from rich claims that had vested under local regulations.[18] Moreover, the creation of a vigorous mining

12. For surveys of typical mining-camp regulations, see Yale, *Legal Titles* 71-88; Shinn, *Mining Camps* 232-258; W. Turrentine Jackson, *Treasure Hill: Portrait of a Silver Mining Camp* (1963).
13. Shinn, *Mining Camps* 288-89.
14. Joseph F. Rarick, "Oklahoma Water Law: Stream and Surface in the Pre-1863 Period," 22 *Okla. L. Rev.* 1, 20 (1969); Pratt v. Ayer, 3 Pinn. 236, 256 (Wis. 1851); Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin* 54-130 (1964).
15. Hurst, *supra*, note 2, at 3-6; Allan Bogue, "The Iowa Claims Clubs: Symbol and Substance," 45 *Miss. Val. Hist. Rev.* 231 (1958).
16. Doris M. Wright, "The Making of Cosmopolitan California: An Analysis of Immigration, 1848-1870," 19 *Cal. Hist. Soc'y Q.* 323, 324 (1940).
17. Warren Thompson, *Growth and Changes in California's Population* 9, 11 (1955); Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1957*, 13 (1961).
18. Shinn, *Mining Camps* 212-218.

economy rapidly opened up lucrative entrepreneurial opportunities in supportive industries. Farmers squatted on the public domain and grew grain and fruit for nearby mining-camp markets. Lumbermen erected saw-mills and produced materials for the construction of housing, sluice boxes, flumes, and mining-shaft timbers. And with miners willing to pay up to $45 per day for water, enterprising individuals formed joint-stock companies, built ditches and flumes, and transported public waters to mining claims on a scale "that would excite the interest of modern engineers."[19] To simply state the multiplicity of interests engaged in productive labor on the public domain is to suggest that the result was a "chaos of casual initiative and insistent competing claims," or, in short, a bedlam of privatism entirely suppressing communal values.[20]

Men like Stephen J. Field who came to California expecting to take "a part in fashioning its institutions . . . [and] exerting a powerful force for good upon its destinies" promptly recognized that resource-users "could not long be left to fight among themselves over questions of priority or extent of claims."[21] By 1851 it was evident that government had to devise a body of workable rules to rank and balance the pioneers' shared goals: rapid exploitation of the public domain, equality of entrepreneurial opportunity, and due protection for the "property rights" of those who had first connected their labor to the land. State officials, however, had at their disposal few policy tools capable of effecting those goals. The 1850 statute conferring statehood on California provided

> That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits . . .[22]

Only Congress could dictate the mode of disposing the public domain, regulate the size of holdings, and fix policy for the use of the land's appurtenances—minerals, timber, and water; Californians recognized that attempts by the state legislature to con-

19. Paul, *supra*, note 1 at 161; see also Harold E. Rogers and Alan H. Nichols, *Water for California*, I, 21 (2 vols. 1967).
20. Joseph Bingham, "Some Suggestions Concerning the California Law of Riparian Rights," in *Legal Essays in Tribute to Orrin Kip McMurray, supra*, note 9 at 8. For a more elaborate discussion of this interpretation, see Harry N. Scheiber and Charles W. McCurdy, "Eminent Domain Law and Western Agriculture," 49 *Agricultural Hist.* 112 (1975).
21. Field, *supra*, note 2 at 2; Black and Smith, "Judge Field as a Legislator," in *Some Account of the Work of Stephen J. Field, supra*, note 9, at 4.
22. 9 *U.S. Stat. at Large* 452, § 3 (Sept. 9, 1850).

sciously allocate federal resources would certainly result in rebukes from Washington.

Field created a solution for that conundrum during a single term in the state legislature. Working from the premise that what the state could not do directly it might accomplish indirectly, Field prepared, reported, and secured passage of a bill reorganizing the state's legal system.[23] The 1851 statute gave the justice courts jurisdiction over all possessory-claim controversies, and provided machinery for appeal to the state's supreme court of decisions involving judgments of over two hundred dollars.[24] Moreover, Field provided in his pioneering Code of Civil Procedure that

> In actions respecting "mining claims," proof shall be admitted of the customs, usages, or regulations established and in force at the bar, or diggings, embracing such claim; and such customs, usages, or regulations, when not in conflict with the Constitution and Laws of this State, shall govern the decision of the action.[25]

The legislation Field sponsored effectively channeled conflict between resource-users into an arena where formal authorities might bring competing interests and ideological commitments into sharp focus before proceeding "to frame the law, and [to] make a system out of what was little more than chaos."[26] And through the first fifteen years of statehood, the California judiciary did indeed eagerly embrace the opportunity to oversee a rational and equitable distribution of federal resources. State judges considered that function to be an integral part of the court's institutional role, and even came to view the few legislative interventions that did occur as unwarranted intrusions upon their decision-making domain.

The most important figure among an entire generation of energetic California jurists was Stephen J. Field. Elected to the California Supreme Court in 1857, Field served as Chief Justice between 1859 and 1863. During his six-year term, Field brought stability and doctrinal symmetry to a court whose authority had been repeatedly weakened by a rapid turnover in personnel and frequent reversals of prior decisions. In the process, he earned

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23. Black and Smith, *supra*, note 21, at 11.
24. 2 *Calif. Stats.* 9, § 89, 5 (March 11, 1851); for an exhaustive analysis of jurisdictional matters respecting possessory-claim actions, see Yale, *Legal Titles* 115-127.
25. 2 *Calif. Stats.* 51, § 621 (April 29, 1851); see William Wirt Blume, "Adoption in California of the Field Code of Civil Procedure," 17 *Hastings L.J.* 701 (1966).
26. Joseph G. Baldwin, "Judge Field," in *Some Account of the Work of Stephen J. Field* 18. Baldwin sat with Field on the California Supreme Court between 1858 and 1862.

a national reputation as "the end of the law" on far-western resource matters.[27]

I

The California judiciary was required to formulate a jurisprudence of mining titles *de novo*. Recognizing that it was in the public interest for the miner to take and hold what he could put to good use, the court assumed from the outset that the right to dig gold on the public domain was a "franchise from the government, and free to all."[28] Under judicial construction, mere possessory rights on the public lands were transformed into "a species of property," and became "title" good "as against all the world but the [United States] government."[29] But the protection of mining property was not a routine, mechanical task. Public policy, as dictated by the miners' codes, charged the court with guarding the vested rights of first-arrivals while simultaneously seeking "to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines."[30] But the interests of established miners and subsequent gold rushers were hardly congruent. Those who arrived late and found the best tracts already occupied frequently called public meetings to "persuade" prior claimants "to diminish the prescribed size of claims so as to give all an equal chance."[31] If persuasion was unavailing, however, "mining camp democracy" was not; newcomers readily mustered new majorities to alter the local regulations.[32] By the mid-1850's, then, population pressures on the available supply of mineral land had transformed many of the miners' assemblies from mere private associations acting upon principles of "fraternal cooperation" into powerful legislative bodies claiming authority to divest priority rights.

Camp-law changes in the prescribed size of claims posed the classic constitutional issue of the police power versus vested

27. Lindley, *supra*, note 3 at 80; see also J. Edward Johnson, *History of the Supreme Court Justices of California* I, 65 (2 vols. 1963).
28. Shinn, *Mining Camps* 270; McClintock v. Bryden, 5 Cal. 97, 99 (1855).
29. Stiles v. Laird, 5 Cal. 120, 123 (1855); Tarter v. Spring Creek Water and Mining Co., 5 Cal. 395, 399 (1855); Crandall v. Woods, 8 Cal. 136, 143 (1857).
30. The quotation is from Field's classic, if somewhat romanticized account of the interaction between law and early California society in Jennison v. Kirk, 98 U.S. 453, 457 (1878).
31. Shinn, *Mining Camps* 175.
32. According to Shinn, "first-comers . . . readily yielded when other miners arrived." But see Ralph Mann, "The Decade After the Gold Rush: Social Structure of Grass Valley and Nevada City, California, 1850-1860," 41 *Pacific Hist. Rev.* 484 (1972), also the sources cited at note 37, *infra*.

rights. The "basic doctrine of American constitutional law" limited legislative power to the formulation of policy in general and prospective terms.[33] Retrospective legislation, endangering rights already vested, constituted confiscation of property and encroached upon the judicial process by "being among other things a repudiation of trial by jury and in effect a bill of pains and penalties."[34] In other words, legislation designed to divest pre-existing rights was considered to be equivalent to the denial of due process. Like virtually all police regulations, however, the miners' codes were both prospective and retrospective. On the one hand, they set out public policy by prescribing basic rules of fairness so that equality of opportunity might prevail; on the other hand, local regulations disturbed the rights of prior claimants, often by design. Since Field and his associates believed that it was certainly "the duty of the Courts to protect private property," they reserved to themselves the power to review regulations adopted in the camps and to formulate reasonable standards for the allocation of mining "titles" among politically-organized claimants.[35] Consequently the Field Court held that the Code of Civil Procedure, which provided that local regulations "shall govern the decision of the action" in any mining claim controversy, actually determined "nothing beyond the admissibility of certain kinds of evidence."[36]

In many instances rule changes were obviously justified because the first two or three men in an area had organized a district and provided for standard claims that were extremely large.[37] When early claimants "went in for [such] trick legislation," the court provided ample room for newcomers to alter the regulations.[38] The miners' codes had initially been framed to overcome precisely that kind of monopolistic activity; thus the

33. See Edward S. Corwin, "The Basic Doctrine of American Constitutional Law," 12 *Mich. L. Rev.* 247 (1914).

34. Wallace Mendelson, "A Missing Link in the Evolution of Due Process," 10 *Vand L. Rev.* 125, 127 (1956).

35. Smith v. Doe, 15 Cal. 100, 106 (1860). As Field later indicated, "the distinction between a judicial and legislative act [was] well defined [in his jurisprudence]. The one determines what the law is and what the rights are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Whenever an act undertakes to determine a question of [existing] right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions." Field J., dissenting in The Sinking Fund Cases, 99 U.S. 700, 761 (1878).

36. Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 378 (1859).

37. For typical examples, see Jim Dan Hill, "The Early Mining Camp in American Life," 1 *Pacific Hist. Rev.* 295 (1932). Harwood Hinton, "Frontier Speculation: A Study of the Walker Mining District," 29 *Pacific Hist. Rev.* 245 (1960).

38. Hill, *supra*, note 37 at 298.

court routinely refused to "inquire into the regularity of the modes in which these local legislatures or primary assemblages act . . . unless some fraud be shown, or some other like cause for rejecting the law."[39] Even when no applicable district regulations had been promulgated, the court was unwilling to eject newcomers from previously located tracts if first arrivals had greedily staked out enormous claims. "No location can be so extended as to amount to a monopoly," the Field Court explained in *Table Mountain Tunnel Co. v. Stranahan* (1862), "and in the absence of local regulations prescribing a limit, recourse must be had to general usage. If the quantity of ground be unreasonable, the location will not be effected for any purpose, and possession under it will only extend to the ground actually occupied."[40]

But where the rights of prior claimants had vested under regulations that conformed to the "general usage" elsewhere, the Field Court viewed rule changes with suspicion. In cases of that variety there was not—to invoke Professor Hurst's language—"a reasonable public interest to justify imposing the public force on individuals' activities."[41] Thus in *Dutch Flat Water Co. v. Mooney* (1859), the court announced that

> The Act of the legislature giving effect to these local regulations, qualifies the power by providing that the rules so passed shall not be inconsistent with the Constitution or laws of the State. . . . We see no inconsistency in holding that the mode of acquiring, and the extent of the claim shall be according to local rules; but where a right of property shall have attached, it may be more difficult to maintain that it can be divested . . . by creating new and arbitrary rules, or [by] abrogating the old ones.[42]

The court clearly assumed that "arbitrary" regulations divesting priority rights held under previous and "customary" district codes would constitute "takings," in contravention of the state constitution's due process clause. Field and his associates did permit revised local regulations to be introduced into evidence ("defendant claimed under them"), but they flatly stated that rights which "had attached" under prior rules "could not be taken away or affected by them."[43] If, as William E. Nelson has recently suggested, the development of vigorous, private-right oriented judicial review in the states initially stemmed from the emergence of "social conflicts between politically-organized groups," then that crucial social process occurred very early in

39. Gore v. McBrayer, 18 Cal. 582, 589 (1861).
40. Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 199, 211 (1862).
41. Hurst, *supra*, note 2 at 8.
42. Dutch Flat Water Co. v. Mooney, 12 Cal. 534, 535 (1859).
43. Roach v. Grey, 16 Cal. 383, 385 (1860).

the California mining camps.[44] And it is noteworthy that Field, who later earned a reputation as the "pioneer and prophet" of a substantive construction of the Fourteenth Amendment, readily invoked due process doctrine to buttress the judiciary's assertion of authority to determine what constituted an "unreasonable quantity of ground."[45] He recognized that both priority rights and equality-of-access policies had to be given their due. In his view, however, it was the judiciary's prerogative to ascertain whether a particular local regulation amounted to a curb on mere speculative holdings or constituted confiscation of equitably-acquired, *bona fide* mining claims.

Late-comers groping for ways to partake of California's abundant mineral wealth utilized a number of other *sub rosa* strategies that mobilized judicial intervention on behalf of claimants who evinced a genuine desire to develop their holdings under customary local regulations. The most popular strategy was "claim-jumping," which inundated the courts with actions for ejectment.[46] Whether merely opportunistic or actually convinced of their rights, claim-jumpers set up ingenious defenses: the prior claimant had abandoned his claim, had failed to diligently work it, had staked it out without following local regulations, or held more claims than district rules permitted. Moreover, one of the very foundations of mining-camp law was that

> any individual who is satisfied that the rules have been violated, and that the claimant has worked a forfeiture may proceed to enter the claim according to the rules, and take possession of the claim. In mining parlance the claim is jumpable.[47]

When claims were jumped, however, the Field Court sought to adjust the parties' rights in view of the particulars of each situation, rather than blindly enforce rigidly-drawn local regulations. As a result, Field and his associates repeatedly held that it was up to the judiciary to determine whether priority rights had vested or had been forfeited to newcomers, and they periodically reprimanded the justice courts for allowing juries and "interested volunteers" to "execute the law according to their [own] crude notions."[48]

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44. William E. Nelson, "Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860," 120 *U. Pa. L. Rev.* 1166, 1178 (1972).
45. Edward S. Corwin, "The Supreme Court and the Fourteenth Amendment," 7 *Mich. L. Rev.* 643, 653 (1909).
46. Court records apparently supply only a small sample of claim-jumping activity. Rodman Paul suggests that most claim-jumpers hoped to be "bought off" and only threatened the prior claimant with litigation. See *Mining Frontiers of the Far West, 1848-1880*, 170 (1963).
47. Yale, *Legal Titles* 81.
48. Fairbanks v. Woodhouse, 6 Cal. 433 (1856), reprimanding a lower court for allowing the jury to determine what constituted abandon-

In *Packer v. Heaton* (1858), for example, a late-comer working a prior claimant's ground argued that the first-arrival had forfeited his "title" by not working his claim two days in every ten as prescribed by local regulations. The prior claimant, seeking ejectment and damages, responded that he had to leave the area to purchase a pump to remove water from a flooded shaft. The court peremptorily disposed of the dispute by ruling that "efforts to procure machinery, with the *bona fide* intent to work the claim may justly be considered work done upon the claim."[49] Litigation also arose when late-comers entered seemingly unoccupied lands and sunk shafts, ran tunnels, and began removing ore only to discover that the tract was already held by a prior claimant who had been ill when the newcomers had arrived. In *Atwood v. Fricott* (1860), the court held it to be no defense that a miner had failed to provide clear physical evidence of his prior entry. The "only value" of a mining claim, said the court, "is in working it and extracting minerals." Thus a miner was "not expected to reside upon his claim, nor to build upon it, nor to cultivate the ground, nor to enclose it."[50] In other words, newcomers had to use due care in selecting their claims. When a prior claimant had properly filed his location with the local-district office and had evinced a "*bona fide* intent to work the claim," it was prima facie evidence of reckless, actionable entry by late-comers.

Perhaps the most disarming illustration of the Field Court's penchant for disregarding the letter of the miners' codes occurred in *Prosser v. Parks* (1861).[51] In that case, a claim jumper occupied a parcel of ground that had been purchased by another operator, and defended himself in an ejectment action by arguing that plaintiff held more claims than local rules allowed. The district code introduced in evidence limited each miner to a single 625-square-foot claim, while plaintiff asserted "title" to a tract 1500 feet wide and 2800 feet long. Nevertheless, there was ample reason for the judiciary to ignore the code provision. As surface deposits were "played out," in some areas as early as 1851, individual projects had necessarily assumed greater pro-

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ment of the claim; Mitchell v. Hagood, 6 Cal. 148 (1856), holding that state officials alone could enforce the law requiring "foreign" miners to purchase a license.

49. Packer v. Heaton, 9 Cal. 568, 570 (1858); see also McGarrity v. Byington, 12 Cal. 426 (1859), holding negotiations with a mechanic for the construction of a tunnel equivalent to diligence in working the claim.

50. Atwood v. Fricott, 17 Cal. 38 (1860); English v. Johnson, 17 Cal. 108, 116 (1860).

51. Prosser v. Parks, 18 Cal. 47 (1861).

portions.[52] The application of advanced mining technology—blasting, tunnelling, and hydraulicking—was cost-efficient only when undertaken on a large-scale basis. Thus plaintiff urged the court to hold that mining codes only regulated the amount of ground claimed by location or prior appropriation. And since he had purchased the contiguous claims of several original locators, plaintiff argued that his property was not subject to ordinary local regulations. *Prosser*, in short, required the court to decide whether to put more weight upon the anti-monopoly policy precepts embraced in the district regulations or upon the market-centered allocation procedures provided by real property doctrine. The Field Court opted for the latter course of action, and held that the miners' assemblies "cannot restrict the quantity of ground or number of claims which any person may purchase."[53] Mining claims were real property, the court explained, even to the extent of being subject to taxation and sale under execution; like all forms of property, they might be transferred at the owner's discretion.[54] Field and his associates apparently assumed that because plaintiff had purchased his enormous tract, he intended to develop it. Consequently there was no reason to suspect that the claim constituted "an unreasonable quantity of ground," or to impair the market's utility as a mechanism for re-allocating mineral land during a period of technological change. In the court's view, it therefore made sense to hold that rights acquired by purchase, even if the federal government continued to hold title to the tract, stood upon a different footing than rights acquired under the miners' discovery and development policies.

"The whole doctrine of possession," the Field Court proclaimed in 1860, "must be controlled and modified by the peculiar nature of the subject and by surrounding circumstances."[55] The rigidly-drawn miners' codes tended to compel results rather than adjust the rights of parties in view of unique "surrounding circumstances" involved in each particular dispute. But once the judiciary had acquired legal leverage over mining claim controversies, several regulatory mechanisms became available for balancing the miners' competing commitments to protection for the claims of first-arrivals and to "equality of right and privilege in working the mines." The court could draw upon the miners'

52. Paul, *California Gold* 124-70.
53. Prosser v. Parks, 18 Cal. 47, 48 (1861).
54. *See* State v. Moore, 12 Cal. 56 (1859) (taxes); McKeon v. Bisbee, 9 Cal. 137 (1858) (sheriff's sale).
55. English v. Johnson, 17 Cal. 108, 117 (1860).

regulations to root out speculative practices, rely upon due process concepts to protect *bona fide* claimants against expropriation, employ market-centered real property doctrine to encourage capital-intensive operations, or simply invoke judicially-defined public policy to resolve disputes arising from "the anomalous condition of things."[56] Armed with this flexible array of doctrinal weapons, the Field Court meted out substantive justice as the occasion required, thereby giving life to vague standards of community policy. And in the process of executing their self-imposed duty of defining reasonable modes of holding and enjoying mining claims, Field and his associates laid down the policy foundations for an American law of mining that endured for several decades in the public land states.

II

Mining was not the only social interest that sought legal protection for the exploitation of resources on the public lands. The mineral region was laced with fertile mountain valleys; enterprising farmers with an appreciation of the profits to be gleaned from nearby mining-camp markets, squatted on likely-looking tracts, built homes, and planted grain and fruit trees. Very early in the state's development, policy-makers recognized the need to provide protection for the agriculturalists' pre-emption claims. The Possessory Act (1850) authorized settlers to occupy up to 160 acres and empowered them to take legal action against "persons interfering with or injuring such land or such possession."[57] In deference to the state's mining interests, however, the act forbade settlement "upon lands containing mines of any of the precious metals." Moreover, an amended version of the Possessory Act, passed in 1852, provided

> that, if the lands occupied and possessed [by settlers], contain mines of any of the precious metals, the possession or claim of the person or persons occupying the same . . . shall not preclude the working of such mines by any person or persons desiring so to do as fully and unreservedly as they might or could do had no possession or claim had been made for grazing or agricultural purposes.[58]

The Possessory Acts were, on their face, good policy. The legislature provided a modicum of protection for farmers, yet ensured that their right to stake out 160-acre claims would not be exercised to monopolize mineral lands under the pretence of agricultural development. *Bona fide* agriculturalists, however,

56. Coryell v. Cain, 16 Cal. 367, 573 (1860).
57. 1 *Cal. Stats.* 203 (April 11, 1850).
58. 3 *Cal. Stats.* 158 (April 20, 1852).

found reasonable compliance with the statute to be a difficult matter. They were required to locate their pre-emption claims on non-mineral-bearing ground only, but the public lands had neither been classified by the General Land Office nor explored by state or federal geological-survey teams. Those measures came later.[59] Thus farmers often located 160-acre claims, set up residence, and sowed their fields before vigorous prospecting in the area occurred. In 1850, for example, two men fenced in a natural meadow near Grass Valley and planted hay. "Here," one of Charles Shinn's informants reported,

> they could annually cut two heavy crops of hay, which was worth eighty dollars per ton; they counted on receiving at least four-hundred dollars per acre that year. However, before a month had lapsed, a prospector climbed the brush fence, sunk a shaft through the soil, struck "pay gravel," and in less than twenty-four hours the whole hay-ranch was staked out in claims of fifty feet square. . . . The tract was not property, in the miners' definition. The possessors had fenced it subject to the risk that there might be minerals there.[60]

The "miners' definition" *was* embraced in the statute. Nevertheless, as similar incidents occurred time and again throughout the mining region, agriculturalists grew increasingly reluctant to idly accept the miners' brazen entry on their holdings, which invariably resulted in the destruction of crops and the transformation of fertile soil into barren waste. The profitable interdependence of farmers and miners was hardly strong enough to withstand such pressures. Consequently farmers resorted to the courts for protection of their pre-emption claims against trespassing miners.

The applicable rule of law in such cases was not at all clear. Federal pre-emption statutes prohibited farmers from claiming lands "on which are situated any *known* salines or mines."[61] The California Possessory Acts, however, placed the burden of proof on the farmer rather than the miner. Even if the agriculturalist had staked out a tract and made improvements on the land without knowledge of the mineral content of the soil, the statute empowered miners to work subsequently discovered deposits "as fully and unreservedly as they might" had no agricultural settlement occurred. The farmers, however, contended that the miners' right to the exploitation of public land rested on no higher ground than the right of other economic interests. In their view, the superior claim of the first arrival, when he had no knowledge of the presence of gold, was as applicable in

59. See Gerald D. Nash, *State Government and Economic Development: A History of Administrative Policies in California, 1849-1933,* 97 (1964).

60. Shinn, *Mining Camps* 264.

61. 5 *U.S. Stats.* 453, § 10 (Sept. 4, 1841).

controversies between farmers and miners as between competing groups of miners. The agriculturalists argued that the true common law rule, which the court had applied in litigation involving mining claims, was "that whoever is in possession of real property, is so far regarded by law as the owner thereof, that no one can lawfully dispossess him of the same, without showing some well-founded title of a higher and better character than such possession itself furnishes."[62] The miners certainly had no title to ground previously located by farmers, and they held no *federal* franchise to effectively dispossess settlers on the public domain. The proper rule, one farmer's attorney suggested in a leading case, was that handed down by Chancellor Kent in *Livingston v. Livingston.*[63] There the New York court had held that if the rights of conflicting claimants were unclear, it was "proper to stay the party from doing an act, which, if it turned out he had no right to do, would be irreparable."[64]

In the early case of *McClintock v. Bryden* (1855), the California Supreme Court summarily rejected the farmer's views. "The wants and interests of a country," the court declared, "have always had their due weight upon Courts in applying principles of law which should shape its conditions; and rules must be relaxed, the enforcement of which would be entirely unsuited to the interests of the people they govern."[65] But the court, as then constituted, made no effort to balance the conflicting needs of farmers and miners. "The interests of the people" were, in its view, equivalent to the interests of "the mining public."[66] In their search for gold, the court explained, miners were not "intruders or wrongdoers" but "were in the exercise of a peaceable and lawful calling . . . upon ground reserved to such purposes by both the policy and laws of this State."[67] The farmer, on the other hand, had "no evidence of his title but his improvements, and no right but that of the naked possession he has usurped," even though he had been living there for some five years.[68]

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62. Emory Washburn, *A Treatise on the American Law of Real Property,* III, 114 (3rd ed., 3 vols., 1868). In Hutchison v. Perley, 4 Cal. 33, 34 (1854), the court held that in cases involving conflicting mining claimants "possession is always *prima facie* evidence of title; and proof of prior possession is enough to maintain ejectment against a mere naked trespasser."
63. McClintock v. Bryden (arg.), 5 Cal. 97, 98 (1855).
64. Livingston v. Livingston, 6 Johns Ch. 497, 499 (N.Y. 1822). See also Joseph Story, *Commentaries on Equity Jurisprudence* II, 248-49, 260-61 (5th ed., 2 vols. 1849).
65. McClintock v. Bryden, 5 Cal. 97, 100-101 (1855).
66. *Id.* at 102.
67. *Id.* at 101.
68. *Id.* at 102.

McClintock was neither good policy nor good law. Granting miners a roving license to enter planted fields at will would have effectively proscribed any agricultural settlement on public land throughout an enormous proportion of the state. Very few farmers would have been willing to risk the summary invasions of miners on lands they had patiently cleared, enclosed, and tilled. Mining was a leading sector in the California economy, and it would provide "a stimulus to population growth, to technology, and to the flow of capital, and lay the groundwork for a more diversified development in the future."[69] But a number of policymakers recoiled from legal doctrine that placed the rights of competing groups on such a substantially different footing. Those men wondered if legislation designed to promote a favored form of enterprise, at such a high cost to the rights of other citizens, was a legitimate, or even necessary means of providing for economic expansion. Thus within a matter of weeks of the *McClintock* decision, legislators began to consider still another amendment of the Possessory Act so as "to reconcile all opinions [interests] on a question which presents many difficulties in the way of doing exact justice to all parties."[70] The resulting Indemnification Act (1855) was intended to "compromise the matter" by coupling the miners' unrestricted freedom of entry with a duty to compensate settlers for the value of improvements made on pre-emption claims prior to the commencent of potentially destructive mining operations. The measure provided that

> Whenever any person, for mining purposes, shall desire to occupy or use any mineral lands of this State, when occupied by . . . improvements, property of another, such person shall first give bond to the owner of the . . . improvements, to be approved by a Justice of the Peace of the township . . . in a sum fixed by three disinterested citizens.[71]

The Indemnification Act had ample precedent in French and Spanish, if not in Anglo-American law.[72] Nevertheless, many people believed that even the "compromise" measure failed to sufficiently protect the farmer's equity in his possessory claim. Among them were Chief Justice Field and his two associates,

69. Nash, *supra*, note 59, at 30.
70. 6 *Cal. Assembly Journal* 401 (1855).
71. 6 *Cal. Stats.* 145 (April 25, 1855).
72. On the continent precious metals are owned by the state, thus franchised miners can dig for gold on private land upon posting bond. In England, however, sub-soil mineral rights pass with title to the land. See Yale, *Legal Titles* 44-47 on continental doctrine; Linley, *supra*, note 3, at 5-19 on English Law. When finally confronted with a case involving the entry of miners on land held in fee, derived from a patented Mexican grant, the Field Court flatly rejected continental law. See Moore v. Smaw, 17 Cal. 199 (1861); [Emory Washburn], "Mines—Mariposa Grant," 10 *Am. L. Reg.* 462 (1862); Carl Brent Swisher, *Stephen J. Field: Craftsman of the Law* 82-88 (1930).

Judges Baldwin and Cope, all of whom had been elected to the bench in the years immediately following the controversial *McClintock* decision.

In a series of decisions handed down between 1859 and 1861, the Field Court relentlessly moved to restrict the applicability of the statute and finally invalidated it altogether. "There is something shocking to all our ideas of the rights of property," Field wrote in 1859, "in the proposition that one man may invade the possessions of another, dig up his fields and gardens, cut down his timber and occupy his land, under the pretence that he has reason to believe there is gold under the surface . . ."[73] The miners certainly had "no [such] license in the legal meaning of that term," he explained. Congress had merely exercised "forbearance," and in the absence of positive *federal* policy agriculturalists were no more "naked usurpers" of the public lands than were the miners.[74] Thus in *Smith v. Doe* (1860), the court simply ignored the compensation provision in the Indemnification Act and issued an injunction perpetually enjoining the entry of miners on a settler's pre-emption claim. "Valuable and permanent improvements, such as houses, orchards, vineyards, and growing crops of every description," the court explained, "should undoubtedly be protected" from the ravages of miners, for "these are as useful and necessary [to society] as the gold produced in the working of the mines."[75]

But the Field Court did not rest once it had rejected outright the contention of counsel for the miners that it was "simply a question of who shall use Government soil for making a profit out of it."[76] Crucial property law questions had been raised; thus the court ultimately reached for higher, constitutional ground to support its position. The Indemnification Act essentially devolved the state's power of eminent domain to the mining industry. Miners might enter and effectively "take" the possessory claims—property—of farmers upon payment of compensation fixed by "disinterested citizens." In *Gillan v. Hutchinson* (1860), the court held that the statute was "clearly invalid."[77] Mining was not a business affected with a "public use," the court explained, and in cases where no public purpose could be shown, "the legislature has no power to take the property of one person and give it to another," even if compensation

73. Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 379 (1859).
74. *Id.* at 374.
75. Smith v. Doe, 15 Cal. 100, 105-106 (1860).
76. Daubenspeck v. Grear (arg.), 18 Cal. 444, 447 (1861).
77. Gillan v. Hutchinson, 16 Cal. 154, 157 (1860).

was provided.[78] "The fact that [miners] were willing to pay for the property" taken was

> immaterial, for there are no means of determining whether the value of the property in money would compensate the plaintiff for its destruction. It may possess a value to them which no other person would place upon it; and there is neither justice nor equity in refusing to protect them in their enjoyment of it, merely because they may possibly recover what others may deem equivalent in money.[79]

The court conceded that the legislature had determined "to foster and protect the mining interests as paramount to all others." But if the miners' demand for "an unlimited general license" was sustained, Field declared, it would create "a state of things" where "the proprietor would never be secure in his possessions, and *without security there would be little development*, for the incentive to improvement would be wanting."[80] In order to provide "justice [and] equity," yet encourage economic growth, the distinction between public and private purposes had to be maintained. And since it was the "duty of the Courts to protect private rights of property," Field and his associates assumed it was axiomatic that only the judiciary could draw the line.[81]

By invalidating the Indemnification Act, the Field Court declared, in effect, that the property rights of farmers and miners had to stand upon the same footing. Field and his colleagues recognized, however, that farmers might easily abuse the privilege of claiming 160-acre parcels of the public domain; in a series of decisions handed down contemporaneously with the Indemnification Act cases, the court held that in some instances miners might enter pre-emption claims *without* compensating the agricultural claimant. In *Baldwin v. Simpson* (1859), for example, a possessory claimant sought to eject miners from an uncultivated tract which he had enclosed with a fence consisting of posts seven feet apart, to which he had nailed a single six-inch board. The fence, said the court, could not even keep cattle in

78. *Id.*

79. Daubenspeck v. Grear, 18 Cal. 444, 448 (1861).

80. Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 377, 379 (1859). Italics added.

81. Field probably imbibed the "public purpose" limitation on eminent domain powers from Taylor v. Porter, 4 Hill 140 (N.Y. 1843)—a case that evoked a political furor and ultimately a constitutional amendment during Field's apprenticeship (1844-1848) in the New York office of his brother, David Dudley Field. It is also noteworthy that despite the propensity of other western-state courts to sustain broad devolution of condemnation powers to the mining sector, the California judiciary repeatedly refused to hold that mining was a "public purpose." See Consolidated Channel Co. v. Central Pacific R.R. Co., 51 Cal. 269 (1876); Harry N. Scheiber, "Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910," 33 *J. Econ. Hist.* 232 (1973).

the enclosure and was "entirely insufficient for any purpose [other] than to mark the line of his claim."[82] Where there was only "the pretence of holding land," as in *Baldwin*, judicial intervention on behalf of settlers would have led to "the most pernicious and disastrous consequences."[83] Indeed,

> to hold that a mere entry on a tract of public mineral land of any given extent gives a right to exclusive occupancy and enjoyment to one man would be to hold that the whole mineral region might be appropriated and monopolized by a few men—a doctrine which would effectively exclude the mass of the people of the State from a participation in the mines.[84]

The Field Court met the difficulty by simply holding that settlers could not attain judicially-cognizable rights until they improved their pre-emption claims. Thus in *Burdge v. Smith* (1859), the court ruled that "when it is shown that a person goes upon mineral land to mine," even when the tract is claimed by settlers, "there is no presumption that he is a trespasser."[85] It was up to the farmer to commence legal action. Moreover, the court would only protect the possessory claims of *bona fide* agriculturalists; evidence of actual possession—houses, fences, and planted crops—would be necessary before the court provided equitable relief.[86] In effect, then, the court placed engrossment of land under "the pretence" of agricultural settlement in the same category with monopolization of mining claims. Large claims of unimproved public land, however justified by the occuppants, impeded rapid growth, limited the opportunities of latecomers, and therefore would not be condoned.

Determining what was a *bona fide* claim and what was a mere speculative holding was not an easy matter. Nevertheless, the court undertook full responsibility for balancing private

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82. Baldwin v. Simpson, 12 Cal. 560, 561 (1859).

83. Martin v. Browner, 11 Cal. 12, 14 (1858); Smith v. Doe, 15 Cal. 100, 105 (1860).

84. Burdge v. Smith, 14 Cal. 381, 383 (1859).

85. *Id.*

86. Injunction granted to protect property rights: Fitzgerald v. Urton, 5 Cal. 308 (1855) (hotel); Smith v. Doe, 15 Cal. 100 (1860) (house, fence, and fruit trees); Gillan v. Hutchinson, 16 Cal. 154 (1860) (house, fence, and vegetable garden); Daubenspeck v. Grear, 18 Cal. 444 (1861) (house, fence, and fruit trees); Hicks v. Compton, 18 Cal. 206 (1861) (house, fence, and planted grain); Rogers v. Soggs, 22 Cal. 444 (1863) (timber on improved farm); Biddle Boggs v. Merced Mining Co., 14 Cal. 279 (1859) (mine on land held in fee). Injunction refused to provide "entire freedom of the mines": Martin v. Browner, 11 Cal. 12 (1858) (unimproved "town lot"); Baldwin v. Simpson, 12 Cal. 560 (1859) (fence only); Burdge v. Smith, 14 Cal. 381 (1859) (enclosure for "grazing purposes," but no evidence of livestock on claim); Wright v. Whitesides, 15 Cal. 46 (1860) (house and fence but no crops); Garrison v. Sampson, 15 Cal. 93 (1860) (same). Compare the impressionistic discussion in Shinn, *Mining Camps* 260-65.

rights with "the entire freedom of the mines," despite the inevitability of "embarrassing" situations.[87] In *Slade v. Sullivan* (1860), for example, a settler sought an injunction to restrain entry of miners who threatened to impair the value of his dwelling and a "milk house." The court scrutinized the substantive value of the settler's improvements and refused to provide equitable relief. The "milk house," said the court, was "for all the purposes of use, neglected and abandoned" and the "diminution in the value of the premises from the working of the ravine [150 feet] in front of the dwelling house is a mere matter of speculation."[88] Presumably, additional evidence of the prior claimant's "incentive to improvement" was necessary before the court could treat a tract of public land as private property.

The Field Court clearly exercised enormous discretion in defining the bounds within which farmers and miners might pursue their respective callings on the public domain. But the urge to formulate judicial solutions for resource-allocation problems was irresistable. Field and his associates believed that legislation was generally "accomplished in hot haste with the utmost carelessness . . . and presented the crudest and most incongruous materials for construction."[89] Even when carefully prepared, moreover, legislative policy often gave special interests unwarranted license to invade and effectively "take" the property of other citizens. The judiciary, on the other hand, would put the rights of all parties on an equal footing, examine the substantive merits of each claimant, and in all cases exercise its discretion "in favor of the party most likely to be injured."[90] For the Field Court, that was the very end of the law. Property rights had to be protected and economic growth encouraged. The role of the judiciary was to put those often conflicting goals into a dynamic balance, so that both might be achieved.

III

It did not take the miners very long to discover that working stream beds with pan, shovel, rocker, and "long tom" was not the only practical mode of exploiting California's mineral wealth. Richer deposits often lay several miles from the nearest watercourse. In order to work placer deposits of that variety, however, a permanent right to use certain amounts of water was as essential as the permanent right to occupy a certain parcel of min-

87. Slade v. Sullivan, 17 Cal. 103, 106 (1860).
88. *Id.* at 107.
89. Baldwin, *supra*, note 26, at 18.
90. Hicks v. Compton, 18 Cal. 206, 210 (1861).

eral land. Water in the streams and lakes on the public domain was, like the mines, owned by the federal government. There were no other riparian owners or occupants with legitimate claims to the water, and miners therefore perceived no legal impediments to their appropriating a natural stream so as to conduct it to their claims through artificial ditches or flumes. Consequently the right to divert water arose as a necessary incident of the right to mine; it universally became one of the mining customs that the right to divert and use a specified quantity of water could be acquired by prior appropriation.[91]

In its first session, however, the legislature adopted the common law of England as the general rule of decision in California courts.[92] Presumably that measure included the common law of watercourses, which prohibits water-users from diverting, polluting, or preventing the natural flow of streams.[93] But the miners had developed an unprecedented form of water use and, because it was executed on the public domain, the "necessities and conditions upon which the common law [of watercourses] was based did not exist."[94] The emergence of litigation involving competing water claimants, then, forced the court to decide whether to follow the miners' policy or the apparent meaning of the statute.

Between 1853 and 1857 the court hotly debated the question of whether to suspend riparian doctrine. On the one hand, judges assumed that rules of decision ought to "conform, as nearly as possible, to the analogies of the common law;" and on the other hand, they believed it was necessary to hand down policy "based upon the wants of the community and the peculiar conditions of things . . . rather than any absolute rule of law."[95] As a result, turnovers in personnel led the court down an erratic and often confusing doctrinal trail.[96] In *Eddy v. Simpson*

91. Colby, *supra*, note 10, at 67-84; Samuel C. Wiel, *Water Rights in the Western States* I, 74-75 (3rd ed., 2 vols. 1911); John B. Clayberg, "The Genesis and Development of the Law of Waters in the Far West," 1 *Mich. L. Rev.* 91 (1902).
92. 1 *Cal. Stats.* 219 (April 13, 1850); see Edwin W. Young, "The Adoption of the Common Law in California," 4 *Am. J. Legal Hist.* 355 (1960).
93. See James Kent, *Commentaries on American Law* III, 438-41 (6th ed., 4 vols. 1848). In other urisdictions, of course, these rigid rules were modified to enable leading economic sectors to make best use of running water. Nevertheless, modifications were always made within the framework of riparianism. See Morton Horwitz, "The Transformation in the Conception of Property in American Law, 1790-1860," 40 *U. Chi. L. Rev.* 248 (1973); Mark Jacobson, "Stream Pollution and Special Interests," 8 *Wisc. L. Rev.* 99 (1933).
94. Clayberg, *supra*, note 91, at 96.
95. Hoffman v. Stone, 7 Cal. 46, 48 (1857).
96. The best surveys of the manner in which the court initially dealt

(1853), for example, the court summarily rejected appropriative principles as "impracticable in [their] application."[97] Yet in *Irwin v. Phillips* (1855), the court considered it to be axiomatic that cases "must be decided by the fact of priority, upon the maxim of equity, 'He who is first in time is first in right.'"[98] By 1857, however, the California judiciary had recognized that it might adopt the law of appropriation, with its "distinguishing feature . . . of separate ownership of land and water," without altogether abrogating riparianism.[99]

In the leading case of *Crandall v. Woods* (1857), the court took judicial notice of the far-reaching, "instrumentalist" revisions that eastern judges had made in the common law of watercourses.[100] Quoting at length from a New York decision, the court suggested that

> no doctrine is better settled than that such portions of the law of England, as are not adapted to our conditions, form no part of the law of this State. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such [doctrines] as are framed with special reference to the physical condition of a country differing widely from our own.[101]

If the eastern courts could declare navigable fresh water streams to be *publici juris*, said the court, then the California judiciary was certainly "justif[ied]" in making "innovations upon the old rules of law" dictated by "the peculiar circumstances of th[is] country, and the immense importance of our mining interests."[102] The "peculiar circumstance" that ultimately played the most important role in California water law development, however, was the fact that, "in the legal sense of th[e] term," there were no riparian owners on the public domain.[103] As a result, the court could settle water-use disputes by mobilizing the antiquated concept of *disseisin*—a common law notion that under normal circumstances does not conflict with riparianism. The *disseisin* concept is generally applied in cases involving a possessor's action against subsequent trespassers, where title vests in a third party. By invoking that doctrine, the court man-

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with the issue are still Yale, *Legal Titles* 144-77; Samuel C. Wiel, "Public Policy in Western Water Decisions," 1 *Cal. L. Rev.* 11 (1912).

97. Eddy v. Simpson, 3 Cal. 249, 252 (1853).
98. Irwin v. Phillips, 5 Cal. 140, 147 (1855).
99. Wiel, *supra*, note 91, at 294.
100. Crandall v. Woods, 8 Cal. 136 (1857).
101. *Id.* at 142, quoting from Starr v. Child, 20 Wend. 149, 159 (N.Y. 1838).
102. *Id.* For an analysis of the influence of eastern modes of legal reasoning on western resource law, generally, see Scheiber and McCurdy, *supra*, note 20, at 115-117, 122.
103. Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 374 (1859); Crandall v. Woods, 8 Cal. 136, 143 (1857).

aged to recognize the rights of water appropriators much as it had protected the rights of mineral claimants: "all the people were disseisors of the United States (it being all public domain and the United States taking no action in the matter), and between disseisors the first has a better standing than the second one."[104] But even as the judiciary proceeded to simultaneously meet "the wants of the community" and preserve "the analogies of the common law," the court made it clear that appropriators would be protected only "where no riparian rights intervened."[105] "It may be, and undoubtedly is, a very convenient rule," Field explained in 1859, "to presume a grant, from the [federal] government, of mines, water-privileges, and the like to the first appropriator; but . . . *this exceptional privilege is, of course,, confined to the public domain* . . ."[106]

Appropriation law seemed, on its face, capable of being mechanically applied to concrete controversies. The maxim *qui prior est in tempore, portior est jure* (first in time is first in right) was the governing rule. The rights of the several appropriators on a given stream were related much as were the rights derived by successive grantees from an original landowner. Where the rights of appropriators conflicted, the later one could only hold what was left after the first-arrival had made his claim. But rapid population growth, combined with increasingly conflicting uses of water, ineluctably impaired the self-executing quality of simplistic maxims. As wave after wave of Anglo-American immigrants made their way into the mining region, the demand for water began to exceed the apparent supply. Prior appropriators demanded that their rights be given full protection while newcomers asserted that water was equally necessary to work deposits they had discovered. Lumber producers and grist-mill operators needed to dam streams for power purposes, often to the detriment of appropriators both above and below them; towns and agricultural settlers sought water for domestic purposes or for irrigation. Moreover, water quality was also a critical factor. Water that had been used by one appropriator to wash gold-bearing gravel was often too polluted to be of bene-

104. Wiel, *supra*, note 96, at 12-13.

105. Conger v. Weaver, 6 Cal. 548, 588 (1856).

106. Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 375, 377 (1859). Italics in original. Although Field assumed that proposition to be unquestionably correct, when the issue finally came up in Lux v. Haggin, 69 Cal. 255 (1886), it took the court eight years of argument and some two-hundred pages in the reports to reach the same conclusion. See Gordon R. Miller, "Shaping California Water Law," 55 *S. Cal. Q.* 9 (1973); Scheiber and McCurdy, *supra*, note 20, at 123-25.

ficial use to others. Rock and sediment carried off by streams also obstructed the ditches of lower appropriators and deposited debris behind mill-dams. The result was a spate of litigation for which the "miners customs" rarely provided mechanical solutions.

Litigation involving conflicting rights to water thus confronted the judiciary with legal issues of great practical magnitude. Water resources had to be allocated among competing users so that no one person or group made unreasonable claims as to quantity or unreasonably impaired the quality of water to the detriment of others. Sustained economic growth could not occur unless "the fundamental object of the law" was "to have the water put to beneficial use; conversely to have none wasted."[107] Between 1857 and 1863, when Field's leadership predominated, the court wove those policy concerns into legal doctrine which, in turn, provided the foundations for a distinctive law of watercourses that not only governed controversies in California, but ultimately spread throughout the subsequently formed states of the Far West.

The jurisprudence of mining titles provided the court with a body of rules that was equally applicable to cases necessitating judicial allocation of water. Indeed, the policy parameters of water and mining law were virtually identical. Field and his associates sought to simultaneously protect water rights vested in prior appropriators and compel first-arrivals to exercise their rights

> within reasonable limits. . . . We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.[108]

As in cases involving conflicting uses of the soil by miners and farmers, the court also asserted that "a comparison of the value of conflicting [water] rights would be a novel mode of determining their legal superiority."[109] Thus it became a fundamental axiom that each of the purposes "to which water is applied . . . stands on the same footing."[110] Anyone might take and

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107. Wiel, *supra*, note 9, at 321.

108. Basey v. Gallagher, 20 Wall. (87 U.S.) 670, 683 (1873); see also Samuel C. Wiel, "Priority in Western Water Law," 18 *Yale L.J.* 189 (1909).

109. Weaver v. Eureka Lake Co., 15 Cal. 271, 275 (1860).

110. McDonald v. Bear River Co., 13 Cal. 220, 233 (1859). See also Rupley v. Welch, 23 Cal. 452 (1863)—enjoining miners from taking water already appropriated by farmer in possession.

use water flowing on the public domain for any beneficial purpose, subject only to the rights of any prior appropriators.

Different forms of enterprise, however, had different legal needs. The giant water companies, which owned several hundred miles of canals and sold water to innumerable miners, needed judicial protection of their rights while their expensive works were under construction. Thus the court held that by posting notice of their intentions and completing a preliminary survey, the appropriator acquired "absolute property" in the flow of the stream at the proposed point of diversion.[111] In order to maximize beneficial use, the court permitted subsequent users to take water on a temporary basis during the prior appropriator's period of construction; once the canals were completed all rights reverted to the prior claimant.[112] But the court also held that, "by itself alone," merely posting notice was "not sufficient" to sustain the rights of first-arrivals.[113] The claimant had to diligently pursue construction. "A bare claim, for no other object . . . than that of speculation" would lock up resources and impede development.[114] Similar considerations conditioned the law of abandonment. The court conceded that water diverted into a ditch or stored behind a mill-dam was personal property.[115] But when it was allowed to flow over a dam or run off as waste during ore-washing operations, the water became subject to appropriation by other parties.[116]

A more difficult task was to decide how much water each of several appropriators might take from a common stream. The court concluded that prior appropriators were limited to the quantity of water they took at the outset, as determined by the means used or the purpose of the appropriation. The remaining flow of the stream was subject to appropriation by later claimants, the rights of the second appropriator vis-à-vis the third to be determined in the same fashion as between the first and the second. Where litigants were engaged in the diversion of water, the court held that the capacity of their respective ditches pro-

111. Park v. Kilham, 8 Cal. 77 (1857); Kimball v. Gearhart, 12 Cal. 27 (1859). The quotation is from Ortman v. Dixon, 13 Cal. 33, 39 (1859).

112. Maeris v. Bricknell, 7 Cal. 261 (1857); Weaver v. Conger, 10 Cal. 233 (1858).

113. Thompson v. Lee, 8 Cal. 275, 280 (1857).

114. Weaver v. Eureka Lake Co., 15 Cal. 271, 275 (1860).

115. For an exhaustive discussion of the nature of the appropriator's property right, see Wiel, *supra*, note 91, at 14-64.

116. Kelley v. Natoma Water Co., 6 Cal. 105 (1856); McKinley v. Smith, 21 Cal. 374 (1863).

vided *prima facie* evidence of the appropriation's extent.[117] Prior appropriators were therefore restrained from enlarging their ditches when to take additional water would impair rights that had vested in others between the completion of the original ditch and the subsequent enlargement of the works. In cases involving mill-dams, the court provided a different rule. The lumber producer was "only entitled to the water for the purpose of the mill . . . [and] whenever the mill did not need or could not use" all the water a stream deposited behind his dam, other appropriators might take what they needed, even from his very reservoir.[118]

The complexity of appropriation doctrine necessarily required the judiciary to review "exceedingly complicated and embarrassing" factual situations.[119] It was not unusual, then, for the court to hold, as it did in the leading case of *Ortman v. Dixon* (1859):

> 1st. That defendants were first entitled to the water flowing in Mill Creek for the use of their saw-mill.
>
> 2nd. That plaintiffs were entitled to the use of a sufficient quantity of water of the stream to fill and supply their Ditch No. 2, at such times as the defendants were not using the same to propel their mill.
>
> 3d. That plaintiffs were entitled to the water to fill their Ditch No. 2, in preference to the ditch of defendants, No. 3.
>
> 4th. That when plaintiff's ditch is filled according to its capacity to contain water, then if there remain any surplus of water flowing in the stream, the defendants are entitled to such surplus.[120]

The *Ortman* decision clearly reveals the lengths to which the court was willing to go in order to allocate resources and ensure their beneficial use by competing claimants. "There may be some difficulty . . . in determining with exactness the quantity of water which parties are entitled to divert," Field admitted in 1858. "The Courts do not, however, refuse the consideration of subjects, because of the complicated and embarrassing character of the questions to which they give rise."[121]

Water use posed legal issues equally as perplexing as the right to appropriate. Mining was simultaneously an agent of economic growth and mass destruction. Particularly after the development of the hydraulic process, miners washed away entire mountains in their search for gold, thereby discharging tons of earth and rock into the streams. Debris invariably covered min-

117. White v. Todd's Valley Water and Mining Co., 8 Cal. 443 (1957); McDonald v. Bear River Co., 13 Cal. 220 (1859).

118. Ortman v. Dixon, 13 Cal. 33, 39 (1859).

119. *Id.* at 35.

120. *Id.* at 33.

121. Butte Canal and Ditch Co. v. Vaughan, 11 Cal. 143, 152 (1858).

ing claims below, clogged ditches owned by lower appropriators, and filled the reservoirs of downstream millers. Saw-mill operators, in turn, raised the height of their dams in order to recover lost power. But that extended the flow of their ponds and often flooded mining claims upstream. By depositing debris into streams, then, miners sooner or later affected the rights of all proprietors on every watercourse in the gold region.

The court initially confronted the problem in *Bear River and Auburn Water and Mining Co. v. New York Mining Co.* (1856). The parties to the action were corporations engaged in both mining and the large-scale diversion of water for sale to others in the mineral region. The prior appropriator's canal was about seven miles below the point where defendant returned to the stream water that had previously been used for milling purposes; plaintiff sought damages and a permanent injunction to restrain the upstream firm from impairing the quality of the water. By dint of being first, plaintiff's counsel contended, the prior appropriator "acquired a vested right to hold, enjoy, and use the waters . . . without any material diminution of quantity, deterioration in quality, and unaffected in its regularity of flow."[122] But despite the fact the jury had found that plaintiffs had indeed sustained a loss of some twenty inches of water per day, the court rejected the prior appropriator's argument. "If we lay down the doctrine . . . that the ditch-owner is entitled to the water in as pure a state as it was at the time he constructed his ditch," the court declared, "the result must be that those locating above him can never use the water at all."[123] "[A]s to the deterioration of quality," the court concluded, injuries sustained by downstream users "should be considered as injur[ies] without consequent [legal] damage."[124]

The Field Court took a different approach. Field and his colleagues recognized that judicial capitulation to the broad demands of prior appropriators would certainly have prevented *upstream* miners from efficiently working their claims. But strict adherence to the rule handed down in *Bear River* would have exerted an analogous effect upon *downstream* appropriators. Indeed, if the court had sustained the right of miners to wantonly dump debris into watercourses, it would have effectively proscribed mining, manufacturing, and agricultural development in

122. Bear River and Auburn Water and Mining Co. v. New York Mining Co. (arg.), 8 Cal. 327, 329 (1856).
123. *Id.* at 335.
124. *Id.* at 336.

the region below. Thus in *Pilot Rock Creek Land Co. v. Chapman* (1858), the court noted that

> it has no where been held that a defendant is not responsible for injuries done to the ditch of another by the deposit of mud and sediment in it. The doctrine of *Bear River* . . . probably went quite as far as it ought to have gone and we certainly feel no disposition to extend it further.[125]

The Field Court, in fact, consistently held that, despite the appropriative foundations of California water law, "the question to be determined" in water quality of debris-damage disputes was "after all . . . the same as that presented by a like controversy between riparian proprietors." In California, the court explained in the leading case of *Hill v. Smith* (1865), "the maxim *sic uture tuo alienum non laedus* [so use your own as to avoid harming your neighbor] . . . has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this State, as operative a test for the lawful use of water as any time in the past or in any other country."[126]

Field and his associates recognized, however, that a mechanical application of riparian maxims, so as to impose a complete ban on water pollution, was impossible without shutting down the mines altogether. Miners had to deposit their tailings somewhere; as Curtis Lindley observed in his influential treatise on mining law,

> to say that the discharge of such tailings is a nuisance *per se*, or to restrict it within unreasonable limits, is to interdict the prosecution of a lawful enterprise and practically to confiscate property of inconceivable value. Should any such stringent rule be invoked . . . the mining industry would be abandoned, awaiting the advent of the magician who will separate gold and silver from the earth and rocks without the aid of water.[127]

As a result, the court fell back on the familiar common law rule of "reasonable use."[128] Water only had to be used "within reasonable limits;" thus Field suggested that the only practical solution was for the judiciary to resolve disputes on the basis of "the special circumstances of each case, considered with reference to

125. Pilot Rock Creek Land Co. v. Chapman, 11 Cal. 161, 162 (1858).

126. Hill v. Smith, 27 Cal. 476, 482-83 (1865); see also Logan v. Driscoll, 19 Cal. 623, 626 (1862); Atchison v. Peterson, 20 Wall. (87 U.S.) 507, 515 (1873). A riparian framework was particularly essential to handle disputes between miners and mill-dam operators. It was all public land; hence there could be no equivalent of a mill-dam franchise. Yet, if claimed by others after the initial construction of the dam, the surrounding land was regarded by the court as property. If wanton dumping had been permitted, either the mill-dam owner would have lost the value of his appropriation—property—or upstream miners would have had their claims flooded. See the discussion in Harvey v. Chilton, 11 Cal. 114 (1858); Nevada Water Co. v. Powell, 34 Cal. 109 (1867).

127. Lindley, *supra*, note 3, at III, 2070.

128. See the sources cited at note 94, *supra*.

the uses to which the water is applied."[129] The state judiciary therefore permitted miners to stake out and hold parcels of the public domain for the express purpose of depositing debris on them, and conceded that streams might generally be used for discharging tailings.[130] But the court also issued injunctions when debris buried the claims of miners below,[131] destroyed the growing crops of pre-emption claimants,[132] filled irrigators' ditches and poisoned their fruit trees,[133] or split the hoses of hydraulic miners downstream.[134] "No system of law with which we are acquainted," Field later explained, "tolerates the use of one's property in th[at] way so as to destroy the property of another."[135]

The delicate structure of water rights erected by the California court managed to survive until it encountered massive new pressures that made it impossible to reconcile the conflicting interests of resource-users on a case-by-case basis. Once the miners began using equipment capable of "discharg[ing] 185,000 cubic feet of water in an hour, with a velocity of 150 feet per second," the tributaries of the Sacramento River became "so heavily charged with sand as to render the [water] unfit for even surface irrigation."[136] Moreover, the great floods of the late 1870s transported tons of mining debris into the valley below, "utterly destroying all the farms of the riparian owners on either side, over a space of two miles wide and twelve miles long."[137] It is significant, however, that despite numerous legislative attempts to resolve the mining-debris problem, it was ultimately the federal circuit court, over which Field presided, that issued the sweeping injunction terminating large-scale, unregulated hydraulic mining in the California mountains.

"The Supreme Court of California," the federal court explained in the leading case of *Woodruff v. North Bloomfield Gravel Mining Co.* (1884), "has never recognized the validity of

129. Atchison v. Peterson, 20 Wall. (87 U.S.) 507, 515 (1873).
130. Jones v. Jackson, 9 Cal. 237 (1858); O'Keiffe v. Cunningham, 9 Cal. 589 (1858); Esmond v. Chew (dictum), 15 Cal. 137, 143 (1860).
131. Pilot Rock Creek Land Co. v. Chapman, 11 Cal. 161 (1858); Esmond v. Chew, 15 Cal. 137 (1860); Logan v. Driscoll, 19 Cal. 623 (1862).
132. Wixon v. Bear River and Auburn Water and Mining Co., 24 Cal. 367 (1864).
133. Levaroni v. Miller, 34 Cal. 231 (1867).
134. Hill v. Smith, 27 Cal. 476 (1865).
135. Jennison v. Kirk, 98 U.S. 453, 461 (1878)—hydraulic miner held liable for damages when debris washes away the ditch of another appropriator.
136. Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753, 757, 763 (C.C. Cal. 1884).
137. *Id.* at 769. See also Kenneth Thompson, "Historic Flooding in the Sacramento Valley," 29 *Pacific Hist. Rev.* 349 (1960).

any custom to mine in such a manner as to destroy or injure the property of others, even in the district or diggings where the local customs and usages of miners are sanctioned by the statutes." And the difference between the early decisions and the case at bar was "only a matter of degree, not of principle."[138] Thus the court shut the works down until 1893 when the Congress finally created an administrative body, the California Debris Commission, to regulate the disposal of tailings.[139] It was a bold step for the judiciary to define policy in a "contest" which, as the court conceded, involved a long-standing political rivalry "between the mining counties and the valley counties."[140] But in the court's view, there was no doubt that Central Valley farmers were "entitled to legal protection" from the "alarming and ever-growing menace" of large-scale hydraulic mining.[141] "Great interests should not be overthrown on trifling or frivolous grounds," the court concluded,

> but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests that the poor man is ultimately able to become a capitalist himself. If the smaller interest must yield to the larger . . . all smaller and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipiency.[142]

It is ironic that the same principle of equality of entrepreneurial opportunity that had been devised "to forge order out of chaos" during the 1850's was ultimately invoked to close down the "vast enterprises" spawned by a fully-developed mining industry. As in the formative years of California's legal and economic development, however, the judiciary assumed it was the special province of the courts to rank competing interests into "a hierarchy of valuation" and to fix the lawful boundaries within which men might exercise their "creative energy" on the public domain.

IV

Between 1850 and 1866, the surging growth of California's

138. *Id.* at 802. For analysis of the court's treatment of the constitutional issues raised by counsel, see Scheiber and McCurdy, *supra*, note 20, at 125-26.

139. 27 *U.S. Stats.* 507 (March 1, 1893). See Lindley, *supra*, note 3, at III, 2093-2114; Samuel Knight, "Federal Control of Hydraulic Mining," 7 *Yale L.J.* 385 (1898).

140. Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753, 803 (C.C. Cal. 1884). The political context of the dispute is thoroughly treated in Robert L. Kelley, *Gold versus Grain: The Hydraulic Mining Controversy in California's Sacramento Valley* (1959).

141. *Id.* at 797.

142. *Id.* at 807.

population outstripped the capacity of federal officials to effectively manage conflict on the public domain. While congressional leaders debated, attempting to formulate broad policy measures capable of reconciling the antithetical goals of "headlong economic growth and stable economic equality," the California judiciary was faced with concrete disputes that required immediate policy responses.[143] Federal statesmen viewed the public domain in general terms, both "as a storehouse of potential wealth" and a "substratum upon which to erect a republican polity of equal, independent, and prosperous citizens."[144] But by an anomalous process of *de facto* delegation of federal authority, it became the province of the California Supreme Court to effect those general policy precepts through the adjudication of specific resource allocation controversies.

In many respects, Field and his associates were, as one early California jurist suggested, "as much pioneers of law as the people of settlement."[145] Before 1851 no state court had ever attempted to continuously engage in balancing the interests of competing trespassers on the public domain; to that extent California's judge-made resource law was unprecedented and even breathtaking in scope. But once the court had seized the initiative to define policy on such a scale, issues were framed, argued, and settled in substantially the same manner as in states where the federal government owned no land whatsoever. By converting the possessory claims of so many trespassers into judicially-cognizable property rights, the California court effectively brought federal land-use policy into the realm of private, and some instances constitutional law. As a result, the court could, and readily did invoke the "instrumentalist" common law doctrine of "reasonable use"—a precept that had figured prominently in the development of eastern property, consequential damage, and tort law—to define what constituted property rights subject to judicial protection. Through that device, the court managed to proscribe all attempts by resource-users to "monopolize" mining claims, pre-emption tracts, or water rights in such a manner as to bottle up scarce resources, limit entrepreneurial opportunities, and impede growth. Moreover, the court also mobilized the still inchoate "public purpose" and due process doctrines to prohibit the miners' "primary assemblages," as well as

143. Mary E. Young, "Congress Looks West: Liberal Ideology and Public Land Policy in the Nineteenth Century," in *The Frontier in American Development: Essays in Honor of Paul Wallace Gates* 74, 111 (David M. Ellis ed. 1969).

144. *Id.*, 77, 90; see also Hurst, *supra*, note 14, at 25-34.

145. Baldwin, *supra*, note 26, at 18.

the state legislature, from using the organized power of the community to divest the equitably-acquired claims of men who had evinced a growth-inducing "incentive to improvement." The result was a body of judge-made law that proved to be an extraordinarily effective mechanism for the allocation of federal resources.

Congress, certainly, was satisfied with the final product. When, in 1866, federal authorities finally moved to expressly legitimate the claims of California's trespassers, congressmen lavished praise upon the "wise judicial decisions" that had molded the miners' codes into "a comprehensive system of common law, embracing not only mining law, properly speaking but also regulating the use of water for mining [and other] purposes."[146] Indeed, the federal land-use statutes of 1866 and 1870 essentially enacted the very rules that Field and his associates had handed down; the California system for managing the public domain was not only retroactively sustained, but it was applied to the Rocky Mountain territories as well.[147]

One final caveat on the impact of California land law development is in order. Stephen J. Field may well have "had a greater impact on California history and institutions than any other man" of his generation,[148] but his years on the California court exerted a reciprocally decisive effect upon his own judicial predispositions. At the very outset of a career that would ultimately span four decades, Field had been confronted with legal issues necessitating judicial allocation of scarce resources; as a result, he had immediately recognized that the nation's economy was more like "a pie to be divided" than "a ladder stretching out beyond the horizon."[149] More importantly, he had been inordinately successful in striking a balance between the competing in-

146. *Congressional Globe* 39th Congress, 1st Session, 3226 (1866).

147. 14 *U.S. Stats.* 251 (July 26, 1866), 16 *U.S. Stats.* 217 (July 9, 1870). Especially noteworthy provisions of the federal statutes are section 10 (1866) and section 12 (1870): "[W]herever, prior to the passage of this act, upon the lands heretofore designated as mineral lands . . . there have been homesteads made . . . [which] have been improved, and used for agricultural purposes, and upon which there have been no valuable mines . . . discovered, the said settlers or owners of such homesteads shall have a right of pre-emption thereto . . . [N]othing contained in this section [authorizing purchase of placer loades] shall defeat or impair any bona fide pre-emption or homestead claim . . . or authorize the sale of the improvements of any bona fide settler to any purchaser [of placer claims]." For a full analysis of far-western resource law development under federal statutes, see Lindley, *supra*, note 3, at 89-126; Wiel, *supra*, note 91, at 96-117; Edward P. Weeks, *A Commentary on the Mining Legislation of Congress* (1877).

148. J. Edward Johnson, *History of the Supreme Court Justices of California* I, 65 (2 vols. 1963).

149. Lawrence Friedman, *A History of American Law* 296 (1973).

terests and ideological commitments of California's early Anglo-American occupants. When he received his commission as the Thirty-Eighth Justice of the United States Supreme Court in the spring of 1863, then, Field carried with him a boundless confidence in the judiciary's capacity to hand down workable solutions for the conflicting policy demands of contending socio-economic interest groups. Indeed, the doctrinal tools and attitudes toward the legal process that he had developed on the California bench ultimately provided the conceptual framework for his peculiar jurisprudence of government-business relations under the Constitution.[150] Throughout his entire judicial career, Field believed that only the courts were capable of resolving allocation problems so as to simultaneously protect property rights, release entrepreneurial energies, and provide all men with an equal opportunity to share in the material fruits of a vigorously-expanding capitalist society.

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150. Compare the standard biographical treatments of Field, where much is made of an alleged metamorphosis from a liberal California jurist who consistently exercised judicial self-restraint, to the very paragon of activism during his tenure on the Supreme Court. See Swisher, *supra*, note 72, at 77-81, 103, 209; Howard J. Graham, "Justice Field and the Fourteenth Amendment," 52 *Yale L.J.* 851 (1943); Robert G. McCloskey, *American Conservatism in the Age of Enterprise* 72-103 (1951). Graham and McCloskey explained that supposed transformation as a response to the Paris Commune! For a different perspective on Field's Supreme Court years, see Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism," 62 *J. Am. Hist.* 970 (1975).