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

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

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

I then examine three ubiquitously taught topics in property law—discovery, labor, and possession—in light of the contexts in which they arose, to highlight their role in the creation of new markets for land and people in early America. I show that Chief Justice Marshall’s iteration of the Discovery Doctrine drew from an international legal tradition that authorized European conquests and the transatlantic slave trade to establish racial hierarchy as the basis of U.S. jurisdiction and trade in lands. In addition to affirming that hierarchy, as scholars have shown, the labor theory also captured the ways that colonists attributed property values to land and people only when they came into white possession. I further argue that the labor of property creation in the colonies in
significant part comprised legal work, beyond agriculture labor, including the passage of laws creating homesteading incentives, making enslavement racial, permanent, and hereditary, and establishing systems such as the rectangular survey, comprehensive title registry, and easy mortgage foreclosure. Finally, taking possession of property in this context entailed a process of dispossession turning the principle of honoring possession on its head. Looking at possession as part of the Discovery Rule and fugitive-slave laws reveals that the state largely delegated enforcement of possession—and the concomitant racial violence of dispossession—to private actors in ways that simultaneously invested them in property interests and racial hierarchy.

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

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


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

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


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

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

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

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7. No single article could complete this work. See infra note 15.
before I taught property law for the first time, several people told me that designing the course is like assembling a train. You choose topics like cars that you string together as you please. As a result, for generations of first-year law students, the course has had the tendency to feel like a grab bag of topics. As I describe below, materials about conquest, slavery, and race have reentered the canon relatively recently, but with the effect of making these topics optional add-on cars in the property-law train, distinct from and less essential than, for example, units on servitudes, adverse possession, or nuisance. But the histories of conquest and slavery constitute more than addenda to traditional doctrines and present more than an opportunity to apologize or condemn a regrettable chapter of the past. They comprise the train’s track, and are essential to explaining what American property is and how it has been constructed by law.

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

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8. Historians have long tended to address the histories of conquest or slavery separately, in a trend too general to single out any person or work. For examples of scholars increasingly taking the imbrication of these histories as a point of departure, see David Chang, *The Color of the Land: Race, Nation, and the Politics of Land Ownership in Oklahoma, 1832-1929* (2010); Wendy Warren, *New England Bound: Slavery and Colonization in Early America* (2016); Paul Frymer, *Building an American Empire: The Era of Territorial and Political Expansion* (2017); and Walter Johnson, *The Broken Heart of America: St. Louis and the Violent History of the United States* (2020).

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

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

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

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

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

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

15. The scope of this Article’s analysis is limited to the three examples it selects from U.S. property law. Deliberately, it does not take up legal doctrines or theories commonly understood to address the rights of minority groups in the United States, such as from the areas of civil rights or Federal Indian law. Rather, if Federal Indian law is “primarily the law of conquest,” as Elizabeth A. Reese has recently clarified, and “not the law of Indian people,” this Article shows that core doctrines of property law generally understood as “neutral,” too, comprise part of the law of conquest and the law of slavery. Elizabeth A. Reese, The Other American Law, 73 STAN. L. REV. 555, 563 (2021). I neither attempt nor purport to cure all the erasures of dominant U.S. legal narratives, but offer an inquiry here that is aligned with this collective effort. In particular, it is adjacent to but distinct from the project of analyzing independent, equally complex traditions of property law that originate in other sovereign histories, and telling the difficult stories of how they have contended with pressures to adopt the ever-increasingly dominant U.S. property-law model, within and beyond U.S. territorial borders, historically and in the present.
“property creation,” in this context, encompassed not only colonists’ creation of markets based on European possession, but also the creation of major property institutions and law in America: namely, laws that made enslavement racial, hereditary, and perpetual; chains of title rooted in Native title; the comprehensive rectangular survey; centralized title registry; and easy mortgage foreclosure. Part IV shows that prioritizing “possession” in the context of these histories entailed facilitating and maintaining massive dispossession. Through the examples of homestead incentives and the fugitive-slave controversy, it explores how the state delegated the racial violence of creating and maintaining property in lands and people—and the racial order that sustained the state—to private interests. Part V reflects on how these histories enrich and transform our understanding of property law and how it has shaped our world, in order to help us imagine how it could.

I. HISTORICAL ERASURE IN PROPERTY-LAW CASEBOOKS

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

In the late nineteenth century, around the time that Harvard Law Professor John Chipman Gray published the first property-law casebook in 1888, the principal texts used for legal education shifted from treatises, which compiled principles of law distilled by scholars from statutes and judicial opinions, to casebooks, which collected original texts of judicial opinions and organized them by key themes with accompanying commentary. Since then, elite legal scholars have used the casebook to identify a field’s most important frameworks, its rep-
resentative doctrines and illustrative cases, and the background needed to understand its development. For over 130 years, the casebook has served as an engine of knowledge production, explicitly propagating what we know about property from one generation to the next.17

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

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

17. While casebooks claimed these functions to some degree at all times, they did so increasingly in the twentieth century as the use of the case method of teaching law became ascendant and treatise-based apprenticeships dwindled. See, e.g., ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 60-63 (1983); John Henry Schlegel, Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor, 35 J. LEGAL EDUC. 311, 317-18 (1985) (describing the gradual incorporation of casebooks into law school curricula).
19. See infra Appendix A.
20. See infra Appendix B for a full list of search terms.
21. This initial study leaves many questions about casebooks open, including the correlation of their content with that in the Restatements of the laws of property, and their relationship to the American Law Institute, the Annual Programs of Property, and related sections at the American Association of Law Schools annual meeting. Casebook editorial boards also appear
ing waves of national historical consciousness over the last 130 years and the corresponding shifting imaginations of the field. Casebooks emerged at a moment of great ideological ferment, coincident with the formal close of the frontier and the ascendance of Jim Crow. For nearly a century, though the law of conquest remained “good law” on the books, casebooks suppressed this history in a departure from earlier legal-treatise traditions that centered it. At the same time, for nearly half a century, they liberally incorporated cases involving the illegal, obsolete form of property in people. Further, when casebooks finally dispensed with slavery cases in the 1940s, they replaced them with another genre of cases affirming racial segregation—those upholding racially restrictive covenants.

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

A. The Erasure of Conquest

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

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

Nonetheless, *Johnson v. M’Intosh* did not appear in John Chipman Gray’s seminal casebook, nor in property-law casebooks thereafter until 1960. Instead, Gray framed American property law primarily in terms of its descent from the
English feudal system, rebuffing a great American preoccupation with the history of conquest and the disposition of public lands. His introduction to the law of real property focuses on aspects of the English system that perhaps distinguish it most from its American offshoot: it devotes twenty-three pages, for example, to topics such as the manor, military tenure, socage tenure, and tenancy in frank-almoign, which are at best marginally relevant to the American system. Gray’s historical account of the property system’s evolution through public-land law in England devotes a mere two paragraphs to “Tenure in the United States,” which include the dubious claims that colonies were held as English manors, and that American colonial property law was more feudal than England’s.

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

28. 1 JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY 385-408 (Cambridge Univ. Press 1888).
29. Id. at 385-408.
30. Id. at 407-08 (quoting Van Rensselaer v. Hays, 19 N.Y. 68, 73 (1859) (concerning rent in arrears)). Hays is representative insofar as it was common in the nineteenth century to cite to English authorities.
31. STORY, supra note 26, at 2.
32. Id. at 1 (“[O]ur domestic institutions and policy . . . have grown out of transactions of a much earlier date, connected on one side with the common dependence of all the Colonies upon the British Empire, and on the other with the particular charters of government and internal legislation, which belonged to each Colony . . . .”).
33. GRAY, supra note 28, at 385 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *59, *60).
34. STORY, supra note 26, at 160.
the Northwest Territory] exist even in theory.”35 Washburn further explained that

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

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

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

35. 1 EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY 43 (Boston, Lit-
tle, Brown & Co. 2d ed. 1864) (quoting Ohio Legislation, 11 AM. JURIST & L. MAG. 94 (1834)).
36. Id. at 43-44.
37. Frederick Jackson Turner, The Significance of the Frontier in American History: Address at
the Forty-First Annual Meeting of the State Historical Society 2 (1893) (published by the State
Historical Society of Wisconsin).
38. Id. at 3.
39. Id.
40. See infra Parts II-IV.
260 years of endogenous legal development in the colonies and the early Republic, encompassing the creation of the survey system, title-registry system, easy foreclosure of lands, and more. 41 To the extent that they addressed the system’s historical evolution, they focused on English feudal law, producing incongruous and often mystifying texts as casebooks began, likely for practical reasons, to incorporate more American cases. 42 It remained common to recite Gray’s suggestion that colonists had merely imported English property law to America, 43 and where the term “conquest” appeared, it referred to William of Normandy’s eleventh-century conquest, not English colonization in America. 44 Nonetheless, cases in these books also referred, without explanation, to specifically American phenomena, such as “lots” and “blocks” of tracts and the iconic 160-acre quarter section of the survey, and even annuities granted for surrender of colonial interests in the Caribbean to the Crown. 45 In the 1940s, Professor Ralph W. Aigler
noted in passing that “[t]he practice of recording or registering instruments of title, while general in the states of the United States, is followed only in portions of England,” without discussing this difference and focusing instead on an English county-level recording statute.46

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

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


50. Dibell, supra note 48, at 3-4.

51. Id. at 4.


53. See id. at 24 n.2 (citing Johnson for its holding that some traditional rules of property were inapplicable to the “savage[]” Natives, and tracing the evolution of this doctrine in United
In 1974, in the wake of massive social movements across the country, Professor Charles Donahue incorporated Johnson, along with the sit-in cases, into the text of an American property-law casebook for the first time.\(^{54}\) In 1978, Professor Richard Chused followed and placed Johnson in a lengthy, groundbreaking section on conquest and Federal Indian law.\(^{55}\) By the time Professor Joseph Singer published a casebook (which remains the standard for teaching about conquest and race in property law) including Johnson in the early 1990s,\(^{56}\) the trend was set. Johnson now appears in every property-law casebook, although teaching notes differ widely in terms of providing information about the case's content and historical significance.

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

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

\(^{57}\) Singer, supra note 22, at 766-67 (footnote omitted).


B. The Erasure of Slavery

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

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

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

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

64. See Valelly, supra note 63, at 139, 144-46; Williams v. Mississippi, 170 U.S. 213, 225 (1898); Foner, supra note 60, at 571-72, 582, 587-601.
65. See Joseph Gordon Hylton, The African-American Lawyer, the First Generation: Virginia as a Case Study, 56 U. PITT. L. REV. 107, 109 (1994). Joseph Gordon Hylton’s work combing through Census records reveals that a “handful” of others joined Allen before the Civil War, including in Louisiana while slavery was still in force. Id. at 108. In 1869, Howard Law School opened, and George Lewis Ruffin became the first Black man to graduate from Harvard Law, and eventually, the first Black judge in Massachusetts. Id. at 116, 140 n.138; see also J. Clay Smith, Jr., Emancipation: The Making of the Black Lawyer, 1844-1944, at 103, 119 (1993) (describing Ruffin’s career); William J. Simmons, Men of Mark: Eminent, Progressive and Rising 740-43 (Cleveland, Geo. M. Rewell & Co. 1887) (providing Ruffin’s biography).
68. Hylton, supra note 65, at 110-11.
69. See Gray, supra note 28, at 50-52 (incorporating Brent v. Chapman, 9 U.S. (5 Cranch) 358 (1809)); id. at 53-56 (incorporating Bryan v. Wecms, 29 Ala. 423 (1856)); id. at 56-64 (incorporating Chapin v. Freeland, 142 Mass. 383 (1886)); id. at 280 (incorporating Fitch v. Newberry, 1 Doug. 1 (Mich. 1843)); id. at 336-88 (incorporating Campbell v. Stakes, 2 Wend. 137 (N.Y. 1828)); id. at 638-40 (incorporating Lewis v. McNatt, 65 N.C. 63 (1871)); W. S. Pattee,
inheritance, and illustrated lessons concerning statutes of limitation,\textsuperscript{70} conversion,\textsuperscript{71} replevin,\textsuperscript{72} trover,\textsuperscript{73} detinue,\textsuperscript{74} trespass,\textsuperscript{75} adverse possession,\textsuperscript{76} gift and


\textsuperscript{72} Harvey v. Epes, 29 Va. (12 Gratt.) 153 (1855) (discussing enslaved people hired to work on a certain portion of a railroad who were taken to another portion, where they died), \textit{as reprinted in Warren 1915, supra note 69, at 437-38}.

\textsuperscript{73} Woodson v. Pearce, 37 Tenn. (5 Sneed) 416 (1858) (involving a slave owner who sought recovery of property in several enslaved people, including a woman named Caroline), \textit{as reprinted in Bigelow \& Jacob, supra note 70, at 74–76}; \textit{Bigelow \& Eckhardt, supra note 70, at 128-129}.

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

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

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

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

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

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


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

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

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

84. See Hooks v. Smith, 18 Ala. 338, 341 (1850) (“[Defendant] was clearly liable for [the slave’s] value.”), as reprinted in Warren 1919, supra note 69, at 147; see also Harvey v. Epes, 53 Va. (12 Gratt.) 153, 153 (1855) (holding the death of enslaved people to be a conversion), as reprinted in Warren 1915, supra note 69, at 437.
A few casebooks from this period include cases that provided perspectives on the legacy of slavery, the challenges Black people faced in acquiring and protecting their property rights, and even abolitionist sentiments. In 1898, for example, Minnesota College of Law Dean William Sullivan Pattee used an 1892 case to illustrate the rule that an adverse possessor can acquire title only to that quantity of land she actually occupies. In that case, *Allen v. Mansfield*, a woman named Malinda claimed a lot upon which she resided with her children in “a small house or shanty” enclosed by a fence by parol gift from her deceased enslaver; the court noted that “[t]he evidence tends to show that she dug a well and planted some trees in the inclosed part, and that she, for a time at least, had a small pig-pen on the uninclosed part.”\(^85\) Her former enslaver’s family nonetheless sold the lot to a third party, who paid taxes on the lot and eventually sued to eject her.\(^86\) Though the lower court awarded Malinda title to the whole lot, on appeal, she was estopped from asserting title to the unenclosed part.\(^87\)

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

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

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85. 18 S.W. 901, 902 (Mo. 1892).
86. Id.
87. Id. at 904.
88. BURDICK, *supra* note 47, at 269.
90. See WARREN 1915, *supra* note 69, at 37-40 (incorporating Ford v. State, 37 A. 172 (Md. 1897)); id. at 134-41 (incorporating Chapin v. Freeland, 8 N.E. 128 (Mass. 1886)); id. at 145-48 (incorporating Bryan v. Weems, 29 Ala. 423 (1856)); id. at 196-97 (incorporating Hepburn v. Sewell, 5 H. & J. 211 (Md. 1821)); id. at 206-13 (incorporating McWillie v. Van Vacter, 35 Miss. 428 (1858)); id. at 427-28 (incorporating Nelson v. Iverson, 17 Ala. 216 (1850)); id. at
activity protesting segregation and Jim Crow in the 1930s and 40s, the number dropped. Furthermore, as casebook authors began to omit cases involving property in enslaved people, they also began to omit portions of decisions citing cases involving property in enslaved people.\(^91\) Though most casebooks dropped all such cases, there were exceptions. University of Chicago Law School Dean Harry A. Bigelow, for example, included several slavery cases in multiple editions of his casebook through 1942.\(^92\) After that, casebooks adopted a new norm of totally erasing the history of slavery from the study of property law.

\(^{91}\) See Park, supra note 6, at 1998.

Around the same time that they phased out traces of slavery, however, many casebook authors began to incorporate cases that upheld the validity of racially restrictive covenants.  

By this time, their incorporation indexed a delay in deeming this law important to the canon. After all, racially restrictive covenants appeared in the United States in the 1890s, and the U.S. Supreme Court upheld the validity of racial covenants in *Corrigan v. Buckley* in 1926. In *Parmalee v. Morris*, a 1922 case that appeared in a 1933 casebook, the Michigan Supreme Court upheld a racial covenant, reciting the Redeemers’ notion that civil rights were “special treatment.”

Casebooks also delayed incorporating cases about racial zoning, which the Supreme Court had declared unconstitutional in 1917 in a decision that did not appear in casebooks until 1948. That year, the Supreme Court finally invalidated racial covenants in *Shelley v. Kraemer*. Though casebooks authors incorporated *Shelley* relatively quickly, they seemed to do so with thinly veiled reluctance. Aigler, for example, tucked a citation to *Shelley* into an unobtrusive footnote in 1951. And Byron R. Bentley, who had previously included many cases validating racial covenants, failed to offer a substantive update of the law, merely omitting the overturned cases and citing *Shelley* without describing its holding in a hypothetical.

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


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


Though case law about racial zoning and racial covenants soon appeared more regularly, casebooks did not explain the historical antagonism to Black property rights that they illustrate. Indeed, both an executive committee and the Supreme Court proved willing to make the connection between the racialized landscape of property in the United States and the country’s history of slavery before any property-law professors did. In 1968, President Johnson’s National Advisory Committee on Civil Disorders released the Kerner Report, which began its account with the history of slavery and racist institutional development after abolition, and characterized the racial unrest in 1967 as “the culmination of 300 years of racial prejudice.”

In 1968, in *Jones v. Alfred H. Mayer Co.*, the Justices also held 7-2 that racial discrimination in housing constituted “badges and incidents of slavery” that the Thirteenth Amendment had empowered Congress to eliminate.

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

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

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

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


a hypothetical estate. Uniquely, however, it also speculates about how these terms became traditional. After noting, “just why no one knows for sure,” it offers the Oxford English Dictionary’s suggestion that it was traditional to denote lands growing different crops by color (“peas and beans are black, corn and potatoes are white”), and the possibility of lands receiving rents (“black rents are payable in produce, white rents in silver”).

My own search found that the terms, infrequent but present in English legal treatises, also constituted the title of a proslavery novel that appeared in 1856, the same year the Court decided *Dred Scott*, from a prominent Confederate press. William Burwell, the author of *White Acre vs. Black Acre*, was the son of a Virginia politician by the same name who served as private secretary to Thomas Jefferson, and was a representative in the Virginia House of Delegates and in the U.S. House of Representatives; Burwell enslaved nearly 100 people. The younger Burwell was also a slaveowner who served in the Virginia House of Delegates, and his daughter Letitia followed him in writing books that vigorously defended slavery and “the Lost Cause.”

In Burwell’s allegorical novel, which formed part of the literary response to Harriet Beecher Stowe’s antislavery classic *Uncle Tom’s Cabin*, “White Acre” was an incompetent northern farm and “Black Acre,” a southern plantation labored upon by loyal, hardworking slaves. It seems likely that the deployment of these terms by a member of a high-profile political family to defend slavery so publicly at this turbulent time might have had some influence on their popular connotations and meaning, or at least as much as obscure English planting terminology.

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

109. *Id.* at 101.


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

113. *See Letitia Burwell, A Girl’s Life in Virginia Before the War* (New York, Frederick A. Stokes Co. 1895); *see also Stephanie Jones-Rogers, They Were Her Property: White Women as Slave Owners in the American South* 201-02 (2019) (discussing Letitia Burwell’s belief that “[s]lavery benefited the enslaved”).

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

II. DISCOVERY AND THE RACIAL HIERARCHY OF COMMERCIAL EMPIRE

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

117. Id. at 1714.
118. In property-law classes today, a case involving rights to a baseball thrown to the crowd is most often used to teach an abstract version of this rule. See Popov v. Hayashi, No. 400545, 2002 WL 3183731, at *4 (Cal. Super. Ct. Dec. 18, 2002).
elevating U.S. title over Native title, and clearly establishing conquest as the basis of U.S. sovereignty and property.

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

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

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

121. I am noting that Chief Justice Marshall made contributions to the Discovery Doctrine—obscuring its relation to enslavement and making its racial hierarchy an explicit principle of the land market—that are distinct from the liberties he took in making the decision turn on the Discovery Rule in the first place, which other scholars have discussed. See, e.g., LINDSAY ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 45-75 (2005) (arguing that the Court in Johnson endorsed a view of the Discovery Doctrine that resulted in devastating effects on Indigenous peoples and their lands); see also Matthew L.M. Fletcher, The Iron Cold of the Marshall Trilogy, 82 N.D. L. REV.
too, emerged from the history of legal reasoning he describes. During the period of the Crusades, building on the Catholic Church’s notion that it had worldwide papal jurisdiction and the duty to build a universal Christian Commonwealth, canon lawyers developed the idea that holy war waged by Christians against infidels was “just war.”122 In 1436, ongoing Portuguese and Spanish raids of islands off the Iberian coast prompted Pope Eugenius IV to issue the Romanus Pontifex, a papal bull that referred to the savage ways of infidel natives to affirm Portuguese claims that their conquests were on behalf of Christianity. Pope Nicholas V repeated these arguments in the Dum Diversas of 1452 and another Romanus Pontifex in 1454, to authorize Portugal’s ongoing entry into West Africa to seize and enslave people.123 These activities launched the transatlantic trade, which the English joined after establishing colonies in mainland America and the Caribbean in the seventeenth century. In Johnson, however, Marshall’s discussion of discovery is confined to the subject of sovereignty and property in land, while in The Antelope, two years later, he obliquely referenced this longer history of enslavement during conquest by identifying the theory of just war as the positive-law origin of the transatlantic slave trade.124 Although it is worth noting that most African enslavement did not result from captives taken in war, the extensive enslavement of Native people during the colonial period—another part of the history of conquest omitted from Marshall’s account of conquest here—generally did.125


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

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

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

\(^{128}\) Benton & Straumann, supra note 127, at 29.

\(^{129}\) See Slattery, supra note 122, at 56-71 (describing the legal arguments France and England developed to challenge Spain and Portugal’s monopoly claims on conquest and the authority of the papal bulls); see also PAGDEN, supra note 122, at 76-80 (explaining that the British and French turned instead to theories of title by possession and labor—occupying and cultivating *res nullius*).
French, Swedish, and Dutch by incorporating the requirement of possession into the rule, and he explicitly articulated the racial hierarchy of conquest—which theories of the law of nations had left implicit—as the basis of trade, or transactions for land.130

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

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131. See, e.g., WILLIAMS, supra note 122, at 86–88 (explaining how the European “vision of Indian normative divergence” undergirding the Laws of Burgos “mandated the diminution” of Native rights under natural law).
133. WILLIAMS, supra note 122, at 101 (quoting FRANCISCO DE VITORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 151 (Ernest Nys ed., John Pawley Bate trans., Carnegie Inst. Wash. 1917) (1557)).
135. Id. at 26 (quoting Francisco de Vitoria, On the American Indians, in FRANCISCO DE VITORIA: POLITICAL WRITINGS 231, 279–80 (Anthony Pagden & Jeremy Lawrance eds., 1991)).
136. Id. at 28.
137. Id. at 20–25.
not prevent [Europeans’ entry and traffic].” 138 Indeed, if they sought to block trade, Europeans would be justified in waging “just war” against them—making the theory of “just war” an enforcement mechanism for European commercial rights.139

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


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


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

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

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

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\(^{144}\) See infra Part IV.


\(^{146}\) Id. at 592.

\(^{147}\) Id at 545.

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

\(^{149}\) Johnson, 21 U.S. (8 Wheat.) at 592.

\(^{150}\) Id. at 587.
Native title in two ways—echoing the Scholastics—through consensual trade or purchase, or by just war.151

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

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

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


155. Jesse Dukeminier calls Justice Marshall’s racial justifications “discomfiting,” and explains that “prior possession by aboriginal populations (which were sometimes called savage populations, or semi-civilized ones), was commonly thought not to matter.” DUKEMINIER ET AL., supra note 108, at 12. This legal fiction was also discomfiting to Marshall, who, despite his own racism, called European discovery claims “extravagant” and “pompous.” Johnson, 21 U.S. (8 Wheat.) at 590-91.
become the subject of active legal disputes between tribal nations and others, than those held by private parties or under public management in general. Johnson, which affirmed prohibitions on state and private purchases that Congress enacted through its Trade and Intercourse Acts as early as 1790, prohibited states and private entities from terminating Native title in ways that remain the cause of action in many land disputes. Its identification of the United States as the only entity to which Native nations could freely transfer title to land created constraints that still apply to lands under Native dominium today, an area larger than that held by California.

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

158. Singer has likened this restraint on alienation to a right of first refusal. Singer, supra note 151, at 30-33. The United States also later became the only entity with the power to reacquire lands for Native nations. See William Wood, Indians, Tribes, and (Federal) Jurisdiction, 65 U. KAN. L. REV. 415, 417 (2016).
159. Reese, supra note 15, at 588.
160. Singer, supra note 151, at 9 (emphasis omitted).
161. Specifically, the extent to which “our land titles originate in the dispossession of first posses- sors . . . places subsequent titles in doubt” and may support demands for restoration and rep- aration. Id. at 9-10; see Singer, supra note 22, at 766 (“From a moral point of view, conquest puts all current land titles in doubt . . . .”).
Here, I underscore that beyond establishing public-title claims in the United States, conquest also resulted in profound practical and systemic consequences for all privately held lands in the country. The import of private title to conquest was already suggested by both the Scholastics’ focus on the commercial dimensions of conquest and the fact that Johnson’s principal question concerned private title to lands. Nonetheless, property-law casebooks and curricula do not emphasize the significant impact of Johnson’s Discovery Rule on commerce in the United States, and more specifically, its land market. In general, the field has astonishingly little explored the enterprise of creating private-property claims in the colonies that the Discovery Rule launched, or the unique ways that the English deployed law to do so. The following two Parts show how theories of labor and possession contributed to settlers’ efforts, under the banner of Discovery, to produce property in land and human beings in the American colonies.

III. THE LABOR OF PROPERTY CREATION IN THEORY AND PRACTICE

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

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


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

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

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

165. Locke, supra note 163, at 290–91.
A. The Labor Theory and Property Value

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

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


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

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

168. TULLY, supra note 166, at 140.
169. Id.
170. BANNER, supra note 24, at 47; David Armitage, John Locke, Carolina, and the Two Treatises of Government, 32 POL. THEORY 602, 603 (2004).
172. JOHN LOCKE, supra note 163, at 288.
173. Id. at 290.
174. Id. at 283-85; see also Brad Hinshelwood, The Carolinian Context of John Locke’s Theory of Slavery, 41 POL. THEORY 562, 564 (2013) (discussing how Locke used the concept of just war); The Antelope, 23 U.S. (10 Wheat.) 66, 114 (1825) (justifying the slave trade). Holly Brewer has more recently argued that “Locke’s support for slavery was weaker than his critics have implied.” Brewer, supra note 171, at 1052.
175. THOMAS, supra note 123, at 92-113.
The English, French, and Dutch joined the African slave trade in the early seventeenth century. The first record of English colonists’ purchase of Africans was in Virginia in 1619. In the 1630s, records of enslaved Africans appeared in Pennsylvania and Maryland, and Massachusetts constructed the slave ship that first brought people from Africa to Connecticut in 1637. In the 1660s and through the 1680s, the number of enslaved persons in the colonies burgeoned as the Crown promoted African enslaved labor through its monopoly company and colonists increasingly built their trade with Barbados. In 1683, Colonel Nicholas Spencer, Secretary of Virginia, boasted that “Blacks can make [Tobacco] cheaper than Whites;” between 1670 and 1698, the Black population increased from 2,000 to 5,000, and by 1710, the number of enslaved Black people in the colony was estimated at “upwards 15,000.” In Professor Anthony Parent’s words, “Virginia had become a slave society.”

By contrast, in keeping with Vitoria’s inclusive model of conquest, Locke does acknowledge some fundamental rights to property in Native peoples in the Second Treatise. He argues, for example, that “the wild Indian,” like all others, derives property rights from his labor in the hunter-gatherer context: if he harvests a nut or gives chase to a deer to kill it, he too is entitled to “the Fruit, or Venison.” However, Locke also acknowledges that his main purpose in the exposition is to describe rights in land, “the chief matter of Property being now not...
the Fruits of the Earth, and the Beasts that subsist on it, but the Earth it self."\textsuperscript{186} Property in land is analogous, he explains: "I think it is plain, that Property in that too is acquired as the former. As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common."\textsuperscript{187}

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

\begin{itemize}
  \item \textsuperscript{186} Id. at 290–91.
  \item \textsuperscript{187} Id.
  \item \textsuperscript{188} Id. at 287.
  \item \textsuperscript{189} Natsu Taylor Saito, \textit{Race and Decolonization: Whiteness as Property in the American Settler Colonial Project}, 31 HARV. J. ON RACIAL & ETHNIC JUST. 31, 52 (2015).
North Carolina, John Lawson observed that Native groups “have no Fence to part one another’s Lots in their Corn-Fields; but every Man knows his own, and it scarce ever happens, that they rob one another of so much as an Ear of Corn.” 192 Several scholars have highlighted that English property arrangements of the time were strikingly similar to many Native groups’ practices, which allocated farming plots to families and maintained common resource areas for the community; the English, like some Native communities, also planted fields together and separated different families’ rows by a narrow strip of grass. 193 While colonists imported fixed-field agriculture practices from England, as Peter Thomas notes, swidden systems, like those used by Native groups in the Connecticut River Valley and “throughout the world[,] have frequently produced equal, or even higher, returns than fields under continuous cultivation.” 194

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

[T]hese savages have no particular propriety in any part or parcel of that country, but only a general residency there, as wild beasts in the forest; for they range and wander up and down the country without any law or government, being led only by their own lusts and sensuality. 195
Similarly, in 1629, Massachusetts Bay founder John Winthrop wrote, “This savage people ruleth over many lands without title or property, for they enclose no ground.”196 William Penn called lands in America “waste or uncultivated Country.”197 Many scholars have observed that these justifications served to obscure different circumstances that the English exploited to claim that Native nations were not using land. In actuality, many English settled on the grounds of villages decimated by new European diseases, or claimed fields temporarily out of use due to Native communities’ crop rotation or preservation of hunting grounds.198

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

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

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197. William Penn, *A Brief Account of the Province of Pennsylvania* 1 (London 1686); see also John Cotton, *God’s Promise to His Plantations* 4 (London 1634) (asserting colonists’ right to occupy “vacant place[s]”).

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


200. The preacher Robert Gray concluded therefore that Native people claimed no property: that “[t]here is not meum and tuum amongst them,” and “if the whole land should be taken from them, there is not a man that can complain of any particular wrong done unto him.” Williams, supra note 122, at 211 (quoting Robert Gray, *A Good Speed to Virginia* [26] (London 1609)).
and spurred this labor. As Chief Justice Marshall describes in *Johnson v. M’Intosh*, under Discovery, each European nation pursued property creation in the colonies differently,201 and the English uniquely relied on settlement to take possession of lands. However, in the early period, English colonial administrators faced perennial problems in recruiting the numbers needed to actually occupy the lands and consummate their collective claims through possession under the Discovery Doctrine.202 Across the Eastern Seaboard, colonies found it virtually impossible to recruit populations for their settlements because of the dauntingly dangerous nature of the venture203 until they adopted some variation of the headright system.204 Headright laws granted individuals “rights” to a certain number of acres (often fifty) in exchange for every person or “head” that they brought to the colony who would clear, cultivate, and defend that land over a term of years.205 In other words, they promised private title to settlers to land that they occupied and “improved.” The activities Locke enumerates—“tilling,” “planting,” and “[i]nclosure”—all specifically constituted homesteading requirements in headright laws, which helped engineer the waves of migration that “peopled North America” and caused the colonial population to burgeon in the late seventeenth and eighteenth centuries.206

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

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

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

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

204 FORD, supra note 202, at 96–98.

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

206 The phrase “peopling North America” comes from BAILYN, supra note 203. See also BERNARD BAILYN, THE BARBAROUS YEARS: THE POPELING OF BRITISH NORTH AMERICA: THE CONFLICT OF CIVILIZATIONS, 1600-1675 (2012) (using the same phrase). Elsewhere, I have argued that the headright system, Native removal, and the forced migration of Africans should be understood as an early part of immigration-law history in America. See K-Sue Park, Self-Deportation Nation, 132 HARV. L. REV. 1878, 1882-87 (2019). Here, I suggest it is part of the development of American property law and its famous, persistent homesteading principle.
nations from their lands. Dispossession and displacement were critical for converting the lands into property, while actual occupation, planting, and tilling had the effects of spreading disease and chasing away game. As settlement made life more difficult for Native people, it became easier for private individuals and governments to purchase land from them: “A [N]ative population decimated by sickness and deprived of sources of food and other necessities had little bargaining power. The title of occupancy went for a pittance.” Moreover, colonies made grants of land to men “able to defend it . . . to secure protection without the expense of a standing army.” Military-aged men who were ready for combat and who had served in wars against Native nations received especially large grants. Even before the Revolutionary War ended, at least three states adopted headright systems to help populate their backcountry, including Virginia and North Carolina, as well as Massachusetts, which offered settlers one hundred acres “on the sole condition of clearing sixteen acres in four years.” Later, the United States adopted the strategy of incentivizing settlement with promises of land, though at a price, to help it extinguish Native title in western territories with the famous Homestead Act of 1862.

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


208. Dukeminier et al., supra note 108, at 18.


210. Id.

211. Id. at 102.


213. Preemption rights had monetary value because of future projections about removal. See infra Section III.B.
transfer of possession that entailed expropriation, which brought them into markets. The next Section explores how property law created those markets—surely a question of interest to the field—or in other words, how colonists evolved new property laws, practices, and institutions to create the powerful, endogenously grown American property-law system of today.

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

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

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

214 Priest, supra note 13, at 5-7.
est factors in its development was the legal transformation of African enslavement into an emphatically racial, hereditary, and perpetual “predicament” disengaged from the Christian mission of discovery. The American institution of African chattel slavery would have a profound effect on the world that cultivated it. The anti-Blackness it entrenched came to provide a blueprint for the racialization of other nonwhites, both who lived in the colonies, and who arrived in subsequent waves of migration long after. Further, in developments beyond the scope of this Article, it would eventually spur a reorganization of property law to circumvent Black property rights and shape the land market after abolition. All the colonies developed some dependence on the labor of enslaved Africans, especially in the South, and passed laws to evolve this form of subjugation. Notwithstanding original justifications for the slave trade through theories of Christian just war, in 1667, for example, Virginia passed a law providing that baptism could not affect the bondage of Black or Native people, ensuring that “the skin color and not the heathenism of their black and Indian slaves [] ‘justified’ their subjugation.” Other laws ensured the racial, hereditary, and perpetual nature of enslavement in America by tying it to kinship and segregation in ways that, as Professor Jennifer L. Morgan writes, “legally complete[d]” the association between Blackness and forced labor. Colonies dictated that free-born women who married enslaved men would be enslaved during their husbands’ lifetimes, and that children born from such marriages would be slaves for life. In 1662, Virginia passed a law stating that “all children borne in this country shalbe held bond or free only according to the condition of the mother,” contravening the English common-law rule that status followed that of the father.

216. See Jennifer L. Morgan, Reckoning with Slavery: Gender, Kinship, and Capitalism in the Early Black Atlantic 5-6 (2021) (discussing her preference for the word “predicament” to the stasis implied by “condition”).

217. Higginbotham, supra note 177, at 36-37.

218. Jennifer L. Morgan, Laboring Women: Reproduction and Gender in New World Slavery 72 (2004); see also Higginbotham, supra note 177, at 40-47 (providing an overview of colonial-era laws that imposed additional servitude on female servants who had children out of wedlock, as well as laws that tied the status of an interracial child to that of the unfree mother, perpetuating servitude); Jordan, supra note 215, at 44-45 (describing colonial-era antimiscegenation statutes and their contributions to racial debasement). These conditions did not evolve immediately or consistently with the importation of Africans to the mainland. See Linda M. Heywood & John K. Thornton, Central Africans, Atlantic Creoles, and the Foundation of the Americas, 1585-1660, at 323-27 (2007); Kathleen M. Brown, Good Wives, Nasty Wenchés, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia 107-08 (1996).

219. Act XII: Negro Womens Children to Serve According to the Condition of the Mother (Dec. 1662), reprinted in 2 William Waller Hening, The Statutes at Large; Being a Collection
This rule of *partus sequitur ventrem*—literally, “off-spring follows the womb”—became a governing principle of property across the colonies, together with antimiscegenation laws. It ascended to paramount importance in the U.S. domestic slave trade after the importation of enslaved Africans was abolished in 1808 and the rape of Black women became a key means of property increase. Virginia Judge Gholson in 1831 argued to the State Legislature, “‘Partus sequitur ventrem’ is coeval with the existence of the right of property itself.”

These forms of legal debasement, key to the construction of Black laborers as *property* in contradistinction to white servants, helped “congeal[]” and “harden[]” categories of racial subjugation,” as Morgan has recently observed. This evolving anti-Blackness affected free as well as enslaved Black people, and also influenced evolving colonial racial ideas about Native people and the ways colonists interacted with nonwhite groups in general. Colonial legal codes increasingly grouped nonwhites together to limit their mobility, freedom of assembly, freedom to bear arms, and capacities in court, among other things.

This general racialization grew more pronounced over time as the colonial population grew exponentially and power relations between colonists and Native nations shifted to favor this aggressive new force.

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

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

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


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

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

226. BANNER, supra note 24, at 24 (quoting instructions from the earliest settlers of Massachusetts); see also id. at 39-43 (arguing that the English respected Indian property rights and continued to do so because their chains of title originated in Native title).
230. BANNER, supra note 24, at 22 (quoting DANIEL GOOKIN, HISTORICAL COLLECTIONS OF THE INDIANS IN NEW ENGLAND 39 (Boston 1792)).
231. Id. at 42.
established by then: establishing municipalities, exercising legal jurisdiction over Native people in their own lands and purchasing land, often coercively, and in huge tracts. The activity of purchase anchored all chains of title in the country in Native title, as Johnson later acknowledged. Evidence indicates that the practice of memorializing these payments with recorded deeds did not become established for many decades, due partly to the impermanent nature of settlement at the time; colonists also preferred, when it was still possible, to find new lands rather than engaging in conflict over specific lands with one another, and their inexact dealings may have stimulated more rapid settlement. Surveys were haphazard as a result of colonists following “freedom of location” to choose the most desirable lands, although to a lesser extent in New England than in the South or Middle Atlantic.

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


234. See Banner, supra note 24, at 140.

235. See, e.g., 1 Thomas Hutchinson, The History of the Colony and Province of Massachusetts-Bay 383 (Lawrence Shaw Mayo ed., Harv. Univ. Press 1936) (1764); David Thomas Konig, Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts, 18 Am. J. Legal Hist. 137, 144 (1974); Konig, supra, at 137 (describing how in Essex, Massachusetts, “order and regularity were not imposed on land arrangements until after 1660”).

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

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

238. See, e.g., id. at 153, 168 (“It was not unusual in these cases for both parties to bring men to court to attest to usage of the land many decades before, when they had been boys.”); Ebenezer W. Peirce, Indian History, Biography and Genealogy: Pertaining to the
to settle disputes over land by appointing townsmen to investigate and record transactions “to be esteemed and accounted as valid and authentick, as if they had been entered and recorded at the time when they were granted, though the day and year of such grants be not mentioned nor remembered.” Questions about the legitimacy of colonial charters and colonists’ claims vis-à-vis Native groups lingered through the seventeenth century, and pointing to chains of title originating in Native title became increasingly important for colonists in confirming their own title claims against the world. When Governor Edmund Andros of the Dominion of New England sought in 1686 to reverse previously settled policy by invalidating all titles that could not be traced back to government grants, he caused a storm of protest from New Englanders, some of whom declared that if purchase from Indians could not serve as the root of a valid land title, “no Man was owner of a Foot of Land in all the Colony.” Each New England coastal town subsequently sought to negotiate retroactive “quitclaim” deeds with “known” descendants of the Native leaders who were contemporaries of the first settlers, to ensure they extinguished Native title on the record.

To construct these chains of title, these early title disputes inspired a consolidation of public records concerning property ownership that is now a hallmark of the Anglo-American property system, and that has distinguished it from the English system. The innovation of building a comprehensive and public title registry was a technological solution that not only helped solve colonial legitimacy questions, but facilitated commerce as land became a preeminent colonial commodity, traded at a scale, intensity, and liquidity theretofore unknown in England. James Willard Hurst, the father of American legal history, noted that though many colonies adopted English practices of protecting estates from easy
alienation, such as entail and primogeniture,243 “the seventeenth-century begin-
nings of the recording act system expressed our early interest in turning land
into a more readily transferable good.”244

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

In short, the fundamental elements of the land system—the comprehensive
title registry, the rectangular survey as a method of creating individual enclo-
sures, as well as the literal outlines of state and local jurisdictions—grew out of
efforts to take possession of Native nations’ homelands. As these activities in-
twined expropriation with property creation, we should understand Locke’s ca-
pacious descriptions of “improving,” “cultivating,” and “enclosing” land, in his

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

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

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

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

247. See FORD, supra note 202, at 10.
own account of property creation, as encompassing this labor, which it seems to
describe—measuring and mapping land to prepare it for market, and consoli-
dating this information to facilitate market transactions. Historically, the final
innovation that structurally completed this new system of property law and en-
abled it to commodify land in a qualitatively unprecedented way—though it does
not appear in Locke’s writings—was the introduction of easy foreclosure.

For centuries, English law had regarded land as essentially unlike moveable
goods due to land’s unique characteristics of sustaining life and the challenges
designating its features, such as rivers, lakes, forests, and shorelines, as anything
other than a common good. Under that ancient distinction, chattel prop-
erty, but not real property, was liable to seizure for the nonpayment of debts.248
However, in the colonies, the protection of large estates from foreclosure made
it possible for debtors to conceal enslaved persons from their creditors on their
land. Further, land and enslaved labor were interdependent commodities: each
asset became useless without the other. The attempt to keep plantations whole
led to experiments in changing the legal categorization of enslaved people: they
were treated alternatively as chattel—the legal equivalent of cattle, sheep, and
horses—and as protected real estate. Indeed, the high value of enslaved people249
led several colonies to use real-property designations to protect this property
from rules governing chattel. South Carolina, following Barbados, tried to char-
acterize slaves as real estate in 1690, though the English Privy Council did not
permit it.250 And Virginia, Louisiana, Kentucky, and Arkansas all designated en-
slaved persons as realty at different periods between 1705 and 1852.251 In the
slaveholding south, Professor Thomas Morris tells us, some rules of real-prop-
erty law were applied to enslaved persons in over a third of jurisdictions.252 Of
these legal experiments, Virginia jurist St. George Tucker stated:

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

248. See 3 WILLIAM BLACKSTONE, COMMENTARIES *419–20; Claire Priest, Creating an American
(2006); K-Sue Park, Money, Mortgages, and the Conquest of America, 41 LAW & SOC. INQUIRY
1006, 1007–08 (2016).

249. See JONES, supra note 10, at 95–98.


251. Id.

252. Id.
as a mere chattel; and in Virginia it might have been equally for the advantage of agriculture to consider the slave who cultivated the land as real estate.\textsuperscript{253}

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

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

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

\\textsuperscript{253} Id. at 65 (quoting St. George Tucker, \textit{Discourse Concerning the Several Acts Directing the Course of Descents, in Virginia}, in 3 St. George Tucker, \textit{Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia app. at 74 (Lawbook Exch. 1996) (1803)).

\\textsuperscript{254} Priest, supra note 248, at 411-16.

\\textsuperscript{255} Park, supra note 248, at 1024.

\\textsuperscript{256} Priest, supra note 248, at 423.

not new, enclosures evolved in America to serve the novel idea that “individuals possess all the resources within a given area of land.” Never before had the power to expel people from lands been a key mechanism of the market, without which credit and growth would grind to a halt. This new land system evolved in response to a conception of “unlimited” land that was there for the taking, which gave erasure a positive frame. As Hurst observed, “the sheer abundance of land was probably enough to assure that a static, feudal type of tenure could not take lasting root with us.” Its effectiveness during the colonial period encouraged colonial and state governments, and finally the United States, bankrupt after the Revolutionary War, to view the sale of “wild lands” as their greatest source of revenue.

Unsurprisingly, the production and regulation of the nation’s two most valuable forms of property—land and people—were a major priority, preoccupation, and source of conflict for governments—colonial, state, and federal—in ways that have had a lasting effect on the nation’s legal institutions as well as its political, social, and economic life.

It is not difficult to see how the labor theory’s narrative justifications for conquest coalesced to fortify the lodestar ideology that acquisition, in American property law, has concerned “unowned things,” and the correspondingly popular, durable mythology of America as terra nullius—open, vacant, virgin soil.

At minimum, teaching about the labor theory should include the well-established scholarship on the context of its development—on the long, consistent history of its invocation by major figures in American history to justify colonization, and the way its fictions stereotype and erase Native and African peoples.

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

259. BANNER, supra note 24, at 37.

260. HURST, supra note 244, at 12.

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

262. This is not a legal justification for conquest in North America, but it is a powerful mythology. See Stuart Banner, Why Terra Nullius? Anthropology and Property Law in Early Australia, 23 LAW & HIST. REV. 95, 95-96 (2005) (exploring the use of the concept by British colonizers in Australia and New Zealand). See generally HENRY NASH SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH (1999) (tracing myths and symbols of Western expansion and their role in politics, economics, and society).
Here, I have further proposed that the labor theory also presents us with an account of the actual work—including legal work—of property creation in the colonies.

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

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

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

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

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

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

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

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

\textbf{A. The Homesteading Principle: Conquest by Settlement}

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

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

\textsuperscript{266}. Alexander Hamilton, for example, noted that “Indian hostilities . . . would always be at hand.” \textit{The Federalist No. 25}, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

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

\textsuperscript{268}. Park, \textit{supra} note 267, at 81.

\textsuperscript{269}. \textit{Id.} at 65.

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

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

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


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

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

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

275. Linklater, supra note 261, at 163.
276. Banner, supra note 24, at 126.
277. Id. at 124-25.
278. Id. at 125.
280. Hibbard, supra note 261, at 198.
281. Park, supra note 267, at 68. In 1807, for example, the state of Utah sent a memorial to Congress describing their settlers as such. Id. (citing Memorial from the Governor and Legislative Assembly of Utah, Records of the U.S. Senate, Record Group 46 (RG 46), 55A-J15; National Archives Building, Washington, D.C.).
282. Hurst, supra note 244, at 4 (quoting Constitution of the Pike River Claimants Union, reprinted in 2 Wisc. Assembly J. 472-75 (1856)).
“rabble” on both sides. But while in some difficult diplomatic situations, the government punished settlers for their incursions, in other instances, they turned a blind eye and confirmed settlers’ claims. Under this arrangement, after all, the government preserved federal dollars by not paying a formal military force to take the lands. The apparent independence of settlers’ violence also left the government free to maintain a position of formal diplomacy towards tribes and pursue an overt policy of conciliation for most of the nineteenth century. In other words, the government’s use of private incentives to motivate settlers created enough distance that the government could disavow, tacitly endorse, or openly praise the racial violence of conquest. At the same time, as Ablavsky has recently shown, the government did not have the ability to do much more than manage the settlers’ prodding and pushing, in ways that created new law, expanded jurisdictions, and cemented a relationship between a nation and its polity marked by distrust and mutual exploitation.

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

284. Park, supra note 267, at 67–68.
285. Id.
286. ABLAVSKY, supra note 270, at 2-3.
287. See Park, supra note 267, at 57.
288. Id. at 78 (quoting H.R. REP. NO. 49-3117, at 10 (1886)).
B. Property Against Human Self-Possession

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

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

290. MORRIS, supra note 250, at 196–97.
292. MORRIS, supra note 250, at 172 (quoting GA. Const. of 1798 art. III, § 12, in 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOR OR HERETOFORE FORMING UNITED STATES OF AMERICA 801 (Francis Newton Thorpe ed., 1906)).
294. 16 N.C. (2 Dev.) at 266.
In other words, slavery pitted people’s self-possession against enslavers’ possession of them, so that one person’s liberty confronted another’s property right. As Professor Peter H. Wood has written, “[n]o single act of self-assertion was more significant among slaves or more disconcerting among whites than that of running away . . . . [T]hese were the people who, in a real sense, elected to ‘steal themselves.’”295 As this Section shows, the effort to defy the persistent truth of personhood manifested in a battery of laws that acknowledged the limited ability of the state to enforce enslavers’ possession by delegating that labor of racial violence to private entities—slave catchers, private militias, and the “pursuing committees” of protective associations.

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

296. Professor Eugene Genovese observes that people’s escapes “struck the hardest blow against the regime.” GENOVESE, supra note 293, at 648.
300. See James Madison, Saturday June 30, 1787, in Convention, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 486 (Max Farrand ed., 1911) (”[T]he States were divided into different interests not by their difference of size, but . . . principally from [the effects of] their having or not having slaves.”).
between 1777 and 1784. 301 The stakes of the trade had also grown to over £21 million by 1774, 302 the equivalent of almost $3.2 billion today. During the Revolutionary Era, as the number of people who escaped and sued their enslavers for freedom increased dramatically, formerly enslaved people in New England organized antislavery committees and disseminated Black freedom petitions with the help of white abolitionists. 303

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

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

301 David, supra note 297, at 20.
302 Jones, supra note 10, at 90.
305 Holden-Smith, supra note 298, at 1118 (footnote omitted).
306 Id. at 1119-20; see also Gary B. Nash & Jean R. Soderlund, Freedom by Degrees: Emancipation in Pennsylvania and its Aftermath 197 (1991) (identifying these same factors).
307 Holden-Smith, supra note 298, at 1087 (quoting David, supra note 297, at 22).
308 Id.; see also Morris, supra note 304, at 33-34 (describing anti-slavery activists’ criticisms of the Fugitive Slave Law on these grounds).
and state assistance for private slave catchers who complied with the state's procedures.309 Pennsylvania, a free state bordered by three slave states, tried repeatedly to address kidnapping.310 In 1826, it required Southern claimants to apply to a judge, justice of the peace, or alderman for an arrest warrant, and to produce evidence other than their own affidavits to verify claims; several other Northern states followed with more and less protective provisions.311 In the circumstances that led to Prigg v. Pennsylvania,312 Margaret Morgan—who had lived with her parents in practical, if not formal, freedom for her entire life—eventually married a free man from Pennsylvania, where she then moved with him and their children and had at least one more child.313 After her formal slaveholder died, his niece and heiress hired “four prominent Maryland citizens,” including Edward Prigg, to seize Mrs. Morgan.314 Since the justice of the peace from whom they sought a certificate of removal “declined further cognizance of the case,” they forcibly took her and her children back to Maryland and into slavery, in violation of Pennsylvania law.315 When the dispute reached the Supreme Court, in a robust assertion of national power, Justice Story found Pennsylvania’s law preempted by the 1793 Act.316 Further, he extolled property rights as sacred above all other rights, and referred to the “possession” or “repossession” of a person such as Mrs. Morgan as property nine times in his discussion of the interests at stake.317 Story never mentioned the problem of kidnapping, in an example of how legal actors, in Holden-Smith’s words, “subordinated the claims

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

310. Nogee, supra note 309, at 191.


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


314. Id. at 1122.

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


of black people to human dignity to the claims of slaveholders to their property.”

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

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


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

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


323. Id. at 465 (emphasis added).

324. Id.

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

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

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

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327. Id. at 128-31.
328. SINHA, supra note 303, at 400.
329. Id. at 399.
330. Id. at 382.
332. The movement used the slogan, “We are Americans.” SINHA, supra note 303, at 324; see id. at 316-30 (describing abolitionist organizing for Black citizenship); id. at 339-80 (describing international abolitionist organizing).
333. Blackett, supra note 326, at 121.
chase of his own freedom with British funds. William Lloyd Garrison, who insisted that enslaved people’s efforts to purchase liberation could not be called “compensation” to slaveholders, called the money a “ransom.”334 Meanwhile, in the literature they produced, self-emancipated people frequently referenced and repurposed familiar theories to emphasize their own personhood through invoking their property rights and self-possession. Henry Bibb, for example, who escaped slavery in 1841 and published his narrative in 1849, invoked the labor theory when he asked, “[W]ho had a better right to eat the fruits of my own hard earnings than myself?”335 William Wells Brown, who escaped in 1834 and published his story in 1847, pointed to his own dispossession when he called his master “the man who stole me as soon as I was born.”336 In his narrative of self-emancipation, James W.C. Pennington—who escaped slavery at the age of nineteen in 1827, became the first African American to attend classes at Yale, and published the first history of Black people in the United States337—resoundingly denounced “the chattel principle,” which reduced human beings to marketable commodities, as the essence of slavery.338

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

334. Sinha, supra note 303, at 427.
335. Id. at 431 (quoting Henry Bibb); see also id. at 424 (referencing an account of Lewis Clarke, who published his account in 1845 and also applied a labor theory of value).
336. Id. at 428 (quoting William Wells Brown).
338. Sinha, supra note 303, at 432 (quoting James W.C. Pennington).
341. Sinha, supra note 303, at 382.
342. Id. at 425.
first panel depicts a slaveholder and federal marshal invoking U.S. law to confront a white abolitionist, with a fugitive enslaved person cowering behind him, while the second panel shows the same abolitionist pointing to stolen cloth in the shop of the slaveholder, who responds with regard to the cloth: “They are fugitives from you, are they? . . . I have a higher law of my own, and possession is nine points in the law.”344 The enslaved person agrees: “Of course Massa. De dam Bobolitionist is de wus enemy we poor n[***]s have got.”345

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

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

344. Id.
345. Id.
346. Letter from Lazarus W. Powell, Gov. of Ky., to Joseph A. Wright, Gov. of Ind. (June 26, 1854), https://www.in.gov/history/for-educators/all-resources-for-educators/resources/under-ground-railroad/gwen-crenshaw/indiana-and-fugitive-slave-laws/ [https://perma.cc/75N2-G5SE].
and African-descended peoples. Consequently, a primary question, in a context launched by discovery, was how to use laws to marshal the force required to produce and protect this new world of property, rather than to preserve the peace. In both the examples of headright or homesteading laws and fugitive slave laws, the state deputized private individuals to enact this violence and incentivized them to do so with the promise to recognize the significant ownership claims they could thereby make. Moreover, it was through this private action that the state expanded its own jurisdiction and increased collective wealth. The conceptual and practical consequences of this arrangement help explain the paramount importance of property in America, and, in particular, its centrality to the relationship between the state and society and social relations more generally. Among other lessons one might draw from this history, the key role of homesteading in territorial expansion demonstrates that in the United States, private property preceded public jurisdiction, reversing European conceptions of a state that distributes private interests. Additionally, using legal devices such as homesteading incentives and fugitive slave laws to invest private parties personally in creating and protecting private property moved the racial violence required for this project into the domain of the private sphere, mobilizing populations against one another as they pursued their property interests and sought to defend themselves—pitting property interests against peace.

V. EXPROPRIATION AND THE CREATION OF AMERICAN PROPERTY LAW

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

348. Bethany Berger, for example, has written that a “central myth of American property law [is] that we start with a world in which no one has rights to anything, and the fundamental problem is how best to convert it to absolute individual ownership.” Berger, supra note 18, at 1089.
their inherent bodily autonomy by force, we acknowledge that historically, “ac-
quision” did not centrally concern “unowned things.”349 Rather, in the English
colonies, establishing property claims constituted a process of collective exprop-
riation, which exacted immeasurable costs from Indigenous and Black commu-
nities. Further, the practices, strategies, and theories that colonists used to render
these resources property— including the three doctrinal principles discussed
above— have become hallmarks of the property laws and institutions that they
engendered.

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

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

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

350. Even this elective status was the hard-won result of advocacy within the legal academy and
groundbreaking scholarship that offered powerful arguments for studying the formative role
of race in law. See, e.g., Kimberlé Williams Crenshaw, Toward a Race-Conscious Pedagogy in
Legal Education, 11 NAT’L BLACK L.J. 1, 6-7 (1988); Lani Guinier, Of Gentlemen and Role Models,
6 BERKELEY WOMEN’S L.J. 93, 95 & nn.6 & 7 (1990). This Article builds on the efforts and
inroads of this earlier work.
enslavement, which sprang from the same, longer legal tradition that authorized European conquests, furnished labor for the expropriation of lands, and also uniquely developed the racism that fueled it. Further, the anti-Blackness it entrenched not only influenced the racialization of other nonwhite groups in America, but (in a story for another time) also powerfully reorganized the land system to circumvent Black property rights after the abolition of slavery. These histories are therefore critical for understanding property in land in the United States, which is still the central subject of property-law classes today. Professor William Wood has written that “[l]and, and controlling what happens on it and the revenues from it, has always been the focal point of relations between Indigenous peoples and non-Natives in North America.”351 This control remains a focal point of maintaining power and wealth for the United States, which grew the market it built from the lands it expropriated into a real estate market worth approximately $64 trillion today.352 This real estate market is still a terrain of racial struggle that continues to enact harms on particular groups. The histories of conquest and slavery out of which it grew also shaped the systems and practices that today govern the population as a whole.353 These are institutions and areas of law viewed as mainstream and fundamental, which constitute the heart of legal education and practice now.

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

351. Wood, supra note 158, at 415.
353. See also K-Sue Park, Race, Innovation, and Financial Growth: The Example of Foreclosure, in HISTORIES OF RACIAL CAPITALISM 27 (Justin Leroy & Destin Jenkins eds., 2021) (explaining how the use of foreclosure to expropriate Indigenous lands helped develop specific racial dynamics in economic transactions in colonial America that have proven persistent over time).
violence. This Article has foregrounded the erasures that persist in the way we conceptualize and talk about property because they are part of the legacy of this ongoing violence.

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

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

“Discovery,” most fundamentally, was a European racial project aimed at the creation of commercial value. Consequently, a broad racial hierarchy of humanity set the stage for English colonists’ activities in mainland America, where “discovery” licensed the use of force on non-Christian non-Europeans. “Discovery”
therefore made race itself a dynamic resource that colonists channeled through the development of new legal institutions and practices. The arena of these activities was *trade*: the drive to produce property, and increase its monetary value, propelled the interdependent processes of conquest and enslavement for centuries. The longer tradition of legal justifications for conquest itself illustrates how universal legal formulations can further hierarchy when that hierarchy comprises a background rule of trade. Chief Justice Marshall himself, however, explicitly affirmed racial hierarchy as the basis of both U.S. jurisdiction and its authority to decide the rules for how other sovereigns—namely, Native nations and states—could trade interests in land as the United States continued to cultivate novel markets to pay its debts and grow.

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

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

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

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


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

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

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

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

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

**CONCLUSION**

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

\(^{358}\) A broad literature on global land-titling programs, influenced strongly by Hernando De Soto, argues that an American-style property system is key to building national wealth. See, e.g., **Hernando de Soto**, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* 5-10 (2000).
## APPENDIX A

### TABLE 1. CASEBOOKS EXAMINED

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<th>Authors</th>
<th>Casebook Title</th>
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<td>Select Cases and Other Authorities on the Law of Property</td>
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### TABLE 2. VOLUMES EXAMINED BUT EXCLUDED FROM ANALYSIS

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### TABLE 3. CASEBOOKS IDENTIFIED BUT NOT OBTAINED FOR ANALYSIS

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# APPENDIX B

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<td><strong>SLAVERY</strong></td>
<td>The Antelope, 23 U.S. 66 (1825)</td>
<td>“Slave[s]/”/”slavery”</td>
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<td>Dred Scott v. Sandford, 60 U.S. 393 (1857)</td>
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<td><strong>RACIALLY RESTRICTIVE COVENANTS</strong></td>
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