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The History Wars and Property Law: Conquest and Slavery as Foundational to the Field

ABSTRACT. This Article addresses the stakes of the ongoing fight over competing versions of U.S. history for our understanding of law, with a special focus on property law. Insofar as legal scholarship has examined U.S. law within the historical context in which it arose, it has largely overlooked the role that laws and legal institutions played in facilitating the production of the two preeminent market commodities in the colonial and early Republic periods: expropriated lands and enslaved people. Though conquest and enslavement were key to producing property for centuries, property-law scholars have constructed the field of property law to be largely devoid of these histories and without a strong conception of the formative role of race. As a result, recent movements to reintegrate these topics into the field generally reflect a broader trend in the legal academy of treating race as an elective rather than fundamental topic. This Article shows that these histories contain insights that are crucial for understanding their legacies in our present legal system. It offers an account of how current conceptions of the field of property law evolved and what we learn from suppressed histories. It shows that the histories of conquest and slavery explain aspects of the system—its construction of jurisdictions, property value, ground-level institutions, and organization of force, for example—that belong at the core of the curriculum and the field.

First, this Article examines patterns of erasure in the property-law canon to explore how we came to understand property law as primarily a collection of doctrines derived from English law regulating relations between neighbors. It uses property-law casebooks as an index and offers the first comprehensive study of the tradition. This analysis shows that many of the norms of erasure and validations of racial hierarchy that casebooks exhibit were set during the period of their emergence—the time of the formal close of the frontier and the Jim Crow Era. It was not until the 1970s that casebooks began to critically examine the histories of conquest and slavery for the first time, but the query into their consequences for the property system has remained partial and inconsistent.

I then examine three ubiquitously taught topics in property law—discovery, labor, and possession— in light of the contexts in which they arose, to highlight their role in the creation of new markets for land and people in early America. I show that Chief Justice Marshall's iteration of the Discovery Doctrine drew from an international legal tradition that authorized European conquests and the transatlantic slave trade to establish racial hierarchy as the basis of U.S. jurisdiction and trade in lands. In addition to affirming that hierarchy, as scholars have shown, the labor theory also captured the ways that colonists attributed property values to land and people only when they came into white possession. I further argue that the labor of property creation in the colonies in

significant part comprised legal work, beyond agriculture labor, including the passage of laws creating homesteading incentives, making enslavement racial, permanent, and hereditary, and establishing systems such as the rectangular survey, comprehensive title registry, and easy mortgage foreclosure. Finally, taking possession of property in this context entailed a process of dispossession turning the principle of honoring possession on its head. Looking at possession as part of the Discovery Rule and fugitive-slave laws reveals that the state largely delegated enforcement of possession—and the concomitant racial violence of dispossession—to private actors in ways that simultaneously invested them in property interests and racial hierarchy.

This Article opens a new inquiry into what these long-buried histories teach us about property law. It argues that they are indispensable for understanding the unique fruits of the colonial experiment that define American property law today—the singular land system that underpins its real estate market and its structural reliance on racial violence to produce value.

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INTRODUCTION

We are in the midst of an ongoing fight over competing versions of U.S. history—an old struggle, older than the nation itself, that is currently in a period of high resurgence.[1] After President Trump issued an Executive Order banning Critical Race Theory in 2020,[2] fourteen states took action seeking to limit, control, or eliminate the teaching of race and histories of racial violence in America in schools.[3] As of November 2021, at least fifteen more states and school boards across the country are currently considering similar measures.[4] This controversy

1. *See America's History Wars*, ECONOMIST (July 10, 2021), https://www.economist.com/united-states/2021/07/10/americas-history-wars [https://perma.cc/ZE9U-XNWV]; Rebecca Onion, *A Brief History of the History Wars*, SLATE (Aug. 20, 2019), https://slate.com/news-and-politics/2019/08/1619-project-conservative-backlash-history-wars.html [https://perma.cc/44BK-TJ2E]; Olivia B. Waxman, *Trump's Threat to Pull Funding from Schools over How They Teach Slavery Is Part of a Long History of Politicizing American History Class*, TIME (Sept. 17, 2020), https://time.com/5889051/history-curriculum-politics [https://perma.cc/VPB4-3UV3]; Matthew Karp, *History as End*, HARPER'S MAG. (July 2021), https://harpers.org/archive/2021/07/history-as-end-politics-of-the-past-matthew-karp [https://perma.cc/R74C-6LVS]; *see also* JEAN O'BRIEN, FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND, at xiv (2010) (arguing that history was a primary means by which European Americans asserted their own modernity while denying it to Indian peoples).

2. Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 22, 2020) ("Combating Race and Sex Stereotyping"), *revoked by* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021) ("Advancing Racial Equity and Support for Underserved Communities Through the Federal Government").

3. Seven states passed legislation. ARIZ. REV. STAT. § 41-1494 (2021); ARK. CODE ANN. § 25-1-902 (2021); IDAHO CODE § 33-138 (2021); IOWA CODE ANN. § 25A.1 (West 2021); OKLA. STAT. tit. 70, § 24-157 (2021); TENN. CODE ANN. § 49-1-102 (2021); TEX. EDUC. CODE ANN. § 28.002 (h-2)–(h-5) (West 2021). Two state executive branches took similar action. 58 Mont. Att'y Gen.'s Op. 1 (May 27, 2021); S.D. Exec. Order 2021-11. Four state school boards passed resolutions. Ala. Bd. of Educ. Res. (2021) ("Declaring the Preservation of Intellectual Freedom and Non-Discrimination in Alabama's Public Schools") (noting plans to codify this resolution in the Alabama Administrative Code); FLA. ADMIN. CODE ANN. r. 6A-1.094124 (2021); Ga. Bd. of Educ. Res. (2021) ("A Resolution of the State Board of Education of the State of Georgia June 3, 2021") (noting plans to codify this resolution in "State Education Rules"); Ohio Bd. of Educ. Res. 13 (2021) ("To Promote Academic Excellence in K-12 Education For Each Ohio Student Without Prejudice or Respect to Race, Ethnicity, or Creed") (revoking an earlier resolution "To Condemn Racism and to Advance Equity for Black Students, Indigenous Students and Students of Color").

4. Nine states have legislation pending. Some legislation is stalled in committee while some legislation is under active consideration. *Compare* H.B. 564, 2021 Leg., Reg. Sess. (La. 2021) (as stalled in committee after committee failed to kill the bill in a 7-7 vote), H.B. 952, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (as referred to committee, Apr. 28, 2021), S.B. 586, 1st Reg Sess. (Mo. 2021) (as referred to committee, Mar. 11, 2021), A.B. A8253, 2021 Gen. Assemb.,

has also reignited a row over the content of textbooks that tends to recur because of their importance in determining what young people will learn and consider fundamental about American history.[5] At its core, this fight revolves around the question of whose story we will make the official story of the nation, and what our collective reference point for imagining a future will be—whether we will reinstall a story from the perspective of one dominant group, or build a story to include the experiences and views of all.

This Article demonstrates that the fight over competing versions of U.S. history is salient for our understanding of law and legal institutions in ways with

Reg. Sess. (N.Y. 2021) (as referred to committee, Aug. 25, 2021), H.B. 322, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) (as referred to committee, June 10, 2021), H.B. 1532, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021) (as referred to committee, June 7, 2021), H. 6070, 2021 Gen. Assemb., Jan. Sess. (R.I. 2021) (as held for further study, Mar. 31, 2021), *and* H. 4325, 124th Gen. Assemb., Reg. Sess. (S.C. 2021) (as referred to committee, May 5, 2021), *with* S.B. 460, 101st Leg., Reg. Sess. (Mich. 2021) (as referred to Comm. of the Whole, Oct. 27, 2021), *and* A.B. 411, 2021 Leg., Reg. Sess. (Wis. 2021) (as passed by the assembly and referred to the senate committee, Oct. 8, 2021). One state has legislation prefiled for its next legislative session. B.R. 60, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022) (as prefiled by sponsors, June 1, 2021); B.R. 69, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022) (as prefiled by sponsors, June 4, 2021). Legislators from other states have talked about prefiling for next session. *See, e.g.*, Rebekah Chung, *Kansas Lawmaker to Introduce Critical Race Theory Bill to Ban it From Schools*, KSNT NEWS (June 25, 2021), https://www.ksnt.com/capitol-bureau/kansas-lawmaker-to-introduce-critical-race-theory-bill-to-ban-it-from-schools [https://perma.cc/X4BY-CKSG]. Some proposed measures are unlikely to be seriously considered. *See, e.g.*, Hannah Falcon, *State Senator Brings up Critical Race Theory During Special Session on Medicaid Tax*, ABC 17 NEWS (June 24, 2021), https://abc17news.com/politics/2021/06/24/state-senator-brings-up-critical-race-theory-during-special-session-on-medicaid-tax [https://perma.cc/AZY2-4LPK] (accusing Republicans of "political pandering" for introducing SB 5 during a special session on another topic). Legislation failed in five states. H.P. 395, 130 Leg., 1st Reg. Sess. (Me. 2021) (failing because of party-line vote); S.R. 56, 2021 Leg., Reg. Sess. (Miss. 2021) (dying in committee, April 1, 2021); H.B. 324, Gen. Assemb., Reg. Sess. (N.C. 2021) (resulting in veto, Sept. 10, 2021); H.B. 544, 2021 Gen. Ct., Reg. Sess. (N.H. 2021) (laying on the table, Apr. 8, 2021); S.B. 618, 85th Leg., 1st Reg. Sess. (W.V. 2021) (dying in committee, Mar. 10, 2021). But some legislators have talked about reintroducing legislation that failed this year. *See, e.g.*, Melinda Deslatte, *Bill Targeting Critical Race Theory Divides La. Lawmakers*, ASSOCIATED PRESS (Apr. 27, 2021), https://www.usnews.com/news/best-states/louisiana/articles/2021-04-27/bill-targeting-critical-race-theory-divides-la-lawmakers [https://perma.cc/P5M6-DCY6] (discussing a sponsor who stalled his own bill in committee but intends to resume debate after revisions).

5. Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory [https://perma.cc/97U3-K8ZN]; Safia Samee Ali, *Amid Growing Critical Race Theory Legislation, Education Experts Say Textbook Content Could Be Next*, NBC NEWS (July 10, 2021, 4:30 AM), https://www.nbcnews.com/news/us-news/amid-growing-critical-race-theory-legislation-education-experts-say-textbook-n1272682 [https://perma.cc/2YDW-9CDD].

which legal scholars and jurists have yet to contend. The predominant understanding of U.S. law and legal institutions, most simply, is built on a narrative from which the histories of colonization and enslavement—and the ways they shaped the evolution of racial dynamics in this country—have been erased over time. New scholarship confronting this past has gained in force and insight over the last several decades, leaving the legal field with little excuse for failing to integrate its findings into our conceptions of the law. The stakes are high, for the way we conceive of the history of this nation, its legal institutions, and specific doctrinal fields and principles impacts our understanding of these things in the present. If our basic conception of how the U.S. legal system developed does not recognize the fundamental role of race, then it is no wonder that we fail to understand the legacies of those histories and address racial inequity in the present. The stakes of these history wars are therefore no less than the greatest stakes of our legal system—namely, the ways that we organize our institutions to distribute power and resources.

Taking the field of property law as an example, this Article illustrates the work of reconceptualizing legal doctrines and institutions in light of suppressed histories. The patterns and consequences of erasure and the work of reconstruction are specific to every field, and it would be strange to assume rather than substantiate the need for new theorization in property law.[6] The first Part therefore begins by examining how the histories of conquest and slavery have been erased from property law, using the law school equivalent of a textbook—the property-law casebook—as a metric for the disciplinary formation of the subject in legal education. The three Parts that follow then demonstrate what we learn from histories therein omitted through examples of topics from property law that remain ubiquitous in casebooks and curricula today: discovery, labor, and possession. Together, these four Parts offer an assessment of what we do not know because of historical erasure, and how we came not to know it.

With this analysis, the Article aims to open a general inquiry into the impact of historical erasure on our understanding of property law, and legal fields more broadly.[7] It further models a method for undertaking such an inquiry, in hopes of inviting future work in dialogue. Perhaps most important, it suggests that a consequence of erasing property law's historical contexts has been a diminished understanding of dynamics of the property system as a whole. The field as currently conceived is fragmented into a bundle of loosely related doctrines. Indeed,

6. Elsewhere, I have called for a general presumption of erasure as a starting point for this work. *See* K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977 (2020) (reviewing JEDEDIAH PURDY, THIS LAND IS OUR LAND: THE STRUGGLE FOR A NEW COMMONWEALTH (2019)).

7. No single article could complete this work. *See infra* note 15.

before I taught property law for the first time, several people told me that designing the course is like assembling a train. You choose topics like cars that you string together as you please. As a result, for generations of first-year law students, the course has had the tendency to feel like a grab bag of topics. As I describe below, materials about conquest, slavery, and race have reentered the canon relatively recently, but with the effect of making these topics optional add-on cars in the property-law train, distinct from and less essential than, for example, units on servitudes, adverse possession, or nuisance. But the histories of conquest and slavery constitute more than addenda to traditional doctrines and present more than an opportunity to apologize or condemn a regrettable chapter of the past. They comprise the train's track, and are essential to explaining what American property is and how it has been constructed by law.

Here, I seek to shift the ongoing inquiry into our property institutions and law onto these tracks. Beyond merely including these histories, I hope to encourage us to ask about their profound impact on our institutions and their significance for the interrelation between law, society, and economy in the United States. After all, for nearly two and a half centuries, colonization and enslavement were primary modes of creating property in America. Beginning in the early seventeenth century, English colonists up and down the Eastern Seaboard grew their market in enslaved people to support their expanding occupation of Native nations' lands. By the eve of the Revolution, these imbricated processes[8] had produced a situation in which property in land enclosures[9] and human beings comprised approximately seventy-five percent of all wealth in the American colonies.[10] After its establishment, the United States continued to accumulate property in lands and people as it extended its jurisdiction to its current borders and the Pacific. After the abolition of slavery, in a story beyond the scope of this

8. Historians have long tended to address the histories of conquest or slavery separately, in a trend too general to single out any person or work. For examples of scholars increasingly taking the imbrication of these histories as a point of departure, see DAVID CHANG, THE COLOR OF THE LAND: RACE, NATION, AND THE POLITICS OF LAND OWNERSHIP IN OKLAHOMA, 1832-1929 (2010); WENDY WARREN, NEW ENGLAND BOUND: SLAVERY AND COLONIZATION IN EARLY AMERICA (2016); PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION (2017); and WALTER JOHNSON, THE BROKEN HEART OF AMERICA: ST. LOUIS AND THE VIOLENT HISTORY OF THE UNITED STATES (2020).

9. This property-law term denotes an almost wholly naturalized understanding of how we organize and distribute land. It refers to privately owned parcels of land with clearly delineated boundaries that distinguish the totality of one owner's interests from another's, and also, increasingly in the United States, identify the extent of an owner's absolute and exclusive control over entry and use. *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

10. ALICE HANSON JONES, WEALTH OF A NATION TO BE: AMERICAN COLONIES ON THE EVE OF THE REVOLUTION 95-98 (1980).

Article, the racism entrenched by slavery, in efforts to circumvent Black property ownership and rights, would come to organize and reshape the land system.[11] These processes transformed basic property institutions and practices in ways that we have not explored, with consequences we have not understood.

Recovering the specific histories of how laws facilitated these processes also opens up a world of questions about the role that racial violence has played in producing the systems, practices, norms, and ideals that form the core of the study of Anglo-American law. It further illuminates the significant contribution of racial legal logic to the creation and distribution of wealth. Private law, especially property law, facilitated the massive commerce in expropriated land and enslaved people that underpinned the colonies' and then the nation's growth. But while some steps have been taken to address the foundational nature of the histories of conquest and slavery to public law,[12] little to none of these histories constitutes a part of the canon of most private-law fields.[13] To the extent that scholars have made pieces of these histories regular parts of curricula and conversation, as in property law, they tend to focus on the experiences of minority groups and laws addressed to minority rights; in other words, including topics on race usually entails lessons on Federal Indian law or civil rights, rather than new perspectives on doctrinal areas considered to be the field's core.[14]

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11. K-Sue Park, *Race and Property Law*, *in* THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES (Devon Carbado, Khiara Bridges & Emily Houh eds.) (forthcoming 2022) (manuscript at 1, 8-10).

12. *See, e.g.*, Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT. L. REV. 1087, 1087 (1993); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1793-95 (2019); *cf.* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 14-15 (2010) (arguing that concepts of political and economic freedom in early America were inextricably tied to the subjugation of slaves, Native Americans, and women).

13. Some recent scholarship that highlights the role of these histories in private law includes Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 81 (2020); CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA 2 (2021); and Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. REV. (forthcoming 2022) (manuscript at 4). A few examples of the broad literature, also not part of regular private-law curricula, that explains how colonization impacts tribal nations' engagement in what are typically thought of as private law transactions, such as contracts, or leasing or mortgaging land, include Matthew L.M. Fletcher, *Contract and (Tribal) Jurisdiction*, 126 YALE L.J.F. 1, 1-3 (2016); Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1061-68 (1974); and Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 794-807 (2019).

14. An important exception is Daniel J. Sharfstein's illuminating analysis of property as "personhood." Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 640-43 (2012).

Part I explores how we arrived at our present conceptions of the field by undertaking the first comprehensive study of property-law casebooks, from the late nineteenth century to the present. Property-law casebooks are the jurist's version of the textbook: they constitute a venue for consolidating political, cultural, and economic consensus about law. They record a continuous effort by preeminent scholars to summate the foundational elements of a field, and their selection of featured cases creates a largely unchallenged narrative about what is significant about and in that area of law. Casebooks tell us the official story of the law and comprise part of the background assumptions we bring to bear when thinking about the history and canon of legal fields. They shape the critical capacities of law students and have determined what generations of lawyers believe property law to be. My analysis of the tradition in Part I shows distinctly different but unmistakable patterns of erasure of the histories of conquest and slavery that lasted until the 1970s, when scholars began to reintroduce material about both. Now, casebooks ubiquitously, if marginally, address the history of conquest, but they have never uniformly confronted the history of slavery.

The next Parts describe the genesis and development of the U.S. land system and market through the processes of colonization and enslavement by revisiting three theories about the initial acquisition of property—discovery, labor, and possession.[15] The unfiltered history of each of these principles illuminates three hallmarks of American property and property law: radical innovations to property systems and law in the colonies, the importance of these new systems to property law and markets, and the central role of race in the creation of commercial value for American property markets. Part II explores the international law of conquest that launched the histories of conquest and slavery in America and how U.S. law drew upon this tradition in articulating a racial hierarchy as the baseline for commerce in the Doctrine of Discovery. Part III pursues the consequences of understanding the labor theory as a theory about the labor of taking possession of property in light of colonial and legal history. It examines how

15. The scope of this Article's analysis is limited to the three examples it selects from U.S. property law. Deliberately, it does not take up legal doctrines or theories commonly understood to address the rights of minority groups in the United States, such as from the areas of civil rights or Federal Indian law. Rather, if Federal Indian law is "primarily the law of conquest," as Elizabeth A. Reese has recently clarified, and "not the law of Indian people," this Article shows that core doctrines of property law generally understood as "neutral," too, comprise part of the law of conquest and the law of slavery. Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 563 (2021). I neither attempt nor purport to cure all the erasures of dominant U.S. legal narratives, but offer an inquiry here that is aligned with this collective effort. In particular, it is adjacent to but distinct from the project of analyzing independent, equally complex traditions of property law that originate in other sovereign histories, and telling the difficult stories of how they have contended with pressures to adopt the ever-increasingly dominant U.S. property-law model, within and beyond U.S. territorial borders, historically and in the present.

"property creation," in this context, encompassed not only colonists' creation of markets based on European possession, but also the creation of major property institutions and law in America: namely, laws that made enslavement racial, hereditary, and perpetual; chains of title rooted in Native title; the comprehensive rectangular survey; centralized title registry; and easy mortgage foreclosure. Part IV shows that prioritizing "possession" in the context of these histories entailed facilitating and maintaining massive dispossession. Through the examples of homestead incentives and the fugitive-slave controversy, it explores how the state delegated the racial violence of creating and maintaining property in lands and people—and the racial order that sustained the state—to private interests. Part V reflects on how these histories enrich and transform our understanding of property law and how it has shaped our world, in order to help us imagine how it could.

I. HISTORICAL ERASURE IN PROPERTY-LAW CASEBOOKS

This Part examines how histories of racial violence fell outside the framework of property law, even as they have continued to work across the landscape in plain sight. As a result, scholars who recently reintroduced the histories of conquest and slavery into the property-law course addressed a general void left by a history of erasure. It is difficult to identify, measure, and assess erasure, and a variety of materials could potentially provide clues about how the antecedents of today's history wars evolved in the legal academy—in other words, how legal scholars came to understand fields through two versions of American history, which either do or do not acknowledge race as a formative force in legal development. Among these materials, however, there is one important and widely used index of a field's self-conception that, like textbooks, both captures dominant ideas about the past and contributes to the reproduction of those ideas in the present: the casebook.

In the late nineteenth century, around the time that Harvard Law Professor John Chipman Gray published the first property-law casebook in 1888, the principal texts used for legal education shifted from treatises, which compiled principles of law distilled by scholars from statutes and judicial opinions, to casebooks, which collected original texts of judicial opinions and organized them by key themes with accompanying commentary.[16] Since then, elite legal scholars have used the casebook to identify a field's most important frameworks, its rep-

16. *See* Peggy Cooper Davis, *Casebooks, Learning Theory, and the Need to Manage Uncertainty*, *in* LEGAL EDUCATION IN THE DIGITAL AGE 230, 230-31 (Edward Rubin ed., 2012).

resentative doctrines and illustrative cases, and the background needed to understand its development. For over 130 years, the casebook has served as an engine of knowledge production, explicitly propagating what we know about property from one generation to the next.[17]

This Part provides the first comprehensive review of the property-law casebook tradition. While scholars have tracked the appearance of particular cases in casebooks before,[18] no scholarly work has undertaken a general analysis of property-law casebooks, nor of their engagement with the histories of conquest and enslavement or the issue of race more generally. The analysis below is drawn from the study of 173 property-law casebooks published between 1888 and 2019, including subsequent editions, but excluding casebooks on real estate transactions and supplements.[19] I searched for key case names and clusters of terms that denoted the history of conquest, slavery, or post-abolition racial exclusion (e.g., "Discovery," "conquest," "colony," "Indian," "Native," and "tribe" for conquest),[20] searching electronically when possible and manually when not. I collected the relevant pages everywhere that cases or terms of interest appeared, recorded the Section or Title where they appeared, and recorded the citation or a characterization.

There is a difference between demonstrating the fact of erasure and explaining the phenomenon. The analysis below aims primarily to establish erasure of the histories of conquest and slavery in the property-law curriculum and canon, rather than to offer a complete theory of how and why erasure and collective path-dependence occurred. As it describes the particular patterns of erasure that casebooks exhibit, it does, however, offer some historical context to illuminate the contours of their evolution.[21] These patterns reflect the trajectory of chang-

17. While casebooks claimed these functions to some degree at all times, they did so increasingly in the twentieth century as the use of the case method of teaching law became ascendant and treatise-based apprenticeships dwindled. *See, e.g.*, ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 60-63 (1983); John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311, 317-18 (1985) (describing the gradual incorporation of casebooks into law school curricula).

18. *E.g.*, Bethany R. Berger, *It's Not About the Fox: The Untold History of* Pierson v. Post, 55 DUKE L.J. 1089, 1095 (2006).

19. *See infra* Appendix A.

20. *See infra* Appendix B for a full list of search terms.

21. This initial study leaves many questions about casebooks open, including the correlation of their content with that in the Restatements of the laws of property, and their relationship to the American Law Institute, the Annual Programs of Property, and related sections at the American Association of Law Schools annual meeting. Casebook editorial boards also appear

ing waves of national historical consciousness over the last 130 years and the corresponding shifting imaginations of the field. Casebooks emerged at a moment of great ideological ferment, coincident with the formal close of the frontier and the ascendance of Jim Crow. For nearly a century, though the law of conquest remained "good law" on the books, casebooks suppressed this history in a departure from earlier legal-treatise traditions that centered it. At the same time, for nearly half a century, they liberally incorporated cases involving the illegal, obsolete form of property in people. Further, when casebooks finally dispensed with slavery cases in the 1940s, they replaced them with another genre of cases affirming racial segregation—those upholding racially restrictive covenants.

These patterns help us to understand why the property-law curriculum today centers English feudal doctrines regulating relationships between neighbors rather than the radical experiments in property that colonists pursued through conquest and enslavement. However, as I discuss in Parts II through IV, those experiments led to innovative property systems so effective at wealth creation that they underpinned the nation's historical growth and remain cornerstones of the American property market today. Moreover, we see that for most of their history, casebooks have followed the current of ideologies furthering histories of racial violence, rather than helping us understand how these histories shaped U.S. property law. This Part takes stock of interventions by recent casebooks, which began to confront the histories of conquest and slavery in the 1970s, in order to contemplate possibilities for the future of this work. Despite scholarly inroads, the history of conquest still appears only marginally, though consistently, in the standard materials for property-law courses,[22] while most casebooks still do not address the history of slavery. In the analysis below, the description of erasure and recovery of histories tracks the way that the casebooks themselves have treated conquest and slavery—as separate issues—and the scope of erasure it examines is limited to the range of content that casebooks have contained. This Article proceeds beyond those constraints in Parts II through IV, where it elaborates on what these erasures obscure, including colonial innovations, new property-law systems, and the imbricated ways that the racial violence of conquest and slavery underpinned American economic growth.

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to have remained long segregated and may have played a gatekeeping role; our initial examination of property-law casebook authors indicated no nonwhite editors until well into the twenty-first century.

22. In 2011, Professor Joseph William Singer warned, "We need to rewrite our history books so that our children understand the actual process by which we acquired title to lands in the United States." Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 773 (2011).

A. The Erasure of Conquest

Nearly every property-law casebook in circulation today recognizes the fundamental status of the 1823 Chief Justice Marshall decision *Johnson v. M'Intosh*[23] to the field. In this case, which remains in effect, the Court confronted the question of whether purportedly conflicting private titles to land were valid if initially purchased directly from the tribal nations that claimed the land, as opposed to from the U.S. government. The holding clearly identifies conquest as both the proper root of private title to land and the sovereign jurisdiction of the United States.

Because of the monumental import of this decision for confirming the rules for valid chains of title and therefore ownership of property in the United States, it appeared frequently in nineteenth-century legal treatises. As Stuart Banner writes, it "quickly assumed a prominent place in them, as the authoritative statement of the foundations of American property law" and "became part of the canon of celebrated cases that all learned lawyers knew."[24] In his overview of U.S. jurisprudence, James Kent drew on *Johnson* to explain how Congress came to have "a large and magnificent portion of territory under their absolute control and disposal": "The title of the European nations, and which passed to the United States, to this immense territorial empire, was founded on discovery and conquest."[25] Joseph Story opened his venerated 1833 *Commentaries on the Constitution of the United States*, which he dedicated to Chief Justice Marshall, by summarizing *Johnson*'s explanation of conquest as the origin of sovereign title and territory in the United States.[26] Kent explained that the case was essential for understanding "the history and grounds of the claims of the European governments, and of the United States, to the lands on this continent, and to dominion over the Indian tribes."[27]

Nonetheless, *Johnson v. M'Intosh* did not appear in John Chipman Gray's seminal casebook, nor in property-law casebooks thereafter until 1960. Instead, Gray framed American property law primarily in terms of its descent from the

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23. 21 U.S. (8 Wheat.) 543 (1823).

24. STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 188 (2005).

25. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 258-59 (New York, O. Halsted, 2d ed. 1832).

26. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION §§ 2-6, at iii, 4-7 (Boston, Hilliard, Gray & Co. 1833).

27. KENT, *supra* note 25, at 379.

English feudal system,[28] rebuffing a great American preoccupation with the history of conquest and the disposition of public lands. His introduction to the law of real property focuses on aspects of the English system that perhaps distinguish it most from its American offshoot: it devotes twenty-three pages, for example, to topics such as the manor, military tenure, socage tenure, and tenancy in frankalmoign, which are at best marginally relevant to the American system.[29] Gray's historical account of the property system's evolution through public-land law in England devotes a mere two paragraphs to "Tenure in the United States," which include the dubious claims that colonies were held as English manors, and that American colonial property law was more feudal than England's.[30]

This focus on English law sharply contrasts with other well-established contemporary understandings of property and American legal development. Story, for example, began his *Commentaries* with *Johnson*'s summary of the history of conquest and explained that "it would be impossible [to] fully . . . understand the [Constitution's] nature and objects" if we neglected "a careful review of the origin . . . and juridical history of all the colonies."[31] In contrast to Gray's suggestion that American property law was a mere English transplant, Story emphasized that "[t]races of [colonial] peculiarities are every where discernable in the actual jurisprudence of each State."[32] Where Gray's introduction to real property comprises a description of the English system, wherein "all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled, the lord paramount,"[33] Story recognized an American relationship to property that was then unimaginable in England when he wrote that "there has never been in this country a dependent peasantry. The yeomanry are absolute owners of the soil . . . ."[34] Emory Washburn's 1864 property-law treatise, too, suggested that feudal tenure was never transferred to nor claimed by the states, citing an American Jurist writer: "The doctrines of tenure do not here [in

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28. 1 JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY 385-408 (Cambridge Univ. Press 1888).

29. *Id.* at 385-408.

30. *Id.* at 407-08 (quoting Van Rensselaer v. Hays, 19 N.Y. 68, 73 (1859) (concerning rent in arrears)). *Hays* is representative insofar as it was common in the nineteenth century to cite to English authorities.

31. STORY, *supra* note 26, at 2.

32. *Id.* at 1 ("[O]ur domestic institutions and policy . . . have grown out of transactions of a much earlier date, connected on one side with the common dependence of all the Colonies upon the British Empire, and on the other with the particular charters of government and internal legislation, which belonged to each Colony . . . .").

33. GRAY, *supra* note 28, at 385 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *59, *60).

34. STORY, *supra* note 26, at 160.

the Northwest Territory] exist even in theory."[35] Washburn further explained that

> [i]t is undoubtedly true . . . that many of the principles of our law of real estate . . . were borrowed originally from the feudal system. . . . But it is apprehended that the adoption of . . . forms of process borrowed from a once existing system of laws, does not necessarily imply that that system has not become obsolete.[36]

Neither prior authority nor the historical record, as I elaborate in Parts II-IV, explain Gray's exclusive insistence on English inheritance so well as ascendant ideological tendencies of the time. In 1890, the U.S. Census Bureau declared the frontier formally closed on the basis that there was no longer land within U.S. territorial boundaries occupied by fewer than two white people per square mile. Many American intellectuals were eager to move past the colonial experience to place the United States on an equal footing with European nations. Gray's casebook epitomizes an impulse to align U.S. legal and political systems with European traditions that his contemporary, Frederick Jackson Turner, famously critiqued in his landmark essay, *The Significance of the Frontier in American History*. Against the trend of emphasizing European derivation, Turner wrote that "the peculiarity of American institutions is, the fact that they have been compelled to adapt themselves to the changes of an expanding people—to the changes involved in . . . winning a wilderness."[37] The American frontier, he argued, was utterly distinct from European borders because it was characterized by movement, the promise of "free land," and constituted "the meeting point between savagery and civilization."[38] He bemoaned that those who wrote about the frontier mythologized the "border warfare and the chase" without seriously studying how territorial expansion impacted the economy and history.[39]

Turner's perception that the failure to attend to westward expansion was a loss for scholarly, institutional understanding applies to the study of law as well.[40] For generations after Gray, casebooks mostly ignored the impact of over

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35. 1 EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY 43 (Boston, Little, Brown & Co. 2d ed. 1864) (quoting *Ohio Legislation*, 11 AM. JURIST & L. MAG. 94 (1834)).

36. *Id.* at 43-44.

37. Frederick Jackson Turner, The Significance of the Frontier in American History: Address at the Forty-First Annual Meeting of the State Historical Society 2 (1893) (published by the State Historical Society of Wisconsin).

38. *Id.* at 3.

39. *Id.*

40. *See infra* Parts II-IV.

260 years of endogenous legal development in the colonies and the early Republic, encompassing the creation of the survey system, title-registry system, easy foreclosure of lands, and more.[41] To the extent that they addressed the system's historical evolution, they focused on English feudal law, producing incongruous and often mystifying texts as casebooks began, likely for practical reasons, to incorporate more American cases.[42] It remained common to recite Gray's suggestion that colonists had merely imported English property law to America,[43] and where the term "conquest" appeared, it referred to William of Normandy's eleventh-century conquest, not English colonization in America.[44] Nonetheless, cases in these books also referred, without explanation, to specifically American phenomena, such as "lots" and "blocks" of tracts and the iconic 160-acre quarter section of the survey, and even annuities granted for surrender of colonial interests in the Caribbean to the Crown.[45] In the 1940s, Professor Ralph W. Aigler

41. *See infra* Section III.B. John Chipman Gray's first two books address the ancient English distinction between real and personal property, citing the thirteenth-century jurist Henry de Bracton and cases almost exclusively from seventeenth- to nineteenth-century English courts—King's Bench, Exchequer, Common Bench, Queen's Bench, Chancery—and one case from the Supreme Court of Pennsylvania. GRAY, *supra* note 28.

42. With exceptions. *See* 3 RALPH W. AIGLER, CASES ON THE LAW OF PROPERTY: TITLES TO REAL PROPERTY: ACQUIRED ORIGINALLY AND BY TRANSFER INTER VIVOS (1916); RALPH W. AIGLER, CASES ON THE LAW OF TITLES TO REAL PROPERTY: ACQUIRED ORIGINALLY AND BY TRANSFER INTER VIVOS (2d ed. 1932); RALPH W. AIGLER, CASES AND MATERIALS ON THE LAW OF TITLES TO REAL PROPERTY: ACQUIRED ORIGINALLY AND BY TRANSFER INTER VIVOS (3d ed. 1942) [hereinafter AIGLER 1942]; 1-2 RALPH W. AIGLER, ALLAN F. SMITH & SHELDON TEFFT, CASES ON PROPERTY (1951); 1-2 RALPH W. AIGLER, ALLAN F. SMITH & SHELDON TEFFT, CASES ON PROPERTY (1960).

43. *See, e.g.*, ARTHUR T. MARTIN, CASES AND OTHER MATERIALS ON THE LAW OF CONVEYANCES 17 (1939) ("It is generally assumed that the colonists brought with them as much of the common law and statute law of England as was suitable to their new circumstances in this country. . . . The extent to which these English forms and theories of conveyance have been a part of our law is a matter on which there is some diversity of opinion.").

44. WILLIAM F. WALSH, SELECT CASES ON THE LAW OF REAL PROPERTY 203-06 (1906); 1 WILLIAM F. WALSH, SELECT CASES ON THE LAW OF PROPERTY REAL AND PERSONAL 243-46 (1922) [hereinafter WALSH 1922]; MARTIN, *supra* note 43, at 1-5; 1 WILLIAM F. WALSH & RUSSELL DENISON NILES, CASES ON THE LAW OF PROPERTY 52-58 (1939); AIGLER 1942, *supra* note 42, at 226-27; HARRY A. BIGELOW, CASES AND MATERIALS ON RIGHTS IN LAND WITH AN INTRODUCTION TO THE LAW OF REAL PROPERTY 1-19 (3d ed. 1945); JOHN A. BLAKE, CASES ON THE LAW OF REAL PROPERTY 1-6 (2d ed. 1948); HOWARD R. WILLIAMS, CASES AND MATERIALS ON THE LAW OF PROPERTY 56-91 (1954); ALFRED G. REEVES, A TREATISE ON SPECIAL SUBJECTS OF THE LAW OF REAL PROPERTY 339-85 (1904).

45. GRAY, *supra* note 28, at 2-6. For example, the first case in the volume, *Aubin v. Daly* (1820) 106 Eng. Rep. 860, 4 B. & Ald. 59, concerns annuities granted for surrender of colonial interests in "the Caribbee Islands[] and certain other islands," including Barbados and the Leeward Islands, to the Crown, 106 Eng. Rep. at 860, 4 B. & Ald. at 60.

noted in passing that "[t]he practice of recording or registering instruments of title, while general in the states of the United States, is followed only in portions of England," without discussing this difference and focusing instead on an English county-level recording statute.[46]

In short, *Johnson v. M'Intosh* and the history of conquest were largely shut out of property-law casebooks for decades.[47] Two exceptions during this period indicate that property treatises did not follow casebooks in this respect. Homer Bliss Dibell's 1920 casebook drew on property-law treatises,[48] including Washburn's and another treatise by Alfred Gandy Reeves, which described U.S. title as rooted in conquest, cited Story, and reviewed the history of the federal survey and disposition of the public lands.[49] Dibell, a Minnesota Supreme Court justice, diligently described the history of Minnesota lands, some of which Great Britain ceded in the Treaty of Paris and some of which the United States acquired through the Louisiana Purchase.[50] He acknowledged that "portions of the lands ceded were occupied by Indian tribes after the Indian fashion," briefly described the federal structure of Indian law, and summarized the issue of Indian occupancy, commenting that "[i]n theory at least the government respected their rights of occupancy."[51] In 1960, University of Illinois College of Law Dean John E. Cribbet followed Dibell and opened his casebook with a straightforward recitation of the root of U.S. title in government grants, "[t]he earliest of [which] were made by European governments seeking to colonize the New World."[52] In a footnote to this history, Cribbet and his coauthor made the first substantive reference to *Johnson* to appear in a casebook, in a description of recent Supreme Court cases that relied on *Johnson* as good authority.[53]

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46. AIGLER 1942, *supra* note 42, at 844-46. Aigler's discussion of comprehensive title registration, an indisputably American innovation, includes no history, only information for navigating the system. He admits the Torrens System of Land Title Registration was used to colonize Australia but argues that many European countries had earlier engaged in similar practices. *Id.* at 979-83.

47. One casebook excerpted *Barnett v. Barnett*, 83 A. 160 (Md. 1912), which briefly cited *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), for the proposition that title is absolute. WM. L. BURDICK, ILLUSTRATIVE CASES ON THE LAW OF REAL PROPERTY 35-37 (1914).

48. HOMER BLISS DIBELL, CASES ON REAL PROPERTY 4 (1920) (citing 2 ALFRED G. REEVES, A TREATISE ON THE LAW OF REAL PROPERTY §§ 1063-70 (1909)).

49. 2 ALFRED G. REEVES, A TREATISE ON THE LAW OF REAL PROPERTY 1405-14 (1909).

50. DIBELL, *supra* note 48, at 3-4.

51. *Id.* at 4.

52. JOHN E. CRIBBET, WILLIAM F. FRITZ & CORWIN W. JOHNSON, CASES AND MATERIALS ON PROPERTY 23-24 (1960).

53. *See id.* at 24 n.2 (citing *Johnson* for its holding that some traditional rules of property were inapplicable to the "savage[]" Natives, and tracing the evolution of this doctrine in *United*

In 1974, in the wake of massive social movements across the country, Professor Charles Donahue incorporated *Johnson*, along with the sit-in cases, into the text of an American property-law casebook for the first time.[54] In 1978, Professor Richard Chused followed and placed *Johnson* in a lengthy, groundbreaking section on conquest and Federal Indian law.[55] By the time Professor Joseph Singer published a casebook (which remains the standard for teaching about conquest and race in property law) including *Johnson* in the early 1990s,[56] the trend was set. *Johnson* now appears in every property-law casebook, although teaching notes differ widely in terms of providing information about the case's content and historical significance.

Despite the inclusion of *Johnson*, as Singer observes, "[a]mazingly, some property casebooks fail to mention Indians at all. Most property casebooks treat conquest as unfortunate but past," or arrange material "as if to show that we have moved beyond barbarism to civilization."[57] In a different variation of erasure, Professors Thomas W. Merrill, Henry E. Smith, John Sprankling, Jerry L. Anderson, and Daniel B. Bogart all omit a basic historical description of the role the Discovery Doctrine played in European conquests, despite Chief Justice Marshall's account in the case. Instead, Merrill and Smith describe its operative principle as the right of the first-in-time,[58] and Anderson and Bogart focus on the principle of certainty.[59] In other words, these scholars extract ahistorical lessons from a case whose content comprises a history of conquest and which also constitutes a landmark in that history itself.

States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946), and *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955)).

54. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), *as reprinted in* CHARLES DONAHUE, JR., THOMAS E. KAUPER & PETER W. MARTIN, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 235-40 (1974).

55. *See M'Intosh*, 21 U.S. (8 Wheat.), *as reprinted in* RICHARD H. CHUSED, A MODERN APPROACH TO PROPERTY: CASES, NOTES, MATERIALS 80-95 (1978).

56. *See M'Intosh*, 21 U.S. (8 Wheat.), *as reprinted in* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 25-35 (1993); SINGER, *supra*, at 1289-1308 (discussing the relationship of property to slavery).

57. Singer, *supra* note 22, at 766-67 (footnote omitted).

58. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 97-101 (3d ed. 2017).

59. JERRY L. ANDERSON & DANIEL B. BOGART, PROPERTY LAW: PRACTICE, PROBLEMS, AND PERSPECTIVES 17-27 (2d ed. 2019).

B. The Erasure of Slavery

The arc of the erasure of the history of slavery follows a distinctly different pattern from the erasure of conquest from casebooks. Early property-law casebooks, which appeared during the Jim Crow Era, included cases about slavery ubiquitously and without reflection, critique, or acknowledgment that property in people was, by that time, illegal and obsolete. That is, they included no information about the history of slavery, the laws of subjugation, nor the significance, scale, or impact of the trade. Rather, they presented cases involving property in enslaved persons, and concomitantly the violent subjugation of Black people by white people, as an unremarkable phenomenon. This practice dwindled in the 1930s, and slavery cases disappeared from casebooks by the late 1940s, only to be replaced by a new genre of cases affirming racial hierarchy and segregation—cases upholding racially restrictive covenants. While these cases were soon overturned, this change did not occasion clear reflection on the law of race and property. Casebooks did not address the history of slavery and abolition until the 1970s and have never done so widely or uniformly.

In other words, the use of cases illustrating white entitlement to subordinate and control Black people was an aspect of the legal culture of Jim Crow. When Gray's casebook first appeared, during the period when modern legal education is widely understood to have begun, slavery had been obsolete and illegal for more than twenty years. In the interim period, federal troops had withdrawn from the South, allowing the white supremacist "Redemption" movement to destroy Reconstruction.[60] The Supreme Court held that emancipation had no effect on debts or contracts for "slave consideration,"[61] and decisions like *United States v. Cruikshank* and the 1883 *Civil Rights Cases* struck decisive blows to efforts to extend civil rights and equal protection under law to Black people.[62] In the 1890s, through the turn of the century, the Court refused to intervene when

60. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 564-601 (1988); *see also* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880, at 659-98 (1935) (discussing organized violence against Black people in the post-war South).

61. *See* Andrew Kull, *The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves*, 70 CHI.-KENT L. REV. 493, 493-94, 504-06 (1994) (synthesizing several cases on this topic); John C. Williams, *Slave Contracts and the Thirteenth Amendment*, 39 SEATTLE U. L. REV. 1009, 1011-25 (2016) (describing and analyzing slave-contract jurisprudence); *see also, e.g.*, White v. Hart, 80 U.S. (13 Wall.) 646 (1871); Osborn v. Nicholson, 80 U.S. (13 Wall.) 654 (1871); Boyce v. Tabb, 85 U.S. (18 Wall.) 546 (1873).

62. United States v. Cruikshank, 92 U.S. 542 (1875); The Civil Rights Cases, 109 U.S. 3 (1883).

southern states intensified their efforts to disenfranchise Black people.[63] The federal government sanctioned de jure segregation, the diminution of educational opportunities for Black people, and their legal and extralegal execution at the hands of whites.[64] During the same period, Ida B. Wells launched her national antilynching campaign, and the number of practicing Black attorneys rose, prompting new obstacles to bar admission. Though the first Black lawyer, Macon Bolling Allen, was admitted to the Maine bar in 1844, Black attorneys "first appeared in significant numbers" in the post-Civil War South.[65] In 1890, almost sixty percent of the 431 Black lawyers in the country resided in formerly Confederate states.[66] These changes helped usher in modern legal culture as we know it: Wisconsin instituted a written bar exam in 1865, followed by Virginia in 1896.[67] Law schools, many of them white-only, proliferated, and the casebook tradition was born.

By 1910, the number of lawyers in the country had grown to 114,704, but the number of Black lawyers among them was only 798.[68] In property-law classes at the new law schools, students read cases that presented white ownership of Black people as part of the natural social order. All but two casebooks published between 1888 and 1916 contained cases either directly involving property in people or citing such cases.[69] These cases often involved questions of devise and

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63. *See* RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 132, 139-41 (2004); Mills v. Green, 159 U.S. 651, 652-53 (1895).

64. *See* VALELLY, *supra* note 63, at 139, 144-46; Williams v. Mississippi, 170 U.S. 213, 225 (1898); FONER, *supra* note 60, at 571-72, 582, 587-601.

65. Joseph Gordon Hylton, *The African-American Lawyer, the First Generation: Virginia as a Case Study*, 56 U. PITT. L. REV. 107, 109 (1994). Joseph Gordon Hylton's work combing through Census records reveals that a "handful" of others joined Allen before the Civil War, including in Louisiana while slavery was still in force. *Id.* at 108. In 1869, Howard Law School opened, and George Lewis Ruffin became the first Black man to graduate from Harvard Law, and eventually, the first Black judge in Massachusetts. *Id.* at 116, 140 n.138; *see also* J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, at 103, 119 (1993) (describing Ruffin's career); WILLIAM J. SIMMONS, MEN OF MARK: EMINENT, PROGRESSIVE AND RISING 740-43 (Cleveland, Geo. M. Rewell & Co. 1887) (providing Ruffin's biography).

66. Hylton, *supra* note 65, at 109.

67. Michael Marshall, *Jim Crow Constitution Stifled Virginia's Black Lawyers*, U. VA. SCH. L. (Oct. 13, 2003), https://www.law.virginia.edu/news/2003_fall/hylton.htm [https://perma.cc/J6DP-94V6].

68. Hylton, *supra* note 65, at 110-11.

69. *See* GRAY, *supra* note 28, at 50-52 (incorporating Brent v. Chapman, 9 U.S. (5 Cranch) 358 (1809)); *id.* at 53-56 (incorporating Bryan v. Weems, 29 Ala. 423 (1856)); *id.* at 56-64 (incorporating Chapin v. Freeland, 142 Mass. 383 (1886)); *id.* at 280 (incorporating Fitch v. Newberry, 1 Doug. 1 (Mich. 1843)); *id.* at 336-88 (incorporating Campbell v. Stakes, 2 Wend. 137 (N.Y. 1828)); *id.* at 638-40 (incorporating Lewis v. McNatt, 65 N.C. 63 (1871)); W. S. PATTEE,

ILLUSTRATIVE CASES IN REALTY 606 (Philadelphia, T. & J.W. Johnson & Co. 1896) (incorporating Allen v. Mansfield, 18 S.W. 901 (Mo. 1892)); CHRISTOPHER G. TIEDEMAN, SELECTED CASES ON REAL PROPERTY: SELECTED AND ARRANGED FOR USE IN CONNECTION WITH THE AUTHOR'S TREATISE ON REAL PROPERTY 444 (St. Louis, The F. H. Thomas Law Book Co. 1897) (incorporating Potter v. Couch, 141 U.S. 296 (1891)); ELMER E. BARRETT, CASES ON THE LAW OF REAL PROPERTY 40 (St. Paul, West Publ'g Co. 1898) (incorporating Ewing v. Shannahan, 20 S.W. 1065 (Mo. 1892)); WILLIAM A. FINCH, SELECTED CASES ON THE LAW OF PROPERTY IN LAND 221 (New York, Baker, Voorhis & Co. 1898) [hereinafter FINCH 1898] (incorporating Walker v. Sherman, 20 Wend. 636 (N.Y. Sup. Ct. 1839)); FINCH 1898, *supra*, at 551 (incorporating Burnett v. Burnett, 17 S.C. 545 (1882)); JASPER C. GATES, CASES ON THE LAW OF REAL PROPERTY 63 (St. Paul, West Publ'g Co. 1898) (incorporating *Sherman*, 20 Wend. 636); GRANT NEWELL, ELEMENTS OF THE LAW OF REAL PROPERTY WITH LEADING AND ILLUSTRATIVE CASES 344 (1902) (incorporating Morse v. Proper, 82 Ga. 13 (1889)); WILLIAM A. FINCH, SELECTED CASES ON THE LAW OF PROPERTY IN LAND 221 (2d ed. 1904) [hereinafter FINCH 1904] (incorporating Lushington v. Sewell (1827) 57 Eng. Rep. 641, 1 Sim. 435); FINCH 1904, *supra*, at 498 (incorporating Cole v. Lake Co., 54 N.H. 242 (1874));FINCH 1904, *supra*, at 551 (incorporating *Burnett*, 17 S.C. 545); JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY 33-37 (2d ed. 1906) (incorporating Bryan v. Weems, 29 Ala. 423 (1856)); GRAY, *supra*, at 37-39 (incorporating Fears, Admr. v. Sykes, 35 Miss. 633 (1856)); WILLIAM F. WALSH, SELECT CASES ON THE LAW OF REAL PROPERTY 334-36 (1906) (incorporating Jackson ex dem. Loucks v. Churchill, 7 Cow. 287 (N.Y. 1827)); WILLIAM A. FINCH, SELECTED CASES ON THE LAW OF PROPERTY IN LAND 218-24 (2d ed. 1912) [hereinafter FINCH 1912] (incorporating *Sherman*, 20 Wend. 636); FINCH 1912, supra, at 570 (incorporating Twitty v. Camp, 62 N.C. (Phil. Eq.) 61 (1866)); FINCH 1912, *supra*, at 570 (incorporating De Blane v. Lynch, 23 Tex. 25 (1859)); BURDICK, *supra* note 47, at 562-68 (incorporating Erck v. Church, 87 Tenn. 575 (1889)); EDWARD H. WARREN, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY 37-40 (1915) [hereinafter WARREN 1915] (incorporating Ford v. State, 85 Md. 465 (1897)); WARREN 1915, *supra*, at 134-43 (incorporating Chapin v. Freeland, 142 Mass. 383 (1886)); WARREN 1915, *supra*, at 145-47 (incorporating *Weems*, 29 Ala. 423); WARREN 1915, *supra*, at 196-97 (incorporating Hepburn v. Sewell, 5 H. & J. 211 (Md. 1821)); WARREN 1915, *supra*, at 207 (incorporating McWillie v. Van Vacter, 35 Miss. 428 (1858)); WARREN 1915, *supra*, at 427-28 (incorporating Nelson v. Iverson, 17 Ala. 216 (1850)); WARREN 1915, *supra*, at 437 (incorporating Harvey v. Epes, 53 Va. (12 Gratt.) 153 (1855)); WARREN 1915, *supra*, at 443 (incorporating Adams v. Mizell, 11 Ga. 106 (1852)); WARREN 1915, *supra*, at 545-46 (incorporating Ayer v. Ritter, 7 S.E. 53 (S.C. 1888)); WARREN 1915, *supra*, at 728-34 (incorporating Melms v. Pabst Brewing Co., 104 Wis. 7 (1899)); HENRY A. BIGELOW, INTRODUCTION TO THE LAW OF REAL PROPERTY: RIGHTS IN LAND 635 (William R. Vance ed., 1919) (incorporating Salmon v. Matthews (1841) 151 Eng. Rep. 1275, 8 Mees. & W. 827); WILLIAM A. FINCH, SELECTED CASES ON THE LAW OF PROPERTY IN LAND 489-498 (2d ed. 1919) [hereinafter FINCH 1919] (incorporating Cole v. Lake Co., 54 N.H. 242 (1874)); EDWARD H. WARREN, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY 37-40 (1919) [hereinafter WARREN 1919] (incorporating *Ford*, 85 Md. 465); *cf.* JOHN R. ROOD, DECISIONS, STATUTES & C., CONCERNING THE LAW OF ESTATES IN LAND (1909) (incorporating no slavery cases); RALPH W. AIGLER, TITLES TO REAL PROPERTY: ACQUIRED ORIGINALLY AND BY TRANSFER INTER VIVOS (1916) (incorporating no slavery cases).

inheritance, and illustrated lessons concerning statutes of limitation,[70] conversion,[71] replevin,[72] trover,[73] detinue,[74] trespass,[75] adverse possession,[76] gift and

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70. Brent v. Chapman, 9 U.S. (5 Cranch) 358 (1809), *as reprinted in* GRAY, *supra* note 28, at 50-52; Bryan v. Weems, 29 Ala. 423 (1856) (examining statute of limitations issues in the context of the disputed inheritance of enslaved persons), *as reprinted in* numerous casebooks, including GRAY, *supra* note 28, at 53-56; GRAY, *supra* note 69, at 33-37; WARREN 1915, *supra* note 69, at 145-48; WARREN 1919, *supra* note 69, at 145-48; HARRY A. BIGELOW & FRANCIS W. JACOB, CASES ON THE LAW OF PERSONAL PROPERTY 235-36 (William Reynolds Vance ed., 2d ed. 1931); HARRY A. BIGELOW & WILLARD LELAND ECKHARDT, CASES AND OTHER MATERIALS ON THE LAW OF PERSONAL PROPERTY 260-67 (3d ed. 1942).

71. Harvey v. Epes, 53 Va. (12 Gratt.) 153 (1855) (discussing enslaved people hired to work on a certain portion of a railroad who were taken to another portion, where they died), *as reprinted in* WARREN 1915, *supra* note 69, at 437-38.

72. Fitch v. Newberry, 1 Doug. 1 (Mich. 1843) (citing Dunbar v. Williams, 10 Johns. 249 (N.Y. 1813) (involving a plaintiff who provided medicines to a person enslaved by the defendant without the defendant's knowledge)), *as reprinted in* GRAY, *supra* note 28, at 271-280; Woodson v. Pearce, 37 Tenn. (5 Sneed) 416 (1858) (involving a slave owner who sought recovery of property in several enslaved people, including a woman named Caroline), *as reprinted in* BIGELOW & JACOB, *supra* note 70, at 74-76; BIGELOW & ECKHARDT, *supra* note 70, at 128-129.

73. Hepburn v. Sewell, 5 H. & J. 211 (Md. 1821) (involving a slave owner who sought to recover the value of property in enslaved children born to enslaved people named Sall, Patt, and Phillis), *as reprinted in* WARREN 1915, *supra* note 69, at 196-97.

74. Nelson v. Iverson, 17 Ala. 216 (1850) (discussing a slave owner who sought recovery of property in two enslaved people claimed by parol gift from his uncle), *as reprinted in* WARREN 1915, *supra* note 69, at 427-28 (1915); WARREN 1919, *supra* note 69, at 427-29.

75. Lewis v. McNatt, 65 N.C. 63 (1871) (involving a slave owner who sought damages for loss of turpentine and injury to enslaved persons), *as reprinted in* GRAY, *supra* note 28, at 638-40; GRAY, *supra* note 69, at 611-13.

76. Chapin v. Freeland, 8 N.E. 128, 129-30 (Mass. 1886) (citing numerous lawsuits for the recovery of enslaved people), *as reprinted in* GRAY, *supra* note 28, at 56-64; WARREN 1915, *supra* note 69, at 134-43; WARREN 1919, *supra* note 69, at 139-40; WILLIAM F. WALSH, CASES ON THE LAW OF PROPERTY 280-82 (1931).

delivery,[77] ejectment,[78] standing,[79] partition,[80] community property,[81] and charitable trusts.[82] The broad variety of doctrines upon which these cases turned accords with Professor Justin Simard's recent observation that "the law of slavery" included not only the laws governing the status, escape, punishment, and emancipation of enslaved people—a category of laws now technically obsolete—but the full variety of cases and doctrines comprising "ordinary" commercial law.[83] These cases also give us a glimpse of how the lives of enslaved people were impacted by their enslavers' health, indebtedness, and preferences between their children, and of lawsuits brought by enslavers' squabbling family members and neighbors. In some cases, the disputes concerned the events through which enslaved people lost their lives, as with one unnamed woman in an action for conversion, who died after she was hired out for housework and then forced to work in the fields.[84]

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77. *See* McWillie v. Van Vacter, 35 Miss. 428, 449 (1858) (holding that title to a person set up through a parol gift required delivery of possession), *as reprinted in* WARREN 1919, *supra* note 69, at 209.

78. *See* Allen v. Mansfield, 18 S.W. 901, 902 (Mo. 1892) (involving a formerly enslaved person who claimed a parol gift of the lot on which she resided), *as reprinted in* PATTEE, *supra* note 69, at 606; Ewing v. Shannahan, 20 S.W. 1065, 1068 (Mo. 1892) (citing a case in which the guardian of minor children purchased people with the money of his wards), *as reprinted in* TIEDEMAN, *supra* note 69, at 22; BARRETT, *supra* note 69, at 40.

79. *See* Bloss v. Holman, Owen, 52 (1587), *as reprinted in* GRAY, *supra* note 28, at 335-36 (containing a footnote citing Justice Holmes for the proposition that an enslaved person has no standing before the law).

80. *See* Walker v. Sherman, 20 Wend. 636, 654-55 (N.Y. 1839) (citing Lushington v. Sewell, 1 Sim. 435, 480 (1827) (holding that "the incidental stock of [people], cattle and implements" pass upon conveyance of land)), *as reprinted in* FINCH 1898, *supra* note 69, at 221-22; GATES, *supra* note 69, at 63; WILLIAM A. FINCH, SELECTED CASES ON THE LAW OF PROPERTY IN LAND 221-22 (New York, Baker, Voorhis & Co. 2d ed. 1912) [hereinafter FINCH 1912].

81. *See* De Blane v. Lynch, 23 Tex. 25, 27 (1859) (holding that crops grown by enslaved people belonging to a married woman on land she owned were community property), *as reprinted in* FINCH 1898, *supra* note 69, at 968-69; FINCH 1904, *supra* note 69, at 968-69; FINCH 1912, *supra* note 80, at 968-69.

82. *See* Jackson v. Phillips, 96 Mass. (14 Allen) 539, 594 (1867) (discussing whether a trust created to further abolition may continue its activities after abolition), *as reprinted in* BURDICK, *supra* note 47, at 304.

83. Simard, *supra* note 13, at 86-88.

84. *See* Hooks v. Smith, 18 Ala. 338, 341 (1850) ("[Defendant] was clearly liable for [the slave's] value."), *as reprinted in* WARREN 1919, *supra* note 69, at 147; *see also* Harvey v. Epes, 53 Va. (12 Gratt.) 153, 153 (1855) (holding the death of enslaved people to be a conversion), *as reprinted in* WARREN 1915, *supra* note 69, at 437.

A few casebooks from this period include cases that provided perspectives on the legacy of slavery, the challenges Black people faced in acquiring and protecting their property rights, and even abolitionist sentiments. In 1898, for example, Minnesota College of Law Dean William Sullivan Pattee used an 1892 case to illustrate the rule that an adverse possessor can acquire title only to that quantity of land she actually occupies. In that case, *Allen v. Mansfield*, a woman named Malinda claimed a lot upon which she resided with her children in "a small house or shanty" enclosed by a fence by parol gift from her deceased enslaver; the court noted that "[t]he evidence tends to show that she dug a well and planted some trees in the inclosed part, and that she, for a time at least, had a small pig-pen on the uninclosed part."[85] Her former enslaver's family nonetheless sold the lot to a third party, who paid taxes on the lot and eventually sued to eject her.[86] Though the lower court awarded Malinda title to the whole lot, on appeal, she was estopped from asserting title to the unenclosed part.[87]

In 1914, Professor William Burdick devoted an unusual forty-nine pages of his casebook to the entirety of an 1867 case about whether a charitable trust created for abolitionist advocacy retained a valid charitable purpose after abolition.[88] In *Jackson v. Phillips*, Justice Gray of the Supreme Judicial Court of Massachusetts reviewed the history of the English slave trade and the history of slavery in Massachusetts, as well as the history of the law of charitable trusts. Toward the conclusion of that lengthy exposition, Gray stated plainly that "[n]either the immediate purpose of the testator—the moral education of the people; nor his ultimate object—to better the condition of the African race in this country; has been fully accomplished by the abolition of slavery."[89] Even without explicit commentary, Burdick's inclusion of this case demonstrates that authors' choices about the content of their property-law casebooks reflected a wide range of contemporary views about slavery.

After 1915, and for over a decade thereafter, it remained common for most casebooks to incorporate one or more cases involving or referring to disputes about enslaved people to illustrate property rules.[90] However, after significant

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85. 18 S.W. 901, 902 (Mo. 1892).

86. *Id.*

87. *Id.* at 904.

88. BURDICK, *supra* note 47, at 269.

89. Jackson v. Phillips, 96 Mass. (14 Allen) 539, 595 (1867).

90. *See* WARREN 1915, *supra* note 69, at 37-40 (incorporating Ford v. State, 37 A. 172 (Md. 1897)); *id.* at 134-43 (incorporating Chapin v. Freeland, 8 N.E. 128 (Mass. 1886)); *id.* at 145-48 (incorporating Bryan v. Weems, 29 Ala. 423 (1856)); *id.* at 196-97 (incorporating Hepburn v. Sewell, 5 H. & J. 211 (Md. 1821)); *id.* at 206-13 (incorporating McWillie v. Van Vacter, 35 Miss. 428 (1858)); *id.* at 427-28 (incorporating Nelson v. Iverson, 17 Ala. 216 (1850)); *id.* at

activity protesting segregation and Jim Crow in the 1930s and 40s, the number dropped. Furthermore, as casebook authors began to omit cases involving property in enslaved people, they also began to omit portions of decisions *citing* cases involving property in enslaved people.[91] Though most casebooks dropped all such cases, there were exceptions. University of Chicago Law School Dean Harry A. Bigelow, for example, included several slavery cases in multiple editions of his casebook through 1942.[92] After that, casebooks adopted a new norm of totally erasing the history of slavery from the study of property law.

437-38 (incorporating Harvey v. Epes, 53 Va. (12 Gratt.) 153 (1855)); *id.* at 443 (incorporating Adams v. Mizell, 11 Ga. 106 (1852)); *id.* at 545-47 (incorporating Ayer v. Ritter, 7 S.E. 53 (S.C. 1888)); *id.* at 728-34 (incorporating Melms v. Pabst Brewing Co., 79 N.W. 738 (Wis. 1899)); BIGELOW, *supra* note 69, at 635 (incorporating Salmon v. Matthews (1841) 8 Mees. & W. 827 (Eng.)); WARREN 1919, *supra* note 69, at 245 (incorporating Reeder v. Anderson's Adm'rs, 34 Ky. (4 Dana) 193 (1836)); *id.* at 338-40 (incorporating Hanna v. Phelps, 7 Ind. 21 (1855)); *id.* at 434-35 (incorporating Hooks v. Smith, 18 Ala. 338 (1850)); JOSEPH D. SULLIVAN, SELECTED CASES ON REAL PROPERTY 67-71 (1921) (incorporating Orndoff v. Turman, 29 Va. (2 Leigh) 200 (1830)); *id.* at 187-90 (incorporating Burdis v. Burdis, 30 S.E. 462 (Va. 1898)); *id.* at 246-49 (incorporating Meeks v. Olpherts, 100 U.S. 564 (1879)); *id.* at 578-82 (incorporating Blake v. Hawkins, 98 U.S. 315 (1878)); *id.* at 951-54 (incorporating Parish v. Murphree, 54 U.S. 92 (1851)); JOSEPH WARREN, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF CONVEYANCES AND RELATED SUBJECTS 728-36 (1922) (incorporating Newman v. Chapman, 22 Va. (2 Rand.) 93 (1823)); Tiedeman, *supra* note 69, at 444 (incorporating Potter v. Couch, 141 U.S. 296 (1891)); BIGELOW & JACOB, *supra* note 70, at 28-29 (incorporating O'Neal v. Baker, 47 N.C. (2 Jones) 168 (1855)); *id.* at 74-75 (incorporating Woodson v. Pearce, 33 Tenn. (5 Sneed) 416 (1858)); *id.* at 236-38 (incorporating *Weems*, 29 Ala. 423); *id.* at 306-08 (incorporating White v. Martin, 1 Port. 215 (Ala. 1834)); *id.* at 314-15 (incorporating McEwen v. Troost, 33 Tenn. (1 Sneed) 186 (1853)); RAY ANDREWS BROWN, CASES AND MATERIALS ON THE LAW OF REAL PROPERTY 396-401 (1941) (incorporating Miller v. Fleming, 18 D.C. (7 Mackey) 139 (1889)); *id.* at 547-50 (incorporating Koehler v. Rowland, 205 S.W. 217 (Mo. 1918); AIGLER 1942, *supra* note 42, at 380 n.1 (citing Hodge v. Blanton, 38 Tenn. 560 (1858)); BIGELOW & ECKHARDT, *supra* note 70, at 35-37 (incorporating Barwick v. Barwick, 33 N.C. (11 Ired.) 80 (1850)); *id.* at 128-30 (incorporating *Woodson*, 33 Tenn. (5 Sneed) 416); *id.* at 260-63 (incorporating *Weems*, 29 Ala. 423); *id.* at 264-68 (incorporating Gatlin v. Vaut, 91 S.W. 38 (Indian Terr. Cir. 1905)); *id.* at 342-43 (incorporating *White*, 1 Port. 215); *cf.* FINCH 1919, *supra* note 69, at 489-98 (incorporating Cole v. Lake Co., 54 N.H. 242 (1874)); 1 WALSH 1922, *supra* note 44, at 243-46 (incorporating 2 WILLIAM BLACKSTONE, COMMENTARIES *48, *53-59).

91. *See* Park, *supra* note 6, at 1998.

92. *See* BIGELOW, *supra* note 69, at 635 (incorporating *Salmon*, 8 Mees. & W. 827 (Eng.)); BIGELOW & JACOB, *supra* note 70, at 28, 29, 74-76, 77, 231-33, 235-36, 306-09, 314 (incorporating *O'Neal*, 47 N.C. (2 Jones) 168; *Woodson*, 33 Tenn. (5 Sneed) 416; *Barwick*, 33 N.C. (11 Ired.) 80; Beadle v. Hunter & Garrett, 34 S.C.L. (3 Strob.) 331 (1848); *Weems*, 29 Ala. 423; *White*, 1 Port. 215; *Troost*, 33 Tenn. (1 Sneed) 186); BIGELOW & ECKHARDT, *supra* note 70, at 35, 36, 128, 129, 260-67, 342, 343 (incorporating *Barwick*, 33 N.C. (11 Ired.) 80; *Woodson*, 33 Tenn. (5 Sneed) 416; *Weems*, 29 Ala. 423; *White*, 1 Port. 215).

Around the same time that they phased out traces of slavery, however, many casebook authors began to incorporate cases that upheld the validity of racially restrictive covenants.[93] By this time, their incorporation indexed a delay in deeming this law important to the canon. After all, racially restrictive covenants appeared in the United States in the 1890s, and the U.S. Supreme Court upheld the validity of racial covenants in *Corrigan v. Buckley* in 1926.[94] In *Parmalee v. Morris*, a 1922 case that appeared in a 1933 casebook, the Michigan Supreme Court upheld a racial covenant, reciting the Redeemers' notion that civil rights were "special treatment."[95] Casebooks also delayed incorporating cases about racial zoning, which the Supreme Court had declared unconstitutional in 1917 in a decision that did not appear in casebooks until 1948.[96] That year, the Supreme Court finally invalidated racial covenants in *Shelley v. Kraemer*.[97] Though casebooks authors incorporated *Shelley* relatively quickly, they seemed to do so with thinly veiled reluctance. Aigler, for example, tucked a citation to *Shelley* into an unobtrusive footnote in 1951.[98] And Byron R. Bentley, who had previously included many cases validating racial covenants, failed to offer a substantive update of the law, merely omitting the overturned cases and citing *Shelley* without describing its holding in a hypothetical.[99]

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93. For example, *Los Angeles Investment Co. v. Gary*, 186 P. 596 (Cal. 1919), is included in BYRON R. BENTLEY, BUSINESS LAW OF REAL PROPERTY 265 (1933); and 2 EVERETT FRASER, CASES AND READINGS ON PROPERTY: INTRODUCTION TO REAL AND PERSONAL PROPERTY 59-63 (2d ed. 1941). *Koehler v. Rowland*, 205 S.W. 217 (Mo. 1918), is included in 1 HARRY A. BIGELOW & SHELDON TEFFT, CASES ON THE MATERIALS ON THE LAW OF PROPERTY 494 (2d ed. 1940); and BROWN, *supra* note 90, at 547-50. *Meade v. Dennistone*, 196 A. 330 (Md. 1938), is included in MYRES SMITH MCDOUGAL & DAVID HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING, AND DEVELOPMENT 168-74 (1948). In *Letteau v. Ellis*, 10 P.2d 496, 497 (Cal. Dist. Ct. App. 1932), *as reprinted in* WILLLIAM E. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 532-36 (1943), a California District Court of Appeals applied the doctrine of changed conditions to find that a racial covenant could no longer serve its original purpose.

94. 271 U.S. 323, 330 (1926); *see* Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 544 (2000).

95. "The issue involved in the instant case is a simple one, i.e., shall the law applicable to restrictions as to occupancy contained in deeds of real estate be enforced or shall one be absolved from the provisions of the law simply because he is a negro?" Parmalee v. Morris, 188 N.W. 330 (Mich. 1922), *as reprinted in* BENTLEY, *supra* note 93, at 264-65.

96. Meade v. Dennistone, 196 A. 330 (Md. 1938), *as reprinted in* MCDOUGAL & HABER, *supra* note 93, at 168-74.

97. 334 U.S. 1 (1948).

98. RALPH W. AIGLER, HARRY BIGELOW & RICHARD POWELL, CASES AND MATERIALS ON THE LAW OF PROPERTY 725 n.57 (1951).

99. *See* BYRON R. BENTLEY, REAL ESTATE LAW WITH CASES, TEXT, AND FORMS 241 (3d ed. 1955).

Though case law about racial zoning and racial covenants soon appeared more regularly, casebooks did not explain the historical antagonism to Black property rights that they illustrate. Indeed, both an executive committee and the Supreme Court proved willing to make the connection between the racialized landscape of property in the United States and the country's history of slavery before any property-law professors did. In 1968, President Johnson's National Advisory Committee on Civil Disorders released the Kerner Report, which began its account with the history of slavery and racist institutional development after abolition, and characterized the racial unrest in 1967 as "the culmination of 300 years of racial prejudice."[100] In 1968, in *Jones v. Alfred H. Mayer Co.*, the Justices also held 7-2 that racial discrimination in housing constituted "badges and incidents of slavery" that the Thirteenth Amendment had empowered Congress to eliminate.[101]

The first property-law casebook to articulate a connection between racial discrimination in housing and slavery did so obliquely. Donahue and his coauthors included *Jones* alongside *Johnson* and the sit-in cases in 1974. In 1978, Chused incorporated the first independent section on the history of slavery and the abolition movement, consisting of selections from *Dred Scott v. Sandford*, a discussion of limitations on Black mobility and citizenship during slavery, and the complicated legal issues involved in the transition to freedom.[102] A few others followed,[103] and in 1993, the first edition of Singer's casebook was published, including *Dred Scott* and a variety of historical and Critical Race Theory materials.[104] But in contrast to the history of conquest, property-law casebooks' initial reckonings with the history of slavery never led to new norms in content across casebooks. Many of the most widely used casebooks today do not mention slavery at all, or they mention it only in passing.[105]

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100. Nat'l Advisory Comm'n on Civ. Disorders, *Report of the National Advisory Commission on Civil Disorders*, NAT'L CRIM. JUST. REF. SERV. 19 (1968), http://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf [http://perma.cc/75NB-BTNG] ("The Kerner Report").

101. 392 U.S. 409, 441-43 (1968).

102. *See* CHUSED, *supra* note 55, at 634-69.

103. *See* SANDRA H. JOHNSON, PETER W. SALSICH, JR., THOMAS L. SHAFFER, MICHAEL BRAUNSTEIN & ALAN M. WEINBERGER, PROPERTY LAW: CASES, MATERIALS AND PROBLEMS 93 (1992); CURTIS J. BERGER & JOHN C. WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE 36-39, 1111-19 (4th ed. 1997); J. GORDON HYLTON, DAVID L. CALLIES, DANIEL R. MANDELKER & PAULA A. FRANZESE, PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 28-31 (1998).

104. SINGER, *supra* note 56, at 1289-1308.

105. ANDERSON & BOGART, *supra* note 59; JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH (4th ed. 2018); *see also* Park, *supra* note 6, at 1998 (providing a descriptive overview).

Both property-law scholarship and casebooks amply illustrate conspicuous avoidance of the history and legacy of American chattel slavery alongside awkward, marginal mentions of the word. Analyzing the twenty-five most cited articles on the law of real property published between 1990 and 2015 reveals that only two address the history of slavery (or conquest) substantially.[106] Eight articles mention the word "slavery" in footnotes, in passing, or reference the abstract condition of enslavement rather than the history of American chattel slavery.[107] Similarly, the current edition of Dukeminier's leading casebook mentions the word "slavery" just twice—first, in a footnote in reference to an English judge who opposed slavery in England. Second, when discussing John Locke's identification of an inherent right to property in one's person, the authors write that "[s]lavery, obviously, was in opposition to that proposition, but slavery has been abolished. So, can we now say, without qualification, that you have property in yourself?"[108]

Another example illustrates how unexpected the contours of the invisibility of history can be. Like all property-law casebooks and Bar examiners, Dukeminier's casebook uses the terms "Whiteacre" and "Blackacre" as legal kadigans for

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106. One additional article mentions conquest in a footnote. *See* Park, *supra* note 11 (manuscript at 2) (discussing a list compiled by Professor Ted Sichelman for the New Private Law group at Harvard Law School).

107. Robert Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1321 (1993) (using "slavery" and "Stalin's dispossession of Ukrainian kulaks" as counterexamples to a theory of land distribution); *id.* at 1349 n.161 (contrasting slavery with the article's analysis of land distribution); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1275 (1996) (citing a town ordinance that prohibited renting "any Tenement to a Slave"); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001) (using the phrase "slavish devotion"); Merrill & Smith, *supra*, at 362 n.20 (noting Adam Smith's theory of slavery and economic incentives); Merrill & Smith, *supra*, at 378 nn.83-84 (citing to a contract-law theory of slavery); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 805 n.229 (1996) (comparing chattel slavery with "contractual" slavery); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folktales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 141 (1998) ("Until the later nineteenth century, our ideas of the correct ordering of the family relegated married women (along with slaves) to propertilessness."); Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 *passim* (1996) (mentioning slavery several times in passing or in footnotes to reinforce or illustrate arguments); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1162-63 (1993) (offering "slavery" as an example of "a using so vicious that the Constitution bars it even in private relations"); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1447-48 (1993) (pointing to a Kentucky constitutional provision enshrining slavery as an example of property law adapting to social change); Sax, *supra*, at 1448 n.70, 1451 n.85 (noting the continuing respect for slave owners' property rights after emancipation).

108. JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 167 (9th ed. 2018).

a hypothetical estate. Uniquely, however, it also speculates about how these terms became traditional. After noting, "just why no one knows for sure," it offers the Oxford English Dictionary's suggestion that it was traditional to denote lands growing different crops by color ("peas and beans are black, corn and potatoes are white"), and the possibility of lands receiving rents ("black rents are payable in produce, white rents in silver").[109] My own search found that the terms, infrequent but present in English legal treatises,[110] also constituted the title of a proslavery novel that appeared in 1856, the same year the Court decided *Dred Scott*, from a prominent Confederate press. William Burwell, the author of *White Acre vs. Black Acre*,[111] was the son of a Virginia politician by the same name who served as private secretary to Thomas Jefferson, and was a representative in the Virginia House of Delegates and in the U.S. House of Representatives; Burwell enslaved nearly 100 people.[112] The younger Burwell was also a slaveowner who served in the Virginia House of Delegates, and his daughter Letitia followed him in writing books that vigorously defended slavery and "the Lost Cause."[113] In Burwell's allegorical novel, which formed part of the literary response to Harriet Beecher Stowe's antislavery classic *Uncle Tom's Cabin*,[114] "White Acre" was an incompetent northern farm and "Black Acre," a southern plantation labored upon by loyal, hardworking slaves. It seems likely that the deployment of these terms by a member of a high-profile political family to defend slavery so publicly at this turbulent time might have had some influence on their popular connotations and meaning, or at least as much as obscure English planting terminology.

The two frequently cited scholars who did substantially discuss slavery and conquest in relation to property law both observed that these histories, properly

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109. *Id.* at 101.

110. *See, e.g.*, EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLANDE, OR, A COMMENTARIE UPON LITTLETON 52 (London, 2d ed. 1628); FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 89 (London, 5th ed. 1788). For an example of historical use of the Blackacre and Whiteacre terminology, see 1 SIR THOMAS EDLYNE TOMLINS, THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE OF THE BRITISH LAW 441 (London, 3d ed. 1820).

111. WILLIAM MACCREARY BURWELL, WHITE ACRE VS. BLACK ACRE (Richmond, J.W. Randolph 1856).

112. 1830 U.S. Federal Census for Franklin County, Virginia, at 19-20 (indicating that William A. Burwell claimed ownership of 96 enslaved people).

113. *See* LETITIA BURWELL, A GIRL'S LIFE IN VIRGINIA BEFORE THE WAR (New York, Frederick A. Stokes Co. 1895); *see also* STEPHANIE JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH 201-02 (2019) (discussing Letitia Burwell's belief that "[s]lavery benefited the enslaved").

114. HARRIET BEECHER STOWE, UNCLE TOM'S CABIN: OR, LIFE AMONG THE LOWLY (Ann Douglas ed., Penguin Books 1981) (1852).

taken up, would require rethinking many fundamental presuppositions of the field. Singer, for example, analyzed Native nations' property rights through Federal Indian law decisions, including *Johnson*, to bluntly assert that "both property rights and political power in the United States are associated with a system of racial caste."[115] Similarly, Professor Cheryl I. Harris wrote that "[t]he legal legacy of slavery and of the seizure of land from Native American peoples is not merely a regime of property law that is (mis)informed by racist and ethnocentric themes."[116] Rather, out of "the parallel systems of domination of Black and Native American people . . . were created racially contingent forms of property and property rights."[117] Parts II-IV turn to specific property-law topics to show how these broad insights translate into new perspectives on specific structures, practices, and institutions of property law.

II. DISCOVERY AND THE RACIAL HIERARCHY OF COMMERCIAL EMPIRE

Today, the Discovery Doctrine is taught as the law of finders—the rule that the first to find a thing may keep it.[118] Though *Johnson v. M'Intosh* appears in nearly every casebook today, it is not always used to teach Discovery, perhaps because it is not possible to draw this abstract rule from the case without acknowledging or treating as unremarkable the racial hierarchy on which it is based. In *Johnson*, Chief Justice Marshall explicitly adopted the Discovery Doctrine from his understanding of the first-in-time rule that ordered relations between European nations vying for domination outside of Europe during the so-called "Age of Discovery." "On the discovery of this immense continent," he wrote, "the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire."[119] From this de facto account of Europeans' agreement to observe the principle of first-in-time between themselves as they sought to expand their empires, Marshall extracted a rule of racial hierarchy to apply to the facts in *Johnson*. He thereby resolved a dispute over land between parties who traced their titles from competing sources—the Native title held by tribal nations and the title by conquest held by the United States—by

115. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 5 (1991).

116. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1724 (1993).

117. *Id.* at 1714.

118. In property-law classes today, a case involving rights to a baseball thrown to the crowd is most often used to teach an abstract version of this rule. *See* Popov v. Hayashi, No. 400545, 2002 WL 31833731, at *4 (Cal. Super. Ct. Dec. 18, 2002).

119. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572 (1823).

elevating U.S. title over Native title, and clearly establishing conquest as the basis of U.S. sovereignty and property.

This Part explores the international legal history of conquest that Chief Justice Marshall invoked as precedent in order to examine Marshall's innovative articulation of the Discovery Rule for U.S. law.[120] The theoretical and historical continuity of Marshall's rule with older traditions places *Johnson* squarely within a legal tradition that guided a broader European racial project of wealth creation through conquest and enslavement. Yet Marshall's history of European discovery obscured the issue of slavery and isolated the question of territorial sovereignty. Further, with respect to sovereignty, Marshall went beyond older traditions to formally recognize racial hierarchy as an explicit legal principle of U.S. sovereignty and jurisdiction. This hierarchy allowed Marshall to map out the parameters of the United States's legal authority, and specifically, its power to regulate a land market and make land a source of unprecedented commercial value. That legal authority historically constituted the source of powers to regulate settlers' occupation or actual possession of lands in America, whose historical importance Marshall emphasizes in his rule and which the next Parts further discuss. More immediately, *Johnson* delineated the legal relations between Native nations, private citizens, and the United States to clarify the baseline according to which expropriation or transactional activity for lands could proceed.

As a preliminary matter, it is important to note that simply reading the decision places the Discovery Doctrine in view of suppressed histories of racial violence, since Chief Justice Marshall explicitly recounts European conquests in America. However, studying the doctrine within the broader legal context of "discovery" illuminates the ways that Marshall's account is reductive, tendentious, and inventive.[121] Among other distortions, the decision artificially separates the history of slavery from that of conquest: the transatlantic slave trade,

120. Several casebooks already offer useful historical context for the decision (e.g., the factual background that produced the dispute) or the immediate legal context of the decision (e.g., the Trade and Intercourse Acts). *See, e.g.*, JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO PENALVER, PROPERTY LAW, RULES, POLICIES, AND PRACTICES 96-101 (1993). However, neither the broader legal context I present here nor the discussion of the case's ramifications for the production of commercial value through racial hierarchy and conquest appear in any casebooks.

121. I am noting that Chief Justice Marshall made contributions to the Discovery Doctrine—obscuring its relation to enslavement and making its racial hierarchy an explicit principle of the land market—that are distinct from the liberties he took in making the decision turn on the Discovery Rule in the first place, which other scholars have discussed. *See, e.g.*, LINDSAY ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 45-75 (2005) (arguing that the Court in *Johnson* endorsed a view of the Discovery Doctrine that resulted in devastating effects on Indigenous peoples and their lands); *see also* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV.

too, emerged from the history of legal reasoning he describes. During the period of the Crusades, building on the Catholic Church's notion that it had worldwide papal jurisdiction and the duty to build a universal Christian Commonwealth, canon lawyers developed the idea that holy war waged by Christians against infidels was "just war."[122] In 1436, ongoing Portuguese and Spanish raids of islands off the Iberian coast prompted Pope Eugenius IV to issue the *Romanus Pontifex*, a papal bull that referred to the savage ways of infidel natives to affirm Portuguese claims that their conquests were on behalf of Christianity. Pope Nicholas V repeated these arguments in the *Dum Diversas* of 1452 and another *Romanus Pontifex* in 1454, to authorize Portugal's ongoing entry into West Africa to seize and enslave people.[123] These activities launched the transatlantic trade, which the English joined after establishing colonies in mainland America and the Caribbean in the seventeenth century. In *Johnson*, however, Marshall's discussion of discovery is confined to the subject of sovereignty and property in land, while in *The Antelope*, two years later, he obliquely referenced this longer history of enslavement during conquest by identifying the theory of just war as the positive-law origin of the transatlantic slave trade.[124] Although it is worth noting that most African enslavement did not result from captives taken in war, the extensive enslavement of Native people during the colonial period—another part of the history of conquest omitted from Marshall's account of conquest here—generally did.[125]

627, 633-39 (2006) (detailing scholars' disagreement with Chief Justice Marshall's application of the Discovery Doctrine in *Johnson*).

122. ALLAN GREER, PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES AND LANDS IN EARLY MODERN NORTH AMERICA 196 (2018). In the thirteenth century, Pope Innocent IV focused on Christians' legal authority to dispossess non-Christians' *dominium*. *See* ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACEY LINDBERG, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 9 (2010); ROBERT A. WILLIAMS JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 13-18, 24, 28-32 (1990); ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C.1500-C.1800, at 8, 24, 126 (1995); Brian Slattery, *Paper Empires: The Legal Dimensions of French and English Ventures in North America*, *in* DESPOTIC DOMINION: PROPERTY RIGHTS IN BRITISH SETTLER SOCIETIES 50, 54-56 (John McLaren, A.R. Buck & Nancy E. Wright eds., 2003).

123. *See* WILLIAMS, *supra* note 122, at 71; MILLER ET AL., *supra* note 122, at 11; HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE: 1440-1870, at 64-65 (1997).

124. *See* The Antelope, 23 U.S. (10 Wheat.) 66, 116-23 (1825).

125. *See* ALAN GALLAY, THE INDIAN SLAVE TRADE: THE RISE OF THE ENGLISH EMPIRE IN THE AMERICAN SOUTH, 1670-1717, at 63-67 (2002); MARGARET ELLEN NEWELL, BRETHREN BY NATURE: NEW ENGLAND INDIANS, COLONISTS, AND THE ORIGINS OF AMERICAN SLAVERY 1-16 (2015).

Chief Justice Marshall's account thereby limited the discussion in *Johnson* not only to the United States's relationship with tribal nations, but even more specifically, to the question of territorial sovereignty. It further simplified the history that provides legal authority for the decision by broadly using the term "discovery" to denote what historically comprised a broad set of evolving European rationales for conquest during the so-called "Age of Discovery" in the early modern period.[126] The principle of noninterference that produces the first-in-time rule between European sovereigns can be traced back to principles contained in the papal bulls.[127] The blanket use of the term "discovery" for this centuries-long tradition, however, obscures an important shift in the underlying legal authority for conquest from the era of these bulls, when the source of legal edicts was the Church, to broader customary international law. In the sixteenth century, Francisco de Vitoria and the Spanish Scholastics introduced a conception of a universal, European-identified *ius gentium*, or law of nations, that facilitated this shift. Historically, this new order of customary international law, which drew in what Professors Lauren Benton and Benjamin Straumann have called a "scattershot" and inclusive manner from a bundle of Roman law principles,[128] produced opportunities for England and France, which had no papal grants, to make claims of conquest at all.[129] Further, the theoretical contours of this order, to which Marshall's decision explicitly refers, illuminates how much he drew from and altered it. Like the Spanish Scholastics, Marshall conceived of empire as a commercial realm based on a universal and sacrosanct right of property. However, he doctrinally captured a practice of claims-making developed by the English,

126. In a recent article, Professor Douglas Lind describes four discrete Discovery Doctrines: 1) the medieval papal theories captured in the papal bulls above described; 2) the "natural law right of discovery" under the law of nations elaborated by Vitoria and the Scholastics that I describe in the next paragraph; 3) Marshall's articulation of the doctrine for United States law (the focus of this section); and 4) the British theory of *terra nullius* that underpinned the conquest of Australia. *See* Douglas Lind, *Doctrines of Discovery*, 13 WASH. U. JURIS. REV. 1, 8-9 (2020).

127. Perhaps most famously, Pope Alexander VI's 1493 *Inter Caetera II* drew a boundary between Spain and Portugal's zones of "discovery," delineating their respective "spheres of influence" with which the other was not to interfere; bilateral treaties between the two countries, such as the Treaty of Tordesillas, subsequently modified this boundary line. *See* PAGDEN, *supra* note 122, at 31-33, 47; Slattery, *supra* note 122, at 55; Lauren Benton & Benjamin Straumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 28 LAW & HIST. REV. 1, 9, 19 (2010).

128. Benton & Straumann, *supra* note 127, at 29.

129. *See* Slattery, *supra* note 122, at 56-71 (describing the legal arguments France and England developed to challenge Spain and Portugal's monopoly claims on conquest and the authority of the papal bulls); *see also* PAGDEN, *supra* note 122, at 76-80 (explaining that the British and French turned instead to theories of title by *possession* and *labor*—occupying and cultivating *res nullius*).

French, Swedish, and Dutch by incorporating the requirement of possession into the rule, and he explicitly articulated the racial hierarchy of conquest—which theories of the law of nations had left implicit—as the basis of trade, or transactions for land.[130]

Unlike earlier canon lawyers' theories of conquest that excluded Native people from the realm of humanity and law,[131] the Spanish Scholastics' model was formally inclusive: Vitoria, for example, argued that Indians had reason and natural-law rights of *dominium*.[132] These rights were imagined to be "universal" in a commercial world where Vitoria also affirmed that Spaniards had rights to "travel in the lands in question."[133] These "universal" individual rights and the powerful conception of private *dominium* they elaborated drew non-Christian, non-Europeans into an emerging transactional global order organized around a sacrosanct right to private property.[134] Vitoria's insistence that Spaniards had rights "to lawfully trade among the barbarians"[135] must be understood in the context of a new vision of an "empire of private rights"[136]—his understanding, that is, of commerce as the principal terrain of conquest. When the Scholastics acknowledged rights in Native peoples, as Professor Martti Koskenniemi has illuminated, they did so to expand the global trade network through conquest, which included questions about the rights of Indigenous peoples as well as about "just price," usury, and emerging forms of credit-based financing.[137] Acknowledging rights in Native people in this way did not disrupt the hierarchies of conquest, since none of these theorists, nor the sovereigns who invoked them, extended any opportunity to non-Christian, non-Europeans to participate in determining the meaning, scope, or enforcement of these rights. Further, the right to trade in this global arena, Vitoria warned, meant that "the natives may

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130. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590-95 (1823).

131. *See, e.g.*, WILLIAMS, *supra* note 122, at 86-88 (explaining how the European "vision of Indian normative divergence" undergirding the Laws of Burgos "mandated the diminution" of Native rights under natural law).

132. *Id.* at 97-108; ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 18 (2005).

133. WILLIAMS, *supra* note 122, at 101 (quoting FRANCISCI DE VITORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 151 (Ernest Nys ed., John Pawley Bate trans., Carnegie Inst. Wash. 1917) (1557)).

134. Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1, 16-17 (2011).

135. *Id.* at 26 (quoting Francisco de Vitoria, *On the American Indians*, *in* FRANCISCO DE VITORIA: POLITICAL WRITINGS 231, 279-80 (Anthony Pagden & Jeremy Lawrance eds., 1991)).

136. *Id.* at 28.

137. *Id.* at 20-25.

not prevent [Europeans' entry and traffic]."[138] Indeed, if they sought to block trade, Europeans would be justified in waging "just war" against them — making the theory of "just war" an enforcement mechanism for European commercial rights.[139]

Following an understanding of rights highly influenced by Vitoria (conveyed to the English-speaking public through George Peckham's "True Reporte"), the English pursued their "rights to trade" and to be accepted in this traffic by Native peoples in America under this law of nations.[140] In the absence of bulls authorizing their conquest, Holland, Sweden, France, and England evolved customary practices of claims-making that included rites upon their arrival in non-Christian lands,[141] but that also increasingly emphasized their possession, or actual occupation of the lands.[142] Benton and Straumann observe that this was a practical evolution: "possession constituted a claim to a thing that could easily be evaluated" on a *relative* basis, making the question not "who had absolute title," but rather, "who of the two contenders had the *better* claim." Further, "[i]nquiring about possession did not involve inquiring about the rightfulness of acquisition."[143] This practice of looking to possession referenced a consequence, rather than a principle, of the Scholastics' theories, but proved so essential to the British

138. ANGHIE, *supra* note 132, at 20 (quoting FRANCISCI DE VITORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 151 (Ernest Nys ed., John Pawley Bate trans., Carnegie Inst. Wash. 1917) (1557)); Koskenniemi, *supra* note 134, at 26.

139. Koskenniemi, *supra* note 134, at 28-29; WILLIAMS, *supra* note 122, at 107.

140. WILLIAMS, *supra* note 122, at 166-69; *see also* MILLER ET AL., *supra* note 122, at 17-19 (explaining England's compliance with "the international law of Discovery" as a means to strengthen its claims in foreign lands).

141. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 15-21 (2005); *see also* MILLER ET AL., *supra* note 122, at 20-21 (describing how European countries, including England and France, "claimed lands by hanging and burying plates and coins, and painting signs and planting their crosses and flags in the soil recognized"); PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492-1640, at 69-73, 101-02 (1995) (describing rituals followed by Spain and Portugal in making claims to the New World).

142. *See* MILLER ET AL., *supra* note 122, at 18-19 (describing how England and France added to the Discovery Doctrine "the element of actual occupancy and possession as a requirement to establish European claims to title by Discovery and they applied this new element in their dealings with Spain and Portugal"); *see also* WILLIAMS, *supra* note 122, at 136-38 (describing England's use of Ireland as a practice ground for its theory of colonization); HANS S. PAWLISCH, SIR JOHN DAVIES AND THE CONQUEST OF IRELAND: A STUDY IN LEGAL IMPERIALISM 34 (1985) (examining the English government's use of judge-made law to consolidate its hold over Ireland in the early seventeenth century) .

143. Benton & Straumann, *supra* note 127, at 30.

conquest of America, as this Article discusses at greater length below,[144] that some two centuries later, Chief Justice Marshall made possession a key element of *Johnson*'s rule of discovery: "Discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments . . . [and] might be consummated by *possession*."[145] In retroactively incorporating this historical practice into his rule, Marshall found that "discovery" claims established by possession had passed to the United States through treaties, purchases, and sovereign chains of title from Britain, Spain, and France.

Similarly, Chief Justice Marshall also incorporated the historical fact of the racial dimensions of European conquest into the doctrinal rule. In a twist upon the Scholastics' universalism, that is, he explicitly subordinated Native title to "absolute, ultimate" sovereign title of the United States.[146] While he did importantly affirm Native nations' "full sovereignty" and original possession of land in America,[147] he invoked "discovery"—the law of conquest—to declare a hierarchy that empowered the United States to define the parameters of Native sovereignty—an ordering that Vitoria had left implicit. Again, the facts of the case involved a pretense that the parties took title to the same land from different parties,[148] and the framework of competing titles facilitated Marshall's clear elevation of U.S. sovereignty by conquest, the source of M'Intosh's claim, above that of the Piankeshaw and Illinois, from whose title Johnson's purchase derived. Critically, this pronouncement of superior jurisdiction specifically delineated the order for trade or purchases of interests in land. Though superior, he argued, U.S. title remained "subject . . . to the Indian title of occupancy,"[149] and the United States had "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[150] In Marshall's schema, only the federal government—and neither private entities nor states—could purchase land from Native nations. Furthermore, the government only had the right to terminate

144. *See infra* Part IV.

145. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

146. *Id.* at 592.

147. *Id.* at 545.

148. The land claims did not actually conflict in this case. The parties colluded in an attempt to produce an answer on the legal question of valid chains of title. *See* ROBERTSON, *supra* note 121, at 45-75.

149. *Johnson*, 21 U.S. (8 Wheat.) at 592.

150. *Id.* at 587.

Native title in two ways—echoing the Scholastics—through consensual trade or purchase, or by just war.[151]

In making the hierarchy of sovereignty dictated by conquest explicit, Chief Justice Marshall also overtly justified this hierarchy with a theory of European racial superiority, writing, for example, that "the character and religion of [America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."[152] If *Johnson*'s first-in-time rule organized the agreement between European nations to engage in conquest, then the decision also clarified that the operative element of the agreement was the racial hierarchy that gave the mission its impetus: without that distinction, Europeans would not have been able to deny the first-in-time entitlements of others.[153] This reasoning does not render the first-in-time rule meaningless. Rather, it highlights the important aspects of the legal world that conquest engendered—a world of property and sovereignty "acquired and maintained by force,"[154] where laws channeled racial violence through the ground rules of trade.[155]

Johnson's rule continues to have many practical effects and consequences. These effects are better understood today in the field of Federal Indian law than in property law, and with respect to lands held under Native *dominium* or that

151. Justice Marshall later clarified such war had to be defensive war. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546, 579-80 (1832); *see also* Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALBANY GOV'T L. REV. 1, 31 (2017) (glossing *Worchester*); Singer, *supra* note 22, at 773 (same). Similar propositions were elsewhere enshrined into the law. *See* NORTHWEST ORDINANCE OF 1787, *reprinted in* 1 UNITED STATES CODE, at LV-LVII (Office of the Law Revision Counsel of the House of Representatives ed., 2006); CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 30-35 (Larry Long & Clay Smith eds., 4th ed. 2008) (describing the Trade and Intercourse Acts period of 1789 to 1887 as "faithfully reflect[ing] Chief Justice Marshall's basic conception of Indian tribes as semiautonomous entities . . . [that] were separated territorially and politically from other American society" and describing how the federal government under these Acts retained exclusive right to terminate Native title).

152. *Johnson*, 21 U.S. (8 Wheat.) at 573.

153. The Court "reject[ed] the doctrine of first possession as giving rise to property rights . . . [and] adopted, instead, the international rule of the doctrine of discovery." Angela R. Riley, *The History of Native American Lands and the Supreme Court*, 38 J. SUP. CT. HIST. 369, 372 (2013).

154. *Johnson*, 21 U.S. (8 Wheat.) at 589.

155. Jesse Dukeminier calls Justice Marshall's racial justifications "discomfiting," and explains that "prior possession by aboriginal populations (which were sometimes called savage populations, or semi-civilized ones), was commonly thought not to matter." DUKEMINIER ET AL., *supra* note 108, at 12. This legal fiction was also discomfiting to Marshall, who, despite his own racism, called European discovery claims "extravagant" and "pompous." *Johnson*, 21 U.S. (8 Wheat.) at 590-91.

become the subject of active legal disputes between tribal nations and others, than those held by private parties or under public management in general. *Johnson*, which affirmed prohibitions on state and private purchases that Congress enacted through its Trade and Intercourse Acts as early as 1790,[156] prohibited states and private entities from terminating Native title in ways that remain the cause of action in many land disputes.[157] Its identification of the United States as the only entity to which Native nations could freely transfer title to land[158] created constraints that still apply to lands under Native *dominium* today, an area larger than that held by California.[159]

Singer has repeatedly underscored that "all land titles in the United States originate in Indian title."[160] Yet we have not fully understood the ramifications of that fact for *property law* as traditionally conceived—a subject that largely focuses on the state and local, as well as some federal, laws governing interests in land. As Singer has noted, the root of U.S. sovereignty in conquest raises serious questions about the legitimacy and morality of all title claims in the nation.[161] These title claims, as *Johnson* foregrounds, include claims to sovereign jurisdiction, beginning with the United States's own claim to sovereignty, and including all the subordinate jurisdictional claims that flow from it—all the jurisdictions that organize the operation of our laws in every field. Examining the broader legal historical context of Discovery, which *Johnson* itself highlights, also reveals what distinguishes the U.S. rule from other iterations. The legitimacy questions raised by Chief Justice Marshall's construction of U.S. jurisdiction as a legacy of European conquest are compounded by his decision to explicitly root jurisdiction in racial hierarchy, so that this hierarchy continues to underpin all jurisdiction in the country and determine the variable reach of national, tribal, state, and local laws.

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156. *Johnson*, 21 U.S. (8 Wheat.) at 604.

157. A 2005 Supreme Court decision by Justice Ginsburg dismissing tribal claims on the basis of the doctrine of laches placed substantial but not insuperable barriers on such claims. *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 217-18 (2005); *see also* Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 663 (1974) (litigating federal jurisdiction).

158. Singer has likened this restraint on alienation to a right of first refusal. Singer, *supra* note 151, at 30-33. The United States also later became the only entity with the power to reacquire lands for Native nations. *See* William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 417 (2016).

159. Reese, *supra* note 15, at 558.

160. Singer, *supra* note 151, at 9 (emphasis omitted).

161. Specifically, the extent to which "our land titles originate in the *dispossession* of first possessors . . . places subsequent titles in doubt" and may support demands for restoration and reparation. *Id.* at 9-10; *see* Singer, *supra* note 22, at 766 ("From a moral point of view, conquest puts all current land titles in doubt . . . .").

Here, I underscore that beyond establishing public-title claims in the United States, conquest also resulted in profound practical and systemic consequences for all *privately* held lands in the country. The import of private title to conquest was already suggested by both the Scholastics' focus on the commercial dimensions of conquest and the fact that *Johnson*'s principal question concerned *private* title to lands. Nonetheless, property-law casebooks and curricula do not emphasize the significant impact of *Johnson*'s Discovery Rule on commerce in the United States, and more specifically, its land market. In general, the field has astonishingly little explored the enterprise of creating private-property claims in the colonies that the Discovery Rule launched, or the unique ways that the English deployed law to do so. The following two Parts show how theories of labor and possession contributed to settlers' efforts, under the banner of Discovery, to produce property in land and human beings in the American colonies.

III. THE LABOR OF PROPERTY CREATION IN THEORY AND PRACTICE

In its abstract form, the labor theory of property identifies entitlement in the party that invests their labor to create the property's value.[162] The theory, which is based on the moral rationales of desert, efficiency, and the prevention of waste, therefore explicitly references the processes by which property is produced. Using the most famous iteration of this theory in John Locke's *Second Treatise* as a touchstone,[163] this Part examines the ways that colonists mobilized the labor theory and Locke's references to property creation and the land market in the colonies. While most casebooks briefly mention Locke, they neither describe nor connect Locke to colonists' invocation of the labor theory to assert claims to lands they deemed vacant or as going to "waste," though this likely constitutes the most significant elaboration of the labor theory in American history. Further, as I argue, Locke's theory appears to reference colonists' actual labors in expropriating resources and rendering them property. This history reveals the major legal innovations in property law that reshaped the foundations of the property system in the American colonies. It also underscores how law contributed to the processes of colonization and enslavement by racializing nonwhite peoples and introducing new institutions to facilitate the expropriations that creating property in land and human beings required.

Section III.A reviews the significant literature that contextualizes Locke's account of property creation in the *Second Treatise* within the histories of conquest

162. Typically, property-law courses teach the theory of labor and investment as a source of entitlement using the case *International News Service v. Associated Press*, 248 U.S. 215 (1918).

163. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, *in* TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

and slavery. This work, whose insights casebooks still largely omit, details Locke's active participation in the colonial project, and highlights that his iteration of the labor theory was just one articulation of widespread colonial ideas. It demonstrates that the labor theory both erases enslaved labor and elaborates racist evolutionary ideas about Native people; and further, on this basis, that it intrinsically links racial ideology with ideas about the value of land to argue that European improvements to the land justified their conquest. These powerful and lasting stereotypes, indeed, prompted Chief Justice Marshall, some two centuries later, to pronounce in *Johnson* that: "To leave [Native people] in possession of their country, was to leave the country a wilderness."[164]

This literature has rightly contested these colonial racial ideologies, and specifically the denigration of Native people and their land use. To add to their analysis of the *Second Treatise*'s ideology, here, I add that the activities Locke referenced also correlated to specific institutions and systems that colonists developed to produce private-property claims in the colonies. "Till[ing], [p]lant[ing]," and "inclos[ing],"[165] for example, constituted specific requirements that settlers had to fulfill under colonial "headright" laws, which granted them ownership of a specific number of acres if they occupied and cultivated that land for a term of years. Further, the ideological link between race and value that scholars have identified also indexes an actual practice of making *monetary* value dependent on white possession, as the English began to build markets in land and slaves where none existed before.

In Section III.B, I turn to the labor of property creation in the colonies that led colonists to introduce many of the core institutions of American property law today. Colonists invested significant *legal* labor in building new institutions and practices to create monetary value in land, in addition to the agricultural labor commonly recognized as a referent of the theory. The innovations that sprang up in colonial laws under the aegis of Discovery in the colonies gave its racial hierarchy practical and ideological substance. They included, for example, laws that made slavery racial, hereditary, and perpetual—producing property and race in a manner that exhibits how racialization both facilitated making property claims to people *and* justified the violence inherent in constructing that relationship. They also included the development of systems for organizing colonial land holdings against Native land claims, such as centralized title registries holding records of individual ownership claims, surveying or measuring lands into rectangular plots, and easy foreclosure. These novel laws, institutions, and practices, as I show, shaped American society as they changed the meaning of property and set its course toward our present.

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164. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823).

165. LOCKE, *supra* note 163, at 290-91.

A. The Labor Theory and Property Value

The labor theory is not merely an abstract story about creating property value, but a historical legal theory that played a major role in the creation of actual property and property value in colonial America. A significant literature has critiqued this theory's role in colonization, especially the ways that its various iterations associated white labor with property value and concomitantly discounted the value of nonwhite labor. This literature has also examined how colonists in fact justified their occupation of Native nations' lands by suggesting that they alone, or in superior ways, labored on the land. This Section first reviews how scholars have debunked these claims about Native people and Native forms of land tenure and unmasked the labor theory's racial ideology. To this account of ideological production, I then add a complementary account of property production: legal history, I argue, helps us to see that Locke's theory was also descriptively *accurate* with respect to colonists' property-making activities. The very practices that colonists ideologically portrayed as evolutionarily beyond Native peoples also, for example, constituted requirements under laws that recruited settlers to the colonies on the condition that they occupy and cultivate land. The link between European presence and value contained in the racial ideology of "improvement," too, finds a practical corollary in a land market where lands were worthless to colonists when they remained in the possession of tribal nations.

The scholarly interventions that initiated the reassessment of Locke's *Second Treatise* in light of Locke's role in the histories of conquest and enslavement only appeared—in an astonishing example of the persistence of erasure—three centuries after its publication,[166] despite the volume of commentaries the work has generated and the influence it has had.[167] As this scholarship highlights, Locke was an aide to the Earl of Shaftesbury, secretary to the Lord Proprietors of Carolina and the Council of Trade and Plantations, and a member of the Board of

166. *E.g.*, DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 118-21 (1966); James Farr, *"So Vile and Miserable an Estate": The Problem of Slavery in Locke's Political Thought*, 14 POL. THEORY 263, 265 (1986); Herman Lebovics, *The Uses of America in Locke's* Second Treatise of Government, 47 J. HIST. IDEAS 567, 578 (1986); JAMES TULLY, *Rediscovering America: The Two Treatises and Aboriginal Rights*, *in* AN APPROACH TO ANALYTICAL PHILOSOPHY: LOCKE IN CONTEXTS 137, 140 (Quentin Skinner ed. 1993); Barbara Arneil, *Trade, Plantations, and Property: John Locke and the Economic Defense of Colonialism*, 55 J. HIST. IDEAS 591, 607-09 (1994); Wayne Glausser, *Three Approaches to Locke and the Slave Trade*, 51 J. HIST. IDEAS 199, 211-12 (1990).

167. This influence extended to the Founders—especially Thomas Jefferson, who drew on the *Second Treatise* to draft the Declaration of Independence.

Trade, the part of the English government responsible for colonial administration.[168] He was an investor in the Company of Merchant Adventurers and the Royal Africa Company,[169] and wrote memoranda and policy recommendations on various colonies, settlement projects, and the institutions of government and property in America, including the *Fundamental Constitutions of Carolina*[170] and a 1698 reform proposal for Virginia.[171] These scholars have also underscored how Locke discounted and ignored the labor of African and Native peoples in the *Second Treatise*, which contains perhaps the most famous iteration of the labor theory: "Whatsoever then [one] removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*."[172]

The most profound erasure accomplished by Locke's selective application of the labor theory according to the racial hierarchy of Discovery may be the utter omission of enslaved labor from his account. Though the *Second Treatise* offers a paean to the way "a Man Tills, Plants, Improves, Cultivates [Land]," Locke never mentions the enslaved Africans who principally engaged in the agricultural labor of "tilling" and "planting" in America to produce colonial cash crops, including tobacco, rice, and cotton.[173] Perhaps referencing both contemporary arguments for enslaving Native people and also the theories of conquest that gave birth to the transatlantic slave trade, Locke does justify slavery on the basis of just war.[174] But his account of the labor of property creation contains no trace mentions of the labor of the people who were treated as property, whose forced importation to the Americas began in the early sixteenth century by Spain and Portugal to supplement the labor of enslaved Native peoples in the Caribbean, and later, the mainland.[175]

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168. TULLY, *supra* note 166, at 140.

169. *Id.*

170. BANNER, *supra* note 24, at 47; David Armitage, *John Locke, Carolina, and the* Two Treatises of Government, 32 POL. THEORY 602, 603 (2004).

171. Holly Brewer, *Slavery, Sovereignty, and "Inheritable Blood": Reconsidering John Locke and the Origins of American Slavery*, 122 AM. HIST. REV. 1038, 1061-66 (2017).

172. JOHN LOCKE, *supra* note 163, at 288.

173. *Id.* at 290.

174. *Id.* at 283-85; *see also* Brad Hinshelwood, *The Carolinian Context of John Locke's Theory of Slavery*, 41 POL. THEORY 562, 564 (2013) (discussing how Locke used the concept of just war); The Antelope, 23 U.S. (10 Wheat.) 66, 114 (1825) (justifying the slave trade). Holly Brewer has more recently argued that "Locke's support for slavery was weaker than his critics have implied." Brewer, *supra* note 171, at 1052.

175. THOMAS, *supra* note 123, at 92-113.

The English, French, and Dutch joined the African slave trade in the early seventeenth century.[176] The first record of English colonists' purchase of Africans was in Virginia in 1619.[177] In the 1630s, records of enslaved Africans appeared in Pennsylvania and Maryland, and Massachusetts constructed the slave ship that first brought people from Africa to Connecticut in 1637.[178] In the 1660s and through the 1680s, the number of enslaved persons in the colonies burgeoned as the Crown promoted African enslaved labor through its monopoly company[179] and colonists increasingly built their trade with Barbados.[180] In 1683, Colonel Nicholas Spencer, Secretary of Virginia, boasted that "Blacks can make [Tobacco] cheaper than Whites;"[181] between 1670 and 1698, the Black population increased from 2,000 to 5,000,[182] and by 1710, the number of enslaved Black people in the colony was estimated at "upwards 15,000."[183] In Professor Anthony Parent's words, "Virginia had become a slave society."[184]

By contrast, in keeping with Vitoria's inclusive model of conquest, Locke does acknowledge some fundamental rights to property in Native peoples in the *Second Treatise*. He argues, for example, that "the wild Indian," like all others, derives property rights from his labor in the hunter-gatherer context: if he harvests a nut or gives chase to a deer to kill it, he too is entitled to "the Fruit, or Venison."[185] However, Locke also acknowledges that his main purpose in the exposition is to describe rights in land, "the *chief matter of Property* being now not

176. *Id.* at 153-62.

177. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 20 (1978).

178. THOMAS, *supra* note 123, at 177. *See generally* WARREN, *supra* note 8 (discussing the importance of slavery in early New England society).

179. Perhaps motivated by a desire to preserve English servant labor for the home country, Charles II "'invite[d] all of his subjects to subscribe to a new joint stock,' the Royal African Company." ANTHONY S. PARENT, JR., FOUL MEANS: THE FORMATION OF A SLAVE SOCIETY IN VIRGINIA 1660-1740, at 60 (2003) (quoting an eighteenth-century collection).

180. *Id.* at 67.

181. *Id.* at 60 (quoting Letter from Lord Culpeper to the Committee for . . . Plantations (Sept. 20, 1683), *enclosed with* Letter from Secretary Spencer to the Committee for . . . Plantations (July 16, 1683) (received Sept. 28, 1683), *in* ENTRY BOOK OF LETTERS, COMMISSIONS, INSTRUCTIONS, CHARTERS, WARRANTS, PATENTS AND GRANTS RELATING TO VIRGINIA, AND ESPECIALLY TO THE PLANT CUTTING DISTURBANCES, THE FORFEITURE OF LORD CULPEPER'S PATENT AND THE APPOINTMENT AS GOVERNOR OF LORD HOWARD OF EFFINGHAM 138 (1681-1685), *microformed in* Public Record Office Class C.O. 5/1356, Reel 28 (Va. Colonial Rec. Project)).

182. *Id.* at 74.

183. *Id.* at 79.

184. *Id.*

185. LOCKE, *supra* note 172, at 287, 289.

the Fruits of the Earth, and the Beasts that subsist on it, but the *Earth it self.*"[186] Property in land is analogous, he explains: "I think it is plain, that *Property* in that too is acquired as the former. *As much Land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property.* He by his Labour does, as it were, inclose it from the Common."[187]

Though land is analogous to other forms of property here, it also constitutes the threshold where the racial hierarchy of conquest and the evolutionary theory it spawned found a distinction. Locke's specific description of the labor of enclosure and property creation categorically excluded "the wild Indian," who, he wrote, "knows no Inclosure, and is still a tenant in common."[188] Scholars have trenchantly critiqued the racism and inaccuracy of this characterization of Native people's agricultural practices and traditions of land tenure. Professor Natsu Taylor Saito writes that Locke's evolutionary narrative was "simply counterfactual, and the settlers knew it."[189] Professor Stuart Banner and others have shown that the English notion that Native people left land to "lye waste and free" contradicted the numerous written observations colonists left describing the Native towns, villages, and "carefully cultivated" orderly crop systems they found up and down the Eastern Seaboard.[190] In Jamestown, John Smith reported that "[e]ach household knoweth their owne lands & gardens;"[191] and in 1709 in

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186. *Id.* at 290-91.

187. *Id.*

188. *Id.* at 287.

189. Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. ON RACIAL & ETHNIC JUST. 31, 52 (2015).

190. BANNER, *supra* note 24, at 19, 30; *see* Saito, *supra* note 189, at 52; KAREN ORDAHL KUPPERMAN, SETTLING WITH INDIANS: THE MEETINGS OF ENGLISH AND INDIAN CULTURES IN AMERICA, 1580-1640, at 81-84 (1980); SAILORS NARRATIVES OF VOYAGES ALONG THE NEW ENGLAND COAST, 1524-1624, at 19 (George Parker Winship ed., 1905); THOMAS HARIOT, A BRIEFE AND TRUE REPORT OF THE NEW FOUND LAND OF VIRGINIA 19-20 (London 1588); THE ENGLISH NEW ENGLAND VOYAGES, 1602-1608, at 88-89, 183-84 (David B. Quinn & Alison M. Quinn eds., 1983); JOHN SMITH, A TRUE RELATION OF SUCH OCCURRENCES AND ACCIDENTS OF NOATE AS HATH HAPNED IN VIRGINIA (London 1608); THE JAMESTOWN VOYAGES UNDER THE FIRST CHARTER, 1606-1609, at 173 (Philip L. Barbour ed., 1969); WILLIAM BRADFORD, OF PLYMOUTH PLANTATION, 1620-1647, at 85 (Samuel Eliot Morison ed., 1952) (1630-1650); Linda S. Cordell & Bruce D. Smith, *Indigenous Farmers*, *in* THE CAMBRIDGE HISTORY OF THE NATIVE PEOPLES OF THE AMERICAS 201, 201-66 (Bruce G. Trigger & Wilcomb E. Washburn eds., 1996); PETER THOMAS, IN THE MAELSTROM OF CHANGE: THE INDIAN TRADE AND CULTURAL PROCESS IN THE MIDDLE CONNECTICUT VALLEY 1635-1665, at 103-13 (1979).

191. John Smith, *A Map of Virginia*, *in* THE JAMESTOWN VOYAGES UNDER THE FIRST CHARTER, 1606-1609, *supra* note 190, at 355, 371; *accord* ALEXANDER WHITAKER, GOOD NEWS FROM VIRGINIA 26-27 (London 1613); Edward Winslow, *Good Newes from New England*, *in* CHRONICLES

North Carolina, John Lawson observed that Native groups "have no Fence to part one anothers Lots in their Corn-Fields; but every Man knows his own, and it scarce ever happens, that they rob one another of so much as an Ear of Corn."[192] Several scholars have highlighted that English property arrangements of the time were strikingly similar to many Native groups' practices, which allocated farming plots to families and maintained common resource areas for the community; the English, like some Native communities, also planted fields together and separated different families' rows by a narrow strip of grass.[193] While colonists imported fixed-field agriculture practices from England, as Peter Thomas notes, swidden systems, like those used by Native groups in the Connecticut River Valley and "throughout the world[,] have frequently produced equal, or even higher, returns than fields under continuous cultivation."[194]

These scholars rightly show that colonists, in many iterations of the labor theory, misrepresented Native people and their agricultural practices. For in suggesting that their possession diminished the value of lands, Locke merely echoed older, well-known colonial accounts that argued English occupation would improve the lands and increase their value for all of humanity. Puritan preacher Robert Gray, for example, proclaimed in 1609:

> [T]hese savages have no particular propriety in any part or parcel of that country, but only a general residency there, as wild beasts in the forest; for they range and wander up and down the country without any law or government, being led only by their own lusts and sensuality.[195]

OF THE PILGRIM FATHERS 361-62 (Boston, Alexander Young ed., 1844); WILLIAM PENN, A LETTER FROM WILLIAM PENN . . . TO THE COMMITTEE OF THE FREE SOCIETY OF TRADERS 6 (London, Andrew Sowle ed., 1683); JOHN LAWSON, A NEW VOYAGE TO CAROLINA 19 (London 1709); JOHN SMITH, A DESCRIPTION OF NEW ENGLAND 33-34 (London, Robert Clerke ed., 1616); WILLIAMS, *supra* note 122, at 211 (citing THE JAMESTOWN VOYAGES UNDER THE FIRST CHARTER, 1606-1609, *supra* note 190, at 371).

192. LAWSON, *supra* note 191, at 179.

193. *See* NANCY SHOEMAKER, A STRANGE LIKENESS: BECOMING RED AND WHITE IN EIGHTEENTH CENTURY NORTH AMERICA 13-34 (2004); R. DOUGLAS HURT, INDIAN AGRICULTURE IN AMERICA: PREHISTORY TO THE PRESENT 65-67 (1987); Anthony F.C. Wallace, *Political Organization and Land Tenure Among the Northeastern Indians, 1600-1830*, 13 SW. J. ANTHROPOLOGY 301-21 (1957); WILLIAM BARTRAM, TRAVELS THROUGH NORTH & SOUTH CAROLINA, GEORGIA, EAST & WEST FLORIDA 325 (Philadelphia 1791); John Bellers, *An Essay Toward the Improvement of Physick*, *in* JOHN BELLERS 1654-1725: QUAKER ECONOMIST AND SOCIAL REFORMER (A. Ruth Fry ed., 1935).

194. THOMAS, *supra* note 190, at 113.

195. WILLIAMS, *supra* note 122, at 211 (quoting ROBERT GRAY, A GOOD SPEED TO VIRGINIA [25-26] (London 1609)).

Similarly, in 1629, Massachusetts Bay founder John Winthrop wrote, "This savage people ruleth over many lands without title or property, for they enclose no ground."[196] William Penn called lands in America "waste or uncultivated Country."[197] Many scholars have observed that these justifications served to obscure different circumstances that the English exploited to claim that Native nations were not using land. In actuality, many English settled on the grounds of villages decimated by new European diseases, or claimed fields temporarily out of use due to Native communities' crop rotation or preservation of hunting grounds.[198]

In a range of arguments that blurred together or became interchangeable, colonists suggested that Native occupancy "did not involve an adequate amount of 'labor' to perfect a 'property' interest."[199] They argued that Native people were not using the lands, that their use was not sufficient to justify their claims, or that there were no people on the lands—the land was *vacuum domicilium*—to make a claim at all.[200] Linking racial ideology and racial presence to conceptions about the value of land justified dispossessing and displacing non-Christian non-Europeans, or carrying out the mandate of "discovery," with lasting effects. The rationales of desert, efficiency, and the prevention of waste associated with the labor theory today derive from these arguments that colonists were entitled to the land because of the value they gave it. This understanding of value, in turn, is therefore inseparable from the colonial ideas that Native and African peoples were, by nature, closer to beasts than humans.

At the same time, Locke's and other iterations of the labor theory also describe a reality of practices and systems that colonists used to create value in lands *for themselves*. Attending to these processes reveals the legal design that organized

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196. John Winthrop, *General Considerations for the Plantation in New England*, *in* 2 WINTHROP PAPERS, 1623-1630, at 120 (Mass. Hist. Soc'y ed., 1931).

197. WILLIAM PENN, A BRIEF ACCOUNT OF THE PROVINCE OF PENNSYLVANIA 1 (London 1686); *see also* JOHN COTTON, GOD'S PROMISE TO HIS PLANTATIONS 4 (London 1634) (asserting colonists' right to occupy "vacant place[s]").

198. *See* TULLY, *supra* note 166, at 138-39. As Banner notes, "[e]veryone knew that land could still be owned [in England] even if it was not being farmed, and indeed even if it was not being used or occupied at all." BANNER, *supra* note 24, at 33.

199. DUKEMINIER ET AL., *supra* note 108, at 16 (quoting Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 3 n.4 (1983)).

200. The preacher Robert Gray concluded therefore that Native people claimed no property: that "[t]here is not *meum* and *tuum* amongst them," and "if the whole land should be taken from them, there is not a man that can complain of any particular wrong done unto him." WILLIAMS, *supra* note 122, at 211 (quoting ROBERT GRAY, A GOOD SPEED TO VIRGINIA [26] (London 1609)).

and spurred this labor. As Chief Justice Marshall describes in *Johnson v. M'Intosh*, under Discovery, each European nation pursued property creation in the colonies differently,[201] and the English uniquely relied on settlement to take possession of lands. However, in the early period, English colonial administrators faced perennial problems in recruiting the numbers needed to actually occupy the lands and consummate their collective claims through possession under the Discovery Doctrine.[202] Across the Eastern Seaboard, colonies found it virtually impossible to recruit populations for their settlements because of the dauntingly dangerous nature of the venture[203] until they adopted some variation of the headright system.[204] Headright laws granted individuals "rights" to a certain number of acres (often fifty) in exchange for every person or "head" that they brought to the colony who would clear, cultivate, and defend that land over a term of years.[205] In other words, they promised private title to settlers to land that they occupied and "improved." The activities Locke enumerates—"tilling," "planting," and "[i]nclosure"—all specifically constituted homesteading requirements in headright laws, which helped engineer the waves of migration that "peopled North America" and caused the colonial population to burgeon in the late seventeenth and eighteenth centuries.[206]

For colonial governments and companies, headrights killed several birds with one stone: they built up the population of settlers, produced property held under private title as well as the colonial jurisdiction, and tended to expel Native

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201. Marshall specified that, according to the principle of noninterference, the ways that Europeans interacted with Native peoples to take possession of lands "were to be regulated by themselves." 21 U.S. (8 Wheat.) 543, 573 (1823).

202. "In the early period, settlement was the end desired, and to further this, lands were freely bestowed." AMELIA FORD, COLONIAL PRECEDENTS OF OUR NATIONAL LAND SYSTEM AS IT EXISTED IN 1800, at 95 (1910).

203. *See id.* at 81; BERNARD BAILYN, THE PEOPLING OF BRITISH NORTH AMERICA 81-83 (1986).

204. FORD, *supra* note 202, at 96-98.

205. In Virginia, settlers had to "build a house, plant one acre, and keep stock for one year," within three years, or risking forfeiting the land; in Massachusetts, settlers had to "tak[e] actual possession . . . build[] a house of certain size . . . and clear[] five to eight acres fit for mowing and tilling." *Id.* at 103.

206. The phrase "peopling North America" comes from BAILYN, *supra* note 203. *See also* BERNARD BAILYN, THE BARBAROUS YEARS: THE PEOPLING OF BRITISH NORTH AMERICA: THE CONFLICT OF CIVILIZATIONS, 1600-1675 (2012) (using the same phrase). Elsewhere, I have argued that the headright system, Native removal, and the forced migration of Africans should be understood as an early part of immigration-law history in America. *See* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1882-87 (2019). Here, I suggest it is part of the development of American property law and its famous, persistent homesteading principle.

nations from their lands. Dispossession and displacement were critical for converting the lands into property, while actual occupation, planting, and tilling had the effects of spreading disease and chasing away game.[207] As settlement made life more difficult for Native people, it became easier for private individuals and governments to purchase land from them: "A [N]ative population decimated by sickness and deprived of sources of food and other necessities had little bargaining power. The title of occupancy went for a pittance."[208] Moreover, colonies made grants of land to men "able to defend it . . . to secure protection without the expense of a standing army."[209] Military-aged men who were ready for combat and who had served in wars against Native nations received especially large grants.[210] Even before the Revolutionary War ended, at least three states adopted headright systems to help populate their backcountry, including Virginia and North Carolina, as well as Massachusetts, which offered settlers one hundred acres "on the sole condition of clearing sixteen acres in four years."[211] Later, the United States adopted the strategy of incentivizing settlement with promises of land, though at a price, to help it extinguish Native title in western territories with the famous Homestead Act of 1862.[212]

Throughout this long, mythologized history, the ideology of the labor theory—the idea that white people, through their occupation, brought improvements in the form of civilization to the continent—propelled and justified these invasions and expansion of the national territory. At the same time, as a matter of fact, lands and people in America acquired value for colonists—that is, they *became* property—when they came into the possession of whites. More bluntly, lands became a monetary equivalent upon Native removal from them, actual or projected,[213] just as human beings became a monetary-value equivalent, in this economy, upon their subjugation. They first acquired monetary value upon a

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207. *See, e.g.*, Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1154 (2000); WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 85-89, 100-107 (2003); Park, *supra* note 206, at 1891-97.

208. DUKEMINIER ET AL., *supra* note 108, at 18.

209. FORD, *supra* note 202, at 103-04.

210. *Id.*

211. *Id.* at 102.

212. Homestead Act of 1862, ch. 75, 12 Stat. 392; *see also* Kades, *supra* note 207, at 1072, 1172-73 (explaining how the U.S. government used the Homestead Act to strategically incentivize settlement in particular areas); Paul Wallace Gates, *The Homestead Law in an Incongruous Land System*, 41 AM. HIST. REV. 652, 653 (1936) (attributing rapid Western settlement to the Homestead Act).

213. Preemption rights had monetary value *because of* future projections about removal. *See infra* Section III.B.

transfer of possession that entailed expropriation, which brought them into markets. The next Section explores how property law created those markets—surely a question of interest to the field—or in other words, how colonists evolved new property laws, practices, and institutions to create the powerful, endogenously grown American property-law system of today.

B. Producing Property, Property Law, and Property Institutions in the Colonies

Colonists' creation of new markets in lands and enslaved persons, where none existed before, was the main enterprise of the context in which the labor theory operated, and the project for which it was mobilized. This Section turns to additional examples of the laws, practices, and institutions that colonists cultivated to treat human beings and expropriated land as new forms of property. For one, colonists developed laws that produced race as a key element of property, as they made the status of enslavement racial, hereditary, and perpetual, and disengaged it from the mission of conversion. They also created what Professor Claire Priest has called "ground-level" legal institutions[214] that facilitated the expropriation of land from Native people and its consolidation in the colonial community as property. These institutions, which constitute the basic elements of the American property system still, include the rectangular survey, through which colonists measured out enclosures of land as commodities for the market, the centralized registry, through which they organized their collective interests in land, and easy foreclosure, which upended the ancient English distinction between real and chattel property to facilitate land dispossession, and thereby make land an opening to a stream of credit.

Significantly, these innovations in property created a social world riven by racial violence as they fostered the rapid growth of colonial markets by producing novel commodity forms in enslaved people and expropriated land. Launched by the racial hierarchy of conquest, this hierarchy also informed the practices of racial violence that grew these colonial markets, and the racial ideologies that colonists elaborated to justify this use of violence. The ways that racial ideologies concerning Native and African people functioned in the colonies is too complex a phenomenon to describe comprehensively here.[215] However, one of the great-

214. PRIEST, *supra* note 13, at 5-7.

215. *See, e.g.*, WINTHROP D. JORDAN, THE WHITE MAN'S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES 14-15 (1974) (describing differences and similarities in Englishmen's racial perceptions of Africans and Native Americans); *see also infra* note 218 and accompanying text (discussing how law entrenched the relationship between racial ideologies and subjugation).

est factors in its development was the legal transformation of African enslavement into an emphatically racial, hereditary, and perpetual "predicament"[216] disengaged from the Christian mission of discovery. The American institution of African chattel slavery would have a profound effect on the world that cultivated it. The anti-Blackness it entrenched came to provide a blueprint for the racialization of other nonwhites, both who lived in the colonies, and who arrived in subsequent waves of migration long after. Further, in developments beyond the scope of this Article, it would eventually spur a reorganization of property law to circumvent Black property rights and shape the land market after abolition.

All the colonies developed some dependence on the labor of enslaved Africans, especially in the South, and passed laws to evolve this form of subjugation. Notwithstanding original justifications for the slave trade through theories of Christian just war, in 1667, for example, Virginia passed a law providing that baptism could not affect the bondage of Black or Native people, ensuring that "the skin color and not the heathenism of their black and Indian slaves [] 'justified' their subjugation."[217] Other laws ensured the racial, hereditary, and perpetual nature of enslavement in America by tying it to kinship and segregation in ways that, as Professor Jennifer L. Morgan writes, "legally complete[d]" the association between Blackness and forced labor.[218] Colonies dictated that free-born women who married enslaved men would be enslaved during their husbands' lifetimes, and that children born from such marriages would be slaves for life. In 1662, Virginia passed a law stating that "all children borne in this country shalbe held bond or free only according to the condition of the mother,"[219] contravening the English common-law rule that status followed that of the father.

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216. *See* JENNIFER L. MORGAN, RECKONING WITH SLAVERY: GENDER, KINSHIP, AND CAPITALISM IN THE EARLY BLACK ATLANTIC 5-6 (2021) (discussing her preference for the word "predicament" to the stasis implied by "condition").

217. HIGGINBOTHAM, *supra* note 177, at 36-37.

218. JENNIFER L. MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY 72 (2004); *see also* HIGGINBOTHAM, *supra* note 177, at 40-47 (providing an overview of colonial-era laws that imposed additional servitude on female servants who had children out of wedlock, as well as laws that tied the status of an interracial child to that of the unfree mother, perpetuating servitude); JORDAN, *supra* note 215, at 44-45 (describing colonial-era antimiscegenation statutes and their contributions to racial debasement). These conditions did not evolve immediately or consistently with the importation of Africans to the mainland. *See* LINDA M. HEYWOOD & JOHN K. THORNTON, CENTRAL AFRICANS, ATLANTIC CREOLES, AND THE FOUNDATION OF THE AMERICAS, 1585-1660, at 323-27 (2007); KATHLEEN M. BROWN, GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA 107-08 (1996).

219. Act XII: Negro Womens Children to Serve According to the Condition of the Mother (Dec. 1662), *reprinted in* 2 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION

This rule of *partus sequitur ventrem*—literally, "off-spring follows the womb"—became a governing principle of property across the colonies, together with antimiscegenation laws. It ascended to paramount importance in the U.S. domestic slave trade after the importation of enslaved Africans was abolished in 1808 and the rape of Black women became a key means of property increase. Virginia Judge Gholson in 1831 argued to the State Legislature, "'Partus sequitur ventrem' is coeval with the existence of the right of property itself."[220]

These forms of legal debasement, key to the construction of Black laborers as *property* in contradistinction to white servants, helped "congeal[]" and "harden[] categories of racial subjugation," as Morgan has recently observed.[221] This evolving anti-Blackness affected free as well as enslaved Black people, and also influenced evolving colonial racial ideas about Native people and the ways colonists interacted with nonwhite groups in general. Colonial legal codes increasingly grouped nonwhites together to limit their mobility, freedom of assembly, freedom to bear arms, and capacities in court, among other things.[222] This general racialization grew more pronounced over time as the colonial population grew exponentially and power relations between colonists and Native nations shifted to favor this aggressive new force.[223]

This growing racialization also changed the dynamics of transactions for lands between Native people and colonists, which rooted all chains of title in the United States in Native title, over time. At the beginning of the colonial period, Europeans' ability to impose such regulations was challenged by the powerful presence of the existing sovereigns.[224] Much to the chagrin of colonial company heads and administrators, the English understood upon arrival in Plymouth and Jamestown that they had no hope of taking lands by force from the Wampanoag or the Powhatan Confederacy.[225] Notwithstanding ideas about *vacuum domicilium*, colonists in Virginia, Massachusetts, and the Carolinas formally recognized

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OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 170 (New York, R. & W. & G. Bartow 1823).

220. DAINA RAMEY BERRY, THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION 11 (2017).

221. MORGAN, *supra* note 216, at 1-2.

222. HIGGINBOTHAM, *supra* note 177, at 39-41, 76-82.

223. SHOEMAKER, *supra* note 193, at 142 (observing that English stereotypes about Native people's inferiority did not congeal in emphatically racial terms until the eighteenth century).

224. *See generally* GREER, *supra* note 122, at 65, 65-96 (2018) ("[European] newcomers formed their settlements within established native tenurial regimes.").

225. *See, e.g.*, Robert Cushman, *Reasons and Considerations Touching the Lawfulnesse of Removing Out of England into the Parts of America*, *reprinted in* THE JOURNAL OF THE PILGRIMS AT PLYMOUTH IN NEW ENGLAND 101, 105 (New York 1849); WILLIAMS, *supra* note 122, at 206-08.

Native title from the earliest days of settlement. In many instances, they arrived with instructions to "purchase their tytle, that wee may avoyde the least scruple of intrusion."[226] Colonists sought permission to occupy lands from groups clearly in control of them, and called such payment a matter of "Prudence & Christian Charity Least otherwise the Indians might have destroyed [the] first planters."[227] Moreover, local French colonists were paying for these rights, making it difficult for the English not to do so—and they found few reasons to object to this way of cheaply obtaining both occupation rights and a foothold for their claims to title.[228] The variety of strategies they used meant that contradictory theories of conquest became arguments in the alternative. The Virginia Company, for example, proclaimed their settlement legal because "there is roome sufficient in the land . . . for them, and us . . . [and] because they have violated the lawe of nations . . . . But chieflie because *Paspehay*, one of their Kings, sold unto us for copper, land to inherit and inhabite."[229] In 1707, the New Hampshire Assembly similarly argued that upon their arrival, the lands "were not onely then Vacuum Domicilium but a miserable desert," but also that their Ancestors "all along informed and assured us the said Lands were honestly and justly purchased."[230]

English colonists thus recognized Native property rights from the beginning, in practice, if not always, in theory. As Banner points out, "[t]here is no actual difference between respecting others' property rights and treating them as if one is respecting their property rights. That's what a property right *is*—the knowledge that one will be treated as a property owner."[231] This practice fit comfortably within the mandate to take possession that *Johnson v. M'Intosh* described: a grant from the Crown did not consummate title, but merely authorized colonists to seek possession. They did so in a variety of ways well-

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226. BANNER, *supra* note 24, at 24 (quoting instructions from the earliest settlers of Massachusetts); *see also id.* at 39-43 (arguing that the English respected Indian property rights and continued to do so because their chains of title originated in Native title).

227. Councells Opinions Concerning Coll. Nicholls Pattent and Indian Purchases, *in* 13 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 487 (Albany, Weed, Parsons & Co. 1881).

228. BANNER, *supra* note 24, at 39-40 (quoting ARCHIBALD KENNEDY, THE IMPORTANCE OF GAINING AND PRESERVING THE FRIENDSHIP OF THE INDIANS TO THE BRITISH INTEREST, CONSIDERED 6 (New York 1751)).

229. *Id.* at 20-21 (quoting A TRUE DECLARATION OF THE ESTATE OF THE COLONIE IN VIRGINIA 10-11 (London 1610)); JEREMY DUPERTUIS BANGS, INDIAN DEEDS: LAND TRANSACTIONS IN PLYMOUTH COLONY 1620-1691, at 20 (2002).

230. BANNER, *supra* note 24, at 22 (quoting DANIEL GOOKIN, HISTORICAL COLLECTIONS OF THE INDIANS IN NEW ENGLAND 39 (Boston 1792)).

231. *Id.* at 42.

established by then: establishing municipalities,[232] exercising legal jurisdiction over Native people in their own lands,[233] and purchasing land, often coercively, and in huge tracts.[234] The activity of purchase anchored all chains of title in the country in Native title, as *Johnson* later acknowledged. Evidence indicates that the practice of memorializing these payments with recorded deeds did not become established for many decades,[235] due partly to the impermanent nature of settlement at the time; colonists also preferred, when it was still possible, to find new lands rather than engaging in conflict over specific lands with one another, and their inexact dealings may have stimulated more rapid settlement.[236] Surveys were haphazard as a result of colonists following "freedom of location" to choose the most desirable lands, although to a lesser extent in New England than in the South or Middle Atlantic.

By the 1660s, as settlements grew more crowded, land disputes increased due to overlapping grants, claims, and a diminishing ability to simply spread out.[237] Because their records were as haphazard as their surveys, colonists began to construct records of events that were many years past. It became fairly common practice to call one another to testify about purchases they had made several decades earlier as proof of title, and recording retroactive quitclaim deeds based on such testimony.[238] The town of Andover, Massachusetts, for example, tried

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232. *See, e.g.*, Benton & Straumann, *supra* note 127, at 35 (describing the establishment of municipalities as a "routine early step" in Spanish colonial acquisition). *See generally* JOHN FREDERICK MARTIN, PROFITS IN THE WILDERNESS: ENTREPRENEURSHIP AND THE FOUNDING OF NEW ENGLAND TOWNS IN THE SEVENTEENTH CENTURY 245-55 (1991) (providing a history of how colonists used municipalities to establish land-holding bodies).

233. *See* Benton & Straumann, *supra* note 127, at 29-37; Lyle Koehler, *Red-White Power Relations and Justice in the Courts of Seventeenth-Century New England*, 3 AM. INDIAN CULTURE & RSCH. J. 1, 1 (1979); YASUHIDE KAWASHIMA, PURITAN JUSTICE AND THE INDIAN: WHITE MAN'S LAW IN MASSACHUSETTS, 1630-1763, at 227 (1986); James Axtell, *Through a Glass Darkly, Colonial Attitudes Toward the Native Americans*, 1 AM. INDIAN CULTURE & RSCH. J. 17, 18-19 (1974).

234. *See* BANNER, *supra* note 24, at 140.

235. *See, e.g.*, 1 THOMAS HUTCHINSON, THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS-BAY 383 (Lawrence Shaw Mayo ed., Harv. Univ. Press 1936) (1764); David Thomas Konig, *Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts*, 18 AM. J. LEGAL HIST. 137, 144 (1974); Konig, *supra*, at 137 (describing how in Essex, Massachusetts, "order and regularity were not imposed on land arrangements until after 1660").

236. *See, e.g.*, Konig, *supra* note 235, at 140, 146.

237. *See id.* at 149 ("[L]and is not a limitless resource.").

238. *See, e.g.*, *id.* at 153, 168 ("It was not unusual in these cases for both parties to bring men to court to attest to usage of the land many decades before, when they had been boys."); EBENEZER W. PEIRCE, INDIAN HISTORY, BIOGRAPHY AND GENEALOGY: PERTAINING TO THE

to settle disputes over land by appointing townsmen to investigate and record transactions "to be esteemed and accounted as valid and authentick, as if they had been entered and recorded at the time when they were graunted, though the day and year of such graunts be not mentioned nor remembered."[239] Questions about the legitimacy of colonial charters and colonists' claims vis-à-vis Native groups lingered through the seventeenth century, and pointing to chains of title originating in Native title became increasingly important for colonists in confirming their own title claims against the world. When Governor Edmund Andros of the Dominion of New England sought in 1686 to reverse previously settled policy by invalidating all titles that could not be traced back to government grants, he caused a storm of protest from New Englanders, some of whom declared that if purchase from Indians could not serve as the root of a valid land title, "no Man was owner of a Foot of Land in all the Colony."[240] Each New England coastal town subsequently sought to negotiate retroactive "quitclaim" deeds with "known" descendants of the Native leaders who were contemporaries of the first settlers, to ensure they extinguished Native title on the record.[241]

To construct these chains of title, these early title disputes inspired a consolidation of public records concerning property ownership that is now a hallmark of the Anglo-American property system, and that has distinguished it from the English system.[242] The innovation of building a comprehensive and public title registry was a technological solution that not only helped solve colonial legitimacy questions, but facilitated commerce as land became a preeminent colonial commodity, traded at a scale, intensity, and liquidity theretofore unknown in England. James Willard Hurst, the father of American legal history, noted that though many colonies adopted English practices of protecting estates from easy

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GOOD SACHEM MASSASOIT OR THE WAMPANOAG TRIBE, AND HIS DESCENDANTS 33-35 (North Abington, Mass., Zerviah Gould Mitchel ed. 1878).

239. Konig, *supra* note 235, at 152 (quoting 8 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY, MASSACHUSETTS 1680-1683, at 82 (1921)).

240. WILLIAM HENRY WHITMORE, *The Declaration of the Gentlemen, Merchants, and Inhabitants of Boston, and the Country Adjacent*, *in* 1 THE ANDROS TRACTS: BEING A COLLECTION OF PAMPHLETS AND OFFICIAL PAPERS ISSUED DURING THE PERIOD BETWEEN THE OVERTHROW OF THE ANDROS GOVERNMENT AND THE ESTABLISHMENT OF THE SECOND CHARTER OF MASSACHUSETTS 16 (Boston, T.R. Marvin & Son 1868); *see* MARY LOU LUSTIG, THE IMPERIAL EXECUTIVE IN AMERICA: SIR EDMUND ANDROS, 1637-1714, at 152-54 (2002).

241. *See, e.g.*, *Narrative: Historical Evidence in Native American Deeds Collection*, S. ESSEX DIST. REGISTRY OF DEEDS, https://salemdeeds.com/NAD/focuspoints2.aspx [https://perma.cc/2U8S-DKXD] (explaining "second generation deeds").

242. "[I]n England, . . . no general deed registration system existed." Konig, *supra* note 235, at 144 n.22.

alienation, such as entail and primogeniture,[243] "the seventeenth-century beginnings of the recording act system expressed our early interest in turning land into a more readily transferable good."[244]

Likewise, when the newly formed United States looked to western land as its primary asset from a position of bankruptcy, it recognized the need for a record-keeping system and a comprehensive rectangular survey, both of which had grown increasingly common during the colonial period.[245] When Congress created a policy for "orderly disposal of the new public domain," it drew from the New England system of survey before settlement and models of administration utilizing a central land office and registers from Virginia.[246] The meridians that formed the basis of outlines for states and townships in Jefferson's plan took their cue from colonial charters that followed north-south directions, or parallels of latitude.[247]

In short, the fundamental elements of the land system—the comprehensive title registry, the rectangular survey as a method of creating individual enclosures, as well as the literal outlines of state and local jurisdictions—grew out of efforts to take possession of Native nations' homelands. As these activities intertwined expropriation with property creation, we should understand Locke's capacious descriptions of "improving," "cultivating," and "enclosing" land, in his

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243. *See* Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 LAW & HIST. REV. 277, 280 (2015) (describing the abolition of "entailing," or the fee tail estate, and primogeniture during a later period of American history to achieve similar effects—namely, making property more readily transferable).

244. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 12 (1956).

245. These practices were evolving in England at the same time, as the enclosure movement continued there, and by the start of the eighteenth century, "surveying land for individual ownership had become respectable and widespread." SHOEMAKER, *supra* note 193, at 21. Colonists planned, but never actualized, large-scale, systematic surveys, most notably in the Carolinas, while Locke was unofficial secretary of the Lord Proprietors. The plan recognized "the whole foundation of the government is settled upon a right and equall distribution of Land, and the orderly takeing of it up is of great moment to the welfare of the Province." FORD, *supra* note 202, at 20 (quoting WILLIAM J. RIVERS, A SKETCH OF THE HISTORY OF SOUTH CAROLINA: TO THE CLOSE OF THE PROPRIETARY GOVERNMENT BY THE REVOLUTION OF 1719, at 355 (Charleston, McCarter & Co. 1856)). Penn purchased title to large tracts of land before offering land to settlers; his first promotional tract promised lands would be sold free of any "Indian" encumbrance. DONNA BINGHAM MUNGER, PENNSYLVANIA LAND RECORDS: A HISTORY AND GUIDE FOR RESEARCH 7 (1991).

246. *See* ROHRBOUGH, *supra* note 212, at 7; *see also* FORD, *supra* note 202, at 18 ("[I]n the early surveys of the New England town commons and of the river lands everywhere, is found the germ of the modern rectangular system.").

247. *See* FORD, *supra* note 202, at 10.

own account of property creation, as encompassing this labor, which it seems to describe—measuring and mapping land to prepare it for market, and consolidating this information to facilitate market transactions. Historically, the final innovation that structurally completed this new system of property law and enabled it to commodify land in a qualitatively unprecedented way—though it does not appear in Locke's writings—was the introduction of easy foreclosure.

For centuries, English law had regarded land as essentially unlike moveable goods due to land's unique characteristics of sustaining life and the challenges of designating its features, such as rivers, lakes, forests, and shorelines, as anything other than a common good. Under that ancient distinction, chattel property, but not real property, was liable to seizure for the nonpayment of debts.[248] However, in the colonies, the protection of large estates from foreclosure made it possible for debtors to conceal enslaved persons from their creditors on their land. Further, land and enslaved labor were interdependent commodities: each asset became useless without the other. The attempt to keep plantations whole led to experiments in changing the legal categorization of enslaved people: they were treated alternatively as chattel—the legal equivalent of cattle, sheep, and horses—and as protected real estate. Indeed, the high value of enslaved people[249] led several colonies to use real-property designations to protect this property from rules governing chattel. South Carolina, following Barbados, tried to characterize slaves as real estate in 1690, though the English Privy Council did not permit it.[250] And Virginia, Louisiana, Kentucky, and Arkansas all designated enslaved persons as realty at different periods between 1705 and 1852.[251] In the slaveholding south, Professor Thomas Morris tells us, some rules of real-property law were applied to enslaved persons in over a third of jurisdictions.[252] Of these legal experiments, Virginia jurist St. George Tucker stated:

> [T]he incidents to real and personal property, respectively, are merely creatures of the *juris positivi*, or ordinary rules of law concerning them; and may be altered and changed to suit the circumstances, convenience, interest, and advantages of society . . . . Thus in England it might be for the benefit of commerce to consider a lease for a thousand years, in lands,

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248. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *419-20; Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 401-03 (2006); K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 LAW & SOC. INQUIRY 1006, 1007-08 (2016).

249. *See* JONES, *supra* note 10, at 95-98.

250. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 64 (1996).

251. *Id.*

252. *Id.*

> as a mere chattel; and in Virginia it might have been equally for the advantage of agriculture to consider the slave who cultivated the land as real estate.[253]

Tucker here underscored the malleability and function of legal categories. However, treating enslaved people as real estate—protecting them from easy seizure—frustrated planters' creditors, who lobbied, oppositely, to make lands *and* enslaved persons liable for unsecured debts in the colonies. At creditors' behest, colonies, beginning in the northeast, thus began to abandon their ancient protections of lands,[254] likely encouraged by the growing practice of foreclosing on Native people's lands.[255]

In response to lobbying from the biggest independent slave traders in England, Parliament finally made lands, as well as enslaved persons, liable for nonpayment of debts across the British colonies with the Debt Recovery Act in 1732.[256] The introduction of easy foreclosure across the colonies spurred massive market growth: land transfers and slave auctions became more frequent, and access to credit flooded the colonial market, as it became routine to seize both land and enslaved people like chattel for unpaid debts. The frenetic pace of this trade became the hallmark of the modern land system—comprised of the comprehensive survey, title registry, homesteading incentives, and easy foreclosure—that thereby emerged. These new elements redefined the enclosure as a commodity; centralizing and publicizing information concerning that commodity facilitated its trade; and above all, the mortgage converted that commodity into an access point for a stream of credit.

To be clear, this system did not exist in England, where the enclosure of common fields was a relatively new development at the time; and though mortgages were common, failure to pay debts resulted in an owner's temporary loss of use or harvest (usufructual) rights.[257] While the idea of boundaries themselves was

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253. *Id.* at 65 (quoting St. George Tucker, *Discourse Concerning the Several Acts Directing the Course of Descents, in Virginia*, *in* 3 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 74 (Lawbook Exch. 1996) (1803)).

254. Priest, *supra* note 248, at 411-16.

255. Park, *supra* note 248, at 1024.

256. Priest, *supra* note 248, at 423.

257. *See* Ann M. Burkhart, *Lenders and Land*, 64 MO. L. REV. 249, 251-53 (1999).

not new,[258] enclosures evolved in America to serve the novel idea that "individuals possess *all* the resources within a given area of land."[259] Never before had the power to expel people from lands been a key mechanism of the market, without which credit and growth would grind to a halt. This new land system evolved in response to a conception of "unlimited" land that was there for the taking, which gave erasure a positive frame. As Hurst observed, "the sheer abundance of land was probably enough to assure that a static, feudal type of tenure could not take lasting root with us."[260] Its effectiveness during the colonial period encouraged colonial and state governments, and finally the United States, bankrupt after the Revolutionary War, to view the sale of "wild lands" as their greatest source of revenue.[261] Unsurprisingly, the production and regulation of the nation's two most valuable forms of property—land and people—were a major priority, preoccupation, and source of conflict for governments—colonial, state, and federal—in ways that have had a lasting effect on the nation's legal institutions as well as its political, social, and economic life.

It is not difficult to see how the labor theory's narrative justifications for conquest coalesced to fortify the lodestar ideology that acquisition, in American property law, has concerned "unowned things," and the correspondingly popular, durable mythology of America as *terra nullius*—open, vacant, virgin soil.[262] At minimum, teaching about the labor theory should include the well-established scholarship on the context of its development—on the long, consistent history of its invocation by major figures in American history to justify colonization, and the way its fictions stereotype and erase Native and African peoples.

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258. BANNER, *supra* note 24, at 43-44 (quoting 1 RODGER WILLIAMS, *A Key into the Language of America*, *in* THE COMPLETE WRITINGS OF RODGER WILLIAMS 120 (James Hammond Trumbull, A. M. ed., Russell & Russell 1963) (1643)) ("The *Natives* are very exact and punctuall in the bounds of their Lands . . . . And I have knowne them make bargaine and sale amongst themselves for a small piece, or quantity of ground.").

259. BANNER, *supra* note 24, at 37.

260. HURST, *supra* note 244, at 12.

261. BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 1 (1924); *see* FORD, *supra* note 202, at 85-89; ANDRO LINKLATER, MEASURING AMERICA: HOW AN UNTAMED WILDERNESS SHAPED THE UNITED STATES AND FULFILLED THE PROMISE OF DEMOCRACY 69-70 (2002).

262. This is not a legal justification for conquest in North America, but it is a powerful mythology. *See* Stuart Banner, *Why* Terra Nullius*? Anthropology and Property Law in Early Australia*, 23 LAW & HIST. REV. 95, 95-96 (2005) (exploring the use of the concept by British colonizers in Australia and New Zealand). *See generally* HENRY NASH SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH (1999) (tracing myths and symbols of Western expansion and their role in politics, economics, and society).

Here, I have further proposed that the labor theory also presents us with an account of the actual work—including legal work—of property creation in the colonies.

The study of how laws evolved to render land and people the two most significant market commodities during this period underscores how innovative the property systems and practices that emerged in colonial America were and how long-lasting they have been. The homesteading principle that comes from headright laws, the anti-Blackness constructed by American laws of slavery, the comprehensive rectangular-survey system from which the shape of state and local jurisdictions as well as private plots of land emerged, the centralized title registry and title recording system, and easy mortgage foreclosure—all these remain major elements of our property system to this day. The history of their respective development from this early period of innovation to their present significant roles in property markets today further underscores how essential the *systems* that define and organize property interests are in American property law. Though they are currently eclipsed in property-law curricula by case law regulating relationships between neighbors, the doctrines in those cases merely affect and modify interests that would not exist and whose trade would be impossible without these systems.

The labor theory illustrates how omitting the crucial role of colonization and enslavement in these developments gives the history of American property ownership and territorial expansion a rosy glow. The traditional narrative about American property has been one of acquisition and expansion without dispossession and displacement; it has tended to suggest that our present systems produce growth without destruction and wealth without costs.[263] Yet the context of conquest and the heavy reliance on enslavement for labor and wealth accumulation meant that the American property system evolved to process resources primarily for their potential to yield monetary profits and open credit streams, and elevated those goals above others—including preserving homelands, protecting health, or creating stability in the various conditions that support life. Prioritizing the creation and protection of the monetary value of property, moreover, required a tremendous amount of racial violence, raising another key question for law—namely the nature of its relationship to violence—that the next Part explores.

263. As Professor James Willard Hurst wrote, exemplifying this discourse, "we began to remove such feudal restrictions on alienation as we had suffered and to build up the intricate body of law concerning the recording acts and the title problems involved in the finance of land trading." HURST, *supra* note 244, at 13.

IV. POSSESSION BY DISPOSSESSION

The theory of "possession" focuses on a central question of modern law: the way the law organizes the state's monopoly on force. The well-known maxim that "possession is nine-tenths of the law" addresses this relationship by acknowledging that it requires an undesirable degree of force to take possession away from someone and grant it to someone else. The ancient Roman law of *uti possidetis* ("as you possess, you may continue to possess") also expresses a strong preference for stability. As the foregoing analysis shows, however, in the American colonies and the United States, taking "possession" of things already in the possession of others was the consummating condition for claiming title by conquest. The necessity of dispossession to take possession flipped the ancient priority of maintaining the status quo on its head,[264] in a context where the project of conquest and nation building were one—a duality that Professor Aziz Rana has called "the two faces of American freedom."[265] Present casebooks, by omitting this context, cannot show the essential role that property law played in acting as a kind of glue between these faces, to both extract resources from prior possessors and reconstitute them as the property of others.

On the one hand, the lack of attention to expropriation as a critical part of property creation stems from another selective application of theory—recognizing whites' possession, but neither Native nor Black people's. Beyond that conceptual inequity, however, it is also important to recognize as a practical matter that the centuries-long, concerted effort to dispossess others, and thereby, to take possession of the continent, imparted lasting dynamics to the laws and institutions that developed to facilitate that process. In particular, in the United States, laws mobilized and sanctioned the use of force to a degree that had not been known or necessary in other contexts, where the aim of governance was to maintain the status quo.

This Part uses two examples to illustrate how *public* laws organized the violence of dispossession and taking possession by delegating that work to *private* entities: first, the example of headrights or land grants discussed in Section IV.A; and second, the "fugitive slave" controversy and enslaved persons' flights to freedom. In both instances, the state had no capacity to take direct responsibility for

264. This inversion of ancient principles is consistent with the laws and institutions described above in Section III.B, which Hurst observed "made private property pre-eminently a dynamic, not a static institution." *Id.* at 10.

265. RANA, *supra* note 12. Similarly, Richard Hildreth in 1840 called the American Republic as much an experiment in racial despotism as in democracy. RICHARD HILDRETH, DESPOTISM IN AMERICA: OR, AN INQUIRY INTO THE NATURE AND RESULTS OF THE SLAVEHOLDING SYSTEM IN THE UNITED STATES 7-34 (Boston, Mass. Anti-Slavery Soc'y & New York, Am. Anti-Slavery Soc'y 2d ed. 1840).

the force required to create and maintain land and people as the two principal genres of property in early America. Instead, it deputized private entities with promises to back their private claims to ownership and wealth, guiding a diffusion of force that also came to permeate and animate private social life. This innovative approach to governance and nation-building generated lasting norms about social violence, and a legal tradition that chronically pitted one community's ancestral homelands against another's real estate market, and human freedom against a fearfully dehumanizing new right to property.

A. The Homesteading Principle: Conquest by Settlement

From the Founding Era, government officials understood that taking possession of lands required violence,[266] and though they explored other modes, they ultimately outsourced this racial violence to private parties as a policy choice.[267] In confronting the fact that powerful Native nations would not allow them to seize lands without a show of direct force, the United States drew from the colonies' experience in adopting the method of incentivizing settlement with land grants and subsidies to take possession of western territories.[268] The United States thus used promises of land to recruit white populations, remove Native nations, and convert lands into property, though it adapted these promises to a new federal structure.[269] Instead of simply granting lands to settlers, however, it planned to create revenue for the federal government by *selling* lands, "the new nation's arguably most valuable asset," to settlers—as Professor Gregory Ablavsky notes, "cheap now, they promised to rise inexorably in value as Anglo-Americans migrated west."[270]

After the Revolutionary War, the United States was both fifty-four million dollars in debt and claimed vast territories ceded by Britain under the Treaty of

266. Alexander Hamilton, for example, noted that "Indian hostilities . . . would always be at hand." THE FEDERALIST NO. 25, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

267. K-Sue Park, *Insuring Conquest: U.S. Expansion and the Indian Depredation Claims System, 1796-1920*, 8 HIST. PRESENT 57, 59 (2018). Hurst gave this delegation a positive spin: "[W]e loaned the organized force of the community to private planners," HURST, *supra* note 244, at 11, ensuring "the central place of the modern institution of private property in our politics as well as in our economic organization;" "the challenge of the unopened continent dominated our imagination," *id.* at 8.

268. Park, *supra* note 267, at 81.

269. *Id.* at 65.

270. GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 14 (2021).

Paris.[271] Though early statesmen anticipated that "a rich and fertile country, of an area equal to the inhabited extent of the United States, will soon become a national stock"[272]—it exerted no actual control over the region, which was ruled by powerful Native nations. When the Continental Congress in 1783 considered how to generate revenue from the lands and pay soldiers, it admitted that "the public finances do not admit of any considerable expenditure to extinguish Indian claims upon such lands."[273] Secretary of War Henry Knox, echoing a view expressed by George Washington, recommended that the nation adopt the well-tested method of conquest by settlement, rather than a military campaign. Referring to the colonial experience, he advised that "it is most probable that the Indians will, by the invariable operation of the causes which have hitherto existed in their intercourse with the whites, be reduced to a very small number."[274]

To produce revenue, the federal government claimed the exclusive prerogative to acquire lands from Native nations—introducing the structure of trade that *Johnson v. M'Intosh* would affirm—to become the middle point for transfer of lands between its extraction and distribution to private entities. In order to manage this role, it also established a bureaucracy to oversee the federal land system, including, eventually, a U.S. Surveyor General's Office and Land Offices to manage both the creation of enclosures and settlers' claims. In theory, the federal prerogative required prospective private purchasers to wait for a survey to purchase land. But in practice, settlers did not observe this formality and entered tribal lands prior to federal acquisition. As Professor Andro Linklater writes, "[t]he race that developed between the surveyors and squatters marked the entire history of the land survey, and it was rare for a surveying team to measure

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271. *See, e.g.*, Reginald Horsman, *The Indian Policy of an "Empire for Liberty," in* NATIVE AMERICANS AND THE EARLY REPUBLIC 37, 38 (Frederick E. Hoxie, Ronald Hoffman & Peter J. Albert eds., 1999); DAVID ANDREW NICHOLS, RED GENTLEMEN AND WHITE SAVAGES: INDIANS, FEDERALISTS, AND THE SEARCH FOR ORDER ON THE AMERICAN FRONTIER 88 (2008); *see also* Park, *supra* note 267, at 267 (describing the financial circumstances of the United States and its relationships to Native nations following the Revolutionary War).

272. THE FEDERALIST NO. 38, at 238 (James Madison) (Robert Scigliano ed., 2000).

273. 25 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 682 (Gaillard Hunt ed., 1922); *see also* HIBBARD, *supra* note 261, at 32-33 (discussing the public-land system's genesis and traits); Park, *supra* note 267, at 65 (providing additional context around the same quote).

274. Henry Knox, *Report from H. Knox, Secretary of War, to the President of the United States, Relative to the Northwestern Indians*, *in* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 13-14 (William S. Hein & Co. 1998), *as reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 13 (Francis Paul Prucha ed., 3d ed. 2000).

productive country that had no settlers at all."[275] This triangulated legal relationship produced a tense dynamic of push and pull between the government and settlers that drove dispossession through the nineteenth century.

Both the federal government and settlers heavily criticized the other's responsibility for the consequent violence, seeking to maximize their own advantages. Still, they largely acquiesced to each other for the mutual benefits they accrued. Settlers, for example, understood the United States' dependence on them for a frontline role in territorial expansion, and "that initiating conflict with the Indians was the surest way to prod the federal government to buy the Indians' land," with the rationale of preventing war.[276] Their aggressive spread into Indian Country to pressure the federal government into purchasing the lands[277] provoked Secretary of State Timothy Pickering to point out that this logic of expansion was limitless, and ask, "[W]here shall we stop?"[278] A federal emissary complained that in Georgia, settlers' rallying cry had become "let us kill the Indians, bring on a war, and we shall get land."[279] While settlers knew these incursions into Native nations' lands were "extra-legal,"[280] they savvily argued that they acted in accordance with the federal government's wishes — as "resident militia" "serv[ing] in the field without compensation and at their own expense"[281] — and criticizing the federal government for failing to provide them with protection. The squatters of the Pike River Claimants Union in 1836, for example, stressed their labor and sacrifices, and explained in their constitution that "as the Government has heretofore encouraged emigration by granting preemption to actual settlers, we are assured that our settling and cultivating the public lands is in accordance with the best wishes of Government."[282]

For the government's part, many government officials described the consequent violence in the borderlands as the result of troublesome "banditti" and

275. LINKLATER, *supra* note 261, at 163.

276. BANNER, *supra* note 24, at 126.

277. *Id.* at 124-25.

278. *Id.* at 125.

279. LETTERS OF BENJAMIN HAWKINS, 1796-1806, at 102 (Savannah, Ga. Hist. Soc'y 1916).

280. HIBBARD, *supra* note 261, at 198.

281. Park, *supra* note 267, at 68. In 1897, for example, the state of Utah sent a memorial to Congress describing their settlers as such. *Id.* (citing Memorial from the Governor and Legislative Assembly of Utah, Records of the U.S. Senate, Record Group 46 (RG 46), 55A-J15; National Archives Building, Washington, D.C.).

282. HURST, *supra* note 244, at 4 (quoting Constitution of the Pike River Claimants Union, *reprinted in* 2 WISC. ASSEMBLY J. 472-75 (1856)).

"rabble" on both sides.[283] But while in some difficult diplomatic situations, the government punished settlers for their incursions, in other instances, they turned a blind eye and confirmed settlers' claims. Under this arrangement, after all, the government preserved federal dollars by not paying a formal military force to take the lands. The apparent independence of settlers' violence also left the government free to maintain a position of formal diplomacy towards tribes[284] and pursue an overt policy of conciliation for most of the nineteenth century.[285] In other words, the government's use of private incentives to motivate settlers created enough distance that the government could disavow, tacitly endorse, or openly praise the racial violence of conquest. At the same time, as Ablavsky has recently shown, the government did not have the ability to do much more than manage the settlers' prodding and pushing, in ways that created new law, expanded jurisdictions, and cemented a relationship between a nation and its polity marked by distrust and mutual exploitation.[286]

Though for decades the federal government refused responsibility for settlers' invasions into Native nations' lands, at the end of the nineteenth century, with the perspective that it had largely achieved conquest, it began to explicitly celebrate settlers' actions in ways that have entered the national mythology.[287] In 1886, for example, the House Committee on Indian Affairs declared that "[t]he early pioneers in the far West, the makers of a new civilization, the founders of a great empire, the leaders in the great army of workers who have made the vast western wilderness blossom with rich harvests, are among the noblest heroes and greatest benefactors of this Republic."[288] Today, the legacy of the long tension over who bore responsibility for the racial violence that fueled conquest includes not only this delayed romantic gloss, but also a public accustomed to social space permeated by *private* racial violence, steeped in all the prejudices and affects of interpersonal relationships. Further, this strategy of conquest cultivated an aggrieved population of settlers who raged against a government they deeply mistrusted—but also found their identity through their alignment with it and its racial war, and vented their rage upon those in possession of the lands in which they believed their future worth lay.

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283. Gerard Clarfield, *Protecting the Frontiers: Defense Policy and the Tariff Question in the First Washington Administration*, 32 WM. & MARY Q. 443, 449-50 (1975).

284. Park, *supra* note 267, at 67-68.

285. *Id.*

286. ABLAVSKY, *supra* note 270, at 2-3.

287. *See* Park, *supra* note 267, at 57.

288. *Id.* at 78 (quoting H.R. REP. NO. 49-3117, at 10 (1886)).

B. Property Against Human Self-Possession

The great contradiction of the American chattel-slave trade was the fact that a person remained a person, but was treated by law as property. This "problem" of law generated an entire legal infrastructure that sharply focuses questions about possession and the relationship between the law and force. In an ongoing effort to elevate the property value above the human value of an enslaved person, legislatures passed a plethora of laws sanctioning slaveholders' and other whites' physical and sexual violence against enslaved people: slaveholders had, for example, "the unlimited right to abuse their slaves to any extreme of brutality and wantonness as long as the slave survived,"[289] and third parties had battery rights with limitations.[290] Colonial laws generally held that killings of enslaved people were not punishable as murder,[291] while U.S. states recognized homicide unless the killings occurred in the commission of the highly malleable exception called a "moderate correction."[292] Indeed, in *State v. Mann*, Judge Ruffin called "full dominion of the owner over the slave . . . essential to the value of slaves as property, to the security of the master, and the public tranquility, greatly dependent upon their subordination."[293]

The controversy over enslaved people's flight from captivity, the focus of this Section, illustrates the way Anglo-American laws sanctioned and directed enormous violence required by the effort to control people as property. Claims of possession constituted the central issue of fugitivity: people's self-reclamation subverted slaveholders' possession or "uncontrolled authority over the body."[294]

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289. Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 132 (1985); *see* MORRIS, *supra* note 250, at 163-71.

290. MORRIS, *supra* note 250, at 196-97.

291. *E.g.*, An Act About the Casuall Killing of Slaves (Sept. 17, 1668 - Oct. 20, 1669), *reprinted in* 2 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 270 (New York, R. & W. & G. Bartow 1823); *see also* MORRIS, *supra* note 250, at 163-65 (discussing homicide laws in the colonies).

292. MORRIS, *supra* note 250, at 172 (quoting GA. CONST. of 1798 art. III, § 12, *in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOR OR HERETOFORE FORMING UNITED STATES OF AMERICA 801 (Francis Newton Thorpe ed., 1906)).

293. State v. Mann, 16 N.C. (2 Dev.) 263, 268 (1829). For commentary, see EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 35-36 (First Vintage Books 1976) (1974); and MARK V. TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: *STATE V. MANN* IN HISTORY AND LITERATURE 20-65 (2003).

294. 16 N.C. (2 Dev.) at 266.

In other words, slavery pitted people's self-possession against enslavers' possession of them, so that one person's liberty confronted another's property right. As Professor Peter H. Wood has written, "[n]o single act of self-assertion was more significant among slaves or more disconcerting among whites than that of running away . . . . [T]hese were the people who, in a real sense, elected to 'steal themselves.'"[295] As this Section shows, the effort to defy the persistent truth of personhood manifested in a battery of laws that acknowledged the limited ability of the state to enforce enslavers' possession by delegating that labor of racial violence to private entities—slave catchers, private militias, and the "pursuing committees" of protective associations.

Since a person inexorably remained in possession of herself, even in the face of overwhelming uses of force, people's determination to escape bondage profoundly destabilized the institution of slavery from its beginning.[296] There was no period during the slave trade when slaveholders did not attempt to mobilize state force against fugitivity to protect their rights to property in people. As C.W.A. David wrote in 1924, "[a]lmost immediately after the introduction of slavery we find that its horrors led to so many runaways that colonial laws relating to fugitive slaves had to be enacted;"[297] and various laws commanded private persons to capture any enslaved person they found traveling without a pass.[298] This common-law heritage likely facilitated the adoption of the Fugitive Slave Clause in the Constitution without event.[299] However, by the time of the Constitutional Convention, the states had divided on the issue,[300] with Vermont, Massachusetts, Pennsylvania, and New Hampshire all having abolished slavery

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295. PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION 239 (1974).

296. Professor Eugene Genovese observes that people's escapes "struck the hardest blow against the regime." GENOVESE, *supra* note 293, at 648.

297. C.W.A. David, *The Fugitive Slave Law of 1793 and Its Antecedents*, 9 J. NEGRO HIST. 18, 18 (1924).

298. *See id.* at 18-19; *see also* MARION GLEASON MCDOUGALL, FUGITIVE SLAVES (1619-1865), at 2, 89 (Books for Libr. Press 1971) (1891) (discussing and giving examples of colonial laws that addressed fugitive slaves); Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and* Prigg v. Pennsylvania, 78 CORNELL L. REV. 1086, 1116 (1993) (detailing attempted legal resistance to the forced return of fugitive slaves).

299. Jeffrey M. Schmitt, *The Federal Right to Recover Fugitive Slaves: An Absolute but Self-Defeating Property Right*, 2 SAVANNAH L. REV. 21, 22 (2015).

300. *See* James Madison, Saturday June 30, 1787. in Convention, *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 486 (Max Farrand ed., 1911) ("[T]he States were divided into different interests not by their difference of size, but . . . principally from [the effects of] their having or not having slaves.").

between 1777 and 1784.[301] The stakes of the trade had also grown to over £21 million by 1774,[302] the equivalent of almost $3.2 billion today. During the Revolutionary Era, as the number of people who escaped and sued their enslavers for freedom increased dramatically, formerly enslaved people in New England organized antislavery committees and disseminated Black freedom petitions with the help of white abolitionists.[303]

In response to a controversy arising from the abduction of John Davis from Pennsylvania back to enslavement in Virginia, Congress passed the Fugitive Slave Act of 1793, which authorized a slaveholder or "his agent or attorney" to "seize the fugitive" and seek a certificate for removal from a judge or magistrate.[304] Because the 1793 Act provided no penalties for false claims, it was easy for slave catchers to procure removal certificates for both free and escaped Black people. As Professor Barbara Holden-Smith observes, the Act "proved to be an inadequate solution to the conflict over the return of fugitive slaves, and it did nothing to deal with the problem of the kidnapping of free blacks."[305] Kidnappings in the North subsequently increased, perhaps also fueled by new pressures from the prohibition on the transatlantic slave trade in 1807 and the establishment of new cotton plantations in the Old Southwest, or the land that eventually became Missouri, Mississippi, Arkansas, Alabama, Louisiana, and Texas, as well as parts of Georgia, Tennessee, Kentucky and western Florida.[306] The free states became "one vast hunting ground,"[307] as slave catchers roamed them "to reclaim runaway slaves but also to kidnap free blacks to sell into bondage in the South."[308]

Many free state governments responded by passing "Personal Liberty Laws" to supplement the Act with both protections for Black people against kidnapping

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301. David, *supra* note 297, at 20.

302. JONES, *supra* note 10, at 90.

303. MANISHA SINHA, THE SLAVE'S CAUSE: A HISTORY OF ABOLITION 67 (2016).

304. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793); *see* Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J.S. HIST. 397, 397 (1990); THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861, at 19-22 (1974) (describing the contents and adoption of the Fugitive Slave Act of 1793).

305. Holden-Smith, *supra* note 298, at 1118 (footnote omitted).

306. *Id.* at 1119-20; *see also* GARY B. NASH & JEAN R. SODERLUND, FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH 197 (1991) (identifying these same factors).

307. Holden-Smith, *supra* note 298, at 1087 (quoting David, *supra* note 297, at 22).

308. *Id.*; *see also* MORRIS, *supra* note 304, at 33-34 (describing anti-slavery activists' criticisms of the Fugitive Slave Law on these grounds).

and state assistance for private slave catchers who complied with the state's procedures.[309] Pennsylvania, a free state bordered by three slave states, tried repeatedly to address kidnapping.[310] In 1826, it required Southern claimants to apply to a judge, justice of the peace, or alderman for an arrest warrant, and to produce evidence other than their own affidavits to verify claims; several other Northern states followed with more and less protective provisions.[311] In the circumstances that led to *Prigg v. Pennsylvania*,[312] Margaret Morgan—who had lived with her parents in practical, if not formal, freedom for her entire life—eventually married a free man from Pennsylvania, where she then moved with him and their children and had at least one more child.[313] After her formal slaveholder died, his niece and heiress hired "four prominent Maryland citizens," including Edward Prigg, to seize Mrs. Morgan.[314] Since the justice of the peace from whom they sought a certificate of removal "declined further cognizance of the case," they forcibly took her and her children back to Maryland and into slavery, in violation of Pennsylvania law.[315] When the dispute reached the Supreme Court, in a robust assertion of national power, Justice Story found Pennsylvania's law preempted by the 1793 Act.[316] Further, he extolled property rights as sacred above all other rights, and referred to the "possession" or "repossession" of a person such as Mrs. Morgan as property nine times in his discussion of the interests at stake.[317] Story never mentioned the problem of kidnapping, in an example of how legal actors, in Holden-Smith's words, "subordinated the claims

309. Joseph Nogee, *The Prigg Case and Fugitive Slavery, 1842-1850*, 39 J. NEGRO HIST. 185, 197-99 (1954); MORRIS, *supra* note 304, at 28-29. Some prohibited the use of state jails, and state officials from assisting in the capture of alleged fugitives, or mandated jury trials or an appellate procedure. *See generally* MORRIS, *supra* note 304, at 23-41 (surveying state and federal responses to "kidnapping and fugitives").

310. Nogee, *supra* note 309, at 191.

311. Schmitt, *supra* note 299, at 24.

312. 41 U.S. (16 Pet.) 539 (1842).

313. Holden-Smith, *supra* note 298, at 1122-23.

314. *Id.* at 1122.

315. 41 U.S. (16 Pet.) at 617-18; see Nogee, *supra* note 309, at 185; *see also* Holden-Smith, *supra* note 298, at 1122-23 (providing more background on the *Prigg* case).

316. *See* Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 294; *see also* Holden-Smith, *supra* note 298, at 1134-38 (detailing Justice Story's "nationalistic vision").

317. 41 U.S. (16 Pet.) at 612-24.

of black people to human dignity to the claims of slaveholders to their property."[318]

The Court's decision in *Prigg*, however, also structurally changed the law of capture. By giving the federal government exclusive jurisdiction over the fugitive-slave problem, Professor Gautham Rao observes, it "absolved the states of any enforcement burden[s]" and "forced slaveholders to drastically reframe their approach to the problem of fugitive slaves."[319] The Justices acknowledged that the federal government had no capacity to marshal the force required for this scale of "property protection" or dispossession. Indeed, the remoteness of the federal government and its lack of manpower, Chief Justice Taney decried, would render the 1793 law "ineffectual and delusive" without help from the states.[320] The Fugitive Slave Act of 1850, which Congress eventually devised to resolve this problem, also looked to the tradition of private informal militias and the tradition of the *posse comitatus*,[321] instating a *federal posse comitatus* law in its command to "all good citizens . . . to aid and assist in the prompt and efficient execution of this law."[322] Section nine focused on the force required to dispossess the fugitive, acknowledging "reason to apprehend that such fugitive will be rescued by force from his or their *possession*."[323] It not only authorized but required the officer overseeing the capture to "employ so many persons as he may deem necessary . . . to overcome such force," and provided for payment from the U.S. Treasury.[324] At least one source estimates that slaveowners succeeded in about eighty percent of their attempts to repossess persons under the new Act.[325] Still, before and after the Act of 1850, slaveholders built their own private enforcement power through local protective associations that organized "pursuing committee[s]," recapture-and-reward funds, and "a force of agents" to find fugitives

318. Holden-Smith, *supra* note 298, at 1146. *See generally id.* at 1138-46 (discussing "the sanctity of property rights"). Joe Lockard describes this balancing act as Justice Story's "fusing of sacrificial nationalism with a racial denial of citizenship and self-determining subjectivity." Joe Lockard, *Justice Story's* Prigg *Decision and the Defeat of Freedom*, 52 AM. STUD. 467, 469 (2007).

319. Gautham Rao, *The Federal* Posse Comitatus *Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 L. & HIST. REV. 1, 22 (2008).

320. *Id.* (quoting *Prigg*, 41 U.S. (16 Pet.) at 631 (Taney, C.J., concurring)).

321. For a comprehensive account, see generally Rao, *supra* note 319, tracing the history of the *posse comitatus* doctrine.

322. Act of Sept. 18, 1850, ch. 60, § 5, 9 Stat. 462, 462-63.

323. *Id.* at 465 (emphasis added).

324. *Id.*

325. Rao, *supra* note 319, at 26 (citing STANLEY W. CAMPBELL, SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860, at 132 (1970)).

who crossed state lines and supplement local police forces.[326] These types of unions spurred tremendous violence between neighbors and prompted raids, shootouts, and kidnappings, especially in state borderlands.[327]

The extensive private organizing mobilized to counter this violence is well known as the Underground Railroad, a network of interracial abolitionist organizing sites in parts of Ohio, south-central Pennsylvania and Philadelphia, upstate New York and New York City, the area around the District of Columbia, the port cities of New Bedford and Boston, Detroit, western Illinois, Black settlements in Canada, and free Black communities in border slave states and the northwest.[328] Like well-known luminaries such as Harriet Tubman, Frederick Douglass, and Sojourner Truth, many who "self-emancipated" by flight eventually led the abolition movement through their advocacy and writings, and by "[r]unning off slaves."[329] The number of people who escaped enslavement is uncertain, but Professor Manisha Sinha's history of the abolition movement estimates that 150,000 people escaped slavery between 1830 and 1860.[330] For a sense of proportion, between 1790 and abolition, the population of enslaved people grew by about 580%, from about 700,000 to almost 4 million people.[331] The abolitionist movement organized powerfully throughout this period, nationwide and also internationally, not only to end enslavement but for citizenship, enfranchisement, and equality.[332] Against this backdrop, the local paper the *Missouri Republican* ran ads showing an annual average of forty people escaping their enslavers between 1851 and 1860; similar ads in Richmond newspapers during that time indicated an annual average of seventy escapes.[333]

Abolitionists, highly conscious of slaveholders' invocation of property rights, resolved to refuse it in absolute terms, to the point of criticizing Douglass's pur-

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326. R.J.M. Blackett, *Dispossessing Massa: Fugitive Slaves and the Politics of Slavery After 1850*, 10 AM. NINETEENTH CENTURY HIST. 119, 128 (2009).

327. *Id.* at 128-31.

328. SINHA, *supra* note 303, at 400.

329. *Id.* at 399.

330. *Id.* at 382.

331. U.S. CENSUS BUREAU, BICENTENNIAL EDITION: HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 14 ser. A-91-104, n.1 (1975), https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p1-chA.pdf [https://perma.cc/D39R-576N].

332. The movement used the slogan, "We are Americans." SINHA, *supra* note 303, at 324; *see id.* at 316-30 (describing abolitionist organizing for Black citizenship); *id.* at 339-80 (describing international abolitionist organizing).

333. Blackett, *supra* note 326, at 121.

chase of his own freedom with British funds. William Lloyd Garrison, who insisted that enslaved people's efforts to purchase liberation could not be called "compensation" to slaveholders, called the money a "ransom."[334] Meanwhile, in the literature they produced, self-emancipated people frequently referenced and repurposed familiar theories to emphasize their own personhood through invoking their property rights and self-possession. Henry Bibb, for example, who escaped slavery in 1841 and published his narrative in 1849, invoked the labor theory when he asked, "[W]ho had a better right to eat the fruits of my own hard earnings than myself?"[335] William Wells Brown, who escaped in 1834 and published his story in 1847, pointed to his own dispossession when he called his master "the man who stole me as soon as I was born."[336] In his narrative of self-emancipation, James W.C. Pennington — who escaped slavery at the age of nineteen in 1827, became the first African American to attend classes at Yale, and published the first history of Black people in the United States[337] — resoundingly denounced "the chattel principle," which reduced human beings to marketable commodities, as the essence of slavery.[338]

All this evidence of self-possession was galling to slaveholders, whose right of possession it directly challenged. They spun narratives in response that "refused to acknowledge among runaways signs of rationality, emotion, and independence, which they hoped to both ignore and suppress."[339] They also blamed white "negro stealers," "unnamed white men," and "thieving Abolitionists" for their losses,[340] claiming that white abolitionists were leading and inspiring fugitives, rather than the reverse,[341] and that Douglass could not possibly have been enslaved.[342] An 1851 cartoon by the Philadelphia lawyer and artist Edward Williams Clay, who specialized in proslavery political illustrations, is typically demeaning and exemplifies how discourse centered the issue of possession.[343] Its

334. SINHA, *supra* note 303, at 427.

335. *Id.* at 431 (quoting Henry Bibb); *see also id.* at 424 (referencing an account of Lewis Clarke, who published his account in 1845 and also applied a labor theory of value).

336. *Id.* at 428 (quoting William Wells Brown).

337. JAMES W.C. PENNINGTON, A TEXTBOOK OF THE ORIGIN AND HISTORY OF THE COLORED PEOPLE (Hartford, L. Skinner 1841).

338. SINHA, *supra* note 303, at 432 (quoting James W.C. Pennington).

339. WOOD, *supra* note 295, at 248.

340. Blackett, *supra* note 326, at 125-26.

341. SINHA, *supra* note 303, at 382.

342. *Id.* at 425.

343. Edward Williams Clay, *What's Sauce for the Goose Is Sauce for the Gander* (print/lithograph), *in Prints & Photographs Online Catalog*, LIBR. OF CONG. (1851), https://www.loc.gov/pictures/item/2008661533 [https://perma.cc/ZF25-VBAH].

first panel depicts a slaveholder and federal marshal invoking U.S. law to confront a white abolitionist, with a fugitive enslaved person cowering behind him, while the second panel shows the same abolitionist pointing to stolen cloth in the shop of the slaveholder, who responds with regard to the cloth: "They are fugitives from you, are they? . . . I have a higher law of my own, and possession is nine points in the law."[344] The enslaved person agrees: "Of course Massa. De dam Bobolitionist is de wus enemy we poor n[***]s have got."[345]

These cultural narratives frequently found expression in the law, particularly when white abolitionists were charged with dispossessing slavers. In 1854, for example, Kentucky governor Lazarus Powell demanded the return of enslaved persons from Indiana governor Joseph Wright, and charged white abolitionist Delia Webster "with conducing and (enticing) away slaves from the possession & services of there [sic] masters and (overseers)."[346] Even when enslaved people "quite literally and obviously took their lives in their own hands," as Wood writes, they were "misrepresented as passive objects, 'forced,' 'urged,' 'allowed,' or 'provoked' to escape by various whites."[347] In other words, there was a strong investment in narratives about property that denied Black people's personhood through a refusal to recognize their inherent self-possession and capacity for property rights. Today, as we mine these histories to consider how they have shaped property law and our world, we must learn, too, to read the layers of erasure within them. Beneath the general erasure of histories of racial violence and dispossession, we must seek the stories of how people resisted enslavement and conquest, to understand better how they shaped the laws against and through which they fought for their lives.

The question of the relationship between law and force, which lies at the heart of the theory of possession in property law, presents another system-wide property issue that received a dramatic new configuration in the American colonies, with consequences for the way we understand the relationship between public and private actors in the United States. Where the traditional theory of possession seeks to minimize the use of force with a rule that honors the status quo of possession, in the colonies and the United States, property markets only emerged from upturning the status quo of possession. The two most significant forms of property could only be created and maintained by using a breathtaking amount of force—that is, through the dispossession and subjugation of Native

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344. *Id.*

345. *Id.*

346. Letter from Lazarus W. Powell, Gov. of Ky., to Joseph A. Wright, Gov. of Ind. (June 26, 1854), https://www.in.gov/history/for-educators/all-resources-for-educators/resources/underground-railroad/gwen-crenshaw/indiana-and-fugitive-slave-laws/ [https://perma.cc/75N2-G5SE].

347. WOOD, *supra* note 295, at 248.

and African-descended peoples. Consequently, a primary question, in a context launched by discovery, was how to use laws to marshal the force required to produce and protect this new world of property, rather than to preserve the peace.

In both the examples of headright or homesteading laws and fugitive slave laws, the state deputized private individuals to enact this violence and incentivized them to do so with the promise to recognize the significant ownership claims they could thereby make. Moreover, it was through this private action that the state expanded its own jurisdiction and increased collective wealth. The conceptual and practical consequences of this arrangement help explain the paramount importance of property in America, and, in particular, its centrality to the relationship between the state and society and social relations more generally. Among other lessons one might draw from this history, the key role of homesteading in territorial expansion demonstrates that in the United States, private property preceded public jurisdiction, reversing European conceptions of a state that distributes private interests. Additionally, using legal devices such as homesteading incentives and fugitive slave laws to invest private parties personally in creating and protecting private property moved the racial violence required for this project into the domain of the private sphere, mobilizing populations against one another as they pursued their property interests and sought to defend themselves—pitting property interests against peace.

V. EXPROPRIATION AND THE CREATION OF AMERICAN PROPERTY LAW

Discovery, labor, and possession are all topics that ubiquitously begin property-law courses and fall under the broader topic of initial "acquisition" of property. Property-law teachers typically present acquisition as an abstract, theoretical question about how property interests arise in the first place, or how unowned things come to be owned.[348] Accordingly, discovery, labor, and possession are presented as principles dictating, respectively, that entitlements belong to the party in a dispute whose claim is "first-in-time," who invests labor to produce the property, or who is already in possession in order to preserve the status quo. Preliminarily, if we begin by acknowledging that the lands belonged to sovereign Native nations, and the African people brought here were deprived of

348. Bethany Berger, for example, has written that a "central myth of American property law [is] that we start with a world in which no one has rights to anything, and the fundamental problem is how best to convert it to absolute individual ownership." Berger, *supra* note 18, at 1089.

their inherent bodily autonomy by force, we acknowledge that historically, "acquisition" did not centrally concern "unowned things."[349] Rather, in the English colonies, establishing property claims constituted a process of collective expropriation, which exacted immeasurable costs from Indigenous and Black communities. Further, the practices, strategies, and theories that colonists used to render these resources *property*—including the three doctrinal principles discussed above—have become hallmarks of the property laws and institutions that they engendered.

Yet as a result of these erasures and the path-dependent development described in Part I, the American property-law curriculum today focuses almost exclusively on English doctrines regulating relations between neighbors—rather than the remarkable innovations that distinguish the American property system from others and made it a model that is now propagated around the world. In particular, the curriculum, as it has evolved, fails to focus on the unique fruits of the colonial experiment that would otherwise help us understand the contemporary national landscape of property: the American land system that underpins the real estate market and its structural reliance on racial violence to produce value. It is under a framework of erasure that the topic of "acquisition" comes to concern hypotheticals between neighbors or a conceptual origin story, not American history. With respect to the curriculum more broadly, recent attempts to teach about race in property-law courses have tended to involve the addition of Federal Indian law or civil-rights topics to an otherwise set property-law canon—not a fundamental rethinking of the core curriculum. This marginalization of race reflects a broader tendency in the legal academy to relegate the study of race to an optional elective rather than a central subject and a necessary element of the study of law.[350] The absence of an account of the formative role of race in American property law, or any other field, reinforces the mistaken idea that racial dynamics are aberrational manifestations of individual prejudice infecting an essentially neutral system of law.

The Parts above show that the history of the relationship between Native nations and the colonies (later the United States) *is* the history of property in land in America. This history, moreover, is highly entangled with the history of

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349. Benton & Straumann, *supra* note 127, at 14. Benton and Straumann painstakingly show that early theorists of empire invoked the principle of "res nullius," from which the idea of "terra nullius" was derived, to criticize it more often than not. *Id.* at 1-2.

350. Even this elective status was the hard-won result of advocacy within the legal academy and groundbreaking scholarship that offered powerful arguments for studying the formative role of race in law. *See, e.g.*, Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 6-7 (1988); Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93, 95 & nn.6 & 7 (1990). This Article builds on the efforts and inroads of this earlier work.

enslavement, which sprang from the same, longer legal tradition that authorized European conquests, furnished labor for the expropriation of lands, and also uniquely developed the racism that fueled it. Further, the anti-Blackness it entrenched not only influenced the racialization of other nonwhite groups in America, but (in a story for another time) also powerfully reorganized the land system to circumvent Black property rights after the abolition of slavery. These histories are therefore critical for understanding property in *land* in the United States, which is still the central subject of property-law classes today. Professor William Wood has written that "[l]and, and controlling what happens on it and the revenues from it, has always been the focal point of relations between Indigenous peoples and non-Natives in North America."[351] This control remains a focal point of maintaining power and wealth for the United States, which grew the market it built from the lands it expropriated into a real estate market worth approximately $64 trillion today.[352] This real estate market is still a terrain of racial struggle that continues to enact harms on particular groups. The histories of conquest and slavery out of which it grew also shaped the systems and practices that today govern the population as a whole.[353] These are institutions and areas of law viewed as mainstream and fundamental, which constitute the heart of legal education and practice now.

These histories, in other words, shaped property law in ways that affect us all. While this analysis has focused on the ways this history directed material resources and affected people's lives, it has also emphasized how closely intertwined the material projects of conquest and enslavement have long been with the enterprise of producing historical narratives about property. The powerful and persistent pathways of narratives about discovery, labor, and possession show that the ideological denial or justification of racial violence is bound up with material practices of creating property and property value through racial

351. Wood, *supra* note 158, at 415.

352. Fin. Accts. Guide, *B.1: Derivation of U.S. Net Wealth*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/apps/fof/displaytable.aspx?t=b.1 [https://perma.cc/XZW3-A5V9]. Figures quoted in the main text are the result of the author's calculations adding real estate at market value for households and nonprofits (line 3) and nonfinancial noncorporate business (line 8), and total residential and nonresidential structures for the federal government (line 17) and for state and local governments (line 21). Interests in land today constitute about sixty percent of global mainstream assets. Leilani Farha (Special Rapporteur), *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, U.N. Doc. A/HRC/34/51 (Jan. 18, 2017).

353. *See also* K-Sue Park, *Race, Innovation, and Financial Growth: The Example of Foreclosure*, *in* HISTORIES OF RACIAL CAPITALISM 27 (Justin Leroy & Destin Jenkins eds., 2021) (explaining how the use of foreclosure to expropriate Indigenous lands helped develop specific racial dynamics in economic transactions in colonial America that have proven persistent over time).

violence. This Article has foregrounded the erasures that persist in the way we conceptualize and talk about property because they are part of the legacy of this ongoing violence.

The analysis above offers an example of how we might take account of the histories of conquest and slavery in our understanding of property law, and how doing so alters our understanding of the principles for which various topics stand. In particular, it shows that beyond incorporating new historical information into our study, undoing the erasure of conquest and slavery from the canon requires rethinking the theoretical conclusions we draw from historical information about the dynamics and impact of existing institutions and practices. Parts II, III, and IV show, for example, that discovery, labor, and possession are not merely abstract alternative principles—they were also intimately related to each other historically. Discovery, indeed, served as an umbrella mandate for labor and possession, creating the imperative to create new markets through conquest and enslavement. As we have seen, possession constituted a critical requirement or condition for making a "discovery" claim. If possession, then, served as the measure of a property claim by conquest, the labor theory references the particular work that colonists performed under this mandate to take possession of—or to actually occupy and control—property. Further, considering the theories in their historical context appears to reverse the abstract principles they are now thought to represent: we see that the Discovery Doctrine nullified rather than upheld first-in-time rights, as it imposed a racial order on the world; the labor theory denied the labor of non-Europeans, who comprised the key labor force in the colonies; and establishing possession of property in America required legal, systematic coordination to make dispossession possible on a massive scale.

Though this Article takes up only three examples of property-law topics, each also illuminates dynamics that operate across specific doctrines to affect the property system, and by extension, the legal system, as a whole. Part II discusses the history of "discovery," or the international laws of conquest that Chief Justice Marshall explicitly described and drew upon in *Johnson v. M'Intosh*, which currently has virtually no place in property-law casebooks and curricula. However, this legal context, which authorized early modern European conquests and the transatlantic slave trade, explains how the original American colonies were established and grew. Without it, property-law courses fail to explain that U.S. sovereign jurisdiction and the authority to decide law—not just property law, but *all* law—stems from "discovery," or conquest.

"Discovery," most fundamentally, was a European racial project aimed at the creation of commercial value. Consequently, a broad racial hierarchy of humanity set the stage for English colonists' activities in mainland America, where "discovery" licensed the use of force on non-Christian non-Europeans. "Discovery"

therefore made race itself a dynamic resource that colonists channeled through the development of new legal institutions and practices. The arena of these activities was *trade*: the drive to produce property, and increase its monetary value, propelled the interdependent processes of conquest and enslavement for centuries. The longer tradition of legal justifications for conquest itself illustrates how universal legal formulations can further hierarchy when that hierarchy comprises a background rule of trade. Chief Justice Marshall himself, however, explicitly affirmed racial hierarchy as the basis of both U.S. jurisdiction and its authority to decide the rules for how other sovereigns—namely, Native nations and states—could trade interests in land as the United States continued to cultivate novel markets to pay its debts and grow.

Section III.A examined perhaps the most significant elaboration of the labor theory and the logic of entitlement by virtue of investment, desert, and prevention of waste, in American history: colonists' invocation of the labor theory to justify their occupation of Native nations' lands, which is virtually absent from property-law casebooks and curricula. Due to the extensive literature on Locke's involvement in the histories of conquest and enslavement, property-law professors who do link the study of Locke with colonization may already underscore the factual inaccuracy of colonists' description of the labor and land tenure of Europeans alone as valuable. As they expose colonial accounts of Native people and practices, it is important to also highlight the lasting ideological *and* material consequences of the labor theory. The strong association between property values and race, which both perceives nonwhite communities as destructive or wasteful to property and drives the actual assessment of higher property values to property occupied by whites,[354] persists across the contemporary real estate market. The theory's account of the labor that settlers were required to perform under headright and homestead laws also indexes a principle that remains enshrined in the U.S. property system as a concept and in actual programs in the present.

The system within which settlers long claimed ownership following homesteading incentives is permeated with values that are deeply informed by its history. In the unique context of the American colonies, this property system attributed monetary value to land and people, but only once those lands and people came into European possession or actual control. This approach to property value, which colonists pursued for centuries, not only relied on a high degree

354. *See, e.g.*, Freddie Mac, *Racial and Ethnic Valuation Gaps in Home Purchase Appraisals* (Sept. 20, 2021), http://www.freddiemac.com/fmac-resources/research/pdf/202109-Note-Appraisal-Gap.pdf [https://perma.cc/6HZF-4FWE]; Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Aug. 27, 2020), https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html [https://perma.cc/Y5BX-S5GE].

of racial violence, but elevated the monetary value of land above its other intrinsic environmental or human values. This construction of value remains prevalent in U.S. law today in many ways; among others, as Professor Rebecca Tsosie has underscored, U.S. conceptions of sovereignty, property, and wealth, are expressed in laws privileging monetary wealth and the interests of non-Indian landowners.[355] Qualitatively, the conception of wealth that privileges monetary value above all radically contrasts the multivalent understanding of "wealth" shared by diverse Native nations, which includes the cultural knowledge and collective identity, both spiritual and political, that comes from land.[356] As Professors Kristen Carpenter and Angela Riley have pointed out, the "classic view of property law [that] focuses on . . . protecting the individual owner's rights of exclusion and alienation primarily for wealth maximization purposes" opposes, more broadly, "a more relational vision . . . [that] honors the legitimate interests of both owners and nonowners, in furtherance of various human and social values . . . including nonmarket values."[357] Indeed, despite the present dominance of the American colonial legal paradigm of property that I have described here, people everywhere continue to experience belonging today through conceptions of the land as a site of collective memory and nonfungible value.

With respect to the mechanical aspects of the property system, the colonial innovations that developed this distinctly narrow conception of land value and dehumanized enslaved people in many respects continue to organize property interests in America and beyond. The ground-level legal institutions that emerged during this period to facilitate the trade of those two all-important commodities ensure property ownership and exchange to this day. As Section III.B argues, the legal work of property creation includes the creation of the systems and practices that remain key features of the land system and anchor the real estate market—the comprehensive survey system, centralized title registry, and easy foreclosure. The survey system—a national institution in the United States—became a way to imagine land enclosures in a uniform way across a populace and facilitated constructing them at scale. Validating ownership through chains of title and recording information concerning commodified land and ownership in comprehensive title registries became important ways of increasing

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355. *See* Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1300-06 (2001) (arguing for an intercultural framework for understanding property).

356. *Id; see also* Carpenter & Riley, *supra* note 13, at 808-10 (noting that across the enormous cultural and political diversity between tribal nations, "a common feature of indigeneity was attachment to land in a spiritual sense," a sacred relationship to land "characterized by rights, obligations, and mutual respect and need.").

357. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L. J. 1022, 1027 (2009).

the certainty of ownership. They also helped reduce intracolonial disputes, directing more energy toward the collective goal of expropriation and wealth accumulation. Finally, easy foreclosure of lands added fuel to this machine by inducing creditors to feed money into the enterprise of expropriation. When foreclosure became a normal market practice across the colonial population, rather than a racially-targeted practice, it marked the normalization of harm to individuals previously unthinkable—all for the profits promised by credit or the debt-based growth of the economy as a whole.

This Article's final example directly addresses the stunning amount of racial violence that was required to establish possession of lands and people in the colonies and United States in order to consummate novel property claims. This overarching reality of American history requires that property-law professors acknowledge that property creation here entailed dispossession, and the contradiction between how "possession" operated under "discovery" and the age-old principle of possession as a justification for property rights. Part IV showed that the United States organized its monopoly over force by delegating this violence to the private sphere, not only by adopting the strategy of conquest by settlement, but also in its doomed efforts to resolve a fundamental conundrum of the chattel slave trade—people's fundamental, inexorable self-possession and desire to be free. Laws deputized potential and present property owners to make and keep property for the markets by stimulating their self-interest. With promises to confirm property claims, legislatures invested whites personally in the racial hierarchy that guided property production. Courts then reinforced this work in private disputes by privileging property rights above the dignity of human life and the conditions necessary to sustain it. Racial violence thereby percolated into the fabric of social relations, so that property interests also engaged nonwhites in the defense of themselves, their communities, and their homelands.

The foregoing Parts together, therefore, show how profoundly property law has shaped the social and economic world of America, in ways that present property-law casebooks and curricula fail to show. The homesteading principle enlisted families across the colonies and then the nation to carry out the violence of conquest in the name of creating or raising the monetary value of property for themselves and the collective in pursuit of the American Dream. The slave trade that grew in tandem with the land market deeply entrenched racial violence as both a market tool and a social norm, as the trade of these interdependent commodities reached unprecedented levels of speed and scale. The erasure of histories of racial violence from property law makes it difficult to appreciate the great extent to which lingering practices and norms arose from conditions unique to the context of this enterprise. For example, not only did colonists act under a racial framework and use violence authorized by the discovery principle, but they

also perceived the lands of others as inexhaustible raw material. The goal of their settlement was profit-making, rather than long-term social stability.

Perhaps most fundamentally, the material now omitted from property law sheds light on the historical evolution of the land system that underpins the real estate market and its structural reliance on racial violence to produce value. These aspects of property law are likely the most intuitive points of entry to the subject in a world of rapidly changing urban environments, rising rents, racial segregation, and homelessness across the country. Moreover, the stakes are now global, as the lucrative nature of the American property-law system has made it a model for propagation around the world.[358] As it continues to produce inequity with wealth, this contest over history will determine whether we understand the American system as a beacon or a challenge—whether we see the widespread and deep hardship it imposes as aberrational or endemic to it, and whether or not we are willing to grapple with its costs.

CONCLUSION

This Article has probed the questions of what we believe we know about a subject and why we think we know it. In the main, it has contended that the centuries-long effort to produce, maintain, and develop new forms of property in lands wrested from Native nations and enslaved people guided the development of American property law in ways that impact us to this day. These histories train us to look differently at the costs of property-law institutions and practices and teach us about the variety of ways in which racial logic works through law. The history of law, like the history of knowledge production, has been characterized by much path dependence. Prevailing epistemic norms of erasure mean that individuals and communities have accrued profound investments over time in the narratives that explain their identity and the world they live in. However, the histories of law and knowledge production are also full of instances in which people made decisive choices, shifted norms, and countenanced great risk. The instability and division that has grown out of these histories of racial violence is rising yet again, and we must choose whether or not we will confront these histories head-on. The question is again on the table as to whether we will try, finally, to account for them and to address the consequences they have wrought.

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358. A broad literature on global land-titling programs, influenced strongly by Hernando De Soto, argues that an American-style property system is key to building national wealth. *See, e.g.*, HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 5-10 (2000).

APPENDIX A

TABLE 1. CASEBOOKS EXAMINED

AUTHORS	CASEBOOK TITLE	YEAR PUBLISHED
JOHN CHIPMAN GRAY	Select Cases and Other Authorities on the Law of Property	1888
CHRISTOPHER GUSTAVUS TIEDEMAN	Selected Cases on Real Property. Selected and Arranged for Use in Connection with the Author's Treatise on Real Property	1897
ELMER E. BARRETT	Cases on the Law of Real Property	1898
CHICAGO COLLEGE OF LAW	Illustrative Cases on Real Property	1898
WILLIAM A. FINCH	Selected Cases on the Law of Property in Land	1898
JASPER C. GATES	Cases on the Law of Real Property	1898
GRANT NEWELL	Elements of the Law of Real Property, with Leading and Illustrative Cases	1902
WILLIAM A. FINCH	Selected Cases on the Law of Property in Land	1904
JOHN CHIPMAN GRAY	Select Cases and Other Authorities on the Law of Property	1906
WILLIAM F. WALSH	Select Cases on the Law of Real Property	1906
JOHN R. ROOD	Decisions, Statutes &c. Concerning the Law of Estates in Land [Rood Real Property Cases]	1909
WILLIAM A. FINCH	Selected Cases on the Law of Property in Land	1912
WILLIAM L. BURDICK	Illustrative Cases on the Law of Real Property	1914
EDWARD H. WARREN	Select Cases and Other Authorities on the Law of Property	1915
RALPH WILLIAM AIGLER	Titles to Real Property, Acquired Originally and by Transfer Inter Vivos	1916
HENRY A. BIGELOW	Introduction to the Law of Real Property; Rights in Land	1919
WILLIAM A. FINCH	Selected Cases on the Law of Property in Land	1919
EDWARD H. WARREN	Select Cases and Other Authorities on the Law of Property	1919

HOMER BLISS DIBELL	Cases on Real Property	1920
JOSEPH DANIEL SULLIVAN	Selected Cases on Real Property	1921
WILLIAM F. WALSH	Select Cases on the Law of Property Real and Personal	1922
JOSEPH WARREN	Select Cases and Other Authorities on the Law of Conveyances and Related Subjects	1922
JOHN HOWARD EASTERDAY	Cases on the Law of Real Property	1925
CHRISTOPHER GUSTAVUS TIEDEMAN AND GUY MERVIN WOOD	Cases on Real Property. Selected and Arranged for Use in Connection with the Author's Treatise on Real Property	1925
JOHN PHILIP MALONEY	Selected Cases on the Law of Real Property	1927
VICTOR HENRY KULP	Cases on Titles to Real Property: As Effected by Acknowledgments, Recording, Curative Acts, Possession, and Lis Pendens	1928
BASIL H. POLLITT	Cases on Problems in the Law of Real Property	1928
JOHN A. BLAKE	Cases on the Law of Real Property	1930
AMERICAN SCHOOL	Real Property, Titles to Estates: Introductory Lecture, Illustrative Cases, Court Decisions, Glossary, and Review Questions	1931
HARRY A. BIGELOW AND FRANCIS W. JACOB	Cases on the Law of Personal Property	1931
JOHN H. EASTERDAY	Cases on the Law of Real Property II-hornbook	1931
JAMES J. O'LEARY	Real Property: Key Principles, Cases, Questions Analyzed, Answered	1931
WILLIAM F. WALSH	Cases on the Law of Property	1931
RALPH WILLIAM AIGLER	Cases on the Law of Titles to Real Property, Acquired Originally and by Transfer Inter Vivos	1932
BYRON ROBERT BENTLEY	Cases in Real Estate and Property Law	1932
MARION RICE KIRKWOOD	Cases on the Law of Conveyances	1932
EVERETT FRASER	Cases and Readings on Property; Introduction to Real and Personal Property	1932

BYRON ROBERT BENTLEY	Business Law of Real Property	1933
RICHARD ROY POWELL	Cases and Materials on the Law of Possessory Estates	1933
HARRY A. BIGELOW AND JOSEPH WARREN MADDEN	Introduction to the Law of Real Property: Rights in Land	1934
FRANK L. MECHEM	Supplementary Cases for Real Property	1935
EVERETT FRASER	Cases and Readings on Property; Introduction to Real and Personal Property	1936
ALBERT MARTIN KALES AND HORACE E. WHITESIDE	Cases on the Law of Property, Future Interests and Illegal Conditions and Restraints	1936
JOHN PHILIP MALONEY	Selected Cases on the Law of Real Property	1936
ROY FIELDING WRIGLEY	Cases and Materials on the Law of Property	1937
EDWARD H. WARREN	Cases on Property	1938
HARRY A. BIGELOW AND OTHERS	Cases and Other Materials on the Law of Property	1938
ARTHUR T. MARTIN	Cases and Other Materials on the Law of Conveyances	1939
MAX RHEINSTEIN	Cases and Other Materials on the Law of Property	1939
WILLIAM F. WALSH	Cases on the Law of Property (and Niles?)	1939
JOHN A. BLAKE	Cases on the Law of Realty Titles	1940
HARRY A. BIGELOW AND SHELDON TEFFT	Cases and Other Materials on the Law of Property	1940
BYRON R. BENTLEY	Real Estate Law with Case Texts and Forms	1940
RAY ANDREWS BROWN	Cases and Materials on the Law of Real Property: A First Course on the Law of Real Property, Consisting of the Law of Estates in Land and an Historical Introduction	1941
MARION RICE KIRKWOOD	Cases and Materials on the Law of Conveyances	1941
OLIVER S. RUNDELL	Cases and Materials on Rights in Land	1941

WILLIAM F. WALSH AND RUSSELL D. NILES	Cases on the Law of Property	1941
EVERETT FRASER	Cases and Readings on Property: Introduction to Real and Personal Property	1941
RALPH WILLIAM AIGLER	Cases and Materials on the Law of Titles to Real Property, Acquired Originally and by Transfer Inter Vivos	1942
VICTOR HENRY KULP	Cases on Titles to Real Property: As Effected by Acknowledgments, Recording, Curative Acts, Possession, and Lis Pendens	1942
HARRY A. BIGELOW AND WILLARD LELAND ECKHARDT	Cases and Other Materials on the Law of Personal Property	1942
WILLIAM EDWARD BURBY	Illustrative Cases on the Law of Real Property	1943
ARTHUR THEODORE MARTIN	Cases and Other Materials on the Law of Real Property	1943
RICHARD ROY BELDEN POWELL	Cases and Materials on the Law of Possessory Estates	1943
HARRY A. BIGELOW	Cases and Materials on Rights in Land: With an Introduction to the Law of Real Property	1945
HARRY AUGUSTUS BIGELOW AND SHELDON TEFFT	Cases and Other Materials on the Law of Property	1946
VICTOR HENRY KULP	Cases on Titles to Real Property: As Effected by Acknowledgments, Recording, Curative Acts, Possession, and Lis Pendens	1947
JOHN A. BLAKE	Cases on the Law of Real Property	1948
MYRES MCDOUGAL	Property, Wealth, Land: Allocation, Planning and Development	1948
JOHN A. BLAKE	Cases on the Law of Realty Titles	1948
A. JAMES CASNER	Cases and text on property	1949
RALPH WILLIAM AIGLER, HARRY A. BIGELOW, RICHARD ROY BELDEN POWELL, ALLAN F. SMITH, AND SHELDON TEFFT	Introduction to the law of real property: Rights in land/Cases and materials on the law of property	1950

RALPH WILLIAM AIGLER, HARRY A. BIGELOW, RICHARD ROY BELDEN POWELL, ALLAN F. SMITH, AND SHELDON TEFFT	Cases and Materials on the Law of Property	1951
WILLIAM F. WALSH AND RUSSELL DENISON NILES	Cases on the law of property	1951
KENNETH S. SKOLFIELD	Cases and Materials on the Law of Real Property: A First Course in the Law of Real Property	1952
EDWARD S. BADE	Cases and materials on real property and conveyancing	1953
HOWARD R. WILLIAMS	Cases and Materials on the Law of Property	1954
EVERETT FRASER	Cases and Readings on Personal Property: Introduction	1954
EDWARD S. BADE	Cases and Materials on Real Property and Conveyancing	1954
HOWARD R. WILLIAMS	Cases and Materials on the Law of Property	1954
BYRON ROBERT BENTLEY	Real Estate Law, with Cases, Text, and Forms	1954
JOSEPH DAINOW	Civil Law Property: Cases and Materials	1955
WILLIAM F. WALSH, RUSSEL D. NILES, AND ELMER M. MILLION	Cases on the Law of Property	1955
JAMES J. HAYDEN	Elements of Real Property Law: Cases and Text	1957
A. JAMES CASNER	Cases and text on property	1958
JAMES J. HAYDEN	Elements of Property Law: Cases and Text	1959
RALPH W. AIGLER, ALLAN F. SMITH, AND SHELDON TEFFT	Cases on Property	1959
JOHN E. CRIBBET	Cases and materials on property	1960
WILLIAM H. FARNHAM	Cases and Notes on Property in Land and Chattels	1960

JOHN A. BLAKE	Cases on the Law of Realty Titles	1962
RICHARD L. BRAUN	Cases and Materials on Real Property (manuscript?)	1963
A. JAMES CASNER	Cases and text on property	1963
JAN Z. KRASNOWIECKI	Cases and Materials on Ownership and Development of Land	1964
JAMES B. MACDONALD, WALTER RAUSHENBUSH, AND JAMES BEUSCHER	Sales of Land: Cases and Materials	1965
CURTIS J. BERGER	Cases and Materials on Property I: Land Ownership and Use	1965
OLIN L. BROWDER, JR.	Basic property law	1966
JOHN E. CRIBBET	Cases and materials on property	1966
EDNA L. HEBARD AND GERALD S. MEISEL	Cases and Problem Analysis in Real Estate Law	1966
CURTIS J. BERGER	Land Ownership and Use: Cases, Statutes, and Other Materials	1967
A. JAMES CASNER	Cases and Text on Property	1968
CURTIS J. BERGER, ALLAN AXELROD, AND QUINTIN JOHNSTONE	Land Transfer and Finance: Cases and Materials	1969
JOHN E. CRIBBET	Cases and Materials on Property I: Land Ownership and Use	1971
OLIN L. BROWDER, JR.	Basic property law	1972
EDWARD H. RABIN	Fundamentals of modern real property law	1973
GEORGE LEFCOE	American Land Law: Cases and Materials	1974
CHARLES DONAHUE, JR.	Cases and materials on property: an introduction to the concept and the institution	1974
CHARLES HAAR	Property and law	1974
NEIL K. KOMESAR	Analytical materials for the study of real property	1977
EDWARD COHEN	Materials for a Basic Course in Property	1977
RICHARD H. CHUSED	A modern approach to property: cases, notes, and materials	1978
JOHN E. CRIBBET	Cases and materials on property	1978

OLIN L. BROWDER, JR.	Basic property law	1978
JESSE DUKEMINIER AND JAMES KRIER	Property and law	1979
MYRES SMITH MCDOUGAL AND LUTHER L. MCDOUGAL	Property, wealth, land: allocation, planning, and development	1981
EDWARD H. RABIN	Fundamentals of modern real property law	1981
CHARLES DONAHUE, JR.	Cases and materials on property: an introduction to the concept and the institution	1982
JOHN E. CRIBBET	Cases and materials on property	1983
OLIN L. BROWDER, JR.	Basic property law	1984
PAUL GOLDSTEIN	Real property	1984
A. JAMES CASNER	Cases and text on property	1984
JON W. BRUCE, JAMES W. ELY, JR., AND C. DENT BOSTICK	Cases and Materials on Modern Property Law	1984
CHARLES HAAR	Property and law	1984
SHELDON F. KURTZ AND HERBERT HOVENKAMP	Cases and materials on American property law	1985
RICHARD H. CHUSED	A modern approach to property: cases, notes, and materials	1987
JESSE DUKEMINIER AND JAMES KRIER	Property	1988
OLIN L. BROWDER, JR.	Basic property law	1988
JON W. BRUCE, JAMES W. ELY, JR., AND C. DENT BOSTICK	Cases and Materials on Modern Property Law	1989
JOHN E. CRIBBET	Cases and materials on property	1989
LAWRENCE W. WAGGONER, RICHARD V.	Family Property Law: Cases and Materials on Wills, Trusts, and Future Interests	1990

WELLMAN, GREGORY S. ALEXANDER, AND MARY LOUISE FELLOWS		
SANDRA H. JOHNSON, TIMOTHY S. JOST, PETER W. SALSICH, JR., AND THOMAS L. SHAFFER	Property Law: Cases, Materials and Problems	1991
EDWARD H. RABIN	Fundamentals of modern real property law	1992
JOSEPH WILLIAM SINGER	Property Law: Rules, Policies, and Practices	1992
CHARLES DONAHUE, JR.	Cases and materials on property: an introduction to the concept and the institution	1993
JESSE DUKEMINIER AND JAMES KRIER	Property	1993
SHELDON F. KURTZ AND HERBERT HOVENKAMP	Cases and materials on American property law	1993
JON W. BRUCE AND JAMES W. ELY, JR.	Cases and Materials on Modern Property Law	1993
JOHN E. CRIBBET	Cases and materials on property	1994
CURTIS BERGER	Property Land Ownership and Use	1996
JOSEPH WILLIAM SINGER	Property Law Rules, Policies, and Practices	1997
JESSE DUKEMINIER AND JAMES KRIER	Property	1997
J. GORDON HYLTON	Property law and the public interest: cases and materials	1998
RICHARD H. CHUSED	A modern approach to property: cases, notes, and materials	1998
A. JAMES CASNER	Cases and text on property	1999
EDWARD H. RABIN	Fundamentals of modern real property law	2000
JOSEPH WILLIAM SINGER	Introduction to Property	2000
JAMES L. WINOKUR, R. WILSON FREYERMUTH, AND JEROME M. ORGAN	Property and Lawyering	2001

JESSE DUKEMINIER AND JAMES KRIER	Property and law	2002
JOHN E. CRIBBET	Cases and materials on property	2002
SHELDON F. KURTZ AND HERBERT HOVENKAMP	Cases and materials on American property law	2002
J. GORDON HYLTON	Property law and the public interest: cases and materials	2003
A. JAMES CASNER	Cases and text on property	2003
EDWARD H. RABIN	Fundamentals of modern real property law	2004
JOSEPH WILLIAM SINGER	Property Law: Rules, Policies, and Practices	2006
JAMES L. WINOKUR, R. WILSON FREYERMUTH, AND JEROME M. ORGAN	Property and lawyering	2006
JOHN G. SPRANKLING AND RAYMOND R. COLETTA	Property: A Contemporary Approach	2009
ROGER BERNHARDT, JOYCE PALOMAR, AND PATRICK RANDOLPH JR.	Property: Statutes and Cases	2009
JESSE DUKEMINIER, JAMES KRIER, GREGORY ALEXANDER, AND MICHAEL SCHILL	Property	2010
JOSEPH WILLIAM SINGER	Property Law: Rules, Policies, and Practices	2010
D. BARLOW BURKE, ANN M. BURKHART, AND R.H. HELMHOLZ	Fundamentals of Property Law	2010
RICHARD H. CHUSED	Cases, Materials, and Problems in Property	2010
EDWARD E. CHASE AND JULIA P. FORRESTER	Property Law: Cases, Materials, and Questions	2010

ALFRED L. BROPHY, ALBERTO LOPEZ, AND KALI MURRAY	Integrating spaces: property law and race	2010
EDWARD H. RABIN	Fundamentals of modern real property law	2011
JAMES L. WINOKUR, R. WILSON FREYERMUTH, AND JEROME M. ORGAN	Property and lawyering	2011
DAVID L. CALLIES	Concise Introduction to Property Law	2011
R. WILSON FREYERMUTH AND JEROME M. ORGAN	Property and Lawyering	2011
JOHN G. SPRANKLING AND RAYMOND R. COLETTA	Property: A Contemporary Approach	2011
THOMAS W. MERRILL AND HENRY E. SMITH	Property: Principles and Policies	2012
SHELDON F. KURTZ, CAROL NECOLE BROWN, AND HERBERT HOVENKAMP	Cases and Materials on American Property Law	2012
CALVIN R. MASSEY	Property Law: Principles, Problems, and Cases	2012
ERIC T. FREYFOGLE AND BRADLEY KARKKAINEN	Property Law: Power, Governance, and the Common Good	2012
GRANT S. NELSON, DALE A. WHITMAN, COLLEEN E. MCDILL, AND SHELLEY ROSS SAXER	Contemporary Property	2012
JESSE DUKEMINIER, JAMES A. KRIER, GREGORY S. ALEXANDER, LIOR STRAHILEVITZ, AND MICHAEL SCHILL	Property	2013

TABLE 2. VOLUMES EXAMINED BUT EXCLUDED FROM ANALYSIS

AUTHORS	CASEBOOK TITLE	YEAR PUBLISHED
SAYRE MACNEIL, JAMES ANGELL MCLAUGHLIN, AND EDWARD WARREN	Cases and Notes Supplementary to Warren's Cases on the Law of Property	1931
SAYRE MACNEIL, JAMES ANGELL MCLAUGHLIN, AND SIDNEY POST SIMPSON	Cases and Notes Supplementary to Warren's Cases on the Law of Property	1933
ALLISON DUNHAM	Modern Real Estate Transactions: Cases and Materials	1951
ALLISON DUNHAM	Modern Real Estate Transactions Cases and Materials	1958

TABLE 3. CASEBOOKS IDENTIFIED BUT NOT OBTAINED FOR ANALYSIS

AUTHORS	CASEBOOK TITLE	YEAR PUBLISHED
WILLIAM SULLIVAN PATTEE	Illustrative Cases in Realty	1894
JOHN CHIPMAN GRAY	Select Cases and Other Authorities on the Law of Property	1904
PAUL GOLDSTEIN	Real property	1984
SUSAN F. FRENCH AND GERALD KORNGOLD	Cases and Text on Property	2018

APPENDIX B

TOPICS	CASES	SEARCH TERMS
CONQUEST	Johnson v. M'Intosh, 21 U.S. 543, 590 (1823)	"Discovery"
		"Conquest"
		"Colon[y/ies]"
		"Indian"
		"Native"
		"Tribe"
SLAVERY	The Antelope, 23 U.S. 66 (1825)	"Slave[s]"/"slavery"
	Com. v. Aves, 35 Mass. 193 (1836)	"Negro[es]"
	Dred Scott v. Sandford, 60 U.S. 393 (1857)	"Black"
		"Mulatto"
		"Colored"
RACIALLY RESTRICTIVE COVENANTS	Corrigan v. Buckley, 271 U.S. 323 (1926)	"Negro[es]"
	Shelley v. Kraemer, 334 U.S. 1 (1948)	"Black"
		"Colored"
		"Race"/"racial"/ "restrictive" + "covenant"
RACIAL ZONING	Buchanan v. Warley, 245 U.S. 60 (1917)	"Negro[es]"
		"Black"
		"Colored"
		"African American"
		"Race"/"racial" + "zoning"
		"Land use"