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K - S U E P A R K

## Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power

**ABSTRACT.** This Article tells an untold history of the American title registry, a colonial bureaucratic innovation that, though overlooked and understudied, constitutes one of the most fundamental elements of the U.S. property system today. Prior scholars have focused exclusively on the registry's role in catalyzing property markets, while mostly overlooking the main sources of this property in the American colonies: expropriated lands and enslaved people. This analysis centers the registry's work of organizing and "proving" land claims that were not only individual but collective, to affirm encroachments on tribal nations' lands. In this way, registries helped scaffold the colonies' tenuous but growing political and jurisdictional power. The specific history of the U.S. title registry illustrates a crucial dynamic between property and sovereignty. In America, property and property institutions did not issue from sovereigns with established authority to govern a territory, as in the understanding drawn from European legal traditions. Rather, property institutions, exemplified by the title registry, preceded and ushered in colonial and U.S. sovereign title to Native homelands.

This Article presents new questions about how the legal infrastructure of property furthered European colonists' conquest and how this progression of conquest on the ground produced the national jurisdiction and real-estate market of today. Leveraging established scholarship on the colonies and deploying original research on county creation, it shows that in the haphazard history culminating in the American title registry, colonists borrowed the English legal forms of the registry and county and remade them into local tools of colonial territorial expansion. The registry and county became key local governmental forms that drew settlers into Native nations' territories and encouraged them to claim lands by reassuring those settlers that their claims would become real property. The time map of county creation—not of the formation of territories, nor the admission of states, nor the conclusion of treaties—most accurately tracks where the United States grew its jurisdictional power, and when. The United States created counties and registries between its plans to invade and its actual ability to govern lands, before the naming of transitional territories, and often even before obtaining Native cessions to the lands by treaty. In the history of conquest, county creation thus lies in the transition between mere white entitlement and actual title. And as a consequence of this history, counties came to underpin the national jurisdiction, and the local institution of the registry became the common and continuous infrastructure for the entire national real-estate market.

This Article's history of the title registry underscores the conceptual and practical stakes of redressing the erasure of race from our understanding of legal institutions and development. In



particular, this history challenges us to recognize less obvious ways that the legacies of conquest and enslavement survive to structure our landscape and lives. Race works to shape law and legal outcomes in ways that many now recognize, such as by excluding people from institutional protections and benefits and through the predatory risks of formal inclusion. But the registry's history also illustrates a third phenomenon: the phenomenon of legal innovation spurred by white settlers' willingness to view racial violence as an economic resource, which introduced new institutions and practices that may appear to be facially "race-neutral" but promote the production of property value through the dehumanizing logic of race. Colonists constructed minimalist registries, which did not authenticate title claims and encouraged their proliferation. In this way, they prioritized the collective goal of building jurisdictional power at the direct expense of Native and Black communities whose lands and people colonists rapaciously claimed as property for that ever-growing market. The result was an institution that continues to privilege the production of property value above all – above protecting individual property interests, and above sustaining homes, communities, and life, in ways that now affect us all.

**AUTHOR.** Associate Professor of Law, UCLA Law School. I am grateful to Greg Ablavsky, Molly Brady, Guy-Uriel Charles, Adam Davidson, Dan Farbman, Lee Fennell, Sheila Foster, Dirk Hartog, Sophia Lee, Shaun Ossei-Owusu, Claire Priest, and Laura Weinrib for their generous comments and feedback during the drafting process. This Article also benefited from the helpful engagement of participants at the legal-history workshops at the University of Minnesota Law School, the University of Michigan Law School, and Stanford Law School; the law-faculty workshops at the University of Pennsylvania, UCLA, Georgetown, Michigan State University, Seattle University, Boston College, and Brooklyn Law School; as well as the Culp Colloquium; the East Coast Political Economy Consortium at Georgetown Law; the Law and Inequality Colloquium at the University of Virginia; the University of Chicago's Public Law Workshop; and Inaugural Colloquium of the Department of Race, Diaspora, and Indigeneity. I thank David Stein, Darryl Li, and Noura Erakat for their constant encouragement, patience, and friendship. This work would simply not have been possible without the research support of Thanh Nguyen, Richard Mobley, and Marianna Yearboro of Georgetown Law Library. I am also indebted to my research assistants Ashley Burke and Radiance Campbell, as well as Laura Hallas, Nathaniel Hay, and the other student editors of the *Yale Law Journal*. Finally, I wish to express my gratitude to county registers, especially Cheryl Berken of Brown County, WI, and Angie Bates of St. Clair County, IL, who tolerated my calls and provided helpful documents.



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The subject was not one that might be expected to rivet the attention of the academic legal community, let alone that of the profession at large.

— C. Dent Bostick on Land Title Registration

The basis for America's greatness was in the combination of vast resources with institutions which, for all their human faults, were adequate to handle the situation.

— Marion Clawson, Director, Bureau of Land Management 1948-1953<sup>1</sup>

## INTRODUCTION

For nearly four centuries, title registries have collected information about the two principal axes of ownership of property in America: what is owned and who owns it. Like courts, registries are “ground-level” legal institutions.<sup>2</sup> They are publicly accessible and publicly maintained at the local level and create the preconditions for the terms of private and public laws that concern property. Registries’ effects are not something we often recognize, perhaps because the records seem to represent an obvious, even natural, activity: storing information about who owns what property in a place. The humble, hardly riveting, clerical institution of the registry is ubiquitous across the 3,141 counties and county equivalents in the United States.<sup>3</sup> Despite some minor institutional variations,<sup>4</sup> the basic form of registries is remarkably uniform across the country. Title registries

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1. C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 *IND. L.J.* 55, 56 (1987); MARION CLAWSON, *THE LAND SYSTEM OF THE UNITED STATES: AN INTRODUCTION TO THE HISTORY AND PRACTICE OF LAND USE AND LAND TENURE* 4 (1968).
  2. CLAIRE PRIEST, *CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA* 5 (2021).
  3. U.S. Geological Surv., *How Many Counties Are There in the United States?*, U.S. DEP’T INTERIOR (Apr. 3, 2008), <https://www.usgs.gov/media/audio/how-many-counties-are-there-united-states> [<https://perma.cc/ZT3F-9DF5>]. This figure does not include county equivalents in the Commonwealths and the territories of Puerto Rico, the Virgin Islands, American Samoa, the Northern Mariana Islands, or Guam. Title registries are maintained at the county level in every state except for Rhode Island and Connecticut, which use townships.
  4. For example, in language that describes their institutional location, title registries may be called “registries,” “registrars,” or “recorders” of “titles” or “deeds.” In some counties, keeping title records is part of the functions of the county-court or probate-court clerk, while some county recorders maintain independent offices. States also privilege recording differently according to recording acts that variably adopt “race,” “notice,” or “race-notice” rules.

constitute a local, public record of voluntarily recorded claims that the government does not verify but simply keeps.<sup>5</sup>

Though the institution of title registries may seem nondescript, it is undisputed that title registries are indispensable to the construction and ownership of property in land in America. Scholars agree that registries have long furnished a unique source of confidence for a broad range of property transactions, especially purchase, sale, and using property as security for a loan. These repositories are privileged by law as the main mechanism for confirming ownership. James Casner and Barton Leach once called title registries “the pulse beat of the American system of title security,”<sup>6</sup> with Leach going as far as to assert that they constitute “the core of our modern land system.”<sup>7</sup> No tier of the American real-estate market—that is, transactions for real property, mortgages, or shares in mortgage-backed securities and beyond—could operate without the recording system that holds real property and its related markets together. Unlike historical precedents for property registries, which principally supported taxation, the American title registry’s main function has been to facilitate property markets. Thus, it is little wonder that existing scholarship on American title registries has focused on registries’ impact on *private* transactions, rather than the public, governmental dimension of their effects.

This Article addresses the public impact of this understudied institution,<sup>8</sup> heretofore unrecognized in the existing literature, by revealing that it has

5. For this reason, I refer to thousands of offices in the singular, to denote the institution of “the American title registry.”
6. A. JAMES CASNER & W. BARTON LEACH, *CASES AND TEXT ON PROPERTY*, at vi (1950).
7. W. Barton Leach, *Dissenting Preface* to CASNER & LEACH, *supra* note 6, at xi.
8. Scholars who have written about the title registry note its neglect. Abraham Bell and Gideon Parchomovsky observe that though the title registry “is vital to the functioning of a legal system of property,” “to date, it has drawn distressingly little scholarly attention”; yet “[v]ery few concepts affect our property system as profoundly as information about property rights.” They attribute this neglect to a strong convention of privileging judge-made law in legal scholarship; the literature on property and data they cite examines how courts convey information to the public about systemic values through their decisions. Abraham Bell & Gideon Parchomovsky, *Of Property and Information*, 116 COLUM. L. REV. 237, 239-40, 244 (2016) (citing Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 40-42 (2000); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 795-96, 801-02 (2001); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1753-54 (2004)). For a historian’s similar observation, see George L. Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U. L. REV. 281, 281 (1941), which notes that although recording was “a significant auxiliary to the law of real and personal property” and “an essential part of much business transacted in writing,” “its history . . . remains to be written; its origins . . . have never been systematically explored”; and “the subject has received scant attention.” Claire Priest’s *Credit*

supported not only private markets but also “jurisdiction” in the most fundamental sense of the word. That is, it shows how registries underpinned the ability first of the colonies, and then of the United States, to determine or *say* what the *law* is on behalf of a collective and give it force in a territory, which is perhaps the defining marker of sovereignty. The first-order fact of jurisdictional power is often taken for granted, but it is distinct from second-order questions about the various kinds of institutions a given society might develop to govern itself effectively and the way that it divides and distributes jurisdictional power among them. The history of title registries indicates that they played an important role in establishing and supporting that fundamental power in American colonies and the United States.

For neither the charters nor European treaties and sales that transferred land rights to Anglo-Americans – often drawn up without seeing or stepping foot on the lands in question – gave colonists actual legal jurisdiction over those lands. It merely gave them an option, *vis-à-vis* other Europeans, to *attempt* to transfer jurisdictional power from Native nations to themselves. The rule of European conquest, the so-called “[d]iscovery rule” as articulated by Justice John Marshall, required the English not only to arrive “first” – that is, before other European nations, in non-Europeans’ lands – but also to then take “actual possession” of those lands. This Article focuses on this second step of discovery: not the ideologies that launched the intra-European race to conquer lands, but colonists’ on-the-ground attempts to take *control* of lands in order to “consummate[.]” their title.<sup>9</sup> It shows that to effectuate their territorial sovereignty, English colonies and the United States relied on settlement and colonists’ property claims to take possession of lands and, in turn, affirmed these claims through title registries.

Between the discovery right and Anglo-American sovereign jurisdiction – *after* colonists’ intention to invade but *before* they consummated their title – the title registry made its appearance across the lands. Its history thus encompasses a history of the mechanics of conquest as well as of American property. Where recent literature on territorial conquest focuses on the United States and the federal role, this account reveals that the site of struggles to take land and build power was *local*. It further establishes that colonists developed the strategies taken up by the United States to wield the political force of property against

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*Nation: Property Laws and Institutions in Early America* remedies this neglect to a substantial degree by providing the most comprehensive historical account of the emergence of the American title registry in the colonies and an important, powerful analysis of how the institution transformed credit markets more generally. See PRIEST, *supra* note 2. This Article adds to these analyses of the registry’s commercial impact by examining how the registry also grew jurisdictional power and takes up a part of the institution’s history that has been almost completely ignored in scholarship on title registries: its role in facilitating and affirming the acquisition of Native nations’ lands.

9. *Johnson v. M’Intosh*, 21 U.S. 5 (8 Wheat.) 43, 573 (1823).

Native nations a century later.<sup>10</sup> Early colonists, who stood no chance of directly challenging Native sovereign claims to lands in America, established their footholds by making private claims to property instead. The innovation of the American title-registry system became the primary mechanism for organizing and “proving” these claims against competing claims, both individual and collective, within and outside the colony. Further, the institution of the registry, as an act of government that established protocol for affirming private claims for both settlers and Native people, itself constituted an assertion of jurisdiction in ways that underpinned a tenuous colonial sovereignty and helped it grow. In this way, colonial territorial jurisdiction followed and became possible *because of* individual settlers’ claims to private property as documented in title registries. In a reversal of the classic conception of property as a distribution by the grace of an established sovereign, property in America was the conceptual and material antecedent to colonial sovereignty. Sovereignty in the colonies depended on the creation of private property to come into being.<sup>11</sup>

Recognizing that colonial U.S. sovereignty did not come into being with Europeans’ intent to conquer but rather entailed a long and fraught struggle to dominate prior sovereigns significantly lengthens the historical timeline during which we understand that Native nations’ sovereignty over their lands was absolute. Further, this Article’s analysis of the registry places its emergence within the larger, racial-legal framework of discovery, which underscores that enslavement was an inextricable part of conquest. As I have highlighted in prior work, the discovery doctrine authorized the seizure of both lands and people based on the premise of a fundamental difference and natural hierarchical relationship

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10. See, e.g., GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 19-50* (2021) (offering a nuanced account of the federal institutions that supported land claims and thus the formation of property in early U.S. territories); PAUL FRYMER, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION 23-24* (2017) (describing federal legislation that encouraged the white migration that was prerequisite to state formation). Unlike Gregory Ablavsky and Paul Frymer’s discussions of transitional federal institutions and laws governing conquest, this Article describes and explains the evolution of an American property-law institution that remains essential to making claims and entering into transactions today.

11. See *M’Intosh*, 21 U.S. at 572 (explaining how the sovereign “prescribe[s] those rules by which property may be acquired and preserved”). Part III discusses this Article’s connection to the two essays by Morris Cohen and Joseph Singer that famously theorize this relationship. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991). Robert Nichols has described the state’s retroactive validation of such property claims as “the recursive logic of dispossession.” Robert Nichols, *Theft Is Property! The Recursive Logic of Dispossession*, 46 POL. THEORY 3, 22 (2018).

between Christian Europeans and non-Christian non-Europeans.<sup>12</sup> This belief also translated into colonists' different treatment of Europeans and non-Europeans with respect to property and sovereignty. Intra-European conquests transferred jurisdiction without affecting private individuals' property, as when the English took control of New Netherlands in 1664 and left Dutch owners their private holdings.<sup>13</sup> By contrast, the English believed they and other Europeans were entitled to strip non-Christian non-Europeans of property and sovereignty, and to seize their lands and their persons.

Colonists' property innovations involved introducing ostensibly "race-neutral" institutions like the registry. The registry arose in the context of colonial laws that openly provided for different treatment of racial groups and that sanctioned extreme violence against nonwhite and especially enslaved people.<sup>14</sup> For centuries, the title registry's chief function was to validate ownership claims to the two most valuable and significant forms of property that colonists held: lands expropriated from Native nations and enslaved human beings. The story below redresses erasure of conquest and enslavement from the history of American colonial property institutions, though its focus on the development of the registry means that it principally explains the actions of colonists.<sup>15</sup> In describing

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12. See, e.g., K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1091-1100 (2022).
  13. See 3 JOHN ROMEYN BRODHEAD, DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 71 (1853) (reproducing an agreement between Sir Robert Carr of Great Britain and "the Dutch and Swedes on Delaware River" that "whoever of what nation soever doth submit to his Maj'ties authority shall be protected in their Estates reall & personall whatsoever by his Maj'ties Lawes and Justice"); see also FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST 128-29 (1975) ("When . . . the duke of York conquered New Netherland, he left Dutch landholders in full possession of their own, requiring that they transfer allegiance from the Netherlands to himself."); YASUhide KAWASHIMA, PURITAN JUSTICE AND THE INDIAN: WHITE MAN'S LAW IN MASSACHUSETTS, 1630-1763, at 45 (1986) ("While conquest of one European country by another meant the transfer of sovereignty (jurisdiction) from one to another without affecting the property of individual members, conquest of an Indian tribe by a European nation would bring about destructive results to the tribe. Not only would sovereignty be transferred but the whole existing concept of land ownership would be destroyed because the Indian's type of landholding, inherent to the very tribal system, was irreconcilable with the white man's idea of landownership.").
  14. See, e.g., Park, *supra* note 12, at 1112, 1126. Many, though not all, of these laws are obsolete. See, e.g., Singer, *supra* note 11, at 3 (arguing that courts treat both Native American sovereignty and property differently and disadvantageously as compared to non-Native sovereignty and property).
  15. Describing the development and logic of a colonial institution in a way that acknowledges its impact on different groups constitutes a distinct endeavor from focusing on the stories of its myriad harms to Native and Black individuals and families. In taking on the former project,



how colonial jurisdictions came into being, this Article also centers colonists' contests with Native nations for sovereign power and control of *land*.<sup>16</sup> But it is crucial to note that registry records themselves attest to the fact that territorial expansion and the expansion of the slave trade in America occurred interdependently and in tandem. This Article therefore points to three particular ways that the institution impacted Native and Black people, which are generalizable across the vast diversity of experiences, traditions, and responses of these communities: the institution impacted 1) the land loss of Native nations represented by every inch of soil claimed in a registry; 2) the loss of freedom and kin that the enslavement of Native and Black people entailed, insofar as the institution helped to grow the slave trade; and 3) the hazards to which free Native and Black people who attempted to use the registry to document their property were subject, because the design of the institution left their ability to defend property contingent on their privilege and power.

Beyond building upon our understanding of the title registry and property institutions, this Article also illuminates the myriad ways that conquest and enslavement were enacted and imprinted upon our world. It has been less than a century since scholars' discomfort with the racial violence that gave rise to much of American property law led to the complete expungement of mention of conquest and enslavement from the field. Before that time, major commentators by and large celebrated this history or took it for granted.<sup>17</sup> One consequence of this whitewashing has been an artificial separation of the development of American property law from histories of racial violence in America. It seems intuitive, for

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this Article is adjacent to and allied with ongoing production of scholarship that centers the experiences of Native and Black people in the American colonies and United States. It aims, in dialogue with such scholarship, to counter prevailing institutional accounts that erase or marginalize their role in conquest and slavery; and to invite, encourage, and provide tools for further inquiry into stories about the effects of institutions upon communities over generations. However, those stories are too numerous and complex across the scope of three centuries and the continental landmass to capture here. The specific evidence this Article presents tracks the growth of the institution and the correspondent growth of colonial and U.S. territory, to support its primary argument about the relationship between property and sovereignty.

16. The issue of land dispossession that produced the public territorial sovereignty of the American colonies and United States uniquely affects Native nations. That land dispossession, of course, also fostered the growth of private markets in both lands and enslaved people, which affected both Native and Black people. This Article emphasizes the close relationship between the two phenomena – territorial and market growth – by making general observations about both, while building its specific argument about the former.
17. Avoidance of the subjects started earlier, but their complete erasure did not occur until the 1940s. See Park, *supra* note 12, at 1071–91.

example, that the militia would be key to the sovereign takeover of a country<sup>18</sup>—but not property institutions, and least of all, the understated, mundane office of the registry. While scholars fail to recognize the constitutive role of racial violence in shaping property law in America, many also view conquest and enslavement as bygone examples of raw violence and think of their consequences only in terms of direct bodily harm. Colonization and enslavement unquestionably involved such harms and naked subjugation at an untold scale. But their legacy combined world-shattering violence with the technical work of building institutions to support markets and jurisdictions, which remain part of our governance systems. The title registry's history indicates that, frequently, the bureaucratic infrastructure of conquest and enslavement is also the bureaucratic infrastructure of American property today.

Divorcing our study of the two has hurt our ability to understand either. We must learn to recognize the breadth of ways that race works through law to shape our legal systems and our world—beyond familiar models of different and unequal treatment, to the way race spurs institutional innovations based on dehumanizing logic. Meanwhile, historians who have studied the title registry have unanimously agreed that it was “a distinctly American invention” that introduced a tremendous innovation to the property system,<sup>19</sup> but without appreciating the range of its functions and effects. The registry illustrates more than one way that racial hierarchy shapes law and legal outcomes. Most fundamentally, it evolved as a local and public institution to spur the proliferation of claims to property—property specifically produced through expropriation and enslavement. Additionally, however, the specific design of the registry minimized government involvement by neither mandating nor authenticating records, and privileged the proliferation of property claims and market growth above ensuring the integrity or accountability of claims. Consequently, like many other American legal institutions, it exacerbates structural inequality by leaving claimants to rely on their material and social privileges in cases of fraud, disadvantaging those most vulnerable to predation and without resources to enforce their rights in courts.

The registry helps us see the transformative effects of race on law more clearly. As an institution, it escalated racial violence to grow property markets and colonial jurisdictions at the direct expense of Native and Black homes and

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18. The registry's work highlights the difference between a mere occupation and conquest: a militia is sufficient to establish the occupation of a country, but arguably, it is the transfer of jurisdictional power from one sovereign power to another that is key to conquest. Thanks to Darryl Li for this insight.

19. W. Scott Van Alstyne, Jr., *Land Transfer and Recording in Wisconsin: A Partial History—Part I*, 1955 WIS. L. REV. 44, 45-46.

lives,<sup>20</sup> first by building new markets from those homes and lives, and then by exposing those homes and lives to loss and predation. This analysis, above all, highlights the *value* system, borne of its context, that the structure of the title registry has promoted. This institution, a keystone of the American property system, long relied on racial violence to produce property value and privileges the production of property value above all. That is, it privileges property value above the protection of individual property rights (since it contains no structural safeguards to protect against discrimination and abuse), as well as, more fundamentally, above the stability of people's homes, communities, and lives. The conceptual and practical stakes of this history of the title registry include understanding the character and the costs of an institution that now underpins the *entire* national jurisdiction, land system, and real-estate market. They also include learning to recognize indirect and less obvious ways that U.S. legal institutions facilitated racial violence. Some of the legacies of this history inhere in bureaucratic, mundane institutions such as the title registry, which appear to be facially "race-neutral" but carry and perpetuate the dehumanizing racial logic of colonization.

To reveal the public work of the institution, against its historical erasure, this Article proceeds in three Parts. Part I first describes the emergence of the title

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20. Some recent scholarship has begun to explore the registry's role in expanding the slave trade. See, e.g., PRIEST, *supra* note 2, at 49, 98-99 (discussing how recording interests in property in enslaved people catalyzed a new credit market). This Article, like the relevant economic-historical literature, focuses on the mechanisms of market growth, but it rejects much of that literature's traditional tendency to minimize or overlook the impact of these markets on Native and Black communities and lives. Writing about "territorial" or "colonial" expansion is not the same as writing about Native nations' dispossession, just as writing about "slavery," "slave markets," and "slave mortgages" is not the same as addressing the experiences of the enslaved. In underscoring the impact of these markets on the lives of Native and Black people, this Article invokes standards for writing about conquest and enslavement that scholars from the fields of African American and Native history, and Black and Native studies, have labored to establish over the past decades in response to dominant norms of erasure. See generally 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* (2017) (undertaking historical research addressing the valuation and commodification of enslaved peoples' lives with a focus on "giv[ing] voice to enslaved people and their feelings about, and reactions to, being treated as property"); WENDY WARREN, *NEW ENGLAND BOUND: SLAVERY AND COLONIZATION IN EARLY AMERICA* (2016) (describing the lives of enslaved peoples in seventeenth-century New England and, in doing so, linking "the story of the beginning of colonial North America and the story of chattel slavery on the continent"); LISA BROOKS, *OUR BELOVED KIN: A NEW HISTORY OF KING PHILIP'S WAR* (2018) (engaging in a decolonial project of "historical recovery" to excavate accounts of "Indigenous adaptation and survival" that are typically erased from the secondary literature on King Philip's War); JEAN M. O'BRIEN, *DISPOSSESSION BY DEGREES: INDIAN LAND AND IDENTITY IN NATICK, MASSACHUSETTS, 1650-1790* (1997) (countering the dominant—and imagined—historical narrative of Native disappearance with one of Native "resistance and persistence").

registry as an important part of the American property system and, second, explains how the title registry came to acquire the consistent features that would characterize it as one continuous institution across multiplying localities in the colonies. Part I draws on existing literature that discusses colonial registries in order to tell a story that centers their role in colonists' assault on Native sovereignty—a question that prior works have not examined. Section I.A recounts how colonists used property claims to establish their footholds and build political *territorial* power and how this engrossment of Native nations' lands also incited the growth of the slave trade. Drawing on the borrowed English legal forms of the registry and county, colonists introduced the American title registry as a way of both organizing their claims to lands and people and asserting governmental authority over intersovereign disputes—helping scaffold colonists' own jurisdictional power vis-à-vis existing sovereigns. Section I.B explains how the registry's specific design evolved to help the colonies build this jurisdictional power: how becoming a local and public institution facilitated its popular use and the strategy of expanding through building new townships and counties. Further, by minimizing government involvement in this passive institution, the colonies encouraged the proliferation of market claims at the expense of their integrity. They thereby prioritized the collective goal of jurisdiction building over individual accountability and protection, at the direct expense of Native and Black communities and life.

After explaining the colonial emergence, function, and uniform design of this institution, Part II describes title registries' subsequent spread across the continent, as the United States, too, relied on the political force of property to build its jurisdictional power at the local level. The first two subsections of Part II analyze the timeline of county creation in the first target region for U.S. expansion outside of the original states and the expansion of U.S. and state sovereignty within the borders of original states. Section II.A shows that, in the Northwest Territory, the United States created counties from unceded lands before the formation of the territories and states to which they would eventually belong. That is, it established local jurisdictions first to affirm property rights, indicating that settlers, with their initial claims to Native nations' lands, helped the United States convert its discovery claims to those lands into sovereign title. Section II.B emphasizes how the goal of establishing federal and state jurisdictional power continued within the borders identified by original states after the nation's founding, focusing on the example of Georgia. Georgia created counties to affirm its own sovereignty in lockstep with every Native cession of lands to the United States, until, frustrated with the federal government's pace of conquest, the state wielded county creation as a tool to finally expel the Cherokee and force federal acquiescence to its agenda. Lastly, Section II.C maps the timing of county creation and the passage of recording acts across the mainland alongside timelines for the establishment of territories and states. It shows that

recording remained a fundamental priority for every new territory and state in the Union, providing us with an outline of how registries came to operate in every locality to underpin the national land market. Further, it reveals changing patterns of county creation that indicate growing U.S. confidence in the imminent conquest of the continent and its ability to use counties and county recorders to expand the national territory.

Part III discusses some of the consequences of this history of the title registry for the theory and practice of property and sovereignty. This analysis foregrounds the fact that scholarly and policy approaches to these topics and the system of the registry, insofar as they concern or touch upon the United States and its law, must begin where their story does: with colonial property and Native sovereignty.

### I. CREATING PROPERTY, REGISTRIES, AND JURISDICTIONS IN THE COLONIES

In the American colonies, the title registry and the county took on a wholly new significance than they had theretofore in England, becoming the foundation for a system of land expropriation and trade. At the beginning of the seventeenth century, England had no requirement or norm of publicly recording interests in land, and the practice remained “very limited”<sup>21</sup> until after 1869.<sup>22</sup> England was divided into several dozen counties, also called shires. But the courts of those jurisdictions developed a common law of property focused on conflicts arising

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21. 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 450 (1830); *see also* 4 NATHAN DANE, GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 88 (1824) (contrasting the lack of a “plain, valid, and intelligible form of conveyance by deed” in England with the “short and simple form” established by American colonial legislatures); PRIEST, *supra* note 2, at 45 (describing colonial innovations in maintaining and publicizing records of conveyances “in a manner not achieved in England” until much later).
22. PRIEST, *supra* note 2, at 48. For further British legal developments, see Land Transfer Act of 1897, 60 & 61 Vict. c. 65 (Eng.) (making registration compulsory); Law of Property Act of 1925, 15 Geo. 5 c. 20 (Eng. & Wales). *See generally* Avner Offer, *The Origins of the Law of Property Acts 1910-25*, 40 MOD. L. REV. 505 (1977) (recounting the establishment of an English land-regulation system). English tradition and customary attachment to privacy in property frustrated seventeenth- and eighteenth-century popular movements to introduce public registries. PRIEST, *supra* note 2, at 181 n.32 (pointing to the Statute of Enrollments of 1536, 27 Hen. 8 c. 16 (Eng.), and the Statute of Uses of 1535, 27 Hen. 8 c. 10 (Eng.), whose “recording provisions” were “widely [not] complied”); *id.* at 48 (“[T]here were various movements to introduce public registries in England in the seventeenth and eighteenth centuries, but large landowners opposed the proposals.”); *cf.* BRITAIN R. WEBB, A TREATISE ON THE LAW OF RECORD OF TITLE OF REAL AND PERSONAL PROPERTY 19 (St. Louis, The Gilbert Book Co. 1890) (“The registry acts of Great Britain are so essentially different from ours in their scope and operation that the decisions of the English courts . . . shed but little light on the subject of this work.”).

from chattels, whether goods or animals, rather than on the paradigm of land as would come to be the case in American property law.<sup>23</sup> When colonists transported the English legal forms of the county and registry to America, they used them to formalize property claims, a practice which became critical to establishing their jurisdictional power. After all, the first colonists controlled no lands, had no sovereignty, and established settlements in the homelands of nations that would tolerate them. Early colonial governors and legislatures kept order in fledgling settlements that aimed, at first, merely to survive, and distant English governing entities overseeing colonial affairs – and even the companies that organized their expeditions – knew little of their day-to-day governance. Units such as the county and township, therefore, embodied the first sites where colonial governments exercised sovereign power and the means through which they expanded it. These local jurisdictions would eventually be subsumed; administrative subdivisions were, in other words, the original seeds from which several successions of higher-level jurisdictions and governing bodies grew. As this Part describes, the local institution of the registry acquired a new ubiquity and distinctive form in the colonies that endowed the county with new capacities, as they transformed property and sovereignty in America together.<sup>24</sup>

Though historians have widely pronounced the novelty of the American title registry in terms of both function and design, they have not recognized the way registries provided early institutional scaffolding for jurisdictional power. For example, early twentieth-century scholars agree that “[t]he distinctive features of the American system of recording deeds [were] indigenous [to the colonies].”<sup>25</sup> But because they did not engage with many of the fundamental facts of

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23. David J. Seipp, *The Concept of Property in the Early Common Law*, 12 *LAW & HIST. REV.* 29, 31 (1994).

24. See LISA FORD, *SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA 1788-1836*, at 17 (2010) (“Regulating settler communities and the process of settlement itself required constant juridical innovation between the seventeenth and eighteenth centuries because the relationship of diasporic communities to the Crown was both novel and unsettled.”); PRIEST, *supra* note 2, at 6 (“[C]olonial administrations defined the problems to be addressed, shaped law, modified it, built institutions, controlled their costs, and regulated their operation in response to local conditions.”).

25. Joseph H. Beale, Jr., *The Origin of the System of Recording Deeds in America*, 19 *GREEN BAG* 335, 339 (1907); see also R.G. Patton, *Evolution of Legislation on Proof of Title to Land*, 30 *WASH. L. REV. & ST. BAR J.* 224, 227 n.23 (1955) (“Recording title documents originated not merely in North America but in the world as a whole almost entirely with enactment of the early colonial statutes.”); Bostick, *supra* note 1, at 67 (“The recordation system is the center of modern American title assurance . . . . The system has ancient roots on this side of the Atlantic, existing in some form since long before the Revolution. Interestingly, no comparable system evolved in England. Various reasons have been advanced for its absence there and its development here. The vast stretches of available land, less likely to be visibly occupied by the owner, must have

colonization,<sup>26</sup> such as the role of property and law in Native dispossession, they tend to conclude that “the origins of the social value [of the system] are shrouded in the mists of the colonial period in American history.”<sup>27</sup> Historians have referred vaguely to “needs of a frontier community,” “[l]ocal conditions in the New World,”<sup>28</sup> and even “the protection of the bona fide purchaser”<sup>29</sup> – but not the presence of Native nations, nor conflicts that erupted when colonists encroached upon their land. Despite the plentiful records transferring land from Native nations to colonists in the registries themselves, historians of the registry pointed instead to colonists’ persecution in England, or to the fragility of documents “in a frontier community,”<sup>30</sup> to explain this institution’s appearance. One commentator noted that “vast stretches of available land . . . must have played a part in the perceived need for [a registry],” and that this territorial vastness simply would have made an owner’s occupation less visible to others.<sup>31</sup>

This Article’s account of the registry, in some ways, returns to older conventions that predate this disavowal of the nation’s origin in conquest. Nineteenth- and even some early twentieth-century treatises on real estate title in the United States frankly acknowledged that land in America was “available” only under the presumptions of “discovery”; and that Christian Europeans had license to expropriate lands and other resources from non-Christian non-Europeans.<sup>32</sup> As

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played a part in the perceived need for an alternative method of putting purchasers on notice of claims.” (footnotes omitted)); Van Alstyne, *supra* note 19, at 47 (“[T]he statutory basis for the recording system was on the books in the first half of the 17th century in America, at a time when it was unknown in England.”). More recently, Maureen E. Brady observed, “colonial clerks, surveyors, and other officials were designing new recording laws and institutions as they settled new lands . . . [T]he colonists who transferred properties and recorded deeds in the first century of American history were taking part in new legal practices.” Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 *YALE L.J.* 872, 890 (2019).

26. See generally Park, *supra* note 12, at 1067 (analyzing the erasure of the “the histories of colonization and enslavement” from “predominant understanding[s] of U.S. law and legal institutions,” and “the field of property law” in particular).
27. Van Alstyne, *supra* note 19, at 45 (“[T]he exact reason or combination of reasons which gave rise to [the recording system] have not, at present, been completely isolated and agreed upon.”).
28. *Id.* at 47 (quoting Haskins, *supra* note 8, at 304).
29. P.H. Marshall, *A Historical Sketch of the American Recording Acts*, 4 *CLEV.-MARSHALL L. REV.* 56, 56 (1955).
30. Haskins, *supra* note 8, at 299.
31. Bostick, *supra* note 1, at 67.
32. Most treatises on title to real estate cited the international rule of discovery as the basis for titles to lands in the United States. See, e.g., JAMES M. KERR, *A TREATISE ON THE LAW OF REAL PROPERTY* 196 (New York & Albany, Banks & Bros. 1895); JAMES WATSON GERARD, ROBERT LUDLOW FOWLER & JAMES HENRY HICKEY, *A DIGESTED TREATISE AND*

these treatises explain, under the international legal conventions the English adopted, the key to colonists' ability to "consummate" their sovereign claims in America was "actual possession," or their successful occupation of Native nations' lands. This literature recognized that to stake out an *option* claim against other European nations, the English had to arrive before those other nations' colonists, but they could not claim sovereign title without also obtaining control of the lands.<sup>33</sup> To center preexisting Native sovereignty and the operation of discovery-doctrine principles in our understanding of title registries, this Part constructs a historical account of the institution that draws on not only these literatures but also works by scholars of federal Indian law, Native Studies, Native American history, American colonial history, and property in colonial America, as well as colonial property records themselves. It describes the registry's critical role in organizing and affirming colonists' claims to property in tribal homelands, and in helping the colonies to assert sovereign jurisdiction and control over the lands tied to these claims.

This Part describes the emergence of the American title registry and how the institution came to acquire the particular characteristics that it has retained across the country to this day. As Section I.A recounts, claiming property was crucial to English territorial claims because colonists lacked the military might to seize lands from Native nations through raw force. Instead, they adopted the approach of defending the private land claims of individual settlers to establish their settlements. The haphazard process toward establishing the registry in all

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COMPENDIUM OF LAW APPLICABLE TO TITLES TO REAL ESTATE IN THE STATE OF NEW YORK 1 (Robert Ludlow Fowler & James H. Hickey eds., 5th ed. 1909) ("The original title to land on the American continent, as between the different European nations, was founded on the international right of discovery and conquest . . . The title thus derived is the exclusive right of acquiring the soil from the native, and of establishing settlements on it. This title, to be perfect, has to be consummated by possession . . . The discovered region thereupon becomes a part of the national domain, and is subject to disposal as such."). For an analysis of treatises, the history of conquest, and additional examples, see Park, *supra* note 12, at 1096-97 and accompanying text.

33. Early English colonial charters reflect the Crown's sensitivity to these stages of claims-making: first, they explicitly granted Crown representatives the license to "discover, search, finde out, and view" lands inhabited by non-European, non-Christian peoples, or to identify the option; and then following a fiefdom model, they authorized colonists to use force to "expulse, repell and resist" any who sought to occupy the same lands or interrupt the process of occupation. See, e.g., *Charter to Sir Walter Raleigh* (Mar. 25, 1584), reprinted by AVALON PROJECT, [https://avalon.law.yale.edu/16th\\_century/raleigh.asp](https://avalon.law.yale.edu/16th_century/raleigh.asp) [https://perma.cc/MJB8-HEED]; *The Letters Patents of King Henry the Seventh Granted Unto Iohn Cabot and his Three Sonnes, Lewis, Sebastian and Sancius for the the Discouerie of New and Unknowen Lands*, (Feb. 3, 1498), reprinted by AVALON PROJECT, [https://avalon.law.yale.edu/15th\\_century/caboto1.asp](https://avalon.law.yale.edu/15th_century/caboto1.asp) [https://perma.cc/SG2N-EYV7]; *Letters Patent to Sir Humfrey Gylberte* (June 11, 1578), reprinted by AVALON PROJECT, [https://avalon.law.yale.edu/16th\\_century/humfrey.asp](https://avalon.law.yale.edu/16th_century/humfrey.asp) [https://perma.cc/G477-4W3R].



regions of British America was propelled by the need for institutional authority to defend questionable claims that were not only individual but collective. Further, as registries became ubiquitous and supported land expropriation, they also propelled the growth of the slave trade – making lands and people the preeminent commodities of colonial markets. Section I.B explains how this approach to building jurisdictional power produced the distinctive structural features of the American title registry: that this public record of claims was situated locally, in townships and counties that grew through court clerks’ collection of claims to land in the region; and that this passive government institution made recording voluntary and did not certify claims in any way. This institutional design minimized costs to the government by shifting risks to private parties using the registries, and did so unequally owing to differences in social vulnerability. Thus, as the institution of the title registry helped colonial property markets to flourish, their greatest costs were exacted from the Native and Black communities from which colonists extracted the lands and people that they rendered property. And the increasingly ubiquitous registry became foundational to a property system that elevated the monetary value of property above all else – above protecting individual users in their property and above non-European communities and life.

#### A. *The Invention of the American Title Registry*

The primary challenge that the English faced in making sovereign claims in America was the longstanding sovereign rule of Native nations over their traditional homelands.<sup>34</sup> Upon arrival, colonists tried to assert English sovereignty and control over lands, including by arranging preposterous ceremonies in which they attempted to declare Native leaders vassals of the King of England.<sup>35</sup> But these strategies failed. Colonists generally found themselves outnumbered and ill-equipped to survive, let alone to attempt direct and open conflict against

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34. The earliest colonists were greatly aided in establishing a foothold on the lands through their lethal spread of diseases to populations without immunity to them. See NEAL SALISBURY, *MANITOU AND PROVIDENCE: INDIANS, EUROPEANS, AND THE MAKING OF NEW ENGLAND, 1500-1643*, at 86 (1982) (“Initial native resistance to colonization and settlement was broken . . . not by superior numbers, enterprise, technology, or military skill but by that most lethal of Europe’s weapons, its diseases.”); K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 L. & SOC. INQUIRY 1006, 1014-15 (2016) (describing how early colonists in New England settled on the grounds of villages decimated by disease); K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1891 (2019) [hereinafter Park, *Self-Deportation Nation*] (“Colonists built more than fifty early settlements on the sites of villages destroyed and vacated by disease.”).

35. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 207-08 (1990).

the Powhatan Confederacy and the Wampanoags, in whose lands they first attempted to settle. Ultimately, they and their settlements in present-day Virginia and Massachusetts survived by declaring their peaceful intentions and goals of coexistence with these tribes.<sup>36</sup> One way of summarizing the events that followed is that each colony aimed at sovereignty from its inception, but, as Neal Salisbury observes of Massachusetts Bay, “rather than announce to the Indians through proclamation or treaty that it was assuming such sovereignty, the colony allowed its position to emerge implicitly from the laws and judicial decisions that it made.”<sup>37</sup> Focusing on the legal institution of the title registry, this Section illustrates how colonial laws and decisions concerning *property* formed an important part of the emergence of sovereign claims. Because colonists could not claim sovereignty upon their arrival to the New World, they instead claimed property in order to establish their settlements.

During the first decades, as colonists struggled to sustain their settlements, they distributed land to individuals but did not organize these entitlements particularly well, or at all. Their interest in simply surviving and maintaining a collective occupation seems to have superseded that in measuring, bounding, or recording interests through mechanisms like a survey or registry. Only after colonists had claimed enough property to establish their occupations did the registry emerge in response to the need for an institutional approach to defending land claims against those of Native nations, as much as each other.<sup>38</sup> The importance of the registry for resolving intersovereign disputes and affirming the colonies’ jurisdictional power is reflected in the records themselves: as time went on, they show that Native people increasingly tried to use the registry to protect their lands, while colonists made a concerted effort to document and consolidate claims that Native people had transferred all lands within a given colony to them.

Some early colonial officials did attempt to institute the practice of recording interests in land during the first decades of settlement, but they failed.<sup>39</sup> In 1626, for example, Virginia mandated the enrollment, within a year, of all land

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36. *Id.* at 206 (“The vastly outnumbered English settlers at Jamestown had no choice but to seek peaceful relations and the Indians’ agreement to their plantation colony.”); SALISBURY, *supra* note 34, at 114-15 (describing the treaty between Plymouth and the Pokanoket, which was undertaken to express mutual intentions of peace but interpreted later by colonists to claim that the Pokanoket had submitted to vassalage).

37. SALISBURY, *supra* note 34, at 186.

38. Brady notes that “in New Haven, it was growth that preceded standardization—not the other way around.” Brady, *supra* note 25, at 884.

39. See 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, 164 (1974) (suggesting this failure was due to the absence of any general registry in England).

purchases with the General Court in Jamestown.<sup>40</sup> Joseph H. Beale, Jr., notes that this vote “proved ineffective, as did similar votes in all the colonies.”<sup>41</sup> In 1634, the General Court of Massachusetts ordered the recording of land grants to freedmen. But local officials failed to respond, and it demanded three years later “[t]hat some course bee taken to cause men to record their lands, or to fine them that neglect.”<sup>42</sup> Some towns responded nominally to these orders, but most did not; as David Thomas Konig writes, “widespread evasion continued.”<sup>43</sup>

The failure to comprehensively record property interests during the early period did not slow or deter settlement, but rather encouraged it across a broader area. The colonies sought to build their population above all else, and found success in doing so by offering headrights, or promises to grant lands for the number of people or “heads” one transported to the colonies. They granted lands in this way for decades without significant concern for institutionalizing a record of these entitlements. Unlike other European colonial charters, which foregrounded trade,<sup>44</sup> early English charters placed a unique emphasis on granting lands in the colonies, both from the Crown to its representatives *and* from those representatives to colonists, who could receive land “in fee-simple, or otherwise, according to the order of the lawes of England.”<sup>45</sup> Through land grants and headrights, the colonies delegated the charge of taking “actual possession” – the occupying, enclosing, and cultivating lands for a term of years – to settlers in exchange for title to those lands. As “Englishmen rushed to apportion their new source of wealth,” which they perceived in “the “superabundance of land in the new world,”<sup>46</sup> David Konig writes, colonists perceived “large amounts of land

40. PHILIP ALEXANDER BRUCE, 1 ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY: AN INQUIRY INTO THE MATERIAL CONDITION OF THE PEOPLE, BASED UPON ORIGINAL AND CONTEMPORANEOUS RECORDS 570 (New York & London, MacMillan & Co. 1896).

41. Beale, *supra* note 25, at 335.

42. 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND: 1628-1641, at 116, 137, 201 (Nathaniel B. Shurtleff ed., Boston, William White 1853) [hereinafter RECORDS OF MASSACHUSETTS BAY].

43. Konig, *supra* note 39, at 144 (“Many residents of Manchester did not bother recording their lots until 1689.”).

44. See, e.g., *Charter of Acadia Granted by Henry IV of France to Pierre du Gast, Sieur de Monts* (Dec. 18, 1603), reprinted by AVALON PROJECT, [https://avalon.law.yale.edu/17th\\_century/charter\\_001.asp](https://avalon.law.yale.edu/17th_century/charter_001.asp) [<https://perma.cc/7CF4-3ZGS>]; *General Charter for Those Who Discover Any New Passages, Havens, Countries, or Places* (Mar. 27, 1614), reprinted by AVALON PROJECT, [https://avalon.law.yale.edu/17th\\_century/charter\\_010.asp](https://avalon.law.yale.edu/17th_century/charter_010.asp) [<https://perma.cc/4HRK-EZ3D>]; *Charter of the Dutch West India Company* (June 3, 1621), reprinted by AVALON PROJECT, [https://avalon.law.yale.edu/17th\\_century/westind.asp](https://avalon.law.yale.edu/17th_century/westind.asp) [<https://perma.cc/SE5B-7ZF4>].

45. *Charter to Sir Walter Raleigh*, *supra* note 33.

46. Konig, *supra* note 39, at 138.

[were] available,” and resolved cases of disputes between themselves by simply granting settlers compensatory lots.<sup>47</sup>

Of course, the absence of the registry as an institution did not mean the absence of records, whether because deeds were unrecorded or dispersed among other court records. Many early deeds reflect the flexibility of a land policy where “scrupulous regard to detail was easily overlooked.”<sup>48</sup> In a context without a uniform surveying system, where “residential patterns were uncertain and frequently only temporary”<sup>49</sup> and where colonists often did not lay out boundaries or abandoned their land grants, colonists often recorded transfers of beneficial ownership but left the properties in question ill defined. The deed records in Colony of New Plymouth through the 1630s to 1640s, for example, generally exhibit such brevity. The following examples are typical: in March 1637, John Winslow did “acknowledg that he hath sould a house and a garden place scituate in the New street in Plymouth aforesd to Mr Thomas Burne,” and in August 1638, Peeter Maycock similarly attested “[t]hat he hath absolutely bargained & sould unto the said Richard Wright the xxv acres of land due to him for his service.”<sup>50</sup> To the extent that early colonists recorded property interests that they purchased from one another, they tended to “assure conveyances without specifying to what precise land the title pertained.”<sup>51</sup> As a result, it was not always easy for granting officials or the community to know whether land was claimed by someone or had been transferred.<sup>52</sup> Reflecting this circumstance, from 1639

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47. *Id.* at 139; *see also id.* at 144, 146 (explaining that the boundary disputes between private parties caused by poor recordkeeping were often resolved by issuing compensatory lots elsewhere).

48. *Id.* at 138; *see also* WESLEY FRANK CRAVEN, *THE SOUTHERN COLONIES IN THE SEVENTEENTH CENTURY, 1607-1689*, at 175 (1949) (“[I]n many places there was no one at hand to challenge a counterclaim. . . . [S]uch surveys as had been made were both imperfect and incomplete.”).

49. König, *supra* note 39, at 140.

50. Memorandum of Contract Between John Winslow and Thomas Burne (Mar. 8, 1637), in 1 *RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND* 28 (David Pulsifer ed., Boston, William White 1861) [hereinafter *RECORDS OF NEW PLYMOUTH COLONY*]; Memorandum of Contract Between Peeter Maycock and Richard Wright (Aug. 25, 1638), in 1 *RECORDS OF NEW PLYMOUTH COLONY, supra*, at 34.

51. König, *supra* note 39, at 147.

52. *Id.* at 141-42, 148 (stating that it was “difficult to tell who owned neighboring property”). *But see* Brady, *supra* note 25, at 910-11 (arguing that contextual social and legal practices such as ritual boundary walking made these descriptions more comprehensible to colonial community members than the documentation is to readers today).

to 1640, Virginia<sup>53</sup> and Massachusetts<sup>54</sup> passed acts requiring recording only if the grantor was in possession and failed to transfer possession to the grantee.<sup>55</sup> In 1653, all that Humphrey Woodbury, a purchaser of abandoned lands, could do was “enter a ‘caveat’ with the county registry of deeds for a land transaction whose grantor held only dubious title.”<sup>56</sup>

While the English resolved early disputes between themselves with compensatory lots, their primary strategy for addressing disputes with Native people was by “purchasing” lands and generating deeds as proof of Native consent, a practice likely inspired by the Dutch.<sup>57</sup> In contrast with deeds between colonists,

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53. PRIEST, *supra* note 2, at 50–51 (citing 1 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 227 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823) [hereinafter *STATUTES AT LARGE OF VIRGINIA*]).
54. 1 RECORDS OF MASSACHUSETTS BAY, *supra* note 42, at 306; *see also* Mark DeWolfe Howe, *The Recording of Deeds in the Colony of Massachusetts Bay*, 28 B.U. L. REV. 1, 3 (1948) (pointing out that amendments to the 1640 Act in 1648, 1660, and 1672 adjusted its mandate to more clearly accord with the Virginia standard). Scholars have regarded the Massachusetts Act as the first recording statute in America, though the Virginia Act was passed first. *See, e.g.*, Beale, *supra* note 25, at 337; Haskins, *supra* note 8, at 284; Marshall, *supra* note 29, at 65.
55. As Konig observes, “it is likely that many grantors and grantees were not interested in exact limits and were using the registry only to certify land deals that were investments in future resale at a higher price.” Konig, *supra* note 39, at 147–48.
56. *Id.* at 141 (citing 1 ESSEX COUNTY LAND BOOK 38 (1855) (recording Humphrey Woodbury’s 1653 land transaction)).
57. *See* JENNINGS, *supra* note 13, at 133; *see also* STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 82 (2005) (describing the English control of the legal system that legitimated land transactions between Indians and English settlers). Historians of the title registry suggest “early Dutch land acts . . . could have had a strong influence on the later American Colonies’ recording acts.” Marshall, *supra* note 29, at 60; *see also* Haskins, *supra* note 8, at 289–90 (contending that the Dutch recording system likely influenced American colonists). Yet the Dutch influence on land purchases from Native groups is more certain. When the Dutch West India Company entered the European colonial competition, it did so without papal authority and could not claim first discovery in North America vis-à-vis the English and Swedes. JENNINGS, *supra* note 13, at 131–32. To legitimize their claims, in 1625, the Company instructed the second director of the colony in New Netherland, Willem Verhulst, to extinguish Native land claims by purchase or persuasion, “a contract being made thereof and signed by them in their manner, since such contracts upon other occasions may be very useful to the Company.” Instructions for William Verhulst (Jan. 1625), in *DOCUMENTS RELATING TO NEW NETHERLAND, 1624–1626*, at 36, 52 (A.J.F. van Laer ed. & trans., 1924). In 1633, New Plymouth, unlike Massachusetts Bay, did not have a charter to justify its claims and obtained a deed for a Pequot land tract to which the Dutch had already obtained a deed from a different Pequot person. JENNINGS, *supra* note 13, at 132–33; *cf.* NATHANIEL MORTON, *NEW ENGLAND’S MEMORIAL* (1669), *reprinted in* *CHRONICLES OF THE PILGRIM FATHERS* 1, 116–17 (John Masefield ed., 1910) (containing the Plymouth colonists’ account of purchasing lands from Native people who had been driven out of the lands by the

the deeds from Native people that brought land under colonial ownership – and in the colonists’ view, under colonial jurisdiction – sometimes contained detailed descriptions identifying the lands they claimed, lands they reserved, and the bounds of settlements. The records colonists created to memorialize these transfers and document their landholdings are characterized by extensive descriptions of the lands from which they would thereafter exclude Native people or to which they would limit their claims. The following record from June 1641 provides a sense of the different degree of detail that marks this trend.<sup>58</sup> It describes the bounds of Yarmouth

on the easterly side . . . from the towne to a certaine brooke called by the Indians Shuckquam, but by the English Bound-brooke, with all that neck of land northward called by the Indians Atquiod, alias, Aqiatt, with all the uplands and marsh meddow which lye on the westerly side of the said broke, to the townewards unto the mouth of the said brooke; and from a marked tree at the payth over the said Bound Brooke by a straight line south and by east to the south sea, so it extend not in length above eight miles, excepting and reserveing unto Masatanpaine, the sachem, the lands from Nobscussetpann westerly, from a marked tree there unto another marked tree at a swamp extending westerly, and from thence to another marked trey northerly by a straight line to the sea, and from the northerly end of the said Nobscusset pan to the sea by a line from the westerly side of the said pan.<sup>59</sup>

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Pequot, “with great difficulty, not only of the Dutch, but of the Indians; notwithstanding the place they possessed themselves of was such as the Dutch had nothing to do with, and likewise was bought of the Indians which they carried with them”).

58. See Brady, *supra* note 25, at 947 (“The effect of metes and bounds descriptions was also to limit access to the colony, even though there is no explicit evidence that the use of metes and bounds was strategic in this way. . . . An outsider unfamiliar with the markers, neighbors, neighborhoods, and surveyors referred to in deeds would have great difficulty either discovering the borders or entering the market. Metes and bounds descriptions helped to keep outsiders out and insiders in. When a community’s assets are not easily marketed, it reinforces connections among residents, prevents defection, and controls immigration. . . . In other words, residents hostile to outsiders used local knowledge and social connections to try to close off the property system to those distant from the land and its community.” (footnotes omitted)).
59. *The Bounds of Yarmouth*, in 2 RECORDS OF NEW PLYMOUTH COLONY, *supra* note 50, at 21.

The record continues to detail the bounds between Yarmouth and Barnstable, and reserves as agreed upon between Nepaiton, Twacommacus “& their heires” and inhabitants of Barnstable.<sup>60</sup>

While the pattern between the two types of records is not absolute, the trend of greater formality in memorializing the bounds of lands in interracial transactions than intracolonial ones is consistent through the 1630s and 1640s. It is not difficult to see that such formality, in a context where transactions between Native people and colonists for land were highly contested, served as a means of legitimating colonial attempts to claim land—both attacking Native sovereign claims and defending colonial counterclaims. In general, as is well known, activity that would invalidate transactions in disputes today was highly prevalent in alleged transfers from Native people to colonists. Stuart Banner notes that “[i]n the colonial period the Indians sold an enormous amount of land to the English”

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60. *Id.* at 21-22; see also JEREMY DUPERTUIS BANGS, INDIAN DEEDS: LAND TRANSACTIONS IN PLYMOUTH COLONY 1620-1691, at 249-50 (2002) (compiling Plymouth Colony records with commentary). Records of the Government of New Plymouth attested that

Massassowat freely gave them all the lands adjacent to them & their heires for ever, [and that] [a]ll that part of New Engl. In America & tract & tracts of lands that lie within or between a certaine Rivolett or Rundlett there commonly called Coahasset alias Conahasset towards the North & the river commonly called Naragunsett River to the utmost limits & bownds of a Cowntrey or place in New Engl. Commonly called Pokenacutt alias Puckenakick alias Sawaamset doe extend together with one halfe of the said River called Naragansetts & the said Rivolet or rundlet called Coahasset alias Conahasset. . . . furthermore all that tract of land or part of New Engl. Or part of America aforesaid which lieth within or between & extendeth itself from the utmost limits of Cobbecontee allias Comaseconte which adjoyneth to the river of Kenebeke alias Kenebekike towards the westerne Ocean, & a place called the falls at Nequamkike in America aforesaid & the space of fifteen English miles on each side the said River commonly called Kenebeck River & all the said river called Kenebeck that lieth within the said limits & bownds Eastward Westward Northward or Sowthward last above mencioned, & all lands grownds soyles Rivers waters fishings hereditaments & profits whatsoever scituate lying & being, arising happening or accrewing or which shall arise happen or accrew in or within the said limits & bownds or either of them . . . .

BANGS, *supra*, at 232-33; see also 2 RECORDS OF NEW PLYMOUTH COLONY, *supra* note 50, at 10-11 (describing reserves Governor Bradford made for himself and his heirs). Subsequent Indian deeds in the Plymouth records, including those delineating reserves to tribes, also follow this pattern. See, e.g., BANGS, *supra*, at 259 (showing that a document from February 1649 states that “Paupmunnucke, Moash, Waumpum, and the rest of their associates, have fully and absolutely resigned up all the right, title and claime which any of them have or can make for themselves, or any others of their associates, in all and every parte of those lands expressed in any of the aforesaid contracts, excepting the thirty acres excepted in the former contract, bearing date the 17<sup>th</sup> of May, (48,) lying att a necke called Cotochesett, and all the lands lying to the westward of Satuite River, and the westward of a north west line running from the easterly side of the next planting field to Cotuite Pond, lying on the easterly side of the said river, unto the bounds betwixt Sandwich and Barnstable”).

for remarkably little compensation – much of it “under the overt or latent threats of English expropriation and ecological destruction,” “some under the misapprehension that the English intended to share it with them,” some under fraudulent pretenses, and much “by individuals who lacked clear authority to sell.”<sup>61</sup> In a context marked by contentious and opposing claims, formality in agreements helped colonists *create* entitlements where they did not previously exist. These abuses in ostensibly private transactions had public consequences: they fostered unstable diplomatic relations that led the colonies, beginning in Massachusetts in 1634, to regulate settlers’ purchases of land from Native people by requiring them to obtain permission or licenses.<sup>62</sup>

After the 1660s, a major shift in recording practices occurred. The result was greater parity between interracial and intraracial colonial deeds, which colonists increasingly consolidated together in local title registries. These events were precipitated precisely by colonists’ claims to ever more property and, thus, territory. Colonists’ coercive engrossments of land predictably increased tensions between colonies and Native nations. In Virginia, especially after 1644, “[n]ew crises in Indian relations inevitably accompanied the resistless expansion of white settlement”;<sup>63</sup> similar dynamics inspired New England colonies to unite in a military confederation in 1643.<sup>64</sup> In other words, the success of the English approach to occupation generated an urgent need to address rising conflicts, both between colonists and Native people and among colonists themselves, concerning land. Headrights and land grants that required settlers to occupy land for a certain number of years to perfect title led to many abandoned and conflicting claims, based on confusion about whether such conditions had been met. The swift growth of colonial populations had made settlements denser, and it became

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61. BANNER, *supra* note 57, at 82. These conditions comprise what David E. Wilkins and K. Tsianina Lomawaima refer to as “the historic realities of European-native negotiation of land transfers.” DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 21 (2001). Compare Justice Stanley Reed’s infamous statement in *Tee-Hit-Ton Indians v. United States*, in which he says “[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.” 348 U.S. 272, 289–90 (1955). Wilkins and Lomawaima called Justice Reed’s statement “one of the most glaring misrepresentations of fact ever uttered by a Supreme Court justice.” WILKINS & LOMAWAIMA, *supra*, at 24.

62. BANNER, *supra* note 57, at 27; KAWASHIMA, *supra* note 13, at 53–54; *see also* Park, *Self-Deportation Nation*, *supra* note 34, at 1891, 1898–1900 (describing colonial preemption laws).

63. CRAVEN, *supra* note 48, at 276.

64. The military confederation was called the United Colonies of New England (or the New England Confederation). *See The Articles of Confederation of the United Colonies of New England* (May 18, 1643), reprinted by AVALON PROJECT, [https://avalon.law.yale.edu/17th\\_century/arti1613.asp](https://avalon.law.yale.edu/17th_century/arti1613.asp) [<https://perma.cc/7ZPR-57EP>].



more difficult to resolve disputes with compensatory lots.<sup>65</sup> In response to these problems, colonists began to better define and track their transactions among themselves.

Further, the consolidation of territory supported by the registry underpinned the expansion of the American slave trade in the late seventeenth century. That is, the colonists' creation of enormous estates and changing migration patterns of white indentured servants in cash-crop-dependent southern colonies prompted them to turn toward large-scale Caribbean-style commercial-plantation slavery.<sup>66</sup> Following this shift, colonists produced these new forms of real and chattel property apace and recorded their interests to both in title registries – a development that had more far-reaching consequences for property law and society. Their intensified interest in accumulating these interdependent forms of property in lands and people redoubled their motivations to more clearly define and defend these claims under law. More specifically, they began to measure and memorialize the bounds of property in land uniformly in at least some colonies;<sup>67</sup> and elite plantation owners (who claimed the most property in enslaved people) passed the first laws, beginning in Virginia, congealing enslavement as a racial, hereditary, and perpetual status disengaged from religious belief.<sup>68</sup> This evolving legal definition of burgeoning new property forms, along with registry records, guided litigation over claims to ownership, while racial ideologies justifying the violence of this racial-property production grew more elaborate and entrenched.<sup>69</sup>

With respect to land claims, it is important to understand that the creation of the title registry did not only *collect* English colonists' "proof" of title against Native claims. As a governmental act establishing a public institution for ordering and affirming these claims, the title registry also constituted an assertion of jurisdiction *contra*, most immediately, Native sovereignty. At this time, colonial jurisdiction was still tenuous, and the colonies' actual control of territory

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65. See Konig, *supra* note 39, at 153.

66. See ANTHONY S. PARENT JR., *FOUL MEANS: THE FORMATION OF A SLAVE SOCIETY IN VIRGINIA, 1660-1740*, at 55-79 (2012) (describing Virginia's transition from reliance on indentured servants to enslaved labor in the seventeenth and eighteenth centuries as "the labor switch" that helped drive a massive expansion of the African slave trade).

67. These changes occurred on varying timelines across the colonies – early in eastern Massachusetts and Virginia, but toward the end of the seventeenth century in the Connecticut River Valley and New Haven – raising interesting questions about more specific local factors that precipitated or delayed this shift. See, e.g., Brady, *supra* note 25, at 891-92, 927-35; WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 73-74 (1983).

68. Park, *supra* note 12, at 1111-12.

69. See K-Sue Park, *Race, Innovation, and Financial Growth: The Example of Foreclosure*, in *HISTORIES OF RACIAL CAPITALISM* 27, 34-36, 43-44 (Destin Jenkins & Justin Leroy eds., 2021).

extended only as far as the colonies' ability to defend colonists' claims, whether private, public, or contested. Recording acts were an expression of colonial authority to affirm settlers' private claims to land, which they *thereby* claimed as a part of their jurisdictions. The registry, as an official legal mechanism for validating claims, assisted the colonies in making private and jurisdictional claims against the claims of Native and other European nations. It served as an important resource through which colonists insisted, as Banner explained, on "control[ing] the legal system within which these transactions were enforced."<sup>70</sup>

Beginning in the 1660s, a consensus coalesced amongst colonists that *all* legitimate chains of title should be rooted in Native title, in addition to being recorded. One likely reason is that the rising frequency of disputes over land between colonists and with Native people gave new importance to constructing chains of "good title" and registries as archives of proof and institutional bulwarks for claims. This new effort to create a complete record of collective transfer merged what was considered proof of valid title for both intracolony and inter-sovereign disputes. The line between the two categories was already blurry because of the fact that colonists approached land expropriation through private purchases of land, which frequently channeled jurisdictional conflicts through disputes about individual transactions. Native people had formal access to colonial courts and even sometimes prevailed when the colony deemed it prudent to curb settlers' worst excesses. Generally, however, in these disputes where sovereign control of land often hung in the balance, they faced a forum where the judge, jury, and witnesses were colonists operating for the colonists.<sup>71</sup>

In a context where not recording title increasingly seemed like a sure way to lose a claim, Native people too began to seek the protections of the newly significant public record for their land. For example, the Plymouth Colony Records Deeds Book, in an addendum entitled "Book of Indian Records for Their Lands," contains a collection of deeds from the 1660s and 1670s, as well as a few from the 1690s, bequeathing land from one Native person to another in an attempt to keep lands within the community or to "p[reserve] our lands for our children."<sup>72</sup> Deeds recorded by Native people, however, were not confined to that book and

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70. BANNER, *supra* note 57, at 82; see also KAWASHIMA, *supra* note 13, at 8 (explaining that Massachusetts policy "allowed no room for Indian law"); KAWASHIMA, *supra*, at 16 ("The first set of laws Indians were compelled to obey [were] . . . regulations on Indian land and trade."); JENNINGS, *supra* note 13, at 129 ("The Euramerican would not accept the sanctions of the tribe; when he bought, he intended to put his land under the jurisdiction of his own colonial government and to secure recognition from *that* government of his property right.").

71. BANNER, *supra* note 57, at 82.

72. The deed from Papamo, Machacam, and Achawanamett stated this purpose when they recorded their interest in a tract of land called Mattapoisett on October 3, 1673. *Book of Indian Records for Their Lands*, in 12 RECORDS OF NEW PLYMOUTH COLONY, *supra* note 50, at 223, 225-26.

appear throughout the general records as well. In one example, in 1668, the Pocasset leader Weetamoo had English witnesses record oral testimony with the Plymouth Court that a deed ostensibly transferring her people's lands to John Sanford and John Archer "was a cheatt . . . to secure her land from Wamsutta or Peter Tallman"; in exchange for participating in this mock sale, they received consideration from her and were "to resigne up [the lands] . . . att her demand."<sup>73</sup> In June 1673, too, she recorded a deed to protect lands marking the boundaries of "Assonet Neck" made in the name of "Piowant," probably a man bound to protect that land who was chosen because of colonial attitudes toward leadership and gender.<sup>74</sup>

The books also, notably, contain retroactive records that many colonial towns created during this period to reconstruct chains of title and memorialize the collective transfer of lands from Native nations to the towns—even when based on allegations about agreements made decades prior. The examples of the kinds of records they created in this process are too numerous to describe comprehensively here,<sup>75</sup> but a few will illustrate the point. In some cases, colonists obtained retroactive deeds or recorded testimony pertaining to long-past alleged transactions from Native people. On March 30, 1668, Rehoboth township recorded a quit-claim deed for eight square miles and 100 acres obtained from Metacom, otherwise known as King Philip, stating that his deceased father had

73. LISA BROOKS, *OUR BELOVED KIN: A NEW HISTORY OF KING PHILIP'S WAR 67-68* (2018); see also 4 *RECORDS OF NEW PLYMOUTH COLONY*, *supra* note 50, at 186 (recording the same transaction).

74. BROOKS, *supra* note 73, at 70-71; see also *BOOK OF INDIAN RECORDS FOR THEIR LANDS*, *supra* note 72, at 242 (recording the same transaction).

75. The town of Plymouth began the practice, before this period, of

calling upon the witness stand some of their oldest dwellers in the country, and taking their testimony under oath that certain tracts of Indian lands, then in the possession of the English, were fairly and properly obtained of the Indians by purchase, and such depositions being entered in and upon the records of the colonial court were relied upon as a title to such lands, of which no written evidences of the purchase in the form, spirit, or letter of a deed could be found, and of which, perhaps, none ever existed.

BANGS, *supra* note 60, at 23. The town of Hingham retroactively purchased the land on which it sat and explained in a deed dated July 4, 1665, that when the town was settled in 1634, it was with "likening and Consent" but without "legall conveyance in writing." JENNINGS, *supra* note 13, at 286 n.11. Essex landowners made "a belated effort" to create records commemorating their original purchases from Native nations decades before. DAVID THOMAS KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692*, at 161 (1981); see 1 JOSEPH B. FELT, *ANNALS OF SALEM 27-32* (2d ed., Salem, W. & S.B. Ives 1845). When Governor Sir Edmund Andros announced his plan to redistribute lands in Massachusetts, based on the idea that "from the Indians noe title cann be Derived," every New Englander became a staunch defender of Native title. BANNER, *supra* note 57, at 41-42.

received compensation for those lands in 1641.<sup>76</sup> Quachatasett, too, on January 16, 1677, acknowledged to the town of Sandwich that his former guardian Quonicoome had “many years since in the time of [his] minority” – possibly as long ago as 1637 – received payment on his behalf for a large tract between Sandwich and Barnstable.<sup>77</sup> In other cases, colonists provided the testimony, such as when John Alden, at 83 years of age, testified on July 6, 1682, to “being one of the first comers into New England, to settle att or about Plymouth, which now is about 62 year since,” and that lands the colony claimed belonged to Osamequin, or Massasoit, Metacom’s father, who with his son Wamsitta “did give, graunt, alianate, and enfeoffe, and confeirme [Hog Island] unto Richard Smith.”<sup>78</sup> By 1747, the standard of deriving “good title” from Native title was so established that a group of New Jersey colonists observed, “Every Man that pretended to Propriety, had gotten his Right by Purchase from the *Natives* . . . without which purchase, the People there would *hiss* at the person pretending Property.”<sup>79</sup>

Today, these “deeds” and other records attesting to claims that Native nations consensually transferred land – as riddled with colonial manipulations and coercions as they were – still anchor chains of title from that era. Their presence in the record, together with the examples presented above, memorialize colonists’ achievement in agreeing to use this institution in intersovereign disputes, to powerful enough effect that Native people tried to avail themselves of its protections as well, much like they often sought relief in colonial courts. Yet, as with courts, the registry drew Native people into fora they did not control, where legal formalities could be used against them as well as for them, and where protection ultimately depended on other forms of privilege and power. The registry, as an official point of proof for the transfer of lands from Native people to colonists *in general*, became a constituent part of colonists’ assertion of sovereign power over territory – political power that not only privileged colonial property interests but was born from them and depended on their proliferation to grow.

### B. *The Registry as a Tool for Expanding Jurisdictional Power*

That the colonies used property claims to assert control over lands expanding outward from local centers highlights another important aspect of how colonists approached the task of building power from a place of weakness. Specifically, this power stemmed from control over the ground itself, as the colonies

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76. BANGS, *supra* note 60, at 387-88.

77. *Id.* at 187.

78. *Id.* at 532.

79. BANNER, *supra* note 57, at 26-27.

responded to concrete disputes against other communities and strove to build structures capacious enough to give force to collective action. Again, in a context where colonists' physical occupation was spotty, and colonial jurisdiction highly contested, the colonies were in no position to claim absolute sovereign authority over the grandiose territories demarcated by the borders of their discovery-based charters. Rather, as they represented the people under their jurisdiction, the colonies insisted their jurisdictional interests extended as far as the parcels those settlers claimed—which were increasingly recorded in county courts and registries. Colonial claims to jurisdiction vis-à-vis Native nations radiated outward from local centers of settlement, rather than inward from the bounds of charter grants.<sup>80</sup> This approach toward building jurisdictional power manifested in the evolution of the American title registry as a local, public, and voluntary institution—a set of choices designed to encourage its broad acceptance and use by colonists. The meager institution of the registry, which constituted little more than a book and a clerk, is a powerful example of how the colonies developed a form with the capacity to facilitate concerted colonial action. Registries not only supported property production but also accelerated it—transforming its very nature to make property, beyond a static asset, a vehicle for credit creation. As the colonies, with the registry, successfully interposed a bureaucratic process upon colonists and Native people alike to further colonial goals, these developments catalyzed not only the growth of the colonies' markets but their jurisdictional reach.

Initially, records of land grants in most colonies were kept in one place “by high-level [Crown] officials of the founding corporations, proprietors, and governors' offices,”<sup>81</sup> in continuation with English requirements that the Crown maintain public records of its land grants.<sup>82</sup> South Carolina maintained a centralized system of records in Charlestown throughout the colonial era<sup>83</sup>; only the

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80. Bernard Bailyn, for example, wrote that a visual representation of their migration patterns would look like “a multitude of short lines forming together a penumbra around each town and joining it with the neighboring towns . . .” BERNARD BAILYN, *THE PEOPLING OF BRITISH NORTH AMERICA: AN INTRODUCTION* 51 (1986). Frederic L. Paxson described how

[t]he development of county government in Virginia and North Carolina kept uneven pace with the need for it among the border settlements,” and how since “there were frequently many settlers and a need to register land titles and probate estates before the colonial legislatures became aware of the fact . . . there was a tendency for them to frame some kind of legal institutions for themselves.

FREDERIC L. PAXSON, *HISTORY OF THE AMERICAN FRONTIER 1763-1893*, at 24-25 (1924).

81. PRIEST, *supra* note 2, at 45.

82. *See id.* (“[N]o freehold may be given to the king, nor derived from him, but by matter of record.” (quoting 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*346).

83. PRIEST, *supra* note 2, at 55. In 1785, South Carolina passed an act for establishing county courts, which required the recording of conveyances “in the Clerk's office of the county where

corporate colonies of Massachusetts and Connecticut, where towns had control over granting land and recording as early as 1629, were exceptions.<sup>84</sup> Yet a distant central registry acted as a prohibitive bar to most people who might otherwise record their interests or check the records. As Wesley Frank Craven of Virginia noted, “each step in [the] outward movement of population increased the distance between the people and the seat of provincial government,” quickly giving rise to the demand “[o]n each frontier . . . for the creation of a local court that would bring the government within easy reach of the people.”<sup>85</sup> Some of these courts’ “most important services” were rendering “a court of record,” and “[o]f all the records kept, none compared in importance with those which testified to a title in land,” the main source of any colonist’s wealth.<sup>86</sup> English settlers had limited ability to travel for such clerical tasks, and local records also strengthened owners’ ability to provide notice “to the world.” Thus, in the late-seventeenth and early-eighteenth centuries, the colonies facilitated making the registry ubiquitous by passing laws providing that property records be maintained at the county level<sup>87</sup> in courts of common pleas.<sup>88</sup> A Virginia Act introduced county-level recordkeeping for deeds or mortgages made “without delivery of possession” as early as 1639;<sup>89</sup> “by the middle of the century no small part of the duties of the clerk of court was that of a registrar of deeds.”<sup>90</sup> Maryland passed a similar law in 1678.<sup>91</sup> By then, as elsewhere, colonists were already recording conveyances with the county court, even if not in an established registry, and “the

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the land mentioned to be passed or granted shall lie,” though it still required county courts to “transmit memorials” of the records they collected to the central office twice a year. *Id.* at 55-56 (quoting An Act for Establishing County Courts and for Regulating the Proceedings Therein (Mar. 17, 1785), in ACTS, ORDINANCES, AND RESOLVES OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA; PASSED IN MARCH, 1785, at 24-25 (Charleston, A. Timothy 1785)).

84. PRIEST, *supra* note 2, at 51.

85. CRAVEN, *supra* note 48, at 270, 172.

86. *Id.* at 277-78.

87. PRIEST, *supra* note 2, at 50. As Claire Priest writes, “[I]n the colonies, publicizing conveyances in open records became widespread practice and was normalized in a manner not achieved in England until the late nineteenth and early twentieth centuries.” *Id.* at 45.

88. Civil courts acted as venues for notifying local communities of changes in each others’ property holdings and status. *Id.* at 41.

89. *Id.* at 51 (quoting Act XVI (Jan. 1639), in 1 STATUTES AT LARGE OF VIRGINIA, *supra* note 53, at 227). This idea is repeated in Act XII (Mar. 1642), in 1 STATUTES AT LARGE OF VIRGINIA, *supra* note 53, at 248.

90. CRAVEN, *supra* note 48, at 280. The legislature extended the scope of this Act to recording chattel mortgages in 1656. PRIEST, *supra* note 2, at 51 (citing Act IV, Against Fraudulent Deeds, in 1 STATUTES AT LARGE OF VIRGINIA, *supra* note 53, at 417-18).

91. PRIEST, *supra* note 2, at 51; HERBERT L. OSGOOD, 2 THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 43-44 (1904).

statute finally enacted hardly did more than confirm an established practice.”<sup>92</sup> Similar laws appeared in 1683 in New York<sup>93</sup> and 1706 in Pennsylvania.<sup>94</sup>

In addition to situating registries locally, the colonies also established publicly accessible registries to facilitate settlers’ use of the registry system.<sup>95</sup> In stark contrast to the English tradition of keeping conveyances private,<sup>96</sup> as Claire Priest comments, “the public’s access to court records and land title records was a central feature of colonial institutions.”<sup>97</sup> As in New Jersey’s 1714 recording acts, many seventeenth- and eighteenth-century colonial laws specified that “all Persons concerned may have Recourse to the said Records, as they shall have occasion.”<sup>98</sup> Zephaniah Swift wrote in a 1795 treatise on Connecticut law that “[t]he records and files of the towns, will shew to every person, that is pleased to enquire, in whom is vested the legal title to lands . . . .”<sup>99</sup> This design feature had the effect of increasing the property on record and transforming the formal aspects of transactions for land. Like English deeds, American colonial deeds increasingly included both beneficial-ownership information and a description of the property. But because publicly searchable records provided what we now call “constructive notice,” as Priest has observed, the traditional English requirement

92. CRAVEN, *supra* note 48, at 305.

93. PRIEST, *supra* note 2, at 51 (citing *An Act to Prevent Frauds in Conveyancing of Lands* (Nov. 3, 1683), in 1 *THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION* 141-42 (Albany, James B. Lyon 1894)).

94. PRIEST, *supra* note 2, at 52 (citing *An Act for the Acknowledgment and Recording of Deeds* (Jan. 12, 1706), in 2 *THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801*, at 206-12 (Pa., Wm. Stanley Ray 1896)) [hereinafter *STATUTES AT LARGE OF PENNSYLVANIA*].

95. As Maureen E. Brady has shown, like contemporary registries, the first registries charged basic fees for recording—six pence in 1672, and two shillings (or twenty-four pence) by 1702, while it cost a penny to search the records for a parcel. Brady, *supra* note 25, at 901.

96. PRIEST, *supra* note 2, at 45. Parliament enacted a national Land Registry Act for England and Wales in 1862. *Id.* at 181 n.32.

97. *Id.* at 47.

98. *Id.* at 48 (quoting *An Act for Acknowledging and Recording of Deeds within each Respective County of this Province* (Mar. 15, 1713/14), in 2 *Laws of the Royal Colony of New Jersey, 1703-1745* (Bernard Bush ed., 1977) [hereinafter *LAWS OF THE ROYAL COLONY OF NEW JERSEY*]). Priest identifies similar statutes in Massachusetts, New Jersey, and New York. *Id.* at 47-48 (citing *An Act in Addition to an Act Entitled “An Act for the More Safe Keeping the Registry of Deeds and Conveyances of Lands”* (Nov. 17, 1720), in 2 *THE ACTS AND RESOLVES PUBLIC AND PRIVATE OF THE PROVINCE OF MASSACHUSETTS BAY 187* (Boston, Wright & Potter 1874); *An Act for Preventing Frauds by Mortgages* (June 20, 1765), in 4 *LAWS OF THE ROYAL COLONY OF NEW JERSEY* 334-36; *An Act for Preventing Frauds by Mortgages* (Dec. 12, 1753), in 3 *THE COLONIAL LAWS OF NEW YORK* (Lawbook Exchange 2006) (1894)).

99. “This renders all conveyances of lands a matter of much more public notoriety, than the ancient method of livery of seisin . . . .” PRIEST, *supra* note 2, at 47 (quoting ZEPHANIAH SWIFT, 1 *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT: IN SIX BOOKS* 307-08 (Arno Press 1972) (1795)).

of a “public and notorious act” to transfer property became redundant and obsolete. The registry, in other words, simplified and facilitated transactions for property<sup>100</sup> by doing away with the cumbersome and expensive *livery of seisin*, a ritual ceremony where the parties and witnesses convened at the land itself for the prior owner to deliver “a clod or turf, or a twig or bough there growing” to the new owner.<sup>101</sup> With the elimination of this ritual, the deed gained in capacity, though its form remained the same<sup>102</sup>: under colonial law, as Priest writes, “the deed itself fully conveyed the property . . . because having the deed authenticated or ‘proved’ in court and recorded in the court records or registry provided the required element of ‘notoriety’ of the transaction.”<sup>103</sup>

While the registry simplified and encouraged colonial claims-making, most colonies could not make recording mandatory because of the high costs of enforcing such a law.<sup>104</sup> As Priest observes, “where public recording was largely a novelty, voluntary recording proved to be the dominant approach.”<sup>105</sup> Instead of invalidating unrecorded titles, they used the power of incentives to ensure widespread recording, with recording acts that gave recorded interests priority over unrecorded ones, just like those still in force today. As they perceived, settlers’ primary preoccupation was property ownership, and they responded to bureaucratic measures that delivered direct advantages to them in a way that they did not to government mandates that threatened to take them away. Colonists had high incentives to record property of significant monetary value, including not only property in land but also in enslaved people; thus their recording interests in enslaved people, as Priest notes, represent a “dramatic departure from the

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100. See PRIEST, *supra* note 2, at 5, 46-47 (quoting SWIFT, *supra* note 99, at 313) (“[O]ur conveying can boast of a simplicity, conciseness, facility, and cheapness, superior to any other country.”); see also *id.* (quoting DANIEL WEBSTER, A DISCOURSE DELIVERED AT PLYMOUTH, DECEMBER 22, 1820, IN COMMEMORATION OF THE FIRST SETTLEMENT OF NEW-ENGLAND 71-72 (Paul Royster ed., Zea Books 2022) (1821)) (“The establishment of public registries, and the simplicity of our forms of conveyance, have greatly facilitated the change of real estate, from one proprietor to another.”).

101. PRIEST, *supra* note 2, at 46 (quoting 2 William BLACKSTONE, COMMENTARIES \*311) (describing the livery of seisin as necessary to complete a conveyance of property).

102. As in England, a deed is a document to convey property that contains the names of the seller and purchaser and a description of the property.

103. PRIEST, *supra* note 2, at 46.

104. Pennsylvania, for example, made recording mortgages mandatory. *Id.* at 52 (citing An Act for the Acknowledgment and Recording of Deeds (Jan. 12, 1706), in 2 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 94, at 206-12; An Act for the Acknowledging and Recording of Deeds (Feb. 28, 1711), in 2 STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 94, at 349-55; An Act for Acknowledging and Recording of Deeds (May 28, 1715), in 3 THE STATUTES AT LARGE OF PENNSYLVANIA, *supra* note 94, at 53-58).

105. PRIEST, *supra* note 2, at 52.



English common law.”<sup>106</sup> Consequently, registry records grew remarkably comprehensive and came to encompass most claims to property within a jurisdiction.<sup>107</sup>

The registry’s design also relieved governments of the burdens of authenticating title or providing indemnity in case of fraud (in contrast to the Torrens registry system, for example, which was introduced in the 1850s to facilitate the colonization of Australia).<sup>108</sup> Voluntary recording meant that any party could record any document, valid or not; minimal government involvement distanced the government from any accountability for the integrity of claims in the record.<sup>109</sup> These features, which lowered the bar to using the registry further still, also made the registry cheap and easy to replicate across the colonies. The contemporary American title registry retains this form as a conspicuously minimal and passive institution, “merely a mechanism for publicly recording private transfers” that leaves transacting parties to test title and enforce their rights by litigation.<sup>110</sup>

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106. *Id.* at 49. Reflecting the deep interdependence of property in people and land, property in people was alternately categorized as chattel and real property during this period. See Park, *supra* note 12, at 117–18; THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW*, 1619–1860, at 61–80 (1996); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 50–53 (1978).

107. In England, no such records came into widespread recognition until 1869, except in York and Middlesex Counties and the Bedford Levels. See PRIEST, *supra* note 2, at 48–49. Though local recording existed in England since the Statute of Enrolments of 1536, which formally required the recording of land conveyances, the recording requirement did not apply when a tenant under a lease purchased the land, causing the practice of leasing land for one year prior to a full conveyance to become common by the 1620s. PRIEST, *supra* note 2, at 46; see also J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 305–06 (4th ed. 2002) (describing the practice, known as “lease and release”); EDWARD JENKS, *MODERN LAND LAW* 305 (New York, H. Frowde 1899) (“This ingenious evasion of the Statute of Inrolments received judicial sanction, clear and unmistakeable . . . in 1620; but it is probable that it had for some time been familiar to practitioners, for the judges in that case treated the validity of the device as beyond question.”).

108. For analyses of the colonial logic of the Torrens registration system, see BRENNA BHANDAR, *COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP* 82–96 (2018); and Sarah Keenan, *Making Land Liquid: On Time and Title Registration*, in LAW & TIME 150–52 (Siân Beynon-Jones & Emily Grabham eds., 2019).

109. Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663, 664 (2003); see also Jerry L. Anderson, *The Divergent Evolution of English Property Law*, 29 PROB. & PROP. 50, 50 (2015) (“The government itself, in almost all jurisdictions, is not in the business of determining, let alone guaranteeing, who owns what.”).

110. Szypszak, *supra* note 109, at 663. The title-insurance industry arose in this space left by the government to private parties to verify and strengthen record claims. *Id.* at 664.

This open, low-accountability system, as scholars have observed, trades remarkable flexibility and speed in private transfers for high risks to individual claimants.<sup>111</sup> These claimants' ability to seek costly assistance if faced with fraud or error in the record, of course, neither is, nor was equal. Enslaved people were permitted neither to own land nor record their interests in registries,<sup>112</sup> but free Black people could and did own land and would have recorded their interests in the local county register.<sup>113</sup> It is very likely that these Black landowners, like the Native people who sought to use the registry, as well as poor English people, faced the structural disadvantages built into the system: the hazards of market predation and unequal bargaining power, including from racial and class discrimination in transactions and law enforcement, as well as a lack of access to resources needed to pay filing fees, court fees, representation, and settlements or fines.<sup>114</sup> One mid-twentieth-century commentator observed, "It is quite clear that the forerunning statutes of today's recording acts were based on a revenue

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111. *Id.* at 664-67.

112. DYLAN C. PENNINGROTH, *BEFORE THE MOVEMENT: THE HIDDEN HISTORY OF BLACK CIVIL RIGHTS* 12, 15 (2023) (elaborating on enslaved people's property interests and rights and ability to "get permission to lawfully buy and sell everything except guns, land, and liquor").

113. *See, e.g.*, LORENZO JOHNSTON GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND* 309-310 (1942) (describing the landholdings of several free Black people in New England between 1656 and 1772 by citing a variety of sources, including the Suffolk Deeds, 1629-1692, and the Early Records of the Town of Providence).

114. We can infer that Black people, like Native people, also experienced disadvantages within the power dynamics of the explicitly racialized colonial court system. For a sense of the extent of this racialization, see Yasuhide Kawashima's discussion of the restrictive laws devised by colonists in New England specifically targeting nonwhites (that is, Native and Black people) with surveillance laws, curfews, and a broad spectrum variety of prohibitions. *See* KAWASHIMA, *supra* note 13, at 205-24. As Dylan C. Penningroth writes of the postabolition era in the United States, which saw the passage of similar "Black codes" in many states, "[l]ow-level officials had a great deal of discretion, and they used that power against Black people across many areas of law." PENNINGROTH, *supra* note 112, at 159-60 (describing predation of the Black community and, specifically, officials "snapping up land for themselves"). It would be surprising if low-level officials during the colonial period did not also exert their discretion in racialized ways. While it would be helpful to have more evidence concerning the specific experiences of Black and Native people with the registry, a running theme of Penningroth's work also points to the great difficulty of recovering these histories. Even in the more proximate context of the United States, nonwhites' use of law did not often reach the highest courts and are instead preserved largely in "sources that are difficult to access":

The most revealing documents are not published or even held in a traditional archive. Instead, they are stored in the back rooms and basements of county courthouses . . . on yellowing paper, trifolded and tightly packed, flaking away or chewed by mice and insects . . . [a]nd they do not identify people by race.

PENNINGROTH, *supra* note 112, at xix-xx.

preservation basis rather than the protection of anyone”<sup>115</sup> – or at least any individual. By amassing colonial claims, and providing the colonies with institutional infrastructure to validate them, the registry protected the white collective.

These harms to people who sought to use the system were, of course, distinct from the immeasurable underlying harms to Native and Black communities wrought by the processes of producing most of the property claims in the registry: the colonization of land and the enslavement of people, increasingly the two most significant commodities in colonial markets. The “growth” of property markets, in this context, meant the seizure of *more* Native nations’ lands and the enslavement of *more* people. To the extent that the registry facilitated making property claims, it furthered the processes of conquest and enslavement, driving the destruction of Native and Black communities and lives. Further, the registry catalyzed market growth, magnifying the scale of this loss, by strengthening colonists’ ability to access credit through property ownership. As they do now, registries gave lenders more confidence in making secured loans to colonists, as they helped to affirm property ownership and provide notice of liens or other encumbrances. Meanwhile, though foreclosure had long been a rare occurrence laden with legal hurdles in England,<sup>116</sup> creditors lobbied for easy foreclosure on lands in the colonies in order to foreclose more easily on enslaved people and to keep plantations whole.<sup>117</sup> After they succeeded in making it possible for colonists to use lands as security for credit for the first time in 1732, lenders became more willing to lend, and on better terms, and poured money into the colonies, funding an explosion of commercial activity.<sup>118</sup>

The institutional infrastructure of the registry was the “backbone of credit” in the colonies, as Priest puts it,<sup>119</sup> and ushered in a new way of thinking about

115. Marshall, *supra* note 29, at 56.

116. See PRIEST, *supra* note 2, at 60; Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 388 (2006); Park, *supra* note 34, at 1011; PARK, *supra* note 69, at 33; David Seipp, *A Very Brief Legal and Social History of Mortgage*, in MORTGAGE ACROSS CULTURES: LAND, FINANCE, AND EPISTEMOLOGY 19, 21 (Daivi Rodima-Taylor & Parker Shipton eds., 2022).

117. Virginia passed a law governing recording of chattel mortgages in 1656. PRIEST, *supra* note 2, at 49 (citing Act IV, Against Fraudulent Deeds (Dec. 1656), in 1 STATUTES AT LARGE OF VIRGINIA, *supra* note 53, at 418). In 1698, South Carolina passed an act that referenced the priority courts should give to recorded “Sale or Mortgage of Negroes” above unrecorded transactions. *Id.* (citing An Act to Prevent Deceits by Double Mortgages and Conveyances of Lands, Negroes, and Chattels (Oct. 8, 1698), in 2 STATUTES AT LARGE OF SOUTH CAROLINA 137–38).

118. PRIEST, *supra* note 2, at 93 (citing Act for the More Easy Recovery of Debts in His Majesty’s Plantations and Colonies in America, 5 Geo. 2 c. 7 (1732) (Eng.)). See also Park, *supra* note 69, at 41–43.

119. PRIEST, *supra* note 2, at 38–56.

property itself. On the frenzied borrowing that followed new laws governing credit and foreclosure, G.B. Warden reflected that “real property in Boston at times more closely resembled a negotiable commodity or medium of exchange”; “the mere possession of property . . . was probably not so important as being able to exchange it rapidly as conditions changed, and to convert property into credit or cash.”<sup>120</sup> Not only did land further approach the status of other chattel goods,<sup>121</sup> but enslaved people “too were treated as assets and were a primary form of collateral driving the economy in many areas.”<sup>122</sup> These transformations further exacerbated the pecuniary, instrumental relationship that colonists had initiated with tribal lands and Black and Native people. They introduced the possibility, too, that colonists might accumulate property in expropriated lands and enslaved people not only because they wished to “cultivate” land, but to obtain more credit, to assuage their perpetual need for cash.<sup>123</sup>

No less than Joseph Story sang the praises of the registry system by writing that “[i]t is hardly possible to measure the beneficial influences upon our titles arising from this source, in point of security, facility of transfer, and marketable value.”<sup>124</sup> But one cannot celebrate this commercial growth without also celebrating the brutal violence of the property production it involved. Though most literature on these economic developments has followed Story in ignoring this violence or treated it as incidental, in truth, this violence was the most obvious and remarkable aspect of the property system developing at this time. It was colonists’ assessment of the plausibility of violence against Native and Black communities that drove their investments in expropriation and enslavement; these property pursuits were thus motivated by violence, and colonists

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120. G.B. Warden, *The Distribution of Property in Boston, 1692-1775*, in 10 PERSPECTIVES IN AMERICAN HISTORY 81, 97-98 (Donald Fleming & Bernard Bailyn eds., 1976); see PRIEST, *supra* note 2, at 75.

121. Park, *supra* note 34, at 1010; JOHN FREDERICK MARTIN, PROFITS IN THE WILDERNESS: ENTREPRENEURSHIP AND THE FOUNDING OF NEW ENGLAND TOWNS IN THE SEVENTEENTH CENTURY 123 (1991) (explaining that although people’s wealth in England “had consisted of many things . . . land was the principal capital of seventeenth-century America”).

122. PRIEST, *supra* note 2, at 56.

123. In a work that describes these legal transformations in several colonies, Richard Pares describes in a footnote how debtor colonists “bought up” a “district of very poor lands” in Barbados to saddle their creditors with them in lieu of repayment. RICHARD PARES, MERCHANTS AND PLANTERS 88 n.56 (1960). This practice appears to have been in use since at least 1689. *Id.*

124. JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 122 § 174 (Thomas M. Cooley ed., Ann Arbor, Mich. 1873); see also PRIEST, *supra* note 2, at 47 (quoting 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT: IN SIX BOOKS 307 (Arno Press 1972) (1795)) (explaining that the registry was “founded in the highest wisdom and policy, and has a most effectual operation to reduce the titles to things real to certainty, and lessen the sources of litigation”).

disciplined and sustained this violence by developing bureaucratic practices and institutions such as the registry. The registry system thereby became the institutional foundation of a property system distinguished by an unprecedented value system: one that elevated the monetary value of property and sought to encourage commercial activity above all – at one level, above safeguards for individuals to ensure the accountability of recordings, and on another, more fundamentally, at the direct expense of non-European communities and lives.

The newly ubiquitous local registry became the foundation for the growth of this property market – and with it, locality by locality, the colonies’ jurisdictional power in America. As Craven remarked, “[T]he expanding frontier . . . [was] conveniently marked for us by the creation of new counties.”<sup>125</sup> New colonial markets and colonial jurisdictional reach grew through expropriation and enslavement, or the systematic destruction of communities they viewed as oppositional to their own. From their situation in townships and counties, registries served as crucial instruments in the colonization efforts by organizing and giving institutional weight to claims based on dispossession and domination. In this story, as Craven noted, “[E]ach new county may be considered the result of an extension of settlement beyond the reach of a county court sitting at points convenient to the older areas of settlement.”<sup>126</sup>

The lasting consequences of these developments would inhere in the function of the county, which settlers would persistently use to push the jurisdictional power of the United States into the sovereign territory of Native nations. Though the United States, as the next Part describes, would make this activity more clearly illegal under its own laws than it had been in the colonies, these local jurisdictions would nonetheless continue to constitute the leading point of conquest. Both beyond the bounds of the original states and within the borders they hoped to claim, counties supported property and sovereignty creation across the United States, offering a history that illuminates how property affirmation and preservation became their primary charge.

## II. EXPANDING PROPERTY, REGISTRIES, AND THE JURISDICTIONAL REACH OF THE UNITED STATES

To a significant extent, the United States adopted the colonies’ approach to building jurisdictional power by encouraging property claims. The title registry appeared quickly in all areas where settlers began to claim property. This activity was incontrovertibly *local*, and counties became the governmental framework that supported the germinating settlements through which the nation extended

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125. CRAVEN, *supra* note 48, at 172.

126. *Id.* at 270.

its sovereign power. Across the mainland, throughout the nineteenth century, the first county-based institution to appear in new local jurisdictions was, along with the sheriff, the title registry – that passive, public, voluntary recordkeeping office that, by affirming property rights, possessed the power to draw settlers to a region. Though the ways that these jurisdictions came into being has receded from view, the registry's near-immediate appearance everywhere clues us into the key role it played in ensuring the viability and future flourishing of newborn jurisdictions. Indeed, the primacy of the registry underscores the extent to which territorial expansion depended on a constant influx of people who came to lands seeking to *own* them. As in the colonial era, the creation of the registry was a simple, low-cost way for the aspirational state to back ownership claims – claims that were a driving force not only of white settlers' migration, but also of their will to organize their collective power.

This Part tracks the progression of U.S. control of lands through the creation of counties, which served as the seat of title registries and thus the epicenters for affirming property claims. It draws on extensive research, compiled in the Appendices, examining the history of county creation alongside various other phenomena: the establishment of the territories and states to which these counties would eventually belong, treaties that ceded the lands comprising these counties and states, population growth in the original thirteen states, land lotteries and the subdivision of counties in Georgia, and the passage of recording acts in territories and states across the mainland United States. Appendices A and D both present the dates when states' first counties were established against those for territories and states, to show that counties frequently predated and ushered in federal claims to sovereignty. Appendix A, which focuses on the Northwest Territory and the Old Southwest, compares that data against the timeline of Native nations' land cessions to the federal government by treaty. Appendix D covers the continental United States, allowing for assessment of nationwide patterns in county creation over time, and also collects the first Recording Acts passed by every territory and state in the Union. Appendices B and C indicate that settlers' property claims and county creation played a pivotal role in states' ability to affirm and exercise sovereignty within their desired borders, as demonstrated by the strong coincidence of federal treaties obtaining land cessions and county creation, as well as county multiplication and population growth.

The picture that the local history of national expansion offers us of U.S. sovereignty dramatically retards conventional understandings of when the United States attained sovereignty over its current landmass, including within its original states. The other side to this corrective is extending our understanding of how Native nations' *absolute* sovereign control of lands persisted in many areas of the mainland long after the creation of territories and states. This understanding of when and how the United States acceded to territorial sovereignty departs

significantly from prevailing norms in legal scholarship of describing the nation as acquiring “sovereignty,” “ownership,” or even “federal jurisdiction” of lands through the major treaties of the era, whether the Treaty of Paris with Great Britain, the Louisiana Purchase, the Florida Purchase, or the Treaty of Guadalupe Hidalgo.<sup>127</sup> It is crucial to recognize that although the United States received rights to land through these treaties, such rights were no more than discovery rights. That is, while the federal government held the *authority* to invade Native nations’ lands, its actual *jurisdiction* did not exist in lands beyond the Appalachian Mountains, or even in many parts of the first states.<sup>128</sup>

As Justice Marshall clearly enunciated in the 1823 decision *Johnson v. M’Intosh*, title by “discovery” could only be consummated by possession. Importantly, this decision did not destroy Native sovereignty, but rather subordinated it to U.S. sovereignty, establishing a plural hierarchical order of sovereignty in the United States.<sup>129</sup> The right of conquest is not equivalent to the right of jurisdiction, or actual jurisdictional power. At stake in the distinction is our ability to recognize the many other possible outcomes that lay between the intention to invade and the act of governance, and between white entitlement and white title to lands. In the gulf between these poles lies more than a century of struggles waged by hundreds of nations to retain sovereign control of their homelands, and it is only by apprehending this gap that we can fully fathom the magnitude and range of mechanisms that were part of the multisited and *local* project of conquest.

To appreciate the history of American jurisdictional development, it is crucial to see how the U.S. legal framework for conquest differed from that in the colonies. Settlers who went beyond U.S. territory in order to extend it by claiming property violated laws on the books in ways that colonists who had pressed into Native nations’ lands outside of their established settlements had not. The reason is that, after establishing its sole authority vis-à-vis competing European nations and states over future conquest,<sup>130</sup> the United States significantly reordered the legal structure of land expropriation from Native nations with a policy of

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127. The convention is so widespread in legal and popular literature as to make it unnecessary and misleading to single out any example. See *supra* note 10 (offering examples of recent scholarship that describes the territorial transition to United States sovereignty but heavily emphasizes the federal role, rather than that of local jurisdictions).

128. See ABLAVSKY, *supra* note 10, at 4.

129. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (describing how as a result of conquest, the sovereign title of the United States became “absolute,” while tribal nations’ sovereignty was no longer, under U.S. law, “absolute”); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (affirming the continuing sovereignty of tribal nations under U.S. law).

130. See COLIN G. CALLOWAY, *THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF THE NATION* 284-85, 300 (2018) (“[T]he US . . . was not the only player in the game.”).

“federal preemption.” Whereas in the colonies, the legal mode of transfer from Native polities to Anglo-Americans had included private contracts, the United States made itself the only entity to which Native nations could transfer title, and treaty became the exclusive tool for formal land acquisition.<sup>131</sup> Additionally, the federal government assumed the responsibility of ordering land surveys and subsequently distributing these lands to private entities and people, first through the Treasury, and eventually through national land offices.<sup>132</sup> Theoretically the nation was supposed to acquire lands formally from tribes before surveying and “disposing” of what it called the “public domain.”<sup>133</sup>

In practice, however, the United States continued to benefit from private individuals’ illegal encroachments in establishing its own actual control or jurisdiction over territory. Following longstanding colonial practice, homesteading settlers continued to intrude on Native nations’ lands prior to their formal acquisition by the United States.<sup>134</sup> During this period, this settlement often occurred in areas where the effects of prior European settlement, especially the spread of disease, had already seriously impacted Native communities’ health and ability to survive and stay.<sup>135</sup> Settlers built on the prior occupations of the French, British, and Spanish and integrated their titles into the first records in the title registries they established, as described below.<sup>136</sup> Such ongoing settlement disrupted these nations’ efforts to recover and rebuild their communities and thereby facilitated the United States’s efforts to later obtain land cessions from Native nations by treaty.<sup>137</sup> As Colin G. Calloway writes, “The US

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131. See BANNER, *supra* note 57, at 85 (“Indian land sales were transformed from *contracts* into *treaties*.”).

132. The Treasury oversaw sales and grants of surveyed land until the creation of the General Land Office in 1812.

133. See CALLOWAY, *supra* note 130, at 285 (“[I]mperialism and republicanism could be deemed compatible if the lands into which the nation expanded were ‘vacant’ and ‘domestic space.’”).

134. See KAWASHIMA, *supra* note 13, at 66-68; MARCUS WILSON JERNEGAN, *THE AMERICAN COLONIES 1492-1750: A STUDY OF THEIR POLITICAL, ECONOMIC AND SOCIAL DEVELOPMENT* 337, 345 (1929).

135. See JEFFREY OSTLER, *SURVIVING GENOCIDE: NATIVE NATIONS AND THE UNITED STATES FROM THE AMERICAN REVOLUTION TO BLEEDING KANSAS* 380-82, 388-406 (2019) (detailing how U.S. policy and action contributed to Native depopulation and displacement after communities were weakened by European disease and providing estimates for Native populations over time).

136. See *infra* pp. 3045-47 (discussing French titles in St. Clair County, Illinois); see also ABLAVSKY, *supra* note 10, at 19-50 (discussing sources of title in the territories).

137. PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 17* (1987) (explaining that one of Congress’s main early preoccupations was finding and controlling “suitably industrious settlers to develop the national domain”); see also *id.* at 25 (stating that in light of the “amazing rapidity” of settlement, George Washington advised: if “you cannot stop the road . . . it is yet in your power to mark the way”).



government absorbed frontier settlers' takeovers of Indian land; sanctioned, turned a blind eye to, or lamented their killing of Indian people; and invoked on-the-ground 'settler sovereignty' to exert jurisdiction and control over Indian country."<sup>138</sup> Benjamin Horace Hibbard also observed, "[T]he settler rarely hesitated to take possession of government land either before or after it was surveyed."<sup>139</sup> In response to the clear preemption violation that these actions entailed, Hibbard defended them as "while not legal . . . extra-legal rather than illegal," and even *necessary* in the face of laws that "did not protect the squatter in his right to the soil."<sup>140</sup>

This Part shows how these settlers, even as they ventured beyond U.S. territory, could nonetheless arrive at a county or expect that one would soon come into being to affirm their property claims. The creation of counties roughly tracks the way these settlers, following a tradition of promises by the state to validate them, continued to lead the expansion of Anglo-American jurisdictional power and the United States's consummation of its sovereign title. It is a fairly common observation in histories of the national land system that settlers often encroached into Native nations' lands before the federal government established its formal claim.<sup>141</sup> For example, one history of the U.S. General Land Office tells us, "[a]s Americans migrated from the original thirteen colonies and continued to push the frontier westward across the North American continent, lands were often settled before the existence of government or claim of sovereignty by any nation other than Native American tribes."<sup>142</sup> However, this observation has rarely been substantiated with historical data, especially across a broad

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138. CALLOWAY, *supra* note 130, at 286. While the United States promised in 1785 to prevent private intrusions into Native nations' lands, its choices selectively enforced that promise, as dictated by concerns about the dollar costs and war.

139. BENJAMIN HORACE HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 198 (1939).

140. *Id.* Throughout the nineteenth century, settlers pointed to the centuries-old tradition of title by "improvement," as well as federal preemption and homesteading policies, to argue they were acting in the service of the nation, even when violating the law. See, e.g., JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 12-13 (1956); Park, *supra* note 12, at 1124.

141. See also *supra* notes 130, 138, 140 and accompanying text (elaborating on this observation by Champ Clark Vaughan and such classic historians of the frontier as Colin G. Calloway, Benjamin Horace Hibbard & James Willard Hurst). For more recent examples of scholars who repeat this observation as common knowledge, see ANDRO LINKLATER, *MEASURING AMERICA: HOW AN UNTAMED WILDERNESS SHAPED THE UNITED STATES AND FULFILLED THE PROMISE OF DEMOCRACY* 163 (2002); FRYMER, *supra* note 10, at 35; and CHAMP CLARK VAUGHAN, *TALES OF THE PUBLIC DOMAIN: A HISTORY OF THE UNITED STATES GENERAL LAND OFFICE IN OREGON 1* (2021).

142. CHAMP CLARK VAUGHAN, *TALES OF THE PUBLIC DOMAIN: A HISTORY OF THE UNITED STATES GENERAL LAND OFFICE IN OREGON 1* (2021).

geographic area. Consequently, it has been difficult to grasp the legal ramifications of this “squatting.”

This Part offers data to back this common observation and an analysis of how squatter-settlers of the early Republic created *local* governments to claim property in ways that directly benefited the United States in its jurisdictional expansion. It shows that as the United States grew in lands, it was counties, rather than the theoretical projections of territories, land districts, or states, that constituted the first tentative attempts to govern on the ground. Further, it was counties that established the first ground-level legal institutions to appear—namely, registries and eventually the courthouses that held them. Indeed, the first and primary function of these counties was to affirm and preserve property rights.<sup>143</sup> Like counties today, counties in the early Republic supported property and population growth (as also marked by their adoption as the unit of choice for the U.S. census).<sup>144</sup> This property included property in enslaved people, and although this Article focuses on land, it is a relentless fact that before abolition, territorial expansion—and the registry that facilitated it—also underpinned the expansion of the slave trade.<sup>145</sup> A major part of the registry’s work was thus furthering the dispossession and subordination of Native and Black people, before and after abolition. For, in addition to direct land dispossession and enslavement, the low-accountability institution of the registry also affected Native and Black people who managed to acquire and record property, who as marginalized individuals would have borne the brunt of the system’s lack of safeguards or accountability.

It is not possible, within the confines of this single Article, to provide a systematic account of all of these effects, nor of how county creation precipitated the formation of every state in the country. In an effort to open new lines of inquiry into the registry for future research, this Part sketches out the institution’s proliferation across the continent over the long nineteenth century and explains

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143. Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 416 (2017).

144. The Census reports of 1800, 1810, and 1820 list population information by townships and counties, but in and after 1830, by counties and states. See U.S. DEP’T OF STATE, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES (1801); An Act Providing for the Third Census or Enumeration of the Inhabitants of the United States, ch. 17, 2 Stat. 564 (1810); U.S. DEP’T OF STATE, CENSUS FOR 1820 (Washington, D.C., 1821); U.S. DEP’T OF STATE, ABSTRACT OF THE FIFTH CENSUS OF THE UNITED STATES (1832). Georgia converted its parishes into eight original counties during the decades before it entered the union. FARRIS W. CADLE, *GEORGIA LAND SURVEYING HISTORY AND LAW* 62 tbl.1 (1991).

145. Sectional conflicts over slavery gave rise to some of the most bitter controversies about the territories before 1865. See, e.g., ROBERT PIERCE FORBES, *THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA* (2007); Adam Rothman, *Slavery and National Expansion in the United States*, 23 OAH MAG. HIST. 23, 24 (2009).

how the county-based approach became a fixture of conquest in the United States. This Part demonstrates that the establishment of counties preceded territorial and state sovereignty in the early period, both in the Northwest Territory—the first region the United States targeted for its territorial expansion—and within the putative boundaries of its original states—especially Georgia and New York. Section II.A’s analysis of the Northwest Territory shows how, initially, the United States drew enormous counties as target areas for settlement, often well before it obtained treaties ceding those lands, as a strategy for building enough population to create transitional territories and, eventually, states.<sup>146</sup> Section II.B highlights how, in the early period, the United States had not obtained sovereign control over extensive lands within the boundaries that original states hoped to claim. Using the example of Georgia, this Section highlights how closely the state synchronized federal-treaty cessions with new county creation to assert its own sovereignty over the lands, and ultimately leveraged county creation to override federal authority over land acquisition and expel the Cherokee nation.

Section II.C then offers some overarching insights into the enduring significance of counties in actualizing the nation’s sovereign claims throughout the nineteenth century, and how patterns of county creation and land acquisition changed as the United States grew more confident in its conquest of the continent. Turning to the establishment of territories and states across the mainland, this Section shows, using the passage of Recording Acts, the perpetual emphasis on affirming property claims as the westward expansion of the United States continued. The indispensability of mechanisms for recording title made the local, low-accountability registry, though not a federally mandated form, an astonishingly uniform system across the country as the number of registries expanded into the thousands. This incredible display of concerted local action produced a common institutional infrastructure for the national jurisdiction and property market, as well as an uncommonly comprehensive record of that history. This Part concludes by briefly discussing the obstacles to historical inquiry that arise from the registry’s particular structure and outlining possibilities for future research.

#### *A. Expanding into the Northwest Territory*

The enormous expanse that Americans called the Northwest Territory was the first area beyond the original states toward which the federal government turned its gaze and over which it sought to extend its control. The area thus served as the testing ground for the nation’s approach to conquest. The methods

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146. See Appendix A.

it developed there, with their strong emphasis on county formation and title registries, proved to have immense staying power, though they would develop over time.

This expansion was an involved, multifaceted process. To begin, the United States had to establish its right to even make discovery claims over these lands, which was a right it had to inherit first from Great Britain (by the Treaty of Paris) and then from Virginia, which ceded its claims beyond the Ohio River to the federal government in 1784. These agreements, again, granted the nation only the right to try to take control of these lands without the interference of other European or state powers; they did nothing to establish effective control over the territory, nor did they ensure dominance over the region's Native inhabitants.<sup>147</sup>

The new nation saw promoting local settlement was crucial to obtaining actual control. Unlike in the colonies, where governments freely promised title in exchange for settlement, the bankrupt, deeply indebted new government devised a plan to sell these lands to settlers as a source of revenue.<sup>148</sup> In 1785, it passed a land ordinance to create the Public Land Survey system, prompting the first national survey in what came to be known as the Seven Ranges in eastern Ohio.<sup>149</sup> However, the intrusion of squatters and surveyors into lands still controlled by Native nations caused intense conflicts over the next two years.<sup>150</sup> After numerous setbacks, the federal government came to understand that it could not begin its conquest with a survey, for Native sovereigns would not relinquish lands because of lines a surveyor drew. The key factor, as in colonial times, was the influx and actual presence of the country's own people. However, the nation's interest in establishing new states remained "remote and hypothetical" to prospective settlers,<sup>151</sup> who were less interested in gaining political rights than property.<sup>152</sup> To encourage settlement, as Peter Onuf observes, Congress realized it would have to provide enough "law and order" in the territories to guarantee settlers their titles to land.<sup>153</sup> The concrete project of supporting settlers in

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147. As Calloway writes, "There were no Indians at the Peace of Paris in 1783. . . . The lands . . . were now there for the taking[,] . . . [and they] faced enormous challenges in securing those lands." CALLOWAY, *supra* note 130, at 283.

148. *Id.* at 293.

149. *Id.* at 22.

150. Calloway estimates the population of Native nations at 150,000. *Id.* at 283.

151. ONUF, *supra* note 137, at 44-45 ("[B]etween 1784 and 1787 it became increasingly clear that the land system alone did not constitute an adequate framework for orderly development. In practice, the implementation of federal land policy retarded settlement . . .").

152. *See id.*; *see also id.* at 58 ("The real issue – for settlers and policy makers alike – was land.").

153. *Id.* at 45.

claiming property, in other words, meant creating local institutions for organizing and defending title – namely, the registry of the county clerk.<sup>154</sup>

Thus, Congress passed the Northwest Ordinance in 1787, in which the United States identified the immense area northwest of the Ohio River as its target for conquest in the coming years and announced its plans to establish territorial governments and eventually states there.<sup>155</sup> The ordinance focused heavily on property law – an aspect of the document that has received relatively less scholarly emphasis than its contradictory, duplicitous commitment to respecting Native nations’ land rights and to annexing the lands as new states.<sup>156</sup> Yet, the Ordinance specifically begins by enumerating recording rules and rules governing inheritance, transfer, and leasing across the territory.<sup>157</sup> It specified that written documents should be “duly proved, and be recorded within one year after proper magistrates, courts, and registers . . . be appointed for that purpose” and provided that the United States would affirm other European settlers’ property interests in the area.<sup>158</sup> It further outlined the governor’s authority for creating counties and townships, which would organize the population and its property: the governor could both appoint local officials and “lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships.”<sup>159</sup>

While the Ordinance envisioned a methodical, planned system of jurisdictional expansion, the actual process was far more haphazard. The provision demarcating the governor’s powers likely meant to describe the United States’s theoretical plan first to obtain treaty cessions – “the parts of the district in which the

154. Onuf writes of the demand for “law and order at the local level” and how “[t]he problem of territorial government thus was transposed from the level of the ‘state’ to that of the local community.” *Id.* at 57.

155. *See id.* at 46-49.

156. *Ordinance, July 13, 1787: An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, reprinted in GOV’T PRINTING OFF., DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, at 47 (1st Sess. 1927) [hereinafter *Northwest Ordinance*]; *see also* BLAKE A. WATSON, *BUYING AMERICA FROM THE INDIANS: JOHNSON V. MCINTOSH AND THE HISTORY OF NATIVE LAND RIGHTS* 162 (2012) (explaining that Congress assumed the Native lands would be taken and eventually admitted as new states); Jeffrey Ostler, “*Just and Lawful War*” as Genocidal War in the (United States) Northwest Ordinance and Northwest Territory, 1787-1832, 18 J. GENOCIDE RSCH. 1, 3 (2016) (describing the Northwest Ordinance as “identifying a foundational location for genocide in US Indian policy”).

157. *Northwest Ordinance*, *supra* note 156, at 47-48; *see also* WILLIAM B. NEFF, *BENCH AND BAR OF NORTHERN OHIO: HISTORY AND BIOGRAPHY* 32 (1921) (“Particular attention was given in the ordinance to property rights and the disposition of estates.”).

158. *Northwest Ordinance*, *supra* note 156, at 48, 52-53.

159. *Id.* at 49.

Indian titles shall have been extinguished” – and then to delineate through surveys the boundaries of counties, townships, and plots upon ceded lands. However, lacking punctuation, the sentence is ambiguous – an ambiguity that epitomizes the reality of what happened on the ground: surveys, or the “laying out” of lands, very often occurred in “parts of the district” where settlement and the creation of counties and townships had already begun to undermine Native nations’ presence and dissolve their title. For example, Governor Arthur St. Clair laid out a first county that he named for himself in 1790, and county officials purchased a building in Cahokia to serve as the county courthouse in 1793.<sup>160</sup> In the first deed book of the St. Clair County Recorder of Deeds, Deed Book A, the first pages record the Governor’s establishment of the County and refer explicitly to the Ordinance’s direction to “make proper Divisions of the Said Territory . . . where the Indian Titles shall have been Extinguished into Counties and Townships.”<sup>161</sup> However, this act of county creation openly flouted federal policy, under which claims by the United States, and all its subordinate jurisdictions, were based on extinguishing Native title first. By examining maps of the region, one sees that the lands constituting the county<sup>162</sup> were not ceded by the Kaskaskia to the United States until 1803. Consequently, the history of St. Clair County also illustrates how county and township creation, by drawing settlers to a region, helped pave the way for the federal government to extinguish Native title.

The Ordinance, in other words, highlighted the means by which Congress believed that Native jurisdictions would give way to the sovereign claims of the United States: settlement and the institutionalization of property claims. The Northwest Territory, as the United States dubbed it, was but a future projection of its own control across a vast expanse of land, an area that would eventually comprise five midwestern states and part of Minnesota. When Congress drew and named this “blank canvas” in the Ordinance in 1787, and despite U.S. settlers’ paper claims to over 13 million acres of land in the area,<sup>163</sup> its white population numbered only 4,280 by 1791.<sup>164</sup>

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160. HISTORY OF ST. CLAIR COUNTY, ILLINOIS: WITH ILLUSTRATIONS DESCRIPTIVE OF ITS SCENERY AND BIOGRAPHICAL SKETCHES OF SOME OF ITS PROMINENT MEN AND PIONEERS 67, 79 (Philadelphia, Brink, McDonough & Co. 1881) [hereinafter HISTORY OF ST. CLAIR COUNTY].

161. BOOK OF DEEDS A, ST. CLAIR COUNTY RECORDER OF DEEDS, at 2 (1790).

162. For this analysis, based on data collected in Appendix A, I checked the territory ceded in treaties against the boundaries of the counties in the present day, which comprise only a small portion of the lands of the original county.

163. ABLAVSKY, *supra* note 10, at 1.

164. Winthrop Sargent & Thomas Jefferson, *Population of the Northwest Territory* (Jan. 31, 1791), in 18 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES 217, 217 (Julian P. Boyd ed., 1971).

Over the years that followed across those lands, counties, recording practices, and title registries appeared *before* the creation of the territories to which they would belong without exception, *before* the states those territories would become, and, in almost every instance, *before* tribal nations ceded the very lands on which the county sat to the federal government.<sup>165</sup> During the first few decades of the early Republic, counties covered large expanses of land, as in the colonial era.<sup>166</sup> In the United States, counties became subdivisions of territories. Like territories, they were transitional jurisdictional units, in that they did not represent territory the United States controlled but rather demarcated lands over which the United States proximately aspired to *take* control. Counties, compared to territories, were hewn more closely around existing settlements, so that they could house rudimentary governmental institutions, namely county courts and registries. Indeed, the county, unlike other transitional jurisdictions such as territories and land districts, may have persisted beyond the national period of territorial expansion<sup>167</sup> precisely because its primary purpose of protecting property rights and the institutions it installed – the registry and county court – have never become obsolete.<sup>168</sup>

Just as in the colonial period, the federal government resolved to confirm any property claims of white French and Canadian settlers who would accept its jurisdiction.<sup>169</sup> As Eric Hinderaker writes, “some residents of the French communities chose to remain, take up property under American law, and establish themselves as white citizens”; other inhabitants, many of whom were Métis, “were unwilling to adapt to the American system of propertyholding” and “preferred simply to move on to someplace where land was not yet being parceled

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165. Again, more often than during the colonial period, when colonists who acquired land by purchase from Native people recognized Native title in so doing, settlement in the United States was often unauthorized. The creation of these counties technically contravened federal law because the United States had reserved to itself alone the prerogative to acquire Native nations’ lands and made this transaction the sole legitimate root of title in the nation.

166. Kentucky was initially a county of Virginia. Arkansas, too, was first a county comprising most of the present-day state and part of Oklahoma. In New York, Albany County functioned much like a territory – it theoretically extended to the Pacific, at some point it included all of Vermont, and even once it was reduced to fit within current state boundaries, it was eventually subdivided into thirty additional counties and became a part of four more.

167. William A. Fischel calls counties “the steadiest of local governments.” William A. Fischel, *Counting on Counties: How the Creation of Three Thousand Counties Shaped Local Government Across America* 51 (2021) (unpublished manuscript), <https://ssrn.com/abstract=3798788> [https://perma.cc/R5BX-XKNH].

168. Farbman, *supra* note 143, at 416.

169. *Northwest Ordinance*, *supra* note 156, at 48; see also ABLAVSKY, *supra* note 10, at 91-99 (discussing the relationship between French *habitant* residents of the Northwest Territory and territorial officials).

and commodified.”<sup>170</sup> In 1790, Governor St. Clair went to the Illinois and Wabash Counties to review the land claims of the white settlers. Once there, he was presented with thousands of deeds, many of them written in French, to examine for validation in the county records. Deed Book A of the St. Clair County Recorder includes a translation of French papers that describe the “Public Papers relative to the recorders office” that William St. Clair “received from the hands of Francois Caboneaux . . . which were in his hands as acting Recorder.”<sup>171</sup> These papers consisted of various bundles stitched together, as well as one book, “part of which is torn away and the pages all [false] numbered so that I have not thought proper to Examine it [for] it never can be produced as an authentic record.”<sup>172</sup> Altogether, these records encompassed 1,309 sale bills, 890 of which commissioners rejected as illegal or fraudulent, according to an 1810 report.<sup>173</sup> The rest, along with headrights from the federal government, became part of the county record, which became part of the Illinois territory upon its formation in 1809 and the state in 1818.

As had been done in the colonies, counties were created in response to the need to organize and validate property claims that settlers had already begun to stake out.<sup>174</sup> Washington County, which would become Ohio’s first county, was established on July 26, 1788, and originally covered about half the area of the state, including the area of the Seven Ranges. The Washington County deed records begin that year,<sup>175</sup> the same year that Enoch Parsons was appointed to be the first county register<sup>176</sup> and the Ohio Land Company building, likely the site

170. ERIC HINDERAKER, *ELUSIVE EMPIRES: CONSTRUCTING COLONIALISM IN THE OHIO VALLEY 1673-1800*, at 263-64 (1997); see also ABLAVSKY, *supra* note 10, at 91 (discussing “outposts whose residents were closely tied to surrounding Native nations through kinship and inter-marriage”).

171. BOOK OF DEEDS A, ST. CLAIR COUNTY RECORDER OF DEEDS, Belleville, IL, at 5.

172. *Id.* at 6; Clarence Walworth Alvord, *Eighteenth Century French Records in the Archives of Illinois*, in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1905, at 353, 357 (1905). The regular deed records began on June 14, 1790. HISTORY OF ST. CLAIR COUNTY, *supra* note 160, at 86.

173. HISTORY OF ST. CLAIR COUNTY, *supra* note 160, at 27, 68.

174. The process for obtaining title for grants of indiscriminate location was that prospective claimants presented a written description of lands they wished to purchase and payment per acre to the state land office. The office recorded the claim and assigned it a number; challengers had time to file caveats. After this period, the state entry-taker issued a warrant authorizing a county survey; when the surveyor returned a plat, or map and property borders, the state secretary issued a grant to the owner, who recorded it in the county court registry. ABLAVSKY, *supra* note 10, at 32.

175. WASH. CNTY. RECORDER’S OFF., <https://countyfusion9.kofiletech.us/countyweb/loginDisplay.action?countyname=WashingtonOH> [<https://perma.cc/5ZZP-T6XN>].

176. The office name was changed to county recorder in 1795. THOMAS JEFFERSON SUMMERS, *HISTORY OF MARIETTA 166* (Marietta, Ohio, Leader Publ’g Co. 1903).



of early property records, was built in the county seat, Marietta.<sup>177</sup> However, as we saw in Illinois, the lands that comprised the county would not be ceded until several years later in the 1795 Treaty of Greenville, by the Wyandotte, Delaware, Shawnee, Ottawa, Chippewa, Potawatomi, Miami, Eel River, Wea, Kickapoo, Piankeshaw, and Kaskaskia peoples.<sup>178</sup> In 1795, the Northwest Territory of Ohio enacted a recording statute,<sup>179</sup> and eight years later, Ohio was admitted as a state.

Indiana, Michigan, and Wisconsin all followed the same pattern. The lands that currently constitute Indiana's Knox County, which then stretched to the Canadian border, were also ceded in the Treaty of Greenville – though the County had been established five years earlier, on June 20, 1790.<sup>180</sup> The Indiana Territory was established in 1800 – a decade after its first county – while the state, formed from the southeastern part of the territory, followed the county by twenty-six years.<sup>181</sup> Wayne County was formed from parts of Knox County in 1796, but the Michigan Territory, to which it would belong, was not created until 1805, and the state not until 1837.<sup>182</sup> The lands of Wayne County, furthermore, were not ceded by the Ottawa, Chippewa, Wyandotte, and Potawatomi until 1807 – more than a decade after the county's establishment.<sup>183</sup> Finally, Brown and Crawford Counties, Wisconsin's first counties, were created in 1818, long before the treaties through which the Chippewa, Menominee, and Ho-Chunk ceded the lands now constituting the counties in 1827, 1836, and 1837, respectively. Initially, the two counties covered all the land in the state today – some of which tribes did not cede until five months *after* Wisconsin entered the Union in 1848.<sup>184</sup>

Indeed, another clear trend in the data from the Northwest Territory shows that the United States almost never succeeded in obtaining treaties ceding all the lands states claimed as part of their territory *before* states entered the Union. In Ohio, the federal government continued to pursue cessions of lands within the state's borders from the Wyandotte, Ottawa, Chippewa, Munsee, Delaware, Shawnee, Potawatami, Seneca, and Miami nations for almost three decades after

177. LARRY NASH WHITE & EMILY BLAKENSHIP WHITE, *MARIETTA: IMAGES OF AMERICA* 12 (2004). The first court of common pleas and probate court were convened at Campus Martius Stockade. NEFF, *supra* note 157, at 39-40. The first courthouse was built in 1798. *First Courthouse*, WASH. CNTY., OHIO, <https://www.washingtongov.org/756/First-Courthouse> [<https://perma.cc/TQ3U-B995>].

178. See Appendix A.1.

179. Marshall, *supra* note 29, at 65; see also 4 ANDREW J. CASNER, *AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES* 533 (1952).

180. See Appendix A.1.

181. *Id.*

182. See Appendix A.1 and D.2.

183. See Appendix A.1.

184. *Id.*

it granted Ohio statehood.<sup>185</sup> Similarly, the last treaty cessions of lands in Illinois and Indiana involved huge portions of lands claimed by states, fourteen and twenty-four years after they came into existence, respectively.<sup>186</sup> The federal government's efforts to follow its own dictates improved after time: by the late 1830s, it managed to obtain treaty cessions to all lands within Michigan's borders—in 1837, it obtained a final cession from the Saginaw and Chippewa just twelve days before Michigan achieved statehood.<sup>187</sup> A little over a decade later, though, the United States again failed to observe its own principle: Wisconsin became a state five months before the United States was able to obtain a cession, in October 1848, at Lake Powawhay Kounay from the Menominee for a sizable tract of land in the center of the state's boundaries.<sup>188</sup>

In sum, in all the states carved from the Northwest Territory, the establishment of counties, which validated the property claims coming into existence in a locality, preceded the appearance of transitional territories, states, and treaty cessions. Furthermore, in all states except one, the establishment of states preceded the cession of the totality of the lands they claimed. In making sovereign claims to lands that remained under the absolute sovereignty of Native nations, however, the states formed from the Northwest Territory merely followed the example set by the original states as Section II.B elaborates.

### *B. Jurisdictional Power Within the States: The Case of Georgia*

The original states, even more than the territories, are thought to have existed from the beginning, or almost the beginning of the Union. However, the story of county creation within them highlights the fact that the states, too, held only discovery claims to large amounts of land within the borders we now associate with them. Beyond those lands, of course, the so-called “landed” original states made vast claims under their original charters or subsequent grants, which accorded them option claims to territories stretching as far as the Mississippi River, or even “from sea to sea.”<sup>189</sup> The cession of these claims to the federal government is now regarded as a central event in establishing a cohesive Union and

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*; Charles C. Royce, *Indian Land Cessions in the United States*, in THE EIGHTEENTH ANNOTATED REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INST., PART TWO, at 780 (Washington, Gov't Prtg. Office 1899).

189. In a story beyond this Article's scope, the “landless states”—New Hampshire, Rhode Island, New Jersey, Pennsylvania, Delaware, and Maryland—entered the Union either without issue or by resolving boundary disputes with adjacent states.

in establishing the federal government's sole authority over conquest in the West.

But much less known are the discovery claims that involved territory within the states' effective borders. After ceding their western lands to the federal government, substantial amounts of land within the aspirational borders of some original states continued to be ruled by sovereign Native nations. States, like the federal government, were eager to obtain actual control of this land to consummate their claims. Further, because the United States held the sole prerogative to enter into treaties with Native nations, states whose boundaries encompassed significant lands under Native governance became dependent on the federal government's willingness and ability to "extinguish Native title" for them. As conquest remained an active process after the end of the Revolutionary War, this exclusive power and the impact it had on state discovery claims gave rise to the most bitter disputes over federalism in the early Republic. Of these conflicts, as is well known, none was more dramatic or legally consequential than the dispute between Georgia and the United States.

When Georgia entered the Union in 1788, the eight counties over which it could claim actual control comprised little more than a narrow strip along the shore. By the beginning of the nineteenth century, despite a fivefold increase in its white population, the vast majority of lands within Georgia's claimed borders remained under de facto Creek and Cherokee sovereignty and control. From this early date, Georgia sought to press the United States to push these nations out of their homelands and, notoriously, did not cede its discovery claims to western lands (extending "to the south seas"<sup>190</sup>) to the federal government until 1802. When it finally did so, it was in exchange for the federal government's agreement to extinguish Indian title within the boundaries the state hoped to claim.<sup>191</sup> This background set the stage for the infamous events of the next decades, which ultimately led to Creek and Cherokee dispossession, the Trail of Tears, and the foundational judicial decisions for the field of federal Indian law.<sup>192</sup> These events comprise one of the most storied and thoroughly parsed annals of struggle and violence channeled through law in U.S. history.

Unlike the voluminous scholarship on the subject, the account offered here does not focus on removal, federalism, or the Marshall Trilogy, nor does it aim

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190. *Charter of Georgia: 1732*, reprinted by AVALON PROJECT, [https://avalon.law.yale.edu/18th\\_century/ga01.asp](https://avalon.law.yale.edu/18th_century/ga01.asp) [<https://perma.cc/NM4C-BWQS>].

191. Articles of Agreement and Cession, U.S.-Ga. Apr. 24, 1802, <https://vault.georgiaarchives.org/digital/collection/adhoc/id/420> [<https://perma.cc/X22F-CRZ8>]; CADLE, *supra* note 144, at 170.

192. *E.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); see 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 189 (1922); WILLIAMS, *supra* note 35, at 306.

to rehash the complex entanglements of the public and private interests and the legal and political maneuvering that drove these events. It aims instead to highlight the often-overlooked role of county formation in this well-known historical conflict, underscoring the importance of county creation to the state's growth and the consolidation of the state's internal jurisdiction. This topic has not yet been a focus of scholarship on states' efforts to overcome the limits imposed by federal preemption on their power over the sovereign nations within their borders.<sup>193</sup> The example of Georgia thus illustrates the way that *existing* states used counties and property infrastructure as tools for diminishing Native sovereignty. Indeed, the strategy Georgia used – to consistently, in the wake of tribal nations' land cessions to the federal government, establish counties to affirm its own *state* sovereignty through settlers' property claims – finds echoes elsewhere. Just like the states that emerged from the Northwest Territory, the new states of Mississippi and Alabama, which entered the Union in 1817 and 1819 respectively, had their first germs in counties established before the Choctaw, Chickasaw, Muscogee, and Cherokee had ceded the lands on which they sat.<sup>194</sup> Several other states engaged in similar struggles against federal preemption, including Alabama, Tennessee, and Kansas, followed Georgia's legal strategies and echoed its arguments for state sovereignty.<sup>195</sup>

Nor was Georgia the sole original state that hoped to seize large amounts of land that remained unceded and under Native control. Even states born from the earliest colonies vied with one another for control over the process of discovery, mirroring the federal government's higher-level efforts to consolidate discovery rights by extracting them from the states and other European nations. For example, discovery rights to lands west of Albany County remained in Massachusetts even after Massachusetts ceded those lands to New York;<sup>196</sup> and between

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193. See generally DEBORAH A. ROSEN, *AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880* (2007) (describing states' methods of extending their authority into the federal government's presumed domain of "Indian policy and regulation," focusing especially on the issue of criminal jurisdiction and the case studies of Georgia and New York).

194. See Appendix A.2.

195. See ROSEN, *supra* note 193, at 46-47, 62-66. For a longer discussion of state-sovereignty arguments, their development during this period of removal, and contemporary consequences, see Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Tropes in Federal Indian Law*, 123 COLUM. L. REV. 1533 (2023). Both Rosen and Allread discuss Alabama's arguments, identical to Troup's, see *infra* note 230 and accompanying text, that the state had no sovereignty if sovereign nations not under its jurisdiction could exist within its borders. See ROSEN, *supra* note 193, at 65-66 (discussing *Caldwell v. Alabama*, 1 Stew. & P. 327 (Ala. 1832)); Allread, *supra*, at 1535 (citing the Alabama House of Representatives Indian Affairs Committee in 1831).

196. Massachusetts had retained its preemption rights to the land after ceding governance claims over the area to New York in the 1786 Treaty of Hartford.

1788 and 1793, those discovery rights passed to land syndicates through the Phelps and Gorham Purchase and sales to Robert Morris and the Holland Land Company, all of which attempted to obtain land cessions from the Seneca.<sup>197</sup> More than a century after New York became an English colony, extensive lands within its aspirational borders remained controlled by the Iroquois Confederacy. New York had created a large number of counties from lands ceded or purchased during the colonial era, and at the end of the eighteenth century sought to extinguish Native title to lands that had been reserved to tribal nations by colonial treaties and purchase agreements. Acting in tandem with land-hungry settlers and in defiance of the federal preemption law, New York passed laws in 1793, 1794, 1795, and 1798 authorizing commissioners or governors to establish treaties for lands with the Oneida, Onondaga, and Cayuga nations and to offer them annuities.<sup>198</sup> Consequently, New York executed treaties in 1795, 1796, and 1798 with disputed representatives of the Oneida, Onondaga, Cayuga, and St. Regis Mohawk nations<sup>199</sup> to authorize white settlers to take possession of significant lands.<sup>200</sup> In New York, as in Georgia, the white population had grown at a rate that surpassed that of other states many times over as settlers poured in, eager to acquire the extensive lands that remained under Native nations' control.<sup>201</sup> The eventual conquest of lands in both states is indexed by population and county growth during the first decades after the Revolution. In states with small territories or that organized their registries by township,<sup>202</sup> or that were already

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197. See A.M. SAKOLSKI, *THE GREAT AMERICAN LAND BUBBLE: THE AMAZING STORY OF LAND-GRABBING, SPECULATIONS, AND BOOMS FROM COLONIAL DAYS TO THE PRESENT TIME* 55-63 (1932). The United States affirmed the boundaries of Phelps's agreement with the Seneca in the Treaty of Canandaigua of 1794. Treaty of Canandaigua art. III, U.S.-Six Nations, Nov. 11, 1794, 7 Stat. 44, 45.

198. See Act of Mar. 11, 1793, ch. 51, 1793 N.Y. Laws 454-55; Act of Mar. 27, 1794, ch. 59, 1794 N.Y. Laws 537-38; Act of Apr. 9, 1795, ch. 70, 1795 N.Y. Laws 614-20; Act of Feb. 26, 1798, ch. 23, 1798 N.Y. Laws 163.

199. See REPORT OF SPECIAL COMMITTEE TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK APPOINTED BY THE ASSEMBLY OF 1888, Assembly Doc. No. 51 app. D, 199, 224, 241, 249, 381 (1889).

200. These illegal treaties gave rise to legal challenges in the twentieth century that persist into the twenty-first. See, e.g., *Canadian St. Regis Band of Mohawk Indians v. New York*, Nos. 82-CV-0783, 82-CV-1114, 89-CV-0829, 2013 WL 3992830, (N.D.N.Y. July 23, 2013).

201. By comparison, most states' populations had grown at rates ranging from 30% to 250% by 1800, but the white populations of Georgia and New York over the same period both increased by around 500%. See Appendix B.

202. These states included Rhode Island, Delaware, New Jersey, New Hampshire, and Connecticut. See *id.*

fairly densely populated,<sup>203</sup> the number of counties changed relatively little or not at all. By contrast, Georgia and New York saw their number of counties more than double over the same period,<sup>204</sup> reflecting the inroads settlers were making into the vast stretches of land that remained under tribes' control.<sup>205</sup>

Georgia, precisely because it did not illegally treat with Native nations, like New York, offers the clearest example of the federal-state-county dynamic of jurisdictional expansion. After the state ceded its discovery claims in the west to the United States, the federal government moved quickly in 1802 and 1805 to obtain additional cessions from the Creek that expanded Georgia's actual control of lands westward. In 1803, the state initiated the creation of three counties, Baldwin, Wilkinson, and Wayne, from these lands.<sup>206</sup> The bill that established these counties also provided for the survey and distribution of these lands through a unique land lottery system, where individual names would be drawn from one rotating drum and lot numbers from another, to assign claims.<sup>207</sup> Eligible persons could register to draw lots and, after paying a grant fee, record a fortunate draw, first in their county of residence, and later in the registry of the county where the land was located.<sup>208</sup> The land lottery records provide us with an excellent record of land distribution and further county subdivision reflecting the expansion of settlement. Following the first lotteries, which took place in 1805 and 1807,<sup>209</sup> these three initial counties were subdivided into six more in 1807 and 1809.<sup>210</sup> As Farris Cadle shows, claims from these land lotteries, like all the lotteries that Georgia would hold during this period, were riddled with fraud.<sup>211</sup> The outcome of fraud litigation, however, had little bearing on the

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203. These states included Virginia, Massachusetts, Connecticut, Maryland, and North Carolina. *See id.* In 1790, "Connecticut had a non-Indian population density more than eighty times greater than that of Georgia." BANNER, *supra* note 57, at 194.

204. *See* Appendix B.

205. Of Georgia, Banner writes, "large portions of [land] were still possessed by Indian tribes." BANNER, *supra* note 57, at 194. At this time, "most of present-day New York State was occupied by independent, self-governing Iroquois Indian nations." ROSEN, *supra* note 193, at 23.

206. CADLE, *supra* note 144, at 173; *see* Appendix C.

207. CADLE, *supra* note 144, at 177; Supplementary to an Act, Entitled "An Act to Make Distribution of the Late Cession of Land Obtained from the Creek Nation by the United States Commissioners, in a Treaty Entered into at or near Fort Wilkinson, on the 16th Day of June 1802," and the Act Relative Thereto, 1803 Extraordinary Sess. Ga. Laws 20.

208. *See* CADLE, *supra* note 144, at 177 (describing the land lottery system); *see generally* SILAS EMMETT LUCAS, JR. & ROBERT S. DAVIS, JR., *THE GEORGIA LAND LOTTERY PAPERS 1805-1914* (1979) (compiling petitions, oaths, and other papers of over 3,000 lottery winners in Georgia).

209. CADLE, *supra* note 144, at 199.

210. *See* Appendix C.

211. CADLE, *supra* note 144, at 199-203, 229-33, 238-41, 264-65, 280-83.

jurisdiction of the presiding courts, which were strengthened by the claims-making and growth of the white population in the area in the first place.

Georgia thereby penetrated into the central region within its aspirational borders, but its control over lands still only covered the eastern part of that territory. At the end of the Creek War of 1813 to 1814, General Andrew Jackson forced the surrender of more than twenty-one million acres of land in northern Alabama and approximately the southern third of Georgia—half of the lands remaining to the Creek nation.<sup>212</sup> The United States then obtained another cession from a small, unauthorized group of Cherokee chiefs in 1817, and another from the Creek following additional hostilities in 1818, for lands connecting Georgia's southern and eastern lands, which extended the state's control into northeastern lands bordering Cherokee territory.<sup>213</sup> From these cessions, Georgia quickly established six more counties—Early, Appling, Irwin, Walton, Gwinnett, Habersham, and Hall<sup>214</sup>—as well as an additional county, Rabun, from an additional Cherokee cession in 1819.<sup>215</sup> Georgia confronted considerable difficulties in beginning its lottery surveys, including from Creek resistance, illness, and commissioners' resignations. Nonetheless, Georgia managed to survey the lands in 1819 and began to distribute the lands in these counties by lottery in 1820.<sup>216</sup> In 1821, in the first Treaty of Indian Springs, the United States secured another cession by bribing a small group of Creek chiefs that pushed Georgia's holdings further westward.<sup>217</sup> The state promptly formed five more counties—Dooly, Henry, Houston, Fayette, and Monroe<sup>218</sup>—and after distributing lands in these counties by lottery in 1821, it created three additional counties by subdivision by 1822.<sup>219</sup>

Within two decades, the relay of U.S. actions to force cessions and Georgia's creation of counties had given the state control over the majority of the land it desired. However, the substantial Cherokee territory to the north and the Creek territory between Georgia's settled lands and its western border remained a thorn in the state's side. In April of 1824, Governor George Troup inveighed against the

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212. See 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 826 (Walter Lowrie & Walter S. Franklin eds., 1834) [hereinafter AMERICAN STATE PAPERS]; INDIAN AFFAIRS: LAWS AND TREATIES 107 (Charles J. Kappler ed., 1904) [hereinafter KAPPLER].

213. CADLE, *supra* note 144, at 206.

214. See 1818 Ga. Laws 27-29; Appendix C.

215. See AMERICAN STATE PAPERS, *supra* note 212, at 187; KAPPLER, *supra* note 212, at 177; Appendix C.

216. See CADLE, *supra* note 144, at 222-28.

217. See AMERICAN STATE PAPERS, *supra* note 212, at 248-49; KAPPLER, *supra* note 212, at 195-97.

218. See Appendix B.

219. See Appendix C.

United States's delay in extinguishing Native title in Georgia, asking if the agreement of 1802 had been "all a dream, a vision, a phantasma, with which the deluded people of Georgia have been plaguing themselves for twenty years[?]"<sup>220</sup> The same year, after witnessing the rapid reduction of their lands to a fraction of their original holdings, the head Creek chiefs enacted a law that decreed death to anyone who attempted to sell additional Creek lands. They also banished William McIntosh, the chief who signed and personally benefited from the first Treaty of Indian Springs and a first cousin of Governor Troup.<sup>221</sup> Meanwhile, the United States began pressuring the Creek nation for more land, warning them, "[y]ou must be sensible that it will be impossible for you to remain for any length of time in your present situation as a distinct Society or Nations, within the limits of Georgia." In response, the Creeks reminded the federal government of its promise, made just a decade earlier, to protect their landholdings.<sup>222</sup>

In early 1825, McIntosh convened a group of U.S. commissioners and Creek individuals of dubious or nonexistent authority and ceded all the Creek nation's remaining lands within Georgia, as well as three million acres in Alabama. This second "Treaty" of Indian Springs exchanged these lands for lands in Arkansas and a \$25,000 cash payment to McIntosh that was memorialized in a separate agreement.<sup>223</sup> Following this deal, the Creek executed McIntosh for treason and vowed to kill the first surveyor who dared stretch a chain across their lands.<sup>224</sup> The circumstances were outrageous enough<sup>225</sup> that the United States renegotiated the treaty in 1826, though without restoring the lands, effectively dispossessing the Creek of virtually all their lands in Georgia.<sup>226</sup> Governor Troup, for his part, wasted no time in ordering a survey of these lands, violating the deadline the United States had set for Creek removal in the Treaty of Washington and

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220. Letter from George Troup, Gov. of Ga., to James Barbour, Sec'y of War (Apr. 24, 1824), reprinted in REPORT AND RESOLUTIONS OF THE LEGISLATURE OF GEORGIA WITH ACCOMPANYING DOCUMENTS, H.R. DOC. NO. 59, at 26-27 (1827) [hereinafter GEORGIA DOCUMENTS].

221. CADLE, *supra* note 144, at 242-46.

222. BANNER, *supra* note 57, at 197, 323 nn.13-14 (quoting Duncan G. Campbell & James Meriwether, U.S. Comm'rs, Remarks to Creek Chiefs (Dec. 9, 1824); Letter from Little Prince, Chilly McIntosh, William McIntosh, Opothle Yoholo & Hopoy Hdago, Creek Council Members, to Duncan G. Campbell & James Meriwether, U.S. Comm'rs (Dec. 11, 1824)).

223. CADLE, *supra* note 144, at 243; BANNER, *supra* note 57, at 198.

224. H.R. REP. NO. 98-19, at 201, 352 (1827).

225. The Indian agent John Crowell alleged the corruption of the commissioners was "of so rank a character that it smell[ed] to heaven." *Id.* at 502.

226. The United States negotiated the cession of a small wedge-shaped tract of land that had been omitted from the Treaty of Washington in 1827.



eliciting a rebuke from the Secretary of War.<sup>227</sup> Georgia formed four counties from the lands along its long-coveted western border and distributed them by lottery in 1827, leading to the subdivision of Troup and Muscogee Counties into four additional counties in 1827 and three more over the next few years.<sup>228</sup>

The final lands Georgia sought to wrest from Native control were the sizable holdings of the Cherokee to the northwest corner of the state's territory. Since 1824, Troup had blamed the United States for "encourag[ing] the Cherokees to make progress in all the arts of civilized life of first necessity and comfort, within the acknowledged limits of Georgia" and claimed that "this has been the sole cause of the unwillingness of any part of the Cherokees to move."<sup>229</sup> In August 1826, Troup insisted to the Secretary of War that Cherokee sovereignty undermined Georgia's own: "Within her own territory she is divested of all the rights of sovereignty and jurisdiction . . . The Indians are the lords paramount . . ." <sup>230</sup> The legislature soon followed with a resolution giving force to Troup's statement that "Georgia must be sovereign upon her own soil, within her chartered limits."<sup>231</sup> The Cherokee's response, in 1827, was to adopt a written constitution asserting their status as a sovereign independent nation with complete jurisdiction over their lands.<sup>232</sup>

Over the next few years, Georgia passed a slew of laws aimed at imposing its own sovereignty over Cherokee lands and making life for the Cherokee within the state's borders untenable.<sup>233</sup> Laws providing for the survey of Cherokee lands, the formation of counties from those lands, and land lotteries to distribute Cherokee lands to white settlers constituted a critical part of these legal acts of aggression. In 1828, the Georgia legislature passed an act annexing Cherokee country to Carroll, DeKalb, Gwinnett, Hall, and Habersham Counties; it declared Georgia had jurisdiction over white persons residing in Cherokee territory

227. See Letter from George Troup, Gov. of Ga., to James Barbour, Sec'y of War (June 29, 1826), reprinted in *GEORGIA DOCUMENTS*, *supra* note 220, at 43; Letter from James Barbour, Sec'y of War, to George Troup, Gov. of Ga. (Aug. 6, 1826), reprinted in *GEORGIA DOCUMENTS*, *supra* note 220, at 43.

228. See Appendix C.

229. See *supra* note 220, at 26, 28; George Troup, Gov. of Ga., Governor's Message to the Assembly of the State of Georgia (Nov. 7, 1825), reprinted in *GEORGIA DOCUMENTS*, *supra* note 220, at 187, 191 ("When . . . the United States [changed] the mode of life of the aboriginal upon the soil of Georgia . . . and gave every encouragement to fixed habits of agriculture, they violated the treaties in their letter and spirit, and did wrong to Georgia.").

230. Letter from George Troup, Gov. of Ga., to James Barbour, Sec'y of War (Aug. 26, 1826), reprinted in *GEORGIA DOCUMENTS*, *supra* note 220, at 44, 45.

231. *Id.*; see *BANNER*, *supra* note 57, at 200, 323 n.19.

232. *CADLE*, *supra* note 144, at 267.

233. See *BANNER*, *supra* note 57, at 200-01; see generally Park, *Self-Deportation Nation*, *supra* note 34 (describing the self-deportation removal policy).

and stated that all persons in the territory would become subject to Georgia law after June 1, 1830.<sup>234</sup> Though the Cherokee continued to refuse to cede their lands to the United States, in 1830, Governor George Gilmer nonetheless convened the legislature to order a survey of Cherokee lands dividing it into districts and sections to be distributed by lottery.<sup>235</sup> All this activity attracted white settlers to the state, bringing their numbers to over half a million; the number of counties, by this point, had more than tripled since 1800, growing from twenty-four to seventy-seven.<sup>236</sup>

The Cherokee nation challenged these laws before the Supreme Court in *Cherokee Nation v. Georgia*.<sup>237</sup> In early 1831, Chief Justice Marshall avoided the substantive question by finding the Cherokee nation was not a foreign nation, but rather a “domestic dependent nation[]” that lacked original jurisdiction to bring a cause of action before the Court.<sup>238</sup> Shortly after this decision, the emboldened legislature passed an act to form one county, called Cherokee, of all the lands it had annexed to five neighboring counties in 1828.<sup>239</sup> The state commenced with surveys, which it mostly concluded by July 1832, and began to organize lotteries for distribution of the lands.<sup>240</sup> In 1832, the state subdivided this county into ten counties.<sup>241</sup> The settlers who drew lots containing “Indian improvements” were barred from claiming their grants until 1838; but many lots that were classified as “unimproved” and thus eligible for immediate claiming were in fact occupied by Cherokee inhabitants, resulting in conflicts when settlers attempted to take possession of the lots they had drawn.<sup>242</sup> In 1835, the United States and a minority coalition from the Cherokee nation ratified the infamous Treaty of New Echota, which required the nation to leave the state within two years and elicited furious protest from Cherokee leaders. After the majority of Cherokee people refused to leave their lands, the U.S. Army initiated their mass expulsion in 1838.<sup>243</sup> In the final denouement of the state’s struggle to expel

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234. 1829 Ga. Laws 198, reprinted in A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA 377 (Thomas R.R. Cobb ed., Power Press of Christy, Kelsea & Burke, 1851).

235. CADLE, *supra* note 144, at 268; 1830 GA. LAWS 127, reprinted in A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA 694 (Thomas R.R. Cobb ed., Power Press of Christy, Kelsea & Burke 1851).

236. See Appendix B.

237. 30 U.S. (5 Pet.) 1 (1831).

238. *Id.* at 17.

239. 1831 Ga. Laws 74.

240. CADLE, *supra* note 144, at 277.

241. 1832 Ga. Laws 56; see Appendix C.

242. CADLE, *supra* note 144, at 279.

243. Park, *Self-Deportation Nation*, *supra* note 34, at 1903; BANNER, *supra* note 57, at 224.

the Cherokee nation and seize its lands, the state forced the nation's hand by creating counties in the last unceded block of Native-ruled lands within its boundaries, prior to any treaty.

The story of the forcible removal of the Creek and Cherokee from their homelands is well known. However, the critical role of county creation on the part of the state, which created supportive infrastructure for settlers flooding in to convert those lands into property, is not. Highlighting county creation reveals how Georgia's strategies fit within a broader context of wielding the local, political force of property to claim sovereignty. Furthermore, as in illustrated in both Georgia as well as other states, neither the Revolutionary War nor formal statehood concluded the project of discovery and conquest within their borders; as would be true for dozens of states admitted to the Union thereafter, statehood merely shifted the terms of the struggle and introduced a new set of authorities. The next Section turns to the ways conquest and county creation continued to be used, for over a century, to bring the lands between the Eastern Seaboard and the Pacific Coast under the control and sovereign jurisdiction of the United States.

### C. *Westward Expansion and Recording*

Inevitably, the conquest of the continent west of the Appalachian mountains was a piecemeal, though extraordinarily rapid, process. Viewing the process from the perspective of county creation elongates the typical understanding of when the United States acceded to its sovereign title over its current landmass, exposing the micromechanisms of the ground-level transition from holding mere discovery claims to asserting actual control over territory. Concomitantly, this frame reminds us how long Native nations held lands across the continent in absolute sovereignty, since the United States did not acquire title to the lands until they came under its actual control. In other words, the United States did not come into absolute sovereignty or "ownership" of lands with the Treaty of Paris in 1783, the Louisiana Purchase in 1803, or the Treaty of Guadalupe Hidalgo in 1848, but only many decades later; tellingly, it did not declare a formal end to treaty making with Native nations until 1871, and the last mainland state, Arizona, did not enter the Union until 1912.

After the United States declared its intent to claim sovereign authority of these lands, building actual power in them remained a *gradual* process that occurred across a multitude of stages and regions. It is not possible, of course, to offer a comprehensive account of U.S. conquest across these thousands of localities here. Instead, this Section shows, using data on the enactment of Recording Acts, that property recording and county creation remained forerunners for the United States' conquest of lands across its landmass. The prompt passage of such

legislation, right on the heels of territories' and states' establishment, shows the high priority every region placed on laying the foundation for a property system as settlers arrived. County creation also continued to precede settlement, though local and territorial jurisdiction-building began exhibiting stronger signs of forethought in the nineteenth century as the United States grew more confident in its conquest and its ability to implement large-scale, long-term strategies.

As had been the case from the colonial period, the process of county creation continued to map where settler populations were claiming Native nations' homelands as new property.<sup>244</sup> As Lewis N. Dembitz noted in 1895, in every new state, "the recorder's office was one of the first institutions organized by newcomers,"<sup>245</sup> reflecting its status as one of the most important and powerful offices on the frontier.<sup>246</sup> The import is reflected in the consistency and speed with which new territories and states passed recording acts. The establishment of recorders' offices and the regulation of recording practices ranked high on the list of priorities for these new jurisdictions; indeed, such legislation appeared upon the heels of the formation of first counties and territories in anticipation of *every state in the Union*.<sup>247</sup> From the North and Southwest Territories to the West Coast, and finally in the upper and lower plains, over the nineteenth century, settlers organized title registries in county courts or as independent, county-level offices to help pass jurisdictional power from sovereign Native nations to the United States. Prior to the Civil War, interdependent property holdings in land and enslaved people motivated settlement in slave territories and states<sup>248</sup>; and since recording continued to facilitate the use of property to access credit in the United States, the high priority recording held in those areas likely reflects settlers' desires to mobilize their interests in both forms of property in this way.<sup>249</sup>

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244. This progression is also observable in national census records.

245. 2 LEWIS N. DEMBITZ, *A TREATISE ON LAND TITLES IN THE UNITED STATES* 941 n.1 (St. Paul, Minn., West Publ'g Co. 1895).

246. See PAUL WALLACE GATES, *THE WISCONSIN PINE LANDS OF CORNELL UNIVERSITY* 94 (1943); PAUL WALLACE GATES, *THE JEFFERSONIAN DREAM: STUDIES IN THE HISTORY OF AMERICAN LAND POLICY AND DEVELOPMENT* 10 (1996) (emphasizing, in both texts, the importance of registers and receivers of federal land offices, whose records produced the titles that individuals and entities then recorded in county registries).

247. See Appendix D2. The longest gap between the formation of first counties and the act establishing a public recorder was three years and occurred in New Mexico. *Id.* We also see a lag in the passage of new laws to govern registries in Michigan and Arkansas, where first counties belonged to multiple territories over time and retained prior territories' recording acts. *Id.*

248. See *id.* Arkansas, Missouri, Mississippi, Louisiana, Alabama, Kentucky, Tennessee, Virginia, Maryland, Delaware, North Carolina, South Carolina, Florida, and Texas.

249. See, e.g., Bonnie Martin, *Slavery's Invisible Engine: Mortgaging Human Property*, 76 J. S. HIST. 817, 831 (2010) (discussing how South Carolina law provided that only mortgages recorded

Even after entering the Union, most states also quickly passed laws governing recording or modifying existing conveyance and recording laws, underscoring the urgency the practice retained for their constituencies.<sup>250</sup>

Changes in the patterns of county creation across the mainland reveal that the United States's approach to conquest developed over time. Above, we saw that in the example of the Northwest Territory, first counties were regularly established before the United States managed to obtain cessions from Native nations for the land they encompassed. The establishment of first counties (with the exception of Washington County, Ohio) preceded the territories and states to which they would eventually belong; many future counties were subdivisions of these original counties. States, too, apart from Michigan, were established before Native nations had ceded all, or even most of the lands within the boundaries the new states claimed.<sup>251</sup> This model, which we might call the Northern Pattern, also played out in the settlement of the area known as the Old Southwest, which would eventually constitute the states such as Mississippi, Alabama, Missouri, Arkansas, Louisiana, and Texas.<sup>252</sup> The Northern Pattern was replicated exactly in the conquest of the lands in Mississippi and Alabama,<sup>253</sup> and partially in those now comprising Arkansas and Iowa, where the first counties of the states initially appeared as a part of other, older territories, and preceded the formation of the Arkansas and Iowa Territories by several years.

But the Northern Pattern was not the only approach that U.S. settlers took to asserting jurisdictional power over lands on which they encroached. The procession of counties appears to characterize an early, hesitant strategy of aspirationally earmarking a vast area of land for conquest, and subsequently carving out additional states from it around first counties, as settlers successfully managed to occupy different parts of the lands in succession. As early as 1803, however, after the Louisiana Purchase, the establishment of the Louisiana Territory introduced another pattern of jurisdiction-building for new settlers, which we might call the Southern Pattern. Counties remained a key element. But this second approach involved establishing several first counties at once, concurrently

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in Charleston would be enforced by the courts); *id.* at 846 & n.50 (observing that under Louisiana's eighteenth-century Spanish rule, the state would enforce only recorded contracts). For a general discussion of enslaved peoples were as collateral to raise capital, see *id.* at 822-23.

250. *Id.* at 831, 846. Exceptions include Louisiana, Arkansas, Nevada, North Dakota, and Oklahoma, where territorial laws governing recording would have remained in force. See Appendix D2. The fact that virtually every state would have had established territorial recording laws and practices further highlights the priority of recording in states that rapidly sought to clarify or amend recording laws following their entry to the Union.

251. See Appendix A1.

252. See Appendix A2. The Old Southwest was also made up of parts of current-day Tennessee, Kentucky, and the panhandle of Florida.

253. See Appendix A2.

with the creation of a territory, or in immediate anticipation of one. For example, Missouri Territory and its first five counties appeared together in 1812; in 1821 and 1836, when the Florida Territory and the Republic of Texas were created, so too were their two and twenty-three first counties, respectively.<sup>254</sup>

The Northern Pattern did not wholly disappear. It persisted as late as the mid-nineteenth century, guiding settlement not only in Michigan and Wisconsin, but also in the lands that now constitute Oregon and Washington, where first counties were established several years ahead of the territories.<sup>255</sup> Nonetheless, the definite trend over the nineteenth century was a shift away from this early approach toward the Southern Pattern, or creating several first counties concurrently or within two years of the territories that contained them. This model reflected more advanced planning, greater confidence, and a capacity to establish ground-level legal institutions. It also more closely conforms to a classic European model of sovereignty, where a larger jurisdiction (albeit a transitional “territory”) exercises its authority to create subordinate jurisdictions. We see this more organized and uniform approach to creating counties and territories in the pre-history of all of the remaining states of the Union, from the Republic of Texas in 1836 until the Oklahoma Territory in 1890.<sup>256</sup> Only Idaho and North Dakota set up a single first county; otherwise, the western territories all created several first counties at once, ranging from four in Arizona and Oklahoma to thirty-six in Kansas.<sup>257</sup>

Over the long nineteenth century, counties proliferated across the landmass that now constitutes the United States, indexing the dynamic growth of the local institution of the title registry. The time-lapsed map of their appearance captures the path of growing U.S. sovereign control over lands, within existing states and in the territories alike. From the Northwest and Southwest Territories, county activity helped the nation take hold of Florida and Texas, and then establish footholds in Oregon Country and up and down the West Coast to Washington and California, before finally helping to secure the conquest of the Rockies and the Great Plains.<sup>258</sup> Counties and registries appeared not where the jurisdictional power of the United States was established and secure, but where it was weak, unstable, or nonexistent, relying heavily on settlers to come occupy the lands and make property claims. Every county created registries not only to collect and organize, but to affirm and encourage Anglo-Americans’ tenuous, audacious claims to the homelands of Native nations. But these nations’ sovereign claims

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254. See Appendix D.2.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

persisted over and against the federal and state claims anchored by this property, and thus continue to lie at the heart of the relationship between property and sovereignty in America.

The holdings of these registries, if they could be consolidated and studied as an archive, would reflect the most significant events in the history of property in America. These records would almost certainly raise many more questions about how the use and development of the registry has shaped those histories as well. In addition to tracking the lands claimed by entities under colonial and U.S. jurisdiction, such a hypothetical united registry would offer an important record of the beneficial ownership of property, including mortgages, claimed in some four million enslaved persons by the time of abolition. After 1865, we would see a dramatic shift in the records from claims to property in land and people to claims to property in land alone. The records would reflect the allotments Native individuals received upon the dismantling of tribal reservation lands under the Dawes Act, losses of 90 million acres of that property, and the transfer of much of that land to non-Natives.<sup>259</sup> They would attest to growth in the number of Black families that became land owners after abolition, which rose from about 43,000 families in 1870 to 506,590 in 1910, amounting to holdings exceeding fifteen million acres.<sup>260</sup> And they would give us more information than we have heretofore had about losses of these lands during the era of Jim Crow, and through fractionation and heirs' property issues affecting Black people, Native people, Mexican Americans, low-income families in Appalachia, as well as others, to this day.<sup>261</sup>

However, though one registry website proudly states that “[b]eing in the County Land Records Office is like being in a gigantic history book,”<sup>262</sup> title registries, as several county registers informed me by phone during the writing of

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259. Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 743.

260. PENNINGROTH, *supra* note 112, at 204; *see also id.* at xiv-xv and 78 (emphasizing recording and county courthouse records), and 80-81 (describing how these chains inserted Black people into “chains of title” – “a series of written entries on courthouse ledgers,” in other words, registry records that both protected their interests and memorialized property crimes against them).

261. *See* Shoemaker, *supra* note 259, at 740-43 (showing how widespread fractionation of Native peoples' lands is a direct legacy of allotment); Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 28-34 (2014) (describing the effects of partition and land loss in Black communities in the South, Mexican-Americans in New Mexico, and others).

262. *Swift County Land Records*, SWIFT CNTY., MINN., <https://www.swiftcounty.com/records>, [https://perma.cc/R2BL-SBZD] (“The first Register of Deeds in Swift County took office in 1871, which is also the year county government began in Swift County.”).

this Article, are not archives and “don’t do research.”<sup>263</sup> Generally, they are underfunded local offices preoccupied with the daily work of keeping public records up to date and preparing records in response to filed requests. Offices dispersed across 3,141 counties and county equivalents in the United States are often inaccessible; online records are variously organized, with more and less functional search tools, often have digitized only recent records, and some registries, including Los Angeles County’s, do not keep online records at all.<sup>264</sup> Above all, these thousands of registries, each of which holds millions of records,<sup>265</sup> are constructed for inquiries about one person or parcel of land,<sup>266</sup> not broader patterns of activity concerning specific types of transactions, parts of the county, or spans of time. Compounded by the necessity of visiting in person to simply view many records, especially old records, the narrow terms of the requests one can make raises barriers to exploring broader property questions through registries that will remain insurmountable,<sup>267</sup> short of major state-based or national projects to consolidate, digitize, and reorganize and tag these records.

The study of a wide cross-section of registries and the information in them, however, would show us not only who has owned property in the country over time, but also how registries themselves have been the site of struggles to

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263. Between Spring and Fall of 2021, I made multiple attempts to contact all the county registers of all first counties listed in Appendices A.1 and A.2. Due to pandemic office closures or reduced hours, many did not answer their phones; many did not call me or answer my email inquiries, several had brief conversations with me, and among those several made comments captured in this statement.

264. Reid Kress Weisbord & Steward E. Sterk, *The Commodification of Public Land Records*, 97 NOTRE DAME L. REV. 507, 519-20 (2022) (discussing how deeds and other land records are usually recorded at the county level).

265. 5 million documents or images of documents appears to be a common milestone that title registries mark. See, e.g., *Search Info*, WARREN CNTY. RECORDER, <https://www.warren-countyrecorder.com/SearchInfo.aspx> [<https://perma.cc/Y82Q-H7AY>]; *Register of Deeds*, GRAFTON CNTY., N.H., <https://www.co.grafton.nh.us/register-of-deeds> [<https://perma.cc/TY7U-C72T>]; *Records Search*, PROBATE CT., MOBILE CNTY., ALA., <https://probate.mobilecountyal.gov/public-records/records-search> [<https://perma.cc/MZ84-AN5U>]. The registry of deeds for Plymouth County, Massachusetts, one of the oldest registries in the country, holds over 17 million images. *Registry Guide*, PLYMOUTH CNTY. REGISTRY DEEDS, <https://www.plymouthdeeds.org/home/pages/registry-guide> [<https://perma.cc/QF84-B7DU>].

266. Weisbord & Sterk, *supra* note 264, at 519. For this reason, the most common use of registries, in addition to obtaining a parcel’s chain of title, is for genealogical research. See, e.g., *Swift County Land Records*, *supra* note 262 (“We have many people searching their ‘roots’—tracing family histories.”).

267. Weisbord & Sterk, *supra* note 264, at 519.



determine who can own property and what ownership means.<sup>268</sup> In a better-known chapter of efforts to circumvent non-white and especially Black property ownership, individuals, and neighborhood associations used registries to file thousands of racially restrictive covenants from the 1890s through the 1960s<sup>269</sup>; and registries remain the site of struggles to understand this history, expunge its traces, and denounce the practice.<sup>270</sup> Less well understood is how widely destroying registry records has facilitated denying some communities' property claims to affirm others. The phenomenon of "burned counties," jurisdictions in which claims and records were lost by fire, natural disaster, theft, or war, is significant across the country, with especially high numbers in Alabama, Arkansas, Georgia, Iowa, Kentucky, Mississippi, Missouri, North Carolina, Tennessee, Texas, Virginia, and West Virginia.<sup>271</sup> In these states, the records of hundreds of

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268. This study could corroborate or reveal variation from U.S. Census Bureau records stating that homeownership rates were 48% in 1890, with large variations between states and race, and that only 13% of the total population held a mortgage. U.S. CENSUS BUREAU, REPORT ON FARMS AND HOMES: PROPRIETORSHIP AND INDEBTEDNESS IN THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, at 19 tbl.7 (Washington, Government Printing Office 1890); ADAM J. LEVITIN & SUSAN M. WACHTER, *THE GREAT AMERICAN HOUSING BUBBLE: WHAT WENT WRONG AND HOW WE CAN PROTECT OURSELVES IN THE FUTURE* 17 (2020). Homeownership was 29% in South Carolina and 78% in North Dakota; 51% among white people and 17% among Black people. *Id.*
269. Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 551, 558 fig.2 (2000).
270. See mapping projects in, for example, *From Restrictive Covenants to Racial Steering*, MAPPING SEGREGATION, <https://www.mappingsegregationdc.org> [<https://perma.cc/6VP6-J25S>]; *Mapping Prejudice*, UNIV. MINN., <https://mappingprejudice.umn.edu> [<https://perma.cc/D2TH-MUD9>]; and The MRC Project, *Mapping Racist Covenants*, UNIV. ARIZ., <https://mappingracistcovenants.org> [<https://perma.cc/YF7V-DLW3>]. See also Irena Li, *Ford Event Panel Discusses First Repeal of Racially Restrictive Housing Deed in Ann Arbor Neighborhood*, MICH. DAILY, (Feb. 24, 2022), <https://www.michigandaily.com/news/ann-arbor/ford-discusses-first-repeal-of-racially-restrictive-housing-deed-in-ann-arbor-neighborhood> [<https://perma.cc/6USB-3VBD>] (discussing Justice InDeed's partnership with legal organizations to repeal racially restrictive covenants).
271. The term "burned county" comes from the source *Notes from the Burned Counties*, 4 VA. GENEALOGICAL SOC'Y Q. BULL. 48 (1966). For an attempt to create a comprehensive list and numbers of "burned counties" per state, see Jeffrey M. Svare, *United States Counties with Records Loss* (June 16, 2022, 4:10 PM MDT), [https://user.xmission.com/~jsvare/record\\_coverage/US\\_County\\_Records\\_Loss.html](https://user.xmission.com/~jsvare/record_coverage/US_County_Records_Loss.html) [<https://perma.cc/VT2H-H4A9>]. I describe states with over twenty-five burned counties, according to this website, as "especially high." Many registries' websites also describe histories of records loss. See, e.g., *History*, COFFEE CNTY., ALA., <https://www.coffeecounty.us/198/History> [<https://perma.cc/U9H7-WUTN>] (describing property records lost in 1851 due to fire, and burned again in 1863 by "Confederate deserters," though without this second conflagration destroying "most" records; records also survived several floods); *Real Estate eRecord*, DEKALB CLERK SUPER. CT., <http://dksuperiorclerk.com/real-estate> [<https://perma.cc/SJ4D-AW8C>] (describing property records lost to

counties were destroyed, both deliberately and accidentally, often as a result of arson and especially during and after the Civil War.<sup>272</sup> A great deal more research would be necessary to determine both the intentionality of such destruction and its consequences—how often these events effected transfers of property rights within a community, or whether the destruction of records in the nineteenth and twentieth centuries, like their creation from the seventeenth through nineteenth centuries, helped whites extinguish Native and Black people’s claims to

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fire in 1842); cf. *Lancaster History*, LANCASTER CNTY., PA., <https://www.co.lancaster.pa.us/195/Lancaster-History> [<https://perma.cc/U8DU-PNDH>] (describing a courthouse in Penn Square destroyed by fire in 1784, though damage to registry records is unclear); *Hamilton County Damaged Deeds*, HAMILTON CNTY. GENEALOGICAL SOC’Y, <https://hcg-sohio.org/cpage.php?pt=216> [<https://perma.cc/YX2G-QBV4>] (describing an 1884 courthouse fire that damaged most deed records but noting that “many” records were copied and thereby saved).

272. For more details, see Mildred Stinson Brown, *Alabama’s Burned Courthouses*, ALGENWEB PROJECT, <https://www.algenweb.org/butler/history/burned.htm> [<https://perma.cc/4YM9-KY7S>] (“Approximately one-half of all the counties in Alabama have had their courthouse to burn.”); *Arkansas Counties and Historical Facts*, RANDOM ACTS GENEALOGICAL KINDNESS, <https://raogk.org/counties/california> [<https://perma.cc/S6XZ-6582>] (listing 40 Arkansas counties with burned courthouses); Samantha Mooney, *A Tale of Two Fires*, DEKALB HIST. CTR. (May 29, 2018), <https://dekalbhistory.org/blog-posts/a-tale-of-two-fires> [<https://perma.cc/76Q3-NQET>] (“Over sixty-six counties in Georgia have experienced courthouse fires (around 42%) and some counties have even had multiple fires destroy successive courthouses.”); Dora Whitaker, *The Rockcastle Courthouse Fires*, *Rockcastle*, 1873, SHAKING PAPER (Mar. 9, 2015), <https://papershake.blogspot.com/2015/03/the-rockcastle-courthouse-fires.html> [<https://perma.cc/VB67-C9K4>] (collecting primary sources related to the 1873 arson of Rockcastle County Courthouse in Kentucky); Dustin Lattimer, *Civil War Era Was Not Kind to Missouri’s Courthouses*, FOX2 (Jan. 4, 2023, 6:06 PM CST), <https://fox2now.com/news/missouri/civil-war-era-was-not-kind-to-missouris-courthouses> [<https://perma.cc/7WZ2-JYZA>] (listing 25 counties with burned courthouses, with year and description of extent of destruction); Bryan F. McKown and Michael E. Stauffer, *Destroyed County Records in South Carolina, 1785-1872*, 97 S.C. HIST. MAG. 149, 152 (1996); *Lost Records: Courthouse Fires and Disasters in Tennessee*, TENN. SEC’Y STATE, <https://sos.tn.gov/tsla/pages/lost-records-courthouse-fires-and-disasters-in-tennessee> [<https://perma.cc/RAL5-78QU>] (listing almost 60 burned counties); *Texas Courthouses with Missing Records: The Complete List Part 1*, COURTHOUSEDIRECT.COM (May 19, 2014), <https://info.courthousedirect.com/blog/bid/386533/Texas-Courthouses-with-Missing-Records-The-Complete-List-Part-1> [<https://perma.cc/UN86-DBQ4>]; *Texas Courthouses with Missing Records: The Complete List Part 2*, COURTHOUSEDIRECT.COM (May 21, 2014), <https://info.courthousedirect.com/blog/bid/386536/Texas-Courthouses-with-Missing-Records-The-Complete-List-Part-2> [<https://perma.cc/G7G6-MU4B>]; *Texas Courthouses with Missing Records: The Complete List Part 3*, COURTHOUSEDIRECT.COM (May 23, 2014), <https://info.courthousedirect.com/blog/bid/386540/Texas-Courthouses-with-Missing-Records-The-Complete-List-Part-3> [<https://perma.cc/B4L7-R42D>]; *Texas Courthouses with Missing Records: The Complete List Part 4*, COURTHOUSEDIRECT.COM (May 28, 2014), <https://info.courthousedirect.com/blog/bid/386543/texas-courthouses-with-missing-records-the-complete-list-part-4> [<https://perma.cc/9J5Q-R3M8>].

property.<sup>273</sup> Without a comprehensive approach, we have only individual stories suggestive of the purposes behind destroying records, as in the case of Paulding, Mississippi. In 1932, a dozen whites set the county courthouse on fire, sending the property records for half of Jasper County, a predominantly Black neighborhood, up in smoke. Once it was no longer clear who owned title to much of the property, Masonite, a company specializing in wood products, swooped in and won legal ownership to more than 9,500 acres of land in the area.<sup>274</sup>

Despite the considerable challenges posed by the nature of registries themselves, we have many clues about how the registry, functioning as a continuous, nationwide system across thousands of disparate localities, has crucially shaped the historical relationships between different groups in America. With the foregoing history, this Article has attempted to offer a foundation for understanding the title registry as a site where property, sovereignty, and power are both made and unmade.

### III. REDRESSING ERASURE IN THE REGISTRY: THEORETICAL AND PRACTICAL IMPLICATIONS

This three-century history of the title registry, and how it multiplied across the mainland, illuminates the modest mechanisms that undergirded the growth of Anglo-American jurisdictional power, first of every colony, and then county-by-county across the United States. This local but ubiquitous institution came to underpin the whole of the national real-estate market, a market that now totals \$64 trillion and comprised 54 percent of the country's net wealth in 2021.<sup>275</sup>

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273. See Sonya Braxton, *Targeted U.S. Courthouse Fires and Paper Genocide*, I LOVE ANCESTRY, <https://iloveancestry.com/topics/ancestry/historical-events/19th-century/american-history-targeted-courthouse-fires> [<https://perma.cc/G2C3-RZZA>] (listing forty-five burned counties and arguing that destroying records weakened Tuscarora land and other claims in North Carolina).

274. Todd Lewan & Dolores Barclay, *Torn from the Land: Black Americans' Farmland Taken Through Cheating, Intimidation, Even Murder*, SEATTLE TIMES (Dec. 2, 2001), <https://archive.seattletimes.com/archive/?date=20011202&slug=torno2> [<https://perma.cc/ZP2C-VBST>]. Thanks to Dorothy Brown for sending me this story. Compare *id.*, with *Historic Courthouse Destroyed by Fire Sat'day*, JASPER CNTY. NEWS (Sept. 15, 1932), <http://www.msgw.org/jasper/community/commppaulding.html> [<https://perma.cc/L36R-KMZW>]. Some county-registry websites contain information about the history of the registry. See, e.g., sources cited *supra* notes 262, 265. The website for the Jasper County Chancery Clerk, however, does not. See *Chancery Clerk*, JASPER CNTY., <https://www.co.jasper.ms.us/chancery-clerk--c66b32ed-cdbd-47b9-bb42-0d711bcac68d> [<https://perma.cc/C6YY-U7G7>].

275. See *B.1 Derivation of U.S. Net Wealth*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (MAR. 7, 2024), <https://www.federalreserve.gov/apps/fof/guide/b1.pdf> [<https://perma.cc/HY7V-RSWU>]. These numbers were calculate by adding lines 3, 8, 17, and 21, then dividing by line

Equally significant, and in a testament to land's enduring character as *territory*, beyond merely commodity, the registry was instrumental in establishing the sovereign land claims of the United States – the bedrock of authority on which all subordinate jurisdictions and domestic law depend. The registry's role in bringing this market and the nation's continental landmass into being underlines its significance as an important source of law and a crucial and contested – though overlooked – part of the legal infrastructure of property.

Few transformations in American history attributable to the influence of law are more momentous than the taking of the continent. However, we cannot understand how the nation came into possession of its jurisdiction, or its conversion of those lands into a market without unearthing a history that has long been suppressed. By seeking out the blind spots in our understandings of property law and institutions, we quickly encounter the process of colonization in which they were entangled. And by examining the logic of institutions designed to further colonization, like the registry, we find a wide range of opportunities to consider the myriad ways that race works through law.

At a meta-level, redressing the erasure of conquest means understanding canonical theoretical questions in legal scholarship differently. It is impossible to address the relationship between “property and sovereignty” without acknowledging Morris R. Cohen's classic 1927 essay of that name. Cohen argued that “private” property and “public” sovereignty can never exist independently of one another, any more than a “free market” could ever exist on the basis of purely private ordering.<sup>276</sup> Beyond protecting owners in their possession of property, he explained, sovereigns distribute power to them, insofar as expanding the property rights of landlords or factory owners endows them with power over other people, an “*imperium* over our fellow human beings.”<sup>277</sup> However, the history of colonization that birthed the American title registry compels us to consider the prior question of how the state acquired its sovereign power in the first place. Cohen might have explored this question had he not drawn solely from European legal thought, or chosen an exclusively top-down focus centered on

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1. See also Treh Manhertz, *U.S. Housing Market Has Doubled in Value Since the Great Recession, Gaining \$6.9 Trillion in 2021*, ZILLOW (Jan. 27, 2022), <https://www.zillow.com/research/us-housing-market-total-value-2021-30615> [<https://perma.cc/6DHW-KNGP>] (estimating the value of the residential market at \$43.4 trillion); Savannah DeLullo, *Estimating the Size of the Commercial Real Estate Market*, NAREIT (Feb. 15, 2022), <https://www.reit.com/news/blog/market-commentary/estimating-size-commercial-real-estate-market> [<https://perma.cc/R4WS-PZLJ>] (estimating the value of the commercial real-estate market at \$20.7 trillion).

276. As he put it: “[T]he ideal of absolute *laissez faire* has never in fact been completely operative.” Cohen, *supra* note 11, at 22.

277. *Id.* at 13; see also *id.* at 29 (“There can be no doubt that our property laws do confer sovereign power on our captains of industry and even more so on our captains of finance.”).

the state's choices regarding the distribution of power through property.<sup>278</sup> In the United States, as Cohen recognized, property and property institutions remain a major source of power; but the path dependence through which property rights acquired their high priority for the state stem from a history Cohen did not consider or understand.

In an essay that responds to Cohen, entitled "Sovereignty and Property," Joseph W. Singer pointed precisely to conquest as the relevant context for understanding sovereignty and property in the United States. Singer turned to federal Indian law decisions to illustrate the contrast between the treatment of Native peoples' property and sovereignty and the treatment of non-Native property and sovereignty under mainstream U.S. law, in an important contribution to highlighting how the racial history of conquest shape property distributions.<sup>279</sup> In focusing on the hierarchical distinction between a protective "property law" and destructive "Indian law," Singer did not explore how conquest also shaped "non-Indian" property law and sovereignty.

Looking at the historical record, however, reveals that colonists did employ property laws and ground-level property institutions to further their conquest. This Article focuses on the registry because it was a significant legal innovation in the context of the colonies, and which the United States adopted to support the growth of its own property and sovereignty. This history makes plain that chief among the challenges that colonists faced was establishing jurisdictional power where they had none. Their use of title registries to help them build jurisdictional power and sovereignty underscores the political force of property and its sovereignty-creating capacity. In that sense, this account aligns closely with Cohen's. It also highlights the fact that colonial property markets did not merely, or perhaps even primarily, serve individual rights; as Singer observes, property does not emerge from individuals laying claims to lands, people, or things in an unordered, unaffiliated way.<sup>280</sup> Rather, as Cohen indicated, the very category of "property" denotes a collective legal framework and a certain degree of governmental organization.

However, the source of this power here did not come first or top-down from federal authority, as Cohen and others suggest. Rather, in both the colonies and the United States, the registry provided a platform for colonists' collective organization vis-à-vis the reigning sovereigns in the lands. In a reversal of the time-honored notion that private law follows from public sovereignty in

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278. Cohen wrote that "it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government." *Id.* at 14.

279. See Singer, *supra* note 11, at 7-8.

280. *Id.* at 5.

America, public sovereignty emerged from ground-level local struggles to produce concrete property interests. From this historical material inquiry, we see that private entitlements are not merely the effect of political power, but can help produce it.

Neither property nor sovereignty are timeless universals. Property and sovereignty are products of legal institutions and practices, whose specific form guides the ways that they can be wielded as conduits for power. And our understanding of how law comes into being must recognize that the United States was born from the specific effort to seize power that characterizes conquest. In states that result from conquest, we cannot presume a model where an established, stable sovereign distributes rights – property rights or otherwise – to private entities. Indeed, using theoretical models drawn from non-colonial states to describe colonies contributes to erasure and confounds our ability to analyze the histories and realities of our present institutions. We must recognize a colonial state as one in which external efforts attack and aim to diminish or dismantle existing sovereign powers, in order to replace them with a new political authority. We must examine colonists' efforts to control resources, territories, and people to identify institutions and practices they adopted, innovated, or developed to build their advantage in this contest for control. And from this study, we must build new theories of property, sovereignty, and our law.

It should therefore not be possible to talk about property and sovereignty in America, theoretically or practically, without acknowledging both that it is *colonial* property and sovereignty, and the persisting property and sovereignty claims of the colonized. The story of jurisgeneration above follows colonial and U.S. efforts to undermine the sovereign claims of hundreds of Native nations in order to perfect title by conquest to the lands. Tribal sovereignty, which is inherent and enduring,<sup>281</sup> continues to underlie and qualify claims to property and sovereignty within U.S. law.<sup>282</sup> On the lands that constitute the United States, therefore, there exist not one but multiple, overlapping conceptions of property that organize a plurality of collective, sovereign relationships to land.<sup>283</sup> Although there is great variation across different tribal nations' property systems, there is an overriding distinction between Indigenous property conceptions and the market-oriented American conception of property worth remarking on here. As Kristen A. Carpenter, Sonya K. Katyal, and Angela R. Riley have explained,

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281. For a legal analysis of persistent tribal sovereignty, see generally Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549 (2022) (exploring consequences of tribes' status as "states" and "nations" in the early United States).

282. Chief Justice Marshall specified that Native nations' absolute sovereign title persisted, under U.S. law, until successful conquest subordinated it to the "absolute ultimate title" of the United States. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 592 (1823).

283. See Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 584 (2021).

Indigenous property conceptions generally “transcend[] the classic legal concepts of markets, title, and alienability that we often associate with ownership,” and offer “a more relational vision of property law [that] honors the legitimate interests of both owners and nonowners, in furtherance of various human and social values, potentially including nonmarket values.”<sup>284</sup>

By contrast, there is also a great deal of variation across different states’ property systems, but one overarching characteristic of what can be described as the national real estate market is that it elevates property value above other kinds of community interests. The multiple conceptions of relationships to land and community within the United States reveal the priorities of title registry, as the basic infrastructure of this system, to constitute a specific policy choice among others. This value system results from a long history, where over the span of three centuries, the primary means through which the state engendered its own jurisdictional power was by encouraging property claims. That sovereign power thus owed much of its foundation to the momentum generated by the prospect of individual entitlements.

This historical perspective explains the value system of America’s colonial property system, as well as how it is an emphatically racial value system. After all, the history above illustrates *multiple* ways that the racial hierarchy underlying European colonization efforts shaped American laws, and how those laws in turn worked to shape a radical new social order. In particular, it shows how the broad racial principle of discovery, affirmed by the Supreme Court in 1823 as the root of all title, private and sovereign, in the United States,<sup>285</sup> materialized from concrete institutions and practices. One example was through the familiar model of unequal treatment of different groups. As we saw, colonists passed rules categorically respecting the property rights of other Europeans, such as the Dutch or French, but not Native people. The condition of these protections – submission to Anglo-American jurisdiction – highlights this inclusion as part of colonial efforts to build sovereignty. And the registry, which organized these claims, was an instrument of this collective *exclusion*.

This history also illustrates the hazards of legal *inclusion*, through Native peoples’ use of the registry. This subtler dynamic is especially worth highlighting because it persists in the dynamics of the registry, and property law more broadly, today. Colonists’ greater formality in early agreements with Native people for land illustrates how formalism does not only work to memorialize and protect rights; it can also function to take rights away. Eventual parity in formal standards between different groups did not signal greater equality; instead, it

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

285. See *M’Intosh*, 21 U.S. at 573.

reflected the colonies' interest in maintaining peace among colonists in an increasingly tense environment and in establishing an institutional bulwark against growing Native challenges to their land claims.<sup>286</sup> Further, the minimal, passive design of the registry, by minimizing accountability, shifted the risks of those transactions to claimants, in familiar ways, onto marginalized groups: Native people, free Black people who acquired property, immigrant communities, poor people, and others.<sup>287</sup> Its effects, as now, were modulated by power differentials that form the backdrop of property transactions – vulnerability to exploitation, unequal bargaining power, racial discrimination in transactions and enforcement, uneven access to legal resources, and subjection to exclusionary decision-making bodies.

Finally, the creation of the registry illustrates one more, less widely recognized way that race works through law, even through ostensibly race-neutral institutions. Namely, it reshapes structures to reflect aforementioned value systems – in this country, at the expense of non-whites and marginalized peoples. Above all, the title registry promoted the production of property value, of property that was produced through the expropriation and subordination of Native and Black communities. By affirming, simplifying, incentivizing, and *growing* property claims through invigorated credit markets, the registry helped drive the racial violence inherent in producing property in expropriated lands and enslaved human beings, and helped build colonial markets that traded *primarily* in these new genres of property. As the “backbone” of lucrative and thriving property and credit markets,<sup>288</sup> the registry came to impact an ever-growing sphere of Native and Black communities, which saw their homelands confiscated, their kinship networks broken, and their beings subjugated and brutalized. While it is difficult to provide more than summary figures, and impossible to capture the

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286. This idea accords with Derrick A. Bell's theory of interest convergence. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

287. The importance of power to arbitrate disputes and control over decision-making is central to Ablavsky's analysis of how the federal government built sovereign power amongst multiple, competing sovereignties – European and Native – in the first territories. Elsewhere, I have described easy, routine foreclosure as another legal innovation that evolved from different and unequal racial practices to become a general market norm. Once a rule of general applicability, the practice took a disproportionate toll on Native peoples because of background factors: hostile racial group relations, unequal bargaining power and resources, and lack of control of decision-making fora and processes. See Park, *supra* note 69, at 29. Keeanga-Yamahtta Taylor, writing about twentieth-century phenomena, calls this mode of subordination through inclusion under a legal and economic order “predatory inclusion.” KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK OWNERSHIP* 253-54 (2019).

288. PENNINGROTH, *supra* note 112, at 12 (describing county deed records as “the backbone of the entire property system”).



profound violence to any single life represented within such a figure, the success of this enterprise was such that expropriated lands and enslaved people comprised approximately seventy-five percent of *all* colonists' wealth by the eve of the Revolution. The registry would have contained claims to most of the nearly four million people who reclaimed their freedom upon abolition ninety years later, and still holds claims to homelands of over 400 federal- and state-recognized tribes across the continental United States.<sup>289</sup>

This Article poses questions fundamental to property and sovereignty in America, which are rarely asked due to the invisibility of the facts of their historical development. What kind of sovereignty emerges from this kind of past? What kind of society will it engender, and what is the nature of a property system whose mechanics – such as the title registry – constituted the legal mechanics of conquest? Understanding this property system therefore *requires* us to understand the process and mechanisms of conquest. In essence, conquest constituted a project of building wealth and political power grounded in global racial hierarchy and the willingness to use force in accordance with this belief. Often, the raw violence and the virulent racial ideologies of conquest have, for good reason, received the lion's share of our critical attention, at the expense of the quieter mechanisms of conquest. Yet two of the most understated elements of our legal system – the unassuming office of the registry and the unglamorous jurisdictional unit of the county – played pivotal roles in structuring the *entire* process of territorial expansion, or the assimilation of 1.9 billion acres into the jurisdiction of the United States.

Over three hundred years, the tools of the county and registry worked with astonishing, unrelenting consistency and now overlay the whole of the nation's landmass and organize the totality of its land market.<sup>290</sup> The establishment of counties and registries in new territories and states represented an arriving, aspirational sovereign's authority over settlers' claims. In retrospect, the reason seems clear: the county was a jurisdictional unit more accessible and proximate to the processes of property formalization and adjudication than the territory or the future state, let alone the nation. Yet as a subunit of all of these, the county also represented and channeled their collective authority. To prospective settlers, the county was an invitation to property creation. It bootstrapped those larger

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289. This figure does not count the 229 registered tribes of Alaska; since the recognition process has presented serious hurdles to tribes, the figure is a gross undercount of sovereigns disposed by conquest.

290. This analysis of building property and sovereignty together accords with Thomas Merrill's observation, responding to Cohen, that private and public power do not exist in a "zero-sum," "one-to-one" relationship, characterized by an inverse relationship between property and sovereignty, or the reverse, in a ratio to be "dialed up or down." Thomas W. Merrill, *Property and Sovereignty, Information and Audience*, 18 THEORETICAL INQUIRIES L. 417, 418, 421 (2017).

sovereign imaginaries to convert on-the-ground processes of claiming property in land into an extension (and expansion) of their jurisdictional power. Contrary to the contemporary truism that local governments are “creatures of the state,” it is the county that gave rise to the states<sup>291</sup>; and it is county creation, rather than treaties, territories, or states, that most accurately tracks the growth and expansion of the United States’s jurisdictional power. With little regard for where governing sovereigns had ceded lands, or where territorial or state lines were or would be drawn, the registry, from a local county seat, established the authority of government over the property claims in the area that it collected. As time went on, the process of county, territorial, and state formation became less provisional projections and more synchronized, reflecting an increasing confidence in planning and the future of conquest.

Today, too, the county remains the jurisdictional unit tasked with the basic functions of property preservation, and which is uniquely suited, among local government forms, for encouraging property and population growth.<sup>292</sup> This analysis of the registry helps explain the preeminence of property and real estate in American society, identifies its mechanisms and the sites at which they are organized, as well as foregrounding how racial hierarchies become fodder for their production of value. It also, however, provides us with a new perspective and information by which to assess the character of our property system, and guides us to proposals for how else its infrastructure could organize relationships and the distribution of resources among the polity. Carpenter, Katyal and Riley, for example, argue for better recognition of coexisting property regimes by strengthening non-owner groups’ ability to exercise custody and control over tribal homelands, which, irrespective of titles under U.S. law, remain vital to nations’ group identity and cultural survival.<sup>293</sup> Such measures, along with various other legal arrangements protecting community interests in trust lands, offer examples of choices we could make that diverge from the way the registry privileges the production of monetary value through market transactions above all.

In short, the history of the registry prompts us to consider the more profound issues of how we conceive of land, property, and the relationships of humans to land, property, and each other, as they are governed by law. And it challenges us to think about how the value system reproduced by the registry—

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291. David Rusk, *Changing the Rules of the Game: Tools to Revive Michigan’s Fractured Metropolitan Regions*, 13 J. L. SOC’Y 197, 235 n.115 (2011) (noting a common saying in the National Association of Counties that “the legislature may create municipalities but only God can make a county”).

292. *Id.* at 199, 207–13 (arguing that “county states,” as compared with “township states,” precisely because of their relatively more minimal provision of services, allow for growth—specifically, through cities’ annexation of surrounding lands within the county—in more “elastic” ways).

293. *Id.* at 1028.

which privileges generation of monetary value above other values, whether safeguarding individuals' property, land's role as home, or its significance for individual and community stability, sustenance, and well-being— affects our daily lives and the health of the polity.<sup>294</sup> As we reflect on the legacies of this history in the contemporary landscape of housing insecurity, racial violence, and political division, this analysis also offers lessons about building political power. It highlights the significance of local jurisdictions as critical hubs for organizing for larger scale movement: the take-over of the country depended on the creation of institutions that followed on-the-ground action and sought to protect the concrete interests of local actors. Finally, it offers a timely reminder that control over lands and resources constitutes a timeless linchpin of political power. The pursuit of power that made real property so ascendant in American economic and political life remains a live force in our world, and controlling lands through private ownership is a way of amassing political power still.

## CONCLUSION

The innovative colonial institution of the American title registry played a pivotal role in subtly extending the reach of the colonies' jurisdictional power. As a governmental institution that organized settlers' property claims, it constituted an assertion of political authority, the power to determine a process to settle disputes over land, *contra* Native nations' sovereign authority in an area. With this mechanism, colonial governments expanded their own territorial sovereignty, claim by claim, private as well as public. Furthermore, the recording of claims and creation of county registries became a marked feature of territorial conquest and expansion in the United States as well. From the beginning of the nation's attempts to broaden its reach beyond the Eastern Seaboard, within the bounds that original states hoped to claim, and to the Pacific, the jurisdiction of the United States followed the creation of property and counties to organize it. Property and property institutions thereby became central to the nation's governance, polity, and power.

In short, in America, rather than issuing from an established sovereign power, property claims preceded the seizure of jurisdictional power by the colonies and the United States over Native nations' homelands. Through the history of the registry, we see the unfolding of that phenomenon, in a reminder that historical material analysis has significant stakes for the shape of theory, and that theory can become an instrument of erasure. Because the institution's history is

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294. Thomas Merrill points to the several "audiences" of the registry—including strangers, transactors, neighbors, and sharers—with interests in private entitlements and sovereign regulation. See Merrill, *supra* note 290, at 421.

steeped in conquest, and the enslavement that was integral to conquest, it also illustrates the range of ways that the colonial premise of racial hierarchy works to shape legal institutions, practices, and outcomes: through explicit racial exclusions; the hazards of inclusion in a system that rewards parties according to their uneven bargaining power, social advantages, and litigation resources; and in the dehumanizing logics that characterize legal innovations, including institutions that now, like the registry, may appear to be facially “race-neutral.” The logic of colonization, which elevates the monetary value of property above other individual and community investments in safety, autonomy, and protection, and prioritizes the monetary value of property above land as a home, source of sustenance, and site of memory, now shapes all our lives.

This structure and logic of the registry remains unchanged to this day; its core features have been preserved despite some significant modern transformations. While it has been partially digitized, for example, and its records newly commodified in the age of the internet and big data, the registry remains a low-accountability, local, public institution that holds voluntary and unverified records. In a tale for another time, its weak structure has bred novel registry practices in recent decades, presenting us with new challenges. In the next chapter of this story, the history of this overlooked institution will equip us to understand how it continues to shape the landscape of property, affect governance, and alter the very nature of property and ownership. This long history reveals the registry’s far-reaching power, and reminds us that even the most modest-seeming legal institutional innovation can engender profound changes. To this point, through its specific design, the registry has molded property to align with racial aims, ideologies, and practices. We must attend to the registry and seek to reimagine it if we hold the goals of redressing not only the epistemological erasure of racial violence from history, but ongoing racial violence itself.

**APPENDIX A**

1. Northwest Territory

First County/ Counties	Year Established	Treaty Ceding Lands of County*	Treating Nations	Territory Name (Parent Territory/ Territories)	Date Established	State	Date Admitted to Union	Treaties Ceding Lands w/in State Borders Post Statehood	Treating Nations
								7/4/1805	Wyandotte, Ottawa, Chippewa, Munsee, Delaware, Shawnee, and Potawatomi
Washington	1788	8/3/1795	Wyandotte, Delaware, Shawnee, Ottawa, Chippewa, Potawatomi, Miami, Eel River, Wea, Kickapoo, Piankishaw, and Kaskaskia	Northwest	7/13/1787	Ohio	3/1/1803	9/29/1817	Wyandotte, Seneca, Delaware, Shawnee, Potawatomi, Ottawa, and Chippewa
								10/6/1818	Miami
								3/17/1824	Wyandotte
								2/28/1831	Seneca of Sandusky River
								8/8/1831	Shawnee
								8/30/1831	Ottawa
								1/19/1832	Wyandotte

First County/ Counties	Year Estab- lished	Treaty Ceding Lands of County*	Treating Nations	Territory Name (Parent Territo- ries)	Date Established	State	Date Admitted to Union	Treaties Ceding Lands w/in State Borders Post Statehood	Treating Nations
Knox	1790	8/3/1795	Wyandotte, Delaware, Shawnee, Ottawa, Chippewa, Potawatomi, Miami, Eel River, Wea, Kickapoo, Piankeshaw, and Kaskaskia	Indiana (Nw.)	5/7/1800	Ind.	12/11/1816	10/26/1832	Potawatami
								10/27/1832	
								3/29/1836	
								4/11/1836	
								11/28/1840	Miami
St. Clair	1790	8/13/1803	Kaskaskia	Illinois (Ind.)	3/1/1809 (1801)	Ill.	12/3/1818	1819	Kickapoo Chippewa, Ottawa, and Potawatami
								7/29/1829	
								9/26/1833	
								10/11/1832	Potawatami, Prairie and Kankakee Band Winnebago
Wayne	1796 (founded) 1815 (organized)	11/17/1807	Ottawa, Chippewa, Wyandotte, and Potawatomi	Michigan (Nw., Ind.)	6/30/1805	Mich.	1/26/1837	1/14/1837	Saginaw Chippewa
Brown	1818	8/11/1827 2/8/1831	Chippewa, Menominee, Winnebago, and Menominee	Wisconsin (Nw., Ind., Mich.)	7/3/1836	Wis.	5/29/1848	10/4/1842	Chippewa

First County/ Counties	Year Estab- lished	Treaty Ceding Lands of County*	Treating Nations	Territory Name (Parent Territory/ Territo- ries)	Date Established	State	Date Admitted to Union	Treaties Ceding Lands w/in State Borders Post Statehood	Treating Nations
Crawford		11/1/1837	Winnebago					10/18/1848	Menominee

2. *Mississippi and Alabama (Old Southwest)*

First County/ Counties	Year Estab- lished	Treaty Ceding Lands of County	Treating Nations	Territory Name (Parent Territory/ Territories)	Date Established	State	Date Admitted to Union	Treaties Ceding Lands w/in State Borders Post Statehood	Treating Nations
Adams, Pickering (now Jefferson)	1799	12/17/1801	Choctaw	Mississippi	4/7/1798	Miss.	12/10/1817	10/18/1820	Choctaw
								9/27/1830	Choctaw
								5/24/1834	Chickasaw
								9/27/1830	Choctaw
Washington	1800	10/17/1802	Choctaw	Alabama	8/15/1817	Ala.	12/14/1819	3/24/1832	Muscogee
								12/29/1835	Cherokee

Sources: Charles J. KAPPLER, *INDIAN AFFAIRS: LAW AND TREATIES* (1904); J.W. POWELL, *EIGHTEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION 1896-'97* (1899).

\* Reference for treaty cessions is the contemporary boundaries of counties. Those boundaries invariably comprise a fraction of the original county area.

**APPENDIX B: ORIGINAL THIRTEEN STATES POPULATION AND COUNTY GROWTH, 1773-1830**

State	Population (1773-1780)	Date Admitted to Union	No. Counties Entering Union	Population in 1800	No. Cities in 1800	Population in 1830	No. Cities in 1830	No. Cities Today (+ County Equivalents)
Del.	37,000 (1780)	12/7/1787	3	72,674	3	76,748	3	3
Pa.	302,000 (1775)	12/12/1787	19	810,091	35	1,348,233	51	67
N.J.	129,000 (1774)	12/18/1787	13	245,555	13	320,823	13	21
Ga.	50,000 (1776)	1/2/1788	10	251,407	24	516,823	77	159
Conn.	196,088 (1774)	1/9/1788	8	262,042	8	297,675	8	8
Mass.	338,667 (1776) including Me.*	2/6/1788	14	700,745 Me.: 228,705	16	610,408 Me.: 399,455	14 Me.: 10	14
Md.	200,000 (1775)	4/28/1788	18	380,546	19	447,040	19	23+1
S.C.	175,000 (1773)	5/23/1788	14	415,115	25	581,185	30	46
N.H.	81,000 (1775)	6/21/1788	5	214,360	5	244,161	8	10
Va.	550,000 (1775)	6/25/1788	63	983,152	72	1,220,978 W. Va.: 176,924	77	95 (+38 independent cities)
N.Y.	190,000 (1775)	7/26/1788	14	959,049	30	1,918,608	56	62
N.C.	260,000 (1776)	11/21/1789	52	556,526	60	737,987	64	100
R.I.	55,001 (1776)	5/29/1790	5	76,931	5	83,059	5	5

Sources: See U.S. DEP'T OF STATE, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES (Philadelphia, Childs & Swaine 1791); U.S. DEP'T OF STATE, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES (1801); U.S. DEP'T OF STATE, ABSTRACT OF THE FIFTH CENSUS OF THE UNITED STATES (Washington, D.C., Duff Green 1832).

\* New counties were created in Massachusetts after it entered the Union, but several former Massachusetts counties were transferred to Maine, or absorbed into Maine or New Hampshire. Prior to Massachusetts's entrance to the Union, four additional counties in New York were transferred to Massachusetts, or the part of Massachusetts that later became Maine, or Vermont.



**APPENDIX C: GEORGIA COUNTIES CREATED FOLLOWING LAND CESSIONS AND FIRST COUNTY SUBDIVISIONS (TO 1857)**

Year Lands Ceded	Treaty/Cession	Treating Nations	Year County Established	County Name	Land Lottery	Year County Subdivided	New County Subdivision Name
<b>PRE-STATEHOOD</b>							
1773	Treaty of Augusta	Cherokee Creek	1777	Wilkes		1790	Elbert
						1793	Oglethorpe
						1796	Lincoln
1783	Treaty of Augusta (contested)	Creek	1784	Washington		1786	Greene
							Montgomery
						1793	Hancock (from Washington and Greene)
1783	Treaty of Augusta	Cherokee Creek	1784	Franklin		1796	Jackson
						1811	Madison (from Franklin, Clarke, Elbert, Jackson, Oglethorpe)
						1853	Hart (from Franklin and Elbert)

Year Lands Ceded	Treaty/Cession	Treating Nations	Year County Established	County Name	Land Lottery	Year County Subdivided	New County Subdivision Name
<b>AFTER STATEHOOD</b>							
1802	Treaty of Fort Wilkinson	Creek	1803	Wayne	1805		
1802 and 1805	Treaty of Fort Wilkinson and Treaty of Washington	Creek	1803	Baldwin	1805 1807	1807	Jasper
							Jones
							Morgan
							Putnam
							Laurens
							Telfair
1814	Treaty of Fort Jackson	Creek	1818	Early	1820		Twiggs
							Decatur
							Baker
							Calhoun (from Early and Baker)
							Miller (from Early and Baker)
							Ware
1814 and 1818	Treaty of Fort Jackson and Treaty of Fort Mitchell	Creek	1818	Appling	1820		Pierce (from Appling and Ware)
							Lowndes
							Thomas (from Irwin and Decatur)
1818	Treaty of Fort Mitchell	Creek	1818	Walton	1820		
1817 and 1818	Treaty of the Cherokee Agency and Treaty of Fort Mitchell	Cherokee Creek	1818	Gwinnett	1820	1822	DeKalb (from Gwinnett, Henry, and Fayette)
1817 and 1819	Treaty of the Cherokee Agency and Treaty of Washington	Cherokee	1818	Habersham	1820	1857	White
				Hall	1820		
1819	Treaty of Washington	Cherokee	1819	Rabun	1820	1856	Towns (from Rabun and Union)

Year Lands Ceded	Treaty/Cession	Treating Nations	Year County Established	County Name	Land Lottery	Year County Subdivided	New County Subdivision Name
1821	Treaty of Indian Springs	Creek	1821	Dooly	1821	1853	Worth (Dooly and Irwin)
						1857	Wilcox (from Dooly, Irwin, Pulaski)
				Henry	1821	1821	Newton (from Henry, Jasper, and Walton)
						1851	Spalding (from Henry, Fayette, and Pike)
							Crawford
				Houston	1821	1822	Bibb (from Houston, Jones, Monroe, and Twiggs)
							Macon (from Houston and Marion)
				Fayette	1821	1858	Clayton (from Fayette and Henry)
Monroe			Pike				
	1821	1822	Butts (from Henry and Monroe)				
			1825	Haralson (from Carroll and Polk)			
1825	Treaty of Indian Springs	Creek	1826	Carroll	1827	1856	
1825 and 1826	Treaty of Indian Springs and Treaty of Washington	Creek	1826	Coweta	1827	1830	Heard (from Coweta, Carroll and Troup)
1826	Treaty of Washington (affirmed by 1827 Treaty of Indian Agency)	Creek	1826	Troup	1827	1827	Meriwether
						1828	Randolph
				Lee	1827	1831	Sumter
						1856	Terrell (from Lee and Randolph)
							Talbot
				Muscogee	1827	1827	Marion (from Lee and Muscogee)
							Harris (from Muscogee and Troup)
							1854

Year Lands Ceded	Treaty/Cession	Treating Nations	Year County Established	County Name	Land Lottery	Year County Subdivided	New County Subdivision Name
							Bartow (originally Cass)
							Cobb
							Floyd
							Forsyth
1831	NO TREATY—illegal state confiscation	Cherokee	1831	Cherokee	1832	1832	Gilmer
							Murray
							Paulding
							Union
							Lumpkin (from Cherokee, Habersham, Hall)

**APPENDIX D**1. *States Formed from Original Colonies/States, Counties, Recording Acts*

<b>State</b>	<b>Colony/ Parent State</b>	<b>First County</b>	<b>Year County Established</b>	<b>Date State Admitted to Union</b>	<b>First Recording Act in the State</b>
Vermont	New York, New Hampshire, Massachusetts (disputed)	Bennington, Windham	1779	3/4/1791	<b>February 19, 1779</b> An Act for Authenticating Deeds and Conveyances. <b>March 8, 1787</b> An Act for authenticating and registering Deeds and Conveyances. <b>March 6, 1797</b> Of Conveyances of Real Estate
Kentucky	Virginia	Kentucky	1776	6/1/1792	<b>December 20, 1792</b> An Act concerning relinquishment of Dower, and recording Letters of Attorney
Tennessee	North Carolina	Washington	1777	6/1/1796	<b>September 30, 1794</b> An act for the relief of such persons that have suffered or may suffer by their grants, deeds, and mesne conveyances not being proved & registered within the time heretofore appointed by law. <b>October 28, 1797</b> An act prescribing what shall be the legal probate of deeds and conveyances of lands and mortgages, where such probate shall be made without the limits of this state, and within the limits of the United States, and for other purposes.
Maine	Massachusetts	York	1652	3/15/1820	<b>March 19, 1821</b> An Act concerning Registers of Deeds
West Virginia	Virginia	Hampshire	1754	6/20/1863	<b>June 26, 1863</b> An act in relation to the powers and duties of the recorder.

2. *Progression of Counties, Territories, and Recording Acts Across the Mainland United States,  
Organized by Chronological Order of First County/Counties*

First County/ Counties (or No. if >2)	Year County Established	Territory	Year Territory Established	First Recording Act in Territory	State	Date State Admitted to Union	First Law Referring to Recording/Registry in State
Washington	1788	Northwest	1787	<b>July 13, 1787</b> An Ordinance for the Government of the Territory of the United States, North- west of the River Ohio. (Nw. Ordinance)	Ohio	3/1/1803	<b>April 16, 1803</b> An Act Providing for the Recording of Deeds, Mortgages, and Other Conveyances of Land.
Knox	1790	(Northwest) Indiana	(1787) 1800	(Nw. Ordinance (1787)) <b>September 17, 1807</b> A Law Establishing the Recorders Office, and for Other Purposes.	Ind.	12/11/1816	<b>January 21, 1818</b> An Act Defining the Duties of Recorders, and Pointing Out the Mode of Conveying Real Estate.
St. Clair	1790	(Northwest) (Indiana)  Illinois	(1787) (1800)  1809	(Nw. Ordinance (1787)) <b>(September 17, 1807</b> <i>A Law Establishing the Recorders Office . . . .)</i> <b>July 21, 1809</b> A Law to Prevent Frauds and Perjuries	Ill.	12/3/1818	<b>February 19, 1819</b> An Act establishing the Recorder's office, and for other purposes.

First County/ Counties (or No. if >2)	Year County Established	Territory	Year Territory Established	First Recording Act in Territory	State	Date State Admitted to Union	First Law Referring to Recording/Registry in State
Wayne	1796	(Northwest) Michigan	(1787) 1805	( <i>Nw. Ordinance (1787)</i> ) <b>November 4, 1815</b> An Act to Adjust the Estates and Affairs of Deceased Persons Testate and Intestate, and for Other Purposes. <b>March 27, 1820</b> An Act Concerning Deeds and Conveyances.	Mich.	1/26/1837	<b>March 22, 1837</b> An Act to Amend an Act Entitled "An Act Concerning Deeds and Conveyances."
Adams, Pickering (now Jefferson)	1799	Mississippi	1798	<b>1799</b> A Law Respecting Sheriffs, Coroners, Recorders, and Treasurers.	Miss.	12/10/1817	<b>June 13, 1822</b> An Act Concerning Conveyances.
Washington	1800	Alabama	1817	<b>November 21, 1818</b> An Act to Authorise Deeds of Conveyance to Be Acknowledged, and Rights of Dower to Be Relinquished Before Clerks of Courts.	Ala.	12/14/1819	<b>December 20, 1820</b> An Act to Authorise the Judges of the Circuit Courts and Justices of the County Courts to Take the Acknowledgements of Deeds and Relinquishments of Dower.
12	1803	Louisiana	1804	<b>October 1, 1804</b> A Law Establishing Recorders Offices.	La.	4/30/1812	<b>March 20, 1827</b> An Act to Create a Register of Conveyances for New Orleans and Other Purposes.

First County/ Counties (or No. if >2)	Year County Established	Territory	Year Territory Established	First Recording Act in Territory	State	Date State Admitted to Union	First Law Referring to Recording/Registry in State
5	1812	Missouri	1812	<b>August 20, 1813</b> An Act Establishing Courts of Common Pleas, and for Other Purposes.	Mo.	8/10/1821	<b>1821</b> An Act to Enable Husband and Wife to Convey Real Estate Belonging to the Wife.
Arkansas	1813	( <i>Missouri</i> )	( <i>1812</i> )	( <i>August 20, 1813</i> <i>An Act Establishing Courts of Common Pleas . . .</i> )	Ark.	6/15/1836	<b>December 21, 1846</b> An Act Concerning the Recording of Deeds.
		Arkansas	1819	<b>October 27, 1835</b> An Act Supplementary to the Several Laws in Force in the Territory of Arkansas, on Descents and Distribution. <b>October 27, 1835</b> An Act to Amend the Law Concerning Conveyances.			



First County/ Counties (or No. if >2)	Year County Established	Territory	Year Territory Established	First Recording Act in Territory	State	Date State Admitted to Union	First Law Referring to Recording/Registry in State
Brown, Crawford	1818	(Michigan)	(1805)	<b>(November 4, 1815)</b> <i>"An Act to Adjust the Estates and Affairs of Deceased Persons Testate and Intestate . . . .")</i>	Wis.	1848	<b>1849</b> Of Counties and County Officers.
		Wisconsin	1836	<b>March 27, 1820</b> <i>An Act Concerning Deeds and Conveyances.)</i>			
				<b>January 8, 1838</b> An Act to Authorize the Several Counties in this Territory, to Hold and Convey Real Estate, to Sue and be Sued, and for Other Purposes.			
				<b>January 1839</b> An Act to Provide for the Election of Registers of Deeds, and to Define their Duties and Powers.			
Escambia, St. John's	1821	Florida	1821	<b>June 29, 1823</b> An Act to Regulate Conveyances of Real Property, and the Recording Thereof, and to Prevent Frauds and Perjuries, and for Other Purposes.	Fla.	1845	<b>March 6, 1845</b> An Act to Secure Certain Rights to Women.

First County/ Counties (or No. if >2)	Year County Established	Territory	Year Territory Established	First Recording Act in Territory	State	Date State Admitted to Union	First Law Referring to Recording/Registry in State
Des Moines, Dubuque	1834	(Michigan)	(attached 1834)	<b>(March 27, 1820</b> <i>An Act Concerning Deeds and Conveyances.)</i>	Iowa	12/28/1846	<b>January 22, 1848</b> An Act in Relation to Deeds: Deeds from the State.
		(Wisconsin)	(1836)	<b>(January 8, 1838</b> <i>An Act to Authorize the Several Counties in this Territory . . . .)</i>			
		Iowa	1838	<b>January 19, 1839</b> An Act Relating to the Office of Recorder of Deeds.			
23	1836	Texas*	1836	<b>January 1836</b> An Ordinance and Decree for Opening the Several Courts of Justice, Appointing Clerks, Prosecuting Attorneys, and Defining Their Duties.	Tex.	2/19/1846	<b>May 12, 1846</b> An Act to Provide for the Registry of deeds, and Other Instruments of Writing.

First County/ Counties (or No. if >2)	Year County Established	Territory	Year Territory Established	First Recording Act in Territory	State	Date State Admitted to Union	First Law Referring to Recording/Registry in State
4 (districts of Oregon Country)	1843	Oregon	1848	<b>February 16, 1843</b> An Act to Regulate Conveyances.  <b>July 5, 1843</b> Report of Legislative Committee, upon the Judiciary.  <b>February 16, 1849</b> An Act to Provide for the Recording of Land Claims in the County Clerk's Office in the Several Counties in Oregon Territory.	Or.	2/14/1859	<b>1859</b> OREGON CONST. article VII, § 15.
Vancouver (now Clark), Lewis	1845	Washington	1853	<b>March 21, 1854</b> An Act relating to Deeds.	Wash.	11/2/1889	<b>March 22, 1890</b> Puyallup Indians; May Sell Lands: An Act enabling the Indians to sell and alien the lands of the Puallup Indian Reservation, in the State of Washington.
9	1849	Minnesota	1849	<b>November 1, 1849</b> An Act to Provide for the Election of Registers of Deeds and to Define Their Duties and Powers.	Minn.	5/11/1858	<b>1858</b> Register of Deeds: An Act Defining the Duties of Registers of Deeds.

First County/ Counties (or No. if >2)	Year County Established	Territory	Year Territory Established	First Recording Act in Territory	State	Date State Admitted to Union	First Law Referring to Recording/Registry in State
27	1850	California <sup>†</sup>	1848	<b>April 16, 1850</b> An Act Concerning Conveyances.	Cal.	9/9/1850	
7	1850	Utah <sup>†</sup>	1850	<b>March 2, 1850</b> An Ordinance in Relation to County Recorder.	Utah	1/4/1896	<b>April 5, 1896</b> Validating the Records of Certain Deeds.
9	1852	New Mexico	1850	<b>January 1, 1855</b> An Act Establishing the Office of Public Recorder.	N.M.	1/6/1912	<b>1913</b> An Act to Provide for the Assessment of Property for Purposes of Taxation and for the Levy and Collection of Taxes . . . .
9	1854	Nebraska	1854	<b>February 21, 1855</b> An Act Establishing the Office of Register of Deeds and Relating to the Conveyance of Real Estate.	Neb.	3/1/1867	<b>Feb 8, 1869</b> An Act to Provide for the Appointment of Notaries Public. And to Define their Duties.  <b>March 1, 1879</b> An Act Concerning Counties and County Officers.

First County/ Counties (or No. if >2)	Year County Established	Territory	Year Territory Established	First Recording Act in Territory	State	Date State Admitted to Union	First Law Referring to Recording/Registry in State
36	1855	Kansas	1854	<b>1855</b> An Act to Establish the Office of County Recorder.	Kan.	3/1/1861	<b>June 4, 1861</b> An Act to Provide for the Management and Investment of the State School Fund and the University Fund  <b>March 5, 1877</b> An Act in Relation to the Transfer of Real Estate in the Name of the Owner
9	1861	Nevada	1861	<b>November 29, 1861</b> An Act to Regulate the Settlement of the Estates of Deceased Persons.	Nev.	10/31/1864	<b>February 20, 1869</b> An Act to Provide for Preserving the Evidence of the Official Acts of Officers Taking Acknowledgments.
17	1861	Colorado	1861	<b>November 5, 1861</b> An Act Concerning Conveyances of Real Estate First Recording Act.	Colo.	8/1/1876	<b>1877</b> Conveyances.
10	1862	Dakota	1861	<b>March 2, 1862</b> An Act to provide for the Recording of Deeds, Mortgages, Bonds, Contracts, Agreements . . . .	S.D.	11/2/1889	<b>March 9, 1891</b> Irrigation.

First County/ Counties (or No. if >2)	Year County Established	Territory	Year Territory Established	First Recording Act in Territory	State	Date State Admitted to Union	First Law Referring to Recording/Registry in State
Owyhee	1863	Idaho	1863	<b>Jan. 16, 1864</b> An Act Concerning Conveyances.	Idaho	7/3/1890	<b>March 13, 1891</b> Chattel Mortgages: An Act to Amend Sections 3386 and 3387 of Title 12 of Chapter 4 of the Laws of Idaho Relating to Mortgages of Personal Property.  <b>1893</b> County Recorder to Keep Record of Liens.
4	1864	Arizona	1863	<b>November 7, 1864</b> An Act Concerning Grants and Deeds for Lands. § 1	Ariz.	2/14/1912	<b>May 17, 1912</b> An Act to Provide for the Improvement of Public Streets, Lanes, Alleys . . . .
9	1865	Montana	1864	<b>February 9, 1865</b> An Act Concerning Conveyances.  <b>1887</b> Conveyance of Realty.	Mont.	11/8/1889	
Pembina	1867	Dakota	1861	<b>March 2, 1862</b> An Act to Provide for the Recording of Deeds, Mortgages, Bonds, Contracts, Agreements . . . .	N.D.	11/2/1889	<b>March 4, 1895</b> An Act to Cure Defective Acknowledgements.

First County/ Counties (or No. if >2)	Year County Established	Territory	Year Territory Established	First Recording Act in Territory	State	Date State Admitted to Union	First Law Referring to Recording/Registry in State
5	1867-69	Wyoming	1868	<b>December 10, 1869</b> An Act Concerning Alienation by Deed, of the Proof and Recording of Conveyances and the Cancelling of Mortgages.	Wyo.	7/10/1890	<b>March 14, 1890</b> An Act to Provide for the Recording of Certain Instruments Affecting the Title to Lands, and for Other Purposes.
4	1890	Oklahoma	1890	<b>December 25, 1890</b> An Act Regulating Conveyances of Real Property.	Okla.	11/16/1907	<b>March 26, 1913</b> Conveyances of Members of Certain Indian Tribes Legalized.

\* Texas claimed status as an independent Republic prior to annexation by the United States.

† California was never a territory, but was governed under federal military authority after the Treaty of Guadalupe Hidalgo in 1848.

‡ Seven counties were organized in 1850 under the provisional State of Deseret, which was established in 1849. The Territory of Utah incorporated those seven counties and added three more.