AMERICAN SQUATTER

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INTRODUCTION

In the 1980s squatters took over eleven buildings in New York's lower east side.[1] Previously abandoned and left to rot amid the city's financial crisis, squatters invoked the image of homesteaders from the nineteenth century, staking claims through sweat equity and possession. Over the time of their occupation of these buildings, the city shifted from a posture of ambivalence to their acts, to aggressive attempts to reclaim those buildings on behalf of speculators eager to capitalize on the lower east side's affordable real estate.[2] The lower east side squatters would challenge the city's ownership claims through adverse possession, and although they lost, they ultimately brought the city to the negotiation table that enabled some of the occupied buildings to legalize their claims.[3] While the legal perspectives of this case often focus on the nature of the adverse possession action—or its deficiencies—what Amy Starecheski terms the "crude legal functionalism[s]," the actual conflicts on the ground oftentimes have more to say to us than just the outcome of claims on buildings in New York City.[4] In fact, looking across the breadth of squatters' claims in America commends to us that squatters tell us something about what land and occupation mean within the American consciousness. Looking at the laws surrounding squatters can tell us something about what it means to be an American.

It is not surprising that land relationships shape the way cultures and communities think about themselves vis-à-vis outliers to its institutions. Kate Green described how land laws form an essentializing character for the cultures that regulate land by shaping what is considered the "ideal landowner."[5] These idealized

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[1] AMY STARECHESKI, OURS TO LOSE: WHEN SQUATTERS BECAME HOMEOWNERS IN NEW YORK CITY 9 (2016).

[2] *See id.* at 9–46.

[3] *See id.* at 117.

[4] *Id.* at 94.

[5] *See* Kate Green, *Citizens and Squatters: Under the Surfaces of Land Law*, *in* LAND LAW: THEMES AND PERSPECTIVES 241 (Susan Bright & John Dewar, eds., 1998).

landowners—"settled and stable," hard-working and committed, rational, self-interested, possessive and individualist—posed no threat to the institution of private property.[6] The moral superiority of the "squatter-landowner's" claim was underlined by the fact that while "[h]e may be apparently 'stealing' land from his neighbour, . . . in practice he can do so only if the neighbour is a bad owner, a waster of the natural national resource."[7] The recognition that laws relating to land are built on the backs of communal expectations for how land shapes our expectations of society is something that has been under-explored and under-accounted for in our legal discourse.

Recent property discourse has attempted to engage with how outsider property norms have an important role to play in shaping how property is regulated. The most important (and detailed) account of how outsider norms interact with property systems is A.J. van der Walt's *Property in the Margins*.[8] Describing rights as framed between either "strong rights [or] weak rights," van der Walt highlights how claims to property are typically framed through dichotomies that elevate property rights over personal rights, and any rights as better than no rights.[9] Indeed, the scaling of rights to occupy land according to what one's status to property is in relation to that land has had an outsized influence on how we think about land interests and their importance to our shared social and narrative values. This influence stretches beyond mere ownership or occupation, but touches on the basis of security, privacy, and identity.[10] By this way of thinking, if owning land is an essentializing aspect of American personhood, then certainly owning land renders one as "more American" than not owning land.

Indeed, Ananya Roy's work on *property and citizenship* highlights how this dichotomy between housed and unhoused (or underhoused) shapes a dialectic around citizenship and worth.[11] "If the American Dream is articulated in a landscape of single-family detached suburban dwellings, then 'less homelike' accommodations . . . are . . . seen as unworthy alternatives."[12] This

[6] *Id.*
[7] *Id.*
[8] *See generally* A.J. VAN DER WALT, PROPERTY IN THE MARGINS (2009).
[9] *Id.* at 221.
[10] *See* Marc L. Roark, *Under-Propertied Persons*, 27 CORNELL J.L. & PUB. POL'Y 1, 9–10 (2017).
[11] *See generally* Ananya Roy, *Paradigms of Propertied Citizenship: Transnational Techniques of Analysis*, 38 URB. AFFS. REV. 463 (2003).
[12] *Id.* at 476.

insertion of worth transcends beyond merely scaling value and identity, but implicates the way we socially articulate values such as right, access, and blame-worthiness when we have to explain why some people are justified in their claims to spaces and some people are not.[13] When outsiders assert challenges to the property franchise, whether through mere temporary possession, long-term possessory occupation, or attempts to claim ownership, owners, neighbors, and even the state often articulate collective disapproval and deploy actions that at their core asks of the intruders "just who do you think you are?"

That question is one that property infers on behalf of owners and other persons who claim access to property legally. In fact, I argue in this Article that the laws and regulations underlying ownership often define identity vis-à-vis non-owners who stake claims to land. In responding to non-owners, legal structures and actors (including the state) set forth a narrative of property ownership that articulates the essential traits that the law promotes. At times outsiders challenge the legal identity structures, urging reforms and reconstituting of property norms that outsiders reveal as unjust or unaligned with the actual values that the social system promotes. Amongst these narrative competitions that squatters have traditionally revealed is the tension between owner as innocent versus squatter as scofflaw; the necessity of land ownership for social progress versus the utility of property use as a local asset; and the romanticized frontier versus the gritty city in American culture.

Indeed, the New York City Squatters in the 1980's and 1990's laid claim to all of these narratives through their occupation—claiming themselves as the rightful progeny of frontiersmen who homesteaded lands in the nineteenth century through sweat equity and their own labor.[14] What they found was a legal system that was ready to leave these squatter narratives in the nineteenth century and return to the time before—when speculators' claims to land were protected by the legal system. In short, in the last seventy-five years of the twentieth century, the homesteading squatters had been written out of the narrative. Instead, they were seen by cities, neighbors and communities as a different type of outsider.

This Article differs from some key other works on squatters and outsiders in legal process. Peñalver and Katyal's seminal work

[13] *Cf.* NICHOLAS BLOMLEY, UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY 75 (2004).
[14] *See infra* Section II.B.

Property Outlaws articulates how outsiders to legal process, including squatters, have helped reframe and reshape the law to account for distributional inequities.[15] Their work offers an alternative narrative of property's dominant claim of stability by focusing on how disobedience exerted in property settings has escalated needed evolution of property norms over time.[16] One of the areas they highlight is the way the image of squatters was transformed during the nineteenth century from lawless opportunists to pioneers whose utility helped expand and build the emerging nation through persistent pressure that forced the federal government to be responsive to their claims.[17] Pointing to a series of federal concessions, from the adoption preemption laws that favored pre-existing occupants claims to stake purchase options on land, to the out-sized myth of the 1862 Homestead Act, Peñalver and Katyal describe in a compelling narrative how property claims transformed thanks to property outsiders challenging the speculation-culture of eastern elite banking interests.[18]

In contrast, Hannah Dobbz in her book *Nine-Tenths of the Law: Property and Resistance in the United States* articulates a version of squatting by outsiders as a tactic towards legal reform, rather than an end or a claim.[19] Dobbz takes the Peñalver and Katyal thesis one step forward, arguing that squatting in the United States has traditionally offered outsiders a mechanism to directly challenge land relationships (whether formed from land speculation, housing disparities, or urban gentrification) that are a product of social and economic disparities.[20] But unlike the *Property Outlaws*' thesis where outsiders influence state action, this version of property activism is not dependent on possessors or squatters actually obtaining legal interests in the places they occupy since those outcomes are rare in American law.[21] Instead, the squatters are a visible articulation of how the property system serves some people instead of others. In Dobbz's narrative the reason that squatters

[15] *See generally* EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTORS IMPROVE THE LAW OF OWNERSHIP 14–16 (2010).
[16] *Id.* at 11.
[17] *See id.* at 63.
[18] *See id.* at 62–63.
[19] *See* HANNAH DOBBZ, NINE-TENTHS OF THE LAW: PROPERTY AND RESISTANCE IN THE UNITED STATES 11–12 (2012).
[20] *Id.* at 12, 60.
[21] *Id.* at 12.

were accepted in the western frontier was a general disdain for legal solutions over pragmatic realities.[22]

This article offers a third-rail approach to the squatter's narratives from Peñalver and Katyal and Dobbz—that squatters reveal the essence of how property law articulates values embedded in social and legal treatment of land relationships. Legal scholarship often attempts to articulate the values that law should embrace when facing property conflicts. For example, Eric Claeys, in his article *Labor, Exclusion, and Flourishing in Property Law*, attempts to cast the institution of private property as a valuable check on both the communitarian instincts of progressive property and the rights instincts of law and economics when it promotes industrious productive labor use as the governing principle for deciding when conflicts around trespass and privilege to trespass emerge.[23] Thus, in Claey's productive labor theory, property is deployed to protect the valuable function of concurrent labor and industriousness in land use, rather than the bare economic speculation of ownership absent use or occupation.[24] Both governance and right are deployed in this framework to promote a "public good in relation to interests in rational flourishing."[25] That public good is importantly germane to identify the characteristics that society expects to embrace as it endorses land relationships in different persons at different times.

Similarly, Jed Purdy notes that defining property is always about making choices amongst possible markets.[26] Recognizing that different people will approach their views of property relations (and critiques of property relations) through pre-filtered lenses that teeter between descriptive and normative claims, Purdy seeks to define his freedom promoting approach as an aspirational "search for new ways of enabling social practices in which autonomy, prosperity, and flourishing are mutually reinforcing values."[27] In doing so, Purdy is articulating a view of property that is not a dormant resource waiting to be filled with the substance of whoever occupies its space, but is

[22] *Id.* at 60 ("This explains why the West was easily perceived as being 'lawless' despite imported legal expectations. Westerners simultaneously believed in the sanctity of law and displayed 'no real respect' for the government's title to natural resources because that title was *unenforceable*, as were many of the supposed laws of the West.").
[23] *See* Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 487 (2017).
[24] *See id.* at 491–92.
[25] *Id.* at 487.
[26] JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION 5 (2010).
[27] *Id.* at 19.

rather a purposeful institution through which society reflects its values. Private property performs an important constitutional and narrative role within political liberalism, by enabling private individuals to accrue resilience. As the foundation for liberal citizenship, private property underpins the liberal promise of individual freedom from interference by other individuals, and protection from the (potentially over-reaching) state. The American narratives that highlight the protective function of property as a bulwark against the state often overlook the interest the state has had in promoting private property interests—even when those interests arguably make the state less stable. Private property performs an important role in mediating relationships between individuals and the state, as these are played out in the context of economic, social, and cultural values. Through this lens, property performs an essentializing function telling us in no uncertain terms what it means to be an American.[28]

Indeed, by focusing on squatters as outsiders, we not only can understand how their actions shape property regimes (Peñalver & Katyal) or the meaning of their actions within a wider property ethos (Dobbz) but we can understand how property itself reveals essential characteristics of Americanism by seeing how actors respond to outsiders through property claims.[29] In this way, squatters highlight how aspects of American essentialism change through the years by seeing how property claims against squatters change.[30] For example,

[28] *See generally* FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 132–33 (Richard Pevear & Larissa Volokhonsky trans., Farrar, Straus & Giroux 1990) (1880) (noting that the strength of the Russian land was its ability to produce natural resources for whipping people into a state of being "Russian"); PAUL READMAN, LAND AND NATION IN ENGLAND: PATRIOTISM, NATIONAL IDENTITY, AND THE POLITICS OF LAND, 1880–1914, at 13 (2008) (describing how land disputes have shaped the character of the English people); PHILIP BULL, LAND, POLITICS AND NATIONALISM: A STUDY OF THE IRISH LAND QUESTION 54–93 (1996) (detailing how land disputes and policies shaped the identity of the Irish people).

[29] *See generally* Green, *supra* note 5, at 256 (discussing nomads); PEÑALVER & KATYAL, *supra* note 15, at 63 (describing how squatters and other outsiders improve property law through outsider actions); DOBBZ, supra note 19, at 12. Notably, looking at outsider or unconventional narratives has often been a source of understanding primary narratives; Richard Lewis observed in his preface to his classic *The American Adam: Innocence, Tragedy and Tradition in the Nineteenth Century* that historians look not only for "the dominant ideas of a period, or of a nation," but also for "the dominant clashes over ideas. . . . [the] opposed terms which, by their very opposition, carry discourse forward." R.W.B. LEWIS, THE AMERICAN ADAM: INNOCENCE, TRAGEDY AND TRADITION IN THE NINETEENTH CENTURY 2 (1955).

[30] This work was influenced particularly by Stephen Prothero. *See generally* STEPHEN PROTHERO, AMERICAN JESUS: HOW THE SON OF GOD BECAME A NATIONAL ICON 297–301 (2003). In *American Jesus* Prothero makes the important observation that the representation of Jesus over time in the American discourse defines the meaning of being American rather than

squatters of the early American period reveal a dualistic nature of Americanism that often offered contradictory versions of American growth. In the early period, American expansion through land acquisition is not only empire-focused but also locally oriented. Likewise American growth simultaneously seemed to promote values of entrepreneurialism while also promoting utility of land-use and occupation.

Essentialism is a dangerous turn in property because it scaffolds legal effect with moral monism in service of one group of actors or another. Hanoch Dagan described this tendency in relation to property theorists' adherence to exclusionary norms as an "essence" of property in laws that serve particular interests.[31] In doing so, the exclusionists struggle to "arbitrate between different property configurations and thus offer[] . . . no guidance as to the interpretation or development of property law."[32] In this mode, the essential characteristics remain static and unable to contemplate evolution within the field or the possibility that plural values may contribute to the understanding of how property relationships are shaped and regulated. This Article observes how the law of property scaffolded onto American identity by validating the claims of exclusionary rights as essentially "American." These exclusionary claims were important because they validated claims to land that contrasted with the on-the-ground realties about how the land was settled, occupied, and put to use. Amongst those fictions were that the land was empty—promoting the views that the land was essentially available for Americans to expand to. Not only was the land occupied by native inhabitants, but the land was also largely occupied by settlers moving westward seeking new opportunities to claim spaces they worked and labored to subdue.

I. EMPTY LAND AND THE FORMATION OF STATE GOALS

John Locke, in his *Two Treatises of Government*, famously opined that "in the beginning, all the world was America."[33] This euro-

defining any content of the historical or biblical Jesus. *See id.* at 297–98. (describing how Americans have created perceptions of Jesus "over and over again" in ways that reflect themselves). Like *American Jesus*, *American Squatter* argues that we understand essential aspects of our national identity by looking to vessels that fill its substance. In *American Squatter*'s case, that vessel is land.

[31] *See* HANOCH DAGAN, PROPERTY: VALUES AND Institutions 39 (2011).

[32] Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1420 (2012).

[33] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 125 (Rod Hay ed., London 1823) (1690).

centric vision of the "New World" as a blank canvas for settlers to accumulate land was oblivious to the rights and claims of native sovereign nations that had for centuries inhabited the American continent.[34] In this view, America was conceived of as empty land, available to be claimed, enclosed and subjugated to European and colonial claims.[35] This view of the American landscape, free of the claims of Native Americans, was repeatedly reified in American legal and political thought, through mechanisms like the Discovery Doctrine (which recognized the supremacy of European claims to lands despite the longer-standing claims of native inhabitants).[36]

Settlers' ownership claims to land that was already inhabited advanced under the political rubric of liberalism and was justified by a social ideology that defined the territory as "empty space[s]."[37] As Uday Chandra notes, liberalism's failure to account for the rights of indigenous persons and others whose personhood as not recognized as equal rested on deference to "abstract principles to justify its rule over subjects who are deemed to be culturally different and morally

[34] *See* ONUR ULAS INCE, COLONIAL CAPITALISM AND THE DILEMMAS OF LIBERALISM 39–41 (2018).

[35] *See id.* at 39. This view is captured in the famed Discovery Doctrine, which granted European nations exclusive right to claim lands in the new world and extinguish the rights of native inhabitants in favor of Christian nations. *See* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 6 (1990). The Discovery Doctrine derived from fifteenth century Papal bulls that authorized nations to take possession by both moral and legal right to any lands not occupied by a Christian Prince. *See id.* at 79–80. For a discussion of the history of the Discovery Doctrine, see generally *id.* at 1–8. Themes that originated in the Papal bulls relating to suppressing "heathen peoples" and the depiction of inhabitants as savages, see *id.* at 92, emerge in John Marshall's famed opinion in *Johnson v. M'Intosh*, an 1823 decision by the United States Supreme Court that extended the Discovery Doctrine to American land claims. *See* Johnson v. M'Intosh 21 U.S. (8 Wheat.) 543, 574–77 (1823).

[36] *See, e.g.*, *Johnson*, 21 U.S. (8 Wheat.) at 574–75, 603–05.

[37] *See* Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 489 (2006). The validation of claims to land on its "emptiness" can be traced to John Winthrop and the original puritan occupations through the Plymouth Company. *See* John Peacock, *Principles and Effects of Puritan Appropriation of Indian Land and Labor*, 31 ETHNOHISTORY 39, 40 (1984). For example, Winthrop supported the notion that the new world fell under land doctrine of *vacuum domicilium* because the indigenous tribes had not subdued it. *Id.* Under Winthrop's application of the doctrine, land that was in the process of being cultivated by native tribes or actually settled on was off limits to puritan settlers as the native inhabitants had a "natural" right to those claims. *Id.* But land merely used as hunting grounds, even though recognized by other tribes as within a tribal territory, was free to be taken since it was not yet subdued. *Id.* These attitudes were not unique to Anglo-American settlers. *See, e.g.*, LYLE N. MCCALISTER, SPAIN AND PORTUGAL IN THE NEW WORLD, 1492–1700, at 90 (1984) (noting the tendency to view native inhabitants as occupying rather than owning territory in the new world).

inferior"; an "imperial ideology of rule."[38] Those abstract principles concealed the ideological assertions that dehumanized groups of people to overcome obstacles in the path of the state's goals. The institution of private property plays a central role in disguising these beginnings by framing property disputes as disputes between private actors, staking claims within the sphere of the ideologically framed state—rather than as disputes with, or challenges to, the state itself. The liberal public/private divide constructs the private realm as a separate space in which insiders have power to transact in ways that maximize their freedom and autonomy. However, moments of state-making necessarily reveal the underlying political and power structures of private property law, as relationships between property, law, the people, and the state are re-negotiated, re-imagined and re-constituted to the framework for a new property *nomos*.

Property systems often serve to reinforce the power of individuals who constructed the state, favoring the class of individuals who built the state in the beginning: in the United States, white men of higher economic stature, with indigenous tribes and peoples, Africans brought to the new world, whether free or not, and women excluded from property ownership. The British Empire's exercise of sovereign power over territory was derived from the same ideology of private property[39] that underpinned the domestic—and transplanted—substance of English common law. Yet, even as the American Revolution cast off the British claim to sovereign political power, the imported norms of private property were nurtured and embedded in the newly independent state. Thus, even while the U.S. Constitution was drafted in the wake of a popular revolution against monarchical sovereignty that sought to re-locate the source of sovereign political and economic authority in a certain subset of the American people, it validated claims to territory acquired under colonial rule.[40]

Where the underpinning ideology of private property in early American legal thought was distinct was in its characterization of private property as both a bulwark against sovereign overreach and

[38] Uday Chandra, *Liberalism and Its Other: The Politics of Primitivism in Colonial and Postcolonial Indian Law*, 47 L. & SOC'Y REV. 135, 135–37 (2013).

[39] Martti Koskenniemi, *Sovereignty, Property and Empire: Early Modern English Contexts*, 18 THEORETICAL INQUIRIES L. 355, 355, 389 (2017).

[40] Patrick Peel, *The Populist Theory of the State in Early American Political Thought*, 71 POL. RSCH. Q. 115, 117 (2018), *see also Johnson*, 21 U.S. (8 Wheat.) at 603. Peel's account of early American political thought highlights the distinction in thinking about politics, between the state and the government, with "the state" defined as the people themselves. *Id.* at 115. *See also Johnson*, 21 U.S. (8 Wheat.) at 603 (holding a charter of land by "the crown" superior title to that by "Indian grant").

a catalyst for entrepreneurial activity. Eventually, those two ideas became conflated in a narrative that intrinsically centered private property, as a vehicle of individual liberty, in the story of what it means to be 'an American'. The American experience of British rule had generated a narrative of mistrust of centralized government, though it had not dampened enthusiasm for the institution of property on the private scale. Indeed, the conceptualization of private property rights as a source of personal sovereignty was amplified in early American constitutionalism, to shelter citizens from potential abuses by the state. It was paradoxical that, at the same time as the new U.S. state validated squatting as a core commitment of personal liberty, the "dispossession of Native peoples w[as] integral to the Constitution's ratification" and subsequent authority to govern the American landscape.[41] Similarly, while the institution of private property relied on a strong national state to underwrite individual claims to land, the private sovereignty of property was viewed as a safeguard against the risk of overbearing state interference with citizens' claims to individual liberty.[42]

The founders of the American Republic drafted their Constitution in the wake of two important factors: the throwing off of the overbearing state through political revolution against British colonial sovereignty, and the fact that the state was established through territorial claims to land that was occupied by native peoples.[43] This context exerted a powerful influence, shaping the framers' commitments to clear limitations on the exercise of state power on individuals while endorsing the authority of the state to use force to reshape the occupancy claims of the physical space. The institution of private property—and its role as a shelter of private sovereignty—was regarded as one of the primary means by which these two contradictions were capable of being reconciled. Casting themselves as the natural progeny of the English Saxons, the founders drew on narratives about the tyranny of the "Norman Yoke" to decry the feudalistic overbearing state.[44] Just as the English Magna Carta of 1215 had emphasized the personal sovereignty of

[41] Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1002 (2014); GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 231 (2021).

[42] *See id.*; Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99, 101 (2012).

[43] *See* Ablavsky, *supra* note 41, at 1002.

[44] *See* TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 8–11 (1998).

individual property owners' claims against the king, some early Americans adopted this pre-political natural law conception of private property rights as a means of diffusing and defending American citizens against the potentially over-weaning power of the state.[45]

Proponents of the natural law claim—that private property rights preceded the creation of the American state—asserted that Jefferson's statement in the Declaration of Independence that the aims of the state included the "pursuit of happiness," had referred to "a bundle of rights that included property rights."[46] Although the Constitution that was ratified in 1780 was silent on private property rights, by 1788, the notion of private property rights as a bulwark against government intrusion had been embedded through the Fifth Amendment to the U.S. Constitution.[47] By limiting government takings of property to defined circumstances (for a public use and subject to payment of compensation) the Fifth Amendment defined individual private property rights as a constraint on government overreach.[48] By embedding a norm of state non-interference in private property rights and making exceptional the possibility of public claims on land, the Fifth Amendment hid the active role of the state in brokering private property claims to American territory by clearing indigenous persons, and the ongoing work of the state in securing those claims. The state's role in relation to private property was defined, outside exceptional circumstances, as one of refereeing competing claims.

The characterization of private property rights as a check on the state's prerogative reflected a foundational skepticism about centralized state power in the making of the American state.[49] Yet,

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[45] *See* Marc L. Roark, *Retelling English Sovereignty*, 4 BRIT. J. AM. LEGAL STUD. 81, 108 (2015) (noting that the Magna Carta's main function, and one which U.S. jurists often refer to is its ability to limit the powers of the crown from usurping rights of the barons). Courts have referred to Magna Carta's property provisions as a check on government interference. *See, e.g.*, *In re* Realen Valley Forge Greenes Assocs., 838 A.2d 718, 727 (Pa. 2003) ("The right of landowners in this Commonwealth to use their property as they wish, unfettered by governmental interference except as necessary to protect the interests of the public and of neighboring property owners, is of ancient origin, recognized in the Magna Carta, and now memorialized in Article I, Section 1 of the Pennsylvania Constitution.").

[46] DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 77–78 (1994).

[47] *See* DAVID J. BODENHAMER, OUR RIGHTS, CHAPTER 24: THE RIGHT TO PROPERTY 1 (2007), https://www.annenbergclassroom.org/resource/our-rights/rights-chapter-24-right-property/ [https://perma.cc/2NVE-GJZU].

[48] *See* U.S. CONST. amend. V.

[49] *See* Epstein, *supra* note 42, at 101. As Epstein observed, "[i]f governments always acted with good motives and full knowledge, the protection would hardly be required." *Id.*

this was also at odds with the decisive move away from monarchical ideas of absolute 'state' power,[50] towards a new model of the state as a civic union of the people, united under government. By framing the new American state as "[w]e, the people," the drafters of the Constitution repositioned the public sovereignty of the state in a populist frame: "for the collective body of the people to rule itself was essential, because, only if it could do so could individuals within society truly be said to live in a personal condition of freedom."[51] While this distinction between the state as the collective sovereignty of the citizenry, and the state as the government, has now been largely elided in the United States,[52] the sovereignty of "the people" was central to early American debates about politics and constitutional practice.[53] Indeed, the idea of a written constitution as a fundamental higher law—along with constitutional conventions to authorize that law—was rooted in the idea that the people as the collective body that comprised the state were independent of the government, and thus could never be directly identified with it. This is salient in relation to property/sovereignty debates: Benvenisti has argued that, on these terms, the putative tension between property/the individual owner and sovereignty/the state is a false dichotomy, because "'the state' is no[] more than the aggregate of individuals who define theirs and others' property rights through the political process."[54]

The narrative strands of the American property *nomos* were developed into traditions of American legal doctrine by justices who viewed private property—and specifically property law—as a catalyst of Americanism. One strand of emerging American property thought developed the underlying narrative of individual freedom as a restraint on interferences—either by competing individuals or by the state—with an individual's private property rights. Roscoe Pound described American legal thinking as unique for its "ultra-individualism, an uncompromising insistence upon individual rights

[50] *See* DANA D. NELSON, COMMONS DEMOCRACY: READING THE POLITICS OF PARTICIPATION IN THE EARLY UNITED STATES 46 (2016); JEAN BODIN, THE SIX BOOKES OF A COMMONWEALE: A FACSIMILE REPRINT OF THE ENGLISH TRANSLATION OF 1606, CORRECTED AND SUPPLEMENTED IN THE LIGHT OF A NEW COMPARISON WITH THE FRENCH AND LATIN TEXTS A15–16 (1962).
[51] *See* Peel, *supra* note 40, at 117, 121.
[52] *See* RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 237–38 (2016).
[53] CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 1 (2008).
[54] Eyal Benvenisti, *Sovereignty and the Politics of Property*, 18 THEORETICAL INQUIRES L. 447, 448 (2017).

and individual property as the central point of jurisprudence."[55] Indeed, this Americanism proved to be even more powerful than religion, reshaping the Puritan experience of piety and repentance around the growth, expansion, and commercialization of the new-found-land.[56]

A central question was how the governance of land should serve these new American values. In *Commodity and Propriety*, Gregory S. Alexander illustrated the complexities of American republicanism, from Jeffersonian ideals of Americans as a society of independent farmers to the vision of Americans as entrepreneurs.[57] At their core, both variants of republicanism relied on the narrative that preserving individual freedom was an essential component of the common good.[58] On the one hand, individual freedom was safeguarded by the sovereignty of private property rights against the state[59] (to the benefit of established property-owning proto-federalists such as Marshall, Washington, and Madison). Yet, at the same time, the pursuit of individual freedom provided the conceptual apparatus for removing barriers to the acquisition of new land by propertyless people—thus, enabling (white, male) newcomers to

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[55] Roscoe Pound, *Puritanism and the Common Law*, 45 AM. L. REV. 811, 815 (1911).

[56] *See id.*; *see also* Perry Miller, *Errand into the Wilderness*, 10 WM. & MARY Q. 3, 11 (1953) (noting that entrepreneurial activities were built on concepts of individual liberty in puritan New England).

> The exhortation to a reformation which never materializes serves as a token payment upon the obligation, and so liberates the debtors. Changes there had to be: adaptations to environment, expansion of the frontier, mansions constructed, commercial adventures undertaken. These activities had not been specifically nominated in the bond Winthrop had framed. They were thrust upon the society by American experience; because they were not only works of necessity but of excitement, they proved irresistible—whether making money, haunting taverns, or committing fornication. Land speculation meant not only wealth but dispersion of the people, and what was to stop the march of settlement? The covenant doctrine preached on the *Arbella* had been formulated in England, where land was not to be had for the taking; its adherents had been utterly oblivious of what the fact of a frontier would do for an imported order, let alone for a European mentality. Hence I suggest that under the guise of this mounting wail of sinfulness, this incessant and never successful cry for repentance, the Puritans launched themselves upon the process of Americanization.

Id.

[57] *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 186–87(1997).

[58] *See id.* at 188.

[59] *See id.* at 186.

stand on equal footing with their more established property-owning counterparts.[60]

Land was a primary asset for speculation in the new America. Opportunities to use and exploit the land were instrumental to forging the new nation state, as it transitioned from sites of individual production to an economy of collective and converging interests.[61] Legislation to enable the assertion of new land claims, or to dilute established claims, gave rise to conflicts about which vision of freedom should prevail under the new Constitution. The Contracts Clause of the Constitution and the Due Process Clause of the Fourteenth Amendment solidified the role of property rights in shaping both varieties of republicanism, and in limiting the power of the state.[62] In addition, the "vested rights" doctrine became the vehicle through which civic republicanism framed the relationship between private property and the state,[63] with property claims perhaps the most important of the vested rights to emerge in the early republic.

Initially, the vested rights doctrine was based not on the Constitution itself, but on the decision in *Calder v. Bull*.[64] U.S. Supreme Court Justices Chase and Iredell applied the concept to resolve the question of *ex post facto* legislation in the dissenting opinion.[65] Justice Chase described the principle of vested rights as a restraint that prevented "free [r]epublican governments" from violating established property rights.[66] The nascent concept was rooted in the proposition that the sovereignty of private property

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[60] *See id.* at 186–87. Many of the conflicts emerged as states granted exclusive franchises to individuals for the development of transportation or communication infrastructure. G. EDWARD WHITE, LAW IN AMERICAN HISTORY 243, 243–44 (2012). In that context, "[i]nstead of established property rights being pitted against the leveling tendencies of representative government, two sorts of property rights were at odds when states chose to encourage economic development by granting the owners of developing canals, bridges, or turnpikes exclusive or privileged franchises." *Id.* As White writes, "[t]he competitors of those new franchises claimed that their vested rights were being interfered with; the states maintained that they were fostering competition in the service of economic progress." *Id.* at 244.

[61] *See* Paul A. Gilje, *The Rise of Capitalism in the Early Republic*, 16 J. EARLY REPUBLIC 159, 160 (1996).

[62] *See generally* U.S. CONST. art. I, § 10, cl. 1; U.S. CONST. amend. XIV, § 1; ALEXANDER, *supra* note 57, at 188–210.

[63] ALEXANDER, *supra* note 57, at 185.

[64] *See generally* Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798); WHITE, *supra* note 60, at 202–03.

[65] *Calder*, 3 U.S. at 390–91.

[66] *Id.* at 388, 390–91. Justice Iredell stated that judges lacked the power to declare legislative acts null on the basis that the act violated the principles of natural justice, although these claims were *obiter dicta*, rhetorically aimed at supporting other considerations before the court. *See id.* at 399 (Iredell, J., dissenting).

rights limited the state's power to legislate.[67] In 1810, Justice Marshall's opinion in *Fletcher v. Peck*[68] solidified vested rights as a doctrine that placed limits on the state, and rooted this in the Constitution—albeit through reference to a constitutional provision that was not, on its face, concerned with land claims.[69] *Fletcher v. Peck* was a dispute over land sales that had been secured through the bribery of nearly every legislator in the state of Georgia.[70] The litigation concerned the validity of legislation enacted to undo those sales due to the corruption by which they were achieved.[71] In 1795 the Georgia Legislature had authorized the Governor to sell western Georgia lands known as the Yazoo lands (stretching from west Georgia to the Mississippi River) to four speculating companies.[72] The deal—described as the "greatest real estate deal in history" because of its seemingly too-good-to-be-true terms—prompted allegations of public bribery of the officials who had voted to grant the authority for the sale.[73] A year later, in the face of public scandal over the deal, the new Georgia legislature rescinded the transaction.[74] However, in the intervening period, the four companies had sold millions of acres to other speculators and settlors.[75]

Alexander Hamilton argued that the revocation of private property rights derived from these transactions, which were conferred for valuable consideration under legislative authority, and where the end-purchasers were innocent of the fraud, would contravene natural justice and social policy.[76] Armed with Hamilton's opinion, two of the investors brought a lawsuit to challenge the validity of the legislative repeal of the land sale.[77] Gregory Alexander described *Fletcher v. Peck* as: "pos[ing] a conflict between the security of land titles, once created by the legislature, and the power of the legislature to correct its prior acts that were the direct result of corruption."[78] It exposed the tension between the civic republican narrative of citizenship

[67] *See id.* at 388–89.
[68] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 126 (1810).
[69] *See id.* at 130, 135.
[70] *See id.* at 130–32.
[71] *See id.* at 131–32.
[72] ALEXANDER, *supra* note 57, at 188.
[73] *See id.* at 188–89.
[74] *See id.* at 189.
[75] *See id.*
[76] *See id.*
[77] *Id.*
[78] *Id.*

(correcting prior bad acts) and the state's interest in ensuring the marketability of land titles for future investors (protecting security of title).[79]

As noted above, land speculation was an important feature in the development of the American economy. One consequence was the calibration of risk appetites to potential rewards. Alexander described a context in which:

> [p]eople were willing to assume the risk of loss because the prospects for gaining their fortunes seemed high enough . . . . Georgia's policy of settling its frontier through favorable land sales would be seriously jeopardized, however, if subsequent purchasers who bought land from land companies with no notice of fraud were subject to losing their titles through legislative repeal of the original legislative grants. Out-of-state land speculators might be foolish enough to buy land sight unseen, but few of them would be willing to assume the risk that the state might snatch their titles away from them at any time.[80]

A critical distinction was drawn between the risks that *speculators* faced: between losses arising from the 'natural market'—something to be accepted in the normal course of business—and the losses that might result from *state* interference with land titles. Justice Marshall, upholding the title of the entrepreneurial purchasers, notwithstanding the backdrop of corruption, stated that: "[t]he past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact."[81]

The decision in *Fletcher v. Peck* drew on an early American tradition that viewed entrepreneurial activity as a means for promoting good social order.[82] It re-framed private property rights in land in terms that reached beyond the use value of land, to recognize the validity of speculative land entrepreneurialism.[83] Indeed, if

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[79] *See id.*
[80] *Id.* at 190.
[81] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810).
[82] *See* ALEXANDER, *supra* note 57, at 194 ("Maintaining the social and political order required that this sort of legislative sabotage, rationalized under the rubric of democracy, be blocked at the outset.").
[83] *See Fletcher*, 10 U.S. (6 Cranch) at 138.

property rights were framed in terms of land use relationships, there would have been little basis for validating the speculators' claims. It also reframed the way colonizing states approached native claims. *Fletcher v. Peck* was seemingly silent on the prior possessory claims of native tribes in lands that absent-owner-speculators were fighting over.[84] Yet, although the record appears only to address the claims of vested rights between competing white absentee speculators, the decision also had a shadowy impact on native possessory claims to the same land. As Stuart Banner has shown, much of the land at issue in *Fletcher v. Peck* was already occupied by Native inhabitants.[85] Consequently, another issue that hung in the balance of the case was whether white settlers could bypass Indian claims to land and simply enforce rights acquired from the state; or whether they were obligated to transact with the native inhabitants, in addition to seeking state-backing for the acquisition of title.[86]

The Court accepted Fletcher's argument that the conveyance from Georgia to speculators was invalid, but overlooked his claim that Georgia had no legitimate basis on which to allocate the land in the first place, since the federal United States government owned the land subject to the Indians' prior right of occupancy.[87] Peck argued that the State of Georgia owned the land, also subject to the Indian right of occupancy.[88] Neither party suggested that the Indians themselves owned the land, seemingly assuming that the title to the land was subject to state determination, not a joint question between state and tribal entities.[89] One of the lawyers in the case asked during oral arguments whether Georgia could in fact convey land where Indian title had not been extinguished.[90] Peck's lawyer responded by asking: "What is the Indian title? . . . It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather

[84] *See id.* at 132.
[85] *See* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 171–72 (2005). C. Peter McGrath suggests that the land sales may have even been more complicated, with claims by the U.S. government, Spain, and Indian Nations involved. *See* C. PETER MCGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF *FLETCHER V. PECK* 14 (1966). McGrath notes that George Washington, as President, raised concerns about the legality of these sales because of the possibility that they may impair relations between Indian tribes and the federal government. *Id.* at 31.
[86] *See* BANNER, *supra* note 85, at 174.
[87] *See id.*
[88] *See Fletcher*, 10 U.S. (6 Cranch) at 139; *see also* BANNER, *supra* note 85 at 171.
[89] *See* BANNER, *supra* note 85, at 172.
[90] *See id.* at 172.

than inhabited. It is not a true and legal possession."[91] Thus, *Fletcher v. Peck* accepted that settler-speculators could establish vested claims that would be protected by law, but that Indian claims were not.[92] This rule was reaffirmed in the Supreme Court decision *Johnson v. M'Intosh*, where the Discovery Doctrine was applied to validate state transactions of land even where an Indian tribe had sold its rights to a different party.[93]

It was not until 1791, with the adoption of the Bill of Rights, that the Fifth Amendment to the Constitution provided for constitutional protection against deprivations of property without due process of law and takings of property for public purposes without just compensation.[94] Yet, notwithstanding the direct recognition and protection of private property rights in the Fifth Amendment, the U.S. Supreme Court did not ground the concept of vested rights in the Fifth Amendment. Instead, Justice Marshall applied the Contracts Clause of the Constitution.[95] By construing land grants as "contract[s]," he reasoned that a "fair construction [of] the [C]onstitution" implied a mandate to avoid interference by states with contractual relations of individuals, independent of the nature of the prior transaction.[96]

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[91] *See id.*
[92] *See id.* at 174.
[93] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823). As noted by Robert Williams, Justice Marshall's decision in *Johnson* uncritically accepts the European doctrine of discovery based on colonization and conquest. *See* WILLIAMS, *supra* note 35, at 325–27. Notably, the decision rests equally on the impotence of the "Courts of the conqueror" to decide matters that conflict with the claims of conquest and the moral rhetorical claims that justified colonizers asserting claims over Indian tribes in the new world. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 385, 388–89 (1993). The foundation of these claims were not unusual. Daniel Webster in 1820 referred to Indian title in a speech promoting the need for expansion of settlements in the West as a settled matter that was extinguished by occupation:

> From the very origin of the Government, these Western lands, and the just protection of those who had settled or should settle on them, have been the leading objects in our policy, and have led to expenditures, both of blood and treasure, not inconsiderable . . . though necessary sacrifices, made for high proper ends. The Indian title has been extinguished at the expense of many millions.

Daniel Webster, *Speech Before the U.S. Senate*, *in* THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION: SELECTED DOCUMENTS 18 (Herman Belz ed., 2000).
[94] *See* U.S. CONST. amend. V; Robert F. Manfredo, Comment, *Public Use and Public Benefit: The Battle for Upstate New York*, 71 ALB. L. REV. 673, 677 (2008). The Constitution passed in 1787 only mentions government owned property and Congress' power to dispose of it. *See* U.S. CONST. art. IV, § 3.
[95] *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137 (1810).
[96] *Id.*

With speculators protected by the courts, the thirst for more lands increased calling for more lands to be opened for settlement. Starting in 1827, the states of Georgia, Alabama (1829), Mississippi (1830), and Tennessee (1833) all passed extension laws that extended state jurisdiction into Indian territories within their state.[97] Leading up to these enactments, the sectionalism of the country that was born in the Constitutional Convention was calcified with the Missouri Compromise.[98] A key driver of the Missouri Compromise was a desire to open up western lands for settlement and expansion (and therefore speculation).[99] Sectionalism was driven along the question of slavery and representation in Congress; the Compromise provided for the admission of Maine as a free state and Missouri as a slave state.[100] But these tensions were fueled by the underlying question of the state's public sovereignty to self-define the limits of its jurisdiction over a class of property (in this case, human chattel slavery),[101] as well as being bound up with the question of how power should be shared with the southern planter class.[102]

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[97] *See* Tim Alan Garrison, *Inevitability and the Southern Opposition to Indian Removal*, *in* THE NATIVE SOUTH: NEW HISTORIES AND ENDURING LEGACIES 110 (Tim Alan Garrison & Greg O'Brien eds., 2017).

[98] *See* Christopher Apap, *The Genius of Latitude: Daniel Webster and the Geographical Imagination in Early America*, 30 J. EARLY REPUBLIC 201, 205, 207 (2010).

[99] *See id.* at 207.

[100] *See* Adam Rothman, *Slavery and National Expansion in the United States*, 23 ORG. AM. HISTORIANS MAG. HIST. 23, 24 (2009). One reason for northern opposition to the disproportional addition of slave states was the 3/5 compromise, which allowed slave states to count slaves as 3/5 of a person for purposes of congressional representation. Kevin M. Smith, *A Case Against a Convention of the States*, 80 ALB. L. REV. 1523, 1531–32 (2017). In the early 19th century, Virginia was already the most populous state in the nation, though the vast majority of its population was enslaved persons and its white population showed slower signs of growth. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 526 (2009). Northern states feared that the addition of more slave states risked a congressional majority by giving southern states both the House of Representatives and the Senate. *See id.* at 532. The Missouri Compromise provided for balance at least in the Senate, where no new slave state could be added without a corresponding free state. *See* Matthew Mason, *The Maine and Missouri Crisis: Competing Priorities and Northern Slavery Politics in the Early Republic*, 33 J. EARLY REPUBLIC 675, 681–83 (2013).

[101] *See* Gordon S. Wood, *The Trials and Tribulations of Thomas Jefferson*, *in* JEFFERSONIAN LEGACIES 411 (Peter S. Onuf ed., 1993). In a letter to John Holmes, representative of Maine, Thomas Jefferson states that northern efforts to limit slavery were "a fire bell in the night." *Id.* Jefferson further expanded this thought, observing that Congress "had no 'right to regulate the conditions of the different descriptions of men composing a state'" and that "[o]nly each state had the 'exclusive right' to regulate slavery" within its boundaries. *Id.* These sentiments were prominent throughout the south.

[102] *See* John Craig Hammond, *President, Planter, Politician: James Monroe, the Missouri Crisis, and the Politics of Slavery*, 105 J. AM. HIST. 843, 845 (2019). One scholar has pointed to President Monroe, a southern planter and advocate for State's rights embracing of the

As states increasingly identified as separate sovereigns, they began to exert their sovereignty not only in the area of slavery but also in relations with Native tribes within their territories, and through Extension Acts that purported to give states jurisdiction over Native Tribal lands.[103] The Extension Acts were direct challenges to the historical understanding of relationships between states, tribes, and the federal government.[104] In the early period of the U.S. republic, private claims to land occupied by Native tribes required a two-fold process, whereby speculators would negotiate to purchase land from the native tribe, and then seek recognition of the legitimacy of those claims from the U.S. land patent office.[105] This approach to Indian title echoed the practices of European colonizers when dealing with Indian land claims:

> While Europeans recognized some Indian interest in land, they never "granted" the tribes all the sticks in the common-law bundle of property rights; in particular, colonists consistently narrowed or entirely denied the Indians' power to sell land. First, while Indians formally had the power to refuse to sell, in reality this was not an option. Second, European sovereigns asserted the right to sell Indian land to their citizens *before purchasing from the Indians*. Such a purchaser took title "subject only to the Indian right of occupancy," but otherwise had a full fee interest. Combined with the exclusive right to purchase Indian lands (or conquer the tribe) . . . this created a novel and peculiar "bifurcated title." Ultimate title resided with the European sovereign or

compromise, noting that "[o]ver the course of the Missouri crisis, Monroe's actions were driven by his concerns for maintaining the privileged position of Virginia's planter class both at home and within the Union." *See id.* at 852. While committed to Congress's defeat of territorial limits on slavery, he also saw the potential for a non-compromise threatening the political power of the Virginia gentry. *See id.* At that point, Monroe changed course, supporting the compromise. *See id.* Monroe's views and change of position aligned with traditional views that entrepreneurial activity and government should be carried out by certain kinds of elite citizens, similar to the animating views of Marshall in *Fletcher v. Peck*. *Compare id.* (detailing Monroe's views on compromise and change of position), *with* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 134, 137 (1810) (noting the primacy of contracts and ownership of property as concepts in American law).

[103] *See* Garrison, *supra* note 97, at 110.

[104] *Id.*

[105] *See* Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1078 (2000). Kades captures the power/powerlessness that Indian title presented to Indian Tribes that influence American views on Indian title. *See id.* at 1068.

> its grantee, while the Indian occupants retained "Indian title" until they sold, or were otherwise relieved of their lands.[106]

Southern states saw these expansion acts over Indian territory as a dual opportunity:[107] first, to reaffirm their constitutional authority over all relationships with tribes except for commerce, which was reserved to Congress in the Constitution;[108] and second, to claim new lands for the white settlers without engaging with the federal state.[109]

The atmosphere of speculation played an integral role in both the rhetoric and intended outcome of the Extension Acts. For example, in Georgia, dissidents William Schley and Robert Campbell opposed the Extension Acts on basis of the rights of Indian people to their native lands.[110] Schley wrote that "[t]he Indians have a natural right to the occupancy of all the lands within their boundaries, and . . . may enjoy that right undisturbed until they shall voluntarily relinquish it."[111] Similarly Campbell, a Savannah lawyer, "offered to fund a petition against his state's general assembly," writing that "[i]n modern times in civilized countries there is no instance of expelling the members of a whole nation from their homes or driving an entire population from its native country," and predicting that the enactment of the Act by Georgia would "bring enduring shame to Georgia's posterity."[112] In Mississippi, land speculators opposed the Extension Act because they feared that it might create an oversupply of land and diminish the value of their holdings.[113] On the whole, however, as Tim Alan Garrison reflected, the Extension Acts were supported by a population that "cared deeply about white political equality but expressed little concern about the property and political rights of their Native neighbors."[114]

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[106] *Id.* at 1078.
[107] *See* Garrison, *supra* note 97, at 110–11. Fomenting at the same time was the nullification crisis in South Carolina in which federal tariffs were declared unenforceable by the state. *See id.* at 111. Together with the Missouri crisis eight years before, these Extension Acts were viewed as yet another legal challenge to federal power to regulate the affairs within the boundaries of the state. *See id.* at 110–11.
[108] *See* U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").
[109] *See* Garrison, *supra* note 97, at 110.
[110] *See id.* at 111, 115.
[111] *Id.* at 111.
[112] *Id.* at 115.
[113] *Id.* at 112.
[114] *Id.* at 115.

Following the states' assertions of claims to Indian territory, on May 28, 1830, President Andrew Jackson signed into law the Indian Removal Act, which authorized federal forces to forcibly remove Indian occupations east of the Mississippi river in exchange for territory west of the Mississippi.[115] Georgia wasted little time in redistributing claims to land to white settlers.[116] In the final legislative session of 1830, the Georgia General Assembly passed legislation requiring a survey of Cherokee lands and the distribution of it to white settlers by lottery.[117] The state followed that up by sending state surveyors into the territory to survey the lands.[118] In response, one newspaper condemned the Georgia Governor William Lumpkin for the naked land grab, asking if it was a "cue of the attributes of *Justice* or of *Wisdom* . . . to get possession of lands or money . . . *by means fair or foul?*"[119] Condemning the land grab as naked aggression, the newspaper asked if it "[was] honest then to seize on, and take by force, a piece of property that pleases our fancy but does not exactly belong to us," asserting that the policy was one of "*might gives right*" rather than one of an "honest, pious man."[120] Despite the admonitions by individuals and newspapers in the south, by 1843 federal forces had effectively moved every major tribe from lands east of the Mississippi River.[121]

With more land now available, the question about who was in the best position to receive these lands re-emerged. The vested rights doctrine affirmed in *Fletcher v. Peck* supported a land distribution system that relied on speculators to distribute lands.[122] Indeed, the Georgia General Assembly's decision to dispose of lands by lottery was in direct contrast to its decision in the 1795 Yazoo Land Scheme,

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[115] *See* Indian Removal Act, Pub. L. No. 21-148, 4 Stat. 411 (1830) (codified as amended at 25 U.S.C. § 174 (2000)). At least one author has suggested that the Indian Removal Act signed by Jackson was later associated with protecting Indians in the face of state advances on Indian territory. *See* Frickey, *supra* note 93, at 392, 395. In this context, the later Marshall cases *Cherokee v. State of Georgia* and *Georgia v. Worcester* have been seen as Marshall's declaration that to the extent that states were going to assert territorial claims over Indian lands, they would do so without the aid of the U.S. courts. *See id.* at 391, 394–95. In addition to the potential crisis of scaled government jurisdiction between states and the federal government, this also raised a scaled tension between the co-equal branches of government in the executive and the courts. *See id.* at 405 n.108. The *Worchester* decision purportedly prompted Jackson to respond that "John Marshall has made his decision: *now let him enforce it!*" *Id.*

[116] *See* Garrison, *supra* note 97, at 118.

[117] *Id.*

[118] *See id.*

[119] *Id.* at 119.

[120] *Id.*

[121] *See id.* at 107.

[122] *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 125–27, 143 (1810).

when speculators were favored to receive cheap lands for resale.[123] The change in national attitude under President Jackson set the vested rights doctrine on a collision course with a second narrative of property and individual freedom that emerged in the nineteenth century—the narrative of the independent entrepreneur. While the Marshall court remained keen to protect economic interests created by states based on a theory of protecting existing rights, later courts perceived a conflict between state-created rights and individual freedom. If states vested owners with exclusive rights in a market free from competition, then how could the market remain open to entrepreneurialism?

The Supreme Court addressed this question in *Charles River Bridge v. Warren Bridge*.[124] The question in this case was whether the State of Massachusetts could grant a corporate charter to the Warren Bridge Company to construct a new bridge for commercial traffic between Boston and Charleston.[125] The new bridge was in direct competition with an older bridge, which charged tolls for passage, and was constructed under an exclusive state charter in 1785.[126] Under the old vested rights doctrine of the Marshall Court, these rights would have been protected from "any such encroachments upon the rights and liberties of the citizens."[127] The majority of the Court, who were mostly Jacksonian Democrats, identified the conflict as one between vested rights and freedom of opportunity.[128] Chief Justice Taney, for the majority, held that no charter granted by legislative bodies should be inferred to include a monopoly power over economic development.[129] Although property rights were to be "sacredly guarded," other members of the community were entitled to freedom of opportunity, and the "well

[123] *Compare* Garrison, *supra* note 97, at 118 (detailing the Georgian disposition of land by lottery), *with* ALEXANDER, *supra* note 57, at 188 (describing the 1795 land scheme, which authorized the conveyance of land to four land-speculating companies).

[124] Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

[125] *Id.* at 539.

[126] *See id.* at 536–38.

[127] *See id.* at 598 (Story, J., dissenting). Story in dissent goes into great detail about the long-standing history (nearly three centuries' worth) of royal charters and the rights of public citizens who were the beneficiaries thereof to exploit those claims without interference. *See id.* at 598–600. He also suggested that contemporary authority found that acts of Parliament that granted charter rights to individuals should be interpreted not as laws (capable of being repealed like any other) but rather like royal charters, and if the unambiguous intent of the grant was to create an exclusive license, then that intent should be upheld. *See id.* at 600.

[128] *See id.* at 540 (majority opinion); ALEXANDER, *supra* note 57, at 206.

[129] *See id.* at 567.

being of every citizen depend[ed] on [the] preservation [of this right]."[130] Taney's rejection of vested rights in this case has been described as a pragmatic move in service of new technological advancements that promised economic growth.[131] This signaled the emergence of a more dynamic, creative and expansive conception of property.[132] It also reflected the evolving role of entrepreneurial activity, from supporting to disrupting social hierarchies, and thereby promoting egalitarian opportunities in the new republic.[133]

The third major movement in the maturing of the vested rights doctrine came on the heels of the U.S. Civil War. Competing social narratives about the conflict between northern and southern states defined the war either in terms of the southern states' rights claims versus northern anti-slavery efforts;[134] or in terms of the slave's natural right to his own labor and the property rights of southern slave owners.[135] Both narratives underlined the role of private property rights in the re-making of the American state, as well as

[130] ALEXANDER, *supra* note 57, at 207.

[131] *See* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 118 (1989).

[132] *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 27–28 (1956).

[133] *See* ALEXANDER, *supra* note 57, at 206.

[134] *See, e.g.*, EDWARD A. POLLARD, THE LOST CAUSE; A NEW SOUTHERN HISTORY OF THE WAR OF THE CONFEDERATES 34 (New York, E.B. Treat & Co. 1866) [hereinafter A NEW SOUTHERN HISTORY]. After the Civil War, the framing of the conflict between north and south as a struggle for states' rights became encapsulated by the Civil War as a lost cause. The phrase was first popularized by journalist Edward Pollard, who wrote in 1866 a book titled THE LOST CAUSE; A NEW SOUTHERN HISTORY OF THE WAR OF THE CONFEDERATES. *See generally id.* He followed that book in 1868 with a publication titled THE LOST CAUSE REGAINED. *See generally* EDWARD A. POLLARD, THE LOST CAUSE REGAINED (New York, G.W. Carleton & Co. 1868) [hereinafter THE LOST CAUSE REGAINED]. Besides being books that mythologized southern culture as valiant and chivalrous, they relegated the conflict between the north and south to one based on the rights of southern states to preserve the culture they created, rather than directed at conflicts around slavery. *See* A NEW SOUTHERN HISTORY, *supra*, at 34–35; THE LOST CAUSE REGAINED, *supra*, at 14–15. This narrative followed those sectional differences over slavery that stemmed from the right of self-determination is what animated the Civil War. *See* Herman Belz, *Abraham Lincoln and the Natural Law Tradition*, NAT. L., NAT. RIGHTS, & AM. CONSTITUTIONALISM, https://www.nlnrac.org/american/lincoln [https://perma.cc/DVJ2-2W2K]. On the other hand, northern fire branders saw the conflicts between the states as about the moral and natural rights that slavery posed. *See id.*

[135] *See* Cynthia Elaine Tompkins, *Title VII at 50: The Landmark Law Has Significantly Impacted Relationships in the Workplace and Society, but Title VII Has Not Reached Its True Potential*, 89 ST. JOHN'S L. REV. 693, 719, 745 (2015). Leading up to the Civil War, abolitionists such as William Lloyd Garrison and Frederick Douglas identified slavery as the principle cause of the Civil War. *See id.* This naturally put property claims of owners at the forefront of the conflict, identifying the war around rights to own certain property and rights to one's labor as a natural right. Drawing on Thomas Jefferson's words in the Declaration of Independence, the natural right to one's own labor pre-empted any claim to other types of property, especially claims that deprived individuals of the freedom to choose how their labor would be deployed. *See id.* at 698.

focusing legal thought on the role the state should play in upholding, or interfering with, those rights; and on how to resolve property claims that were based in an indefensible institution. One legacy of the conflict was the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments—the most significant changes to the U.S. Constitution since the adoption of the Bill of Rights more than sixty years prior.[136] Indeed, this change was arguably more far-reaching, since its effect was to incorporate provisions of the U.S. Constitution, which previously applied only to the federal Government, to each of the states.[137] In one move, the U.S. Constitution scaled distinctive powers between different layers of the federalized state, as well as re-scaling rights and powers between citizens and state-level institutions, and between citizens and the federal state.

Over the forty years that followed, judicial interpretations of these amendments (particularly the Fourteenth Amendment, which incorporated the Bill of Rights, and which included the Due Process Clause which provided for constitutional protection of private property against the states)[138] with respect to property relationships spurred a dramatic new phase of jurisprudential debate about the vested rights doctrine. At issue were the limits placed on states and municipalities in their role as institutions of the state with authority to regulate land uses that impacted on existing ownership claims. This question was particularly salient in cases involving public health and safety, where claims to operate businesses, or to use land for certain purposes, conflicted with state regulations for the purpose of protecting the public. On the one hand, the Fourteenth Amendment appeared to provide constitutional weight to the Jacksonian view that the state should not interfere with entrepreneurial freedom of opportunity to create new property interests. However, in practice, the court was faced with the challenge of effective governance of collective property problems, balancing the powers of the state to act in the collective interest with the vested claims individuals might assert at the level of the states under the Fourteenth Amendment. The solution was the emergence of police powers, which the court defined as "areas traditionally left

[136] *See Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SEN., https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm [https://perma.cc/Y2N5-ME8Z] (noting the Thirteenth Amendment was passed in 1865, with the Fourteenth and Fifteenth Amendments following in 1868 and 1870, respectively); Manfredo, *supra* note 94, at 677 (noting the Bill of Rights was ratified in 1791).

[137] *See* U.S. CONST. amend. XIV.

[138] *See id.*

to the state," in which states were free to regulate.[139] The tension then, that vested rights presented in the 19th century reflected what William Hurst observed as the transition from an 18th century concern for "the integrity of the community," to a concern for "individualism."[140]

Willard Hurst argued that the concept of vested rights was prominent in judicial and popular narratives for two reasons: "(1) the central place of the modern institution of private property in [American] politics [and] . . . economic organization; [and] (2) the extent to which the challenge of the unopened continent dominated [the American] imagination . . . ."[141] Vested rights doctrine performed an important function in protecting and promoting a culture of private entrepreneurship within American legal narratives. Alexander argued that it also performed an important function in preserving the existing hierarchy that Marshall, Hamilton, Washington, and Madison—all land speculators before, during, and after their time in office—were part of.[142] Disrupting the Yazoo land transactions would have risked unseating the ordered hierarchy of these state actors, who were also stakeholders (investors) in the property system of the new republic. It would have favored an unruly democratizing movement that was perceived as threatening the economic security of some, and the social and political security of all.[143]

Throughout this period, the criteria for citizenship and its effects with respect to private property shaped American property thought with respect to trespass, ownership, and use of land. While native inhabitants were not recognized as citizens, their collective rights as

[139] *See* Charles River Bridge Co. v. Proprietors of Warren Bridge, 36 U.S. 420, 477 (1937) ("[The Court] cannot deal thus with the rights reserved to the states; and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well-being and prosperity."); *see also* Thomas Reed Powell, *The Police Power in American Constitutional Law*, 1 J. COMPAR. LEGIS. INTL. L. 160, 160 (1919) (noting that original conceptions of the police powers were defined as those areas that states were free to regulate). Later in the 19th Century, the police powers became associated with regulation over the health, safety, and welfare of the citizens of a state. *See, e.g.*, Thorpe v. Rutland and Burlington R.R. Co., 27 Vt. 140, 149 (Vt. 1855); Commonwealth v. Alger, 61 Mass. 53, 108 (Mass. 1851) (using health safety and welfare as defining traits of the police powers).

[140] *See* HURST, *supra* note 132 at 36–37.

[141] *See id.* at 8.

[142] *See* ALEXANDER, *supra* note 57, at 191–92; *The Founders and the Pursuit of Land*, LEHRMAN INSTITUTE, https://lehrmaninstitute.org/history/founders-land.html [https://perma.cc/2SNU-5X8C].

[143] *See* ALEXANDER, *supra* note 57, at 192.

a tribe were recognized in the early period of the U.S. Republic.[144] As rights to territories and space were forcefully retracted in the mid-nineteenth century, so too were the rights of these populations.[145] Black non-citizens were permitted to enter legitimate transactions with European-Americans until the state disarmed this power in the late nineteenth century.[146] The hierarchy of power with respect to access, occupation and ownership of land scaled both ownership and land use, with enduring effects. It elevated European-Americans in a hierarchy built on land relations: giving them the power to create valid legal claims to land, to extinguish native claims and to validate African ownership by virtue of their willingness to transact.[147] This scaled hierarchy was underpinned by the principles that were embedded in the constitutional framework from the outset of the U.S. formation and significant social limits on racialized property relations.

These narratives have left a lasting legacy within American legal discourse. Purdy articulated three dominant strands of American property theory: (1) the libertarian conception of private property rights as the basis of negative liberty, freedom from interference or state intrusion; (2) welfarist conceptions of property rooted in market efficiency and material wellbeing; and (3) personhood theories of property, that promote positive liberty and autonomy, the capacity to enter into and cultivate relationships.[148] While these are often conceived of as oppositional positions within property debates, Purdy observed that:

> [e]ven as the alternative approaches to property display differences, they also bear profound family resemblances.

[144] *See* Indian Citizenship Act of 1924, Pub. L. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)); *see also* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 47 A.B.A. HUM. RIGHTS MAG. (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/ [https://perma.cc/E29F-X6EK].

[145] *See, e.g.*, Fletcher, *supra* note 144. For African Americans, it would take the passing of the Thirteenth and Fourteenth Amendments for them to claim the mantle of citizenship and the unequivocal right to property. *See* Marc L. Roark, *Loneliness and the Law: Solitude, Action, and Power in Law and Literature*, 55 LOY. L. REV. 45, 65–67 (2009) (describing the adoption of the Civil War Amendments and their later interpretation). For Indians, it would be another sixty years after that for native peoples to be granted U.S. Citizenship when the Indian Citizenship Act was signed into law in 1924. *See* Indian Citizenship Act of 1924.

[146] *See* Roark, *supra* note 145, at 67–69.

[147] *See supra* notes 136–37, 139–40 and accompanying text.

[148] *See* PURDY, *supra* note 26, at 19–20.

> These reflect the fact that they have emerged as partial secessions from a fairly unified vision of the place of property in social order.[149]

While competing property theories vie to establish normative dominance—defining and re-defining the role or essence of property, its values and purpose(s)—Purdy argued that "they continue to have their greatest appeal not as competing master values, but as mutually reinforcing parts of an integrating property regime."[150]

Purdy located this normative pluralism in the "integrating ambitions that defined property's normative tradition at the outset."[151] The reality of hybrid property norms and values is also accommodated, in part, through the U.S.'s multi-scalar approach to governance—developed during the early period of the state to mediate competing narratives of democratic accountability and concerns about the accountability of the state to the people. Although the drafters of the U.S. Constitution were anxious about potential overreach and interferences with individual freedom by an overly powerful centralized state, they remained committed to principles of good government and order.[152] These tensions were resolved by vesting significant control over individuals in the hands of state governments.[153] By leaving large areas of the development of American law—including the exercise of police powers,[154] housing, and land use—within the jurisdiction of states,[155] the United States' multi-level legal system was scaled to accommodate normative hybridity. Property was central to this process, as the power and functions of the city were crafted to shape a new urban legal order.[156] Under the Amended Constitution, the state became at once multi-

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[149] *Id.* at 23.

[150] *Id.*

[151] *Id.*

[152] *See* HALL, *supra* note 131, at 5.

[153] *See id.*

[154] *See id.* This created the jurisdiction for state and local decisions that respond to squatting; for example, the exercise of police powers by U.S. cities and states in response to so-called blight led to the formation of New York City's Lower East Side squatter communities. *See infra* notes 377–407 and accompanying text.

[155] *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[156] *See generally* HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 21–32 (1983) (discussing political thought around the overlap of property and legal order).

scalar in every sense of the word: not only was state power vertically distributed, but multiple official narratives and rationales for action relating to land were distributed across the institutions of the state.

II. SQUATTING AND THE LAW

A. Adverse Possession and Schemes for Normalizing Land Claims

American legal approaches to, and attitudes about, squatting[157] emerged from the legal norms that evolved from the origin of states as colonies and territories of European powers, as well as conflicts in the nineteenth century about the distribution of large amounts of land amongst new settlors. These narratives were also influenced by the on-the-ground realities of building new communities in territory that was treated as if it were unoccupied.[158] In this period, adverse possession laws and criminal sanctions were deployed to bolster land

[157] The language applied to occupants of land mattered significantly in the early days of U.S. settlement, as it usually does. As one scholar notes: "The set of attitudes which made the conquest of the American frontier a matter of social, historical, and political reality, and which became one of the primary forces in the development of a unified complexity to be called 'the American Spirit' is best defined in the characteristic language of the frontiersman." C. Merton Babcock, *The Social Significance of the Language of the American Frontier*, 24 AM. SPEECH 256, 256 (1949). Indeed, as Babcock suggests, the labels associated to various activities on the frontier had specific meanings, conjuring "historical, social, and spiritual significance." *Id.* Claimants were those that secured claims to land, and then built claim shanties to mark their occupation, while squatters were those that occupied land, often with improvements, "and took their chances on confirming legal title at a later date." *Id.* at 257–58. The term *squatter* also referred to those that entered lands prior to their official survey. *Id.* at 258; *see also* Melvin Van Den Bark, *Nebraska Pioneer English*, 7 AM. SPEECH 1, 14 (1931) (noting that the term *squatters* referred to those that "took" a claim, reserving the term *settlers* for those who acquired a right from a government office, including those that were previous squatters). Paul Gates notes that the term *speculator* carried an equally complicated meaning for many westerners. *See* Paul W. Gates, *The Role of the Land Speculator in Western Development*, 66 PA. MAG. HIST. & BIOGRAPHY 314 (1942), *reprinted in* THE JEFFERSONIAN DREAM: STUDIES IN THE HISTORY OF AMERICAN LAND POLICY AND DEVELOPMENT 7–9 (Allan G. Bogue & Margaret Beattie Bogue eds., 1996).

[158] *See* Douglas W. Allen, *Homesteading and Property Rights: or, "How the West Was Really Won,"* 34 J. L. & ECON. 1, 6 (1991). The United States grew most of its territory "by purchase from European powers rather than conquests." *Id.* As Allen notes:

> The Louisiana Purchase (1803) added over 500 million acres, . . . Texas (though the 200 million acres were never part of the public lands) was annexed in 1845, the Gadsden Purchase (1853) added another 19 million acres. The Oregon Territory was settled diplomatically with Britain in 1846, and, although a war with Mexico was fought over the Pacific southwest, its 334 million acres were eventually purchased in 1848.

Id. In Part I, I explain how the nation's views of indigenous claims changed as demand for more land emerged. *See supra* notes 97–121 and accompanying text.

policies to manage the vast supply of empty land.[159] Because states emerged as distinct colonies or territories, they adapted to these conditions in the context of local factors. This complicated the formalization of land conveyances, and the role that titles might play in settling claims to occupied land. Importantly, the United States, unlike other countries, does not have a unitary approach to solving land claims. Instead, each of the fifty states has developed its own criminal laws (which in some cases extend to trespass by squatters, to varying degrees), and its own civil laws to protect private property rights, to provide remedies for owners to recover land, and to govern adverse possession and prescription based on long occupation by squatters.[160] Rather than offering an exhaustive account of the law of squatting in each of the fifty states, this section describes the conditions that influenced those laws and provides illustrations of how adverse possession laws, statutory land distribution schemes, and criminal laws were deployed to further national and local agendas.

Across the laws of adverse possession and criminal sanctions for squatting in U.S. States and territories, three major themes emerge. First, states legislated to legitimate actual transactions of lands that, despite the good faith of the buyer, lacked legal force because of the disorganized state of early land titles.[161] Second, laws protecting land speculators often led to conflict with local communities, which expected land ownership to be geared toward greater community benefit, particularly to support the development of local infrastructure.[162] Third, legal approaches to squatting ebbed and flowed depending on shifting alignments between the actions and interests of squatters and the state's political and policy objectives regarding land claims.[163] What emerged was a patchwork of adverse possession laws that changed over time and varied from place to

[159] PEÑALVER & KATYAL, *supra* note 15, at 57.

[160] *See* Shannon Dunn McCarthy, *Squatting: Lifting the Heavy Burden to Evict Unwanted Company*, 9 U. MASS. L. REV. 156, 159, 163, 181 (2014).

[161] *See* Paul W. Gates, *Tenants of the Log Cabin*, 49 MISS. VALLEY HIST. REV. 3, 9–14 (1962). These legislative acts were built around adverse possession laws but favored transactions that were seemingly legitimate by reducing the time period necessary to quiet title. *See* Allen, *supra* note 158, at 8; *see also infra* notes 318–321 and accompanying text.

[162] *See* Gates, *supra* note 157, at 13. This was largely revealed through the reluctance of speculators to pay taxes while local communities sought to expand services to community members. *See id.* at 17; *see also infra* notes 330–335 and accompanying text.

[163] *See infra* notes 336–349 and accompanying text. These issues emerged in the relationship to how adverse possession aligned with other means to assert legal title, like pre-emption or homesteading rights, and mitigate harms that title allocation had towards actual possessors. *See id.*

place. In some contexts, the emphasis has been on correcting errant deeds where squatters occupied under color of title; in other cases, the emphasis has been on the state's interest in collecting tax revenue against the land; and in the case of homesteading, the state's official agenda was based on promoting the value of productive land use. These themes re-emerged in the 1980s and 1990s as squatters took over properties in New York's lower east side; in cities where local governments outlawed rough sleeping on public property; and in states dealing with high volumes of foreclosed and empty properties in the wake of the 2008 housing crisis and the Great Recession that followed.

Across the states and territories, adverse possession claims are governed by a range of time periods and criteria.

Adverse Possession Requirements by State

State	Year Territory Acquired by U.S.	Time Period (Years) for Claims for Adverse Poss.	Time Period (years) for Claims for Ostensible Adverse Poss.	Requires Color of Title for Ostensible Claims	Requires Payment of Taxes for Ostensible Claims	Requires both Color of Title and Payment of Taxes for Ostensible Claims
Alabama	1819[164]	20[165]				
Alaska	1959[166]	10[167]				
Arizona	1912[168]	2[169]				

[164] *Order of States' Admission*, ARK. SEC'Y OF STATE, https://www.sos.arkansas.gov/education/arkansas-history/history-of-the-flag/order-of-states-admission [https://perma.cc/4W8U-3YTX].
[165] ALA. CODE § 6-5-200(a)(1) (2021).
[166] *Order of States' Admission*, *supra* note 164.
[167] ALASKA STAT. § 09-45-052(a) (West 2021).
[168] *Order of States' Admission*, *supra* note 164.
[169] ARIZ. REV. STAT. ANN. § 12-522 (2021).

Arkansas	1836[170]		7[171]		X[172]	
California	1850[173]		5[174]		X[175]	
Colorado	1876[176]	18[177]	7[178]			X[179]
Connecticut	1788[180]	15[181]				
Delaware	1787[182]	20[183]				
Florida	1845[184]		7[185]	X[186]	X[187]	
Georgia	1788[188]	20[189]	7[190]	X[191]		
Hawaii	1959[192]	20[193]				
Idaho[194]	1890[195]		20[196]	X[197]	X[198]	
Illinois	1818[199]	20[200]	7[201]		X[202]	

[170] *Order of States' Admission*, *supra* note 164.
[171] ARK. CODE ANN. § 18-11-106(a)(1)(A) (2021).
[172] *Id.*
[173] *Order of States' Admission*, *supra* note 164.
[174] CAL. CIV. PROC. CODE § 325(b) (West 2021).
[175] *Id.*
[176] *Order of States' Admission*, *supra* note 164.
[177] COLO. REV. STAT. ANN. § 38-41-101(1) (West 2021).
[178] *Id.* § 38-41-108.
[179] *Id.*
[180] *Order of States' Admission*, *supra* note 164.
[181] CONN. GEN. STAT. § 52-575(a) (West 2021).
[182] *Order of States' Admission*, *supra* note 164.
[183] DEL. CODE ANN. tit. 10 § 7901 (West 2021).
[184] *Order of States' Admission*, *supra* note 164.
[185] FLA. STAT. ANN. § 95.12 (West 2021).
[186] *Id.* § 95.16(1).
[187] *Id.* § 95.18(a)(1).
[188] *Order of States' Admission*, *supra* note 164.
[189] GA. CODE ANN. § 44-5-14 (2021).
[190] *Id.* § 44-5-164.
[191] *Id.*
[192] *Order of States' Admission*, *supra* note 164.
[193] HAW. REV. STAT. ANN. § 657-31 (West 2021).
[194] In 2006, the state of Idaho increased the time for Adverse Possession from five years to twenty years. IDAHO CODE § 5-210 (2021) statutory notes (amendments).
[195] *Order of States' Admission*, *supra* note 164.
[196] IDAHO CODE ANN. § 5-206 (2021).
[197] *Id.* § 5-207.
[198] *Id.* § 5-210.
[199] *Order of States' Admission*, *supra* note 164.
[200] 735 ILL. COMP. STAT. ANN. 5/13-101 (West 2021).
[201] *Id.* 5/13-109.
[202] *Id.*

Indiana[203]	1816[204]	10[205]				
Iowa	1846[206]	10[207]				
Kansas	1861[208]	15[209]				
Kentucky	1792[210]	15[211]	7[212]		X[213]	
Louisiana	1812[214]	30[215]	10[216]	X[217]		
Maine	1820[218]		20[219]		X[220]	
Maryland	1788[221]	20[222]				
Massachusetts	1788[223]	20[224]				
Michigan	1837[225]	15[226]				
Minnesota	1858[227]		15[228]		X[229]	
Mississippi	1817[230]		10[231]		X[232]	
Missouri	1821[233]	10[234]				

[203] In 1982, the State of Indiana amended its adverse possession law to change the period for possession from fifteen years to ten years. *Indiana Adverse Possession Laws*, FINDLAW, https://www.findlaw.com/state/indiana-law/indiana-adverse-possession-laws.html [https://perma.cc/FH69-8QUE].
[204] *Order of States' Admission*, *supra* note 164.
[205] Fraley v. Minger, 829 N.E.2d 476, 487 (Ind. 2005).
[206] *Order of States' Admission*, *supra* note 164.
[207] IOWA CODE ANN. § 614.17A(1)(a) (West 2021).
[208] *Order of States' Admission*, *supra* note 164.
[209] KAN. STAT. ANN. § 60-503 (West 2021).
[210] *Order of States' Admission*, *supra* note 164.
[211] KY. REV. STAT. ANN. § 413.010 (West 2021).
[212] *Id.* § 413.060(1).
[213] *Id.*
[214] *Order of States' Admission*, *supra* note 164.
[215] LA. CIV. CODE ANN. art. 3486 (2021).
[216] *Id.* art. 3475.
[217] *Id.*
[218] *Order of States' Admission*, *supra* note 164.
[219] ME. REV. STAT. ANN. tit. 14, § 816 (West 2021).
[220] *Id.*
[221] *Order of States' Admission*, *supra* note 164.
[222] MD. CODE ANN., CTS. & JUD. PROC. § 5-103(a) (West 2021).
[223] *Order of States' Admission*, *supra* note 164.
[224] MASS. GEN. LAWS ANN. ch. 260, § 21 (West 2021).
[225] *Order of States' Admission*, *supra* note 164.
[226] MICH. COMP. LAWS ANN. § 600.5801(4) (West 2021).
[227] *Order of States' Admission*, *supra* note 164.
[228] MINN. STAT. ANN. § 541.02 (West 2021).
[229] *Id.*
[230] *Order of States' Admission*, *supra* note 164.
[231] MISS. CODE ANN. § 15-1-13(1) (2021).
[232] Trotter v. Roper, 92 So. 2d 230, 232 (Miss. 1957).
[233] *Order of States' Admission*, *supra* note 164.
[234] MO. ANN. STAT. § 516.010 (West 2021).

Montana	1889[235]		5[236]		X[237]	
Nebraska	1867[238]	10[239]				
Nevada	1864[240]		5[241]		X[242]	
New Hampshire	1788[243]	20[244]				
New Jersey	1787[245]	30[246]				
New Mexico	1912[247]		10[248]		X[249]	
New York	1788[250]	10[251]				
North Carolina	1789[252]	20[253]	7[254]		X[255]	
North Dakota	1889[256]		20/10[257]	X[258]		X[259]
Ohio	1803[260]	21[261]				
Oklahoma	1907[262]	15[263]				
Oregon	1859[264]	10[265]				

[235] *Order of States' Admission*, *supra* note 164.
[236] MONT. CODE ANN. § 70-19-411 (West 2021).
[237] *Id.*
[238] *Order of States' Admission*, *supra* note 164.
[239] NEB. REV. STAT. ANN. § 25-202(1) (2021).
[240] *Order of States' Admission*, *supra* note 164.
[241] NEV. REV. STAT. ANN. § 11.150 (2021).
[242] *Id.*
[243] *Order of States' Admission*, *supra* note 164.
[244] N.H. REV. STAT. ANN. § 508:2.I. (2021).
[245] *Order of States' Admission*, *supra* note 164.
[246] N.J. STAT. ANN. § 2A:14-30 (West 2021).
[247] *Order of States' Admission*, *supra* note 164.
[248] N.M. STAT. ANN. § 37-1-22 (2021).
[249] *Id.*
[250] *Order of States' Admission*, *supra* note 164.
[251] N.Y. REAL PROP. ACTS. LAW § 511 (2021).
[252] *Order of States' Admission*, *supra* note 164.
[253] N.C. GEN. STAT. § 1-40 (2021).
[254] *Id.* § 1-38(a).
[255] *Id.*
[256] *Order of States' Admission*, *supra* note 164.
[257] North Dakota recognizes twenty years with color of title, see Ellison v. Strandback, 62 N.W.2d 95, 100–01 (N.D. 1953), or ten years with payment of taxes plus color of title, N.D. CENT. CODE § 47-06-03 (2021).
[258] N.D. CENT. CODE § 28-01-04 (2021).
[259] *Id.* § 47-06-03.
[260] *Order of States' Admission*, *supra* note 164.
[261] OHIO REV. CODE ANN. § 2305.04 (LexisNexis 2021).
[262] *Order of States' Admission*, *supra* note 164.
[263] OKLA. STAT. ANN. 12, § 93(4) (2021).
[264] *Order of States' Admission*, *supra* note 164.
[265] OR. REV. STAT. ANN. § 105.620(1)(a) (West 2021).

Pennsylvania	1787[266]	21[267]				
Rhode Island	1790[268]	10[269]				
South Carolina	1788[270]	10[271]				
South Dakota	1889[272]	20[273]				
Tennessee	1796[274]	20[275]	7[276]	X[277]		
Texas	1845[278]	10[279]	5[280]			X[281]
Utah	1896[282]	7[283]				
Vermont	1791[284]	15[285]				
Virginia	1788[286]	15[287]				
Washington	1889[288]	7[289]				
West Virginia	1863[290]	10[291]				
Wisconsin	1848[292]	20[293]	10[294]	X[295]		
Wyoming	1890[296]	10[297]				

[266] *Order of States' Admission*, *supra* note 164.
[267] 42 PA. STAT. AND CONS. STAT. ANN. § 5527.1(a) (2021).
[268] *Order of States' Admission*, *supra* note 164.
[269] 34 R.I. GEN. LAWS § 34-7-1 (2021).
[270] *Order of States' Admission*, *supra* note 164.
[271] S.C. CODE ANN. § 15-67-210 (2021).
[272] *Order of States' Admission*, *supra* note 164.
[273] S.D. CODIFIED LAWS § 15-3-1 (2021).
[274] *Order of States' Admission*, *supra* note 164.
[275] Cumulus Broad., Inc. v. Shim, 226 S.W. 366, 376–77 (Tenn. 2007) (quoting Ferguson v. Prince, 190 S.W. 548, 552 (Tenn. 1916)).
[276] TENN. CODE ANN. § 28-2-101(a) (2021).
[277] *Id.*
[278] *Order of States' Admission*, *supra* note 164.
[279] TEX. CIVIL PRAC. & REM. CODE ANN. § 16.026(a) (West 2021).
[280] *Id.* § 16.025(a).
[281] *Id.* § 16.025(2)–(3).
[282] *Order of States' Admission*, *supra* note 164.
[283] UTAH CODE ANN. § 78B-2-208(2) (LexisNexis 2021).
[284] *Order of States' Admission*, *supra* note 164.
[285] VT. STAT. ANN. tit. 12, § 501 (2021).
[286] *Order of States' Admission*, *supra* note 164.
[287] VA. CODE ANN. § 8.01-236 (2021).
[288] *Order of States' Admission*, *supra* note 164.
[289] WASH. REV. CODE ANN. § 7.28.050 (2021).
[290] *Order of States' Admission*, *supra* note 164.
[291] W. VA. CODE ANN. § 55-2-1 (2021).
[292] *Order of States' Admission*, *supra* note 164.
[293] WIS. STAT. § 893.25(1) (2021).
[294] *Id.* § 893.26(1).
[295] *Id.* § 893.26(2)(a).
[296] *Order of States' Admission*, *supra* note 164.
[297] WYO. STAT. ANN. § 1-3-103 (2021).

In the colonial period and the years immediately following the Revolutionary War, the legal approach to land claims in the newly independent states mostly reflected the colonial governance of the British Empire: through reliance on transplanted English common law regimes or by the transfer of powers from England to individual states or to the federal government.[298] In a context of concerns that land should not be wasted, but nor should it be obtained without a claim, adverse possession played an important role in the early period.[299] Early adoptions of adverse possession laws turned on whether the source of the claim was acquisitive (as in providing a right to individuals who had an ostensible ownership claim) or defensive (barring an owner from ejecting a possessor after long standing occupancy).[300] Early adoptions of adverse possession doctrine in North Carolina and in the Tennessee territory required color of title (or some indicia of right to ownership) as a requirement if adverse possession was to be invoked as a bar to a suit for ejectment.[301] Later adaptions through the nineteenth century reflected ongoing tensions that emerged in the process of land distribution in Tennessee and across the west.[302]

As the United States acquired more territory, policymakers disagreed about how lands acquired as a result of conquest, purchase, and succession should be distributed into private hands.[303] Between 1803 and 1849, the United States acquired territories that nearly tripled the land mass of the country.[304] Two competing schools of thought developed to justify the early transfer of land interests and

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[298] *See* R.D. Cox, *History of the Adverse Possession Statutes of Tennessee*, 6 MEM. STATE U. L. REV. 673, 674–77 (1976) (describing the way certain English conveyance norms persisted, despite the lack of conveyancers in the new world).

[299] *See id.* at 674.

[300] *See id.* at 675.

[301] *Id.* at 675–76.

[302] *See id.* at 678–83.

[303] PEÑALVER & KATYAL, *supra* note 15, at 55–56. Besides squatters, homesteaders, and settlers, the railroads and large-scale farming operations played an important role in shaping western lands policy, sometimes overlapping with homesteaders, squatters, and one another. *See, e.g.*, Harold E. Briggs, *Early Bonanza Farming in the Red River Valley of the North*, 6 AGRIC. HIST. 26, 26 (1932); PAUL. W. GATES, THE FARMERS AGE: AGRICULTURE, 1815-1860, at 89–92 (1960).

[304] Paul Frymer, *"A Rush and a Push and the Land Is Ours": Territorial Expansion, Land Policy, and U.S. State Formation*, 12 PERSPS. ON POL. 119, 119 (2014). Frymer argues that land policies for settlement of lands were strategically designed to facilitate expansion, while reducing conflict that may strain the new nation's fragile resources. *See id.* Frymer notes that preemption was at once a concession to squatters and a way to bring squatters into the legal regime of the state where the federal government could exert greater control over unoccupied lands to reduce conflicts. *See id.* at 126.

land policy in the western United States. Some policy makers regarded the vast territory claimed by the state as a resource for driving new revenue to fund national development.[305] This led them to favor selling large swaths of property to speculators, on the understanding that they would, in turn, subdivide the land into smaller parcels which would be sold off for a profit.[306] This approach was bolstered by legal doctrines like the vested rights doctrine,[307] which served to protect speculators from legislative clawbacks when land sales were deemed imprudent or corrupt.[308]

A related issue was the role of access to credit (or lack thereof) in shaping how individuals laid claim to open lands. Paul Gates described the failure of the United States to re-charter the Second Bank of the United States as fueling land speculation, because it reduced barriers to access to credit if borrowers already held property that could be mortgaged or leveraged.[309] In the 1830s, cheap and easy access to capital fueled a land grab in the western states, where speculators purchased more land than they could manage or maintain.[310] The growth of absentee ownership in the west was a key concern of President Andrew Jackson, who issued a Specie Circular in 1836 aimed at "sav[ing] the new States from a non-resident proprietorship."[311] He described absentee ownership as "one of the greatest obstacles to the advancement of a new country and the prosperity of an old one."[312] The Specie Circular limited land sales to physical currency (gold or silver), with the exception that settlers in actual occupation of land could arrange for credit to purchase the lands they occupied for the remainder of the year.[313] Yet, despite the more favorable treatment intended for actual settlers over absentee landowners, squatters on public lands rarely had access to credit or held good title to lands that could serve as leverage, so they were often relegated to a subprime market, where loan sharks and

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[305] *See* PEÑALVER & KATYAL, *supra* note 15, at 56.
[306] *See* Gates, *supra* note 157, at 7, 14.
[307] *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 125–27 (1810).
[308] For example, the famed Yazoo land deal implicated the corrupt bargain of members of the Georgia General Assembly to favor certain speculators to acquire land for profit. *See supra* notes 72–75 and accompanying text.
[309] *See* Gates, *supra* note 157, at 11.
[310] *See id.* at 15.
[311] *Id.* at 14.
[312] *Id.*
[313] *Id.*

promoters sold land on usurious terms.[314] Since squatters did not have access to gold and silver to purchase land directly from the government, they were required to work through intermediaries who purchased the land on their behalf, but charged usurious interest rates.[315] Oftentimes, these intermediary money lenders were representatives of the same banks and eastern speculators that competed to purchase lands from the government on more favorable terms.[316] If squatters did not have the resources to purchase land on their own terms, they were often forced to borrow on these disadvantageous terms, attempt to hold onto the property despite the auction or sale, or pick up stakes and move on.[317]

The other major problem that emerged as a result of land allocation practices in the newly established United States of America was the disjointed and often unreliable state of conveyances in these territories. Paul Gates described the "wasteful inefficienc[ies]" that characterized certain areas: "[p]rodigal conveyances that greatly exceeded the area of land available, looseness of entry procedure, and absence of the rectangular system of survey permitted extensive frauds, duplicating and overlapping boundaries, huge and multiple grants to the same persons, concentration of holdings, and a large

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[314] *See id.* at 13. Gates notes that "[s]quatters upon the public lands did not benefit from the easy banking policies of the thirties. Since they had no property to mortgage, credit was available to them only on . . . usurious terms." *Id.* He goes on to describe how a squatter might access credit to purchase land he had occupied, credit that often originated from the same sources where speculators accessed credit on far more favorable terms:

> When newly surveyed lands were first announced for sale the squatters had to arrange for the purchase of their lands—made valuable by their improvements—before the opening of the auction or run the risk of losing them to speculators. Claim clubs and special preemption laws gave them protection against speculators only to the date of the sale. Squatters were inclined to put their meager capital into stock, housing, fencing and clearing which seemed the most essential for the moment and to hope that the land sale would be postponed until they could accumulate money with which to purchase their claims. The sale, although announced in advance by advertisement, seemed always to catch the settlers unprepared and obliged them to borrow from the "loan shark."
>
> These money lenders were the representatives of western banks and eastern capitalists. Their charges were five per cent for arranging the loans, and from two and one-half to five per cent for making collections [on top of the higher interest rates that squatters paid for access to credit in the first place].

Id.

[315] *See id.*

[316] *See id.*

[317] *See id.* at 8, 13–14.

amount of absentee ownership."[318] These challenges created "a labyrinth of judicial perplexities," cluttering up court dockets as the competing claims of settlers and speculators strained the legal system's capacity to resolve disputes.[319] This was only exacerbated by the prevalence of squatters staking claims on unsurveyed lands, often in conflict with the native tribes who were in prior possession of certain territories.[320] The emergence of "claim clubs" in the 19th century provided squatters with extra-legal means to survey lands and organize themselves to protect their claims against Native Americans and speculators.[321]

Over the course of the first fifty years of the nineteenth century, the United States claimed territorial rights to over 1.2 billion acres of public lands.[322] The federal government attempted to manage the process of allocating land through various legislative acts passed by Congress. The Land Act of 1796 provided for the surveying of lands through townships of six square miles, and further subdivided into rectangular plots of 640 acres.[323] The land was sold for $2.00 per acre and purchasers could purchase on credit terms that lasted more than a year from purchase.[324] By 1820, the credit for purchase option was eliminated but the price to acquire land at public auction was lowered to $1.25 per acre.[325] In 1830, the first federal pre-emption law came into force, giving squatters on land the option to purchase their land before it was sold at auction.[326] Because the law did not provide for a credit option, a secondary credit market emerged, whereby land companies and investors purchased occupied land and sold it back to settlers on credit for significant profits.[327] Initial pre-emption rights only applied to surveyed lands, but between 1853 and 1862 squatters became entitled to pre-emption claims on land in Oregon, California, Washington, Kansas, Nebraska, and Minnesota.[328] From 1862 to

[318] Gates, *supra* note 161, at 3. In Kentucky, Henry Clay noted as late as 1822 that the "same identical tract was frequently shingled over by a dozen claims." *Id.* at 4 & n.3.
[319] *Id.* at 5.
[320] *See id.*; *Squatters' Rights*, ENCYCLOPEDIA, https://www.encyclopedia.com/history/news-wires-white-papers-and-books/squatters-rights [https://perma.cc/MH49-WHZE].
[321] Allan G. Bogue, *The Iowa Claim Clubs: Symbol and Substance*, 45 MISS. VALLEY HIST. REV. 231, 231–32, 234, 236 (1958).
[322] *See* Allen, *supra* note 158, at 7.
[323] *See id.*
[324] *Id.*
[325] *Id.* at 8.
[326] *Id.* at 19.
[327] *See id.* at 8.
[328] *See id.*

1934, Congress authorized homesteading, which allowed settlers to also stake pre-emption claims on unsurveyed lands.[329]

The processes of land acquisition gradually shifted from land allocation based on price, to a "first come, first served" land grab, reflecting the view from the federal government that land speculation was a wasteful enterprise that resulted in unused land and land conflicts for years.[330] The prominence of absentee ownership on the western lands reinforced the idea that land speculation was a wasteful enterprise, and an unproductive endeavor for a young, growing country.[331] For one thing, speculation often caused widespread dispersion of the population.[332] Additionally, as Gates has noted, speculators were reticent to pay local taxes:

> They resisted increased levies, secured injunctions against expenditures for buildings and roads, and sometimes simply refused to pay taxes. Heavy interest penalties and tax titles did not trouble them particularly since they knew they could later make a compromise settlement with the hard-pressed county boards, or could have the tax titles set aside by the courts.[333]

This placed a higher burden on local farmers and settlers, who relied on local taxes to pay for railroads, schools, and roads.[334] Gates noted that, in addition to the impact on local infrastructure, the fact that farmers had to pay a higher share of taxes led them to cut corners and adopt farming practices that depleted the soil, caused erosion, and diminished land value.[335]

While speculators enjoyed both financial and political advantages when staking their claims, the wasteful practices of absenteeism, and

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[329] *See id.* at 8, 12 n.33.

[330] *Id.* at 8; *see also* KENNETH E. LEWIS, WEST TO FAR MICHIGAN: SETTLING THE LOWER Peninsula, 1815-1860, at 110 (2002) (noting that the prevailing sentiment by 1820 was the speculators stood as "commercial middlemen who conducted business for personal gain," and whose interests "interfered with the settlement process"). While federal policies seemed to favor settlement over speculation, the secondary market still thrived for land sales after allocation. *See id.* at 111–12 tbl.6.1. Kenneth Lewis tracks the growth in land prices in Michigan between 1820 and 1860, noting that the increase in prices coincided with the availability of cheap credit following the collapse of the Second Bank of the United States. *See id.*

[331] *See supra* note 318 and accompanying text.

[332] *See* Gates, *supra* note 157, at 17.

[333] *Id.*

[334] *See id.*

[335] *See id.*

a growing democratic spirit of land opportunity, reinforced the virtues of utility and productive land use. That sentiment gained a social movement capacity as claims clubs often promoted the idea that "title [to land] passed directly from God to the first who put the land to beneficial use."[336] A normative view emerged that ownership of land was not mediated through the state; but rather, the state's role was limited to facilitating the allocation of land to settlers who would use it productively.[337] This perspective was given effect through the federal pre-emption laws passed in 1830, 1834, 1838, and 1841, which allowed settlers who occupied land for minimum periods of time, and who improved land by fencing, cultivation, or improvement, to purchase the land at a federally-set price.[338] From 1862, homesteading provided a mechanism for promoting the federal preference for settlers who would build and cultivate land, deeding them title in return for their labor in settling previously vacant lands.[339]

Yet, it is important to recognize that federal pre-emption and homesteading were exceptions to a norm of acquisition of land by purchase. Federal programs that normalized squatting (or occupation prior to acquisition of title) by granting legal title were typically limited to land that had not previously been allocated through the patent process.[340] At the state and local level, some state legislatures and courts attempted to mitigate the harms that squatters might face when land they had settled was sold to speculators. For example, Donald Pisani highlights efforts in Kentucky, and other places that protected some of the interests squatters created on lands.[341] In 1797, Kentucky passed its own version of pre-emption, promising settlers the right to as much as 400 acres of land at $20 per one hundred acres.[342] The Act allowed squatters to demand restitution from speculators for improvements they made to settled land if the improvements exceeded 75% of the

[336] Donald J. Pisani, *The Squatter and Natural Law in Nineteenth-Century America*, 81 AGRIC. HIST. 443, 444 (2007); *see also* PEÑALVER & KATYAL, *supra* note 15, at 56.
[337] *See* Pisani, *supra* note 336, at 444.
[338] See Donald J. Pisani, *Squatter Law in California, 1850-1858*, 25 W. HIST. Q. 277, 284 (1994); *infra* notes 341–349 and accompanying text.
[339] *See* Paul W. Gates, *The Homestead Act: Free Land Policy in Operation, 1862-1935, in* LAND USE POLICY AND PROBLEMS IN THE UNITED STATES 28 (Howard W. Ottoson ed., 1963).
[340] *See* Pisani, *supra* note 338, at 300.
[341] *See id.* at 285.
[342] *Id.*; DWIGHT B. BILLINGS & KATHLEEN M. BLEE, THE ROAD TO POVERTY: THE MAKING OF WEALTH AND HARDSHIP IN APPALACHIA 38 (2000).

price of the land alone,[343] which they almost always did. The law also conferred on occupants who lived on the land for up to seven years a legal possessory right to the land, distinct from the ownership or title claims of another.[344] In 1801, Kentucky enacted legislation to protect actual occupiers by ordering all non-resident owners to declare their lands for payment of taxes, while exempting actual occupants from doing the same.[345] The 1797 law also excused actual occupants who were faced with claims of superior title from paying rents until the title owner filed an ejectment suit.[346] Through these measures, as Pisani notes, Kentucky awarded settlers the right to claim the value of their improvements, when their claim to title was rejected.[347] Of course, settlers could also assert the right to claim title through sustained, uncontested use under adverse possession laws. Even after the U.S. Supreme Court ruled that the Kentucky legislation conflicted with the national land distribution policy, Kentucky courts continued to provide remedies for squatters in the face of speculator-held title.[348] Several other states followed suit by invoking occupancy laws for those with "color of title," thus giving preference to claimants who occupied and improved land.[349]

At the same time, federal and state bodies enforced laws that criminalized trespass on federal land that was subject to land sales, and actively protected owners against attempts to interfere with their title to land.[350] In 1809, Congress passed a law punishing trespassers with either $1,000 fines or one year in prison.[351] James Madison responded to the growth of squatter settlement associations (reported to have used violence and intimidation to frighten would-be speculators from bidding on occupied land) by issuing a proclamation that subjected persons "who have unlawfully taken possession of or made any settlement on the public lands" to ejectment by the U.S. Army and criminal trespass prosecution.[352] In the halls of Congress and in Washington, a dim view was formed of

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[343] Pisani, *supra* note 338, at 285.
[344] *See id.*
[345] Gates, *supra* note 161, at 12–13.
[346] *See id.* at 12.
[347] Pisani, *supra* note 338, at 285.
[348] *See* Gates, *supra* note 161, at 24.
[349] *See* Pisani, *supra* note 338, at 285–86; *see also* Gates, *supra* note 161, at 10 (noting that the State of Kentucky legislature was dominated by "resident landlords" who were sympathetic to the plight of settlers).
[350] *See* PEÑALVER & KATYAL, *supra* note 15, at 57.
[351] *Id.*
[352] *See id.* at 57–58.

squatters, who were described as "lawless rabble," or "uninformed or evil disposed persons."[353] Reports of violence by claims clubs, intimidation of potential buyers and resistance to attempts to displace squatters attracted considerable political and public attention.[354] In 1850, a squatter uprising in California led to the famed "Sacramento Squatter's Riot," in which the sheriff, the city assessor, and six other residents were killed in fighting over the rights of speculators and claimants to land.[355]

Typically, the settlement of the west was achieved through the transfer of land to private interests via land auctions—whether the land in question was previously settled or not.[356] Prior to an auction, the government surveyed lands, and designated plots for sale.[357] Squatters in occupation were expected to make arrangements to purchase the land they occupied before the opening of the auction, or risk losing both the land and the benefit of improvements to speculators.[358] Although speculators could leverage other financial interests for favorable lending terms, they also faced significant risks. The emergence of squatters' 'claims clubs' was often instrumental in frightening potential buyers away from purchasing settled land at auctions or intimidating those that actually purchased land from taking occupancy.[359] Additionally, after the auction, speculators had to grapple with the process of recovering physical possession from squatters in situ.[360] Those who could afford to designate an agent to claim the land, but investors who did not have the resources to appoint a local agent, or who ran out of capital to maintain a local agent, ran the risk that previous settlers or new settlers would re-claim the land.[361]

In this context, adverse possession played an important role in sorting out claims to land where speculative investors either never arrived to take physical possession of the land, or where they abandoned their interest because it had become too costly to maintain.[362] In fact, in many cases, it was the concerns of local communities in relation to land allocation practices and protection of

[353] *Id.* at 58.
[354] *See* Pisani, *supra* note 338, at 277.
[355] *See id.*
[356] *See* Gates, *supra* note 157, at 8.
[357] *See id.* at 13.
[358] *Id.*
[359] *See* Bogue, *supra* note 321, at 231–32.
[360] *See* Gates, *supra* note 161, at 15.
[361] *See* Gates, *supra* note 157, at 15.
[362] *See* Gates, *supra* note 161, at 5.

claims that shaped the law of adverse possession in particular states.[363] One of the most important features to emerge in the United States was the role of paying taxes in supporting a claim of adverse possession.[364] Local communities grew weary of out-of-town speculators who were uninterested in paying local taxes to create shared infrastructure.[365] Settled squatters, on the other hand, were willing to pay taxes and contribute towards local infrastructure, because they had a long-term stake in the community.[366] The legacy of this feature remains evident in the current law: thirteen states continue to recognize payment of taxes as either a requirement for staking a claim or proof of valid claim by a potential adverse possession claimant.[367]

States were also cognizant of the importance of title, and of the potential impact of flaws in title for settlers who had bargained to purchase land, only to discover that their title was deficient. On the one hand, land settlers who found "not one but several owners with whom they had to negotiate for the title . . . even after they had purchased the land and made their improvements" were faced with the possibility of eviction brought by persons who had prior rights to those that they negotiated with.[368] On the other hand, land speculators provided the various states with a cheap and easy way to distribute land, working through a smaller number of transactions. To this end, adverse possession was at once seen as a valuable corrective to title and a dangerous policy that promoted fears amongst speculators that "title will be found insecure."[369] By the end of the nineteenth century, states that sought to balance the tensions between speculators and settlers with material (not merely abstract) claims to land ownership, gravitated around two central principles: protecting purchasers who could produce evidence of a purchase,

[363] *See id.* at 8.
[364] *See* Gates, *supra* note 157, at 15.
[365] *See id.* at 17. Often, these speculators maintained their claim to land through a land agent employed to monitor their interests. *Id.* at 15. Having already paid land agents to protect their interests, some speculators were reluctant, or unable, to find additional funds to pay local taxes. *See id.* Gates notes the importance of the land agent in the western frontier as a critical cog in the land development policy, responsible for dealing in land warrants and scrip, purchasing discounted notes, running operations of exchange, and being a conduit for eastern funds to squatters to purchase lands they occupied. *See id.* at 10.
[366] *See id.* at 17.
[367] *See supra* Section II.A.
[368] Gates, *supra* note 161, at 5–6.
[369] *See id.* at 7–8.

such as a tax title or an errant deed, and protecting those who had paid taxes on the land in the years after they settled the land.[370]

This hybrid approach blurred the line between claims that were based on good faith but errant purchase of title, and those that were based on occupation alone but where squatters had, through payment of taxes, contributed to building communities.[371] Today, twenty out of the fifty U.S. jurisdictions shorten the time period for adverse possession in cases where squatters have either paid taxes or can demonstrate color of title.[372] In twenty states, a would-be claimant must show color of title, consecutive years paying taxes, or both as a prerequisite to staking an adverse possession claim.[373] These requirements reflect the evolution of American adverse possession law in the context of land settlement.

B. Urban Land Claims and Squatters

In the 1980s and 1990s, these same rhetorical claims re-emerged to justify claims to vacant unowned land in the urban context of the lower east side of New York City. The familiar tropes of absentee landlords, adverse effects of land speculation, and the virtue of productive use and occupation were deployed to justify squatters' claims to vacant buildings in the absence of legal title. In the context of severe affordable housing shortages, squatters took over eleven city-owned buildings, describing themselves as a modern urban homesteaders movement.[374] Squatters made claims of right based on sweat equity, and the movement adopted the language of homesteading to assert rights to buildings that were abandoned because they no longer met the requirements for minimum habitability.[375] By 1995, squatters turned to adverse possession law, as the settlers in the west had done, in an attempt to demonstrate a stronger legal right to the buildings than the paper-title owners who had purchased development rights from the city in the years before.[376]

[370] *See id.* at 14 (noting that these two advancements were drawn on the injection of equity principles into the law of ejectment).
[371] *See id.*
[372] *See supra* Section II.A.
[373] *See supra* Section II.A.
[374] STARECHESKI, *supra* note 1, at 66–68.
[375] *Id.* at 66–67.
[376] *See, e.g.*, E. 13th St. Homesteaders' Coal. v. Lower E. Side Coal. Hous. Dev., 646 N.Y.S.2d 324, 325 (App. Div. 1996); *see also* STARECHESKI, *supra* note 1, at 95–104.

In understanding the claims that squatters made to these abandoned buildings it is important to appreciate the context in which urban squatting re-emerged in these places. In the mid-1970s the City of New York faced a severe financial crisis.[377] One response to that crisis, implemented by the New York Financial Control Board, was to engage in a policy of planned shrinkage, eliminating many city services from certain areas of the city, including fire protection, police protection, waste removal, libraries, and other essential city services.[378] This reduction in provisions left landlords holding aging property that quickly depreciated to below the cost of their annual maintenance.[379] These under-serviced and declining neighborhoods were seen as crime zones, and potential for rental income was insufficient to offset the high costs of bringing these buildings back up to habitability code standards.[380] Soon, landlords stopped paying taxes or maintaining property, handing buildings over to the city in receivership proceedings.[381] The city too, also facing financial straits, could not afford to maintain the buildings and soon considered a policy of active neglect to discourage would-be occupants.[382] Stairways were removed, concrete was poured into plumbing, electrical wiring removed, doors and windows were bricked up, and holes were punched through roofs, all in an effort to make the properties unattractive for homeless people.[383]

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[377] *See* WILLIAM SITES, REMAKING NEW YORK: PRIMITIVE GLOBALIZATION AND THE POLITICS OF URBAN COMMUNITY 47 (2003).

[378] *See id.* at 40.

[379] *Id.* at 45; JANET ABU-LUGHOD, *Defending the Cross-Subsidy Plan: The Tortoise Wins Again*, *in* FROM URBAN VILLAGE TO EAST VILLAGE: THE BATTLE FOR NEW YORK'S LOWER EAST SIDE 313, 314 (1994) (noting the fall out in housing and real estate prices in the late 1980s to early 1990s). The dissent in *East 13th Street Homesteader's Coalition v. Lower East Side Coalition Housing Development* articulated the state of the neighborhood as related in a lower administrative court proceeding: "by the early 1980's the buildings had become a 'neighborhood hazard, housing drug activity, litter, and trash.' The City, having defaulted on its obligation to maintain order and ensure tranquility, the plaintiffs moved into the vacant buildings." *E. 13th St. Homesteaders' Coal.*, 646 N.Y.S.2d at 327 (Kupferman, J., dissenting).

[380] ABU-LUGHOD, *supra* note 379, at 314–15; *see* SITES, *supra* note 377, at 76–77; *see also E. 13th St. Homesteaders' Coal.*, 646 N.Y.S.2d at 327 (noting the presence of drug activity in the neighborhood).

[381] *See* SITES, *supra* note 377, at 45, 77.

[382] STARECHESKI, *supra* note 1, at 55–56 (describing Roger Starr's infamous agenda of "planned shrinkage"); SITES, *supra* note 377, at 39.

[383] *See* Survival Without Rent 14, 18 (on file with author). A book produced by the squatters on the lower east side provided useful ways to make repairs to structures to make them habitable. *See id.* at 15, 18–19. In it, the authors describe some of the issues that squatters may encounter that were created to make the building uninhabitable. *See id.* at 14, 18. The book was self-published and has no date, no author, and no attribution. *See generally id.*

From the 1960s, these buildings became the site for the most significant squatter activity in the United States since the nineteenth century.[384] Describing themselves as "homesteaders," groups began to occupy buildings and restore their conditions to make them livable.[385] Investing sweat equity into the buildings, the homesteaders argued that the city forfeited the right to ownership and control by neglecting the buildings and failing to put them into productive use.[386] The concept of urban homesteading gained traction through city-level and federal legislation that authorized the use of "homesteading" as a way to restore older buildings that were in disrepair.[387] Occupants were permitted to obtain clear title based on their work to restore buildings, with the only requirement that they live in the building for five years.[388] The financial crisis in New York City in the 1970s, and the emergence of federal policies of retrenchment, coincided with the stripping away of financial support for these programs.[389] Nevertheless, the political and rhetorical purchase power they carried seemingly validated the basic assertion of urban homesteaders—that sweat equity entitled occupants to a right that trumped mere title.[390] In this frame, their claim based on use and occupation as affordable housing took priority over the investment interests of speculative or absentee owners.[391]

For most of the 1980s, the city ignored the squatters on the Lower East Side. But as the city began to financially stabilize, opportunities arose to redevelop these areas as part of the reinvigoration of the city.[392] In 1985, institutional lenders like Citibank began to provide loans to local real estate developers.[393] The newly entrepreneurial city looked to under-valued areas (like the Lower East Side) for investment and redevelopment and the buildings that squatters had taken over became a primary focus.[394] A conflict emerged between the city and the squatters, both at the site of squatted buildings and

[384] STARECHESKI, *supra* note 1, at 65–66.
[385] *See id.* at 66–67; Survival Without Rent, *supra* note 383, at 7, 15, 18–19.
[386] STARECHESKI, *supra* note 1, at 67.
[387] *See id.* at 67–68.
[388] *See id.* at 68.
[389] *See id.* at 70.
[390] *See id.* at 66–67.
[391] *Id.*
[392] *See* SITES, *supra* note 377, at 48; NEIL SMITH ET AL., *From Disinvestment to Reinvestment: Mapping the Urban 'Frontier' in the Lower East Side*, *in* FROM URBAN VILLAGE TO EAST VILLAGE: THE BATTLE FOR NEW YORK'S LOWER EAST SIDE, *supra* note 379, at 149, 155.
[393] SITES, *supra* note 377, at 119.
[394] *See id.* at 87–89.

beyond. Squatters mobilized breakdown crews to reopen buildings that police had barricaded or bricked up and battled police in attempts to retake buildings.[395] In 1988, Tompkins Square Park became a site of intense violence as police and protestors came into conflict.[396] The park, which had been a primary site for homeless occupants over the years, was a symbolic site associated with the visible manifestation of the affordable housing crisis.[397] In 1994, a group of squatters interrupted a local government housing meeting by deploying smoke bombs and locking the members in the chamber.[398]

Notwithstanding these protests and obstructions, by the early 1990s gentrification and development in the Lower East Side was well underway. Some squatter-occupied buildings were destroyed in fires, freeing the lots for new development, while others were recovered by evicting squatters, either by force, or with court orders.[399] In 1994, a group of squatters occupying two of the buildings on the Lower East Side opposed a court-ordered eviction by asserting a claim to ownership by adverse possession.[400] Under New York State law, a successful claim to adverse possession required occupation for ten consecutive years, and while the squatters could not demonstrate that they personally had occupied the buildings for ten years, they argued a case of successive squatting: that collectively, they had possessed the building, passing possession from occupant to occupant for the required period of time.[401]

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[395] *See* JANET ABU-LUGHOD, *The Battle for Tompkins Square Park*, *in* FROM URBAN VILLAGE TO EAST VILLAGE: THE BATTLE FOR NEW YORK'S LOWER EAST SIDE, *supra* note 379, at 252–53.
[396] *See id.* at 234–35; DIANA R. GORDON, *A Resident's View of Conflict on Tompkins Square Park*, *in* FROM URBAN VILLAGE TO EAST VILLAGE: THE BATTLE FOR NEW YORK'S LOWER EAST SIDE, *supra* note 379, at 217, 219.
[397] *See* ABU-LUGHOD, *supra* note 379, at 235, 249.
[398] STARECHESKI, *supra* note 1, at 92.
[399] *See* SITES, *supra* note 377, at 125–26; ALEXANDER VASUDEVAN, THE AUTONOMOUS CITY: A HISTORY OF URBAN SQUATTING 225 (2017).
[400] STARECHESKI, *supra* note 1, at 92–93.
[401] *See id.* at 98. Known as tacking, most adverse possession and acquisitive prescription regimes provide for adding together the time of successive wrongful possessors to reach the prescriptive time period. *See* 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.10 (Michael Allan Wolf ed., 2021). Tacking usually requires some form of privity (transactional connection between the successor and her predecessor in title) or universal succession interest, where the successor obtains a universal right to enforce the obligations and rights of his predecessor in title. *Id.* In *East 13th Street Homesteaders' Coalition v. Lower East Side Coalition Housing Development*, the court said that the squatters presented "no evidence of privity between successive occupants of the apartments, nor is there evidence of any intended transfers." E. 13th St. Homesteaders' Coal. v. Lower E. Side Coal. Hous. Dev., 646 N.Y.S.2d 324, 326 (App. Div. 1996). The majority emphasized that evidence showed that many

While New York law and most other states allow claimants to state a claim for adverse possession based on successive claims of individual squatters, the claimants had not themselves transferred their interests to the buildings in a transaction that might meet the strict definition of privity that was required to tack the time together.[402] In a bid to overcome this legal obstacle, occupants strung together notes, relationships, and encounters to formulate a theory of privity.[403] The court determining the dispute noted that "since [the] claim of right is not supported by a written instrument, they must show actual, not constructive, possession to establish the requisite temporal element."[404] Furthermore, the court noted that the police had entered the buildings several times, thus disrupting the peaceful occupation by squatters.[405] Finally, while the squatters produced various types of evidence supporting a chain of possession, they were unable to produce evidence of "successive possession [that] was continued by an unbroken chain of privity."[406] Ultimately, in an important illustration of the interaction of law, pressure and politics in shaping state responses to squatting, while the East Thirteenth Street Squatters were unsuccessful litigants, their lawsuit brought the city back into negotiations relating to further development in the lower east side and resulted in the conversion of several buildings into co-operative housing.[407]

apartments were vacant for some period between occupants, suggesting that there was "no contact at all." *Id.* at 326 (citing Berman v. Golden, 515 N.Y.S.2d 859 (App. Div. 1987)). The dissent in the case offered a slightly more nuanced view of privity, stating that "in determining whether the common-law requirement of 'continuity of possession' has been met in an adverse possession claim to an estate in land, a court should consider not only the adverse possessor's physical presence on the land but also the claimant's other acts of dominion and control over the premises." *Id.* at 326 (Kupferman, J., dissenting) (quoting Ray v. Beacon Hudson Mountain Corp., 666 N.E.2d 532, 533 (N.Y. 1996)). For a discussion for why privity should be required in adverse possession cases, see Carol Necole Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 598–99 (2010) (arguing that squatting without some semblance of title fails to achieve the laudable goal of consensual transfers in land).

[402] *See* POWELL, *supra* note 401, § 91.10; STARECHESKI, *supra* note 1, at 98.

[403] *See* STARECHESKI, *supra* note 1, at 98, 100–02.

[404] *E. 13th St. Homesteaders' Coal.*, 646 N.Y.S.2d at 326 (citing Van Valkenburgh v. Lutz, 106 N.E.2d 28, 29 (N.Y. 1952); Birnbaum v. Brody, 548 N.Y.S.2d 691 (App. Div. 1989)).

[405] E. 13th St. Homesteaders' Coal. v. Wright, 635 N.Y.S.2d 958, 960 n.2 (App. Div. 1995), *rev'd*, 646 N.Y.S.2d 324 (1996).

[406] *E. 13th St. Homesteaders' Coal.*, 646 N.Y.S.2d at 326 (citing Garrett v. Holcomb, 627 N.Y.S.2d 113 (App. Div. 1995); Pegalis v. Anderson 490 N.Y.S.2d 544 (App. Div. 1985); Belotti v. Bickhardt, 127 N.E. 239, 242 (N.Y. 1920)).

[407] *See* STARECHESKI, *supra* note 1, at 93; *E. 13th St. Homesteaders' Coal.*, 646 N.Y.S.2d at 326. Notably, the settlement with the city and the conversion of several buildings to co-ops was a

The East Thirteenth Street Squatters would not be the last squatter-based adverse possession case in New York. In 1982, Mark Whitcombe began occupying an abandoned home in a flood plain in the Bronx.[408] Whitcombe had lived in the area since the 1950s and after he and his landlord began having difficulties, he began looking for a new place to live.[409] He found a house on Ditmars Street that was overgrown and looked abandoned, and he moved in.[410] Whitcombe advertised his artist studio from the front yard, took mail at the new address, installed a telephone and electrical service, and made improvements to the structure of the house.[411] But in 1998, the house was sold to Crystal Waterview Corporation at a foreclosure auction.[412] After the Whitcombes were served with an ejection notice, they asserted a claim based on adverse possession, based on their previous sixteen years of occupancy.[413] The court rejected the Whitcombes' claim, noting that the failure to enter under a "claim of right" meant that he had not claimed a legitimate interest.[414] By claim of right, the court required Whitcombe to show that he entered under some ostensible claim, either title purchased from another, or inherited.[415] Absent that, Whitcombe's occupancy did not mature into ownership, despite the fact that he held the property as an owner for nearly sixteen years.[416]

In the wake of the 2008 housing crisis, some states responded to a slate of new so-called *squatter conflicts* by passing new criminal legislation against trespass on empty property.[417] Before 2008, U.S. criminal law generally only responded to trespass when it involved either burglary (entering an occupied home) or destruction of property.[418] But, in the eye of a storm of high-volume foreclosures and anxious banks keen to safeguard their investments, the legal system came under renewed pressures to secure collateralized assets. In these states (which included Michigan and Nevada, among the

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contested choice by some squatters who saw themselves as a part of a greater autonomous squatters' movement, rather than simply vying for an ownership stake. *See* STARECHESKI, *supra* note 1, at 128–29.

[408] *See* Joseph v. Whitcombe, 719 N.Y.S.2d 44, 45–46 (App. Div. 2001).

[409] *See id.* at 45.

[410] *See id.*

[411] *Id.*

[412] *See id.*

[413] *See id.*

[414] *See id.* at 47.

[415] *See id.* at 46–47.

[416] *See id.* at 45, 47.

[417] *See, e.g.*, MICH. COMP. LAWS § 750.553(1) (2021).

[418] *See, e.g.*, CAL. PENAL CODE § 459 (West 1991).

worst affected by the financial crash) new criminal sanctions were enacted to criminalize squatting, empowering absent owners and law enforcement to act with the full force of criminal sanction.[419] The enactment of criminalizing legislation in Michigan was directly related to the high volume of foreclosed or abandoned properties that lay empty in the wake of the credit and housing crash.[420] An analysis of the law by the House Fiscal Agency noted that the new rise in squatting was different in its character compared to "squatting of old where a person takes up residence in an abandoned shack in the woods or builds their own dwelling on another's property."[421] Rejecting Thoreau-inspired romantic notions of squatting built around self-sufficiency, the legislative report identified new squatting as "a person or family moving into an empty apartment or house without the consent of the owner and without paying rent to that owner."[422] The criminalization provision targeted its aim by limiting its reach to single-family or two-family properties (known in the United States as duplexes).[423] The analysis suggested that often these houses were either bank-owned foreclosed houses or municipally owned houses that were seized for non-payment of taxes, but also could be homes offered for sale by owners forced to find employment in other cities, who purchased new houses, or family properties acquired from deceased relatives.[424] The Fiscal Agency's non-partisan legislative analysis also noted that the bill could increase costs on state and local correctional systems, though it was unclear about the extent of costs, in the absence of information about the number of persons that might be convicted.[425]

This turn to criminal law in the United States in a context of economic and political crisis—echoing similar moves in Spain in

[419] *See, e.g.*, MICH. COMP. LAWS ANN. § 750.553(1) (2021); NEV. REV. STAT. § 205.0817(3) (2021).
[420] SUSAN STUTZKY & ROBIN RISKO, MICH. HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: SQUATTING: LANDLORD/OWNER REGAINING POSSESSION 1 (2014), https://www.legislature.mi.gov/documents/2013-2014/billanalysis/House/pdf/2013-HLA-5069-6B5192E9.pdf [https://perma.cc/DC6Y-PHTA].
[421] *Id.*
[422] *Id.*
[423] *See id.*
[424] *Id.* at 1–2.
[425] *See id.* at 1. Interestingly, one identified beneficiary of criminalizing squatting was local libraires since criminal fines are constitutionally designated to benefit local libraries in Michigan. *See id.*

1995[426] and in England in 2012[427]—revealed again how state responses to squatting highlight pressure points in the property system, and served as a timely reminder of the interactions between unlawful occupation and governance of land, public power, and private property. The Michigan Fiscal Agency report noted four important intersections of the state and private property in describing the rationale and impacts surrounding the adoption of these laws, and highlighted the confusion and even challenges that state officials (like the police) have had in sorting through claims to occupancy of these properties.[428] At the most basic conflict level, it noted that law enforcement has been reticent to intervene where they have been unclear about the rights between occupiers and owners.[429] Second, the report identified municipality-owned properties alongside bank-owned and other properties as particularly susceptible to squatter claims.[430] Third, the report noted that there was an increase in lengthy delays in using the judicial process to remove squatters from properties, costing owners money and resources over time.[431] Lastly, the fact that the bill identified costs to implement[432] provided an important reminder that the protection of private property (or municipally owned property) isn't cost-free.[433] These issues highlight the complex matrices that inform state responses to a problem is multi-dimensional, spanning the gamut between resource allocation and protection, citizens' confidence in the legal system (and the state) to resolve legal conflicts and protect vested rights, and the potential consequences for communities and states when problems grow into one another, creating potential tipping-points in public confidence in state institutions to resolve these problems.

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[426] *See* Miguel Angel Martínez López, *Squatters and Migrants in Madrid: Interactions, Contexts, and Cycles*, 54 URB. STUD. 2472, 2479 (2017).

[427] Shannon Holmberg, Note, *Squashing the Squatting Crisis: A Proposal to Reform Summary Eviction and Improve Case Management Services to Stop the Squatter Supply*, 65 DRAKE L. REV. 839, 862 (2017).

[428] *See* STUTZKY & RISKO, *supra* note 420, at 1–2.

[429] *See id.* at 2.

[430] *See id.* at 1–2.

[431] *See id.* at 2.

[432] *See id.* at 1.

[433] *See* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 14–15 (1999).

III. CONCLUSION

In December 1853, Herman Melville published his first, and one of his best-known short stories, *Bartleby, the Scrivener: A Story of Wall Street*.[434] The story follows the relationship between the maker of legal documents for land transactions (a Scrivener) and his employees, one of whom is Bartleby.[435] As the tale proceeds, we learn that Bartleby is living uninvited in the scrivener's office.[436] Over the course of the story, we learn that Bartleby doesn't do much work—in fact one is left wondering what right he has to be in the office at all.[437] When the scrivener implores him to leave, Bartleby simply responds that he would prefer not—passively continuing to claim that space as his own.[438] Scholars have often surmised that Bartleby represents innocence or natural man, much like Billy Budd in Melville's later work.[439] I want to posit another possibility—that Bartleby is a squatter. But as a squatter, he highlights the tensions present in American land transactions. As a scrivener, he is clothed in innocence, much like the landowner is buoyed by the virtue of owning property in the New America. Doing nothing, he presents the conundrum of whether Wall Street should be supported by those that labor, or those that are imbued by claims of right. Like Bartleby, American land claims were bounded by contradictory assertions of virtue. Those with title asserted the power of the state to dictate and enforce property laws and assertions of title even leaning on criminal sanction to enforce their economic interests, while squatters drew down on the claims of innocent occupation and their labor in the fields to morally validate their presence on owned land.

Reflecting on how the American law of adverse possession has evolved and responded to squatters over time, Amy Starecheski described "[a]dverse possession [as having] a mythological status in the world of American squatters: a powerful idea, challenging to realize."[440] It is, as Sally Merry notes, a doctrine engrained in the

[434] Herman Melville, *Bartleby, the Scrivener: A Story of Wall-Street*, *in* 2 PUTNAM MONTHLY MAG. AM. LITERATURE, SCI., & ART (New York, G.P. Putnam & Co., 1853), *reprinted in* BARTLEBY AND BENITO CERENO 3 (Stanley Appelbaum ed., 1990).
[435] *See id.* at 3–4, 8–9, 20–21.
[436] *See id.* at 16.
[437] *See id.* at 17–18, 20–21.
[438] *See id.* at 21–22.
[439] *See* Kingsley Widmer, *The Perplexed Myths of Melville: "Billy Budd,"* 2 NOVEL: A F. ON FICTION 25, 25 (1968).
[440] STARECHESKI, *supra* note 1, at 93.

squatter's consciousness.[441] And yet, conversely, while Americans are generally familiar with what they term *squatters rights*, they may not be aware of the detailed legal frameworks in which those rights emerge (other than by occupying land) or their salutary effects.[442] Yet, while the term is often meant to convey that someone has taken something they did not own, squatting is primarily motivated by use for the time being, rather than acquisition of title. Hannah Dobbz notes this point, while acknowledging that the U.S. culture of private property places such a strong emphasis on homeownership, that the allure of property "even seeps into the consciousness of squatters and others who claim an aversion to it."[443]

Indeed, reflecting on the history of squatting in the United States, Dobbz also notes that, while often characterized as an act stemming from the radical left:

> [S]quatting is instead a unique act that rides the fence between left and right politics. . . . [and] [b]ecause the philosophy of squatting straddles political ideologies, it finds supporters and critics in both camps: In the one camp, right-leaners celebrate the idea of the homestead and detest government interference, and in the other camp, left-leaners advocate housing justice and push for equal access to shelter across classes. The broader notion of squatting embraces all of these things, which suggests that it actually transcends both party lines.[444]

Certainly, in the United States, the pathway from squatter to owner was never politically or legally clear-cut. Rather it was often marked with legal hurdles—shaped to local contexts, obstacles to access credit, and—for the squatters who managed to accrue sufficient time to meet the limitation period—challenges as well as opportunities in navigating criteria to establish a successful claim.

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[441] *See* SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 5 (1990).

[442] At least one newspaper ran a how-to guide to obtaining squatters' rights. *See, e.g.*, Ben David, *How to Get Squatter's Rights*, S.F. GATE (Dec. 6, 2018), https://homeguides.sfgate.com/squatters-rights-46690.html [https://perma.cc/JHK4-8SYX].

[443] *See* DOBBZ, *supra* note 19, at 162.

[444] *Id.* at 212. Dobbz goes on to observe that "since it is easier to try to make sense of ideas by dividing them into opposing dualities, or even a complementary yin and yang, pundits have cavalierly shunted whole movements into sweeping categorizations." *Id.*

For example, in the earliest days of the U.S. Republic, the strong desire to settle the territory that was newly secured in a neat and orderly way prompted the U.S. Government to sell lands to speculators to offset the public debt accumulated to fight the Revolutionary War.[445] This, in turn, created a secondary market for land transactions. But as Gordon Wood observed, "[e]verything was built on illusions."[446] Settlers moving west largely ignored constraints imposed by the federal government, seeing their claims to land as ordained.[447] Moreover, they refused the higher prices that speculators demanded for usable land.[448] One Ohio squatter spokesman said "all mankind . . . have an undoubted right to pass into every vacant country, and there to form their constitution, and that . . . Congress is not empowered to forbid them, neither is Congress empowered . . . to make any sale of uninhabited lands to pay the public debt."[449]

These sentiments would be echoed across the nineteenth century and into the late twentieth century as settlers claimed rights to unoccupied lands, as urban squatters claimed rights to vacant buildings, and as speculators sought to rely on the legal title they purchased to assert a greater right. One advocate for squatter's inherent rights to claim land was James McClatchy, an Irish immigrant who founded the Sacramento Bee and editorialized his views on land regularly, including, at times, advocating violence.[450] In one dramatic call, McClatchy, after declaring that God's laws were above man's laws, stated: "If the land-holders . . . act as they do, we shall be obliged to lick 'em."[451] McClatchy was described by at least one historian as "[bringing] an Irishman's hatred of land monopoly to his leadership of the squatters in the gold rush period and then to the *Bee's* editorial columns."[452] In the end, the law that provided a way to reconcile these interests, to some degree. Adverse possession, trespass, and the law of registry afforded a *crude functionalism* for settling an individual's legal claims. However, these conflicts

[445] *See* Wood, *supra* note 101, at 95.
[446] *Id.* at 119.
[447] *See id.* at 119–20.
[448] *See id.*
[449] *Id.* at 120.
[450] *See The Press: The Beehive*, TIME (Mar. 10, 1952), http://content.time.com/time/subscriber/article/0,33009,822239,00.html [https://perma.cc/AZ8N-C24S]; 1 THE BASIC WRITINGS OF JOSIAH ROYCE: CULTURE, PHILOSOPHY, AND RELIGION 145 n.10 (John J. McDermott ed., 2005).
[451] THE BASIC WRITINGS OF JOSIAH ROYCE, *supra* note 450, at 145–46.
[452] WALTON BEAN, CALIFORNIA: AN INTERPRETIVE HISTORY 260 (2d ed. 1973).

between squatters and title holders were ultimately rooted in something greater than individual claims to land.[453] They were rooted in opposing ideas about the nature of property, the nature and role of the state, and the importance of identity in determining which claims would be recognized.

[453] *See* STARECHESKI, *supra* note 1, at 97.