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Race and Property Law

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Race and Property Law

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Race is so distinctive and significant a structuring force in the history of property in the United States that it is difficult to identify a part of the law of property that it has not touched. The simplest explanation for this intimate relationship between race and property law is that the creation of the vast majority of all property in North America, since the English established their first permanent settlements there in the early seventeenth-century, has depended on racial distinctions: the attribution of monetary value to the two most important forms of property in early America--land and enslaved people—depended upon their ownership and control by white people and legal regulations that enforced the racialization of peoples dispossessed of their lands and personal autonomy. English, British, colonial, and U.S. administrations, legislatures, and courts, as well as private entities, all evolved these racial distinctions in myriad ways as they developed the American property law system. The use of race to create value in property was entrenched by enslavement and colonization, and has continued to shape the regulation of property in powerful ways after the abolition of slavery, the Civil Rights Movement, and to the present day.

This chapter offers an outline for understanding the key role of race in producing property values in the history of the property law system. It identifies major developments in the mutually formative relationship between race and property in America that made and remade property interests in America through the processes of 1) dispossessing nonwhites, 2) degrading their homelands, communities, and selves, and 3) limiting their efforts to enter public space and occupy or acquire property within the regime thereby established. It begins with the use of law to create the two most important forms of property in the colonies and early Republic, both of which acquired monetary value and status as property through white ownership and control—namely, enclosed land and enslaved human beings. Second, the way that race produced property values shifted significantly after the abolition of slavery, and the anti-blackness entrenched by the slave trade spurred and organized resistance to Black landownership and property rights more generally. Third, after the government consolidated the national territory through conquest, it drew upon the continuing backlash to abolition and widespread desire for racial segregation to remake the infrastructure and the very commodities on offer on the real estate market through its notorious redlining program and establishment of a major secondary mortgage market.

My focus on the production of interests in land accords with the focus of most property law courses today. Unlike the traditional property law course, however, this chapter focuses on the role of race in shaping the field. To lay the context for this intervention, I preface the discussion of the history of property law below with a brief description of the evolution of property law casebooks and the marginalization of these topics in the most cited scholarship in the field. It is because of this evolution and path dependence that, despite the extensive scholarship illuminating the relationship between race and property law, the field retains as a baseline norm the idea that property law is an essentially neutral system, which has at time been infected with aberrational instances of prejudice. By showing how property interests in land today acquired their monetary value through racial domination, this chapter corrects the relegation of race to an optional or “add-on” topic in property law, and demonstrates that race is a necessary analytic for understanding the field.
The Erasure of Race from the Study of U.S. Property Law

The traditional curriculum excludes the histories of conquest and slavery and questions of race as a result of path dependence upon norms set during the era of Jim Crow. To the extent that the issue of race has been brought back into the course, it has been relegated to the margins of the field, and its relation to the foundations of the field obscured. Consequently, Alfred Brophy, Alberto Lopez and Kali Murray’s excellent 2011 supplement on property law and race opens by noting how common it remains for students to hear little to nothing about race in the first-year property law class; they noted that students routinely asked them, “why don’t we hear more about the role of race in property law in the first-year course?”

My examination of 173 property law casebooks over 130 years, beginning in 1888, shows that property law casebooks, with few exceptions, by and large naturalized or affirmed the histories of conquest and slavery and the highly racialized social order they produced. From the outset, casebooks eschewed the nineteenth century property treatise tradition of beginning with the history of conquest, captured in the text of the seminal case Johnson v. M’Intosh, and focused instead on English feudal systems. By contrast, for several decades, casebooks liberally incorporated cases involving disputes over the illegal and obsolete form of property in people, before eliminating these cases and all traces of the history American chattel slavery from property law casebooks in the 1940s. Though casebooks began to reintroduce some materials on the histories of conquest and slavery in the 1970s, for the most part, the additions that became widespread were marginal and did not disturb the traditional program.

Property law scholarship also reflects this norm of erasure. An analysis of the 25 most cited articles on real property published between 1990 and 2015 shows that only three mentioned conquest, one of which did so only in footnotes. Eight articles mentioned “slavery,” but most did so only in passing or in a footnote, or referenced an abstract condition of enslavement, rather than the specific institution of American chattel slavery. Seven out of ten

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2 ALFRED BROPHY, ALBERTO LOPEZ, & KALI MURRAY, INTEGRATING SPACES: PROPERTY LAW & RACE xvii (2011). Brophy, Lopez, and Murray directly answer these questions with sections that address “The Making of Property Law” through conquest and slavery, the racial regulation of public spaces and discrimination in the sale and occupancy of real property after abolition, Civil Rights cases, and more.
3 Park, The History Wars and Property Law, supra note 1, at 1071-91.
4 See id., at 1074-86.
5 Richard Chused and Joseph Singer’s casebooks were notable exceptions. RICHARD CHUSED, A MODERN APPROACH TO PROPERTY (1978); JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES (7th ed. 2017).
articles that mentioned race at all did so only in passing or in footnotes. Only two articles discuss conquest, enslavement, and examined the significance of race for property law. In *Whiteness as Property*, Cheryl Harris writes that “[t]he legal legacy of slavery and of the seizure of land from Native American peoples is not merely a regime of property law that is (mis)informed by racist and ethnocentric themes.” Rather, she explains that out of “the parallel systems of domination of Black and Native American people were created racially contingent forms of property and property rights.” In *Sovereignty and Property*, Joseph Singer analyzes Native nations’ property rights through American Indian Law decisions, including *Johnson*, to bluntly assert that “both property rights and political power in the United States are associated with a system of racial caste.”

Harris and Singer offered observations about the relation between these topics that, if taken up by property law scholars and extended to various doctrines, would have required the field to revise many of its fundamental presuppositions. Over the past three decades, scholarship about race and property law has continued to grow, and the fundamental relationship between race and property has been well established by historical scholarship, in ways that have changed public discourse and consciousness as well. The public is growing increasingly aware that property rights in the United States “are associated with a system of racial caste,” and that “racially contingent forms of property” long constituted the vast majority of all property. The field of property law, however, still retains the basic shape of the canon acquired by through the omission of race from the study of the subject. The field as a whole should revisit its foundations to avoid a growing lack of consensus about its own basic tenets, history, priorities, and possibilities for the future. The analysis below, which focuses on the racial production of value that has been constitutive of property in the United States, represents a start.

**Race and the Making of Property**

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9 See Park, *The History Wars and Property Law*, supra note 1, at 1089. Several articles from this list that do mention “race,” however briefly, do so in order to argue that we should on factors other than race in analyses of ostensibly racialized circumstances: Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics*, 103 YALE L.J 1383 (1994) (arguing that factors other than race were more significant in choices to target minority neighborhoods in hazardous land use siting choices); Gregory Alexander, *Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV 745 (2009) (briefly noting that enforcing laws on the basis of moral obligations such as not discriminating or using “factors such as race in selecting my friends” is unreasonable and substantially violates privacy interests); Michael Heller, *Boundaries of Private Property*, 108 YALE L.J 1163 (1999) (acknowledging that cities might abuse their zoning powers to exclude the poor and racial minorities, but underscoring other logics driving minimum lot sizes); Carol Rose, *Several Futures of Property: of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV 129 (1998) (noting controversy over the role of race in analyses of toxic siting choices, to emphasize a “more general point” not about race and citing Vicki Been’s work about how factors other than race were more important than race). The final articles’ mentions of “race” truly constitute “mere mentions,” and contain practically no substantive content about the issue of race at all. Rose, *supra* note 7 (mentioning feminist theory and critical race theory’s defense of rights, and citing articles responding to critical legal studies’ critiques of rights); Carol Rose, *Property as the Keystone Right*, 71 NOTRE DAME L. REV 329 (1996) (citing a N.Y. Times article about a “German with a Racist Past”); Jed Rubenfeld, *Usings*, 102 YALE L.J 1077 (1993) (asking, in a discussion of “efficiency,” “Shall we discriminate against a race upon a finding that it would make society still richer?”); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV 1449 (1990) (characterizing *Shelley v. Kraemer* in one footnote about state action doctrine and noting that state courts are attentive to public opinion about “controversial and salient issues such as criminal sentencing and race relations” in another).

10 Harris, *supra* note 7, at 1724.
11 Id. at 1714.
12 Singer, *supra* note 7, at 5.
On the eve of the Revolution, lands expropriated from Native nations and enslaved human beings comprised about 75 percent of all colonists’ assets. During the preceding century and a half, and for as long as people accumulated these forms of property, property laws authorized these expropriations and guided their conversion into and regulation as property. In other words, the processes critical to making property out of lands and human beings depended on law: first, seizing sovereign holdings and beings; second, defining the parameters through which they could be understood as “property”; third, trading them on a market and regulating that trade. These processes made it possible for Europeans to own and control Native nations’ lands and Native and African people, and attribute monetary value to them. Further, ideas about the non-Europeans whose lands and bodies were the object of this process proliferated from and facilitated each step of this process.

First, expropriation was authorized by the international Doctrine of Discovery, which made a hierarchical order of humanity the justifying impetus for Christian Europeans to seize lands from and enslave non-Christian non-Europeans. The English launched their colonizing projects under the auspices of this imperial racial project in the late sixteenth and early seventeenth centuries; shortly after doing so, they joined the transatlantic slave trade that had grown from Portuguese expeditions to Africa that earlier iterations of the Doctrine authorized in the mid-fifteenth century. English settlements therefore grew under the general premise of European entitlement and superiority to Native nations and African peoples in America. A little over two centuries after the English arrived in mainland America, the 1823 John Marshall decision in Johnson v. M’Intosh established conquest and the Discovery Doctrine as the foundation of sovereign jurisdiction and private property rights. Marshall’s iteration of the Discovery Doctrine offered a two-stage rule: first, a European nation had an option to make an initial claim to lands and people that no other European sovereign had yet conquered; second, however, to consummate their claims, that European nation then had to establish control, or achieve “actual possession” of those resources. Insofar as colonists took possession of other people’s lands and bodies, this rule authorized those peoples’ dispossession.

If the Discovery Doctrine’s European hierarchical order launched the ships that brought colonists to the Americas, colonists created the foundations of a new society on the ground, as they interacted with Native and African peoples and established and grew their settlements. Through these interactions, they elaborated the specific racial content of the basic distinctions

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15 Miller et al., supra note 14; Williams, supra note 14; Slattery, supra note 14.
17 Johnson v. M’Intosh, 21 U.S. 543, 583 (1823).
that provided the impetus for conquest, and they also created laws to treat the land they expropriated and the human beings they subordinated as property. With the goal of expropriation, colonial laws and policies also encouraged the various migrations that fortified the colonies: European settlers’ migration to the colonies; colonists’ importation of African peoples as enslaved labor; and Native peoples’ migrations from their homelands, both to remake their lives in other parts of the continent, and their exportation to other European colonies as enslaved labor. These migrations were critical to the growing market in lands, which had no value without the removal of Native people or labor to cultivate them. They also involved great violence against Native and African people. While the violence of enslavement is direct, extreme, and obvious, the violence of settlement encompassed a range of harms to the people that lived on the land. One of the key methods by which the English recruited settlers to America was the “headright” or homesteading system, by which every mainland colony promised title to a certain amount of land to each “head” that would occupy the land against the Native inhabitants. Settlers who occupied Native nations’ lands made life more difficult for Native peoples in those lands not only by engaging in direct physical violence against them, but also by spreading disease, and degrading the landscape upon which communities depended to sustain themselves by overharvesting, overhunting, and chasing away game.

Colonists expressed their understanding of the difference they perceived between themselves and nonwhites in explicit theories about nonwhites’ inferiority, theories about their own entitlement to property that they created through violence, and through the application of different rules for different groups in their system of law. For example, the “labor theory,” made most famous by John Locke in the Second Treatise, describes Englishmen’s entitlement to lands as rooted in their unique ability to labor on the lands, misrepresented Native nations’ land use as “waste,” and failed to acknowledge the labor of the labor of enslaved African and Native people in the colonies. Colonists also applied different rules to transactions with Native people than they did with other settlers for goods and land. They did not wholly exclude most Native people from their markets, as they did enslaved people. Rather, they pursued a strategy of

20 Park, supra note 19.
21 The ramifications of settlements forged through this violence for the sense of identity that comes with property, or the notion of “property as personhood,” are explored in Daniel Sharfstein’s excellent article, “Atrocity, Entitlement, and Personhood in Property.” Daniel Sharfstein, Atrocity, Entitlement, and Personhood in Property” 98 VA. L. REV. 655 (2012).
23 JOHN LOCKE, THE SECOND TREATISE (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); STUART BANNER, HOW THE INDIANS LOST THEIR LAND 188 (2005); Saito, “Race and Decolonization.”
24 CRONON, supra note 22 (especially chapters 4, 7, and 8). Accounts of early surveys and enclosure of what colonists called “waste” lands can be found in a variety of sources: FARRIS W. CADLE, GEORGIA LAND SURVEYING HISTORY AND LAW (1991) (chapter 1); FAIRFAX HARRISON, VIRGINIA LAND GRANTS: A STUDY OF CONVEYANCING IN RELATION TO COLONIAL POLITICS (1925); David Thomas Konig, Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth Massachusetts, 18 AM. J. LEGAL HIST. 137, 144 (Apr. 1974).
predatory inclusion, or the use of many kinds of misrepresentation and fraud to “purchase” lands for mere trinkets, or to deliberately indebted Native people, to then foreclose on their lands.

The colonial laws that defined the parameters of enslavement and human beings as enslaved property remade the condition as a racial, hereditary and perpetual one, explicitly entrenching colonists’ belief in European racial superiority. Laws disengaged enslavement from conversion and Christian mission that initially justified the transatlantic trade, and established the principle of partus sequitur ventrem—that the status of the child would follow that of the mother. This rule, which contravened English laws providing that a child’s status followed that of the father, quickly became the general law of the colonies and made sexual violation and enslaved women’s “future increase” a means through which enslavers expanded their wealth.

Other laws allowed enslavers to use almost unlimited violence upon the enslaved. These laws engaged and contributed to racial ideas that authorized white treatment of African and Native people as monetary equivalents and property, in ways that shaped colonial society as well as property law. The creation of colonial “Black Codes” that applied to Native American and mixed-race as well as Black people, to restrict their use of public space by imposing curfews and limiting travel and gatherings, further indicates that colonists increasingly lumped non-whites together as an entity to regulate differently than members of the white community.

By the time of the Revolutionary War, colonists controlled much of the eastern seaboard and had amassed massive holdings in lands and people, worth £60,221,000 and £21,463,000, respectively. After the war, the new federal government adopted many of the property systems from the colonies that had proved so effective in building the markets for lands and enslaved people, including northern colonies’ use of the survey to enclose land into rectangular, privately owned parcels, southern colonies’ approach to land administration, and title registries for recording information about entitlements. However, the federal government reorganized these systems to centralize power in itself—perhaps most notably, the formal power to expropriate land from Native nations. The United States thereby shifted the formal process of expropriation from contracts between Native nations and various public and private entities to inter-sovereign treaties, even while it continued to incentivize private parties to occupy Native lands through land grants, as well as the Preemption and Homestead Acts. Squatters therefore continued to

27 HIGGINBOTTOM, supra note 18, at 36-37.
30 JONES, supra note 13, at 90.
31 HIGGINBOTTOM, supra note 18, at 36-41, 76-82.
32 JONES, supra note 13, at 90. The equivalent of over $12 billion and $4.3 billion today.
invade Native nations’ territories ahead of treaties, disrupt Native communities’ ability to live in their lands, and thereby facilitated the federal government’s ability to formally extract the lands by agreement. Consequently, in the United States, private ownership brought the public jurisdiction into being, rather than the other way around. As in colonial times, the United States also frequently reached agreements with individuals known not to have the authority to alienate lands, threatened war if a treaty could not be reached, and deliberately indebted Native groups in order to “lop off cessions” of lands.

As the United States thereby expanded its own jurisdiction and created new local and state jurisdictions, enslavers dramatically increased their property in people to expand their production, especially of cotton, upon those lands. Between 1783 and the end of the international slave trade in 1808, enslavers forcibly imported about 170,000 Africans (about one-third of the entire enslaved population imported to North America since 1619); by 1860, almost four million people were enslaved. The responsibility that U.S. laws delegated to individuals to create and protect property in lands and people during this period powerfully associated the American idea of freedom to make one’s fortune with the process of creating property through racial violence. Meanwhile, the process of dispossessing Native and Black people that this property creation required continued to ravage communities, landscapes, and lives. The abolition of property in human beings at the end of the Civil War forced the nation to confront the fundamentally racial order of its property system and challenged it to create a new order of property that could serve a society in which Black people were equal members. Rather than do so, however, whites responded to the loss of its most explicitly racial form of property—enslaved people—by evolving the legal system governing land, its most valuable remaining form of property, to maintain the racial social order that slavery entrenched.

Race and the Remaking of Property After Abolition

In 1860, the end of the domestic slave trade seismically disrupted the organization of property law in America by abolishing a form of racial property that then constituted over $3 trillion and almost half of southern whites’ total wealth. During the period of Reconstruction, freed Black people mobilized powerfully to work for political inclusion and religious, social, and economic autonomy, despite facing violence at the hands of whites “that raged almost unchecked in the postwar South.”

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35 Robert Nichols describes this logic as “recursive.” ROBERT NICHOLS, THEFT IS PROPERTY?: DISPOSSESSION AND CRITICAL THEORY 8-9 (2020). On headright system, see BAILYN, supra note 19.
36 BANNER, supra note 23, at 143.
38 Id. at 109.
39 See generally RANA, supra note 19.
40 Harris, supra note 7. The culture was thorough, gendered, bred from birth. STEPHANIE JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH (2019).
called for land rights under an iteration of the labor theory of entitlement unbound from the racial constraints of the Discovery Doctrine. However, the promise of land redistribution, captured by General Sherman’s famous Field Order No. 15, deflated when President Andrew Johnson (who succeeded to the presidency following the assassination of Lincoln) early pardoned and restored Confederates’ property in lands. Against all odds, some Black people nevertheless still managed to acquire lands, collectively and individually, using every creative means of financing available to them.

The general arc of federal choices post-abolition, driven by the pressure of organized institutional and private white mobilization to preserve the anti-black social order, reshaped the property system to circumvent Black landownership and accommodate white refusal to share public space with non-whites. The fulcrum of the ensuing struggle was property rights. On one side hung the fight for equal membership in a colonial society where property rights had become central to the idea of freedom, and for equal rights under law by people long treated as property themselves; on the other, the demand for redress of property losses by southern slavers, and their machinations to shape a new property law that would serve their interests in preserving racial hierarchy. The federal actions that immediately followed abolition plainly outlined property rights for Black people. The Civil Rights Acts articulated equal rights in terms of private law rights, not only “to make and enforce contracts,” but also, to enjoy “the same right as is enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real and personal property,” the Fourteenth Amendment and the Civil Rights Acts of 1866 and 1870 all enumerated the right of reasonable access to public places. These articulations were open enough that they might have enabled individuals theretofore excluded from participating in the economy, except as objects of it, to actively do so, as well as to gain tools for securing shelter, subsistence, and meeting other fundamental human needs. The Supreme Court, however, undercut these laws’ capacity to protect Black economic participation by sanctioning the right of private actors to discriminate: the Civil Rights Cases, hobbled Equal Protection jurisprudence with the state action doctrine, which limits violations of law to discrimination by government (“state”), not private actors.

After the final withdrawal of federal troops from the South in 1877, during an era known as Jim Crow, legal innovations by whites ran riot to remake a racial property order no longer based primarily on state protection of racial property in human beings, but rather, on state non-intervention in private efforts to maintain racial land monopolies and segregated space. These efforts intensified still further after the start of the Great Migration, or the mass migrations of African Americans out of the rural South to the Northeast, Midwest, and West that began in earnest during World War One. As a consequence of these migrations, the number of Black Americans rose in parts of the country where their presence had formerly been marginal, and

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43 Foner, supra note 24, at 159-64. Only about 2,000 freedmen in South Carolina and Georgia received lands.
44 Id. at 106.
46 U.S. Const. art. XIV; Civil Rights Act of 1866, ch. 31, 14 Stat. 27.
47 On experimental aspect, see Jane Dailey, Glenda Elizabeth Gilmore, & Bryant Simon, Jumpin’ Jim Crow: Southern Politics from Civil War to Civil Rights (2000); Elizabeth A. Herbin-Triant, Threatening Property: Race, Class, and Campaigns to Legislate Jim Crow Neighborhoods (2019) (noting that tension and divergence between “Middling” and elite white views produced policy outcomes during this period in the South).
with it, white opposition to sharing space with them and to their acquisition of property. The efforts of Black Americans to seek economic opportunity across the country were met with tremendous violence against them, including lynching and firebombing, which law enforcement sanctioned through selective non-enforcement of prohibitions on violent crime.

During this era, courts simultaneously developed and clarified the state action doctrine by sanctioning private entities’ activities to explicitly segregate neighborhoods and cities. In particular, whites organized during this period to legally circumvent non-white ownership of property. One of the best known tools that they used, racial restrictive covenants, first appeared in the late nineteenth century in California to keep Chinese immigrants from purchasing property in white neighborhoods.\textsuperscript{49} Advocacy by the real estate industry, the National Association of Real Estate Boards, and homeowners associations, encouraged the spread and use of racial restrictive covenants to Southern and border states, and then Northern and Midwestern cities to prevent Black people from purchasing property in many neighborhoods.\textsuperscript{50} During the same period, southern cities tested the strength of state action doctrine by also passing municipal zoning ordinances prescribing separate residential areas for Blacks and whites, beginning with Baltimore and Richmond in 1911. In 1917, one of the NAACP’s first legal victories, the Supreme Court found racial zoning to be discriminatory state action in \textit{Buchanan v. Warley}.\textsuperscript{51} Nonetheless, cities continued to pass racial zoning laws, prompting the Supreme Court to find the practice unconstitutional again in 1927.\textsuperscript{52} One year after it, by contrast, upheld racially restrictive covenants as permissible private action in \textit{Corrigan v. Buckley}.\textsuperscript{53}

In addition to consolidating white landownership and obstructing Black landownership in this way, whites organized to limit and condition the entry of Black people into public spaces. Indeed, even before abolition, northern and border states had already undertaken efforts to legally segregate public space, in contravention of the pre-abolition rule that places open to the public had a duty to serve anyone who could pay.\textsuperscript{54} After the fall of Reconstruction, white private organizing, sanctioned by the courts, reduced the potential for the creation of robust property rights under the early Civil Rights Acts to “allowing” Black people to transact for property only within the bounds of a strictly segregated public and with individuals willing to transact with them. The lawfulness of white-only amenities of all kinds was affirmed in \textit{Plessy v. Ferguson}’s notorious “separate but equal” rule in 1896, cementing a regime of subordination that

\textsuperscript{49} \textit{Id. at 543, 548-50, 551, 563.}

\textsuperscript{50} \textit{Id. at 543, 548-50, 551, 563.}

\textsuperscript{51} \textit{Buchanan v. Warley, 245 U.S. 60 (1917); Jones-Correa, supra note 48, at 548; Herbin-Triant, supra note 47, at 187-92.}

\textsuperscript{52} \textit{Harmon v. Tyler, 273 U.S. 668 (1927); Jones-Correa, supra note 48, at 548.}

\textsuperscript{53} \textit{Corrigan v. Buckley, 271 U.S. 323, 330 (1926). The Court did not reverse this decision until 1948, when it found judicial enforcement of racially restrictive covenants to be unconstitutionally discriminatory state action in \textit{Shelley v. Kraemer}. Shelley v. Kraemer, 334 U.S. 1 (1948).}

\textsuperscript{54} A rule much broader than the modern mandate applied to innkeepers and common carriers. In 1765, Blackstone noted 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.” \textit{William Blackstone, Commentaries On The Laws Of England} 164 (Univ. of Chicago 1979) (1768). For centuries this duty applied to “anyone who held himself out [as open to the public] to serve all who might apply.” 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 Massachusetts case, where the court held that Howard Athenaeum, a well-known lecture hall near the State House, could exclude African Americans. 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). \textit{Singer et al., supra note 34, at 28-29.}
would not turn until the Court’s 1954 decision in Brown v. Board of Education and the passage of the Civil Rights Act of 1964. In all these ways, whites responded to the abolition of slavery by transferring the racial values captured by white ownership of Black people into the legal organization of interests in land, where those values would become fodder for remaking the very nature and profitability of interests in land in previously unthinkable ways.

Race and the Remaking of Property After the Close of the Frontier

In the twentieth century, the federal government remade the infrastructure of the property law system to expand the interests in land that defined the real estate market. To do so, it drew on both its control over a “public domain” being consolidated through conquest and the growing, organized resistance by developers, investors, and other private entities to Black property rights and landownership.55 Between the 1850s and 1880s, the government accelerated its process of expropriating Native nations’ lands and assimilating them into the U.S. real estate market “at unprecedented speed.”56 In 1887, it passed the Dawes Act in 1887 to break up tribal relations, and distributed or “allotted” lands to individual tribal members, with devastating results.57 The pretension of allotment was, again, to include Native people in the individualistic U.S. property system,58 but in practice, allotment functioned as another method of resource extraction: Native nations lost almost two-thirds of the lands that had been reserved to them by treaty or Executive Order.59 In 1890, the U.S. Census Bureau announced the frontier formally closed, on the basis that there was no longer land within U.S. territorial boundaries occupied by fewer than two settlers per square mile.60 The consolidation of the “public domain” and the burgeoning efforts to undermine Black property rights described in the previous section combined to set the conditions for the government to build a modern mass-market in home mortgages through the creation of exclusionary suburbs.

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55 On the role of developers and private organization for segregation that began in the late nineteenth century, see Paige Glotzer, How the Suburbs Were Segregated: Developers and the Business of Exclusionary Housing, 1890-1960 (2020).
56 Banner, supra note 23, at 235. Before the Civil War, the government had increasingly pursued a policy of concentrating Native nations on lands “reserved” to them in treaties, which remained the United States’ main vehicle for bringing lands into its public land system. See id. at 229-35; see generally Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly (1994), especially at 26. By the 1870s, the U.S. Army was confining Native peoples to reservations and in 1871, Congress ended the practice of treating with Native nations. Abolition of Treaty Making, in Documents of United States Indian Policy 135, 135 (Francis Paul Prucha ed., 3d ed. 2000) (rider to appropriations bill). Report of the Doolittle Committee, Jan. 26, 1867, in Documents of United States Indian Policy 103, 103 (Francis Paul Prucha ed., 3d ed. 2000) (noting that “the making of treaties and the disposition of the lands and funds of the Indians is of necessity intimately connected with our public land system, and, with all its important land questions”).
60 Dep’t of the Interior, Census Office, Compendium of the Eleventh Census: 1890 (1892).
As a result of the government’s long-term strategy of conquest by settlement, by the early twentieth century, a remarkably high proportion of private individuals in the U.S. owned land compared to other nations. Further, estates and corporations’ preferred method of real estate investment was mortgage lending, rather than collecting rents. These factors set the stage for federal government’s decision to incentivize the private mass-creation of home mortgages in the wake of the Great Depression. During the Depression, foreclosures exceeded 1,000 a day and half of all home mortgages in the U.S. were in default, and the government experimented in different ways with efforts to increase the housing supply. However, the program that ultimately became a bulwark institution of the U.S. real estate market, which remade the landscape and interests in property that comprised that market, was the Federal Housing Administration (FHA)’s initiative to insure banks that issued mortgages, thereby reducing risk for lenders. These mortgages, now so familiar, were wholly novel at the time—30-year, fully amortized “purchase money” mortgages that made mortgages the instrument for acquiring homes and monthly payments affordable. However, the FHA placed conditions on these guarantees that reshaped the American landscape: it specified that it would insure homes only in racially homogenous zones, with no non-white or immigrant homeowners per its notorious “redlined maps.” The FHA thereby directed the mass-production of a new commodity—the white suburban home-- whose value derived from the desire for segregation.

Through redlining, the government revamped the grid of plots for private ownership that it had created through conquest to translate racial values into monetary value in new ways. Indeed, the federal redlining program engineered a ubiquitous new form of property whose monetary value was so identified with the value of segregation to white Americans that it became possible to speak abstractly about homeowners’ prerogatives to maintain and protect “property values”—constructed ex ante through race—without referring explicitly to race. It solidified the segregating American landscape, and also vastly expanded and institutionalized the mortgage industry. By guaranteeing the mortgage lender’s profitability, the government infused the real estate market with an inexhaustible appetite for developing and reselling real property, thereby generating an unending stream of new mortgages—which themselves shortly became

61 By 1909, the government had “disposed of” about 40% of the public lands to individuals and corporations and 11% to states. BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 529 (1924); KENNETH JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190 (1985).
63 JACKSON, supra note 61, at 192. The Home-Owners’ Loan Corporation (HOLC) directly issued new mortgages to replace mortgages facing imminent foreclosure, and it extended mortgages to both whites and non-whites; it created the redlined maps later used by the FHA, which coded neighborhoods based on the presence of racial minorities, in order to assess risk in a uniform way across the country.
65 In this way, it drew from its approach to land development over the past few centuries, during which it had steered the creation of plots for private ownership, whose monetary value required the removal of Native people from the lands and their replacement with the presence of whites. As Keeanga-Yamahtta Taylor writes, “Racial real estate practices… represented the political economy generated out of residential segregation.” TAYLOR, supra note 25, at 11. See also K-Sue Park, Predatory Inclusion: A Long View of the Race for Profit, LAW & POLITICAL ECONOMY BLOG (January 15, 2020), https://lpeproject.org/blog/predatory-inclusion-a-long-view-of-the-race-for-profit/.
66 See generally FREUND, supra note 64.
principal commodities of the real estate market.\textsuperscript{67} Further, the FHA’s policies encouraged new construction, rather than renovation of existing buildings, and single-family rather than multi-family homes. In this way, the government spurred the mass-construction of white-only suburbs while leaving the urban centers of America without resources and full of Black and immigrant families without access to financing. As consumers with few options for procuring housing, they frequently fell prey to predatory forms of mortgage lending developed for second-class borrowers, such as “contracts for deed,”\textsuperscript{68} or high-risk installment contracts. Indeed, in the 1960s, about 85% of all property purchased by Black people in Chicago was sold through “contracts for deed.”\textsuperscript{69} Non-white urban centers, ravaged by crumbling, overcrowded infrastructure and starved of resources by the government, became the targets of a wide range of voracious, predatory activity and crime.\textsuperscript{70}

In the early 1960s, the Congress of Racial Equality and the Student Non-Violent Coordinating Committee organized freedom rides, sit-ins, and “dive-ins,” during which they faced brutality, bloodshed, and mass arrest, to desegregate travel, restaurants, and public pools, and to challenge white refusal to share public space more generally. White establishments resisted and framed their resistance in terms of property rights and their right, as private actors, to exclude.\textsuperscript{71} In 1964, Congress passed a Civil Rights Act that prohibited the exclusion of people from public facilities, workplaces, and polling places, on the basis of race, color, religion, sex, or national origin. In 1967, President Johnson formed a National Advisory Committee on Civil Disorders to explain the racial unrest that had torn through the nation’s cities that summer, targeting white property on one side and Black lives on the other. In early 1968, the resulting Kerner Commission Report called the violence “the culmination of 300 years of racial prejudice” and recounted the history of slavery, racist institutional development, and anti-racist protest movements. It pointed to urban housing conditions and opened with the blunt pronouncement: “white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.”\textsuperscript{72} In June of that same year, the Supreme Court declared in \textit{Jones v. Mayer} that racial barriers to the acquisition of property by private entities were “badges and incidents of slavery” that the Thirteenth Amendment empowered Congress to eliminate.\textsuperscript{73}

In April 1968, one week after the assassination of Dr. Martin Luther King, Jr., Congress passed the Fair Housing Act, which prohibited discrimination concerning the sale, rental, and

\textsuperscript{67} Today, they are the building blocks of mortgage-based securities (MBS), or securities made of thousands of pooled mortgages—a market itself with $11.2 trillion worth of securities outstanding. US MORTGAGE BACKED SECURITIES STATISTICS, SIFMA, https://www.sifma.org/resources/research/us-mortgage-backed-securities-statistics/us-mortgage-backed-securities-statistics-sifma/.

\textsuperscript{68} BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA 42 (2009); Contracts for Deed now rampant in colonias and border towns. BROPHY ET AL., supra note 2.


\textsuperscript{72} UNITED STATES, THE KERNER REPORT: THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 1, 95-107 (1968)

financing of housing based on race, religion, national origin, or sex.4 Four months later, it also passed the Housing and Urban Development (HUD) Act, in which the federal government again turned to the private market to accomplish its mandate of building ten million units of new and rehabilitated housing in the next decade. In addition to extending FHA loans to people previously deprived of this opportunity, the Act privatized the Federal National Mortgage Association (Fannie Mae), which it had chartered in 1938 to package and sell loans to investors, making it a share-holder owned company funded by private capital. These actions opened a new era of “predatory inclusion” that marked a cyclical return to indebting non-whites to extract wealth from them. The government mobilized private forces to indebt non-whites, and then abandoned the responsibility for racial equity that it had momentarily seemed to shoulder; the frenzy of racial extraction that ensued triggered waves of foreclosure on Black homeowners and led to the program’s relatively rapid collapse. The program’s failure became the government’s excuse to withdraw from the role of social provisioning it had taken on with the New Deal. Moreover, it validated that withdrawal by resorting to racist stereotypes and celebrating the “colorblindness” achieved by the Civil Rights movement, which it understood as relieving it of the need to explicitly address and confront racism in its various forms.5 It did not deal, nor has it since confronted the extent to which, as a result of the foregoing history, white ownership and control of property continues to produce property value in a market of ever-increasing scale and stakes.

Conclusion

This account of the racial legal formation and development of property in the United States describes key shifts in the ways that racial domination produced property values over time. These shifts frame and anchor many of the stories about race and property law with which we may be more familiar.6 That is, the drive to produce property value in this way lies at the heart of the stories told in the abundant scholarship that illuminates the systemic adjustments and legal mechanisms that continued dispossession7 and harm to nonwhites’ lands, health, and communities after the abolition of slavery.8 It is also central to the literature describes the

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5 See generally TAYLOR, supra note 25.
6 Singer, supra note 7. Harris drew on legal theories of property to argue for an expansion of the category of “property” that encompasses the racial identity of whiteness itself, with major implications for all areas of law. Harris, supra note 7, at 1714.
8 E.g., the development of public lands and desecration of Indigenous homelands and sacred sites and toxic siting on lands occupied by nonwhites, the development of transportation systems to segregate and degrade life conditions in Black and brown neighborhoods. See, e.g., Dina Gilio-Whitaker, AS LONG AS GRASS GROWS: THE INDIGENOUS FIGHT FOR ENVIRONMENTAL JUSTICE, FROM COLONIZATION TO STANDING ROCK (2019); Michalyn Steele & Stephanie Hall Barclay, Rethinking Protections for Indigenous Sacred Sites, 134 HARV. L. REV. 1294 (2021);
obstacles and limitations that nonwhite communities face in their attempts to enter and occupy public space,\textsuperscript{79} or to occupy,\textsuperscript{80} acquire,\textsuperscript{81} or make property productive for themselves,\textsuperscript{82} especially in ways that resist assimilating property to the broader U.S. real estate market.\textsuperscript{83} This chapter has identified how the racial production of property value was shaped during the colonial period, reconfigured in response to the abolition of slavery, and continues to organize interests in expropriated land. The production of this value during and after the second half of the twentieth-century must be understood in the context of the diversification and amplification of interests in real property that have dramatically escalated potential profits and the pressures to produce such value.

The legacy of these developments is, among other things, a housing market where property values remain highly racialized today. The proportion of white people who own homes in the United States is now 31.2\% higher than in the Black community, and 15.6\% higher than the group with the second-highest rate of homeownership, Asians and Pacific Islanders.\textsuperscript{84} This gap in homeownership levels is moreover a significant factor in the racial wealth gap; at present, the typical White family has about eight times as much wealth as the typical Black family and five times the wealth of the typical Latinx family. More than half a century after the formal end of redlining, appraisals consistently find that Black people’s homes are less valuable for no other


\textsuperscript{79} E.g., attempts to invoke public nuisance and trespass laws against Black people in public spaces. See, e.g., Henderson & Jones, supra note 71.


\textsuperscript{82} E.g., the “jurisdictional maze” that Indian country has become as a result of homeowners’ inability to use their homes on reservations as loan collateral until the 1990s. Shoemaker, supra note 57; Julian Brave Noisecat, America’s Forgotten Crisis: Over 50\% of One Native American Tribe are Homeless, THE GUARDIAN, April 6, 2017.

\textsuperscript{83} Carpenter & Riley, supra note 59.

\textsuperscript{84} USA Facts, Homeownership Rates Show That Black Americans Are Currently the Least Likely Group to Own Homes, USA FACTS, July 28, 2020, https://usafacts.org/articles/homeownership-rates-by-race/.
reason than that Black people live in them.\textsuperscript{85} White people’s continuing intolerance of sharing public spaces with Black people is reflected in their calls to the police about Black people barbecuing in the park, getting coffee at Starbuck’s, sleeping in dormitory lounges, or birdwatching in a botanical garden – and has spawned the viral hashtag #LivingWhileBlack. As the value of property and housing costs skyrocket, foreclosure, eviction, and homelessness are on the rise, affecting Black, Indigenous, and immigrant communities significantly more than whites.\textsuperscript{86} Pressures to privatize reservations, in ways that continue to discount Indigenous priorities of land tenure and undermine efforts to sustain Indigenous traditions.\textsuperscript{87} In rural America, massive land loss by nonwhites since the early twentieth century has produced a situation where whites own 98 percent of agricultural land and operate 94 percent of farmland.\textsuperscript{88}

The present reality of property—a deeply segregated and unequal public sphere and highly lucrative but destructive real estate market—is a direct consequence of the nation’s founding histories of racial violence. It results from approaches to creating and protecting property values innovated through the processes of conquest and enslavement, as well as the revitalization of the residential real estate market in the twentieth century; the ongoing production of these values continues to draw on traditions of resistance to Native sovereignties and post-abolition organized resistance to Black property rights. There can be no reckoning with the racism of property law without recognizing the way the value of property in this country, so important to the laws that protect and regulate property, derives from racial domination. Concomitantly, the long-buried histories of property that I narrated here, which constitute the history of the nation itself, can no longer be considered “elective” topics in the supplementary subfield of “race and property law.” The structuring role of race, which these histories explain, must instead be understood as fundamental to property and property law. It is only by coming to terms with the many aspects of how race shapes property law, and understanding the profound imprint of this relationship on the development of the nation, that we can hope to understand our current dilemmas, confront them, and cultivate a system that works upon a different foundation, towards decidedly different ends.

\begin{itemize}
\item Carpenter & Riley, \textit{supra} note 59.
\item Shoemaker, \textit{supra} note 58.
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