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

K-Sue Park

Georgetown University Law Center, KSue.Park@georgetown.edu

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This Article tells an untold history of the American title registry—a colonial bureaucratic innovation that, though overlooked and understudied, constitutes one of the most fundamental elements of the U.S. property system today. Prior scholars have focused exclusively on its role in catalyzing property markets, while mostly ignoring their main sources in the colonies—expropriated lands and enslaved people. This analysis centers the institution’s work of organizing and “proving” claims that were not only individual but collective, to affirm encroachments on tribal nations’ lands and scaffold colonies’ tenuous but growing political, jurisdictional power. In other words, American property and property institutions did not issue from sovereigns with established authority to govern a territory—as in the understanding drawn from European legal traditions— but rather preceded and ushered in colonial and U.S. sovereign title to Native homelands.

* Associate Professor of Law, Georgetown University Law Center. I am grateful to Molly Brady, Guy Charles, Adam Davidson, Dan Farberman, Lee Fennell, Sheila Foster, Dirk Hartog, Sophia Lee, Shaun Ossei-Owusu, and Claire Priest for their generous comments and feedback during the drafting process. This article also benefited from the helpful engagement of participants at the Legal History workshops at the Universities of Minnesota and Michigan, the law faculty workshops at Penn Carey, UCLA, and Georgetown, the Culp Colloquium, and the University of Chicago’s Public Law workshop and Inaugural Colloquium of the Department of Race, Diaspora, and Indigeneity. Thanks to David Stein, Darryl Li, and Noura Erakat for their support, encouragement, and friendship, always. For all their excellent research support, I am indebted to Thanh Nguyen, Richard Mobley, and Marianna Yearboro of Georgetown Law Library, and my research assistants Ashley Burke and Radiance Campbell. Finally, I wish to express my gratitude to county registers, especially Cheryl Berken of Brown County, WI and Angie Bates of St. Clair County, IL, who tolerated my calls and provided helpful documents. © 2023, K-Sue Park.
Using established scholarship on the colonies and original research on county-creation for the United States, this analysis presents new questions about how the legal infrastructure of property furthered conquest, and how the progression of conquest on the ground produced the national jurisdiction and real estate market. It shows that in the haphazard process toward the American title registry, colonists borrowed the English legal forms of the registry and county to remake them into local nuclei of colonial territorial expansion—the key governmental forms that drew settlers into Native nations’ territories and encouraged them to claim lands by reassuring them that those claims would become real property. The United States adopted this colonial approach to perfecting the Discovery claims it inherited or acquired from other Empires. The timed map of county creation—not the creation of territories, nor states, nor treaties—most accurately tracks where the United States grew its jurisdictional power, and when. For between its plans to invade and ability to govern lands—between mere white entitlement and actual title—it created counties and registries, before transitional territories and often before obtaining Native cessions to the lands by treaty. In this way, counties came to underpin the national jurisdiction and the local institution of the registry became the common and continuous infrastructure for the entire national real estate market.

This history of the title registry underscores the conceptual and practical stakes of redressing the erasure of race from our understanding of legal institutions and legal development. In particular, it also challenges us to recognize less obvious ways that the legacies of conquest and enslavement survive to structure our landscape and lives. Race works to shape law and legal outcomes in different ways, including through the familiar dynamics of exclusion from institutional protections and benefits and the predatory risks of formal inclusion. But the registry’s history also illustrates a third phenomenon: legal innovation spurred by the willingness to view racial violence as an economic resource, or the development of new institutions and practices that may appear to be facially “race-neutral,” but promote the production of property value through the dehumanizing logic of race. The minimal, low-accountability design of the title registry encouraged the proliferation of market claims without authenticating them, prioritizing the collective goal of building jurisdictional power at the direct expense of Native and Black communities whose lands and people colonists rapaciously claimed as property for that ever-growing market. The result was an institution that continues to privilege the production of property value above all—above protecting individual property interests, and above sustaining homes, communities, and life, in ways that now affect us all.

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INTRODUCTION

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

-- C. Dent Bostick on Land Title Registration

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

-- Marion Clawson, Director, Bureau of Land Management 1948-1953

INTRODUCTION

For nearly four centuries, as they have collected information about ownership claims, title registries have confirmed the two principal axes of ownership of property in America—what is owned and who owns it. Like courts, registries are “ground-level” legal institutions, publicly accessible and publicly maintained at the local level, which create the preconditions for the terms of private and public laws that concern property. Their effects are not something we often

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recognize, perhaps because the records seem to represent an obvious, even natural activity—collecting information about who owns what property in a place. The humble, hardly riveting, clerical institution of the registry is ubiquitous across the 3,141 counties and county equivalents in the United States, and despite some minor institutional variations, the basic form of registries is remarkably uniform across the country. The institution is a local, public record of voluntarily recorded claims that the government does not verify, but simply keeps.

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

In contrast to this literature, this Article shows that this understudied institution has supported not only private markets, but “jurisdiction” in the most fundamental sense of the word: the ability to determine or say what the law is on

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3 “How Many Counties Are There in the United States?” U.S. Geological Survey, U.S. Department of the Interior, [https://www.usgs.gov/media/audio/how-many-counties-are-there-united-states](https://www.usgs.gov/media/audio/how-many-counties-are-there-united-states). This figure does not include county equivalents in the Commonwealths and territories of Puerto Rico, the Virgin Islands, American Samoa, the Northern Mariana Islands and Guam. Title registries are maintained at the county level in every state except for Rhode Island and Connecticut, which use townships.

4 For example, in language that describes their institutional location: they are variably called “registries,” “registers,” or “recorders” of “title” or “deeds”; in some counties, keeping title records is part of the functions of the county court or probate court clerk, while some county recorders maintain independent offices. States also privilege recording differently according to their recording acts, which adopt “race,” “notice,” or “race-notice” rules.

5 Why I refer to thousands of offices in the singular, to denote the institution of “the American title registry.”

6 James Casner & W. Barton Leach, Cases and Text on Property vi, xi (1951).

7 Scholars who have written about the title registry note its neglect: Abraham Bell and Gideon Parchomovsky observe that though the title registry “is vital to the functioning of a legal system of property,… to date, it has drawn distressingly little scholarly attention”; yet
behalf of a collective and give it force in a territory, which is perhaps the defining marker of sovereignty. The first-order fact of jurisdictional power is often taken for granted, but it is distinct from second-order questions about the various kinds of institutions a given society might develop to govern most effectively, and the way it divides and distributes jurisdictional power among them. The history of title registries indicates that they played an important role in establishing and supporting that fundamental power in American colonies and the United States. For neither the charters nor European treaties and sales that transferred land rights to Angloamericans gave them actual control over lands. It merely gave them an option to attempt to transfer jurisdictional power from Native nations to themselves. The rule of European conquest, the so-called “Discovery rule,” as articulated for U.S. law by Justice John Marshall, required Europeans to take actual possession of lands in order to “consummate” their title. To effectuate their territorial sovereignty, English colonies and the United States relied on settlement and colonists’ property claims to take actual possession of lands, and affirmed them through title registries.

Between the Discovery right and Angloamerican sovereign jurisdiction-- after colonists’ intention to invade but before they consummated their title—the title registry made its appearance across the lands. Its history thus encompasses a history of the mechanics of conquest as well as of American property, one that illustrates the political force of property and reveals the site of struggles to take land and build power were local. Early colonists, who stood no chance of directly challenging Native sovereign claims to lands in America, established their foot-

“[v]ery few concepts affect our property system as profoundly as information about property rights.” They attribute this neglect to a strong convention of privileging judge-made law in legal scholarship; the literature on property and information they cite examines how courts convey information to the public about systemic values through their decisions. Abraham Bell & Gideon Parchomovsky, Of Property and Information, 116 COLUM. L. REV. 237, 244, 239-240 (2016) (citing Thomas Merrill & Henry Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 YALE L.J. 1, 40-42 (2000); Thomas Merrill & Henry Smith, The Property/Contract Interface, 101 COLUM. L. REV. 773, 795-96, 801-02 (2001); Henry Smith, Property and Property Rules, 79 N.YU. L. REV. 1719, 1753-54 (2004)). For a historian’s similar observation, see George L. Haskins, The Beginnings of the Recording System in Massachusetts, 21 B.U. L. Rev. 281, 281 (1941) (though recording was “a significant auxiliary to the law of real and personal property” and “an essential part of much business transacted in writing… its history… remains to be written; its origins… have never been systematically explored” and “the subject has received scant attention.”).Claire Priest’s recent book addresses this gap by providing the most comprehensive historical account of the emergence of the American title registry in the colonies in Chapter 2, and a powerful analysis of how the institution transformed credit markets more generally. Priest, supra n.2. This Article adds to this analysis of the registry’s commercial impact with an analysis of how it also grew jurisdictional power.

8 Johnson v. M’Intosh, 21 U.S. 543, 573 (1823).
holds by making private claims to property instead. The innovation of the American title registry became the primary mechanism for organizing and “proving” these claims against competing claims, both individual and collective, within and outside of the colony. Further, the institution of the registry, as an act of government that established protocol for affirming private claims, for both settlers and Native people, itself constituted an assertion of jurisdiction in ways that underpinned a tenuous colonial sovereignty and helped it grow. In this way, colonial territorial jurisdiction followed and became possible because of individual settlers’ claims to private property. In a reversal of the classic conception of property as a distribution by the grace of an established sovereign, in America, property was the conceptual and material antecedent to colonial sovereignty, which depended on the creation of private property to come into being.9

In short, the development of the title registry is an integral part of the history of colonization as well as property law in America, and these dual projects belong to the larger, racial legal framework of Discovery. Further, though this analysis of the registry centers the contest for sovereign power with Native nations in order to ask how colonial territorial jurisdictions came into being, the history of the registry itself underscores that the expansion of the slave trade was an inextricable part of that project. The overarching framework of Discovery authorized Christian European conquest and the enslavement of non-Christian, non-European people, based on the premise of a fundamental difference between the two groups that reflected a hierarchy of humanity. This belief translated into colonists’ innovations of legal institutions and practices that differentiated treatment for Europeans and non-Europeans: when the English took control of New Netherlands in 1664, for example, they left Dutch owners their private holdings.10 Intra-European conquests transferred jurisdiction without affecting private individuals’ property, because the English believed they and other Europeans were entitled to strip non-Christian non-Europeans of property and sovereignty. In pursuit of this goal, American colonists’ legal innovations to build property markets that were uniquely predicated on colonization and enslavement included innovating ostensibly facially “race-neutral” institutions like the registry. The registry

9 See id. at 572 (the sovereign “prescribe[s] those rules by which property may be acquired and preserved”). See Part III for a discussion of this work’s relationship to the two essays by Morris Cohen and Joseph Singer that famously theorize this relationship. Morris Cohen, Property and Sovereignty, 13 CORNELL L. Q. 8 (1927); Joseph Singer, Sovereignty and Property, 86 NW. U. L. REV. 86 (1991). Robert Nichols has described the state’s retroactive validation of such property claims as “the recursive logic of dispossession.” Robert Nichols, Theft is Property! The Recursive Logic of Dispossession, 46 POL. THEORY 3 (2017).

10 Francis Jennings, The Invasion of America 128-29 (1975) (pointing out that “when the duke of York conquered New Netherland, he left Dutch landholders in full possession of their own, requiring that they transfer allegiance from the Netherlands to himself”). See also John Romeyn Brodhead, History of the State of New York (1859-71), II, 19, 25, 36; Yasuhide Kawashima, Puritan Justice and the Indian: White Man’s Law in Massachusetts 45 (1986).
arose in the context of colonial laws that openly provided for different treatment of racial groups, and sanctioned extreme violence against non-white and especially enslaved peoples; for centuries, its chief function was to validate ownership claims to the two most valuable and significant forms of property that colonists held: lands expropriated from Native nations and enslaved human beings.

It has been less than a century since scholars’ discomfort with the racial violence that gave rise to much of American property law led to the complete expungement of mention of conquest and enslavement from the field. Before that time, major commentators by and large celebrated this history or took it for granted. One consequence of this whitewashing has been an artificial separation of the development of American property law from histories of racial violence in America. It therefore seems intuitive that the militia would be key to the sovereign takeover of a country, but not property institutions-- least of all the understated, mundane office of the registry. While scholars fail to recognize the constitutive role of racial violence in shaping property law in America, many also view conquest and enslavement as bygone examples of raw violence, and think of their consequences primarily in terms of direct, bodily harm. Colonization and enslavement unquestionably involved such harms, and naked subjugation at an untold scale. But their lasting legacy combined world-shattering violence with the technical work of building institutions to support markets and jurisdictions, which remain part of our governance systems. The title registry’s history underscores that frequently, the bureaucratic infrastructure of conquest and enslavement is also the bureaucratic infrastructure of American property.

Divorcing our study of the two has hurt our ability to understand either. We must learn to recognize the broad range of ways that race works through law to shape our legal systems and our world, beyond familiar models of different and unequal treatment, to the way race spurs institutional innovations based on dehumanizing logic. Meanwhile, historians who have studied the title registry have unanimously agreed that it was “a distinctly American invention” that introduced

11 See, e.g., K-Sue Park, The History Wars and Property Law: Conquest and Slavery as Foundational to the Field, 131 YALE L. J. 1062, 1112, 1126 (2022). Many, though not all of these laws are obsolete; see, e.g., Singer, supra n.9 (arguing that courts treat both Native American sovereignty and property differently and disadvantageously as compared to non-Native sovereignty and property).

12 Avoidance of the subjects started earlier, but their complete erasure did not occur until the 1940s. See Park (2022), supra n.11 at 1071-91.

13 The registry’s work highlights the difference between a mere occupation and conquest: a militia is sufficient to establish the occupation of a country, but arguably, it is the transfer of jurisdictional power from one sovereign power to another that is key to conquest. Thanks to Darryl Li for this insight.
a tremendous innovation to the property system, but without appreciating the range of its functions and effects. The registry illustrates more than one way that racial hierarchy shapes law and legal outcomes. For one, the specific design of the registry minimized government involvement by neither mandating nor authenticating records, and privileged the proliferation of property claims and market growth above ensuring the integrity or accountability of claims. Consequently, like many other American legal institutions, it exacerbates structural inequality by leaving claimants to rely on their material and social privileges in cases of fraud, disadvantaging those most vulnerable to predation and without resources to enforce their rights in courts. More fundamentally, however, it also evolved as a local and public institution to spur the proliferation claims to property—property specifically produced through expropriation and enslavement. The registry escalated that racial violence to grow property markets and colonial jurisdictions at the direct expense of Native and Black homes and lives.

This analysis reveals the specific value system, born of its context, promoted by the structure of the title registry, the foundation of American property system: it is an institution that relied on racial violence to produce property value, that contains no structural safeguards to protect against discrimination and abuse, and that privileges the production of property value above all—above the protection of individual property rights, and more fundamentally, above the stability of people’s homes, communities, and lives. The conceptual and practical stakes of readdressing the erasure in the history of the title registry include understanding this character, and the costs of an institution that now underpins the entire national jurisdiction, its land system, and real estate market. They also include learning to recognize that the ways U.S. legal institutions facilitated racial violence were not all direct, or obvious. Some of the most lasting legacies of this history inhere in bureaucratic, mundane institutions such as the title registry that may appear to be facially “race-neutral,” but carry and perpetuate the dehumanizing racial logic of colonization, which built new markets from other people’s bodies and homes.

Part I’s history of the haphazard colonial process toward the American title registry, using borrowed English legal forms of the registry and county, centers the role of the institution in colonists’ assault on Native sovereignty—a question that the literature on title registries and property in colonial America, from which the section draws, has never examined. In Section I(A), I describe how colonists used property claims to establish their footholds, and then build political power by engrossing Native nations’ lands, in ways that also incited the growth of the slave trade. Their creation of registries not only organized the two preeminent colonial property forms—lands and people—but helped scaffold colonies’ own jurisdictional power vis-à-vis existing sovereigns as an assertion of governmental

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15 As recent scholarship has begun to explore. See, e.g., Priest, supra n.2 (discussing how recording interests in property in enslaved people catalyzed a new credit market).
authority over inter-sovereign disputes. Section I(B) explains how the design of the registry system evolved to help the colonies build jurisdictional power: how becoming a local and public institution facilitated its popular use and the strategy of expanding through building new townships and counties; and how by minimizing government involvement in this passive institution, colonies encouraged the proliferation of market claims at the expense of their integrity, prioritizing the collective goal of jurisdiction building over individual accountability and protection, and at the direct expense of Native and Black communities and life.

The original research and analysis Part II presents demonstrates how the United States continued the colonial approach of using the political force of property to build its jurisdictional power at the local level. The timeline and map of county-creation, it shows, captures how settlers and their property claims spread across the mainland to help the United States converted its Discovery claims into sovereign title to lands. Section II(A) demonstrates how regularly county-creation in the Northwest Territory preceded the establishment of the territories and states to which they would eventually belong, as well as the treaties between Native nations and the United States ceding the very lands comprising these counties. Section II(B) describes how the process of building jurisdictional power through county creation also continued in the original states after the nation’s founding. Focusing on the example of Georgia, it shows that the state, in lock step, followed every Native cession of lands with counties, until frustrated with the federal government’s pace in pursuing conquest, it wielded county creation as a tool to force federal acquiescence to its agenda and finally expel the Cherokee. Section II(C) reveals that recording, as reflected by the passage of recording acts, remained a first priority for every new territory and state in the Union, and that changing patterns of county-creation indicate growing U.S. confidence in the imminent conquest of the continent and its ability to use counties and county recorders to expand the national territory.

I. CREATING PROPERTY, REGISTRIES & JURISDICTIONS IN THE COLONIES

At the beginning of the seventeenth century, England had no requirement or norm of publicly recording interests in land, and the practice remained “very limited” until after 1869. Further, though England was divided into several dozen

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16 James Kent, Commentaries on American Law, vol. 4 450 (1830); Nathan Dane, Digest of American Law, vol. 4 88 (1824).

17 Land Registry Act of 1862; 1897 Land Transfer Act (making registration compulsory); Law of Property Act of 1925. See also Avner Offer, The Origins of the Law of Property Acts 1910-25, 40 Modern L. Rev. 505 (1977). English tradition and customary attachment to privacy in property frustrated seventeenth and eighteenth-century popular movements to introduce public registries. Priest, supra n.1 at 4, 48, 181 (citing the Statute of Enrollments of 1536, 27 Hen. 8, cap. 16, with whose recording provisions, along with the Statute of
counties, also called shires, the courts of those jurisdictions developed a common law of property focused not on the paradigm of land—like American property law—but disputes concerning goods and animals. When colonists transplanted English legal forms in America, the registry and the county took on a wholly new significance as the foundation for a system of land expropriation and trade. Private property claims became critical to the way that colonists established their jurisdictional power over lands, and local units such as the county and township embodied the sites of their sovereign claims as they expanded them. As this Part describes, the registry acquired a new ubiquity and distinctive form in the colonies that endowed the county with new capacities, as they transformed property and sovereignty in America together.

The novelty of the American title registry, in terms of its function and design, is widely accepted. Early twentieth century historians of the title registry all agree that “[t]he distinctive features of the American system of recording deeds [were] indigenous.” Nonetheless, the way the title registry provided early institutional scaffolding for jurisdictional power is little understood. As W. Scott Van Alstyne Jr. observed in 1955, “the origins of the social value [of the system] are shrouded in the mists of the colonial period in American history.” To the extent

Uses of 1535, were largely not complied). See also BRITAIN RICE WEBB, A TREATISE ON THE LAW OF RECORD OF TITLE OF REAL AND PERSONAL PROPERTY 19 (1890) (“The registry acts of Great Britain are so essentially different from ours in their scope and operation that the decisions of the English courts… shed but little light on the subject of this work.”).


19 See LISA FORD, SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA 1788-1836 17 (2022) (“Regulating settler communities and the process of settlement itself required constant juridical innovation between the seventeenth and eighteenth centuries because the relationship of diasporic communities to the Crown was both novel and unsettled.”). See also Priest, supra n.2 at 6 (they “defined the problems to be addressed, shaped law, modified it, built institutions, controlled their costs, and regulated their operation in response to local conditions.”).

20 Joseph H. Beale, Jr., The Origin of the System of Recording Deeds in America, 19 GREEN BAG 335, 339 (1907); see also R.G. Patton, Evolution of Legislation on Proof of Title to Land, 30 WASH L. REV. & ST. B. J. 224, 226-27 (1955) (“Recording title documents originated not merely in North America but in the world as a whole almost entirely with enactment of the early colonial statutes”); Bostick, supra n.1 at 67; Van Alstyne, supra n.14 at 47 (“the statutory basis for the recording system was on the books in the first half of the 17th century in America, at a time when it was unknown in England.”); More recently, Molly Brady observed, “colonial clerks, surveyors, and other officials were designing new recording laws and institutions as they settled new lands… the colonists who transferred properties and recorded deeds in the first century of American history were taking part in new legal practices.” Maureen Brady, The Forgotten History of Metes and Bounds, 128 YALE L. J. 872, 890 (2018).

21 Van Alstyne, supra n.14 at 45 (“the exact reason or combination of reasons which gave rise to it have not, at present, been completely isolated and agreed upon.”).
that they attempted to explain its appearance, they referred vaguely to “the ‘needs’ and requirements of the people,” “[l]ocal conditions in the New World,”22 or “the protection of the bona fide purchaser.”23 More concretely, they gestured to colonists’ persecution in England, or to the fragility of documents “in a frontier community.”24 One commentator explained that “the vast stretches of available land... must have played a part in the perceived need”—but only because the “vastness” of the land in America would have made an owner’s occupation less visible to others.25

It is little wonder that these historians could not explain the origins of the American registry, however, because their accounts are marked by a refusal to engage with the specificity of its context—the legal conditions of the colonization of America,26 as well as the plentiful records transferring land from Native nations to colonists in the registries themselves. Yet prior to the historiographical trend of disavowing the nation’s origin in conquest, treatises on title to real estate in the United States frankly acknowledged that land in America was “available” only under the presumptions of “Discovery”; and that Christian Europeans had license to expropriate lands and other resources from non-Christian non-Europeans.27 As these treatises explain, under the international legal conventions of conquest the English adopted, the key to colonists’ ability to “consummate” their sovereign claims in America was “actual possession”—or their successful occupation of Native nations’ lands. To stake out an option claim against other European nations, the English had to arrive before them, but could not claim sovereign title without also obtaining control of them.28

22 Van Alstyne, supra n.14 at 46-47.
24 Haskins, supra n.7 at 299.
25 Bostick, supra n.1 at 67.
26 See generally, Park, supra n.11. Cf.
27 Most treatises on title to real estate cited the international rule of discovery as the basis for titles to lands in the United States. See, e.g., JAMES M. KERR, A TREATISE ON THE LAW OF REAL PROPERTY 196 (1895); JAMES WATSON GERARD, ET AL., A DIGESTED TREATISE AND COMPENDIUM OF LAW APPLICABLE TO TITLES TO REAL ESTATE IN THE STATE OF NEW YORK, 5th ED. 1 (Baker, Voorhis: 1909) (“The original title to land on the American continent, as between the different European nations, was founded on the international right of discovery and conquest... The title thus derived is the exclusive right of acquiring the soil from the native, and of establishing settlements on it. This title, to be perfect, has to be consummated by possession... The discovered region thereupon becomes a part of the national domain, and is subject to disposal as such.”). For an analysis of treatises, the history of conquest, and additional examples, see also Park, supra n.7 at 1096-97.
28 Early English colonial charters reflect the Crown’s sensitivity to these stages of claim-making: first, they explicitly granted Crown representatives the license to “discover, search,
This Part describes the registry’s crucial role in organizing and affirming colonists’ claims to property in tribal homelands, and as a governmental, institutional repository for these claims, in helping colonies to assert sovereign jurisdiction and control over the lands. As Section I(A) describes, claiming property was crucial to English territorial claims because colonists lacked the military might to seize lands from Native nations through raw force. Instead, they adopted the approach of defending the private land claims of individual settlers to establish their settlements. The haphazard process toward establishing the registry in all regions of British America was propelled by the need for institutional authority to defend questionable claims that were not only individual, but collective. Further, as registries became ubiquitous, the success of land expropriation they supported propelled the growth of slave trade, making lands and people the preeminent commodities of colonial markets. Section I(B) explains how this approach to building jurisdictional power produced the distinctive structural features of the American title registry: this public record of claims was sited locally, in townships and counties that grew around the central institution of the court clerk that collected claims to land in the region; and this passive government institution made recording voluntary, and did not certify claims in any way. This institutional design minimized costs to government by shifting risks to private parties who used it, and unequally, according to their social vulnerability. Yet its greatest costs, as it helped colonial property markets to flourish, were exacted from Native and Black communities, from which colonists extracted the lands and people that they rendered property for these markets. In other words, the registry, now ubiquitous, became foundational to a property system that elevated the monetary value of property above all else—above protecting individual users in their property, and above non-European communities and life.

A) Settlement, Property Claims, and the Invention of the American Title Registry

The primary challenge that the English faced in making sovereign claims in America was the longstanding sovereign rule of Native nations over their traditional homelands. The earliest colonists found themselves ill-equipped to survive in these lands and outnumbered by the Powhatan Confederacy and the Wampanoags, and settled in present-day Virginia and Massachusetts by declaring their finde out, and view” lands inhabited by non-European, non-Christian peoples, or to identify the option; and then following a fiefdom model, they authorized colonists to use force to “expulse, repulse and resist” any who sought to occupy the same lands or interrupt the process of occupation. See, e.g., Charter to Sir Walter Raleigh (25 March 1584), available at https://avalon.law.yale.edu/16th_century/raleigh.asp; Letters Patents of King Henry the Seventh Granted unto John Cabot (1498), available at https://avalon.law.yale.edu/15th_century/cabot01.asp; Letters Patent to Sir Humfrey Gylberte (1578), available at https://avalon.law.yale.edu/16th_century/humfrey.asp.
peaceful intentions and goals of coexistence with these tribes. In other words, they could not claim sovereignty upon arrival, but rather claimed property in order to establish their settlements. During the first decades, colonists struggled to sustain these settlements, and though they distributed land to individuals, they did not organize these entitlements well; it appears their interest in maintaining a collective occupation superceded that in measuring, bounding, or recording interests through mechanisms like the survey or registry. Only after colonists had claimed enough property to establish their occupations did the registry emerge, in response to the need for an institutional approach to defending land claims against those of Native nations, as much as each other. The importance of the registry for resolving inter-sovereign disputes and affirming colonies’ jurisdictional power is reflected in the records themselves, which show Native people’s increasing use of the registry to protect their own interests, and colonists’ concerted efforts to consolidate documented claims that all lands in the colony were transferred to it by Native people.

Some early colonial officials did attempt to institute the practice of recording interests in land during the first decades of settlement, but failed. In 1626, for example, Virginia mandated the enrollment, within a year, of all land purchases with the General Court in Jamestown. Joseph Beale notes that this vote “proved ineffective, as did similar votes in all the colonies.” In 1634, the General Court of Massachusetts ordered recording of land grants to freedmen; but local officials failed to respond, and it demanded three years later “that some course bee taken to cause men to record their lands, or to fine them that neglect.” Some towns responded nominally to these orders, but most did not; as David Thomas Konig writes, “widespread evasion continued.”

29 Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest 206 (1990).
30 Brady notes that “in New Haven, it was growth that preceded standardization—not the other way around.” Brady, supra n.20 at 884.
33 Beale, supra n.20 at 335.
35 Konig, supra n.31 at 144 (Many residents of Manchester “did not bother recording their lots until 1689.”)
The failure to comprehensively record property interests during the early period not did not negatively impact settlement, but rather encouraged it across a broader area. Colonies sought to build their population above all else, and found success through the strategy of offering headrights; they granted lands for decades without significant concern for institutionalizing a record of these entitlements. Unlike other European charters, which foregrounded trade, early English charters placed a unique emphasis on granting land, both from the Crown to its representatives and from those representatives to colonists, who could receive land “in fee simple, or other-wise, according to the order of the lawes of England.” Through land grants and headrights, colonies delegated the charge of taking “actual possession”-- occupying, enclosing, and cultivating lands for a term of years-- to settlers in exchange for title to those lands. As “Englishmen rushed to apportion their new source of wealth,” which they perceived in “the superabundance of land in the new world,” Konig writes, colonists perceived “large amounts of land [were] available,” and resolved cases of disputes between themselves by simply granting settlers compensatory lots.

Of course, the absence of the registry as an institution did not mean the absence of records, including unrecorded deeds or dispersed among other court records. Many early deeds reflect the flexibility of a land policy where “scrupulous regard to detail was easily overlooked.” In a context without a uniform surveying system, where “residential patterns were uncertain and frequently only temporary,” and where colonists frequently did not lay out boundaries or abandoned their land grants, they often recorded transfers of beneficial ownership, but left the properties in question ill-defined. The deed records in Colony of New Plymouth through the 1630s and 40s, for example, generally exhibit such brevity, and the following examples are typical: in March 1637, John Winslow did “acknowledge that he hath sould a house and a garden place scituate in the New street in Plymouth aforesd to Mr. Thomas Burne,” and in August 1638, Peeter Maycock similarly attested “That he hath absolutely bargained & sold unto the


37 See supra n.28.

38 Konig, supra n.31 at 139.

39 Id.; see also id. at 44, 146.

40 Id. at 139. See also Wesley Frank Craven, The Southern Colonies in the Seventeenth Century 175 (1949) (“in many places there was no one at hand to challenge a counterclaim… such surveys as had been made were both imperfect and incomplete”).

41 Konig, supra n.31 at 140.
said Richard Wright the xxv acres of land due to him for his service.” 42 To the extent that early colonists recorded property interests that they purchased from one another, they tended to “assure conveyances without specifying to what precise land the title pertained.”43 As a result, it was not always easy for granting officials or the community to know whether land was claimed by someone or whether it had been transferred.44 Reflecting this circumstance, in 1640, Virginia45 and Massachusetts46 passed Acts requiring recording only if the grantor was in possession and failed to transfer possession to the grantee47; in 1653, all that Humphrey Woodbury, a purchaser of abandoned lands, could do was “enter a ‘caveat’ with the county registry of deeds for a land transaction whose grantor held only dubious title.”48

Where the English resolved early disputes between themselves with compensatory lots, one of the major ways that they dealt with disputes with Native people was by “purchasing” lands and generating deeds as proof of Native consent, a practice likely inspired by the Dutch.49 In contrast with deeds between


43 Konig, supra n.31 at 147.

44 Id. at 141-42, 148 (stating that it was “difficult to tell who owned neighboring prop-

erty.”). But see Brady, supra n.20 (arguing that contextual social and legal practices such as ritual boundary-walking made these descriptions more comprehensible to colonial community-members than the documentation is to readers today).


46 1 RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY (1853) 306-07. See also Mark DeWolfe Howe, The Recording of Deeds in the Colony of Massachusetts Bay, 28 B.U. L. REV. 1, 3 (1948) (pointing out that amendments to the 1640 Act in 1648, 1660, and 1672 adjusted its mandate to more clearly accord with the Virginia standard). Scholars have regarded the Massachusetts Act as the first recording statute in America, though the Virginia Act was passed first. See, e.g., Beale, supra n.20; Haskins, supra n.7 (1941); Marshall, supra n.23 at 65.

47 As Konig observes, “it is likely that many grantors and grantees were not interested in ex-
act limits and were using the registry only to certify land deals that were investments in future resale at a higher price.” Konig, supra n.31 at 147.

48 See also id at 141; see also Essex County Land Book, in I THE REGISTRY OF DEEDS, Sa-
lem 38:

49 See generally STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 82 (2005). Jennings, supra n.10 at 133. Historians of the title registry suggest “early Dutch land acts… could have had a strong influence on the later American Colonies’ Recording Acts.” See, e.g., Marshall, supra n.23 at 60. Haskins, supra n.7 at 289-90. Yet the Dutch influence on land purchases from Native groups is more certain. When
colonists, the deeds from Native people that brought land under colonial ownership—and colonists’ view, under colonial jurisdiction—sometimes contained detailed descriptions identifying the lands they claimed, lands they reserved, and the bounds of settlements. The records colonists created to memorialize these transfers and document their landholdings are characterized by extensive descriptions of the lands from which they would thereafter exclude Native people or to which they would limit their claims. The following record from June 1641 provides a sense of the different degree of detail that marks this trend: it describes the bounds of Yarmouth “on the easterly side […] from the towne to a certaine brooke called by the Indians Shuckquam, but by the English Bounds brooke, with all that neck of land northward called by the Indians Atquiod, alias, Aquiatt, with all the uplands and marsh meddow which lye on the westerly side of the said broke, to the townewards unto the mount of the said brooke; and from a marked tree at the payth over the said Bound Brooke by a straight line south and by east to the south sea, so it extend not in length above eight miles, excepting and reserving unto Massatanpaine, the sachem, the lands from Nobscussetpann westerly, from a marked tree there unto another marked tree at a swamp extending westerly, and from thence to another marked tree northerly by a straight line to the sea, and from the northerly end of the said Nobscusset pan to the sea by a line from the westerly side of the said pan…” The record continues to detail the bounds between Yarmouth and Barnstable, and reserves as agreed upon between Nepaiton, Twacommacuus, “&their heirs” and inhabitants of Barnstable.

the Dutch West India Company entered the European colonial competition, it did so without papal authority and could not claim first discovery in North America vis-à-vis the English and Swedes. Jennings, supra n.10 at 131-32. To legitimize their claims, in 1625, the Company instructed the second director of the colony in New Netherland, Willem Verhulst, to extinguish Native land claims by purchase or persuasion, “a contract being made thereof and signed by them in their manner, since such contracts upon other occasions may be very useful to the Company.” Instructions for William Verhulst, Jan. 1625, in A.J.F. VAN LAER TRANS. AND ED. DOCUMENTS RELATING TO NEW NETHERLAND, 1624-1626, in the Henry E. Huntington Library (San Marino, CA 1924) 51-52. In 1633, New Plymouth, unlike Massachusetts Bay, did not have a charter to justify its claims, and obtained a deed for a Pequot land tract to which the Dutch had already obtained a deed from a different Pequot person. JOHN MASEFIELD, CHRONICLES OF THE PILGRIM FATHERS (London: J.M. Dent &Co. 1920).

50 See Brady, supra n.20 at 896 (observing a similar pattern where agreements between strangers or “outsiders” were often memorialized with a greater degree of formality than between family members or “insiders”).

51 Plymouth Court Records, Court Orders II 21-22. See also JEREMY DUPERTUIS BANGS, INDIAN DEEDS: LAND TRANSACTIONS IN PLYMOUTH COLONY 1620-1691 249-250 (2002); and records of the Government of New Plymouth attesting that “Massassowat freely gave them all the lands adjacent to them & their heires for ever,” and describing “All that part of New Engl. In America & tract & tracts of lands that lie within or between a certaine Riv-olett or Rundlett there commonly called Coalhasset alias Conahasset towards the North & the river commonly called Naragunsett River to the utmost limits & boundws of a Cowntrey or place in New Engl. commonly called Pokenacutt alias Puckenakick alias Sawaamset doe
While the pattern between the two types of records is not absolute, the trend of greater formality in memorializing the bounds of lands in interracial transactions than intracolonial ones is consistent through the 1630s and 40s. It is not difficult to see that such formality, in a context where transactions between Native people and colonists for land were highly contested, served as a means of bolstering and legitimating colonial attempts to claim land—both attacking Native sovereign claims and defending colonial counterclaims. For in general, as is well known, activity that would invalidate transactions in disputes today was highly prevalent in alleged transfers from Native people to colonists. Stuart Banner notes that “[i]n the colonial period the Indians sold an enormous amount of land to the English” for remarkably little compensation—much of it “under the overt or latent threats of English expropriation and ecological destruction,” “some under the misapprehension that the English intended to share it with them,” some under fraudulent pretenses, and much “by individuals who lacked clear authority to sell.” In a context marked by contentious and opposing

extend together with one halfe of the said River called Naragansetts & the said Rivolet or rundlet called Coahasset alias Conahasset... furthermore all that tract of land or part of New Eng. Or part of America aforesaid which lieth within or between & extendeth itself from the utmost limits of Cobbiscontee allias Comasecontee which adjoyneth to the river of Kenebeke alias Kenebekike towaers the western Ocean, & a place called the falls at Nequamkike in America aforesaid & the space of fifteen English miles on each side the said River commonly called Kenebeck River & all the said river called Kenebeck that lieth within the said limits & boundes Eastward Westward Northward or Sowthward last above mentioned, & all lands grownds soyles Rivers waters fishings hereditaments & profits whatsoever scituate lying & being, arising happening or accrewing or which shall arise happen or accrew in or within the said limits & boundes or either of them...” Bangs, supra n.51 at 232-233 (undated, probably from 1636). See also 2 RECORDS OF THE COLONY OF NEW PLYMOUTH, IN NEW ENGLAND: COURT ORDERS 10-11 (David Pulsifer & Nathaniel Bradstreet Shurtleff eds.) (W. White, 1855) (describing reserves Governor Bradford made for himself and his heirs). Subsequent Indian deeds in the Plymouth records, including those delineating reserves to tribes, also follow this pattern. See, e.g., Bangs, supra n.51 at 259, (a document from February 1649 states that Paumunnucke, Moash, Waumpum, and the rest of their associates, have fully and absolutely resigned up all the right, title and claime which any of them have or can make for themselves, or any others of their associates, in all and every part of those lands expressed in any of the aforesaid contracts, excepting the thirty acres excepted in the former contract, bearing date the 17th of May, (48,) lying att a necke called Cotochesett, and all the lands lying to the westward of Satuite River, and the westward of a north west line running from the easterly side of the next planting field to Cotuite Pond, lying on the easterly side of the said river, unto the bounds betwixt Sandwich and Barnstable.”).

52 Banner, supra n.49 at 82. These conditions comprise what David Wilkins and K. Tsianna Lomawaima refer to as “the historic realities of European-native negotiation of land transfers.” DAVID E. WILKINS AND K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 21 (2001). Cf. Justice Stanley Reed’s infamous statement in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (“Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral
claims, formality in agreements helped colonists create entitlements where they did not previously exist. These abuses in ostensibly private transactions had public consequences: they fostered unstable diplomatic relations that led colonies, beginning in Massachusetts in 1634, to regulate settlers’ purchases of land from Native people by requiring them to obtain permission or licenses.53

After the 1660s, a major shift in recording practices brought the formalism of interracial and intraracial deeds into greater parity and consolidated them together in local title registries. These events were precipitated precisely by colonists’ claims to evermore property, and thus territory. Colonists’ coercive engrossments of land had predictably increased tensions between colonies and Native nations: in Virginia, especially after 1644, “[n]ew crises in Indian relations inevitably accompanied the restless expansion of white settlement”; similar dynamics inspired New England colonies to unite in a military confederation in 1643.54 In other words, the success of the English approach to occupation generated an urgent need to address rising conflicts between both colonists and Native people and colonists themselves concerning land. The swift growth of colonial populations made settlements denser; and headrights and land grants that required a certain number of years of settlement to perfect title led to many abandoned claims. The confusion about whether these conditions had been met generated conflicting claims, and it became more difficult to resolve disputes with compensatory lots.55

In response to these problems, colonists began to better define and track their transactions between themselves. Further, as they consolidated their control of lands, their massive landholdings and changing patterns in the migration of white indentured servants prompted cash-crop dependent southern colonies to turn late in the century toward the model of large-scale commercial plantation slavery.56

The expansion of the American slave trade redoubled the property interests colonists sought to organize and protect, and racial ideologies justifying the violence

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range by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land”). Wilkins and Lomawaima call Reed’s statement “one of the most glaring misrepresentations of fact ever uttered by a Supreme Court justice.”


55 Konig, supra n.31.

56 See ANTHONY PARENT, FOUL MEANS: THE FORMATION OF A SLAVE SOCIETY IN VIRGINIA 1660-1740 60-68 (2012). (describing Virginia’s transition from reliance on indentured servants to enslaved labor in the seventeenth and eighteenth centuries, as “the labor switch” that helped drive a massive expansion of the African slave trade).
of this racial property production grew more elaborate and entrenched. During these decades, colonists produced these increasingly interdependent new forms of real and chattel property apace, and began to more clearly define this property to help them assert and defend their interests. More specifically, they began to uniformly measure and memorialize the bounds of property in land in at least some colonies, and elite planters who claimed the most property in enslaved people passed the first laws, beginning in Virginia, congealing enslavement as a racial, hereditary, and perpetual status disengaged from religious belief. This legal definition of burgeoning new property forms guided litigation over claims to ownership, along with registry records.

With respect to land claims, however, the creation of the title registry did not only collect English colonists’ “proof” of title against Native claims. As a governmental act establishing a public institution for ordering and affirming these claims, the registry also constituted an assertion of jurisdiction contra, most immediately, Native sovereignty. At this time, colonial jurisdiction was still tenuous, and colonies’ actual control and territorial reach extended only as far as colonists’ claims, private or public, and colonies’ ability to defend those contested claims. Recording acts were an expression of colonial authority to affirm settlers’ private claims to land thereby claimed as a part of their jurisdictions. The registry, an official legal mechanism for validating claims, assisted colonies in making private and jurisdictional claims against the claims of Native and other European nations. It served as an important resource through which colonists insisted, as Banner explained, on “control[ling] the legal system within which these transactions were enforced.”


58 These changes occurred in varying timelines across colonies-- early in eastern Massachussets and Virginia, but toward the end of the seventeenth century in the Connecticut River valley and New Haven-- raising interesting questions about more specific local factors that precipitated or delayed this shift. See, e.g., Brady, supra n.20 at 892, 921-35; WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 74 (1983).

59 Park (2022), supra n.11 at 1111-12.

60 Banner, supra n.49 at 82; see also Kawashima, supra n.10 at 8 (Massachusetts policy “allowed no room for Indian law.”); id at 16 (“[t]he first set of laws Indians were compelled to obey was… regulations on Indian land and trade.”); Jennings, supra n.10 at 129 (“The Euramerican would not accept the sanctions of the tribe; when he bought, he intended to put his land under the jurisdiction of his own colonial government and to secure recognition from that government of his property right.”).
Beginning in the 1660s, the consensus that legitimate chains of title were rooted in Native title also coalesced amongst colonists, merging what was considered proof of valid title for both intracolonial and intersovereign disputes. The rising frequency of disputes over land between colonists and with Native people gave new importance to constructing chains of “good title” and registries as archives of proof and institutional bulwarks for claims. Neither was there a clean division between intracolonial and intersovereign disputes. Because colonists’ approach to land expropriation mimicked the form of private purchases of land, the jurisdictional conflict they raised also were frequently channeled through individual transactional disputes, though sovereign control of land hung in the balance. Native people had formal access to colonial courts, and even sometimes prevailed when the colony deemed it prudent to curb settlers’ worst excesses. Generally, however, they faced a forum where the judge, juries, and witnesses were colonists operating for the colonists.61

In a context where not recording title increasingly seemed like a sure way to lose a claim, Native people too increasingly sought to use the newly significant public record to protect their land. For example, the Plymouth Colony Records Deeds Book, in an addendum entitled Book of Indian Records for their Lands, contains a collection of deeds from the 1660s and 70s, as well as a few from the 1690s, bequeathing land from one Native person to another in an attempt to keep lands within the community, or to “preserve our lands for our children.”62 Deeds recorded by Native people, however, were not confined to that book, and appear throughout the general records as well. In one example, in 1668, the Pocasset leader and saunkskwa Weetamoo recorded oral testimony with the Plymouth Court that a deed ostensibly transferring her people’s lands to John Sanford and John Archer “was a cheatt… to secure her land from Wamsutta or Peter Tallman,” for which they received consideration for her and were “to resigne up… att her demand.”63 In June 1673, too, she recorded a deed to protect lands marking the boundaries of “Assonet Neck” made in the name of “Piowant,” probably a man bound to protect that land who was chosen because of colonial attitudes about leadership and gender.64

Alongside these records, the books contain retroactive records that many colonial towns created during this period to reconstruct chains of title and memorialize the collective transfer of lands from Native nations to the towns, even when based on allegations about agreements made decades prior. The examples

61 Banner, supra n.49 at 82-83.

62 Deed from Papamo Machacam and Achawanamett stated this purpose when they recorded their interest in a tract of land called Mattapoissett on October 3, 1673. PLYMOUTH DEED BOOKS, supra n.40 at 225-26.


64 BROOKS, supra n.64 at 70-71. See also 12 PLYMOUTH COURT ORDERS 242.
of the kinds of records they created in this process are too numerous to describe comprehensively here, but a few will serve to illustrate the point. In some cases, colonists obtained retroactive deeds or recorded testimony pertaining to long past alleged transactions from Native people. In March 30, 1668, Rehoboth township recorded a quit claim deed for eight square miles and 100 acres obtained from Metacom, otherwise known as King Philip, stating that his deceased father had received compensation for those lands in 1641. Quachatasett, too, on January 16, 1677, acknowledged to the town of Sandwich that his former guardian Quonicome had “many years since in the time of [his] minority”—possibly as long ago as 1637—received payment on his behalf for a large tract between Sandwich and Barnstable. In other cases, colonists provided the testimony, such as when John Alden, at 83 years of age, testified on July 6, 1682, to “being one of the first comers into New England, to settle att or about Plymouth, which now is about 62 yeer since,” and that lands the colony claimed belonged to Osamequin, or Massasoit, Metacom’s father, who with his son Wamsitta “did give, graunt, alianate, and enfeoffe [Hog Island] unto Richard Smith.” By 1747, the standard of deriving “good title” from Native title was so established that a group of New Jersey colonists observed, “Every Man that pretended to Propriety, had gotten his Right by Purchase from the Natives, without which purchase, the People there would hiss at the person pretending Property.”

Today, these records attesting to claims that Native nations consensually transferred land, like deeds involving Native signatories, as frequently riddled with colonial coercions as they were, still anchor chains of title from that era.

65 The town of Plymouth began the practice, before this period, of “calling upon the witness stand some of their oldest dwellers in the country, and taking their testimony under oath that certain tracts of Indian lands, then in the possession of the English, were fairly and properly obtained of the Indians by purchase, and such depositions being entered in and upon the records of the colonial court were relied upon as a title to such lands, of which no written evidences of the purchase in the form, spirit, or letter of a deed could be found, and of which, perhaps, none ever existed.” Bangs, supra n.51 at 23. The town of Hingham retroactively purchased the land on which it sat, and explained in a deed dated July 4, 1665, that when the town was settled in 1634, it was with “likening and Consent” but without “legal conveyance in writing.” Jennings, supra n.10 at 143-44. Essex landowners made a belated effort to create records commemorating their original purchases from Native nations decades before. DAVID THOMAS KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692 161 (1981); JOSEPH B. FELT, ANNALS OF SALEM, VOL. I., 2ND ED. 30 (1845-49). When Governor Sir Edmund Andros announced his plan to redistribute lands in Massachusetts, based on the idea that “from the Indians noe title cann be Derived,” every New Engander became a staunch defender of Native title.” Banner, supra n.49 at 42.

66 Bangs, supra n.51 at 387-88.

67 Id. at 187.

68 Id. at 532.

69 Banner, supra n.49 at 27, fn. 35.
Their presence in the record, together with the examples presented above, memorialize colonists’ achievement in building consensus among themselves to use this institution; and that they wielded it to powerful enough effect in intersovereign disputes that Native people sought to use its protections as well, much as they often sought relief in colonial courts. Yet as with courts, the registry drew Native people into fora they did not control, where legal formalities could be used against them as well as for them, and where protection ultimately depended on other forms of privilege and power. The registry, as an official point of proof for the transfer of lands from Native people to colonists in general, became a constituent part of colonists’ assertion of sovereign power over territory—political power that did not only privilege colonial property interests, but was born from them and depended on their proliferation to grow.

B) Expanding Jurisdictional Power Through the Local Institution of the Registry

The fact that colonies used property claims to assert control over lands from local centers highlights another important aspect of how colonists approached the task of building power from a place of weakness: it occurred from the literal ground upward, through concrete disputes against other communities and their efforts to build structures capacious enough to give force to collective action. Again, in a context where colonial occupation was spotty, and colonial jurisdiction highly contested, colonies were in no position to claim absolute sovereign authority over the grandiose territories demarcated by the borders of their Discovery-based charters. Rather, as they represented the people under their jurisdiction, they insisted their jurisdictional interests extended as far as the parcels which those settlers claimed—which were increasingly recorded in county courts and registries. Colonial claims to jurisdiction vis-à-vis Native nations radiated outward from local centers of settlement, rather than inward from the bounds of charter grants. This approach toward building power manifested in the evolution of the American title registry as a local, public, and voluntary institution, a set of choices designed to encourage its broad acceptance and use by colonists. The meager institution of the registry, which constituted little more than a book and a clerk, is a powerful example of how colonies developed a form with the capacity to facilitate concerted colonial action. Registries not only supported

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70 Bailyn, for example, wrote that a visual representation of their migration patterns would look like “a multitude of short lines forming together a penumbra around each town and joining it with the neighboring towns.” Bernard Bailyn, The Peopling of British North America: An Introduction 51 (1986). Paxson described how “[t]he development of country government in Virginia and North Carolina kept uneven pace with the need for it in border settlements”; and how since “there were frequently many settlers and a need to register land titles and probate estates before the colonial legislatures became aware of the fact… there was a tendency for them to frame some kind of legal institutions for themselves.” Frederic Paxson, History of the American Frontier 1763-1893 24 (1924).
property production; they accelerated it, and transformed its very nature to make property, beyond a static asset, a vehicle for credit creation. As colonies, with the registry, successfully interposed a bureaucratic process upon colonists and Native people alike to further colonial goals, these developments catalyzed not only the growth of colonies’ markets but their jurisdictional reach.

Initially, records of land grants in most colonies were kept in one place, by high-level crown officials of the founding corporations, proprietors, and governors’ offices, in continuation with English requirements that the Crown maintain public records of its land grants. South Carolina maintained a centralized system of records in Charlestown throughout the colonial era; only the corporate colonies of Massachusetts and Connecticut, where towns had control over granting land and recording as early as 1629, were exceptions. Yet a distant central registry acted as a prohibiting bar to most people who might otherwise record their interests or check the record. As Wesley Frank Craven noted of Virginia, “each step in [the] outward movement of population increased the distance between the people and the seat of provincial government,” quickly giving rise to the demand “[o]n each frontier… for the creation of a local court that would bring the government within easy reach of the people.” These courts “rendered [their] most important services” “as a court of record, and “[o]f all the records kept, none compared in importance with those which testified to a title in land,” the main source of any colonist’s wealth. English settlers had limited ability to travel for such clerical tasks, and local records also strengthened owners’ ability to provide notice “to the world.” Thus, in the late seventeenth and early eighteenth century, colonies facilitated making the registry ubiquitous by passing laws providing that property records be maintained at the county level, in courts of

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71 Priest, supra n.2 at 44-45.
72 Id; see also Blackstone, supra n.84 (“no freehold may be given to the king, nor derived from him, but by matter of record”).
73 Priest, supra n.2 at 55. In 1785, South Carolina enacted “An Act for establishing county courts, which required the recording of conveyances “in the Clerk’s office of the county where the land mentioned to be passed or granted shall lie,” though it still required county courts to “transmit memorials” of the records they collected to the central office twice a year. ACTS, ORDINANCES AND RESOLVES OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA 24 (Act of March, 1785) (Charleston, SC: A Timothy, Printer to the State).
74 Priest, supra n.2 at 51.
75 Craven, supra n.40 at 270, 172.
76 Id. at 277-78.
77 As Priest writes, “in the colonies, publicizing conveyances in open records became widespread practice and was normalized in a manner not achieved in England until the late nineteenth and early twentieth centuries.” Priest, supra n.2 at 50.
common pleas. 78 A Virginia Act introduced county-level recordkeeping for deeds or mortgages made “without delivery of possession” as early as 1639;79 “by the middle of the century no small part of the duties of the clerk of court was that of a registrar of deeds.”80 Maryland attempted to provide for recording in 1639 and 1663, and succeeded in passing a law in 1678.81 As elsewhere, by then, colonists were already recording conveyances with the county court, even if not in an established land registry, and “the statute finally enacted hardly did more than confirm an established practice.”82 Similar laws appeared in 1683 in New York83 and 1706 in Pennsylvania.84

In addition to situating registries locally, colonies also established publicly accessible registries to facilitate settlers’ use of this system.85 In stark contrast to the English tradition of keeping private conveyances private,86 as Priest comments, “the public’s access to court records and land title records was a central feature of colonial institutions.”87 As in New Jersey’s 1714 recording acts, many seventeenth and eighteenth century colonial laws specified that “all Persons concerned may have Recourse to the said Records, as they shall have occasion”88;

78 Civil courts that acted as fora for notifying local communities of changes in each others’ property holdings and status. Id. at 41, 50.
79 Act 16 (1639), I HENING, STATUTES AT LARGE, at 227; repeated in Act 12 (1642), id. at 248.
80 Craven, supra n.40 at 280. The legislature extended the scope of this Act to recording chattel mortgages in 1656. Against fraudulent deeds, Act 4, I HENING, STATUTES AT LARGE, at 417-18.
81 Priest, supra n.2 at 51; HERBERT OSGOOD, 2 THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 43 (1904-07).
82 Craven, supra n.40 at 305.
83 An Act to prevent frauds in conveyancing of lands (Nov. 3, 1683), 1 COLONIAL LAWS OF NEW YORK 141-42.
85 As Brady has shown, like contemporary registries, the first registries charged basic fees for recording—six pence in 1672, and two shillings (or twenty-four pence) by 1702, while it cost a penny to search the records for a parcel. Brady, supra n.20 at 901.
86 Priest, supra n.2 at 45. Parliament enacted a national Land Registry Act for England and Wales in 1862.
87 Id. at 47.
88 Id. at 48. See also An Act for Acknowledging and Recording of Deeds 1713/1714; An Act in addition to an Act entitled “An Act for the More Safe Keeping the Registry of Deeds and Conveyances of Lands,” (November 17, 1720), reprinted in 2 THE ACTS AND RESOLVES PUBLIC AND PRIVATE OF THE PROVINCE OF MASSACHUSETTS BAY ch. 12 187 (1874); An Act for Preventing Frauds by Mortgages (1765), 334-36; An Act for Preventing frauds by
Zephaniah Swift wrote in a 1795 treatise on Connecticut law that, “The records and files of the towns, will shew to every person, that is pleased to enquire, in whom is vested the legal title to lands.”89 This design feature had the effect of increasing the property on record, and transforming the formal aspects of transactions for land. Like English deeds, American colonial deeds increasingly included both beneficial ownership information and a description of the property. But because publicly searchable records provided what we now call “constructive notice,” as Claire Priest has observed, the traditional English requirement of a “public and notorious act” to transfer property became redundant and obsolete. The registry, in other words, simplified and facilitated transactions for property90 by doing away with the cumbersome and expensive livery of seisin, a ritual ceremony where the parties and witnesses convened at the land itself for the prior owner to deliver “a clod or turf, or a twig or bough there growing” to the new owner.91 With the elimination of this ritual, the deed gained in capacity, though its form remained the same:92 under colonial law, as Priest writes, “the deed itself fully conveyed the property… because having the deed authenticated or ‘proved’ in court and recorded in the court records or registry provided the required element of ‘notoriety’ of the transaction.”93

While the registry simplified and encouraged colonial claims-making, most colonies nonetheless did not make recording mandatory.94 As Priest observes that

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89 “This renders all conveyances of lands a matter of much more public notoriety, than the ancient method of livery of seisin.” ZEPHANIAH SWIFT, I A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT: IN SIX BOOKS 307-8 (described in Priest, supra n.2 at 47).

90 Id. (“our conveyancing can boast of a simplicity, conciseness, facility, and cheapness, superior to any other country.”). See also Daniel Webster, “A Discourse Delivered at Plymouth, December 22, 1820, in Commemoration of the First Settlement of New-England,” Fourth Ed. 41 (1826) (“[t]he establishment of public registries, and the simplicity of our forms of conveyance, have greatly facilitated the change of real estate, from one proprietor to another.”).

91 See Priest, supra n.2 at 46; see also WILLIAM BLACKSTONE, 2 THE COMMENTARIES ON THE LAWS OF ENGLAND 311 (1765-69).

92 As in England, a deed is a document containing the names of the seller and purchaser and a description of the property to convey property.

93 Id. at 46.

“where public recording was largely a novelty, voluntary recording proved to be the dominant approach.”95 Because recording acts, like those still in force today, gave recorded interests priority over unrecorded ones by law, they created incentives for widespread recording, though they did not invalidate unrecorded titles. Settlers were more likely to pursue activities that would deliver direct advantages to them than to heed government mandates about formalities; as their primary preoccupation was property, they had high incentives to record property of significant monetary value, which included not only property in land, but the highly interdependent form of property in enslaved people. The recording of transactions involving chattel property in enslaved people, as Priest notes, represents “dramatic departure from the English common law.”96 Registry records grew remarkably comprehensive, in the sense that they came to encompass most claims to property within a jurisdiction.97

The registry’s design relieved governments of the burdens not only of enforcing a registration requirement, but also of authenticating title or providing indemnity in case of fraud (in contrast to the Torrens registry system, for example, which was introduced in the 1850s to facilitate the colonization of Australia).98 Voluntary recording meant that any party could record any document, valid or not; minimal government involvement distanced the government from any accountability for the integrity of claims in the record.99 These features, which lowered the bar to using the registry still further, also made the registry cheap and easy to replicate across the colonies. The contemporary American title

95 Priest, supra n.2 at 52.

96 Id. at 49. Reflecting the deep interdependence of property in people and land, property in people was alternately categorized as chattel and real property during this period. See Park (2022), supra n.11 at 1117-18; THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 61-80 (1996); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 49-53 (1978).

97 In England, no such records came into being until 1869, except in Yorkshire, Middlesex County, and the Bedford Levels. See Priest, supra n.2 at 48-49. Though local recording existed in England since the Statute of Enrolments of 1536, which formally required the recording of land conveyances, the recording requirement did not apply when a tenant under a lease purchased the land, causing the practice of leasing land for one year prior to a full conveyance to become common by the 1620s. Priest, supra n.2 at 46; see also J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 4TH ED. 305-6 (2002).

98 For analyses of the colonial logic of the Torrens registration system, see BRENNA BHANDAR, COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP (2018); Sarah Keenan, “Making Land Liquid: On Time and Title Registration,” in LAW AND TIME (Sian Beynon-Jones & Emily Grabham, EDS., 2018).

registry retains this form as a conspicuously minimal and passive institution—“merely a mechanism for publicly recording private transfers” that leaves transacting parties to test title and enforce their rights by litigation.  

This open, low-accountability system, as scholars have observed, trades remarkable flexibility and speed in private transfers for high risks to individual claimants. These claimants’ ability to seek costly assistance if faced with fraud or error in the record, of course, neither is, nor was equal; Native people, the small group of free Black land owners in the colonies, and poor English people who sought to use the registry to protect their claims faced the structural disadvantages built into the system: the hazards of market predation, unequal bargaining power, and racial discrimination in both transactions and law enforcement, as well as access to resources needed to pay filing fees, court fees, representation, and settlements or fines. As one commentator observed, “[i]t is quite clear that the forerunning statutes of today’s recording acts were based on a revenue preservation basis rather than the protection of anyone” or at least any individual. By amassing colonial claims, and providing colonies with institutional infrastructure to validate them, the registry protected the collective.

These harms to participants in the system, of course, were distinct from the immeasurable underlying harms to Native and Black communities wrought by the processes of producing the property that was the object of nearly all claims in the registry: land and people, increasingly the two most significant commodities in colonial markets. The “growth” of property markets, in this context, meant the seizure of more Native nations’ lands and the enslavement of more people. To the extent that the registry facilitated making property claims, it furthered the processes of conquest and enslavement, driving the destruction of Native and Black communities and lives. Further, the registry further catalyzed market growth, magnifying the scale of loss, by strengthening colonists’ ability to access credit through property ownership. As Priest recently showed, registries gave lenders more confidence in making secured loans to colonists, as they helped to affirm property ownership and provide notice of liens or other encumbrances. Meanwhile, though foreclosure had long been a rare occurrence laden with legal hurdles in England, creditors lobbied for easy foreclosure on lands in the col-

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100 Szypszak, supra n.99 at 663. The title insurance industry rose in this space left by the government to private parties to verify and strengthen record claims.

101 Id. at 665.

102 Id.

onies, in order to more easily foreclose on enslaved people and to keep plantations whole. After they succeeded in making it possible, for the first time, for colonists to use lands as security for credit in 1732, lenders became more willing to lend and on better terms, and poured money into the colonies to fund an explosion of commercial activity.

The institutional infrastructure of the registry was the “backbone of credit” in the colonies, as Priest put it, and ushered in a new way of thinking about property itself. On the frenzied borrowing that followed new laws governing credit and foreclosure, G.B. Warden reflected that “real property in Boston at times more closely resembled a negotiable commodity or medium of exchange”; “the mere possession of property… was probably not so important as being able to exchange it rapidly as conditions changed, and to convert property into credit or cash.” Not only did land further approach the status of other chattel goods, but enslaved people “too were treated as assets and were a primary form of collateral driving the economy in many areas,” further exacerbating the pecuniary and instrumental relationship that colonists had initiated to tribal lands and human beings. Colonists began to accumulate property in expropriated lands and enslaved people, not only because they wished to “cultivate” land, but in order to obtain more credit—because of their bald need for cash.

No less than Joseph Story gushed of the registry system, “It is hardly possible to measure the beneficial influences upon our titles arising from this source, in point of security, facility of transfer, and marketable value.” But one cannot celebrate this commercial growth without also celebrating the brutal violence of the property production it involved. Though most literature on these economic

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104 Virginia passed a law governing recording of chattel mortgages in 1656. Priest 49 (52); Against Fraudulent Deeds, HENING, I STATUTES AT LARGE at 418. In 1698, South Carolina passed an Act that referenced the priority courts should give to recorded “Sale or Mortgage of Negroes,” above unrecorded transactions. An Act to prevent Deceits by Double Mortgages and Conveyances of Lands, Negroes, and Chattels (Oct 8, 1698), 2 STATUTES AT LARGE OF SOUTH CAROLINA, no. 161, 137-38.

105 Priest, supra n.2 at 5.


107 Priest, supra n.2 at 56. See also Park (2016), supra n.103; JOHN FREDERICK MARTIN, PROFITS IN THE WILDERNESS: ENTREPRENEURSHIP AND THE FOUNDING OF NEW ENGLAND TOWNS IN THE SEVENTEENTH CENTURY 123 (1991) (though people’s wealth in England “had consisted of many things,… land was the principal capital of seventeenth-century America.”).

108 JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §174 161 (1833) (the registry was “founded in the highest wisdom and policy, and had a most effectual operation to reduce the titles to things real to certainty, and lessen the sources of litigation.”).
developments has followed Story in ignoring this violence or treated it as incidental, in truth, this violence was the most obvious and remarkable aspect of the property system developing at this time. It was colonists’ assessment of the plausibility of violence against Native and Black communities that drove their investments in expropriation and enslavement; these property pursuits were thus motivated by violence, and colonists disciplined and sustained this violence by developing bureaucratic practices and institutions such as the registry. The registry system thereby became the institutional foundation of a property system distinguished by an unprecedented value system: one that elevated the monetary value of property, and sought to encourage commercial activity above all—at one level, above safeguards for individuals to ensure the accountability of recordings, and on another, more fundamentally, at the direct expense of non-European communities and lives.

The newly ubiquitous, local registry became the foundation for the growth of this property market, and with it, colonies’ jurisdictional power in America. These markets, and this power, grew through expropriation and enslavement, or the systematic destruction of communities they viewed as oppositional to their own. The registry organized and supported these processes of dispossession and domination, from local centers, the sites of colonization, where they found their seat—townships and counties in the north, and counties in the southern colonies, where Craven noted, “each new county may be considered the result of an extension of settlement beyond the reach of a county court sitting at points convenient to the older areas of settlement.”109 These developments would have lasting consequences, as the next Part describes, and make property affirmation and preservation the primary charge of the county in the United States.

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

In significant part, the United States adopted the colonies’ approach to building its jurisdictional power by encouraging property claims. Consequently, the title registry appeared quickly in all areas where settlers began to claim property—locally, in counties, which framed the local germs of settlement through which the nation extended its sovereign power. In the United States, as Craven remarked of the colony of Virginia, “the expanding frontier…[was] conveniently marked for us by the creation of new counties.”110 This Part tracks the progression of U.S. control of lands through the creation of counties, which often appeared prior to the creation of territories or states, as well as before Native nations ceded the very lands of those counties by treaties. The picture that the local history of national expansion offers us of U.S. territorial sovereignty dramatically

109 Craven, supra n.40 at 270.
110 Id. at 172.
retards the timeline of when the United States attained sovereignty across its current landmass, including within its original states. Concomitantly, extends our understanding of how long Native nations’ absolute sovereign control of lands persisted in many areas across the current U.S. landmass, well after its creation of territories and states.

This understanding of the history of U.S. territorial sovereignty significantly departs from the common convention in legal scholarship of describing the United States as acquiring “sovereignty,” “ownership,” or even “federal jurisdiction” of lands through the Treaty of Paris with Great Britain, the Louisiana Purchase, the Florida Purchase, or the Treaty of Guadalupe Hidalgo.111 But when the United States received rights to land passed by these treaties, and from the charters of its various states, these rights were no more than Discovery rights; as Justice Marshall would clearly enunciate in the 1823 decision Johnson v. M’Intosh, title by “Discovery” could only be consummated by possession. At stake in this distinction is whether or not we clearly understand the difference between the right of conquest and the right of jurisdiction; between a plan to invade and governance; between white entitlement and actual title to lands. In the space between these pairs lies more than a century of struggles waged by hundreds of Native nations to retain sovereign control of their homelands, as well as our ability to appreciate the full scale and range of mechanisms of the enormous, multi-sited and local project of conquest.

Thus, federal authority governed U.S. plans to invade Native nations’ lands; federal jurisdiction did not exist in lands beyond the Appalachia or in many parts of the first states. 112 Because the United States adopted the colonies’ approach of encouraging settlement and private property claims, “[a]s Americans migrated from the original thirteen colonies and continued to push the frontier westward across the North American continent, lands were often settled before the existence of government or claim of sovereignty by any nation other than Native American tribes.”113 For this reason, as the United States grew in lands, it was counties, rather than the theoretical projections of territories, land districts, or states, that constituted their first tentative attempts to govern on the ground, and that established the first ground-level legal institutions to appear—namely, court houses and registries. Their first and primary function was to affirm and preserve

111 The convention is so widespread in legal and popular literature as to make it unnecessary and misleading to single out any example. This analysis also aims to highlights the role of local jurisdictions in response to important recent scholarship that also describes the territorial transition to United States sovereignty, but heavily emphasized the federal role. See, e.g., GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES (2020); PAUL FRYMER, BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION (2017).

112 See, e.g., Ablavsky, supra n.111 at 4.

property rights. Like counties today, counties in the early Republic were created to support not only property but population growth, and their use in the U.S. Census marks a growing uniformity over time to the nation’s approach to recording both. Furthermore, the specific local, public, voluntary and unverified form of the registry, though not federally mandated, remained astonishingly uniform as it multiplied into the thousands, in an incredible display of concerted local action that created a common institutional infrastructure to underlie the whole of the national jurisdiction and market.

It is important to first understand how the contours of the U.S. legal framework for conquest differed from that of the colonies. After establishing its sole authority vis-à-vis competing European nations and states over future conquest, the United States significantly reordered the legal structure of land expropriation from Native nations with a policy of “federal preemption.” Where in the colonies, the legal mode of transfer from Native polities to Angloamericans had included private contracts, the United States made itself the only entity to which Native nations could transfer title, and treaty became the exclusive tool for formal land acquisition. Further, the federal government also assumed responsibility for overseeing land surveys and then distributing these lands, first through the Treasury, and eventually through national land offices, to private entities and people. Theoretically, the nation was supposed to formally acquire lands from tribes before surveying and “disposing” of what it called the “public domain.”

In practice, however, the United States continued to benefit from private individuals’ willingness to claim Native nations’ lands as property to establish its actual control or jurisdiction of territory. Following longstanding colonial practice, homesteading settlers continued to encroach on Native nations’ lands prior

115 The Census reports of 1800, 1810, and 1820 list population information by townships and counties, but in and after 1830, by counties and states. Georgia converted its parishes into eight original counties during the decades before it entered the union. FARRIS W. CADLE, GEORGIA LAND SURVEYING HISTORY AND LAW 62 (1991).
117 “Indian land sales were transformed from contract into treaties.” Banner, *supra* n.49 at 85.
118 The Treasury oversaw sales and grants of surveyed land until the creation of the General Land Office in 1812.
119 See Calloway, *supra* n.116 (“imperialism and republicanism could be deemed compatible if the lands into which the nation expanded were “vacant” and “domestic space.”).
to their formal acquisition by the United States.\textsuperscript{120} During this period, this settlement often occurred in areas where the effects of prior European settlement, especially the spread of disease, had already seriously impacted Native communities’ health and ability to survive in their homelands.\textsuperscript{121} Ongoing settlement disrupted these nations’ efforts to recover and rebuild their communities and facilitated the United States’ ability to obtain land cessions from them by treaty.\textsuperscript{122} As Colin Calloway writes, “the US government absorbed frontier settlers’ takeovers of Indian land; sanctioned, turned a blind eye to, or lamented their killing of Indian people; and invoked on-the-ground-‘settler sovereignty’ to exert jurisdiction and control over Indian country.”\textsuperscript{123} As Benjamin Horace Hibbard too observed, “the settler rarely hesitated to take possession of government land either before or after it was surveyed”; approvingly, he characterized “[t]hese actions, while not legal, [as] extra-legal rather than illegal,” and even necessary in the face of laws that “did not protect the squatter in his right to the soil.”\textsuperscript{124} In short, settlers and their property claims, following a tradition of promises by the state to validate them, continued to lead Angloamericans’ expansion of jurisdictional power and consummation of sovereign title.

Section II(A) analyzes county creation in the Northwest Territory to show that the United States’ early approach to conquest was to establish counties to draw settlers in advance of obtaining treaties ceding those lands, to create conditions under which it was possible to create transitional territories, and eventually states.\textsuperscript{125} Section II(B) describes how the United States also continued to pursue

\textsuperscript{120} See Kawashima, \textit{supra} n.10 at 66-68; Marcus Jernegan, \textit{The American Colonies 1491-1750: A Study of Their Political, Economic, and Social Development} 337, 345 (1929).


\textsuperscript{122} One of Congress’ main early preoccupations was finding and controlling “suitably industrious settlers to develop the national domain.” Peter S. Onuf, \textit{Statehood and Union: A History of the Northwest Ordinance} 17 (1987); see \textit{also id} at 25 (in light of the “amazing rapidity” of settlement, George Washington advised, “if you cannot stop the road, it is yet in your power to mark the way”).

\textsuperscript{123} Calloway, \textit{supra} n.116 at 186. While the United States promised in 1785 to prevent private intrusions into Native nations’ lands, its choices selectively enforced that promise, as dictated by concerns about the dollar costs and war.

\textsuperscript{124} Benjamin Horace Hibbard, \textit{A History of the Public Land Policies} 198 (1939). Throughout the nineteenth century, settlers pointed to the centuries-old tradition of title by “improvement,” as well as federal preemption and homesteading policies, to argue they were acting in the service of the nation, even when violating the law. See, e.g., James Willard Hurst, \textit{Law and the Conditions of Freedom in the Nineteenth-Century United States} 12 (1956); Park (2022), \textit{supra} n.11 at 1124.

\textsuperscript{125} See Appendix A.
sovereign control of lands within and with the cooperation of original states; using the example of Georgia, it follows the close correspondence between state county-creation and federal treaty cessions, to show how the state ultimately used county creation to override federal authority over land acquisition and expel the Cherokee nation. Section II(C) uses the passage of Recording Acts in territories and states to show how property claims continued to usher in the United States’ occupation, and that counties remained critical sites for actualizing its sovereign claims, though patterns of county-creation changed as the nation grew more confident in its eventual conquest of the continent.

A) Expanding Jurisdictional Power into the Northwest Territory

To claim Discovery rights in what became the Northwest Territory, the United States had to inherit them from both Great Britain, in the Treaty of Paris, allowing it to try to take control of the lands without interference other European powers; and from Virginia, which ceded its overlapping claims to the lands that lay northwest of the Ohio River to the federal government in 1784. The bankrupt, deeply indebted new nation regarded these lands as its only source of revenue, and almost immediately, Congress passed an ordinance in anticipation of “opening the West” to settlement. In this ordinance, it announced its plans to establish governments and eventually states in the territories; and in 1785, it passed a land ordinance to create the Public Land Survey system for western lands, prompting the first national survey in what came to be known as the Seven Ranges in eastern Ohio. However, the intrusion of squatters and surveyors into lands still controlled by Native nations caused intense conflicts over the next two years. After numerous setbacks, the federal government came to understand that it could not begin its conquest with a survey, for Native sovereigns would not relinquish lands because of lines a surveyor drew. Further, its own interest in new states remained “remote and hypothetical” to settlers, who were interested in gaining not political rights but property. To encourage settlement, Peter

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126 As Calloway writes, “There were no Indians at the Peace of Paris in 1783... The lands... were now there for the taking...[and] faced enormous challenges in securing those lands.” Calloway, supra n.110 at 283.

127 Id. at 293.

128 Onuf, supra n.113 at 44.

129 Estimates of the population of Native nations range from 150,000. Calloway, supra n.110 at 283.

130 Onuf, supra n.113 at 45 (“between 1784 and 1787 it became increasingly clear that the land system alone did not constitute an adequate framework for orderly development. In practice, the implementation of federal land policy retarded settlement.”)

131 Id. See also id at 58 (“[t]he real issue—for settlers and policy makers alike—was land”).
Onuf observes, Congress realized it would have to provide enough “law and order” in the territories to guarantee titles to land. The concrete project of supporting settlers in claiming property meant creating local institutions for organizing and defending title—namely, the registry of the county clerk.

Thus the Northwest Ordinance of 1787, which identified the vast area northwest of the Ohio River as lands over which the United States would attempt to assert control in the coming years, focused heavily on property law. This aspect of the document has received relatively little scholarly attention, compared to its duplicitous avowal to respect Native nations’ land rights, while simultaneously providing for the eventual admission of their homelands as states. Yet it opened with recording rules, and rules governing inheritance, transfer, and leasing across the territory. It specified that written documents should be “duly proved and be recorded within one year after proper magistrates, courts and registers… be appointed for that purpose”; and provided that the United States would affirm other European settlers’ property interests in the area. It further outlines the governor’s authority for creating counties and townships, which would organize that population and its property; the governor could both appoint local officials and “lay out the parts of the district in which the Indian titles shall have been extinguished into counties and townships…”

This line likely meant to describe the United States’ theoretical plan of first obtaining treaty cessions—“the parts of the district in which the Indian titles shall have been extinguished”—and following them with surveys to draw the boundaries of counties, townships, and plots upon ceded lands. Yet the ambiguity resulting from the absence of punctuation also more accurately captures the reality of what did happen on the ground: surveys, or the “laying out” of lands, very often occurred in “parts of the district” where settlement and the creation of counties and townships had already begun to undermine Native nations’ presence and dissolve their title. For example, Governor Arthur St. Clair laid out a first county

132 Id.
133 Onuf writes of the demand for “law and order at the local level” and how “[t]he problem of territorial government thus was transposed from the level of the ‘state’ to that of the local community.”
135 Northwest Ordinance; see also William B. Neff, Bench and Bar of Northern Ohio 32 (1921) (“Particular attention was given in the ordinance to property rights and the disposition of estates”).
136 Northwest Ordinance (Their “lands and property shall never be taken from them without their consent”; “not less than three nor more than five States”).
that he named for himself in 1790, and county officials purchased a building in Cahokia to serve as the county courthouse in 1793. In the first deed book of the St. Clair County Recorder of Deeds, Deed Book A, the first pages record the Governor’s establishment of the County, and refer explicitly to the ordinance’s direction to “make proper Divisions of the Said Territory … where the Indian Titles shall have been Extinguished into Counties and Townships.” However, this act of county creation openly flouted the direction to extinguish Native title first— for the lands constituting only the present-day county—a small fraction of the county’s area as initially formed— were not ceded by the Kaskaskia to the United States until 1803. Consequently, St. Clair County also illustrates how the creation of counties and townships, by drawing settlers to a region, helped pave the way for the federal government to extinguish Native title.

The Ordinance, in other words, highlighted the means by which Congress believed that Native jurisdictions would give way to the sovereign claims of the United States: settlement and the institutionalization of property claims. The Northwest Territory, as the United States dubbed it, was but a future projection of its own control across a vast expanse of land—an area that would eventually comprise five midwestern states and part of Minnesota. Congress drew and named this “blank canvas” in the Ordinance in 1787, and despite U.S. settlers’ paper claims to over 21 million acres of land in the area, its white population numbered only “4,280 souls” by 1791.

In the years that followed, across those lands, counties, recording practices, and title registries, without exception, appeared before the creation of the territories to which they would belong, the states those territories would become, and in almost every instance, before tribal nations ceded the very lands on which the county sat to the federal government. During the first few decades of the early Republic, counties covered large expanses of land, as in the colonies. In the United States, counties became subdivisions of territories. Like territories, they were transitional jurisdictional units, in that they did not represent territory the

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137 HISTORY OF ST. CLAIR COUNTY, ILLINOIS: WITH ILLUSTRATIONS DESCRIPTIVE OF THEIR SCENERY AND BIOGRAPHICAL SKETCHES OF SOME OF THEIR PROMINENT MEN AND PIONEERS 79 (Phil: Brink, McDonough & Co. 1881).

138 THOMAS JEFFERSON, REPORT ON WESTERN LANDS (8 Nov. 1791); see also Ablavsky, supra n.111 at 1.


140 Kentucky was initially a county of Virginia; Arkansas, too, was first a county. In New York, Albany County functioned much like a territory—it theoretically extended to the Pacific, at some point included all of Vermont, and even once it was reduced to fit within current state boundaries, it was eventually subdivided into thirty additional counties and became a part of four more.
United States controlled, but rather, demarcated lands over which the United States proximately aspired to take control. Counties, compared to territories, were hewn more closely around existing settlements, so that they could house first, rudimentary governmental institutions—namely, county courts and registries. Indeed, the county, unlike other transitional jurisdictions such as territories and land districts, may have survived the period of territorial expansion precisely because its primary purpose of protecting property rights and the institutions it installed—the registry and county court—have never become obsolete.142

As in the colonies, the federal government resolved to confirm any property claims of white French and Canadian settlers who would accept its jurisdiction.143 As Eric Hinderaker writes, “some residents of the French communities chose to remain, take up property under American law, and establish themselves as white citizens”; other inhabitants, many of whom were Métis, “were unwilling to adapt to the American system of propertyholding” and “preferred simply to move on to someplace where land was not yet being parcelled and commodified.”144 When Governor St. Clair, went to the Illinois and Wabash Countries in 1790 to review white settlers’ land claims, he received thousands of deeds to examine for validation in the county records. Deed Book A of the St. Clair County Recorder includes a translation of French papers that describe the “Public Papers relative to the recorders office” that William St. Clair “received from the hands of Francois Caboneaux… which were in his hands as acting Recorder.” These Papers consisted of three bundles stitched together, five Books “called” or “stiled a Register” with detailed descriptions of their condition and missing pages, as well as “A Book part of which is torn away and the pages all-----se----numbered so that I have not thought proper to Examine it ----- it can never be produced as an authentic record”; as well as papers documenting the number of property sales each year from 1722 to 1790.145 Altogether, these records encompassed 1309 sale bills, 890 of which commissioners rejected as illegal or fraudulent, according to an 1810 report.146 The rest, along with headrights from the federal government, became part of the county record, which became part of the Illinois territory upon its formation in 1809, and the state in 1818.

142 Farbman, supra n.114 at 416.
143 Northwest Ordinance; see also Ablavsky, supra n.111 at 91-99.
144 ERIC HINDERAKER, ELUSIVE EMPIRES: CONSTRUCTING COLONIALISM IN THE OHIO VALLEY 1673-1800 263 (1997). See also Ablavsky, supra n.111 at 91.
146 HISTORY OF ST. CLAIR COUNTY, ILLINOIS, supra n.130 at 27, 68.
Like in the colonies, too, the Governor often created counties to respond to the need to organize property claims that settlers had already begun to stake out on the ground, and through the winding process of realizing a claim from the state. Washington County, which would become Ohio’s first county, was established on July 26, 1788, and originally covered about half the area of the state, including the area of the Seven Ranges. The Washington County deed records began that year, the same year that Enoch Parsons was appointed to be the first county register and the Ohio Land Company building, likely the site of early property records, was built in the county seat, Marietta. However, as we saw in Illinois, the lands that comprised the county would not be ceded until several years later, in the 1795 Treaty of Greenville, by the Wyandotte, Delaware, Shawnee, Ottawa, Chippewa, Potawatomi, Miami, Eel River, Wea, Kickapoo, Piankeshaw, and Kaskaskia peoples. In 1795, Ohio Country enacted a recording statute, and eight years later, Ohio was admitted as a state.

Indiana, Michigan, and Wisconsin all followed the same pattern. The lands that currently constitute Indiana’s Knox County, which then stretched to the Canadian border, were also ceded in the Treaty of Greenville-- though the County had been established five years earlier, on June 20, 1790. The Indiana Territory was established in 1800—a decade after its first county-- while the state, formed from the southeastern part of the territory, followed the county by twenty-six years. Wayne County was formed from parts of Knox County in 1796 to form Wayne County, but the Michigan Territory, to which it would belong, was not created until 1805. The lands of Wayne County, furthermore, were not ceded by the Ottawa, Chippewa, Wyandotte, and Potawatomi until 1807—more than a

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147 See, e.g., Ablavsky on the process for obtaining title for grants of indiscriminate location: prospective claimants presented a written description of lands they wished to purchase and payment per acre to the state land office, which recorded the claim and assigned it a number; challengers had time to file caveats. After this period, the state entry-taker issued a warrant authorizing a county survey; when the surveyor returned a plat, or map and property borders, the state secretary issued a grant to the owner, who recorded it in the county court registry. Ablavsky, supra n.111 at 32.


149 The office name was changed to county recorder in 1795. Thomas Jefferson Summers, History of Marietta 166 (1903).

150 Ohio Company land office, Marietta, Ohio, Photograph, Ohio, Marietta 1953, available at https://www.loc.gov/item/92501164/. The first court of common pleas and probate court were convened at Campus Martius Stockade. Neff, supra n.127 at 39-41. The first courthouse was built in 1798. See https://www.washingtongov.org/756/First-Courthouse.


152 Knox County’s first courthouse in Vincennes was built in the 1790s. George Rogers Clark and J.P. Hodge, Vincennes in Picture and Story: History of the Old Town 209 (Carlisle, Applewood Books 1902).
decade after the county’s establishment, and three decades before Michigan entered the union. Finally, Brown and Crawford counties, the Wisconsin’s first counties, were created in 1818, long before the treaties through which the Chippewa, Menominee, and Ho-Chunk ceded the lands now constituting the counties in 1827, 1836, and 1837. Initially, the two counties covered all the land in the state today—some of which tribes did not cede until five months after Wisconsin entered the union in 1848.

Indeed, another clear trend in the data from the Northwest Territory shows that the United States almost never succeeded in obtaining treaties ceding all the lands states claimed as part of their territory before states entered the union. In Ohio, the federal government continued to pursue cessions of lands within the state’s borders from the Wyandotte, Ottawa, Chippewa, Munsee, Delaware, Shawnee, Potawatami, Seneca, and Miami nations for almost three decades after it granted Ohio statehood. Similarly, the last treaty cessions of lands in Indiana and Illinois involved huge portions of lands claimed by states, twenty-four and fourteen years after they came into existence, respectively. The federal governments’ efforts to follow its own dictates improved after time: by the late 1830s, it managed to obtain treaty cessions to all lands within Michigan’s borders—in 1837, it obtained a final cession from the Saginaw and Chippewa just twelve days before Michigan achieved statehood. A little over a decade later, the United States failed to observe its own principle again: Wisconsin became a state five months before the United States was able to obtain a cession, in October 1848, at Lake Powawhaykouhnay from the Menominee for a sizable tract of land in the center of the state’s boundaries.153

In sum, in all the states carved from the Northwest Territory, the establishment of counties, to validate the property claims coming into existence in a locality, preceded the appearance of transitional territories, states, and treaty cessions, and the establishment of states preceded the cession of the totality of the lands they claimed in all cases but one. In this final respect, however, the states carved from the Northwest Territory only followed an example set by the original states, as Section II(B) elaborates, in making premature sovereign claims to lands that remained under Native governance and control.

B) Expanding Jurisdictional Power within States

As a preliminary matter, to establish its sole authority over conquest in the west, the United States required the so-called “landed” original states—Massachusetts, Connecticut, New York, Virginia, North Carolina, South Carolina, and Georgia—to cede their Discovery claims to it as a condition of entry into the union. These states, under their original charters or grants made by Great Britain after the French-Indian War, held option claims to territories stretching as far as

153 CHARLES C. ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES, CESSIONS OF 1846-1851 780 (1899).
the Mississippi river or even “from sea to sea.” However, even after ceding their western lands to the federal government, many states held no more than Discovery claims to substantial amounts of land within their new boundaries. In other words, the lands continued to be ruled by sovereign Native nations, and states, like the federal government, were preoccupied with obtaining actual control of them to consummate their claims.

Further, because the national land system gave the United States exclusive prerogative to treat with Native nations for lands, states whose boundaries encompassed significant lands under Native governance became dependent on the federal government’s willingness and ability to “extinguish Native title” for them. This section turns to one of the most bitter disputes over federalism of the early Republic, to highlight the major role county creation played in states’ consolidation of internal jurisdiction. Not only did the creation of counties and their local property institutions frequently occur in lockstep with a treaty cession and its “extinguishing” of Native title to lands. The state of Georgia also eventually wielded county creation as a tool to deny Cherokee jurisdiction, assert its own sovereignty, and expel the nation from the state.

But Georgia was not the only original state where a great deal of land remained unceded and under Native control and conquest remained an active process after the end of the Revolutionary War. Some states angled with one another for control over the very process of Discovery, mirroring the overarching efforts of the federal government with respect to states and other European colonists. For example, Discovery rights to lands west of Albany County remained in Massachusetts even after Massachusetts ceded those lands to New York. Between 1788 and 1793, those Discovery rights passed to land syndicates through the Phelps and Gorham Purchase and sales to Robert Morris and the Holland Land Company, which all attempted to obtain land cessions from the Seneca.

In general, population and county growth during the first decades of the early Republic provides us with an indication of which states lacked control of significant amounts of land, and where they were working to encourage settlement to extend and consolidate their control. By 1800, most states’ populations had grown by 30% to 250%; and in states that claimed only a small amount of territory, or that organized their registries by township, such as Rhode Island.

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

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

Delaware, New Jersey, New Hampshire, and Connecticut, the number of counties remained static. States that were already most populous, including many of the earliest colonies, including Virginia, Massachusetts, Connecticut, Maryland, and North Carolina, also saw no, or relatively little multiplication of counties.\textsuperscript{157} By contrast, after Georgia and New York entered the union, their white populations over the same period grew by around 500\%. Their counties more than doubled,\textsuperscript{158} reflecting the inroads settlers were making into the vast stretches of land that remained under tribes’ control.\textsuperscript{159}

In Georgia and New York, in particular, the exclusive federal prerogative to obtain land cessions from Native nations generated enormous tension between the states and the federal government, culminating in infamous illegal acts by these states. In New York, a large number of counties were created from lands ceded or purchased during the colonial era. After statehood, settlers hoped to take possession of the extensive lands within those counties that had been reserved to Native nations in treaties and purchase agreements. In defiance of the federal preemption law, the state passed laws in 1793, 1794, 1795, and 1798 authorizing commissioners or governors to treat for lands with the Oneida, Onondaga, and Cayuga nations, and to offer them annuities.\textsuperscript{160} Consequently, New York executed treaties in 1795, 1796, and 1798 with disputed representatives of the Oneida, Onondaga, Cayuga, and St. Regis Mohawk nations,\textsuperscript{161} to take possession of significant lands. These illegal treaties gave rise to legal challenges in the twentieth century that persist into the twenty-first.

By contrast, Georgia was the last colony England established on the mainland in 1733, and when it entered the union in 1788, the lands to which it could claim actual control comprised little more than a narrow strip along the shore—

\textsuperscript{157} See Appendix B. In 1790, Connecticut “had a non-Indian population density more than eighty times greater than that of Georgia.” Banner, \textit{supra} n.49 at 194.

\textsuperscript{158} See Appendix B.

\textsuperscript{159} Of Georgia, Banner writes, “large portions of [land] were still possessed by Indian tribes.” Banner, \textit{supra} n.49 at 194. At this time, “most of present-day New York State was occupied by independent, self-governing Iroquois Indian nations.” DEBORAH ROSEN, \textit{AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880} 23 (2007).

\textsuperscript{160} An Act relative to the lands appropriated by this State to the use of the Oneida Onondaga and Cayuga Indians (11 March), \textit{NEW YORK SESSION LAWS} ch. 51 (1793); An Act relative to the Indians resident within this State, (27 March) \textit{NEW YORK SESSION LAWS} ch. 59 (1794); An Act for the better support of the Oneida Onondaga and Cayuga Indians, and for other purposes therein mentioned (9 April), ch. 70 \textit{NEW YORK SESSION LAWS} (1795); An Act authorizing the governor to appoint commissioners to treat with the Oneida Indians for the purchase of part of their lands (26 February), \textit{NEW YORK SESSION LAWS} ch. 23 (1798).

\textsuperscript{161} See Report of Special Committee to Investigate the Indian Problem of the State of New York Appointed by the Assembly of 1888 (“Whipple Report”), \textit{ASSEMB. DOC. NO. 51, 1889, APP. D- TREATIES WITH THE STATE}. 
its first eight counties. Notoriously, Georgia did not cede its Discovery claims to western lands (extending “to the south seas”) to the United States until 1802. When it finally did so, it was for consideration and in exchange for the federal government’s agreement to extinguish Indian title within the state’s boundaries. 162 For by the beginning of the nineteenth century, despite the fivefold increase in white population, the vast majority of lands within the boundaries Georgia claimed remained under de facto Creek and Cherokee sovereignty and control. The events of the next decades led to Creek and Cherokee dispossession and the infamous Trail of Tears, as well as what has been called the most serious crisis in the history of the Supreme Court. 163 They comprise one of the most storied and thoroughly parsed annals of legal struggle and violence channeled through law in U.S. history.

This account, unlike the voluminous scholarship on the subject, does not focus on removal, federalism, or the Marshall Trilogy, or aim to rehash the complex entanglements of public and private interests and legal and political maneuvering that drove these events. Rather, its overview simply highlights the role of county formation in this history. It shows how consistently and closely county creation, as an index of settler expansion and property claims, followed land cessions by the Creek and the Cherokee in Georgia over decades, until it did not. In the final denouement of the state’s struggle to expel the Cherokee nation and seize its lands, the state created counties in the last unceded block of Native-ruled lands within its boundaries, prior to any treaty, as an act of aggression, in an attempt to force the nation’s hand.

After its agreement with Georgia ceding its Discovery claims in the west, United States moved quickly, in 1802 and 1805, to obtain additional cessions from the Creek that expanded Georgia’s actual control of lands westward. In 1803, the state initiated the creation of three counties-- Baldwin, Wilkinson, and Wayne-- from these lands. 164 The bill that established these counties also provided for the survey and distribution of these lands through a unique land lottery system, where individual names would be drawn from one barrel and lot numbers from another, to assign claims. 165 Eligible persons could register to draw lots and, after paying a grant fee, record a fortunate draw, first in their county of residence,

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162 Articles of Agreement and Cession Regarding Georgia’s Western Lands, 1802, Governor's Subject Files, Executive Dept., Governor, RG 1-1-5, Georgia Archives. See also Cadle, supra n.115 at 170.
163 See Charles Warren, The Supreme Court in United States History 189 (1928); Williams, supra n.29 at 360.
164 Cadle, supra n.115 at 173. See Appendix C.
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and later in the registry of the county where the land was located.166 Following
the first lotteries, which took place in 1805 and 1807,167 these three initial coun-
ties were subdivided into six more in 1807 and 1809.168 As Farris Cadle shows,
claims from these land lotteries, like all the lotteries that Georgia would hold
during this period, were riddled with fraud.169 The outcome of litigation about
fraud, however, had little bearing on the jurisdiction of the presiding courts,
which had been strengthened by the claims-making and growth of white popula-
tion in the area in the first place.

Georgia thereby penetrated into the central region within its aspirational bor-
ders, but its control over lands still only covered the eastern part of that territory.
At the end of the Creek War of 1813-1814, General Andrew Jackson forced the
surrender over 21 million acres in land in northern Alabama and approximately
the southern third of Georgia–half of the lands remaining to the Creek nation.170
The United States then obtained another cession from a small, unauthorized
group of Cherokee chiefs in 1817, and another from the Creek following addi-
tional hostilities in 1818,171 for lands connecting Georgia’s southern and eastern
lands, and that extended the state’s control into northeastern lands bordering
Cherokee territory. From these cessions, Georgia quickly established six more
counties—Early, Appling, Irwin, Walton, Gwinnett, Habersham, and Hall,172 as
well as an additional county, Rabun, from an additional Cherokee cession in
1819.173 Georgia confronted considerable difficulties in beginning its lottery sur-
veys, including from Creek resistance, illness, and commissioners’ resignations;
but nonetheless managed to survey the lands in 1819 and distribute the lands in
these counties by lottery in 1820.174 In 1821, in the first Treaty of Indian Springs,
the United States secured another cession through bribery and conspiracy from a

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166 See description of land lottery in Cadle, supra n.115 at 177; see also ROBERT S. DAVIS,
JR. AND REV. SILAS EMMETT LUCAS, JR., THE GEORGIA LAND LOTTERY PAPERS 1805-1914
(1979).

167 Cadle, supra n.115 at 199.

168 See Appendix C.

169 Cadle, supra n.115.

170 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 826 (Walter Lowrie & Walter S. Franklin
eds., 1834) (AMERICAN STATE PAPERS); INDIAN AFFAIRS: LAWS AND TREATIES (Charles J.
Kappler ed., 1904) (Kappler); S. DOC. NO. 319, 107 (2d Sess. 1904).

171 Cadle, supra n.115 at 206.

172 1818 GA. LAWS 27. See Appendix C.

173 AMERICAN STATE PAPERS, supra n.166 at 187; Kappler, supra n. 170 at 177. See Appen-
dix C.

174 Cadle, supra n.115 at 222.
small group of Creek chiefs that pushed Georgia’s holdings further westward.\textsuperscript{175} The state promptly formed five more counties—Dooly, Henry, Houston, Fayette, and Monroe\textsuperscript{176}—and after distributing lands in these counties by lottery in 1821, it created three additional counties by subdivision by 1822.\textsuperscript{177}

Within two decades, the relay of U.S. action to force cession and Georgia’s creation of counties and land distribution had given the state control over the majority of the land it desired. However, the substantial Cherokee territory to the north and the Creek territory between Georgia’s settled lands and its western border remained a thorn in the state’s side. In April of 1824, Governor George Troup bitterly protested the United States’ delay in extinguishing Native title in Georgia, asking if the agreement of 1802 had been “all a dream, a vision, a phantasma, with which the deluded people of Georgia have been plaguing themselves for twenty years?”\textsuperscript{178} The same year, after witnessing the rapid reduction of their lands to a fraction of their original holdings, the head Creek chiefs enacted a law that decreed death to anyone who attempted to sell additional Creek lands. They also banished William McIntosh, the chief who signed and personally benefited from the first Treaty of Indian Springs, and a cousin of Governor Troup.\textsuperscript{179} Meanwhile, the United States commenced the pressure on the Creek nation for more land, warning them, “You must be sensible that it will be impossible for you to remain for any length of time in your present situation as a distinct Society or Nations, within the limits of Georgia”; in reply, the Creeks reminded the federal government it had promised, just a decade earlier, to protect their landholdings.\textsuperscript{180}

In early 1825, McIntosh convened a group of U.S. commissioners and Creek individuals with no authority or of dubious authority, and ceded all the Creek nation’s remaining lands within Georgia, as well as 3 million acres in Alabama. This second “Treaty” of Indian Springs exchanged these lands for lands in Arkansas, and a $25,000 cash payment to McIntosh that was memorialized in a

\textsuperscript{175} \textit{American State Papers}, \textit{supra} n.166 at 248; Kappler, \textit{supra} n.170 at 195.

\textsuperscript{176} \textit{See} 1821 \textit{Ex. Sess. Ga. Laws} 3; \textit{see also} Appendix B.

\textsuperscript{177} \textit{See} Appendix C.


\textsuperscript{179} Cadle, \textit{supra} n.115 at 242.

\textsuperscript{180} U.S. Commissioners to Creek Chiefs, 9 Dec. 1824, Document TCC008, SNA. Little Prince et al. to U.S. Commissioners, 11 Dec. 1824, Document TCC181, SNA. Banner, \textit{supra} n.49 at 197.
Following this deal, the Creek executed McIntosh for treason and vowed to kill the first surveyor who dared stretch a chain across their lands. The circumstances were outrageous enough that United States renegotiated the treaty in 1826, though without restoring the lands, effectively dispossessing the Creek of virtually all their lands in Georgia. Governor Troup, for his part, wasted no time in ordering a survey of these lands, violating the deadline the United States had set for Creek removal in the Treaty of Washington and eliciting a rebuke from the Secretary of War. Georgia formed four counties from the lands along its long-coveted western border and distributed them by lottery in 1827, leading to the subdivision of Trapol and Muscogee counties into four additional counties in 1827, and three more over the next few years.

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

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181 Cadle, supra n.115 at 243; Banner, supra n.49.
183 The Indian agent John Crowell alleged the corruption of the commissioners was so rank that it smelled to heaven. H.R. REP. NO. 98, 19th Cong. 2D Sess. 502 (1827).
184 The United States negotiated the cession of a small wedge-shaped tract of land that had been omitted from the Treaty of Washington in 1827.
185 Georgia Documents, supra n.179 at 43.
186 See Appendix C.
187 Georgia Documents, supra n.179 at 28 (Gov. Troup to the Secretary of War, 24th April 1824); and at 191 (Governor’s Message to the Assembly of the State of Georgia, 8th Nov. 1825) (“When… the United States, by changing the mode of life of the aboriginal upon the soil of Georgia… and gave every encouragement to fixed habits of agriculture, they violated the treaties in their letter and spirit, and did wrong to Georgia.”)
188 Georgia Documents, supra n.179 at 45.
189 Id; Banner, supra n.49 at 200, fn. 19.
190 Cadle, supra n.115 at 267.
Over the next few years, Georgia passed a slew of laws to counter-assert sovereignty over Cherokee lands and that aimed to make life for the Cherokee within the state’s borders untenable.\(^{191}\) Laws providing for the survey of Cherokee lands, the formation of counties from those lands, and land lotteries to distribute Cherokee lands to white settlers constituted a critical part of these legal acts of aggression. In 1828, the Georgia legislature passed an act annexing Cherokee country to Carroll, DeKalb, Gwinnett, Hall, and Habersham counties; it declared Georgia had jurisdiction over white persons residing in Cherokee territory, and stated that all persons in the territory would become subject to Georgia law after June 1, 1830.\(^{192}\) Though the Cherokee continued to refuse to cede their lands to the United States, in 1830, Governor George Gilmer nonetheless ordered a survey of Cherokee lands dividing it into districts and sections to be distributed by lottery.\(^{193}\) All this activity attracted white settlers to the state, bringing their numbers over half a million; and the number of counties more than tripled after 1800, growing from twenty-four to seventy-seven.\(^{194}\)

The Cherokee nation challenged these laws before the Supreme Court in *Cherokee Nation v. Georgia*. In early 1831, John Marshall refused the substantive question by finding the Cherokee nation was not a foreign nation, but rather, a “domestic dependent nation” that lacked standing to bring a cause of action before the Court. Shortly after this decision, the emboldened legislature passed an act to form one county, called Cherokee county, of all the lands it had annexed to five neighboring counties in 1828.\(^{195}\) The state commenced with surveys, which it mostly concluded by July 1832, and began to organize lotteries for distribution of the lands.\(^{196}\) In 1832, the state subdivided this county into ten more counties.\(^{197}\) The settlers who drew lots containing “Indian improvements” were temporarily delayed in claiming their grants; but Cherokee people occupied many other lots that surveyors had reported as unimproved, resulting in conflicts when settlers attempted to take possession of the lots they had drawn.\(^{198}\) In 1835, the United States and a minority coalition of Cherokee to ratified the infamous Treaty of New Echota requiring the nation to leave the state, which Cherokee leaders

\(^{191}\) See, e.g., Banner, *supra* n.49 at 200-201; See Park (2019), *supra* n.50.

\(^{192}\) 1828 GA. LAWS 88; Dawson 198.

\(^{193}\) 1830 GA. LAWS 127.

\(^{194}\) See Appendix B.

\(^{195}\) 1831 GA. LAWS 74.

\(^{196}\) Cadle, *supra* n.115 at 277;

\(^{197}\) 1832 GA. LAWS 56; see Appendix C.

\(^{198}\) Cadle, *supra* n.115 at 279.
strongly contested. After the majority of Cherokee people refused to leave their lands, the U.S. Army initiated their mass expulsion in 1838.199

Though the story of the forcible removal of the Creek and Cherokee from their homelands is well-known, the critical role of county-creation on the part of the state, which created supportive infrastructure for settlers flooding in and the conversion of those lands into their property, is not. As the experiences of Georgia and New York illustrate, the Revolutionary War shifted the project of conquest and Discovery rights in the original states, as in the territories, to a new set of authorities, rather than concluding them. As the next section emphasizes, the process of would continue on, for more than another century, to bring the lands between the eastern seaboard and the Pacific coast under the control and sovereign jurisdiction of the United States.

C) The Priority of Recording Across the Continental United States

The timeline of how the United States transitioned from holding mere Discovery claims to asserting actual control over territory, tracked by county-creation, significantly elongates the typical understanding of when the United States acceded to its sovereign title, and concomitantly, of how long Native nations held lands across the continent in absolute sovereignty. The United States did not come into absolute sovereignty or “ownership” of lands with the Treaty of Paris in 1783, the Louisiana Purchase in 1803, or the Treaty of Guadalupe Hidalgo in 1848, that is, but many decades later; it did not declare a formal end to treaty-making with Native nations until 1871, and the last state, New Mexico, did not enter the union until 1912. Beneath its declaration of intent to claim sovereign authority of those lands, building power in them gradual process that occurred in a multiplicity of stages and local sites. While it is not possible to comprehensively describe its conquest by thousands of localities, this section shows that recording property and county-creation remained the forerunners of United States’ conquest of lands across its landmass. Legislatures’ prompt passage of Recording Acts almost as soon as territories and states came into existence demonstrated that laying the foundation for a property system remained a high priority as settlers arrived in every region of the mainland. County-creation, too, continued to lead settlement, though the planning of local and territorial jurisdiction-building changed over the nineteenth century as the United States began to approach conquest with more confidence in its ability to lay large-scale anterior plans.

As in earlier periods and on the eastern seaboard, the process of county creation continued to map where settler populations were claiming Native nations’ homelands as new property200-- by recording them. As Lewis Dembitz noted in

199 Park (2019), supra n.53 at 1903; Banner, supra n.49 at 224.

200 This progression is also observable in national census records.
1895, in every state, “the recorder’s office was one of the first institutions organized by newcomers,” 201 reflecting its status, as Paul Wallace Gates observed, as one of the most important and powerful offices on the frontier. 202 This import is reflected in the consistency and speed with which new territories and states passed recording acts. One of their first priorities was the passage of laws establishing recorders’ offices and governing recording practices; indeed, such legislation appeared upon the heels of the formation of first counties and territories in anticipation of every state in the union. 203 From the North and Southwest Territories to the west coast, and finally in the upper and lower Plains, over the nineteenth century, settlers organized title registries in county courts or as independent county level offices to help pass jurisdictional power from sovereign Native nations to the United States. Prior to the Civil War, interdependent property holdings in land and enslaved people motivated settlement in slave territories and states 204; and since recording continued to facilitate the use of property to access credit in the United States, the high priority recording held in those areas reflects settlers’ desires to mobilize their interests in both forms of property in this way. 205 Even after entering the union, most states also quickly passed laws governing recording or modifying existing conveyance and recording laws, underscoring the urgency the practice retained for their constituencies. 206

Changes in the patterns of county creation across the mainland also show how the United States’ approach to conquest developed over time, although counties remained a key element. Above, we saw that in the example of the Northwest Territory, first counties were regularly established before the United States managed to obtain cessions concerning the lands that constituted them

201 LEWIS NAPHTALI DEMBITZ, A TREATISE ON LAND TITLES IN THE UNITED STATES 941 (1895).


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

204 Arkansas, Missouri, Mississippi, Louisiana, Alabama, Kentucky, Tennessee, Virginia, Maryland, Delaware, North Carolina, South Carolina, Florida, and Texas.


206 Id. Exceptions include Louisiana, Arkansas, Nevada, North Dakota, and Oklahoma, where territorial laws governing recording would have remained in force. The fact that virtually every state would have had established territorial recording laws and practices further highlights the priority of recording in states that rapidly sought to clarify or amend recording laws following their entry to the union.
from Native nations; the establishment of counties (excepting Washington County, Ohio) preceded the territories and states to which they would eventually belong; and states were nearly all, except Michigan, established before Native nations ceded all, or even most of the lands within the boundaries they claimed.\footnote{See Appendix A1.}

This set of trends, which we might call the Northern pattern, appears also in the history of settlement of the area known as the Old Southwest, which would eventually constitute the states of Mississippi, Alabama, Missouri, Arkansas, Louisiana, and Texas.\footnote{As well as parts of Tennessee, Kentucky, and the panhandle of Florida.} The Northern pattern was replicated exactly in the conquest of the lands in Mississippi and Alabama,\footnote{See Appendix A2.} and partially in those now comprising Arkansas and Iowa, where the first counties of the states initially appeared as a part of other, older territories, and preceded the formation of Arkansas and Iowa Territories by several years.

But the Northern pattern was not the only approach that U.S. settlers took to creating counties to assert jurisdictional power over the lands on which they encroached. The precession of counties appears to characterize an early, hesitant strategy of aspirationally earmarking a vast area of land for conquest, and subsequently carving out additional states from it around first counties, as settlers successfully managed to occupy different parts of the lands in succession. However, as early as 1803, after the Louisiana Purchase, the creation of the Louisiana Territory introduced another pattern of jurisdiction-building for new settlers, which we might call the Southern pattern. This second approach, which reflects more confident planning, involved establishing several first counties at once, concurrently with the creation of a territory, or in direct anticipation of one. For example, Missouri Territory and its first five counties appeared together in 1812; in 1821 and 1836, when the Florida Territory and the Republic of Texas were created, it was with two and twenty-three first counties, respectively.

The Northern pattern did not wholly disappear: it appeared as late as the mid-nineteenth century, to guide settlement not only in Michigan and Wisconsin, but also in the lands that now constitute Oregon and Washington, where first counties were established several years ahead of the territories.\footnote{See Appendix D2.} Nonetheless, the definite trend over the nineteenth century shifts away from this early approach toward the Southern pattern, where several first counties were created concurrently or within two years of the territory that contained them. This model, with its more advanced planning and readiness to establish ground-level legal institutions, more closely conforms to a classic European model of sovereignty, where a larger jurisdiction (albeit a transitional “territory”) exercises its authority to create subordinate jurisdictions. We see an increasingly organized and uniform
approach to creating counties and territories in the pre-history of all of the remaining states of the union, from the Republic of Texas in 1836 until the Oklahoma Territory in 1890. Only Idaho and North Dakota set up a single first county; otherwise, the western territories all created several first counties at once, ranging from four in Arizona and Oklahoma to thirty-six in Kansas.\textsuperscript{211}

Over the long nineteenth century, counties proliferated across the landmass that now constitutes the United States, indexing the dynamic growth of the local institution of the title registry. The time-lapsed map of their appearance captures the path of growing U.S. sovereign control over lands, within existent states and in the territories alike. From the Northwest and Southwest territories, county activity helped the nation take hold of Florida and Texas, and then moved to Oregon Country and up and down the West Coast to Washington and California, before finally helping to secure the conquest of the Rockies and the Great Plains.\textsuperscript{212} Counties and registries appeared not where the jurisdictional power of the United States was established and secure, but where it was weak, nonexistent or unstable, and most dependent on settlers to come occupy the lands and make property claims. Every county created registries not only to collect and organize, but to affirm and encourage Angloamericans’ tenuous, audacious claims to the homelands of Native nations, whose sovereign claims persist over and against the federal and state claims anchored by this property, and thus at the heart of the relationship between property and sovereignty in America.

### III. Redressing Erasure in the History of the Title Registry: Theoretical and Practical Implications

This three-century history of the title registry, and how it multiplied across the entire mainland, illuminates the institution’s critical contributions to building Angloamerican jurisdictional power in every colony, from its appearance in the seventeenth century, and first county by county in the United States. By doing so, this local but ubiquitous institution came to underpin the whole of a national real estate market, on which land values have grown to a sum of $64 trillion, and comprised 54% of the country’s net wealth in 2021.\textsuperscript{213} In a testament to land’s

\textsuperscript{211} Id.

\textsuperscript{212} Id.

enduring character as territory, beyond commodity, it also helped establish the sovereign land claims of the United States--the foundations of power on which all subordinate jurisdictions and domestic law depend. The story of how the registry helped bring this market and the national continental landmass into being underscores its significance as an important source of law and a crucial and contested, though overlooked part of the legal infrastructure of property.

There are few more momentous transformations in American history that we might study as the effect of law than the taking of the continent, and the conversion of that landmass into a market. Yet these events belong to a long-suppressed history whose erasure has formed blind spots in our knowledge about the registry, the process of colonization in which it is implicated, and the ways that race works through law. At a meta-level, redressing erasure means shifting away from the ways we have been used to approaching canonical questions in legal scholarship, especially about property and sovereignty—the subject of Morris Cohen’s classic 1927 essay, which in some ways aligns closely with the story above. Cohen argued that “private” property and “public” sovereignty can never exist independently of one another, any more than a “free market” could ever exist on the basis of purely private ordering; and that beyond protecting owners in their possession of property, sovereigns distribute power to them, insofar as expanding the property rights of landlords or factory owners endows them with power over other people—“imperium over our fellow human beings.” Cohen drew from European legal thought, Roman and Teutonic law, and modern English, Irish, Scottish, French, to understand examples from the United States, which explains his top-down focus on the state’s choices about how to distribute power through property. But the history of colonization that birthed the American title registry prompts us to ask how the state acquired its sovereign power in the first place.

A major part of the answer is through property and the creation of ground-level property institutions. The dramatic transformations to property markets and jurisdictions that the innovation of the title registry ushered in, in this context, illustrates that neither property nor sovereignty are timeless universals; rather, they are shaped by legal institutions and practices, whose specific form guides the ways that they become dynamic and malleable conduits for power. In the United States, as Cohen recognized, property and property institutions remain

\[ \frac{\text{author calculations, (Table B.1 Line 2 + Table B.1 Line 8 + Table B.1 Line 17 + Table B.1 Line 21)}}{\text{Table B.1 Line 1)}} \]


As he put it, “the ideal of absolute laissez faire has never in fact been completely operative.” Cohen, supra n.9 at 22.

Id. See also id at 29 (“[t]here can be no doubt that our property laws do confer sovereign power on our captains of industry and even more so on our captains of finance.”).

Cohen wrote that “it is necessary to apply to the law of property all those considerations of social ethics and public policy which ought to be brought to the discussion of any just form of government.” Id. at 14.
a major source of power; but the path-dependence through which property rights acquired their high priority for the state stem from a history Cohen did not consider or understand. Unlike Cohen, and in an essay responsive to his through its title, Joseph Singer insisted that conquest was the relevant context for understanding sovereignty and property in the United States, and pointed to Federal Indian law decisions to contrast the treatment of Native peoples’ property and sovereignty with the treatment of non-Native property and sovereignty under mainstream U.S. law. Yet as this Article shows, the process of conquest also shaped fields outside of Federal Indian law and “non-Indian” property and sovereignty; and colonists’ legal innovations to further their colonization of America, such as the title registry, help flag for us the fields, and the conditions and challenges specific to this context.

Chief among the challenges colonists faced, as we saw above, was establishing jurisdictional power where they had none; and the early development of the title registry shows that it helped them build not only property markets, as is commonly recognized, but through the political force of property, jurisdictional power. Examining the role that this novel institution played in facilitating conquest therefore upends a basic way that we understand how law comes into being, as well as the way that we understand those terms in a basic sense. In a reversal of the time-honored notion that private law follows from public sovereignty, we see that private entitlements are not merely the effect of political power, but can help produce it. The source of controlling this power, then, may not come first or most powerfully top-down from federal authority, as Cohen and others suggest, but from ground-level local struggles to produce concrete interests. In a state born from a colony, we cannot presume a model where an established, stable sovereign that distributes rights to private entities-- property rights or any other kind of rights. Rather, we must assess an external effort to dismantle or diminish an existing sovereign power or powers in order to replace it with a new political authority capable of controlling resources, territories, and people-- and look precisely to those resources, territories, and people to see what new institutions and practices appeared as the site of that contest for control.

In short-- it should not be possible to talk about property and sovereignty in America without recognizing that colonization was the indisputable scene of their historical realization. Further, we cannot understand their relationship without acknowledging the Native sovereign land claims against which they co-evolved. Over three centuries, the primary means through which the state engendered its own jurisdictional power in America was by encouraging property claims that were collected and organized in the novel institution of the registry. That sovereign power was therefore heavily indebted to the energies generated by the promise of individual entitlements. By the same token, colonial property markets did not just, or perhaps even primarily, serve individuals’ rights, but rather, helped the collective polity to assert sovereign power vis-à-vis the reigning sovereigns.

217 Singer, supra n.9 at 7-8.
in the land. If property claims preceded and facilitated the consummation of colonial claims, making property claims, as Singer points out, is never an individual endeavor; property does not emerge from individuals laying claims to lands, people, or things in an unordered, unaffiliated way. Rather, as Cohen indicated, the very category of “property” denotes the legal work of a collective and some degree of government organization. In the colonies and the United States, the registry provided such collective organization to frustrate the claims of existing sovereigns on the land.

What kind of a sovereignty grows out of this kind of colonial history? What kind of society will it shape, and what is the nature of a property system whose mechanics—such as the title registry-- were the legal mechanics of conquest? In order to understand that property system, we must better understand the technical process of conquest, a task also obscured by layers of historiographical erasure. In essence, conquest constituted a project of building wealth and political power on the basis of a belief in global racial hierarchy and the willingness to use force in accordance with this belief. Often, the violence and the virulent racial ideologies of conquest have, for good reason, received the lion’s share of our critical attention, at the expense of the quieter mechanisms of conquest. Yet two of the most understated elements of our legal system—the unpresuming office of the registry, and the unglamorous jurisdictional unit of the county—played a key role in structuring the entire process of territorial expansion, or the assimilation of 1.9 billion acres into the jurisdiction of the United States. Across that landmass, over three hundred years, the tools of the county and registry worked with such astonishing, unrelenting consistency, that they now overlay the whole of the nation’s landmass and organize the totality of its land market.

In the early Republic, the creation of counties, whether in new territories or established states, meant the advent of courts and registries, which represented an arriving, aspirational sovereign’s authority over settlers’ claims. The county presented a jurisdictional unit more diminutive, less threatening, and more proximate to the processes of property formalization and adjudication than the territory, the future state, let alone the nation. Yet as a sub-unit of all of these, it also represented and channeled their collective authority. To prospective settlers, the county was an invitation to property creation. It bootstrapped those larger sovereign imaginaries to convert on-the-ground processes of claiming property in land into an extension, the expansion of their jurisdictional power. It is county creation—not treaties, nor territories, nor states—that most accurately tracks where the jurisdictional power of the United States grew and when. With little respect for where governing sovereigns had ceded lands, or where territorial or state lines

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218 Id. at 5.

219 This analysis of building property and sovereignty together accords with Thomas Merrill’s observation, responding to Cohen, private and public power do not exist in a “zero-sum,” “one-to-one” relationship, characterized by “more property and less sovereignty,” or the reverse, in a ratio to be “dialed up or down.” Thomas W. Merrill, Property and Sovereignty, Information and Audience, 18 THEORETICAL INQ. L. 417, 421 (2017).
were or would be drawn, the registry, from a local county seat, established the authority of government over the property claims in the area that it collected. The county early became the official unit according to which the nation measured property and population increase, the two most essential factors in its own growth; and as time went on, the process of county, territorial and state formation became less provisional projections, and more synchronized, in a show of increasing confidence in planning and the future. This history helps explain the preeminence of property and real estate in American society, as well as why the county, across the country, remains the jurisdictional unit tasked with the basic functions of property preservation.

It also points to multiple ways that the racial hierarchy that framed European colonization efforts shaped colonial and U.S. laws, and how those laws worked in turn to shape a radical new social order. In particular, it highlights how the broad racial principle of Discovery, which the Supreme Court would affirm in 1823 as the root of all title, private and sovereign, in the United States, found expression through concrete institutions and practices. It manifested through the familiar model of unequal treatment of different groups, as in rules categorically respecting the property rights of only other Europeans, such as the Dutch or French, who colonists understood to be part of a common enterprise of conquest. The condition of these protections—submission to Angloamerican jurisdiction—highlights this inclusion as part of colonial efforts to build sovereignty. The registry, which organized these claims, was an instrument of this collective exclusion; but Native people’s use of the registry also illustrates the hazards of legal inclusion. Colonists’ greater formality in early agreements with Native people for land reflected group relations of mistrust, illustrating how formalism not only memorializes and protects rights, but can create them for some while taking them away from others. Eventual parity in formal standards between different groups similarly did not signal greater equality, but rather, a convergence between colonies’ interest in keeping the peace between colonists, in an increasingly tense environment, and in having an institutional bulwark against growing Native challenges to their claims. Further, the minimal, passive design of the registry, by minimizing accountability, shifted the risks of those transactions to claimants in familiar ways, which work to the detriment of marginalized groups—Native people, Black people who gained property rights upon emancipation, immigrant communities, poor people, and more. Its effects—as today—were modulated

220 Johnson, supra n.8.

221 This idea accords with Derrick A. Bell, Jr.’s theory of interest convergence in his classic, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980).

222 The importance of power to arbitrate disputes and control over decision-making is central to Ablavsky’s analysis of how the federal government built sovereign power amongst multiple, competing sovereignties, European and Native, in the first territories. Elsewhere, I
by power differentials that remain the crucial context of property transactions, including vulnerability to predation, unequal bargaining power, racial discrimination in transactions and enforcement, access to litigation resources, and subjection to decision-making fora controlled by non-group members.

The creation of the registry itself illustrates one more, less widely recognized way that race works through law: by spurring innovation that introduces new legal institutions, including ostensibly “race neutral” institutions like the registry, which transform the very logic of the property system according to new values. Above all, the title registry promoted the production of property value, at the direct expense of the Native and Black communities whose expropriation and subordination that property production required. By affirming, simplifying, and incentivizing and growing property claims by injecting credit markets with new confidence, the registry helped drive the racial violence inherent in producing property in expropriated lands and enslaved human beings. It constituted part of the bureaucratic infrastructure that not only facilitated colonists’ treatment of lands and people as monetary equivalents, but used them to transform the nature of commodification, and built colonial markets to trade primarily in these new genres of property. As the “backbone” of lucrative and thriving credit markets, the registry came to impact an ever-growing sphere of Native and Black communities, which saw their homelands confiscated, their kinship networks broken, and their beings subordinated and brutalized. While it is difficult to provide more than summary figures here, and impossible to capture the profound violence to any single life represented within such a figure, the success of this enterprise was such that expropriated lands and enslaved people comprised approximately seventy-five percent of all colonists’ wealth by the eve of the Revolution; the registry would have contained claims to most of the nearly four million people who took their freedom upon abolition ninety years later, and still holds claims to homelands of over 400 federally and state recognized tribes across the continental United States.224

The story of jurisgeneration above follows the historical path of colonial and U.S. efforts to undermine the sovereign claims of hundreds of Native nations in described easy, routine foreclosure as another legal innovation that evolved from different and unequal racial practice to become a general market norm. Once a rule of general applicability, the practice took a disproportionate toll on Native peoples because of background factors: hostile racial group relations, unequal bargaining power and resources, and lack of control of decision-making fora and processes. Park (2021), supra n.57. Keeanga-Yamahtta Taylor, writing about twentieth-century phenomena, calls this mode of subordination through inclusion under a legal and economic order “predatory inclusion.”


223 Supra n.105.

224 This figure does not count the 229 registered tribes of Alaska; since the recognition process has presented serious hurdles to tribes, the figure is a gross undercount of sovereigns dispossessed by conquest.
order to perfect title by conquest to the lands. Because tribal sovereignty is inherent and enduring, it continues to underlie and qualify claims to property and sovereignty within U.S. law. Their centrality to the formation of property and sovereignty illuminates multiple, overlapping conceptions of property that organize a plurality of collective, sovereign relationships to land. Although there is great variation across the property systems of different tribes, there is an overriding distinction between Indigenous property conceptions and the market-oriented American conception of property that elevates property value above many other kinds of community interests. As Kristen Carpenter, Sonya Katyal, and Angela Riley have explained, Indigenous property conceptions generally “transcend[d] the classic legal concepts of markets, title, and alienability that we often associate with ownership”; these alternative understandings and systems “present a more relational vision of property law [that] honors the legitimate interests of both owners and nonowners, in furtherance of various human and social values, potentially including nonmarket values.” They argue for better recognition of these coexisting property regimes by strengthening non-owner groups’ ability to exercise custody and control over tribal homelands, which, irrespective of titles under U.S. law, remain vital to nations’ group identity and cultural survival. Such measures, along with various other legal arrangements protecting community interests in trust lands, offer examples of choices we could make that diverge from the way the registry privileges the production of monetary value through market transactions above all. These multiple conceptions of relationships to land and community within the United States reveal the priorities of title registry to constitute a specific policy choice among others.

This analysis of the registry thus makes fundamental questions about property and sovereignty newly visible, giving us perspective and information with which to assess the character of our property system and how its infrastructure does and could organize relationships and the distribution of resources among the polity. It foregrounds a history of violence that explains how the stark power disparities between groups evolved according to the racial hierarchies at the core of European principles of Discovery. And it shows how the structure of the reg-

225 For a legal analysis of persistent tribal sovereignty, see Seth Davis, Eric Biber, & Elena Kempf, Persisting Sovereignties, 170 U. PENN. L. REV. 549 (2022).
226 Marshall specified that Native nation’s absolute sovereign title persisted, under U.S. law, until successful conquest subordinated it to the “absolute, sovereign title” of the United States. Johnson, supra n.8 at 592.
227 See Elizabeth Reese, 73 The Other American Law 555, STAN. L. REV. (2021).
229 Id. at 1028.
DRAFT: PLEASE DO NOT CITE OR CIRCULATE WITHOUT PERMISSION OF THE AUTHOR

istry reinforces those disparities in individual transactions, such as appear in Cohen’s examples. It also, however, underscores more profound questions about how we conceive of land, property, and the relationships of humans governed by the law to both and to each other. And it challenges us to think about how the value system reproduced by the registry— which privileges generation of monetary value above other values, including the protection of individuals’ property, and land’s function as home, and a source of individual and community stability, sustenance, and health— affects our daily lives and health as a polity today. As we reflect on the legacies of this history in the contemporary landscape of housing insecurity, racial violence, and political division, it offers lessons about building political power that highlight local jurisdictions as the site of critical organizing for larger scale movement: the take-over of the country was crucially supported by the creation of institutions, which followed on-the-ground action to protect the concrete interests of on-the-ground actors. Finally, it timely reminds us that control over lands and resources constitutes an evergreen linchpin of political power. The pursuit of power that made real property so ascendant in American economic and political life remains a live force in our world, and controlling lands through private ownership is a way of amassing political power still.

CONCLUSION

The innovative colonial institution of the American title registry organized the political force of settlers’ property claims, to surreptitiously extend the reach of colonies’ jurisdictional power. Thus property claims, rather than issuing from an established sovereign power in America, preceded colonial jurisdictional power in Native nations’ homelands and property institutions underpin jurisdictional power in the United States. This history also illustrates a range of ways that the colonial premise of racial hierarchy works to shape legal institutions, practices, and outcomes: through explicit racial exclusions; the hazards of inclusion in a system that rewards parties according to their uneven bargaining power, social advantages, and litigation resources; and by inducing legal innovation, including institutions that now, like the registry, may appear to be facially “race-neutral,” but carry the dehumanizing logic of colonization and enslavement into the present. This logic, which elevates the monetary value of property above other individual and community investments in safety, autonomy, and protection, and land as home, source of sustenance, and site of memory, now shapes all our lives. Analyzing this overlooked institution reveals its far-reaching power, and reminds us that even the most modest-seeming legal institutional innovation can profoundly change and evolve a property system, and its effects. Through its spe-

230 Merrill points to the several “audiences” of the registry—including strangers, transactors, neighbors, and sharers—with interests in private entitlements and sovereign regulation. Thomas W. Merrill, Property and Sovereignty, Information and Audience, 18 THEORETICAL INQ. L. 417, 421 (2017).
cific design, it can forge them to accord with racial aims, ideologies, and prac-
tices, as it has over the long course of its development—or with the goals of
redressing not only the epistemological erasure of racial violence from history,
but ongoing racial violence itself.
## Appendix A

### 1. Northwest Territory

<table>
<thead>
<tr>
<th>First Count(y/ies)</th>
<th>Year Established</th>
<th>Treaty Ceding Lands of County*</th>
<th>Treating Nations</th>
<th>Territory Name (Parent Territory/ies)</th>
<th>Date Established</th>
<th>State</th>
<th>Date Admitted to Union</th>
<th>Treaties ceding lands w/in state borders post-statehood</th>
<th>Treating Nations</th>
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<tbody>
<tr>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>9/29/1817</td>
<td>Wyandotte, Seneca, Delaware, Shawnee, Potawatomi, Ottawa, and Chippewa</td>
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<td></td>
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<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>10/6/1818</td>
<td>Miami</td>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3/17/1824</td>
<td>Wyandotte Seneca of Sandusky River</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2/28/1831</td>
<td>Shawnee</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>8/8/1831</td>
<td>Ottawa</td>
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<td></td>
<td></td>
<td></td>
<td>8/30/1831</td>
<td>Wyandotte</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>1/19/1832</td>
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</tr>
<tr>
<td>Treaty</td>
<td>Year</td>
<td>Date</td>
<td>Tribes</td>
<td>State</td>
<td>Date</td>
<td>Date</td>
<td>Tribe</td>
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<tr>
<td>Knox</td>
<td>1790</td>
<td>8/3/1795</td>
<td>Wyandotte, Delaware, Shawnee, Ottawa, Chippewa, Potawatomi, Miami, Eel River, Wea, Kickapoo, Piankeshaw, and Kaskaskia</td>
<td>Indiana (NW)</td>
<td>5/7/1800</td>
<td>12/11/1816</td>
<td>Potawatami</td>
<td></td>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td>Kickapoo, Miami</td>
<td></td>
<td></td>
</tr>
<tr>
<td>St. Clair</td>
<td>1790</td>
<td>8/13/1803</td>
<td>Kaskaskia</td>
<td>Illinois (IN)</td>
<td>3/1/1809</td>
<td>12/3/1818</td>
<td>Kaskaskia</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(1801)</td>
<td></td>
<td>Kickapoo, Ottawa, Potawatami, Potawatami, Prairie and Kankakee Band Winnebago</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wayne</td>
<td>1796**</td>
<td>11/17/1807</td>
<td>Ottawa, Chippewa, Wyandotte, and Potawatomi</td>
<td>Michigan (NW, IN)</td>
<td>6/30/1805</td>
<td>1/26/1837</td>
<td>Saginaw Chippewa</td>
<td></td>
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<tr>
<td></td>
<td>1815</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Brown</td>
<td>1818</td>
<td>8/11/1827; 2/8/1831</td>
<td>Chippewa, Menominee, Winnebago; Menominee</td>
<td>Wisconsin (NW, IN, MI)</td>
<td>7/3/1836</td>
<td>5/29/1848</td>
<td>Chippewa</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Crawford</td>
<td>11/1/1837</td>
<td>Winnebago</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Menominee</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

Source: Kappler’s Indian Affairs: Law and Treaties.
2. Mississippi and Alabama (Old Southwest)

<table>
<thead>
<tr>
<th>First Count(y/ies)</th>
<th>Date Established</th>
<th>Treaty Ceding Lands of County*</th>
<th>Treating Nations</th>
<th>Territory Name (Parent Territory/ies)</th>
<th>Date Established</th>
<th>State</th>
<th>Date Admitted to Union</th>
<th>Treaties ceding lands w/in state borders post-statehood</th>
<th>Treating Nations</th>
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</thead>
<tbody>
<tr>
<td>Adams, Pickering (now Jefferson)</td>
<td>1799</td>
<td>12/17/1801</td>
<td>Choctaw</td>
<td>Mississippi</td>
<td>4/7/1798</td>
<td>MS</td>
<td>12/10/1817</td>
<td>10/18/1820/27/1830 5/24/1834</td>
<td>Choctaw Choctaw Chickasaw</td>
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</table>

Appendix B: Original Thirteen States Population and County Growth 1773-1830

<table>
<thead>
<tr>
<th>State</th>
<th>Population (1773-1780)</th>
<th>Date Admitted to Union</th>
<th># Counties Entering Union</th>
<th>Population in 1800</th>
<th># Cties In 1800</th>
<th>Population in 1830</th>
<th># Cties in 1830</th>
<th># Cties Today (+ cty equivs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DE</td>
<td>37,000 (1780)</td>
<td>12/7/1787</td>
<td>3</td>
<td>72,674</td>
<td>3</td>
<td>76,748</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>PA</td>
<td>302,000 (1775)</td>
<td>12/12/1787</td>
<td>19</td>
<td>810,091</td>
<td>35</td>
<td>1,348,233</td>
<td>51</td>
<td>67</td>
</tr>
<tr>
<td>NJ</td>
<td>129,000 (1774)</td>
<td>12/18/1787</td>
<td>13</td>
<td>245,555</td>
<td>13</td>
<td>320,823</td>
<td>13</td>
<td>21</td>
</tr>
<tr>
<td>GA</td>
<td>50,000 (1776)</td>
<td>1/2/1788</td>
<td>10</td>
<td>251,407</td>
<td>24</td>
<td>516,823</td>
<td>77</td>
<td>159</td>
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<tr>
<td>CT</td>
<td>196,088 (1774)</td>
<td>1/9/1788</td>
<td>8</td>
<td>262,042</td>
<td>8</td>
<td>297,675</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>MA</td>
<td>338,667 (1776) *including ME</td>
<td>2/6/1788</td>
<td>14</td>
<td>700,745 ME: 228,705</td>
<td>16</td>
<td>610,408 ME: 399,455</td>
<td>14</td>
<td>ME: 10</td>
</tr>
<tr>
<td>MD</td>
<td>200,000 (1775)</td>
<td>4/28/1788</td>
<td>18</td>
<td>380,546</td>
<td>19</td>
<td>447,040</td>
<td>19</td>
<td>23+1</td>
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<tr>
<td>SC</td>
<td>175,000 (1773)</td>
<td>5/23/1788</td>
<td>14</td>
<td>415,115</td>
<td>25</td>
<td>581,185</td>
<td>30</td>
<td>46</td>
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<tr>
<td>NH</td>
<td>81,000 (1775)</td>
<td>6/21/1788</td>
<td>5</td>
<td>214,360</td>
<td>5</td>
<td>244,161</td>
<td>8</td>
<td>10</td>
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<tr>
<td>Year Lands Ceded</td>
<td>Treaty/Cession</td>
<td>Treating Nations</td>
<td>Year County Established</td>
<td>County Name</td>
<td>Land Lottery</td>
<td>Year County Subdivided</td>
<td>New County Subdivision Name</td>
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<td>Kentucky</td>
<td>Virginia</td>
<td>Kentucky</td>
<td>1776</td>
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Tennessee        North Carolina       Washington       1777        6/1/1796        Sept. 30, 1794
An act for the relief of such persons that have suffered or
may suffer by their grants, deeds, and mesne conveyances
not being proved & registered within the time heretofore
appointed by law.

October 28, 1797
An act prescribing what shall be the legal probate of deeds
and conveyances of lands and mortagages, where such
probate shall be made without the limits of this state, and
within the limits of the United States, and for other
purposes.

Maine            Massachusetts       York            1652        3/15/1820       March 19, 1821
An Act concerning Registers of Deeds

West Virginia   Virginia            Hampshire        1754        6/20/1863       June 26, 1863
An act in relation to the powers and duties of the recorder.

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

<table>
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<th>First County/ies (# if &gt;2)</th>
<th>Year County Established</th>
<th>Territory</th>
<th>Year Territory Established</th>
<th>First Recording Act in Territory</th>
<th>State</th>
<th>Date State Admitted to Union</th>
<th>First Law Referring to Recording/Registry in State</th>
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<td>Washington</td>
<td>1788</td>
<td>Northwest</td>
<td>1787</td>
<td>July 13, 1787 An Ordinance for the Government of the Territory of the United States, North-west of the River Ohio. (NW Ordinance)</td>
<td>OH</td>
<td>3/1/1803</td>
<td>April 16, 1803 An act providing for the recording of deeds, mortgages, and other conveyances of land.</td>
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<td>Knox</td>
<td>1790</td>
<td>(Northwest)</td>
<td>(1787) 1800</td>
<td>(NW Ordinance (1787)) Sept. 17, 1807 A law establishing the Recorders Office, and for other purposes.</td>
<td>IN</td>
<td>12/11/1816</td>
<td>January 21, 1818 An act defining the duties of Recorders, and pointing out the mode of conveying real estate.</td>
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<td>St. Clair</td>
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<td>Sept. 17, 1807</td>
<td>Indiana</td>
<td>A law establishing the Recorders Office</td>
<td>An Act establishing the Recorder's office, and for other purposes.</td>
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<td>July 21, 1809</td>
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<td>A law to prevent Frauds and Perjuries</td>
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<td>Nov. 4, 1815</td>
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<td>&quot;An Act to adjust the Estates and affairs of Deceased Persons</td>
<td>March 22, 1837 An act to amend an act entitled &quot; An act concerning deeds and conveyances.&quot;</td>
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<td>testate and intestate, and for other purposes.&quot;</td>
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<td>March 27, 1820</td>
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<td>An act concerning Deeds and Conveyances.</td>
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<td>November 21, 1818</td>
<td>Alabama</td>
<td>An act to authorise deeds of conveyance to be acknowledged, and rights of dower to be relinquished before clerks of courts.</td>
<td>December 20, 1820 An act to authorise the Judges of the Circuit Courts and Justices of the County Courts to take the acknowledgements of deeds and relinquishments of dower.</td>
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<td>October 1, 1804</td>
<td>Louisiana</td>
<td>A Law establishing Recorders Offices.</td>
<td>March 20, 1827 An Act to create a register of conveyances for New Orleans and other purposes.</td>
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<td>(Missouri) 1812</td>
<td>An act establishing courts of common pleas, and for other purposes.</td>
<td>AR 6/15/1836</td>
<td>December 21, 1846 An Act Concerning the Recording of Deeds.</td>
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<td>An act establishing courts of common pleas…</td>
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<td>1821</td>
<td>Florida</td>
<td>Escambia</td>
<td>June 29, 1823</td>
<td>An Act to Provide for the Election of Registers of Deeds, and to Define their Duties and Powers.</td>
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<td>1845</td>
<td>Florida</td>
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<td>March 6, 1845</td>
<td>An act to secure certain rights to women.</td>
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<td>1834</td>
<td>Iowa</td>
<td>Des Moines (California), Dubuque (Iowa)</td>
<td>January 19, 1839</td>
<td>An Act relating to the office of Recorder of Deeds.</td>
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<td>1846</td>
<td>Iowa</td>
<td>Des Moines (California), Dubuque (Iowa)</td>
<td>January 22, 1848</td>
<td>An Act in Relation to Deeds: Deeds from the State.</td>
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<td>1836</td>
<td>Texas</td>
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<td>January 1836</td>
<td>&quot;An ordinance and Decree for opening the several courts of Justice, appointing clerks, prosecuting attorneys, and defining their duties&quot;</td>
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<td>1843</td>
<td>Oregon</td>
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<td>February 16, 1843</td>
<td>An act to regulate Conveyances.</td>
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<td>1859</td>
<td>Oregon</td>
<td></td>
<td></td>
<td>Constitution of Oregon, Article VII, §15</td>
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<td>Date</td>
<td>Event</td>
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<td>July 5, 1843</td>
<td>Report of Legislative Committee, upon the Judiciary.</td>
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<td>February 16, 1849</td>
<td>An act to provide for the recording of Land Claims in the County Clerk's Office in the Several Counties in Oregon Territory</td>
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<td>March 21, 1854</td>
<td>An Act relating to Deeds.</td>
<td></td>
<td>WA</td>
<td>11/2/1889</td>
<td>Puyallup Indians; May Sell Lands: An Act enabling the Indians to sell and alien the lands of the Puallup Indian Reservation, in the State of Washington.</td>
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<td>April 16, 1850</td>
<td>An Act Concerning Conveyances</td>
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<td>CA</td>
<td>9/9/1850</td>
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<td>March 2, 1850</td>
<td>An Ordinance in Relation to County Recorder</td>
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<td>UT</td>
<td>1/4/1896</td>
<td>April 5, 1896 Validating the Records of Certain Deeds</td>
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<td>January 1, 1855</td>
<td>An act establishing the office of Public Recorder.</td>
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<td>NM</td>
<td>1/6/1912</td>
<td>1913 An act to provide for the Assessment of Property for purposes of Taxation and for the Levy and collection of Taxes... -- Notice to Owner of Duplicate Tax Sale -- Redemption.</td>
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<td>No.</td>
<td>Year of Admission</td>
<td>State</td>
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<td>Act Title</td>
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<td>9</td>
<td>1854</td>
<td>Nebraska</td>
<td>1854</td>
<td>February 21, 1855</td>
<td>An Act establishing the office of Register of Deeds and relating to the conveyance of Real Estate</td>
<td>NB</td>
<td>3/1/1867</td>
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<td>36</td>
<td>1855</td>
<td>Kansas</td>
<td>1854</td>
<td>1855</td>
<td>An act to establish the office of county recorder.</td>
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<td>3/1/1861</td>
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<td>9</td>
<td>1861</td>
<td>Nevada</td>
<td>1861</td>
<td>Nov. 29, 1861</td>
<td>An act to regulate the Settlement of the Estates of Deceased Persons.</td>
<td>NV</td>
<td>10/31/1864</td>
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<td>17</td>
<td>1861</td>
<td>Colorado</td>
<td>1861</td>
<td>November 5, 1861</td>
<td>An Act Concerning Conveyances of Real Estate First Recording Act</td>
<td>CO</td>
<td>1/8/1876</td>
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<td>10</td>
<td>1862</td>
<td>Dakota</td>
<td>1861</td>
<td>March 2, 1862</td>
<td>An act to provide for the recording of deeds, mortgages, bonds, contracts, agreements...</td>
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<td></td>
<td>Owyhee</td>
<td>Idaho</td>
<td>1863</td>
<td>Jan. 16, 1864</td>
<td>An act concerning Conveyances.</td>
<td>ID</td>
<td>7/3/1890</td>
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**February 8, 1869**
An act to provide for the Appointment of Notaries Public. and to Define their Duties.

**March 1, 1879**
An act concerning counties and county officers.

**June 4, 1861**
Funds.

**March 5, 1877**
Liens, mortgages, and conveyances must be recorded if not already). Real estate - transfer of, in name of owner.

**February 20, 1869**
An act to provide for preserving the evidence of the official acts of officers taking acknowledgments

**March 9, 1891**
Irrigation.

**March 13, 1891**
Chattel Mortgages: An act to amend sections 3386 and 3387 of Title 12 of chapter 4 of the Laws of Idaho relating to Mortgages of Personal Property.
<table>
<thead>
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<th>Year</th>
<th>State</th>
<th>Year</th>
<th>Description</th>
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<tbody>
<tr>
<td>1893</td>
<td>County recorder to keep record of liens.</td>
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<td>4</td>
<td>1864</td>
<td>Arizona 1863</td>
<td>An Act Concerning Grants and Deeds for Lands. § 1</td>
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<tr>
<td>9</td>
<td>1865</td>
<td>Montana 1864</td>
<td>An Act Concerning Conveyances</td>
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<td>Pembina 1867</td>
<td>Dakota 1861</td>
<td>An act to provide for the recording of deeds, mortgages, bonds, contracts, agreements...</td>
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<td>5</td>
<td>1867-69</td>
<td>Wyoming 1868</td>
<td>An act concerning alienation by deed, of the proof and recording of conveyances and the cancelling of mortgages.</td>
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<td>4</td>
<td>1890</td>
<td>Oklahoma 1890</td>
<td>An Act regulating conveyances of real property.</td>
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</tbody>
</table>

*Texas claimed status as an independent Republic prior to annexation by the United States. **California was never a territory, but governed under federal military authority after the Treaty of Guadalupe Hidalgo in 1848. ***Seven counties were organized in 1850 under the provisional State of Deseret, which was established in 1849. The Territory of Utah incorporated those seven counties and added three more.