DID I GET PUBLIC RIGHTS WRONG?

*Caleb Nelson**

In earlier work, I discussed historical understandings of the kinds of disputes that Congress can authorize nonjudicial actors to resolve and the kinds of disputes that can be resolved only by courts. The framework that I described revolved around two distinctions: (1) the difference between "public rights" (which I defined as legal interests that belong to the government or the people collectively) and legal interests that belong to a private person; and (2) within the category of private legal interests, the difference between mere privileges or expectancies and vested rights to life, liberty, or property. In my telling, nineteenth-century lawyers and judges thought that Congress could authorize executive-branch actors to administer and dispose of "public rights" and mere privileges or expectancies without judicial involvement, but that only courts could render judgments conclusively rejecting a private person's claim to vested rights.

Recently, Professor Gregory Ablavsky has taken issue with my account. In Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 Stan. L. Rev. 277 (2022), he identified an alleged counterexample to the framework that I described: when foreign sovereigns ceded territory to the United States, inhabitants of the ceded territories who claimed "imperfect" titles based on incomplete grants from the previous sovereign were not thought to be entitled to judicial adjudication of their claims, even though the legal interests that they asserted were regarded as property. According to Professor Ablavsky, this history supports a broader understanding of "public rights" than I offered, and it potentially legitimates more nonjudicial adjudication than my framework would suggest.*

This Article responds. It explains why imperfect titles to land in the ceded territories were not treated as judicially cognizable vested rights, and it defends my understanding of "public rights."

* Emerson G. Spies Distinguished Professor of Law, University of Virginia. Thanks to Greg Ablavsky, Will Baude, John Harrison, and Ann Woolhandler for helpful comments at various stages.

INTRODUCTION

Article III of the Constitution begins as follows:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.[1]

The strong implication is that only true federal courts, whose judges enjoy the independence that allegedly comes with a guaranteed compensation and tenure during good behavior, can exercise what Article III calls "[t]he judicial Power of the United States."[2]

Unfortunately, figuring out what that means is harder than it might seem. Nonlawyers might assume that any governmental body that

[1] U.S. Const. art. III, § 1.

[2] See, e.g., Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1372–73 (2018) ("Congress cannot 'confer the Government's "judicial Power" on entities outside Article III.'" (quoting Stern v. Marshall, 564 U.S. 462, 484 (2011))); Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (opinion of Marshall, Circuit Justice) (observing that decision-makers who "do not compose a court ordained and established by congress, nor . . . hold offices during good behavior," are "incapable of exercising any portion of the judicial power" of the United States).

resolves particularized matters via adjudication—finding facts, applying pre-existing legal principles to those facts, and rendering decisions with legal effect—must be exercising "judicial Power" of the sort that Article III regulates. But history belies this assumption. With statutory authorization, officials in the executive branch have long made various kinds of adjudicative decisions that have legal consequences, but that are thought to entail the exercise of "executive" rather than "judicial" power.[3] For instance, the First Congress authorized a trio of executive officers to entertain petitions from applicants who were seeking patents for inventions, and to grant patents from the United States to applicants who met the statutory criteria.[4] Likewise, Congress itself routinely entertained petitions from people with legal or moral claims against the United States, and Congress used its "legislative" powers to enact private bills awarding money from the Treasury or other relief to claimants whom Congress deemed deserving.[5]

Still, some other kinds of adjudicative decisions cannot be made either by Congress itself or by officials or agencies in the executive branch. For instance, Congress cannot enact a statute authoritatively declaring that you are guilty of a federal crime and sentencing you to prison.[6] Nor can Congress empower an executive branch agency to make decisions of that sort. Such decisions can be made only by a true court, exercising "judicial" power.

[3] Cf. William Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511, 1540 (2020) ("[N]ot every application of law to fact requires a court. Indeed, factfinding, and the application of law to fact, is a ubiquitous part of executive action.").

[4] See Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109–10 (repealed 1793).

[5] See generally William C. diGiacomantonio, Petitioners and Their Grievances: A View from the First Federal Congress, *in* The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development 29 (Kenneth R. Bowling & Donald R. Kennon eds., 2002) (canvassing many kinds of petitions acted upon by the First Congress). See also Maggie McKinley, Petitioning and the Making of the Administrative State, 127 Yale L.J. 1538, 1579–1600 (2018) (noting Congress's eventual creation of alternative mechanisms, including administrative mechanisms, for handling matters that had generated a high volume of petitions). Admittedly, when Congress handled these matters itself, the private bills that Congress enacted did not *have* to reflect the application of pre-existing legal criteria; by virtue of its "legislative" powers, Congress could change the law in more freewheeling fashion than either executive or judicial actors. In practice, though, Congress could choose to perform the same sorts of adjudicative tasks in these matters that executive or judicial actors might be called upon to perform.

[6] See U.S. Const. art. I, § 9, cl. 3 (prohibiting the passage of bills of attainder).

Almost twenty years ago, I wrote an article providing a historical account of these distinctions.[7] Under longstanding ideas about the operation of American-style separation of powers, I argued, "judicial" power was associated with the protection of certain types of legal interests belonging to private individuals or entities—what I called "core private rights," and what nineteenth-century lawyers thought of as "vested rights" to life, liberty, or property.[8]

As nineteenth-century lawyers and judges fleshed out their understanding of the constitutional distribution of powers, they tended to regard the political branches as appropriate representatives of the public, and they did not think that the government needed to exercise "judicial" power in order to dispose of so-called "public rights"—legal interests belonging to the government itself or to the people in their collective capacity. For instance, Congress could transfer land from the public domain to a private person simply by enacting a statute to that effect.[9] Alternatively, if Congress did not want to administer such transfers itself, Congress could establish statutory criteria for land grants and authorize an executive branch agency to determine whether particular applicants satisfied them. Under nineteenth-century understandings of the Constitution, Congress normally did not have to let would-be transferees dispute those determinations in court, because the would-be transferees' legal interests normally amounted to mere expectancies or privileges that Congress had the power to dash (rather than core private rights that had vested even as against Congress).[10] But things changed once a transfer occurred. To be sure, even after the government had issued a land patent evidencing the transfer, the patent might still be subject to cancellation on certain grounds (such as fraud on the part of the transferee or certain types of mistakes on the part of the land office).[11] If the transferee resisted, though, the executive branch could not unilaterally determine that such grounds existed and expect courts to give its determination conclusive effect. By this point, the transferee

[7] Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559 (2007) [hereinafter Nelson, Adjudication].

[8] See id. at 566–72; see also Caleb Nelson, Vested Rights, "Franchises," and the Separation of Powers, 169 U. Pa. L. Rev. 1429, 1438–84 (2021) [hereinafter Nelson, Franchises] (amending what I had said about the place of "franchises" in this framework).

[9] See Nelson, Adjudication, supra note 7, at 577 & n.71 (citing cases).

[10] See id. at 577–80; Nelson, Franchises, supra note 8, at 1435.

[11] See, e.g., United States v. Stone, 69 U.S. (2 Wall.) 525, 535 (1865).

would be claiming a "vested" right to the land, and the legally conclusive rejection of such a claim required judicial power.[12]

Because the current Supreme Court is looking to history to help identify the adjudicative authority that Congress can and cannot give federal administrative agencies, the framework that I described has enjoyed a resurgence.[13] Recently, however, Professor Gregory Ablavsky has argued that I missed an important part of the history and that I therefore drew the wrong conclusions. "Throughout the nineteenth century," he writes, "the administrative adjudication of at least one form of vested rights to private property was constitutionally permissible."[14] Based on this alleged counterexample, he draws broad lessons—perhaps that "the administrative adjudication of rights, including to property, is on firmer historical footing than current critics argue,"[15] or perhaps that history does not supply answers at all because "people then were just as confused as we are."[16]

Professor Ablavsky's counterexample grows out of the expansion of the United States. When the United States acquired sovereignty over territories previously governed by other countries, the United States also acquired title to the public domain—the lands that had been owned by the previous sovereign. But not all of the land in these territories was in the public domain. Even if Indigenous titles had somehow been "extinguished,"[17] other residents of the territories claimed private ownership rights derived from the previous sovereign. The nature of those claims varied. Some people had "perfect" and "complete" titles; the former sovereign had granted a defined tract to them or their predecessors in interest, and the grant had been completed before sovereignty passed to the United States. Many other people, though, claimed "imperfect" or "inchoate" titles of one sort or another.[18] Perhaps

[12] See id. (observing that the cancellation of a land patent "is a judicial act, and requires the judgment of a court"); see also Nelson, Adjudication, supra note 7, at 578 n.74 (citing additional cases); Nelson, Franchises, supra note 8, at 1503–04 & nn.429–32 (same).

[13] See Nelson, Franchises, supra note 8, at 1432 & nn.7–10 (citing cases and commentary).

[14] Gregory Ablavsky, Getting Public Rights Wrong: The Lost History of the Private Land Claims, 74 Stan. L. Rev. 277, 284 (2022).

[15] Id. at 285.

[16] Id. at 351.

[17] See id. at 290 (noting this locution).

[18] See, e.g., 1 Curtis H. Lindley, A Treatise on the American Law Relating to Mines and Mineral Lands § 116 (San Francisco, Bancroft-Whitney Co. 1897) (discussing claims based on Mexican grants within the territory ceded by the Treaty of Guadalupe Hidalgo, and observing that "[m]ost of [the claimed grants] were inchoate—that is to say, something

provincial authorities who lacked final authority to make grants had issued a "concession" in favor of a private person, but the previous sovereign had not approved and completed the grant by the time sovereignty passed to the United States.[19] Perhaps a grant from the previous sovereign had been subject to conditions precedent (such as occupation and cultivation of the land) that had not been satisfied by the time sovereignty passed—with the result, again, that legal title to the land had remained in the previous sovereign and was now held by the United States.[20] Perhaps the relevant concession or grant had purported to be unqualified but had not adequately defined the boundaries of the land in question.[21] Perhaps the previous sovereign had simply authorized a private person to choose a specified quantity of land from within a larger tract, and the location had not been made while the previous sovereign was in charge.[22]

remained to be done to either perfect and establish the title or to fix the boundaries"); see also Tobin v. Walkinshaw, 23 F. Cas. 1338, 1342 (C.C.N.D. Cal. 1856) (No. 14,069) (defining "[t]he distinction between perfect and inchoate titles" in terms of whether "'further action of the political authority'" is needed (quoting Hancock v. McKinney, 7 Tex. 384, 457 (1851) (opinion of Lipscomb, J.))).

[19] See, e.g., West v. Cochran, 58 U.S. (17 How.) 403, 413 (1855) (describing "the condition of claims to land derived from France and Spain, before the United States acquired Louisiana"); see also Snyder v. Sickles, 98 U.S. 203, 203 (1878) ("Titles to lands claimed by individuals in Louisiana at the time the province was ceded to the United States were in most cases incomplete, as the governor of the province never possessed the power to grant a patent. All he could do was to issue to the donee an instrument called a concession or order of survey, which never invested the party with a fee-simple title . . . ."); Menard's Heirs v. Massey, 49 U.S. (8 How.) 293, 303–06 (1850) (similar).

[20] See United States v. Wiggins, 39 U.S. (14 Pet.) 334, 350 (1840) (observing that in Florida, "there were at the date of the [Adams-Onís] treaty very many claims, whose validity depended upon the performance of conditions in consideration of which the concessions had been made, and which must have been performed before Spain was bound to perfect the titles").

[21] See, e.g., Bissell v. Penrose, 49 U.S. (8 How.) 317, 334 (1850) (referring to Spanish concessions in Upper Louisiana that had "designat[ed] some natural object only, such as the head or sources of a river, as the place where the tract should be located"); More v. Steinbach, 127 U.S. 70, 78 (1888) (noting that some Spanish and Mexican grants in California had referred to "lands known only by particular names, without any designated boundaries").

[22] See *Bissell*, 49 U.S. (8 How.) at 334 (noting the prevalence of such floating grants in the former Louisiana territory); *More*, 127 U.S. at 78 (same with respect to California); cf. Scull v. United States, 98 U.S. 410, 419–20 (1879) (referring separately to "an inchoate or imperfect title" and "a perfected grant for an unknown location, or for a given quantity within defined out-boundaries," but contrasting both with "a title completed under the foreign government").

Although the United States acknowledged an obligation to recognize imperfect titles of various sorts, and although the United States chose to recognize some additional inchoate claims that it might *not* have had an obligation to recognize,[23] deciding which claims were factually and legally valid was an enormous challenge. As Professor Ablavsky recounts, Congress took different approaches at different times and with respect to different ceded territories. But a common theme was that people who were claiming less-than-perfect title had to present their claims to a board of commissioners for adjudication.[24] As time went by, some of the relevant statutory schemes provided for de novo judicial review of the commissioners' decisions in a regular court,[25] but Congress evidently did not consider that necessary. Sometimes, Congress made the commissioners' decision to confirm a claim final and conclusive against the United States.[26] Sometimes, the commissioners would simply refer their decision to Congress, which could confirm claims by statute if it so chose.[27] Under either of those arrangements, the confirmation of a claim acted upon public rights by releasing whatever title the United States might otherwise have had to the land; on one way of thinking, the United States was stepping into the shoes of the former sovereign and completing the grant. But if a claim of this sort was *rejected*, or was not presented to the board of commissioners at all, the disappointed claimant could not get a court to recognize his purported rights to the land in question (unless Congress had so provided). In practice, moreover, the (nonjudicial) confirmation of one imperfect title could defeat the interests of others who asserted imperfect titles to the

[23] In the early nineteenth century, for instance, Spain occupied the territory known as West Florida, but the United States took the position that Spain had ceded this territory to France (via the Treaty of St. Ildefonso in 1800) and that the United States had acquired it from France as part of the Louisiana Purchase. In accord with this position, the Supreme Court refused to recognize land grants purportedly made by Spain during its allegedly wrongful occupation. See, e.g., United States v. Reynes, 50 U.S. (9 How.) 127, 153–54 (1850). In 1860, though, Congress enacted a statute allowing the confirmation of claims based on such grants. See Act of June 22, 1860, ch. 188, 12 Stat. 85; see also United States v. Lynde, 78 U.S. (11 Wall.) 632, 634–47 (1871) (recounting history and observing that "the case of the claimants . . . must stand on the voluntary bounty of our government, exerted through its legislative department").

[24] See Ablavsky, supra note 14, at 287.

[25] See id. at 294–95.

[26] See id. at 292.

[27] See id. at 293.

same land.[28] According to Professor Ablavsky, these arrangements are inconsistent with the framework that I described, because even imperfect titles to land allegedly were regarded as "vested" private rights to property.

Professor Ablavsky is an expert on land law in the early American West, and his account is rich and informative. It has already received well-deserved praise, including the William Nelson Cromwell Foundation's inaugural $10,000 prize for the Legal History Article of the Year.[29] But while I have learned from Professor Ablavsky's research, I do not think that his evidence does much to undermine the framework that I described. This Article explains why.[30]

I. THE BASICS OF PROFESSOR ABLAVSKY'S COUNTEREXAMPLE

A. "Imperfect" Rights Derived from a Previous Sovereign

With the possible exception of land in California (discussed separately below),[31] Professor Ablavsky does not claim that the treatment of "perfect" titles in the ceded territories was inconsistent with the framework that I described. When Congress required people claiming lands through the former sovereign to submit their claims to commissioners for adjudication, Congress sometimes explicitly exempted people who claimed to have received completed grants.[32] So far as I know, moreover, the Supreme Court never interpreted any federal statutes as effectively requiring people who claimed perfect title

[28] See, e.g., Dent v. Emmeger, 81 U.S. (14 Wall.) 308, 312–13 (1872); Landes v. Brant, 51 U.S. (10 How.) 348, 370 (1851).

[29] Legal History Article of the Year Prize, William Nelson Cromwell Found., https://cromwellfoundation.org/legal-history-article-of-the-year-prize/ [https://perma.cc/QU7H-PPFM] (last visited Jan. 24, 2026).

[30] There is already something of a debate about whether Professor Ablavsky's research is contrary to mine. Compare Richard H. Fallon, Jr., Non-Article III Federal Tribunals: An Essay on the Relation Between Theory and Practice, 99 Notre Dame L. Rev. 1691, 1723–24 (2024) (taking there to be real disagreement), with Ann Woolhandler & Michael G. Collins, The Public/Private Rights Critics, 99 Notre Dame L. Rev. 1779, 1781–85 (2024) (arguing that Professor Ablavsky's account tends to "confirm" rather than undermine the framework that I described), and Ilan Wurman, Nonexclusive Functions and Separation of Powers Law, 107 Minn. L. Rev. 735, 763 n.136 (2022) (asserting that "the distinction Ablavsky draws . . . tracks the [public/private] dichotomy exactly").

[31] See infra Section II.C.

[32] See, e.g., Ablavsky, supra note 14, at 316 & n.208 (citing Act of Mar. 2, 1805, ch. 26, § 4, 2 Stat. 324, 326–27).

to land in the ceded territories to submit their claims to mere commissioners and to abide by the results without any opportunity for truly judicial determinations. "For both Congress and the Supreme Court," Professor Ablavsky concludes, "th[e] dichotomy [between completed grants and imperfect titles] had legal, and perhaps even constitutional, significance."[33] In particular, "perfect title could be challenged only in court."[34]

In Professor Ablavsky's words, "Imperfect titles were different."[35] To be sure, the Supreme Court characterized even imperfect titles as "property."[36] After sovereignty passed to the United States, moreover, Congress could not have abrogated those titles without putting the United States in breach of its international obligations. (As Professor Ablavsky emphasizes, some treaties of cession specifically required the United States to respect the property of inhabitants of the ceded territories, and the customary law of nations created such an obligation even in the absence of relevant treaty provisions.)[37] By and large, though, imperfect titles derived from the former sovereign were not thought to be automatically cognizable in U.S. courts. Instead, Congress was in charge of the mechanisms for confirming these imperfect titles and completing the relevant grants.

Professor Ablavsky observes that Congress acted on this assumption from the start. Indeed, Congress did not involve regular federal courts in the confirmation of imperfect titles until 1824, and Congress did not consistently use that method thereafter.[38] As Professor Ablavsky notes, moreover, few people raised constitutional objections to the role that Congress either asserted itself or gave nonjudicial commissioners in this project.[39]

For its part, when the Supreme Court started hearing cases in which litigants claimed imperfect titles, the Court first acknowledged and then

[33] Id. at 313.

[34] Id. at 317; see also, e.g., Morrison v. Whetstone, 5 La. Ann. 636, 638 (1850) ("[A]lthough claims founded upon incomplete titles might be subject to the decision and generosity of Congress, yet claims founded upon complete grants could be subject only to the decision of the judiciary if contested by Congress or the executive officers of the government.").

[35] Ablavsky, supra note 14, at 316.

[36] See id. at 319 & nn.231–34 (citing cases).

[37] See id. at 290.

[38] See id. at 292–96.

[39] See id. at 296–98.

validated Congress's assertions of authority. In 1827, the Court offered this description of the situation:

> Whilst the government has admitted its obligation to confirm such inchoate rights or concessions as had been fairly made, it has maintained, that the legal title remained in the United States, until, by some act of confirmation, it was passed, or relinquished to the claimants. It has maintained its right to prescribe the forms and manner of proceeding in order to obtain a confirmation, and its right to establish tribunals to investigate and pronounce upon their fairness and validity. This is demonstrated by the laws which Congress have repeatedly passed, establishing boards of commissioners to investigate these claims, and to reject or confirm them, or report them to Congress in cases of doubt, and by the acts of Congress requiring all such claims to be recorded within prescribed periods.[40]

By the 1840s, the Court was explaining Congress's authority over these matters by invoking what Professor Ablavsky calls "a robust version of the political-question doctrine."[41] Unless a treaty not only pledged to respect imperfect titles derived from the former sovereign but also itself confirmed such titles "so as to bring them within judicial cognisance and authority," the Supreme Court held that "it rests with the political department of the [United States] government to determine how and by what tribunals justice should be done to persons claiming such rights."[42] Basically, Congress could handle these claims itself (enacting statutes to confirm claims that it deemed valid and to complete the relevant grants), or Congress could delegate some of the relevant adjudicative tasks either to the regular courts or to special tribunals that Congress designed for this purpose. In an 1868 case involving claims of imperfect title in territory ceded by Mexico, the Court provided a crisp summary of its doctrine on this point:

> In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the

[40] De la Croix v. Chamberlain, 25 U.S. (12 Wheat.) 599, 601–02 (1827).
[41] Ablavsky, supra note 14, at 301.
[42] United States v. King, 44 U.S. (3 How.) 773, 787 (1845).

> ordinary tribunals. It is the sole judge of the propriety of the mode, and having the plenary power of confirmation it may annex any conditions to the confirmation of a claim resting upon an imperfect right, which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest the action of board or courts at any stage.[43]

The upshot of this doctrine was that Congress could choose whether to involve the courts in the process of confirming imperfect titles derived from the former sovereign. If Congress did *not* involve the courts, moreover, such titles did not come "within judicial cognisance" until they were confirmed through the processes that Congress established for that purpose.[44] As Professor Ablavsky summarizes the prevailing ideas, judges thought that if courts recognized and enforced the rights of people with imperfect claims, the courts would be perfecting those rights—which was something that courts could do only if the political branches so provided.[45] In Professor Ablavsky's words, "[P]erfecting an imperfect title was not a judicial function" (unless the political branches made it one by involving the courts in the confirmation process).[46]

This doctrine was not necessarily peculiar to the United States. In the 1840s, the Texas Supreme Court not only articulated a similar doctrine with respect to imperfect claims derived from previous governments in Texas, but also indicated that the Supreme Court of the Republic of Texas had recognized the same doctrine before Texas became part of the

[43] Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 379 (1868); accord, e.g., United States v. Santa Fe, 165 U.S. 675, 714 (1897) ("The duty of protecting imperfect rights of property under treaties such as those by which territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political and not the judicial department of the government. To the extent only that Congress has vested them with authority to determine and protect such rights, can courts exercise jurisdiction." (citations omitted)).

[44] *King*, 44 U.S. (3 How.) at 787; see also, e.g., Glenn v. United States, 54 U.S. (13 How.) 250, 258 (1852) ("[N]o standing can be allowed to imperfect and unrecognized claims in the ordinary judicial tribunals, until confirmed either by Congress directly, or by a special tribunal constituted by Congress for that purpose."); LeBeau v. Armitage, 56 Mo. 191, 195 (1874) ("Previous to the confirmation of 1811, there was no title which the courts could recognize. There was a mere political obligation on the government to carry out the imperfect grants of its predecessor . . . .").

[45] See Ablavsky, supra note 14, at 317.

[46] Id. at 325.

United States. Citing cases stretching back to that period, the Texas Supreme Court summarized its position as follows:

> We have held in numerous instances . . . that the recognition of imperfect claims to lands originating under a former Government depends upon the will of the existing sovereignty; that this act of recognition appertains to the political authorities, and does not and cannot emanate in the first place from courts of justice; that the political authorities alone are competent to determine whether it will comport with the existence, policy, or welfare of the existing sovereignty to complete the arrangements of the former Government for the distribution of the public domain which still lie in contract not executed; and until there be some such act of recognition such claims are not the proper subjects of judicial cognizance.[47]

When applying these doctrines, U.S. courts sometimes drew support from the law and practices of the former sovereign. Although the transfer of territory from one sovereign to another was not supposed to destroy pre-existing property rights belonging to inhabitants of the relevant territory, the transfer also did not automatically give the inhabitants *more* rights or change the character of their rights. In an 1846 case about a claim based on a Spanish concession, the U.S. Supreme Court asserted that the power previously exercised by the Spanish government to complete imperfect titles "was in a great degree political, and altogether the exercise of royal authority, and of course subject to no supervision but by the same high authority itself."[48] As the Court understood the effect of the treaty of cession, "the United States assumed the same exclusive right to deal with the title in their political and sovereign capacity."[49] A few years later, the Court reiterated that

[47] Jones v. Borden, 5 Tex. 410, 411–12 (1849) (citing, inter alia, Bd. of Land Comm'rs v. Reily, Dallam 381 (Tex. 1841), and Bd. of Land Comm'rs v. Walling, Dallam 524 (Tex. 1843)). In another opinion, the Texas Supreme Court emphasized "the distinction between perfect and imperfect titles" in this respect:

> [W]e have uniformily decided, that in case of imperfect titles, to give them a standing in Court, required the action of the political authority; but if consummated before the change of the government, and owned by a citizen of the Republic, [titles] were valid without any act of the political authority.

McMullen v. Hodge, 5 Tex. 34, 78–79 (1849).

[48] Les Bois v. Bramell, 45 U.S. (4 How.) 449, 461 (1846).

[49] Id. The Supreme Court had made a similar point in *Chouteau v. Eckhart*, 43 U.S. (2 How.) 344 (1844). There, the Court noted that under the law and practices followed in Upper Louisiana before sovereignty passed to the United States, the lieutenant governor of

claims based on Spanish concessions that had not been surveyed and perfected by the time sovereignty passed to the United States "must depend for their sanction and completion upon the sovereign power"[50]—but "claimants had no just cause to object" to this fact, because "their condition was the same under the Spanish government."[51]

Still, the previous sovereign's law was relevant only up to a point. When deciding what the previous sovereign had or had not granted (and hence whether a claimed title was perfect, imperfect, or wholly unfounded), American decision-makers obviously needed to consult that sovereign's law. To the extent that titles were imperfect, though, the United States did not feel obliged to use the same approach for perfecting them that the previous sovereign would have used.[52] Under U.S. law, once sovereignty (and legal title) had passed to the United

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the province had made concessions and issued orders of survey, but only "the general intendency at New Orleans" had the power "to adjudge on the equity of the claim, and to exercise the sovereign authority, by making the grant, as the king's deputy." Id. at 374. According to the Court, after sovereignty passed to the United States,

> [Congress] acted as the successor of the general intendency, and had the same discretion to confirm; and the sovereign power to perfect the incipient right; or to reject it, that the intendent-general had: Each exercising sovereign power, in regard to the claim, with full authority to award, or to refuse, a perfect title.

Id.; see also Lobdell v. Clark, 4 La. Ann. 99, 100 (1849) (summarizing the Supreme Court's statements).

[50] Menard's Heirs v. Massey, 49 U.S. (8 How.) 293, 307 (1850); see also id. at 308 ("From the first act, passed in 1805, up to the present time, Congress has never allowed to these claims any standing other than that of mere orders of survey and promises to give title; and which promises addressed themselves to the sovereign power in its political and legislative capacity, . . . which must act, before the courts of justice could interfere and protect the claim.").

[51] Id. at 307. Some members of Congress continued to make this point much later in the nineteenth century. See, e.g., 18 Cong. Rec. 2491 (1887) (statement of Sen. George Edmunds) (asserting that the bill under consideration "undertakes to put the Congress of the United States . . . in exactly the attitude that the supreme government of Mexico would have been if we had not acquired this territory," and explaining that in the cases covered by the bill, "the claimant under a Spanish or Mexican grant could not have gone to the courts, but must appeal to the legislative authority of that country to see whether under the circumstances . . . he could show he was entitled to have a grant at all"); id. ("[W]hat we are now dealing with are not any legal rights, but only rights that in Mexico, had she the possession of this territory at this moment, would be rights that would have to appeal to the supreme authority there to confirm their claims according to legislative discretion, and exercising this legislative discretion we have provided this bill.").

[52] Cf. More v. Steinbach, 127 U.S. 70, 81 (1888) ("The doctrine . . . that the laws of a conquered or ceded country . . . remain in force after the conquest or cession until changed by [the new sovereign] . . . has no application to laws authorizing the alienation of any portions of the public domain . . . .").

States, the completion of grants was thought to require authorization by the political branches of the U.S. government.[53] Correspondingly, courts could not take it upon themselves to recognize private ownership of land based on imperfect rights derived from the previous sovereign.[54]

B. The Nature of Imperfect Rights Derived from a Previous Sovereign

1. Professor Ablavsky's Evidence

As Professor Ablavsky acknowledges, if those imperfect rights were seen as mere "privileges" rather than "vested" rights to property, then Congress's power over the mechanisms for confirming them would readily fit the framework described in my earlier article. But Professor Ablavsky argues that this reconciliation is not available. In his telling, the legal interests in question were genuine rights rather than mere privileges.

To support this conclusion, Professor Ablavsky begins with quotations from Chief Justice Marshall. In 1824, Congress had authorized certain people with imperfect claims to lands in Missouri (which had been part of the Louisiana Purchase) to present their claims to the federal district court in Missouri for adjudication, with a right of appeal to the Supreme Court.[55] Specifically, the statute established this procedure for

> any person . . . claiming lands, tenements, or hereditaments, in that part of the late province of Louisiana which is now included within the state of Missouri, by virtue of any French or Spanish grant, concession, warrant, or order of survey, legally made, granted, or issued, before [March 10, 1804], by the proper authorities, to any person or persons resident in the province of Louisiana, at the date thereof, or on or before [March 10, 1804], and which was protected or secured by the treaty between the United States of America and the

[53] See, e.g., id. (indicating that the perfection of a title "could not be had, after the cession of the country, except by American authorities acting under a law of Congress"); Beard v. Federy, 70 U.S. (3 Wall.) 478, 490 (1866) (referring to "grants of an imperfect character, which require further action of the political department to render them perfect").

[54] See, e.g., *Les Bois*, 45 U.S. (4 How.) at 461 (invoking a longstanding understanding that "claims like the plaintiff's had no standing in a court of justice until confirmed by Congress, or by its authority").

[55] Act of May 26, 1824, ch. 173, §§ 1–2, 4 Stat. 52, 52–53.

> French republic, of [April 30, 1803], and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs, of the government under which the same originated, had not the sovereignty of the country been transferred to the United States.[56]

To identify the claims that this statute covered, courts had to determine which grants, concessions, warrants, or orders of survey that might have been perfected into complete titles were protected or secured by the Louisiana Purchase Treaty (to which the statute referred). The treaty, in turn, had pledged not only that "[t]he inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States," but also that "in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."[57] When cases under the statute reached the Supreme Court in the 1830s, Chief Justice Marshall asserted that the "[t]he term 'property,' as applied to lands, comprehends every species of title inchoate or complete," including "those rights which lie in contract; those which are executory;

[56] Id. § 1, 4 Stat. at 52; see also Act of June 17, 1844, ch. 95, 5 Stat. 676 (reviving the 1824 statute and extending it to lands in some additional states). March 10, 1804, is when Upper Louisiana was transferred to the United States.

In keeping with Congress's reference to interests "which might have been perfected into a complete title," the Supreme Court eventually held that the procedure established by the 1824 statute "was confined to inchoate equitable titles, which required some other act of the government to vest in the party the legal title or full ownership." Fremont v. United States, 58 U.S. (17 How.) 542, 554 (1855); accord United States v. Pillerin, 54 U.S. (13 How.) 9, 10 (1852) ("The act of 1824 is very clear upon this point; and it has always been so construed by this court."). In the Supreme Court's words, "If [a party] claimed to have obtained from either of the former governments a full and perfect title, he was left to assert it in the ordinary forms of law, upon the documents under which he claimed." *Fremont*, 58 U.S. (17 How.) at 554; see also United States v. D'Auterieve, 56 U.S. (15 How.) 14, 23–24 (1854) ("The place to litigate [an alleged complete and perfect title] is in the local jurisdiction of the State by the common-law action of ejectment, or such other action as may be provided for the trial of the legal titles to real estate."); United States v. McCullagh, 54 U.S. (13 How.) 216, 217 (1852) ("[T]he validity or invalidity of this claim, can be tried and determined in any court having competent jurisdiction to try and decide a disputed title to land between individual claimants. There was no necessity, therefore, for any special jurisdiction to try them, and on that account they were not embraced in the acts of Congress above mentioned.").

[57] Treaty Between the United States of America and the French Republic, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200 [hereinafter Louisiana Purchase Treaty].

as well as those which are executed."[58] According to Chief Justice Marshall, indeed, "no principle is better settled in this country, than that an inchoate title to lands is property."[59] Chief Justice Marshall added that property rights "would be held sacred" even in the absence of a treaty stipulation, because the transfer of sovereignty over an inhabited territory "is never supposed to divest the vested rights of individuals to property."[60]

In other cases from the 1830s, Justice Henry Baldwin repeated these statements and cast them as uncontroversial. In his words, "It was never doubted by this court that property of every description in Louisiana was protected by the law of nations, the terms of the treaty and the acts of congress."[61] He understood cases under the 1824 statute to present the following question:

> Whether in the given case, a court of equity could, according to its rules and the laws of Spain, consider the conscience of the king to be so affected by his own, or the acts of the lawful authorities of the province, that he had become a trustee for the claimant, and held the land claimed by an equity upon it amounting to a severance of so much from his domain . . . .[62]

Justice Baldwin indicated that if such an equity did exist, then the claimant had an "equitable right of property in the land,"[63] and the 1824 statute provided for the United States to "carry [the previous sovereign's grant, concession, warrant, or order of survey] into specific execution" by issuing a patent.[64]

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[58] Soulard v. United States, 29 U.S. (4 Pet.) 511, 512 (1830); cf. Morrison v. Whetstone, 5 La. Ann. 636, 638 (1850) (asserting that the "property" protected by the Louisiana Purchase Treaty "necessarily embraced every thing or claim that was valuable to an individual; for a claim, however weak, is property, if value can be fairly obtained for it").

[59] Delassus v. United States, 34 U.S. (9 Pet.) 117, 133 (1835).

[60] Id.

[61] Smith v. United States, 35 U.S. (10 Pet.) 326, 330 (1836).

[62] Id. at 330–31.

[63] See id. at 330; see also Strother v. Lucas, 37 U.S. (12 Pet.) 410, 436 (1838) (Baldwin, J.) ("This Court has defined property to be any right, legal or equitable, inceptive, inchoate, or perfect, which before the treaty with France in 1803, or with Spain in 1819, had so attached to any piece or tract of land, great or small, as to affect the conscience of the former sovereign, 'with a trust,' and make him a trustee for an individual, according to the law of nations, of the sovereign himself, the local usage or custom of the colony or district; according to the principles of justice, and rules of equity.").

[64] *Smith*, 35 U.S. (10 Pet.) at 330; see also id. (explaining that even if the United States had been unaware of a particular claim at the time of the Louisiana Purchase, the 1824

Professor Ablavsky says that in addition to characterizing these imperfect rights as "property," jurists of the day considered them "vested." As Professor Ablavsky notes, Chief Justice Marshall used the phrase "vested rights" in one of the cases from the 1830s.[65] In 1855, moreover, Chief Justice Taney's majority opinion in *Fremont v. United States* described a grant made by Mexican authorities in California as having given the recipient "a vested interest in the quantity of land mentioned in the grant," even though the precise location of the land had not been determined at that time.[66] As Chief Justice Taney understood the grant, it conveyed "a present and immediate interest" to the recipient: "The right to so much land, to be afterwards laid off by official authority, in the territory described, passed from the government to him by the execution of the instrument granting it."[67] In Taney's words, unless "any thing done or omitted to be done by [the recipient], during the existence of the Mexican government in California, forfeited the interest he had acquired, and revested it in the government," the interest "remained vested in [the recipient] or his assigns" at the time sovereignty passed to the United States, and "the United States are bound in good faith to uphold and protect it."[68]

When Chief Justice Taney used the word "vested" in *Fremont*, though, he was simply saying that the recipient of the grant had present interests when sovereignty passed to the United States. Congress had authorized the courts to adjudicate the grantee's claim, so Chief Justice Taney had no occasion to decide whether the relevant interests were "vested" in the sense that operated even as against Congress and that would *require* judicial adjudication under the framework described in my earlier article.[69] In earlier cases from Florida and Missouri,

statute "waived all rights which the treaty could give [the United States] as purchasers for a valuable consideration without notice").

[65] See supra note 60 and accompanying text; Ablavsky, supra note 14, at 321.

[66] 58 U.S. (17 How.) 542, 558 (1855), *quoted in* Ablavsky, supra note 14, at 322.

[67] *Fremont*, 58 U.S. (17 How.) at 557–58.

[68] Id. at 557.

[69] In a different context, Professor Woolhandler has made a similar point about Chief Justice Marshall's use of the word "vested" in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Compare id. at 162 ("[A]s the law creating the office [of justice of the peace] gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights . . . ."), with Ann Woolhandler, Public Rights, Private Rights, and Statutory Retroactivity, 94 Geo. L.J. 1015, 1031 (2006) ("Statutory entitlements might be vested in the weak sense as against executive intrusion while not being vested in the strong sense against legislative termination; it is not clear in

moreover, the Supreme Court had held that grants without a sufficiently definite location were not eligible for judicial confirmation under the statutes applicable to those cases.[70]

Nonetheless, Professor Ablavsky suggests that both the rights at issue in *Fremont* and other imperfect rights derived from the previous sovereign were indeed "vested" in the sense relevant to my framework. In his words, treaties between the United States and the previous sovereigns "unambiguously bound the United States to honor all preexisting rights, even inchoate ones"—with the result, he suggests, that "the treaties themselves had vested all inchoate rights."[71] According to Professor Ablavsky, indeed, "[E]ven if a property claim was originally defeasible under the Spanish, Mexican, or French government, it became a vested claim as against the United States, even if it would never become a possessory, perfect title."[72]

Professor Ablavsky focuses on three treaties: "the 1803 Louisiana Purchase Treaty with France, the 1819 Adams-Onís Treaty with Spain, and the 1848 Treaty of Guadalupe Hidalgo with Mexico."[73] All three treaties pledged that inhabitants of the ceded territories would eventually be admitted to all the rights of citizens of the United States.[74] In

which sense Marshall meant the right was vested. The issue of whether Marbury's office was legislatively defeasible was not presented . . . ."). See also Nelson, Franchises, supra note 8, at 1472 (echoing Woolhandler).

[70] See, e.g., United States v. Miranda, 41 U.S. (16 Pet.) 153, 156 (1842) (refusing to confirm a grant made by Spanish authorities in Florida, and asserting that "[t]he grant is void . . . because the calls of the grant are too indefinite for locality to be given to them"); see also Smith v. United States, 35 U.S. (10 Pet.) 326, 334 (1836) ("We are . . . clearly of opinion, that no claim to land in Missouri can be confirmed under the acts of 1824 or 1828, unless by a grant, concession, warrant or order of survey for some tract of land described therein, to make it capable of some definite location, consistently with its terms, made, granted or issued before the 10th of March 1804, or by an order to survey any given quantity, without any description or limitation as to place, which shall have been located by a survey, made by a proper officer before that time . . . .").

[71] Ablavsky, supra note 14, at 321; see also id. at 323 ("[T]he moment when the private land claims vested was clear: It happened when the United States promised to honor preexisting property rights in the ceded territories.").

[72] Id. at 323.

[73] Id. at 290 (footnotes omitted).

[74] See supra text accompanying note 57 (quoting relevant language from the Louisiana Purchase Treaty); Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Spain-U.S., art. 6, Feb. 22, 1819, 8 Stat. 252 [hereinafter Adams-Onís Treaty]; Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., arts. VIII–IX, Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

addition, both the Louisiana Purchase Treaty and the Treaty of Guadalupe Hidalgo included language protecting inhabitants' "property,"[75] and the Adams-Onís Treaty specifically addressed the validity of Spanish grants of land in Florida (annulling some,[76] but confirming others "to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty"[77]). Still, none of these provisions purported to change the

[75] See supra text accompanying note 57 (quoting relevant language from the Louisiana Purchase Treaty); Treaty of Guadalupe Hidalgo, supra note 74, at arts. VIII–IX; see also Treaty with Mexico, Mex.-U.S., art. V, Dec. 30, 1853, 10 Stat. 1031 [hereinafter Gadsden Purchase Treaty] (extending provisions of the Treaty of Guadalupe Hidalgo to the additional territory covered by the Gadsden Purchase).

[76] See Adams-Onís Treaty, supra note 74, at art. 8 ("All grants made since the . . . 24th of January, 1818, when the first proposal, on the part of his Catholic Majesty, for the cession of the Floridas, was made, are hereby declared, and agreed to be, null and void."); see also Doe v. Braden, 57 U.S. (16 How.) 635, 657–59 (1854) (addressing such a grant and treating it as invalid). The Gadsden Purchase Treaty included a similar provision. See Gadsden Purchase Treaty, supra note 75, at art. VI.

[77] Adams-Onís Treaty, supra note 74, at art. 8. The details are complicated. The relevant portion of the English-language version of article 8 of the treaty read as follows:

> All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which, the said grants shall be null and void.

Id. At first, the Supreme Court understood the phrase "shall be ratified and confirmed" simply to pledge future action by the U.S. government and not yet to provide "a rule for the Court." Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). But in *United States v. Arredondo*, 31 U.S. (6 Pet.) 691 (1832), and *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), the Spanish-language version of this provision was called to the Supreme Court's attention, and the Court understood it to say that these grants "shall *remain* ratified and confirmed." *Percheman*, 32 U.S. (7 Pet.) at 88 (emphasis added); accord *Arredondo*, 31 U.S. (6 Pet.) at 741. Construing the English-language version in light of the Spanish-language version, the Court concluded that the treaty itself confirmed these grants, without the need for further action by the political branches of the U.S. government. See id. at 741–42; *Percheman*, 32 U.S. (7 Pet.) at 88–89.

Still, *Arredondo* and *Percheman* both involved *completed* Spanish grants in a part of Florida that the United States conceded had been Spanish territory at the time of the grants. See *Arredondo*, 31 U.S. (6 Pet.) at 734, 745; *Percheman*, 32 U.S. (7 Pet.) at 83; see also Curtis A. Bradley, Self-Execution and Treaty Duality, 2008 Sup. Ct. Rev. 131, 161–62 (explaining that "the land at issue in *Percheman* was indisputably within Spanish territory at the time of the 1819 treaty" and contrasting the land that had been at issue in *Foster v. Neilson*). As the Supreme Court noted, "so far at least as [titles] were consummate" before

nature of the property rights that inhabitants of the ceded territories had previously enjoyed—so imperfect claims that had been defeasible before the transfer of sovereignty were not automatically less defeasible by virtue of the treaties. To the contrary, Chief Justice Marshall understood the Louisiana Purchase Treaty to reflect the same general principle as the law of nations: "The people [in the ceded territory] change their sovereign. Their right to property remains unaffected by this change."[78]

Even though the treaties did not themselves change the inhabitants' pre-existing property rights (whether for better or for worse), it is certainly possible that U.S. constitutional law could give some or all of those pre-existing rights more protection than Spanish, French, or Mexican public law would have given them. In particular, to the extent that property rights in the ceded territories counted as vested private rights for purposes of U.S. constitutional law, Congress's power over them might be subject to constitutional limits that the previous sovereign

the transfer of sovereignty, they could have been "asserted in the courts of the United States" even without any treaty specification. *Percheman*, 32 U.S. (7 Pet.) at 88; see also David L. Sloss, Executing *Foster v. Neilson*: The Two-Step Approach to Analyzing Self-Executing Treaties, 53 Harv. Int'l L.J. 135, 154 (2012) ("[I]n Marshall's view, legislation was not necessary to validate Percheman's title because he already had a perfect title before Spain conveyed Florida to the United States."). In the Court's view, article 8 of the treaty "must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred." *Percheman*, 32 U.S. (7 Pet.) at 88. In later cases, then, the Court sometimes summarized *Arredondo* and *Percheman* as having read the treaty simply to confirm *perfect* titles. See United States v. Wiggins, 39 U.S. (14 Pet.) 334, 349 (1840) ("It was adjudged by this Court, in the cases of Arredondo and Percheman, . . . that the words 'shall be ratified and confirmed,' in reference to perfect titles, should be construed to mean 'are' ratified and confirmed, in the present tense."); Ainsa v. N.M. & Ariz. R.R. Co., 175 U.S. 76, 82–83 (1899) ("[I]t was accordingly held that a Spanish grant which was complete before the date mentioned in the treaty was confirmed by the treaty itself, needed no confirmation by Congress, and was not impaired by its rejection by the commissioners appointed by the President under authority of Congress to examine claims to lands in Florida."). On the other hand, Chief Justice Marshall suggested that article 8 of the treaty confirmed "incipient" as well as "complete" titles, albeit only to the extent that they would have been valid if the lands had remained under Spanish sovereignty. See United States v. Clarke, 33 U.S. (8 Pet.) 436, 449–50 (1834); accord 1 George Ticknor Curtis, Commentaries on the Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States § 290, at 401 (Philadelphia, T. & J.W. Johnson 1854).

So far as I know, the Supreme Court never pinned down whether imperfect titles in Florida would have been judicially cognizable simply by virtue of article 8 of the Adams-Onís Treaty, even in the absence of action by Congress. That question was not pressing, because Congress had already acted; the Act of May 23, 1828, ch. 70, 4 Stat. 284, provided for claims to land in Florida to be adjudicated by the regular (territorial) courts, subject to appellate review in the U.S. Supreme Court. See id. §§ 6–7, 9, 4 Stat. at 285–86.

[78] Delassus v. United States, 34 U.S. (9 Pet.) 117, 133 (1835).

would not have faced. That may well have been the situation of titles that had already been perfected before the transfer of sovereignty. But imperfect titles were different. Thus, in the 1844 case of *Chouteau v. Eckhart*, the U.S. Supreme Court offered the following summary and endorsement of statements that the Missouri Supreme Court had made in cases about "inchoate claims" in territory covered by the Louisiana Purchase:

> These cases maintain in substance, that such inchoate claims . . . were not changed in their character, by the treaty by which Louisiana was acquired; that the treaty imposed on this government only a political obligation to perfect them: that this obligation, sacred as it may be, in any instance, cannot be enforced by any action of the judicial tribunals: and that the legislation of Congress from 1804, to the present time, has proceeded upon this construction of the treaty, as is manifested by the modes adopted to investigate the claims through boards of commissioners, and then acting on them by legislation. . . .
>
> We think this reasoning correct . . . .[79]

Although Professor Ablavsky cites this passage,[80] I read it as supporting the framework that I described in my earlier article. Toward the end of the passage, the Court described "the legislation of Congress from 1804, to the present time," as "manifest[ing]" the view that the Louisiana Purchase Treaty "imposed on this government only a political obligation" to perfect the inchoate claims in question. Otherwise, the Court suggested, Congress would not have thought that it could provide for "investigat[ing] the claims through boards of commissioners, and then acting on them by legislation." The implication is that these claims were *not* regarded as involving normal vested rights, claims to which the government could not authoritatively reject without the use of "judicial" power.

2. International Obligations and the Political Branches

That said, I agree with Professor Ablavsky that the inchoate claims in question differed from ordinary "privileges" of the sort described in my earlier article. For instance, they differed from a private person's interest in receiving a gift or other transfer of land that was fully in the public

[79] Chouteau v. Eckhart, 43 U.S. (2 How.) 344, 375 (1844).
[80] See Ablavsky, supra note 14, at 322 n.247.

domain. As Professor John Harrison has explained, it is not surprising that Congress could put the executive branch in charge of administering and disposing of land that the federal government owned free and clear of all private claims, because "[a] core function of the executive is to exercise the proprietary rights of the government itself according to law."[81] Nineteenth-century lawyers would have said that until particular recipients had proprietary rights of their own (specifically, until a transfer had proceeded to the point at which such rights "vested" in the recipient), Congress could revise the criteria for disposing of public land, and courts did not have to be involved in the process of identifying worthy recipients.

Unlike a private person's interest in receiving a gift from the federal government, the private interests underlying even "imperfect" claims to land in the ceded territories were not simply matters of legislative grace. To be sure, because the relevant grants had not been completed before the transfer of sovereignty, legal title to the land in question had been held by the former sovereign and was now held by the United States. Still, many of the claimants were asserting equitable rights that counted as a species of property, and treaties and the customary law of nations both gave the United States an obligation to respect those rights. Professor Ablavsky concludes that "imperfect private land claims were not privileges; they could be, and were, considered vested rights to property under well-established law, and legislatures could not simply legislate them out of existence."[82]

It is true that if Congress had refused to respect imperfect claims to land in the ceded territories—for instance, if Congress had insisted on the federal government's legal title and had refused to establish any mechanisms for completing the relevant grants—Congress would have been putting the United States in breach of its international obligations. In that sense, at least, imperfect titles lay beyond Congress's discretion to abrogate. But according to the predominant understanding of public international law in the nineteenth century, international obligations ran from one nation to another. Although the promises that the United States had made in its treaties with other sovereigns operated to the benefit of individual residents of the ceded territories, the United States had made

[81] John Harrison, Public Rights, Private Privileges, and Article III, 54 Ga. L. Rev. 143, 172–73 (2019).

[82] Ablavsky, supra note 14, at 324.

those promises to the other sovereigns, not directly to any individuals.[83] As relevant here, the unwritten law of nations likewise identified obligations that one nation owed to other nations, not to individuals.[84] Usually, moreover, neither treaties nor the customary law of nations specified the internal mechanisms that each nation should use to comply with those obligations. If another nation thought that the United States was breaching one of its international obligations, the normal recourse would have been diplomacy (or war), not a lawsuit against the United States (which, as a sovereign, was immune even from more conventional kinds of lawsuits).[85]

Admittedly, domestic U.S. law—specifically, the Supremacy Clause of the Constitution—made treaties part of the supreme law of the land. As a matter of domestic law, moreover, treaties could be "self-executing" in the sense of supplying rules of decision for courts without the need for implementing legislation. Some treaties that addressed rights to property in the United States—such as treaties allowing property to pass to citizens of the other country by descent or

[83] See The Federalist No. 75, at 450–51 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that treaties "are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign"); Frelinghuysen v. Key, 110 U.S. 63, 71 (1884) ("No nation treats with a citizen of another nation except through his government."); see also Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (observing that "[a] treaty is in its nature a contract between two nations," though proceeding to discuss the ramifications of the Supremacy Clause as a matter of domestic U.S. law).

[84] See, e.g., E. de Vattel, The Law of Nations or the Principles of Natural Law 12 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916, Legal Classics Libr. spec. ed. 1993) (1758) ("The Law of Nations is the law of sovereigns; free and independent States are moral persons, whose rights and obligations we are to set forth in this treatise."); see also Thomas H. Lee, Making Sense of the Eleventh Amendment: International Law and State Sovereignty, 96 Nw. U. L. Rev. 1027, 1032 (2002) ("The classical law of nations imposed duties and conferred rights only upon sovereign states."); cf. J. Andrew Kent, Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations, 85 Tex. L. Rev. 843, 849–50 (2007) (observing that "state-centric positivism—which saw customary international law as derived only from state practice and binding only between states— . . . had not fully taken hold by 1787, when the Constitution was written," but asserting that it "was the norm in the nineteenth and early twentieth centuries"). Although customary international law is now understood to confer certain rights on individuals as well as states, even scholars who championed this development acknowledged that it had not been the traditional conception. See, e.g., Philip C. Jessup, The Subjects of a Modern Law of Nations, 45 Mich. L. Rev. 383, 383–84 (1947).

[85] See, e.g., 1 Robert Phillimore, Commentaries upon International Law 53 (Philadelphia, T. & J.W. Johnson 1854) (listing negotiation, arbitration, reprisals, embargo, and war as the legal means of protecting and enforcing public international rights).

inheritance—were understood to do just that.[86] But with the possible exception of the 1819 Adams-Onís Treaty by which Spain ceded Florida to the United States,[87] the Supreme Court did not take this view of the treaty provisions that bore on imperfect titles to land in the ceded territories. Although those treaties were understood to give the United States an obligation to respect valid claims and to complete the relevant grants, this obligation was understood to be addressed to the political branches of the U.S. government, and domestic U.S. law was understood to put Congress in charge of specifying the mechanisms for satisfying it.

Indeed, domestic U.S. law might even have been thought to put Congress in charge of deciding *whether* the United States would satisfy its international obligations. Scholars have yet to produce a definitive history of the development of the "last-in-time" rule—the doctrine that as far as domestic U.S. law is concerned, "an act of Congress may supersede a prior treaty."[88] Within the judiciary, though, Justice Benjamin Curtis applied the doctrine on circuit in 1855,[89] and Professor John Parry argues that the doctrine really emerged in congressional

[86] See Head Money Cases, 112 U.S. 580, 598 (1884) (using this example).

[87] See supra note 77.

[88] The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1871); accord, e.g., *Head Money Cases*, 112 U.S. at 597.

[89] See Taylor v. Morton, 23 F. Cas. 784, 785–87 (C.C.D. Mass. 1855) (No. 13,799), *aff'd on other grounds*, 67 U.S. (2 Black) 481 (1863); accord Webster v. Reid, 1 Morris 467, 477 (Iowa 1846) ("[A] treaty is by the constitution declared to be a supreme law of the land, but so is an act of Congress. The latter may repeal the former in the same manner that one statute may repeal another."), *rev'd on other grounds*, 52 U.S. (11 How.) 437 (1851). Professor Marco Basile reports divisions of opinion among the Justices on this issue in the 1850s and 1860s. See Marco Basile, The Splintering of American Public Law, 92 U. Chi. L. Rev. 1529, 1571–72 (2025). Justice Samuel Miller agreed with Justice Curtis's position. Id. at 1572 (citing In re Clinton Bridge, 5 F. Cas. 1060, 1062 (C.C.D. Iowa 1867) (No. 2,900), *aff'd on other grounds*, 77 U.S. (10 Wall.) 454 (1870)). As Professor Basile notes, however, Justice John Catron may have disagreed. Compare Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 525–26, 528 (1857) (Catron, J., concurring) (arguing that the reference to "property" in the Louisiana Purchase Treaty protected slavery and that Congress lacked the power to "repeal" this article of the treaty, though not necessarily addressing the last-in-time idea more generally), with id. at 629–30 (Curtis, J., dissenting) (responding partly by noting that "I had occasion to consider this subject [in *Taylor*], and I adhere to the views there expressed"). Professor Basile also points to jury instructions that Justice Samuel Nelson allegedly gave on circuit after Justice Curtis's opinion in *Taylor*, see Basile, supra, at 1571 & n.265, but those instructions were actually given in 1849. See Record at 6, 15–16, Curtis's Adm'x v. Fiedler, 67 U.S. (2 Black) 461 (1863).

debates in 1816.[90] Indeed, as early as 1798, Congress declared by statute that France had materially breached treaties with the United States and that those treaties "shall not henceforth be regarded as legally obligatory on the government or citizens of the United States."[91] Although members of Congress in 1798 probably did not think that they could simply abrogate the treaty without cause,[92] I doubt that American courts would have considered themselves free to second-guess Congress's conclusion that France was in breach or Congress's declaration that the treaties were no longer in force; nation-to-nation questions of this general sort figured prominently in nineteenth-century versions of the political-question doctrine,[93] and if the political branches took the

[90] See John T. Parry, Congress, the Supremacy Clause, and the Implementation of Treaties, 32 Fordham Int'l L.J. 1209, 1303–16 (2009). By contrast, Professor Parry identifies only a few exponents of the last-in-time rule in congressional debates in 1796. See id. at 1286–87 (observing that in the House debates about requesting documents relating to the negotiation of the Jay Treaty, "[a]lmost no one on either side . . . spoke in support of a last-in-time rule," though Rep. James Hillhouse did); see also Julian G. Ku, Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes, 80 Ind. L.J. 319, 379–80 (2005) (noting that Treasury Secretary Oliver Wolcott also invoked the last-in-time rule in this context); cf. The Federalist No. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961) (observing that treaties can be canceled only with the consent of both parties); Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 Va. L. Rev. 1071, 1096 (1985) (taking there to be "strong support . . . among the founding fathers for the superiority of treaties over either preexisting or subsequent federal statutes").

[91] Act of July 7, 1798, ch. 67, 1 Stat. 578, 578; see also Curtis A. Bradley, Treaty Termination and Historical Gloss, 92 Tex. L. Rev. 773, 789–91 (2014) (noting that "the 1798 statute appears to be the only instance in U.S. history in which the full Congress purported to effectuate a termination directly," but "Congress has authorized or directed presidential termination of treaties in a number of other instances"); cf. id. at 801–25 (discussing twentieth-century development of the idea that the President can terminate treaties unilaterally).

[92] See Lobel, supra note 90, at 1099 (citing the 1798 statute to illustrate the view that "subsequent legislation could supersede treaties only for reasons permitted under the rules of international law, such as breach by the other party"); Detlev F. Vagts, The United States and Its Treaties: Observance and Breach, 95 Am. J. Int'l L. 313, 314 (2001) (similarly concluding that "[t]he notion of a later-in-time rule had yet to be conceived").

[93] See Curtis A. Bradley, The Political Question Doctrine and International Law, 91 Geo. Wash. L. Rev. 1555, 1557 (2023) ("[T]he political question doctrine emerged in part to allow the political branches, rather than the courts, to make determinations about this country's—and other countries'—rights and responsibilities under international law."); see also Nelson, Adjudication, supra note 7, at 593 (noting that even when these questions were relevant to ordinary lawsuits involving individual rights, nineteenth-century courts "treated as authoritative the political branches' decisions about the territorial boundaries between the United States and foreign sovereigns, . . . the identity of the legitimate government in

position that the United States had no further obligations under a treaty, I do not think that U.S. courts would have contradicted them.[94] If so, then Congress had at least the practical ability to abrogate treaties by statute (as far as domestic U.S. law was concerned), and the broader last-in-time rule might be thought to follow.[95]

Of course, even if domestic U.S. law allowed Congress to put the United States in violation of its international obligations, those obligations still existed (at least as far as other nations were concerned). If Congress had refused to establish any mechanisms for completing imperfect titles in the ceded territories, and if the United States had therefore failed to recognize those titles, Congress would have been doing something wrong. That is why I agree with Professor Ablavsky that many imperfect titles in the ceded territories did not fit the standard model of a "privilege"; Congress did not have legitimate discretion to abrogate them. Before they were confirmed through mechanisms established by Congress, though, these imperfect titles also did not fit

a . . . foreign country, or . . . whether particular treaties between the United States and other countries remained in force and continued to bind each nation" (footnotes omitted)).

[94] Cf. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 309 (1829) ("If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature.").

[95] See Bradley, supra note 93, at 1565–66 (noting that in 1855, when Justice Curtis articulated the last-in-time rule on circuit, he invoked the political-question doctrine as one of his arguments). Here is the relevant passage from Justice Curtis's opinion:

> Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; [or] whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. . . . [And] if it be admitted that congress has these powers, it is wholly immaterial to inquire whether they have, by the act in question, departed from the treaty or not; or if they have, whether such departure were accidental or designed, and if the latter, whether the reasons therefor were good or bad.

Taylor v. Morton, 23 F. Cas. 784, 787 (C.C.D. Mass. 1855) (No. 13,799); see also Whitney v. Robertson, 124 U.S. 190, 194–95 (1888) (endorsing this argument).

the standard model of a "vested right"; the nation's obligation to recognize them was owed to another sovereign (rather than to private rights-holders), and they were not judicially cognizable outside of the mechanisms that Congress chose to establish to comply with that obligation.[96]

3. Attorney General Legaré, His Critics, and the Supreme Court

The special nature of these legal interests figured prominently in an 1841 opinion by U.S. Attorney General Hugh Legaré, which Professor Ablavsky acknowledges but dismisses as unrepresentative. In 1832, Congress had instructed two commissioners and the recorder of land titles in Missouri "to examine all the unconfirmed claims to land in that state, heretofore filed in the office of the said recorder, according to law, founded upon any incomplete grant, concession, warrant, or order of survey, issued by the authority of France or Spain, prior to [March 10, 1804]."[97] Based on evidence that had already been presented as well as whatever additional evidence was admitted, the panel was to sort the claims into two classes: (1) "claims [that], in their opinion, would in fact have been confirmed, according to the laws, usages, and customs of the Spanish government, and the practice of the Spanish authorities under them, at New Orleans, if the government under which said claims

[96] In that respect, the imperfect titles in question were not like other kinds of equitable titles recognized by domestic American law. Speaking of property law in general, Professor Ablavsky notes that although "only a perfect title was a *legal* title" that could be vindicated in an action at law (such as ejectment), "[h]olders of inchoate titles . . . also had rights that they could vindicate in court: They could bring suits in equity based on their *equitable* titles." Ablavsky, supra note 14, at 314. That was true when their equitable rights were judicially cognizable, but it was not true of people who claimed inchoate titles in the ceded territories unless their claims had been confirmed through mechanisms established by Congress. From the standpoint of the individual claimant, rights of this sort seem to have been considered "imperfect" in a sense once described by Vattel: they did not "carry with them the right of compelling the fulfillment of the corresponding obligations," but only "the right to request," and the purported obligor (here, the United States) retained "the right of deciding what are his obligations according to the law of conscience." Vattel, supra note 84, at 7; cf. Dent v. Emmeger, 81 U.S. (14 Wall.) 308, 312–13 (1872) ("[I]nchoate rights such as those of Cerre were of imperfect obligation and affected only the conscience of the new sovereign. They were not of such a nature (until that sovereign gave them a vitality and efficacy which they did not before possess) that a court of law or equity could recognize or enforce them.").

[97] Act of July 9, 1832, ch. 180, § 1, 4 Stat. 565, 565–66; see also Act of Mar. 2, 1833, ch. 84, § 1, 4 Stat. 661, 661–62 (extending the panel's purview to claims of "donation[s] of land . . . held in virtue of settlement and cultivation").

originated had continued in Missouri," and (2) "claims [that], in their opinion, are destitute of merit, in law or equity, under such laws, usages, customs, and practice of the Spanish authorities aforesaid."[98] The panel was periodically to transmit its reports to the Commissioner of the General Land Office, "to be laid before Congress for their final decision upon the claims contained in such first class."[99] Ultimately, in 1836, Congress passed a statute confirming en masse almost all of the favorable decisions that had been laid before Congress (though "saving and reserving . . . to all adverse claimants, the right to assert the validity of their claims in a court or courts of justice").[100] In 1841, however, the Commissioner of the General Land Office and the Secretary of the Treasury sought guidance from the Attorney General about whether the claims that Congress had confirmed in 1836 took priority over some other classes of claims (including claims that had already been confirmed under earlier statutes or titles that the United States had conveyed through ordinary sales before 1836).[101]

Attorney General Legaré began his analysis by addressing "the nature of the claims under the treaty with France, which is the origin of the whole discussion."[102] In his view, what "the confirmees under the treaty" were claiming was "not property strictly so called, or the *dominium* of the civil law, but the doing of what is necessary to complete title, and to convey property."[103] He described the claimants' situation as follows:

> The lands to which they lay claim, form still (where patents have not been granted) a part of the public domain of the United States; and, although the United States acknowledge themselves bound to provide for those claims, still the whole subject is in contract, and their rights are only *jura ad rem* under treaty with a foreign government.[104]

Although this distinction did not affect "whether those rights shall or shall not be held sacred," Legaré asserted that the distinction "is very important" with respect to "*how* they are to be satisfied, *how* they are to

[98] Act of July 9, 1832, § 1, 4 Stat. at 565–66.
[99] Id. § 2, 4 Stat. at 566–67.
[100] Act of July 4, 1836, ch. 361, § 1, 5 Stat. 126, 126–27.
[101] See Mo. Land Claims, 3 Op. Att'ys Gen. 720, 721–22 (1841) (describing correspondence).
[102] Id. at 723.
[103] Id. (second emphasis omitted).
[104] Id.

be regarded by courts of justice, *how* they have been affected by federal legislation, [and] *how* they stand when they come in conflict with the rights of others, who, with equal equity, happen to have the advantage of an equally vested legal estate."[105]

Legaré struck similar themes later in his opinion. He described "claims under a treaty" as "claims against [the United States] as a government—claims which no court has any right to enforce, and which bind Congress only in conscience, and bind the other departments only so far as Congress has been pleased to acknowledge them."[106] Thus, Legaré did not think that the Louisiana Purchase Treaty had itself given people with inchoate claims to land in Missouri a "vested" right to the land, of the sort that would disable Congress from conveying the land to someone else. In his words,

> To say that Congress, having granted once by the treaty, has no power to make a second grant, is to mistake a claim to land protected by a treaty with a foreigner for a title actually vested in a citizen under the constitution of the United States, which are in my judgment two very distinct things.[107]

Legaré seemed to think that people with inchoate claims acquired a vested right to particular tracts of land only when their claims to those tracts were confirmed by Congress (or through mechanisms established by Congress). If Congress had confirmed someone else's title to land that should have been granted to them, they could seek a compensating grant of other land from Congress, but they did not have enforceable rights to the particular tract that they had claimed; to the contrary, the rights to that tract had vested in the person whose claim had been confirmed. Presumably for that reason, Legaré concluded that earlier confirmations (and earlier sales by the United States) took priority over the claims that Congress had confirmed in 1836.[108]

Legaré's analysis is a useful illustration of the framework described in my earlier article. To answer the questions that he had been asked, Legaré started by thinking about the nature of the claimants' legal interests. For him, the Louisiana Purchase Treaty had not itself caused the claimants' interests to "vest" in the same manner as ordinary

[105] Id.
[106] Id. at 727.
[107] Id. at 728.
[108] See id. at 729.

property rights (which were judicially cognizable without the need for legislative confirmation). That conclusion, in turn, affected Legaré's views about the role that Congress could play (and had played) with respect to the relevant claims—just as the framework that I described would lead one to expect.[109]

Professor Ablavsky responds that "many disagreed with Legare's assessment—including, most notably, the Supreme Court."[110] Rather than citing direct disagreement with Legaré, though, Professor Ablavsky simply notes that the Supreme Court had already referred to inchoate titles as "property," and subsequent cases and commentary continued to do so.[111] Even if the Court would have disagreed with Legaré's view that the claimants did not have "property strictly so called" in the tracts that they claimed, the Court recognized a difference between the claimants' interests and other property interests (such as completed titles), and this difference led the Court to reach many of the same conclusions as Legaré. As we have seen, the Court repeatedly indicated that claims to "incipient titles" in Missouri were not judicially cognizable unless and until Congress made them so[112]—something that the Court would not have said about other property interests. Like Legaré, moreover, the Court explained this point by observing that "[t]he [Louisiana Purchase] treaty addressed itself to the political department."[113] Similarly, the Court agreed with Legaré that the claims

[109] Along the same lines, it is useful to compare Legaré's views about the legal status of inchoate titles based on incomplete grants by the former sovereign of a ceded territory with his views about the legal status of titles based on ordinary land grants made by the United States. In his words, "[W]here the act of issuing [a patent] is complete, and the patentee will not give it up to be cancelled, it is, in my opinion, a good title at law until judicially avoided"—even if the land office concluded that the patent had been issued by mistake or as the result of fraud. See Rescission of Land Pats., 4 Op. Att'ys Gen. 120, 121 (1842).

[110] Ablavsky, supra note 14, at 319.

[111] See id. at 319 & nn.231–34.

[112] See, e.g., United States v. Lawton, 46 U.S. (5 How.) 10, 28 (1847) ("Previous to the passing of the act of May 26, 1824, conferring the jurisdiction on the courts to adjudge incipient titles, . . . the political power could alone finally pass on them, and Congress uniformly did so."); see also United States v. King, 44 U.S. (3 How.) 773, 787 (1845) ("[S]uch titles are not confirmed by the treaty itself so as to bring them within judicial cognisance and authority . . . ."); supra notes 44–54 and accompanying text.

[113] Glenn v. United States, 54 U.S. (13 How.) 250, 260 (1852); accord, e.g., Les Bois v. Bramell, 45 U.S. (4 How.) 449, 464 (1846) ("[O]n this government was imposed the duty by the treaty to satisfy individual and unperfected claims. This was to be done in a due exercise of the political power, to whose justice alone the claimant could appeal, and to whose decision she was compelled to submit . . . .").

that Congress confirmed in 1836 were subordinate to both prior confirmations and prior sales.[114] As explained above, those conclusions reflect the premise that confirmations or sales authorized by Congress caused the vesting of rights that the treaty itself had *not* vested (as far as U.S. courts were concerned).

[114] See Landes v. Brant, 51 U.S. (10 How.) 348, 370 (1851) (summarizing *Les Bois v. Bramell* and *Chouteau v. Eckhart*, 43 U.S. (2 How.) 344 (1844), as having decided that "when Congress confirmed and completed an imperfect claim, and then confirmed another and different claim for the same land, the older confirmation defeated the younger one; nor could a court of justice go behind the first confirmation, and ascertain from facts and title papers which claimant had the better original equity"); Menard's Heirs v. Massey, 49 U.S. (8 How.) 293, 308 (1850) ("The title of Cerré having no standing in court before it was confirmed [by the 1836 statute], it must of necessity take date from the confirmation, and cannot relate back so as to overreach the patents made in 1826 and 1827."); see also *Les Bois*, 45 U.S. (4 How.) at 463 (appearing to refer favorably to Legaré's opinion that the confirmations made by the 1836 statute "must yield to prior confirmations[,] school sections, ordinary sales prior to the act of July 4th, 1836, &c.").

The Supreme Court did disagree with Legaré about the relative priority of the claims that Congress confirmed in 1836 and certain "New Madrid" grants. In 1815, Congress enacted legislation providing relief to "persons owning lands in the county of New Madrid, in the Missouri territory, . . . whose lands have been materially injured by earthquakes." Act of Feb. 17, 1815, ch. 45, § 1, 3 Stat. 211, 211. The legislation authorized any such person "to locate the like quantity of land on any of the public lands of the said territory, the sale of which is authorized by law," and to exchange his earthquake-damaged lands for the new tract that he had chosen. Id.; see also Act of Apr. 9, 1818, ch. 42, 3 Stat. 417 (establishing a deadline). Legaré and the Supreme Court agreed that grants made under this authority took priority over later confirmations of imperfect titles based on concessions of the former sovereign. See Mo. Land Claims, 3 Op. Att'ys Gen. 720, 722, 728–29 (1841) (concluding that New Madrid locations "are valid, as against the claim confirmed by the act of the 4th of July, 1836"); Bissell v. Penrose, 49 U.S. (8 How.) 317, 333 (1850) (indicating in dicta that if "the location of the New Madrid certificate was made in pursuance of law," then it would supply "better title" than the 1836 statute's later confirmation of a Spanish concession); see also Barry v. Gamble, 44 U.S. (3 How.) 32, 51–56 (1845) (upholding the title of a person who had received a patent from the United States in 1827, based on a New Madrid location made in 1818, over that of someone whose incomplete title based on a Spanish concession had been confirmed through proceedings that were not initiated until 1829). By statute, though, Congress had reserved from sale lands in Missouri for which claims based on Spanish concessions had been made and not finally resolved, so New Madrid claimants were not supposed to receive tracts of this sort. See, e.g., Act of Mar. 3, 1811, ch. 46, § 10, 2 Stat. 662, 665. Ultimately, the Supreme Court held that locations made and patents issued in violation of this restriction were void and therefore did not take priority over the claims confirmed by the 1836 statute. See Stoddard v. Chambers, 43 U.S. (2 How.) 284, 317–18 (1844); accord *Bissell*, 49 U.S. (8 How.) at 331–33. Legaré had previously reached a different conclusion; although he did not deny that New Madrid locations were void "when made on lands not subject to sale," he interpreted a provision in the 1836 statute to "cure defects in such locations." Mo. Land Claims, 3 Op. Att'ys Gen. at 728–29. This disagreement, however, was about the meaning of the 1836 statute, not about the fundamental nature of unconfirmed imperfect titles in the ceded territories.

To be sure, even if one agreed with Legaré (and the Supreme Court) that imperfect titles to land in the ceded territories were not judicially cognizable until they were confirmed through mechanisms approved by Congress, one could have disagreed with Legaré about the temporal effect of confirmation. That is especially true in cases where a claimant asserted imperfect title to a specific tract of land that the former sovereign had already identified (as opposed to "unlocated" grants). In such cases, once the claimant's title was confirmed and became judicially cognizable, courts could perhaps treat the claimant's rights as having existed all along—so that instead of operating like a new grant, the confirmation of the claimant's title would effectively relate back to the date on which the former sovereign had severed the land from the public domain. In the 1860s, under the guidance of Justice Stephen Field, both the California Supreme Court and the U.S. Supreme Court took something like this position with respect to confirmations under the California Land Act (discussed below). According to Justice Field, a patent issued by the United States after such a confirmation "is not only the deed of the United States, but it is a solemn record of the Government, of its action and judgment with respect to the title of the claimant existing at the date of the cession"—and in its latter aspect, Justice Field argued, it could take priority over "subsequently acquired rights."[115] Like Legaré's position, though, Justice Field's position was compatible with the framework described in my earlier article. Once titles became judicially cognizable, it was up to courts to determine their priority vis-à-vis other claimed titles, but the framework that I described does not necessarily dictate an answer to questions about the temporal effect of the confirmation of imperfect titles.

[115] Teschemacher v. Thompson, 18 Cal. 11, 26–28 (1861) (Field, C.J.); accord Leese v. Clark, 20 Cal. 387, 421–24 (1862) (Field, C.J.); Beard v. Federy, 70 U.S. (3 Wall.) 478, 491–92 (1866) (Field, J.); see also Ablavsky, supra note 14, at 339–42 (discussing Justice Field's opinions); Knight v. U.S. Land Ass'n, 142 U.S. 161, 184 (1891) ("[T]he patent of the government [issued after a decree of confirmation and an official survey] is evidence of the title of the city under Mexican laws, and is conclusive, not only as against the government and against all parties claiming under it by titles subsequently acquired, but also as against all parties except those who have a full and complete title acquired from Mexico anterior in date to that confirmed by the decree of confirmation."); cf. Pollard's Heirs v. Greit, 8 Ala. 930, 940 (1846) ("If Pollard had a claim to the lot confirmed to him, the confirmation would relate back to the time when the incipient title attached, if the fee was in the United States. But it is not competent for Congress, by a mere enactment to confer upon its grantee, a title which had already vested in a third person . . . .").

Admittedly, some of Legaré's contemporaries expressed more fundamental disagreements with his conclusions. Most notably, an 1842 report by the U.S. Senate's Committee on Private Land Claims harshly criticized Legaré's opinion as "a vindication of *Government power* against *private rights*."[116] Citing Chief Justice Marshall's opinions from the 1830s,[117] the report observed that "these claims to land, under the Louisiana treaty, are real and substantial *property*, and not merely the shadowy imbodiment of the right of petition."[118] In the committee's view, the relevant property rights "had accrued under the Spanish and French Governments of Louisiana,"[119] were "assured by treaty stipulations"[120] (but would have been judicially cognizable even in the absence of those stipulations),[121] and were like other vested rights to property for purposes of U.S. constitutional law.[122] These premises led the committee to reach "nearly the reverse" of Legaré's conclusions.[123] For instance, in the event of conflict between claims that Congress had confirmed in 1836 and prior (nonjudicial) confirmations, the committee thought that courts should simply "determine the better claim" rather than feeling bound by the earlier confirmation.[124]

[116] S. Rep. No. 27-440, at 8 (1842).

[117] See supra notes 58–60 and accompanying text.

[118] S. Rep. No. 27-440, at 3–4.

[119] Id. at 3.

[120] Id. Because the U.S. Constitution makes treaties part of the supreme law of the land, the committee suggested that the relevant treaties supplied rules of decision for courts without the need for congressional say-so. See id. at 7; see also id. at 5 (condemning the view "that citizens coming under the jurisdiction of this Government by treaty, as did those of Louisiana, can not invoke in our courts the constitution of the United States, the provisions of the treaty, the law of nations, or the common law, to vindicate such rights of property; and have no other claim at the hands of the legislative department than such as addresses itself to their grace and discretion"); cf. id. at 7 ("Your committee will forbear to say how far Congress may forbid jurisdiction to the *federal courts*, and so foreclose investigation and relief to these claims and claimants under said treaty. But they can not interdict the State courts from investigating *any title* or right to private property within the State's dominion.").

[121] See id. at 5–6.

[122] See id.

[123] Id. at 8.

[124] Id. at 9. Similarly, the committee suggested that if Congress "direct[ed] its executive and ministerial officers" to make decisions about the priority of claims and to award titles accordingly, courts would not be bound by those decisions either. Id. at 2; see also id. ("The judgment of the Executive Department in *construing* and *administering* law, becomes no rule of decision for the court, nor can disparage or divest any private legal right, when brought before the judicial tribunals for decision.").

Tellingly, though, the committee criticized not only Legaré but the longstanding practices of Congress itself. In the report's words, "[T]he committee believe that Congress, in much of its legislation, has *assumed the province of the courts*, and decided many questions of private right to property, which were and are purely judicial."[125] In particular, the government "has assumed to *settle* by various laws of compromise and qualified recognitions of right, and by ministerial agencies of its own, in form of various boards of commissioners, *private rights to property—legal and constitutional rights*, without permitting the citizen to invoke a *judicial inquiry* upon them."[126] Of course, claimants could not sue the United States itself without its consent. For the committee, though, that merely postponed the courts' legitimate ability to investigate the relevant questions; once the United States transferred its "naked legal title" to someone else, the original claimant should be able to argue in court that the assignee held the land in trust for the claimant.[127] According to the committee, the federal government "can not rightfully assume, by its legislative department, to determine conclusively upon the validity of such *private claim*, or forbid the claimant his day in court"—so the claimant could "assert his rights against the Government assignee of his property, regardless of federal legislation to restrain him."[128]

[125] Id. at 7.

[126] Id.

[127] See id. at 8.

[128] Id. In 1829, when Joseph White transmitted to the Secretary of State his compilation of Spanish and French ordinances relevant to land claims, his letter of transmittal had suggested a similar point (again predicated on the view that private rights were at stake). In White's words:

> It has been computed that the unadjusted land claims in Louisiana, Alabama, Missouri, Arkansas, and Florida, yet cover ten or twelve millions of acres. Their validity depends upon principles of Spanish law, local usages, and the construction of treaties, which, sooner or later, must be investigated and determined before the judicial tribunals of the country.
>
> In Arkansas and Missouri a reference of these claims to the courts for adjudication was authorized, some time since, by Congress. . . . No act has, as yet, been passed for the final adjustment of private land claims in the States of Louisiana, Mississippi, and Alabama. . . . In the meantime the individual claimants have repeatedly applied to the federal legislature, by petition, for a confirmation of their titles. The impossibility of thus settling numerous and perplexed questions of private right, depending upon foreign law, seems now to be generally admitted; and the refusal of Congress to invest the judicial tribunals with authority to determine them, if it be not a denial or delay of justice, is, at least, a measure of doubtful policy. Though the claimants can institute no

For my purposes, the striking feature of the debate between Legaré and the committee is that *each side's* position was consistent with the framework described in my earlier article. According to Legaré, the legal interests created by the former sovereign's concessions (short of completed grants) were not vested rights to property for purposes of domestic U.S. law, and Congress was in charge of how to carry out the treaties that pledged to respect them. According to the committee, those legal interests were indeed "private and vested rights,"[129] and Congress could not "prevent the courts from taking cognizance of them as against any assignee of the United States[,] and . . . adjudging such titles upon their original merits and integrity."[130] Given their different premises, both sides in this debate took the position that the framework described in my earlier article would lead one to expect.

Professor Ablavsky argues that the Supreme Court's own doctrines were inconsistent with that framework; in his telling, the Supreme Court regarded even imperfect titles as vested property rights, but it nonetheless tolerated nonjudicial disposition of claims to such titles. Even if imperfect titles based on the former sovereign's concessions were "vested" both in a moral sense and in the sense that generated international obligations for the United States, though, the Supreme Court made clear that those titles were not judicially cognizable outside of the mechanisms that Congress established.[131] Professor Ablavsky apparently thinks that the framework described in my earlier article leaves no room for the Supreme Court's position, but I do not see why. The operation of the framework could have been limited to interests that were judicially cognizable—so that if an interest was *not* judicially cognizable (unless and until Congress made it so), then courts would not have held that it triggered the need for judicial adjudication. I take this to have been the Supreme Court's position, as well as the position of at least some lawyers in Congress.[132]

> process against the United States, the moment [the United States] part with their title to individuals a suit may be commenced against the purchaser.

Letter from Jos. M. White to Henry Clay, Sec'y of State (Feb. 4, 1829), *reprinted in* 5 American State Papers: Public Lands 631, 632 (Asbury Dickins & John W. Forney eds., Washington, D.C., Gales & Seaton 1860).

[129] S. Rep. No. 27-440, at 11.

[130] Id. at 7.

[131] See supra notes 44–54 and accompanying text.

[132] See, e.g., 19 Cong. Rec. 896 (1888) (statement of Sen. George Edmunds) ("[W]here [a claimant] has not a title, and appeals to further legislation for some kind of action to confirm

Professor Ablavsky might respond that analysis of this sort is "circular."[133] That would be a fair criticism if there were no external logic to ideas about which property interests were and were not judicially cognizable, and if imperfect titles in the ceded territories therefore should have been treated like other property interests for purposes of the framework. But while a different Court might have reached different conclusions, there are doctrinal explanations for the distinctions that the Court drew. The idea that the relevant imperfect titles were not judicially cognizable reflected the Court's view that Congress was in charge of the mechanisms for confirming those titles, which in turn reflected the Court's understanding of the nature of international obligations and the role that domestic U.S. law gives the political branches in deciding how (and perhaps even whether) to carry out those obligations.[134]

his grant to him, which had not been completely confirmed when the sovereignty changed in 1848, then the courts have not jurisdiction, not because they have not jurisdiction of every question of legal and equitable private right between everybody, but because the man in the case I state has not any right which a court of law or a court of equity can recognize.").

[133] Cf. Ablavsky, supra note 14, at 320 ("Legare's conclusion was circular: Private land claims could not be property because they were not treated like[] property.").

[134] See supra notes 83–96 and accompanying text. One might wonder whether these reasons permit any distinction between "perfect" and "imperfect" titles in the ceded territories. After all, the same treaties that gave the United States an obligation to complete imperfect titles also gave the United States an obligation to respect titles that had already been completed, and again the United States owed that obligation (like other treaty obligations) to the other sovereign rather than to private individuals.

In later years, the Supreme Court sometimes seemed to speak as if perfect and imperfect titles were indeed alike in this way. For instance, here is how the Court summarized its doctrine near the turn of the twentieth century:

> The duty of securing private rights in lands within the territory ceded by Mexico to the United States by the treaties of 1848 and 1853, (whether complete and absolute titles, or merely equitable interests needing some further act of the Government to perfect the legal title,) and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the Government; and might either be discharged by Congress itself, or be delegated by Congress to a strictly judicial tribunal or to a board of commissioners.

United States v. Baca, 184 U.S. 653, 656 (1902); accord, e.g., Ainsa v. N.M. & Ariz. R.R. Co., 175 U.S. 76, 79 (1899); Astiazaran v. Santa Rita Land & Mining Co., 148 U.S. 80, 81–82 (1893); Tameling v. U.S. Freehold & Emigration Co., 93 U.S. 644, 661 (1877). But cf. United States v. Santa Fe, 165 U.S. 675, 714 (1897) (limiting this sort of statement to "[t]he duty of protecting imperfect rights of property" under the treaties).

Yet even though the United States had similar *international* obligations with respect to both perfect and imperfect titles, domestic U.S. law (including constitutional law) could still draw distinctions between them. If a grant had not been completed before the transfer of sovereignty, and if the United States therefore held legal title to the land in question,

With respect to interests that *were* judicially cognizable, moreover, the Supreme Court's doctrine followed the framework that I described. Indeed, I do not take Professor Ablavsky to argue otherwise. None of the evidence that he presents provides any basis for thinking that Congress could have used its approach to inchoate titles in the ceded territories as a model for resolving disputes about completed titles outside the ceded territories. Even within the ceded territories, Professor Ablavsky acknowledges that completed titles were judicially cognizable, and he appears to acknowledge that, as a result, courts followed the framework described in my earlier article. In his words, although determining "whether a given claim constituted perfect title" was a "fact-intensive, difficult, and unpredictable inquiry," antebellum courts treated it as "a constitutional matter, defining the outer limits of congressional power."[135] He adds:

> As a consequence, antebellum courts routinely dove into the merits of particular claims on which the commissioners had already ruled. If the courts concluded that the claim was *imperfect*, that conclusion

completion of the grant required further action by the U.S. government—and domestic U.S. law did not treat the would-be grantee as having judicially cognizable interests in the absence of such action. Perfect titles were different: because they had been completed before the transfer of sovereignty, they might be judicially cognizable under domestic U.S. law without the need for any further governmental action. Cf. Ablavsky, supra note 14, at 316 (summarizing doctrine of the 1840s as holding that "upon cession, the perfect titles became yet another complete land title within the United States"—with the result, for instance, that "perfect titles could serve as the basis for an ejectment suit without any sort of government recognition").

The fact that treaties obliged the United States to respect both perfect and imperfect titles would not itself alter the protections that domestic U.S. law already gave perfect titles. By way of analogy, imagine that the United States had pledged by treaty not to execute or imprison inhabitants of the ceded territories without due process. As a matter of international law, the United States would have been making this promise to the other sovereign, not directly to the inhabitants. But the treaty would merely have added an international obligation to obligations that already existed as a matter of domestic U.S. law. Under domestic U.S. law, after all, the inhabitants surely had rights to life and liberty that were judicially cognizable without the need for further government action, and they could have invoked those (vested) rights even if the treaty had not provided any additional protection for them.

Aspects of the debate between Attorney General Legaré and the Senate Committee on Private Land Claims can be cast in these terms. The Senate committee thought that even imperfect titles counted as vested rights to property for purposes of U.S. domestic law and therefore benefited from the normal constitutional protections for vested rights. By contrast, Legaré suggested that although completed titles were judicially cognizable for purposes of domestic U.S. law, imperfect titles were not (unless and until Congress made them so).

[135] Ablavsky, supra note 14, at 327.

> divested the courts of all jurisdiction to hear the case [(assuming that Congress had not chosen to involve the courts in the adjudication of imperfect claims)]; the political branches' decision was final and unreviewable. But if the courts determined that the claim was, in fact, *perfect*, then the entire administrative adjudication was ultra vires, and courts could make their own decision about the claim's merits—which, of course, they had effectively already done.[136]

On the assumption that unconfirmed imperfect claims were not judicially cognizable vested rights but that completed grants were, these are exactly the results that the framework described in my earlier article would produce.

II. SOME DETAILS

The preceding Part lays out the big picture: even if one thinks that a single counterexample would defeat the framework described and documented in my earlier article, Professor Ablavsky has not really identified such a counterexample. This Part discusses some additional points of detail. Section II.A addresses Professor Ablavsky's criticism of

[136] Id. (footnote omitted). Professor Ablavsky describes this analysis as "remarkably circular" because it "link[ed] merits and jurisdiction." Id. It is true that the nature of the underlying legal interests (as judicially cognizable vested rights or not) determined whether Congress could provide for claims about them to be rejected conclusively through nonjudicial processes, and the courts therefore would have no further work to do if they decided that a claim was imperfect. But that does not make the analysis circular. It simply means that the authority of the political branches depended on the nature of the private legal interests at stake. That is consistent with the framework described in my earlier article. See Nelson, Adjudication, supra note 7, at 571–72 ("In sum, as American-style separation of powers developed in the nineteenth century, the respective roles of the branches depended on the kinds of legal interests that were at stake.").

One technical note: It is not necessarily true that whenever the courts classified a claim as perfect, they effectively had already decided that the claim was valid. If my neighbor claims to own my house, and if I resist the claim by saying that the house belongs to me, we are each *claiming* perfect title. Even today, let alone in the nineteenth century, Congress probably could not require courts adjudicating this dispute to accept nonjudicial determinations of the merits of our respective claims (unless, perhaps, my neighbor and I have entered into an arbitration agreement or otherwise have consented to abide by such determinations). Still, the fact that a party is *claiming* a judicially cognizable vested right, and that only governmental entities with "judicial" power can reject such a claim conclusively (i.e., in a way that has preclusive effect in later litigation), does not mean that the party's claim is automatically valid. A court might decide that my claim is valid and my neighbor's claim is not, or vice versa. Cf. Riddle v. Ratliff, 8 La. Ann. 106, 107–08 (1853) (observing that "[t]he plaintiff claims title under a complete Spanish grant," but concluding that "[t]he plaintiff has failed to make out his case").

my definition of "public rights." Section II.B addresses the legal effect of nonjudicial dispositions of imperfect claims to land in the ceded territories. Section II.C questions the conclusions that Professor Ablavsky draws from the California Land Act of 1851, which required even people with perfect titles to present their claims to a board of commissioners but permitted de novo review of the commissioners' decisions in the regular courts.

A. The Definition of "Public Rights"

Under the framework described in my earlier article, Congress could sell, donate, waive, or otherwise dispose of "public rights" simply by enacting a statute, and the statute would act upon the relevant public rights without the need for any judicial decree. Alternatively, Congress could establish criteria for decision-makers in the executive branch to use for this purpose, and Congress again could provide for the resulting dispositions to have the force of law. Where authorized by statute, and where core private rights were not at stake, decision-makers did not need "judicial" power to decide either to retain or to dispose of public rights.

In my telling, the phrase "public rights" referred to legal interests belonging to the government or to the people collectively. Examples included:

> (1) proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury; (2) servitudes that every member of the body politic could use but that the law treated as being collectively held, such as rights to sail on public waters or to use public roads; and (3) less tangible rights to compliance with the laws established by public authority "for the government and tranquillity of the whole."[137]

Under the framework that I described, disputes about the government's enforcement, administration, or disposition of a public right did not necessarily have to wind up in court; if the only private interests at stake on the other side were "privileges" or mere expectancies, the government could act by statute or through statutorily authorized administrative decision-makers. In some situations, though, public rights

[137] Nelson, Adjudication, supra note 7, at 566 (footnote omitted) (quoting 4 William Blackstone, Commentaries *7).

were pitted against vested private rights—as when the government sought to vindicate the public right to compliance with laws by depriving criminal defendants of their core private rights to life or liberty. In those situations, the framework that I described still allowed the political branches to surrender or release the relevant *public* rights (as when the President pardons someone or when Congress repeals a criminal statute and makes the repeal applicable to pending cases), but private individuals or entities were in charge of the core private rights on the other side, and only decision-makers with "judicial" power could conclusively adjudge that those claimed private rights had been forfeited or had never vested at all.

Professor Ablavsky says that his research "yields a very different definition of public rights than the one advanced by Nelson."[138] But he does not specify any alternative definition, nor does he survey how nineteenth-century cases and commentary used the phrase "public rights." Instead, he relies on how Justice Benjamin Curtis allegedly used the phrase in the leading case of *Murray's Lessee v. Hoboken Land & Improvement Co.*[139] That case did not itself involve land claims in the

[138] Ablavsky, supra note 14, at 284.

[139] 59 U.S. (18 How.) 272 (1856); see also Ablavsky, supra note 14, at 281 (describing *Murray's Lessee* as "the 1856 decision that inaugurated the public-rights doctrine"). As explained below, my main reaction to Professor Ablavsky's argument is not that he is wrong to focus on the relevant passage from *Murray's Lessee*, but simply that he overreads the passage. In my view, though, the idea that legislatures could act upon "public rights" without the need for judicial involvement long predated *Murray's Lessee*, so I am less confident than Professor Ablavsky that contemporaries would have regarded Justice Curtis's opinion as the urtext for "the public-rights doctrine." See, e.g., Letter from the Sec'y of the Treasury to Thomas Worthington, Register of the Land-Office at Chilicothe (Aug. 21, 1800), *in* 3 The Territorial Papers of the United States 102, 102 (Clarence Edwin Carter ed., 1934) (expressing the view that "questions relative to the rights of preemption secured by the 16th section of [a particular statute] will generally arise under such circumstances as to be susceptible of decisions only in the Courts of law," but adding that "[i]n other cases . . . the Act should receive an interpretation favorable to the Claimants" and recommending a position to take "so far therefore as the public rights are concerned" (footnote omitted)); see also Nelson, Franchises, supra note 8, at 1442–63 (noting early nineteenth- and late eighteenth-century statements contrasting legislative power to modify the charters of "public" corporations, such as cities and towns, with vested-rights ideas for the charters of "private" corporations). While lawyers and judges immediately treated *Murray's Lessee* as an important statement about the meaning of "due process of law," I see little evidence that they looked to *Murray's Lessee* for their understanding of the phrase "public rights." At any rate, I have found only three judicial opinions before the 1890s that quoted the passage on which Professor Ablavsky focuses, and none of those opinions treated *Murray's Lessee* as defining (or redefining) "public rights." See Pullan v. Kinsinger, 20 F. Cas. 44, 48

ceded territories, but Justice Curtis invoked doctrines about such claims to illustrate the possibility of nonjudicial adjudication. Here is the relevant passage:

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title.[140]

Professor Ablavsky summarizes this passage as saying that the (private) legal interests of inhabitants who claimed land in the ceded territories were themselves "public rights."[141] That is the basis for his assertion that I got "public rights" wrong. In his words, "The citation to the private-land-claims cases demonstrates . . . that when the Court spoke of public rights in *Murray's Lessee*, it did not mean to limit them only to those rights owned by the public."[142]

Contrary to Professor Ablavsky's summary, though, Justice Curtis did not say that the legal interests of private individuals were themselves public rights. Instead, he said that equitable claims to land by the

(C.C.S.D. Ohio 1870) (No. 11,463); Ex parte Towles, 48 Tex. 413, 450 (1878) (separate opinion of Gould, J.); Taylor v. Place, 4 R.I. 324, 338 (1856).

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

[141] See, e.g., Ablavsky, supra note 14, at 309 (describing the Court as having "said . . . that the private land claims were a defining example of public rights").

[142] Id. at 308; see also id. at 284 ("The private land claims that *Murray's Lessee* made the definitional example of public rights were neither rights belonging to the public nor privileges that the government could freely take away.").

inhabitants of ceded territories were "matters, *involving* public rights," that Congress did not have to "bring within the cognizance of the courts of the United States."[143] These matters unquestionably did "involv[e]" public rights: the United States held legal title to the land, and resolution of the inhabitants' inchoate claims would determine whether the public enjoyed full ownership or instead would convey its legal title to the claimants. Even if the private interests on the other side were protected by treaty, moreover, Justice Curtis had already indicated that Congress can override treaties as far as U.S. courts are concerned.[144] In any event, someone who accepted the framework described in my earlier article, but who also accepted the settled doctrine that the claimed imperfect titles were not judicially cognizable until confirmed through procedures authorized by Congress, could make exactly the statement that Justice Curtis made. Justice Curtis need not be read as using the phrase "public rights" to encompass the private interests of the claimants.

Unfortunately, Justice Curtis did not clarify this point one way or the other, and the phrase "public rights" did not appear elsewhere in *Murray's Lessee*.[145] But a different passage in the opinion used the phrase "public wrong"—and if a "public wrong" entails the violation of a "public right,"[146] then Justice Curtis's understanding of the one phrase sheds light on his understanding of the other. In *Murray's Lessee*, Justice Curtis referred to "public and private wrongs" as separate categories, and the examples that he offered fit my understanding; he spoke of wrongfully detaining goods belonging to a private owner as "a private wrong," and he spoke of both "a public nuisance" and the failure to pay over "public dues" (that is, money owed to the government) as "public wrong[s]."[147]

Other writings by Justice Curtis point in the same direction. Although he used the phrase "public rights" in only two other opinions during his

[143] *Murray's Lessee*, 59 U.S. (18 How.) at 284 (emphasis added).

[144] See supra notes 89 and 95 (citing Taylor v. Morton, 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,799)).

[145] See Ablavsky, supra note 14, at 283 ("The *Murray's Lessee* decision . . . used 'public rights' only once.").

[146] See, e.g., United States v. Sanges, 48 F. 78, 84 (C.C.N.D. Ga. 1891) (indicating that the "correlative" of a public wrong "is a public right"); 4 William Blackstone, Commentaries *5 ("[P]ublic wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's social aggregate capacity.").

[147] *Murray's Lessee*, 59 U.S. (18 How.) at 283.

brief tenure on the Supreme Court, both of those usages fit my understanding.[148] So do usages of the phrase in his nonjudicial work.[149]

A general search for the phrase "public rights" in Westlaw's database of state and federal cases returns more than a thousand cases decided before 1900.[150] I have not read them all, but those that I have read are consistent with my understanding that the phrase referred to interests belonging to the government or to the public collectively. For instance, my earlier article cited the following passage from an 1829 opinion by Chancellor Reuben Walworth of New York:

> The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all *public* rights belonging to the people at large. They are not the *private* unalienable rights of each individual. Hence the legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the public at large; provided they do not interfere with vested rights which have been granted to individuals.[151]

This passage crams in more information than most, but its usage of the phrase "public rights" is typical. That remained true after *Murray's Lessee*: just as I doubt that Justice Curtis was using the phrase "public rights" differently than earlier lawyers would have, so too I see little

[148] See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 628 (1857) (Curtis, J., dissenting) (referring to "public rights gained by States"); Smith v. Maryland, 59 U.S. (18 How.) 71, 74–75 (1855) (noting that Maryland owns the soil below low-water mark in the Chesapeake Bay "not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish").

[149] See, e.g., Benjamin R. Curtis, Argument in Defence of President Johnson Delivered Before the Senate of the United States, Sitting as a Court of Impeachment (Apr. 9, 1868), *reprinted in* 2 A Memoir of Benjamin Robbins Curtis, LL.D., With Some of His Professional and Miscellaneous Writings 343, 381 (Benjamin R. Curtis ed., Boston, Little, Brown & Co. 1879) ("[T]he President . . . comes here to assert, not a private right, but a great public right confided to the office by the people . . . ."); Benjamin R. Curtis, Changes in the Use of Public Property, Which Affect Private Rights (Nov. 5, 1870), *reprinted in* 1 A Memoir of Benjamin Robbins Curtis, LL.D., With Some of His Professional and Miscellaneous Writings, supra, at 430, 430 ("Though owners of lands take their titles subject to such injurious changes as the Legislature may see fit to make in adjacent lands or waters belonging to the public, yet this subjection of private to public rights cannot be extended to such a case as that now presented.").

[150] Westlaw, adv: OP("public rights") & DA(bef 1900), 1,008 results (Aug. 30, 2024) (on file with the *Virginia Law Review*) (filtered by "Cases").

[151] Lansing v. Smith, 4 Wend. 9, 21 (N.Y. 1829) (opinion of Walworth, C.).

evidence that nineteenth-century usage of the phrase "public rights" changed in the wake of *Murray's Lessee*.[152]

[152] As a sample, here are snippets from every fiftieth case retrieved by my Westlaw search, supra note 150. See Moerder v. City of Fremont, 10 Ohio Cir. Dec. 501, 504 (1899) (quoting a prior case's statement that a particular ordinance "violates no private right" and simply "prohibit[s] an invasion of the public rights"); People v. Mould, 52 N.Y.S. 1032, 1033–34 (Sup. Ct. 1898) (quoting a prior case as saying that "[t]he title to lands under tide waters within the realm of England were by the common law deemed to be vested in the king, as a public trust, to subserve and protect the public rights to use them as common highways for commerce, trade, and intercourse"), *rev'd*, 55 N.Y.S. 453 (App. Div. 1899); Marsh v. Village of Fairbury, 45 N.E. 236, 237–38 (Ill. 1896) ("Whatever rights existed in the public by this common-law dedication became vested in the municipality when it became incorporated. But, in connection with these public rights, those who purchased lots fronting on this park took with reference to the plat, and had an appurtenant right therein which was their own property . . . ."); People ex rel. Bentley v. McClees, 38 P. 468, 470 (Colo. 1894) ("To warrant this court in taking jurisdiction in an original proceeding by injunction, . . . the case must be one involving the rights or franchises of the state in its sovereign capacity, that is, public rights or interests, as contradistinguished from matters of private or individual concern."); Almy v. Church, 26 A. 58, 60 (R.I. 1893) (explaining the doctrine that "no right by adverse possession can be gained against the public" partly on the ground that "in public rights of property each individual feels but a slight interest, and will tolerate a manifest encroachment"); Snow v. Mt. Desert Island Real-Est. Co., 24 A. 429, 429 (Me. 1891) ("While [the shore or flats in front of upland] may be held in private ownership under our law, they are yet subject to the public rights of navigation and fishing."); McGuire v. Rapid City, 43 N.W. 706, 708 (Dakota 1889) (noting the lack of "testimony that the city council was entering into such a contract in fraud of public rights, or in the interest of private parties"); People's Gaslight & Coke Co. v. Chi. Gaslight & Coke Co., 20 Ill. App. 473, 487 ("Doubtless there are strong reasons . . . which imply enlarged public duties from the exercise by corporations of great public rights, such as the exercise by a railway company of the right of eminent domain, the right to turn watercourses, bridge streams, and to cross and run upon and occupy, to the exclusion of other modes of travel, the public highways."), *rev'd*, 13 N.E. 169 (Ill. 1887); Banister v. Pa. Co., 98 Ind. 220, 224 (1884) (per curiam) (referring to whether a railroad company could have erected a fence at a particular place "without injury or obstruction to its own business or to public rights or easements"); Mayor of Bayonne v. Ford, 43 N.J.L. 292, 296 (1881) (referring to "the public rights now in question" as "rights that belonged not to [the corporate authorities of Bayonne] but to the public at large"); Curtenius v. Hoyt, 37 Mich. 583, 585 (1877) (discussing a municipal taxpayer's standing to sue to enjoin the issuance of bonds, and reciting the plaintiff's argument that "the object of the [suit] is not to guard or assert public rights but to defend the [plaintiff's] private and individual interests"); Shields v. Bennett, 8 W. Va. 74, 87 (1874) (referring generally to "private and public rights and interests"), *overruled by*, Simms v. Sawyers, 101 S.E. 467 (W. Va. 1919); Tomlin v. Dubuque, Bellevue, & Miss. R.R. Co., 32 Iowa 106, 110 (1871) (quoting the headnotes to *Gould v. Hudson River R.R. Co.*, 2 Sel. 522, 522 (N.Y. 1852), *overruled by*, Rumsey v. N.Y. & New Eng. R.R. Co., 30 N.E. 654 (N.Y. 1892), which said that "the owner of lands adjoining a navigable river in which the tide ebbs and flows has no private right or property in the waters of the river, or in the shore between high and low-water mark," and that "whatever rights the owner of the land in such cases has in the river, or in its shore below high-water mark, are public rights, which are under the control of the legislative power"); Cross v. Mayor of Morristown, 18 N.J. Eq. 305, 311

B. The Legal Effect of Nonjudicial Dispositions of Imperfect Claims in Ceded Territories

The framework that I described did not prevent nonjudicial officials from investigating the facts of particular matters or thinking about how existing law applied to those facts. To the contrary, such inquiries often are essential to the work of the executive branch. For instance, before pursuing criminal charges against someone, federal prosecutors presumably reach the conclusion that the person is guilty. Because the defendant's core private rights are at stake, though, the framework that I described would prevent Congress from requiring courts to accept that conclusion simply because executive officials had reached it.

Professor Ablavsky therefore discusses what he calls the "preclusive effects" of decisions that Congress or boards of commissioners reached about land in the ceded territories.[153] In his telling, even when Congress did not provide an opportunity for de novo review of those decisions in the regular courts, the Supreme Court allowed the decisions to bind private people with respect to "property": the rejection of claims would

(Ch. 1867) (observing that the English cases cited by counsel "related to presumed grants of crown lands and privileges from the sovereign in his individual capacity, and not to him in his character of *parens patriae*, and as the repository of public rights"); Richards v. Merrimack & Conn. River R.R., 44 N.H. 127, 136 (1862) (referring to the legislature as "the representative of the public rights and interests"); Commonwealth ex rel. Thomas v. Comm'rs of Allegheny Cnty., 32 Pa. 218, 223 (1858) (summarizing English decisions as holding that "the Court of King's Bench, as the general guardian of public rights, and in exercise of its authority to grant the writ [of mandamus], will render it, as far as it can, the suppletory means of substantial justice in every case, where there is no other specific legal remedy for a legal right; and will provide, as effectually as it can, that all official duties are fulfilled, whenever the subject-matter is properly within its control"); Levasser v. Washburn, 52 Va. (11 Gratt.) 572, 577 (1854) (defending the idea that laches do not run against the government by invoking "the great public policy of preserving public rights and property from damage and loss through the negligence of public officers"); Gough v. Bell, 22 N.J.L. 441, 461 (1850) (opinion of Green, C.J.) ("The only title which the state claims to the soil [of navigable rivers] is by virtue of its sovereignty, for the protection of the public or common rights."), *aff'd*, 23 N.J.L. 624 (1852); id. at 474 (opinion of Carpenter, J.) (referring to "the power of the legislature to grant or control mere public rights," as opposed to "the property of one person"); French v. Camp, 18 Me. 433, 434–35 (1841) (observing that the waters of the Penobscot River "are, of common right, a public highway, for the use of all the citizens," even when the surface is frozen, and recognizing legal protection for these "public rights"); Boothe v. Town of Coventry, 4 Vt. 295, 297 (1832) ("[I]t stands as part of our common law, that towns own public rights of different descriptions."); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 280 (1796) (opinion of Iredell, J.) (resisting an interpretation of a treaty that would "extinguish private as well as public rights" (emphasis omitted)). Nearly all of these usages support my understanding of public rights as rights belonging to the public.

[153] Ablavsky, supra note 14, at 304–08.

"impair[] [the claimants'] property rights against the United States,"[154] while the confirmation of claims "effectively barred competing ownership claims."[155]

Based on these statements, readers might assume that Professor Ablavsky has indeed identified a counterexample to the framework that I described. Throughout his article, however, Professor Ablavsky uses phrases like "property rights" and "ownership claims" to include unconfirmed claims to imperfect or inchoate titles in the ceded territories—which the Supreme Court did describe as "property," but which the Supreme Court also held were not judicially cognizable outside of the mechanisms that Congress established for their confirmation. As I understand Professor Ablavsky's evidence, those were the kinds of pre-existing property interests that Congress could either handle itself or authorize nonjudicial commissioners to handle without an opportunity for adjudication by a true court. Professor Ablavsky does not show that Congress could have authorized nonjudicial disposition of claims to vested private rights that were judicially cognizable.

Professor Ablavsky is certainly correct that under nineteenth-century doctrines, nonjudicial disposition of claims to imperfect titles within a ceded territory could have legal effects for the claimants and for others with similar interests. Recall that although the United States owed other sovereigns a duty to complete imperfect titles in the ceded territories (both by virtue of the customary law of nations and by virtue of particular treaties), the federal government's political branches were understood to be in charge of the mechanisms for complying with those international obligations—with the result that imperfect titles to land in the ceded territories were judicially cognizable only to the extent that Congress so provided.[156] Because of that doctrine, inchoate titles that were not confirmed or completed through the approved mechanisms did not exist as far as the courts were concerned. The decision by Congress or a board of commissioners to reject a claim would not necessarily have

[154] Id. at 305–06.

[155] Id. at 305 (noting that this was true "even when [the other potential] claimants did not participate in the administrative adjudication"); see also id. at 307 (asserting that when two claimants submitted overlapping claims to the same parcel and the federal government confirmed only one of those claims, the confirmation "effectively divested" the other person of his "competing title claim").

[156] See supra notes 41–54, 83–96 and accompanying text.

preclusive effect in the sense of dooming the claim forever; Congress could still surrender the relevant public rights by confirming claims that had previously been rejected, and Congress could also authorize boards of commissioners or courts to do so.[157] But as long as a claim to imperfect title was unconfirmed (whether because the authorized decision-makers had rejected it or because the claimant had failed to present it in the first place), the claimant would not have judicially cognizable rights to assert. At least in this negative sense, the authorized decision-makers' rejection of a claim to imperfect title had important legal consequences.

Nonjudicial *confirmations* of such claims had more direct legal consequences. If Congress enacted a statute confirming someone's claim to imperfect title in a ceded territory and completing the relevant grant, or if commissioners confirmed such a claim under a statute that allowed the commissioners' actions to take effect without the need for congressional approval, the government would be releasing whatever ownership rights the United States might have been able to assert (or transferring to the claimant whatever title the United States was in a position to convey), and the government would also be enabling the claimant to assert judicially cognizable interests in the property. Again, those legal effects might not exactly be matters of claim or issue preclusion; rather than mirroring the legal effects of a judicial judgment, they arguably were more like the legal effects of a statute conferring title.[158] But the (nonjudicial) confirmation of a claim definitely did have legal consequences.

[157] See, e.g., Stoddard v. Chambers, 43 U.S. (2 How.) 284, 311 (1844) (argument of counsel) (observing that the Act of July 9, 1832, ch. 180, 4 Stat. 565, authorized a new board of commissioners in Missouri "to proceed on all rejected claims standing on the records of the former commissioners, with or without a fresh presentation"); Letter from Wm. H. Crawford, Sec'y of the Treasury, to Henry Clay, Speaker of the House (Dec. 7, 1818), *reprinted in* 3 American State Papers: Public Lands 392, 393 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834) (describing a "long series of acts" as "an uninterrupted . . . course of relaxation in favor of land claimants of every description," which had been accomplished in part "by giving authority, not only to decide upon such claims, but to revise and confirm such as had been previously rejected"); see also Ablavsky, supra note 14, at 294 (noting Congress's penchant for "reviv[ing] claims that commissioners found dubious").

[158] Professor James Pfander and Andrew Borrasso have noted the distinction between the preclusive effects of judicial judgments about pre-existing interests and the legal effects of "constitutive" acts (such as statutes or administrative decrees that "confer new rights or establish a new status or relationship"). See James E. Pfander & Andrew G. Borrasso, Public Rights and Article III: Judicial Oversight of Agency Action, 82 Ohio St. L.J. 493, 498–99

Importantly, though, under statutory schemes that did not give asserted rights-holders an opportunity for de novo review in a true court,[159] nonjudicial decisions on imperfect claims did not automatically

(2021). Professor Ablavsky acknowledges that "[t]his dichotomy clarifies the views of nineteenth-century jurists, who clearly regarded perfecting imperfect land rights as a *constitutive* act." Ablavsky, supra note 14, at 326. But cf. id. (arguing that in the context of claims to land in the ceded territories, "constitutive acts quickly blurred into adjudication").

Pfander and Borrasso themselves present the distinction between the "constitutive" creation of new legal interests and the backward-looking adjudication of pre-existing legal interests as the basis for "a new synthesis of the public rights cases for today's jurists." Pfander & Borrasso, supra, at 504–05. In their telling, Congress can delegate "constitutive" tasks to agencies, but "[a]djudication remains a task for courts" (with agencies being allowed to "propos[e] a disposition" but not to "exercise final control over the resolution of disputes within the judicial power"). Id. at 499.

This idea raises the problem of "distinguishing the constitutive from the adjudicative role," but Pfander and Borrasso use examples from history to suggest how that might be done. See id. at 539–46. They indicate that a decision had "an inescapably adjudicatory character" if it could not validly be explained in "constitutive" terms—that is, if Congress would not have had the power to resolve a disputed matter by creating new legal relations and applying them to the pre-existing dispute. See id. at 546. As a historical matter, some or all of the limits on that power came from limits on Congress's ability to give new legal rules "retrospective applications." Id. Congress could resolve certain disputes between the government and a private individual simply by enacting a statute supplying new rules for the matter at hand—so that whatever claim the individual might have been able to present under pre-existing law, the new statute eliminated or modified that claim. Pfander and Borrasso suggest that, subject to any constitutional restrictions on delegation, Congress could give similar "constitutive" authority to executive branch actors, even if they exercised this authority through processes that resembled adjudication. But in situations where new law could *not* shuffle existing entitlements in this way (because, for instance, a private person had acquired "vest[ed]" rights that Congress could not abrogate by statute), adjudication of the dispute under pre-existing law was necessary, and that "was a task for the courts." See id. at 545–46; see also id. at 546 (summarizing the allocation of authority with respect to land grants by observing that "Congress had authority to alter the distribution system prospectively but could not reopen and redistribute privately held land").

I doubt that Pfander and Borrasso would want to be enlisted in support of the framework that I described, and I may be guilty of thinking about their argument more in terms of my categories than theirs. Still, to the extent that their historical examples involve constitutional restrictions on legislative retroactivity, our understanding of the nineteenth-century framework might end up in much the same place. In the nineteenth century, legislatures could abrogate public rights without regard to limits on retroactivity, but legislatures could not validly divest a private person of core private rights that had already vested in that person. See Woolhandler, supra note 69, at 1019–46 (using this framework to understand historical doctrines about constitutional limits on legislative retroactivity); see also James L. Kainen, The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights, 79 Corn. L. Rev. 87, 103–11 (1993) (discussing the importance of "vested rights" in nineteenth-century thought about legislative retroactivity).

[159] As I hope this qualification makes clear, this Section does not discuss practice under the California Land Act of 1851, which covered claims to perfect as well as imperfect titles

defeat any vested private rights that were judicially cognizable. The rejection of a claim to imperfect title was bad for the claimant, because it meant that the claimant's asserted interest would remain invisible to the courts, but it did not operate as against any judicially cognizable vested rights. Likewise, the confirmation of a claim was good for the claimant (and bad for others who might have been able to assert imperfect titles to the same land), but nonjudicial actors could not authoritatively decide that the claim took priority over judicially cognizable vested rights. For instance, even if Congress or a board of commissioners confirmed *A*'s imperfect claim to a parcel of land, *B* would still be able to argue in court that the foreign sovereign had previously made a complete grant of the land to *B* and that this grant took priority over *A*'s alleged rights.[160]

Indeed, as Professor Ablavsky acknowledges, many federal statutes that either confirmed claims directly or authorized boards of commissioners to do so indicated explicitly that the confirmations had only limited legal effect; by the terms of the statutes, these nonjudicial confirmations operated as releases of *public* rights, but they did not purport to bind adverse *private* rights that were superior to the public's.[161] Some statutes said that claims were "confirmed against any

but which did provide opportunities for de novo judicial review. Again, that Act is not evidence against my thesis, but for different reasons than discussed in this Section. See infra Section II.C.

[160] See United States v. Mayor of Phila., 52 U.S. (11 How.) 609, 622–23 (1851) (argument of counsel) ("[I]t has been repeatedly decided by the tribunals of Louisiana, and the principle is recognized by the Supreme Court of the United States, that a party claiming land by virtue of a Spanish or French grant, perfected before the cession, could maintain successfully his action of ejectment against a possessor under a subsequent title, even if that title were a patent from the United States."); Doe v. Eslava, 50 U.S. (9 How.) 421, 445 (1850) ("[W]hen a party, holding such complete title, is encroached upon, he should find protection in the judicial tribunals . . . ."); Mayor of New Orleans v. De Armas, 34 U.S. (9 Pet.) 224, 236 (1835) (noting that one party "had obtained a patent from the United States, acknowledging the validity of his previous incomplete title under the king of Spain," but observing that "this patent did not profess to destroy any previous existing title; nor could it so operate"); see also, e.g., Lavergne's Heirs v. Elkins' Heirs, 17 La. 220, 230–32 (1841) (observing that "[a] grant which was complete under the French or Spanish government required no confirmation to give it validity under ours," and holding that such a grant took priority over a subsequent sale of the same land by the United States).

[161] See Ablavsky, supra note 14, at 304 & n.150 (citing examples); see also Jerry L. Mashaw, Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829, 116 Yale L.J. 1636, 1717 (2007) ("The statutes providing for land commission adjudication of private claims made those determinations final against the

claim on the part of the United States."[162] Others specified that the relevant confirmations "shall amount only to a relinquishment forever, on the part of the United States, of any claim whatever to the tract of land[] so confirmed or granted."[163] Provisions of this sort sometimes included extra phrases such as "without prejudice to the interests of third persons."[164]

Professor Ablavsky points out that these limitations did not distinguish nonjudicial confirmations from judicial judgments in ejectment cases (which also did not bind nonparties, and which simply determined which of two litigants had the superior right of possession at the time of the suit).[165] But calling attention to the limited preclusive effect of judicial judgments in ejectment cases does not help Professor Ablavsky establish a counterexample to the framework described in my earlier article. Rather than observing that some judicial judgments themselves had limited preclusive effect, he needs to show that nonjudicial confirmations were given *more* legal effect than my understanding of the relevant framework would permit.

In an effort to do so, Professor Ablavsky argues that Congress's attempts to limit the legal effect of nonjudicial confirmations "did not

United States, but not against third party claimants."); Baude, supra note 3, at 1543–44 (same).

[162] E.g., Act of Feb. 28, 1823, ch. 15, § 2, 3 Stat. 727, 727; Act of May 11, 1820, ch. 87, § 1, 3 Stat. 573, 573.

[163] E.g., Act of Apr. 22, 1826, ch. 29, § 7, 4 Stat. 156, 156–57; Act of May 8, 1822, ch. 122, § 4, 3 Stat. 699, 700; Act of May 8, 1822, ch. 128, § 2, 3 Stat. 707, 707; Act of Mar. 3, 1819, ch. 100, § 2, 3 Stat. 528, 530; see also Ablavsky, supra note 14, at 304 n.150 (citing additional examples).

[164] Act of May 28, 1830, ch. 146, § 1, 4 Stat. 408, 408; see also, e.g., Act of Mar. 2, 1829, ch. 40, § 4, 4 Stat. 358, 359 ("[T]he confirmation of all the claims provided for by this act shall amount only to a relinquishment for ever, on the part of the United States, of any claim whatever, to the tracts of land and town lots so confirmed, and . . . nothing herein contained shall be construed to affect the claim or claims of any individual or body politic or corporate, if any such there be."); Act of May 8, 1822, ch. 129, § 5, 3 Stat. 709, 718 ("[S]uch confirmation shall only operate as a release of any interest which the United States may have, and shall not be considered as affecting the rights of third persons . . . ."), *quoted in* Ablavsky, supra note 14, at 304; cf. infra note 191 and accompanying text (noting the Supreme Court's relatively narrow interpretation of the term "third persons" in the California Land Act of 1851).

[165] Ablavsky, supra note 14, at 305. One might add that even when Congress involved courts in the confirmation process, Congress often imposed similar limits on the legal effect of the courts' decrees. See, e.g., Act of May 23, 1828, ch. 70, § 13, 4 Stat. 284, 286 ("[T]he decrees which may be rendered by said district, or the Supreme Court of the United States, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.").

work," because the Supreme Court ultimately gave such confirmations broader consequences than Congress may have expected.[166] Of course, to the extent that the government's confirmation of a private claim relinquished whatever public rights the United States might otherwise have been able to assert, the confirmation would naturally have some downstream consequences for people claiming through the United States. At a minimum, once the government had authoritatively surrendered its own claims to ownership of the land, it would not be able to convey title to anyone else—so someone who purported to own the land by virtue of a subsequent grant from the United States would normally lose. That is not inconsistent with the framework I described.

Professor Ablavsky notes that courts frequently faced cases in which "two private parties" asserted "competing chains of title" to the same property, with "one tracing back to the United States."[167] He asserts that "in these cases, courts uniformly ruled that Congress's resolutions *were* binding, even though they affected private parties."[168] But binding against what sorts of claimed interests? The three cases that Professor Ablavsky cites in the accompanying footnote[169] illustrate only Congress's power over the disposition of interests owned by the United States (as opposed to core private rights that had already vested in a private person).[170]

Professor Ablavsky uses similarly broad phrasing when he describes the legal consequences of "the Court's political-question doctrine"[171]—that is, the doctrine that inchoate titles based on incomplete grants from a former sovereign were not judicially cognizable outside of the mechanisms approved by the political branches. In his words, "Because

[166] Ablavsky, supra note 14, at 305–08.

[167] Id. at 306.

[168] Id. at 306–07.

[169] See id. at 307 n.162.

[170] See Lindsey v. Lessee of Miller, 31 U.S. (6 Pet.) 666, 675–76 (1832) (discussing the proper interpretation of a federal statute that had limited the locations available for patents from the United States); Chotard v. Pope, 25 U.S. (12 Wheat.) 586, 587–90 (1827) (interpreting a federal statute that authorized the legal representatives of a named person to choose and appropriate a parcel of land, and holding that the statute should not be understood to let them choose land that had already been appropriated for the site of a town); Matthews v. Zane, 20 U.S. (7 Wheat.) 164, 203–11 (1822) (discussing the plaintiff's efforts to purchase a tract of land from the federal government, but concluding that Congress had transferred the power of selling the tract to the Zanesville District of the land office before the plaintiff made his entry in the Marietta District).

[171] Ablavsky, supra note 14, at 307.

courts lacked all jurisdiction over claims until Congress had confirmed them, Congress's decision to validate one claimant's title but not that of another claimant was, in practice, a dispositive ruling on their respective merits."[172] As his accompanying citation makes clear, though, the claims to which this statement refers were claims to inchoate titles, involving land as to which the United States held legal title but the claimant wanted the United States to confirm or complete a grant that had been initiated before the transfer of sovereignty.[173] So long as these titles were inchoate and not confirmed, they were not judicially cognizable vested rights, and their disposition by Congress or boards of commissioners did not offend the framework described in my earlier article.

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[172] Id.

[173] See id. at 307 n.164 (citing Widow of Mackay v. Dillon, 7 Mo. 7, 12–13 (1841), *rev'd on other grounds sub nom.*, Mackay v. Dillon, 45 U.S. (4 How.) 421 (1846)). Here is the cited passage from *Widow of Mackay*:

> It appears to be well settled, that the treaty by which Louisiana was acquired, imposed only a political obligation upon this government to perfect the titles, rights and claims originating under the former government. . . . This political obligation, sacred as it is, cannot be enforced by any action of the judicial tribunals. The legislation of congress, from 1804 to the present day on this subject, is obviously based upon this supposition. They have established, from time to time, tribunals to investigate these claims, and from time to time have confirmed such as they thought just, and rejected such as were supposed to be unfounded. They have afforded every facility to claimants, and seemed anxious to retain the title themselves no longer than the conflicting rights of others could be examined and decided.
>
> The federal government, being unable to confirm the same land to two adverse claimants, must then, to some extent, determine between the conflicting titles.
>
> Each claimant depends upon the justice or comity of the present government; and when the government exercises its powers, and confirms the land to one, it must necessarily be to the extinction of *any mere inchoate title* in the other.

Widow of Mackay, 7 Mo. at 12–13 (emphasis added).

As part of the same general discussion, Professor Ablavsky cites three additional cases: *Landes v. Brant*, 51 U.S. (10 How.) 348, 370 (1851); *Les Bois v. Bramell*, 45 U.S. (4 How.) 449, 464 (1846); and *Chouteau v. Eckhart*, 43 U.S. (2 How.) 344, 375–76 (1844). Ablavsky, supra note 14, at 307–08 nn.165–67. Again, though, the relevant passages all involved imperfect claims that were not judicially cognizable outside the mechanisms approved by Congress. See *Landes*, 51 U.S. (10 How.) at 370 (explaining that "as between two claimants under [the Spanish] government, setting up independent imperfect claims, the courts of justice had no jurisdiction," and "in such cases it appertained to the political power to decide to whom the perfect title should issue"); *Les Bois*, 45 U.S. (4 How.) at 464 (noting that the government's duty to satisfy "unperfected claims" was "to be done in a due exercise of the political power, to whose justice alone the claimant could appeal," and discussing situations in which there were "two adverse claims to the same land, equally inchoate"); *Chouteau*, 43 U.S. (2 How.) at 375 (again discussing "such inchoate claims" and observing that "the treaty imposed on this government only a political obligation to perfect them").

What happened after confirmation also fits that framework. The nonjudicial confirmation of an imperfect claim, and the ensuing completion of the relevant grant by the United States, elevated the nature of the claimant's interests; the claimant now could assert a judicially cognizable vested private right to the land in question. As a result, if Congress or a board of commissioners ended up confirming two different people's imperfect claims to the same parcel of land, each of those people would be in a position to assert legal interests that fit the template of vested private rights. Under the framework that I described, only true courts could authoritatively adjudicate such competing assertions (at least absent the parties' consent to nonjudicial resolution). Professor Ablavsky acknowledges that this is what happened: "If the federal government confirmed *both* claimants' land rights," then "[t]he claimants could turn to the courts to adjudicate their dispute."[174]

To be sure, Professor Ablavsky notes that in this situation, "the date of a federal patent might prove dispositive, with the older claim gaining priority."[175] Absent aggressive relation-back doctrines,[176] though, that is what one might expect courts to conclude in a world where imperfect claims based on incomplete grants from a former sovereign were not themselves judicially cognizable vested rights. If the action of the U.S. political branches in confirming the claimant's interest and locating and completing the relevant grant was what caused private rights to vest (at least in a judicially cognizable sense), then the dates of that process might matter more than the dates of the previous sovereign's imperfect concessions.[177] Indeed, to the extent that courts gave earlier confirmations and patents priority over later ones, that might be a sign

[174] Ablavsky, supra note 14, at 307; cf. Henshaw v. Bissell, 85 U.S. (18 Wall.) 255, 265 (1874) ("[W]henever two surveys covering the same tract are approved by the political department, and a legal controversy arises respecting the land between claimants under the different surveys, the question which of the two surveys appropriates the premises in dispute is necessarily transferred to the judiciary.").

[175] Ablavsky, supra note 14, at 307.

[176] Cf. supra note 115 and accompanying text.

[177] At least with respect to inchoate claims whose boundaries had not been adequately located before confirmation, the Supreme Court said as much in *Dent v. Emmeger*, 81 U.S. (14 Wall.) 308, 313 (1872):

> When confirmed by Congress they became American titles, and took their legal validity wholly from the act of confirmation and not from any French or Spanish element which entered into their previous existence. The doctrine of senior and junior equities and of relation back has no application in the jurisprudence of such cases. The elder confirmee has always a better right than the junior, without reference to the date of the origin of their respective claims or the circumstances attending it.

that the courts were thinking of nonjudicial confirmations more as part of the process of granting legal title than as being like judicial judgments.[178] Under standard doctrines about the preclusive effect of judicial judgments, the *more recent* judgment normally takes priority over inconsistent earlier judgments.[179] With land grants, by contrast, once the United States had relinquished its interests and conveyed legal title to one person, the United States had no remaining interest to convey to someone else, so the *earlier* grantee was better off.

In any event, unless I have overlooked something in Professor Ablavsky's evidence about the legal effect of nonjudicial confirmations, he does not establish a conflict with the framework described in my earlier article. Specifically, he does not present evidence that nonjudicial confirmation of imperfect claims could abrogate claims of pre-existing vested rights that were judicially cognizable but that the rights-holders had never had an opportunity to present in court.

C. The California Land Act of 1851

Although Professor Ablavsky acknowledges that antebellum jurisprudence distinguished imperfect claims to land in the ceded territories from perfect titles conferred by grants that the foreign sovereign had completed before the transfer of sovereignty, he notes that the California Land Act of 1851 lumped those claims together.[180] In his telling, when the Supreme Court upheld the constitutionality of that Act in the 1889 case of *Botiller v. Dominguez*,[181] the Court "collaps[ed] the two categories" and thereby "cast aside nearly a century's worth of jurisprudence."[182]

By the terms of the 1851 statute, "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" (apparently including completed grants as well as inchoate titles) was required to present the claim and any supporting evidence to a board of commissioners established by the

[178] Cf. supra note 158 (noting Pfander and Borrasso's distinction between "constitutive" acts and adjudicative judgments).

[179] See, e.g., Kevin M. Clermont, Limiting the Last-in-Time Rule for Judgments, 36 Rev. Litig. 1, 3 (2017).

[180] See Ablavsky, supra note 14, at 330 & n.300 (citing California Land Act of 1851, ch. 41, § 8, 9 Stat. 631, 632).

[181] 130 U.S. 238 (1889).

[182] Ablavsky, supra note 14, at 338.

statute.[183] The commissioners would hold a hearing and "decide upon the validity of the said claim."[184] Whether the commissioners rejected or confirmed the claim, though, either the claimant or the district attorney for the United States could petition a federal district court "to review the decision of the said commissioners, and to decide on the validity of such claim," based on the evidence that had been presented to the commissioners and "such further evidence as may be taken by order of the said court."[185] (As the Supreme Court later put it, "The district court . . . hears the case *de novo*, upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce.")[186] Whichever party lost in the district court had a right to appeal to the Supreme Court.[187]

The 1851 statute established a two-year window for submitting claims to the board of commissioners. Lands for which no claim was submitted within this period, as well as all lands covered by claims that

[183] California Land Act of 1851, § 8, 9 Stat. at 632. As Professor Ablavsky recounts, litigants disputed whether this general language should really be understood to require people with perfect titles to submit their claims to the commissioners (upon pain of forfeiting their titles for nonsubmission). In *Minturn v. Brower*, 24 Cal. 644 (1864), the Supreme Court of California construed the Act narrowly; according to the state supreme court, only people claiming imperfect titles had to submit claims to the commissioners. See Ablavsky, supra note 14, at 336–37. Eventually, however, the U.S. Supreme Court rejected this interpretation and held that the Act covered perfect titles too. See *Botiller*, 130 U.S. at 247–56; Ablavsky, supra note 14, at 337–38.

[184] California Land Act of 1851, § 8, 9 Stat. at 632.

[185] Id. §§ 9–10, 9 Stat. at 632–33. In 1852, Congress modified the mechanism for initiating the proceedings in the district court. Whenever the board of commissioners rendered a final decision, the board was required to file a transcript of its proceedings and its decision with the clerk of the district court, and Congress provided that this filing "shall *ipso facto* operate as an appeal for the party against whom the decision shall be rendered." Act of Aug. 31, 1852, ch. 108, § 12, 10 Stat. 76, 99. Within the next six months, that party would still need to file a "notice . . . of his intention to prosecute the appeal," id., but the Supreme Court understood this revised procedure to eliminate the need for the party to file a petition for review at the outset. See United States v. Ritchie, 58 U.S. (17 How.) 525, 533 (1855).

[186] *Ritchie*, 58 U.S. (17 How.) at 534 (observing that although the later 1852 statute called the proceedings in the district court an "appeal" from the board of commissioners, "we must not . . . be misled by a name, but look to the substance and intent of the proceeding," and "the suit in the district court is to be regarded as an original proceeding"); accord, e.g., Le Roy v. Wright, 15 F. Cas. 386, 387 (C.C.N.D. Cal. 1864) (No. 8,273) (Field, Circuit Justice).

[187] See California Land Act of 1851, § 10, 9 Stat. at 633. But cf. Act of July 1, 1864, ch. 194, §§ 2–3, 13 Stat. 332, 333 (preserving the Supreme Court's jurisdiction over pending appeals, but providing for cases that were still pending in district court to be appealed to a circuit court rather than directly to the Supreme Court).

were "finally rejected by the commissioners" or "finally decided to be invalid by the District or Supreme Court," would "be deemed, held, and considered as part of the public domain of the United States."[188] By contrast, if a claim was "finally confirmed" through the process described in the statute, the surveyor-general for California was supposed to survey the claim (after first locating it if necessary), and the claimant could then obtain a patent from the United States—except that "if the title of the claimant to such lands shall be contested by any other person," that other person could "present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same."[189] A different section of the 1851 statute added that "the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."[190] Ultimately, however, the Supreme Court adopted a narrow interpretation of the phrase "third persons" in this provision, so the provision protected fewer nonparties than one might have assumed.[191]

[188] California Land Act of 1851, § 13, 9 Stat. at 633.

[189] Id.; see also id., 9 Stat. at 633–34 (empowering the judge to enjoin the confirmee from obtaining a patent "until the title thereto shall have been finally decided").

[190] Id. § 15, 9 Stat. at 634.

[191] See Ablavsky, supra note 14, at 341; see also Beard v. Federy, 70 U.S. (3 Wall.) 478, 493 (1866) ("The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property.").

The Court's eventual conclusion on this topic may have been influenced by changes that Congress made in 1860. As the Supreme Court understood the original 1851 statute, the main proceedings were between the United States and one particular claimant, and outsiders with conflicting claims should not normally be able to intervene. See United States v. Fossat, 61 U.S. (20 How.) 413, 424–25 (1858). Nor did the 1851 statute give the district courts broad authority to review surveys and locations made by the surveyor-general after a claim was confirmed. See United States v. Sepulveda, 68 U.S. (1 Wall.) 104, 107–08 (1864). Correspondingly, the Supreme Court observed that "a patent under the act is only conclusive between the United States and the claimant, and does not affect third persons." *Fossat*, 61 U.S. (20 How.) at 425; see also Rodrigues v. United States, 68 U.S. (1 Wall.) 582, 588, 591 (1864) (agreeing that before the act of 1860, "no other private claimant was made a party to the proceeding," and only "the claimant and the United States" were bound).

In 1860, however, Congress established a new procedure for the district courts to review and modify locations and surveys, and Congress also invited broad intervention. Under the

As Professor Ablavsky notes, the California Land Act of 1851 was not the first statute to say something about perfect as well as imperfect titles. As early as 1805, Congress had provided that anyone claiming title to land within the Louisiana Purchase by virtue of a French or Spanish grant that had been completed before October 1, 1800 (when Spain secretly agreed to cede Louisiana to France) "may" deliver an appropriate notice to the register of the land office or the recorder of land titles in the relevant district.[192] (Although the statute made this notice optional, landowners had practical reasons to provide it, so as to reduce the risk that the government would assume that the land was part of the public domain and would purport to sell or grant it to someone else.)[193] For grants bearing date *after* October 1, 1800, moreover, the statute imposed a requirement: it said that people claiming land by virtue of such grants "shall" deliver the relevant notice by a specified deadline.[194] Still, this requirement functioned only as a notification and

1860 statute, the surveyor-general was required henceforth to publish notices of each survey and plat that he approved under the 1851 statute, and "any party interested" could ask the appropriate district court to order the survey to be brought into court "for examination and adjudication." Act of June 14, 1860, ch. 128, §§ 1–2, 12 Stat. 33, 33; see also id. § 3, 12 Stat. at 33–34 (instructing the court to grant such an order at the behest of "any party whom the district courts . . . shall deem to have such an interest in the survey and location of a land claim, as to make it just and proper, that he should be allowed to take testimony and to intervene for his interest therein," and requiring a further round of notice "admonishing all parties in interest to intervene for the protection of such interest"); id. § 4, 12 Stat. at 34 (authorizing the court to "set aside and annul . . . or correct and modify" locations and surveys); id. § 5, 12 Stat. at 34 (giving the results of this process "the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States"). The Supreme Court understood these changes to expand the set of people who were bound by the proceedings. See *Rodrigues*, 68 U.S. (1 Wall.) at 589–91 (indicating at a minimum that people who did become parties were bound); see also Treadway v. Semple, 28 Cal. 652, 659–62 (1865) (so interpreting *Rodrigues*); Yates v. Smith, 38 Cal. 60, 61 (1869) (extending *Rodrigues* to people who failed to intervene after public notice).

Congress repealed the 1860 statute in 1864. Act of July 1, 1864, § 8, 13 Stat. at 334. Still, Congress continued to require the surveyor-general to publish notice of his surveys and plats, and Congress allowed competing claimants to make objections that would be adjudicated by the commissioner of the general land office. Id. § 1, 13 Stat. at 332–33.

[192] Act of Mar. 2, 1805, ch. 26, § 4, 2 Stat. 324, 326–27.

[193] Cf. Letter from the Sec'y of the Treasury to John W. Gurley (Mar. 30, 1805), *reprinted in* 9 The Territorial Papers of the United States 427, 428 (Clarence Edwin Carter ed., 1940) ("[T]he object of [this part of the statute] is merely to enable [people with legal French or Spanish grants] to have their grants recorded in an American Office, if they shall think it expedient, and to prevent the possibility of the United States selling through mistake lands which have already been legally granted.").

[194] Act of Mar. 2, 1805, § 4, 2 Stat. at 326–27 (covering "any grant or incomplete title bearing date subsequent to [October 1, 1800]"); see also Barry v. Gamble, 44 U.S. (3 How.)

recording mechanism, not as authorization for mandatory nonjudicial adjudication of purportedly perfect titles.[195]

Professor Ablavsky observes that the California Land Act of 1851 was different. In his words, "[T]hough past laws had required all titles to be registered, [the California Land Act] went further and unambiguously mandated that *all* titles, both perfect and imperfect, undergo adjudication by the Board of Commissioners."[196] As he also notes, though, the California Land Act differed from some of its predecessors in a second respect too: "[I]nstead of reserving to Congress the ultimate power to confirm or reject rights, the law made the commissioners' decisions subject to a de novo appeal to the federal district court and then to the U.S. Supreme Court."[197]

Professor Ablavsky does not comment on the connection between these two features of the Act. To my way of thinking, though, the two features are linked. Assuming that perfect titles based on completed Mexican grants were judicially cognizable vested rights without the need for any action by the political branches of the U.S. government,[198] the framework described in my earlier article would not have allowed Congress to make people claiming such rights abide by nonjudicial adjudications adverse to their claims. Under that framework, then, the constitutionality of the first feature of the Act (encompassing claims to perfect as well as inchoate titles) depended on the second feature of the Act (enabling claimants to obtain fully "judicial" adjudication of their claims).

The Supreme Court's opinion in *Botiller v. Dominguez* was consistent with this analysis. Brigido Botiller and the other defendants below had settled upon what they believed to be federal land in California, with the

32, 55 (1845) (interpreting this provision to cover "complete grants" as well as incomplete titles); supra note 23 (noting the United States' position that Spain lacked authority to make grants after this date).

[195] See Act of Mar. 2, 1805, § 5, 2 Stat. at 327–28 ("[N]othing in this act . . . shall be construed so as to recognize any grant or incomplete title, bearing date subsequent to [October 1, 1800], or to authorize the commissioners aforesaid to make any decision thereon."); see also Letter from the Sec'y of the Treasury to John W. Gurley, supra note 193, at 428 (acknowledging the fourth section's coverage of "persons claiming lands under complete grants dated after the 1st of October 1800," but adding that "supposing that Congress should refuse to confirm some grants of that description, it will not preclude the Claimants from their remedy in Courts of law").

[196] Ablavsky, supra note 14, at 330.

[197] Id.

[198] See supra notes 33–34, 135–36 and accompanying text; cf. supra note 134.

intention of qualifying for a grant of the land from the United States. In the 1880s, Dominga Dominguez brought an action in the nature of ejectment against them in state court, arguing that she owned perfect title to the land by virtue of a completed grant made by the government of Mexico to her predecessors in interest in 1834.[199] No claim under this alleged grant had been presented to the board of commissioners established by the California Land Act of 1851, but Dominguez argued that the Act should be interpreted to cover only imperfect titles and not to have required people with perfect titles to submit claims. Ultimately, the U.S. Supreme Court rejected this interpretation of the Act. But in holding that the Act had indeed covered claims of perfect title as well as imperfect title, the Court noted that the Act had allowed claimants to obtain fully judicial adjudication of their titles. In the Court's words,

> The superior force which is attached, in the argument of counsel, to a perfect grant from the Mexican government had its just influence in the board of commissioners, or in the courts to which their decisions could be carried by appeal. If the title was perfect, it would there be decided by a court of competent jurisdiction, holding that the claim thus presented was valid . . . . So that the superior value of a perfected Mexican claim had the same influence in a court of justice which is now set up for it in an action where the title is contested.[200]

As the Court saw matters, given the confusion of titles in California, there was nothing "unjust or oppressive" about "requiring the owner of a valid claim . . . to present his demand to a tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid."[201] To the contrary, "[e]very person owning land or other property is at all times liable to be called into a court of

[199] See Botiller v. Dominguez, 130 U.S. 238, 238 (1889) (statement of the case).

[200] Id. at 249.

[201] Id. at 250. Admittedly, the Court's reference to "a guarantee of judicial proceedings" was ambiguous. Professor Ablavsky presents this statement as being entirely about the board of commissioners. See Ablavsky, supra note 14, at 338 ("[T]he Court reiterated that the Board of Commissioners was a 'tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings.'"). That is possible. But the previous paragraph of the Court's opinion had referred to "the courts to which [the commissioners'] decisions could be carried by appeal," *Botiller*, 130 U.S. at 249, and the right to de novo review in the regular courts may well have been part of the "guarantee" that the Court had in mind.

justice to contest his title to it."[202] In the Supreme Court's view, no one would have raised any constitutional objections if Congress "had provided that the United States should sue everybody who was found in possession of any land in California at the time the treaty was made, and thus compel him to produce his title, if he had any"—and the fact that the statute put the burden on the owner "to come before a similar tribunal and establish [his claim] by a judicial proceeding" did not make a constitutional difference.[203]

Although *Botiller* is consistent with the framework described in my earlier article, Professor Ablavsky uses the legislative history of the 1851 statute to suggest that nineteenth-century lawyers did not actually think in terms of that framework. For instance, he writes that the bill's leading opponent—Senator Thomas Hart Benton of Missouri—"did not share the concerns of current critics of Article I adjudication."[204] But it is not surprising that opponents of the bill did not harp on the unconstitutionality of nonjudicial adjudication of core private rights, because the bill was not particularly vulnerable on that front; again, it gave all land claimants (perfect or imperfect) an opportunity for de novo judicial evaluation of their claims.[205]

To be sure, Senator Benton did not like how the bill did so. He characterized the bill as impeaching all titles in California and requiring every property-owner to run a "gauntlet" of legal proceedings simply to keep his property.[206] Benton specifically criticized the bill for "sending

[202] *Botiller*, 130 U.S. at 250.

[203] Id.

[204] Ablavsky, supra note 14, at 332.

[205] Cf. Cong. Globe, 31st Cong., 2d Sess. app. at 58 (1851) (statement of Sen. William Gwin) ("The bill now before the Senate, in a plain and direct manner, proposes to ascertain what is private property, in order to separate it from the public lands; it then provides, after the evidence is collected, if there is a doubt about a title, it shall be submitted to the judiciary, and there by appeal to be finally settled.").

When the framework described in my earlier article was more relevant, Senator Benton did invoke it. For instance, the previous Congress had considered a different bill that again would have established a board of commissioners to entertain claims to land in California and New Mexico, but that would have made confirmation of claims dependent upon action by Congress. According to Benton, "[T]his is a confounding of the legislative power with the judicial power; and it is subjecting claimants who have *rights* to all the humiliation of being petitioners begging favors." Cong. Globe, 30th Cong., 2d Sess. 255 (1849).

[206] Cong. Globe, 31st Cong., 2d Sess. 158 (1851); see also id. at 160 (statement of Sen. Benton) ("[I]t is no consolation to tell these people that by bringing their claims through three different trials, and coming up here to the United States Government, they may at last get what ought never to have been disturbed."); id. at 364 (statement of Sen. Benton) ("This

all these claims to a board of commissioners, who are not even a judicial tribunal," for the initial trial, "without making any distinction between the perfect and the imperfect, the complete and the incomplete, the full and the inchoate titles."[207] Benton proposed an alternative system in which owners would have to record their titles but the burden would be on the United States to initiate *scire facias* proceedings in court against people whose titles the United States wanted to deny.[208] Both under the bill and under Benton's preferred alternative, though, no one's claimed title would be authoritatively rejected without an opportunity for fully judicial proceedings.

Professor Ablavsky suggests that participants in the debate did not think that Congress *had* to provide this opportunity even to people who claimed perfect titles. In his words, "[T]he bill's proponents and detractors agreed that it might be preferable to make the commissions' determinations final, without right of appeal, in small cases . . . ."[209] But Professor Ablavsky may be overreading the remarks by Senator John Berrien on which he bases this statement.

bill subjects a man to three trials for his land, and on rigorous conditions, and with forfeiture if he does not comply with all the conditions, and finally succeed.").

[207] Id. app. at 61. Based on his understanding of Mexican law, Benton asserted that most private land titles in California were perfect. See id. app. at 52; cf. id. app. at 131 (statement of Sen. Gwin) (criticizing "the new-fangled theories as to what constitutes 'perfect titles' in California under the Mexican laws"). Even with respect to imperfect claims, though, Benton argued that the bill erred by subjecting all claims to "attack" by an attorney for the government, who allegedly would be working "to take away the land from the claimant in order to grant it to others." Id. app. at 61; see also id. at 349 (statement of Sen. Benton) ("It is contrary to the whole idea of creating a board of commissioners, that you are to have an interested party there against the claimant."). According to Benton, "[T]here is no previous law that has ever been passed by Congress for establishing a board of commissioners that subjected claims, even those which are imperfect, inchoate, and merely inceptive, to such a proceeding; not one that ever subjected them to all the arts of an attorney." Id. app. at 61. Benton noted that "[t]he law of nations says that an imperfect title is property," and "[t]he Supreme Court has said that Congress cannot, by any act, legislate away any man's property." Id. at 350. With respect to both perfect and imperfect titles, Benton accused the bill of effectively violating this principle by "institut[ing] a set of onerous and vigorous proceedings against [a person's] property" and "subject[ing] him to a set of petitions and double trials." Id.

[208] See id. app. at 64 (statement of Sen. Benton); id. at 159 (statement of Sen. Benton); Amendment to S. 346, 31st Cong., 2d Sess. §§ 3, 8 (as proposed by Sen. Benton, Jan. 2, 1851), https://www.congress.gov/bill/31st-congress/senate-bill/346/1850/09/19/text/UBTV4 [https://perma.cc/2SKW-YCMC].

[209] Ablavsky, supra note 14, at 334 (citing Cong. Globe, 31st Cong., 2d Sess. 426 (1851) (statement of Sen. John M. Berrien)).

Berrien was responding to an amendment proposed by Senator Benton, who wanted the bill to say:

> [N]o appeal to the Supreme Court shall be allowed *in favor of the United States* in any case in which the land claimed does not exceed the quantity contained in one league square, or on which there shall not be a valuable gold mine, or silver mine, or quicksilver mine.[210]

Berrien replied that "[t]his subject was under consideration by the committee" (meaning the Senate Judiciary Committee).[211] According to Berrien, previous legislation had given commissioners "authority to confirm claims to an extent not exceeding six hundred and forty acres" without the need for further action by Congress, and the committee too had been disposed "to allow the decisions of the commissioners to the extent of six hundred and forty acres to be considered as final"—but "in consequence of the valuable minerals" that might be found even on small tracts in California, the committee ultimately had "abstain[ed] from any limitation as to the right of appeal."[212] As Professor Ablavsky notes, Berrien did add that "[i]f hereafter, upon further information, it shall be deemed proper, it will be in the power of Congress to provide that the decisions of the commissioners, or of the district court, shall be final in these minor claims."[213] In context, though, Berrien probably was simply saying that Congress did not have to let *the government* seek review of decisions *in favor of claimants*—meaning that if the commissioners *confirmed* a "minor" claim, they could be given the last word (as far as public rights were concerned). That position is consistent with the framework that I described.

Admittedly, there are two respects in which the California Land Act raised unsettled questions under that framework. First, despite the denials of some supporters, the Act was most naturally understood to mean that potential claimants would forfeit their titles (whether perfect

[210] Cong. Globe, 31st Cong., 2d Sess. 426 (1851) (emphasis added); see also id. at 451 (statement of Sen. Benton) (advocating a plan that would "discriminate between large and small claims, so as to make the decision of the tribunal in California conclusive in favor of small claims against the United States").

[211] Id. at 426 (statement of Sen. Berrien); see also Karen B. Clay, Property Rights and Institutions: Congress and the California Land Act of 1851, 59 J. Econ. Hist. 122, 130 (1999) (noting that the Senate Judiciary Committee had discussed a proposal that "would have limited government appeals, essentially confirming claims smaller than 640 acres").

[212] Cong. Globe, 31st Cong., 2d Sess. 426 (1851) (statements of Sen. Berrien).

[213] Id.

or imperfect) if they did not submit claims before the deadline. Especially with respect to perfect titles, opponents of the bill attacked this scheme as a legislative abrogation of vested rights.[214] But the Supreme Court's rejection of this argument in *Botiller* is unsurprising. As early as 1838, the Court had noted that statutes establishing deadlines of this sort "are . . . analogous to acts of limitations, for recording deeds," which similarly threaten landowners with the loss of property rights for failing to provide notice of their claimed title.[215] Statutes of limitation also establish deadlines for pursuing choses in action that qualify as property, and those statutes again use a species of forfeiture to enforce the deadlines. While nineteenth-century lawyers would have said that only judicial power can authoritatively determine that vested rights have indeed been forfeited, they would not have said that vested rights are immune from forfeiture.[216] Just as legislatures can regulate property in other ways, it is not automatically unconstitutional for statutes or common law doctrines to require property-owners to make filings or to take other positive steps to avoid abandonment or forfeiture of their property.[217]

Second, although the California Land Act did authorize de novo review by district courts "in all cases of the rejection or confirmation of any claim by the board of commissioners,"[218] the courts would make their determinations at least partly on the basis of the evidence that had been presented to the commissioners.[219] But even with respect to a claim

[214] See, e.g., id. at 363 (statement of Sen. John P. Hale) ("I take it to be clear that it is admitted by everybody . . . that if there be grants of land valid at the time we took this land by the treaty, they are preserved by the treaty, the laws of the United States, and the Constitution, and it is not competent for us to disturb them. So that it is plain that this act, so far as it proposes to divest these titles, is unconstitutional, inoperative, and can have no possible effect in its application to those titles which became vested prior to the execution of the treaty of Guadalupe Hidalgo.").

[215] Strother v. Lucas, 37 U.S. (12 Pet.) 410, 448 (1838).

[216] See Nelson, Franchises, supra note 8, at 1434 ("Of course, the doctrine [of vested rights] did not prevent statutes from regulating how people used their property or identifying circumstances in which property would be deemed to be abandoned, transferred from one person to another, or forfeited to the government.").

[217] See Caleb Nelson, The Constitutionality of Civil Forfeiture, 125 Yale L.J. 2446, 2512 (2016) ("Throughout American history, legislatures have enacted statutes that extinguish property rights belonging to owners who fail to take certain affirmative actions."); id. at 2512–13 (providing examples).

[218] California Land Act of 1851, ch. 41, § 9, 9 Stat. 631, 632–33.

[219] See id. § 10, 9 Stat. at 633 (instructing the district court "to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order

of perfect title, the Supreme Court had already spoken favorably of statutory provisions that allowed certain evidence to be carried over from boards of commissioners to the courts.[220] In other contexts, moreover, rules of evidence had long allowed courts to consider some testimony that was taken in front of commissioners or other officers who were not themselves judges.[221] The fact that the California Land Act allowed evidence to be carried over from the board of commissioners to the district court, which would evaluate it de novo, does not strike me as a violation of the framework described in my earlier article.[222]

CONCLUSION

Professor Ablavsky and I agree about some important things. For instance, we agree that nineteenth-century jurisprudence about the role of U.S. courts in adjudicating claims to imperfect titles in the ceded territories reflected a version of the political-question doctrine—specifically, the idea that although both the customary law of nations and particular treaties gave the United States an obligation to respect such titles, the political branches of the federal government were generally in charge of the mechanisms for discharging that obligation. But while Professor Ablavsky suggests that this idea cannot readily be explained in a way that does not spill over to other titles, the application of the political-question doctrine in this context strikes me as less inscrutable. In the nineteenth century, treaties and the law of nations

of the said court"); cf. United States v. Ritchie, 58 U.S. (17 How.) 525, 534 (1855) ("The district court is not confined to a mere reëxamination of the case as heard and decided by the board of commissioners, but hears the case *de novo*, upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce.").

[220] See United States v. Arredondo, 31 U.S. (6 Pet.) 691, 717 (1832).

[221] See, e.g., 1 Simon Greenleaf, A Treatise on the Law of Evidence § 320 (5th ed. Boston, Charles C. Little & James Brown 1850) ("If the witness *resides abroad*, out of the jurisdiction, and refuses to attend, or is *sick and unable to attend*, his testimony can be obtained only by taking his *deposition* before a magistrate, or before a commissioner duly authorized by an order of the Court where the cause is pending; and if the commissioner is not a Judge or magistrate, it is usual to require that he be first sworn. This method of obtaining testimony from witnesses, in a foreign country, has always been familiar in the Courts of Admiralty; but it is also deemed to be within the inherent powers of all Courts of Justice." (footnote omitted)).

[222] Cf. Nelson, Franchises, supra note 8, at 1520–22 (discussing nineteenth-century provisions about patent-interference appeals, where the Court of Appeals of the District of Columbia would reach its own conclusions on the basis of the evidence produced before the Commissioner of Patents).

were both thought to create obligations that nations owed to other nations, and the political branches were understood to be in charge of compliance with at least some nation-to-nation obligations.

That does not mean that the land claims on which Professor Ablavsky focuses were wholly *sui generis*. In the international context, commissioners have historically been used to adjudicate various other claims that nationals of one country asserted against foreign sovereigns.[223] To this day, indeed, the Foreign Claims Settlement Commission—an agency within the Department of Justice that adjudicates certain kinds of claims by American citizens against foreign countries, including claims for payments from funds created by settlement agreements between those countries and the United States[224]—is thought to have the authority to render "final and conclusive" decisions that "shall not be subject to review . . . by any court."[225] As a historical matter, the ideas underpinning commissioners' adjudication of such claims are related to the ideas underpinning commissioners' adjudication of imperfect land claims based on equities created by the previous sovereign.

Still, those ideas do not extend nearly as far as Professor Ablavsky suggests. The fact that the political branches were in charge of carrying out certain nation-to-nation obligations does not justify nonjudicial adjudication of other matters. Thus, the pocket of law that Professor Ablavsky discusses does not undermine the evidence presented in my earlier article.

Indeed, Professor Ablavsky himself does not directly take issue with that evidence. His argument rests on his purported identification of a counterexample to the framework that I described. Yet the lessons of that counterexample turn out to be limited.[226] If anything, the version of

[223] See Ablavsky, supra note 14, at 293 ("Boards of commissioners had also been common practice in international treaties, especially to determine issues of compensation."); see also, e.g., Comegys v. Vasse, 26 U.S. (1 Pet.) 193, 212–13 (1828) (addressing one such arrangement and the extent to which the commissioners' decisions were conclusive).

[224] See generally Stephen P. Mulligan, Cong. Rsch. Serv., IF11376, The Foreign Claims Settlement Commission of the United States (2019) (summarizing the Commission's work and noting different sources of funding for different programs).

[225] Act of Mar. 14, 1980, Pub. L. No. 96-209, § 107, 94 Stat. 96, 97 (codified at 22 U.S.C. § 1622g).

[226] In a footnote, Professor Ablavsky suggests that even if his research simply establishes an "exception" to my framework for land claims based on treaties, that exception is vast, because "most of the land within the United States" can be traced to the treaties that Professor Ablavsky examines. Ablavsky, supra note 14, at 348 n.413. For the nineteenth-

the political-question doctrine that it implicates—allowing the political branches rather than the courts to decide how to fulfill certain nation-to-nation obligations—actually reflects the public/private distinction. While I am willing to confess error when I believe that I have erred,[227] Professor Ablavsky has not persuaded me that I got public rights wrong.

century Supreme Court, though, the relevance of a treaty at one step of someone's chain of title would not have meant that all future Congresses could freely authorize nonjudicial adjudication of unrelated ownership disputes involving the property. To the contrary, once the previous sovereign's incomplete or imperfect grants were confirmed and completed, the owners and their successors could assert judicially cognizable vested rights that triggered the doctrines discussed in my earlier article.

[227] See, e.g., Nelson, Franchises, supra note 8, at 1432.