Land, Property and Colonization: Some Conceptual Issues

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1. Colonization and Dispossession: The Illusion of Transparency

This is a story most of us think we already know. In the wake of Columbus's discoveries, Europeans came to the New World, claimed territories in the name of a distant monarch, and then divided up the land into private holdings for settlers. Empowered by guns, germs and steel, they were able to defeat indigenous peoples' resistance and so they began seizing a continent through a double operation, subjecting large expanses to the imperial sovereignty of Spain, Portugal, England, France and Holland and allocating spaces within these zones for the exclusive use of individual colonists. Deeds were issued, boundaries measured, forests cleared, fences erected. In the long run, Natives found themselves deprived of both their political independence and the use of their land. For some this is a story of greed, cruelty and injustice; others may celebrate the origins of what would become a new nation; but most tend to assume that the assertion of imperial sovereignty naturally entailed the dispossession of Native people and the establishment of settler property. The narrative seems morally problematic, but conceptually straightforward; and because it happened that way, it seems inevitable in retrospect.

This, I think, is an instance of what Henri Lefebvre calls "the illusion of transparency," which is to say that our view of the topic (and by "our" I mean both historians and non-specialists) as familiar and self-evident prevents us from examining the difficult issues that lurk within this simple formulation.¹ For those of us who reap the benefits of living in settler nations founded upon a primordial act of colonial appropriation, the comforting sense of obviousness and naturalness might well be a kind of ideological blindness.

It is useful to note in this context that, for the people involved in the sixteenth and early seventeenth century, there was nothing obvious or inevitable about the sequence of imperial control followed by property allotments to settlers. Indian people did not think they needed to relinquish control of their lands whenever a European flag was planted in

¹ Henri Lefebvre, The Production of Space (Malden, MA: Blackwell, 2004); Henri Lefebvre, La Production de l’espace. 3e ed. (Paris: Editions Anthropos, 1986), Ch 1-13, pp 36-39
their midst; indeed, the Europeans themselves were not necessarily convinced that they were entitled to take over in that sense. In any case, explorers in that early age of overseas empires were generally more interested in plundering treasure, controlling trade and extending the authority of their respective kings and religions than in founding fortunes in real estate. Along the coasts of Africa and Asia their territorial claims rarely extended beyond tiny commercial enclaves. America emerged as a special case where European empires, beginning with that of the Spanish, penetrated inland and laid claim to vast regions in the name of a distant monarch and a Christian religion. Only gradually, and with some hesitation, did bite-sized portions of these New World empires fall under the control of individual colonists from overseas. The hesitations stemmed partly from doubts about the morality and legality of depriving others of their property, even if those others were conquered and even if they were "pagans." Expert opinion at the time was divided on the principles involved, as evidenced most famously by the Valladolid Debates of 1550-51, pitting Bartholomé de Las Casas against Juan Gines de Sepúlveda, over the question of whether Indians have rights (especially property rights); similar but less well-known discussions later took place among English and French proponents and critics of colonization.² In the Spanish case, these moral and legal questions were resolved, in principle, in ways that largely favored Native land rights; moreover, imperial legislation endeavored to protect the latter from settler incursions. None of which stopped Spaniards in Mexico, or English, Dutch or French further to the north, from occupying Indian lands when circumstances - a demand for livestock and therefore for ranching pastures in Mexico, a tobacco boom in Virginia, a flood of immigrants in New England - made them attractive. Learned discussions about justice for indigenous peoples and state regulation were not without effect, but the moral principles turned out

to be infinitely adaptable and imperial regulations so poorly enforced that dispossession proceeded apace when not blocked by native resistance. And yet it never really ceased to be problematic, even for empire builders.

This book is about the practices by which settlers came to exert control over particular portions of the land at the expense of Indian peoples. Scholars working in an intellectual history tradition have already examined, with great rigor and thoroughness, the various legal doctrines, "theories of empire" and "ceremonies of possession" by which Europeans expressed their qualms and asserted their justifications for seizing overseas territories. The emphasis here will instead be on concrete on-the-ground actions, actions that had the effect of instituting settler property and destroying indigenous property. Of course, it is not that simple: we cannot escape discursive and conceptual issues merely by dedicating ourselves to the study of practices. The vocabulary evoked here, beginning with the key terms “property” and “land,” raise all sorts of questions of definition. To project these words, loaded as they are with contemporary assumptions and ideals, back into the seventeenth century is to court conceptual disaster. (By way of illustration, we might note that the word “propriété” rarely occurred in connection with land in the French language at that time, while in English people usually spoke of property in, rather than property of, a piece of land.) But even in the context of today’s world, the language of property is anything but transparent. Those who have thought deeply about the topic show that the everyday discourse of property is rife with metaphors, reification, complex and contradictory assumptions. 3 When we speak of property, and all the more so when we speak of property in land, we confront the illusion of transparency at a fundamental level.

We might be tempted to characterize the colonial appropriation as theft: colonists stole Indian land, just as Cortes stole Moctezuma’s gold and silver. 4 But the equation does not bear close scrutiny: the Spanish conquistadors grasped plates made of precious

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metal and took them away, but no one can remove land from its setting. The fact is that land cannot be reduced to a material object. We speak loosely of “ownership of the soil,” but land is not topsoil; we don’t say that the proprietor of a building lot has less land after earth is removed to excavate the foundations. It might better be understood as a delineated portion of a natural landscape: from this river to that rock. Or perhaps it should be described in geometric terms, as a space defined by precise coordinates and therefore independent of the natural environment. If so, how deeply does that land as defined in two dimensions extend into the earth? (Someone else may own the right to extract oil, gas or coal from beneath your land.) How far above the ground does your property remain yours: to the top of your roof? Far into the sky? (North Carolina farmers once went to the Supreme Court suing the US government for trespass because low-flying air force planes intruded into the air space above their farms and disturbed their chickens.) The fact that the earth is covered with living things – according to some, it is itself an organism – further complicates matters. In agrarian societies, the plants growing on your land are yours (that is what makes property valuable), but what about the animals that burrow into your ground or wander across it: are they yours? If land is a portion of the earth, there is nothing simple about dividing it up into mine and yours (and ours).

When it comes to ownership, land is not like concrete objects (“moveable property” in the language of the law). Land cannot be passed from hand to hand in barter transactions, nor can it be relocated. It is inextricably attached to a specific environment. Water runs over its surface and collects underground; weeds, insects and fires cross its boundaries; the trees that grow on a lot and the buildings erected upon it affect the currents of air and the exposure to sun of neighboring properties; access to roads, waterways and utilities necessitate arrangements that connect different properties and common spaces. Landscape may also have sacred significance, perhaps less so in our modern secular society than in many others, but even we would not allow landowners unrestricted control over buried human remains or ancient artifacts found on their property. Land cannot help but be part of a landscape that has natural, social and spiritual

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dimensions. No matter how loudly I proclaim, “Mine, mine, mine!” my land cannot belong to me exclusively, simply because it cannot be fully detached from other lands.

And what about this “me” who claims the land? Can I really be completely disconnected for ownership purposes from my spouse, my family, my community and nation? Land is for all practical purposes eternal, whereas human life is finite; consequently property in land implies some sort of inheritance arrangements and therefore, almost of necessity, it implicates lineages as well as individuals. At least that is the case where the owner is a human person; but in today’s world, much land is owned by corporations or by offshoots of the state (corporate bodies were also proprietors of significance in the early modern period). The superficial view of property as a relationship between a single owning subject and an owned object (“I own this land.”) is deceptive in several respects. The anthropologist Marilyn Strathearn delights in pointing out that, through the wonders of contemporary intellectual property law, a pharmaceutical company may claim ownership of certain gene sequences, with the effect that the individual human body, or at least an aspect of it, can become the object rather than the subject of a property relationship.6 (Of course slavery stands as a much more horrifying case of subject/object inversion. It is worth noting that, during the colonial period of North American history, slaves were not only treated as property: for many legal purposes, they tended to be assimilated specifically to real estate.) More generally, the question of ownership leads directly to the question of “the self,” one of the central problems of contemporary philosophy.

Though it sometimes appears to refer to a relationship between a person and a thing, property is actually very much a social phenomenon. The American legal scholar, Wesley N. Hohfeld, made this point a century ago.7 Like most other legal concepts, Hohfeld maintained, property is basically a matter of “legal power and legal liability”: my rights as a landowner are inseparably connected to your duty not to trespass. Property claims inhere not in the object but in the law’s regulation of the powers and obligations of people with respect to that object. Since Hohfeld’s time, legal thinkers tend to conceive
property claims as a set of powers that an owner enjoys “against the world” with respect to an item of value. Anticipating Hohfeld, Karl Marx had expressed the point in a pithy phrase: “An isolated individual could no more have property in land and soil than he could speak.”

Then there is the question of exactly what powers property entails for an owner of land. Roman law specified the triad of *usus, fructus* and *abusus*: the right to use the property, the right to benefit from its produce and the right to modify, alienate or destroy the good. Of course, it is not possible to destroy land; furthermore, there are many societies where land cannot be alienated; nevertheless, the Roman formulation does have the virtue of demonstrating that property involves a composite of discrete powers.

Modern legal scholarship has lengthened the list considerably, while calling into question the coherence of the concept of property. A metaphor coined by Sir Henry Maine in the nineteenth century became a cliché: property, he wrote, was not a single phenomenon, but a “bundle of rights.”

More recent writers point to a number of legal provisions – mortgages, trusts, easements, entails, alienable mineral rights, etc. – which have long complicated the relationship between owners and owned, particularly where land is concerned. If one person holds title to a given tract, while another has rights to the surface by virtue of a lease, a third party retains subsurface mineral rights, a bank holds a mortgage and a neighbor has an easement, can we really speak of property rights in terms of a single owner’s unrestricted control over a thing?

Some argue that, in today’s world of corporations, complex financial instruments, and multiple rights over land, the concept of property threatens to explode into fragments.

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It does not simplify matters to shift the focus back in time to the early modern period. There may not have been hedge funds and mortgage-backed securities in the seventeenth century, but there were innumerable permutations and combinations in play defining the attributes of ownership and situating owners in relation to kin, state and society. Some of the "incidents of ownership" that lawyers now consider essential features of property - most notably the free sale of land - were nowhere fully recognized at the time Europeans colonized America; others were configured very differently than they are today. In Spain, England and France at the time, as well as in indigenous America, partial and overlapping claims to a given tract were typical. Then as now, “property” meant many different, sometimes conflicting, things to different people in different circumstances. Then as now, its meaning could be uncertain and contested and subject to mutation; not only did the various indigenous American and European nations have their own peculiar property regimes, each of these was constantly in evolution and therefore never fully stable. When we get down to the concrete details to do with what an owner is and what specific powers property confers over people and over nature, it becomes apparent that property is never one unified, clearly defined phenomenon. Colonial property, as it emerged in New Spain, New France and New England, was protean and multi-dimensional, just like the indigenous American and European systems from which it proceeded. There was no neat and tidy replacement of one “system” of property by another. To invoke “property” in the context of early modern colonization is therefore to raise questions rather than to provide answers.

And yet, the subject has long been treated in such abstract and schematic terms as to give a completely contrary impression. Enlightenment philosophers set the tone, writing of property as if it were a singular institution that was either present or absent in a given society. For them, property was the hallmark of civilization: Europeans had it, Indians lacked it, and thus the progress of humanity was served when the former displaced the latter. Their discourse almost reads like a secularized version of the missionary ideal that fueled imperial expansion a century before, property taking the

place of true religion as the gift that justifies European rule: the reward was to be salvation in the seventeenth century, whereas in the eighteenth it would be productivity and progress. Pursuing the parallel, we might acknowledge the existence of modified versions of the binary, on/off view of religion and property. Some evangelizers of the early period recognized among American natives a dim and garbled knowledge of God that was inadequate but more than nothing; similarly some thinkers in the Enlightenment tradition felt that Indians did have a form of property in land, deficient and undeveloped though it was.

Few historians take up their pens today intending to defend imperial conquest and few would express themselves as bluntly as eighteenth century scholars on the superiority of European civilization. Yet, on the whole, the field has not found its way out of the Enlightenment’s approach to framing the history of colonial dispossession and property formation. The root of the problem may be the persistent tendency to simplify and reify property in land. This version of the illusion of transparency seems to guide treatments of the subject, whether in history textbooks, popular discourse or learned monographs. “Native North Americans,” states one Canadian history textbook, “…had very little sense of territorial ownership,”13 the implication being that Europeans had, not simply a different sense of “territorial ownership,” but a bigger (and better?) one. More frequently, the impression is conveyed (because basic assumptions are involved, this is rarely spelled out explicitly) that colonists arrived from Europe with a system of property that was somehow complete, fully formed and perfectly in line with that of the historian’s own time. “Colonists were moved to transform the soil by a property system that taught them to treat land as capital,” writes one historian of early New England.14 In some contemporary versions of the basic Enlightenment narrative, the meaningless qualifier “absolute” is added to property15; elsewhere the term “private property” is introduced as a gesture in the direction of greater precision. A US history textbook puts it this way:

Even when the English purchased land from the Indians, their contrasting concept of ownership caused grave misunderstanding. Whereas the colonists believed in private property, the natives thought they were selling the rights to use lands for hunting, fishing, and communal farming. They expected to continue using the territory they had 'sold' for these purposes.\\footnote{16}

The quotation marks around the verb “sold” make it clear that the native view of the operation was somehow mistaken and that the “contrasting concept of ownership” that the English brought to the transaction corresponded more fully to a real, proper and legitimate sale. One final example, this one from a materialist historian determined to speak of actions rather than concepts and “misunderstandings,” only succeeds in compounding the confusion about property. Writes Howard Zinn, “Behind the English invasion of North America, behind their massacre of Indians, their deception, their brutality, was that special powerful drive born in civilizations based on private property.”\\footnote{17}

A later chapter in this book argues that, as far as land and dispossession are concerned, “the English invasion” actually proceeded mainly by way of common rather than private property. The notion that England was a land of private property in the early seventeenth century is highly questionable, as is the proposition that land was treated as a fully saleable commodity, much less as “capital.” In any case, the term, “private property” remains a very slippery phrase, useful mainly for designating utopian ideals rather than actual practices in that or any other period. The function it tends to fill in historians’ discourse is to designate some higher or more fully realized form of property in land. Thus, instead of saying, with the eighteenth-century philosophers, that Europeans had property and Indians did not, we say Europeans had private property whereas Natives had communal property,\\footnote{18} or kin-based property or a “spiritual”

\\footnote{17} Howard Zinn, \textit{A People’s History of the United States: 1492-present}, revised edn. (New York: HarperCollins, 2003), 16.\\
\\footnote{18} “The Indians did not view land as parcels of property held in exclusive personal possession but rather as a common resource that was inherited from ancestors, held in trust by tribal chefs for future generations, and used by contemporaries for daily need.”
relationship with the Earth. What remains is still an opposition that exaggerates and essentializes difference, one that presents European ways as the norm and indigenous ways as a set of deficiencies.

“Property” is a far more complicated, multivalent and problematic concept than any of these schematic histories suggest; so is “land” for that matter. One reaction to this realization might be to eliminate the term from our analytic vocabulary. Another response, the one pursued in this book, is to take the ambiguities and multiple dimensions of the term as a point of departure for deeper investigation. Precisely because the concept of property in land is so rich in meanings and overtones, and because it involves relations of power – among people and between peoples, as well as between humanity and nature – it appears as a particularly useful vehicle for reconsidering early modern colonization.

2. Making Colonial Space

“The actual geographical possession of land,” wrote Edward Said, “is what empire in the final analysis is all about,” reminding us that colonization takes place in space and that territorial possession is a defining feature. Said’s formulation wisely leaves open the question of whether it applies to “possession” in the sense of territorial sovereignty or in the sense of landed property. Though many historians are insistent that these were completely distinct modes of claiming “geographical possession of land,” this book will argue that owning and ruling, though analytically distinct, were intimately connected aspects of early modern empire building. The appropriation of New World

19 “To the Indians, neither the furs nor the land was of much value because by their understanding, they did not 'own' either. According to their beliefs, all things had innate spirits and belonged to themselves....According to Indian belief, people could not own land: the land was seen as a living being - a mother - who feeds, clothes, and houses people as long as she receives proper respect. The idea of buying or selling land was unthinkable to Indians." Carol Berkin, Making America: a History of the United States, 6th ed. (Boston: Wadsworth, Cengage Learning, 2012), 19.
21 See, for example, Francis Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest (Chapel Hill: University of North Carolina Press, 1975), 128.
territory was not accomplished at a stroke, through the magical efficacy of the grants of kings, the declarations of popes or the ceremonies of explorers; it was instead an extended, and necessarily uneven, process of claiming, conquering and reconfiguring space. Establishing colonial property was a central aspect of the larger business of asserting sovereignty and it has not received the attention it deserves from colonial historians.

Empires have never been neatly bounded territorial entities, least of all at the time when European monarchies were struggling for control over America. Confident-sounding proclamations and boldly sketched maps give the impression that vast domains were fully under control, but we know that these artifacts mostly portray geographies of fantasy and desire. Colonial rule was actually very unevenly spread on the ground. Seventeenth-century colonial regimes could only administer and enforce laws within small enclaves, usually coastal places where settlers predominated demographically, and even there control was often uncertain. Beyond these intensely colonized zones, traders, missionaries, and the occasional punitive military expedition might exercise some authority over indigenous populations; the latter might consider themselves “children” of the colonial governor or of his royal master; however, they remained autonomous and their land was still their own. Further from the colonial centers, imperial authority grew weaker and more uncertain until it disappeared in the midst of uncolonized populations that had scarcely heard of Europe, its kings and its gods. There was no real “edge of empire,” but only, to borrow Ann Stoler’s phrase, “degrees of sovereignty,” the latter too multi-dimensional to be measured on a scale, too uncertain and shifting to be plotted on a map.

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Spatially, the mainland colonies of North America – Caribbean islands, small in scale and unambiguously bounded by nature, were a different matter – appear as nuclei of European power and settlement surrounded by zones where native autonomy and colonial hegemony coexisted in varying shades and combinations. In the seventeenth century these nuclei typically hugged the Atlantic coastline and the navigable rivers that ran into it. Over time, the zones of intense colonial control tended to expand until, with settler nation-states taking the place of empires, they threatened to swallow up the entire continent (though many areas of native possession and mitigated sovereignty remain to this day in places such as northern Canada). This is the pattern of the “colony of settlement,” a pattern that was roughly reproduced later in South Africa, Australia, New Zealand and elsewhere. That phrase, useful for distinguishing these polities from other kinds of imperial formation, can be misleading if it suggests that the history of “colonies of settlement” is all about the settlers and the areas they fully dominated. A proper spatial history of colonization needs to keep in view both the fully “settled” zone and the adjacent “grey” zone, the latter occupied mainly by Natives who remained proprietors, though subject to some degree of colonial sovereignty.

Property, it seems to me, had a crucial role to play in the spatial dynamics of early modern colonization. To a significant degree, it was land tenure that fully anchored European territorial claims in New World soil. It is through attention to property making that we can best trace the geography of difference dividing fully colonial from expansively imperial spaces, the latter claimed by empire but still possessed by Indians. The institution of colonial property was and is often understood as merely a practical device for ensuring the orderly allocation of resources and for stimulating economic development; but it also formed part and parcel of the business of establishing colonial jurisdictions, the legal apparatus of sovereignty.

Legal historians interested in colonization have tended to focus on criminal law as the prime instrument for establishing authority and for differentiating colonized peoples. Under the banner of legal pluralism, they have shown how prosecutions and punishments functioned to create categories and maintain boundaries dividing settlers from Indians,

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subjects from quasi-subjects and non-subjects. Without questioning for a moment the value of this approach, I would suggest that land law, and tenure practices more broadly, form an equally important avenue for investigating colonization. In differentiating space, property also differentiated people; it included and it excluded. Moreover, since property has to do with power, over other humans as well as over nature, it cannot help but be implicated in the questions of rule that are at the heart of the history of colonization.

Briefly to evoke the zones claimed by European powers in Africa and Asia: most of these were not colonies of settlement since they never accommodated large numbers of white colonists and since their lands remained mostly in the possession of the indigenous population. And yet, here too property formation was a central aspect of colonization. The Permanent Settlement of Bengal (1793) is often cited in this connection: a British enactment which brutally transformed a complex and fluctuating system of peasant holdings and privatized tax farming into a configuration of native landlords and stable government revenues. The tendency in nineteenth century India, as well as in other Asian and African colonies, was to introduce European styles of surveying and title recording, with the general effect of empowering landlords while making land easier to sell. Landed property was modernized in these colonial holdings in ways that paralleled developments in the colonies of settlement, but mostly to the benefit of indigenous proprietors rather than white settlers. Imperial administrators here appear to have been driven to remake tenure mainly for fiscal reasons as well as for considerations of economic “improvement.”

When thinking about the spatial dimensions of colonial property making, we can learn much from the work of Henri Lefebvre, even though Lefebvre had little to say about property and almost nothing to say about colonies. Nevertheless, his theoretical work, The Production of Space, invites us to think about spaces of all kinds – national, architectural, conceptual, etc. – as fundamental to the organization of the social world;

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26 In addition to Benton, Search for Sovereignty, see, Lisa Ford, Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836 (Cambridge, Mass.: Harvard University Press, 2010).
furthermore, they are human constructions, created through the exercise of power and themselves conferring power. In particular, Lefebvre thought of the State as fundamentally a spatial entity. States do not simply exist in space, they make and remake space. The modern state works to create a homogeneous “abstract space” on top of what Lefebvre refers to, somewhat cryptically, as “absolute space”; "absolute space" seems to mean space as it exists in "nature" and space as apprehended intuitively through "religion." Abstract space privileges the geometric (the mathematization of space), the visual (as opposed to other modes of apprehending the world) and the phallic (vertical constructions symbolizing power). State space-making, for Lefebvre the essence of sovereignty, he views as inherently violent: “Or, souveraineté veut dire ‘espace’ et de plus espace sur lequel s’exerce une violence (latent ou déchainée), donc établi et constitué par la violence.” It is important to understand that in Lefebvre’s conception, "space" is neither a "thing" nor an "idea," but rather a fundamental structure of social reality. Nor is it exclusive: state space and various natural, sacred and community spaces can coexist; indeed they must, for the homogenization of space is the goal and ongoing project of the modern State, never an accomplished fact. States work to reorganize space, but also to promulgate the illusion that space really is homogeneous and national.

Some of Lefebvre’s insights can be helpful in reconsidering colonization spatially, and particularly in examining the role of property formation. At the very least, he alerts us to the need, when examining “spaces of empire,” to consider linkages connecting developments that are typically studied in mutual isolation: the emergence of colonial jurisdictions and territorial states, the transformation of the natural environment, the establishment of new property regimes, the allocation of reserved land for Indians and

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29 Lefebvre, *Production de l’espace*, 328-31. Though Lefebvre does not cite feminist scholarship, it is apparent that he was ahead of his time in his appreciation of the gendered nature of space.
30 Lefebvre, *Production de l’espace*, 322.
the pervasive presence of violence, latent or manifest. If sovereignty is fundamentally spatial and if state formation is all about reconfiguring space, then surely the overseas extension of European sovereignty needs to be apprehended spatially. Property in land is also unavoidably territorial, but what exactly is the relationship between this dimension of colonial space-making and the others, notably the assertion of sovereignty? Is property entirely the product of state sovereignty or is it to some degree a factor in constructing sovereignty?

Another set of questions arises when we transpose Lefebvre’s theory to a zone of colonization, questions related to the prior and continuing existence of native space. It starts with the basic recognition that America was a pre-owned continent when Europeans arrived, its spaces already configured according to the economic and political arrangements of its indigenous societies. Following Lefebvre, we would not expect colonization to erase native space immediately and fully, since, try as they might, even the most powerful modern agencies of spatial transformation can never eliminate residual and rival versions of space. In approaching the history of colonial property formation, therefore, we shall have to consider questions about the relationships between the establishment of settler tenures and surviving native space. Did native space shape settler space; and conversely, was native space shaped by emergent colonial space? Needless to say, these questions can only be addressed in specific historical contexts.

Pursuing the spatial approach, particularly where landed property is concerned, also implies attention to the natural environment and to relations between human societies and non-human nature. To one degree or another, property implies human control over ground and therefore over nature. That control may be lightly exercised and can be perfectly compatible with a reciprocal sense of nature’s or the earth’s power over humanity. On the other hand, it sometimes takes absolutist forms, at least as an aspiration: in modern versions, property sometimes seems to confer complete mastery over nature. Lefebvre’s understanding of social space as both “ideological” and, at the same time, very real and profoundly consequential in its effects, is not without relevance in this context. The “abstract” or homogeneous space that he associates with state sovereignty, with capitalism and modernity, is both a powerful reality and an illusion, a hegemonic ideal that conceals other realities from view. Can colonial property formation
be understood as a particularly vivid illustration of this larger phenomenon? After all, early modern empires seem to have been driven by powerful fantasies of mastery: mastery over peoples and over lands. Laying claim to, exercising power over, earth and water, forest and field, as well as over subjugated savage nations: these were the objectives, or more accurately, the desires, that lay behind the colonization of North America. Of course, nature really was transformed through the process of colonization, subjugated even in some respects, but anything resembling absolute mastery remained elusive. Where the subject of colonial property and the natural environment is concerned, it will be interesting to consider both the theme of control and exploitation of nature and that of limits to that control.

3. Property and Modernity

The history of colonial property making is habitually subsumed into a metanarrative of modernity. Even when the term "modern" is not used explicitly, there is nevertheless an underlying sense that this is an evolution with a clear direction and an ultimate destination; that the direction is fundamentally positive; and that the destination corresponds to the condition of the contemporary "developed" world. Settlers may have treated Natives badly, but they acted (perhaps unwittingly) as the agents of the transhistorical forces of modernization. What they established in America was - or contained the seeds of - private property. It may have been a painful historical process, but it was a necessary and ultimately beneficial one. This narrative might be considered another instance of the "illusion of transparency." In situating developments on a linear track of progress, in selecting aspects of the past that seem to foreshadow the present and in assuming the inevitability of current arrangements, this view of the emergence of private property also resembles the "Whig Interpretation of History" that long dominated British political historiography.32 We might add that, just as the Whig interpretation of history tended to universalize the British experience, the history of the progress of

(private) property is often recounted as though specifically Anglo-American versions of property in land represented the pinnacle of perfection.\textsuperscript{33}

A variant of this story of progress sometimes appears in the form of what Charles Taylor calls the modernist “narrative of subtraction”: a sense of history as the progressive shedding of that which is not modern.\textsuperscript{34} Religious or magical worldviews, absolutist polities, the integration of Church and State, paternalism and patriarchy all declined or were overthrown and, as a consequence, secular, liberal ideas and practices were allowed to thrive. The latter, seen as a kind of “default setting” for human existence, do not require the same sort of analysis as the “systems” that preceded them; they are simply the condition that prevails when obstacles have been removed. The story of property is often recounted in just these terms. Feudal tenures and open-field systems in Europe or communal hunting grounds in America are construed by scholars as so many objects for research and discussion, whereas their historical successors, vaguely designated as “freehold” or “private property,” raise fewer issues. The newer versions of property in land tend to be treated not so much as objects of study but as a more or less normal situation. Feudal or seigneurial tenure was “abolished” at the time of the Revolution in France and elsewhere over the course of the nineteenth century through various land reforms;\textsuperscript{35} state property was done away with in formerly Communist countries in the 1990s; and what followed was “private property,” self-evident and utterly unmysterious. Where tenure is concerned, the New Regime is simply that which remains once the Old Regime’s accretions of irrational tradition have been removed.

\textsuperscript{33} Such Anglo-American centered whiggism is particularly visible in the field of economic history. See, for example, Douglass C. North and Robert Paul Thomas, \textit{The Rise of the Western World; a New Economic History} (Cambridge: Cambridge University Press, 1973).

\textsuperscript{34} Charles Taylor, \textit{A Secular Age} (Cambridge, MA.: Harvard University Press, 2007).

\textsuperscript{35} Attempting to translate the dramatic “abolition of feudalism” on 4 August 1789 into practice, French revolutionaries were bedeviled by insoluble problems when they tried to sort out legitimate property rights from feudal exactions and servitudes. Rafe Blaufarb, “The Nation as Lord: The French Revolution and the Creation of National Feudal Dues,” paper delivered to the symposium on “The Struggle for Land: Property, Territory, and Jurisdiction in Early Modern Europe and the Americas,” Newberry Library, Chicago, April 2011.
A teleological view of history is only one of the ways in which the metanarrative of modernity has shaped thinking about landed property and property formation. A brief examination of some of the other attributes of modernity, as diagnosed by postmodernist scholarship, seems in order as part of the preliminary exercise of reconfiguring the terms in which the history of colonization and property are considered. Scholars associate modernity with universalism, the assumption that certain (Western) ethical values, political principles and forms of rationality apply everywhere and always. The notion, taken for granted in the literature, that there is a single correct way for land to be configured as property can be seen as one instance of modernist universalism. Individualism is another attribute of modernity, meaning both the predisposition to treat individuals as the fundamental unit of social analysis and a tendency to exalt the individual, typically construed as a white male. Such individualism pervades modern philosophical and historical discourses about property, revolving as they do around the pivotal figure of the owning subject. Postmodern diagnoses have also drawn attention to the characteristically modern obsession with classification and taxonomy: an urge to represent reality in mutually exclusive, clearly bounded categories. Again, modern writing about property, with its habit of reducing the complexity and diversity of historical property systems into simple categories nicely illustrates this broader tendency.

Binary oppositions, a major item on the postmodernist indictment of modernity, also feature prominently in discussions of property. Tenure was either feudal or freehold, private or communal; property was present or absent; colonial possession was either about sovereignty or about property; exactions levied on land holdings had to be either "rent," an attribute of property, or "tax," a prerogative of sovereignty. One last characteristic of modernity, the drive for human mastery over nature, can be seen in the ideal of absolute ownership as well as in the modern preference for property systems that facilitate the exploitation of resources.36

In Bruno Latour’s view, as expressed in his book, We Have Never Been Modern, the binary opposition of nature versus culture is the defining feature of the modern

condition. The insistence on treating nature and culture as separate realms is what Latour calls the "denial of hybridity," a central feature of modernity. For moderns, phenomena must be placed in one realm or the other, whereas most things are actually both. Land might be cited as an instance of this aversion to multiple realities. In places designated as "wilderness," land is considered purely “nature,” even though its wildness is very much culturally construed; but where the soil is cultivated for farming or where, as in cities, it underlies houses, streets and offices, it is apprehended as culture, which is to say as property. Modern property typically takes the form of a lot with a specific cadastral location, an owner, an associated record of title, and so on: all of these qualities constructed socially and dependant on technologies of measurement and recording. Insofar as nature intrudes in the form of flood, fire or earthquake, the law, aided perhaps by engineering expertise, steps in to normalize events, reinserting land into a cultural framework as property. Efforts are made to treat owned land as though its abstract, legally defined identity were all that mattered and as though it were not really a portion of the earth. Here we rejoin Henri Lefebvre’s notion of “abstract space,” at once an illusion and a project, ultimately impossible of realization, to remake the world. “Denial of hybridity” is another way of describing the syndrome.

Where property in land is concerned, the ideal of “absolute private property” seems to be the key element in the modernist denial of hybridity. Because it is part of the earth (and because owners are part of a society), land cannot be absolutely under the control of an owner and yet the dominant historical discourse on the subject embraces this condition of full and complete individual ownership as the endpoint and destination of centuries of change. When exactly was this state of perfection realized? Here the narrative gets slippery. Did the appropriation of Native lands in colonial North America bring about something resembling absolute private property, or was that merely a step on the way? Are we there yet, or is "full" and "free" property still to be realized in the future? When pressed on these points, scholars usually admit that private property regimes have never been "perfect," but they remain reluctant to abandon this ideal type as a fundamental organizing concept.

The utopian ideal of absolute private property has a history and that history coincides roughly with the period of European and Euro-American history extending from the Enlightenment and Age of Revolutions to the twentieth century, the epoch usually designated as “modern.” There had been intimations of an absolutist view of private property during the course of the revival of Roman law in the sixteenth century and earlier; likewise in John Locke’s theory of “possessive individualism” of in the seventeenth century, though Locke actually believed that ownership rights came hedged with significant limitations and obligations.\textsuperscript{38} The ideal of absolute private property only makes its full appearance in the second half of the eighteenth century when intellectuals and political actors began to enunciate versions of the myth in Britain, France and the new United States. Even then, reality forced thinkers and legislators quietly to introduce qualifications that reduced the force of their bold declarations.

William Blackstone’s *Commentaries on the Laws of England* (1766), a work of deep and lasting influence, both in Britain and in the breakaway American colonies where the law had to be reframed for a republican civic order, seems at first to take an extreme position of the rights of property owners. “There is nothing which so generally strikes the imagination, and engages the affections of mankind as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”\textsuperscript{39} This opening statement, endlessly quoted by modern commentators, reflects Blackstone’s impassioned view of property in what he saw as its essence. However, his practical advice to lawyers on the ins and outs of knight’s service, tenure inurbage, gravelkind, escheat, vileinage, and similar matters constitutes the bulk of what the *Commentaries* have to say on landed property, and together they give a very different impression. The thirty-two chapters of Book Two discuss landed property in consistently historical terms, anatomizing the various feudal aspects of English tenure still in force in


the eighteenth-century (not entirely a thing of the past in the twenty-first); their cumulative effect was to ensure that ownership of land remained a variable notion admitting of all sorts of partial and conditional claims to the ground. Blackstone the tub-thumping ideologue insists that property is an “absolute right, inherent in every Englishman,” but Blackstone the careful jurist is fully immersed in the complexities and ambiguities of the real estate law of his time.

Both the American and French Revolutions enshrined property as a right that the state had an imperative obligation to protect. Thomas Jefferson insisted on changing the favored trope of “life, liberty and property” to “life, liberty and the pursuit of happiness” when he drafted the Declaration of Independence (presumably worried about the implications for slavery), but the French Declaration of the Rights of Man and the Citizen (1789) is more forthright: “The aim of all political association is to preserve the natural and imprescriptible rights of man. These are liberty, property, security and resistance to oppression.” The Civil Code, promulgated under Napoleon in 1804, put it more forcefully: “Property is the right to make use of and dispose of things in the most absolute manner, provided that nothing is done contrary to the laws and regulations,” setting the tone for civil law regimes as subsequently established across Europe and through overseas regions formerly ruled by France. More clearly than is the case in the English common law tradition, absolute ownership rights stand at the center of civil law property doctrine. However, the very sentence that asserts those supposedly “absolute” rights ends in a clause that subordinates them to state legislation. The Napoleonic Code certainly favored strong property rights, but the word “absolute” was strictly a rhetorical flourish. Moreover, it proved to be a very effective rhetorical device: throughout the modern period, the vision of “absolute” property rights continued to inspire even if it could never be translated into concrete reality.

42 « La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu’on n’en fasse pas un usage prohibé par les lois ou par les règlements. » Code civil, article 544. www.legifrance.gouv.fr.
To gain a better understanding of the history of colonial property formation, we need to abandon the assumption that this was a story with a preordained conclusion. In particular, we must jettison the Platonic ideals of “absolute” property, “private” property and their synonyms “full” and “complete” property. Aztec, Spanish, Algonquian, French and English versions of property in land at the time of colonial contact were different, they were not better or worse or further along the road to perfection. The establishment and evolution of colonial property systems through the interactions over time between indigenous and European tenures certainly represented change. Within strict limits, we might even speak of “progress” in particular aspects, such as the “progressive” increase in the ability to buy and sell land. But to merge all the dimensions of landed property into a single essence and to portray it as travelling along a single track towards the present would be to reproduce an ideology of progress that was (and still is) used to justify colonial rule and the dispossession of Natives.

4. The Concept of Property Formation

There does clearly seem to be a need to look at this complex subject differently and even to introduce some new vocabulary. The term “property formation” is proposed here to more fully historicize matters. The phrase is meant to convey a sense of movement and flux, embracing change but ruling out whiggish teleology. It evokes a process of becoming that is never complete. As with the concept of “state formation” from which it is obviously derived, it directs attention to the social forces in play where access to land is concerned and resists the attempt to treat property as a thing. Property formation is relational: it implicates both natives and newcomers, together with their respective property forms, in their confrontations and entanglements. In place of the conventional before/after narrative of replacement, it implies a process of mutual engagement: native property, European property and new colonial property forms could coexist and shape one another. Of course, this was a massively unequal encounter, one in which force and violence were rarely absent; almost invariably people of settler stock flourished at the expense of indigenous populations; yet the triumph of settler tenures was not instantaneous, nor was it completely conclusive, nor was it the outcome of unilateral
settler action. Colonial property formation is instead a fully historical process, filled with contingency and driven by multiple actors. Of necessity, it has to be apprehended in the context of larger historical processes.

If land and owners appear as the object and the subject of property relations, the property formation approach considers them as mutually constitutive; put differently, the same process that makes land into property makes people into owners: subject and object can therefore be considered two sides of the same property coin. To the extent that it plays a part in creating colonial subjects, property formation includes and excludes: it institutes privileges for some while it pushes others to the margins. In a colonial setting, property can be a prime location for the definition of race, tending at times to divide people into those qualified to own (“whites”), those qualified to be owned (“blacks”) and those not qualified to own or be owned (“Indians”). We will need to be attentive, in the chapters that follow, to the ways in which emergent rules and practices relating to control over land may have functioned to distinguish “settlers” from “natives” and from intermediate categories such as mestizo or métis. Of course, gender is also typically constructed in and through property regimes, as are family and kin relations. A history of colonial property formation cannot afford to overlook these fundamental axes of social differentiation and the creation of subjects. Nor can it ignore the reciprocal influences at work, power and privilege producing differential access to land even as property formation produces differential power and privilege.

It is difficult to exaggerate how much was at stake in the inclusions and exclusions inherent in colonial property formation. Wealth and profit could accrue to some land owners, though that was not actually a major factor in New France or New England through most of the colonial period. More typically in this period, land ownership provided the material and spatial basis for a way of life. Dispossession, the other side of property formation, could and did destroy ways of life. Its effects were

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44 Needless to say, race formation was never so simple as to correspond exactly to this tripartite model. On this subject, see Patrick Wolfe’s suggestive essay, “Land, Labor, and Difference: Elementary Structures of Race,” *American Historical Review*, 106 (June 2001): 866-905.
frequently more severe than that: it could destroy life itself by depriving peoples of the basis of subsistence.

Questions about sovereignty and legal jurisdiction are also closely bound up in the study of property formation -- not always and everywhere, for property is not necessarily dependent on the existence of states and formal judicial institutions -- but where the State does appear, landed property is bound to be affected. Property formation as presented here revolves around the ways in which courts and governments create tenures and also the ways in which property relations work to create and sustain courts and governments. Making states, making subjects and making space: property formation is intimately involved in all these connected processes.

As mentioned earlier, property formation was a central aspect of the effort to establish and extend imperial territorial sovereignty across North America. The various technologies and procedures used to inscribe property in space therefore deserve close attention. In this context, the techniques of surveying, so closely connected to the sciences of navigation and cartography that sustained European overseas expansion, are an obvious focus of investigation. How was the geography of settler property inscribed upon the face of the land through visible markers? Were there analogous native practices and did these influence settler practices? How was the geography of colonial property inscribed upon paper through maps and surveyors’ reports? Did surveying really create a mathematical, “abstract” space? Did surveyors function as the agents of landowners or as agents of the colonial state or were they both at once? The history of land surveying in colonial North America holds many surprises for anyone expecting the kind of doctrinaire imposition of straight lines across the landscape that became the norm in nineteenth-century settler states.

Apprehending property formation in its spatial aspect also means paying attention to the physical transformation of environments through the burning of underbrush, the felling of trees, the ploughing of soil, the draining of swamps and the building of cities. Such transformations sometimes followed the establishment of settler property; in other cases, they preceded it. Grazing livestock, set free to range across the face of the land, had a major impact on the ecology of many parts of the continent, spearheading the process of settler property formation and interfering with native food gathering as they
went. Frequently, native dispossession was largely accomplished by this means before any human settlers arrived.\(^{45}\)

One last word on academic disciplines and fields: there are many specialized approaches to the topic of colonial property formation, each offering a particular form of methodological rigor and each contributing valuable perspectives on the topic. From economic history we can learn about the problem of scarcity and the operation of real estate markets. Historical geography and historical anthropology/ethnohistory are of obvious importance, especially where indigenous property systems are concerned. Clearly law is a crucial dimension of the story of property formation and legal historians have been among the scholars most devoted to understanding colonization, particularly where land and property are concerned. Intellectual histories focusing on ideas of empire and European attitudes to non-western cultures also have a role to play. Colonial historiography, traditionally pursued as an aspect of Mexican, United States and Canadian history, has certainly provided a wealth of evidence and analyses. Taken together, these specialized literatures form the substance from which this book is crafted. Yet each of them comes with built-in biases in favor of European and settler points of view to the detriment of indigenous experience and outlooks. The most enlightened scholars make heroic efforts to overcome these disciplinary biases, but how can basic frameworks such as “the law” or “the economy,” not to mention “political philosophy,” be purged of their European and modern frames of reference so as to do full justice to the indigenous dimension of the history of colonial property formation? The discipline of history suffers from similar handicaps. When New Spain, New England and New France (16\(^{th}\) – 18\(^{th}\) centuries) are studied separately, each as a colonial prelude to the history of a nation-state, natives are once again likely to be slighted and colonial property formation naturalized. If the emergence of the settler nation state is present at the outset as an organizing metanarrative, then settlers are meant to establish themselves on native land, territorial states are meant to take their intended shape and there is little reason to probe the conflicting forces and multiple contingencies involved. For a more fully historical understanding of colonization, one that give due consideration to all the actors involved,

we need to push back against the national and disciplinary perspectives that continue to structure research and discussion. Property formation is best apprehended in its integrity, broadly and comparatively.