

# Building an American Empire: Territorial Expansion in the Antebellum Era

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I. Race and American Expansion: Incorporating Versus Removing.....	920
II. Land Policy and State Authority .....	929
A. Residence and Defense .....	935
III. The Legal Framework for Removal.....	941
A. Property Law .....	943
B. Federalism .....	947
C. The Supreme Court .....	949
IV. Conclusion: Indian Removal and the End of the First Phase of American Empire .....	953

*The [Constitution] speaks its own importance; comprehending in its consequences, nothing less than the existence of the UNION—the safety and welfare of the parts of which it is composed—the fate of an empire, in many respects, the most interesting in the world.*

—Alexander Hamilton, 1787

*[I]t is impossible not to look forward to distant times, when our rapid multiplication will expand itself beyond those limits, and cover the whole northern, if not the southern continent, with a people speaking the same language, governed in similar forms, and by similar laws; nor can we contemplate with satisfaction either blot or mixture on that surface.*

—Thomas Jefferson, 1809

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*[P]ossess it they did, even without a standing army. What can be a stronger proof of the security of their possession? And yet by a policy similar to this throughout, was the Roman world subdued and held . . .*

—Benjamin Franklin, 1760

*Where wretched wigwams stood, the miserable abodes of savages, . . . we beheld the foundations of cities laid, that in all probability, will rival the greatest upon earth.*

—Daniel Boone, 1784<sup>1</sup>

During the nation's beginnings, the idea of "empire" consumed Americans both physically and psychologically: Americans declared independence from Britain, were surrounded by France and Spain, and frequently spoke of Rome as they looked north, south, and west at vast expanses of land.<sup>2</sup> In the first decades after independence, the initial thirteen states expanded south to the Gulf of Mexico and west to the Pacific Ocean. At different moments, political leaders had designs for annexing Cuba, Mexico, and other nations in the Caribbean, Latin America, and South America, as well as for claiming territory in Western Africa. Settlers, business leaders, and politicians quickly bought, sold, and populated lands, filibustered nations to the south, policed spheres deemed to be of influence, and created and directed trade routes.

This expansion necessitated a confrontation with an array of populations residing on, and claiming ownership of, the land. Hundreds of thousands of indigenous people as well as many tens of thousands of European settlers resided in these spaces and claimed ownership rights that preexisted the United States. My ongoing research is interested in the aspirations of American politicians to create

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1. THE FEDERALIST NO. 1, at 1, 1 (Alexander Hamilton) (Andrew Hacker ed., 1964); Letter from Thomas Jefferson to Governor Monroe (Nov. 24, 1801), in 4 THE WRITINGS OF THOMAS JEFFERSON 419, 420 (H.A. Washington ed., New York, Taylor & Maury 1854); BENJAMIN FRANKLIN, *The Interest of Great Britain Considered with Regard to her Colonies and the Acquisitions of Canada and Guadaloupe* [sic], in 4 THE WRITINGS OF BENJAMIN FRANKLIN 32, 74 (Albert Henry Smyth ed., Haskell House 1970) (1760). Boone is quoted in PATRICK GRIFFIN, *AMERICAN LEVIATHAN: EMPIRE, NATION, AND REVOLUTIONARY FRONTIER* 179–80 (2007).

2. See, e.g., ANDY DOOLEN, *FUGITIVE EMPIRE: LOCATING EARLY AMERICAN IMPERIALISM* (2005); NIALL FERGUSON, *COLOSSUS: THE RISE AND FALL OF THE AMERICAN EMPIRE* (2004); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830* (2005); GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* (2004); PETER S. ONUF, *JEFFERSON'S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* (2000); AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010); CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865* (2010); R.W. VAN ALSTYNE, *THE RISING AMERICAN EMPIRE* (Norton 1974) (1960); Reginald Horsman, *The Indian Policy of an "Empire for Liberty,"* in *NATIVE AMERICANS AND THE EARLY REPUBLIC* 37 (Frederick E. Hoxie et al. eds., 1999).

an empire, the method by which the United States attempted to carry out its goals, and the politics of the confrontation between the nation and other peoples. In this Article, I provide an overview of three general themes within this broader research, with the specific aim of explaining the early outcomes of empire building—conquering the land of what now constitutes the forty-eight contiguous states, but failing to take further lands, particularly those just south of the border—prior to the Civil War.

The first theme concerns the politics of race. Empire is quintessentially about constructing hierarchies between peoples, subordinating one or more groups to enrich another; “[t]he nation-state proclaims the commonality of its people . . . while the empire-state declares the non-equivalence of multiple populations.”<sup>3</sup> But American confrontations with nonwhite populations were not of one result or outcome. In some places, particularly at the nation’s peripheries, confrontations led not just to conquering and expansion but to a surprising amount of racial diversity and hybridity; in others, the United States markedly slowed down its imperial aspirations when confronted with populations of non-Europeans that were considered too large to be incorporated into a white democratic polity.<sup>4</sup> These dynamics were further complicated in that any engagement with other peoples—indigenous, African, European, or mestizo—was intimately tied to national policy debates about the expansion of slavery into new federal territories. Often, the rush to remove Indians in territories such as Kansas was intertwined with the desire to create “a dazzling dream of empire” with a “slave system triumphant” in the “great western wilderness,” as W.E.B. Du Bois so well recounted in *John Brown*.<sup>5</sup> Equally often, the push to annex islands off the southern coast of the United States was intertwined with the desire to protect slavery and its economy.<sup>6</sup>

But imperial activism by the United States cannot solely be explained by the politics of slavery and race. Although the belief in a hierarchy of a European race held explicitly and implicitly by Americans served both to energize and justify continuing national expansion, the nation also needed a means to carry out such massive expansion across the continent and beyond. This was most apparent in the outright removal of hundreds of thousands of Native Americans from what is now the continental United States. Indian removal during the decades before the Civil War involved military might and violence, unprecedented commercial

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3. JANE BURBANK & FREDERICK COOPER, EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE 8 (2010). *See also, e.g.*, GEORGE M. FREDRICKSON, *Colonialism and Racism: The United States and South Africa in Comparative Perspective*, in THE ARROGANCE OF RACE: HISTORICAL PERSPECTIVES ON SLAVERY, RACISM, AND SOCIAL INEQUALITY 216 (1988); EDWARD W. SAID, *ORIENTALISM* (Vintage Books 1979) (1978); Stuart Hall, *Race, Articulation, and Societies Structured in Dominance*, in *SOCIOLOGICAL THEORIES: RACE AND COLONIALISM* 305 (UNESCO 1980).

4. *See infra* notes 30–47.

5. W.E.B. DU BOIS, *JOHN BROWN* 70 (David Roediger ed., Modern Library 2001) (1909).

6. *See infra* notes 30–47.

acquisitions and land taking, the eventual movement of more than a hundred thousand people from one home to temporary camps and then to new homes, and future colonization.<sup>7</sup> The government also used less direct forms of power to take indigenous lands: it intentionally destroyed people's food sources, drew maps and surveys to direct the way for hordes of settlers, introduced disease, and used trade to create deeply indebted peoples with no option but to sell land on the cheap. By 1840, only a few thousand indigenous people were left east of the Mississippi, leading Alexis de Tocqueville to remark: "[N]ever has such a prodigious development been seen among the nations, nor a destruction so rapid."<sup>8</sup>

That the United States accomplished "such a prodigious development" suggests a quite powerful American government—or, using the language of political science, a powerful American "state"—that was capable of conquering thousands of miles of land and removing hundreds of thousands of people. The very nature of the word "empire" suggests a powerful state; indeed the Latin "imperium," from which the word is derived, is defined as a supreme power and absolute rule, particularly by a state.<sup>9</sup> But to suggest this immediately raises a conundrum for how we understand the relationship between the American state and empire. The American state has always been understood, particularly in its earliest years, as "weak"—it consistently struggled to assert authority, capacity, and independence and to act concertedly and forcefully on behalf of national goals in the face of challenges from a variety of private actors.<sup>10</sup> For this reason, scholars who study the beginnings of American empire have tended to focus on a later time period, after the Civil War, when the government is thought to have finally

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7. For just a few of the important studies of this early period of national expansion, see NED BLACKHAWK, *VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST* (2006) (particularly chapters 5–6); MICHAEL PAUL ROGIN, *FATHERS AND CHILDREN: ANDREW JACKSON AND THE SUBJUGATION OF THE AMERICAN INDIAN* (Transaction Publishers 1991) (1975); ALAN TAYLOR, *AMERICAN COLONIES* (2001); RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815* (1991); GRIFFIN, *supra* note 1. I do not discuss Indian reservations in this Article. For a focus on this period, see KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS* (2007).

8. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 321 (J.P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1966).

9. See, e.g., BURBANK & COOPER, *supra* note 4, at 28. Regarding what constitutes the American "state," see STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982).

10. See, e.g., RICHARD FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877* (1990); DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001); FAREED ZAKARIA, *FROM WEALTH TO POWER: THE UNUSUAL ORIGINS OF AMERICA'S WORLD ROLE* (1998); Robert O. Keohane, *International Commitments and American Political Institutions in the Nineteenth Century*, in *SHAPED BY WAR AND TRADE* 57, 58 (Ira Katznelson & Martin Shefter eds., 2002).

developed “vast powers” of military and economic regulatory capacity that enabled it to begin ventures into Cuba, Hawaii, Puerto Rico, the Philippines, and other island territories off the nation’s coasts.<sup>11</sup>

The second theme of the Article, then, is to examine the role of the American state in promoting expansion and empire. Conventional understandings of the state’s role in expanding across the continent in the antebellum years are in keeping with arguments stressing the weakness of the state. Some scholars argue that the absence of a strong state was itself consequential as state actors failed to slow down rambunctious settlers who continued to take land, declare private wars, wage terrorist violence, and engage in reckless capitalist speculations; if empire was happening, it was not occurring within the purview of state control. Many accounts of these early years emphasize the seemingly unstoppable force of European settlement and the drive toward Manifest Destiny. Emblematic here are works such as Francis Prucha’s *The Great Father*, in which the government is portrayed as nobly but unsuccessfully trying to slow down the settlers, contain their violence, and engage with Native Americans; Michael Rogin’s *Fathers and Children*, in which Andrew Jackson’s actions are merely emblematic of a part of a broader societal demand for conquest and liberation; and Patrick Griffin’s *American Leviathan*, which emphasizes the lawlessness of the settlers who were often out of the control of whatever few state actors were involved.<sup>12</sup> A second line of argument suggests that taking Indian lands was, as Niall Ferguson argues, “easy;” “the Native American populations were too small and technologically backward to offer more than sporadic and ineffectual resistance to the hordes of white settlers swarming westward . . . .”<sup>13</sup>

My goal is less to refute these accounts—settler society was active, private power was powerful, and indigenous populations were often quickly overwhelmed as they were thinned by famine, disease, and internal warfare—than to illuminate features of state authority that are both frequently overlooked and particularly well suited for empire-building. These features of state power are not so much large regulatory agencies and militaries, but rather the political and legal control exercised over land distribution through the creative use of property laws and the ability to move settler populations strategically so that the nation could both populate and defend the vast spaces. Land policy and property laws created a market for the land, a rationale for taking it from indigenous populations, an American population for settling and cultivating it, and a structure for defending it. One of the antebellum government’s most significant tasks was distributing and

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11. See, e.g., ZAKARIA, *supra* note 10.

12. GRIFFIN, *supra* note 1; FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* (vol. 1 & 2 unab. prtng. 1995); ROGIN, *supra* note 7.

13. FERGUSON, *supra* note 2, at 35.

regulating immense amounts of open space. The federal government's largesse with public land, and the legal system it created to distribute this land, was one of its most important tools in creating revenue and wielding power and authority over states, businesses, and individual settlers.

The discussion of state capacity as an engine of national expansion and empire building, then, emphasizes different features of how political power is manifested by a state.<sup>14</sup> Land laws replace the need for bureaucracies, and settlers—as the epigraph by Benjamin Franklin suggests—replace the need for armies. Courts need not create or implement policy reform but need only to help perpetuate the legitimacy of specific rules. Federalism—often cited as an obstacle to national governing authority—can accelerate the process of expansion by setting additional processes in motion so that at least some part of the state is always pressing forward, demanding more land. States still represent and exert power, and they still have a “monopoly of the legitimate use of physical force within a given territory;” but the ways in which they wield this power are more dynamic and multifaceted, with incessant piecemeal activity through a plurality of mechanisms both national and local so as to enable the power to become, in Michel Foucault's famous words, “capillary.”<sup>15</sup>

14. Historians and American political development scholars have increasingly emphasized the role of the federal government in encouraging land and economic development, as well as the methods by which the government frequently harnessed private power for national ends. *See, e.g.*, BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009); LAURA JENSEN, *PATRIOTS, SETTLERS, AND THE ORIGINS OF AMERICAN SOCIAL POLICY* (2003); PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987); PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* (1987); STEPHEN J. ROCKWELL, *INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY* (2010); William J. Novak, *The Myth of the “Weak” American State*, 113 *AM. HIST. REV.* 752 (2008); Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 *YALE J.L. & HUMAN.* 1 (2007); Desmond King & Robert C. Lieberman, *Ironies of State Building: A Comparative Perspective on the American State*, 61 *WORLD POL.* 547 (2009) (review essay); Stefan Heumann, *The Tutelary Empire: State- and Nation-Building in the 19th Century United States* (2009) (unpublished Ph.D. dissertation, Univ. of Pa.); Tom Ogorzalek, *Filibuster Vigilantly: The Liminal State and 19th Century U.S. Expansion* (2009) (unpublished manuscript) (on file with the author); Ira Katznelson, *Flexible Capacity: The Military and Early American Statebuilding*, in *SHAPED BY WAR AND TRADE*, *supra* note 10, at 82.

15. *See* Michel Foucault, *Two Lectures*, in *CULTURE/POWER/HISTORY: A READER IN CONTEMPORARY SOCIAL THEORY* 200, 213 (Nicholas B. Dirks et al. eds., 1994). Max Weber has famously defined the state as having a “monopoly of the legitimate use of physical force within a given territory.” Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946). The distinctiveness of the state activities I am discussing is in keeping with scholarship on comparative empires around the world, which finds that the promotion of empire requires a strong state but also one that enables flexibility, resilience, and the ability to draw from private power as much as centralized bureaucracies. This is a theme common to the comparative study of world empires. *See, e.g.*, KAREN BARKEY, *EMPIRE OF DIFFERENCE: THE OTTOMANS IN COMPARATIVE PERSPECTIVE* (2008); BURBANK & COOPER, *supra* note 3; J.H. ELLIOTT, *EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA, 1492–1830* (2006); J.V. FIFER, *THE MASTER BUILDERS: STRUCTURES OF EMPIRE IN THE NEW WORLD* (1996);

One particularly notable form of state authority, and the third theme of this Article, is the legitimating power of law and courts during this time. The Supreme Court, most famously in *Johnson v. M'Intosh*, denied indigenous title to land and endorsed American power based importantly in part on the “discovery doctrine” that centuries prior was instituted by Catholic and Spanish leaders to rather crudely justify European conquest.<sup>16</sup> But the real power of the law in promoting territorial expansion was not so much through big doctrinal statements by the Supreme Court but through federal, state, and local courts consistently privileging European-derived common law understandings of sovereignty, capitalism, property ownership, and citizenship. “Whites always acquired Indian land within a legal framework of their own construction,” a construction that rested on judicial and common law rules and institutions that would enable property transactions to continually benefit settlers and speculators at the expense of indigenous people.<sup>17</sup> It enabled Americans to conquer “the continent less with violence than with the confidence with which they carried forward their notions of constitutional liberty, notions forged in the matrix of empire.”<sup>18</sup> Particularly in the absence of national bureaucracies, it was often courts that were at the forefront of unifying disparate territories, providing a basis for capitalist exchange and property distribution, extending jurisdiction, and articulating a language through which an imperial project could be recognized within broader notions of rights, liberties, and property.<sup>19</sup>

In the rest of this Article, I use these three themes to organize different contours of America’s expansionist and imperialist project. But while I separate the themes for organizational purposes, they are obviously deeply intertwined with each other. The American state took shape in the midst of severe racial divisions; slavery in particular impacted constitutional design, political representation, and limits for national governing authority. In turn, state design had long term consequences for the racial makeup of the United States, as constitutionally entrenched forms of political representation would prove repeatedly consequential

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MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000); MICHAEL MANN, 1 *THE SOURCES OF SOCIAL POWER: A HISTORY OF POWER FROM THE BEGINNING TO A.D. 1760*, at 130–78 (1986); *SETTLER COLONIALISM IN THE TWENTIETH CENTURY: PROJECTS, PRACTICES, LEGACIES* (Caroline Elkins & Susan Pedersen eds., 2005); GEORGE STEINMETZ, *THE DEVIL’S HANDWRITING: PRECOLONIALITY AND THE GERMAN COLONIAL STATE IN QINGDAO, SAMOA, AND SOUTHWEST AFRICA* (2007).

16. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

17. STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 4 (2005).

18. HULSEBOSCH, *supra* note 2, at 11.

19. *See, e.g.*, LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900* (2010); LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900* (2002); SKOWRONEK, *supra* note 9, at 19–36; John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 HARV. L. REV. 754 (2007) (review essay).

in shaping political efforts at territorial expansion. Finally, I emphasize “law” as a theme in an effort to highlight its particular importance, as well as to comment on an important irony; if there was one branch of government that, given its predispositions, ought to have protected indigenous property rights, quite arguably it should have been the Supreme Court. That the Court came to embrace settler populism over the property and sovereignty claims of Native peoples reflects how it too was importantly limited by its own readings of race and racial hierarchies.<sup>20</sup>

#### I. RACE AND AMERICAN EXPANSION: INCORPORATING VERSUS REMOVING

In the first half of the nineteenth century, the territory of the United States more than tripled in size (Figure 1). Peace with Great Britain in 1783 gave the United States territory from the Atlantic Ocean to the Mississippi River and from the Great Lakes to the southern boundary of Georgia, which amounted to 531 million acres. From there, possession of what would eventually become the continental United States took place in two distinct phases. The first involved treaties, state cessions, and armed conquest led both by national leaders and local settlers. The United States bought the Louisiana Territory from France in 1803; with more than 756 million acres of land, this land acquisition alone just about doubled the size of the United States. Another 38 million acres came in 1819 with the acquisition of Florida, a taking that resulted from federal and local assertion and a short war with Spain and Britain. Soon after, nearly 340 million acres were added to the nation after the Treaty of Guadalupe Hidalgo in 1848, including lands that are now California, Nevada, Utah, Arizona, and parts of New Mexico and Colorado. Another 29 million acres were added with the Gadsden Purchase in 1853.<sup>21</sup>

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20. See, e.g., RANA, *supra* note 2 at 106–08; ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

21. THOMAS DONALDSON, THE PUBLIC DOMAIN 13 (Washington, Government Printing Office 1880).

Figure 1



All of these lands, as well as the territory of the original thirteen states, were acquired from entities the United States recognized as nation-states—most notably Britain, France, Spain, and Mexico. But none of these lands were empty and, although the nation would immediately assert sovereignty over the land based on its treaties with the triad of European empires, such assertions did not mean there was consent or transfer of property rights from those who inhabited the land. Indigenous populations were the largest group that inhabited these lands. Scholars, federal government agencies such as the Office of Indian Affairs, and recent anthropological estimates have fairly consistently placed the number of indigenous people at around six hundred thousand.<sup>22</sup> Other populations also claimed ownership and possession of the land. When the United States acquired Louisiana, it included a population of roughly forty thousand French settlers, as well as smaller numbers of Spanish, Irish, and West Indians.<sup>23</sup> Acquisition of Spanish Florida added another twenty thousand people including about five thousand Seminoles and a significant free black population.<sup>24</sup> The Treaty of Guadalupe Hidalgo in 1848 involved land that included more than one hundred thousand Mexicans, and acquisitions of parts of New Mexico led to an additional

22. See PAUL STUART, *NATIONS WITHIN A NATION: HISTORICAL STATISTICS OF AMERICAN INDIANS* 52 (1987); RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492*, at 43 (1990). For discussion of the debate regarding an accurate estimate of Native American populations, see C. MATTHEW SNIPP, *AMERICAN INDIANS: THE FIRST OF THIS LAND* 1–25 (1989).

23. LEWIS WILLIAM NEWTON, *THE AMERICANIZATION OF FRENCH LOUISIANA: A STUDY OF THE PROCESS OF ADJUSTMENT BETWEEN THE FRENCH AND THE ANGLO-AMERICAN POPULATIONS OF LOUISIANA, 1803–1860*, at 4 (Arno Press 1980) (1929).

24. D.W. MEINIG, 2 *THE SHAPING OF AMERICA: A GEOGRAPHICAL PERSPECTIVE ON 500 YEARS OF HISTORY, CONTINENTAL AMERICA 1800–1867*, at 31–32 (1993).

sixty thousand Mexicans and seventy thousand indigenous people.<sup>25</sup> Engagement with and incorporation of these different populations, whether French, Mexican, Creole, or Pueblo, created fundamental issues of incorporating varied religions, languages, legal structures, labor practices, gender relationships, and politics.<sup>26</sup>

This confrontation with a multitude of racial groups also forced aspiring empire-builders, settlers, and indigenous populations to reevaluate their own ideologies and understandings of race. Many people on and around the North American continent had not developed deeply thought-out ideas about the meaning and reality of race “until they encountered its plurality . . . .”<sup>27</sup> The outcome of this political, social, and intellectual inquiry was quite varied and complicates conventional accounts of both racial formation and the notion of racial orders in the development of an American people.<sup>28</sup> It also complicates the way in which we often attribute racism either to driving or limiting the nation’s imperial aspirations.<sup>29</sup> There is no one constant or unifying story here, and the

25. Kevin Bruyneel, *Hierarchy and Hybridity: The Internal Postcolonialism of Mid-Nineteenth-Century American Expansionism*, in RACE AND AMERICAN POLITICAL DEVELOPMENT 106, 107 (Joseph Lowndes et al. eds., 2008); Laura E. Gómez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC’Y REV. 1129, 1139–40 (2000).

26. See, e.g., EMPIRE AND OTHERS: BRITISH ENCOUNTERS WITH INDIGENOUS PEOPLES, 1600–1850 (Martin Daunton & Rick Halpern eds., 1999); JULIE ROY JEFFREY, FRONTIER WOMEN (rev. ed. 1979); ANDRÉS RESÉNDEZ, CHANGING NATIONAL IDENTITIES AT THE FRONTIER: TEXAS AND NEW MEXICO, 1800–1850 (2005); RACHEL ST. JOHN, LINE IN THE SAND: A HISTORY OF THE U.S.-MEXICO BORDER (2011); Jeremy Adelman & Stephen Aron, *From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History*, 104 AM. HIST. REV. 814 (1999); John Mack Faragher, “More Motley Than Mackinaw”: *From Ethnic Mixing to Ethnic Cleansing on the Frontier of the Lower Missouri, 1783–1833*, in CONTACT POINTS: AMERICAN FRONTIERS FROM THE MOHAWK VALLEY TO THE MISSISSIPPI, 1750–1830, at 304–26 (Andrew R.L. Cayton & Fredrika J. Teute eds., 1998). Culinary differences were also a boundary to overcome, as indicated by one army engineer’s initial survey into Pueblo territory in New Mexico where he encountered “the Mexican tortilla”: “although I was excessively hungry, it did not fail to leave at the stomach a slight sensation of nausea. When folded and rolled together, it does not look unlike (particularly that made from the blue corn) a ‘hornet’s nest’—a name by which it is sometimes called.” J.H. Simpson, *The Report of Lieutenant J.H. Simpson of an Expedition into the Navajo Country in 1849*, in REPORTS OF THE SECRETARY OF WAR 55, 62 (Washington, Union Office 1850).

27. UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT 15 (1999). Mehta’s quote refers specifically to imperial elites. For discussions of how broader populations also participated in learning about race, see, for example, GEORGE REID ANDREWS, AFRO-LATIN AMERICA, 1800–2000 (2004); JULIAN GO, AMERICAN EMPIRE AND THE POLITICS OF MEANING (2008); MATTHEW FRYE JACOBSON, BARBARIAN VIRTUES: THE UNITED STATES ENCOUNTERS FOREIGN PEOPLES AT HOME AND ABROAD, 1876–1917 (2000); PETER SILVER, OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA (2008); Adelman & Aron, *supra* note 26.

28. Generally on the idea of racial formation and racial orders, see, for example, ANTHONY W. MARX, MAKING RACE AND NATION (1998); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994); Desmond S. King and Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75 (2005).

29. For the important argument that imperial aspirations were driven and energized by feelings of racial superiority, see, for example, REGINALD HORSMAN, RACE AND MANIFEST

details reflect simultaneously the important ways in which American understandings of racial hierarchies were very much in flux and the ways in which politics of the state intervened to skew toward a specific set of outcomes.<sup>30</sup>

First, there was a surprising amount of multiracial diversity and hybridity, particularly in personal relationships and at geographic borderlands such as New Orleans, New Mexico, and Oklahoma. This forced empire builders into fierce deliberations over the meaning of these interracial dynamics for the future of American democracy and racial identity.<sup>31</sup> Sometimes, political leaders assumed that white settlements would overwhelm fears of racial diversity becoming hegemonic. The lack of sufficient numbers of American settlers was a consistent problem that limited empire building as often as it encouraged it.<sup>32</sup> The United States could take Texas and other parts of Mexico only if few Mexicans resided on the land; further efforts to annex Cuba, the Dominican Republic, and other areas south of the continental United States (and later regions in the South Pacific) were consistently slowed by fears of incorporating non-Europeans.<sup>33</sup> Unless the United States felt safe that there were sufficient American (and at the time, this was equivalent to “white”) majorities, it held off moving forward with annexation or at least, as the long sagas with Hawaii and New Mexico represented, it kept the territory and its people in a status below state and citizen. At other times, American politicians chose *not* to annex or incorporate lands because they feared that political and population transformations happening domestically in those lands made the possibility of maintaining white majorities precarious. In Cuba, for instance, higher rates of racial miscegenation led Americans, who otherwise supported the annexation of the island on the grounds that its white population was large enough to dominate the extension of democracy to the island, to rise up in opposition out of fear that the white ruling class in the country was too unstable, too willing to mix with other racial groups, and thus, was a threat to existing American racial boundaries.

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DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981); ROGIN, *supra* note 8. For an equally important claim that race constrained national expansion, see, for example, ERIC T.L. LOVE, *RACE OVER EMPIRE: RACISM & U.S. IMPERIALISM, 1865–1900* (2004).

30. I pursue this argument in more detail in Paul Frymer, *Imperial Aspirations and Racial Formation in Antebellum America* (2011) (unpublished manuscript) (on file with the author).

31. Adelman & Aron, *supra* note 26.

32. A noted exception to this pattern was in the Deep South where African slaves typically outnumbered white citizens. No doubt interrelated to this exception, this area was, as David Adams writes, “an armed camp” to enforce slavery during these years. There were at least 250 slave revolts, and 11 federal military companies were involved in preventing Nat Turner’s rebellion in Virginia. David Adams, *Internal Military Intervention in the United States*, 32 J. PEACE RES. 197, 198–99 (1995).

33. Later debates about statehood for Hawaii followed similar themes, as Americans waited for a moment when the American population was large enough to form a “democratic” majority over native Hawaiians and Japanese. See, e.g., SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* (2000); LOVE, *supra* note 29, at 73–158 (2004).

More than anything else, the specter and politics of slavery hovered over any form of American expansion and any discussion of how to conceptualize, intellectualize, or live race.<sup>34</sup> Divisions in the nation and in government over slavery dominated discussions about national expansion, whether it involved expanding to Canada or Cuba. For instance, the drive to maintain slavery frequently led slave owners in the South to support acquiring territories with large African and Afro-Latin populations (both slave and free).<sup>35</sup> Of course, these southern slave supporters only wanted incorporation of the islands as a way to maintain the existence of slavery in the United States; but had they succeeded in achieving their short-term political goals, the long-term racial geography of the United States, and the eventual scope of its imperial conquest, would quite likely have looked far different. Meanwhile, the success of the slave revolution in Haiti at the turn of the nineteenth century led President Jefferson—out of fear that a free Haiti would threaten American slave interests—to reach out to the French and encourage their maintenance of a military presence in New Orleans. The French declined; but had they agreed, it would have made the possibility of a future United States acquisition of the Louisiana territory far less likely, and thus would have significantly shaped the future of American expansion.<sup>36</sup>

When the nation did expand, the existence of significant nonwhite populations heightened fears in the United States that the maintenance of the nation's white majority was at risk. From Thomas Jefferson to national geographers to the heads of the nation's Census bureaus, maintaining white majorities was an ever-present concern.<sup>37</sup> From early on, then, the United States' following of the Roman model of citizen expansion took place with a racially hierarchical tinge, with both the continuing presence of slavery in new territories as well as the passage of the Naturalization Act of 1790 providing statutory confirmation that naturalization for new immigrants was only open to free white persons.<sup>38</sup> Perceptions of whiteness eased the opportunities for non-British

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34. See, e.g., Jed Handelsman Shugerman, *The Louisiana Purchase and South Carolina's Reopening of the Slave Trade in 1803*, 22 J. EARLY REPUBLIC 263 (2002); Michael Zuckerman, *The Color of Counterrevolution: Thomas Jefferson and the Rebellion in San Domingo*, QUADERNI ONLINE: QUADERNO II, THE LANGUAGES OF REVOLUTION 83 (<http://www.library.vanderbilt.edu/Quaderno/Quaderno2/quaderno2.html>); MEINIG, *supra* note 24, at 154–58. See also, JOHN SLIDELL, MAKING APPROPRIATIONS TO FACILITATE THE ACQUISITION OF THE ISLAND OF CUBA, S. REP. NO. 35–351 (1859); WILLIAM W. FREEHLING, *The Complex Career of Slaveholder Expansionism*, in THE REINTEGRATION OF AMERICAN HISTORY: SLAVERY AND THE CIVIL WAR 158 (1994).

35. Notably, see ROBERT E. MAY, THE SOUTHERN DREAM OF A CARIBBEAN EMPIRE 1854–1861 (1973).

36. See, e.g., THE IMPACT OF THE HAITIAN REVOLUTION IN THE ATLANTIC WORLD (David Patrick Geggus ed., 2001); Zuckerman, *supra* note 34.

37. See, e.g., J.D.B. DeBow, STATISTICAL VIEW OF THE UNITED STATES 45 (Washington, Senate Printer 1854) (with tables entitled *White Population of the United States*, and *Increase of the Whites*). On the notion of “whiteness” more broadly, see DAVID ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (rev. ed. 2007).

38. See RONALD T. TAKAKI, IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY

European settlers despite the great potential for fear and incompatibility. Despite tensions that resulted from German, Polish, and other European immigrants arriving on the continent, the United States consistently granted legal and political protections to these settlers. When courts and administrators dealt with land disputes between American citizens and Spanish, French, Mexican, and British citizens, there were consistent references to the legal foundations of those countries as a reference point for sorting out claims.<sup>39</sup> When the United States purchased the Louisiana Territory in 1803, the resident French population was given statehood and citizenship rights within a decade despite the fact that “Louisiana was an imperial colony of alien people,” who spoke a different language, preferred a different style of government, practiced a different religion, followed a different form of law, and had very different views of individualism, racial and gender roles, and culture.<sup>40</sup>

Decades later, the Treaty of Guadalupe Hidalgo notably provided citizenship rights to Mexican and Spanish citizens residing in the area being transferred from Mexico to the United States.<sup>41</sup> There was far more public concern here, more so than with the granting of citizenship rights to the French of Louisiana: Senator Lewis Cass from Michigan argued in Congress that the United States does “not want the people of Mexico, either as citizens or subjects. All we want is a portion of territory, which they nominally hold, generally uninhabited, or, where inhabited at all, sparsely so, and with a population, which would soon recede, or identify itself with ours.”<sup>42</sup> Senator John C. Calhoun feared that “[t]o incorporate Mexico, would be the very first instance of the kind of incorporating an Indian race; for more than half of the Mexicans are Indians, and the other is composed chiefly of mixed tribes . . . . Ours, sir, is the Government of a white race.”<sup>43</sup> The Polk Administration responded accordingly; it claimed land that was largely unpopulated, calculating carefully in peace discussions with Mexico how to draw the line between the two nations so as to leave with Mexico the land that held the majority of settled areas. Polk and Congress also agreed to strike Title X—which had explicitly protected preexisting legal status of Mexican property

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AMERICA 14–15 (Oxford Univ. Press 2000) (1979).

39. See, e.g., 13 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF LOUISIANA-MISSOURI, 1803–1806, at 319 (Clarence Edwin Carter ed., 1948); Paul Gates, *The California Land Act of 1851*, 50 CAL. HIST. Q. 395 (1971).

40. MEINIG, *supra* note 24, at 15.

41. Kevin Bruyneel well points out that this was not simply a granting of equal citizenship, but an offer of citizenship to a population that had little choice given the “rapidly and radically altered political, cultural, and racial context . . . .” Bruyneel, *supra* note 25, at 113. See also SMITH, *supra* note 20, at 181–85. Moreover, some of these people subsequently lost important democratic rights after state legislators passed laws denying rights such as the vote, the right to a trial and jury, and so forth. See, e.g., MARÍA E. MONTOYA, *TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840–1900* ch. 5 (2002); Gómez, *supra* note 25.

42. CONG. GLOBE, 29TH CONG., 2D SESS. 369 (1847).

43. CONG. GLOBE, 30TH CONG., 1ST SESS. 98 (1848).

rights—from the Treaty of Guadalupe Hidalgo. Without Title X protections, people who found themselves newly Mexican-Americans also found that their property claims were dependent entirely on U.S. courts; numerous studies have found that Mexicans did not fair well in these courts, losing the predominant number of property claims to white settlers.<sup>44</sup> Unlike the French-Louisianans, those Mexicans who did reside in areas of land that were turned over to the United States found their opportunities to maintain citizenship and property rights to be quite varied, and again fairly dependent on the size of their population vis-à-vis American settlers. Where Mexican populations were largest, such as in New Mexico, their rights remained most durable; in places where they found American settlers overwhelming them with greater numbers, such as Texas, their rights were more quickly seized as, despite the granting of official U.S. citizenship rights, a number of states passed laws that discriminated against Mexican populations and relied on land commissions and courts to extinguish their property rights. In still other areas, the multifaceted nature of the state's different racial histories often placed people of Mexican ancestry in the middle of racial hierarchies in between whites and Europeans on one side, and Indians and blacks on the other.<sup>45</sup>

Before the United States expanded to Louisiana and through parts of Mexico, it had confrontations with indigenous populations residing on the eastern side of the Mississippi River. Unlike the treatment of significant portions of the people residing in areas of Louisiana, Mexico, and Cuba, American treatment of Native Indians was exceptional both in that American expansion was only slowed briefly by their presence on the land and discussions of incorporation and assimilation were never seriously considered. When the United States purchased lands from the French, as we saw above, the assumption was that American settlers would intermix and assimilate the French populations that remained. In contrast, lands that held indigenous people were often thought not to have populations at all. Many Europeans subscribed to the Roman legal principle *res nullius*, which held that “empty” land remains common property until put to use; the first to appropriately use the land became the owner. Early charters of colonies such as Virginia and Georgia claimed vast expanses of land that stretched from the eastern coastline to the western coastline; Massachusetts claimed land to the west coast on condition that it was not actually “possessed or inhabited by any other Christian Prince or State.”<sup>46</sup> This followed important strands of British and Spanish colonial political and legal thought that legitimated conquest of a population of people deemed to be savages and “others,” enabling the British (and

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44. See, e.g., TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA ch. 3 (2d ed. 2009); MONTOYA, *supra* note 41; Bruyneel, *supra* note 25.

45. ALMAGUER, *supra* note 44; RESÉNDEZ, *supra* note 26.

46. LISA FORD, SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788–1836, at 16 (2010).

as we will see, later the Americans) to take land with only sporadic thought to the rights of those inhabiting it.<sup>47</sup> Perhaps most notable in this vein is chapter V of John Locke's *Second Treatise of Government*, which portrayed American geography as a vast vacant space because it did not have farmers who cultivated the land, in contrast to Indians who were products of nature, not entitled to own property that they did not properly use.<sup>48</sup> Locke, like other leading British theorists at the time, learned about British Empire from personal experience working in numerous government jobs in the American colonies and writing an early constitution for the Carolina colony. As David Armitage writes, no "figure played as prominent a role in the institutional history of European colonialism before James Mill and John Stuart Mill joined the administration of the East India Company."<sup>49</sup> Locke's argument that indigenous populations, as well as African slaves, were reduced to a state of nature justified the view that these populations were not worthy of human rights.<sup>50</sup>

This sentiment was not uniform among American leaders, even if it was importantly hegemonic. There were debates about whether indigenous people would be treated equally as individuals and their communities as nations, as well as movements to civilize and assimilate them into American culture.<sup>51</sup> There were also meaningful debates about granting U.S. citizenship rights and statehood to indigenous populations. At least some American political leaders supported providing Native Americans with the opportunity to follow the procedures of the Northwest Ordinance and create an American territory with the idea of eventually becoming a state; there were moments in both national and state treaties with Indian nations that led to opportunities for Native Americans to become American citizens.<sup>52</sup> Article VI of the Treaty with the Delawares at Fort Pitt in

47. Specific to British articulations about the conquest of America, see Christopher Tomlins, *In a Wilderness of Tigers: Violence, the Discourse of English Colonizing, and the Refusals of American History*, 4 THEORETICAL INQ. L. 451 (2003). For a variety of discussions on both the racism and complexity within British colonial thought, see MEHTA, *supra* note 27; SAID, *supra* note 3; Hall, *supra* note 3.

48. See David Armitage, *John Locke, Carolina, and the Two Treatises of Government*, 32 POL. THEORY 602 (2004); MEHTA, *supra* note 27, at 123–32; RANA, *supra* note 2, at 33–37.

49. Armitage, *supra* note 48, at 603.

50. This racialized thought was not limited to England. George Fredrickson has argued that the distinction was between "Christian" and "heathen," reflecting "the religious militancy nurtured by the long and bitter struggle for supremacy in the Mediterranean between Christian and Islamic civilizations. . . . [T]he Pope authorized the enslavement and seizures of lands and property of 'all saracens and pagans whatsoever, and all other enemies of Christ . . .'" GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 7–8 (1981). See also ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 13–118 (1990).

51. Notably, regarding political thought at the time, see ROGIN, *supra* note 7; TAKAKI, *supra* note 38; ANTHONY F.C. WALLACE, *JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS* (1999).

52. Regarding support for an Indian American territory, presumably with the future opportunity under the laws of the Northwest Ordinance to eventually create a state, see Annie H. Abel, *Proposals for an Indian State, 1778–1878*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL

1778 permitted the Delawares and “any other tribes, who have been friends of the United States, to join the present confederation, and to form a State, whereof the Delaware nation shall be the head, and have a representation in Congress.” The Treaty of Hopewell in 1785 with the Cherokees provided similar language declaring in order “that the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy, of their choice, whenever they see fit, to Congress.” Thomas Jefferson subsequently told Delaware tribal leaders that once they came to believe in and accept private property, they would find themselves wanting to “form one people with us, and we shall all be Americans. You will mix with us by marriage. Your blood will run in our veins and will spread with us over this great island.”<sup>53</sup>

Even as the policy for Indian removal accelerated in the late 1820s, there remained opportunities—at least officially stated opportunities—for specific indigenous populations to obtain American citizenship. Multiple treaties with the Choctaws in Mississippi, such as the Treaty of Doak’s Stand in 1820 and the Treaty of Dancing Rabbit Creek in 1831, provided that any Choctaw who elected not to move westward with the Choctaw Nation could become an American citizen if he stayed on designated lands for five years after treaty ratification. Scholars tend to treat these distinctions with a healthy amount of dubiousness,<sup>54</sup> but such distinctions had at least some legal meaning and were sometimes enforced by courts even in surprising settings.<sup>55</sup> Even Chief Justice Taney’s thoughts of the possibility of Native American citizenship as opposed to African American citizenship were striking in the otherwise ignominious decision of *Dred Scott v. Sandford*. Taney argued that although indigenous people

were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws . . . [T]hey may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.<sup>56</sup>

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ASSOCIATION FOR THE YEAR 1907, at 87 (1908); JEDEDIAH MORSE, A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES ON INDIAN AFFAIRS (Augustus M. Kelley 1970) (1822).

53. Quoted in WHITE, *supra* note 7, at 474.

54. See, e.g., SMITH, *supra* note 20, at 183.

55. See, e.g., *McIntosh v. Cleveland*, 15 Tenn. 46 (Tenn. Err. & App. 1834) (upholding the property rights of a Cherokee who had been driven from his home during the process of Cherokee removal since it did not constitute a voluntary removal, and he himself had become a citizen of Tennessee and resided on land outside of Cherokee lands); *Jones’ Lessee v. Evans*, 13 Tenn. 323, 328 (Tenn. Err. & App. 1833) (holding that Indians have opportunities in treaties to become citizens of the United States, and their property rights should not be taken away if they so choose to do it).

56. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–04 (1857).

These debates would continue past the Civil War to the debates over Oklahoma and Sequoia statehood at the end of the century. but the lost possibilities and potentials are just that. Despite sometimes meaningful debates about the place that indigenous populations could have as equal partners in an expanding American nation, and the often significant efforts of Indian populations in shaping their own identity and future, the bulk of the history of the nineteenth century would continue a course of removal and eradication.<sup>57</sup> Since the United States decided not to incorporate indigenous populations into its polity, the next part of the story of American expansion involves some of the methods by which the land was taken, particularly in forms that could be legitimated in a state without extensive powers and within a nation that was attached to a deep-seated discourse of liberal individual rights. I turn in the rest of this essay to some of the processes by which the American state would carry out this twin process of expansion and eradication.

## II. LAND POLICY AND STATE AUTHORITY

By the time of formal Indian removal in the 1820s and '30s, the numbers of American settlers overwhelmed the indigenous populations remaining east of the Mississippi. But at the nation's inception, the balance was closer and hence, there were many purely strategic and political reasons why the U.S. government needed to negotiate with indigenous populations. In early years, Indian nations were in important alliances with other European empires, strengthening their hand against the new nation and, at times, strengthening the hand of the United States against rivals.<sup>58</sup> Moreover, Native populations were important economic middlemen between colonial buyers and sellers of land. Individuals and land companies who bought land from Native Americans wanted such transactions granted in legal and political dealings; otherwise, their purchases were illegitimate. Numerous land companies, despite repeated government prohibitions, bought land from Indian tribes with the hopes of winning later in court or winning a preemption grant from the federal government. Finally, the numbers of indigenous people were particularly sizeable in many areas where Americans wanted to expand. The state of Georgia would repeatedly find itself at the center of Indian removal efforts in part because so much of potential state territorial expansion was limited by Cherokee, Creek, and other indigenous nations living on their borders. As the United States negotiated the Northwest Territory from Virginia, further swaths of frontier land populated by Indian nations presented issues for expansion.

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57. Regarding the ways in which Indians importantly structured their own identities, see SILVER, *supra* note 27; WHITE, *supra* note 7.

58. In particular, see WHITE, *supra* note 7.

Because neither the British nor the early United States were in a position to immediately dominate the progression of land disputes, both nations either paid for Indian land or negotiated with indigenous nations in a way that recognized a notable degree of independent sovereignty.<sup>59</sup> The British initially adopted policies of coexistence with Native American nations because of their sense that they lacked the political resources to carry out expansion. The British stationed a mere seven companies of seventy-five men each to regions in the West (Ohio, Michigan, Kentucky), numbers that would never be able to control the vast regions. After the victory over the French in the Seven Years' War in 1763, the British established the initial boundaries of the American colony between British settlements and Indian nations, following generally along the western side of the Appalachian mountains, incorporating South Carolina on the north through all but the most western parts of Pennsylvania and splitting New York in half.<sup>60</sup> In that year, the British decided to give up on claiming territory—although maintaining the assertion of sovereignty—that was west of the dividing line. As Patrick Griffin suggests, “[T]he royal proclamation seemed to provide for an empire on the cheap, revealing from the outset a British failure of will to make good on what was promulgated on paper.”<sup>61</sup>

Confusion about land rights had reigned over the last years of the British colonies and the early years of the American republic. The thirteen British colonies participated in different ways and at different speeds in adjudicating these conflicts and were often inconsistent with each other in understanding jurisdiction and occupancy rights. Colonies were dealing with situations where delineated boundaries were confusing, numerous groups—from empires to colonies to large land companies to individual settlers—were claiming property rights, and both squatting and corruption were common. Moreover, all of the colonies were making their own land deals, whether for financial profit or to encourage settlement through headright systems. Because most of the land on the continent had been neither explored by the British nor entirely understood, individual states often made grandiose claims of sovereignty. As mentioned earlier, numerous states asserted title to all of the land going far west, even to the Pacific Ocean, and states such as Connecticut—after discovering that Pennsylvania had formed its own colony on land that Connecticut claimed by charter—turned further west to find land available for transplanting their own surplus of citizens.<sup>62</sup>

The activities of squatters, traders, and speculators led an increasing number of settlers to claim territory for themselves, and began to put pressure on

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59. BANNER, *supra* note 17, at ch. 2; FORD, *supra* note 46, at 19.

60. GRIFFIN, *supra* note 1, at 25.

61. *Id.*

62. Paul Moyer, “Real” Indians, “White” Indians, and the Contest for the Wyoming Valley, in FRIENDS AND ENEMIES IN PENN’S WOODS: INDIANS, COLONISTS, AND THE RACIAL CONSTRUCTION OF PENNSYLVANIA 221 (William A. Pencak & Daniel K. Richter eds., 2004).

the British government for a change in policy. British law forbade giving legal title to those settlers who were making deals with indigenous peoples, but this did not stop speculators from making local level deals with whomever they could find that could arguably lay a claim to having ownership of the land, and hence the authority to sell the land to the settler. Settlers and speculators believed that they would have the best claim to the property once the British revoked their own policy of forbidding land sales. Since property law legitimated the possessor of the “best claim” to land, as opposed to a certainty of legal possession, speculation and squatting ran amok with individuals hoping to put themselves in the best position to claim land once it was legally available. George Washington was among those who recognized the abundant opportunities for land speculation: responding in 1767 to one wealthy Virginian speculator, Washington asked for help in acquiring “a good deal of land,” suggesting to the speculator that the Proclamation prohibiting land purchases was nothing other than

a temporary expedient to quiet the Minds of the Indians and must fall of course in a few years especially when those Indians are consenting to our Occupying the Lands. Any person therefore who neglects the present opportunity of hunting out good Lands and in some measure marking and distinguishing them for their own (in order to keep others from settling them) will never regain it . . . .<sup>63</sup>

Once speculators had an interest in the land being available, they put pressure on the British government to relinquish its monopoly. But while they waited for the British, they were gobbling up land quite informally with crude contracts from dubious sources of authority; local courts were increasingly stamping approval on these transactions. Now, all that the speculators needed was a national sovereign to approve of the acts.

The Proclamation of 1763 outlawed private purchase of Native American land, which had often created problems in the past due to fraud, intimidation, and conflicts over ownership. Instead, only the British government would be allowed to make future purchases of land. Furthermore, British colonists were forbidden to move beyond the line and settle on native lands, and colonial officials were forbidden to grant lands without royal approval. The proclamation gave the Crown a monopoly (versus the other European empires) on all future land purchases from American Indians. But for now, the British would let Indian nations remain on the land; with the exception of building a few forts and roads to serve the settlers, the British left those on the frontier to fend for themselves, refusing to commit troops or resources, and dismantling many of their forts.<sup>64</sup>

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63. Letter from George Washington to William Crawford (Sept. 21, 1767), in 2 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 467, 469 (John C. Fitzpatrick ed., Greenwood Press 1970) (1931).

64. GRIFFIN, *supra* note 1, at 43–44.

This was a land “beyond law. There were no courts to evict, no laws to protect the interests of the wealthy, no speculative grants to safeguard. In short, the world beyond the line lay beyond regulation.”<sup>65</sup> Squatters and speculators were widespread, but they were on their own to fend for their own safety.<sup>66</sup>

Like the British, in the earliest years after the War of Independence, the U.S. central government was too weak to oversee the process of land negotiation, and squatters raced out throughout the new territories to claim lands. The government followed the British by continuing to intervene with a combination of treaties, land purchases, and restrictions on settlers, prohibiting the purchasing of land from indigenous people or even interaction with them. The government purchased 419 million acres from Native Americans between 1795 and 1838, paying more than eighty-one million dollars.<sup>67</sup>

But the rage of land speculation at this time remained extensive; as Washington wrote, “[S]carce a valuable spot within any tolerable distance of it, is left without a claimant . . . . In defiance of the proclamation of Congress, they roam over the Country on the Indian side of the Ohio, mark out Lands, Survey, and even settle them.”<sup>68</sup> As they had done with the British, speculators pushed the

65. *Id.* at 60.

66. ERIC HINDERAKER, *ELUSIVE EMPIRES: CONSTRUCTING COLONIALISM IN THE OHIO VALLEY: 1673–1800* (1997).

67. JOEL R. POINSETT, *INDIANS REMOVED TO WEST MISSISSIPPI FROM 1789*, H.R. DOC. NO 25–147, at 9 (1839). On the frequency of the United States paying for Indian lands, see BANNER, *supra* note 17. There is debate as to what “purchasing” meant regarding whether the terms the United States negotiated were fair. Certainly, there was a great deal of manipulation, coming from all levels of government and society. Thomas Jefferson’s letter to the governor of New York, William Henry Harrison, is indicative. Jefferson promoted the creation by the government of trading houses that would lead “good and influential individuals among them run in debt . . . .” Once in debt, Native Americans “become willing to lop them off by a cession of lands.” Letter from President Jefferson to William Henry Harrison (Feb. 27, 1803), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 22, 22 (Francis Paul Prucha ed., 3d ed. 2000). Jefferson also gave a speech to Congress promoting legislation authorizing the creation of trading houses so as to counter Native Americans’ growing unease “at the constant diminution of the territory they occupy . . . .” Trading houses, he believed, would encourage Indians to abandon hunting, making forests less necessary, “and they will see advantage in exchanging them for the means of improving their farms and of increasing their domestic comforts.” President Jefferson on Indian Trading Houses (Jan. 18, 1803), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 21, 21 (Francis Paul Prucha ed., 3d ed. 2000). It seemed fairly commonplace that the United States underpaid for the land. In dicta, for instance, one Alabama Supreme Court judge wrote matter of factly,

We can not, however, suppress the reflection, as the fact constitutes part of our authentic history, that the prices given by the Puritans, (Penn and others,) were scarcely more than nominal, compared with the then value of the lands: or with the prices which the United States have repeatedly offered to the various tribes in different states. The prices originally given, were doubtless, in most instances, less, and so considered, than would have been the expense of occupying the same lands, forcibly, against the consent of the Indians; nor is it to be forgotten, that the Indians were then numerous and formidable; and that policy may have been strongly united with humanity in dictating the terms by which the Indian titles were extinguished.

*Caldwell v. State*, 1 Stew. & P. 327, 358 (Ala. 1832).

68. Letter from George Washington to Jacob Read (Nov. 3, 1784), *in* 27 THE WRITINGS OF

United States to grant property rights to the Indians. Settlers competed with individual states in claiming land; indeed, states were often in competition with each other. Settlers were declaring their own states, and still others were seemingly looking to other empires for help.<sup>69</sup> Washington wrote at the time that “[t]he Western settlers, (I speak now from my own observation) stand as it were upon a pivot; the touch of a feather, would turn them any way.”<sup>70</sup> By the 1780s, it was increasingly seen as necessary that the national government intervene. Some of this came from the nation’s center, as the federal government tightly regulated the dispersal of land, but there was also an important place for the American state at the periphery. Because land disputes were often at the outer reaches of the nation, it would be the governing bodies—particularly land offices and courts—at the frontier that were at the forefront in determining who had the proper title.

In the midst of all this confusion and the threat of both violence and international invasion, the U.S. government emerged in a number of ways to promote nation building while settling a variety of brewing internal conflicts. The first role largely played by the federal government (but not uniformly played, as individual states were also partaking in this activity) was to encourage population expansion to fill the open spaces. American leaders were constantly looking and aggressively advertising for settler populations from the East Coast of the United States and from northern Europe to fill spaces in the western frontier.<sup>71</sup> Populations were thought to increase the possibilities for securing the land against Indian or European attack and to cultivate and spur commerce in the regions. Specifically white populations were thought necessary to counteract what was thought to be a range of potential threats in areas with large nonwhite populations, from slave revolts in the South to terrorist violence in Indian territories to fears of miscegenation in areas where white settlers and nonwhite populations interacted. Specifically female populations were thought necessary to avoid the increasing pattern of American men having children with indigenous women.<sup>72</sup> Support for European immigration in the early decades of the American nation was fairly bipartisan for these reasons, as were low land prices that were designed to encourage population settlement.<sup>73</sup> The U.S. population increased sevenfold in the first seven decades counted by the Census Bureau. As of the Census in 1790, the population of the new nation was 3.9 million (seven hundred

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GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 485, 486 (John C. Fitzpatrick ed., Greenwood Press 1970) (1938).

69. HINDERAKER, *supra* note 66, at 246.

70. Letter from George Washington to Governor Benjamin Harrison (Oct. 10, 1784), in 27 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 68, at 471, 475.

71. See HINDERAKER, *supra* note 66; ONUF, *supra* note 14, at 37.

72. See Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1358 (2009).

73. DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 53–60 (2002).

thousand of whom were slaves); two-thirds of the population lived within fifty miles of the Atlantic Ocean. By 1850, the nation's population had expanded to twenty-three million (including three million people classified as slaves). Settlers went westward moving through Ohio, Kentucky, Tennessee, and across the Mississippi River well into Texas, Missouri, and Iowa.<sup>74</sup>

The government was also active in organizing the purchase and distribution of lands, retaining—at least officially—sole authority to purchase land from Indians and to supervise and facilitate land grabs by private actors. The Constitution of 1787 gave the federal government authority over Indian relations in the same manner as it treated diplomacy with other nations: all actions must be governed by constitutional treaty and war powers. President George Washington, with the Fort Hमार Treaty of 1789, established that Indian treaties required formal ratification in the same manner as European treaties.<sup>75</sup> Land acquisition was centralized under the federal government within the first years of the Washington presidency, with boundary lines to be enforced by federal troops.<sup>76</sup> The government immediately provided both subsidies for entrepreneurs to speculate and a legal network to allow for the transfer of land to capitalist entrepreneurs. Politicians and lobbyists wanted land to build infrastructure, from canals to tunnels to land-grant universities to rail tracks. The federal government assisted this movement actively through numerous pieces of legislation such as the Land Ordinance Act of 1785 and the U.S. Land Office (which regulated property dispersal) and through the use of military personnel to protect capitalists and their property from outsiders.<sup>77</sup> The Land Ordinance Act was designed to organize the surveying and marketing of public lands, to regulate land prices in a manner favorable to the federal government, and to protect against squatters.<sup>78</sup> The Ordinance also determined where the land would be settled, clustered into small areas of lands with adjacent townships that would both develop local markets and protect against the potential of Indian attacks.<sup>79</sup> The Northwest Ordinance of 1787 further regulated the process, creating the logistics by which settlers could eventually apply to have their territory become a state and creating a timeline and set of procedural hurdles that would need to be followed before a population

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74. THE SEVENTH CENSUS OF THE UNITED STATES: 1850, at ix, xlvi (J.D.B. DeBow ed., Washington, Robert Armstrong Public Printer 1853), <http://www.census.gov/prod/www/abs/decennial/1850.html>.

75. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 30 (2002).

76. Horsman, *supra* note 2, at 45.

77. BALOGH, *supra* note 14, at 180–84.

78. ONUF, *supra* note 14, at 21–43.

79. *Id.* at 30.

could ask for statehood.<sup>80</sup> In later decades, banking laws provided easy credit and loans for purchasing land.<sup>81</sup>

The Northwest Ordinance also mandated that the government would have to survey land before it would be distributed. This was designed to slow the process of settlers, giving the government greater ability to control the process of land population. Government agencies continually frowned upon squatters residing on unsurveyed land, rejecting adverse possession claims even when the squatters followed standard formulas in obtaining title. The government's pattern of settlement paid attention to security issues—instead of scattering far and wide, the surveys moved in small, compact, rectangular patterns that pushed settlers to live close to each other so as to provide a common defense. Laws passed by Congress providing preemption rights to settlers occurred in accordance with the goal of maintaining control over peripheral lands as the preemption laws continually rewarded settlers rights to land when they were already surveyed, cultivated, and in close proximity to settled lands.<sup>82</sup> Congress passed a bevy of preemption laws during these years to allow settlers to retain land they seized illegally. In 1816, Congress allowed up to 320 acres for anyone inhabiting and residing on public land otherwise not claimed. As of that year, more than two hundred thousand acres had been acquired, with the overwhelming portion in Ohio and Mississippi. In 1822, eighty thousand acres in Louisiana plus another eighteen thousand in Arkansas were claimed by private squatters. In 1826, another seven thousand acres were granted in Louisiana and thirty-five thousand in Florida. The government also gave out more than sixty million acres (as of 1880) in land bounties for military or naval service, another forty-five million acres for railroad land grants, and more than sixty-seven million acres for land-grant schools.<sup>83</sup>

#### *A. Residence and Defense*

Charles Maurice de Talleyrand once said, empire is “the art of putting men in their place.”<sup>84</sup> A great deal of government activity in the early nineteenth century followed this maxim quite well: the United States (and the British before them) devoted extensive energy to populating and defending their newly conquered lands.<sup>85</sup> By traditional standards, the United States was not a large or

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80. On the importance of the Northwest Ordinance, see Heumann, *supra* note 14, at 89–112.

81. PAUL W. GATES, *LANDLORDS AND TENANTS ON THE PRAIRIE FRONTIER: STUDIES IN AMERICAN LAND POLICY* 55 (1973).

82. See, e.g., *ORLEANS LAND ACT*, ch. 14, 2 Stat 617 (1811).

83. DONALDSON, *supra* note 21, at 22–23.

84. Quoted in ANTHONY PAGDEN, *PEOPLES AND EMPIRES*, at xxiii (Modern Library 2003) (2001).

85. See TOMLINS, *supra* note 2, at 22 for a discussion of the importance of “population and the means to manage its movement, distribution, and behavior” for British colonization of the continent.

powerful government with the seeming capacity to carry out the conquering and planting of vast lands. It had little of a bureaucratic entity with the power to control large segments of society, and its budgets were fairly minimal.<sup>86</sup> The military also was quite small, with the exceptions of temporary buildups for the War of 1812, the Seminole Wars, and the War with Mexico. Ira Katznelson has suggested that this was a reflection of “flexibility” more than a lack of strength: “The country’s lean, very mobile, ‘expansible’ military produced a remarkable, and relatively low-cost, extension to the country’s sovereign capacity and international reach.”<sup>87</sup> But of equal importance was the government’s ability to intersect its authority with settlers and speculators to create a land policy that would defend itself against external threats.<sup>88</sup> First, this involved making deals with large land speculators to secure land and clear populations. For example, shortly after the passage of the Land Ordinance of 1785, the federal government contracted with the Ohio Company to create settlements that would be populated with New Englanders. Congress paid the Company to find hardworking settlers who would in turn promote rapid economic growth.<sup>89</sup> Typically, these settlements were not entirely “above board.” Government surveyors had notoriously close links with private land companies, and their determinations of land boundaries consistently favored the intersection between the federal government and private land companies.<sup>90</sup> Quite frequently, the interests between the government and private land companies were intersected by more than just outside lobbying. One notable example was the dealings between government officials and the large trading firm of Panton, Leslie, which had asked for land from Indians in exchange for debts of nearly three hundred thousand dollars from the Cherokees, Chickasaws, Choctaws, and Creek. Panton, Leslie made agreements with federal agents whereby the firm would receive its money by taking Indian title of a large grant of land between the Oconee and Ocmulgee rivers. In turn, the United States would pay Panton, Leslie the amount of money owed by the Indians in exchange for the land.<sup>91</sup> The United States would then attract immigrants to the land to help pay for the cost of purchasing it from the traders. In this case, however, while the United States was attracting new settlers to migrate, the government found that several Indian leaders opposed the cession of land and had not even been aware of the

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86. DONALDSON, *supra* note 21, at 20. More broadly, see SKOWRONEK, *supra* note 9.

87. Katznelson, *supra* note 14, at 98.

88. On the more general point of the government relying on private sources to defend national borders and interests, see Parrillo, *supra* note 14.

89. ONUF, *supra* note 14, at 42–43.

90. See, e.g., MONTOYA, *supra* note 41, at 11–12.

91. With specific respect to the treaty signed with the Choctaws and Chickasaws, see *The Choctaws* (Jan. 15, 1808), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS 748–51 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832). More broadly, see WILLIAM S. COKER & THOMAS D. WATSON, INDIAN TRADERS OF THE SOUTHEASTERN SPANISH BORDERLANDS: PANTON, LESLIE & COMPANY AND JOHN FORBES & COMPANY, 1783–1847, at 243–49 (1986).

initial transaction. With settlers already on the land, the government then negotiated a treaty paying a small sum of money to resolve the matter.<sup>92</sup> For roughly four hundred thousand dollars, the United States received eight million acres of land in parts of Georgia, Mississippi, and Tennessee.

Second, the government saw the dispersal of land as a way of conquering and securing new territories. The government consistently wielded land in a manner that channeled new populations to areas of the country that were most “threatened” by indigenous populations. This would reach a high mark, after the time period being discussed here, with the Homestead Act of 1862. The government steered large populations to limited lands—the term Oklahoma “sooner,” for example, comes from the rush of people racing to claim limited land provided by the government. In the first half of the century, the government also consistently distributed land in a manner that helped create secure territory for a nation fighting Indian tribes on the cheap.

A condition for obtaining the land from the government was that the settlers needed to be able to defend their property without requiring government intervention. The United States frequently sought military veterans and other armed settlers to conquer the land for the government, much as the Romans had utilized soldier-settlers to establish safe havens in areas that needed defense.<sup>93</sup> This solved two capacity problems for the government—it was a way of paying bounties for military service (as opposed to paying dollars), and it saved the government in future war costs by enabling the armed settlers to defend themselves. The government consistently passed laws providing war veterans with land for their military service in fights against Indian nations. Military bounty land grants were numerous during this time, passed in 1847, 1850, 1852, and 1855. These grants led to more than one hundred million acres of land being given to ex-military personnel.<sup>94</sup> To help do this effectively, government land policies emphasized providing available land in small increments, forcing settlers to live close to one another so as better to defend the land.<sup>95</sup>

This is a history that predates the United States. In 1701, Virginia offered groups 200 acres of land if these groups would settle and be “able fighting men” who would protect the frontier and encourage further settlements.<sup>96</sup> Numerous states provided military bounties during and after the Revolutionary War, and the

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92. COKER & WATSON, *supra* note 91, at 251–65.

93. BURBANK & COOPER, *supra* note 3, at 29.

94. DONALDSON, *supra* note 21, at 237. The bounty land grants were subject to widespread misuse; beneficiaries of the land were often swindled by land speculators or lost their land to squatters unknowingly residing on their possession. Many veterans also struggled to reach their land, since much of what was allocated was in remote dangerous areas on the outskirts of the nation.

95. See Douglas W. Allen, *Homesteading and Property Rights; or, “How the West Was Really Won,”* 34 J.L. & ECON. 1, 5 (1991). See also Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J.L. & ECON. 39 (1994).

96. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 39 (1968).

state of Georgia provided one hundred acres for anyone who provided four months of service fighting Native Americans. With land far more abundant a resource than people or money, Georgia offered further bounties during the Creek War of 1787, promising 640 to 1000 acres of Creek land assuming the successful conclusion of the war.<sup>97</sup> The Federal government passed the Federal Military Tract so that the nation could secure land north of the Ohio River.<sup>98</sup> President Washington argued that land could not “be so advantageously settled by any other class of men as by the disbanded officers and soldiers of the army,” for this plan “would connect our government with the frontiers, extend our settlements progressively, and plant a brave, a hardy and respectable race of people as our advanced post, who would be always ready and willing (in case of hostility) to combat the savages and check their incursions.”<sup>99</sup> Time and time again, the land made available was right on the frontier, in the midst of, or next to, Native Americans. Indeed, it often led to complaints from individual soldiers who found the land they received to be dangerous, difficult to use, or—periodically—reclaimed by Native Americans after a new treaty or legal fight. Veterans were also used to fill in empty space. In 1819, the year after Illinois became a state, the region had less than one person per square mile. Military bounties were used to populate, providing servicemen with 160 acres each—though speculators often preyed on the remoteness of the tracts of land to buy at low prices and leave it empty while searching for buyers.

Government motives were quite explicit in explaining the transfer of land to private citizens. In 1806, Thomas Jefferson recommended 160 acres be given to white males between the ages of eighteen to thirty-five who agreed to reside in Louisiana Territory for at least seven years: “I see no security for (New Orleans) but in planting on the spot the force which is to defend it.”<sup>100</sup> A House report in that same year, with regards to the future of land claims in the Michigan territory, promoted

a liberal policy to the people of the said territory, as a sure means of binding them to us by the ties of interest and of friendship; thereby to increase the physical force of the country, so as to oppose a formidable barrier to encroachments in that quarter, and soon supersede the necessity of the maintenance of a military force there by the United States.<sup>101</sup>

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97. See MILTON SYDNEY HEATH, *CONSTRUCTIVE LIBERALISM: THE ROLE OF THE STATE IN ECONOMIC DEVELOPMENT IN GEORGIA TO 1860*, at 94–95 (1954).

98. GATES, *supra* note 96, at 254.

99. Washington is quoted in PAYSON JACKSON TREAT, *THE NATIONAL LAND SYSTEM, 1785–1820*, at 21–22 (Russell & Russell 1967) (1910).

100. Letter from Thomas Jefferson to Mr. Gallatin (Jan. 31, 1807), in 5 *THE WRITINGS OF THOMAS JEFFERSON* 36 (H.A. Washington ed., New York, Taylor & Maury 1854).

101. John G. Jackson, *Land Titles in Michigan Territory* (Mar. 18, 1806), in 1 *AMERICAN STATE PAPERS: PUBLIC LANDS* 244 (Walter Lowrie ed., Washington, Duff Green 1834).

In 1838, shortly after the removal of Native Americans in southern states across the Mississippi, Arkansas Senator William Fulton asked Congress to secure the land by creating a buffer to serve as a defense for the states of Missouri and Arkansas that are “exposed to great danger” against what he claimed were more than 330,000 “Indians with striking distance.” The “object,” he said,

is to have a dense settlement of hardy adventurers all along the exposed frontier . . . [S]hould hostilities ever break out between those Indians and our country, and an alliance be formed amongst them, they would be able to concentrate a force sufficient to endanger the lives and property of the inhabitants, and spread desolation and ruin throughout the frontier settlements. Thus are the citizens of Missouri and Arkansas placed in the very face of danger; and, as this state of things has been produced by the action of the Government itself, the obligation to afford to the people the most ample protection is more than doubled . . . . In offering those lands for sale, and inducing our citizens to settle them, a peaceable and quiet possession was most solemnly guaranteed to all the purchasers . . . . Under these views, it is considered to be an object of the first importance to promote and obtain a dense settlement of able-bodied and enterprising men, convenient to the point of danger extending along the line of our southwestern frontier. To those who will thus expose themselves, and be willing to devote themselves to the service of their country, the inducement held out by the offer of a small tract of land appears to be the easiest mode which can be devised calculated to accomplish so desirable an object. No cheaper plan could be adopted for placing a strong and permanent force all along the frontier, than by offering the lands, which can only be occupied at the greatest hazard, to those who are prepared to peril every thing in their defence.<sup>102</sup>

Four years later, in the same month (August) that the government ended the Second Seminole War—a war that at the time was the second most costly in American history—Congress passed the Armed Occupation Act, providing 160 acres of land to those settlers who were armed and willing to occupy land south of Gainesville, Florida, land at the time still dangerous and controlled by Native Americans. Proposed by Senator Thomas Hart Benton of Missouri, Chair of the Committee on Military Affairs, it required settlers to reside on land that was more than two miles from a military fort for seven years, building a house, and being responsible for protecting the land from Indians. When fights broke out between settlers and Indians, communications between settlers and the army made clear that the government had no plans to help the settlers. The 1842 Act explicitly induced settlements on public domains in dangerous or distant portions of the

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102. STATEMENT OF SENATOR FULTON, S. DOC. NO. 25-152, at 1–3 (1838).

nation.<sup>103</sup> Benton submitted a letter to the Senate from the Surgeon General's Office at the end of 1838. The Surgeon General described that he had

arrived at the conclusion that the war with the Seminole Indians can be terminated in a shorter time, and at less cost, by an armed occupation of the country, than by the continuance of a regular mode of warfare. Our armies have been for years engaged in hunting up, pursuing, and killing a few Indians in each campaign: and, judging from the success we have already had, it will take five or ten years longer to kill off those that still remain, and seem determined to remain, in the country. The establishment of military colonies, on the other hand, will change the system of warfare. Instead of the white men fighting the Indians in their natural fortresses, the Indians will have to come out and attack the whites within *their* lines of defence, and where the skill and intelligence of the civilized man can have its influence.<sup>104</sup>

In proposing the bill, Benton stated on the House floor, “[t]he principle of the bill was residence and defence . . . Residence on the land itself is not required, because the very nature of the case will require settlers to live together, in stations or block-houses, for mutual defence.”<sup>105</sup> Senator Linn added in floor discussion that the settlers would go there under the inducement held out by the bill—a bounty in land—and fight for the soil, and save the blood of regular military forces that had been withdrawn from the region. The government (according to Linn) would have either to do one or the other:

hold out an inducement for necessitous, enterprising, and bold men to go to Florida, and save the defenceless women and children from the knife of the savage; or speedily enlist another body of men, and give them this very bounty, and pay them from the treasury a heavy sum of money, to fight until the last Indian was driven from the Territory.

Added Senator Preston:

This bill was therefore to encourage poor and destitute, but vigorous, energetic, and hardy men, who were filled with enterprise, to go there and

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103. The bill in the Senate (S. 160) was proposed “to provide for the armed occupation and settlement of that part of Florida which is now overrun and infested by marauding bands of hostile Indians.” General Joseph M. Hernandez, commander of the East Florida Militia, referred to the land in 1839, as “now overrun by the Indians . . .” S. DOC. NO. 25–93, at 1 (1839). For further discussion, see JENSEN, *supra* note 14, 177–86.

104. SURGEON GENERAL'S OFFICE TO THOMAS H. BENTON, S. DOC. NO. 25–42, at 2–3 (1838). Benton submitted another letter to the Senate, noting that “[n]o force employed against them, either in the former or present Seminole war, no matter by whom commanded, has ever been able to catch them . . . Let them be crowded by settlers, and that which has invariably occurred throughout the whole history of our settlements will occur again, they will not only consent to remove, but will desire it as the greatest benefit the nation can confer upon them.” ADJUTANT GENERAL'S OFFICE TO THOMAS H. BENTON, S. DOC. NO. 25–163, at 4 (1839).

105. CONG. GLOBE, 27TH CONG., 2D SESS., 619 (1842).

grapple with the Indian, and root him out for the sake of the bounty . . . . These men would go there with their knives, and a willingness to fight for their lands—and they would have the lands.<sup>106</sup>

The Armed Occupation Act resulted in the patenting of 1317 claims acquiring a total of 210,720 acres of land.<sup>107</sup> It was followed quickly by further legislation for other regions. The Oregon Donation Act in 1850 provided 320 acres of land to men and 640 to married couples willing to venture into dangerous territories in Oregon. Residence and cultivation of land for four consecutive years was necessary to insure a patent from the government; this act resulted in more than 2.5 million acres of land going to 7317 patents.<sup>108</sup> Another 290,000 acres went to nearly 1000 patents in the Washington Territory Donation Act of 1853, 1.2 million acres in Texas were given to military volunteers in the early 1850s, and New Mexico settlers received another 160 acres for settling there before 1858, amounting to more than 50,000 acres settled. All of these donation acts were designed to give “land to settlers in these territories where they might help to reduce the Indian menace.”<sup>109</sup>

### III. THE LEGAL FRAMEWORK FOR REMOVAL

In his visit to the United States, Alexis de Tocqueville was struck by how Americans borrow “legal phraseology and conceptions” in their controversies, ideas, and language.<sup>110</sup> “Democratic government favors the political power of lawyers,” he wrote, because “lawyers constitute a power which is little dreaded and hardly noticed . . . . But it enwraps the whole of society, penetrating each component class and constantly working in secret upon its unconscious patient, till in the end it has molded it to its desire.”<sup>111</sup> The power of law was most striking with regard to Native American removal. “[T]he dispossession of the Indians is accomplished in a regular and, so to say, quite legal manner.”<sup>112</sup> He writes, “The Spaniards, by unparalleled atrocities which brand them with indelible shame, did not succeed in exterminating the Indian race . . . .” In contrast, Americans attained this result “with wonderful ease, quietly, legally, and philanthropically, without spilling blood and without violating a single one of the great principles of morality in the eyes of the world. It is impossible to destroy men with more respect to the laws of humanity.”<sup>113</sup>

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106. CONG. GLOBE, 27TH CONG., 2D SESS., 818 (1842).

107. DONALDSON, *supra* note 21, at 295.

108. *Id.* at 296–97.

109. GATES, *supra* note 96, at 390. Specifically with regards to Texas, see THOMAS LLOYD MILLER, BOUNTY AND DONATION LAND GRANTS OF TEXAS, 1835–1888 (1967).

110. TOCQUEVILLE, *supra* note 8, at 270.

111. *Id.* at 266, 270.

112. *Id.* at 324.

113. *Id.* at 339. Tocqueville’s argument continues to inspire current work, as reflected in Daniel Hulsebosch’s recent claim that Americans “conquered the continent less with violence than

Tocqueville overstates the civility with which indigenous populations were removed from their land. Settler violence and military wars were common throughout the period, and they involved frequent brutality and human rights atrocities directed at people of all ages.<sup>114</sup> But what Tocqueville recognized was the way in which legal mechanics disempowered indigenous populations on a day-to-day basis, moving slowly but surely to engulf their lands within the province of American authority. By the time “Indian removal” became the official policy of the national government, much of the work of American expansion had already been accomplished.

Ironically, the Supreme Court’s role in this period is most often remembered for its general institutional weakness. After all, it was at the height of the federal government’s Indian removal policy that the Court in *Worcester v. Georgia* tried to stop the policy and ignominiously failed; Andrew Jackson was reported to say that if Justice Marshall wanted the law enforced, the Chief Justice would have to enforce it himself. Further decisions on land policy such as *Green v. Biddle* were also ineffective because the Court’s promotion of a contractual understanding of property law was contested and (in this specific case) rejected by local and state governments promoting alternative understandings of property that rested on settler rights. The Supreme Court did play a role in legitimating the taking of land from indigenous peoples, most notably in the high profile cases *Fletcher v. Peck* and *Johnson v. McIntosh* that denied indigenous title to land based on legal doctrines deriving from sources as varied as natural law and declarations by the Pope.

But when de Tocqueville was referring to the importance of law, he was thinking not of the Supreme Court but the broader legal system and its range of courts, litigators, and laws that would have the true significance in promoting American empire during these years. From symbolic rituals of legality as a means of asserting legitimacy to formalized legal process and norms, the law was an important arena not merely in justifying the land taking but in being the principle means through which the taking was channeled.<sup>115</sup> In this section, I provide a brief overview of two important ways that the U.S. legal system promoted expansionist policies: its particular understanding of property law and the activity of local and state courts in enforcing property law independent of the Supreme Court. I end with an examination of the particular role of the Supreme Court in *not* defending Native American property rights (when its own jurisprudence provided reason to think that it should have).

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with the confidence with which they carried forward their notions of constitutional liberty, notions forged in the matrix of empire.” HULSEBOSCH, *supra* note 2, at 11.

114. See, e.g., BLACKHAWK, *supra* note 7; GRIFFIN, *supra* note 1.

115. See generally BENTON, *supra* note 19; FORD, *supra* note 46; TOMLINS, *supra* note 2.

*A. Property Law*

The government, private land companies, and settlers all consistently relied on common law to defend their rights to the land. Courts were critical to this process because officials in the public land departments were overwhelmed by the task of sorting through the myriad of land claims leaving courts the primary arena for the defense of land rights. The government also had on its hands the difficulty of sorting out a myriad of conflicting claims over land. As one congressional report on the territory of Michigan found in 1806, “notwithstanding the settlement of this country for nearly one hundred and fifty years, only *eight* regular titles are to be found within its limits.”<sup>116</sup> This congressional report found claims dating back to the first years of the 1700s founded on French, British, Canadian, and Indian grants, as well as claims of squatters founding their rights based on settlements and improvements involving land masses as great as one hundred thousand acres.<sup>117</sup> Throughout the history of the period, debates about land became litigated debates in the courtroom; land weighed constantly on the minds of speculators and settlers alike, and the process of litigation, in particular its costs, often overwhelmed indigenous populations into compliance, even when the law was on their side.<sup>118</sup> Recognition of what types of legal actions were needed to win in court shaped settler actions and left indigenous populations constantly making mistaken choices.

But success in the courtroom was not just a product of Americans being more aware of the rules of the game. The common law applications of land rights were themselves rooted in notions about conquest and racial hierarchies that dated to Roman law and fifteenth- and sixteenth-century European imperial law. It rested both on understandings of human progress that privileged European settlers and rigid racial hierarchies. Many of the assumptions of the common-law origins only worked if indigenous populations were not perceived as equals. The idea of *terra nullius* is emblematic of this: it is a principle stating that unoccupied land was common property until put to use; the first to use the land appropriately became its owner. Only by ignoring indigenous people as users of the land could such an application be warranted. Common law also dated to Spanish use of the “discovery doctrine” that legitimated the taking of indigenous land on the assumption that Christians had a right to conquest.<sup>119</sup> Perhaps most directly important for American common law was the British justice and legal scholar Sir Edward Coke, who in a famous decision in *Calvin’s Case* first addressed the rights

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116. Jackson, *supra* note 101, at 263.

117. *Id.* at 268–69.

118. See, e.g., ALMAGUER, *supra* note 44, at 80–81; SIDNEY L. HARRING, CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY (1994); Deborah A. Rosen, *Colonization Through Law: The Judicial Defense of State Indian Legislation, 1790–1880*, 46 AM. J. LEGAL HIST. 26 (2004).

119. WILLIAMS, *supra* note 50.

of aliens under British common law and helped provide an early legal legitimacy for imperial conquest. In the case involving a Scotsman's rights under British law, Coke delineated a theory of rights for the British Empire that held its common law protections did not extend beyond English soil. Coke made a critical distinction between the legal rights of aliens who were friends of Britain, those who were enemies, and—among those enemies—those who were temporary or perpetual enemies. He argued that perpetual enemies

cannot maintain any action, or get any thing within this realm . . . All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with devils, whose subjects they be, and Christian, there is a perpetual hostility, and can be no peace . . .<sup>120</sup>

Since infidels are outside of the law and its potential protections, the conquering king has absolute authority over conquered subjects.

Scholars have been careful to point out both the degree to which Coke's arguments rested on faulty case law, as well as the limited use of *Calvin's Case* as an outright sanctioning of imperial conquest—the case has never officially been followed, has been disagreed with, and has been widely manipulated and maneuvered by numerous judges and legal experts.<sup>121</sup> At the same time, Coke's influence as both a judge and interpreter of British law had huge influence both for British and (as we will see) later American conceptions of imperial authority.<sup>122</sup> As Lauren Benton has argued, the case's discussion of differential citizenship and subjectivity as well as divided sovereignty “provided part of the framework for describing legally uneven imperial territories.”<sup>123</sup> Contributing further to this discussion was British and European legal thought about the ownership of unpossessed and uncultivated land. In addition to the discussion earlier in this paper about John Locke's views of property, other British philosophers and legal theorists, from Adam Smith and Thomas More to John Stuart Mill and William Blackstone, developed a series of arguments premised in ideas of progress and civilization that legitimated the taking of uncultivated land that was deemed as not being properly used. A scholar who was amply cited by American jurists and was quoted frequently by George Washington, Thomas Jefferson, and others, was Emmerich Vattel, a Swiss writer, who wrote in 1758 in *The Law of Nations* that cultivation and ownership of land was a critical part of progress. Although he rejected the discovery doctrine and trusted democratic sovereignty even in times

120. Sir Edward Coke, *Calvin's Case*, 77 ENG. REP. 377, 397 (1608) (citation omitted).

121. See, e.g., FORD, *supra* note 46, at 14–15; HULSEBOSCH, *supra* note 2, at 20–32; RANA, *supra* note 2, at 20–98; WILLIAMS, *supra* note 50, at 199–205.

122. Notably, see HULSEBOSCH, *supra* note 2, at 20–32; J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30–55 (reissue with a retrospect 1987).

123. BENTON, *supra* note 19, at 29.

of war and conquest, his claims that those who were ill-prepared to partake in this process could be removed or even enslaved was widely received by American legal thinkers. As he wrote of indigenous populations, “disdain to cultivate the earth” entitles Europeans to occupy their land and even to exterminate them “as savage and pernicious beasts.” In viewing cultivation as critical to land possession, American settlers were able to view both the land of the North American continent as empty and their own role in cultivation as a legitimate reason for taking possession.<sup>124</sup>

A popular definition of property rights in many parts of the United States was that title required that an individual take singular possession of the land. Courts consistently (though often inaccurately) ruled that because Indians were in constant motion, they could not claim attachment to a specific area of land to legitimate a right to property. The power of eminent domain was defended as a legitimate reason for why the American government should be entitled to take the land with “just compensation.” Squatters, under rights of preemption, were entitled to land they occupied as long as they were not removed from the land by the previous owner. Unaware of such legal formalities, indigenous populations often let settlers live peaceably on their land, only to later find those settlers had attained title.<sup>125</sup> Similar problems occurred when Indians “sold” land with an expectation that they were really “renting” the land, which was indicated by the fact that Indian nations would ask for continual payments over time for settlers to occupy the same piece of land.<sup>126</sup> Courts consistently found against Indian ownership when settlers were able to show continuous possession. The New York Supreme Court held that “[i]t is a fact too notorious to require proof that Indian lands . . . were invariably held in common, and that individual property in land was not known amongst them.”<sup>127</sup> The Louisiana Supreme Court denied the Caddo Indians ownership because there was “no evidence that the Indians ever hunted over [the lands], although they appear sometimes to have turned their horses on

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124. See M.D. Vattel, *THE LAW OF NATIONS* 94 (Northampton, S. & E. Butler 1805) (1758); see also BANNER, *supra* note 17, at 150–90. Rana’s argument focuses on the historical longevity of this view dating back to Locke and British legal thought. See RANA, *supra* note 2, at 33–37. For a specific example of this view in practice in early eighteenth-century Massachusetts, see JEAN M. O’BRIEN, *DISPOSSESSION BY DEGREES: INDIAN LAND AND IDENTITY IN NATICK, MASSACHUSETTS, 1650–1790* (1997). Banner argues, however, that it was a newer phenomenon, dating to the beginning of the nineteenth century when Americans began to focus more directly on cultivation and farming as a necessity for property ownership. Prior to that time, Locke aside, Americans recognized that Indians were farmers and legitimate owners of their land.

125. Accusations of lawyers manipulating, swindling, and otherwise ascertaining power of attorney over indigenous people, leading to land sales, was commonplace. Questions of who within indigenous populations had the authority to sell land also marred an otherwise messy and corrupt process by which Native Americans sold land to speculators.

126. Thomas J. Sugrue, *The Peopling and Depeopling of Early Pennsylvania: Indians and Colonists, 1680–1720*, 116 PA. MAG. HIST. & BIOGRAPHY 3 (1992).

127. *Jackson v. Sharp*, 14 Johns. 472, 476 (N.Y. Sup. Ct. 1817).

them . . . .”<sup>128</sup> The Alabama Supreme Court referenced Vattel to help defend the assertion that “a mere travelling over a country, and occasionally erecting a monument, without occupying and cultivating the soil, is not sufficient, to give a title to the domain, nor to empire; and that the pretensions of those who live by the chase, must yield to the cultivator of the soil.”<sup>129</sup> The Tennessee Supreme Court found property rights in land to derive from the “usefulness” of creating “a barrier to the Indians in difficult times.”<sup>130</sup> In a later case from the same state, written by future U.S. Supreme Court Justice John Catron, the court cited *Calvin’s Case*, international law dating to Roman times, and numerous European philosophers to support the idea that “[o]ur rights on this continent had their origin in discovery, in the fifteenth century,” and as such, entitled Tennessee to have ownership over Cherokee lands on grounds that the lands had been conquered.<sup>131</sup>

Property law functioned in a second way that enabled more aggressive land taking from the Indians. Property law emphasized that there is no one “true” owner of land, only a multitude of potential claimants with title ultimately determined by the entity with the “best” claim; this emphasis helped inspire competition for acquiring land even in times when it was politically prohibited. Settlers and land speculators, as discussed earlier, often bought land owned by Indians during periods when the government either did not own the land itself, or owned the land but prohibited private transactions with indigenous people. These private buyers made these purchases as “speculative” buys, assuming all the while that their interests would be upheld in a court of law. Although this activity predated American independence, the Supreme Court further supported the speculative purchases when, in *Fletcher v. Peck*, it upheld a land deal of this type. Speculators took the Court’s decision as a sign that they could go ahead with land accumulation even when the United States had not yet acquired the land through treaty, because they assumed that the United States would *eventually* own the land (and later sell to these speculators). “When speculators traded in Indian land, what they were buying and selling was not *land*, or even the right to *buy* land from the Indians, but rather the prospect of being the owner of the land once the *government* bought the land from the Indians.”<sup>132</sup> States during this time sold parcels of land that they did not own, in part because they believed that they did own it, and in part because they believed that they (or the federal government) would soon own it.<sup>133</sup> Lawyers versed in property law seized on these opportunities of preemption; as long as Indian land was a title in *fee simple*, they could draw up contracts that

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128. *Brooks v. Norris*, 6 Rob. 175, 183 (La. 1843).

129. *Caldwell v. State*, 1 Stew. & P. 327, 339 (Ala. 1832).

130. *Gould v. Hoyle*, 4 Tenn. 100, 102 (Tenn. 1816).

131. *State v. Foreman*, 16 Tenn. 256, 258–59 (Tenn. 1835).

132. BANNER, *supra* note 17, at 160.

133. *Id.* at 190.

provided a transfer of the land in the event of a future transaction. State courts, meanwhile, repeatedly approved the contracts; the Supreme Court of Virginia declared, “Indian title did not impede . . . the power of the legislature to grant the land”—and other state courts soon followed this decision.<sup>134</sup> The result, then, was that settlers and speculators were dividing up land that was not theirs and relying on the dynamics of property law to gain a subsequent legal claim.

### B. Federalism

A great deal of the activism around land taking was in local courts, particularly those at the borders of the nation. Squatters associations often set up their own courts, particularly in new territories such as Kansas, where they followed their own interpretation of property law and takings; though these associations’ legal matters rarely withstood challenge from federal court, their commanding presence over the land (as forged by squatter justice) inevitably forced legislative officials to negotiate compromises of preemption to satisfy the new status quo.<sup>135</sup> Land commissioners were created by the federal government on a number of occasions—such as in the aftermath of the Mexican-American War—for the purpose of adjudicating disputes between indigenous and settler rights in new territories. As mentioned earlier, these commissions tended to bias their findings toward American settlers. But more broadly, state courts in a wide range of areas around the country defended state rights and asserted principles of federalism to justify asserting legal authority over Native American nations.<sup>136</sup> One common method was to assert state jurisdiction by claiming that if indigenous populations were surrounded by the state, the interstate commerce clause and federal Constitution failed to apply.<sup>137</sup> State courts also were active in determining whether contracts between Native Americans and whites for the sale of land were enforceable and whether Native Americans could participate in litigation.<sup>138</sup> Finally, states regulated criminal jurisdiction, whether on matters of violence, theft, or trespass. New York and numerous New England state laws claimed jurisdiction over Indian lands in criminal cases—they argued that when Indians interacted with the state, they subjected themselves to state law.<sup>139</sup> In the 1820s, southern

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134. *Id.* at 162.

135. For examples in Kansas, see *Records of the Squatter Association of Whitehead District, Doniphan County*, 13 KANSAS HISTORICAL QUARTERLY 16 (Martha Caldwell ed., 1944); Anna Heloise Abel, *Indian Reservations in Kansas and the Extinguishment of Their Title*, 8 TRANSACTIONS OF THE KANSAS STATE HISTORICAL SOCIETY, 1903–1904, at 72 (Geo. W. Martin ed., 1904).

136. TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL* (2002); HARRING, *supra* note 118; Rosen, *supra* note 118.

137. Rosen, *supra* note 118, at 32–33. See also *United States v. Cisna*, 25 F. Cas. 422 (C.C.D. Ohio 1835) (No. 14,795) (holding federal laws were inoperative in Ohio because the reservation was so small and surrounded by state populations).

138. Rosen, *supra* note 118, at 28.

139. See, e.g., *Goodell v. Jackson*, 20 Johns. 693 (N.Y. Sup. Ct. 1823).

states such as Alabama, Georgia, and Mississippi used state criminal law to expand state jurisdiction through Indian land, claiming that states and not the federal government have the authority through the Commerce Clause to regulate affairs internal to state sovereignty.<sup>140</sup>

Even when the Supreme Court decided a matter of specific relevance to Indian property rights, state courts felt invigorated to move in different directions. The Supreme Court's decision in *Fletcher v. Peck* was ambiguous enough in its understanding of Indian title that it "provided temporary political quiescence rather than legal certitude and did nothing to slow down the encroachments of whites onto Indian lands."<sup>141</sup> Georgians took the case to mean that they controlled the fate of Indian lands in their territory. Georgian state courts referred to *Fletcher* as precedent for their authority over Indian nations. As the state court declared in *Georgia v. Tassels*, "every acre of land in the occupancy of his sovereign, independent Cherokee Nation, is vested in fee in the State of Georgia."<sup>142</sup> The Georgian government was particularly emphatic in asserting its rights to extinguish Indian land claims and fight wars with Indians within its declared territory. In the mid-1790s, the Georgian government, led by Governor Jared Irwin, continued to form and maintain state militias to fight the Creek, claiming that they had a constitutional right to protect themselves against imminent danger, despite being told repeatedly by the federal government that it was both unconstitutional and unwarranted given the broader foreign policy agendas of the time.<sup>143</sup> After protracted battles with the federal government over land claims, Georgia agreed to give up land rights that extended to the Mississippi River in exchange both for the rights of legitimate settlers to keep their land possessions and for the federal government "at their own expense, [to] extinguish, for the use of Georgia, as early as the same can be peaceably obtained, on reasonable terms, the Indian title" that remained within state boundaries.<sup>144</sup>

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140. HARRING, *supra* note 118, at 36–44. See also FORD, *supra* note 46.

141. GARRISON, *supra* note 136, at 84.

142. *State v. Tassels*, Dudley (Ga) 229, 234 (Ga. 1830). For further discussion of this case, see GARRISON, *supra* note 136, at 112–16. And of course, this case represented one of the more infamous moments when a state defied the Supreme Court. While the Supreme Court was weighing its own decision, the state of Georgia executed Tassel, leaving the case moot.

143. See *Report of February 4, 1813*, in REPORTS FROM THE WAR DEPARTMENT 26, 27 (Washington, E. De Krafft 1818).

144. *Georgia Cession* (Apr. 26, 1802), in 1 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 101, at 113, 114. At the same time, the U.S. government forged a treaty with the Creek Indians to buy some of their land. General Wilkinson addressed the Creek Nation on May 29, 1802:

We see that hunting, to which you and your ancestors have heretofore resorted for support, is failing you year after year. We know that this precarious resource will soon be entirely destroyed, and that you can no longer rely on it for the maintenance of your old men, your wives, and your children; and we believe that, thus circumstanced, you should look around you and endeavor to provide, from the means you possess, some more permanent and more certain dependence, to protect you against the poverty and wretchedness which may otherwise be your portion. We address you in plain language, but with sincere hearts, when we say, that, of the much you possess, we think a little may

### C. *The Supreme Court*

Perhaps ironically, the one body that ought to have respected Native American property rights was, quite arguably, the Supreme Court. The Marshall Court, after all, was renowned for emphasizing the importance of contract law and nationalizing economic procedures and sovereignty;<sup>145</sup> this contrasted with the law being demanded by settlers, one that often intertwined with states rights activists and republican-spirited yeoman supporters of productive cultivation. In many of the decisions by state courts, the justices were protecting rights of settlers who gained property title by adding value to the land. They were also promoting the rights of individual states to make their own determinations about land ownership and sovereignty, and not abide simply by the authority of the national government. These were not typically ideas that had been supported by Justice Marshall or the majorities on the Marshall Court.

In *Fletcher v. Peck*, Marshall's nationalist and contractual interpretation on economic matters intersected with land speculators attempting to preemptively buy land that was owned by Native Americans. The Court here, for the first time, addressed the fact that some of the land had been occupied by Indian nations at the time of the sale. Georgia had proclaimed the lands "vacant" and assumed dominion.<sup>146</sup> In this case, the Court largely skirted the issue but for a final paragraph of the decision that seemed to be an afterthought—"the nature of the Indian title . . . is not such as to be absolutely repugnant to seisin in fee on the part of the state." The Court allowed the selling of the lands by the Georgia legislature (despite Native Americans owning the land), holding that the ownership was not "absolutely repugnant to" ownership of the title. Native Americans, then, held title to the land and a right to occupy it "until it be legitimately extinguished."<sup>147</sup> But the facts and context of the case had some bearing on future decisions involving Indian title. The case involved the New England Mississippi Land Company's successful appeal of its claim to a contract provided them by the Georgia state

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suffice, to attain for you this great and desirable end. We ask you, whether you do not think it might be advisable for you to sell some of your lands, the most distant from your towns and villages, to provide for the old, the poor, and the helpless, among your people, and to establish a broad foundation of peace and comfort, for those who may rise up after you are laid in your graves. This has ever been the policy of your white brethren, in every age and every country, and will it not be for your interests to follow their example? We know a market can be found for some of your lands, at a price which may relieve the present wants of your whole nation, and with care and attention on your part, provide for the wants of your posterity. You can receive a payment in hand, and payments year after year, in money or goods, at your option; not such as you have heretofore received for the lands you have sold, but such as honest men may offer, and freemen may accept.

*The Creeks* (Dec. 28, 1802), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS, *supra* note 91, at 668, 673.

145. For a classic standard of this argument, see, for example, ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* ch. 3 (5th ed. 2010) (1960).

146. LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* 67 (2005).

147. *Fletcher v. Peck*, 10 U.S. 87, 142–43 (1810).

legislature—a contract that had been fueled with bribery money.<sup>148</sup> Here, the Court declared that the contract could not be invalidated by a decision of a state legislature, even as, in this case, the state legislature rested its invalidation on the premise that the contract was the result of bribery and scandal. “No party shall . . . pass any . . . law impairing the obligations of contracts.” The Court held that the sale of land by the Georgia legislature, whether a product of bribery or not, had to stand as a private transaction, and the speculators who purchased the land were to receive compensation.

*Fletcher* foreshadowed many of the great contract decisions of the Marshall years, from *M’Culloch v. State* to *Trustees of Dartmouth College v. Woodward* to *Gibbons v. Ogden*. One of those cases, *Green v. Biddle*, could well have been the way in which Marshall handled indigenous rights to land. This case pitted settlers in Kentucky who improved and possessed land against its original owners who claimed original title in absentia. Here, Kentucky passed laws preventing the contractual owners from claiming land against the settlers who had cultivated and lived on the land. There was no claim by the absentia owners of possession or cultivation, merely a contractual right. The Marshall Court, in an opinion written by Justice Story, dismissed the importance of land cultivation and current possession; original title was an original contract, and this was most sacred under law.<sup>149</sup>

But in the same year as *Biddle* was decided, the Supreme Court also decided *Johnson v. McIntosh*, a case that involved a title dispute between private land speculators from the Illinois-Wabash Company and a state entity, this time the U.S. government, over lands that had formerly (presently) been owned by Native American nations in Illinois.<sup>150</sup> The legal question at hand was whether Indian tribes were sovereign; if they were, the tribes could legally sell their land to the land company who then could claim title; if not, the land was owned by the United States. For much of the decision, Justice Marshall drew on the lengthy history of European conquest and its legal underpinnings. Country after country in Europe divided up the American continent and distributed land possessions on the basis of the principle of discovery that gave them title to the land they conquered.<sup>151</sup> Indians initially occupied all of this land, Marshall admitted. But “all the nations of Europe who have acquired territory on this continent have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.”<sup>152</sup> Ultimately, “[c]onquest gives a title which the Courts of the conqueror cannot deny . . . .”<sup>153</sup>

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148. *Id.* at 142.

149. *Green v. Biddle*, 21 U.S. 1 (1823).

150. *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

151. *Id.* at 573–76.

152. *Id.* at 584.

153. *Id.* at 588.

For Marshall, legitimacy rested on a variety of themes, none of which were fully explicated in the case itself, about the rights of the conquered, whether rooted in the discovery doctrine, Coke's division between infidels and Christians, or Locke's understanding of property rights. Indians, he argued at one point, were "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . ."154 The state of Virginia, he argued later, was granted rights to "vacant lands" and no distinction was made between such lands and those "occupied by Indians."<sup>155</sup>

These last passages about "vacant lands" are inconsistent with Marshall's standard views about original title. Marshall also rejected arguments made before the Court that Indians inherently had first possession and thus full sovereignty over the land. This was the argument of the land speculators who hoped, if the Court granted original title to the Indians, that they would be the recipients of the title through purchase. McIntosh countered that the Indians had not used the land for agricultural purposes, and thus the land was open to "a people of cultivators."<sup>156</sup> In siding with McIntosh, Marshall is remembered primarily for putting his stamp on American imperial law; the United States reigns supreme in its right to conquest, and all those who are defeated have secondary rights under the nation. But, it is also worth noting that Marshall reversed himself on the sacredness of contract law; here, unlike in *Fletcher* and *Biddle*, Native Americans were distinguished as not having the right of original title. This would not be the last time that he went against general Marshall Court principles when it came to matters of indigenous rights.

Indeed, legal scholars have since written much of what happened next with national expansion, the Supreme Court, and the rights of Native Americans.<sup>157</sup> Soon after *McIntosh*, and immediately after the 1828 presidential election victory of Andrew Jackson, the state of Georgia passed a law to remove Cherokee Indians from their lands within charter limits. The Georgia state legislature abolished the Cherokee's court and legislature, annexed their land, and divided it up for auction in a state lottery; Alabama and Mississippi passed laws that permitted whites to settle on Indian lands which led to "swarms of whites" occupying the disputed territories.<sup>158</sup> Congress passed the Indian Removal Act of 1830, following a close vote in the House during which supporters consistently

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154. *Id.* at 590.

155. *Id.* at 596.

156. McIntosh is quoted in GARRISON, *supra* note 136, at 91.

157. *See generally* GARRISON, *supra* note 136; JILL NORNGREN, *THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE FIGHT FOR SOVEREIGNTY* (2004); SMITH, *supra* note 20, at 237–42; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875 (2003).

158. ROGIN, *supra* note 7, at 212–13, 219.

referred to the *McIntosh* decision to legitimize and justify the law.<sup>159</sup> The Act gave President Andrew Jackson the authority to negotiate removal treaties with the tribes, and Jackson moved quickly to order federal officials to negotiate such treaties.

The Supreme Court further legitimated Georgia and Jackson in *Cherokee Nation v. Georgia*. In this case, the Cherokees sued as a foreign state, claiming that as such, they could only be dealt with through a federal treaty. The Court here declared that Native American tribes did not have jurisdiction because they were not a foreign state, but instead, “may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will . . . . [T]hey are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.” Moreover, Marshall argued that the Court did not have the jurisdiction—“the bill requires us to control the legislature of Georgia . . . . The propriety of such an interposition by the court may well be questioned. . . . If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted.”<sup>160</sup> As in *McIntosh*, Marshall seemed to be finding new grounds to deny the Cherokees rights—grounds that he typically was unconcerned with in other charges leveled against state obstructionists.

With this decision in *Cherokee Nation*, however, Justice Marshall then subsequently reversed the position of the Court. In an about-face, the discovery doctrine was repudiated by the Court in *Worcester v. Georgia*. Here, Marshall wrote that Georgia’s attempt to rule over the Cherokee nation violated federal law.<sup>161</sup> In *Worcester*, a case involving four missionaries contesting their arrest by the Georgian government on Cherokee land, the Court suggested that Native American tribes were sovereign nations akin to small countries in Europe: “The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power . . . .”<sup>162</sup> As a result, Marshall held that “all intercourse with them shall be carried on exclusively by the government of the union.”<sup>163</sup> This was a bold decision: state law, Marshall declared, is preempted by federal law and by treaties between the national government and the Cherokees.

As stated earlier, President Jackson actively ignored the decision, and with additional appointments to the Court, had the decision overturned—once again reestablishing the right of discovery for a conquering nation.<sup>164</sup> But in a

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159. 21 REG. DEB. 994, 1005–16 (1830).

160. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 20 (1831).

161. *Worcester v. Georgia*, 31 U.S. 515 (1832).

162. *Id.* at 559.

163. *Id.* at 557.

164. *See Martin v. Lessee of Waddell*, 41 U.S. 367 (1842); *Mitchel v. United States*, 40 U.S. 52

larger context, *Worcester* is hardly an indictment of Court authority. The Supreme Court was not being defied so much as it was, far too late, trying to suddenly reverse a long line of decisions coming from a multitude of courts and regions that established American title over indigenous lands.

#### IV. CONCLUSION: INDIAN REMOVAL AND THE END OF THE FIRST PHASE OF AMERICAN EMPIRE

The Cherokee decisions and the Indian Removal Act, then, were the final pieces of a long political process that came well after the primary activity of indigenous removal had been accomplished. By the 1820s, most of the indigenous population east of the Mississippi had disappeared. In a report to Congress in 1825, the Office of Indian Affairs placed the number of Native Americans remaining east of the Mississippi at roughly 130,000, a small fraction of those that resided on these lands just twenty-five years prior. Subsequent Indian removal was not *just* a final piece—some reports claim as many as a third of those forced to emigrate lost their lives in the process, and instances during the 1830s in which Native Americans were bullied, bludgeoned, and beaten into leaving their homes would qualify as genocide under current international legal standards.<sup>165</sup> But this was not a moment that was followed by earnest self-reflection by the United States.

With the removal of Indians east of the Mississippi River, expansion continued in earnest to the west and south, Texas and New Mexico to California, and across the prairies of the Dakotas, Oklahoma, and on to Oregon and Washington. As the United States became stronger, and as indigenous populations became weaker, American politicians bargained and negotiated less and started taking more, often with widespread violence.<sup>166</sup> In 1886, a special operations force of the United States army found and captured Geronimo, the notorious leader of the powerful Apache Empire. Geronimo, while hiding in the mountains of Arizona, had terrorized and resisted settlers and militaries from both the United States and Mexico for decades. Four years later, the Massacre of Wounded Knee in 1890 led to the death of 150 Lakota Indians, and has been generally marked as the symbolic end of the many centuries long confrontations between the United States and Indian nations. In 1896, Frederick Jackson Turner famously wrote that

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(1841); *United States v. Fernandez*, 35 U.S. 303 (1836); *Mitchel v. United States*, 34 U.S. 711 (1835). Moreover, lower federal court judges repeatedly ignored *Worcester*. See SMITH, *supra* note 20, at 239–40.

165. *Plan for Removing the Several Indian Tribes West of the Mississippi River*, in 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 541, 544–47 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834). See also SECRETARY OF WAR, INDIANS REMOVED TO WEST MISSISSIPPI FROM 1789, H.R. DOC. NO. 25-147 (1939). Regarding the violence of the process, see ROGIN, *supra* note 7.

166. See ALMAGUER, *supra* note 44, at ch. 4; BANNER, *supra* note 17; BLACKHAWK, *supra* note 7.

“the frontier has gone, and with its going has closed the first period of American history.”<sup>167</sup>

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167. See FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* 38 (Henry Holt & Co. 1921) (1920).