

Theft Is Property! The Recursive Logic of Dispossession

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Abstract

This article offers a preliminary critical-historical reconstruction of the concept of *dispossession*. Part I examines its role in eighteenth- and nineteenth-century struggles against European feudal land tenure. Drawing upon Marx's critique of French anarchism in particular, I identify a persistent limitation at the heart of the concept. Since dispossession presupposes prior *possession*, recourse to it appears conservative and tends to reinforce the very proprietary and commoditized models of social relations that radical critics generally seek to undermine. Part II turns to use of the term in Indigenous struggles against colonization, both in order to better grasp the stakes of the above problematic and suggest a way beyond it. Through a reconstruction of arguments by Indigenous scholars and activists, I seek to show the coherence and novelty of their formulation by suggesting that dispossession has come to name a unique historical process, one in which property is generated under conditions that require divestment and alienation from those who appear, only retroactively, as its original owners. In this way, theft and property are related in a recursive, rather than strictly unilinear, manner. Part III provides a specific historical example in the form of nineteenth-century US property law concerning squatters and homesteaders.

Keywords

dispossession, expropriation, property, theft, colonialism

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The term *dispossession* is commonly used to name some manner of coercive appropriation of property, typically on a large scale (affecting more than one individual), and typically of private property by a public entity (the state or its agents). In this, the concept overlaps with notions of *expropriation* and *eminent domain*. As legal categories, these terms can boast a rich and varied provenance, extending back to and figuring prominently in Roman law, as well as its revival by medieval civil and canon jurists of the eleventh and twelfth centuries.¹ As tools for social criticism and radical politics, however, their use has been more uneven and controversial. Recent decades suggest an upsurge of interest in the latter fields, as this family of terms has been increasingly pressed into service by a wide range of contemporary critical theorists, including Étienne Balibar, Daniel Bensaïd, Judith Butler, Nancy Fraser, David Harvey, and Edward Said.² Perhaps most interestingly, these concepts have been reworked and redeployed by a range of Indigenous scholars and activists—particularly in Anglophone settler societies such as Australia, Canada, New Zealand, and the United States—where they have come to name a distinct feature of the settler colonial processes that both originally generated, and continue to anchor, those societies.³ As dispossession and expropriation have taken a more central role in debates over colonization, property relations, racial capital, slavery and its afterlives, a number of tensions and outright conflicts have emerged between differently positioned communities and modes of analysis.⁴ While such conflicts may reflect genuinely contradictory interests, they also emerge from misapprehension, since shared terms of critique frequently mask distinct and divergent histories, intellectual contexts, and traditions of interpretation, all of which feed polysemic conceptual intension.

This paper makes a contribution to this field of analysis by recovering something of dispossession's diverse and polyvalent critical genealogy. It proceeds in three moves. Part I returns us to debates of the eighteenth and nineteenth centuries to retrieve fragments of an era in which dispossession and expropriation were deployed as important tools of social criticism, particularly vis-à-vis systems of feudal land tenure and landed aristocracy. It then considers why they were largely displaced as categories of critique, attending to a set of tensions at the heart of these concepts that remain alive for us today. I focus in particular on the persistent concern that insofar as dispossession and expropriation gain their normative force from a perceived violation or corruption of actually existing property relations (i.e., a species of theft), they are generally conservative concepts that moreover tend to reinforce a proprietary model of social relations that critical theorists generally seek to undermine. Part II turns to the circulation of the terms in the field of Indigenous and Settler Colonial studies as a means of better grasping the

stakes of this problem and suggesting a way beyond it. Drawing upon scholarly and activist work in this field, I argue that Indigenous peoples in Anglo-settler societies have developed a powerful and novel alternative formulation. Reflecting the history of these struggles, I suggest that dispossession can be usefully reconstructed to name a unique historical process, one in which property is generated under conditions that require its divestment and alienation from those who appear, only retrospectively, as its original owners. In this formulation, the term therefore names not only the forcible *transfer* of property but *transformation into* property, albeit in a manner that is structurally negated for some, i.e., ‘the dispossessed’. I theorize this in terms of its *recursive logic*, in which theft paradoxically precedes, rather than presupposes, property. Part III substantiates this alternative formulation through historical research into early nineteenth-century US colonial property relations. Via a reading of the Intrusion, Preemption, and Homesteading Acts, I demonstrate one mechanism by which Indigenous peoples were dispossessed of their lands through the creation and extension of a novel form of “structurally negated” proprietary rights, that is, the “right only to sell.” The conclusion considers some broader implications.

I

Although concepts of dispossession and expropriation have long histories as juridical categories—most often used to legitimate the sovereign’s prerogative to forcibly appropriate property and assets from subjects—over the course of the eighteenth and nineteenth centuries, they were pressed into service as tools of social criticism in a novel and innovative manner. The primary reason for this was their perceived utility in delegitimizing the institutions of a permanent landed aristocracy. This was one expression of the central role that struggles over *land tenure* played in the context of revolts against feudalism. Republican radicals in particular could reach back to a rich (albeit quasi-mythological) Greco-Roman tradition, which placed great emphasis on the virtues of fixed agricultural property, not only for the property holders but also for the political community as a whole. Fixed agricultural holdings, especially when held in small units by independent farmers, were the fount of republican excellence. Such farmers were relatively autonomous in a material and ethical sense: their unmediated access to land could provide them not only basic subsistence but also a medium for virtuous labour. Modern republicanism could critique feudalism on the basis of its perversion of this relationship, since the majority of landholders were no longer independent farmers but proprietors of large estates funded by rent.

One strategy of critique was to argue that the landed aristocracy was the beneficiary of an ancient act of *theft*, one that extended back to the origins of civil society itself. This is quite clear in Rousseau, for instance, who affirmed the special status of property-in-land, and criticized the system of feudal estates by linking it to an original mal-appropriation of the common inheritance that was the earth. As he famously put it in 1755:

The first man who, having enclosed a piece of ground, to whom it occurred to say *this is mine*, and found people sufficiently simple to believe him, was the true founder of civil society. How many crimes, wars, murders, how many miseries and horrors Mankind would have been spared by him who, pulling up the stakes or filling in the ditch, had cried out to his kind: Beware of listening to this impostor; You are lost if you forget that the fruits are everyone's and the Earth no one's.⁵

In this way, Rousseau suggested that originary appropriation was, in fact, expropriation.

Rousseau was not alone. Thomas Paine, for one, extended and elaborated upon this basic idea. In *Agrarian Justice* (1797), written in the context of post-revolutionary France, Paine complained that the near total monopoly over land ownership enjoyed by the European aristocracy had effectively “dispossessed more than half the inhabitants of every nation of their natural inheritance.”⁶ Paine sought a more reformist solution to the problem than some Rousseau-inspired radicals however. He argued that although the aristocracy had certainly taken *advantage* of its monopoly privilege, current holders of land titles were not directly responsible for the context itself, in either a moral or legal sense. “The fault,” as he put it, “is not in the present possessors. . . . The fault is in the system, and it has stolen imperceptibly upon the world, aided afterwards by the Agrarian law of the sword.” The key then was to transform the underlying system of ownership, ideally “without diminishing or deranging the property of any of the present possessors,” a process Paine conceded would take many “successive generations.”⁷ His proposed solution was a new taxation system that would serve a compensatory and redistributive function by providing the dispossessed poor with some recompense for their historic losses. This general approach to the exclusion of the rural poor from landholding gained support across pockets of Western Europe in the eighteenth and early nineteenth century, playing a role in some utopian socialist projects aimed at giving the poor opportunities to return to agrarian living or, failing that, to receive support in the form of Poor Law redistributions. In Great Britain, it eventually led to the *Return of Owners of Land* (1873), a modern “Doomsday book” project that sought to document

the concentration of aristocratic land ownership in that country.⁸ So, as the transition from Rousseau to Paine suggests, although questions of expropriation and dispossession entered into early modern European legal and political thought as an extension of some very general and abstract questions about property *as such* (backdated to the origins of society itself), by the late eighteenth century they had come to function as tools in urgent, contemporary political struggles.

This development reached something of a zenith in nineteenth-century anarchism. In the eyes of several classical anarchists, even the post-feudal, modern European state system was a continuation of a history of expropriation, understood now all the more explicitly as the *theft of land* from the rural peasantry. As Proudhon put it,

Through the land the plundering of man began, and in the land it has rooted its foundations. The land is the fortress of the modern capitalist, as it was the citadel of feudalism, and of the ancient patriciate. Finally, it is the land which gives authority to the government principle, an ever-renewed strength, whenever the popular Hercules overthrows the giant.⁹

While these thinkers could draw upon a long tradition of thought that cited inequities of landed property as the fount of social stratification more generally, they extrapolated to the even more radical claim that modern property was *per se* illegitimate, since other inequalities in ownership were derivative of the originary seizure of communal land. Hence, the famous slogan of nineteenth-century anarchists: *La propriété, c'est le vol!*¹⁰ For the French anarchists the originary theft of land was thus unjust both intrinsically and consequentially, and terms such as *expropriation* came to play an increasingly important role in denouncing this peculiarly structured theft, serving, for example, as a central organizing concept in Kropotkin's 1892 text, *La conquête du pain*.¹¹

Marx represents something of a turning point in this critical history. Although initially impressed by these arguments,¹² Marx eventually came to view the preceding analysis as inadequate and improperly formulated. By positing that classical, feudal, and modern forms of domination all emanated from the same source (i.e., land appropriation), the anarchists had generated a falsely abstract and ahistorical conception of "expropriation," one that failed to grasp the specificity of modernity and capitalism.¹³ Moreover, in hitching their critique to the language of *theft*, they had adopted a restrictively conservative legal and moralistic category, one that in fact presupposed and naturalized a similarly abstract and ahistorical conception of property. For Marx, the expression "property is theft" was self-refuting, since the concept

of theft presupposes the existence of property.¹⁴ Even before Marx arrived at this conclusion, Max Stirner made a similar observation. In his major work, *The Ego and Its Own* [1844], he wrote:

Is the concept of “theft” at all possible unless one allows validity to the concept “property”? How can one steal if property is not already extant? What belongs to no one cannot be *stolen*; the water that one draws out of the sea he does *not steal*. Accordingly property is not theft, but a theft becomes possible only through property.¹⁵

In the shuttling back and forth between anarchist and Marxist positions on the question of property and theft, we can observe an interesting correlate movement of conceptual and linguistic translation. Within classical anarchism, the French term *expropriation* came to function as a placeholder for the processes of large-scale theft that were viewed as constitutive of the modern state system itself. When Marx engaged these debates, he frequently used the Germanic term *Enteignung* in his earlier writings, but often changed this over to the Latinate *Expropriation* in later interventions, presumably to signal its relevance to the French debates.¹⁶ Finally, and somewhat confusingly, when *Das Kapital* was translated into English, the relevant terms were often, but inconsistently, rendered as *dispossession* (sometimes used interchangeably with *expropriation*, sometimes as distinct). From this point on, the latter term enters English-speaking debates and now enjoys wide circulation across a variety of critical traditions and thinkers, from David Harvey to Judith Butler.

As these key terms were translated linguistically, so too were they renovated conceptually. Anarchist thinkers had posited that the seizure of communal lands was itself a violence committed against the feudal peasantry by the aristocratic nobility, and that this was essentially *theft*; it was a coercive and illegitimate transfer of property from the original owners. Although Marx continued to speak of *Expropriation* and *Enteignung*, he changed the meaning of these terms when he provided a more abstract definition. For him, *dispossession* came to refer to the initial “separation-process” [*Scheidungsprozeß*] that divorced immediate producers from direct access to the means of production, thus forcing them into new labour conditions, now mediated by way of the wage.¹⁷ This implied a conceptual shift away from viewing *dispossession* in terms of “theft” strictly speaking. Whereas the original anarchist argument presented the rural peasantry as the original “owners” of the land, Marx sought to shear this critique from its normative investment in property. Hence Marx (and Stirner) identified a core tension at the heart of the concept of *dispossession*, a tension that remains alive for us today: to speak meaningfully of *dispossession* appears to presuppose a prior relation of possession. It seems

limited then as a tool of radical critique since its normative force derives from a generally conservative defense of previously existing property relations and, moreover, tends to reinforce the very proprietary models of social relations that these critical traditions generally seek to undermine. Recourse to the language of dispossession by critical theorists appears therefore contradictory and self-defeating.

This critique had two effects. First, these categories were slowly displaced as tools of radical politics, and became narrowly legalistic terms. The expansive normative and critical sense with which Rousseau, Paine, or Proudhon spoke of dispossession, for instance, was collapsed into the more technical and legalistic categories of expropriation and eminent domain that we are familiar with today.¹⁸ Second, insofar as the category has persisted as a tool of social criticism, it has been subordinated to other, more fundamental concepts. Therefore, where dispossession has endured within critical theory, its normative force has generally come to be viewed as derivative from some other circumstance that it enables.

One clear instance of this can be found in contemporary Marxist and post-Marxist theory. The Marxist tradition has always been reluctant to collapse broad macro-historical processes (such as the emergence of capitalism itself) into narrow moral terms (“The communists do not preach morality at all . . . ”¹⁹). The terms *dispossession* and *expropriation* nevertheless persist in some forms by thinkers of a more Marxian orientation even to the present, most obviously in David Harvey’s claim that “accumulation by dispossession” best characterizes a neoliberal era of capitalism.²⁰ Nancy Fraser has recently echoed this as well, employing the term *expropriation* to designate the “ongoing confiscatory process essential for sustaining accumulation in a crisis-prone system.”²¹ An even more instructive example—one that better highlights a shift in normative content—can be found in the “analytic Marxism” of G. A. Cohen, in whose work the normative grounds of a concern with dispossession has most clearly shifted away from notions of *theft* and towards *exploitation-enablement*.

Although Cohen recognizes that expropriation might be regarded as unjust on “independent grounds,” in his reading, it is “thought unjust by Marxists chiefly because it forces some to do unpaid labour for others.”²² In this reformulation then, the relation between exploitation and expropriation is explicitly circular. Cohen contends that it can be true that exploitation is “unjust because it reflects an unjust distribution,” *and* that the original “asset distribution is unjust because it generates that unjust extraction.”²³ At first glance, this seems confused since each key concept appears fundamental from the standpoint of the other. But we can relatively easily decode this seemingly tautological formulation by showing that the two poles are fundamental in

different senses, namely, in *causal* versus *normative* ways. On Cohen's rendering, exploitation is wrong on fully independent grounds, because the coercive extraction of value is indefensible in and of itself. By contrast, dispossession—defined here as the unequal distribution of access to the means of production—is not normatively wrong in a similarly self-standing manner. Dispossession is objectionable only inasmuch as it enables the kind of coercive transfer characteristic of exploitation. Thus, dispossession is causally but not normatively fundamental. The unequal distribution of access to productive resources in, say, land is not *intrinsically* unjust, at least not in one sense of the word. It is not intrinsically unjust because it is possible to imagine scenarios in which such inequality would diminish, rather than enable, exploitation. However, in order to prevent his thesis from becoming tautological in the wrong way, Cohen must posit *as a matter of fact* that dispossession is exploitation-enabling: “its injustice resides in its *disposition* to produce a certain effect, a disposition which might not be activated.”²⁴ It is not necessary to pursue this line of reasoning further for our purposes here. The point is merely to highlight that within Marxism of a certain variant, one can find arguments that critique dispossession and/or expropriation but avoid doing so by framing them as a species of theft.

In what follows, I should like to explore an alternative means of reconstituting dispossession as a tool of critical theory. This requires, however, a reorientation in the primary object of analysis. Whereas dispossession has had diminishing relevance as a tool in the critique of one set of historical processes—namely, the process by which feudal land tenure systems were dismantled and replaced by liberal-capitalist systems of private property and commodified real estate markets—it has gained, over the same period, increased relevance with regard to a parallel set of historical developments, namely, the global expansion of those liberal-capitalist institutions into non-European societies. Reviving the utility of the term requires therefore reframing this context and considering alternative cases where it may more usefully apply. I argue here for its particular relevance to the liberal-capitalist, Anglo-settler colonial world. This shift in empirical focus entails a correlate shift in critical and normative intension.²⁵

II

Indigenous scholars and activists—particularly in Anglophone settler societies such as Australia, Canada, New Zealand, and the United States—tend to employ the term *dispossession* to denote the fact that in these sections of the globe, Indigenous peoples have not only been subjugated and oppressed by imperial elites, they have also been divested of their *lands*, that is,

the territorial foundation of their societies, which in turn have become the territorial foundations for the creation of new, European-style, settler-colonial societies. So dispossession is thought of as a broad macro-historical process related to the specific territorial acquisition logic of settler colonization. As a result, within these parts of the world, Indigenous scholars such as Glen Coulthard (Yellowknives Dene) and Audra Simpson (Kahnawake Mohawk) frequently define their peoples' experience of colonialism as a "form of structured dispossession."²⁶

At first glance, this may appear to succumb to a similar set of tensions as identified above. To speak of dispossession is to use a negative term. It is "negative" both in the ordinary language sense (i.e., pejorative), but also in the more philosophical sense, in that it signals the *absence* of some attribute. Again, a condition of dispossession is most intuitively characterized by a privation of possession. In this particular case, the term is used in a seemingly paradoxical manner to denote the fact that Indigenous peoples have had the territorial foundation of their societies (i.e., their ancestral lands) *stolen* from them, while simultaneously asserting that these lands were not "property" in the (pre-colonial) first instance.

This is not mere pedantry. In her recent work, *The White Possessive*, the Indigenous (Goenpul) scholar Aileen Moreton-Robinson discusses a case that clarifies the "real world" stakes of this issue, namely, the so-called Australian "history wars."²⁷ Sparked by the 2000 publication of *The Fabrication of Aboriginal History* by the rightwing, populist historian Keith Windshuttle, these debates pivoted (in part) upon his claim that, because Australian Aborigines had no word in their languages for "property" as prevailing Western legal and political systems understand it—or indeed, in some cases lacked any conception of "land" as a discrete entity in which one could claim property—there could be no meaningful subsequent claim to theft of that land.²⁸ As Moreton-Robinson unpacks the logic of the argument: "Indigenous people did not have a concept of ownership, which means that we had no sovereignty to defend. Thus there was no theft, no war, and no need to have a treaty."²⁹ Similar kinds of arguments have gained traction in the Canadian context as well.³⁰

It is not my intention to explore this rather dubious line of reasoning here. The point is simply to highlight the extent to which critics are seizing and capitalizing upon a basic conceptual ambiguity at the heart of dispossession. They wish to catch Indigenous peoples and their allies up on the horns of a familiar dilemma: Either one claims prior possession of the land in a recognizable propertied form—thus universalizing what Moreton-Robinson calls the "possessive logic of white patriarchal sovereignty" as the appropriate normative benchmark—or one disavows possession as such, apparently undercutting the force of a subsequent claim of dispossession.³¹

Accordingly, when the term dispossession migrates into discussions of colonization, a certain danger emerges. On the one hand, it is potentially problematic to adopt the classical anarchist strategy of construing dispossession as a case of straightforward theft since this leaves one vulnerable to both longstanding objections from the Marxian camp and more opportunistic critiques from the right. On the other hand, however, the route provided by the Marxist reply to anarchism may also prove inadequate, since this drags the heart of the whole matter away from expropriation towards exploitation. It would seem very odd indeed to suggest that the dispossession of Indigenous peoples from their lands is problematic because it enables their exploitation as labourers, since this is empirically not a very accurate description of the experience of colonization faced by many Indigenous peoples (especially in the Anglo settler world), but more to the point, it seems to distort the underlying logic of these struggles.

An alternative route around this dilemma is to insist that dispossession is not really about possession at all. In this strategy, although the *word* is used to describe something specific about the territoriality of Indigenous social and political orders or its role in settler colonization, the “possessive” part of dispossession is rendered rather more incidental. In this case, we might really mean something like deracination or desecration. The first of these terms denotes a form of “uprooting” and carries connotations of displacement and removal. It can have literal and more metaphorical uses (as is the case with, say, dislocation), and has a certain intuitive appeal since the expropriation of the territorial foundation of a society will clearly have a massively negative, disruptive effect on that society. Dispossession *qua* deracination carries its own ambiguities and dangers of course. It may, for instance, suture Indigeneity to territorial *fixity* (an issue I cannot explore here).³² However, the language of deracination does seem at least to lead us away from implying that that relationship to land must in its original form be a propertied one.

At other times when people use the term dispossession in these contexts, they seem to really mean something like “desecration.” In this valence, Indigenous peoples often raise a concern with the degradation or defilement of some object of concern whose moral worth cannot be measured in purely anthropocentric terms. What is interesting about this framework is that the primary object of injury has changed. Whereas deracination, theft, exploitation, and coercion are all things that happen to the human inhabitants as a result of land appropriation, desecration implies that the *earth itself* is the injured party. This isn’t to say that there cannot be some additional injury to the human inhabitants, but this shifts to the level of a secondary effect. Consider the following passage from the Mohawk legal scholar Patricia Monture-Angus:

Although Aboriginal Peoples maintain a close relationship with the land . . . it is not about control of the land. . . . Earth is mother and she nurtures us all. . . . Sovereignty, when defined as my right to be responsible . . . requires a relationship with territory (and not a relationship based on control of that territory). . . . What must be understood then is that Aboriginal request to have our sovereignty respected is really a request to be responsible. I do not know of anywhere else in history where a group of people have had to fight so hard just to be responsible.³³

What is motivating about this rendering is the novel way in which the claims and relationships have been reversed from the standard proprietary model. Monture-Angus provides us with a clear example of an argument that does not rest on a normative commitment to property-in-land, but still leverages a strong critique of territorial acquisition. The important element is that she has converted a traditionally rights-based claim into a duty-based one. As she construes it, Aboriginal title is a claim about the necessity of being responsible to something greater than oneself, that is, the earth itself. This seems to get us out of some of the complications of the strictly proprietary use of dispossession and brings us closer to the desecration sense of the term.

Let us set aside these alternative formulations, however, in order to more completely explore our original problematic. If I do so, it is not because the rendering given by thinkers such as Monture-Angus isn't important or convincing. Rather, we may wish to explore alternatives because, for instance, not all Indigenous peoples and communities will view their relationship to the earth in this way. What is more, as any engagement with the actual writings and works of such people reveals, there is a palpable sense in which Indigenous communities in the Anglo-settler world have experienced, and continue to experience, colonization as a form of theft. Notwithstanding all the complications just raised then, there is a certain claim here to the effect that *this land is stolen*, a claim that cannot be simply sidestepped if we wish to remain responsive to the specific historical experience at stake. We may wish then to persist in grappling with the language of theft out of an interest in engaging these claims as they are presented to us, perhaps precisely because the issue at hand does not fit neatly into expected frames of reference. Continuing to speak of dispossession *qua* "theft of land" would then not simply be important as part of rhetorical strategy, or as a principle of solidarity (although these may also be an important considerations). Rather, it would be worth retaining these terms because they in fact express an appropriate, conceptually complex apprehension of the nature of colonization.

Part of what continues to motivate the use of the term dispossession in these contexts, I would suggest, is the real sense that colonization

(especially *settler* colonization) does involve a unique species of theft for which we do not always have adequate language. Namely, colonization entails the large-scale transfer of land that simultaneously *recodes* the object of exchange in question such that it appears *retrospectively* to be a form of theft in the ordinary sense. It is thus not (only) about the *transfer of* property, but the *transformation into* property. In this context then dispossession may refer to a process by which new proprietary relations are generated, but under structural conditions that demand their simultaneous negation. Those impacted by this process—the dispossessed—may even come to attach to these new relations, experiencing them (or elements of them) as effects of a positive development in the sense that the process entails a nominal expansion of their proprietary rights, i.e., a new form of property. However, they can also come to experience a deep conflict between the *abstract* form of the proprietary right and the *concrete conditions* of its realization. The reason for this is that the dispossessive process has also changed background social conditions such that the actualization of the proprietary right in question is necessarily mediated in such a way as to effectively negate it. In effect, the dispossessed may come to “have” something they cannot use, except by alienating it to another.

This formulation helps us avoid some of the false dilemmas sketched above since it can name a process of dispossession without presuming an original possession or requiring a theory of “first occupancy.”³⁴ It also helps to explain the paradoxical phenomenon we find in the history of settler colonialism of colonizers who simultaneously affirm and deny Indigenous proprietary interests in land. In the long and complex history of the European colonization of the Anglo settler world, we of course find numerous examples of colonial figures who simply deny outright the very possibility of Indigenous property in land, typically as a function of Indigenous peoples’ supposedly lower levels of socioeconomic development, rationality, techniques of cultivation, enclosure, and the like. As has been well documented, thinkers from Vattel to Locke to Kant have all doubted whether Indigenous peoples have ever exhibited the appropriate level of socioeconomic and technological development required to take true possession of land. Alongside these blanket denials, however, we also find various forms of partial recognition and selective affirmation of Indigenous proprietary interests. Historically, settlers have routinely affirmed certain forms of Indigenous property rights because they have recognized that, in a consolidating colonial context, Indigenous peoples can only actualize their property rights through alienation. As the Lakota (Standing Rock Sioux) philosopher Vine Deloria Jr. put this point in his landmark 1969 work, *Custer Died for Your Sins*,

[O]ne day the white man discovered that the Indian tribes still owned some 135 million acres of land. To his horror he learned that much of it was very valuable. . . . Animals could be hearded together on a piece of land, but they could not sell it. Therefore it took no time at all to discover that Indians were really people and should have the right to sell their lands. Land was the means of recognizing the Indian as a human being. It was the method whereby land could be stolen legally and not blatantly. . . . Discovery negated the rights of the Indian tribes to sovereignty and equality among the nations of the world. It took away their title to their land *and gave them the right only to sell*.³⁵

Deloria is putting his finger here on a peculiar nominal property right enjoyed by Indigenous peoples in colonial contexts: the right “only to sell.” Put somewhat differently, although the standard form of a property right is a tripartite conjunction of exclusive rights to (a) acquisition, (b) use and enjoyment, and (c) alienation, within the context of settler-colonial capitalism, “Indigenous property” often appears as an already paradoxical conjunction, a truncated form of property that can only be fully expressed in the third moment, that is, alienation.³⁶ In other words, *it is fully realized only in its negation*. Indigenous propertied interests are only rendered cognizable in a retrospective moment, viewed backward and refracted through the process of generating a distinct form of “structurally negated” property right in land. Paradoxically then, in such cases, possession does not precede dispossession but is its effect. The system *produces what it presupposes* (namely, property). Rather than avoid the problem of a negatively defined concept, I suggest, we should therefore highlight precisely this *recursivity* as the essential feature of the specific process under consideration.

If dispossession can be usefully thought of as consisting in a relationship between a juridical structure of right—in this case, property in land—and the social context that actualizes that system of right, then a full account of it will need to explain both that *de jure* structure and its *de facto* actualization. We will need to demonstrate precisely how proprietary interests can be “structurally negated” by a background social context. It is beyond the scope of a single article to provide a full account of this sort. Instead, let me point to one exemplary case.

III

Not long after independence, the United States moved to regulate westward expansion. In 1785, Congress issued a proclamation forbidding unlawful settlement and authorizing the Secretary of War to remove those in the breach.³⁷ In 1806, the term *squatter* was used for the first time in congressional debates to refer to the growing problem of claims obtained outside of

the formally recognized and legally sanctioned process.³⁸ Formal, legislative prohibition peaked in the form of the Intrusion Act of 1807, which forbid US citizens not only from unlawfully taking possession or making settlements but also from surveying, designating boundaries, or even marking trees in such a way as to facilitate a future claim. It moreover reauthorized the President and his officials “to employ such military force as he may judge necessary and proper” to remove offenders.³⁹

Congress faced two obstacles in its attempt to curtail settler expansion by legislative means. First and foremost, legislative control over illegal squatting was practically unenforceable. By the turn of the nineteenth century, settlers had grown in numbers and technical competences to be an independent social force that could effectively overrun the state in its official capacity. Moreover, as Roxanne Dunbar-Ortiz points out, the new Republic itself was increasingly materially dependent upon access to new land, which quickly “became the most important exchange commodity for the accumulation of capital and building of the national treasury.”⁴⁰ This created tensions between different aims in the state building process—between territorial expansion, capital accumulation, and the rule of law. The resulting struggle between government agents (e.g., surveyors, bureaucrats, and auctioneers), homesteading squatters, and financier-speculators was most acutely felt in the effort to enforce frontier laws. Army officers were sent out to the countryside, charged with handing out and collecting fines, as well as enforcing foreclosures and jail sentences. In July of 1827, federal troops were sent into Indian land in Alabama, where they forcibly removed squatters, burning their homes and crops. Repeated periodically throughout the 1830s and 1840s, this came to be known as the “Intruders’ War.”⁴¹ Among other difficulties of enforcement, soldiers were generally sympathetic to squatters, not a surprise given that cheap frontier land was a common reward for service.

The second problem was more abstract. State measures against intrusion relied upon a clear understanding of the legality of settlement for their consistent application and enforcement. Here we encounter a unique conceptual problem that bears upon larger questions of dispossession and expropriation. The history of Anglo-settler societies evinces an especially complicated gesture of simultaneously avowing and disavowing the rule of law: squaring a reliance on extra-legal violence as constitutive to their founding and continued expansion with a self-image as distinctly free societies governed by law. Tocqueville, for one, observed the strange preoccupation with providing legal justification for the colonization process in the United States. Having personally witnessed the mass expulsion of the Choctaws from their ancestral lands via the mechanism of Andrew Jackson’s *Indian Removal Act* (1830), Tocqueville commented that although the “Spaniards were unable to exterminate the India race by those

unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly depriving it of its rights . . . the Americans of the United States have accomplished this twofold purpose with singular felicity, tranquility, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world.” He wryly concluded: “It is impossible to destroy men with more respect for the laws of humanity.”⁴² In noting the “regular and, as it were, a legal manner”⁴³ of the violence against Indigenous peoples in the United States, Tocqueville was attending to the particularly fraught and unstable distinction between legality and illegality that operated in the land acquisition process of such a state, which posited the state as the legitimate source of law while nevertheless acknowledging, even fostering, the extra-legal mechanisms that made its very existence possible.

Consider again the Intrusion Act of 1807. The Act expressly applies to squatters on already-acquired public lands, that is, illegal possession *within* the extant ambit of US law. However, since squatters, by definition, do not observe the bounds of law, the Act recognizes that they are also found in land “not previously recognized and confirmed by the United States.” These are squatters *beyond* the territorial bounds of the United States, but nevertheless (and somewhat inexplicably) within the ambit of the Act. One way to express this tension is through a distinction between *illegality* and *extra-legality*. Whereas squatters on recognized and claimed US public lands are clearly located within a sphere of illegality—itsself readily cognizable and justiciable by the law—the squatters beyond the territorial bounds of the extant state are in a space of *extra-legality*. Their activities are outside US law, but not necessarily in conflict with it. The slippage between these two is vexing from a legal standpoint, for instance, as a problem of justiciability. It is nevertheless productive and integral to the dispossessive process since the prohibition against squatting in lands “not yet recognized” as within the bounds of the state presumptively figures these lands as awaiting incorporation, as *potential but not yet fully actualized* public lands. In this way, the lands beyond the frontier are merely at a temporally earlier stage in the recursive process of legitimation by which public lands came to be subsumed beneath settler state law, since even the territory from which the law currently speaks (the settler metropole) is but a previous era’s quasi-legal frontier lands that have been retroactively validated. As such, we see judges and jurists of early-nineteenth century America struggling with the issue of frontier illegality not only as a problem enforcement of law but of its ultimate legitimacy. As Mississippi federal judge Harry Toulmin wrote to President Madison, “How can a jury be found in Monroe County to convict a man of *intrusion*—where every man is an *intruder*?”⁴⁴

One solution to this was to incorporate a measure of illegality into the operation of the law, an illegality that, it was hoped, could be retroactively redeemed through a recursive device. In the early nineteenth century, this took the form of *preemption*. The word preemption refers to a preference or prior right of acquisition by a specific claimant, typically the occupant. In the early colonial period, it referred to a right claimed by one European power against others to “first occupancy,” assigning a special status to the original “discoverer” of a new territory.⁴⁵ In the wake of US independence, the principle was recognized by the Continental Congress and reformulated to apply to settlers on the western frontier. Effectively, it gave squatters a right of first bid on territory they occupied, often at a significantly reduced price, provided they had dwelled on the land for a given period of time and had sufficiently “improved” it. In the period between staking an initial claim and redeeming that claim through purchase, squatters were deemed “tenants at will.”⁴⁶ If they sufficiently improved the land and raised enough capital to eventually buy it from under themselves at auction, they were effectively exonerated of the crime of trespass. If not, the state could remove them and sell the lands to more worthy competitors. In this way, a grey zone of illegality was preserved within its confines of the law itself in the form of delayed or belated enforcement: the distinction between an “illegal squatter” and “valid tenant at will” could only be known in light of a retrospective gaze. In short, in Congress’s own formulation, theft preceded and produced property.

Between 1799 and 1838, thirty-three special or temporary preemption acts were passed.⁴⁷ Originally contained as clauses within legislation whose primary intent was to restrict illegal squatting (e.g., within the Intrusion Act of 1807), such provisions were expanded and formalized in their own right over the course of the 1820s, 1830s, and 1840s. In 1830, the first properly titled “Preemption Act” was passed by Congress, which included a general pardon for all inhabitants of illegally settled lands. Initially intended to be a temporary measure, it set a new precedent. By that point, settlers recognized that they could effectively disregard the previous Intrusion Act since there was a high degree of probability they would simply be exonerated by later preemption legislation.⁴⁸ In practice, then, the strange recursive relation between the Intrusion and Preemption acts actually encouraged illegal settlement. By the mid-1830s, the preemption bill was coming up for renewal as frequently as annual appropriations.⁴⁹

In 1841, revisions to the policy of preemption sought to remove its awkward retroactivity. From that point on, Congress did not even consider settlement prior to purchase as trespass per se, subject to some provisos. “Homesteaders” (as they were now more positively deemed) had to be the head of a family, a widow, or a single man over twenty-one years of age and

a citizen of the United States (or current applicant for citizenship). They could not already be the proprietor of 320 acres or more of land in any state or territory, must reside on the plot in question and “improve” it.⁵⁰ In this way, the Preemption Act not only gave legislative cover for squatting, it continued the Lockean ideal of restricting appropriation based upon good standing, improvement, and sufficiency.

Squatters, homesteaders, and “tenants at will” thus came to possess a *sui generis* form of right—the retroactively legitimized, quasi-legal claim of preemption. As a hybrid racial-legal category of people, “Indians” possessed a corollary form of right that, not coincidentally, was also referred to as “preemption.” Importantly, in the 1820s and 1830s American Indian law came to codify “Indians” as those who did not possess full rights to sovereignty and land ownership. Theirs was a *sui generis* right of “occupancy” or “tenancy” and, in this sense, was not entirely dissimilar to squatter rights. As Chief Justice John Marshall put it, theirs was a right of tenancy or temporary occupancy, which awaited “consummation” by US possession.⁵¹ The Indian form of preemption was, however, the inverted mirror reflection of that accorded to squatters. Whereas squatters possessed the preemptive right to *purchase*, Indians held the preemptive right to *sell*. This truncated property right (i.e., the right to alienate) was, in effect, one of the first “indigenous rights.”⁵²

This does not mean that individuals once coded as “Indians” could never purchase land. It did require, however, that they could not legally own “homesteads.” For instance, legislation from 1865 provided the first possibility for some Indians to receive plots under the 1862 Homestead Act.⁵³ An 1875 appropriations bill expanded and further entrenched this possibility, but did so only through an explicit requirement that said Indians had “abandoned” their “tribal relations” (including providing “satisfactory proof of such abandonment”).⁵⁴ An 1884 revision to this further clarified that “Indian homesteads” would be held in trust by the federal government for twenty-five years. The Dawes Act came into effect in 1887 and, for the forty-seven years it was in effect, it provided the legislative mechanism by which approximately 90 million acres of *additional* lands were appropriated from Indigenous nations and distributed to “homesteaders”—an area larger than present-day Germany.⁵⁵ In his extensive documentation of this process, the historian David Chang concludes, “Allotment combined the making of land into private property and the taking of that private property from Indians.”⁵⁶ In a strict definitional sense then, “Indians” alienated proprietary claims to land, whereas “homesteaders” actualized them. A single person could perform both roles, but not at the same time: one was *either* an Indian or a Homesteader.

Attending to the movement of Intrusion → Preemption → Homesteading enables us to specify and concretize what it means to say that new property

rights in land “left no room for the Indians,” or were “predicated upon their dispossession and dehumanisation.”⁵⁷ Moreover, we can better grasp the *recursive logic* that made this possible. First, we can observe in it a kind of bootstrapping procedure that generates legal possession out of avowedly extra-legal seizures. In this, the state is figured as the originator of law, which is meant to secure its validity and distinctiveness from other non-state forms of coercion that have not been publically validated and thus cannot avail themselves of the status of law (such as private squatting). On the other hand, however, the state itself must arise out of extra-legal force, for there is no prior law that can validate founding itself. In Anglo settler societies, the solution to this has often been to redeem the validity of founding through a recursive mechanism, one that sees the state acting “as if” it is a source of publically validated law until such time that it properly becomes one (a point on the horizon that is, of course, ever receding). The admixture of legality and illegality inherent in this expressed itself in both spatial and temporal terms, as both a zone and a time, as the *frontier* and the *waiting period* between initial trespass and retrospective redemption through purchase (what Patrick Wolfe has called a “lethal interlude”).⁵⁸

Second, it gives us a clear glimpse of the reconfigured relation between state and market. While the new Republic attempted to deploy the traditional mechanisms of state control to contain the socio-economic processes unleashed in the decades prior to independence, sending military and police agents to restrict illegal squatters, this proved ultimately futile. Paradoxically, the state was both a central agent of market formation, and in thrall to it. The creation of private property in land “simultaneously extended and masked the reach of state power.”⁵⁹ How so? The land market that was created at the turn of the nineteenth century did not spring out of thin air as a model of self-organizing economic relations. Rather, it was a construct generated as much by the coercive power of the state apparatus as by “private” interests and individuals. The new market for land was, after all, predicated upon the military conquest of Indigenous peoples, their forced removal from the territories in question, and their *de jure* and *de facto* exclusion from the market through legislation explicitly designed to ensure Indians could not compete with white settlers when it came time to (re)purchase land at auction. At the same time, however, state officials quickly found they could not fully contain or control market forces once they took hold. They could not fully control squatters, nor the proliferation of “Claims Clubs” which colluded to drive down land prices through collective bidding—practices that gained increased respectability and legal protection through such organizations as the National Land Association (founded in 1844) and the Free Soil Party (active from 1848 to 1852).⁶⁰ Thus, we find less a colonization process driven by state

demands for territorial sovereignty *or* economic drives for capital accumulation, but rather a complex assemblage of both at once. The two were interwoven since, much as government officials might complain of meddlesome squatters, these same squatters were the primary mechanism by which the state was able to convert frontier land from a threatening external wilderness to a fiscal resource and national asset.⁶¹ Thus, while the distinct processes of state and market formation remain “semi-autonomous” in the sense that they are analytically distinguishable from one another—and even run up against one another or compete from time to time—they nevertheless functioned as part of an emergent composite whole, a fact we can observe more clearly when we consider the relatively uniform effect these processes had on the dispossession of Indigenous peoples. Most importantly for our purposes here, we can see how the emergence and expansion of a whole new system of proprietary rights in land systematically *extended* and yet *negated* those rights for “Indians.” Indians came to possess new rights to land, but could only actualize them through alienation to squatters, homesteaders, and government agents. A system of organized theft and a system of property were related in a distinctly recursive, rather than strictly unilinear, manner.

IV

The upheaval and transformation of land tenure within Europe—the dismantling of feudalism and slow, uneven emergence of capitalist private property and commodity markets in “real estate”—took place alongside and in relation to the territorial expansion of European societies into non-European lands and, in the specific case of Anglo settler expansion, the construction of new systems of liberal-capitalist land tenure in the absence of a dominant feudal system. This expansionist system of land appropriation and property generation serves as a second horizon of meaning through which theories of dispossession must be articulated. As such, colonization is not simply an interesting “case study” for a theory of dispossession. Rather, alongside and in conjunction with the critique of European feudalism, it is the most significant setting to frame the development of original debates over dispossession and expropriation. In short, it is not an *example* to which the concept applies, but a *context* out of which it arose. The interrelation of these contexts has implications then for historical-explanatory, textual-hermeneutic, and normative-conceptual purposes: how we read history and texts, to what purposes, and through what lenses.

This has been obscured, however, by the one-sided analysis of such processes in the history of social and political thought. Narratives of dispossession commonly begin with the *intra*-European process and are only subsequently

adapted to explain the *extra*-European projection of power (if at all). We find this, for example, in one of the most influential and insightful works to analyze the transformation of landed property: Karl Polanyi's seminal text *The Great Transformation* (1944). There, Polanyi analyzes the "commercialization of the soil" as part of the historical emergence of capitalism in the collapse of feudalism. However, although he does acknowledge the "field of modern colonization" as the site where "the true significance of such a venture becomes manifest," Polanyi nevertheless does not pursue investigation of this alternative context.⁶² The same can be said for almost all major works of social and political thought to deal with expropriation, dispossession, and land appropriation. This article has offered a preliminary sketch of an alternative genealogy, one that takes seriously the historical processes of property formation in the colonial world. The result is at least to begin to unravel some of the paradoxes and puzzles associated with the question of dispossession today. As I have argued here, the supposed circularity of the critique is, in fact, reflective of the recursive logic of dispossession itself, that is, as a mode of *property-generating theft*.⁶³

This does not mean of course that colonization itself is reducible to, or exhaustively captured by, dispossession of this sort. Colonization involved—and involves—a complex array of difference processes not mentioned here, including labour exploitation, enslavement and racial domination, gendered and sexual violence, cultural defilement, and the usurpation of self-governing powers, to name only a few. It also entails cases of theft in the perfectly ordinary sense. If I have focused here on one subsystem within this broader complex, it is not because it is exhaustive but because it is distinctive and useful for unraveling the vagaries of dispossession, historically and in the present.

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1. My understanding of this process is indebted to Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014), esp. chapters 1 and 2; Richard Tuck, *The Rights of War and Peace* (Oxford: Oxford University Press, 1999), esp. chapters 1 and 2; Peter Garnsey,

- Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge: Cambridge University Press, 2007).
2. See Étienne Balibar, “The Reversal of Possessive Individualism,” in *Equaliberty: Political Essays* (Durham, NC: Duke University Press, 2014), chap. 2; Daniel Bensaïd, *Les dépossédés: Karl Marx, les voleurs de bois et le droit des pauvres* (Paris: La fabrique edition, 2007); Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Malden, MA: Polity, 2013); Nancy Fraser, “Expropriation and Exploitation in Racialized Capitalism,” *Critical Historical Studies* (Spring 2016); David Harvey, *The New Imperialism* (Oxford: Oxford University Press, 2005); Edward Said, *The Politics of Dispossession: The Struggle for Palestinian Self-Determination, 1969-1994* (New York: Random House, 1994). For an insightful engagement with this literature, see Catherine Kellogg, “‘You May Be My Body for Me’: Dispossession in Two Valances,” *Philosophy & Social Criticism* 43, no. 1 (2017): 83–95.
 3. For a small sample of the voluminous literature in which the term appears prominently, see Brenna Bhandar and Davina Bhandar, eds., *Reflections on Dispossession: Critical Feminisms* (London: Living Commons Press, 2016); Jean O’Brien, *Dispossession by Degrees: Indian Land and Identity in Natick, Massachusetts, 1650-1790* (Cambridge: Cambridge University Press, 1997); Lindsay Robertson, *Conquest by Law: How the Discovery of America Disposessed Indigenous Peoples of their Lands* (Oxford: Oxford University Press, 2007); Adele Perry, “The Colonial Archive on Trial: Possession, Dispossession, and History in *Delgamuukw v. British Columbia*,” in *Archive Stories: Facts, Fictions, and the Writing of History*, ed. Antoinette Burton (Durham, NC: Duke University Press, 2005), 325–50; Paige West, *Dispossession and the Environment: Rhetoric and Inequality in Papua New Guinea* (New York: Columbia University Press, 2016).
 4. For a set of sharp exchanges along these lines, see Bonita Lawrence and Enakshi Dua, “Decolonizing Antiracism,” *Social Justice* 32, no. 4 (2005): 120–43; Nandita Sharma and Cynthia Wright, “Decolonizing Resistance, Challenging Colonial States,” *Social Justice* 35, no. 3 (2008/2009): 120–38; Jared Sexton, “The *Vel* of Slavery: Tracking the Figure of the Unsovereign,” *Critical Sociology* 42, no. 4/5 (2016): 583–97; Iyko Day, “Being or Nothingness: Indigeneity, Antiracism, and Settler Colonial Critique,” *Critical Ethnic Studies* 1, no. 2 (Fall 2015): 102–21.
 5. Jean-Jacques Rousseau, “Discourse on the Origin and the Foundations of Inequality among Men [1755],” in *The Discourses and Other Early Political Writings*, ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), part II, 161.
 6. Thomas Paine, *Agrarian Justice*, in *The Rights of Man, Common Sense, and Other Political Writings*, ed. Mark Philp (Oxford: Oxford University Press, 1995), 409–33 at 419.
 7. *Ibid.*, 420.
 8. *Return of Owners of Land*, 2 v. (London: Her Majesty’s Stationery Office, 1875).

9. Pierre-Joseph Proudhon, *General Idea of Revolution in the Nineteenth Century* (New York: Haskell House Publishers, [1851] 1969), 195.
10. Cf. Pierre-Joseph Proudhon, *What Is Property?* (Cambridge: Cambridge University Press, [1840] 1993).
11. *La conquête du pain* (Paris: Les Éditions invisibles, 2009).
12. See Daniel Bensaïd, *Les déposés*. For Marx's original works (and a German translation of Bensaïd's essay), see Daniel Bensaïd, *Die Enteigneten: Karl Marx, die Holzdiebe und das Recht der Armen*, trans. Roland Holst (Hamburg: LAIKA Verlag, 2012).
13. Hence, as Marx developed his views on dispossession, he came increasingly to situate it within a much broader discussion of "primitive accumulation," most famously in part VIII of *Capital, Vol. 1*. Elsewhere, I have made the case that the concept of dispossession might be productively freed from this broader picture. See Robert Nichols, "Disaggregating Primitive Accumulation," *Radical Philosophy* 194 (November/December 2015).
14. See Karl Marx, "Letter to J.B. Schweizer," in Karl Marx and Frederick Engels, *Collected Works*, vol. 20 (New York: International Publishers, 1985), 26–33, at 27–28.
15. Max Stirner, *The Ego and Its Own* (Cambridge: Cambridge, [1844] 1995), 223.
16. The period of the 1872 French translation of *Das Kapital* is a telling transition moment in this movement from Germanic to Latinate terms.
17. Marx-Engels Werke, Band 23, *Das Kapital*, Bd. I, Siebenter Abschnitt (Berlin/DDR: Dietz Verlag, 1968), 743.
18. See Susan Reynolds, *Before Eminent Domain: Toward a History of Expropriation of Land for the Common Good* (Chapel Hill: University of North Carolina Press, 2010).
19. Karl Marx and Frederick Engels, *The Germany Ideology*, vol. 1, part III ("Saint Max") in Marx and Engels, *Collected Works*, vol. 5, (New York: International Publishers, 1976), 247.
20. Harvey, *The New Imperialism*, 144. Harvey does not elaborate on what "dispossession" is meant to signal here, and uses the phrase more or less interchangeably with "primitive accumulation." For an overview and critical analysis of these debates, see Nichols, "Disaggregating Primitive Accumulation."
21. Fraser, "Expropriation and Exploitation," 169.
22. G. A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995), 146. It should be noted that Cohen (and others working in this tradition) does not typically use the term *dispossession*. Rather, he tends to speak of the "unfair" or "unequal" original distribution of "productive resources."
23. *Ibid.*, 197; emphasis modified.
24. *Ibid.*, 201.
25. One voice is notably absent from this genealogy: Locke. There is of course a voluminous literature on Locke's relation to both colonialism and property rights. Thanks in particular to contributions by David Armitage, Barbara Arneil,

- James Tully, and others, we now know that Locke was central to the justification of colonial dispossession and expropriation in the early modern English-speaking world. Aside from a desire not to replicate this already extensively analyzed field, I exclude Locke here in favour of thinkers who deploy notions of dispossession as tools of social and political critique and, in particular, to *delegitimize* colonial expansion, not justify it.
26. Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 7. Audra Simpson defines settler colonialism as “an ongoing structure of dispossession that targets Indigenous peoples for elimination.” *Mohawk Interruptus* (Durham, NC: Duke University Press, 2014), 74.
 27. Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015).
 28. Keith Windshuttle, “Mabo and the Fabrication of Aboriginal History,” <http://samuelgriffith.org.au/docs/vol15/v15chap11.pdf>, 120 (accessed February 2016).
 29. Moreton-Robinson, *The White Possessive*, 150.
 30. For an argument that follows a similar logic in the Canadian context, see Tom Flanagan, Christopher Alcantara, and André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen’s University Press, 2010).
 31. This argument has been advanced in various guises by many on the left as well, who have similarly posited that contemporary Indigenous struggles over land necessarily presuppose exclusive proprietary rights and ethno-nationalist “ownership” that is therefore inherently anti-Black and/or anti-migrant. Op. cit. at 4.
 32. Recently explored by the Biniza scholar Isabel Altamirano-Jiménez in *Indigenous Encounters with Neoliberalism* (Vancouver: University of British Columbia Press, 2013). On the other side of deracination, Audra Simpson frequently pairs dispossession with containment. See Simpson, *Mohawk Interruptus*, 16, 99, 105.
 33. Patricia Monture-Angus, *Journeying Forward* (Halifax: Fernwood, 1999), 36. Quoted in Andrea Smith, “Native Studies at the Horizon of Death,” in *Theorizing Native Studies*, ed. A. Smith and A. Simpson (Durham, NC: Duke University Press, 2014), 207–234 at 222.
 34. E.g., Jeremy Waldron, “Indigeneity? First Peoples and Last Occupancy,” *New Zealand Journal of Public and International Law* (2003): 55–82. For a critical response, see Robert Nichols, “Indigeneity and the Settler Contract,” *Philosophy & Social Criticism* 39, no. 2 (2013): 165–86.
 35. Vine Deloria Jr., *Custer Died for Your Sins*, rev. ed. (Norman: University of Oklahoma Press, [1969] 1988), 7, 30 (emphasis added).
 36. It is worth noting that after alienation and extinguishment, some Indigenous peoples were viewed to retain “usufructuary” rights. However, by this point, these are not full and true property rights. They are rights to *use* that are delegated by those who possess full rights to *ownership* (reminiscent of a feudal rentier relation).
 37. Everett Dick, *The Lure of the Land: A Social History of the Public Lands from*

- the Articles of Confederation to the New Deal* (Lincoln: University of Nebraska Press, 1970), 50. See also Amelia For, *Colonial Precedents of our National Land System*, *Bulletin of the University of Wisconsin*, History Series, II, no. 2 (Madison, Wis. 1909-10), 117-18.
38. Dick, *The Lure of the Land*, 51.
 39. An Act to prevent settlements being made on lands ceded to the United States, until authorized by law. [<http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=016/llac016.db&recNum=640>]
 40. Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States* (Boston: Beacon Press, 2014), 124. See also Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007), 14.
 41. Dick, *The Lure of the Land*, 53.
 42. Alexis de Tocqueville, *Democracy in America*, 2 vols., trans. D. Boorstin (New York: Vintage, 1990), vol. 1, 355.
 43. *Ibid.*, 340.
 44. Judge Harry Toulmin to the President, January 20, 1816, in Clarence Carter, ed., *The Territorial Papers of the United States, Mississippi Territory*, VI (Washington, DC: Government Printing Office, 1938), 644-47. Cited in Dick, *The Lure of the Land*, 53.
 45. Patrick Wolfe, *Traces of History: The Elementary Structures of Race* (New York: Verso, 2016), esp. chap. 5.
 46. Dick, *The Lure of the Land*, 51. See William Lester, *Decisions of the Interior Department in Public Land Cases* (Philadelphia, 1860), 28-30.
 47. I have consulted the following congressional legislation in the composition of this section: Ordinance of April 23, 1784; *Journals of the Continental Congress, 1774-1789*, ed. Worthington C. Ford et al. (Washington, DC, 1904-37), 26:275-279; Ordinance of May 20, 1785; *Journals of the Continental Congress, 1774-1789*, ed. Worthington C. Ford et al. (Washington, DC, 1904-37), 28:375-382; Ordinance of July 13, 1787; *Journals of the Continental Congress, 1774-1789*, ed. Worthington C. Ford et al. (Washington, DC, 1904-37), 32:332-343; Ordinance of May 26, 1790 (1st Congress), 1 Stat. 123; Act of March 3, 1801 (6th Congress), Ch. XXIII, 2 Stat. 112-114; Act of April 25, 1812 (12th Congress), Ch. LXVIII, 2 Stat. 716-718; Act of September 4, 1841 (27th Congress), Ch. XVI, 5 Stat. 453-458; Act of September 27, 1850 (31st Congress), Ch. LXXVI, 9 Stat. 496-500; Act of July 17, 1854 (33rd Congress), Ch. LXXXIV, 10 Stat. 305-306; Act of July 22, 1854 (33rd Congress), Ch. CIII, 10 Stat. 308-310; Act of March 2, 1855 (33rd Congress), Ch. CXXXIV, 10 Stat. 626; Act of March 3, 1855 (33rd Congress), Ch. CCVII, 10 Stat. 701-702; Act of May 20, 1862 (37th Congress), Ch. LXXV, 12 Stat. 392-393; Act of March 3, 1865 (38th Congress), Ch. CIX, 13 Stat. 530-532; Act of March 3, 1865 (38th Congress), Ch. XXVII, 13 Stat. 541-563; Act of June 21, 1866 (39th Congress), Ch. CXXVII, 14 Stat. 66-67; Act of March 3, 1873 (42nd Congress), Ch. CCLXXVII, 17 Stat. 605-606; Act of March 3, 1875 (43rd Congress), Ch. CXXXII, 18 Stat. 402-420; Act of February 2, 1887 (49th Congress), Ch. CXIX, 24 Stat. 33-36. [The "Dawes

- Act”]; Act of March 3, 1891 (57th Congress), Ch. DLXI, 26 Stat. 1095–1103. Dick, 56. Lester, *Decisions*, 64–65.
48. Dick, *The Lure of the Land*, 56; Lester, *Decisions*, 64–65.
 49. Roy Robbins, *Our Landed Heritage: The Public Domain, 1776–1936* (New York: Peter Smith, 1950), 50.
 50. Robbins, *Our Landed Heritage*, 89–90.
 51. For an extended analysis of Marshall’s decision, see Robertson, *Conquest by Law*.
 52. Moreover, as Wolfe (citing Harvey Rosenthal) reminds us: “the American right to buy always superseded the Indian right not to sell” (Wolfe, *Traces of History*, 143). Citing Harvey D. Rosenthal, “Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission,” in Imre Sutton et al., *Irredeemable America: The Indians’ Estate and Land Claims* (Albuquerque: New Mexico University Press, 1985), 36.
 53. See Act of March 3, 1865 (38th Congress), Ch. CIX, 13 Stat. 530–532; Act of March 3, 1865 (38th Congress), Ch. XXVII, 13 Stat. 541–563.
 54. Act of March 3, 1875 (43rd Congress), Ch. CXXXII, 18 Stat. 402–420. The funding provisions for “Indian relations” in this appropriations bill is a veritable survey of the range of US–Indigenous relations at the time. It includes specific funding provisions for the “suppression of Indian hostilities” in Montana; educational, social benefits and subsistence monies for the Seminole, Kickapoo, Navajo, Apache, Northern Sioux; the sale of bonds to the Pottowatomie and Choctaw; and the forced removal of the Pia Ute.
 55. Act of February 2, 1887 (49th Congress), Ch. CXIX, 24 Stat. 33–36. [The “Dawes Act”].
 56. David Chang, “Enclosures of Land and Sovereignty,” *Radical History Review*, Issue 109 (Winter 2011): 108–119, at 108. See also David Chang, *The Color of the Land: Race, Nation, and the Politics of Landownership in Oklahoma, 1832–1929* (Chapel Hill: University of North Carolina Press, 2010).
 57. Fitzmaurice, *Sovereignty, Property*, 189.
 58. Wolfe, *Traces of History*, 144.
 59. Chang, “Enclosures of Land and Sovereignty,” 109.
 60. The National Land Association was founded in 1844; the Free Soil Party was active in federal and some state elections from 1848 to 1852.
 61. “To the frontiersman, whether orderly settler or venturesome ‘squatter,’ the land was a not a fiscal resource but a potential national asset which his own enterprise and resourcefulness alone could capitalize for the nation.” Chester Martin, *‘Dominion Lands’ Policy*, Lewis Thomas, ed. (Toronto: McClelland and Stewart, 1973), 118.
 62. Later in his life, Polanyi undertook a series of studies that considered alternative economic histories beyond Europe. See J. Helm, P. Bohanna, and M. Sahlins, *Essays in Economic Anthropology, dedicated to the memory of Karl Polanyi* (Seattle: University of Washington Press, 1965); Gareth Dale, *Karl Polanyi* (Cambridge: Polity Press, 2010), esp. chap. 4.

63. Another way to put this point would be to say that the critique of dispossession is partially characterized by its *belatedness*, in the sense that the primary normative concern here is refracted backward through the process itself, rather than offered from the standpoint of an original, uninjured, or unalienated subject.

Author Biography

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