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Conquest and Slavery as Foundational to the Property Law Course

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Abstract:
This chapter addresses the foundational place of the histories of conquest and slavery to American property law and the property law course. It begins by briefly reviewing how these topics have been erased and marginalized from the study of American property law, as mentioned by casebooks in the field published from the late nineteenth century to the present. It then shows how the history of conquest constituted the context in which the singular American land system and traditional theories of acquisition developed, before turning to the history of the American slave trade and the long history of resistance to Black landownership that its abolition fueled. This chapter suggests ways to correct for the tendency of traditional property law curricula to focus exclusively on English doctrines regulating relations between neighbors, rather than the unique fruits of the colonial experiment -- the land system that underpins its real estate market and its structural reliance on racial violence to produce value.

Conquest and Slavery as Foundational to the Property Law Course

K-Sue Park

The task of integrating the histories of conquest and slavery can prove elusive and challenging for property law professors whose expertise lies in later eras of the field’s development. In this chapter, I describe the lessons these histories hold about the relationship between property and race and how I present them in the first-year property law course. Because understanding this relation has been substantially obstructed by the way these histories have been narratively erased from the study of property law, I preface this discussion by briefly reviewing the patterns of this erasure as they appear in the content of property law casebooks from the late nineteenth century to the present. The traditional property law curriculum in American law schools focuses largely on English doctrines regulating relations between neighbors, rather than the unique fruits of the colonial experiment -- the American land system and its structural reliance on racial violence to produce value. The development of property in the United States has relied heavily on racial practices, racial ideological formations, and racial violence since before the nation’s inception. The first English settlers who arrived on the shores of the eastern seaboard seized land from Native nations under a racial colonial mandate to produce property, and the slave trade they built and expanded entrenched a racial social order that would inform practices of trading interests in the land enclosures formed through the process of colonization.

Below, I summarize my approach to showing how race has structured property and property law in America and offer a new frame for the standard doctrinal program, largely using materials already available in property law casebooks. I do not describe my entire course, but

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1 The casebook I require, which contains the best materials for teaching about the relationship between race and American property law is Singer, Berger, Davidson, Peñalver, *Property Law: Rules Policies, and Practices, Seventh Edition* (New York: Wolters Kluwe, 2017). However, I also draw excerpts from other casebooks by Dukeminier, Anderson and Bogart. See footnotes 41 and 45 below. The scope of this chapter follows a practical attempt to offer suggestions for building upon standard property law curricula now, when it remains relatively rare to teach these histories at all or in significant depth. It is not an effort to reimagine the property law course from the ground up, and useful suggestions in this vein may look very different in the future than what I offer here. For now, I have
focus on themes and points for discussion from units most relevant to the task of incorporating the histories of conquest and slavery into the course. While there are many ways to address the history of race and property law in the United States, my strategy emphasizes the structural role of race in the broader system in which traditional doctrines operate.

Before I taught Property Law for the first time, several people told me that designing the course was like assembling a train: you choose topics like cars that you string together as you please. This approach has meant that for generations of first-year property law students, the course has had the tendency to feel like a grab-bag of topics. Because casebook authors added the histories of conquest and slavery to their materials relatively recently, as I discuss in the next section, it is not surprising that these topics frequently appear to be optional cars of second-order importance -- less essential than, for example, units on estates, servitudes, adverse possession, or nuisance. Many property law professors do not choose to add these histories as cars in their train; if they do, may face challenges explaining the connection between these topics and the rest of the course. In part, these challenges stem from the fact that the materials on these histories are uneven in terms of both quantity and quality and across casebooks, which follows from the history of erasure and partial recovery that I describe below. I aim to show that the histories of conquest and the slave trade constitute the train’s track, rather than addenda to traditionally taught doctrines. These histories present more than an opportunity for apology or condemnation. They are essential to understanding what American property is and how it has been constructed by law.

The arc of the course that I construct begins with the land system itself, and proceeds with background about the histories of conquest and slavery. The course opens, as I elaborate below, with a lesson on the recording system and recording acts, which I pair with reading about the history of the survey system, in order to establish that the course is about the study of the development of the unique American land system and the doctrines that operate within it. Introducing that system in its proper context— the history of territorial expansion and conquest—also aligns with the traditional first unit of a property law class: theories of acquisition, namely, discovery, labor, and possession. The racial framework of the Discovery Doctrine guided the formation of land enclosures and captive people as two all-important forms of American property. The history of the American slave trade was a fundamental part of the long history of colonization: the slave trade expanded with the territory, I explain, so that by the time of the Revolution, property in land and people comprised over 75% of all assets held across the colonies. Presenting students with this background lays ground for explaining how the antiblackness entrenched by the slave trade came to operate within the land system, in widespread resistance to Black landownership before and after abolition, expressed through the passage of racial zoning laws, the proliferation of racially restrictive covenants, the development of explicitly racial criteria in the Federal Housing Administration’s appraisal guidelines, and the racial inequities of the recent housing crisis. The content of these and other topics in the property law curriculum show, in my view, that histories of racial violence are so intertwined with the development of property in America that their omission has presented many obstacles to

constructed this chapter to make it easy for property law course instructors to adopt my suggestions in whole or in part, with respect to a single topic or one class.

The topics are, of course, very broad, and there are many issues that have shaped the history of property law that I do not discuss here, which are properly understood as part of these continuing histories and their aftermath: inter alia, allotment, fractionation and heir’s property, contracts for deed, antidiscrimination law, Alien Land laws.

teaching about the fundamental structural elements, including racism, of the highly influential American land system that underpins the real estate market today.

I. Historical Erasure in Property Law Casebooks

To teach about the histories of conquest and slavery in the first-year property law course requires speaking into a void left by a history of erasure. To be clear, a rich scholarly literature has explored many dimensions of these histories and their intersection, but the insights have largely not been incorporated into property law casebooks or curricula. While one could characterize the scope of erasure in casebooks by all this literature tells us about property law that does not appear in them, here, the metric I use for identifying “erasure” is simply the extent of the recovery of these histories in casebooks now: the long absence and late incorporation of the materials that provide fodder for classroom discussion of these histories—namely, the cases Johnson v. M’Intosh and the presence of an independent section, however brief, about the American slave trade.

The monumental 1823 John Marshall decision Johnson v. M’Intosh clearly identifies conquest as the root of title to every parcel of land in the United States. Though nearly every property law casebook in circulation today recognizes the fundamental status of the case in our property system (and though it also appeared frequently in nineteenth century treatises), the case did not appear in a single property law casebook between 1888 and 1954. Instead, the first property law casebook by John Chipman Gray describes English feudal law in great detail and frames American property law primarily in terms of its descent from that system. This heavy emphasis on American property law’s English inheritance exemplified precisely the tendencies

4 Materials on the headright system, land grants and subsidies through which governments procured the labor of settlement, and the Homestead Acts, the survey system, the Land Office, preemption laws, and the history of mortgage foreclosure, for example, were all instrumental to converting lands into real estate, and arose through the history of westward expansion and conquest. The legal system that facilitated the creation of property in people, if we look at that material process in a parallel fashion, would entail laws that regulated the construction of slave ships, castles, chains, and other technologies on which that trade depended to take people captive and treat them as chattel property, as well as the international and domestic laws that governed competing entitlements in the trade.


6 John Chipman Gray, Select Cases and Other Authorities on the Law of Property Vol. 1 (Cambridge: University Press, 1905). For example, Section I of Book III about “tenure in general” describes the feudal system, beginning with the extract: “Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled, the lord paramount, or above all.” (307). The section goes on to describe the various aspects of the feudal system such as the manor, military tenure, socage tenure, etc. (see 307-331).
to align the legal and political systems of the United States with European traditions that Frederick Jackson Turner would critique just a few years later in his landmark essay, “The Significance of the Frontier in American History.” In this work, Turner famously wrote that “the peculiarity of American institutions is, the fact that they have been compelled to adapt themselves to the changes of an expanding people—to the changes involved in… winning a wilderness...” Further, he commented, in the process of westward expansion, the frontier was “the outer edge of the wave—the meeting point between savagery and civilization” and could be “sharply distinguished from the European frontier” by the fact that the American frontier lay “at the hither edge of free land.” Turner’s formulation of “free land” and the “wilderness,” too, performs an erasure of the racial violence of removal that this territorial expansion required, though we see its trace in his description of the moving zone of progressive conquest as a confrontation between “savagery and civilization.”

However, neither this revisionist account of westward expansion as a triumph and achievement nor the underlying history of conquest appeared in Gray’s casebook, which laid the basic framework for subsequent casebooks for decades, and arguably, in some respects, to the present.

Though Gray neither described the uniquely American institution of slavery, nor the internationally organized process of capture and subjugation that made it possible for colonists to treat African people as enslaved property, slavery was by contrast an incontestable presence in casebooks between 1888 and the 1930s. Because property in enslaved people was such a major part of the history of American property, every casebook that appeared between 1888 and 1908 contained cases either directly involving or citing cases involving property in slaves, which were used to illustrate doctrines such as conversion, statutes of limitation, replevin, trespass, bailment, and ejection. After 1908, most casebooks included several cases involving property in enslaved people; the number that did so did not dwindle significantly until the 1930s, when an increasing number of casebooks dropped all cases involving property in people. The last casebook to include such cases appeared in 1942. After this time, property law casebooks exhibited a total erasure of this history and form of property; in addition to omitting cases involving property in people, cases that cited such cases were edited to omit those citations.

It was not until 1978, in the wake of massive social movements across the country, that Richard Chused published a groundbreaking casebook comprised of lengthy sections on

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8 Here, Turner pointedly commented that “[m]uch has been written about the frontier from the point of view of border warfare and the chase, but as a field for the serious study of the economist and the historian”—and we might add, legal scholar—“it has been neglected.” Turner, The Significance of the Frontier in American History, 3.
9 Turner, The Significance of the Frontier in American History, 3.
10 Many scholars have elaborated on the euphemistic metaphors of “virgin land” for the genocide that occurred. See Henry Nash Smith, Virgin Land: The American West as Symbol and Myth (Cambridge: Harvard University Press, 1970). For an account of the violence of this removal, see K-Sue Park, “Self-Deportation Nation,” Harvard Law Review 132, no. 5 (2019). The erasure of race, though not the history of westward expansion, is also visible in Turner’s description of the close of the frontier. As Turner recounts in the opening of his essay, in 1890, the U.S. Census Bureau declared the frontier formally closed because there was no longer land within the territorial boundaries of the United States occupied by fewer than two white people per square mile. Turner writes that “In the census reports [the frontier] is treated as the margin of that settlement which has a density of two or more to the square mile.” Turner, The Significance of the Frontier in American History, 3.
11 Park, “This Land is Not Our Land,” (forthcoming) 22.
12 Park, “This Land is Not Our Land,” (forthcoming) 22, citing Bigelow and Eckhardt, Cases and Other Materials on the Law of Personal Property 35, 342.
conquest and federal Indian law, slavery and racial discrimination in housing, and gender and women’s property rights. Joseph Singer followed with a widely adopted casebook that remains the standard for integrating materials about the themes of conquest, enslavement, and race in the property law course. But, even though the case Johnson v. M’Intosh now appears in every property law casebook, some of the most widely used property law casebooks today do not mention slavery or mention it only in passing, and only a handful engage the topic substantively, including Chused and Singer and his co-authors.

II. Teaching Property Law

The fact that property law is already known to be an inherently historical subject facilitates integrating the histories of conquest and slavery into the study of the subject. Furthermore, omitting the histories of conquest and slavery makes it more difficult to explain two crucial aspects of American property and property law—1) the basic features of its unique land system that supported its real estate market and 2) its reliance on racial violence to produce value. These two aspects of property in America are both highly determinative of the character of American property and its law and likely to be intuitive points of entry to the subject for students, who will be familiar with and interested in understanding the rapid rise in rents in cities across the country and globe, as well as their deep racial segregation.

A. Conquest and the American Land System

Many property law courses begin with the subject of acquisition and frequently present the content in abstract, conceptual terms: for example, “discovery” justifies property interests in a contest between two claims according the principle of “first-in-time,” “labor,” on the basis of “desert” or a party’s “investment” in the property, and “possession,” on the practical efficiency of preserving the status quo. Historically and materially, however, the collective process of Anglo-American land “acquisition” from Native American tribes in North America entailed conquest, and each of these theories also played a major role in that process. The process of land acquisition and territorial expansion of the United States was large scale, but relatively brief: over the course of about a century following the Revolution, the newly formed United States invested a great deal of its institutional resources and energy into acquiring 1.5 billion acres of

13 Dukeminier (e.g., mentioning a nineteenth century English anti-slavery judge, and “Slavery obviously was in opposition to that proposition [that “every man has a property in his own person”], but slavery as been abolished. So can we now say without qualification, that you have property in yourself.; Anderson and Bogart; Sprankling and Coletta. For descriptive overview, see also Park, “This Land is Not Our Land,” (forthcoming).
15 Property concerns the history of claiming land, individually and collectively; historical events have deeply shaped property law; and many of its rules deal with transmitting property entitlements across generations.
16 This system is still in the process of being propagated in countries across the globe. A wide literature is still proliferating on global land titling programs, influenced strongly by Hernando De Soto’s arguments that an American style property system is the key to building national wealth. The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (New York: Basic Books, 2000).
land from tribes to bring it under its own jurisdiction and onto the national land market. This massive transfer is a good starting point for pointing out different aspects of the study of American property and property law, especially the way it shaped both the material landscape of the United States and its institutions of government.

More specifically, through the processes of territorial expansion and land extraction from tribes, the country developed its institutions for defining, organizing, and distributing property, and regulating a market in land. I teach students about this system in an opening unit that begins with a lesson on the survey and recording systems and proceeds to cover the three basic theories of acquisition that most property law courses address—namely, discovery, labor and possession. The crucial role of these theories in the formation of American property is a matter of historical as well as conceptual explanation, and covering this material creates an opportunity for raising questions about the society that grew from an economy founded primarily on trading the commodities of land and people, the material processes that continue to create property in land, and the role of racial distinctions in producing property values.

1. The Recording System: Acquisition and The Survey

Beginning the property law course with the land system that is the subject of our study gives students a basic understanding of the main features of the land system: the survey system, the registry, and the recording system. Not only did these elements of the system emerge from the process of westward expansion, but they also developed significantly with the creation of the primary and secondary mortgage markets and the financial crisis. The recording system, I explain, is where and how we store information about all the parcels of land that are subject to trade within the jurisdiction of the United States. It also provides a good introduction to the topic of acquisition: this feature of our system presupposes acquisition, since before we could map, measure, and record information about parcels, there had to be parcels; in order to make parcels for the purpose of buying and selling them, it was necessary to first acquire lands from tribes. Without this process, there could be no sale of land and therefore, no land market.

In order to contextualize the establishment of the survey and recording systems in the history of westward expansion, I assign excerpts from writer and historian Andro Linklater’s engaging and accessible account of the history of the survey system, Measuring America. In chapters 11 and 12, Linklater describes how the process of westward expansion and the land market created by the federal government were crucial to the survival of the colonies and the United States. The United States was bankrupt at the time of the Revolution, and the founders regarded the Western lands as the nation’s greatest asset. Though they counted on income from the sale of Western lands to repay the debts of the United States, it is important to remind students that it is not possible to just claim lands still occupied by other nations abstractly: it is necessary to exert force to actually take control of them, and once in possession, the United States also had to take steps

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17 On the first day of class, I show the students a time lapse video showing the national territory at the time of the Revolution, and each formal land acquisition or cession by a tribe memorialized in a different treaty. As I explain, between about 1776 and 1871, when the practice of treating with Native nations ended, the U.S. entered into over 500 of these treaties for land. As the video describes: “Between 1776 and 1887, the United States seized over 1.5 billion acres from America’s indigenous people by treaty and executive order. The Invasion of American shows how by mapping every treaty and executive order during that period. It concludes with a map of present-day federal Indian reservations.” “Invasion of America,” The University of Georgia Maps, Accessed July 12, 2020. http://usg.maps.arcgis.com/apps/webappviewer/index.html?id=e6ca76e0008543a89349f2517db47e6

18 Material on the recording system and types of recording acts appears in standard casebooks.
to make the land marketable, or a thing that was possible to sell. It had to define the tracts that would constitute commodities on the land market, which it did by imposing the survey or grid system.

Linklater relates the history of the United Surveyor General Jared Mansfield and the system of meridians, or the North-South lines he surveyed to construct an East-West baseline and draw townships. Linklater’s narrative points to parts of the United States’ landscape that students will recognize, which makes it possible to anchor the history he relates visually. I show my students images of the first Meridian, running up between Interstate 70 and State Route 227 in Ohio, just west of the Indiana border; of the U.S. Land Survey and township maps identifying the parcels that private individuals could buy and record; and of the straight-line borders of western states that correspond to these meridians, in order to show how the government developed the collective project of forming jurisdictions—national, state, and municipal—at the same time that it created individual property interests in land.

Linklater’s account also furnishes excellent material for considering the survey and recording systems as technological solutions for establishing ownership and collecting information about the products of the survey, respectively. Using his narrative, I highlight three different technological challenges to surveying that produced irregularities in the grid, and consequently, difficulties in measuring, mapping, and recording. First, he emphasizes challenges to creating this basis for claims before the era of GIS and satellites posed by the terrain itself and the curvature of the earth. In vivid detail, Linklater describes surveyors’ ordeals on horsebacks as they tried to lay out chains on swamps or cliffs. Further, the way lines of longitude grow closer together as they run toward the pole forced surveyors to make corrections after every four or five townships stacked on top of each other, with new meridians starting back 50 or 60 yards east or west, producing jogs in roads and state lines. Second, Linklater describes how land had to be “pried away” or “squeezed out” of tribes, using euphemisms for wars. I underscore that we will return to the point that the lands were already inhabited in future classes; here, wars and conflicts with Native nations frequently forced surveyors to stop surveys and return later once those groups were vanquished in war or forced to leave their lands in other ways. Finally, Linklater describes errors as resulting from the fact that surveyors worked at breakneck pace, which raises the useful discussion of the reason for their urgency: that the nation badly wanted to put the lands up for sale to make money as quickly as possible, and that masses of land hungry European migrants were already in the process of moving onto the land and demanding to buy it. This point sets up future discussions on the role of squatters and federally created incentives to settlement, which will recur in teaching the doctrine of adverse possession.

Beginning my course by focusing on the process of defining ownership entitlements and collecting this information helps me establish a context for a lesson on the recording system and the recording act rules. In order to make students aware of the contemporary stakes of this history, I do two additional things during this first class. To give them a hands-on understanding of how the recording system works today, I lead them through an exercise of searching for a

22 Such as the Homestead Act and the series of Land Acts that reduced the size of individual claims to increase their accessibility to homesteaders; for further discussion, see Singer et al., *Property Law*, 104.
specific property transaction that took place in Chicago in the 1990s. Second, while discussing how important the formation of the land market was in the nation’s history, I also emphasize that this land market never ceased growing and still constitutes an enormous part of the overall national economy. To underscore the contemporary stakes of the system, I share some figures with the students: that in 2018, the U.S. residential housing market was worth $34 trillion; that real estate now constitutes 60% of global mainstream assets; that the unique land system that promoted this growth is an American phenomenon developed during and for the process of territorial expansion, and that this American phenomenon is now a model for export as the global speculative real estate market continues to grow.

2. **Theories of Acquisition: Discovery, Labor and Possession**

a) Discovery

Theories of acquisition, in the property law course, offer legal justifications for who holds title to property in land (as surveyed and recorded by the processes discussed above). Acquisition, however, is a euphemistic way of describing expropriation, and can obscure the history of expropriation in which it is rooted when taught without reference to American history. However, *Johnson v. M’Intosh*, which articulates the Discovery Doctrine in the property law canon, clearly describes how the first-in-time principle operated during the historical process of collective colonial land acquisition from Native nations. Furthermore, that history foregrounds the racial structure of the law that facilitated that initial transfer and it names that process as conquest. It also develops the conversation about chains of title by describing how intra-European sovereign chains of title determine individual chains of title.

The Discovery Doctrine governed the European project of enslaving non-European people and colonizing their lands for centuries. The documents that developed the doctrine include the papal bulls *Dum Diversas* (1452) and *Romanus Pontifex* (1455), which authorized the Portuguese to enter lands in West Africa and build their slave trade, and the *Inter Caetera* (1493).

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23 I use an exercise in the book “Real Property for the Real World” which asks students to search for musician Kurt Elling’s sale of a condo to a family that turns out to be the Obamas. Here, you can emphasize the local administration of registry websites, and the consequent variations in whether records are included online or not, and the various sorts of searches they support or do not; several of my students noticed, in keeping with the theme of technology, that the Cook County website seemed to be very old and did not work very well. Heather Way, Lucille Wood, Tanya Marsh, *Real Property for the Real World: Building Skills Through Case Study* (St Paul: Foundation Press, 2017), 3.


25 This decision is historical both in its significance and its content, making it difficult to simply extract an abstract principle of “first in time” and not discuss its historical context and the moral questions it raises. Although some teachers may therefore choose to omit it from the course, it furnishes an excellent opportunity to discuss how abstract principles that, like the principle of “first in time,” appear based on fairness, arise from complex material circumstances that contain other lessons for understanding property law.

26 Many property law professors teach Johnson together with *Popov v. Hayashi*, a case about catching a baseball at a game, to deal with the concept of discovery. While it is surely appealing to teach cases about baseballs and news services (see discussion of *INS v. Associated Press*, infra, p. 12), I balance that temptation against the serious challenge of providing a basic background of the 400 year history of colonization and enslavement, which I consider essential for explaining the structure of the land system and its racial dynamics, in the three weeks I dedicate to covering theories of acquisition, the recording system, and adverse possession. *Popov v. Hayashi*, 2002 WL 31833731 (Cal.Superior Dec 18, 2002) (NO. 400545).
and the Treaty of Tordesillas (1494), which demarcated the zones of the Atlantic that Spain and Portugal could invade without interference from one another. As Marshall describes in Johnson, the Dutch, French, and English all launched their colonizing expeditions under this principle during the next centuries. The Doctrine relied on a fundamental racial distinction\(^2\) between Europeans and non-Europeans to impose a “first in time” principle between European nations vis-à-vis their rights to attempt to subjugate non-Europeans. Chief Justice John Marshall clearly explains that the Discovery Doctrine was intended to reduce conflicts between European nations in competition with one another\(^2\): the first Europeans to arrive in a non-European land, he writes, had “the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere.”\(^2\) As I will describe, this racial distinction created a hierarchical order of international sovereignty: it informed European colonists’ treatment of Native peoples on the ground as they sought to realize their discovery claims, and it created specific kinds of value for colonial markets that materialized upon the transfer of resources from Native nations to colonists. There is therefore no clearer description of the structural racial determinants of American property than that which appears in Johnson.

As Johnson concerns collective land acquisition (how a nation acquires its entitlements to land in the first place), the case is also, as most teachers already likely point out, about the relationship between property and sovereignty. The lesson that property and property law flow from sovereignty is useful to establish early in the course as a basis for explaining the government role in shaping the property system, and especially for topics that typically appear later in the course like zoning and eminent domain. Again, Johnson describes the source of this sovereignty (and therefore the authority for these types of government action) as the international law principle of discovery, which determined collective chains of title allocating entitlements between sovereigns: in his decision, Marshall emphasizes European claims by conquest—from Britain, Spain, and France—passing to the United States under this order. That chain of sovereign title, under the racial principle of Discovery, excludes the sovereign claims of Native nations. Thus, he concludes that the United States “have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country”; and famously also, that “Conquest gives a title which the Courts of the conqueror cannot deny.”\(^3\)

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\(^3\) Note that by this time, the Doctrine of Discovery was a governing principle for several centuries, and it transformed considerably over these centuries. In my class, I also give students the example of the Papal Bulls and their allocation of interests between Spain and Portugal to illustrate previous ways the Doctrine was mobilized to reduce competition between European nations and subsequently shaped the world. See Robert Miller, Jacinta Ruru, Larissa Behrendt, Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010), 1-2; see also Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in North America,” in *In John McLaren, A.R. Buck and Nancy E. Wright, eds. Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: University of British Columbia Press, 2005), 50-78.

\(^2\) Johnson v. M’Intosh, 21 U.S. 543, 573 (1823); the case is also printed in the casebook I use, Singer et al., *Property Law*, 31.

\(^3\) *Johnson*, 21 U.S. at 587-88, printed in Singer et al., *Property Law*, 93.
As Marshall acknowledged, the sovereign presence and claims of Native nations posed a material challenge to these intra-European claims: “the whole of the territory, in the letters patent described... was held, occupied, and possessed in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil; and who neither acknowledged nor owed any allegiance or obedience to any European sovereign or state whatever.” Conquest therefore necessarily entailed more than just the formal claim under the principle of discovery. Marshall articulated the full rule as a two-stage process, “This principle was, that discovery gave title to the government by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession.” First, a European sovereign made first-in-time “discovery” claims; second, its representatives needed to take actual possession of the lands thereby claimed, by removing, destroying, or subordinating Native inhabitants to extinguish their competing claims.

Acquisition, therefore, has been a euphemistic way of describing expropriation; Under the principle of discovery, no other European nation could disturb the discoverer in taking “possession” to “consummate” title. As Marshall wrote, the relations between the discoverer and Native nations were to be regulated by themselves; “The Rights thus acquired being exclusive, no other power could interpose between them.” As a result, Marshall continues, the United States “maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.” This point raises a) the historical question of what British colonists actually did to take control of land in North America—purchase, in addition to outright force; b) the legal question of how colonists’ action in pursuit of possession would impact their claims to title later, arguably the main question of Johnson itself; c) and the conceptual question about the impact of this condition on the first, formal claim. That is, the condition of actual possession renders the formal first in time claim a preemption or an option right—an option to try to take the lands from its indigenous inhabitants.

In a contest between sovereignties, the prevailing sovereign determines what property is and how to allocate and enforce property rights, including the rules for determining individual chains of title—the heart of the dispute in this case. The case presents a dispute over competing claims to title between parties that purchased from the U.S. government (M’Intosh) and inherited from the Illinois and Wabash Land Company, which purchased directly from the Piankeshaw and Illinois Nations. Marshall’s question presented asks about “the power of

32 Here, you can anticipate a future lesson on “possession” and the lesson of Pierson v. Post by defining it as “taking control.”
33 Johnson, 21 U.S. at 573, printed in Singer et al., Property Law, 93.
34 Johnson, 21 U.S. at 573, printed in Singer et al., Property Law, 91.
35 Johnson, 21 U.S. at 587, printed in Singer et al., Property Law, 92.
36 See sections on labor and possession below.
37 At this juncture, it may be worth establishing that the sovereign retains rights over privately owned land in anticipation of future lessons on the public regulation of lands.
38 Which purchased it from the Illinois and Piankeshaw tribes. Governor William Henry Harrison, later president, negotiated the 1803 treaties under which M’Intosh claimed, by first obtaining the consent of tribes in the area without strong claims to the lands, and then used that consent to pressure other tribes to sign. The U.S. obtained the signatures for those treaties without paying any tribes anything at all. [source?]
39 Murray and Viviat, the individuals who negotiated those purchases, chose strategically to deal with the Piankeshaw at a time when they had been devastated by disease and war—rather than with other stronger tribes that
Indians to give, and of private individuals to receive a title which can be sustained in the Courts of this country”—that is, the parameters of Native title excluded from chains of title between European sovereigns constructed under the principle of discovery. Marshall resolved the question by subordinating Native property interests to European interests in keeping with the racial hierarchy of the Discovery Doctrine: tribes held a mere “right of occupancy,” he held, subject to the “ultimate dominion” acquired by a European nation through conquest. In doing so, he ignored a centuries old colonial practice of private individuals purchasing land directly from tribes and instead affirmed the U.S. rule under the Trade and Intercourse Act of 1790, which limited Native nations’ ability to sell land to any party other than the U.S. government. Some casebooks have used Johnson to focus on the certainty that property rules create that allows transactions to continue or occur more “efficiently” because the rules can be “easily administered and applied,” and therefore contribute to “peace and order.” I ask my students to identify the object of efficiency in order to point out that rules that promote property transactions may not also efficiently serve other possible goals of property systems, such as providing universal shelter, subsistence, and other public goods. This emphasis on economic interests is also claimed the same land. The land claims supposedly conflicted, but casebooks already include maps of the parcels in question that show that the claims of Johnson and M’Intosh were not actually in conflict, and the case was a case of collusion intended to produce an answer on the legal question of valid chains of title. Singer et al., Property Law, 95. See also Lindsay Robertson, Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands (Oxford: Oxford University Press, 2007).

40 Tellingly, Johnson argued that the Piankeshaw were the owners of the lands in dispute, and that their power to sell was confirmed by longstanding colonial practices of purchasing lands directly from Native nations. Consequently, as his attorney notes, “all, or nearly all, the lands in the United States, is holden under purchases from the Indian nations.” Johnson, 21 U.S. at 563; Singer et al., Property Law, 8. M’Intosh, on the other hand, argued for the exclusion of such claims under the principle of discovery: the “uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of the civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations.” Johnson, 21 U.S. at 567; Singer et al., Property Law, 9.

41 Stuart Banner, How the Indians Lost their Land: Law and Power on the Frontier (2005) 39-43 ff [highlighting that the English respected Indian property rights and continued to do so because their chain of titles originated with purchases from the Indians]. Direct purchase from tribes was a widespread practice throughout the colonial period. The Trade and Intercourse Act of 1790 was especially significant because colonists had resoundingly refused the identical prohibition on private purchases of Native nations’ lands that King George III tried to impose upon them in the Proclamation. Many people continued to make private purchases of Native nations’ lands in violation of the Proclamation (including, famously George Washington); Marshall might have invalidated Johnson’s claim on these narrower grounds. The Trade and Intercourse Acts made the federal government the main point of access to acquire and then distribute Native nations’ lands and required it to manage a federal land system that included surveyors, a Land Office, and making government grants to states and other entities. This organization also explains why, as Linklater describes, settlers, squatters and speculators, all had to wait to buy land, even if they have already entered onto tribal lands, from the federal government. Many states, however, violated these Acts by continuing to purchase land directly from tribes that, leading to litigation in the late 20th century that lasted for decades and ended with a decision in 2005 dismissing tribal claims on the basis of laches doctrine. See Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (Oneida I); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (Oneida II); Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005). The Oneida cases are discussed in Singer et al., Property Law, 102-103.


43 See Hernando De Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (2000) 49-51, 61-62 ff. “Although they are established to protect both the security of ownership and that of transactions, it is obvious that Western systems emphasize the latter. Security is principally focused on producing trust in transactions so that people can more easily make their assets lead a parallel life as capital.” (62)
rooted, too, in the historical context of conquest: if the Discovery Doctrine promoted colonization, colonization was an economic endeavor that enriched Europe collectively and in the British colonies, produced new forms of property that would become the basis of the market worldwide. The land market motivated the colonies to revolt from Britain and supported the United States’ survival and growth into a dominant world power. No parcel of land acquired monetary value on this market without the removal of Native people and the extinguishing of Native claims, actual or projected: the production of its value depended, in other words, upon white presence and the racial structure of conquest.

Marshall was clear about both the racial structure of discovery and the racial justification for conquest: as he explained, “the character and religion of inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.” The principle of first in time applied only to Europeans, presenting a tiering of humanity that appears to make Marshall himself uncomfortable, and to call claims under the rule “extravagant” and “pompous.” Dukeminier similarly calls this structure “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.” The racial character of conquest, however, as I noted above, presents a matter of greater importance than an opportunity for apology or condemnation. As I described above, it is substantively, structurally important to the holding. The devaluation of Native sovereign claims is denoted by the very term “discovery”; the corresponding characterization of lands subject to conquest by European explorers as “virgin lands,” “vacant lands,” or lands available for taking.

b) Labor Theory

The labor theory is an alternative theory of acquisition used to justify property interests that comprises the relatively intuitive idea that if you put your labor or sweat equity into an object or land, it should become yours. Though most property law courses teach the theory of labor and investment as a source of entitlement using the case INS v. Associated Press, the topic presents an opportunity to teach about one of the most important and long-lasting ideological formations to justify the colonization of America. In my unit on labor, students read excerpts of John Locke’s Second Treatise and legal scholar Stuart Banner’s How the Indians Lost Their Land to build on their understanding of the land system, the discovery doctrine, and the recording system. I also place my class on slavery in this unit, since colonists developed property in people to supply labor to support territorial expansion; the trade furthermore presents a glaring institutional contradiction to the labor theory, highlighting the applicability of this principle, like the rule of Discovery, was to Europeans only.

Most students have heard of John Locke and may know that he had a huge impact on the Founders, and in particular Jefferson, who drew on heavily on his writings to draft the Declaration of Independence. Few however know his biography: Locke was an aide to the Earl of Shaftesbury, an original proprietor of the Carolinas, wrote the Fundamental Constitutions of

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44 Johnson, 21 U.S. at 573; Singer et al., Property Law, 10.
45 Johnson, 21 U.S. at 590; Singer et al., Property Law, 13.
47 Dukeminier et al., Property, 12.
48 It is much simpler to point out that conquest was called “discovery” during the Age of Discovery.
Carolina and its agrarian laws, as well as a reform proposal for Virginia in 1696, and wrote many other memoranda and policy recommendations for the board of trade on the various colonies, settlement projects, and the institution of government and property in America; he served as secretary to the Board of Trade, the part of the English government responsible for colonial administration, during the 1670s, and was an investor in the Company of Merchant Adventurers to trade with the Bahamas and the Royal Africa Company (the Crown’s monopoly on the English slave-trade until the late seventeenth century). His *Second Treatise* chapter on Property reflects his knowledge about and real material interests in the colonies, as well as the main, widely taught justifications for rewarding labor—namely, desert, distributional equity, and efficiency/preventing waste.

I also draw on Locke’s chapter and excerpts from Banner to discuss Native property rights. Locke’s passages about Native people articulate the idea that they, like others, have property rights that derive from labor: if they give chase to and kill a deer, for example, they get the deer. However, colonists did not recognize Native people’s labor on the *land*, to conclude that in America, “lands lye wast and free.” Different factors, including the devastation caused by disease, agricultural practices involving crop rotation, and the preservation of hunting grounds, produced the idea that “Native occupancy did not involve sufficient “labor” to perfect a “property interest.” It is easy to highlight the continuing pattern of discounting Native presence and sovereignty, according to the logic of the Discovery Doctrine, that produced the idea that land in America was available, lying waste, and free: e.g. Native labor on the land is not “labor”; Native use of land is not “use.” The idea that the land was vacant and unused in turn produces the abstract rationales traditionally associated with the labor theory: colonists *deserved* the land, *needed* the land (distribution), *improved* and made *efficient use* of the land, rather than wasting it. These ideas perfectly correspond to endless examples of ways that colonists justified their occupation of Native nations’ lands; William Penn called it “waste or uncultivated Country,” and Samuel Purchas, for example, argued: “if any Countrey be not possessed by other men, every man by Law of Nature and Humanitie hath right of Plantation.” As Banner notes, “Everyone 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.” He asks why land in North America should be any different; the answer, of course, is given by the racial structure of the Discovery Doctrine: the rule explicitly provides that it is different to deal with Native people than other Europeans.

The Banner reading provides an opportunity to return to the question of how the English “consummated” their title to take actual possession, as well as the point that the Native “right of occupancy” that Marshall delineated in *Johnson* was a fairly new idea in 1823: before about

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53 In anticipation of the class on possession, it is worth noting that the concept was a part of the Rule of Discovery and also a part of the theory of Labor.
1790, many colonial officials and private individuals paid indigenous people to purchase huge tracts of land, cultivated, or not.\textsuperscript{56} The question Banner poses of why the English recognized Native property rights during the early period through purchase is worth devoting some time to, as it focuses the question on the nature of a property right. Banner provides a range of answers: 1) tribes clearly had property; 2) colonists did not have sufficient power to take tribal lands by force; 3) the English were competing with the French, who purchased land from tribes; 4) colonists found that they could purchase land from Native people cheaply.\textsuperscript{57} Further, because English entitlements came in this way to rest on Native title, the settled expectations of colonists functionally depended on the validity of Native peoples’ ability to sell.\textsuperscript{58} Banner makes clear, too, that English people did not need to respect Native people in order to respect Native property rights, in keeping with the hierarchical order of the Discovery Doctrine.\textsuperscript{59} Banner usefully builds on this point to focus on the very nature of a property right, arguing that, as a matter of practice, “There 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.”\textsuperscript{60}

Locke’s text is also useful for underscoring a conception of land that homologizes it to other forms of chattel property: cultivating land is like gathering an acorn or hunting a deer. This equivalence denotes a breakdown of the ancient English distinction between real property and chattel property that was remarkably new during the colonial period. For centuries, English property law regarded land and moveable goods as essentially unlike. Land was treated very distinctly because of its unique characteristics that sustain life; common interests in rivers, lakes, forests, shorelines, that make it difficult to conceive of these entities, or a part of them, as being owned by one person. Neither do the character of land nor mundane and long term environmental changes respect the survey’s neat boundaries that separate one person’s ownership rights from another: as lessons on nuisance law will later highlight, water and air move particles and objects across boundaries as a matter of course. In particular, chattel property, but not real property, had long been liable to seizure for the nonpayment of debts.\textsuperscript{61} Though mortgages were common, failure to pay debts resulted in divisions of interests that no longer exist in the same way, such as the owner’s loss of usufructual rights, or the right of a lender to take possession of a property and harvest the fruits and rents of land.\textsuperscript{62} The enclosure of common fields was a relatively new development during the period of colonization in England too. Against the tendency to justify colonial action on the basis of supposed cultural and practical

\textsuperscript{56} Banner, \textit{How the Indians Lost Their Land}, 33.

\textsuperscript{57} Banner, \textit{How the Indians Lost Their Land}, 34-39.

\textsuperscript{58} Banner, \textit{How the Indians Lost Their Land}, 41-42. E.g., When Edmund Andros, governor of the Dominion of New England, reversed previously settled policy by invalidating all titles that could not be traced back to government grant, he caused a “storm of protest” from New Englanders, leading to a group of Bostonians to declare that if purchase from Indians could not serve as the root of a valid land title, “\textit{no Man was owner of a Foot of Land in all the Colony.”}

\textsuperscript{59} Banner, \textit{How the Indians Lost Their Land}, 42. Banner notes that the NY Council commented in 1674 that “the usual practice” was “to give their Indians some recompence for their land & so [the landowner] seems to purchase it of them, yet that is not done for want of sufficient title from the King.” His account emphasizes the \textit{function} of recognizing property rights: colonists believed that paying Native people was a matter of “prudence & Christian charity lest otherwise the Indians might have destroyed the first planters.”

\textsuperscript{60} Banner, \textit{How the Indians Lost Their Land}, 42.


difference between colonists and Native peoples, Banner usefully describes the similarities between Native property arrangements and old English commons: villages claimed large areas of land, chiefs allocated plots for farming to families, based on size and need, and unallocated lands were available to all members of the community for harvesting fruit, wood, etc. The town planted fields together; but family plots were distinguished by narrow strips of grass. While the ideas of boundaries themselves were not new, enclosures evolved in America to serve the novel idea that “individuals possess all the resources within a given area of land,” in large part because of the idea, discussed above, that land was “unlimited,” “available,” and there for the taking.

U.S. law has rewarded only certain kinds of labor, incentivizing particular types of work and not others. Historically, colonial governments and the United States created laws to recognize, reward and encourage immigration and the labor of settlement. Under headright systems, they promised people land on the condition that they clear, cultivate, occupy, and defend it. The use of such incentives to create value in land is apparent in the famous Homestead Act of 1862, as well as its predecessor and progeny legislation. This long legislative tradition, which continues to today, presents the opportunity to make two points: 1) the government played a major role in encouraging and managing the settlement of lands, territorial expansion, and building the land market; and 2) the collective project of settlement was also a project of removal. Dukeminier’s casebook includes a good note on work by legal scholar Eric Kades, who described this effect of settlement in great detail, and focuses on how settlement facilitated the government’s purchase of land from tribes: “A native 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.”

c) Possession

The idea that one’s possession of something justifies their continued possession of it, in the context of the colonization and settlement of America, is closely related to both the Discovery Doctrine and the labor theory. The importance of taking actual control is apparent in the Discovery Doctrine’s requirement for “consummating title”; “labor,” or English settlers’ cultivation and enclosure of lands, over and against Native occupation, was a means of taking...

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64 Banner, How the Indians Lost Their Land, 43-44, quoting Roger Williams: “The Natives are very exact and punctual in the bounds of their Lands. And I have knowne them make bargain and sale amonst themselves for a small piece, or quantity of ground.”
65 Banner, How the Indians Lost Their Land, 37.
66 Singer et al., Property Law, 104-106 (discussing Government Grants, such as the Homestead Act and land grants); see also Singer et al., Property Law, 106 (discussing the Pike River Claimants Union and their constitution, which wrote that “…and as Government has heretofore encouraged emigration by granting pre-emption to actual settlers, we are assured that our settling and cultivating the public lands is in accordance with the best wishes of Government…”).
68 The classic case Pierson v. Post is useful for clarifying this requirement of possession. Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805). Property law scholar Bethany Berger’s indispensable article about the case examines the contest over lands that was its historical context to highlight the fallacy of “vacant lands” at the root of the Property Law myth that the field’s central problem is how to recognize ownership interests in a world of “unowned things.” Bethany R. Berger, “It’s Not About the Fox: The Untold History of Pierson v. Post, 55 Duke L. J. 1089 (2006).
actual control or possession. Individual possession that preceded title supplied essential labor for the colonization project—again, settlers spread European diseases against which tribes had no immunity, cleared land, and hunted prodigiously to get hides and fur.

During the historic process of colonization, settlers usually entered into Native nations’ territory, encouraged by government incentives, before the government made its formal claims to title of those lands, as Linklater, Banner, and casebook authors discuss. The government legislation that encouraged possession therefore, in practice, worked somewhat retroactively and in marked contrast to its theory. In theory, for example, the Trade and Intercourse Acts, by giving the government the prerogative to formally acquire lands from tribes, suggested a sequence of acquisition, followed by survey, and distribution to individuals who would settle lands. In actuality, it was common for private individuals to enter tribal territory and attempt to settle it first; their labor made acquisition easier for the federal government, who followed to pursue formal cessions that would allow it to then distribute claims to the individuals and reward them for their labor.

This process of settlement helps to explain the theory of possession: actual possession facilitated government acquisition of Native lands. Additionally, just as a theory of “Discovery” justified colonists in embarking on the process of conquest, and a theory of “labor” justified their claims to the land while they were in the process of settlement, once they took actual control of lands, the theory of possession justified their continuing control of it. This dynamic also denotes some degree of coordination between individuals and governments during the process of westward expansion; the interests of American officials, who were generally also investors, speculators, and settlers, aligned in acquiring land quickly and cheaply from tribes so it could be resold at a profit. When individuals spread into Indian Country aggressively, they placed pressure on the federal government, who could only avoid war by following to purchase land. Each acquisition of new territory only led to more settlement and pressure from the settlers for the federal government to acquire even more land, causing Secretary of State Timothy Pickering to point out that expansion driven by this dynamic would have essentially no limit.

The act of taking collective possession of lands also changed settlers’ conception of Native property rights. Banner describes a strong shift between the colonial period, when direct purchases from tribes were common, to the limited right of occupancy Marshall described in

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69 As the Dukeminier casebook writes: “Professor Kades argues that the settlers' objective was efficient expropriation; they wanted to get land at the least cost to themselves, with cost defined broadly to include lives lost in battle, diversion of capital to military production, and so on. In this light, purchase was often the cheapest course.” Dukeminier et al., *Property*, 17, discussing Eric Kades, “The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands, 148 U. Pa. L. Rev. 1065 (2000).

70 Dukeminier et al., *Property*, 18.

71 Settlers moved West ahead of the survey: “The race that developed between surveyors and squatters marked the entire history of the land survey, and it was rare for a surveying team to measure productive country that had no settlers at all.” Linklater, *Measuring America*, 163.

72 “Settlers resisted federal policy, occupying federal lands before formally purchasing them,” Singer et al., *Property Law*, 105.


74 To emphasize the government role again, Linklater describes successive land legislation that lowered the price and minimum sizes of parcels for purchase that made land increasingly accessible to individual settlers who performed this labor. Linklater, *Measuring America*, 164.


77 Banner, *How the Indians Lost Their Land*, 125.
Johnson: by the time of Johnson, he points out, there was no longer a strong belief in Native people owned the land; Anglo-Americans felt, rather, that the land was already theirs, illustrating how the Discovery Doctrine distributed entitlements in such a way that dealing with Native claims became a matter of removing an obstacle, a means to an end. Changes in treaties with Native nations also indicated a shift in attitudes: where treaties had previously defined the boundaries of what tribes conveyed, the 1784 Treaty of Fort Stanwix with the Iriquois, for example, defined the boundaries of land not conveyed and assumed the Iriquois ceded all other lands. The idea that the Indians now retained no land other than what was given them by the grace of the government reflects a theory of possession, under which property rights stemming from control and dominion already achieved, as well as the different position of the United States vis a vis tribes since English expeditions launched under the Discovery Doctrine two centuries prior, and since settlers’ labor led to their occupation of most of the eastern seaboard.

The strong relationship between the activity of squatting and possession has no better doctrinal illustration than adverse possession. This history and this doctrine both raise the important question of when the government tolerates unlawfulness and incorporates self-help, even unlawful self-help, into law to create a property interest.

B. The Slave Trade and the Resistance to Black Landownership

1. Property in Enslaved People

The class I teach on slavery gives students a brief overview of the institution that emphasizes its scale and the importance of this form of property to American wealth, growth, and political viability. Further, the racial social order that this major property institution entrenched in America is critical for explaining a huge proportion of the developments in laws and institutions governing interests in real property that followed abolition. All of the colonies developed some dependence on enslaved Africans to provide the labor they needed to work the lands they were so rapidly acquiring, especially in the South. In total, about 600,000 of the 12 million Africans taken into captivity for the transatlantic slave trade were brought to mainland America. By 1790, there were about 700,000 enslaved persons in the United States, a little less than 20% of the total Black and white population at the time. The value of property in humans held across the colonies by 1774 was over £21 million (the equivalent of almost $3.2 billion today). By 1860, the enslaved population had grown by 580%, so that there were almost 4 million enslaved persons in the US.

The slave trade profoundly impacted the American property system, both by creating a tremendous proportion of the wealth in property that propelled its growth and increased the

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78 Banner, How the Indians Lost Their Land, 124-29.
79 The Singer et al. casebook has a good section on the role of squatters. The chapter includes an excerpt from James Willard Hurst’s discussion of the 1836 Pike River Claimants Union, and the settlers’ explicit acknowledgment that although they had settled unlawfully, it was in reliance on the government’s incentives and promise to reward their labor. Singer et al., Property Law, 105-07, 108-09.
80 Given the breadth and importance of this part of the history of property law, devoting one class to the subject highly compresses the topic. This section offers ideas intended to demonstrate how foundational this system was to the development of property law in general, and to improve upon a situation where frequently, property law professors do not address the subject at all. See supra, n. 1.
81 Jones, Wealth of a Nation to Be, 90.
power of the United States, and by entrenching racial dynamics in American society that practices of governing and regulating property in land would continue to institutionalize and maintain after abolition. Despite our knowledge of these facts, law professors continue to face epistemic difficulties in explaining how the trade in property in people shaped the American property system. One example of the extent to which we remain unaware of how the institution of slavery shaped the basic terms of the field is the pervasive use of the legal kadigans “White Acre” and “Black Acre” in property law casebooks, classrooms, and questions on the bar exam. While it is possible to find at least two uses of the terms in English legal treatises in the seventeenth and eighteenth centuries, the terms spread most prominently across the United States after publication of an 1856 pro-slavery novel, White Acre vs. Blackacre, written in response to Uncle Tom’s Cabin, where in White Acre represents an incompetent northern farm and Black Acre is the name of a southern plantation labored upon by loyal, hardworking slaves. Further, property law courses address slavery at all—and frequently, they do not—the content of the lesson focuses on what moral limits the law should impose on the kinds of things we treat as property. However, the laws that facilitated the trade and accumulation of property in people reached beyond this conceptual question, and also beyond the laws that specifically governed the treatment and capture of slaves, which became obsolete with abolition.

For example, as Justin Simard has recently shown, a full range of doctrines in not only property law, but also contracts, evidence, civil procedure, criminal procedure, statutory interpretation, and torts, among other fields, developed through their application to disputes concerning property in people, producing decisions that are still cited by courts in a majority of states, every federal court of appeals, and the Supreme Court. In order to emphasize the point that the slave trade was not only the focus of singular and dramatic constitutional events, but also everyday commercial law, I assign Bryan v. Weems, an 1856 Alabama case involving a claim that property in enslaved people had been wrongfully devised that invokes the principle of partus sequitur ventrem, the rule stating the status of the child follows the mother (see Timeline below). This case was used to teach statute of limitations and appeared in subsequent editions of casebooks by John Chipman Gray of Harvard Law School, Edward Henry Warren of Harvard Law School, and Harry Augustus Bigelow, Dean of University of Chicago Law School, between 1888 and 1942. So that students may follow the facts more easily, it may be useful to teach this case after covering the basic forms of estates and the concept of devise.

I designed my class on slavery in order to develop several themes already on the table at this point in the semester. First, I teach the 1825 John Marshall decision The Antelope because this decision shows that the slave trade, like conquest, operated within a larger framework drawn by international law and the Discovery Doctrine; again, the Portuguese slave trade launched under the authority of the doctrine as articulated in two papal bulls, the Dum Diversas (1452) and Romanus Pontifex (1455). It is easy to draw parallels between The Antelope and Johnson v. M’Intosh: in both decisions, students will be struck by Marshall’s moral equivocations and protestations that he is bound by positive law. I include the lesson within a unit on labor in order to point out that 1) the labor of enslaved persons, along with white persons’ labor of settlement, together made the colonies viable and productive and furthered territorial expansion and conquest; 2) slavery poses a major institutional contradiction to the labor theory of entitlement.

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82 William Burwell, White Acre vs. Black Acre. A Case at Law, (Richmond: J.W. Randolph, 1856); see also Park, “This Land is Not Our Land” (forthcoming 2020).
starkly illustrating that the labor theory, like the rule of First in Time in the Doctrine of Discovery, followed racial lines, and applied to white Europeans only.

In order to help students understand the temporal scope of its development and to provide context for the cases, it is extremely helpful to give students a basic timeline of the trade using a power point. I use the following timeline in my class, which contains the beginning point of the trade in the mainland colonies in America, its endpoint with abolition in the United States, and key developments that help explain the racial social order it produced and the international framework in which it operated:

**TIMELINE**

1619: First enslaved Africans arrive in Virginia.

1662: Virginia passes law stating that “all children borne in this country shalbe hold bond or free only according to the condition of the mother.”

Rule of *Partus sequitur ventrem* (lit. “off-spring follows the womb”) came to govern property in slaves across the colonies.

- Contravened the English common-law rule that status followed the condition of the father.
- This change, together with anti-miscegenation laws, tied enslavement to kinship, making the institution of slavery in this country uniquely racial.

1772: Somerset’s case confirms slavery on English soil was unsupported in English law, but slavery remained legal in most of the British Empire until 1833.

1788: Constitution Article I, section 9, clause 1: Congress not to prohibit U.S. participation in the international slave trade until 1808.

1807: The Slave Trade Act of 1807 restricted slavery across the British Empire; it prevented trading slaves but did not end slavery.

The United States adopted an Act Prohibiting the Importation of Slaves, which provided for the abolition of its Atlantic slave trade and increased the importance of the domestic slave trade.

1833: Slavery Abolition Act ended slavery across the British Empire.

1865: 13th Amendment passed, abolishing slavery in the U.S.

In order to show how property law categories were mobilized and changed to create the novel form of property in people, I also review the history of experimentation in designating property in people as either chattel property or real property. As Thomas Morris put it,

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84 William Hening, ed., *The statutes at large:: being a collection of all the laws of Virginia, from the first session of the legislature, in the year 1619. : Published pursuant to an act of the General Assembly of Virginia, passed on the fifth day of February one thousand eight hundred and eight*. Vol. 2 (New York: Printed for the editor, by R. & W. & G. Bartow., 1823), 170.
How slaves would be categorized could be important to the slaves and would be to widows, heirs, legatees, debtors, and creditors. Would slaves be defined as realty or as chattels? Given the mobility and the humanity of slaves, the answer may seem obvious, but it is not, even though scholars normally refer to slaves as ‘chattels personal.’ In Virginia from 1705 to 1792 slaves were defined as real estate for some purposes. South Carolina tried to characterize slaves as real estate in 1690, when it followed the Barbadian code, but this was disallowed by the English Privy Council. In Louisiana slaves were designated as ‘immoveables,’ although sometimes the phrase ‘real estate’ was used. They were defined as realty for some purposes in Kentucky from 1798 to 1852 and in Arkansas from 1840 to 1843. But that does not end the list. Some judges analogized slaves to land and adopted rules reflecting that correspondence. For one reason or another rules of real property law were applied to slaves in some instances in over one-third of the jurisdictions that made up the slave South.85

These experiments underscore three important points. First, as the following quote from the Virginia jurist St. George Tucker of Virginia well illustrates, the experiments underscore the malleability and function of legal categories:

> the incidents to real and personal property, respectively, are merely creatures of the juris positive, or ordinary rules of law concerning them; and may be altered and changed o 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, 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.86

Second, because property in enslaved people was extremely valuable and constituted a huge part of people’s assets,87 colonists used the real property designation to protect these assets from the rules governing property in moveable goods, which made chattel property liable for unsecured debts. Finally, the value of land and the labor of enslaved people became interdependent in the colonies, since each of these assets became essentially useless without possessing the other. Additionally, the possession of large estates made it possible for debtors to conceal enslaved persons from their creditors when land was protected from liability for those debts. When land did become liable for nonpayment of debts across the colonies in 1732, slave auctions became more frequent both because property in people could no longer be concealed on protected lands, and because land began to change hands more quickly, increasing the frequency with which people sought to acquire property in persons for labor. Consequently, I point out, during the colonial period, property laws changed to render both land and enslaved people into a form of property closer to chattel or personalty at the same time.

C. Racism in the American Real Estate Market

1. Resistance to Black Landownership

87 See charts showing property in “slaves & serv.” made up around 20% of physical wealth in the thirteen colonies. Hanson Jones, *Wealth of a Nation to Be*, 95-98.
It is crucial to emphasize that the slave trade entrenched ideological anti-blackness that profoundly shaped the social order of the colonies in addition to its material property formations.\(^8^8\) This racial ideology impacted the development of the real estate market, as I discuss below, by underpinning a long history of widespread resistance to Black landownership. I teach the 1838 Mississippi case *Hinds v. Brazealle*,\(^8^9\) involving the revocation of a deed of emancipation and bequeath of land to an enslaved person, together with a section from Berger, Davidson, Singer and Peñalver’s casebook on Freed Slaves, in order to highlight how the resistance that *Brazealle* illustrates translated into an enormous issue after abolition. In 1865, General Sherman issued Special Field Order No. 15 promising free people forty acres and later, mules; some formerly enslaved people took over plantations after the war. The arguments of freedpeople about their rights to the land—that “[t]he land ought to belong to the man who could work it,” not those who “sit in the house and profit by the labor of others”-- sound strongly in the labor theory and its ideas of fairness and desert. In a brief excerpt by Harriet Jacobs, describing her longing for a “hearthstone of her own,” even more for her children and herself, students will recognize how critical the issue of landownership is to the idea and experience of freedom in America.\(^9^0\)

In 1868, Andrew Johnson issued pardons to members of the Confederacy and used violence to remove former slaves and restore all their landed property. As a result, former plantation owners were able to run sharecropping systems that gave freed people very few options but to work for the same people who had enslaved them and under very exploitative conditions. Some emancipated Black people did become landowners by taking advantage of legislation such as the Homestead Act, or by purchasing land in the private market, where they encountered serious discrimination and predation. Yet resistance to Black landownership greatly intensified in scale after abolition, in ways that are crucial for understanding many of the most significant developments in property law during the late nineteenth and twentieth centuries, including the history of public accommodations law, to which I turn next.

Finally, however, it is important to note that the long history of resistance to Black landownership implicates many property law topics that appear later in the course, and some that typically do not but provide excellent examples of the dynamics of development in America, historically and today. These topics include, for example, racially restrictive zoning laws,\(^9^1\) racially restrictive covenants,\(^9^2\) contracts for deed,\(^9^3\) partition, which has been used as a tool of

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\(^8^9\) Brophy et al., *Integrating Spaces*, 42-44.

\(^9^0\) Linklater, for example, describes how in America, land meant opportunity, possibility, freedom, a chance to take care of your family. Linklater, *Measuring America*, 175.


\(^9^3\) This predatory and highly risky purchase money financing tool was widely used against the African-American community during the period of redlining. Beryl Satter, Family Properties (2009). Today, their use is on the rise again and they appear in high numbers in colonias across the southern border.
Black land loss after fractionation that results from intestate descent of property, especially in rural areas,\textsuperscript{94} and property tax foreclosures in American cities.\textsuperscript{95}

2. Public Accommodations

The topic of public accommodations, or the tension between an owner’s right to exclude unwanted patrons and the patron’s competing right of reasonable access, presents an excellent opportunity to elaborate on the thick relationship between property rights and American conceptions of freedom. Berger, Davidson, Peñalver and Singer’s casebook provides excellent material on the history of public accommodations. First, the authors track the shift from traditional, pre-abolition rule that places open to public had a duty to serve anyone who could pay,\textsuperscript{96} (a rule much broader than the modern mandate applied to innkeepers and common carriers), to the proliferation of efforts around the time of the Civil War to legally segregate public space in anticipation of slavery’s imminent fall.\textsuperscript{97} After abolition, the Fourteenth Amendment’s equal protection clause and the Civil Rights Acts of 1866 and 1870 each underscored the right of reasonable access to public places. In particular, the Civil Rights Acts articulated equal rights in terms of \textit{private} law rights—not only as the right “to make and enforce contracts,” but also as “the same right as is enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property.”\textsuperscript{98} In other words, the nineteenth-century Civil Rights Acts constructed emancipated peoples’ new freedom in terms of rights to participate in the economy—not only in order to be able to secure shelter, subsistence, and other fundamental


\textsuperscript{96} The Singer casebook discusses how Blackstone noted in 1765 that, “if an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal \textit{assumpsit} an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller,” 3 William Blackstone, \textit{Commentaries on the Laws of England} 164 (Univ. of Chicago reprint 1979) (1768). For centuries this duty applied to “anyone who held himself out [as open to the public] to serve all who might apply,” in part due to fourteenth century laws enacted in the wake of the Black Death that required all who were able to work to do so at a reasonable rate, and that none could refuse to “practice his calling.” See Norman F. Arterburn, \textit{The Origin and First Test of Public Callings}, 75 U. Pa. L. Rev. 411, 421 (1927) in Singer et al., \textit{Property Law}, 28..

\textsuperscript{97} The Singer casebook notes that the first case to clearly assert that places of entertainment holding themselves as open to the general public did not have a common law duty to serve the public was an 1858 case in Massachusetts. There, the court held that Howard Athenaeum, a well-known lecture hall near the State House, could exclude African Americans. \textit{McCrea v. Marsh}, 78 Mass. 211 (1858); see also \textit{see also Burton v. Scherpf}, 83 Mass. 133 (1861) (allowing an African American to be ejected from a theater after he had bought a ticket). Singer et al., \textit{Property}, 28-29.

human needs, but also to face liability for transactions undertaken toward those ends (“to be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind”). The emphasis, within this framework, on being able to transact for property underscores again how core property is to the construction of freedom in the society and economy of the United States.

The possibility of a robust right to participate in property transactions, however, was quickly narrowed after the Supreme Court struck down an 1875 public accommodations law that explicitly sought to regulate private actors in the Civil Rights Cases. The Court thereby introduced the state action doctrine, permanently cabining Equal Protection jurisprudence. This history of how the state action doctrine emerged is critical background for understanding the Court’s decisions in the landmark cases Buchanan v. Warley (1917) and Shelley v. Kraemer (1948), concerning racial zoning and racially restrictive covenants, respectively. It also provides an opportunity to underscore the consequences of the doctrine for the notion of freedom encompassed in the Civil Rights Act of 1866: what is left of the property right, after the state action doctrine, is the ability to purchase and own property or contract for services only if you can find a willing seller. This reduction of rights granted after the end of the Civil War ultimately resulted in the notorious decision in Plessy v. Ferguson and the era of Jim Crow, in a tide of legal subordination that did not turn until the Court’s decision in Brown v. Board of Education in 1954 and the passage of the Civil Rights Act of 1964.

Both the Civil Rights Act of 1866 and the Civil Rights Act of 1964, passed to govern public accommodations pursuant to the Commerce Clause, concern individuals’ rights to access the marketplace and contract for goods and services, highlighting the essentially relational nature of property law. However, examining the two acts together, as Berger, Davidson, Peñalver, and Singer’s book allows you to do, further highlights the difference between the state’s attempt to ensure access through each law: on the one hand, the 1866 law’s creation of strong positive rights to transact for property, and on the other, the 1964 law’s delineation of narrow limitations on people’s right to exclude, on dominion otherwise considered to be fairly absolute. The CRA of 1866 was addressed to new citizens who had been barred from “the commons” and concerned their new affirmative rights in that space—to enter, receive equal treatment, and engage in commerce. By contrast, the CRA of 1964 is addressed to businesses and focuses on prevention at the margins: it identifies some limitations on the ways that some of those businesses can exclude people from their premises. The quick and successful efforts to diminish the robust property rights guaranteed by the CRA of 1866 in the wake of abolition highlights the extent to which efforts to create private rights for newly free people in public spaces was viewed as a major affront to private property. Accordingly, the opponents of the sit-ins, demonstrations, and litigation over public accommodations criticized the CRA of 1964 as violation of owners’ private property rights. However, the CRA of 1964’s shift to focus on the rights at the business owners’ end of the property relation, even if to limit and regulate them, still came at the expense of individuals’ ability to fully exercise newly granted rights of contract and property and ownership, and therefore, to live on par with other citizens. Viewed from above, this shift redistributed entitlements in a shared world to largely maintain the status quo with respect to property and access to it.

Conclusion: Race and the Production of Land Value

This chapter describes the ways that the histories of conquest and slavery comprise an important part of the foundations of American property law, one that illuminates the ways in which developments in the colonies produced a property system distinct from England’s. Its scope has been limited to the histories of conquest and slavery that laid these foundations; it does not attempt to describe the longer, ongoing histories of colonization and resistance to Black landownership. Rather, its goal is to describe a framework for grounding the property law course in an understanding of the history and main justifications for property in America that will facilitate teaching the units of the course that follow—again, to establish a track upon which teachers may arrange their cars. Perhaps above all, this framework emphasizes the structure of the property system in which the English doctrines that traditionally appear in the course operate.

The history of the government creation of the survey and recording systems that underpinned the market in land enclosures is important background for understanding the federal government’s twentieth-century interventions to build, upon that foundation, a national mortgage market and secondary mortgage market. It is impossible to understand contemporary property—the real estate market-- without a basic understanding of the structure of these markets, which remain anchored by interests in land enclosures.

Additionally, the history I outlined above shows how the racial violence of colonization and the slave trade produced the value of property in the American real estate system itself. The history of property that demonstrates structural reliance on racial violence to produce monetary value exceeds the histories of conquest and slavery that I have discussed here but begins with them. Specifically, the land had no monetary value on the colonial market until white people were present upon it and Native people removed from it. The monetary value of land then increased according to the extent to which whites established their claims to lands, developed the lands, and populated the lands in proximity to one another. The U.S. Census Bureau indeed used the density of white population as the measure to determine that the frontier had formally closed in 1890, when it found that there were no longer lands with less than two white people per square mile within the territorial boundaries of the nation.

As I described above, after abolition, the concerted effort to suppress Black landownership followed a similar logic of raising the value of real estate according to the density of its occupation by white people. Without teaching this history, it is difficult to explain how white presence came to signify market desirability, why racial zoning laws were a major part of the history of zoning law, and why racially restrictive covenants were a major part of the history of real covenants in America. Furthermore, it is again essentially impossible to understand the structure of the contemporary real estate market without learning about how the Federal Housing Administration created a mortgage market by assuming lenders’ risk in issuing them, and transformed the American landscape by underwriting the construction of the suburbs. Yet there is no clearer example of institutional efforts that formally affirmed and raised real estate value because of white presence and diminished it because of non-white presence than the FHA’s notorious program of “redlining,” which delineated neighborhoods where the federal government would and would not insure mortgages based on the race of their occupants.100 The patterns of

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white flight and the unequal distribution of government resources between the suburbs and the urban core constitute crucial background, further, for explaining the history of urban disinvestment. However, it is that disinvestment that underpins the urban renewal efforts that students will be familiar with from their own observations about what is happening in cities across the country, as well as cases from the second half of the twentieth century used to teach doctrines such as covenants and zoning in the property law curriculum\textsuperscript{101} and the vast racial disparities in the impact of the 2008 foreclosure crisis.\textsuperscript{102}
