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If Your World Was Built on Dispossession:
Strategies of Conquest by Settlement in America

by

Teresa K-Sue Park

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

In

Rhetoric

And the Designated Emphasis

in

Critical Theory

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Marianne Constable, Chair

Professor Samera Esmeir

Professor Wendy Brown

Professor Judith Butler

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Abstract

If Your World Was Built on Dispossession by

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Doctor of Philosophy in Rhetoric and the Designated Emphasis in Critical Theory

University of California, Berkeley

Professor Marianne Constable, Chair

This dissertation explores the role of the history of conquest in the formation of American legal institutions. The histories it presents begin during the early colonial period, and argue that American legal practices—of property-making, contract, and the creation of federal alliances, for example—grew out of colonial relationships and practices aimed at resource extraction, colonial expansion, and indigenous removal. The dissertation also describes how colonial practices of land dispossession developed to become the basis of basic social, political and legal formations in the United States. It considers the relationship between the past and the present, and how conquest informs an American social world divided by race, class, ancestry and different relationships to money and speculation.

Specifically, the chapters examine 1) the history of mortgage foreclosure, 2) the relationship between contracts and social contracts, 3) an early federal tort system, which showcases one aspect of the nation's civil-military approach to war, and 4) how removal policies that constitute the genealogical antecedents of administrative immigration law first emerged in the context of colonial and then federal laws of Indian Affairs. Each chapter examines these histories through the lens of a well-known narrative about American legal and political institutions: respectively, the ideas that speculation and credit can be a healthy fount of economic growth, without concomitant costs; that by virtue of its democratic social contract, America is a government by, for and of the people, based on their consent; that the U.S. has the duty of benevolent intervention in conflicts abroad to keep the world safe from terror; and the idea that the United States is a nation of immigrants, with a long and proud history of offering asylum to the world's tired and poor.

The chapters thus together, by performances and analysis, emphasize knowledge production as a form of agency and of historical event. Each chapter presents a counter-narrative to a "settled" legal story that integrates the story of the conquest of America into it. At the same time, each also offers a meditation on the transmission of narratives and concepts and how these carry historical matter into the present.

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Concepts have teeth, and teeth that bite through time.

-- Audra Simpson, *Mohawk Interruptus*

Introduction

If your world was built on dispossession, would you know? Your answer to this question might depend on who you are and where you come from, or on your own story.

In this dissertation, I explore the relevance of the history of conquest to American legal institutions. In order to do this, I examine a narrative about the past that has been rent apart. The conquest of America encompasses both the stories of the peoples who suffered dispossession and the stories of those who enacted it. It comprises stories about loss and survival, and also about the creation of institutions to expropriate indigenous lands and regulate the economy built with these resources. These two trains of stories implicate the same events in the past; they are imbricated in one another. Yet for the most part, histories about the American political system and about conquest are worlds apart. Across academic and legal fields, and for the general public, the fundamental connection between narratives about American political and legal traditions and the history of indigenous dispossession has been conceptually broken. Why?

Each chapter in this dissertation takes up a well-known narrative about American legal and political institutions to offer a counter-narrative that integrates the story of conquest into it. These chapters thus render familiar narratives strange by retelling them *without* omitting the story of conquest; they therefore highlight the rift between histories that are known to everyone and those known to only some. They do so by synthesizing and reorganizing readily available historical material into different frameworks than those in which they usually appear. With these counter-narratives, I aim to address a contemporary situation in which the history of indigenous dispossession in America is known intimately by some, and hardly at all by others.

For indigenous communities in America, for example, the history of conquest is a history that everybody knows, for it remains fundamental to understanding the conditions of indigenous peoples' lives. It recounts the experience of their families, constrains their ability to live in their homelands, and still determines the parameters of many of their struggles. These communities have kept the history of dispossession alive in memory and consciousness as it has continued to unfold over time; for them, there can be no question that this dispossession has been the literal ground of possibility for the emergence of the United States.

At the same time, other narratives from the settler perspective about the arrival of those settlers in America, and the institutions and societies they built, have proliferated since the earliest years of their migrations from Europe.¹ For most of American history, scholars and writers have justified and celebrated conquest through stories about the growth and development

¹ As many scholars have compellingly illuminated, the project of narratively disavowing colonial violence and inscribing histories marked by indigenous peoples began in colonial times (see, e.g., O'Brien 2010; Williams 1990; Ross 1998; Dunbar-Ortiz 2014). The participation of the social sciences in colonial projects in particular is well-known (Wolf 1982; Wallerstein et al. 1996).

of European migrant society in America, and the pioneers' courage in the face of adversity.² The publicity of narratives about settler society has overlaid narratives providing the perspective of the dispossessed. These dominant American narratives have fostered paradigms that frame conquest as an event in the distant past; alternatively, they describe these events as indigenous extinction, or suppress recognition of indigenous peoples altogether. Stories that exclude the histories of conquest and dispossession from their account of the founding and florescence of America are the inheritance of those settlers' descendants and of later immigrants to the United States and their children.

In this dissertation, I therefore explore how it came to be that a story that is obvious to some is also shocking, strange and counter to what others have learned. Using canonical and scholarly works, I attempt to gather the traces that the history of dispossession has left in a multitude of narratives about the past. Thus, I rely on both primary and secondary sources to

² The roster of Presidents of the American Historical Association, which includes descendants of founders and statesmen, military men and Presidents of the United States with exceptionally expansionist legacies shows that the office was closely allied with projects of power- and state-building. Presidents of the Association include Theodore Roosevelt (1912), Woodrow Wilson (1924), John Jay (1890), Henry Brooks Adams (1893-94), and Samuel Eliot Morison (1950). Its first President, A.D. White (1884-85), tried to help annex the Dominican Republic and co-founded Cornell on money made from the conquest of the Midwestern lands, specifically from investments in timberland made through the Morrill Land-Grant Colleges Act (see Hurst 1964); its second, George Bancroft (1886), was a statesman and Secretary of the U.S. Navy who penned a *History of the United States, from the Discovery of the American Continent* (1859). Several Presidents of the Association contributed to the tradition of looking to Europe to describe American heritage, rather than examining dynamics of contact, and remarkably produced historical accounts of the first American colonial settlements in which indigenous people appear rarely or not at all (Channing 1884; Andrews 1891, 1919, 1964). When Natives appear in these works, they do so marginally, in a late chapter that concedes the impossibility of ignoring an event like Metacom's War (Andrews 1919). Such episodes are described as inexplicable, startling attacks, rather than events arising from mounting tension in a society that became diverse and violent with the colonists' arrival. Andrews, writing about Rhode Island in a statement that was nevertheless not specific to that colony, described New England as a "wilderness—a barbarous and howling wilderness" that "remain[ed] so for many generations to come" after "the first settlers entered it" (Andrews 1964, 87). Frederick Jackson Turner, who headed the Association in 1910, famously reacted against this tendency and radically reshaped the field of American history by identifying the experience of "winning a wilderness" on the frontier as the formative locus for the development of American character and democracy (Taylor 1972, 3). Teddy Roosevelt, who took this office two years later, openly gloried in this westward movement as conquest, and did so with great fanfare, describing it as "the great epic feat in the history of our race," "a record of men who greatly dared and greatly did," "of endless feats of arms, of victory after victory in the ceaseless strife waged against wild man and wild nature" (1926, 455).

In the 1940s, under the pressures of the United States' new global engagements, anthropologists and historians joined forces to study the "non-Western world," carrying on their nineteenth century justificatory work in the service of continuing American expansion (Cohn 1980, 212). In this spirit, Walter Prescott Webb, the Association's President in 1950, urged that the American frontier concept "be lifted out of its present national setting and applied on a much larger scale to all of Western civilization in modern times" (1952, 7); for him, this concept was America "as the sole proprietor of an unsettled contiguous territory":

Always, for three centuries, to the west of the settlements there stretched an empty country inviting settlement, luring the venturesome toward the sunset. Of this territory the United States came piece by piece into undisputed possession. No foreign power contended for it; it therefore did not present a problem in sovereignty, and movement into it was civilian, not military... [t]he settlers were citizens moving into territory owned by the nation. (1952, 3)

On a global scale, he argued, this dynamic meant a confrontation between "the Metropolis," "clad in the culture of an old civilization rich in ideas and institutions, equipped with experience in government and skilled in all the known arts," and "the frontier," "a rude figure, lacking in all the refinements, ignorant of government and law, shy on arts and letters": "There was every reason why the two actors should become interested in each other, and enter into a mutual exchange of benefits, one gaining wealth and the other culture..." (1952, 11)

offer synthetic narratives. My purpose in utilizing a narrative form is not to contribute “new” historical information, but to present information that is already plentifully available — sometimes painfully so—in a different form. The materials I draw from include regional histories of settlement, histories of the frontier and of the public lands, commentaries on colonial legislation, monographs on immigration and indigenous currency, military histories, ethnohistory, Native American legal studies and history, works of political philosophy, American legal histories, law and economics literature, and legal academic scholarship (a genre perhaps quintessentially characterized by short-term pragmatism). The extent to which the historiography of conquest changes over time and varies across disciplines precludes holding up these texts as “capturing the reality of the objects seen” (Scott 1991, 792). The patterns of omissions and gaps between narratives show how concepts and modes of narration change over time and across disciplinary boundaries. In particular, I analyze how the development of key concepts has produced such omissions.³ In addition to integrating stories that historical practice has segregated, these chapters historicize concepts that have been rendered ahistorical through their universalization.

Using these materials, I point to the way the memory of conquest is scattered across many differently-motivated discourses that concern the same histories, and I highlight the recurring patterns resulting in the absence of accounts of conquest in many of these narratives. Throughout, I attend to the omission, marginalization and distortions of narratives about conquest and indigenous dispossession and their role as an integral part of the story of conquest in America itself. Narrative is central to the politics of American state- and law-making, and law played an especially critical role in the historical emergence and development of the United States. It is widely recognized that English colonization in America, compared with other European colonization endeavors of the same era, emphatically proceeded through *legal* means (Williams 1990; Banner 2005). DeTocqueville famously observed, “the conduct of the Americans of the United States toward the native races is characterized by a most singular affection for legal formalities... Men could not be destroyed with more respect for the laws of humanity” (2003, 397). At the same time, the theories of property, contracts and federalism that emerged to justify conquest during the colonial period represented the colonizing practices in America as abstract theoretical principles. These theories couched descriptions of practices in ethical and logical doctrines that effectively masked the violent way colonizing tactics exploited

³ Reading across the gaps and omissions of these literatures indeed presents an obligation that Joan Scott describes as “trying to understand the operations of the complex and changing discursive processes through which identities are ascribed, resisted, or embraced, and which processes themselves are unremarked and indeed achieve their effect because they are not noticed” (1991, 792). If, as Scott suggests, concepts are inherent in forms, then as Dipesh Chakrabarty has warned, “it is not enough to historicize history, the discipline, for that only uncritically keeps in place the very understanding of time that enables us to historicize in the first place” (1997, 55-56). Immanuel Wallerstein and his colleagues, too, have described social sciences in the contemporary period as marked by a growing awareness of the ways that concepts and theories once held to be universal reflect “the degree to which heritage is parochial,” or of the prejudicial “presuppositions built into the theoretical reasoning of the social sciences (and indeed into that of the natural sciences and the humanities as well)” (1996, 48, 55). Consequently, they observe “the need for the social sciences to intrude this debate into the very foundations of their analytical constructs”—and, perhaps recognizing how indispensable processes of knowledge production have been to colonizing practice, identify the “call for elucidation of theoretical premises” as a “call for decolonization, that is, for a transformation of the power relationships which created the particular form of institutionalization of the social sciences that we have known” (1996, 57, 56).

differences and dependencies on the ground.⁴ Until recently, for the most part, these concepts have travelled to the present moment through fields of study that are entirely separate from the disciplines interested in the history of colonizing practices in America.

Over time, narratives that avoid conquest have come to represent the history of American political life and its bedrock ideas. The study of the development of American politics, law and government today consequently focuses on abstract moral and logical principles underlying practices of contract and property-making and federal political organization. As this dissertation will show, when scholars educated in American politics, government, law and history look for the antecedents of legal institutional practices in American colonial history, they articulate histories whose parameters are consonant with the abstract principles and concepts that were developed to disavow or justify European colonization in America and elsewhere. These conceptual boundaries are thereby imposed on scholars of colonial American economy, property, and law who seek to interpret historical legal institutions, since they see the past through the lens of their contemporary education. Subsequently, for them, colonists demonstrated principles of agreement, restitution and cooperation to resolve conflicting interests. And as regards the history of the colonization, the boundaries they adopt create substantive omissions: such scholars largely limit their inquiries to narratives about colonists' interactions with one another, rather than also examining how colonists employed practices of contracting and property-making in transactions with indigenous people, to achieve the appropriation of indigenous lands on which colonial expansion depended (e.g. Innes 1995; Hoffer 1998; McCusker and Menard 1985; Perkins 1988).

I try to show while colonial relationships took their character from legal practices, colonial legal practices themselves—such as practices of contract, property-making, and the creation of federal alliances—also were directly informed by the colonial relationships and colonizing practices aimed at resource extraction, indigenous removal and colonial expansion. The question of how to best engage indigenous people in trade to appropriate indigenous lands and resources was *the* principal preoccupation of the colonial speculators, settlers, traders and governments who came to America. The basic practices of executing agreements, asserting and enforcing claims, trading goods, and forming political alliances, moreover, did not fundamentally change with the establishment of the United States, which adopted many reconfigured colonial strategies for dealing with tribes and expropriating lands. Despite these developments and transformations, the building blocks of the American legal tradition-- of executing trade agreements, recording property entitlements, and forming federations to consolidate force-- are remarkably consistent over the last four hundred years. No phenomenon wielded so much, and such forceful formative influence on the basic contours of these practices, as I will argue in Chapter 1, as the English arrival over centuries in America itself.

Legal categories thus offer the key terms for the history I tell here. Throughout, I suggest that a central aspect of the character of the concepts, historical narratives and discourses of American legal institutions is the absence of the history of conquest. Nowhere is this truer than with respect to the foundations of American legal practice and education— property, contracts, torts and the governmental principle of federalism. Therefore, I retell “settled” legal stories about precisely these subjects as a part of the history of conquest. In these chapters, I examine one

⁴ This production of political theories “independent” from the context of colonization sometimes occurred in writings that stood wholly apart from the literature of American settler historiography, as in the case of the seminal labor theory of value that John Locke elaborated in the *Second Treatise*, but sometimes emerged as a part of writings within that explicitly described the history of American settlement, as did De Tocqueville’s equally classic text *Democracy in America*.

specific form of historical dispossession—the creation of real property through the expropriation of indigenous lands. Specifically, I look at histories of mortgage foreclosure and claims clubs; the relationship between contracts and social contracts; an early federal tort system, which showcases one aspect of the nation’s civil-military approach to war; federal constitutional laws of Indian Affairs; and removal policies that constitute the genealogical antecedents of administrative immigration law. These aspects are not the only lenses through which to examine the history of dispossession and how it lives on in the present: one could also, fruitfully examine the role played by early laws of criminal and civil procedure in the colonial project, and the evolution of concepts of jurisdiction and due process. These chapters tell only part of a story that is in the process of emerging, a story which can make the history of dispossession on which America was founded a story that everybody knows. In pursuit of this goal, this dissertation joins the efforts of many to whom this work is indebted and who are still to come.

Together, the chapters describe *material* practices of conquest that include the use and transformation of the legal instrument of the mortgage, as well as the social, political and governmental forms upon which legal orders could be founded. These practices also include strategies for structuring private incentives through civil laws, for deescalating tensions with appeasement techniques to calibrate low-intensity conflict, and for controlling these civil systems through the deployment of public law enforcement. At the same time, I survey American colonial histories of property and currency, political theory (specifically, Locke and social contract theory), military histories and manuals of counterinsurgency, as well as American immigration history and the practice and scholarly fields of U.S. immigration law. Each chapter therefore also considers the *narrative* features that the literatures exhibit that work to submerge the history of indigenous dispossession and conceal it from view.

More specifically, Chapter 1 examines the simple *omission* of events, or the excision of from the history of mortgage foreclosure of events from the early colonial period. Chapter 2 proposes that the familiar social contract narrative is a product of *narrative spotlighting*, through which the exclusive focus on *one* group of actors masks their dependent or interdependent relations with others. In Chapter 3, I explore the consequences of narrative *inversions*, or to adopt a psychoanalytic term, the *projection* of descriptions and concepts applicable to one group onto another group, to whom it is imagined to be opposed. Finally, in Chapter 4, I look at how the entire disciplinary apparatus of immigration law and policy has been informed by the techniques of omission, spotlighting and inversions to function as a replacement narrative, a story about the settler protagonists which implies a narrative about the disappearance or extinction of the native other.

In Chapter 1, I begin with the history of mortgage foreclosure, and how land first acquired the legal status of chattel when it became liable for debts in colonial America. As scholars of colonial currency and land have long observed, English property law had recognized a distinction between land and chattel for centuries; but in America, foreclosure made it possible for colonists to use land to secure their debts, and it therefore expanded their access to credit from European merchants. I build on this story, first, by attending to this literature’s omission of the first instances in which mortgage foreclosure appeared—namely, the transactions through which colonists acquired land from indigenous people in the first place. I then explore the ramifications of this story about foreclosure that begins with the transformation of the legal instrument of the mortgage into a tool of dispossession, and predatory lending practices by colonists, through which they created indigenous debt as a commodity to trade between themselves. At the intersection of material and narrative foreclosure, therefore, this chapter

explores the relationship between credit and conquest, and the practices that rendered land equivalent to money.

I also show how colonists exploited the radical differences between their own and indigenous peoples' conceptions of money, land, and exchange to create trade dynamics characteristic of what I call a *contact economy*. In Chapter 2, I turn to the colonial political organization that formalized difference as an economic strategy. In the first part of the chapter, I look at the social compacts that colonists formed in early New England, to suggest that this material context inspired John Locke's narrative about the social contract in the *Second Treatise*. By taking up the principle by which a group of individuals voluntarily surrendered some liberties to assemble their forces for the good of the whole, I show how the "Body Politicks" thereby formed in New England operated *within* a "State of Nature," which Locke describes as the relationship between insiders and outsiders to the compact. These historical events illustrate how colonial social contracts instituted the difference between themselves and indigenous tribes as a political and economic division, giving rise to a dual order of law and relationships. Consequently, colonists' relationships with those considered internal and external to the social contract were governed by the laws of "civil society" and the laws of "nature," respectively. Under this dual legal order, the former set of laws constrained colonists' use of violence, while the laws of "nature" licensed it, skewing the balance of power and controlling the direction of the flow of goods in the contact economy in favor of the colonists.

The second part of Chapter 2 considers the elevation of the social contract principle to a form of inter-group organization—namely, federalism. This political form, I argue, consolidated and organized the colonists' forces, increasing their bargaining power on a new scale, to support the continuing growth of the contact economy and territorial expansion. Under the federal order of the United States, individual consent became a matter of political, rather than direct representation. In addition, this central government claimed the appropriation of indigenous lands as its prerogative, shifting the transfer of lands exclusively into the order of treaties and transnational relations, and transforming contracts into a uniform order. Under the United States government, settlers continued to form social compacts on the frontier in order to enforce their claim against future arrivals-- but the claim to lands first articulated under the doctrine of discovery became a race between them, making the major rule of entitlement the rule of the first in time.

In Chapter 3, I examine the state's role in organizing conquest, to probe the relation between violence and labor in a state founded on the basis of territorial conquest. This chapter begins by considering the category of *war*, and the rift between historical literatures about war, colonial wars, and accounts of the so-called "Indian wars." It departs from the observation that American history undermines the basic premise of contemporary counterinsurgency doctrine, or the conceit that it is waged against the unique threat posed by an enemy who blurs the distinction between civilian and combatant in violation of international laws of war. However, the imperial, colonial and the U.S. armies were tiny and poor, and it was the settlers themselves who performed the labor of conquest, blurring the line between civilians and combatants as they engaged in the hostilities with native people. Formal military forces instead *policed* settler-indigenous tension to prevent it from rising to the level of an all-out, costly war.

Examining how the state recruited and mobilized the labor for the project of conquest, however, takes the chapter's analysis beyond the categories of military literature to break down the very distinction between military operations and the everyday regulatory apparatus of a colonial state created to facilitate territorial expansion. To overthrow established indigenous

political orders in America, settler governments created liberal immigration, land and credit policies incentivizing settlement on Western lands. They also adopted systems to defuse interracial tensions and maintain conflict at a level of low intensity, including government regulated trade, an early federal tort system, programs to encourage indigenous conversion and assimilation, and other strategies aimed at capturing native “hearts and minds.” In this way, settler governments correlated the project of structuring a vast system of private incentives with a public system of law enforcement. Through this approach, they harnessed the power of self-interest for the project of national economic expansion, and made personal investment in the national economy and domestic defense a fundamental condition of American life.

My fourth chapter explores the displacement caused by the processes of dispossession, settlement, and property creation, by turning to “Indian removal” as a colonial goal, project, and set of techniques. This chapter imagines the stories of prior chapters as “immigration” stories, to underscore how each constitutes an account of laws and policies that forced the movements of indigenous people during this era. Laws of “Indian affairs,” too, were directed at encouraging white migration, and articulated the property entitlements of white migrants during this period. Colonial removal practices indeed depended on continuous immigration from Europe to build the numbers that gave Anglo-American social compacts their power, to ensure there would be enough civilian soldiers to claim and defend ground against the natives, and to encourage the departure of indigenous communities through the use of force and the threat of force.

This final chapter responds to the proud American narrative about the country’s tradition of asylum, a narrative implied in the idea that the U.S. is a “nation of immigrants.” Historian Jean O’Brien, writing about New England, has described the master narrative of settlement as “the replacement of ‘uncivilized’ peoples whose histories and cultures they interpreted as illogically rooted in nature, tradition, and superstition, whereas New Englanders symbolized the ‘civilized’ order of culture, science and reason” (2010, 3). In looking at the contours of the narratives and practices of contemporary immigration law, I ask how a disciplinary formation itself can come to function as what she calls a “replacement narrative.” I tell a counter-narrative about an American tradition of removal, one which begins with early laws of settlement that functioned as “self-deportation” laws, or laws designed to make life unbearable for tribal communities and to encourage them to leave. These self-deportation policies culminated in the Indian Removal Act, which authorized and sponsored deportation by the military, after the establishment of the U.S. When U.S. territorial expansion efforts reached the nation’s current continental borders in 1848, the government shifted to a policy of detaining tribes on reservations during the height of the wars of conquest. During this period, anticipating the close of the frontier, a nativist movement—the first self-proclaimed “Native Americans”—arose in response to new waves of immigration to America.

Each chapter in this dissertation thus offers a counter-narrative about conquest and a meditation on storytelling itself. That is, these chapters take historical, narrative transmission as their object, but also assume the risks of participating in it. They do so to emphasize that the history of conquest in America requires us to take knowledge production seriously as a form of agency and of historical event.⁵ I approach historical and legal texts with a critique of basic

⁵ Fifteen years ago, in *Settler Colonialism and the Transformation of Anthropology*, the anthropologist Patrick Wolfe declared, “invasion is a structure, not an event” (1999, 3). Wolfe’s formula expressed a necessary decision at that time to acknowledge the continuing usurpations of indigenous space in the present, both as physical occupation and through the discursive and epistemological practices of relegating invasion and conquest to a time past and finished. Because of Wolfe’s important intervention, it seems both possible and necessary now to approach invasion

aspects of these disciplines' traditional postures, which Linda Tuhiwai Smith puts forth in her book on research and indigenous peoples, *Decolonizing Methodologies*. These include the ideas that history as a discipline is "innocent" and "pure," that is, "not implicated with other disciplines, that there is a universal history, which is about development, progress and a self-actualizing subject, and that history is "one large chronology" of facts in linear order (1999, 30-31). Here, by contrast, I show how our received narratives relating to conquest are themselves motivated products of the history of conquest. It is therefore not possible to interpret the language with which they transmit information about events as neutral, nor to view the information so conveyed as self-evident; and yet they have become so self-evident on their own terms in today's world, that to re-tell their stories, I must tell the stories of how they have been told. To describe why the stories I offer have come to seem so categorically unrelated to the themes and questions of property, contracts and the social contract, war and immigration, my analysis in each chapter takes, in Joan Scott's words, "the emergence of concepts and identities as historical events in need of explanation" (1991, 792).⁶

My specific aim in these chapters is, again, to show the relevance of colonizing practices and the history of indigenous land dispossession to the development of basic social, political and legal formations in the United States: a social world divided by different relationships to money and economic speculation, as well as race, class and ancestry, governed by a federal system and a legal system premised on the sanctity of contracts and private property. These enduring institutions in America and the transmission of narratives and concepts about them carry their historical matter into the present. These chapters engage and analyze those lived concepts and narratives, to read concept and historiography against one another, and to consider their independent and complementary effects in the present. They are limited to an examination of one specific form of historical dispossession—the creation of real property through the expropriation of indigenous lands. I therefore focus on the broader structural underpinnings and dynamics of *emergent* rather than established legal institutions-- on how institutional practices arose from colonial legislation, administrative and everyday practices in the early American colonies. As a result, these chapters look different from much of the contemporary legal scholarship on colonial America, which typically begins after the first few decades of colonization, primarily analyzes court cases and decisions, and generally understands historical texts as representative conduits, rather than as acts that are themselves productive of historical truth.⁷

To offer an alternative to these histories, this dissertation examines the stakes of narrative organization in dominant, institutional histories, rather than offering a "history from below." The chapters present examples of what Chakrabarty has described as "critiques of institutions on their own terms" (1997, 50). With these "secular critiques for secular institutions of government," I aim to wield the codes of historical narrative and secular time in order, in keeping with Chakrabarty's suggestion, to suggest their very finitude. In doing so, I hope to offer institutional histories that do not foreclose but rather give supporting ground to histories from below. In other

as both a structure *and* an event. The relationship between structure and event is critical because the history of the events that amounted to invasion *is* the history of the development of the structures that still govern our worlds.

⁶ These chapters must, to paraphrase Michael Taussig, appear in a mode of representation that represents representation itself (1989, 11).

⁷ See, for example, Claire Priest's articles, "Creating an American Property Law: Alienability and its Limits in American History," and "Currency Policies and Legal Development in Colonial New England"; Pfander, James E., and Theresa R. Wardon. "Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency." *Virginia Law Review* 96 (2010): 359-1965; and Neuman, Gerald L. "The Lost Century of American Immigration Law (1776-1875)." *Columbia Law Review* 93 (1993): 1833-901.

words, I hope to point to the rich presence of all the other modes and traditions of thought, value, belief and relationship that already lie within and around these institutions, and us.⁸ While this dissertation is itself a contribution to academic scholarship, it does not presume that scholarship is the only source of history. Nonetheless, it cannot be denied that scholarship plays an important role in building a variety of stories, ideas, and explanations about the past; it validates some historical perspectives above others, and brings new ones into its own traditions, often in response to perceived political exigencies, signaling its hope of shaping practices outside of its own institutions, as well as within. In this spirit, I highlight the way that scholarly work produces histories, explanations, and concepts, but also how it draws upon those already in circulation.

The chapters that follow suggest that popular histories, explanations and ideas carry the mark of developments that reflect the swirling motivations of their uses at different moments, under a myriad of different historical circumstances; they permeate our lives in ways that often escape our awareness. Indeed, the most prominent ideas in our midst are mobilized for immediate use more frequently than they are explored all the way to their root: advocates often grasp at powerful ideas to help them persuade the world, and the ideas they deploy often draw their power from being widespread and familiar. Some of these stories and ideas thus find greater popular reinforcement over time than others; they thereby gain in influence and strength, and become touchstones for all thinking about and understanding of the present. In this dissertation, I explore the range of practices-- material, conceptual, narrative, and relational-- that have given rise to some narratives that have come to imbue the common sense of American life. Their power, I would suggest, holds up legal institutions, which depend on the popular *belief* cultivated by such narratives in their very being.

Before turning to the chapters themselves, it is worth concluding with some clarifications about the scope and limitations of this dissertation. First, my focus is on the continuity of narrative structures and collective practices that are patterned after a consistent but evolving landscape of rules; I ask questions about *collective* social phenomena and organization, institutional dynamics and popular narrative production. Histories of structural and institutional aspects of social life frequently run the risk of making the run of past events seem inexorable, inevitable, univocal and flat. The histories I present in these chapters are subject to this hazard not only because they emphasize collective practices, but also because they strongly accentuate diachronic continuity and transmission over time. I do not foreground an analysis of contingency, plurality, and possibility here. However, I work from the premise, well-understood by scholars of law and legal institutions, that the outcomes of such collective, institutional events are always the result of contingent, non-transparent, and contradictory actions and forces.

⁸ In his "Theses on the Philosophy of History," the philosopher Walter Benjamin called this last, linear conception of time "homogenous, empty time," and opposed it to sacred, or Messianic time (1969, 261). Chakrabarty draws upon this distinction to point out that "The moment we think of the world as disenchanted, we set limits to the ways the past can be narrated"; a "practicing historian" constructing "histories" "within the master code of secular History," or using the accepted academic codes of history writing, he further warns, must "take these limits seriously" (1997, 51). The crux of undermining institutional logic, he puzzles, is that it requires legibility within the institution; subsequently, one must never "grant this master code its claim of being a mode of thought that comes to all human beings naturally, or even to be treated as something that exists out there in nature itself" (1997, 56). Subaltern histories, he writes, must instead remember "History itself as a violation, an imperious code that accompanied the civilizing process that the European Enlightenment inaugurated in the eighteenth century as a world-historical task" (1997, 56); and the historian's challenge is "to ask how this seemingly imperious, all-pervasive code might be deployed or thought so that we have at least a glimpse of its own finitude, a vision of what might constitute an outside to it" (1997, 56).

Second, the histories I offer about settlement practices are limited to the periods of colonial America and the early Republic. The primary goal of this dissertation is to connect histories that have been severed in innumerable ways, temporally, conceptually, and substantively, from other historical accounts and contemporary discourses about American legal institutions. As I attempt to show how the history of dispossession has been riven from present discourses, historical and otherwise, I also illuminate the breach itself. I show the gap between narratives and perspectives, even as I attempt to draw lines of connection between them through acts of synthesis, in order to raise questions about both. By pointing to both connection and rift, I aim to raise questions about the nature of the relation of the present and the past. This work intends to lay a foundation for further research that will elaborate on the lines of historical recurrence, resonance, and correlations it identifies. It is far beyond the aim or the capacity of this dissertation to give a comprehensive, detailed causal account of *how* the histories I present have led us to the present moment. The centuries of intervening events between the episodes I describe and the present hold countless stories about how the traces I identify have been overlaid and reworked by other developments, other events, and other players. My work here is limited to an attempt to take some first steps in inquiring into how the ghosts of the past have survived into the present. Just as a middle-aged individual's entire way of functioning cannot be explained solely through the story of her birth trauma, the accounts of the past I offer here are incomplete in terms of their ability to account for the present.

Nonetheless, in this work, I also hold fast to the idea that the story of one's birth-- where one was born, to whom, and under what circumstances-- does matter. Against the American notion that one can be anyone one wants, and give birth to one's self, I value the psychoanalytic idea that early years are formative years--perhaps even as much for nations as for persons. As a diasporic person born and raised in the United States, I write this history as a part of my own story. It is the story of a place that I come from. The early history of the nation that I try to tell here is one that I needed, and whose absences I felt long before I began this research. I have written it, in some part, for those who, like me, also grew up in the United States under conditions in which our parents were often unable to transmit stories about America other than the ones I have questioned here. I grasped long ago that my parents did not have all the tools to prepare us for the world we faced here, although they sought to provide us with everything they could. Yet before this work, I had little sense of the stories they could not tell me. These histories, for me, describe the beginning of the perspective that my parents held-- the idea of the American Dream embraced by many immigrants.⁹ I understand the histories in these chapters, too, as a beginning to the complicated and multiple stories about how I came to be born here. They do not tell my whole story. But my story cannot be told without them.

As I have tried to put together stories that are known by everyone in some worlds but not in others, I have found that the synthesis of disparate perspectives—the story, indeed, of their relationship—seems often to be a story that nobody knows. Indeed, a story that nobody knows need not be any kind of secret; it can be simply a story that no one person has told. It can be a story that has become difficult to tell, not necessarily because it is buried deep within an archive,

⁹ I believe children of immigrants often also adopt that dream out of loyalty to their parents, or choose some other perspective from the swirling multitude of views around them in resistance to that narrative, without always fully understanding why. Another alternative, which I have tried to pursue here, is to seek to understand these perspectives themselves, and to consider them in relation to one another-- to ask questions that return to beginnings and do not take foundations for granted.

but because a vast multiplicity of other stories, explanations, and theories already coexist and have crowded into the space where it might otherwise appear. In these chapters, I tell stories that many know in parts, but that pick a path across different orbits with the hope of opening new possibilities for exchange, understanding, and inquiry. A history that nobody knows can, it is true, remind us of the alarming multitude of views that constitute our world, and the violent pasts that have set them at odds. Yet when the histories close at hand feel irrelevant to or discordant with one's experience, or when there is the will to find a shared story about a shared past, even when no such narrative already exists-- there is also sometimes comfort to be found in the thought that there remain multitudes of stories that can and explain and move these situations, stories that nobody knows, but that anyone might tell.

Chapter 1

Foreclosure and Dispossession

What is this you call property? It cannot be the earth, for the land is our mother, nourishing all her children, beasts, birds, fish and all men. The woods, the streams, everything on it belongs to everybody and is for the use of all. How can one man say it belongs only to him?

– Massasoit, Sachem of the Wampanoag, 1620s

... consider the case of Peter Minuit and the American Indians. In 1626, Minuit bought all of Manhattan Island for about \$24 in goods and trinkets. This sounds cheap, but the Indians may have gotten the better end of the deal. To see why, suppose the Indians had sold the goods and invested the \$24 at 10 percent. How much would it be worth today? About 385 years have passed since the transaction. At 10 percent \$24 will grow by quite a bit over that time. How much? The future value factor is roughly: $(1+r)^t = 1.1^{385} \sim 8,600,000,000,000,000...$

The future value is thus on the order of $\$24 \times 8.6 = \207 quadrillion (give or take a few hundreds of trillions)... This example is something of an exaggeration of course. In 1626, it would not have been easy to locate an investment that would pay 10 percent every year without fail for the next 385 years.

--*Fundamentals of Corporate Finance, 10th Ed., 2013*

Land's legal status as chattel today arises from practices of dispossession that colonists developed during the earliest days of settlement in America. This history tethers present experiences of dispossession by foreclosure to that past. Now, one can own, buy, or sell land with relative ease, and most members of the American middle class aspire to do so. One generally buys real property by taking out a mortgage or two, understanding that if one fails to pay, one may lose one's home or business to foreclosure. After the debt, fees and costs are paid, a former owner receives money remaining from a foreclosure sale, but she does not get her property back. While the crash of 2008 illuminated the crisis these commonplace ideas could generate on an epic scale, it is still difficult to imagine a more mundane set of propositions, or one that more ubiquitously structures our lived environment.

The practices of foreclosing on a mortgage and treating land as chattel both have clearly identifiable and relatively recent historical beginnings in the American colonial period. Moreover, the origins of these practices are intertwined: land acquired the legal status of chattel when it first became possible to foreclose upon a mortgage. Mortgages had long made it possible to secure a monetary debt with land, but the form of the instrument that first permitted a mortgagee to seize or sell the land to recuperate the debt appeared during the British colonization of America. The possibility of foreclosure enabled colonists to use land as security for credit, allowing credit transactions to become the basis for a market and therefore making it possible for colonists to use land like money. Indeed, during this period, colonists came to call money

“Coined Land;” by becoming a money equivalent, land generated wealth of proportions that would eventually support the birth of a nation (Waldstreicher 2006, 198). In this paper, I revisit the history of the mortgage to trouble this idea, which has become as natural as breath.¹

Foreclosure means to shut out, to close beforehand, to preclude a borrower from reclaiming her land. This story of dispossession simultaneously concerns both material and discursive practices of foreclosure—that is, the interrelated practices of developing legal instruments for indigenous land-seizure, and narrating history so as to marginalize these material practices. The account in this chapter puts forward the barred indigenous claim to lands and comprehends indigenous people as economic actors, indigenous peoples as polities, and indigenous currency as currency, in a narrative about early America that has been largely foreclosed by other histories of the period. First, I review the history of the English mortgage and the scholarly literature that describes the dramatic change it underwent in the American colonies. I then highlight this literature’s omission of half a century of episodes in which colonists first altered the English mortgage to permit foreclosures on land.

Indeed, although scholars have found this shift remarkable, they have also begun its history conspicuously late, excluding transactions with indigenous people for indigenous land. This treatment of the story of the American mortgage has become a narrative about generative credit, rather than dispossession. I return to this history to explore the ramifications of recognizing indigenous people as participants in the colonial economy. Specifically, I examine the character of transactions between colonists and indigenous people in what I call a *contact economy*, and I outline the role of these proliferating transactions in determining the political, economic and social intercultural dynamics in the rapidly expanding Euroamerican territory, thereby also shaping the institutions that developed during this time.²

By the term *contact economy*, I mean a market whose dynamics are determined by negotiations and transactions between groups that approach one another with fundamentally different premises concerning trade and the value of the objects that they nonetheless exchange.³ While trade partners in early America negotiated over those objects of exchange, they referred to different systems of value and held different conceptions of the capacities of those objects. Not only did indigenous political, social and economic institutions contribute to the shape of the contact economy, but for colonists, creating leverage *using* difference was a major policy concern, since they understood indigenous people as gatekeepers to coveted resources. Instead of the classic Anglo-American account of contracts in which agreements proceed through a “meeting of the minds,” trade between natives and English settlers in early America commenced through *miscomprehensions* about trade agreements, both accidental and deliberate. Conceptions about trade *not* shared by parties influenced the power dynamic between these groups in the contact economy, and was a conscious means by which the English transformed it.

Here, I show how the differences between colonial and indigenous conceptions of, first, *money*, and then *land*, fueled colonial growth in New England. Land became a money equivalent through the colonists’ adoption of indigenous money, insistence on European conceptions of property, and imposition of an English legal instrument on land, which they adapted for the

¹ I do so following the spirit of Karl Polanyi’s observation that “[w]hat we call land is an element of nature inextricably interwoven with man’s institutions. To isolate it and form a market for it was perhaps the weirdest of all the undertakings of our ancestors” (Polanyi 1944, 187).

² Peter Thomas, in his study of trade in the Connecticut River Valley, identifies the “contact period” as roughly 1550-1675 in New England (Thomas 1979, 9).

³ I identify these groups by cultural differences, superseding the regional diversities previously familiar to both white Europeans and indigenous people.

colonial project—the mortgage. The contact economy of early America, driven by the goal of expansion, was inherently dynamic, characterized by one party’s growth at another’s expense. This analysis of the contact economy appreciates the costs of trade by recognizing that the English expropriated indigenous lands for the American real estate market. In episodes that determined the fundamental character of mortgages and money in America, the colonial economy grew thanks to credit and acquisition.⁴ Further, as the mortgage enacted a new equation between land and money, the money side of the equation represented *debt*. Indigenous debt created through colonial lending practices, often predatory in nature, enabled the seizure of indigenous land. Land therefore became a money equivalent, not through positive sale, but through debt and loss; foreclosure was a tool of indigenous dispossession.

To tell this history of foreclosure, I draw on the concepts and episodes described in nineteenth to mid-twentieth century historical monographs on wampum and colonial land acquisition, classical political and monetary theory, and contemporary historical literatures on mortgages and money in colonial America. I synthesize literature that embraces colonial interpretations of indigenous practices with corrective accounts by Native American and ethno-historians. In describing how the contact economy arose from interactions between indigenous people and European immigrants, I offer an alternative to accounts that overlook native participation as a formative aspect of the colonial American economy, and explore the conceptual consequences of these omissions. I seek to illuminate the distortions caused by indigenous erasure that obscure the salience of this history today, and the persistent power of mythologies that have long justified the material practices of colonization.

Foreclosure as an American Colonial Innovation

Although colonists in America drew upon a variety of local English laws as the foundation for their legal systems, and adapted them according to a variety of local needs (Schultz 1997, 314-495, 487; Nelson 2008, 8-9; Haskins 1960, 5-6), the evolution of the mortgage in America eventually conformed to one major structural change across the colonies⁵: it became possible to foreclose upon it, and land thereby acquired the legal status of chattel, despite the clear distinction maintained between these categories for centuries in English law (Pollock and Maitland 1895, 2). The threat of foreclosure through which the contemporary mortgage operates is widely understood to be an American colonial innovation. However, historical accounts of the new colonial alienability of land tend to describe transactions occurring exclusively between Euroamericans. Here, I describe the mortgage’s transformation, situating it earlier than standard histories have suggested, and I consider the interpretive consequences of acknowledging that mortgage foreclosure first appeared in the context of indigenous dispossession.

First, however, to appreciate the novelty of the American mortgage, it is important to note the extraordinarily enduring tradition of protecting the human connection to land in English property law before the colonial period. This deeply ingrained preference was reflected by the limits of the English mortgage. Prior to the early seventeenth century, when the British colonies in America were first established, it was virtually impossible to alienate one’s land through a

⁴ The Latin for “to seek or search for” is *quaerere*—a verb that would become a component of both the words “acquire” and “conquer,” which express both the interpersonal and collective aspects of these trade expeditions.

⁵ The mortgage underwent a distinct trajectory of development in England (Turner 1934).

debt transaction under English law.⁶ The earliest European arrangement of using land as security for debts, which had come into being by the eleventh century, was an instrument known as the gage.⁷ Since charging interest on loans was prohibited as a form of usury during this time, English lenders with a gage were entitled to the rents and fruits of the land.⁸ Those lenders held a property entitlement that does not fit easily within any legal estate in land recognized today: their legal and economic benefits “flowed directly from the encumbered land.” Ranulf de Glanvill, a Chief Justiciar for the King of England in the twelfth century, described two varieties of the gage: the *vif* gage and the *mort* gage, or the “living” and “dead” pledge, respectively (Glanvill 1812, Ch. 6-11; Pollock and Maitland 1895, 119; Burkhart 251). In a *vif gage*, the lender applied the rents and profits towards the debt, so the debt would diminish over time. By contrast, in a “dead pledge,” the fruits and rents the lender collected did *not* count towards repayment, but added profit to the amount of the loan (Glanvill 1812, 252-53; Littleton 1846, 141).⁹ The *mort gage* thus presented an early opportunity to avoid the prohibition on interest, and unsurprisingly, it became “the more frequently used gage” (Burkhart 1999, 252; Glanvill 1812, 258). Initially, lenders held only weak possession rights, but over time, they increasingly took possession of land for the duration of a mortgage. This possession was limited, and came with obligations to maintain the land: while in possession, lenders were still liable to the borrower for waste, and by the fifteenth century, for nuisance (Burkhart 1999, 256, 258; Glanvill 1812, 256).

English laws protected the inheritance of estates across generations, recognizing that the stability of the economic, political, and social order depended on it. To maintain the integrity and cohesiveness of landed estates, the laws treated real property and personal property as starkly different entities, and made real property practically inalienable (Priest 2006, 385, 398-99). Unsecured creditors could claim personal property or income from a debtor’s land; they could assume possessory or tenancy rights on half of the land for a temporary period, or send debtors to prison; but they could not seize the land itself. These laws ensured that real property would pass in one undivided parcel to the eldest male heir. They also recognized the family’s collective interest in the land with entails limiting his ownership to a life interest, and circumscribed that interest with family settlement agreements specifying benefits for other family members (Priest 2006, 399-400). Chancery protected land even after the death of the debtor, and prohibited creditors from claiming land when a debtor’s land had not been explicitly offered as security for the loan (Priest 2006, 401-03). Even when a mortgagor explicitly gave his land as security for a loan, he still held an equity right of redemption—the right to pay and redeem the land within a reasonable period, typically twenty years (Priest 2006, 401-03). A creditor who sought to quiet the equity of redemption bore substantial procedural expenses at Chancery, which preferred to sell land only when personal property was insufficient; even after issuing a foreclosure decree, it sometimes allowed mortgagors to pay off their debt with interest, and redeem the land (Priest 2006, 404-08). In short, it was exceedingly difficult to tear an English family from their ancestral land.

During the seventeenth century, monetary systems— and concomitantly, the relationship between money and land— underwent a sea change in England and America. In the late

⁶ Burkhart periodizes the 12th-17th c. as the first era of the mortgage (Burkhart 1999).

⁷ Pollock and Maitland date the practice of making land security for debts to the eleventh century (Pollock and Maitland 1895, 117).

⁸ If a Christian lender died holding debts collecting interest, he died a sinner and forfeited his personal property to the King (Burkhart 1999, 250-51).

⁹ *The Standard Library Cyclopedia* explains that courts weakened the mortgage with the equity of redemption (1849, 371).

sixteenth century, to stimulate trade, the English began to explore the possibilities of establishing colonies in America,¹⁰ and Parliament loosened the restrictions on mortgages. In the early seventeenth century, the English colonial enterprise took root in America with the establishment of its first surviving settlements, Jamestown and Plymouth, in 1607 and 1620, respectively. Prior to this period, England had lacked an established and standardized monetary system (Burkhart 1999, 249-50). But when Parliament eliminated the last prohibitions on charging interest in 1623, it allowed for the creation of a new type of currency in the form of the negotiable instrument—money that functioned on the basis of credit, or a promise to pay later (Burkhart 1999, 260).

Recently, Christine Desan has tracked the stunning transition of English money from metal coin that individuals paid to mint from bullion at the opening of the seventeenth century, to a credit-based paper currency that was regulated by the government by the close of the same century (Desan 2014, Ch. 6). During the “dawning of the English monetary economy,” money acquired the capacity to grow by leaps and bounds through the mere passage of time, presenting new investment possibilities (Burkhart 1999, 258). Interest and liquidity became a primary source of profit for lenders and borrowers, and cash, paid for with tax revenue, began to circulate in the form of interest-bearing bonds. Meanwhile, English lenders holding mortgages no longer needed to take possession of encumbered land to make a return on their loans, and they increasingly permitted debtors to remain in possession of their lands until they defaulted.

In America, land itself would become liquid as the mortgage changed dramatically in the service of English economic expansion. Claire Priest, who has perhaps most thoroughly described this transformation, identifies the earliest experiments in making lands liable for debts in colonial laws of the 1670s. In 1675, Massachusetts passed a law permitting a creditor to take an individual’s freehold interest in land to satisfy an unsecured debt, whatever the amount¹¹; in 1682, the legislature of West New Jersey made land liable for unsecured debts if the debtor’s personal estate was insufficient to satisfy the debts¹²; and at the beginning of the eighteenth century, Pennsylvania, Connecticut and New Hampshire also made lands liable to be sold or applied as assets for debts.¹³ For Priest, these laws culminated in the general colonial policy announced by the Debt Recovery Act of 1732, which led to a tremendous expansion of the colonial economy through credit in the 1740s. In his commentaries on the Constitution, the early nineteenth-century Supreme Court Justice Joseph Story likewise observed that the policy of “mak[ing] land, in some degree, a substitute for money” was an American colonial innovation (Story 1833, 168). Story and Priest both note that this equivalence was created through instruments of debt, and emphasize that these measures to abolish the distinction between real and personal property resulted from colonists’ desire to obtain more credit to support their colonial ventures during the late seventeenth and early eighteenth centuries (Priest 2006, 418; Story 1833, 164). In Story’s words, by giving land “all the facilities of transfer, and all the prompt applicability of personal property,” creditors were able to obtain security for loans, which did “in no small degree” affect “the growth of the respective colonies” by increasing the overall funds available for colonial projects (Story 1833, 168).

¹⁰ Initial colonization efforts comprised a handful of failed missions, including the lost colony of Roanoke.

¹¹ General Court Enactment of May 12, 1675 (Shurtleff 1854, 29).

¹² The Acts and Laws of the General Free Assembly, Ch. 12 (1682) (W. Jersey) (Leaming, Sedgwick and Spicer 1881, 442).

¹³ Priest, 414; Executions Act, in *Acts and Laws of His Majesties Colony of Connecticut in New-England* (Connecticut 1702, 32); An Act for Making of Lands and Tenements Liable to the Payment of Debts (1718) (New Hampshire 1761, 84).

Histories of colonial currency and land policies dating this radical transformation of English property law to the late seventeenth century begin remarkably late. For as early as 1615 in Virginia, nearly as soon as the English had arrived on the eastern seaboard, colonists had begun to utilize the mortgage in America in the novel fashion that would become the essence of its modern incarnation—to alienate land from its inhabitants. That year, John Rolfe, eventual husband of the famed Pocahontas, observed that a number of minor chiefs mortgaged all their lands to the colony in exchange for wheat (Rolfe 1616, 6); some of these, Alden Vaughan reports, were “nearly the size of an English shire” (Vaughan 1978, 74). In 1747, William Stith, one of the earliest historians of Virginia, recounted that around the same time, Sir Thomas Dale lent four or five hundred bushels of corn to Indians “for Repayment whereof the next Year, he took a Mortgage of their whole Countries” (Stith 1747, 140). In 1618, Governor Samuel Argall wrote in a letter to the company, of which only a summary survives: “Indians so poor cant pay their debts and tribute” (Kingsbury 1936, 92). Vaughan, reflecting on the “frustratingly sparse” surviving “scraps of evidence” that provide clues about how early colonists acquired land from Indians, comments that “[i]t is impossible to estimate how much land the Indians lost through their inability to redeem their mortgages, but the statements by Rolfe and Argall suggest that the total may have been considerable” (Vaughan 1978, 74).

These episodes illuminate the literature’s exclusive focus on intra-European economic transactions. However, transactions between indigenous people and settlers not only shaped mortgage and monetary practices, but decided the fate of colonial settlements. In the seventeenth century, when the English sought to build their commerce in America, their expeditions were broadly motivated by the search for goods, but this quest required them to establish trade with indigenous peoples first. Furthermore, the origination of mortgage foreclosure in practices of indigenous dispossession suggests that far from representing an unprecedented new idea, by the time of the Debt Recovery Act, mortgage foreclosure had become *normalized* as a business practice. It shows that over the course of the seventeenth century, it became conceivable to apply a tool of indigenous conquest to transactions between whites, perhaps because colonists’ need for credit outstripped any concerns over the dispossession of foreclosure.

Traditionally, American historical scholarship has been disposed to efface the formative indigenous role from the history of economic development during this time, creating the illusion that the actions of, and interactions between people of European descent were almost exclusively responsible for the shape of American colonial history (see e.g., Innes 1995; Hoffer 1998; McCusker and Menard 1985; Perkins 1988). These omissions, and the analyses they inspired, stem from deeply ingrained perspectives and presumptions transmitted through a history of scholarship and academic institutions that advocated for American colonial expansion more often than they critiqued it. However, in neglecting the role of indigenous people in the early colonial economy, the literature fails to consider what may have been the most distinctive and powerful aspect of the colonial economy—its radical diversity. Priest, for example, focuses exclusively on the consequences of the commodification of land and people for Euroamerican society; for her, the main significance of the new alienability of land lies in the implications of the new credit policies for federalism and the diminishing role of landed inheritance in the organization of white society.¹⁴ Consequently, her discussion of the colonial debates leading to

¹⁴ Priest does point out English inheritance law was “partially repealed at the instigation of the English” in “the unique context of British colonialism and imperial rule,” to show alienability served the ends of Empire (Priest 2006, 393).

the decision to regard humans and land as chattel does not address the racially divided economic and political colonial society that was their context.¹⁵

But if we eschew mythologies that land in America was “discovered” or “free” for the taking, it is plain to see that colonists wishing to expand their access to credit by using land as security would need to acquire lands in the first place. The process of land acquisition, through which mortgage foreclosure appeared, was one of indigenous dispossession. This dispossession is properly part of the history of the mortgage; this history also sheds light on the process whereby, as a late eighteenth century commentator wrote, “[b]y running debt [with European merchants], America increased really in power” (Kaminski et al. 1988, 159; Priest 2006, 452). More precisely, credit secured by land required land appropriation, and made more land appropriation possible. Credit and conquest were therefore inextricably linked in colonial America. In the following account of the political economy of New England, I trace this chain of debt back, not to a miraculous gift of “free” or “discovered” lands, but to transactions in which Anglo-American borrowers were creditors too, and native Americans were the debtors of the debtors. In this analysis of the dynamics of the emerging *colonial* economy, the costs of the debt-based economy that subsequently emerged skyrocket. This story shows that dispossession was the predicate of English expansion in America, and that the tale of American growth from debt is also one of staggering loss.

Difference in the New England Contact Economy

To see how land became the equivalent of money in colonial America, it is necessary to understand the monetary system operating in what I have described as a *contact economy*—an economy in which dynamics are shaped by trading partners’ different conceptions of value and exchange. In the following two sections, I describe trade between indigenous people and colonists in New England to underscore the structural, perhaps paradigmatic character of a *contact economy*: though identical objects may circulate in trade and change hands between diverse communities, and despite the “agreement” represented by the exchange, those objects possess qualitatively incommensurate values for the parties. This difference works as a lever in the dynamics of the trade itself. Specifically, below, I address the colonists’ strategic trade practice of mobilizing differences between themselves and their indigenous partners, concerning conceptions first of *money*, and then of *land*. Colonists adopted indigenous currency to cultivate mutual dependencies, used the leverage they acquired through this trade to engage in predatory lending, and then introduced mortgage foreclosure. In so doing, they turned land into chattel, and an equivalent of money, for the first time.

Critically, the backdrop to any narrative concerning indigenous-settler trade during this period is the devastation of indigenous social and political orders. This destruction and disruption of tribal communities occurred through colonists’ spread of disease and acts of war. The arrival of Europeans in America triggered broad, world-shaking environmental and biological transformations and subsequently induced social, economic and political changes. During this period, wherever they made contact with Europeans, tribes operated under acute crisis

¹⁵ Priest recounts how, as states began to compete for credit, they considered whether to protect their citizens’ slave and land holdings from outside creditors, or to invite credit flow into their borders by providing creditors with new forms of security. Yet Priest discusses land acquisition without acknowledging indigenous dispossession, and growth of the African slave trade without acknowledging the racial character of the early American economy (Priest 2006, 387, 432-35, 440, 451-57).

conditions. Their communities suffered epidemics caused by microparasites brought from Europe to North America; at the time of contact, American indigenes had no immunity against these illnesses, which often inflicted death rates of 80 or 90 percent of a village's population (Cronon 1983, 86; Crosby 1976, 290). In 1616, an epidemic in Southern New England killed so many that there were no survivors left to bury the corpses, and the Plymouth colonists found "none to hinder our possession" (Cronon 1983, 87; Salisbury 1982, 175). The first several thousand settlers who arrived in the Bay Colony to overwhelm the Massachusett and Pawtucket brought another epidemic that put an effective end to those tribes' "quarrell with [the English] about their bounds of land," and inspired John Winthrop to write to Sir Simonds D'Ewes, "God hath hereby cleared our title to this place" (Salisbury 1982, 190-92, 183). Contact with Europeans also occasioned massive social disorganization, breaking up kinship networks and disrupting the systems of political, spiritual and medical authority that had previously organized collective life (Cronon 1983, 89; Crosby 1976, 297). The context and perhaps the condition for colonial growth and the new mortgage foreclosure was thus an unstable trade environment in which local balances of power were shifting dramatically. Trade across difference in the contact economy transformed local economies and monetary systems, as well as European frameworks of law and of commerce, intertwining the development of American finance with real estate as colonists increasingly focused on expropriating indigenous land.

MONEY

Understanding the monetary world of the American colonial contact economy requires reevaluating classic conceptions of money as well as historical accounts of money in early America. Because of their traditional coincidence, the world of early America is a theoretically and historically freighted site for revisiting theories of money, and thinking through its materiality and institutional design. Since colonial times, the pre-colonial world in North America has been conflated with ideas about a primitive, wild, simple world, which appear in narratives purporting to describe man's evolution and the beginning of civilization. Narratives like these, especially insofar as they are situated in America, generically represent the ideological complement to the material project of colonization: they arise from the narrative removal of the indigenous dispossession and the African slave trade on which the American colonial economy depended (Baptiste 2014). Typically, in these schemes, a fiction about the developmental transition of one community masks the violence of contact between indigenous groups and settlers; the moment when one distinct social system confronts another is replaced with a moment of evolution.¹⁶ Consequently, literatures that perform this erasure have not analyzed the interracial transactions that shook and transformed the social and economic world of early America.

The best-known work that interweaves these ideologically powerful mythologies about money, man's evolution into civil society, and America as wilderness is John Locke's *Second Treatise*. Written contemporaneously with the colonizing of America, its story of the transformation of the state of nature—generally read as a wilderness from which the bedrock of modern Western political society emerged, as if by spontaneous generation-- begets its own power, and describes its own origin. Locke invokes the commonplace colonial conflation of

¹⁶ Lewis H. Morgan succinctly exemplified theories of colonial evolutionism: "In studying the conditions of tribes and nations in these several ethnical periods we are dealing, substantially, with the ancient history and condition of our own remote ancestors" (Morgan 1907, 16-18).

America with a pre-political and pre-economic “state of nature.”¹⁷ He himself most clearly endorses a colonial notion of evolutionary development in his theory of money, wherein he describes the pre-civilizational state as characterized by the absence of money, famously writing that “in the beginning, all the world was America, and more so than it is now, for no such thing as money was anywhere known” (Locke 1689, 301).

Locke’s text, still the touchstone of classical monetary theory, conceptualizes money as a way to accumulate and preserve value, eliminating waste and facilitating trade by furnishing an object desired by all at all times, a symbolic stand-in for material goods. Money, by this account, is a symbolic representation of goods, a means of overcoming their perishability. It is abstract and separate from the material economic relationships to which it refers. Locke’s story about “America” imparted this scheme of a universal trajectory of progress to the generic classic account of money’s development, in which, as Desan puts it, “[m]etal gradually rose like fat to the surface” and gold became the favored medium of exchange, store of value and unit of account (Desan 2014, 27). Desan notes that these developmental narratives are a “conjured space” in which pre-money “exchange was a murky broth of barter” (Desan 2014, 27). Consonantly, the literature on the early colonial economy follows the cues of classical monetary theory in describing the use of money as a progressive development, part of a general social awakening into political, institutional life. Scholars writing on colonial currencies generally argue that colonists in America were chronically short of specie through the seventeenth century, and having neither the means nor the authority to mint English coin, adjusted by using “money substitutes.”¹⁸ Almost uniformly, writings on colonial American currencies describe the lack of institutional infrastructure in Euroamerica as the key difference between the American colonial and English economic environments. However, the literature does not remark, as it might, on the significance of indigenous presence and the unique dynamics of trade between groups with unshared basic premises about money, trade, land, and the world (Priest 2001; Nettels 1973; Carruthers and Ariovitch 2010; cf. Miller and Hamell 1986; Salisbury 1996). Instead, by emphasizing the absence of European institutional infrastructure, this literature characterizes the contact economy’s system of exchange as a necessary *regression* to barter, a community concession to the absence of money and to survival concerns. It thus reinforces its association with the “state of nature,” pre-civilization, and prehistory, and frames its institutions and dynamics as utterly distinct from those that govern the present.

Despite the substitution of indigenous absence for indigenous difference within the accepted colonial narrative, the record shows that colonists who imported the mortgage to America encountered indigenous systems of money there almost immediately, and adopted local forms of currency to insinuate themselves into local markets. It is uncontroversial that colonists traded with “wampum,” or “sewan,” as the Dutch called it, both buying it with various goods and using it as currency to buy goods. It is also known that they used it in trade with other Europeans, as well as with members of Indian tribes. In acts now identified as barter, indigenous people and settlers also “traded all sorts of objects among themselves—grain, gold, cow and hides, promises, services, fish, and salt.” But although these superficial aspects of the colonial economy have become the trademark features of the “conjured” early world of money

¹⁷ See Chapter 2, where I offer a more in-depth reading of Locke’s social contract narrative as historically descriptive, and his “state of nature” as a relationship.

¹⁸ Cf. Edwin J. Perkins describes this as merely “colonial rhetoric,” writing, “there is no firm evidence suggesting that the colonies were plagued by a severe and persistent shortage of specie”; “colonists held about as much gold and silver coins and other forms of money as they demanded” (1988, 163-65).

mythologies, the “wild simplicity” of the notion of pre-money barter cannot capture the complexity of the process that unfolded through exchange between groups operating according to wholly different conceptions of goods, money and exchange itself (Desan 2014, 27). Settlers and indigenous people developed their trade relationships, agreed upon the objects they exchanged, and brought their own presumptions about the nature of money to bear on this exchange. The monetary economy that emerged suggests that money, far from being a neutral, symbolic representation of material goods, operated as a material practice that fundamentally shaped those relations themselves (Desan 2014, 27).

The objects that came to be known by the general term “wampum” were strings of shell beads with a number of different names, depending on their color, the kind of shell from which they were made, and their value. White beads were called *wompi*, and were made from the *Pyrula Carica* or *Canaliculata* periwinkle shells common to the southern coast of New England; *Suckaúhock* were black beads made from the dark part of the common quahog, *Venus mercenaria* or round clam, and were worth twice as much as *wompi*. The shell cylinders were about one eighth of an inch in diameter and one quarter inch in length, and were polished and strung on hemp fibers or animal tendon; strings were called *peage* and traded by the fathom. Like any other money, wampum represented value, a medium of exchange and a way of settling accounts.

Wampum entered the fringes of the European economy in 1622. The Dutch discovered “how much it facilitated their trade” when a Dutch West Indian Company trader named Jacques Elekens threatened to behead a Pequot sachem unless he received “a heavy ransom.” The sachem promptly delivered 140 fathoms of “sewan” (Cronon 1983, 95; Salisbury 1982, 148). Thereafter, the Dutch began to purchase large quantities of wampum from the Narragansett and the Pequot, reinforcing the dominance of these tribes in the area. Meanwhile, the English had established themselves in Plymouth in 1620. In 1627, to try and prevent the English from becoming competitors for the Connecticut fur markets, another agent of the West India Company, Isaac de Rasieres, sold fifty pounds of wampum to the Pilgrims, hoping they would spread its use to tribes in Maine, and return to New Netherland to purchase more wampum from the Dutch (James 1963, 63; Salisbury 1982, 151).

The Plymouth traders had been building up their trade with the Abenaki and Algonquians by cultivating corn to trade for skins. But wampum could be traded when beaver pelts were thickest (late winter and early spring), unlike corn, which was harvested when pelts were thinnest, in the late fall (Salisbury 1982, 151). The English quickly found alternate supply sources for wampum in Connecticut, Long Island and Narragansett, and within two years, accomplished the Dutch goal of spreading the market for wampum to northern tribes. By cornering the market in wampum, they came to dominate European-indigenous trade (Cronon 1983, 96; James 63; Weeden 1884, 21). “The Plymouth men could hardly furnish wampum enough,” Rhode Island historian William Babcock Weeden wrote in 1884, and “control of this currency gave them an advantage which virtually excluded the fishermen and other traders from competing for the trade of the river” (Weeden 1884, 21).

Settlers took up wampum to enter into local trade, but the currency meant vastly different things to the groups who traded it with one another. It should be noted that the only available literature on wampum is historical or anthropological, and the observations are thus filtered through the lens of outside perspectives, European scholarly traditions, and colonial interests.¹⁹

¹⁹ Similarly, Thomas notes, “[t]here is an inherent limitation in the very nature of the source material generally employed by historians. In any situation where a literate society comes into competitive contact with a non-literate

Colonists had limited interest in wampum's meanings beyond its effects on native groups, such as its potential use for annexing indigenous labor to procure beaver pelts, or deescalating tension as a peace offering. Still, by various accounts, the form of money made of shells possessed great ideological and symbolic meaning for the tribes that used it, and who believed the shell substance, along with crystal, to be other-worldly in origin (Miller and Hamell 1986, 318). Weeden observed that wampum was more powerful than words. It could give force to words and could be used to remove "the hatchet fixed in the head" (Weeden 1884, 13). Furthermore, it held a "literary office": the beads served as a mnemonic record, "an ideogram in the bud"; they "conveyed the words, giving warrant and sanction to the first communication, then preserved the facts by this symbolic association." Facts were "talked into" the beads, and belts could preserve words, faith, and honor. Southern New England tribes also used wampum belts to transmit authority and personal status, through rituals performed by Mourning Councils to lament a sachem's death and install a successor (Morgan 1907, 139-43). Because wampum carried power, "[l]esser individuals dared not accumulate too much of it unless they were willing to challenge those with higher prestige" (Cronon 1983, 95).

Colonial records indicate, however, that wampum also bore significance for colonists not understood by their indigenous partners in trade. On one hand, the great value the wampum held for an increasing number of northeastern tribes endowed it with value for Europeans (Herman 1956, 29). The beads "carried a permanent value through the constancy of the Indian desire for them," since "[t]he holder of wampum always compelled trade to come to him" (Weeden 1884, 6). But on the other, for colonists, the value of wampum to indigenous people only mediated its value on the international market. Europeans in America sought commodities that would repay their debts to European merchants, and wampum, like corn, could be traded for furs, for which Europeans would pay European money.²⁰ The value of wampum translated into pounds and shillings, or the profits in English money that its use would produce.

The colonists' world of commodity exchange was thus hybridized with cash assumptions: whether the objects exchanged were shell beads, silver, or fish, the count was in coin and the goal was to accumulate goods highly valued on the international markets. Colonists' handling of trade and goods in America exemplified behavior to be expected of those already inculcated in a modern Western monetary system; as Desan notes, "[t]rades made without money will take place in the shadow of the moneyed economy" (Desan 2014, 61). Internally, colonists' networks of debt relationships permitted community members to exchange goods and clear debts between themselves without using cash: the community relied on book accounts that individual settlers paid off at intervals (Carruthers and Ariovitch 2010, 86-67; Banner 2005, 55). Colonial laborers were compensated in kind, with the use of "shop notes" that limited their expenditures to a particular shop and a narrow set of goods (Priest 2001, 1375). Thus, "[e]ven trades made purely on credit—ongoing relations reciprocal enough to operate indefinitely without a token changing hands" were "rebalanced in the moneyed world" (Desan 2014, 61). Colonial laws designated wampum and other commodities as currency, specifying that these products were receivable for payment of taxes and other public debts, and called them "country pay" (Nettels 1973, 208). The profits of international market sales were calculated according to expenditures on commodities

society, the resultant documentation is inevitably biased and the attitudes expressed are frequently the product of ignorance" (1979, 4).

²⁰ "[W]hen Francis Higginson said that it was 'almost incredible what great gain some of our English Planters have had by our Indian Corne,' he was excited not about the grain itself but about its easy convertibility into furs" (Cronon 1983, 94).

valued in terms of English coin. Colonial assemblies created schedules of prices, assigning equivalents in shillings and pounds for certain quantities of wampum, corn, peas, pork, beef, tobacco and tar, for example (Nettels 1973, 210); “[t]he legislators tinkered at the money question constantly,” in efforts to manipulate the market using fluctuating standards for these equivalents (Weeden 1884, 24).

As a contemporary textbook widely used in business schools explains, value is created “by identifying an investment worth more in the marketplace than it costs us to acquire” (Ross, Westerfield and Jordan 2013, 267). With European money, colonists could acquire raw materials to support their trade in America, to engage in exchange on the other end for vast profits in European money. Initially, the two goods most important to colonists were wampum and beaver skins, for they each offered ready access to other investments (Segal and Stineback 1977, 46): Weeden writes that while the colonist “desired corn and venison, all the world desired beaver” (Weeden 1884, 15); “[w]ampum was the magnet which drew the beaver out of the interior forests,” and wampum, as we will see, would later be used to extract land. When colonists traded beaver to Europeans for money, they derived profits from the gap between the values of these goods—wampum, beaver, and European money—for indigenous people and colonists. The value that European money did *not* have to indigenous people was key. In just one example, in 1629, a newly arrived settler named Francis Higginson met an English trader who had recently paid six shillings and eight pence for seed corn, which he had traded for beaver skins that netted him a profit of £327 on the London market (Salisbury 1982, 185). The scale of this enterprise involved tens of thousands of beaver and otter skins delivered to trading posts each year during this era, and the Plymouth colony was able to pay off its English creditors with animal skins supplied by Abenaki hunters on the Kennebec River in Maine. In the 1640s, “even as their population was cut in half by disease and intertribal warfare, the Hurons produced 30,000 beaver pelts annually, and by the late 1650s, 46,000 pelts were pouring into Fort Orange alone (Axtell 1992, 130-31).

Colonists were keenly aware of the differences between Indian and European conceptions of money, other objects, and their very traditions of exchange, and they sought to mobilize these differences to their own advantage. Because trade with tribes was indispensable to colonists, native ideas about cosmology, political life, and human relations to each other and to land strongly shaped the way trade and diplomacy emerged and developed between Indians and Europeans. Colonists’ adoption of wampum, not only for trade with indigenous people, but as currency between themselves, may furnish one of the strongest examples of how the English pursued trade in America by adopting protocols and rituals rooted in native kinship obligations and gift exchange. The use of wampum helped colonists by giving them entry into the local economy, and also by defusing the tensions they created there. When faced with seemingly insoluble conflict, imperial officers and Anglo-American settlers alike used the gift of wampum for the ritual, healing significance it held for the Six Nations and Ohio Indians—to remove “the hatchet fixed in the head” (Jacobs 1985, 43-44).

Colonial companies and governments were initially bewildered to find English rules did not apply to the Indian trade. The English had assumed that Indians would bring more furs if they offered them better prices, in accordance with “the normal European reaction,” but noted early on that “the Indian did not react to ordinary European notions of property nor to the normal European economic motives” (Rich 1960, 46-47). Contrary to expectation, an experienced Hudson Bay Company trader warned, “The giving Indians larger Price would occasion the Decrease of Trade” (Rich 1960, 47). At first, English merchants tried to convert Indians to English ways by “inculcat[ing] a notion of *Property*” in them. They hoped to make them

“sensible of the Conveniency of having some Property,” *not* to “increase their real Necessities, yet it would furnish them with imaginary Wants,” and enlarge the market for European goods. However, exchange between tribes continued to be “articulated in the language of gift giving;” it expressed political, diplomatic relations and had the capacity to articulate collective relationships between sovereignties.²¹ Even when indigenous people sought out European goods, such as kettles, glassware or textiles, they did so for their similarity in substance to other materials they already valued, qualifying them by Indian, rather than by European “schemes of value” (Miller and Hamell 1986, 318; Salisbury 1996, 452-53). “In effect, they became different objects,” whose significance Europeans did not fully understand (Cronon 1983, 94; Weeden 1884, 13); as historian Jean O’Brien has written, “Indians incorporated new items of material culture selectively and in Indian ways” (1997, 6). Fur traders found that no matter the circumstance, “nothing like the European equation could be established”: “[t]here was no question of setting a quantity of spirits against a quantity of furs” (Rich 1960, 50). With reference to their own standards for building economic relationships, natives bargained shrewdly, playing European competitors against each other, as Axtell recounts, and “avoiding superfluities that had no place in their own culture” (Axtell 1992, 132).

Nonetheless, as the English arrived in greater numbers, both the contact economy and the power imbalance between the English and the natives grew. As Indians became increasingly enmeshed in trade relations with the English, systematic fur trade relations replaced earlier, more sporadic exchanges. Competition for wampum promoted dependence on European traders. It destroyed balances that had been implicit in Indian notions of reciprocity, established new local leaders and contributed to shifts in the tribute obligations that previously existed between Indian villages (Cronon 1983, 96). Generally, the new trade combined with epic fatalities to create widespread political crises, altering power relations within and between Indian communities, as survivors formed new villages with relatives (O’Brien 1997, 6).

Regarding the effects of the colonists’ adoption of wampum, William Bradford, governor of Plymouth Colony, remarked, “Strange it was to see the great alteration it made in a few years among the Indians themselves” (Cronon 1983, 96). Previously, Indian notions of status had been measured by “a handful of goods, whereas Europeans could accumulate wealth with virtually any material possession” (Cronon 1983, 98). As European arrival disrupted earlier status systems, wampum gained new importance for sachems seeking to acquire wealth to retain power. Tribes began to stockpile goods desired by Europeans in an effort to reconstitute their fractured social orders and adapt to their dramatically changing environment; “things began to have prices that had not had them before. In particular, one could buy personal prestige by killing animals and exchanging their skins for wampum or high-status European goods” (Cronon 1983, 97). To meet the intensifying European demand for wampum, tribes produced it in greater quantities, making greater quantities available to individuals across the social spectrum; south coastal Indians even shifted their settlement patterns in the 1630s, remaining in their coastal sites year-round to stockpile shellfish and increase production of the currency (Cronon 1983, 101).

But although indigenous practices began to resemble European ones after the “eliminat[ion of] many of the social sanctions which had formerly restricted individual accumulation,” indigenous and colonial accumulation of goods remained critically distinct during this period (Cronon 1983, 98). For indigenous communities, accumulation could alter orders of social status, and perhaps even the very meaning of proportions and social status.

²¹ The political and social valences of diplomacy in indigenous America were, in this regard, not wholly unlike those of trade between European nations.

However much European influence in the contact economy encouraged indigenous accumulation, this accumulation could not translate into European notions of wealth. First, indigenous communities did not embrace the concepts of fungibility, investment, or interest on which credit and debt practices were premised. The flexible capacity of English money to draw abstract equivalences between the values of a vast range of trade objects according to a cumulative measure was foreign to them.

Second, even insofar as they sought to participate in this economic game, indigenous groups *could* not value English money like the colonists, for they did not have access to the overseas European markets that motivated and validated colonial endeavors in America. In the pre-colonial northeast, trade in wampum and the other goods between villages in the New England area had been relatively local in character. As Cronon writes, “no entrepreneurial class existed whose chief role was to move commodities over long distances” (1983, 92-93). But Europeans “took hold of the traditional maize-fur trade network and transformed it from a system of binary village exchange to a link in the new Atlantic economy” (Cronon 1983, 94). For colonists, the markets of the American contact economy were appendages that fed into a European market, and Europeans possessed exclusive control over this cross-Atlantic nexus. Even as their trade in the early days established the dynamics of these relationships for years to come, it is doubtful whether the indigenous traders in this contact economy could fully understand English motivations, or the limited role that they had been assigned in the scheme of the economy the English were building. They were subject to its logic, but had limited access to its rules, stakes, and possibilities. This limitation was not incidental. It was due to a structural information asymmetry, and from the colonists’ point of view, it was exceedingly profitable. Merchants in Europe would not have contracted directly with tribes; tribes were not competitors by design. The premise of the colonial investment market itself was that indigenous tribes participated in the market, but not as investors. Meanwhile, the colonists labored productively as middlemen whose role was to expropriate wealth and land from tribes.

Thus, through continuous trade concerning objects and agreements “that meant one thing to the Puritans and another to the Indians,” indigenous traders’ competitive economic position grew weaker while colonists accumulated wealth and political power. This growth attracted further immigration, nearly tripling the Bay Colony population between 1634 and 1638, strengthening colonial forces, and mounting pressure for land. When colonists began to spill into Connecticut, this caused heightened tensions in an only tenuously peaceful trade environment (Salisbury 1982, 216-17; 225-26). The English took hostile Pequot responses to incessant colonial encroachment as an opportunity: in an infamous pre-dawn surprise attack, they destroyed a Pequot village, slaughtering all but seven of 300-700 sleeping women, children and old men. After another battle at Sadqua Swamp, the Pequot nation was declared dissolved under the Treaty of Hartford in 1638 (Salisbury 1982, 221-22; Segal and Stineback 110). After extinguishing the Pequots, the English moved swiftly to isolate the Narragansett, who had been English allies up until then (Salisbury 1982, 229). In 1643, in response to growing indigenous resistances, the several colonies formed the Confederation of New England, which first exercised its power to find a pretext upon which to dispatch the Narragansett sachem Miantanomo (Weeden 1884,31-32).²² After Miantanomo was accused of plotting to murder the Mohegan sachem Uncas, Uncas captured and delivered him to the English. Perceiving that the Narragansett would never be so vulnerable again, the Commissioners prosecuted and convicted

²² This unsavory episode repelled even the perpetrators’ loyal descendants, including Weeden.

Miantonomo, and turned him over to Uncas for execution before English witnesses (Weidensaul 2012, 147-48).²³

These acts of aggression constituted critical turning-points for English political ascendance in New England, and each resulted in explosive increases in commercial activity. After the Pequot massacre, settlers' need for wampum to access trade with Indians rose so high that Connecticut began to receive wampum for taxes at four a penny, and the Bay fixed the rate at six beads a penny for any sum under 12d.²⁴ Miantonomo's death ensured the future of "New England" by extinguishing effective native resistance to English Puritan hegemony until Metacom's War at the end of the century.²⁵ As Weeden wrote, "[t]hese astute men of the United Colonies, more cunning than Uncas, sacrificed the friendly Miantonomo for the good of the State, as they conceived it" (Weeden 1884, 31-32). Directly after his death, wampum became legal tender in all the New England colonies, and the next year, in 1644, the Indian trade and the value of wampum together reached new heights (Thomas 1979, 73). By 1645, *peage* was New York's most effective currency, used widely in New Jersey and Pennsylvania; the inventories of deceased colonists commonly contained these strings of wampum. In the late 1640s, to deal with the problem of counterfeit wampum, Massachusetts "instituted a process more like coinage than anything which [Roger] Williams found among the Indians, and described in the familiar terms of the mint" (Nettels 1973, 211-12). Wampum was not only the primary medium of exchange between colonists as well as with Indians; there was little other money in the colonies. Indeed, as Weeden recounts, when an old English shilling was found on a highway in Flushing, Long Island in 1647, it was displayed as a public attraction, as it constituted a genuine curiosity to most colonists (Weeden 1884, 24-25).

LAND

One century later, the presumption that land was equivalent to money had become a colonial commonplace, in continuing tension with the indigenous conception of land, to which such an equivalence remained foreign. In 1742, in a conversation with the Pennsylvania lieutenant governor George Thomas about the poverty of the exchange of goods for land, Canassatego, who spoke on behalf of the Six Nations, protested: "We are sensible that the Land is Everlasting, and the few Goods we receive for it are soon Worn out and Gone." Thomas replied, "What you say of the Goods that they are soon worn out is applicable to everything, but you know very well that they cost a great deal of Money, and the Value of Land is no more than what it is worth in Money" (Banner 2005, 80-81). The disagreement about the value of land was the crux that drove the contact economy, and lay at the heart of its explosive growth. As Stuart Banner has noted, the difference in "how value was constructed" for settlers and indigenous people "was itself part of the engine that drove land sales," and thus, indigenous land loss (2005, 81).

To expand colonial landholdings, colonists not only observed, but made deliberate use of the differences between European and indigenous conceptions of land. In New England, Indian ways of belonging on the land involved mobility based on kin relations between central village sites and seasonal change; "a large Indian sense of place connected many separate locations together in an intricately webbed landscape" (O'Brien 1997, 21-22). In contrast, the English

²³ The English, however, specified that Uncas was to kill him in Mohegan territory (Weidensaul 2012, 147-48).

²⁴ Weeden, 22; Mass Rec. I. 238, Col. Rec. Conn., 1637, 12.

²⁵ This conflict was also known as King Philip's War.

colonizers emphasized fixity on the land, bounded enclosures, and exclusive ownership to be enforced by a bureaucratic legal system providing procedures for property transfers and inheritance (O'Brien 1997, 22). Although indigenous people could reach agreements concerning the common use of lands, the lands themselves could never be enclosed for absolute, exclusive individual ownership, nor sold for corn, fur or wampum. But where colonists accommodated indigenous conceptions of currency, they were unyielding about European conceptions of real property. They partitioned, fenced, granted and otherwise marked off land for their exclusive use, expressing their belief that the land was an object properly enclosed, with the capacity to be owned, bought and sold. Concomitantly, they insisted natives' rights with respect to the land after "sale" were extinguished.

In early New England, real estate both drove the growth of the contact economy and was created through it. Again, colonists in New England first imposed their notion of property upon lands vacated in the aftermath of epidemics. From this foothold, they pursued trade and interdependence with native communities. A few years after spreading into the Massachusetts Bay in 1630, rapid population growth shifted the focus of the colonists' commercial exchange from "portable commodities, principally furs, to the land itself" (Salisbury 1982, 164-66). Land became "the principal capital of seventeenth century America," "the most precious commodity the Indian had to offer" (Martin 1991, 123). In his study of the founding of New England towns in the seventeenth century, John Frederick Martin observes that there were only two ways to expand landholdings, "the only plentiful source of capital": "first, to convert more wilderness from public to private ownership; and second, to improve land and thereby (as Locke would later say) increase its value" (1991, 123). These methods required colonists to demand that indigenous people accommodate their presumptions about land. One historian, aiming at circumspection, timidly wrote that "[t]he settlers seem always to have evaluated the Indian land solely in their own terms: no evidence exists that the colonists understood land values in the natives' terms or ever consulted the natives in determining the price" (Kawashima 1986, 59-60).

In the mid-seventeenth century, land increasingly became the subject of credit practices. One way colonists imposed their own conception of property upon land was to first impose their own conception of money and credit upon indigenous people. Colonists extended credit to indigenous people to draw them into debt, inducing them to then take out "mortgages" on which they would later foreclose. However, when colonists used the imported mortgage form to *foreclose*, they not only insisted on the English conception of land, ignoring indigenous understandings of belonging to a place, but they *widened* the existing breach between English and indigenous conceptions of land by abandoning age-old English hesitations about identifying land as chattel, thus creating a brand-new American commodity.

Indeed, it appears that "[s]ettlers... adapted their economic practices to meet the credit demands of the Indian trade" *because* of the difference between settler and Indian conceptions of credit, trade and land. Peter Thomas understates the situation by commenting, "one is still not sure that decades later 'credit' was a concept which the [Connecticut River] Valley tribesmen fully understood" (1979, 136). Since "credit was alien to the local villagers," it did not work well as a method for obtaining moveable goods; "the 'sale' of a trade good 'on credit' was too readily confused with the indigenous idea of a 'gift' for the distinction to be immediately apparent" (Thomas 1979, 170). Henry Smith argued granting Indians credit was likely

to drive them from us, and the worst way to get a supply of Corne; as we have had late experience about the debt they owe Mr. Pinchon; for they kept away from us, and would

not come at us because they were held to their promise. Thus, therefore will they deal with Mason as they have with Mr Pinchon, and afterwards say (by way of excuse) that they were fools not knowing what they did. (Green 1888, 26)

From similar experience, William Pynchon, who established Springfield in 1636 by obtaining a quitclaim deed for considerable lands on the east and west banks of the Connecticut from eleven individuals for eighteen fathoms of wampum, and eighteen coats, hoes, hatchets and knives, contended that such contracts rarely worked, and vehemently opposed the use of credit to bring in maize or furs (Thomas 1979, 119, 170-71).

When it came to land, however, colonists did not need to wait for tribesmen to deliver goods to settle their debts. They could initiate action to claim lands, and did so. Subsequently, the practice of extending “credit” to natives, who had no conception of the practice, “caused an inordinate amount of controversy, particularly after Indian land became standard collateral” (Thomas 1979, 171). The impact of this shift, Thomas writes, “was immediate and widespread.” Mortgage foreclosure became regular during the 1660s, leading to the colonial laws of the 1670s instituting foreclosure. Indeed, noting that William’s son John did not hesitate to foreclose upon fellow colonists’ mortgages, as well as Indians’, after advancing goods to them on credit, Thomas argues that “the move” to use land as collateral for credit, widespread by 1660, “may be seen as a logical extension of a practice which had become a cornerstone of the colonial economic system” (1979, 324).

In Springfield, William used “[t]remendous amounts of wampum” to acquire a monopoly on the fur trade in the region: he extended credits to fellow townsmen for manufacturing wampum, or stringing together the beads, and sought to acquire the currency for local trade, but primarily to develop trade with the local natives.²⁶ After William returned to England in 1652, John continued to run the Pynchon store in the Connecticut River Valley for more than half a century, and accumulated one of the most extensive private landholdings in colonial Massachusetts. In a 1941 essay entitled “The Techniques of Seventeenth Century Indian Land Purchasers,” Harry Andrew Wright describes how “[b]y continuous steps,” John Pynchon “turned his merchandise and his wampum into cash or its equivalent,” accepting furs and land from Indians for wares, and accepting lands, produce or labor from the English (Wright 1941, 187-88). In twenty-two transactions between February 13, 1659 and September 14, 1660, Pynchon allowed the Norwottock Sachem Umpanchela to take a variety of goods on credit, including numerous coats, wampum, “shag” cotton, and the occasional pair of breeches. In July, to settle his outstanding debt of £75, Umpanchela executed a deed for land. Pynchon then assigned this land to the inhabitants of Hadley as West Hadley, now Hatfield. The books show no record of how the town of Hadley paid him, but Wright reports that “in other similar cases, he often accepted in full payment, a sizable tract in a wilderness that was about to become a settled community, as in this instance” (1941, 190). By the deed’s terms, Umpanchela reserved some fields and land for the tribe’s use, but later mortgaged them with additional cornfields at Nattacouse for three coats, two yards of shag cotton and two of Kersey cloth (Wright 1941, 191-92). Pynchon foreclosed on these lands for Hadley Towne in December 1660 (Thomas 1979, 326).

Wright’s account strongly indicates Umpanchela’s band fundamentally did not understand the Englishmen’s conception of land. Wright writes that the settlers at Hadley faced considerable difficulties in trying to remove “the squalid band [that] remained, a pest to be

²⁶ William also often collected bills from other colonists in wampum (Thomas 1979, 182; Wright 1941, 186).

endured,” on a parcel of land known at the time of Wright’s writing as “Indian Hollow” (1941, 191, 194). Although Wright replicates the colonial refusal to acknowledge the difference between settler and indigenous conceptions of land, as plain as his racism is the fact that the natives did not fully comprehend or accept the terms of trade, especially those indicating that they were to leave. The settlers at Hadley, whom Wright describes as “once-bit twice-shy,” found the “situation too burdensome to be continued,” and persuaded Umpanchela to sell the lands he had reserved, leaving him with only five acres of fenced-in land that he had already agreed would become town property when he died. “Thus,” Wright reports, “did Umpanchela dispose of his great heritage for little more than ‘a riband to stick in his coat’” (1941, 191-95).

Umpanchela’s story presents a classic case of predatory lending, involving the cultivation of debilitating debt in order to extract mortgage on land, followed by foreclosure. The term “predatory lending” still has no single official definition, but encompasses a range of techniques of lending for profit that begin with ensnaring vulnerable consumers with offers of credit (Davenport 2002, 554). Pynchon’s actions suggest that the contact economy furnished fertile ground for what is nevertheless widely understood as “[o]ne of the most egregious and destructive” of all forms of predatory lending (Foodman 2009, 256): “equity stripping,” or loaning money based on the equity in a borrower’s home with the knowledge that the borrower will not be able to repay it, in order to foreclose and “strip” the equity (Davenport 2002, 543).

Incommensurable indigenous and English notions of land were also at work when the English employed the technique of purchasing land from one member of a tribe who lacked authority to speak for the others, as they frequently did. These exchanges are frequently described as if the principal problem were that others were unaware of the exchange, and thus could not agree to it. However, unlike the sale of jointly owned property by only one party today, the native parties to these transactions did not only frequently lack the authority to speak for the collective. Neither those who struck the deal, nor those left out, believed that they had sold or alienated their land, because they did not believe that land could be so alienated. “Deeds” often recorded multiple sequences of transactions, recording instances when parties not present at the original agreement came to contest its validity, and Wright bemoans the costs of these tactics, since Pynchon and others were given wampum, cloth, and tools to quiet their claims (Thomas 1979, 142-43). On rare occasions, natives brought actions for this reason to the General Court in Boston, which produced settlements of wampum and occupation or use rights for claimants, but never restored ownership rights to the land (Thomas 1979, 327-29). In Hadley, we learn, “eventually the sorely-tried English” began to insist that all members of a tribe come at once to a sale (Wright 1941, 193-94).

Wright states frankly that Umpanchela’s story “is a typical exposition of Pynchon’s methods. Though varying in details, the fundamentals of his transactions were consistently similar” (1941, 195). By acquiring land for townships in this way, Pynchon held title to the townships until they reimbursed him for the purchase money, and also gave him land rights as a reward for initially financing the towns. In this manner, Pynchon initially purchased and helped to launch the towns of Northampton, Westfield, Deerfield, Hatfield, Suffield, Brookfield, Enfield and Northfields, in addition to Hadley (Martin 1991, 49-51). While Pynchon’s success was unusual, his techniques were not, and during this period, other traders and colonists regularly extended credit to indigenous communities (Martin 1991, 49-51; Thomas 1979, 325-27). Through such predatory lending, credit and its darker face, *debt*, became a mechanism of Anglo-American ascendance and indigenous decline as many traders acquired large tracts of Indian

land, from Massachusetts to Virginia and through the Connecticut River Valley, making foreclosure increasingly quotidian (Banner 2005, 55; Kawashima 1986, 62).

Mortgage foreclosure was used by individual traders, groups and governmental associations, as illustrated in the following story about the land-grabbing efforts of Humphrey Atherton, a captain in the Massachusetts militia. During the decades following Miantonomo's assassination, Connecticut, Massachusetts and Rhode Island disputed between themselves for Narragansett territory. In the midst of the subsequent uncertainty, Atherton "was determined to obtain Narragansett land by one means or another," and early sought to convince John Winthrop, Jr., who would eventually become Governor of Connecticut, to join him in the endeavor. Though Winthrop disavowed his involvement in Atherton's projects, his name was on the list of Atherton's partners who paid for and received a share of the lands (Dunn 1956, 70-71).

When the Narragansetts protested these activities, Connecticut called on the New England Confederation in the spring of 1660 to punish them for their "disturbances." That September, the Confederation Commissioners, including Winthrop, issued an ultimatum to the Narragansett sachems: if they did not pay 595 fathoms of wampum within four months to the governor of Connecticut "in expiation for their crimes," Connecticut would use force to exact the sum. However, "[i]n case the sachems could not produce such a large supply of wampum, they were graciously to be permitted to mortgage the whole of the Narragansett Country to the New England Confederation." Atherton intervened, and offered to pay the wampum to Governor Winthrop, *if the Confederation would transfer the mortgage to his company*. Atherton thus proposed a *secondary purchase* of a mortgage, or to trade in Indian debt itself, for value of potential foreclosure. "Winthrop balked," Dunn writes, "but Atherton swore there was 'nothing but plainness' in the scheme, and he persuaded Winthrop to accept his wampum" (1956, 69-72).

Atherton foreclosed on the entire Narragansett country within six months. While the dispute over title to these lands did not end there, the episode shows debt had become tangible leverage in transactions in the contact economy-- an asset that colonists could *create* by extending credit in the first place, that they could thus trade amongst themselves. In other words, they created a secondary market in the contact economy for *indigenous* debt to circulate between settlers, by granting credit not on the basis of the borrower's ability to pay, but for the collateral attached.

While predatory lending created mortgage obligations, the constant shadow of force, whether in the shape of formal, military threats or more diffuse forms of coercion, decided outcomes in the context of the contact economy. In colonial America, as now, the crucial elements of predatory lending include targeting, threatening, deceiving, manipulating and defrauding the most vulnerable borrowers, who have limited monetary resources and lack financial education, and are often elderly or non-white. After Metacom's war, for example, Umpanchela's band finally found itself surrounded by hostile colonists and "deserted the Valley," so that "all remaining Indian lands were taken over by the English" (Wright 1941, 195). As O'Brien demonstrates in her study of colonial Natick, even in the absence of formal mortgage agreements, debt often effectively prevented Indians from being able to refuse offers of sale, especially for land whose value had been diminished by white settlement and subsequent game shortages (1997, 132-43). Under such circumstances, without regulation or fear of retribution, predatory lenders targeted borrowers "whom they believe[d] [we]re most vulnerable and susceptible to the lenders' predatory tactics," whom they believed would default on their debts, and who possessed objects that lenders were glad to take in lieu of monetary payment (Davenport 2002, 533).

The Afterlife of Foreclosure

In colonial America, land became the equivalent of money through a series of events beginning with the colonists' adoption of indigenous money. It proceeded through the imposition of European conceptions of private property and law on indigenous land, and it relied on a combination of legal process, predatory tactics and the threat of force. Colonists' great success in this enterprise led to such growth that the colonies were a formidable military force by the time the Yamassees and several Muskogee groups in South Carolina chose all-out war in 1715, recognizing that they had little hope of ever repaying the tribal debts of 100,000 deerskins that they had accumulated (Haan 1981). In the early 1760s, prophets in western Pennsylvania and Ohio Valley counseled the Delawares to "learn to live without any trade or connections with the white people, clothing and supporting themselves as their forefathers did" (Axtell 1992, 150).

By this time, colonists had begun to propagate the myth of a pre-contact barter society that they had been forced to participate in. They also endeavored to discredit wampum as currency almost as soon as it had outlived its usefulness to them. By 1649, Weeden wrote, "the aboriginal man is no longer financially equal to the European intruder," and indigenous "money dropt from the tax gatherer's list" (Weeden 1884, 26). The Bay Colony annulled wampum as legal tender in 1661 (Weeden 1884, 19). Connecticut soon followed, and in 1662, the Providence Court announced that wampum "is but a commodity," opining, "it is unreasonable that it should be forced upon any man" (Weeden 1884, 20; Cronon 1983, 103). Wampum did not pass out of circulation in New England, however; it was recognized in the rates of the Brooklyn ferry in 1693, and several towns of New York State continued to fabricate it until the mid-eighteenth century (Weeden 1884, 30). But calling it *money* entailed a recognition of indigenous sovereignty that the colonists were now anxious to negate.

Colonists adjusted the status of wampum to accord with a narrative in which money was an emblem of civilization, whereas indigenous peoples were mired in a primitive world of barter and commodity trade. The legal demotion of wampum's monetary status marked a milestone of conquest, but also scripted it: it created prospective arrangements for trade with indigenous communities while retroactively denying the power of wampum— and tribes— along with colonists' dependence on both during the early years of the contact economy. Colonists demoted wampum to a mere commodity to index what they perceived as the imminent extinction and passage into prehistory of indigenous peoples. Two centuries after its demise, Weeden struggled with indigenous currency's undeniable significance in colonial history, and wrote that "[t]he little shell bead... is the symbol of the rise and fall of aboriginal-colonial life"; "[w]hen communities meet, systems clash... The barbarian reels under the shock and his system crumbles into dust, which feeds the growth of a new and stronger race" (Weeden 1884, 51).

This demotion has persisted, to narratively foreclose analysis of indigenous currency and to support the notion of a regression to barter in histories of the early American political economy. Wampum's changing monetary status thus indexes the post-hoc nature of this justificatory work *and* narrative's role in conquest. Scholarship that does not recognize the role of indigenous participants, polities, or currency in the early American economy, in American economic development and in the rise of a colonial American polity participates in that tradition. This strategically one-sided style of narrative and action fostered the colonial states that produced them, and flourished in the world the colonists built.

Through the thick of this narrative production, it is difficult to comprehend the role of cultural difference in the early monetary and market institutions that arose in what was above all

a *contact* society, or to discern the mark of the colonists' appropriation of indigenous land through mortgage foreclosure on the present. With this history of money and mortgages, I have attempted to show how indigenous perspectives concerning the meaning and functions of money, trade, and the human relationship to land, contributed to the dynamics of the contact economy, and of colonists' "techniques of land purchasing." In the contact economy, indigenous money furnished a way of representing and moving resources within a culturally and politically divided collective, and this method created and changed the economic relationships within it. The rules governing monetary transactions shaped the transformations that European arrival set in motion in the developing contact economy. By reinventing the mortgage with the aim of dispossession, colonists in America simultaneously expanded colonial resources and landholdings *and* imperial territorial sovereignty. Indigenous-settler exchanges broke down distinctions between "private" commercial trade and sovereign political struggle as they grew the British economy and Empire at once.

Colonists employed practices still prevalent today—predatory lending and mortgage foreclosure-- to ride the tide of epidemics. They complemented them with acts of war, and used them, like war, to the end of removing and eliminating indigenous peoples. Given the direct descent of the U.S. economy from the colonial institutions described above, it seems unremarkable that characteristics of the past live on in the present, and it is worth considering the extent to which we live in a contact economy still today. The process of conquest began in the context of contact between sovereign nations and ultimately domesticated indigenous sovereignties in the late nineteenth century. This thus tale points both outward, toward the sphere of transnational relations in which it originated, and inward, to the logic of the domestic economy it established.

The dynamics of the contact economy remain perceptible in ongoing processes of American expansion, suggesting that difference and dependence remain key structural components of the global economy. Outside investors penetrate local markets by adopting local currencies and developing trade in local products. These practices transform balances of power in markets by initiating and deepening local dependencies upon foreign providers, services and goods, and appending local markets to the global capital market. They might also reshape local monetary systems and practices by introducing logics of accumulation into their value structures, bringing them into greater conformity with the global monetary economy. The shadow of military force and the breakdown of local authorities still amplify the effectiveness of these practices.

In the U.S., it is hardly possible to conceive of a more universally unquestioned ideal than property ownership, or land as chattel. But every current entitlement in U.S. land can still be traced to a transaction of the colonial contact economy. The economy that has grown from it still also consists of trade between groups with wholly different conceptions of money, land, value and exchange itself. Consider, for example, the various uses of a dollar. One sector of society views it principally through the lens of investment logic, or money's capacity to grow over time. This demographic invests in stocks and bonds, and participates in the world of speculative finance. Another sector still primarily conceives of dollars as objects to exchange for basic needs or desired goods. This segment of the population lacks access to speculation because of a dearth of knowledge or capital, or other formal and informal barriers. It is common to refer to people in this sector as "unsophisticated" consumers. Before the recent foreclosure crisis, many consumers imagined they were using credit like money to buy the significant commodity of a family

home.²⁷ At the time, consumers with poor credit commanded high interest rates, making their debts—the commodity from the perspective of the financial sector—highly valuable. In hindsight, investors have blamed those consumers for the fact that their poor investments made their debts a poor investment in turn. These sectors sought distinct market commodities: a house on which would-be owners pinned dreams, and home loans that investors pooled and sold in the mortgage-backed securities market. Investors and non-investors still depend on each other: debt commodities would not exist without consumers seeking credit, nor credit without a market in loans.

The recent foreclosure crisis seared the connection between dispossession and foreclosure into the consciousness of the world, and onto the trace of an old memory. Foreclosure's emergence as a practice in colonial America exposes the myth of discovery as the ground spring of the prevailing belief in America's miraculous growth from European investments and credit. The losses wrought by dispossession also crack the national myth of magically productive credit with the power to redeem all losses incurred through debt creation. The concept of a contact economy also resurrects the idea of multiple ways of using money, rather than erecting a linear measure of advancement. It shows that the logic of multiplying money through investment is not money's only or true function. The mixed uses of money still include the purchase of things out of necessity and for pleasure, to express status, and to develop and symbolize relationships through material exchange.

Along with this history, the reverberating effects of the crisis thus finally suggest that finance practices—lending, borrowing, taking out mortgages, debt-collection, eviction, and foreclosure—build relationships too, and of a specific quality which now permeates U.S. society. Money still materializes and sustains relationships between people, relationships that can displace and degrade, but that can also express belief, preserve meaning, and even heal. Further, the crisis also illuminates, as Glen Coulthard recently emphasized, that *land*, like money, is a relationship—a “way of knowing, of experiencing and relating to the world and with others” (2014, 61). What kind of relationships, then, does land *as* money create? I argued above that the events that transpired when colonists foreclosed on the lands of different tribes created relationships of a particular kind. Now, cost-saving measures for companies, such as releasing factory toxins into waters and lands, destroying wildlife and sickening human inhabitants, also produce specific relationships. Today, landlords, investors, actors for mortgage servicers, banks, and debt collection agencies accept the routine expulsion of people and families from their homes as the unremarkable default consequence of an unbalanced monetary equation from which they derive incremental gains. Yet investing in a bundle of subprime loans for pennies on the dollar, each of which was taken out for a home, whose location you do not know, by people you have never met and who supposedly let *you* down as the owner of their loan when they default—this action creates a type of relationship too. Although relevant institutions have developed to resist the impact of any individual's capacity to transform them, it is critical, if sometimes maddening, and sometimes hopeful, to remember that institutions can only function through the decisions of myriad actors who still create the world.

²⁷ Credit now blurs the distinction between investment and consumption; it has practically replaced money for consumers, whose troubles often begin with mistaking credit for money.

Chapter 2

The Social Contract and Settler Compacts: Making American Property

The divided sociality of the contact economy began with a basic distinction between insiders and outsiders, instituted through an early settler form of political and economic organization—the social contract. This chapter will describe how the historical form of the social contract cultivated the differences central to the contact economy.¹ To that end, I examine John Locke’s *Second Treatise*, a text that enshrined the concept as a touchstone for practice in colonial America, in the light of the very context out of which it emerged. By drawing on historical evidence about how colonists established political societies in early America, I argue that compacts between settlers in early New England directly inform Locke’s *Ur*-narrative about the origins of “civil society.” Locke’s text captures the foundational arrangements of English settlements in America, which ordered both relationships between settlers and the collective relationship of colonists to the indigenous polities where their communities settled. The parallels between historical material and the *Second Treatise* indeed illuminate the way social contracts in colonial America functioned institutionally to build economic advantage, mobilizing collective action and relying on organized violence to foster productivity.

Nevertheless, the *social contract*, this famous phrase from classic political philosophy, is today invoked as the most prominent origin story for republican government. It stands for the notion of a miraculously peaceful order achieved through the people’s consent, and rests on the presumption that the state exists to serve the will of the people. Indeed, the social contract has become a fully popular liberal ideal. Contemporary social criticism and popular media frequently interpret violence and the most egregious examples of pervasive inequality as signs of a “dissolving,” “shredded” or “broken” social contract—evidence of its “abandonment” or “erosion.” Alternately, hope finds expression through the call to renew or restore the social contract. These uses suggest a notion of the social contract that is at odds with a world riven by violence and social difference. They locate this unquestioned good in a fictive past or in an aspirational future, but not here in our time.

The material past of the social contract, however, suggests that the social contract shapes the present as a form of governmental organization arising from an American heritage with an unbroken line of transmission to the present. Historically, there has been nothing elusive about this form of organization or its guiding principle. However, the social contract as a theoretical concept has come to mask the historical form’s practical relations with a world it constituted as external to English settler communities, and upon which its expansion depended. I therefore seek to recontextualize the ideal concept in its historical form. In doing so, I seek to bridge a gap not between the ideal and the real—for the ideal has cultivated its own reality-- but between the past and the present, between the history of colonization in America and a contemporary world that is

¹ The social contract remains a beloved trope across the political spectrum today. Elizabeth Warren gave the term a burst of prominence during a Senate campaign speech in August 2011 in Andover, Massachusetts, when she argued, “There is nobody in this country who got rich on his own... you built a factory and it turned into something terrific or a great idea—God bless, keep a big hunk of it. But part of the underlying social contract is you take a hunk of that and pay forward for the next kid who comes along” (Madison 2011). Conservatives have taken it up in direct response to Warren and independently (Will 2011; Dunkin 2015).

permeated by concepts, like the social contract, purged of traces of the contexts in which they arose.

This chapter's reading of the colonial *settler* contract in context grows out of a body of work that first erupted in the 1990s, beginning with James Tully's remarkable 1993 essay on Locke. Tully's essay examines how Locke's concepts of political society and property, which continue to shape dominant Western understandings of political legitimacy and property, obscured and downgraded the Amerindian conceptions of polity and property encountered by colonists. The "colonial turn" in Locke studies that Tully initiated has subsequently exposed the field's deep and enduring resistance to thinking about colonial invasion and the dispossession of indigenous peoples. It has also exposed how grounded Locke's theoretical contributions were in his material interests in the British colonies in North America. Still, the connection between Locke's theory and the American colonies has generally followed two courses: first, analyzing Locke's colonial activities and writings before and during the 1680s, when he produced the *Two Treatises* (Arneil 1996; Armitage 2004); and second, tracing the dissemination of Locke's ideas about property and the labor theory of value in colonists' justification of indigenous land seizure in the early eighteenth century (Tully 1993, 166-76).

By contrast, this chapter examines events that transpired before Locke's time (of which he was almost certainly aware) to argue that his social contract narrative may describe how colonial settler communities constituted themselves in relation to indigenous communities through the social contract. The chapter proceeds in two parts. In the first, I revisit Locke's text in light of historical social compacts in New England, to explore how these political and social forms structured the contracts settlers made with indigenous people and amongst themselves in the contact economy. I suggest that Locke described the "state of nature" as a *relation*, and moreover, a colonial relation between civil society and tribes. The state of nature-- this colonial relation-- was not a lawless space, as it has been commonly understood, but was governed by a set of norms that colonists deployed to complement those of "civil society:" the "laws of nature." The particular content of these norms governing transactions with outsiders to the social compact licensed a greater degree of violence than they did for transactions between those bound together by this social compact. Through the social compact, colonists amassed and organized their forces to increase their bargaining power in the contact economy, and this enabled them to engage in collective coercion to obtain trade advantages and facilitate expansion.

In the second part of the chapter, I explore the patterns of colonial expansion that followed from the initial creation of compacts between individuals. These patterns show the formation of inter-group social compacts, or federations, which eventually led to the union of states. Therefore, I suggest, the social compact originated and founded new civil societies, not only as a series of historical events, but also as a structural principle of development. The emergence of the United States, however, wrought changes in the orders of contracts and compacts, both of which continued to proliferate in the nineteenth century. The federal government took exclusive control of formalizing the process of dispossession, ensuring that the laws of civil society uniformly governed the order of contracts. On the ground, settlers continued to perform the labor of conquest by forming social compacts across the frontier, despite facing a new uncertainty over their ability to claim for themselves the property they thereby helped to bring into being.

Because of the easy conflation between the terms "contract" and "compact," both of which denote kinds of agreements or promises, it is worth clarifying my use of this language at this early point. The word "compact" has the root meaning of "knitting together" or "bringing the component parts closely and firmly into a whole" (Lutz 1988, xxvi). Below, following Locke's

own usage in the *Second Treatise*, I use the word to refer to *collective* agreements that founded laws to affect the entire community or relations between communities. I distinguish between these and individual *contracts*, which I use to denote restricted agreements involving specific commitments between individuals and small groups of people that are enforceable by law, but without the status of law (Lutz 1988, xxvi).² However, since Locke has become known as a “contract theorist” and the term “social contract” has become a term of art, I also use the qualified *social contract* and *compacts* interchangeably.

PART I

“Where are, or ever were, there any *Men in such a State of Nature?*”
-- John Locke, *Second Treatise*

The Original Settler Compacts of New England

During the earliest years of the British colonization of America, historian Donald Lutz tells us, men of “the middling sort” across New England created and signed formal agreements intended to function as the basis for a common, legitimate government (Lutz 1988, 31). In these agreements, the men consented that the decisions of the collective formed by the agreement to bind them as if by law, or consented to surrender some of their liberties for the protection and the benefit of the community as a whole. The oldest such surviving compact based on popular consent is known as the Mayflower Compact.³ On November 11, 1620, its signers “solemnly and mutually, in the presence of God and one another, [did] Covenant and Combine our selves together into a Civil Body Politick, for our better ordering and preservation, and furtherance of the ends aforesaid” (Lutz 1988, 31).⁴ Nine years later, in Salem, settlers similarly covenanted “with the Lord and one with an other” to “band our selves in the presence of God;” other settlers made covenants using parallel articulations in short succession in Watertown, Cambridge, Dorchester, Dedham, Exeter, Pocasset and Quinipiack (Lutz 1988, 35, 38, 45, 46, 68). The settlers in Providence and the Inhabitants upon the Piscataqua River premised their Agreements in 1637 and 1641, respectively, on the emergent notion of popular sovereignty, which was not yet a legal or formal constitutional principle. Although the signers at the Piscataqua had not consulted with those of the Mayflower Compact, their Combination for Government nonetheless closely echoed the language of that earlier compact: it explicitly created an order between them based on their own volition or consent, in the absence of any other authority, which submitted them to laws collectively agreed upon, to “the more comfortably enjoy” their benefits:

² It should be noted that this distinction is useful but not perfect, as it imports a contemporary understanding of “contracts” into the past: in one instance, Locke speaks of the variety of compacts and promises men can form with one another, seemingly including “contracts” I have identified them here (see note 22).

³ The “Mayflower Compact” was known as the Plymouth Combination by those who formed it, and did not acquire the name by which it is known now until 1793, when a historian in New York reprinted the agreement for the first time outside of Massachusetts (Lutz 1988, 31). Compacts differed from “covenants,” in that the latter, which had secular and religious variants, required sanction by the highest relevant authority, whether the Crown or God (Lutz 1988, xxxvii).

⁴ This language, which would appear again and again in New England, contrasts strongly with the terms of the founding document of the Colony of Virginia, which established a government by martial law.

Whereas sundry Mischiefs and Inconveniencies have befallen us, and more and greater may, in regard of want of Civill Government, his gracious Majesty having settled no order for us, to our knowledge, we whose names are underwritten, being Inhabitants upon the River of Pascataqua have voluntarily agreed to combine ourselves into a body Politick. (Lutz 1988, 88)⁵

As in early New England, so too in Locke's narrative of the so-called "social contract," a compact created a new community through the consent of the individuals taking part and in the absence of any other order or authority. In the compact of the *Second Treatise*, "every Man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to every one of that Society, to submit to the determination of the majority, and to be concluded by it" (1689, 332). To become a "Body Politick" here meant to submit to the common law, which the collective would decide and enforce: "when any number of Men have, by the consent of every individual, made a *Community*, they have thereby made that *Community* one Body, with a Power to Act as one Body, which is only by the will and determination of the *majority*" (Locke 1689, 331).

Locke repeatedly described early colonists' collective agreements in New England with near exactness in the *Second Treatise*, explaining, "[w]hen any number of Men have so *consented to make one Community* or Government, they are thereby presently incorporated, and make *one Body Politick*, wherein the *Majority* have a Right to act and conclude the rest" (1689, 330-31). Given the profound resonances between his description of the foundational event of Civil Society and historical events, one must give serious consideration to the view that Locke's narrative was not a work of imagination, and that he referred to real historical events of which he had direct knowledge. However, in a testament to the power and influence that the *Second Treatise* has assumed, far beyond the little-known history of colonial compacts, in Lutz's compilation of the colonial foundation documents, he anachronistically notes that these agreements have a "Lockean" format. Even though these agreements preceded the writing of the *Second Treatise*, and in some cases, Locke's own birth, by several years, he comments that "[i]t is easy to discern the dead hand of John Locke" in them (Lutz 1988, xxvi).⁶ Given the direction of history's unfolding, and Locke's extensive knowledge of engagement with English colonization in America, it seems only reasonable to entertain the more likely possibility—that it is the imprint of these living early American agreements that we discern in Locke's famous narrative about the political compact.

By simply recognizing settler compacts as the reference point for this now-prototypical conceptual origin of political or *civil society*, we will find that a number of surprising consequences follow. But first, it is important to survey the scholarly context in which I present this idea, which helps to materially ground the growing, but still extremely *new* literature that reads the *Second Treatise* in light of Locke's engagement with colonial America. As Tully, Barbara Arneil, and other scholars who launched this stream of scholarship have noted, while Locke's role in the development of American political thought has been studied intensely for

⁵ In noting that to their *knowledge*, "his gracious Majesty... settled no order for us," these settlers speak to the potential friction they perceive between their establishment of an independent order of government and the fealty they owe the Imperial Crown (see also note 10 below).

⁶ He does earlier note that although people "writing on political obligation have been quite taken with John Locke; however, in this collection we have people solving the problem of political obligation in a modern context even before Locke was born" (Lutz 1988, xviii).

centuries, “the role of America and its aboriginal population in Locke’s political theory... has been largely overlooked” (Arneil 1996, 2). Most Locke scholarship has conspicuously avoided considering the relationship between his writings and colonization, despite Locke’s heavy investment in colonial plantation trade and slave-trading companies, and his close oversight of the design and management of colonial institutions as first Landgrave of the government of Carolina, secretary to the Lords Proprietors of Carolina. Locke was also a correspondent for migrants to America for the Council on Trade, an investor in the slave-trading Royal Africa Company and the Company of Merchant Adventurers’ trade with the Bahamas, and a Commissioner for the Board of Trade and Plantations (Tully 1993; Pateman 2007, 47-48).⁷

Through the second half of the twentieth century, even when critics explicitly sought to contextualize the narrative in history, they avoided mention of colonial politics. The most prominent commentators of the *Two Treatises* have limited their analyses of the work’s relation to seventeenth century political events to contemporaneous domestic or *English* policies (Laslett 1988; Pocock 1975; Ashcraft 1986). Thus, in 1996, Barbara Arneil observed that while much scholarship “has demonstrated the influence of English politics on Locke’s philosophical writings, the impact of colonial policy, particularly in relationship to the Amerindian, has been until recently left virtually untouched” (1996, 6). More often, interpreters of Locke’s social contract have argued over *how* the social contract entails a “fictitious, symbolic idea embodying the notion of the legitimacy of social arrangements based on the norm of consent” (Fineman 2001, 1419).⁸ Some have argued that the social contract provides a way of understanding how a collective negotiates its own *conventional* norms, while others understand it as representation through which to imagine how objective norms find form (Darwall 2003). The notion that the social contract narrative is a heuristic device, rather than a historical description, still remains the most popular and prevalent conceptualization of the phrase in scholarship, and has given rise to a contemporary social contract theory that invariably proceeds from an “abstract starting point... that had nothing to do with the way these societies were founded” (Tully 2000, 44).

In proposing that the American colonies were the material referent for Locke’s project, this chapter participates in colonial Locke studies and also in a subversive social contract literature arguing that the social contract has facilitated historical relations of subordination and domination on the basis of sexual and racial difference. This literature has also more recently connected the social contract paradigm to European settler colonization. Carole Pateman identified Rawls’ *A Theory of Justice* as perhaps the most notable example of social contract theory “peopled by parties abstracted from social political institutions and structures” (2007, 77). In 1988, Pateman’s *The Sexual Contract* led the radical interrogation of how the “presumptively neutral and ideal” of the social contract that renders political consent a logical abstraction legitimized the subordination of women; in 1995, Charles Mills’ *The Racial Contract* followed

⁷ Locke’s writings on colonial affairs include the Fundamental Constitutions of Carolina, Carolina’s agrarian laws, a reform proposal for Virginia, memoranda and policy recommendations for colonial boards of trade across the colonies, histories of European exploration and settlement, and manuscripts on government and property in America (Tully 1993, 140-41).

⁸ Martha Fineman’s writing furnishes an example that seeks to use this abstract conception of the social contract for progressive ends. She infers the idea of a contemporary, unwritten social contract from this symbol, which she describes as an “interwoven, collective set of responsibilities and entitlements” that “guides and gauges the relationship among individuals, societal institutions and the state” (2001, 1405). Yet she also observes that “all agreements are made in a historic context where certain preexisting structures and institutional arrangements are assumed” without exploring this historical dimension (2001, 1425).

with analysis of the contract's justification of white supremacy⁹; and most recently, Robert Nichols has argued that decontextualized contemporary social contract theory (like Locke scholarship that omits colonialism from its analytic) continues to support colonization by "erasing the actual historical event of conquest from the normative theory of sovereignty" and "easing the burden of the story's historical inheritance" (2013, 179, 169). Focusing also on the work of justification that the narrative performs, Nichols urges us to consider how "historical experiences of the settler-colonial societies of Anglo-America" are "at least partially *constitutive*" of the discipline of political theory, and to analyze "why this central constituting role has remained relatively underexamined or effaced" (2014, 100).

Accordingly, this chapter offers a contextualized reading to examine how the general resistance to exploring the American colonies as the site of the social contract has fostered significant convolutions in reading and understanding Locke's classic text. The historical context of settler compacts sends us back to some of the oldest scholarly debates concerning his social contract—namely, discussions over the plausibility of the social contract narrative as an "origins" story, and in the next section, the significance of the state of nature. To begin with questions of beginnings, then, the example of the early New England social compacts squarely answers one of the most long-standing principal objections to the social contract narrative: the claim that it cannot be taken as a literal description of the beginning of a political society. This objection was so vociferous even in Locke's own time that he himself recognized it in the *Second Treatise*, and summed it up as the charge "[t]hat there are no Instances to be found in Story of a Company of Men independent and equal one amongst another, that met together, and in this way began and set up a Government" (1689, 333). As early as 1777, David Hume protested the idea of an *original* "agreement, by which savage men first associated and conjoined their force," writing that the compact was both implausible as an idea and never happened in fact. Ironically, he rejects precisely the evolutionary implication of the narrative, writing that such a compact was too "far beyond the comprehension of savages" to have occurred by a sudden evolution or transcendence (1777, 468); "would these reasoners look abroad into the world," he continued, "they would meet with nothing that, in the least, corresponds to their ideas," but rather— interestingly— only the establishment of sovereignty "from *conquest* or succession" (1777, 469-70; emphasis mine). On the basis of this rejection, many scholars since Hume have concluded that the social contract is "essentially nothing more than a logical abstraction used by Locke as a mirror to reflect the origins of civil man and his society." (Arneil 1996, 2; see also Dunn 1969, 97, 101, 113).

The view Hume represented, and his insistence that "[n]o compact or agreement, it is evident, was expressly formed for general submission," has had a lasting influence (1777, 468). Throughout the long period during which commentators rejected the colonies as relevant to Locke scholarship, many protested that the story of the social contract was "fact defective" as a historical description of the evolution of political society, and an inaccurate account of what holds contemporary societies together (Waldron 1989, 3; Nozick 1974, 7-9). Centuries later, Rawls, on logical grounds, would echo Hume's skepticism *and* his complaint about the so-called generational problem, arguing that even if there *had* been a sudden revelation to create a government by consent, the government would cease to be voluntary and consent-based within a generation ("no society can... be a scheme of cooperation which men enter voluntarily in a literal sense; each finds himself placed at birth in some particular position in some particular

⁹ As Nichols notes, Mills' analysis remains fixed on the social contract as an ideal, and on the gap between "the ideal of the social contract" and the reality of the Racial Contract (Nichols 2014, 99).

society”; 1971, 13). Even critics who emphasize Locke’s colonial investments might object to interpreting the social contract as an origin story about civilization; like Hume, they might find the narrative about people in a pristine wilderness deciding, suddenly and self-consciously, to change their own social organization, to be an implausible account that offensively implies an *evolutionary* transition.

The early social compacts of New England suggest that Locke’s narrative *is*, after all, a description of historical events of his time, as well as of the origin of a political society. However, they also show the moment of “evolution” to be a typical colonial mapping of difference onto a trajectory of development. If the original political compact is an agreement between English colonists in Americas, then those men who leave the state of nature to form a “Body Politick” in the *Second Treatise* seem quite clearly to be immigrants. The formation of the social contract, then, does not mark the transition of an unorganized people into a civil society, as the standard interpretation would suggest, but a people’s arrival in a strange land. It is not a moment of a revelation, but one of immigration. The impetus to quit a “Condition, which however free, is full of fears and continual dangers” then describes the motivation to escape the perils of contact *without* the force of the collective “Body Politick.” In the context of arrival, the event in which a group of individuals perceive more peril in the environment and its inhabitants than each other is appears to be their recognition of their vulnerability, and their resulting attempt to reconstitute a familiar state in an unfamiliar environment.

Seeing the main event of this narrative as a moment of *arrival* and of contact changes our understanding of the legitimacy of the society founded by social compact. Traditional interpretations that assume a non-colonial context assess legitimacy abstractly, and by reference to the same collective people’s government, whether one generation prior or following. But if the compacting men are immigrants, and the society they formed are a colonial immigrants’ society, then the very orientation of questions about its legitimacy shifts from a temporal to a spatial plane—to colonists’ very presence in the new land, and their actions, individual and organized, as they interacted with the inhabitants of that land.¹⁰ The measure of this society’s legitimacy must then be taken not only with regard to the form of its organization, as it shaped colonists’ mutual relationships within the social contract, but also in terms of its deployment of collective power when engaging with external groups, and the nature of the relationships that ensued.

The State of Nature as a State of Relation

Colonial Locke studies have generally followed traditional Locke scholars in presupposing that the “state of nature” in Locke represents a pre-civilizational space. Observing the coincidence of colonial claims about indigenous *absence* with the conceptualization of

¹⁰ The issue of tension between American and English orders of authority also rears its head throughout (see notes 5, 28; Part II, 53). The questions that arise from reading Locke in colonial context relate to the other debates in Locke scholarship about politics in England at the time. For example, Locke’s many references to America suggest that the social compacts of the early settlers were his referents, but why did he not make this explicit? The answer could lie in Locke’s concern about overemphasizing new forms of independent government arising in America, given the fidelity the settlers owed the English Crown. Given this tension and conflict, it is also unsurprising that like settlers themselves, Locke underscores the *necessity* of the association by dwelling on the peril, fear and insecurity that the members of these “original contracts” faced. In Locke’s own response to a second major Objection to his narrative, he seems to wish to calm any suspicions of subversion: “’Tis impossible of right that Men should do so, because all Men being born under Government, they are to submit to that, and are not at liberty to begin a new one” (1689, 333-34).

indigenous peoples as representatives of a lesser stage of human development, scholars who emphasize Locke's colonial investments have charged him with depicting the state of nature as a space and time of savagery, as pre-contact America. However, this presumption reflects a preoccupation with colonial ideological formations, rather than colonial practices-- two separate but interrelated arms of the colonial project. Under the dominant interpretation, Locke *fails* to recognize the political organization of indigenous people in the Americas, in keeping with the *terra nullius* doctrine used in Africa and Oceania, where it negated indigenous presence altogether (Arneil 1996; Pateman 2007). But while critical responses to colonial projects have focused on ideological *erasures*, colonial harm inheres not only in *failing* to recognize indigenous peoples, as Glen Coulthard has cautioned us, but also in interactions with them and in the necessary recognition and political and legal interpellation of indigenous peoples as colonial subjects by colonists and colonial governments (Coulthard 2014, 45-46). As Chapter 1 showed, while literary and ideological erasures served to justify indigenous dispossession to remote white audiences, on the ground, colonists were preoccupied with *engaging* tribes and effectively deploying strategies of dispossession. Nichols has usefully distinguished these two aspects of colonial relations as *colonization*-- a set of practices-- and *colonialism*, or the body of theoretical reflection on those practices (2015). While the premise of indigenous absence subtends settler *colonialism*, colonization practices on the ground began with strategies for dealing with, subordinating, removing, and thus *necessarily* recognizing indigenous nations. Legal records, which lie at the nexus of theory and practice, unsurprisingly contain elements of both.

Here, I propose that a close reading of the *Second Treatise* suggests that Locke used the figure of the "state of nature" to inscribe a primary dynamic of the project of conquest: the institution of difference, or a distinction between the inside and outside of the community created by the settler compact. The state of nature appears, indeed, to depict transnational relations, i.e. the dynamics of a contact economy in a state of differentiated *economic* relationships, rather than a pre-contact, pre-civilizational wilderness or state of being. As I then show in the following section, Locke's text elaborates on the twinned phenomena of colonial growth and indigenous dispossession, explaining the proceedings used to create this distinction between internal and external, on which the power of colonial contracts turned.

To be clear, Locke's "state of nature" did ride upon an atmosphere of colonial evolutionary ideological predilections, and he did nothing disturb this semantic context. The plain language of Locke's narrative, too, implies that the moment of the social compact marks a transition: Locke elaborated to state that "this original Compact, whereby he with others incorporates into *one Society*, would signifie nothing, and be no Compact, if he be left free, and under no other ties, than he was in before in the State of Nature" (1689, 332). Without the individuals' submission to the law of the collective, men remain in a "State of Nature," where they were *before*; men *leave* the State of Nature to form a "Body Politick." During Locke's time, European arguments for non-Europeans' potential for conversion, or eventual transcendence of savagery, drew upon a notion of difference that would eventually blossom into the fully-formed theories of evolution and progressive development of the nineteenth century, which Darwin would propagate in the natural sciences, as Hegel would in history, and Lewis Henry Morgan in anthropology.¹¹ In the

¹¹ Bernard Cohn observes that nineteenth-century social evolutionism and modernization theory in the twentieth-century map the power differential of domination, and thus racial, cultural, social difference, across "one analytical system or scheme which is temporal" (1980, 212). Notably, Uday Singh Mehta has also elaborated on the discounting of difference and contemporaneity through such universalizing theories of historical progress, and has

intellectual context of a nascent social evolutionism, his repeated description of this moment as an *exit* from “the state of nature” does suggest that the state of nature is prior to the state of political organization by compact, and that civil society represents enlightenment.¹²

Barbara Arneil thus reasonably argues that Locke adopted the hierarchy embedded in the idea of development by privileging the story of “Europeans, that is men in civil society,” over the story of “natural man” (1996, 3). As Arneil shows, throughout the *Second Treatise*, Locke draws from the authority of thickly social evolutionary texts, including Sir Walter Raleigh’s *History of the World*, Samuel Purchas’ *Pilgrims*, or Richard Hakluyt’s *Principle Navigations* (1996, Chapter 1). Furthermore, Tully has analyzed how Locke characterizes indigenous American forms of government as less developed than modern European political formations. As in his Ur-story about transcendence from barter to the use of money, Locke’s narrative about the birth of republican political society rearranges racial, cultural, and social difference onto a normative, developmental timeline.¹³

However, the text does not precisely support Arneil’s argument that Locke conceived of indigenous people in America as “living examples of natural men” (1996, 201). Nowhere in the *Second Treatise* does Locke actually identify the peoples of America as “natural man,” nor does he identify any being called “natural man” (1689). Critically, Locke describes different indigenous peoples in America at various moments in the text, as “several Nations of the *Americans*,” unlike Hobbes, at no point does he deny that they are politically organized collectives, although his evaluation of their sovereignty does diminish (1689, 296).¹⁴

Rather than deploy the state of nature simply to simply oppose “nature” to “civilization,” Locke repeatedly states that the state of nature persists alongside Civil Society, and indeed suggests that the state of nature will intensify *because of* civil society. He articulates clearly that the “state of nature” is a relationship between individuals not bound to one another through membership in the same polity: “where-ever any two Men are, who have no standing Rule, and common Judge to Appeal to on Earth for the determination of Controversies of Right betwixt them, there they are still *in the state of Nature*, and under all the inconveniences of it” (1689, 326). The social compact removes a very *specific* group of men from the state of nature, and *only in relation to one another*—so that “where-ever there are any number of Men, however associated, that have no such decisive power to appeal to, there they are still *in the state of Nature*” (1689, 325)—*by reference to the polity formed by the social contract*. Most importantly, the state of nature emerges from the *difference* between the inside and the outside of a community, “Whereby it is easie to discern who are, and who are not, in *Political Society* together.”

As John Simmons has argued, Locke configures “the state of nature” as a mode of relation obtaining between different collectives rather than as an absolute state of being or place. Further, as I try to show here, Locke’s “state of nature,” which runs in the current of colonialism, describes a *colonial* relationship that underpins the colonizing *practices* that settlers deployed in

argued that this constituted a “liberal strategy of exclusion” through the nineteenth century (1990, 1999), or in Cohn’s words, “an explanation of and program for European domination of the world” (1980, 212).

¹² In an account of pre-nineteenth-century social evolutionary thinking, Anthony Pagden has closely examined the intellectual trajectory through which pre-Enlightenment theologians (including Acosta, whom Locke cites in the *Second Treatise*) confronted American Indians and rendered “differences in place” “identical to differences in time” (1982, 2).

¹³ See Chapter 1’s discussion of money and the myth of barter.

¹⁴ Finally, for Locke, “the *Kings of the Indians in America*... are little more than *Generals of their Armies*” (1689, 339). Hobbes claimed that the peoples of America “have no government at all” (1688, 77).

New England. Indeed, Locke explicitly uses the term “state of nature” to describe a *transnational* relation, or the way a collective formed by social compact politically and legally approached individuals and groups external to itself as a political organization.¹⁵ He brandishes transnational relations as proof of the concept’s living reality to his critics, and foresees that they will perennially ask “*Where are, or ever were, there any Men in such a State of Nature?*”: “it may suffice as an answer at present; That since all *Princes* and Rulers of *Independent Governments* all through the World, are in a State of Nature, ’tis plain the World never was, nor ever will be, without Numbers of Men in that State” (1689, 276). Indeed, he repeatedly identifies international relations as a collective variety of the “state of nature,” writing that “wherever any persons are, who have not such an Authority to Appeal to, for the decision of any difference between them, there those persons are still in the state of Nature. And so is every Absolute Prince in respect of those who are under his Dominion” (1689, 326). Within this order, the state of nature coexists contemporaneously with civil societies; a member of one polity—whom Locke acknowledges may be a member of an indigenous polity—has no obligations to a member of another, even sovereigns. For they are in a state of nature, and thus, “[t]hose who have the Supreme Power of making Laws in *England, France or Holland*, are to an *Indian*, but like the rest of the World, Men without Authority” (1689, 273).

The establishment of “civil society,” therefore situates a collective in a state of nature *vis-à-vis* another collective, not by existing in or representing “nature,”¹⁶ but by virtue of the relevance of the “laws of nature” to that relationship. Locke suggests that the absence of an authority to arbitrate disputes between them places sovereigns in a state of nature in relation to one another, or in a relationship governed by the law of Nature, according to which every Individual has “Executive Power,” or the power to punish crime as he sees fit (1689, 274-75). While the ink spilt by scholars on the parameters of “natural law” has tortured the question of whether it derives from man’s essential nature, or if it coincides with or overlaps with divine law,¹⁷ the secular interpretation of “natural law” has allowed it to be used a gloss for describing states of lawlessness or anarchy, in contrast to the human-made laws of civil society. But on the collective, transnational level, we see that Locke understands natural law, on the one hand, as characterized by the absence of a common authority, but also as open to *definition* by each party—*civil society* retains the “executive power” to engage with indigenous nations as it “sees fit.”

To extirpate questions about the specific character of “natural law” in colonial America from its conflation with “lawlessness,” it is worth pointing out the symmetry of this conflation—perhaps even its overlap—with the debate over whether “international law” can be said to constitute law at all.¹⁸ Because of the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions, the legal theorist H.L.A. Hart in the mid-twentieth century posed the question, “is international law really law?” (1961, 209). Without those institutions, he argued, the rules governing relationships between states merely resembled

¹⁵ My argument that Locke understood colonists and tribes in a transnational framework seems to contradict Robert Nichols’ suggestion that social contract theory “developed in a dialectical relationship to the political practice of excluding indigenous peoples from the international realm” (2005, 44). However, our arguments accord insofar as the recognition of “nations” I suggest Locke conceptualizes—like the “tribal sovereignty” in the treaties I discuss on pp. 57-58—served the conquest that aimed to destroy this international, sovereign status.

¹⁶ This interpretation that this state represents an “essence” of *nature* is different yet again from C.B. McPherson’s suggestion that it represents the essential nature of man (1980, xiii).

¹⁷ Insofar as the “laws of nature” have been understood to arise from man’s own moral constitution, the state of nature has become a metaphor for the original and essential attributes of man (see note 14).

¹⁸ Arneil also connects natural law and the law of nations of the seventeenth century (1996, 6).

“that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system” (209). While Hart was invested in limiting the category of “law” to institutional forms endemic to contemporary Western nation-states, I would suggest that much is lost by dismissing “natural law” (or international law) as an absence of law, and that historically, such a move obscures the specific geography, history and complexity of orders of governance.¹⁹ In the colonial American context, such categorical boundary-drawing would prevent us from examining the part of the colonial legal order that governed engagement with tribes, and which becomes much more visible if we consider what the law sanctions by deregulation, rather than by regulation alone. As Locke notes, colonists did not apply the laws of “civil society” to their relations with the peoples they encountered in North America: instead, they brought into being a complementary order that they understood as “natural law,” the character of which we may still deduce from the historical record that the colonists left.

Law and Contracts in the Contact Economy

The settler compacts, or the *collective*, society-founding agreements described in the *Second Treatise* not only initiated a dual order of economic relationships, but correspondingly organized a dual order of the more specific promises between individuals and groups that we commonly call *contracts*. Carole Pateman has observed that “[s]urprisingly little attention has been given” to this relation between compacts and private contracts (1988, 7), about which Michel Rosenfeld further comments that “[t]here is no consensus” (1985, 775).²⁰ Here, by drawing on historical texts and Locke’s seminal work of political philosophy, I show that the structural framework of the social compact produced the contract protected by the laws of civil society in complementary relationship to a world of agreements made with outsiders in the contact economy, and with indigenous people in particular. These shadow contracts were made in conformity with the laws of “nature,” which colonists understood as authorizing relatively unfettered levels of coercion to achieve favorable outcomes in trade. That is, in the plural legal order of the contact economy, colonial laws derived from English traditions and customary

¹⁹ This is especially true, I would argue, for nonwestern orders, including relations between nonwestern polities, or a nonwestern polity with which Western positive law comes into colonial contact, as in early New England.

²⁰ In the three instances I have found of scholars attempting to reconcile a modern social contract with modern private contracts, the authors understand the social contract as an abstract concept, rather than as historically, structurally related, or in other words, continuous with contracts in terms of the principles of consent, fairness and justice. Joseph Kary, for example, draws on history to consider how private contracts have changed, but aims thereby to reconcile the two concepts of contract (2000). Fineman analogizes the social contract with private contract on the basis of its flexible symbolism to argue that the social contract should respond to social change, mirroring the contract doctrine of changed conditions (2001, 1408, 1426, 1413). She writes, “It is time to rewrite our social contract, to reconsider the viability and equity of our existing social configurations and assumptions” (2001, 1413). Michel Rosenfeld endeavors to show how “at the level of deep structure,” by which he means the nature of relationships between individuals and to society, contracts and social contracts form “complementary poles of a coherent overall perspective” based on individualism and a belief that justice is inherent in procedure (1985, 896). He considers the ideological conditions under which the freedoms and obligations of social contract and private contracts are compatible, to conclude (abstractly) that they can be reconciled through the contractarian paradigm of pure procedural justice and free pursuit of individual self-interest. However, he adds, this compatibility is precarious, and can only lead also to compensatory and distributive justice when there is “background fairness,” or equal bargaining power. He concludes that justice is only possible if individual self-interest does not destroy contractual relationships, either through the undermining of others’ contracts or of others’ opportunities to enter into contractual relationships (1985, 898).

indigenous law governed English settlements and indigenous nations internally (Salisbury 1982, 192-93; Tomlins 2010, 296).²¹ Again, by non-mutual determination, colonists understood the standards for arbitrating intergroup relations as given by “natural law” (Ford 2010, 42, 3). In practice, the substance of “natural law” mandated some basic conformity to the shape and procedure of contracts under civil law, and led to the production of documents attesting to the execution of a transaction that could enter into New English legal records and even, on occasion, find validation in colonial courts. However, where laws of civil society limited the coercion that colonists could use against one another, the laws of nature instead massed the power of the collective behind each individual’s use of force. The social compacts of early New England show that these events instituted this dual order by drawing a line assigning different obligations based on insider or outsider status. The role of this difference in catalyzing the growth of the contact economy of early America cannot be overstated. The social compact thereby created complementary forms of collective action that facilitated the colonists’ pursuit of *acquiring* goods and especially land, and then holding them as property within the community.

Traditional social contract theory emphasizes the internal relations between members of the social contract through narrative spotlighting. This literature thus emphasizes the peace and harmony that form of social organization achieves between its members through their collective acquiescence to a central authority with decision-making power, a common property-based measure with which to approach controversies, and enforcement mechanisms organized by the collective (Locke 1689, 124-26, 351; Pateman 1988; Fineman 2001).²² Basic *contract* theory similarly emphasizes the mutual understanding or “meeting of the minds” expressed in agreements and promises. The law of contract outlines standards for fairness that the community agrees to enforce. In modern times, it also comprises doctrines that refuse to uphold agreements that are unfair or unconscionable, because they were made under circumstances of coercion, duress, undue influence, concealment, misrepresentation, or mistake. Thus, contract law discourages the use of violence in trade and curtails economic violence between individuals in a common society. Colonial courts’ enforcement of private contracts exemplified the classic formulation of social contract theory: parties agreed to abide by courts’ decisions because they had exchanged obedience to certain standards of fundamental fairness decided by the collective, limiting their individual freedom to use violence against one another, for protection by the enforcement power of the whole.

By contrast, the world of economic transactions between whites and Indians, which has fallen into the shadows of this traditional story about contracts, were *not* held to standards prohibiting coercion, by law or enforcement. However, Locke recognized that the social compacts of early America put an end to the state of nature only between their members themselves, in contrast with a backdrop of ongoing interracial trade, and wrote: “’tis not every Compact that puts an end to the State of Nature between Men, but only this one of agreeing

²¹ Christopher Tomlins has cautioned against viewing colonization as the wholesale importation of a template of “English law,” since colonial legal orders themselves reflected a plurality of European legal cultures, and involved “successive seedings of mainland North America with a plurality of legal cultures,” influenced by specific local objectives and the regional origins of the English migrants in question (2010, 296).

²² In Pateman’s words, “[t]he social contract... creates a society in which individuals can make contracts secure in the knowledge that their actions are regulated by civil law and that, if necessary, the state will enforce their agreement” (1988). As Fineman notes, “those who would contract must rely on law, courts, and police power as the default enforcement mechanisms” (2001, 1424); in other words, most private contracting is ultimately public activity.

together mutually to enter into one Community, and make one Body Politick” (1689, 277).²³ He goes on to explain that “other Promises and Compacts, Men may make one with another, and yet still be in the State of Nature”; for example, “a *Swiss* and an *Indian* in the woods of America” remain “perfectly in a State of Nature, in reference to one another,” even as they form “Promises and Bargains for Truck” (1689, 277). Though uneven bargaining power plays a role in determining the outcome of most promises and bargains, in *these* transactions, the disparities of bargaining power were greatly amplified by the use of coercive tactics prohibited by laws of civil society. For example, such agreements were characterized by fraud that was “widespread though not universal”; Englishmen routinely utilized a range of “devices to put a fair face on fraud” when dealing with Indians, including harassing them and destroying their property, getting the other person drunk before having him sign a deed that he could not read, recognizing claims by Indians known not to have any authority to alienate land and giving them payment to “buy” it from them, and exploiting barriers to interpretation and communication, including those raised by different schemes of value and justice. They also relied on simpler tactics such as bribing interpreters and resorting to the simple threat or use of violence (Jennings 1975).

In one sense, the advantage accrued as a matter of *collective* action by such patterns of activity is a matter of simple accumulation, or arithmetic. Recall that Harry Andrew Wright, writing about John Pynchon’s capture of Norwotock lands, described the sachem Umpanchela as “greedy” because of the number of times he returned to Pynchon seeking further compensation for the settlers’ possession of his tribes’ homelands (Ch. 1, 28-29). Yet the conversions in Pynchon’s account books show that, in contrast to the prices Pynchon charged his colonial sub-traders in the region, he imposed a 56% mark-up for coats, a 66% mark-up for shirts, a 71-100% increase in the cost of “Bilboe rug” and a 37% increase for shag cotton in his Indian trade (Thomas 1979, 305). Pynchon was able to make more money from selling to Indians than to other settlers, in large part because he held a monopoly in the region; no settlers would protest his decision, and the Indians, if they protested, might risk war. Trade decisions made in light of such factor show how the collective compact influenced the nature of individual contracts by placing collective force behind every individual transaction, giving colonists greater leverage and capacity to exercise coercion in trade, and directly enabling the community’s steady, incremental gains.

Traders commonly implemented selective mark-ups in this fashion across the Connecticut River Valley and through New England, as well as in the middle Atlantic and the Southern colonies, until the time of the Revolution (Thomas 1979, 305). In 1784, Benjamin Franklin penned a short piece on indigenous-settler relations that he closed with a story about price-fixing told by the Onondaga leader Canassatego told to Conrad Weiser, a German interpreter who was naturalized among the Six Nations and spoke Mohawk.²⁴ This story, which I quote at length, highlights how whites in the contact economy in eighteenth-century Pennsylvania accorded one another transactional privileges that stopped at the limit of the group, and maximized their profits as buyers by uniting against indigenous sellers of beaver, just as they did in the Connecticut River Valley more than a century earlier.²⁵ Weiser related that

²³ See note 2, *supra*.

²⁴ This tract painted a picture of colonists’ behavior as much as tribes,’ though it was entitled “Remarks Concerning the Savages of North America.”

²⁵ Locke reflects on how lucrative it was to use money—which we saw in Ch. 1 was premised on division in a contact economy-- for the members of the social contract: money, he repeatedly remarked, had the effect of causing men to enlarge their possessions; “Great Tracts of Ground cannot lie in common where people have consented to the Use of Money” (1689, 299).

Canassatego had asked him what the whites did in the “great house” in which they assembled once every seven days, and shut up all their shops. When Weiser answered, “They meet there to hear and learn good things,” Canassatego replied, “I do not doubt that they tell you so; they have told me the same” (Franklin 1784, 36). But, he continued, “I doubt the truth of what they say, and I will tell you my reasons.” He explained,

I went lately to Albany to sell my skins, and buy blankets, knives, powder, rum, &c. You know I used generally to deal with Hans Hanson; But I was a little inclined this time to try some other Merchants. However, I called first upon Hans and asked him what he would give for beaver. He said he could not give more than four shillings a pound: But, says he, I cannot talk on business now; this is the day when we meet together to learn *good things*, and I am going to the meeting. So I thought to myself, since I cannot do any business today, I may as well go to the meeting too, and I went with him. There stood up a man in black, and began to talk to the people very angrily. I did not understand what he said; but perceiving that he looked much at me, and at Hanson, I imagined he was angry at seeing me there; so I went out, sat down near the house, struck fire, and lit my pipe, waiting till the meeting should break up. I thought too, that the man had mentioned something of Beaver, and I suspected it might be the subject of their meeting. So when they came out, I accosted my Merchant. ‘Well, Hans, says I, I hope you have agreed to give more than four shillings a pound. “No, says he, I cannot give so much. I cannot give more than three shillings and sixpence.” This made it clear to me that my suspicion was right; and that whatever they pretended of meeting to learn *good things*, the real purpose was to consult how to cheat Indians in the price of Beaver. (Franklin 1784, 36-38)

While the standard narrative about the social contract proudly extols collaborative decision-making and the reduction of violence in the community as the compact’s great achievement, in this story, Canassatego—through Weiser and Franklin’s interpretations-- describes how the condition for cooperation between the members of the social contract is his own exclusion from the meeting. He describes the community agreement as a secret that operates to the benefit of colonists at the expense, and to the detriment, of outsiders. The inside narrative, here, would constitute a partial truth-- one that omits the non-mutuality, inequity and hostility that such compacts facilitated in the community’s relationship with other communities in the first place.

But from Canassatego’s outside perspective, the internal cooperation of the social contract appears to be “cheating.” Indeed, at the level of the collective, cooperation that happens in secret in order to cheat, deceive, or do something unlawful or harmful to others is the very definition of “collusion” or “conspiracy.” As Canassatego’s story illustrates, the cooperation of the social contract, like collusion and conspiracy, relied on non-transparent communication and secrecy; it resulted in harm to outsiders that was beneficial for insiders. Where a particular legal definition of “collusion” and “conspiracy” now identifies certain practices with this character “illegal,” the compact provided the *foundation* for law. That is, it gave rise to the laws of civil society that governed internal relations *and* the norms governing external relations, or the “laws of nature.” An organized, collective approach to trade emerges from the social compact’s correlation of the two systems, the laws of nature and of civil society; that is, the very divergence between the inside and outside perspectives characterizes the business of colonial expansion.

By emphasizing the church as the central site of the social compact members’ trade decisions, Franklin’s story about Canassatego also illustrates how colonists used piety and

spiritual enlightenment, on which basis they understood their cultural superiority and attempts to convert natives, to cloak economic aggression. Indeed, Canassatego goes on to observe how settler “ethics” and trade intertwine:

Consider but a little, Conrad, and you must be of my opinion. If they met so often to learn *good things*, they would certainly have learned some before this time. But they are still ignorant. You know our practice. If a white man in travelling through our country, enters one of our cabins, we all treat him as I treat you; we dry him if he is wet, we warm him if he is cold, and give him meat and drink, that he may allay his thirst and hunger; and we spread soft furs for him to rest and sleep on: We demand nothing in return. But if I go into a white man’s house at Albany, and ask for victuals and drink, they say, where is your money; and if I have none, they say, get out, you Indian Dog. You see they have not yet learned those little *good things*, that we need no meetings to be instructed in, because our mothers taught them to us when we were children; and therefore it is impossible their meetings should be, as they say, for any such purpose, or have any such effect; they are only to contrive *the cheating of Indians in the price of Beaver*. (Franklin 1784, 38-39)

Canassatego’s character here articulates a view in which trade and ethics *are* intimately imbricated, and related to mutuality, equity, and hospitality. He distinguishes the English colonial perspective to ask about the distinction or overlap between ethics and economics that appears there. At the end of his piece, therefore, Franklin uses Canassatego’s story to draw colonial and indigenous practices of trade, hospitality, and attitudes toward equity into comparison. For him, it serves to acknowledge both relativism and colonists’ general denial of reciprocity, the central concerns grounding this writing, which he opened with the line: “Savages we call them, because their manners differ from ours, which we think the perfection of civility; they think the same of theirs” (Franklin 1784, 25).

As we saw in Chapter 1, English colonial trade began with beaver but shifted quickly to land after the establishment of permanent settlements to land as a means of generating wealth, supporting its growing population, displacing indigenous groups, and thereby expanding Angloamerican jurisdiction and power. Colonists’ approach to trading with tribes for land was similar to their approach when trading for beaver, insofar as it rested on coordinating the actions and unifying the force of the community. Again, however, because of the possibility of moving onto the land—rather than having to wait for it to be delivered-- colonists were able to take far more independent action in asserting their claims to land, as opposed to movable goods (Ch. 1, 27-28). Internally, they rested these claims on a system of records, containing deeds, or transfers of land entitlements into the community and amongst themselves. However, they also regarded these deeds as binding externally; that is, they declared the collective was willing to enforce them, and to treat them as extinguishing the claims of native inhabitants. The “deeds” of the early period emphasized quitclaim or cession, whether between individuals or to a colonial government, marking their function as documents that could be claimed to memorialize indigenous assent to transfers of every last acre of ground, to validate colonists’ own claims in ongoing and future conflicts (Thomas 1979, 139). The deed system thereby ordered colonists’ claims and relationships not only against tribes, but against other European colonists, as well as one another.

Colonists’ creation of the deed system occurred against the background of English charters, through which the Crown had already granted native lands to colonists, presupposing

that the Empire held absolute and ultimate title to North American lands by the principle of discovery.²⁶ The colonists travelled to America in order to take possession, and the multiple purposes that deeds could serve prompted the English “home government,” as a policy matter, to “[instruct] the colonial governors to take every opportunity to pay the natives for their land.”²⁷ Following this instruction, in the 1630s, the General Court of the Massachusetts Bay Colony encouraged towns and prominent individuals to purchase what were, in effect, Indian quitclaim deeds. Over the next decade, colonists of Cambridge, Charlestown, Concord, Ipswich, and Boston paid the Pawtucket for tracts that the General Court had already granted to the towns by the General Court, and which were, in most cases, already occupied by English settlers. The typical “payment” recorded for these grants was typically a combination of wampum, tools and cloth (Salisbury 1982, 199-200). Essex landowners did not bother to confirm their individual Essex holdings with the crown, but after Governor Sir Edmund Andros challenged the validity of their claims in 1686 the colonists made a belated effort to confirm purchases from the Indians and declared that prior to the transfer the Indians had been “the true, sole and lawful owners of all the afore bargained premises” (Konig 1979, 161; Kawashima 1986, 50). In the 1660s, the Royal Commissioners investigated the United Colonies of New England, a governmental formation we will shortly explore below, and voided the United Colonies’ grants, on the grounds that the country belonged to native people “till they give it or sell it, though it be not improved” (Kawashima 1986, 50).²⁸ The town of Hingham, Massachusetts, responded by purchasing its land from the Indian landlord retroactively, explaining that the town was settled in 1634 with the Indians’ “likening and Consent” though without “legal conveyance in writing” (Kawashima 1986, 50): “Even John Winthrop came fully to affirm Indian title to the land... by the time he bought 1,260 acres of Indian land on the Concord River in 1642 and registered it as the first recorded Indian deed.”²⁹

Again, as Stuart Banner has noted, the power of the collective formed by the social compact stood behind colonists’ ability to write and enforce the terms of these deeds against colonists and indigenous communities alike, so that “[t]he threat of physical force was always present” (2005, 82-83). When the Pilgrims arrived in Plymouth, for example, they lacked a charter from the king that would reinforce their claim to title to the land. To obtain a document that they could claim demonstrated indigenous assent to their occupation, they entered into a mutual assistance pact with the Wampanoags. Whatever the Wampanoags believed, the Pilgrims then interpreted that pact as a “deed of cession” that authorized them to seize “unspecified acreage”; as Segal and Stineback relate, “[f]or their part, the Wampanoags had no desire to test the effectiveness of English military technology in a struggle over an area that had been depopulated by a devastating epidemic” (1977, 47-48). While the Pilgrims’ and the

²⁶ Tully, Arneil, and many others have thoroughly shown that settlers--John Winthrop emphatically, and then Locke--justified seizing lands for themselves because they perceived them to be empty, going to waste, a *vacuum domicilium* in need of cultivation and improvement (Tully; Arneil; Williams; Kawashima, 47).

²⁷ Kawashima, 53. “In the first general letter of instruction from the governor and deputy of the New England Company for a plantation in Massachusetts Bay, to the governor and council for London’s plantation in the Massachusetts Bay in New England, written from Gravesend, April 17, 1629, is the following passage:-- ‘if any of the salvages pretend right of inheritance to all or any part of the lands granted in our patent, we pray you endeavor to purchase their tytle, that wee may avoyde the least scruple of intrusion.’” Wright, *Indian Deeds of Hampden County*. 7.

²⁸ This investigation flags the tension between the English and colonial authorities, since nothing in the charters of the various colonies had authorized the creation of such a union (See below, Part II, 53; also see notes 5, 10 above).

²⁹ William Penn also negotiated a treaty with the Delaware in 1682 and paid them for land he already considered that he owned. (Kawashima 1986, 51).

Wampanoags' negotiation might have any number of interpretations, under the shadow of force, the colonists' exclusive view prevailed. Colonists across the eastern seaboard, like the Pilgrims, used the formality of the "pact" as a basis to claim an unspecified range of permission to access lands from tribes, whose boundaries they tested and defined by exercising their powers of coercion. While Jefferson was still the governor of Virginia, he reflected on the history of land sales in that state in lines of a manuscript that he struck out before publication: "It is true that these purchases were sometimes made with the price in one hand and the sword in the other" (Miller 2011, 13).

Peter Thomas notes that "considerable question" often arose after the fact, indicating that such "sales" often involved very different interpretations of agreements by whites and indigenous people, informed again by their different understandings of the terms, value, and capacities of trade objects (1979, 59; Ch. 1). These "questions" heightened intergroup tension, and when civil disputes arose with tributary Indians who lived on or within colonial borders, they were often settled by formal conferences or negotiations.³⁰ During most of the seventeenth century, interracial civil disputes, concerning putative contracts and exchanges of property, rarely found forum in the courts that regularly adjudicated contracts between whites, for the few Indians and blacks who did live among whites largely did not use them and "no special regulations were made to rule them (Kawashima 1986, Ch. 8). While English courts were not formally closed to nonwhites, access to the courts was expensive, as indeed it remains today; racial bias also structured the proceedings. Thus Indians "intentionally stayed away from the court," and civil suits brought by non-whites were few and sporadic (Kawashima 1986, 200).³¹ But the most numerous civil cases involving Indians in colonial courts were debt collection cases, a fact that highlights the extent to which colonists deliberately ran Indians into debt (Kawashima 1986, 182). Indeed, a 1718 Act invalidated all Indian bills, bonds and other forms of contract that two county justices of the peace had not authorized, in an attempt to curb the "great wrong and injury [that] happens to said Indians... by reason of their being drawn in by small gifts or small debts, when they are in drink, and out of capacity to trade, to sign unreasonable bills or bonds for debts, which are soon sued, and great charge brought upon them, when they have no way to pay the same but by servitude" (Massachusetts 1869—1922, vol. 2:104). Appearance in court, however, more often than not drove indigenous people further into debt and therefore reduced their bargaining power in and outside of court, since Indians had to pay court fees, fees for their apprehension, prison time, and punishment (often a choice between whippings, at two shillings a stripe, or fines), as well as restitution damages if the crime was theft or burglary, and the entire cost of civil suits if they lost. Those who could not pay had to sell themselves into servitude to comply with court orders (Kawashima 1986, 137, 142-43).

Under the "laws of nature," most interracial disputes did not come to court. However, those that did exhibited a pattern of in-group preference and bias that functioned more through monopoly than absolute racial exclusion—colonists insisted on their own forums to protect themselves from Indian jurisdiction-- and through financial exclusions in the form of fees and fines, which limited access to courts. Whites "determined to make their law prevail among themselves" increasingly insisted on English-controlled courts as forums for interracial disputes: in the early eighteenth century, the Bay Colonists began to demand that Massachusetts law

³⁰ Chapter 3 explores the state's management of this tension.

³¹ Even Kawashima, who tries to defend colonists' intentions, describes their "hostile and disdainful" attitude toward Indians, their "prejudice, fear, condescension, and combination of insensitivity to cultural differences in this area and desire for cultural uniformity" (1986, 200, 17).

should settle interracial disputes as a term of treaties; and at a conference at George Town on Arrowsick Island in 1717, Governor Samuel Shute had the sachems of the Eastern Indians pledge that “if any wrong happens to us we would not avenge ourselves, but apply to your Excellency for Redress” (Kawashima 1986, 22-23). Similarly, in 1726, Lieutenant Governor William Dummer assured forty Penobscots at Falmouth in Casco Bay of “equal Justice with His Majesty’s English Subjects in all Points, when ever any Difficulty shall arise concerning the Property of Lands or any other matters” (Kawashima 1986, 23). In 1735, at Deerfield, Governor Jonathan Belcher promised the chiefs of the Caganawags, Hanssatonscoes, and Scantacooks that he would treat their people and colonists alike as “his children” (Kawashima 1986, 24).³²

Colonists’ determination, as Banner describes it, to “have land disputes decided by English officials using English law rather than Indian officials using Indian law” (2005, 82-83), created a non-reciprocal transnational jurisdictional structure. As a result, indigenous people had no effective forum for challenging the deeds colonists created; to refuse them, again, was to risk war. Endless disputes were generated by deliberate misunderstanding: at a peace conference at St. George’s in 1753, the Indians challenged the validity of land transactions settled in the treaty of 1727 between Dummer and the Penobscot Confederacy, and demanded the return of their lands, since English settlement would drive the game away. The colonists presented deeds to them as evidence, to which the native leaders replied, “We don’t think these Deeds are false, but we apprehend you got the Indians drunk, and so took the advantage of them, when you bought the land” (Kawashima 1986, 24).³³

In short, colonists organized and channeled their force through a dual system of law, in which internal protections heightened the collective’s bargaining power by pooling the powers of coercion they could wield against indigenous groups in any given interaction. In New England, these mutually dependent orders proved enormously powerful. The social compact produced the state of nature as a colonial relationship, and the potential gains to be made through utilizing laws of nature motivated fidelity to the social contract. The stakes of this dual order, in which neither element could function without the other, were high. The compact fortified the community’s ability to survive, as well as its effectiveness in its expansionist aims. It raised the stakes of any individual action to the level of collective and transnational relations by placing the potential for war behind every act of violence, and the potential for community expansion behind every private profit or gain. In the political economy of dispossession, the *limits* of contract law organized the community’s use of force and constituted its extraction mechanisms, so that contract standards functioned to help the community to enlarge not only individual material holdings, but also the collective, institutional good of private property itself.

PART II

The traffic between theory and event moved colonies into nation-states.

--Audra Simpson, *Mohawk Interruptus*, 2014

³² The chiefs responded that colonial laws were severe, and that their people feared being taken to prison or that their children would be taken away because of debts. They added, “We don’t pretend desire anything, but that if any of our People should commit murder or any other crying Wickedness, they should be liable to the law” (Kawashima 1986, 24).

³³ They were unable to resolve the issue (Kawashima 1986, 24).

The Constitution as a Settler Compact

If the context of the American colonies can indeed illuminate Locke's *Second Treatise*, then the continuing material history of the colonies suggests that the social contract narrative concerns an *original agreement founding* civil society in multiple senses. First, as we saw in Part I, the text outlines early processes of conquest by describing the collective agreements that colonists created to join their forces; it highlights the fact that the social formation grounded in this social contract prospered by exploiting difference, which became integral to the dynamics of the contact economy. As these social forms flourished, colonial communities formed further inter-group social compacts, making the basic principle of the social compact—the collective organization of force *vis-à-vis* other communities—a principle of structural development.

More concretely, in response to increasing tension and hostilities that arose from their colonizing activities under “natural law,” the communities formed by social compact compacted together according to the same principle of collectivizing their force, to form colonial federations in the covenantal tradition in Massachusetts, New Hampshire, Rhode Island, and Connecticut. These federations eventually united to form the United Colonies of New England, the first inter-colonial association of federations.³⁴ I will suggest that the same principle finally underpinned the formation of the United States (Allen 2005, 31). In other words, I propose that the cherished principle of federalism—the balance of power between sovereign states and the federal government—reflects a higher-order social compact. Further, I propose that once elevated to the inter-group level, the social contract, which has so often been interpreted as a metaphor, does indeed render *consent* indirect and abstract, by filtering it through the concept of representation.

The United Colonies of New England, also known as the New England Confederation, was a higher-level federal formation that cohered in response to an environment characterized by radical social difference. It arose some time after such a union was first proposed as a military alliance in response to security concerns about threats posed by the Mohegans, the Narragansetts, and the Dutch (Allen 2005, 44; Weir 2005, 109); the New Haven General Court records indicate that “The confederation betwixt the colonies was no rash & sudden ingagemt, it had bine severall yeares vnder consideration” (Pulsifer 1861, ix). The smaller federations met in Cambridge as early as 1638 to discuss the possibility of forming a union, but “that conference ended without fruit,” so that the four jurisdictions, “though knitt together in affections, stood in refference one to another loose and free from any express covenant or combination.” In other words, they remained without formal obligation to one another, in “a state of nature,” until September 27, 1642, when the General Court of Massachusetts ordered a committee of “the magistrates in & neare Boston wth the deputies of Boston, Charlestowne, Cambridg, Watertowne, Roxberry, Dorchester, or the greater part of them” to treat with Commissioners from Plymouth, Connecticut, or New Haven about forming a union “concerning avoyding any danger of the Indians, & to have power to do hearin what they shall find needfull for comon safety & peace, so as they enter not into an offensive warr without order of this Courte” (Pulsifer 1861, x). In May 1643, the United Colonies of New England was born (Pulsifer 1861, ix).³⁵

³⁴ These included the Massachusetts Ordinance on the Legislature, 1644; the General Laws and Liberties of New Hampshire, 1680; the Organization of the Government of Rhode Island, 1642; and in Connecticut, the Fundamental Articles of New Haven, 1639; the Fundamental Orders of Connecticut, 1638-39, and the New Haven Fundamentals, 1643 (Allen 2005, 42). The Fundamental Orders of Connecticut united inhabitants of Windsor, Hartford and Wethersfield by establishing a government based on “New World covenants,” making the community “orderly knit together” (Allen 2005, note 43).

³⁵ The colonies “had aboute five yeares time to consider what they were aboute, the compass and consequences of

This union of unions was not authorized under the charters of the member settlements, which included the newly-created New Haven federation, other federations of the colony of Connecticut, and the colonies of Massachusetts Bay and Plymouth. To govern the union, the United Colonies created Articles of Confederation that justified its formation on the grounds that “hostile Native American tribes to the west” posed an urgent, common threat to its members. They explained:

... whereas we live encompassed with people of several nations and strange languages which hereafter may prove injurious to us or our posterity. And forasmuch as natives have formerly committed sundry insolence and outrages upon several Plantations of the English and have of late combined themselves against us. (Pulsifer 1861, 3)

Each colony agreed to maintain its own government and legal order, but approved twelve articles designed to govern their common affairs, including such matters as jurisdiction, procedures for membership, representation and meeting, and proportionate shares of the Confederation’s defense budget and spoils of war, as well as the “removal of residents from one plantation to another; policies towards the Native Americans,” or in other words, immigration and Indian affairs (Pulsifer 1861, 3). To aggregate their power, the colonial federations swore to submit to these Articles, and thereby, to “jointly and severally hereby enter into a firm and perpetual league of friendship and amity for offence and defence, mutual advice and succor upon all just occasions... for their own mutual safety and welfare” (Pulsifer 1861, 3).

Two aspects of this inter-federation compact seem especially noteworthy in light of the foregoing discussion.³⁶ First, the New England Confederation was *analogous* to the compacts between individuals that formed its constituent units. Like them, it announced itself as a mutual defense pact, in light of the dangers presented by the hostile relations that they had cultivated with the tribes in the area, or “the state of nature” Locke described. The purpose of this union was similarly to protect colonists’ security and property in America, all of which, in 1643, colonists had but freshly claimed. It facilitated colonists’ ability to hold--but also first to acquire, and then continue to acquire--quantities of goods and land from indigenous people. Another term for this pattern of continuous creation of property through the acquisition of indigenous lands is colonial *expansion*, which the social compact supported at the inter-group level, as well as the individual level, by making possible the liberal use of violence in transactions with outsiders. The privileges and violence that the social compact distributed placed the collective threat of violence behind every member of the colonial community in its acquisitive, extractive, expansionist endeavors.

Second, the New England Confederation exemplifies a distinct social compact formation that ordered a multi-level system of government. We can thus understand Locke’s narrative as encoding a *foundational* structural principle that gave rise to a new society in a broader sense, as

such a consociation, and probably did improve it, and saw cause to renew the treaty so long suspended” (Pulsifer 1861, ix).

³⁶ While less germane to the argument of this Chapter, given the previous Chapter’s emphasis on the contact economy, it is critical to note that many have elaborated on the argument that colonists’ inter-federation compacts were inspired by the Iroquois League of Nations (Howe 2002, 37-41; Grinde 1992). James Wilson, a delegate from Pennsylvania who authored the first draft of the U.S. Constitution, declared that “Indians know the striking benefits of confederation,” and that they had “an example of it in the Union of the Six Nations” (Ford 1904, 1078). While I do not explore the Haudenosaunee Confederation here, the example raises the question of how such a union *might* organize violence and reveal the peculiarities of the colonists’ approach.

well as rethinking its character as plausibly historically descriptive. As higher-order social compacts facilitated intergroup cooperation against an ever-expanding background of trade, or “Promises and Barter for Truck” and *land*, the consent that individuals had expressed to form the lower-order compacts were first once, then twice removed to representatives of the increasingly large imagined communities. The passage of time, or the famous generational problem, did not defeat *actual* consent within the federated social compact—already an abstraction from the still-feudal family order-- as much as spatial, territorial ambition, or *expansion* did. When direct participation became impractical within the government that held itself to be of, by and for the people, consent became synecdochal through political representation.

Thus, while the social compacts founding New England towns and uniting colonial federations were analogous in form, they also existed in direct relation to one another and transformed the meaning of consent to political government. By 1700, the growth and proliferation of federations between the originally diverse townships formed by civil covenants, which had determined “where people settled and lived” and “affected virtually all citizens of seventeenth century New England,” resulted in increasing civil and political uniformity (Weir 2005, 236, 233). The United Colonies’ Articles of Confederation emerged in parallel order with the later 1754 Albany Plan of Union, an intercolonial pact that Benjamin Franklin proposed in order to treat with the Iroquois Confederation.³⁷ Both preceded the Articles of Confederation and Perpetual Union ratified by all thirteen of the original colonies in 1781.

As John Quincy Adams stated, “The New England confederacy of 1643 was the model and prototype of the North American confederacy of 1774” (Pulsifer 1861, xiv-xv). In both of these cases, the parties formed the union without authority or sanction from the charters given by the Crown, the authority to which they were supposed to defer. Where the formation of the United Colonies produced tension within this hierarchical relationship, the United States pursued independence through the Revolution, indexing the growing power and appeal of the colonial expansion these unions supported. Adams, indeed, refuted the colonies’ debt of allegiance to the Crown by identifying *natural law* as the source of authority for these federal compacts, writing, “In both cases it was the great law of nature and of nature's God-- the law of self-preservation and self-defence, which invested the parties, as separate communities, with power to pledge their mutual faith for the common defence and general welfare of all” (Pulsifer 1861, xiv-xv). The law of transnational relations, by his account, licensed the Union to organize their forces against both indigenous nations and the Crown, when it allied with the enemies against whom the colonies had joined forces.

In short, as the advantages of civil society in the state of nature made social compacts proliferate across New England, these compacts’ intensification of the state of nature they produced gave rise to a higher-order compact and the principle of federalism itself, which was finally enshrined in the Constitution.³⁸ This emergence of federations signaled the appearance of

³⁷ In 1697, William Penn proposed a plan to unite all colonies that, like the later Albany Plan, provided for a congress comprised of representatives from each colony and an executive appointed by the Crown to preside in legislative sessions. A century later, when revolution seemed imminent, Joseph Galloway, a Loyalist Pennsylvania delegate to the first Continental Congress, proposed a union of the colonies under a confederated British and American legislature called the American Grand Council, which would exercise the same rights, liberties and privileges as the House of Commons, forming “an inferior and distinct branch of the British legislature” (Allen 2005, 57).

³⁸ Colonists, too, wrote constitutions, which were highly varied with respect to the manner in which they recognized indigenous sovereignty (Hsueh 2010). In the seventeenth century, the word “constitution” was not used to refer to a specific document in the same manner as today, but denoted agreements that derived their elements from

prototypical modern state forms, whose consolidation and organization of force raised the stakes of the omnipresent threat of war in the state of nature. At this inter-group level, the comparison we drew earlier between compacts and collusion or conspiracy also translates as a project Charles Tilly has called “war risking and state making.” Drawing from the European, rather than American context, Tilly describes states as “quintessential protection rackets with the advantage of legitimacy,” and historical war and state makers as akin to “coercive and self-seeking entrepreneurs” (1985, 169). However, where Tilly contrasts this image of states as coercive forces of business against benevolent ideas about the state such as “social contract” (1985, 169), I have tried to show here how the social contract is not the opposite but the essence of the form that organizes and directs the violence of the state that Tilly emphasizes. The historical example of New England, I have argued, sheds light on the *Second Treatise* by illustrating “the place of organized means of violence in the growth and change of those peculiar forms of government we call national states” (Tilly 1985, 170), from the law-founding consolidation of violence of the first individual and federal compacts, to the new orders of violent expropriation, contracts and compacts that emerged under the United States’ expansion efforts, which I will explore below.

First, however, it is worth noting that the same calculation that incentivized the states to consolidate their force also motivated them, conversely, to seek to splinter their enemies’ power. Even before the Revolutionary War,³⁹ the accumulated pressures of white immigration, land dispossession and the displacement of tribes were laying the groundwork for a coalition of Northern and Southern tribes, and such a union seemed imminent to colonists by the spring of 1774 (Sosin 1967, 85). As the authors of the Federalist Papers note, the states’ independent activities only exacerbated the threat of a full-blown interracial war; they cite “several instances of Indian hostilities... provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish offences, have given occasion to the slaughter of many innocent inhabitants” (Hamilton, Jay and Madison 1788, 16). During this period, “[t]he menace of unsettled boundaries was everywhere” (Paxson 2001, 48), and the “vast tract of unsettled territory within the boundaries of the United States” was the source of “discordant and undecided claims” lingering “between several of [the States]” (Hamilton, Jay and Madison 1788, 34).⁴⁰ The

agreements, compacts and covenants, as well as frames, fundamentals, or plans of government, charters, or grants, and ordinances, and gave rise to state constitutions (Lutz 1988, xxxv).

³⁹ Barbara Allen notes that the Revolution occurred in waves. According to her, the first period of the American Revolution lasted from 1775-1776; the second, involving the middle states and the coastal south, from 1776-1781; the third from 1779-1781, entailing an uprising of borderland immigrants against invading American Loyalists and British Regulars; and the fourth phase, from 1781-1783, was a period of economic and diplomatic struggle. “[T]he denouement of these overlapping wars of independence consisted of a series of compromises worked out among the three dominant colonial regions” (Allen, 2005, 58).

⁴⁰ Moreover, the Federalists warned that “the dissolution of the Union would lay a foundation for similar claims between them all”; territorial disputes had always been, they note, “at all times... one of the most fertile sources of hostility among nations,” and “the cause of “[p]erhaps the greatest proportion of wars that have desolated earth.” They recognize that “[t]his cause would exist among us in full force” (Hamilton, Jay and Madison 1788, 34). Examples of boundary disputes between the colonies abound, and one example that I offer here is that between Georgia and South Carolina after the French and Indian War. During this period, lands held and ceded by the Creeks within the colony were in great dispute, and when the Creeks and Georgia finally agreed upon boundaries in 1768, in order to prevent further changes, “[d]eputy surveyors Samuel Savery and Roderick McIntosh blazed it out in the latter part of the year,” completing the survey in three months and killing two horses through fatigue so that the lines could be formally ratified within the year (Cadle 1991, 46). Not five years later, Georgia officials obtained over two million more acres by negotiating with the Upper Creeks and Cherokee for Lower Creek land, sparking an exchange of violence that created white panic and flight from settlement along the Saluda, Reedy and Pacolete rivers (Sosin 1967, 84). After word spread that Spain would cede Florida, Georgia and South Carolina struggled over lands south

creation of a speculative land market based on the conquest of western lands would require cooperation between states and with the federal government, and the formation of a strong counter-union that could face its enemies in war. To lessen the causes of war that a “*disunited America*” would proliferate, the Federalists therefore argued that a “United America” was necessary to consolidate the power of the states in the service of a common aim; a central power would both constrain and mediate between the states, and between the states and Indian nations (1787, 13-14, 16). For the Federalists, “[t]he utility of the UNION” would be to facilitate continuing conquest: future dispossession would relieve member states of their individual and collective debt, manage internal unruliness by creating a central monopoly on violence, and allow for surplus accumulation that could become the basis of a powerful national economy (1787, 6). On the same principle, under the compact that established the United States, the central government promptly adopted a policy of exploiting longstanding rivalries and hostilities between tribes. This divide-and-conquer approach to Indian Affairs constituted a logical counterpoint to the new, centralized strength of the Union.⁴¹ Under the authority of the War Department, General St. Clair, who negotiated separately with the Six Nations and the Great Lakes tribes, thought he could “set them at deadly variance” (Smith 1882, 113).⁴² Congress counseled Indian agents to “deal with each Indian tribe or nation as separately as possible,” and insisted that “the tribes were to be kept separated so that negotiations would be easier” (Kades 2000, 1120).

Contracts in the United States

The social compact’s highest order constituted the United States, which almost immediately reconfigured the relationship between settler compacts and contracts as it centralized control over indigenous land expropriation to maximize the efficiency of the process.⁴³ During the colonial period, white immigrant communities’ appropriation of lands and interracial land sales had largely taken place through private contracts between a wide variety of individuals and groups, including individual farmers and Indians, large-scale land speculators, small groups, whole Indians tribes, towns and colonial governments. Indeed, the revolt against the Imperial government was in part sparked by its attempt to prohibit private trade in lands through its extremely unpopular Proclamation of 1763. Nonetheless, after the Revolution, the

of the Altamaha River, where neither colony had exercised any real authority because of the Spanish presence. Anticipating that the area would likely be annexed to Georgia, South Carolina Governor Thomas Boone issued warrants for over 300,000 acres of land to less than 200 speculators, including a number of his friends. These men had no intention of becoming permanent residents on the land (Cadle 1991, 42; 28 Col. Rec. Ga. (pt. 1) 409, 412). The Georgia Assembly promptly complained, and Governor Wright dispatched a letter of protestation and warning against issuing warrants or making surveys of the land. Boone refused to receive the protest, and his secretary would not permit the document enter the province’s public records. Wright appealed to the Board of Trade, which promptly disapproved of these actions, but by then, many more warrants had been issued and great numbers of people, some armed, including surveyors, had been seen traveling south to execute them. Though the land was indeed annexed to Georgia, the Board of Trade found that the grantees had acquired vested rights in the lands, over the strenuous objections of Governor Wright (Cadle 1991, 42-43). Georgia was ordered to confirm the grant and survey the area without interfering with any Carolina grant.

⁴¹ In this regard it was very much like the recent, hated imperial policy, and unlike the system of diverse, local control that had predominated prior to the French and Indian War (Sosin 1967, 151).

⁴² Letter from Governor St. Clair to the President (May 2, 1789).

⁴³ See Kades’ article generally for the argument that the United States’ laws maximized efficiency in conquest (2000). Perhaps as Hartz has suggested, the United States is the only truly “Lockean nation” (Hartz 1955, 4-13).

U.S. government created its own variant of that hated policy by quickly assuming control of the “laws of nature” or those laws governing dispossession and transnational relations. However, unlike the King, the U.S. sought to manage and control, rather than curb westward expansion. It was in the interest of *successful* conquest that colonist-citizens could no longer purchase land directly from Indians; more significantly, tribes could no longer alienate their land to whomever they chose. Congress asserted its monopoly over the direct negotiation for land with the passage of the Trade and Intercourse Acts, fittingly known as the Non-intercourse Acts. In 1823, *Johnson v. M’Intosh* would affirm the principle of these Acts by holding that any sale of land by Indians to parties other than the government would not be protected in the courts of law and would face the force of the U.S. government’s competing claim.

The Non-intercourse Acts, by placing the government between Indians and immigrants as a mediator, cleaved the U.S. project of establishing private property into two parts—that is, it separated the project of indigenous dispossession and the distribution, or what it called the “disposition,” of the lands to settlers. As far as formal title was concerned, the United States would first coerce tribes into selling or ceding their lands. But once the United States had expropriated indigenous lands, the government, from its central seat, distributed these lands as private property or as land grants in a massive project known as the *disposition* of the public lands, so that land dispossession and disposition became both its prerogative and preoccupation (Hibbard 1924; Rohrbough 1968). As a result, every settler thereafter, as the frontier historian Frederick Paxson observed, has taken “his deed directly from the Nation” (2001, 167). By placing land acquisition under the exclusive purview of government, the government sought to control the nature of transactions between Indians and individual white immigrants, as Chapter 3 will further explore. However, I wish to emphasize that where during colonial times, one action had sufficed to execute these sequential processes of conquest—extinguishing native title and articulating an individual settler’s claim-- under the U.S., these became separate genres of legal transaction.

Under the purview of the U.S., settler-indigenous land transfers shifted from the level of transactions between private parties to that of transactions between sovereigns: that is, they became memorialized exclusively through treaties, rather than through contracts and treaties, as before (Banner 2005, Ch. 3).⁴⁴ Patrick Wolfe and Dorothy Jones have argued that the treaties between tribes and the United States that were drawn under this order legally defined and constituted the notion of “indigenous sovereignty” that the U.S. utilized as an instrument of dispossession (Wolfe 2007; Jones 1982).⁴⁵ As Wolfe explains, “Since treaties require and presuppose national sovereignty on the part of signatories, it was Indian nations’ sovereignty that enabled their respective territories to be converted into so many parts of the United States” (2007, 139). Treaties codified an “agreement” analogous to the colonial deeds we considered above, the terms of which were determined by the dramatically uneven bargaining power created

⁴⁴ As Dorothy Jones shows, a treaty system had long been in place, in which abuses were not unfamiliar. But the colonial system was one, she writes, of “accommodation,” “worked out by mutual agreement and compromise,” in which the goal was to divide Indian lands and jurisdiction from English lands and jurisdiction. Although the U.S. treaty system established in 1796 looked superficially similar to the Anglo-Indian treaty system of the early 1760s, the disparity of power between the participants in the U.S. made them profoundly different (Jones 1982, 3).

⁴⁵ We should note the tendency of legal language to coopt ordinary language, giving legal practitioners much power in shaping meanings that then bleed back out to the world outside of legal practice. Subsequently, many non-lawyers and many lawyers come to imagine a conflation that is real. Sovereignty can be, and is, otherwise imagined, and exists outside the law (Barker 2005; Simpson 2011, 2014; Kauanui 2008; Brown 2014).

by colonial willingness to use force, and which were crafted for the “courts of the conqueror.”⁴⁶ The legal contours of the “sovereignty” recognized within them furnish an example of legal translation that narrows broad concepts into an operative definition. Over time, the tribal “sovereignty” that appears in treaties illustrates the chimeric nature of enduring legal principles, for the turbulent career of this legal fiction shows that it underwent a particularly dramatic transformation as a result of its own effects. Indeed, it helped to extinguish the very transnational character with which it had endowed these transactions in the first place, by facilitating conquest aimed at the “domestication” of tribes; over the first century of the United States, their terms grew increasingly harsh, reflecting growing inequity of bargaining power between tribes and the federal government (Spirling 2012). Treaties thus represented an elevation of the private interracial contracts executed under the “laws of nature” to the collective level: they bore all the distinguishing marks of those shadow contracts, insofar as they were obtained on the basis of coercion or under duress, and were often broken. Like deeds, they resembled inter-European treaties in form, and on this basis, they functioned as a backstop to disputes over the validity of transfers in settler courts. Cutting through the pretension or misapprehension of legal sovereignty as a “universal or neutral good [that] just needed to be more equitably distributed” in searing terms, Wolfe articulates its character and achievements through its appearance in treaties:

from its axioms up, the concept contained, encoded and reproduced Indian subordination. Indian sovereignty was not recognized but imposed. Domination was of its essence. No amount of enhanced acknowledgement can address, let alone redress, the comprehensive inequity that it ordained. (2007, 136)

Finally, during the colonial period, as we saw, contracts enforced by law worked in tandem with the permissive contracts governed by “natural law.” But under the great, totalizing jurisdictional claims of the United States, when those permissive contracts rose to the order of inter-sovereign treaties, private contracts came uniformly under the aegis of laws of civil society. The cleavage of dispossession from contract enacted a legal, conceptual severance of U.S. contract law from the long history of violent interracial appropriation through contract, walling off the history of productive violence that both motivated early contracts and brought contract regulation into being in America. Consequently, the “enthusiastic expansion of contract” in the nineteenth century has become famous; the proliferation of rules for this form of transaction are understood as expressions of individual will and reason, created to reflect, anchor and honor individual expectations, and they have earned the period the appellation “the age of fairness of contract.”⁴⁷ This legal development thus transformed the story of contract, like Locke’s still-powerful narrative, into one about civil society alone, making the inner world of the social contract stand in for the entire world. It thereby replaced recognition of the profit potential of violent exploitation of radical, racial social difference with fictions about the origins of contracts and property in human reason, fairness and justice.

⁴⁶ In the seminal 1823 case, *Johnson v. M’Intosh*, Chief Justice Marshall wrote, “Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.” 21 U.S. 543, 588 (1823).

⁴⁷ However, as James Willard Hurst wrote, throughout the nineteenth century, courts “never wholly lost sight of the fact that their enforcement of promises involved delegating the public force in aid of private decision making” (1956, 11).

Compacts In the United States

Even after the elevation of the social compact to a principle of federal structural development, groups of individual settlers continued to form first-order unions when they entered tribes' territories, introducing a "state of nature." Even before the War had ended, as early as 1779, settlers rushed westward across the Ohio River, and began clearing land and building cabins (Sosin 1967, 150). These whites were impervious to orders from state and national governments, who commanded them to depart forthwith out of fear that violence would erupt from this colonial aggression. They were not deterred, not even by the detachment of troops Congress sent in 1785 to disperse them and protect surveyors, and "continued to come" (Rohrbough 1968, 15-16; Barnhart 1953, 128-31). George Washington, while touring his western lands in 1784, reported that "in defiance of the proclamation of Congress, they roam over the Country on the Indian side of the Ohio, mark out Lands, Survey, and even settle them" (Rohrough 1968, 15).

Thus, although the federal government took priority in negotiating indigenous-white transfers of title, on the ground, settlers continued to be the first representatives of the new nation to enter onto Indian lands, and thereby played a crucial role in expansion by moving the frontier westward. Settlers traveled beyond the bounds of settled colonial territory to build homes that were "often many miles from even a territorial capital, beyond the reach of organized courts, and substantially beyond the pale of organized government" (Hibbard 1924, 208). Generally, once they had established a presence in a region, agents of the federal government would follow them there and hold an auction to formally grant them actual title to the lands. According to this pattern, countless groups of settlers brought the rules of contract into Indian country; they transformed it into a space of violence by invoking natural law, in order to convert lands into private property to be governed by U.S. law. These social compacts, later called "claims clubs," proliferated across the frontier and furnished the material force of national expansion through the nineteenth century.

In an early example of such a formation, in January 1789, a group of inhabitants on the North Carolina frontier assembled, and declared that they did so, "not under the authority of any State or name of State, nor in opposition to the laws of any State, or the United States, but purely to defend ourselves from the savage enemy" (North Carolina Colonial and State Records). During this meeting, these men reviewed the measures the Congressional General Assembly had taken for the defense of their community. They concluded that they were insufficient and that the Officer responsible was "unworthy of [their] confidence." They therefore testified: "after maturely considering the said information and our present distressed situation, ... [we have decided] that our lives and properties are in continual danger till peace is made, as the Indians still continue their depredations, unless we agree on some plan to defend and secure ourselves from their inroads." Therefore, they explained: "to secure our lives and properties from the present dangers that threaten by the frequent incursions of the savage enemy, we unanimously agree to adopt the following plan..." Under this plan, these North Carolinian settlers agreed, among other things, to set aside their disputes in order to unite and petition for admission to the Union, and to form a Council of Safety tasked with conducting negotiations with the tribes in the area. These settlers framed their union as a matter of defense, though their recent encroachment onto the lands reflected the aggressive recommendation that they resolved to lay before the Commissioner of Indian Affairs that May: "it would be good policy and of essential service to

this country if the Indians will agree to give up any of the country south of Tennessee River to our Council of Safety” (North Carolina 1789).

Such formations continued to be so fundamental to the creation of American property that James Willard Hurst, sometimes called the father of American legal history, opened his most famous work on nineteenth-century American law, with a similar story of squatters in Pike Creek, Michigan, who faced “the challenge of the unexploited continent” almost fifty years later (1956, 10). The members of the Pike Creek Claimants’ Union, too, had “come upon the lands” before the federal survey was done, before the President proclaimed a sale day, and outside the time limitations of contemporary pre-emption laws (Hurst 1956, 3). The compact that they created in 1836 took the classic, “Lockean” form of the social compacts in colonial New England: “We,” they declared, “as well meaning inhabitants, having in view the promotion of the interest of our settlement, and knowing the many advantages derived from unity of feeling and action, do come forward this day, and solemnly pledge ourselves to render each other our mutual assistance, in the protection of our just rights...” (Hurst 1956, 4). They recounted the various deprivations, expenses and hardships they had borne during their “perilous journey, advancing into a space beyond the bounds of civilization.” Relying on the belief that “our settling and cultivating the public lands is in accordance with the best wishes of Government,” and noting that “the Government has heretofore encouraged emigration by granting preemption to actual settlers,” they ventured into lands still “beyond the bounds” of U.S. territory, to turn it into a zone of conflict (Hurst 1956, 4). As they ruefully acknowledged, they entered onto lands “on the peaceable possession of which our all is depending,” to assume a labor of conquest that endowed on them “the many difficulties and obstructions of a *state of nature* to overcome” (Hurst 1956, 4).

These frontier episodes of social compact formation, fifty years apart, illustrate the precarious and hopeful temporality of settler compacts after the formation of the U.S. These compacts were called claims-clubs, and extended the reach of U.S. law itself by heralding its arrival. They were neither strictly law-founding, nor law-maintaining, for they derived from the U.S. tradition of political federal formation, but U.S. “law did not protect the squatter in his right to the soil.” Following the model of the founders, settlers invoked natural law, declaring that the absence of an authority to protect them amounted to the absence of an authority with the right to constrain them or preempt their independent organization; they thus acted in some tension with the U.S. government, though as we saw above, they declared their conformity with its goals and recorded their hope of future validation. Signaling the mutual formation of a relationship of unarticulated cooperation, the government and other “capitalists rarely clashed with squatters over the selection lands,” and “early acquired a respect for the law of the claim association” (Gates 1968, 148). Claims-clubs thus became the front-line actors of U.S. expansion. In his history of the public land laws, Paul Henry Hibbard emphasizes that the claims clubs, “while not legal, were extra-legal rather than illegal.” He further observes: “[a]lthough ‘claim-law’ is no law derived from the United States or from the statute book of the territory, yet it nevertheless is the law, made by and derived from the sovereigns themselves, and its mandates are imperative” (1924, 203). As *extra*-legal entities, claims clubs *were* the law outside the law; in fact, they grew the law, by arriving prior to it and ushering it in.

All across the western frontier, groups of farmers, ranchers, miners, and others formed compacts “mutually, to sustain and protect each other in their claim rights.” They wrote their own constitutions and bylaws, elected officers, and established rules for adjudicating disputes and procedures for the registration of claims to lands that had only sometimes already passed

under survey (Anderson and Hill 1990, 44).⁴⁸ Mining and riparian claims clubs and ranchers' associations were created in an explicit analogy to the social contracts of squatter-farmers (Clay and Wright 2005).⁴⁹ These laws demonstrate that claims clubs, in addition to paving the way for the entry of federal law, also created the specific content of American property law; that is, U.S. property law absorbed the claim law of mining and riparian rights that settlers developed in response to local conditions (Clay and Wright 2005, 167). Consequently, scholars of the economy of property law today note such locally developed rules' greater efficiency and sensitivity to the variability of local environmental conditions, in contrast to the general rules for prioritizing claims that were handed down from a distance in other instances by the federal government (Libecap 2007; Anderson and Hill 1990).⁵⁰

These events, insofar as they created private property from indigenous lands, raise what is perhaps *the* fundamental question within the study of property, concerning the roots of legitimate title: "What gives any group of individuals, even those in control of the state, the right to bind others to its conception of property rights?" (Epstein 1979, 1238) Property law gives precisely three answers to this question, which continues to be the subject of incessant debate: the principle of discovery, the labor theory of value, and the right of the first in time. Contemporary law and economics scholars interested in the origin of property law on the frontier have looked for these principles in the historical record, and generally followed the analysis of Benjamin Shambaugh, who was the superintendent of the State Historical Society of Iowa for forty years. He held that these clubs, which represented "the beginnings of Western local political institutions," fostered "natural justice, equality, and democracy" (1900, 71, 83). In 1958, Allan Bogue noted that "[l]and historians and the authors of widely used western history texts have not deviated to any extent from this general interpretation" (232).

However, in keeping with the analysis I offer above, the records pertaining to these instances of property creation suggest that it was not an abstract principle but the organized violence of these clubs, again, that gave effect to the land claims made under the principle of discovery given by English charters, the "clearance" of indigenous populations that I have argued constituted the primary labor of colonization, and finally, the principle of the first in time. In contrast with colonial times, settlers united by compact defended their claims as vehemently against future settlers as they did against the indigenous peoples from whom they seized the land, justifying on their acts by calling on the rule of the first in time. A resident of Fort Dodge, Iowa, for example, recounted how the local association advertised that "any one attempting to Settle on any Lands Claimed by any Member Would be dealt With by the Club and his life Would not be Safe in that Community" (Swierenga 1968, 17). In 1830, an aggrieved Alabama resident in 1830 complained to the Secretary of War that "The citizens occupying this land, together with a few others, have held a meeting or convention, and entered into written and solemn resolutions to

⁴⁸ Hibbard adds, "There was much similarity in type in these organizations, although some had long and elaborate constitutions, while some had but a simple statement of principle and purpose" (1924, 203).

⁴⁹ The point of Clay and Wright's article is, however, that these laws developed divergently because of the particularities of the industries. Because of the idiosyncratic "search and race aspects of gold mining to find a small number of high payoff claims, there was an extreme tendency toward use-it-or-lose-it rules in the case of mining" (163); exceptionally high turnover and explicit condoning of claim jumping put "an inordinate premium on speed" (162, 169, 177), whereas "[f]or resource stocks such as farmland, early, unambiguous establishment of clear title minimizes wasteful conflict" (174).

⁵⁰ Federal requirements under the Homestead Acts, for example, meant more wasted resources because they specified holding sizes below the level of optimal economic efficiency, and required unnecessary investments like land irrigation, tree planting, plowing, etc. (Anderson and Hill 1990, 447).

prevent all, and every person, whatsoever, from viewing or exploring the land previous to the day of sale. Further, he reported that the members of this compact had “pledged themselves to do this by force of arms”: “In pursuance of these resolutions, a number of men who wish to buy farms of this land have been met by companies of armed men, and driven from the townships. They have surrounded a house (where three men had put up) at the hour of twelve at night, and compelled the landlord to drive them off” (Hibbard 1924, 199). The violence settlers wielded as a united body, by compact, also enabled them to control the outcome of federal land auctions by restricting competition in bidding (Anderson and Hill 1990, 193). The “Body Politick” they formed would choose one individual in each township “to bid off the whole of the land that they or any of their body may wish to buy.” Meanwhile, “the balance of their company [was] to be armed with their rifles and muskets before the land office door, and shoot, instantly, any man that may bid for any land that they want...” (Hibbard 1924, 199). Such violence was not peculiar to Alabama: in other similar cases where the first group of settlers in an area asserted their rights against *other arriving settlers* through the formation of a social compact, “[w]hipping was not unknown; threats of drowning are recorded; destruction of improvements common.” (Shambaugh 1900, 15). Shambaugh observes that “few, if any, lost their lives,” but that this result “was due in no small measure to the discretion of the offender,” for “the settlers were determined, at almost any cost, to enforce their regulations” (1900, 15). Though the special relationship between such “claim law” and expansion made such complaints largely futile, the Alabama resident begged the federal government to intervene in this “determined violence,” and reassert its own authority over the “the large body that is united” and the federal sale (Hibbard 1924, 199).

The Gold Rush was a sign of what was to come during the next era of American history. Because white settlers arrived in California late, it offers a potent illustration of the racialized determination of the “first” that property law privileges. Mexico ceded California to the U.S. at the end of the war with Mexico in 1848; neither party knew that nine days earlier, James Marshall had discovered gold at Sutter’s Mill. No federal mining laws existed, the government had just abandoned its attempt to regulate mineral extraction, would not pass any legislation until the 1866 Lode Law to determine claims to gold, and most local and federal law enforcers in California deserted to the gold fields themselves (Clay and Wright 2005, 159; Umbeck 1977, 49).⁵¹ Given the difficulty of travel from the eastern territories, fortune-hunters arrived in waves, and “geographic origin was the most important determinant of their order of arrival” (Chan 2000, 50). While Gold Rush historiography has long “depict[ed] the Yankee Argonaut as ‘universal man’ or... the quintessential miner,” the first miners who arrived in 1848 and in early 1849 were from Australia, Great Britain, China, Chile, France, Hawaii, Ireland, Mexico and Peru, as well as some settlers from Oregon (Chan 2000, 47).

The arrival of the infamous forty-niners, 90,000 of whom poured into the region beginning that spring, created a great disturbance in the social world of those early miners, as historian Sucheng Chan has related (2000, 57-58). They had no experience in gold mining, and at first were glad to learn skills from the more experienced Sonorans and Chilenos. But once they acquired some technical knowledge, these first white representatives of the U.S. resented the

⁵¹ For example, a letter from the military governor to the adjutant general on August 19 1848 despaired: “If sedition and rebellion should arise, where is my force to meet it? Two companies of regulars, every day diminishing by desertions, that cannot be prevented, will soon be the only military force in California... In the meantime, however, should the people refuse to obey the existing authorities... my force is inadequate to compel obedience” (Umbeck 1977, 49).

others' successes, and assumed that the U.S.' victory in the Mexican-American War had made all of California's wealth "belon[g] only to themselves—the land's new masters" (Chan 2000, 59). These settlers, many of whom were veterans, acted quickly to form compacts-- "local ad hoc associations"-- and "drew up regulations to govern how claims could be made and kept," specifying the claim sizes, numbers, recording processes, and investment requirements that they would recognize (Chan 2000, 59). They did not apply these "egalitarian practices" to "foreign 'interlopers,'" but used them as the means to consolidate their forces and "drive the foreigners out." Drawing on their collective force, they used "physical intimidation and discriminatory rules and laws" including evictions, floggings, shootings, robbery, fines, and the imposition of a Foreign Miners' Tax (Chan 2000, 60, 65). In spring, 1849, they posted notices in the Southern Mines "warning all non-U.S. citizens to leave within twenty-four hours"; by late September, miners along the North and South forks of the Stanislaus River declared that "none but Americans" could mine in those areas (Chan 2000, 64). In July 1850 in Sonora, settlers passed a resolution requiring foreigners "not engaged in permanent business and of respectable character" to leave within fifteen days, and the rest to turn their firearms in and obtain a permit "from a self-styled enforcement committee of American miners" (Chan 2000, 64). Individuals and foreign governments' attempts to resist or appeal these actions met with violent retaliation or no result, respectively (Chan 2000, 64-65). When the Forty-Niners' expulsion campaign began, "the English, Irish, and Germans lined up on the side of Americans against the other foreigners" in racial solidarity (Chan 2000, 60).⁵² As Chan observes, "assumptions underlying Manifest Destiny determined proprietary rights" (2000, 59).⁵³

A number of law and economics scholars interested in the origin of property rights have taken miners' codes and claims clubs from the Gold Rush era as a quintessential example of what scholars such as Karen Clay and Gavin Wright celebrate as settlers' development of "procedural alternatives to violence" (2005, 157). However, the historical record shows that in miners' claims clubs, like in other settler compacts, the reduction of violence within the settler community itself occurred in inverse proportion to the violence the community wielded against others; moreover, this reduction of violence was only relative, and based on a tenuous suspension of hostilities sustained by the constant *threat* of violence. Umbeck admits, "The concept of violence... is ambiguous," and could include actual physical force, or merely the threat of it (1977, 40). In the mining clubs, the threat of force pervaded the order the collectives established, though the likelihood of using actual physical force against outsiders was higher as a result of the collectives' foundational agreements to respect one another's claims.

Claim-laws based on the organization of collective, extractive violence produced orders that might more starkly be described as the law of the firearm, according to records from early mining communities. When a new deposit was discovered, miners created districts by explicit

⁵² The French were the one exception; from the early mining period they had formed close ties to the miners from Chile, Peru and Mexico. In response to the California legislature's imposition in 1850 of a Foreign Miners' Tax of twenty dollars a month (less than most placer miners averaged in gold dust per month), notices appeared in a Sonora mining camp calling "Frenchmen, Chileans, Peruvians, Mexicans," and declaring, "It is time to unite." Alarmed, the Americans in the vicinity gathered "about 180 well-armed men" in response, led by the sheriff of Tuolumne County, to confront "the foreign crowd" (Chan 2000, 63).

⁵³ The racial politics of mining developed considerably over the next decades, following the departure of thousands of Latino and French miners from gold country between 1850 and 1852, and the arrival in California of over 20,000 immigrants from China in 1852. Chan writes that this occurred "[i]n the absence of appropriate laws" (2000, 59). By contrast, I question here what "appropriate laws" could mean if U.S. law emerged out of the violence and racism she describes.

agreement, and before mining notices were printed, prospectors had to construct their own proclamations in every camp (Umbeck 1977, 51). Concretely, this meant that individual miners staked out their claim by constructing wooden posts, to which they attached written notices identifying themselves as claimants and warning others to stay away. These notices read, for example:

All and everybody, this is my claim, fifty feet on the gulch, cordin to Clear Creek District Law, backed up by shotgun amendments. – THOMAS HALL
(Shinn 1884, 558; Los Angeles Mining Review, 43)

Or more simply:

Clame Notise.

Jime Brown of Missouri takes this ground: jumpers will be shot.
(Los Angeles Mining Review, 43)

Or,

... any person found trespassing on this claim will be persecuted to the full extent of the law. This is no monkey tale butt I will assert my rites at the pint of the sickers shirter if leagally necessary so taik head and good warnin. (Shinn 1884, 559)

Settlers did not construct walls around these first claims, or enclose them. Rather, “[t]he pistol, which nearly every miner wore, was the primary instrument for maintaining exclusivity” (Umbeck 1977, 51)⁵⁴; The force of the “first” property law hung on the threat of execution communicated by such posts, which at once proclaimed the law of the land and declared the claimants’ readiness to kill. Both members and outsiders to the compacts were highly conscious that force was the essence of the reigning order, and that transgression would mean death. As in the New England communities formed by social compact, the *order* in this violence came from the collective’s agreement to utilize and support such force, which in essence provided procedural notice of what a future encroacher could expect. This order organized violence by distributing it in varying degrees, and though violence permeated this order, because it produced a relative privilege created by the difference between insiders and outsiders, the constant, tacit threat of force somehow came to look like peace.

Conclusion: Dispossession as an Externality of Expansion

Above, I suggested that Locke’s seminal narrative of the social contract was based on the historical events of social compacts in colonial America, and further offered a reading of the “state of nature” that engages seriously with Locke’s elaboration of it as a *relation*, and a transnational relation besides. Drawing on the historical context of New England, I also explored how Locke described the state of nature as a colonial relation ordering contracts in the contact economy, bringing the “laws of nature” into being as both a thought-product and a set of practice norms. This order of contracts was a dual order: it authorized a high level of coercion and

⁵⁴ Umbeck writes, “this fact is testified to by nearly every observer during this period” (citing, among others, Hittell 1898, 46; Marryat, 1855, 123).

violence in dealings with indigenous people to bring land and other material goods *into* the community's possession; and at the same time, it carefully regulated a lesser degree of coercion to maintain land and wealth within the community by granting individuals some level of predictability and guarantee of their protection. This contractual order of dispossession served, as I will discuss further in the next chapter, to slow the coercion that colonists used in extracting lands they already considered theirs under the principle of discovery. It was also employed to try to minimize the violence of the existing inhabitants' responses and to formalize and order the colonists' claims amongst themselves and against other Europeans.

I further proposed that the broader economic and social structure introduced by the discrete form of the social compact was premised on the relationship that Locke called "the state of nature." Moreover, it entailed a collective action project that organized violence in service of the aim of continuing colonization, or expansion. The success of this project—and the continuing relevance of Locke's text—is marked by the evolution of the social contract form from a basic event between individuals to a principle of structural development. Thus, the communities formed by social compact compacted with one another to form federations, and then federations of federations, leading eventually to the decision to form a union of States. This highest order of the compact maintained the basic dynamics that characterized the white settler community's expansion in the colonies, applying violence according to the "laws of nature" to expropriate indigenous lands, and bringing them under the possession of the settler community as private property. The laws of civil society were used to quiet disputes and protect entitlements between the members of the settler community, thereby maintaining the community's property as such and bolster its likelihood of survival by establishing a relative peace within it. However, under the new centralized order of the United States, I observed, the activity of making both contracts and compacts changed on the ground. The federal government assumed controlling responsibility for formalizing land dispossession—requiring the declaration of a "transfer" and the extinction of Indian title in lands—as well as its disposition to settlers. As a result, contracts became wholly governed by the laws of "civil society." Meanwhile, settlers continued to perform the labor of dispossession on the ground by forming social compacts, frequently called "claims-clubs" during this era, through which they staked out their rights not only against the indigenous people they displaced, but also against future settlers. They thereby established, through practice, a principle that has become a cornerstone of U.S. property law – the right of the first in time.

This history therefore shows how all three of the basic doctrines of American property law today operated in the creation of private property and the growth of colonial states into the nation-state. English colonists used the social compact to take possession of lands in America that the Crown had already claimed, and for which they had issued charters, under the *discovery* doctrine. Social compacts ordered relationships between their members to establish an order of entitlement that recognized the right of the first colonists to settle lands, to claim them. This principle of the *first in time*, finally, contains an endorsement of Locke's *labor theory of value*; according to Shambaugh, squatters organized claim clubs to forestall the land speculator and the claim jumper who might swoop in to seize what they had made rightfully theirs with "honest" labor and investment (1900, 83). As in the historiography of mortgages and colonial property law examined in Chapter 1, contemporary law and economics literature on claims clubs effaces the scene of dispossession, especially when taking the Gold Rush as a data mine for studying the

genesis of property rights. In its first-in-time iteration of the labor theory of value, its emphasis turns toward future competitors for land, rather than its past possessors.⁵⁵

This reading of the “social contract” through social compacts made in America offers a nexus at which to consider the interrelation between the narrative effacement of colonial practices of dispossession and the operation of those practices. Where mortgage historiography erased the scene of dispossession through the *omission* of mortgage transactions between settlers and indigenous people, the social contract narrative exemplifies two practices that are counterpoints to simple effacement and domination, and which point to both narrative and material practices, like the life of the compact itself. First, the *narrative* spotlight on the actors and relationships internal to the social compact obscures a larger picture of motivations, interactions and dependencies between the inside and outside communities, as well as the costs of colonial profit. Second, the legal practice of *recognition* brought outside communities under the scope of colonial law, colonial claims, and colonial enforcement power, to the extent that this power could execute its threats when called to do so.

Rather than totally eliding historical events, the spotlight narratives transmitted to us about compacts and contracts have focused on the relative peace they fostered between colonists, who have become universal individuals in a “colorblind” imagination. This narrative device avoids the difference and dependence that the social compact developed, and obscures how indigenous presence on the lands was the impetus for the formation of social compacts in America in the first place. It makes the process of *taking* resources from indigenous people in order to expand a colony appear to be the independent growth of a new society. The collective organization and use of violence was critical to the economic productivity of social compacts and colonial transactions, as well as to colonial expansion. Thus, the focus on the internal actors within a colonial community does not merely represent a one-sided perspective; it fundamentally distorts the dynamic of the story. It supplants a story of dependence with one about independence, reinvents a narrative about the institution of economic and racial difference as the creation story of a cooperative and egalitarian world, and replaces a story about violence with one about peace.

The economic concept of an “externality,” which captures a basic connection between disjointed accounts of the same story, may help us here, because of its close structural resemblance to the type of narrative patterning of the social contract that I have described. In legal education, an externality refers to a consequence of an activity experienced by persons understood not to be its principal actors; it is therefore a conceptually detached element, eliminated from the main frame of the activity. It at once privileges one narrative, and recognizes the limits of its understanding of actors and consequences—that is, that the activity has effects, and affects people, at or beyond the periphery of this narrative; it paradoxically identifies a part of an activity to discount it. The typical discourse surrounding the term “externality” further implies that externalities are inevitable and result from a psychology of good faith. Though economists have observed that externalities bring devastation and enrichment outside of what they consider to be “economic activities” proper, they assume and infer that externalities follow economic activity only incidentally. In a convoluted translation of “coercion,” they worry less about the violence that creates externalities than about the fact that the appearance of externalities takes away parties’ “choice” and free will; that is, they deplore the fact that people

⁵⁵ The common interpretation has been that the laws of first in time protected farmers from speculators (Anderson and Hill 1990, 444-45). But the victims of force and exclusion from these contracts, again, were often the “foreigners” who were already there—Chilean, Mexican, Peruvian, Chinese miners (Clay and Wright 2005, 169).

suffer involuntarily, or enjoy windfall “for free.” Harold Demsetz’ enormously influential essay on the emergence of property rights (1967) represents the general, prevailing view: that the solution to this problem of confounded choice is more law, or that legal provisions are a necessary and appropriate *response* to externalities.⁵⁶

If we recognize the economic motivations that drove colonial land expropriation and think of the social contract in terms of the economic figure of an externality, then we might consider dispossession to be a “negative externality” of expansion.⁵⁷ In this example, the primary effects of economic transactions, and indeed, the issue of the boundary of the community of the social contract, which fed its expansion and growth, are trimmed from the narrative to become a remainder of the story. In the wake of events that are rendered, implicitly, as innocent accidents, true to discourse about externalities, the profits of settler colonialism materialize as if through a series of miraculous events, and the social contract narrative becomes an invisibly racial formula that hides from sight both violence and the populations upon whom that violence has been concentrated. As in the most commonly invoked example of negative externalities, pollution from industry, the externality of dispossession here includes the costs of transactions that cry out later for redress, suggesting that externalities encompass not only unanticipated effects, but also effects that generate demands for redress that are unanticipated. Like other negative externalities, dispossession was a cost of business for which colonists assumed no responsibility, and which, for this very reason, held profit potential. The violence they used to produce this externality thus presented an opportunity with a hopeful temporality—the potential for eliminating or deferring these costs of business forever. Social contract theorists have observed that in any basic acquisitive transaction, an individual’s use of violence creates a personal advantage, but that such individual violence, unregulated or unconstrained by the threat of counter-violence wielded by the state, disintegrates social formation. The story of the growth of the communities formed by social compacts in New England suggests that the organized distribution of violence on the collective level harnesses the advantages it presents at the individual level, and mines its productive potential.

The law instituted by the social contract, or the laws of “civil society,” are heralded now for their peace-keeping power, and the idea of the social contract itself has come to represent the ideal of a cooperative, harmonious and egalitarian society. The direct line of descent of today’s American “civil society” from historical manifestations of social contracts, including the first compacts in New England and claims clubs, is proudly avowed. It somehow does not seem difficult to believe that we live in a “civil society” that *originated* in an ingenious form of political organization that was startlingly violence-free, even if we have somehow fallen short of that ideal; this idea accords with a conception of the law as an *alternative* to violence, a just force that keeps us safe, rather than a historical institution that maintains an ongoing uneven distribution of violence and privilege. The spotlight narrative has, in short, mystified the resonance between the social contract and the present. By making the source of present violence a mystery, it prompts the generation of theories of and debates about *who* is to blame for it. Ironically, the very violence that continues to issue from the social contract organizing this world

⁵⁶ In this theory, property rights arise to internalize the cost of “externalities,” which Demsetz admits is an “ambiguous concept.” He turns to the examples of Indian tribes in Quebec and the Southwest to make this argument that externalities necessitate law, rather than arising from it (1967).

⁵⁷ Adjusting the concept of “externalities” for this purpose requires stretching the frame of an economic concept typically used to describe discrete projects to cover the broad historical arc of the complex (if consistent), massive process of conquest, which began almost two centuries before the U.S. was established.

perpetually draws perplexed scholars *back* to the scene of the social contract, in hopes of divining a way to return to that supposedly perfect, non-violent order represented in the abstract or as a fictive past.

But here, I have tried to show how Locke's text both encodes *and* obscures material processes of conquest in America. According to this reading, his social contract narrative condenses two projects: it documents contemporaneous practices and performs the work of theoretical justification and facilitation of those practices by the same stroke. I further pointed to the symmetry between his narrative spotlighting and the economic concept of an "externality" to flag this economic and political strategy that relies on narrative as a part of its extractive practice, and has been most phenomenal and generative on the scale of collective, institutional life. The social contract narrative, in other words, captures the phenomena that the social contract form fostered: a history of institutional development through the collective organization of violence (see Tilly 1985), giving rise to a federal political structure that enters into engagements with the external world on the basis of its calculations of its own advantages in bargaining power, and a market in which transactions play out as a microcosm of this dynamic, and which remains grounded, quite literally, by speculation in real-estate. Eruptions of violence in this history, this historical society, then signal not the failure of law, but breaks in the tenuous legal fictions that cover ongoing processes of economic expansion, dispossession and violence. The lasting ideological consequences of historical social contracts have shored up the dramatic material rearrangements they effected during the first century of colonization, through the events that I have described here.

Chapter 3

Homeland Security and the American Dream

Immigration makes us stronger.

--President Obama, naturalization ceremony for active duty service members and civilians, March 25, 2013

Sacred land becomes real estate.

--Roxanne Dunbar-Ortiz, *Indigenous People's History of the United States*

In what sense did settlers' colonizing activities in America constitute acts of *war*? And what, in turn, will our answer to this question tell us about how we conceptualize war itself?

We can learn a great deal from the way military history does and does not recognize the colonization of America as warfare. It does not count the conflicts between colonists and tribes in histories of "regular warfare" in America, alongside the Revolutionary or Civil Wars. Furthermore, the so-called "Indian Wars" appear only very erratically across histories of "irregular" warfare alternately called colonial or small wars, asymmetric warfare, low-intensity conflicts, or counterinsurgencies as they are commonly known today. On the whole, this literature is relatively consistent in its inclusion and treatment of other campaigns—for example, the French in Algeria, the British in India, the U.S. in Cuba, the Philippines, and later, Vietnam. However, wildly variable assessments of relevance and reflexively applied formulas drawn from other scenarios characterize its treatment of the United States' first, foundational, colonially rooted conflict on its present ground. In early studies of the "principles and practice" of asymmetric warfare, the story of conquest in early America had a clear place: British Colonel Callwell's classic 1906 review of nineteenth century small wars, for example, examines the U.S. campaign of "desultory warfare" against "the nomad Red Indians" (1906, 22). But in other histories of small wars, this conflict is explicitly bracketed (Boot 2002)¹. Most often, it is absent altogether, as in the U.S. Marine's seminal *Small Wars Manual* of 1940, which otherwise drew heavily from Callwell's tract (Rid 2010; Schmitt 2004).² In a form of U.S. exceptionalism that manifests as exemption, the violence between whites and indigenous people in early America has become marginal, at best. Nonetheless, the struggle between indigenous people and white immigrants in America also occupies a *foundational* place in the history of irregular warfare in the major recent history of U.S. counterinsurgency doctrine by Andrew Birtle, Chief of the Military Operations Branch at the U.S. Army Center of Military History. Birtle calls the Army "a child of the frontier," and describes "Indian pacification" as an antecedent to and, because the conquest of America stretched over centuries, a model contemporaneous with the Army's first "counter-guerrilla" operations (1998, 7).

¹ Boot's historical overview of U.S. small wars focuses on campaigns abroad. He warns in his Introduction that there is "[n]othing on the many wars against Native Americans, the primary occupation of the U.S. Army until 1890" (Boot 2002, xvi).

² In his *Theory of the Partisan*, Carl Schmitt describes a combatant's irregularity as "determined by the force and significance to the regular that is challenged by him." He therefore isolates his interest in irregular battle to the post-Napoleonic era. (Schmitt 2007, 2).

Still, Birtle and others who do include the Indian wars in the history of low-intensity conflicts uniformly present indigenous tribes as an example of the variety of “irregulars” that the U.S. Army has faced. That is, they assimilate this conflict into a distinction from the literature on colonial wars that remains central to the modern definition of counterinsurgency—namely, a situation in which “regulars,” or soldiers in uniform, in “organized armies” struggle “against opponents who will not meet them in the open field” (Callwell 1906, 21). Under small war and counterinsurgency theory, “irregular” warfare obtains its character from the “elusive” enemies that regular armies face in “rebellions and guerilla warfare;” these guerillas, insurgents, and terrorists, formerly “savages and semi-civilised races,” fail to make the distinction between combatants and noncombatants that characterizes enlightened modern “war in form.”³ In this framework, the unique threat posed by the enemy necessitates the regular army’s engagement in “irregular warfare,” which therefore appears to be a defensive response to an external force, rather than aggression motivated by the aim of economic growth.⁴

However, the history of white-indigenous conflict in early America undermines this definitional distinction of irregular warfare, or at least its traditional racial alignment. The principal white combatants in conflicts with indigenous groups in America were not “regulars,” or members of the imperial or colonial militaries or the U.S. Army, which were too “tiny” and poor to effect a take-over of the continent (Birtle 1998, 7). Rather, they were settlers, an informal immigrant force recruited to assume the risks of frontier conflict that blurred the distinction between civilians and combatants, private and public agendas, domestic defense and pursuit of the kinds of “opportunity” that, in shorthand, have become known as the American Dream. As we examined in the last chapter, enterprising individuals and *families* moved to the frontier, where their armed defense of the long series of homestead plats meant securing their own domiciles. While the last chapter focused on how these settlers organized their forces on the frontier, this chapter turns to the role of the state in bringing them there in the first place, and in managing colonial and then U.S. expansion. Below, I show how colonial governments and then the U.S. federal government erected a battery of civil laws instituting economic incentives to encourage and direct settlers’ continuous encroachment on native land. Meanwhile, the state deployed its military as a police force to *contain*—not to conclude-- the conflict between settlers and indigenous people on the westward moving frontier.

³ Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 48, June 8, 1977, 1125 U.N.T.S. 3 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”). For this reason, in an article entitled “How to Fight Savage Tribes,” Elbridge Colby argued that “irregulars” present a combat challenge to which international laws of war categorically do not apply, or only ambiguously (1927). More recently, Secretary of State George P. Shultz, in a speech before the Anti-Defamation League of B’nai B’rith, while receiving the Joseph Prize for Human Rights in Palm Beach, Florida, February 12, 1988, stated of military operations in Libya, Columbia, Iran and North Korea, “We face a long and hard struggle against this modern barbarism” (Alexander and Kraft 2008, 112). In more theoretical literature, Carl Schmitt, in *The Theory of the Partisan*, also emphasized the distinction between the unidentifiable irregular and the regular as a soldier in uniform (2007, 10). In an example of narrative spotlighting in *Nomos of the Earth*, he looks at inter-European cooperation, without looking at the costs of colonialism to the colonized, to extol the “miracle” of “war in form” (Schmitt 1950, 150-51).

⁴ During remarks at a photo opportunity with the National Security Team in the Cabinet Room on September 12, 2001, President George W. Bush said, “The American People need to know that we’re facing a different enemy than we have ever faced. This enemy hides in shadows, and has no regard for human life. This is an enemy who preys on innocent and unsuspecting people, then runs for cover” (Alexander and Kraft 2008, 248).

In what follows, I explore the strategies that colonial and then federal governments employed for *escalating* hostilities—recruiting immigrants to aid in expansion—as well as for *deescalating* them, and maintaining them at a low intensity, to avoid the outbreak of full-scale war. The latter included wide range of tactics aimed at indigenous and settler “hearts and minds,” including native conversion efforts, trade regulation, and payments for services and eventually for losses through an early government tort system. This system shows how the state created a vast system of private incentives, which it coordinated with a system of public law enforcement by deploying their policing military force to oversee the conflict. It also demonstrates the convergence between the structure of incentives procuring labor for conquest and the processes by which they created a new market in lands. Families staked out the Anglo-American claim to indigenous lands by making personal claims and assuming risks in hopes of improving their own fortunes; by defending their homesteads, they carried out the aggression of colonial expansion, establishing colonization by settlement as the foundation for the intimacy between American discourses of war, consumerism and the American Dream. Through this process of aggression and expansion, which was at once economic and military, the land became a fungible asset, a market commodity. Meanwhile, the regular military assumed the function of policing interracial strife which, through the very progression of conquest, shifted the conflict from the order of transnational warfare to a violent, racially divided and permanently armed national social fabric.

This chapter thus suggests that the distinction between the land market and the military in America is an artificial one, even though these issues are conceptualized as polar opposites (at least in mainstream parlance). They are often invoked in relation to one another: the conservative think tank, the Heritage Foundation, and the Obama White House, for example, would likely agree on the idea that the security state is necessary to protect the American economy, which supports the “American way of life,” and the American Dream (Feulner 2012; White House 2013). In exploring the processes of contact economy as aggression, this chapter takes up phenomena that have been excluded from recognized binary categories despite integrally belonging to both of the categories conceptualized as opposites: these binaries include war and peace, the military and the market, national defense and the economy, laws of public and private, civil action, conquest and consumption. Indeed, these phenomena are erroneously relocated to an in-between “grey area” when they are not wholly ignored, perhaps because they tend break down popular understanding of these binaries themselves. As Talal Asad has pointed out, in colonial “small wars” and counterinsurgencies, “the separation between war and peace is not easily established,” both because, as the Small Wars Manuals instructs, they entail ongoing diplomacy and military action together, rather than one putting an end to the other, and they require no formal declaration of hostilities (1940, 2-5). We might then define low-intensity conflict as war without beginning or end, which rages on in the everyday life of the margins, without intruding on the everyday life of the metropole.

If the law of war is a language of interpretation and argument, as David Kennedy has argued, its rhetorical effects not only distinguish and demote colonial warfare relative to “conventional warfare,” but make it more difficult to articulate its “space of violence shared by ‘war’ and ‘peace,’” or to render its violence less visible, less articulable, less known (Kennedy 2004; Asad 2010, 16, 5). The invisibility of the violence of ongoing counterinsurgency efforts mirrors that of the white-indigenous hostilities from which the U.S. emerged, and which continue to haunt them. The Small Wars Manuals heads the reading list for the Afghanistan counterinsurgency training command; theses from the School of Advanced Military Studies urge the Army to draw on principles from nineteenth-century small wars and Apache Wars, especially

the military use of “non-military tactics” described in the Small Wars Manual, for the “prolonged,” “protracted” operations in Iraq (Siegrist 2005; Macak 1988). Further, as Roxanne Dunbar-Ortiz has noted, the phrase “Indian Country” remains a military term of trade, which the American military has used to refer to other “counterinsurgent” or asymmetric excursions to mean “behind enemy lines” (2004). *Atlantic Monthly* writer Robert Kaplan noted, “ ‘Welcome to Injun Country’ was the refrain I heard from troops from Colombia to the Philippines, including Afghanistan and Iraq” (2005, 4); “Vietnam, the soldiers said, was ‘Indian Country,’” historian David Stannard has written, and Captain Robert B. Johnson, during congressional war crime hearings concerning the My Lai massacre, explained his use of the phrase by saying, “It is like there are savages out there, there are gooks out there. In the same way we slaughtered the Indian’s buffalo, we would slaughter the water buffalo in Vietnam” (Stannard 1992, 251; Silliman 239).

Below, I elaborate on this history that the military so frequently refers to, to show how colonies and then the U.S. government stoked and harnessed private violence by carefully structuring private incentives given by *civil* laws—not only by the laws of property and contract I explored in Chapters 1 and 2, but immigration law, public land laws, and the tort system of depredations claims. These governments thereby facilitated white immigration to the continent and westward, and oversaw a stratified immigrant society that continued to move poor immigrants to the frontier. The white community’s territorial land-base in early America therefore grew not primarily from formal military conquest but from cross-Atlantic and westward migration that the government intended to effect Indian removal and tribal land appropriation. As I will show, white America *produced* its security concerns through its pursuit of an aggressive expansion policy that relied on settlers’ labor to remove indigenous peoples, the destruction of indigenous polities, and the occupation of indigenous lands.

PART I

Strategies of Aggression and Containment During the Colonial Period

Colonial Security

In the colonial era, two meanings of security— removal from harm and object of trade--converged in land. Historians of colonial America invariably name security in the first sense as the chief concern of early European immigrants, and James Willard Hurst too identified it as “a natural emphasis in colonial law”: “Isolated, endangered by Indians and imperial rivalries,” he wrote, “we felt the need to draw tightly together in our separate colonies” (1956, 37). For colonists, security derived from distancing Indian communities from the community as a whole spatially, which they saw as a measure that would aid them in defending their homes. Therefore, laws concentrated settlement, for scattered settlement made whites less able to defend themselves, as well as more reliant on the military services of the government (Kades 2000, 1159). In Plymouth, therefore, each person was given one acre of land only for a minimum of seven years “as near the town as might be,” so that “they might be kept close together, both for more safety and defense, and the better improvement of the general employments” (Bradford 1952, 145). Where migrant families otherwise might have dispersed to exploit the rich land, indigenous presence patterned settlement according to a concept of security that required both racial homogeneity and clustering, and continuous expansion.

At the same time, exclusive occupation of land displaced Indians and made colonists richer. During the colonial era, land meant wealth; the more individual settlers gained in land, the more colonial states gained in political territory, and the more the community gained in collective wealth, resources and power. As we have seen, colonized land enclosures became a market commodity, the value of which would rise as indigenous inhabitants were displaced, rendering the land more “secure.” Colonial politicians, including the citizens of the General Court in Massachusetts and the Virginia House of Burgesses, considered settlers cheaper and more effective than mercenary troops for performing this labor, perhaps because in addition to participating in armed conflict against tribes, they also spread disease and thinned game (Rohrbough 1968, 61-62). Thus, many colonial governments’ required that settlers “improve” land by clearing and building upon it in order to claim it: Virginia’s “ancient cultivation” statutes, for example, gave squatters title for clearing sufficient acreage (Hening 1619, 206-07); and Massachusetts required settlers to settle at least five acres of land and to build a house to perfect their titles (Ford 1910, 103). Many colonies expressed the value of this labor by adopting a rectangular survey system in which they sold the first sections within a block to settlers for next to nothing, and subsidized these sales by reserving the last section until its value multiplied significantly from settlement. In another variation, landowners in Augusta, Maine, reserved every third lot, hoping to sell after settlement increased the value of unsold parcels (Ford 1910, 101).

Historians have frequently blamed the violence of the American frontier on an “aggressive, undisciplined” settler “rabble” (Sosin 1967, 83). But this characteristic has obscured the governments’ role in cultivating the dynamics of the time. From the earliest days of settlement and into the nineteenth century, governments created policies incentivizing families to move to the frontier with promises of facilitating land ownership, and deliberately placed newcomers along the Indian border, “where their bodies might be a buffer between the French or Indian raiders and the British settlers” (Sosin 1967, 3). Colonial governments, including Virginia, Pennsylvania, Maine and Georgia, thus helped immigrants to cross the Atlantic, and in exchange for the risks that they would assume, offered support to them during their first years on the frontier in the form of military bounties, land grants, tax subsidies, and agricultural implements. Virginia’s “headright” system awarded fifty acres to each immigrant (Robinson 1957, 32-33); Georgia experimented with offering lands to Jewish families in backwoods areas where it proved most difficult to lure settlers, and even banned importation of slaves periodically in order to try to create a labor market with sufficiently high wages to attract European settlers (Spalding 1977, 4, 20, 48, 60-61, 72). As Sosin writes, “due to the desire of the royal and various colonial governments to establish a bulwark of settlers in the back country, by the middle of the eighteenth century even those with very limited means could legally obtain tracts” (1967, 25). Through this system of bribery, colonial governments meant “to promote compact settlement on the frontier by men able to defend it, and in this way to secure protection without the expense of a standing army” (Ford 1910, 103-04; Sosin 1967; Paxson 2001; Cadle 1991).

Thus, families carried out the labor of indigenous land appropriation in America, and moved to the frontier to claim land following incentives created by governments. The importance of the nuclear family formation in this plan cannot be overstated, for this laboring unit both furthered expansion and created peculiarly personal stakes in the project of empire. Colonists in America directly imported the form from England, where households consisted of parents and

children, with hired workers performing a gendered division of labor.⁵ While few women accompanied the first English exploring parties and trading companies that travelled to North America, England quickly “discovered that commercial profits and economic development required stabilized communities rather than rapid exploitation” (Abramovitz 1988, 45). The imperial strategy for colonization shifted to settlement, and trading companies and colonial leaders began “to bring women to America to stimulate the formation of families” (Abramovitz 1988, 45). By increasing the “supply of free white women,” governments aimed to induce farmers to marry and invest in their homesteads, rather than return to Europe. Trading companies thus paid transportation costs for planters who brought wives, provided additional land to men who married, and promised to give new couples servants to help “preserve families and proper family men before single persons.” In 1619, the Virginia House of Burgess allotted husbands an equal land share for wives, and between 1620 and 1622, the Virginia Trading Company of London sent 140 women to the colony “to make the men there more settled and less moveable” (Abramovitz 1988, 46).

Colonial policy reflects the high priority of recruiting women in land laws offering inducements to women themselves (Kessler-Harris 1982, 11).⁶ At the same time, however, laws of marriage, inheritance, and paternity cultivated dependence upon patriarchs, and created obstacles to women’s independence; husbandless women and unwed mothers, as well as many men, were deported or sent back to their place of origin (Abramovitz 1988, 99). Colonial law generally encouraged whites to marry and to remarry upon divorce, and criminalized “deviant” sexuality. Massachusetts, for example, prohibited unmarried adults from living outside family units or established households (D’Emilio 1983, 104), and Maryland’s legislature introduced a bill in 1634 threatening to repossess land from women who did not marry within seven years of receiving it.⁷ Colonial communities consisted of nuclear families, and each unit was governed by a male property-owner and head-of-household, who controlled the reproductive and domestic labor of women and children. Massachusetts Bay encouraged families to become “little cells of righteousness” and act as centers of governance, schooling, training, business, welfare and church (Kessler-Harris 1982, 4). Marriage was the “lynchpin” of the colonial family ethic, “the centerpiece of the economic system,” and the “keystone of social order” in Puritan New England (Abramovitz 1988, 53; Kessler-Harris 1982, 4).

Colonial governments pursued encroachment on Indian land by encouraging both immigration and reproduction. The more bodies there were to lay claim to land, the more they brought under colonial jurisdiction. As a result of these policies, the white immigrant population in America grew from about 40,000 in 1650 to 235,000 by 1700, by which time natural increase became “the key factor in white population growth.” In New England, the birthrate averaged over seven children per woman of childbearing age (D’Emilio 1983, 104), and across the colonies, men fathered about seven children on average within marriages (Perkins 1988, 3).⁸ Benjamin Franklin cited early marriage and large families as the chief explanations for American

⁵ This nuclear family structure contrasts with household formation in Eastern Europe, for example, which included grandparents, cousins by blood or marriage and other extended family (Perkins 1988, 152).

⁶ Pennsylvania offered seventy-five acres to each woman who came at her own expense, and Salem, Massachusetts offered “maid lotts” to unmarried women (Kessler-Harris 1982, 11).

⁷ “Unless she marry within seven years after land shall fall to hir, she must either dispose away of hir land, or else she shall forfeite it to the nexte of kinne, and if she have but one Mannor, whereas she canne not alienate it, it is gone, unlesse she get a husband” (Abramovitz 1988, 46; Kessler-Harris 1982, 11).

⁸ By 1750, the sex ratio between men and women, slave and free, became evenly balanced, and birthrates reached the estimated biological maximum for both whites and blacks (Perkins 1988, 7).

growth, and estimated that the typical number of children per family was twice as high as it was in England and in the rest of Europe (Perkins 1988, 3). During the same period, colonists grew the American slave trade to keep “development” of the lands apace with its seizure, and forced immigration drove the dramatic increase of the black population until the 1740s, although the reproductive labor of black bodies also critically fueled the accelerating expansion of the colonies by producing workers and commodities. As Edwin Perkins notes, the spectacular growth of the colonial economy during the seventeenth and eighteenth centuries was due to a staggeringly rapid increase of the free white and black slave populations (1988, 1-2). The total colonial population had doubled every quarter of a century as the indigenous population declined, and in 1775, the population, both white and black, reached 2.6 million (Perkins 1988, 1-2); natural increase was responsible for over 70 percent of this growth (Perkins 1988, 10).

In short, the political economy of the colonies drew upon a division of labor between the public and private on both the state and familial levels: the private economy of the family fed the public economy driven by conquest; gendered productive and reproductive immigrant labor constituted the engine of state-engineered expansion. Government design employed the promise of lands to lure immigrant families to the American frontier, where they destroyed the environments upon which tribes depended for survival, engaged in direct combat with natives, and reproduced their own forces. The accomplishments of the colonial policy of using families to conquer lands included obscuring the government interest in and the political and military nature of settlement. For this policy cast the labor of indigenous land appropriation as voluntary market participation, a private investment for American families, and a matter of defending settler homes. It also transformed land into a fungible asset-- or security-- in the new colonial debt-based economy, giving rise to a speculative financial market in America.

De-escalation and Conflict Management

Expansion thus proceeded principally through the “low-intensity conflict” of continuous settlement. However, these activities stoked tensions that constantly threatened to burst into overt military aggression, and sometimes did. A critical part of waging low-intensity war, therefore, were strategies that colonists employed in an ongoing effort to decrease the interracial tension generated by the exploitation and violence of the contact economy. Specifically, colonists employed containment tactics including proselytizing efforts, enlisting indigenous people in the labor of conquest, and regulating trade to “protect” and “pacify” natives (see Ch. 2). The colonies’ urgent need for “hearts and minds” measures of war stemmed from the insufficient ability of New England’s militia to carry out colonization at the rate of settlement using force alone. For as Johnson writes, while “[o]n paper, the militia remained the epitome of the “well-regulated” armed citizenry enshrined in historical folklore[, i]n practice, as a number of contemporaries perceived, it was more an ornament of local social and political life than an adequate weapon of war” (Johnson 1977, 639).

It is worth noting first, however, that colonists used these “hearts and minds” tactics in *conjunction with*, rather than instead of so-called “traditional kill-capture approaches” exemplified by episodes like the infamous pre-dawn surprise attack of the 1637 Pequot Massacre of (Ch. 1, 25). Such episodes of shocking brutality indicate a colonial strategy that closely resembles the approach that Harlan Ullman and James Wade’s 1996 report recommended to the U.S. National Defense University for achieving “rapid dominance” through “imposing a regime of Shock and Awe.” Ullman and Wade explain that the tactic of instilling terror in the enemy

works by overwhelming an adversary “on an immediate or sufficiently timely basis to paralyze its will to carry on.” Forces “seize control of the environment and paralyze or so overload an adversary's perceptions and understanding of events that the enemy would be incapable of resistance at the tactical and strategic levels” (1996, xxv). This intimidation tactic worked consistently with the greater threat colonists had already presented to the lives of indigenous people by bringing epidemics: some natives groups feared, not inaccurately, that the sicknesses were another technology “that the English had brought and could inflict upon them again” (Salisbury 1992, 502).⁹

Through sustained efforts to convert indigenous people in Southern New England, Puritan missionaries hoped to diminish tensions by winning native confidence and sympathy, and to weaken tribal unity by attracting natives to European ways of life. To similar ends, colonists in Virginia also sent carefully selected members of tribes, including Powhatan and his counselors, to Europe “with the expectation that upon their return they would spread the gospel of European superiority throughout their villages” (Axtell 1988, 140-41).¹⁰ Of course, the very premise of the conversion effort conveyed powerful convictions about English superiority, even as it also served the function of formally eschewing violence and making their invasion of native lands more palatable to their communities in America and in Europe (in contrast to the activities of the New Model Army in England and the Spanish conquistadors) (Bross 327). In New England, furthermore, the colonists’ conversion efforts only officially began after colonists felt that they had obtained military and economic control over the region, after the Pequot Massacre and Miantanomo’s murder (Salisbury 1974, 30; Ch. 1, 25-26). This timeline suggests that conversion efforts were management tools, rather than ways of building new relationships, and “presupposed [colonists’] domination of the prospective converts and the latter’s isolation from outside influences” (Salisbury 1974, 30).

During the mid-1640s, a period of accelerated expansion and economic growth, Massachusetts passed legislation requiring all Indians to undergo religious instruction. Over the next three decades, John Eliot formed fourteen “praying towns” of Indian converts, where he established schools and congregations, and translated the Bible and many other tracts into Wampanoag (Salisbury 1992, 503). The praying town was a tool through which the colonists explicitly sought to “make the Barbarians stationary” and “gather them together from their scattered kinde of life; First unto Civile Society, then to Ecclesiastical” (Brenner 1980, 140). Bounding and segregating groups on these early reservations “pushed aside once scattered groups of Indians into tight units, thus making land available for White settlers” (Brenner 1980, 140). It helped colonists control the populations, and to maintain boundaries between their communities. Evidence shows that English missionaries targeted the communities that had been most severely damaged by disease, and were the most successful in converting indigenous people from communities that had been most devastated by epidemics or war (Brenner 1980, 138; Jennings 1971, 206). Eliot did not approach strongholds of native political life. Instead, he began his preaching on the seaboard by seeking out vulnerable families, people whose tribes had experienced political fragmentation and dislocation, and had lost much of their land. With this approach, Eliot employed the strategy Petraeus would recommend in his *Guide for Action in the*

⁹ Meanwhile, the English interpreted the epidemics, and their success in destroying the Pequots, as signs from God: “But God was above them, who laughed his Enemies and the Enemies of his People to Scorn, making them as a fiery Oven... Thus did the Lord judge among the Heathen, filling the Place with dead Bodies” (Bross 2001, 325; see generally Silva 2008).

¹⁰ Axtell dates this strategy from colonists’ taking three Tupinambas from Brazil to Rouen in 1562 (1988, 140-41).

Counterinsurgency Field Manual of 2006, of “seeking early victories.” These conversion efforts provide an early model for the following advice Petraeus gives to counterinsurgents: “Do not try to crack the hardest nut first. Do not go straight for the main insurgent stronghold or try to take on villages that support insurgents. Instead, start from secure areas and work gradually outwards. Extend influence through the local people’s networks” (U.S. Dept. of the Army 2007, A-5: A29).

Many natives resisted these conversion efforts and had little use for the white men’s religious teachings (Ronda 1977). Yet under the circumstances, for native communities facing the greatest challenges, conversion “was potentially a cost-benefit situation” (Brenner 1980, 138). As Elise Brenner writes, “[i]t was not Uncas, Metacomet, Ninigret, Massasoit and their followers who were eager to convert, for their own despair and the undermining of their tribal resources had not yet become quite so devastating” (1980, 138; see also Salisbury 1974, 36). For native peoples living under conditions of slow, sustained, and sometimes explosive assault, conversion was a highly pragmatic choice that granted tribes some degree of autonomy and self-determination. In exchange for ostensibly adhering to a body of restrictive legislation, they received “protection,” food, shelter, and a means of livelihood. The Massachusetts, for example, lost 90 percent of their coastal population, and yielded up all their land to the Bay Colony in 1644. After this cession, no member of the tribe could hold title to any lands unless the General Court donated reservation land to him. Francis Jennings writes that “Indians were not slow to grasp the association: to accept the missionaries was to secure a place to live” (1975, 206). Since Europeans did not intend to fully assimilate Indians into mainstream colonial society in New England anyway, they did not closely monitor day-to-day activities in all praying towns (Brenner 1980, 141). Tribes were thus often able to follow traditional lines of political succession, even if under the guise of English-imposed European-style elections (Brenner 1980, 141; Bragdon 1996, 580).¹¹

In 1675, the hostilities created by ongoing settlement in New England reached a tipping point and burst into Metacom’s War. A number of major tribes in the area formed a coalition to attack over half of New England’s towns, destroying or heavily damaging nearly a quarter of them (Johnson 1977 625; Lepore 1998; Kawashima 2001). Indians who spoke English, who had adopted English dress, and who quoted Scripture had previously assured New Englanders of their own good work in converting the natives. However, they now began to trigger the suspicion of colonists, who turned on other whites that they considered “Indian-lovers” during the war. War narratives of the time “repeatedly asserted the difficulty of telling friend from foe and reported instances of the enemy using the English language, dress, and even Christian religious rhetoric as camouflage or weapons” (Bross 2001, 335-36). In accordance with this logic, colonial authorities and troops did not differentiate between the enemy and the loyal Praying Indians, whom they incarcerated on Deer Island for seven months, where many died (Bross 2001, 336). In the same spirit, after the War, every colony passed legislation imposing “policies of strict control through ethnic segregation,” confining Indians to restricted areas, and forbidding them to enter towns or travel at night (Johnson 1977, 625-26).

Ironically, it was during this period of profound mistrust that colonies first adopted the tactic of employing Indian auxiliaries, though they had previously excluded Indians from the colonial militia. The New England colonies did so only reluctantly, after witnessing

¹¹ The autonomy that natives garnered through varying degrees of compliance with colonizer demands may explain why many sachems and their advisers also adopted Christianity and became literate, while continuing to rule native communities, even in the areas least affected by disease, such as the southeastern regions of Massachusetts Bay and Plymouth Colonies and on Martha’s Vineyard and Nantucket, (Bragdon 1996, 580).

Connecticut's astonishing military success after particular circumstances caused the Mohegans to volunteer their services to the colony. Hartford pled to Massachusetts and Plymouth to likewise "improve Indians against Indians," and these colonies followed suit in 1676. Their Indian recruitment, which began in 1676, and subsequent employment of native scouts and auxiliaries caused their kill-and-capture rates to spike and led to the execution of Metacom himself (Johnson 1977, 628). Eventually, every colony would engage indigenous people to fight for them, and the dispatch of racially combined parties "became the pattern of New England's offensive operations for many years to come" (Johnson 1977, 625, 628).

New England plunged into an intensive search for Iroquois aid during the forty years following Metacom's War precisely because of the *weakness* of settler colonization, from a military perspective (Johnson 1977, 638-39). The colonies' reliance on a settler militia to remove indigenous polities meant that it was entirely impractical to "stri[p] entire communities of their manpower" during episodes of heightened military conflict by drafting men (Johnson 1977, 639). The civilian militia that maintained the prolonged war of conquest were already engaged in "local self-defense," and could not be reassigned to defend other townships scattered across 300 miles. As Johnson writes, "Unlike Europe, New England had no floating surplus of able-bodied manpower ripe for gathering into military service."

The recruitment of local Indians "offered a convenient solution to many of these difficulties" (Johnson 1977, 639). Indigenous soldiers not only made it possible for the colonists "to bridge a period of weakness in their own military institutions," but also provided the colonies with "the advantages of a professional standing force with few of its dangers" (Johnson 1977, 641). In the field, natives were highly mobile, could act as spies, and possessed the skills required to "live off the land." Colonists found natives easy to lead, as well as to disband, for to the English they were "expendable": they had no relatives who would vote in future elections, did not draw pensions, and "did not disrupt the economy when called into service." Furthermore, native soldiers, who often understood themselves to be fighting for their homelands too, fought well, and were, by various accounts, "far more capable than the English, and "very terrifying to the Enemy." As a result, colonists came to find them indispensable in battle: James Fitch, Jr. opined, "We have found non like indians to hunt down indians," and in 1700, John Tracy wrote to Governor Fitz-John Winthrop, "Our English souldiars wait and loose their time for want of Indians not knowing the woods or manners of that work, and Indians we can git none" (Johnson 1977, 640). However, this very dependence intensified anti-Indian sentiment amongst colonists even as their leaders solicited their aid; Johnson recounts how "the Indian's superiority in border warfare" only grew the "impotent frustration" of frontiersmen, who found "the attempts of their own governments to enlist the Indian to protect them" galling (Johnson 1977, 650).

Indian auxiliaries were finally also an economical choice for colonists. In Plymouth and Connecticut, they were paid just over half the wages of their white counterparts. This disparity notwithstanding, colonial leaders took great care to ensure that Indians received the compensation they were due, and must have therefore viewed the situation as win-win. It is difficult to tell which party had more to lose. In 1696, for example, James Fitch wrote to Massachusetts, "If now our Indians are kindly used, you may hereafter have more, if other wise non will stir," and in 1712, Dudley entreated a New Hampshire subordinate to treat enlisted Indians well, explaining "I shall never get an Indian to serve for your province again if they want a shilling of their due" (Johnson 1977, 647).¹² The "frequent wranglings over money" reflected in the historical record, with this care, suggest that pay and bounties were a powerful inducement

¹² Dudley to Samuel Penhallow, Mar. 17, 1712.

for Indian soldiers (Johnson 1977, 644). Johnson recognizes, again, that there is a paucity of materials “on which to base an interpretation of the Indian’s side of the relationship and fewer still that have not passed through the refracting glass of white transcription” (1977, 643). Nonetheless, at a time when New England tribes were being stripped of their lands, he suggests that much like conversion, military service was often “a personal strategy for survival, a revealing and neglected phase in their response to the dislocations inflicted by European colonization” (1977, 643). Income was an inducement, however low, and the natives who served in the greatest numbers were, like those who converted, from tribes “whose way of life were most deeply affected by association with white society;” these, again, were the communities most affected by disease and warfare (Johnson 1977, 647).

In the swirling change of the contact economy in the late colonial period, colonists were highly conscious of their ability to deploy offers of income and favorable terms of trade as a means of “diplomacy” to address their limited military resources.¹³ Massachusetts was the first government to “assume complete responsibility for the conduct of the trade” by establishing and operating truck-houses (Macfarlane 1938, 48).¹⁴ With this action, the Province hoped to offer tribes at least some protection from abuses “which were all too common in their relations with private traders.” They hoped thereby to fortify tribes’ distinction between the colonial government and private individuals and groups, as well as to discourage native groups from allying with their competitors, the French. During the early years of colonization, the governments of Plymouth and Massachusetts Bay had created monopolies for profit, but after Metacom’s War, the aim shifted: “The public truck-houses were established to win the friendship of the Indians, rather than to earn a profit for the colony” (Macfarlane 1938, 48).

During the early eighteenth century, these truck-houses carried on trade with local tribes during periods punctuated by the outbreak of war between New England, New France, and the Wabanaki Confederacy. Indeed, the truck-houses were established through an Act passed shortly after the Eastern tribes allied with the French in King William’s War. This Act stated its explicit purpose as furnishing the tribes with “Clothing and other necessaries... at such easy rates and prices as may oblige them to adhere firmly to the English interest” (Macfarlane 1938, 50).¹⁵ In a sign of how the colony formally imbricated trade with its military project, the government fortified the trading houses with garrisons. Government agents managed the trade according to the advice of the militia, and often drew an allowance as military officers in addition to their salary as truck-master (Macfarlane 1938, 53). When Captain Joseph Kellogg advised the government that a trading post would improve relations with natives on the Connecticut, the General Court set up Maldon’s Fort to “supply the Western Indians with a suitable Quantity of European and West India Goods” (Macfarlane 1938, 51). “Successful” truck-masters originated many ideas on which the government based eighteenth-century Indian policy, which usually included specific instructions to undersell the French (Macfarlane 1938, 54).

The truck-houses caused considerable controversy between colonists, above all since “[g]overnment management of Indian trade was never profitable to the province from an economic point of view”: “goods were sold to natives cheaply, agents paid a high figure for their furs, and the trade involved high transportation costs, building and fortifying the truck-houses themselves, as well as salaries for truck-masters, armorers, missionaries, and the ten to twenty

¹³ See especially Chapter 1.

¹⁴ All the American colonies attempted to minimize colonial casualties of settlement by restricting the sale of liquors, firearms and ammunition to natives.

¹⁵ “An Act for giving necessary supplies to the Eastern Indians, and for Regulating Trade with them.”

garrison men who were all stationed at each truck-house” (Macfarlane 1938, 58-59). Moreover, despite legislation prohibiting the advance of credit to natives, the trade still led to “bad debts,” abuse of native customers, “leakages and losses in goods in transit,” and other losses not accounted for by the record, which led to contentious disputes about how to regulate or censure truck-masters (Macfarlane 1938, 60-62). These houses also required the government to confront and manage the misunderstandings which so often underpinned trade in the contact economy. Since many native groups, including the Penobscots and Norridgewocks, also continued to struggle to understand the English logic of trade, specifically concerning why prices rose and fell. The Governor struggled to explain: “but you must know they rise and fall & it can’t be help’d but the Government will always use you as well as they can & better than any other will use you.” (Macfarlane 1938, 64).

However, during one period of dispute between the Massachusetts Governor and Assembly over all of these issues and “the conduct of military affairs in general,” a series of battles known as Râle’s War broke out. When it ended, with the Treaty of Falmouth, the Massachusetts government committed firmly to the truck-houses and apportioned greater funds for their maintenance, embracing them as a stop-gap measure that could dissipate tensions and allay intense warfare that might interrupt expansion. Massachusetts understood that “even when substantial losses were sustained at the truck-houses, the net loss to the province was much smaller than what would have been incurred in an Indian war.” It hoped to use these posts to “watch the movements and temper of the tribes, to re-establish their confidence, and to subdue their jealousies and suspicions,” and thereby maintained a relative peace for twenty years (Macfarlane 1938, 55-56).

In the Counterinsurgency Field Manual of 2006, Petraeus explains that the “true meaning” of the phrase “hearts and minds [...] comprises two separate components ...: ‘Hearts’ means persuading people that their best interests are served by COIN success. ‘Minds’ means convincing them that the force can protect them and that resisting it is pointless” (A5:A26). As I showed above, colonists deployed “hearts and minds” tactics only after decimating indigenous political orders and ways of life to the extent that they held significant bargaining power over natives, and could control the variables of natives’ calculation of their own “best interests.” Indigenous peoples’ diminishing ability to actively resist the forces of colonial settlement—a result of colonists’ legal consolidation of their own bargaining power, as well as their use of kill-capture techniques—made the promise of *relative* autonomy, fair dealing, and opportunities to earn income and claim lands, distinctly preferable to the absence of all of these in the rapidly transforming environment. As Petraeus adds, neither the matter of best interests nor of fear of the alternatives “concerns whether people like Soldiers and Marines. Calculated self-interest, not emotion, is what counts” (2007, A5:A26).

Transition: On the Eve of the Revolution

The complementary colonial effort of aggression and management of hostilities intensified so tremendously during the mid-eighteenth century that the most outstanding characteristic of the Revolutionary War, in this environment of ongoing warfare, was the division that it articulated within Empire. During this period, so many migrants poured across the borderlands of settled society that the threat of full-scale interracial war reached fever pitch. Interracial violence was especially rife along the borders of Virginia and Pennsylvania and in the backcountry of Georgia and South Carolina. These states that had all encouraged expansion and

offered subsidies for settling back country land that they wished to populate with immigrants. These states also offered other inducements, including livestock, utensils, food, religious toleration, easy terms of naturalization, and travel grants, in exchange for short periods of indenture (Sosin 1967, 21; Hutchinson 1981, 389). Meanwhile, officials not only permitted but “rather encourage[d]’ the murder of natives,” like magistrates of Virginia and Pennsylvania frontier counties who an Indian agent observed, “ought to have preserved the peace” (Sosin 1967, 83). By the 1750s, Superintendent William Johnson learned that the Seneca believed that the English “intended to dispossess them of all their lands.” Similarly, missionary John Brainerd reported that members of several tribes in Pennsylvania “understood that the White people were contriving a method to deprive them of their country.” The Creek in Georgia began to call the English *Ecunnaunuxulgee*, or “People greedily grasping after the lands of the Red people” (Banner 2005 87).

In an effort to quell the forces unleashed by the colonists, the imperial government prohibited further western migration with the Royal Proclamation of 1763. It also made land purchase and sale the exclusive prerogative of colonial governments and tribes, whereas previously, however nominally or coercively, sales had involved a variety of individuals and groups, from individual farmers and Indians to large-scale land speculators, small groups of Indians, tribes, towns and colonial governments. However, neither the British garrison at Fort Pitt, nor the Virginia, North Carolina, Maryland, or Pennsylvania governments were successful in their efforts to evacuate squatters, and the imperial government feared a war it could not afford so soon after the French-Indian war had drained its coffers (Sosin 1967, 150). So many Virginians moved to occupy unpurchased Indian land in defiance of the colony’s warnings that in 1766, Governor Fauquier lost patience, announcing that transboundary migrants “must expect no protection or mercy from Government, and be exposed to the revenge of the exasperated *Indians*.” One year later, British General Thomas Gage reported that “Such frequent Accounts are transmitted of the Violences committed upon the Indians and usurpation of their Lands by the Frontier People that we can scarcely be secure of the Duration of Peace” (Banner 2005, 98). Pennsylvania even imposed the death penalty for illegal settlements in 1768 (Sosin 1967, 17).

Furthermore, far from abiding by the Proclamation, speculators, the vast majority of whom were officers in colonial government,¹⁶ merely accelerated their private purchases of valuable Indian lands. George Washington famously warned against “neglect[ing] the present opportunity of hunting out good Lands and in some measure marking and distinguishing them for their own (in order to keep others from settling them)”; and he wrote to a business partner, “I can never look upon that Proclamation in any other light (but this I say between ourselves) than as a temporary expedient to quiet the Minds of the Indians...”¹⁷ Ordinary individuals on the frontier also ignored the ban on private purchasing, and continued to secure debts with land transfers.

The imperial government could not enforce the Proclamation, “only ma[king] things worse, by giving the Indians a ‘new Ground of Disgust’” (Banner 1005, 104).¹⁸ During the pre-

¹⁶ To understand “how closely government was intermingled with land speculation,” a list of names including only the well-known men in government of the time includes George Washington, Benjamin Franklin, Thomas Jefferson, Patrick Henry, and William Johnson; but this list provides an example of just one colony and company. Twenty of the twenty-five Virginian shareholders in the Ohio Company were members of the House of Burgesses, and of those twenty, two served as acting governor and lieutenant governor; two were presidents of the Council, and nine were members of the Council, along with “the fathers of two of the others, the brothers of a few more, and other close relatives of most” (Banner 2005, 106-7).

¹⁷ George Washington to William Crawford, September 21, 1767.

¹⁸ Quoting Lord Hillsborough, secretary of state for the colonies, in 1770.

Revolutionary decade, the activities of squatters and speculators forced the imperial government, despite its resolution to stop expansion, to acquire millions of acres of frontier land from tribes, since “[t]he only practical solution to appease the natives was to purchase the lands” (Sosin 1967, 17). Nonetheless, by the early 1770s, violence against Indians by white migrants, “[e]ncroachments on Indian lands by both speculators and squatters, as well as the dubious tactics used to clear native title to the soil” had made “the danger of a general Indian war” appear inevitable (Sosin 1967, 83-84).

PART II

Strategies of Aggression and Containment in the United States

Transition: Post-Revolution

Though the Revolution marked only an episode in indigenous groups’ ongoing war to defend their lands, this event introduced a key shift in the Anglo-American institutional approach to settler-indigenous relations. Like the British, the U.S. faced limited resources and enforcement; but unlike the British, the U.S. had no intention of halting the movement of settlers, squatters and speculators. Rather, the new government sought to fuel and harness the energy of private incentives that exploded from the wild potential of colonial exploitation in America. From its central position, it assumed an organizing and coordinating role to ensure “the orderly advance of the frontier.” It did not rely principally upon its army to engage its enemy until after the Civil War; just as in colonial times, “the historical record shows that fighting was the exception rather than the rule in Indian-white relations” (Kades 2000, 1132). Instead, in its engagement with Indian tribes, the U.S. used “a host of non-military strategies to obtain Indian lands cheaply” and placate both tribes and settlers (Kades 2000, 1132). These measures included the passage of immigration and land laws to recruit forces to continue conquest, the establishment of government trading houses, and a new federal torts system. At the same time, the new nation’s government used its small army to police the primary conflict between indigenous people and immigrants on the ground.

Right after the Revolutionary War, the U.S. boldly asserted its claim to Indian lands by conquest. The country was steeped in war debt, close to bankruptcy, and had paid soldiers with promises of land. The Continental Congress, perceiving western lands as the nation’s principal asset, resolved to use the sale of Western Territories to generate revenue (Banner 2005, 126; Hibbard 1924, 32-33). But tribes responded with “the highest disgust,” and several western tribes, including the Shawnee, Miami, Chippewa, Wabash and Wyandot broke with the Six Nations to form their own confederacy and insist on their right to an Ohio River boundary. They asserted that claim in the years following the Revolution by engaging in a border war with settlers who lived along the Ohio and came pouring across (Clarfield 1975, 445). Fearing the coalition that could threaten them if the Six Nations joined the war, early statesmen of the United States fought amongst themselves over the best course of action to take. Such a full-scale interracial war, Rufus King warned Alexander Hamilton in 1791, would “break up our whole frontier” and drive land values down (Clarfield 1975, 446; Rufus King to Hamilton, Mar. 24, 1791, *Hamilton Papers*, VIII, 213).

In the face of this challenge, it was clear that “the impoverished, ill-armed United States did not have the means to carry out the policy of force that it had adopted” (Horsman 1999, 38). Secretary of War Henry Knox calculated that it would require 2500 to 3000 men each year, and at least \$2 million over two years, without even accounting for the losses in lives, destruction of property and the abandonment of the frontiers by settlers fleeing the violence (Banner 2005, 130-131). By contrast, a policy of conciliation for managing Indian relations would be only \$15,000 a year over the next fifty years. Though frontiersmen were agitating for war, an Indian war would be a market failure, “expensive, risky and unrewarding even in victory” (Kades 2000, 1136). As Pelatiah Webster commented, “nobody ever yet gained anything by an Indian war” (Kades 2000, 1137).¹⁹ Knox observed that “on an abstract view of the question,” even if the government were sympathetic to the demand to remove Indians from lands by force, “the finances of the United States would not at present admit of the operation” (Prucha 2000, 12).²⁰ Moreover, the Indian resistance and hostilities that white migration continued to provoke also increasingly threatened to halt expansion altogether, unless the government could appease tribes to the extent that they would be willing to sell more lands (Prucha 2000, 21).²¹ The heads of the new state therefore sought a structural solution through which they could continue the territorial expansion of white society, yet contain that process to the extent necessary to avoid war.

The U.S. fell back on the colonies’ approach of maintaining the conflict of conquest at a low level. To do so, it drew from a number of familiar colonial strategies, but reconfigured them in important ways. Above all, it complemented a vast system of private incentives with a system of public law enforcement that would become the core of the nation’s approach to government-citizen relations and economic growth. At Knox’s urging, the government undertook a “conciliation” policy beginning with the Northwest Ordinance of 1787, entailing formal disavowals of its hostile or warlike intent. Such U.S. “promises of benevolence” functioned, indeed, as indispensable tools, if not weapons, in the national program of slowly repelling and disarming tribes, insofar as they worked to circumvent the certainty of an organized, formal hostile response (White 1991, 459). In the spirit of “protecting” tribes, the U.S. passed the first Non-Intercourse Act in 1790, which established the federal government as the mediator of Indian trade. The Act required that all settler trade with Indians take place through licensed federal agents, drew white-indigenous trade relations into the purview of federal courts, and shifted interracial contracts from the sphere of private legal interactions to the treaty. Under the Nonintercourse Acts, in 1796, the federal government followed Massachusetts by establishing

¹⁹ He continued, “Their spoils are of no value; but their revenge and depredations are terrible. It is much cheaper to purchase their lands, than to dispossess them by force...” (Kades 2000, 1137)

²⁰ Report of Henry Knox on the Northwestern Indians (June 15, 1789). George Washington too, in a letter to James Duane, dated September 7, 1783, had opined that, “policy and oeconomy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country, which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end” (Prucha 2000, 2). Knox, in a Report from Committee on Indian Affairs in the Northern Department, argued that the nation was “utterly unable to maintain an Indian war with any dignity or prospect of success.” (Prucha 1994, 54-55).

²¹ Thomas Jefferson noted on January 18, 1803: “[t]he Indian tribes residing within the limits of the United States have for a considerable time been growing more and more uneasy at the constant diminution of the territory they occupy ... and the policy has long been gaining strength with them of refusing absolutely all further sale on any conditions, insomuch that at this time it hazards their friendship and excites dangerous jealousies and perturbations in their minds to make any overture for the purchase of the smallest portions of their land” (Prucha 2000, 21). Jefferson’s presidency would most fully realize Knox’s early position (Horsman 1999, 39).

trading houses, or the “factory system.”²² Echoing the colony’s rationale, Knox counseled Congress to invest in the system even though the houses would run at a loss: “It may be wise to extinguish with a small sum of money, a claim which otherwise may cost much blood and infinitely more money” (Banner 2005, 131).²³

As in colonial times, these conciliation measures directed at tribes were pursued for their collateral effects on the military’s budget.²⁴ Jefferson noted that this very imbrication permitted the central government to do what private traders, with their singular activity and aim, could not - “for they must gain” (Prucha 22-23). Again, the trading houses were located in the shadow of the military posts that the Federalists had predicted would be “keys to the trade with the Indian nations.” (Prucha 1986, 58-59, 36; Hamilton, Jay and Madison 1788, 150). Indian agents reported to the War Department and military commanders on frontier conditions, and placated tribes to the best of their abilities. When treaties, laws, proclamations and trade provisions failed to keep frontier violence at a low, self-regulating level, the military was to back the decisions of Indian agents from within the War department and subdue white immigrants, or Indians, or both (Prucha 1986, 22-23).

However, like the imperial government, the federal government lacked the resources to enforce its laws. Its mediation did curb some white-on-Indian violence,²⁵ and government-run trading houses became a standard feature of federal policy for a time. But the early demise of the system reflects a shift in the general tone of conquest under the U.S., and the new bold aggression allowed by the scale of its amassed force. The trading houses could now intertwine trade with war and with the emergent property system by taking over a central commercial colonial practice of extending credit to indigenous people, using land as security for the debt (Ch. 1). In 1803, Jefferson wrote in a letter to William Henry Harrison that “We shall push our trading houses and be glad to see the good and influential individuals among them run into debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop them off by a cession of lands.” Jefferson predicted that if the U.S. could become the creditor of enough Indians, “our settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States or remove beyond the Mississippi” (Prucha 2000, 22-23).

The factory system proved contentious, like Massachusetts’ truck-houses, but although Jefferson advocated for the trading houses as “the cheapest and most effectual instrument we can use for preserving the friendship of the Indians,” under the U.S., the dispute yielded a different outcome (Carter 1939, 106-07).²⁶ After the War of 1812, the jealousy of private trading interests

²² The first law was approved on July 22, 1790, continuing the policy from the Ordinance for the Regulation of Indian Affairs of 1786.

²³ In a letter outlining the principles of the nation’s future Indian policy, George Washington emphasized the necessity of taking preemptive measures to avoid the wars that would be a sure consequence of the “overspreading [of] the Western Country... by a parcel of Banditti.” For over a decade, he insisted that Indian Trade should be conducted “on Government Acct., ... [to] supply the Indians upon much better terms than they usually are; engross their Trade, and fix them strongly in our Interest,” because it “might prevent the expense of a war with them” (Prucha 1986, 18-19, 116).

²⁴ If this is an aspect of neoliberalism, it may not be quite so “new” as some suggest.

²⁵ It was a means to “conciliate the affections of a distressed and unhappy people [...]” (Prucha 1986, 116). Washington had recognized that white abuses would be unavoidable in any system of interracial trade, but he concluded that federal regulation of trade could nevertheless minimize the damage (Prucha 2000, 2).

²⁶ Letter from President Jefferson to Secretary of War Henry Dearborn (Aug. 13, 1802). The factory system was abolished in 1822, despite protests from Jefferson, the superintendent of Indian trade and Secretary of War John C. Calhoun (Prucha 2000, 33).

successfully demolished a system that had from the outset only been intended “to restrain and govern the advance of the whites, not to prevent it forever.” (Prucha 1986, 47).²⁷ This accession of private interests signaled a new force in the tension between public policy and said interests, which now had the ability to command government institutions to act in their interest.

Subsequently, the influence of white traders over Indians grew so strong that, though treaties were ostensibly between two sovereign parties, a tribe and the U.S. government, “in many cases the government would have been unable to procure the treaties of cession it wanted without providing adequately for the traders’ interests” (Prucha 1986, 93). In 1841, Commissioner Crawford complained that when annuities were paid, “The recipients of money are rarely more than conduit pipes to convey it into the pockets of their traders” (Prucha 1986, 106).²⁸ Because Indian debt could be recovered by provisions in treaties for cash annuities to tribes or for direct allotments marked for that purpose, private traders were heavily involved in the treaty process until its abolition.

Frontier Force Recruitment

In 1783, the “shrewd Yankee” merchant and diplomat Silas Deane remarked that “[t]he best branch of business in America, next to [law]... is that of adventuring in lands, and procuring inhabitants to settle them” (Sosin 1967, 24).²⁹ President Washington at first hoped to settle the frontier with “disbanded officers and soldiers of the army,” since settlers in colonial times “formed a rough, ready, and cheap border militia.”³⁰ Thus, the federal government proceeded just as colonial governments had, creating incentives that shifted the on-the-ground risks of expansion to settlers who, in pursuing economic opportunity, appeared to militarize voluntarily, in defense of their own interests. To recruit these immigrants, the federal government created its first federal immigration laws and public land laws to facilitate the distribution of western lands to them. These proved so successful over the next half century that in 1846, a Belgian analyst of the causes of emigration pronounced that “the two laws, the public lands and naturalization, have a combined influence upon the whole matter of emigration” (Abbott 1926, 99-100; Zolberg 117-18). During this era, naturalization meant access to lands for immigrants,³¹ and Congress sought to invite immigration and settlement with a uniform rule of naturalization restricted to “free

²⁷ Prucha also wrote, “The laws of Congress, the proclamations of the president, and the orders issued by the War Department did provide a brake on the westward-rolling juggernaut. ... The energy of the government in removing intruders was, in fact, proportionate, either directly or inversely, to a number of other circumstances,” including the seriousness of Indian objections to the intruders, the strength of the tribe, or the likelihood of war (1986, 46, 47).

²⁸ This activity began with the Osage treaty of 1825, but the practice became practically universal in the Old Northwest (Prucha 1986, 92).

²⁹ Deane to James Wilson, April 1, 1783.

³⁰ Washington argued that western lands could not “be so advantageously settled by any other class of men as by the disbanded officers and soldiers of the army,” and that this plan of colonization “would connect our government with the frontiers, extend our settlements progressively, and plant a brave, a hardy and respectable race of people as our advanced post, who would be always ready and willing (in case of hostility) to combat the savages and check their incursions.” Further, the presence of military men “would be the most likely means to enable us to purchase upon equitable terms of the Aborigines their right of preoccupation; and to induce them to relinquish our Territories” (Kades 2000, 1162, 1072).

³¹ Naturalization thus structured the decisions of prospective immigrants; the voyage overseas was cumbersome enough to ensure that passengers were “(almost invariably) making a permanent decision to relocate” (Pfander and Wardon 2010, 366-67).

white person[s]” in 1790.³² Immigrants began to agitate for legal reform that would remove further barriers to landownership for aliens after the War of 1812, and although the process was already far from restrictive, Congress responded by reducing the waiting period for eligibility to purchase federal lands in 1824 and 1828 (Franklin 1906, 167).

The federal government also established a new system for administering the disposition of the public lands. This approach drew on old colonial methods, but represented a new degree of coordination and potential for growth on a scale that was wholly unprecedented. Whereas no colony had had the means to “administer a large scheme of preliminary surveys before the lands in question came upon the market,” the federal government passed the Land Ordinance of 1785 to establish the Public Land Survey System to locate and dispose of western lands according to rectangular surveys (Paxson 2001, 63). Following a pre-Revolutionary war plan for military colonies north of the Ohio, lands from Appalachia to the Pacific were surveyed into six-mile square townships and subdivided into thirty-six one-mile square sections for settlers and land speculators (White 1983; Howe 1896). As “the sole purchasing entity,” Congress was able to control the price of land, which otherwise would have skyrocketed from profitable bidding and competition, and could dictate where new immigrants would settle on the frontier, while at the same time avoiding cumbersome administrative costs.³³

Under the Non-intercourse Acts, the federal government claimed priority not only in acquiring, but also in distributing lands. The government’s prohibition of private purchases of Indian land changed the practices of land speculation and created a new type of commodity, or entitlement in land.³⁴ During and immediately after the Revolution, a market in the “preemption right” “sprang to life” (Banner 2005, 135). In an early variant of the futures option, speculators traded not land, nor the right to buy land from Indians, but the right (without the obligation) to purchase a parcel of land *after* the government acquired it. A gentleman farmer from Yorkshire named William Strickland noted in the mid-1790s that these rights were “continually passing from one hand to another, . . . increasing in value as the prospect of possessing [the land] improves, or approaches, tho numerous tribes are still in possession.” In other words, a preemption right would grow in value in proportion to the likelihood of the government acquiring the land from its indigenous inhabitants in the near future, so that the holder of such a right would hope for “war, or invasion of the small pox,” and sometimes even take measures to further their removal himself. “American jurisprudence holds valid many such airey sales and purchases as this,” Strickland marveled, and noted that “these land speculations are carried on to a degree of madness” (Strickland 1971, 165-68). Perhaps no other example of an entitlement in land created during this period so convincingly demonstrates the founders’ confidence in their entitlement *to* the lands of the continent, or indeed the fact that for them, war with indigenous tribes constituted an essentially *speculative* activity, inseparable from the market in lands that grew out of conquest.

The government sought to discourage the activities of large-scale private speculators, however, since their purchases of millions of acres, without intention to occupy or “develop” the land, would leave those lands at low value and those territories insecure. The government still had need of actual settlers to go occupy lands and “defend” those tracts as their homes. Beginning in 1791, therefore, Congress offered what amounted to subsidies in the form of credit

³² An Act to establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103-04; new Naturalization Acts were passed in 1795, 1798, and 1802. The first deportation law was passed in 1798, in the aftermath of the French Revolution.

³³ Kades notes that the seminal case *Johnson v. M’Intosh* solved these collective action problems (2000, 1112).

³⁴ Confusingly, this was also called a “Preemption right” (Banner 2005, 135).

for the purchase of lands; even more generous terms followed in 1800 (Kades 2000, 1170).³⁵ After extending the time for payment of debts on public lands numerous times between 1808 and 1820, Congress passed the Debtors' Relief Act in 1821, extending the time still further, discounting payment for those who completed payment that year, and permitting a debtor to give up part of his land to complete payment on the rest (Rohrbough 1968, 143). In 1822, the Huntsville *Alabama Republican*, observing how little this Act had done to reduce the amount of outstanding debt, observed, "few who have taken further credit on their lands, ever intend paying for them" (Rohrbough 1968, 151).

Through successive Land Acts, beginning in 1796, Congress changed the price of land and provided for the sale of smaller tracts to make it commercially accessible to more immigrants. Credit also made the Harrison Land Act of 1800 effective, by making it possible for a man to pay fifty cents per acre of land, and the balance within five years (Treat 1910, 378-79). By 1817, the government had reduced the minimum parcel size in certain sections of townships from 160 acres to 80, about the size of a family farm (Hibbard 100-115). The Treasury Department oversaw the system until the General Land Office was created for this function in 1812, and the Land Ordinance remained fundamental U.S. land policy until the Homestead Act displaced it in 1862.

Right after the Revolutionary war, the new government was too deeply in debt to repeat the colonial policy of gifting land freely (Sakolski 1938, 101). However, it did selectively offer subsidies for lands in the regions most threatened by war with tribes. In 1788, for example, the Confederation granted 400 acres of land to every head of household in Illinois and Indiana, which were under the control of hostile tribes, and in 1791 Congress again liberalized the standard for granting land to French immigrants there after a land commissioner argued that they would provide useful labor in defending the area.³⁶ Congress also gave away land in Mississippi, Alabama, Louisiana, and Arkansas--all states with contested borders--as well as in Missouri and Michigan, before the government "had cleared these areas of hostile tribes."³⁷ The "most obvious case of homesteading to induce settlement," Eric Kades writes, was the Armed Occupation Act of 1842, which gave 160 acres to any man capable of bearing arms and willing to move south of Gainesville and "improve the land" for five years. This resulted in the grant of over a thousand permits for over 160,000 acres within two years. All of these programs, he continues, culminated in "the most massive land 'giveaway' in history": the Homestead Act of 1862 and its successor legislations, which vested title to anyone who would actually occupy and improve from eighty to 640 acres of less-desirable land.³⁸

By this point the states themselves were also heavily in debt. However, since they had become proprietors of vast, unsettled domains, it was their turn to offer lands to settle their debts, and together with private land companies, they advertised frontier life heavily and offered

³⁵ Act of May 10, 1800, ch. 55, 2 Stat. 73 (1800) (establishing four land offices, enjoining the surveyor general to transmit 'general plats of the lands hereby directed to be sold' to those offices, and establishing the system by which the lands in question were to be divided").

³⁶ Act of Mar. 3, 1797, ch 27, 1 Stat. 221, giving 400 acres to persons "who in the year one thousand seven hundred and eighty three, were heads of families at Vincennes or in the Illinois county, on the Mississippi." Report Regarding Land Claimants in the Northwestern Territory (Dec. 23, 1790) (U.S. Congress 1834).

³⁷ Act of Mar. 3, 1803, ch. 27, 2 Stat. 229 (disposing of land in Mississippi Territory), Act of Mar. 3, 1807, ch. 34, 2 Stat. 437 (regulating grants of land in Michigan), Act of Mar. 27, 1804, ch. 61, 2 Stat. 303 (regulating grants of land in Missouri).

³⁸ Homestead Act of 1862, ch. 75, 12 Stat. 392 (vesting title to certain land in those people who established that they ha[d] resided upon or cultivated the same for [a] term of five years").

subsidies to potential settlers from Europe and the eastern U.S (Sakolski 1932, 31).³⁹ As a result, the states outdid the federal government, selling around fifty million acres between 1783 and 1800 (Linklater 2002, 149). The states with large back country regions continued to make the most sustained efforts to recruit settlers after this time. In 1828, Pennsylvania beckoned emigrants with “almost total exemption from taxation” and the promise of wealth and independence—if, the state qualified, emigrants not fall into the frequent error of settling “in the large cities on the coast, or in the thickly settled country in their vicinity, where property is high and competition great, instead of moving directly to the west, where an excess of lands, and a less abundant population create a greater demand of labour...” (Abbott 1926, 732-33)⁴⁰ In 1853, Wisconsin’s Commissioner of Emigration for Wisconsin emphasized that the state depended on more immigration for its future prosperity. He proudly reported having sent nearly 30,000 pamphlet advertisements to newspapers in New York catering to the Irish and German immigrant population, and many more to publications in England, Ireland, Germany and Switzerland, resulting in numerous inquiries from German, Irish, Norwegian, Swedish, English, Scotch, and Dutch immigrants (Abbott 1926, 129-31).⁴¹ These efforts continued well into the second half of the century: as late as 1871, Minnesota reported distributing some 34,000 pamphlet advertisements in the eastern states and in Europe (Abbott 1926, 167-72).⁴²

In addition to federal policies, Paxson identifies “two types of special stimuli” that could raise the flow of migrants to the border “to the proportions of a flood;” namely, the continuous, systematic advertisement of frontier life described above, and “hard times that increased the difficulty of finding work” (2001, 187). The economic distress that many migrants experienced in already-settled territory worked in concert with these inducements to encourage individuals and families to assume the risks of living on the frontier. Throughout the nineteenth century, poverty and discrimination moved new arrivals to the frontier; even when immigrants did not settle in the back country but established themselves in the East, they still contributed to expansion by reducing the land available to others in the coastal region and forcing other, more desperate newcomers to seek options outside of densely settled areas (Sosin 1967, 22-23). As early as 1796, a pamphlet entitled “Look Before You Leap” warned of the “tremendously awful” U.S. immigrant life for “the *labouring poor*,” who faced “horrors of the most unprecedented nature” anywhere in the territory: “miserable *indented servants are likely to remain slaves forever*,” while [t]hose situated upon the bordering territory are often scalped by Indians, and their lives are in continual jeopardy.” By 1804, the dangers of conquest for which desperate immigrants were being recruited had made Western states’ rose-colored advertisements the object of contemporary satire. The Scioto Company, for example, attempted to draw French families to the frontier with the promise of “[v]enison in plenty, the pursuit of which is uninterrupted by wolves, foxes, lions, or tigers”; but one critic dryly warned that they were being enlisted in a war, writing, “These munificent promisers ... quite forgot to mention, that though there be no bears or tigers in the neighborhood, there are wild beasts infinitely more cunning and ferocious, in the shape of men, who were at that time at open and cruel war with the whites” (Abbott 1926, 31). In 1819 a traveler to the U.S. concluded, “it must be *the distressed* alone, who

³⁹ Sakolski notes, “land speculation grew out of public poverty” (1938, 31-32).

⁴⁰ “Immigrants Welcomed in Western Pennsylvania,” Addressed “To All Those Who May Be Desirous of Emigrating to the Western Country,” Extract from Hazard, *Register of Pennsylvania*, I (1828), 24-26.

⁴¹ “Stimulation of Emigration by American States,” Extract from *Second Annual Report (1853) of the State Commissioner of Emigration* (Herman Haertel).

⁴² “Efforts to Attract Immigrants to a Western State,” extract from *Report of the Minnesota Board of Immigration*, 1871.

can hope to find alleviation here,” and offered these “Words of Caution to Prospective Immigrants”: “The old American (or Yankee) looks with the most sovereign contempt upon the emigrant: he considers him a wretch...”; and since “[t]he country is inundated with the vast torrent of emigration, that has been flowing into it;... the new arriver must be content to penetrate far into the wilderness, and undergo fatigues, expense, and hardships, which he can badly estimate by his fireside” (Abbott 1926, 50).⁴³

Between the Revolution and 1837, more than four and a half million people migrated west of the Appalachians in search of lands to claim (Rohrbough 1968, 295). With its policies of urging immigrants on to the frontier, but controlling their spread, the federal government was riding a thin line of tension between open hostilities and continuous conquest. The growth of U.S. property was conditioned at every step by the possibility of war that continuous migration to the frontier constantly threatened to provoke. “Indian unrest” and the fear of the “Indian menace” “spread terror” among white settlers in Mississippi, Orleans, Detroit, Illinois, Indiana, and in the South, causing them periodically to withdraw from the frontiers and “retrea[t] to the safety of towns and forts” (Rohrbough 1968, 58-59, 131). In other words, war and market conditions were directly related. The hostilities that sprang up periodically deranged surveys and deterred immigration and land sales in the Old Northwest and Southwest; but within a few years, the government would “pacify” tribes, making the land office business a powerful force once again.

In Illinois territory, for example, generous credit policies, small plot sizes, low prices and friendly immigration policies after an outbreak of violence caused a spike in annual sales, which doubled in 1818 at nearly 3.5 million acres, the highest amount in a single year to date, and trebled again as demand drove average prices up (Rohrbough 1968, 119-25). Such successes meant that states intent on filling their lands with migrants became increasingly influential in the national legislative process. When businessmen attempted to restrict land sales to confine labor to the east in the late 1820s, western states overrode these efforts, and in 1830, Congress authorized squatters who, as of 1829, had established themselves “on the public domain,” to claim up to 160 acres at the minimum price (Zolberg 2006, 118). In 1832, Congress reduced the smallest area for which one could bid at a government land auction to the now-mythical “modular unit of settlement”-- forty acres, one quarter of a quarter section (Linklater 2002, 166). Between 1830 and 1837, the General Land Office sold more than fifty-seven million acres of land, and by the end of the nineteenth century, more than a quarter of a billion acres of public domain had been converted into private property through these means (Linklater 2002, 175).

From the time of the Revolution, these migrants poured into unsettled territory with “one object in view, viz., to dispose of their holdings at a profit in a short time” (Sakolski 47). Unlike in Europe, where land was a badge of wealth or an emblem of nobility, in America, people sought to acquire and settle lands in order to sell them at a profit. Sakolski writes that speculators, “instead of drawing wealth from land directly, aimed merely to extract wealth indirectly from their fellows’ pockets” (47). However, in 1817, a correspondent of the *Western Intelligencer* observed that “almost every person has in greater or less degree, become a dealer” in the public lands (Rohrbough 1968, 132). As Rohrbough wrote, “[s]peculation was everywhere. Everyone engaged in it to a greater or a lesser degree. Large entrepreneurs bought great tracts and parceled them out. Squatters sold their improvements. Both expected to profit” (1968, 301). During the first fifty years of the Republic, he continues, “men spent much time

⁴³ Extract from E. Howitt, Selections from Letters Written during a Tour through the United States, in the Summer and Autumn of 1819 (Nottingham, 1820).

devising ways to get something for nothing from the public domain”: their “main idea was to obtain the advantage of the ‘unearned increment’—the added value which comes from the growth of population and material wealth” (47).

The Policing Military

The federal government and settlers’ interests converged in securing, or securitizing, land, but for divergent reasons. One sought land sales while the other pursued the promise of prosperity and a home, and each perceived and sought to exploit the other’s interest (Rohrbough 1968, 131). Around the time of the Revolution, Washington and the Treasury Department endeavored to create a standing army for the same reason that the colonies had employed Indian auxiliaries by the hundreds—because of the insufficient number of settler colonists to defend as well as conduct the colonization project itself. They aimed to bring the total forces in the army up to nearly six thousand, which more than doubled its size (Clarfield 1975, 449).

The administration faced obstacles in justifying an apportionment of national funds for this purpose, however. In Knox’s defense of federal policy, he had inaccurately given the public the impression that Indians on the frontier constituted a mere “rabble,” or a group of “Indian banditti” who were outcasts from their own tribes and did not pose a major threat (Clarfield 1975, 449-50).⁴⁴ At the same time, many who opposed the Washington administration blamed frontier violence on settlers, calling *them* “rabble” and “banditti.” One congressman argued that “check[ing] the roving disposition” of frontier settlers would end the war (Clarfield 1975, 445). Such arguments dismissing both settlers and Indians as unruly “rabble” and blaming them for the violence elided the government’s role in staging their conflict. Meanwhile, the government contemplated the creation of an army to *police* conflict between the two groups who, for their part, understood themselves as fighting for their homelands, future and past.

In the settling tradition of British forces, frontiersmen also brought their families, blurring the line between civilians and combatants (Paxson 2001, 18-19, 24). “In nearly every case the unit working on the frontier was a young married couple;” these units’ investment in their families’ futures determined “[t]he potential military strength of any American border settlement,” or “the capacity of the frontier for war” (Paxson 2001, 37). In addition to bearing and raising children, women tended livestock and engaged in household production for family consumption or sale on the market (Perkins 1988, 47)⁴⁵. As De Tocqueville observed in 1832, “[t]he Americans have applied to the sexes the great principle of political economy which currently dominates industry. They have carefully divided up the functions of men and women so that the great work of society might be better performed” (Tocqueville 697).

In the United States, the issue of lands remained linked to the question of national security. However, where taking possession of lands had been a means of *increasing* security in the time of the colonies, in the U.S., the need for national “defense” would more explicitly follow from the process of continuously encroaching upon indigenous lands. Although settler and government interests converged in continuing conquest, the new nation’s continued existence relied far less than the erstwhile colonies’ on the survival of individual settlers and their families. Their safety thus marked a point of divergent concern. Given the inadequacy of the army to execute the conquest of the continent, the government sought an efficient, cost-

⁴⁴ Ultimately, the administration imposed tariffs on imports (see generally Clarfield 1975).

⁴⁵ However, any income earned by married women and unmarried girls under 21 belonged legally to the male head of household (Perkins 1988, 142).

effective means of expansion; but just as in colonial times, the principal combatants were families with personal stakes in the dream of land, wealth, upward mobility, and a home. The government and settlers thus played strategically upon their mutual dependence and each regularly pushed the other to the brink. The government plied settlers with incentives all the way to the frontier, where it exposed them to as much danger as they would tolerate while still remaining willing to migrate and labor for the nation. Meanwhile, settlers tread a fine line, pushing the government to purchase Indian lands by initiating conflict with tribes, but thereby also risking the possibility that it might mobilize its army against them instead. In Georgia, for example, the doctrine of settlers became known as, “let us kill the Indians, bring on a war, and we shall get land.”⁴⁶ Meanwhile, Washington and the Treasury Department resolved to enlarge the military to ensure a greater measure of control over settlers whose interests lay in prolonging the fighting with tribes (Clarfield 1975, 449).

While the state facilitated settler families’ quest for land by regulating a profitable market and rewarded their service to it by affirming their family status and title, the government also maintained a formal distance from settlers’ activities to preserve some leeway for diplomacy and negotiation in its dealings with tribes. Unlike privatized agents or mercenaries in government service today, settlers held no defense contracts. The informality of the government’s relationship to its civilian militia meant that it lacked direct control over this force, but also that it was not beholden to its members when it acted to recover control over them using its Army.⁴⁷ To settlers’ frequent frustration, the government would not guarantee them protection, and even asserted itself against them to placate tribes (Sosin 1967, 150). Thus, in 1785, Congress explicitly authorized Indians to approach white settlers “as disorderly persons and compel them to retire” (Banner 2005, 120). Again, right after the war, General William Irvine at Fort Pitt issued orders prohibiting whites from crossing the Ohio, and Congress sent a detachment of troops to disperse squatters (Sosin 1967, 150).

In the ongoing “undeclared war” on the frontiers, consisting of constant raids and counter-raids between settlers and indigenous people, the new standing army also increased the bargaining power of the state when approaching tribes for land, by presenting the threat of violence. The U.S., like the colonies, recognized that displays of potential military strength made them effective in conferences and negotiations by making natives feel a sense of awe, respect, fear, or futility. In this same vein of deterrence, whites also used forms of technology like the telegraph and the telephone “to impress Indians with the pointlessness of war” (Anderson and McChesney 1994, 58-59). To keep Indians from forming alliances and to avoid direct military conflict with tribes, the government offered to compensate weak tribes for their loss of land by protecting them against strong neighbors (Kades 2000, 1120). But when tribes refused to negotiate, for example, this was grounds for a military expedition; President Monroe admitted to Jackson in 1817 that “if the Indians did not voluntarily submit to the civilizing programs, compulsion would have to be resorted to” (Prucha 1994, 154).⁴⁸

⁴⁶ Benjamin Hawkins, the federal emissary to the southern Indians, describing the doctrine of settlers in Georgia (Banner 2005, 126).

⁴⁷ See Chapter 2 on the settlers’ inability to depend on the government for protection. As early as 1779, squatters began to build cabins and make clearings across the Ohio, though Congress prohibited settlement on Indian lands without express permission. In 1784, George Washington, while touring his western lands, reported that “in defiance of the proclamation of Congress, they roam over the Country on the Indian side of the Ohio, mark out Lands, Survey, and even settle them” (Rohrbough 1968, 15).

⁴⁸ Monroe to Jackson, October 5, 1817.

The government thus used the army to intervene when events threatened to significantly slow the progression of the frontier. Again, the Federalists acknowledged the new nation speculated in security risks as it did in lands; they anticipated that “Indian hostilities... would always be at hand” *because* “a rich and fertile country, of an area equal to the inhabited extent of the United States, will soon become national stock.” When the authors of *The Federalist* insisted on the necessity of keeping a standing federal army at all times, those founding fathers sneered a little at any who did not recognize the ambiguity of the difference between war and peace in those times, asking “Who shall judge of the continuance of the danger?” They pointed to the “Indian hostilities... [that] would always be at hand,” and dismissed temporary, occasional detachments of troops as impractical and inadequate to “guard against the ravages and depredations of the Indians” that would certainly persist (Hamilton, Jay and Madison 1787, 153-54, 149-50). Yet they were quite clear that it was *U.S.* aggression in its expansion campaign that would create this continuous threat of war for the new nation, and that the challenge at hand was to avoid full-scale war in the process. Through armed peace, or sustainable conflict issuing from steady advance upon the enemy, they intended that “a rich and fertile country, of an area equal to the inhabited extent of the United States, will soon become national stock” and acknowledged that “[t]he savage tribes on our Western frontier ought to be regarded as our national enemies... because they have the most to fear from us” (Hamilton, Jay and Madison 1787, 238, 149).

Around the time of the Revolution, at least some elements of the public recognized that the ongoing frontier violence fell within the designs of the new federal government. Some contemporaries accused the government of practicing genocide, including an essayist who wrote in the *National Gazette* in 1792 that the purpose of the war was to “extirpate” the Indians to take their lands (Clarfield 1975, 445).⁴⁹ As I described above, the U.S. operations that comprised its Indian pacification effort were “*inherently civil-military* in scope” and blurred the line between war and peace, with the purpose of *not* ceasing hostilities. As Birtle notes, the federal government’s Indian “pacification” efforts comprised “military operations against irregulars and civil operations” (1998, 4). The irregulars against whom the military operations of this “constabulary force” were directed included both the “savages” to whom that term has traditionally been attached, *and* the “irregular” civilian-soldiers that were the settlers on the frontier. The “civil operations” included the battery of positive inducements deployed to lower tension, namely the incentives structured by immigration and public land laws, provisions for non-citizen voting and non-citizen access to federal land in the west, government regulation of trade, and a new federal, interracial tort system, as the next section describes (Rana 2010, 12-13).

Whose Hearts and Minds?

Among the compensation measures that the U.S. deployed during the early Republic to diminish the intensity of violence and obviate interracial war was an early system of tort claims against the federal government, now virtually forgotten, which lasted from 1796 into the twentieth century (Skogen 1996). This system built on provisions of the Nonintercourse Acts that granted compensation to owners of stolen horses, in a government-sponsored attempt to lessen the frontier violence that was such a “tremendous drain on the nation’s treasury” (Skogen 1996,

⁴⁹ *National Gazette* (Philadelphia), Jan. 9. 1792. Benjamin Hawkins, a senator from North Carolina, further alleged in a letter to Washington on Feb. 10, 1792, that the War Department was allowing the frontier wars to continue because Secretary Knox was conspiring with contractors with whom he did business to generate profits for them through the creation of a standing army (Clarfield 1975, 446).

25). The War Department had also developed a practice of paying families of murdered Indians fixed sums of money or goods; it directed Indian agents to offer pecuniary satisfaction in cases where the murderers could not be apprehended, and in 1803, suggested that each murder of an Indian be compensated with a sum of one to two hundred dollars, which they regularly gave (Prucha 1986, 43).

In the depredation claims system, like in the trading-house system, the government allocated funds to placate individuals who might otherwise seek retributive justice on their own. However, more directly than through the regulation of trade, the government paid individuals to redress losses from interracial destruction of personal property, including homes, utensils, crops, and animals, usually cattle and hogs that had been killed, or horses stolen (Skogen 1996, 43, 4). While both natives and whites could theoretically apply for indemnity under the depredations system, American Indians rarely did. Thus, in contradistinction to the trading house system, the depredations system became a measure to pacify whites, rather than indigenous people, marking a shift in the government's priorities, its perception of the new tensions with its settler militia resulting from the federal structure and its calculation of where the most serious threats to continuous conquest were likely to arise.

The government thus offered whites on the frontier the hope of compensation for losses if they could prove Indian culpability through a system that drew on treaty provisions. Congress backed this system and sometimes interceded for constituents when other means did not provide restitution (Skogen 1996, 31). The depredations system reflected the fact that, despite the government's disavowal of settlers' labor, it nonetheless depended upon that labor for revenue via the conquest of lands, again regarded to be the nation's "most promising asset" (Hibbard 1924, 1). In 1833, a commentator opined, "Our North American possession will require for many years a vast accession of settlers" who should possess "strong physical qualities" (Abbott 1926, 84).⁵⁰ In 1844, President Tyler repeatedly opined, "In view of the vast wilderness yet to be reclaimed, we may well invite the lover of freedom, of every land, to take up his abode among us" (Hutchinson 1981, 31).⁵¹ Recruitment efforts continued in the east and in Europe throughout the nineteenth century precisely because the federal and state governments recognized that "our wild land," without settlers to purchase and hold it, was worthless (Abbott 1926, 171).⁵²

Though now completely ignored in law school classrooms and histories of torts, court records identified depredations claims as torts, and these claims both run parallel to and disrupt standard histories of U.S. torts. When negligence became a general torts standard in the U.S., it was also applied in depredation claims. Over a half century before the government lost its sovereign immunity to torts through the Federal Tort Claims Act, which is known for creating the first federal torts claims in 1946, the depredation system allowed individuals to sue the

⁵⁰ Extract from John M'Gregor, *British America* (2d ed. Edinburgh 1833) II, 550-56.

⁵¹ Second session of 28th Congress opened Dec 3, 1844. Tyler dissented from the anti-alien position of the growing Native American movement. He may have represented the majority opinion during the 27th Congress, when he referred to the vastness of the nation's unoccupied or underpopulated land, and declared, "We hold out to the peoples of other countries an invitation to come and settle among us as members of our rapidly growing family" (Hutchinson 1981, 30).

⁵² It was also acknowledged that the success of their efforts would depend in large part on the lands available under the homestead laws, and that "exceeding by far any of these [other] interests is that resulting from being the cheap European labor in contact with our wild land. The national wealth has been by no other means so rapidly developed and accumulated as by bringing the cheap, and *there*, nearly valueless labor of the old world into direct contact with our equally cheap lands, which, *without that labor*, are of as little value to us, as is the surplus labor of the old world to it, without our lands." "Efforts to Attract Immigrants to a Western State," extract from *Report of the Minnesota Board of Immigration*, 1871.

government for tortious conduct, since the U.S. government assumed guardianship for tribes in the late nineteenth century (Skogen 1996, xviii). Furthermore, though the system is excluded from the modern study of torts, the explanation that the depredations claims system subsidized frontier warfare falls within the subsidy interpretation of nineteenth century torts. This theory explains the purpose of the negligence rule as transferring resources to nascent industries to support their development.⁵³

In the legal dispute that a depredation claim initiated, one major recurring hurdle to applications zeroed in exactly on the ambiguity of colonial wars, or low-intensity conflict in general, which issued here from the settlers' supposedly sub-governmental actions. To receive compensation, claimants needed to answer, *were the Indian tribes in question and the U.S. at peace or at war?* This issue highlighted precisely the question that the government sought to obscure through its reliance upon civilian militia. As a part of a claims system, it integrated the question into the rule-bound world of legal procedure, thereby stripping it of its potential to destabilize the structure to which it belonged. The government would only compensate claims when it could be proved that Indians "in amity" caused the loss, for the indemnity system required that a party seek legal action *rather* than revenge, in the context of peace. But in the context of an ongoing, low-level conflict imbued with the constant threat of war, the Court of Claims often found the task of determining "friendliness" or "peace" utterly confounding. The Court was confronted with the challenge of determining whether an act of theft or destruction "represented an isolated depredation or an act of war," and of categorizing the nature of the "violent epiphenomena" that characterize ongoing hostilities not dignified with the name of war, and that Asad has described as "peace-war."⁵⁴

Like contemporary torts, depredations claims held tremendous potential for fraud and for the financial benefit of lawyers, who were above all others involved in such claims.⁵⁵ The government at one point capped the amount of money available to pay depredation claims to address its concerns about such fraud; and it allowed the president to deduct payments to whites from the annuities of accused Indian nations promised by treaty (Skogen 1996, 25). It is unclear to what extent these claims deprived Indian nations, who were struggling to survive in the new money economy, of their promised annuities. In the most extreme example of depredations administration, under Commissioner Ely Parker, however, indemnities of one third, one half, or exceeding the entire sum of appropriations to tribes were charged against their annuities (Skogen 1996, 50-51).

⁵³ Cf. Skogen, who argues that Indian torts, along with slave torts, involved disputes unrelated to "the nation's burgeoning industries" (1996, 212). I argue here that the violence of interracial conflict was a cost of building the nation's foundational law and economy, upon which the industries of tort law would depend.

⁵⁴ The phrase comes from Talal Asad's "Thinking About Terrorism and Just War," where he describes the war against terror as the descendant of small wars, especially in terms of the phenomenon of "peace-war" (2010). If hostilities between the U.S. and an Indian nation broke out, judges would recognize a state of war between parties, regardless of any prior treaty. Thus, a situation emerged in which an Indian nation could not be charged for its "depredations" if the court decided that a state of war had obtained between it and the nation, unless a treaty that concluded the hostilities specifically allowed for this. In an example of another structural opposition between the federal government and settlers, officials representing tribes thus "found themselves in the ironic position of defending claims against the country's 'domestic dependent nations,' at the expense of their fellow citizens, by proving that a state of war had existed between the United States and its 'wards.'" As claimant attorney John W. Clark observed, the tribes that the U.S. considered to be dependent subjects, like its citizens, could not be held liable precisely when they became "contumacious and unruly" (Skogen 1996, 44).

⁵⁵ Skogen describes lawyers who worked with agents as expert claims seekers as "[u]ndoubtedly... the biggest winners" of the system (1996, 49, 210-211).

The height of depredations claimants' success during the antebellum period was during the 1830s, after which Indian affairs changed so dramatically that it was no longer possible to define the extent of Indian country or even attempt to delineate the difference between 'friendly' and 'hostile' nations on the plains. During the 1830s, the Secretary of War began to shift central responsibility for Indian removal from its civilian-militia to the army (Prucha 1986, 80). In the 1840s, the U.S. became preoccupied with the conquest of Northern Mexico, which concluded with the Treaty of Guadalupe-Hidalgo and the arrival of the southwestern border in its current location, in 1848. The acquisition of the southwest territories changed the government's objective, from "separat[ing] whites and Indians by one artificial barrier," to "clearing" indigenous people from white travel routes and white settlements by restricting them to specified areas, which treaties with smaller tribes already called "reservations" (Utley and Washburn 1985, 169). The next year, Indian Affairs moved from the Department of War to the Department of the Interior, reflecting a shift in how the Government understood the process of conquest, from a project of external expansion to the establishment of an internal order. During this mid-nineteenth century period of flux, Congress threw the depredations system into abeyance by requiring that all annuities be paid directly to the Indians, which made it impossible, for a time, to pay claims from Indian funds (Skogren 1996, 65, 191).

Although Utley and Washburn note that the new territory presented "awesome new challenges" to what remained a "weak little army," the military nevertheless remained "intimately involved in many aspects of Indian affairs" (Utley and Washburn 1985, 170; Birtle 1998, 77). Indeed, hostilities grew so overt that in 1855, General Wool declared that the Northwest had "become a contest of extermination by both Whites and Indians" (Utley and Washburn 1985, 180). Volunteer troops filled in for "regulars" during the Civil War, during which the military grew significantly and professionalized. In the post-war period, tribes were confronted by more numerous and better-trained soldiers than ever before, and waging war against tribes was "the main thing the U.S. army did" (Banner 2005, 228). Birtle's account of these "Constabulary Years" opens with the observation by a late 19th century officer that "In reality, the Army is now a gendarmery—a national police" (Birtle 1998, 55).

At the same time as the violent wars of the Plains reached new heights, the military's focus shifted. It aimed to force indigenous people into concentrated areas, where they would become subject to a new battery of efforts to assimilate them. Precisely when the centuries-long low-intensity conflict with white migrants became an unequivocal, raging war, assimilation for the first time became a comprehensive national policy, so that the government intensified its campaign to exercise "soft" and "hard" power simultaneously over indigenous people.⁵⁶ Indian "pacification" efforts increasingly involved separating the "population" from its "insurgent leaders," and focusing on the population to make Indian "hearts and minds" more American by banning traditional dances, feasts, and marriage, medicinal and religious practices under the Code of Indian Offenses (Utley and Washburn 1985, 233).⁵⁷ During the late nineteenth century, Indians confronted a newly professionalized corps of civil servants who sought to institute systematic and widespread reforms, who were highly influenced by developing social sciences,

⁵⁶ Birtle writes that "[t]hroughout [its campaign against indigenous tribes], the United States sought to achieve two goals. The first was to open as much Western land as possible to white settlement with a minimum of bloodshed. The second was eventually to assimilate Native American peoples into American culture and society" (1998, 77).

⁵⁷ Further, "The conquest was decisive in large part because General Sheridan made certain the war leaders did not remain with their people to foment trouble again" (Utley and Washburn 1985, 233).

and who were able to draw on “a full range of national government capacities” (Weiner 2006, 25).

The new acculturation efforts were led by military officers such as Colonel Richard Henry Pratt, who founded the first Indian boarding school, and was a vociferous advocate for allotment and the destruction of the reservation system.⁵⁸ Since reservations promised some of the same opportunities for autonomy as the praying towns, the government also initiated a deliberate effort to “pulverize” their collective life with a new policy of allotting tribal lands. Under the Dawes Act of 1879, tribal land holdings were broken up into individual plots for “allotment,” ostensibly to “civilize” Indians by abolishing communal landholding, but actually to enable the federal government to sell surplus lands. Under this disastrous policy, tribes lost over two-thirds of their remaining lands.

The more obvious the state of war between the U.S. and Indian tribes became, the more the depredations claims system faltered over the ambiguities and contradictions of identifying relations within the ongoing “peace-war” as either one or the other. However, the system was revived during the late 1880s when the Secretary of the Interior tapped income from allotment as a means to pay depredation claims that had been stuck in the bureaucratic pipeline for decades (Skogen 1996, 189). Only after it felt U.S. victory on the Plains to be imminent did the government dare to acknowledge the hostilities of the long history of conquest as war, and the purpose that depredations claims had served.⁵⁹ By then, lawmakers had spent a century debating the “wisdom” of “paying for losses occurring as a consequence of being on the front line of national expansion.” While their exclusion of claims incurred by Indians “at war” indicates the consensus that the government would not do so, in the late nineteenth century, the government embraced an opposite narrative.

In 1886, House Committees from Indian Affairs described frontier migrants in glowing terms, and declared that the indemnity system paid the debt that the nation owed these forces:

The early pioneers in the far West, the makers of a new civilization, the founders of a great empire, the leaders in the great army of workers who have made the vast western wilderness blossom with rich harvests, are among the noblest heroes and greatest benefactors of this Republic, and deserve from a grateful country an ample recognition of their trials and privations (Skogen 1996, 122).

Further, the government proclaimed, “To no class of its citizens is the American Government more indebted than to the heroic men and women who, as pioneers of our civilization... risked life and property to secure homes, wealth and progress as the heritage of those who should follow in their pathway” (Skogen 1996, 123). Lawmakers *retroactively* recognized the government’s history of encouraging western migration, “with an implicit, if not actual, promise of protection.” They argued that the government had incurred liability for their losses since

⁵⁸ Pratt cultivated his plan for Indian education while guarding Indian political leaders in prison, and handpicked their children to be the first Indian boarding school students (Series I, box 14. Americana). Utley and Washburn also write, “The reservation system featured a concerted effort to destroy tribal organization and identity and emphasize the individual, to root out the beliefs and customs of the old life and substitute new ones from the white man’s culture, and to carve up the reservations into individual homesteads, returning ‘surplus’ lands to the public domain for white settlement. Coercion marked this program” (1985, 291).

⁵⁹ As Skogen points out, Indian depredations do not belong to “Indian history in the sense of contributing to knowledge about American Indian people or their cultures;” this was a policy that operated between settlers and their government (1996, xx).

settlers “did not receive that protection by reason of the inadequate military force employed in that part of our domain,” and since the government had accepted responsibility for the Indians as wards over the course of the century (Skogen 1996, 123). Congress, During a time of rising nativist sentiment, Congress cut off noncitizens as claimants. However, attorneys strenuously counter-argued to Congress that the government had actively recruited foreigners by giving away land under the Homestead Act, so that many alien pioneers had taken on the same risks and paid the same costs as citizens on the frontier. Though alienage remained a fatal defect to a depredations claim after that time, it became the leading and most contentious reason that courts dismissed suits, after the question of amity.⁶⁰

The depredations claims system failed according to both policy justifications the government articulated for it during its early period and during the 1880s, which had contradicted each other in practice. It did not bring peace to the frontiers, nor did it effectively compensate white migrants for their labor of conquest (Skogen 1996, 86). Similarly, the amity rule (the exclusion of claims against Indians with whom the nation was at war) pretended to support a supposed state of peace and refused to acknowledge the constant war on the frontier. This very contradiction between rhetorical lines exposes the functionalism of the system, and an important aspect of the relation between discourse and legal instrument. Indeed, it highlights the central coordination of a governmental system that operated through an absence of obligation to the forces on whose labor it depended, and institutions designed to harness private individuals’ labor but deny any accountability to them. Ironically, because of the privatized structure of conquest, this tool of “Indian pacification” was used to pacify *whites*. The depredations system supplemented settler aggression with the reassurance that settler and government interests were aligned. Like other forms of bureaucracy, perhaps, its function was to encourage people to stay within the system by promising the possibility of compensation, rather than actually providing it, and by representing an investment of time and organization that was calculated in terms of the big picture, rather than individual and short-term costs.

Conclusion: Slow and Endless Economic War

Since 1785, the landmass of the U.S. has grown to 2.3 billion acres. Of these, 1.8 billion acres across thirty-two states have held the status of “public lands” at one time or another. The government has transferred more than one billion of these acres to private ownership, and seven million remain under ownership of the states or of the federal government (Linklater 2002, 234). In late 2014, *Forbes* magazine commented that commercial real estate, “one of the oldest industries in the United States,” was on the brink of transformation, and would become a hotbed of entrepreneurship this year because of its massive scale—roughly the size of the U.S. stock market at an estimated \$15 trillion (Robertson 2014).

Each parcel on this market once transferred from indigenous hands to a white settler government, which operated coordinated systems to bring “the real conquerors” onto native lands—“the pioneers who tramped westward by the thousands and then millions... spreading across the land and destroying the game, grass, timber, and other resources that sustained the Indian’s way of life” (Utley and Washburn 1985, 289). The design of this system offered natives a choice of hardships: voluntary removal, cooptation in the settler system, or the full hostility of

⁶⁰ Congress eliminated the words “or inhabitant” from the 1796 articulation promising compensation to “any citizen or inhabitant of the United States.” The two issues disqualified almost half of the 10,841 claims on the court’s docket in the 1890s (Skogen 1996, 148-49, 150).

the state. Settlers who arrived in frontier conflict zones with no guarantee of protection by government understood those risks as the condition of the market participation that might allow them access to the economic rewards of empire. The governmental policy of colonization by settlement thus conflated settlers' participation in the national economy and their militarization, and intertwined the economic fate of the market participant-soldier and the state. The system of private incentives directly propelled colonizing actions while making them appear voluntary, growing a speculation-based economy out of *private* acts of conquest, and making national security a *domestic* matter of family fortune.

Despite these practices as well as because of them, Americans hold an image of themselves as "a peace-loving people." The narratives transmitting the history of conquest both preserve the perception of America's defensive national security state as responding to external threats posed by a savage enemy *and* relegates the conflict to sub-war status. This absence has supported popular conceptions according to which the U.S. traditionally embraced policies of isolation and non-interference, rather than economic and political conquest, the idea of what Birtle refers to as "the nation's traditional antimilitarism" (Birtle 1998, 78; Higginbotham 1964, 26). This effacement of the frontier wars in early America has its own history. In 1823, for example, the Supreme Court affirmed that conquest had secured the U.S.'s right to the title of lands it occupied in *Johnson v. M'Intosh*. Only half a century after the formal close of the frontier, during the U.S. ascendance to world power, the U.S. Marine Corps pointedly omitted Callwell's account of "campaigns against the Red Indian" in their *Small Wars Manual* of 1940, and declared, "campaigns of conquest are contrary to the policy of the Government of the United States" (2).

In this chapter, I have described the government's organization of violence through its arrangement of private incentives and public enforcement. A key component in the structural dynamics of the conquest of America was the state's deployment of violence against settlers and indigenous people alike through its small "regular" military, which acted as a police force and, in large part, performed the work of intimidation. Ironically, the term "Indian pacification" for the military's work seems to have been a pacification tool in itself, directed at settlers. It contained a reassuring official narrative about the aggressive, savage Indian who required "pacification" and whom the government blamed for the violence. Although the term "pacification" implies the calming of a belligerent force, efforts at pacification were unmistakably violence: "force was the *sine qua non* of Indian pacification," Birtle explains, because most officers accepted "the brutal fact that government policy ultimately entailed the destruction of the Indians' traditional way of life, something many Native Americans were unwilling to accept without a fight" (1998, 79). According to him, the rationale behind using two strategies in the army's civil-military program—civil and military-- was that civil strategies made the military strategies more *effective and efficient*: "to be effective a pacification campaign must include at least some positive inducements, for 'the maintenance of military despotism in the rear of an invading army must generally prove a waste of manpower'" (1998, 90-91). These complementary elements of military technique—civil inducements and payoffs, and the military police—underscore the dual elements of the environment of *peace-war* that they created in America, as well as the ambiguity of their admixture in the civilian settler militia who performed the primary work of conquest. The conflict between whites and tribes across the continent could be characterized as a low-intensity "war" that lasted for centuries, as a time of "peace" imbued with violence—or as a police state. To describe the formal military force that hovered over and monitored the constant ongoing interracial violence, Birtle writes that "since small wars were often peacetime affairs of

a quasi-police nature, the term *constabulary operation* is perhaps equally appropriate” (1998, 4). The “peace” and “war” aspects were further divided spatially: the metropolitan center experienced this state of war as peacetime. Meanwhile, violence was concentrated at the margins of the territory and the population. In this state, “peace” was “neither the opposite of ‘war’ nor indistinguishable from it, but [...] depend[ed] on intermittent war,” as Asad writes of colonial war and counterinsurgency in general (2010, 16).

Insofar as narrative comprises a key component of asymmetric warfare, the persistent general absence and irregular appearance of this first American interracial conflict in the history of American warfare, and even colonial warfare, indicate that the hostilities are not over. Consequently, to work within received narratives, or to consider the threatening potential of alternatives, is, in some measure, to assume a place within the ongoing conflict. Ongoing narrative erasures continue to serve purposes, and to shape public discourse about the past and the present, as well as future possibilities. Consider, for example, the first argument of this chapter, which pointed to the unsuitability of the typical counterinsurgency model for describing the conquest of America, exemplified by Birtle and others’ claims that the U.S. army developed “counterinsurgency” techniques through their struggle against Indians. The U.S. military field manual on counterinsurgency defines insurgency as “an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power or other political authority while increasing insurgent control.” Yet this irregular struggle, in which white settlers, rather than tribes, blurred the distinctions between civilian and combatant, long predates the “insurgent” conflicts that sought to weaken Anglo-American government, such as the Revolutionary and Civil wars, or even smaller insurrections like Shay’s Rebellion. It not only preceded these conflicts, but Anglo-American government itself, and indeed brought this political order into being, as we have seen. How, under Birtle’s model, could counterinsurgency predate insurgency? How could settlers’ aggression be *reactive*? The conflict, as I have shown, was a “classic ‘poor man’s war,’” as insurgencies have been dubbed (Beckett 2001, ix). The strategies that colonial and the U.S. governments employed were strategies for “warfare on the cheap” (Alexander and Kraft 2008, xxxvi).

The historical record opens up an inversion of the counterinsurgency doctrine’s narrative, to show that settlers organized a white “insurgency” aimed at the dismantling of countless preexisting tribal political orders. The “counterinsurgency” tactics that have subsequently informed the long list of U.S. “responses” to other internal and external “insurgencies” were thus born, it seems, out of the European invasion of America, in which settlers were the first insurgents. If that insurgency, i.e. that overthrow of indigenous governments, has now become world-hegemonic, must we understand the targets of their counterinsurgency efforts as “insurgents”? Or might we understand this response to U.S. power itself as *reactive*, as “counterinsurgency,” a response to a historically entrenched and indiscriminate mode of weakening local, established orders wherever they stand as obstacles to desired resources, like indigenous orders were to the land that now comprises the territorial U.S.?

Here, I have aimed to show how military conflict and development of civil law in the U.S. were functionally continuous with one another and highly interdependent, even if narratively and conceptually divorced. The breadth of this armed struggle spans centuries, during which settlers sought to domesticate the indigenous enemy, or to transition the “Indian problem” from a matter of international to internal affairs. This span is preserved in the continuing relevance of this history to the country’s national economic logic of limitless growth, but also to its related, current entanglements in international affairs, and its projection of the image of

insurgent invaders onto natives in history and foreigners in the future. If nothing else, the early history I have offered here suggests that however much Petraeus' "kindler, gentler" counterinsurgency tactics are touted as the "new COIN," the strategies that this effort comprises are emphatically not new. The market functions, market logics and market weapons of ongoing asymmetric warfare are also far from new. Early American history suggests that the military's "irregular engagements" relied heavily on the economic incentives and coercions produced by a battery of civil law operations, and the broader history of colonial war suggests that this genre of warfare is protracted, slow, low-intensity, and fundamentally economic.

Today, the contemporary corollary of the suppression of the long conquest of indigenous lands in American history is the invisibility of indigenous people and the high concentration of violence to which they continue to be subjected. This historical suppression also continues to underpin an American conviction that it stems from a long tradition of peace, and is under assault by jealous, vicious enemies. In 1984, for example, Secretary of Defense Caspar W. Weinberger described the national predicament in precisely this way: "Aware of the consequences of any misstep, yet convinced of the precious worth of the freedom we enjoy, we seek to avoid conflict, while maintaining strong defenses. Our policy has always been to work hard for peace, but to be prepared if war comes" (Alexander and Kraft 2008, 113). Perhaps most obviously, the continuing life of the history I narrated above is evident in the "new" life of counterinsurgency doctrine in the ongoing war on terror. In the continuing justification offered for it-- that military operations are a necessary (preemptive) reaction to a "unique" and irregular threat-- this war is a paradigmatic example of an American small war, a tradition of wars with neither "a declaration of war" nor exit strategies. In view of the conquest of America, which slowed dramatically after allotment, but has never ended, it is also possible to imagine the war on terror as belonging to a tradition of wars without end. The American economic expansion that began with conquest of the territory, moreover, has never truly come to a halt. The United States' growth is now drawn from transactions that reach resources in every part of the globe, and the fundamental techniques and dynamics of its economic growth, while they have developed, have not changed in their reliance on inducements paired with control over the variables determining parties' respective bargaining power, including building an omnipresent background threat of military force. It is thus still possible to say, as Secretary Weinberger commented three decades ago: "In today's world, the line between peace and war is less clearly drawn than at any time in our history" (Alexander and Kraft 2008, 113).

The dynamics of these historical practices also continue to reverberate on the soil where they emerged, through the racially and economically divided social order of the U.S. today, for a civilian population that remains unable to contemplate an unarmed peace, or peace that is not "peace-war." In the domestic economy, real estate remains a cornerstone commodity; but as a security, real estate purchases are now the foundation of a debt economy, pooled and bundled by the hundreds of thousands. Insofar as they represent tremendous wealth, they are the source, if an unstable one, of consumers' bargaining power *vis-à-vis* one another, and collectively against the world. The history above does not explain contemporary phenomena, but it underscores resonances and continuities between the past and the present. I have tried to furnish the basis for beginning to ask more questions-- about the line of descent between the colonial military and the police force that protects this property today; about the rights and privileges distributed by the state that still hinge on a group's military service and other contributions to the national economy⁶¹; about the extent to which docile consumers still acquiesce in the aggressive

⁶¹ Under the contested DREAM Act, military service remains one pathway to naturalization.

expansion projects of the state; and about the state's manipulation of economic incentives to enlist families in imperial projects, draw on their desire to partake in imperial spoils, cloak military aggression behind personal investments, and give consumer family choices the appearance of autonomy from state design.

Chapter Four

Removal and Displacement

The idea that the settlers or first insurgents “surged” into Indian country, westward, and across the lands to the Pacific was a popular idea at the time of their migration. Early nineteenth-century observers very often used the metaphor of “a flood of men” to describe the movement of white settlers. In his second inaugural address, Thomas Jefferson, for example, described native lands inundated by “the stream of overflowing population from other regions” (1805); of the migration toward the Missouri River, John Mason Peck wrote that migrants “poured in a flood,” “like a mountain torrent”—“they came like an avalanche” (Rohrbough 1968, 133); and Peck’s *New Guide to the West*, published in Boston in 1837, announced that “wave after wave” of white migration was “rolling westward” (Taylor 1972, 16). In 1830, Andrew Jackson’s Secretary of War and Michigan Governor Lewis Cass, who oversaw the forced removal of tribes, described these actions as unplanned but necessary. “For many years after the first settlement of the country,” he wrote, “the colonists were engaged in the duty of self-preservation,” and could not “coolly examine” the situation; “[t]hat the Indians were borne back by the flowing tide, was evident; but that this tide would become a deluge, spreading over the whole country, and covering the summits of the loftiest mountains, could not be foreseen, and was not anticipated” (Evarts, Cheever and Francis 1830, 21). Humanitarians opposed to forced removal responded bitterly, and commented: “The Indians had better stand to their arms and be exterminated, than march further onwards to the Pacific, in the faith that the coming tide of civilized population will not sweep them forever till they mingle in its depths” (Evarts, Cheever and Francis 1830, 14).¹

Indeed, when de Tocqueville visited America in the early 1830s, he saw clearly that the process of conquest was one of mass migration: of the “vast uninhabited regions” “beyond the frontiers of the Union in the direction of Mexico,” he wrote, “[t]he people of the United States will force their way into these solitary areas even sooner than those very people who have a right to occupy them” (2003, 480). He, too, wrote of witnessing “millions of men, [...] all marching together toward the same point on the horizon,” in the “gradual and unending advance of the European race toward the Rocky Mountains” (Tocqueville 2003, 328). Peck’s *Guide* reported that “[m]igration has become almost a habit in the West. Hundreds of men can be found, not over 50 years of age, who have settled for the fourth, fifth, or sixth time on a new spot” (Taylor 1972, 16). And Colin Calloway noted that European immigrants in America “moved frequently, even frantically, it must have seemed to Indian eyes, their migrations motivated by the desire for more land or for distance from neighbors. Confronted with the influx of thousands of Europeans, Indian people must have felt much like the citizens of imperial Rome as hordes of Huns, Goths, and Vandals invaded their world” (Calloway 1997, 134).

This migration, which constituted a deliberate government technique of expansion, as we have seen, peaked in intensity during the nineteenth century. The U.S. conquered northern Mexico after pursuing the maxim “to populate is to govern” in Texas through a period of concerted insurgent migration during the 1820s and 30s (Weber 1998, 178). Seeing, as a Mexican general cautioned, that “[t]he North Americans have conquered whatever territory

¹ Later, Frederick Jackson Turner later incorporated this metaphor of the flood into his cultural thesis: “the frontier is the outer edge of the wave—the meeting point between savagery and civilization” (Taylor 1972, 4).

adjoins them,” the Mexican government passed a law in 1830 prohibiting further immigration from the U.S. and the introduction of slaves into Texas.² Nonetheless, “Anglo-Americans ... flooded Texas following the passage of the Law..., as if it had never been enacted. Most came as illegal aliens...” (Weber 1998, 177). Mexican Secretary of State Alamán, who foresaw the loss of Texas, is said to have written, “Where others send invading armies, ... [the Americans] send their colonists” (Weber 1998, 170).³ Meanwhile, in the U.S., Stephen Austin, the “Father of Texas,” spoke of “Americanizing Texas” through immigration. “The more the American population of Texas is increased,” he stated in 1835, “the more readily will the Mexican government give it up.” He continued, “[a]ll that is now wanting is a great immigration of good and efficient families this fall and winter. [Then]... the peach will be ripe” (Weber 1998, 178). When the U.S. annexed Texas in 1845, Weber tells us, “the Mexican governments looked with alarm toward other parts of the frontier as a new wave of American immigrants rolled beyond Texas toward New Mexico and California, where Americans talked of replaying ‘The Texas game’” (Weber 1998, 178).

This history of immigration to the far west is the culmination of the history of settlement presented by the foregoing chapters. It stands in dramatic contrast to the history of immigration embraced by “classical immigration law,” a discipline from whose history conquest has been effaced. This body of law governs the entry and exit, or the admission and expulsion of aliens in a definition “common to the literature” (Motomura 1990, 547; Legomsky 1984, 256). Today, the border is perhaps the central preoccupation of contemporary immigration debates; certainly, the two most prominent activities of immigration courts, ordering removal and granting asylum, refer centrally to it. By determining whether the crossing of an “alien” is legal or illegal, immigration judges constitute two major groups of present-day immigrants-- undocumented immigrants and refugees or asylees-- as “bad” and “good” immigrants in contemporary immigration discourse, respectively. In addition, classical immigration law understands its lineage through a federal immigration law that did not come into being until Chinese Exclusion in 1875, reversing a prior policy tradition of maintaining an open border (Motomura 1992; Pfander and Wardon 2010).⁴ According to this narrative, the country was founded long ago as an asylum for immigrants fleeing persecution in Europe. Among numerous explanations for the closure of its border, one popular asylum practice guide explains that the overwhelmed country reached a limit to its generosity in the late nineteenth century, because of the unquenchable demands of the external world; others suggest that border walls and increased deportation stem from unique modern security concerns.⁵ Whatever explanation is offered for the country’s later history, neither the anti-immigrant movement nor advocates for a borderless world would contest

² The previous year, the President had emancipated all slaves in Mexico in what Weber calls “a move that was basically humanitarian, but might also have been intended to slow down American immigration. Protests from Texas and Coahuila, however, had exempted Texas from the ruling” (1998, 170).

³ Weber quotes Angela Moyano Pahissa (*El comercio de Santa Fé y la Guerra del '47* (1976), 11) but notes that her citation is incorrect and that he could not locate the original.

⁴ The idea of an era of unrestricted immigration is so pervasive in the literature that Gerald Neuman comments, “authors cited to illustrate it need feel no individual embarrassment” (1993, 1835).

⁵ One standard immigration law handbook speculates that welcoming the persecuted was probably easier for the U.S. when global population was lower and travel more expensive, dangerous and rare, and when there were no quotas in immigration law (Germain 2007, xvii). A recent work on detention claims, “[u]ntil there was immigration control, there could be no immigration detention. Looking at liberal states in the mid-nineteenth century, we can see a relative lack of concern about ‘the border’ as a site of regulation” (Wilsher 2012, 11).

the popular notion that underlies this conception: the idea that the U.S. originated with this kind of asylum, making its populace “a nation of immigrants.”

This popular “immigrant paradigm” (Gabaccia 1999), however, rose to the level of national propaganda during the Cold War, the era when the U.S. began to offer asylum on a broad scale to asylees and refugees from Communist-bloc countries. In his book, *A Nation of Immigrants*, John F. Kennedy created a classic version of the narrative about how immigrants flocked to America because of its robust democracy, plentiful resources, and willingness to offer asylum. The ideas that appeared in this tract have subsequently become the basis for describing the closing of the border as a “betray[al] of one of our country’s most cherished traditions—providing safe haven for the persecuted” (Foxman 2008, xliii).⁶ Concurrently, practitioners of asylum and refugee law, which now dominates U.S. immigration law practice in general, have become torchbearers for the idea that asylum is the historical and proper tradition of U.S. immigration law (Twibell 2010, 202-03).

But the asylum narrative of the “nation of immigrants” paradigm cannot resolve the uncomfortable questions it raises logically and historically about the relationship between immigration and displacement. The popular belief that immigrants “always” found refuge here, that is, raises questions about which immigrants were the first to arrive, and who they found here—and with them, the specter of this country’s colonial heritage of indigenous dispossession. Kennedy resolved that originary problem with the figure of an exception, declaring, “every American who ever lived, *with the exception of one group*, was either an immigrant himself or a descendant of immigrants” (2008, 3). He named this exception, of course, as the Native American. Rather than examine contact, he deferred the question of the first into the deeper past, speculating that the indigenous people whom early colonists encountered might themselves have been guilty of displacing prior “aborigines” when they migrated across the Bering Strait (2008, 3).⁷

The asylum paradigm of classical immigration law, the notion that America is a “nation of immigrants” who resettled here from elsewhere, rests on the effacement of the native. It implies the complementary, long cultivated and powerful narrative according to which early colonists found a vacant and virgin land in America that was “free” for the taking, and relies on the expungement of the history of the immigrant invasion with which this chapter began (Taylor 1972; Webb 1952; Smith 1957). But the rhetoric of the contemporary immigration debates accompanying this pride in the nation seem drawn from the echo chamber of memory. Pat Buchanan invoked the surging “tidal wave of immigrants,” an impending “immigration tsunami that will make whites a minority” and “White America [an] endangered species” (2006, 2013). The specter of invading “armies” of immigrants that will imminently flood the border to “inundate native lands” recall the very immigration invasion through which this country was founded; it seems to anticipate the repetition of a history that is yet not avowed by the adherents of these fears. Moreover, these images draw an unwitting analogy between the very tactics of conquest that Anglo-American settlers used in early America and the threat their descendants perceive in “illegal immigrants” that animates their vociferous anti-immigrant advocacy now.

⁶ James Smith, for example, writes, “The United States has had one of the most generous and open immigration policies in the world. But since the ratification of the Constitution, United States immigration policy has been schizophrenic. . . [Concerns, beginning with the discrimination against the Irish] have prompted a United States immigration policy that has at times been inconsistent, racist, and surprisingly un-American” (Smith 1995, 227).

⁷ Kennedy elaborated, “The exception? Will Rogers, part Cherokee Indian, said that his ancestors were at the dock to meet the *Mayflower*.” He then commented, “some anthropologists believe that the Indians themselves were immigrants from another continent who displaced the original Americans—the aborigines” (2008, 3).

This parallel between early colonists and contemporary “bad” immigrants stands in direct contrast to the analogy between the settlers from Europe and asylees, or the “good” immigrants of today.

In what follows, I propose to think about immigration law’s disciplinary exclusion of the history of conquest against its history of implication in it. In the first section below, I explore key terms of the discipline—“immigrant,” “immigration” and its identification of “immigration laws”—through legal scholarship that has sought to construe those terms broadly, to include within histories of immigration and immigration law these histories of forced migration and the laws that controlled them. I then recount a history that recognizes indigenous people during the colonial period and early Republic as migrants too. For as European migrants to America destroyed indigenous communities, forms of political organization, modes of exchange, and relationships to the land through the developing contact economy, they also caused displacement on a massive scale. As they continued to arrive across the land, white migrants again and again caused the migration of Indian tribes. Subsequently, “[t]housands of Indian people also participated in the process of migration and resettlement,” moved to new locations and built multiethnic communities in refugee camps (Calloway 1997, 151). The arrival of Europeans “created a world in perpetual motion,” so that the experience of Indian and European migrants during this time was one of constant displacement and relocation, and repeatedly beginning processes of building “new lives and communities far from the places of their birth and far from their ancestors’ graves” (Calloway 1997, 151).

The variation of the description of America as “a nation of immigrants” I offer here includes the displacement of indigenous people in the history of American immigration. It draws an analogy between removal practices in contemporary immigration law and historical American colonial policies of Indian removal. For this framing, this chapter is deeply indebted to scholarship that has already disturbed the parameters of immigration history, and in particular, to Daniel Kanstroom, the only immigration scholar who has identified Indian removal as an antecedent of detention and deportation under current immigration in law (2007).⁸ However, Kanstroom’s brief discussion of Indian removal focuses largely on early nineteenth-century Supreme Court cases that shaped the debates over forced removal. By contrast, I describe a longer arc of Indian removal that begins in the American colonial period, and suggest that the context for the nineteenth-century forced removal that Kanstroom discusses was a centuries-long policy of self-deportation. In the colonial era, I show, these policies began with a strategy of “self-deportation,” or of making it impossible for tribes to survive and sustain their way of life, so that they would leave and relinquish their land to settlers. After the establishment of the U.S. and through a heated dispute over federalism, these “passive” colonial eliminatory practices culminated in the passage of the Indian Removal Act in 1830, and a policy shift to forced removal that authorized the infamous Trail of Tears. During the period of accelerated conquest in the mid- to late-nineteenth century, when frontier warfare rose to new heights on the Plains, the government also turned to the strategy of detaining indigenous people on reservations. Meanwhile, the “shrinking promise” of the frontier and resulting fears about future scarcity gave

⁸ Kanstroom includes this observation in his diagnosis of a variety of antecedents, including the English use of removal and replacement in Ireland to resolve the problem of an intractable native population (2007, 21). The immigration law scholar Leti Volpp has also produced work at the specific intersection of American Indian history and U.S. immigration law (2012), and new work on the intersection of immigration and settler colonialism is also beginning to appear (e.g. Saranillio 2013; Walia 2013).

rise to a new nativism, and to parties that declared themselves “Native Americans” for America and against immigrants.

If we acknowledge that laws of immigration include the laws affecting the migrations of indigenous people, then it seems apparent that the vast majority of settlement laws, too, were immigration laws. In this sense, this chapter reimagines each of the previous three chapters in the light of early laws of immigration. During the colonial period at least, the distinction between the categories of immigration laws and laws of Indian affairs could not be drawn sharply, not least because the laws of Indian Affairs were directed to the property entitlements of white immigrants, rather than of tribes. I explore the contours of the field of immigration law to consider how a disciplinary formation itself can function as what Jean O’Brien has called a “replacement narrative”—a narrative that posits that natives have vanished, that they exist only in the past tense, and that they have been replaced by non-Indians “who are making modernity” (2010, 55-56). In particular, the historiography of New England negates Indian history and the ongoing existence of Indian nations, portraying them instead to be “dead-end;” it replaces them “with a glorious New England history of just relations and property transactions rooted in American diplomacy that legitimated their claims to Indian homelands, and to the institutions they grounded there” (2010, 189).⁹ The popular conception of the U.S. as a “nation of immigrants” is precisely such a replacement narrative, and remains a politically potent call to national pride, rooted in the belief in hospitality as an American tradition.¹⁰ Below, I present an alternative to the asylum paradigm that describes instead invasion and removal, dispossession and displacement as interdependent processes central to American notions of sovereignty, territorial security, and belonging. This history of removal underscores a long tradition of displacement by immigration in the name of “development” and progress. By reimagining the contours of “immigration law,” I show the rift between an immigration history that depends on and perpetuates the national myth of indigenous absence, and one that recognizes indigenous displacement and can thus support drawing connections between processes of migration, displacement, real estate, speculation, and development.

Immigration

It is important to note that the histories of the language and categories associated with removal and the histories that the substantive practices of removal policy have comprised follow distinct paths. Mapping the words “immigrant” or “immigration law” onto the colonial period, for example, is anachronistic, since the orderly distinctions between the different directions in which migration could occur, distinctions that now define the terms of the field, developed much

⁹ O’Brien argues that historical monuments, commemorations, relics, ruins, place-names, and changes in the land itself, along with historical and literary production, contribute to the production of “replacement narratives.”

¹⁰ In addition to Kennedy, Franklin Delano Roosevelt, too, in an address to the Daughters of the American Revolution on April 21, 1938 in Washington D.C., famously admonished them to “Remember, remember always, that all of us, and you and I especially, are descended from immigrants and revolutionists.” Additionally, President Obama reserved his appeal to this time-honored *Presidential* trope for the closing crescendo of his Immigration Address on November 20, 2014, announcing his Executive Order action in the face of Congress: “My fellow Americans, we are and always will be a nation of immigrants. We were strangers once, too. And whether our forebears were strangers who crossed the Atlantic, or the Pacific, or the Rio Grande, we are here only because this country welcomed them in, and taught them that to be an American is about something more than what we look like, or what our last names are, or how we worship... That’s the tradition we must uphold. That’s the legacy we must leave for those who are yet to come.”

later. The distinction between “immigration” and “emigration” was weak during the early Republic, when “[t]he menace of unsettled boundaries was everywhere.” During the colonial period, jurisdictional territories were less consolidated still (Paxson 2001, 48). As immigration law scholar Gerald Neuman writes, even in the late nineteenth century, people more frequently used the terms “emigration” or “emigrants” to refer to what we would today describe as “immigration” and “immigrants” (1993, note 19).

What work does the construction of categories like “immigrant” and “immigration” perform?¹¹ The impulse to draw them narrowly is at least as old as the United States. As early as 1789, Jedidiah Morse explicitly differentiated “immigrants” from “the original inhabitants, the Dutch and English “settlers.” Similarly, in the early twentieth century, John Higham, historian of American nativism, also found it expedient to “exclude the founders of a society from the category of immigrant” (nonetheless, he then described the first major phase of “immigration” as beginning in the 1680s) (1984).¹² Morse and Higham’s distinctions both presume an all-European early “immigrant” polity; their refusal to call the founders “immigrants” only further establishes the presence of those founders in the place of the “original.” The erasure of indigenous presence that results from their categorical choice helps us understand how the history of removal has become so obscure. This erasure continues colonists’ determined efforts to script the story of the “vanishing Indian” as a dying breed even from the earliest days of settlement, when colonists were still outnumbered by indigenous people, and were deeply engaged in expropriating land from tribes (O’Brien 2010). Moreover, the absence of the primary forced migrations of American Indians from American immigration history contributes to the relative invisibility of indigenous presence and concerns in American society now, despite indigenous survival of the repeated migrations that shook the worlds of these innumerable groups to the core, and changed their ways of life forever.

The inclusion of American Indians in American immigration history distresses the fundamental presumptions of the field, because as Leti Volpp has shown, the “time-space” construction of the current immigrant paradigm forecloses the history of indigenous removal, conquest, and the moving border.¹³ Yet indigenous people’s migrations from their homelands lie at the heart of the early history of migration to and within America; they fundamentally shaped the experiences of the celebrated “first migrants,” the founders of the nation. The original inhabitants continue to haunt the story from which they are absent. The way they trouble the immigrant paradigm furnishes a starting point for an inquiry into how this “nation of immigrants” emerged through the permanent alienation of non-European groups.

The move to recognize the indigenous people as migrants within American immigration history builds on other work that already emphasized the centrality of forced migration in American immigration history, and looked back to the colonial period to do so. In the first major work to systematically challenge the myth of an early open border and the idea that American immigration policy began with late-nineteenth-century exclusion, Neuman addressed early state statutes restricting the movement of free blacks and slaves, among others, relying on a broad

¹¹ An analysis of the mythology of choice in U.S. immigration history would treat not only the question of whether individuals chose to migrate to America but also whether they chose to migrate permanently. This question is outside the scope of this chapter, but is still pertinent, insofar as I draw here on a broad concept of coercion that impinges on the concept of choice.

¹² Higham provides a functional justification, writing, “To distinguish immigration from other aspects of American history, we shall have to exclude the founders of a society from the category of immigrant” (1984, 6).

¹³ As immigration law scholar Leti Volpp has stated, “Forgotten is how nations come to be” (2012).

definition of an immigration regulation.¹⁴ A law is an immigration regulation, he proposed, “if it seeks to prevent or discourage the movement of aliens across an international border, even if the statute also regulates the movement of citizens, or movement across interstate borders, and even if the alien’s movement is involuntary” (Neuman 1993, 1837-38). Furthermore, laying the ground for studies of immigration and race in the early Republic, Neuman explicitly analyzed early bans on black immigration and fugitive slave laws as varieties of immigration regulation (Kanstroom 2007, 77-83; Kraehenbuehl 2011).

Others soon followed Neuman’s recognition of involuntary movement in this definition, arguing for the importance of recognizing the history of the forced migration of Africans to America as immigration history, and outlining the powerful ideological effects of excluding slaves from the category of “immigrant” (Buckner Inniss 1999; Fogleman 1998). Rhonda Magee, for example, writes that the present stakes of this omission include the suppression of analyses of historical state-sponsored forced migration, and the transmission of exclusions (2009). She underlines the strong contemporary salience of acknowledging an American history of “state-sponsored forced migration human trafficking, endorsed by Congress, important to the public fisc as a source of tax revenue, and aimed at fulfilling the need for a controllable labor population in the colonies, and then in the states, at an artificially low cost” (2009, 277). To extend this analysis, is important to underscore the resonance between policies regulating undocumented immigrants today and those that constrained the movements of enslaved Africans in early America. Both groups comprise indispensable, rightless labor forces on which the national economy is and was heavily dependent. By contrast, Indian removal policies and legislation in North America were not enacted to harness the labor power of the targeted group, but to address the obstacle of indigenous presence hindering Anglo-American possession, sale, and cultivation of a market in lands. In Chapter 3, I examined the ways the state addressed its needs to procure labor for Indian removal; here, I suggest that Indian removal, and by implication contemporary removal, may show that immigration regulation concerns not only the importation of people as a labor force, but also the deportation of individuals who are considered to be expendable laborers, or whose labor becomes considered extraneous.

Magee also points out that failing to include these laws and policies in the history and framework of “immigration” preserves an immigration narrative about a “nation of immigrants” that “transport[s] the racism of our past into our present,” and continues to spell out who counts as an “American,” and who does not, to all who newly encounter it (Magee 2009, 277). By contrast, she urges, recognition of the Middle Passage and other importation components of slavery as immigration could shed light on historical and contemporary battles over immigration law and policy, and the relation of these to the evolving, but persistent racial hierarchy in America (2009, 275). The history of the forced migration of Africans for the slave trade, like that of displaced and repeatedly relocated indigenous peoples, draws attention to their experiences of coerced displacement, uprooting, and loss of homelands. This emphasis is consistent with contemporary immigrants’ rights advocates’ focus on removal, which controversy lies at the heart of contemporary immigration debates primarily because of the violence with which it uproots people and forces their migration, directly or indirectly (rather than because of their disputed effectiveness at “preventing or discouraging” people from crossing borders). However, the effacement of indigenous peoples and their migration experience is repeated even in works that recognize forced migration within American immigration history. This exclusion seems to

¹⁴ See Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477-78 (excluding prostitutes and convicts from admission to the United States).

derive from an understanding of *arrival* as central to the concept of an “immigrant.” Aaron Fogleman, for example, defines immigrants as “people who came from somewhere else to the mainland colonies or the United States (as opposed to having been born there)” (1998, 50); he therefore includes slaves and indentured servants. Before him, Oscar Handlin also identified the importation of British convicts and slaves as two examples of “involuntary” migration, without mentioning Indian removal (1951, 2).¹⁵

Kunal Parker, however, has challenged precisely the idea of “arrival” as critical to the category of “immigrant.” He does so by pointing to state schemes to deport free blacks to Africa (called “colonization” by many emancipationists), which Kanstroom tells us “bounded throughout the nineteenth century.”¹⁶ Specifically, Parker considers Massachusetts’ failed attempt in the late eighteenth century to pass a law to assign newly freed blacks a place of origin in Africa in order to categorize them as alien and deport them, even when they were American born (2001). Parker argues that this law, as an immigration law, reveals the functional, constructed character of “here” in the formulation of an immigrant as one who has moved from “there” to “here.” He further observes,

This fragment of African-American history suggests that the “problem” with immigration is not that immigrants come “here,” that the solution is not to keep immigrants “there,” and that we cannot responsibly justify this solution on the ground that immigrants have a “there” to which they can return. The “problem” is instead one of curtailing immigrants’ legal visibility on the landscape of claims. (Parker 2001, 121)

Beyond Parker’s argument about discursive effects, moving people “there” is of course also one way of refuting their claims “here.” If an “immigrant” could also be someone forced to *leave* a place by law, like Indians and slaves in early America, it would seem to follow that “there” never matters so much as “here.” The removal of Indians poses a particularly interesting case in which “there,” by virtue of the movement of the border—or the arrival, again, of white immigrants as a result of expansion—became “here” again. Could *this* way of becoming present “here” also constitute arrival?

Furthermore, settlers were in the process of characterizing that land, or the “here” in early America, and developing a very specific kind of human relationship to place—that is, a legal possessory interest in a type of commodity that was novel to this terrain. Given this interest, from the perspective of law and policy makers, the desired absence or presence of a given group would follow from the impact of absence or presence on the value of the possession, depending on the balance of the labor that group supplied and the resources they consumed. To manipulate these factors, as Parker points out, the problem for the state indeed depended on their ability to maintain control over these groups’ “legal visibility on the landscape of claims.”

¹⁵ Paul Spickard also points to the forced migration of Africans and the “decimation of Native Americans” as “the two founding facts of American History... [and] central facts in the story of American immigration (2007, 63).

¹⁶ Kanstroom describes how colonists considered such “emancipation plans” as early as 1714 and how a bill supporting a proposal to bring a group of free African Americans to Sierra Leone passed the Senate in 1813, before “losing steam in the House.” The American Colonization Society successfully obtained funds shortly thereafter to sponsor hundreds of African Americans to self-deport to Africa; supporters and members included Thomas Jefferson, James Madison, James Monroe, Millard Fillmore, John Marshall, Roger B. Taney Andrew Jackson, Daniel Webster, Stephen A. Douglas and Abraham Lincoln. Indeed, in August 1862, Kanstroom recounts, Lincoln invited a group of free black men to the White House to ask them to leave the country voluntarily and set a positive example, saying “You and we are different races. It is better for us both, therefore, to be separated” (2007, 84-90).

Besides the complications inherent in the dynamics of conquest when it comes to distinguishing “here” from “there,” the case of the slave trade’s involuntary displacement and removal of Africans from their homelands should already prompt us to consider that migration can be forced *in* as well as *out*. We might therefore adapt Neuman’s definition of an immigration law to cover these circumstances, and consider a law an immigration regulation “if it seeks to *encourage* or *force*, as well as prevent or discourage the movement of aliens across an international border, even if the statute also regulates the movement of citizens, or movement across interstate borders, and even if the alien’s movement is involuntary.” This adaptation can encompass both Indian Removal and the importation of slaves (not just the restrictions on the movements of already imported slaves), while still, as in Neuman’s definition, recognizing the different degrees of coercion so critical in making self-deportation and deportation legible as alternate strategies toward the same goal. Such a definition also implies a possible convergence between my own argument and Magee’s, in historical extension: its logic suggests that after abolition, the “self-deportation” character of many laws of the Jim Crow era led to the Great Migrations of blacks out of the south and the formation of black towns across the West. This definition of immigration generally lends greater coherence to recent literature comparing “self-deportation” policies directed at undocumented immigrants to the Jim Crow laws that produced sundown towns (Johnson 2012; McKanders 2010; Marulanda 2010). But beyond mere comparison, this invites further historical analysis of post-slavery racial regulations in the South *as* self-deportation, and thus migration law and policy itself.¹⁷

The different inquiries that this definition of immigration has the potential to open suggest that this history of removal offers a framework that can capture the connection between the past and the present, as well as between different histories of forced migration. First, it underscores how U.S. law directly incorporated colonial migration laws and policies, and therefore renews the salience of examining colonial practices for understanding later developments and the present moment. As Edward Hutchinson noted in his magisterial history of American immigration policy, “[w]hen the federal government in turn took over the responsibility for dealing with immigration... it was not venturing into an altogether new and unexplored area of national policy formation, but rather entering on an already trodden path” (Hutchinson 1981, 388). Second, it furnishes tools for exploring the correlations and co-articulation of the histories of indigenous and African displacement and removal with respect to the settler colonies in America. The integral relation between these histories far exceeds the scope of this project, but key points of contact might include the way indigenous displacement underpinned the persistent growth of the colonial slave trade, since slaves were needed to perform agricultural labor upon the rapidly expanding lands procured by Indian removal. One might also consider the way the anti-blackness engendered by the slave trade formed the basis for the particular racism that settlers developed toward indigenous people, which further fueled their projects of dispossession (Vaughan 1982; Winthrop 1968). From a presentist view, the histories of slavery and indigenous dispossession—which followed from Anglo-American laws seeking to encourage and force these groups across borders not yet clearly domestic nor international— together constitute a common history of the emergence and founding of this state, and of the institutions that have evolved into those that govern over our collective life today.

¹⁷ Kunal Parker too begins to suggest this framework for examining the migrations of free blacks. He wrote, “[a]s a class living under the constant threat of deportation only because they were no longer slaves, free blacks in the antebellum South suffered all the kinds of exploitation enabled by fear—in the areas of labor, access to justice, and so on—that “illegal” immigrants suffer today” (Parker 2001, 120).

Removal

The very history of the word “removal” is illustrative: it has lost its self-contained agency, and has come to connote transitive force; where one once removed, or changed location, one now generally removes something (or someone else) from a situation. That is, in colonial times, the word “removal” meant simply *to emigrate* and could describe the voluntary, as well as involuntary movements of bodies from one place to another (Banner 2005, 192-93). Benjamin Franklin, for example, wrote a short tract in 1784 addressed to prospective immigrants in Europe entitled “Information to Those Who Would Remove to America,” in which he described settlement conditions, including the ease with which one could naturalize, purchase land, and find work. But a range of Euroamerican settler activities were also self-consciously used to *get* neighboring Indians to “remove... with as little trouble as possible” in order to free land for white immigrant purchase. The word thus has the capacity to describe more and less coercive circumstances of Indian removal, and to capture the range and different approaches of strategies that we have used to define an immigration regulation here: policies calibrated to prevent, discourage, encourage or force migration. “Removal” could describe the decision of tribes to depart from their homelands because of a range of passive and aggressive actions by the settlers who arrived there, as well as the forced displacement of tribes by the military that would come under the Indian Removal Act. It could also concern the laws governing the kinds of inducements that Franklin noted, which encouraged whites to leave Europe and come and settle in America. Thus, the very history of the word captures a sense of its definition: change through the absence of an element formerly present.

In 1996, “removal” became the formal language for expulsion of immigrants under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The term consolidated the formerly separate procedures of “deportation” and “exclusion” to reflect the strange temporality of deporting individuals on grounds of inadmissibility, or deportation as *retroactive exclusion*. Since then, the strategy of “self-deportation” has come under the spotlight as an alternative to removal: while it gained heightened public awareness as part of Mitt Romney’s immigration platform during his 2012 presidential campaign, it also characterizes the substance of 164 restrictive immigration laws that were passed by different states in 2010 and 2011 alone (Mother Jones 2012). The term itself was born out of an artist’s prank, a piece of faux news that marks an early moment in what appears to be a rising convergence of media and satire: two Mexican-American artists, Lalo Alcaraz and Esteban Zul, released a fake press release in September 1994 in response to Proposition 187, which would have barred illegal immigrants from state-run hospitals and schools in California, calling for the creation of “self-deportation centers” (Mackey 2012; Martin 2012).¹⁸ The contact for “Hispanics Against Liberal Takeover” was a “militant self-deportationist” named “Daniel D. Portado,” who appeared on a mock radio show to support Governor Pete Wilson’s “self-deportation message” (Glass and Portado 1996; Glass 2012). Subsequently, *Telemundo*, unaware of the fictional nature of this character, invited him to appear; by November, Governor Wilson had incorporated the term into his vocabulary

¹⁸ This ad speaks of “the dire need for reverse immigration,” and includes such lines as “Illegal immigrants are living the good life hogging all the jobs that Americans have a God-given right to refuse... That’s why we’re down on brown” (Alcaraz 2012).

(Safire 1994),¹⁹ inspiring Republican policy makers like Chris Kobach, architect of Romney’s immigration plan and the notorious S.B. 1070 (Kobach 2007; Kobach 2008).²⁰

The long history of the substantive strategy of “self-deportation,” however, indicates that it has always been an alternative strategy of removal, rather than alternative *to* removal. Like contemporary self-deportation, colonial removal policy was designed to coerce the migration out of a territory of a specific group, distinct from the polity of the Euroamerican tradition, by limiting that group’s access to basic life necessities within the territory. Most simply, self-deportation denotes an immigration policy of “making life unbearable” for groups living within a territory. The policy comprises a means of “chang[ing] their behavior,” or less euphemistically, practices that force them to migrate out of a state or country (Safire 1994). “Self-deportation” presents a methodological and less costly alternative to “removal”—the term, in contemporary immigration law, for government-conducted forced removal, or the expensive process through which the government ferrets out individuals for mass deportation. The goal of “self-deportation” laws and removal is the elimination of an unwanted group within the territorial jurisdiction.

As Patrick Wolfe has noted, settler colonization is propelled by the logic of elimination of the native (2006).²¹ While colonization has manifested as genocidal, he explains, it is not invariably so; it is, however, “inherently eliminatory,” and the primary motive for seeking to eliminate indigenous people is access to territory (2006, 387). The restrictive racial classification of Indians, as he points out, furthered this logic of elimination: they were racialized—and “killed, driven away, romanticized, assimilated, fenced in, bred White”—because of who they were, which was defined by *where* they were—on the lands (Wolfe 2006, 387-88). “Territory,” Wolfe writes, “is settler colonialism’s specific, irreducible element.” Where “[n]egatively, [this form of colonization] strives for the dissolution of native societies, [...] [p]ositively, it erects a new colonial society on the expropriated land base” (2006, 388). The bifurcation of this *dependent* relationship has given rise to many narrative breaches, including those I examined in prior chapters as well as here. In Chapter 1, I looked at the disconnect between the history of conquest, dispossession, insurgent invasion, removal and displacement, and the fractured stories about the “new colonial society” concerning “healthy, productive credit”; in Chapter 2, the discrepancy between the consent-based social contract and a cooperative, diverse society; in Chapter 3, the disconnect between the trope of Americans as a peace-loving people and the narrative about armed conflict with jealous, irrational, irregular enemies; and here, the breach opened between the experiences of indigenous people and the national myth about the nation’s founding tradition of opening its doors to offer a place of refuge to the world’s tired and poor.

¹⁹ Wilson explained to William Safire, “If it’s clear to you that you cannot be employed, and that you and your family are ineligible for services, you will self-deport” (Safire 1994).

²⁰ Kobach prefers to call this strategy “attrition through enforcement,” a phrase that focuses on the law to be enforced, and implicitly on the immigrant’s illegal act, rather than deportation, or the state’s act of removing him. According to this turn of phrase, we might also understand the colonial “self-deportation” strategy I describe below as “attrition” through *establishment* of the “rule of law,” to draw attention to the fact that there was no Anglo-American law before, except through this attrition. We could also think of it as “attrition by overthrow” if we wish to draw attention to the legal orders governing the peoples of the land at that time.

²¹ He says “settler colonialism”; this is as true of (colonization) practices as ideological production.

Removal in Colonial America

Indian removal constituted a major part of colonization efforts, but could only occur because of background conditions that gave colonists bargaining power in the first place. Again, European diseases like tuberculosis, cholera, smallpox, measles, malaria, respiratory viruses, typhoid, typhus, dysentery and venereal diseases decimated indigenous communities. The epidemic that spread across Southern New England in 1616 might have been the bubonic plague or chicken pox. It left so many dead that when colonists arrived a few years later, they found heaps of bleached bones and skulls, leading Thomas Morton to describe the scene as “a new found Golgotha” (Cronon 86-87; Crosby 1976, 290). Smallpox destroyed half of the people of the Huron and Iroquois confederations during the 1630s and 40s, half the Cherokee in 1738, nearly half the Catawbas in 1759, half the Piegan tribe during the Revolutionary War, two-thirds of the Omahas and about half the population between the Missouri River and New Mexico shortly before the Louisiana Purchase, and revisited the people of the plains in 1837 to kill half of those who remained (Crosby 1976, 290-91). As noted in Chapter 1, this scale of biological devastation caused massive social disorganization within tribes, breaking up kinship networks and systems of political, spiritual and medical authority that had previously organized the life of their communities (Cronon 1983, 89; Crosby 297; Ch. 1, 18-19).

The example of disease highlights how the projects of removal and conquest converged, how colonists exploited biological and environmental advantages where they could to *avoid* high-intensity warfare, economically unsustainable even with the colonists’ unanticipated advantages, to the end of native elimination. Colonists sometimes wielded these tools intentionally, as they did when British General Jeffery Amherst deliberately exposed the Ottawa to blankets infected with smallpox, leading to the collapse of Chief Pontiac’s resistance movement in 1763 (Fenner 1988, 239).²² Again, the reason the English in North America did not often go to war with tribes in the early period was because the diseases they spread by contact largely alleviated the need for armed struggle. As John Duffy has written, smallpox was “a dangerous ally” that “was frequently a decisive factor in the victories of the Europeans over the Indians.” Had disease not “cleared the way for white occupation” by eliminating tribes “with only a minimum of friction,” European colonists in many parts of America would likely have perished as quickly as the first settlements in Virginia (Duffy 1951, 341). This one-way biological assault performed a great part of the labor of conquest, at a time when the right of conquest was controversial in international law, and the English were burdened with the task of asserting the superiority of their claim to indigenous lands over the claims of other European nations. Because it was convenient and *possible* to frame their entry and expansion in non-warlike terms, English settlers resolved to purchase Indian land, however coercive the agreement or nominal the price.

The Europeans, “[o]ver and over again... made their first settlements on the sites of destroyed Indian villages,” “thus saving their inhabitants much initial work in clearing trees” (Cronon 1983, 90). By 1800, indigenous peoples in New England survived in only a fraction of their former numbers, and they had been forced onto inferior agricultural lands and into small praying towns and reservations. They could no longer sustain themselves as they had before,

²² Frank Fenner quotes Amherst: “Could it not be contrived to send smallpox among these disaffected tribes of Indians? We must on this occasion use every stratagem in our power to reduce them,” and the local commander replied, ‘I Will try to inoculate the **** [*sic.*] with some blankets that may fall in their hands, and take care not to get the disease myself’” (Fenner 1988, 239). See Chapter 3: it was war.

both because their ability to move through the landscape had become “severely constrained” and because the game on which they had depended—beaver, deer, bear, turkey, wolf, and others—had largely vanished. These animals had been replaced by European livestock that more heavily burdened the plants and soils, and required “hundred of miles of fences,” which fostered weeds, dandelion, alien grasses and rats. Settlers’ agricultural practices led to continuous soil exhaustion; their clear-cutting destroyed old growth oaks and white pine, cedar and hickory, beech and maple. Deforestation dried soils, giving rise to an increase of species like oak, and made temperatures and drainage patterns more erratic, in addition to causing water and wind erosion (Cronon 1983, 159-60). Again, these activities diminished the value of the land for indigenous people, and made disease and malnutrition a daily challenge for them, leading to their increasing dependence on European trade and making them vulnerable to European coercion, both interpersonal and governmental.

These forms of coercion include the myriad techniques examined above for making life increasingly unbearable for indigenous survivors of disease, and “getting” tribes to remove. For example, we saw that changing the ecology of the land became a deliberate settler tactic, and that many colonial governments required that settlers “improve” land by clearing and building upon it in order to claim it. Indeed, the British government would void patents if individuals did not occupy, improve, and cultivate land within a reasonable time (Ch. 3, 73). Meanwhile, colonial governments imposed penalties for “depopulation” of the lands— their term for failure to occupy, or repopulate the land with Europeans. For the same reason, governments recruited settlers to come occupy and transform the lands by offering inducements to colonists who brought more migrants with them. In 1649, Maryland pledged three thousand acres of land for every thirty persons “transported into the province; and for a lesser number of persons one hundred acres for every individual” (Dillon 1879, 133). New Jersey promised each colonist one hundred fifty acres of land, six months’ provision “for his own person,” a good musket with twenty pounds of bullets and ten pounds of powder, along with an additional one hundred fifty acres for each able servant accompanying him, and seventy five additional acres for weaker servants or slaves (Dillon 1879, 138-39). South Carolina promised money and lands at low to no cost to prospective immigrants from the late seventeenth through the early eighteenth centuries, noting that “the engrossing and holding of large tracts of land, unimproved, by several persons, is very detrimental to the well settling of this province,” and declaring it “very necessary that some further measures should be taken for the importation of white people, in order to the better settling and strengthening of this province...” (Dillon 1879, 140-43; see Chapter 3).

The variety of interpersonal coercions we examined above, each of which exploited specific instances of uneven bargaining power, contributed to greater collective disparities in bargaining power in pursuit of the goal of *removal*. Opportunities for these forms of coercions grew as English communities expanded, since they grew up around the indigenous people who resisted removal; meanwhile, the English grew their slave trade for the agricultural labor that this expansion required.²³ After colonists destroyed the Indians’ ability to procure their own sustenance, the tribes who remained on their lands had increasingly to live among Euroamericans. In this circumstance, they faced harassment and found their occupational choices limited to menial work; their mobility and ability to travel were restricted by laws targeting them, with blacks, as a minority group. As a means of establishing racial subordination and obtaining racial control over the minorities who remained among them, colonists expanded early slave

²³ The number of Africans in New England grew from fewer than 1,000 in 1700 to 16,000 at the end of the eighteenth century (Davis 1989, 248).

codes into general race-based laws that, in the name of security, placed numerous restrictions on the movements and activities of blacks and Indians in the colonies, who mostly remained as part of a servant and slave class. These specialized laws forbade non-whites to travel between certain neighboring towns and without a permit, and placed sharp limits on the public assembly of non-whites, including the times and places that funerals could be held. They also prohibited these groups from education, ownership of real property and weapons, including canes, and they restricted non-whites to menial and poorly paid labor. These laws also included curfew laws barring racial minorities from the Boston Common after sunset. Early progenitor policies to racial profiling were codified in laws that forbade more than two non-whites to be seen on the streets “idling or Lurking together.” Other laws forbade a range of activities that simply caused annoyance to whites: non-whites were forbidden from keeping hogs and dogs, and barred them from purchasing provisions from country people so that their business stayed in town, where the storekeepers could raise their prices at will (Kawashima 1986, 209-14). Yet colonists increasingly placed both formal and informal restrictions on these groups’ access to colonial courts, even as they became more and more frequently interpellated by the legal order.²⁴ Prohibitively high court fees, apprehension fees, restitution fees, prison fees and punishment fees, including the expense of being whipped, had always functioned as bars to court access for these groups (Kawashima 1986, 199).²⁵ But in 1673, when Indians began to arrive in growing numbers in Plymouth on Court days, the General Court banned them from the town during regular sessions and restricted their ability to present claims to July and October meetings only (Kawashima 1986, 209).

Jean O’Brien describes the gradual increase in the number of English settlers in colonial Natick which, over the course of the seventeenth century, led many natives to adopt the English proprietary system early in the eighteenth (1997, 101). Some Indians concluded that “only by working through these mechanisms could they meet the objective of perpetuating Indian landownership into the future” (O’Brien 1997, 151). Subsequently, Indian lands fell into the English land market as a commodity and came under the control of English legal and bureaucratic procedures: land became a means of income and repaying debts, and was subject to seizure for unpaid fines (O’Brien 1997, 104; Jennings 62).²⁶ While indigenous people fell into debt from everyday needs, financial overextension, illness, injury, and litigation, English creditors pressed lawsuits when they knew Indians owned land. As we saw in Chapter 1, other Englishmen sometimes intervened with loans and the offer of a mortgage, knowing that the Indians’ “land would serve as security against their investments” (O’Brien 1997, 172-74). In Natick, Indian land sales to English purchasers “accelerated so rapidly after 1740 that the General Court took notice,” and in 1747, recognizing that Indians “have been often imposed by designing and ill-minded men in the dispossessing of their Lands... to the great loss & Injury of themselves & Families,” the magistrates required that land petitions be reviewed by guardians elected to oversee Indian plantations” (O’Brien 1997, 171). But O’Brien notes that even where Indians might have retained their land base there and continued to subsist on it, “Natick Indians no longer faced a viable future in the town” because of “the accelerating presence of often

²⁴ As Lyle Koehler notes, only Rhode Island did not penalize Indian offenders more harshly than whites for the same offense. The state made no effort to extend English law over Indian neighbors, and even utilized Indian jurors, including “pagan” Indians. Rhode Island tried neither to “civilize” Indians by providing them with English clothing, nor to regulate their moral behavior according to English mores, nor did it generally intrude into Indian affairs or lifestyles until the eighteenth century (1979, 16-17).

²⁵ Such fines often caused Indians to sell themselves into servitude to comply (Kawashima 1986, 137).

²⁶ See also Jennings, 62.

contentious English neighbors.” Those who were not “harried out by land loss through debts or by English threats of legal prosecution liquidated what remained of their holdings and moved on.”

This order of aggressions thus constituted a broader strategy of Indian removal. Colonists employed agricultural, financial, and legal tactics to make life unbearable for indigenous people, and to “inscribe their social order on the land.” The story of a woman who sought to stay on her land in Natick illustrates with particular poignancy how coercion can stem from the absence of choice: Hannah Speen was forced to sell her land because it had become “Intirely surrounded by the Lands of the English, & No Way [to get] from Said Land but by Trespassing on Others” (O’Brien 1997, 182). Under such circumstances, people’s best option was often to sell, and to leave an increasingly intolerable hostile environment. Colonial and then successive U.S. governments relied on this phenomenon of “voluntary removal” for centuries. In the 1830s, De Tocqueville described this dual pattern of enclosing and removing indigenous communities on a broader scale: either the settlers give chase to the Indians, he wrote, or tribes are “swallowed up into the states” (2003, 385). Especially in the South, he noted, “the Europeans continued to surround them on all sides and to hem them in more and more” (2003, 391):

Several important nations . . . found themselves virtually surrounded by Europeans who disembarked on the shores of the Atlantic coast. . . . These Indians were not driven from place to place as were the northern tribes, but have gradually been entrapped within overly narrow boundaries, just as hunters encircle a copse before simultaneously breaking into it. (2003, 385)

He further described these pressures of settlement and Indian removal as a “twin movement of immigration [that] never halts” (2003, 328).

The removal strategies of the first two centuries of colonization placed coercion and voluntariness within a framework of degrees, rather than dichotomies. They operated across a range of circumstances, as Robert Hale aimed to show in his classic piece, “Coercion and Distribution in a Supposedly Non-Coercive State” (1923, 443). In this essay, Hale disrupted basic legal premises about agency and rational choice by reinterpreting the market economy as structured by relative coercive power between uneven economic positions, rather than by free and voluntary agreements. For example, Hale pointed to the factory laborer who worked not voluntarily, but to avoid starvation, and the constraints on the factory owner’s coercive power constituted by the power of his customers and laborers “to make matters more or less unpleasant for him.” He thereby showed, as early American removal policy illustrates, that forms of coercion could include inducements and actions directly addressed to people’s vulnerability, created by the environmental absence of alternative choices (1923, 474). The very title of O’Brien’s study, *Dispossession by Degrees*, also captures Banner’s observation that land transfers between whites and Indians did not strictly resemble either contract or conquest, but occurred mostly within a “middle ground” between the two (2005, 3-4).²⁷ During the colonial era, settlers did not *remove* indigenous people at gunpoint. If they pointed guns, it was to kill or

²⁷ Banner’s use, as I have suggested, is framed by Hale’s concept of coercion rather than Richard White’s more famous use of the phrase, in his book so entitled, to describe the mutual creation of social and economic practices between Algonquian-speaking Indians, the French, the British, and American settlers during the early colonial period (through what he calls “creative misunderstanding”) (2011).

not to be killed; using arms to escort members of tribes *en masse* out of a territory against their will would come later.

Instead, settlers' actions and inactions during the colonial period tended toward the outcome that we would today call "self-deportation." Colonial Indian removal and contemporary self-deportation, moreover, are both described as "voluntary departure." The invocation of choice affirms Hale's observation about the tendency of legal language to mask the level of force operating on an actor, a masking effect that is redoubled in these examples by the fact that the burden of cost was shifted from the state to its citizens, whom it could make economically desperate by policy choice. Then as now, as Hale observed, "[p]opular judgment of social problems is apt to be distorted by the popular recognition or non-recognition of 'coercion'" (1923, 475). Contemporary public debate reflects colonists' distaste for forced removal, suggesting the power of legal articulation to influence popular recognition or non-recognition of coercion. Settlers favored the "less violent" option, or preferred to respond to situations on the ground with statutes and policies that would anticipate judicial struggles to identify discriminatory effects in facially neutral laws. However, regulations that would deprive a people of health, life, livelihood and shelter, constrain their mobility and life choices, and present them with the hazards of bias, within a legal system orchestrating all of these conditions, implicated the settlers and oriented their behavior, as a matter of general policy, in the direction of Indian removal.

Removal in the United States

After the establishment of the U.S., the state laws that continued to create conditions leading to "self-deportation" were often in tension with federal laws. This conflict engendered questions about the proper role of the states and federal government with respect to national migration policies similar to those that plague debates over immigration regulation today. Then, as now, self-deportation functioned as part of a larger removal scheme that came to include forced removal. Though it had become common knowledge among colonists that most of the Indians eventually died or moved away wherever whites migrated in large numbers, by 1792, Euro-Americans could no longer wait out the gradual processes of self-deportation tactics, and began to contemplate forced removal (Banner 2005, 207). Many white Americans started arguing for mass Indian removal, or indeed demanded the exchange of western lands for eastern tribal lands after the Revolutionary War and the Louisiana Purchase in 1803 made this a viable option (Banner 2005, 207). The success of laws and policies and encouraging immigration had led to a situation where there were "now too many emigrants to the west, and too much need for the federal revenue the land promised to ring in, to wait for the game to be driven away" (Banner 2005, 147).

After the establishment of the U.S., the methods of Indian removal diversified, and the faster, more costly, and controversial option of forced removal was introduced. The Indian Removal Act of 1830 was the culmination of the colonial self-deportation policies that preceded it, and marked both the identical nature of their ends and the difference made by the articulation of that purpose. The U.S. hesitated before reaching this policy shift because of strong humanitarian criticism in public debate; in 1823, in the seminal decision *Johnson v. M'Intosh*, Chief Justice Marshall acknowledged the constraining force of "public opinion," which opposed "wanton" oppression.²⁸ The problem that gave rise to the Indian Removal Act was the same

²⁸ *Johnson v. M'Intosh*, 21 U.S. 543, 589 (1823).

reality stoking the immigration controversy today: an unwanted group of people who were *already present*. The presence of Indians on lands desired by white Americans within the territorial boundaries of established states also raised numerous questions that continue to plague policy debates about “undesirable” populations within state borders today. Was this group to be forcibly removed, or could it somehow be assimilated? James Madison famously expressed this frustrated concern: “Next to the case of the black race within our bosom, that of the red on our borders is the problem most baffling to the policy of our country” (1826). When removal seemed overwhelmingly to be the answer to this question, in the face of recalcitrant settler population opposed to “integration,” what was the proper role of states and the federal government in that removal? What recourse did dissatisfied states have in the event of federal inaction? What prerogative would the Supreme Court assume to make these determinations, and would it challenge sub-federal regulations contradicting federal regulations? What, especially, were states’ rights with respect to these groups? Was removal ultimately a federal responsibility, and if so, on what doctrinal grounds did this agreement rest? What was the difference between the federal and state dynamic in forcing migration by the letter of the law and on the ground?

Tensions with the federal government over states’ rights with respect to Indian removal came to a head most spectacularly in the state of Georgia, which had finally agreed to cede its unbounded imperial grant of Western lands to the federal government in 1802 in exchange for the promise that the U.S. would remove the tribes remaining within its territorial boundaries. In the 1820s, Georgia grew increasingly restless as its white population grew and the “white clamor for Cherokee lands intensified” after gold was discovered upon them. Whites reacted with impatience and anger to the Cherokee Nation’s constitution of 1827, which proclaimed its existence as an independent, self-governing entity. That year, the Georgia legislature issued a resolution stating that Indians were mere tenants at will, and that Georgia could end the tenancy at any time, since she held “the right to extend her authority and laws over her whole territory, and to coerce obedience to them from all descriptions of people, be them white, red or black, who may reside within her limits” (Rosen 2007, 39). Over the next few years, the state continued prod the federal government to act by contradicting its authority: it extended its full jurisdiction over Cherokee Territory, nullified Cherokee laws, prohibited Indians from testifying in cases involving a white party, and punished anyone who interfered with the Cherokees’ emigration or land cessions (Rosen 2007, 39-40). Congress finally responded in 1830 by allocating \$500,000 for Indian emigration and resettlement under the Indian Removal Act, providing for a western “exchange of lands.” That year, Georgia moved to “enforce” what was now federal law by creating a special 60-man guard to protect the mines and enforce the law in Cherokee country, and laying plans for how the territory would be surveyed and allotted to whites by lottery. In one of the most sadly notorious episodes of the history of Indian removal, nearly 17,000 Cherokee were forcefully removed from their eastern homelands in 1838, and over 8,000 may have perished during their migration to lands west of the Mississippi (Rosen 2007, 46).²⁹

Removal crystallized the issue of states’ rights in a federal political structure, and the history of removal illustrates how removal policy developed through an intergovernmental dynamic, despite formal articulations of federal authority, as Deborah Rosen shows in her study of American Indians and state law of the period (2007). The U.S. claimed primacy in the field of Indian Affairs under the Commerce Clause, and shortly after the establishment of the federal government, the U.S. passed a series of Trade and Intercourse Acts under this authority, more

²⁹ Banner explains that though the removal of the Cherokee was perceived to flout the Court’s decision in *Worcester*, it did not contradict the Court’s holding (2005, 217).

aptly known as the Non-Intercourse Acts. With these acts, the federal government concretized federal power in this area by prohibiting private Indian-settler trade relations, especially where land was at stake. Thus, from the states' perspective, the primary legal challenge to their authority to regulate Indians "came from the federal government, not the tribes." But though the federal government made much Indian land technically or legally unavailable to whites, the states found ways to access these lands and bring them into the market. Rosen observes that the Supreme Court decisions regarding Indian tribal sovereignty during this period, which have been viewed as "the major statements of federal authority regarding Indians," were so vague and inconsistent that state courts did not feel beholden to obey them, or alternately, felt invited to interpret them as upholding state legislation (Rosen 2007, 55). For example, though the Cherokee put up a mighty legal resistance to forced removal, Georgia, like other southeastern states, repudiated their legal victory in the Supreme Court case *Worcester v. Georgia* by continuing to assert its jurisdiction over Indians, notwithstanding the Court's voiding of such extension laws (Rosen 2007, 46; Garrison 2002). Removal became a focal point of states' resistance to federal authority in the antebellum period, and consequently, as Tim Garrison has commented, "southern removal ideology... [became] the law of the land" (2002, 25).

When states assumed authority to regulate and remove Indians, the federal government generally acquiesced, as long as the states "were able to maintain social order and peace with Indians in their borders" (Rosen 2007, 75). In an example that did not end in government-funded and militarily-enforced mass expulsion, the early New York state constitution and laws "mirrored" federal policy by prohibiting the private purchase and sale of lands with Indians; however, at the same time, the state contradicted federal laws throughout the 1790s by authorizing state commissioners and the governor to negotiate with tribes to purchase their lands in exchange for perpetual annuities and allotments. In an early precedent of the later, devastating allotment period, after allotments had been made to Indian families, the remaining lands would be divided into lots and sold to whites at public auction (Rosen 2007, 34). In the 1840s, New York reversed policy and passed legislation empowering Indians to buy and alienate lands to private individuals, in contracts enforceable in state courts (Rosen 2007, 35). At the same time, though, the state sought to destroy tribal solidarity and communal landholding by intruding into tribes' internal governance structures, and making some Indians subject to the state's general laws on marriage, divorce, and inheritance (Rosen 2007, 34-36). All of these legal developments took place in the context of an ongoing "effort to persuade them to sell their lands and move west." The political pressure of the Ogden Land Company, which held an option to buy Seneca reservation land, in favor of removal led to the fraudulently induced Treaty of Buffalo Creek of 1838, which provided for the sale of almost all the Seneca lands and their removal, along with the Oneidas, Onondagas, Cayugas, Tuscaroras, Stockbridges, Munsees, Brothertons, and St. Regis Indians. In 1842, at a time when a public mood repudiated "removal," some of the territory was returned to the Senecas, though white negotiators retained the Buffalo Creek lands, and removal was made "voluntary" (Rosen 2007, 38).

Illustrating the way the language of comparison conveniently dissipates the coercion of self-deportation policies, Rosen writes that "Indian removal from New York ended up being formally *voluntary* rather than militarily coerced" (2007, 38; my emphasis). But even with respect to the new levels of force, removal retained some sense of *choice*: agency filled the field of the new American conception of choices. Cognizable coercion was a legal category that could be construed as needed, and narrowed even to the sole index of death. Under the first removal treaty carried out under the Act, the Treaty of Dancing Rabbit Creek, the Choctaw were forced to

surrender about 11 million acres of their homelands and accept land in Oklahoma instead, or citizenship, if they chose to remain in Mississippi (Foreman 1932). “Not a single Choctaw favored the sale and cession of the lands of the tribe,” as General Edmund Gaines wrote. “Yet,” the Choctaw chief George Harkins noted in 1832, “it is said that our present movements are our own voluntary acts—such is not the case. We found ourselves like a benighted stranger, following false guides, until he was surrounded on every side, with fire and water. The fire was certain destruction, and a feeble hope was left him of escaping by water. A distant view of the opposite shore encourages the hope; to remain would be inevitable annihilation. Who would hesitate, or who would say that his plunging into the water was his own voluntary act?”

Nonetheless, Rosen’s account of the situations in Georgia and New York indicate that military coercion and formally “voluntary” policies were part of the same toolkit of removal strategies that state and federal governments utilized together to minimize conflict with tribes, depending on the recalcitrance of the state or tribes in question. Tocqueville’s epic chronicle of early America, too, identifies federalism as a dynamic which gave life to the pattern of repeated Indian removal: “the states’ tyranny forces the tribes to flee; the Union’s promises and offer of resources make this flight easy,” even though it is “perfectly aware that it can offer no guarantee to them” (2003, 394-95). As he observed, “[t]hese very different measures tend to the same end” (395). Similarly, Rosen notes that “it was disingenuous to present the federal and state governments as having conflicting interests when it came to Indians.” Indeed, the perception that the federal government was “unable to protect the Indians” was a useful posture (2007, 79):

The federal government and the state governments shared an end goal, and they acted in tandem to achieve that goal. By presenting itself as the protector of Indians against the states and aggressive, land-hungry individuals, the federal government was able to squeeze more concessions from the Indians. It is doubtful that federal government officials envisioned sharing territory with truly autonomous Indian nations. (79)

Ultimately, the “common goal of the state and federal governments with regard to Indians... was control of Indians and Indian lands” (78). Just as they sometimes do now, federal and state governments calibrated their legal actions to make the most of the great elasticity that the push-and-pull dynamic between them produced.³⁰

With federally sponsored removal conducted by the military, the now-dominant *transitive* sense of the word “removal,” taking indigenous people as its object, became codified by law. This Act also brought into being a linguistic consonance that underscores the parallel between the removal regimes that followed each other temporally on the same soil-- Indian Removal and “removal,” now contemporary immigration law’s term of art. The Euroamerican polity employed a similar approach to dealing with unwanted, but present populations historically, as indeed it still does today— coercing mass dislocation, using a full spectrum of degrees of force. In both cases, the policies comprising “self-deportation” are directed toward groups that present a problem by virtue of being already “here,” and being identified as racial and cultural outsiders who threaten the sovereignty of the Euroamerican state.

Through this very process, indigenous people were rendered “aliens”-- a name, Peter Schuck notes, that expresses how “they remain strangers, objects of our vigilance, our suspicion, and perhaps even our hostility” (1984, 1). The new U.S. polity itself persistently proposed this analogy during the nineteenth century with language that explicitly compared Indians to aliens

³⁰ This dynamic persists in the field of immigration law today (see Rodriguez 2008; Tichenor and Filindra 2012).

and foreigners in public discourse and in court cases. In the 1830s, De Tocqueville employed this rhetorical about-face, writing that at first, “when the colonies first came into existence, [the Indians] could have combined their forces and freed themselves of the small number of foreigners who had just landed on the shores of the continent”; but a few pages later, the figures and the terminology have undergone a revolution: “Isolated in their own land, the Indians now formed only a small colony of unwelcome foreigners in the midst of a numerous and imperious people” (2003, 382, 391).³¹ In 1823, the New York court in *Goodell v. Jackson* puzzled over the status of Indians, finding them to be neither citizens, nor aliens, “in every sense of the term.”³² In 1866, the Supreme Court of Kansas held that “[a] Wea can claim no greater immunities against punishment for crime than a Frenchman.”³³ At the same time, anti-foreign *nativist* parties were arising in these states against the newer waves of immigrants arriving in America. These parties first formed during the 1830s and 40s; the “Know-Nothing” movement of the 1850s began as the Native American Party in New York, and later called itself the American Party (Higham 1955, 4; Schrag 2010, 30). This declaration by settlers of their own nativity as grounds for their proprietary interest in protecting their lands was distinct from contemporaneous settler absorptions in “playing Indian,” but it constituted a kind of counterpart to these activities (Deloria 1998; Huhndorf 2001): it was an assertion of the settler’s position as the original inhabitants in America, who now feared displacement by newcomers. Anti-immigrant activists’ identification of themselves as Native Americans was a “replacement narrative” so wide and deep, such a complete affirmation of the myth of the vanishing Indian, that it erased the settler story about their own conquests.

The clamor for Indian removal soon arose in the west, as tribes that insisted on remaining within newly-created state borders became an obstacle to continuing white immigration westward, both in terms of open space for white settlement and the security of white emigration routes (Banner 2005, 230-31; Prucha 1986, 45). Francis Paul Prucha describes how the line separating Indian country from white lands, defined in the Nonintercourse Act of 1796, gradually moved westward, continuously pushing Indian tribes westward “out of the way of advancing white settlement” (Prucha 1986, 45). Though some believed that “the removals of the 1830s had culminated this process, and that the removed Indians were finally secure behind a permanent line running from the Red River north and northeast to Lake Superior,” he writes, “suddenly, before the end of the 1840s the concept of such a line was shattered, and it was not long before the barrier itself was physically destroyed.” The acquisition of Texas, Oregon, California, and the rest of the Mexican Cession created a wholly new situation and required a radical change in the relationship between the U.S. and Indian tribes, because of the sheer number of new Indian nations and aggressive pioneers suddenly enclosed in an area “invaded, crossed and crisscrossed” by a new rush of emigrants cutting across the Plains territory to reach the Pacific” (Prucha 1986, 108-09). In 1843 the first mass movement to Oregon took place, and by 1848, more than 14,000 migrants had set out on the Oregon trail.

White invasion of Indian country became so total during this period that it became clear to Commissioner Manypenny that “it was no longer possible to solve the question of the Indians’ destiny by the convenient scheme of repeated removal (Prucha 1986, 109). As General Sherman declared in Congress in 1866, “The poor Indian finds himself hemmed in” (Utley 1974, 4). And

³¹ This marked a shift in settlers’ confidence in their claims to the land. As Leti Volpp notes, the transformation of “indigenous” into “alien” occurred concurrently with white immigrants’ efforts to “indigenize” (2012).

³² 20 Johns. 693 (1823).

³³ *Hunt v. Kansas* 4 Kan. 60, 1866 WL 447 (Kan.). 4.

Senator Morrill of Maine described the necessary end to the policy of continuously removing the Indian: “As population has approached the Indian, we have removed him beyond population”; but with the settling of the border in the Southwest, “population now encounters him on both sides of the continent, and there is no place on the continent to which he can be removed beyond the progress of population” (Prucha 1986, 109). Manypenny hoped at first to move the tribes in Kansas and Nebraska into “colonies.” The U.S., with Jackson’s support, also considered creating a western Indian state that, as a voluntary confederation of tribes, would have delegate representatives in Congress and eventually take its place in the Union. But this idea came to nothing in the face of resistance from whites and Indian tribes (Prucha 1986, 105). After the border ceased its rapid westward migration in 1848, Manypenny promoted the assignment of permanent reservations where Indian tribes already resided, though diminished in size. During the era when federal policy shifted from removal to reservations, the government had to use force to confine tribes on reservations: U.S. cavalry policed their boundaries, so that indigenous people were unable to leave without obtaining permits, and were hunted down upon escape (Prucha 1986, 113). One of the most notorious episodes was the internment—or detention-- of the Navajo people at Bosque Redondo at Fort Sumner from 1863 to 1868 (Bailey 1998). As Robert Trennert has written, “[t]he beginnings of the reservation system came in the era of Manifest Destiny, when it was looked upon as an alternative to extinction” (1975, 197).

This shift, from removal to detention, coincided with the shift in the government’s characterization of Indian affairs. Instead of being treated as part of an external, quasi-transnational framework, this segment of government activity was confidently reclassified as an internal one, shortly after the U.S. conquest of Northern Mexico: removal was to become a transnational process again, but containment was a domestic problem. In 1849, the government therefore transferred Indian Affairs from the War Department to the newly created executive Department of the Interior (Prucha 1986, 111-12),³⁴ signaling the imminent close of the frontier, though not the end of removal as a U.S. migration policy directed towards developing and maintaining the border. Once they reached the current territorial boundaries of the United States, territorial expansion efforts went overseas with the U.S. acquisitions of Alaska, Hawai’i, Puerto Rico, Guam and the Philippines over the following half-century. During this period, the analogy between Indians and immigrants continued to grow, and by the turn of the century, the founder of the first Indian boarding school and avid proponent of assimilation and Americanization Richard Henry Pratt would regularly draw analogies between the two groups, in order to suggest that they presented similar problems that should be dealt with in similar ways:

Suppose we should take the foreigners who emigrate to our shores in any one year and place those from each nation upon separate reservations, place over them agencies with a few employees and even establish among them schools for their own children only, make them amenable to a bureau in Washington to the extent that they cannot leave their reservation without its consent. Would they within any reasonable time develop into capable Americans? (Pratt 1904)

Meanwhile, during the 1880s, “[a] new sense of ‘closed space’ compounded the emerging fears” of a society that had lost the “safety valve” of the open frontier had offered. In 1881, a letter-writer in the New York *Tribune* expressed the sentiment that America’s resources and

³⁴ The Department of the Interior also assumed responsibility for the historically closely related General Land Office.

opportunities were limited and ought to be kept for Americans, rather than parceled out to “all the strangers we can induce to come among us” (Higham 1955, 38). In 1883, the land reformer Henry George wondered what the use of further immigration would be when the end of territorial conquest had eliminated the need for that immigrant labor, and referred to that surplus labor as trash: “What in a few years more, are we to do for a dumping-ground? Will it make our difficulty the less that our human garbage can vote?” (Higham 1955, 42). The official “close” of the American frontier in 1890 spurred further anxieties about its “shrinking promise,” and what would become of the nation once “the supply of good vacant land,” which was already “dwindling,” gave out (Higham 38, 42). Under these conditions, the nation entered the era of Chinese exclusion and began to deport those who violated restrictive immigration laws, triggering a new era of removal practices that would now entail the removal of “illegal” entrants.

Disciplines and Displacement

During the latter half of the nineteenth century, voluntary immigration to America underwent a fundamental change through the emergence of a new routine practice of deporting immigrants in violation of Exclusion laws. Indigenous removal and the new exclusion of immigrants both constituted ways of controlling the makeup of the population within a demarcated territory. In practice, both were enacted through state regulated deportation, or the forced movement of bodies. In the late nineteenth century, to facilitate these policies, the doctrine of plenary power likewise came to control both the fields of immigration and Indian Affairs, making Congress’ power in both areas unqualified, or absolute. This doctrine at once laid the groundwork to think of these fields as parallel and *as distinct fields*, in a way that they had not been thought of before. I have tried to show above how entangled immigration and indigeneity had been in America until then-- how European immigration per se meant encountering peoples indigenous to the land, and made those inhabitants into migrants themselves, through displacement. New disciplines in legal practice, academic study and American historiography emerged and developed through the establishment of policies for handling immigrants and indigenous people, conceptualizing them as distinct, if analogous populations, unwanted peoples either previously present or newly arrived.

The doctrine of plenary power has turned the fields of immigration law and American Indian law into parallel outliers in U.S. law. Scholars have widely denounced plenary power, which bestows upon Congress an “untrammelled authority to make decisions” (Legomsky 1984, 306). This power derives from a wholly “extra-constitutional” force that makes the very existence of tribes and immigrants subject to the pleasure of Congress, and places Congress’ power “beyond any limiting force of the rule of law at all” (Frickey 1996, 35-36).³⁵ A distinctly progressive sensibility characterizes the criticism of the doctrine, identifying it as anomalous in an otherwise modern, reformed legal terrain. Sarah Cleveland, for example, describes it as a relic

³⁵ Scholars have tried to trace the legal origins of plenary power, and note that the doctrine has no clear source of authority. Legomsky explains, “In the *Chinese Exclusion Case*, the Supreme Court sustained an immigration statute by locating a Congressional exclusion power within the concept of ‘sovereignty.’ It was therefore unnecessary to tie the statute to one of the constitutionally enumerated powers” (1984, 274); Sarah Cleveland writes that it “cannot be justified by mainstream forms of constitutional analysis... [nor] vindicated as originalism. It was not accepted at the nation's inception, is not supported by the Constitution's text and structure, and is contrary to the principles of political theory which inform the American constitutional system. It cannot be defended on doctrinal grounds, since most of the late-nineteenth-century doctrines from which the theory derives have long since been abandoned in other jurisprudential contexts. Nor can it be defended as modernism” (2002, 14).

of the dark past—of “a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power” (Cleveland 2002, 14). Indeed, critics find such power is an “oddity” in “a legal system that prides itself as based on a Constitution that delegates only specified powers to its national legislature and then cabins the exercise of that authority by a Bill of Rights” (Frickey 1996, 35-36). Similarly, in the immigration context, plenary power has been described as “a rights-subverting constitutional anomaly” which has “long been relegated to a sort of constitutional hall of shame” (Spiro 2002, 339). Philip Frickey commented that “[a] less palatable contemporary constitutional doctrine would be hard to identify, for it denies the immigrant the dignity of fair treatment and the Native the dignity of self-determination and cultural survival” (1996, 35-36). He also described American Indian and Immigration Law as standing “together well outside the ‘constitutional law mainstream’” as “allied fields” (1996, 41, 36).

However, scholars in immigration law rarely recognize this parallelism, in an indication of how far the history of conquest and the contemporary struggles of indigenous tribes remain from academic and general consciousness. For example, Peter Schuck argues, “Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system. In a legal firmament transformed by revolutions in due process and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir” (1984, 1). Subsequently, critics have expressed the wish that the fields catch up with an implicitly valid and thereby validated body of “mainstream” law.³⁶ The area of immigration is called “a maverick, a wild card, in our public law,” and critics note that for over a century, the Court “has treated immigration law as *sui generis*,” and Peter Schuck, for example, asserts that “[o]ver no conceivable subject is the legislative power of Congress more complete” (Schuck 1984, 1).

Here, I have sought to show that the very characteristics of immigration law that so confound scholars today, including both removal practices and the plenary power of Congress, derive from a long tradition of federal action rooted in the history of the conquest of America. The foregoing chapters described how the federal government asserted its power to centrally coordinate conquest drawing precisely from the authority that it would later call “plenary” and limit its dealings with tribes—and new waves of immigrants—as the project of territorial conquest drew to a close. In these chapters, I also sought to show how the bedrock doctrines of American law—property, contract, and even torts—emerged out of, and were shaped by this early history. The practices that the laws codified, in other words, were practices of conquest, characterized by the limitation of violence between settlers that was to facilitate the wielding of collective violence against the generic category of “tribes”—any tribe. In this way, colonial governments, and later the U.S., created a bizarre, monolithic category encompassing thousands of peoples between the Atlantic and Pacific coasts, whose clearest common denominator was these governments’ uniformly violent approach to them, rather than any other characteristic. As David Wilkins comments, “If the tribal nations of North America had been organized into a monolithic unit, as the inaccurate but persistent term ‘Indian’ implies, it might have been possible for the federal government to develop a coherent body of legal principles and relevant doctrines to deal with them” (1997, 1). The inappropriate nature of the name “Indian law” is

³⁶ Some immigration scholars have therefore tried to argue for alternative, more constrained interpretations to curb the doctrine, including that the power historically was and should be still subject to transparency, uniformity and prospectivity requirements (Pfander and Wardon 2010).

consistent with the excess and inadequacy of American legal and other monikers for indigenous individuals and tribes in general, so that Native American, American Indian, indigenous and first nation “are all wrong,” and so can be used interchangeably (Levey 2005). William Canby adds that “there is no all-purpose definition of an Indian tribe,” but several mismatching definitions that correspond to particular statutes or federal programs (Canby 2009, 3, 4). Nonetheless, while the Laws of Indian Affairs, particularly during the colonial period, permeated all aspects of colonial administration, the U.S. began to gather and consider the aspects of its practices that involved direct dealings with tribes as a distinct “field” of law—American Indian law. As early as 1831, the Supreme Court observed that “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else” (*Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)). Similarly, in 1886, the Court commented again on the long relationship between tribes and the U.S. as “anomalous” and “of a complex character” (*U.S. v Kagama*, 118 U.S. 375, 381 (1886)).

The discourse of immigration law demonstrates how difficult it now is for many to conceive of indigenous experience and history as related to immigration, or as having any connection at all to the everyday lives of most Americans. It is symptomatic of how wholly irrelevant the history of colonization has come to appear in American legal practice and legal education. This also illustrates the extreme marginalization of the field of American Indian or Federal Indian Law, comprising rules governing the relationship between the federal government and tribes. While Frickey valiantly sought to defend Federal Indian law as “an important area of public law,” which did “not deserve its image as a tiny backwater of law inhabited by impenetrably complex and dull issues” (1993, 383), he also observed that one of the challenges of accessing federal Indian law was that the field is “doctrinally chaotic, awash in a sea of conflicting, albeit often unarticulated, values” (1996, 37-38; see also Frickey 1990, 1997, 2002, 2005).³⁷ More than any other field of public law, American Indian law bears the scars of history and disciplinary carve-outs. The Supreme Court has never overturned contradictory precedents from different historical eras of federal Indian policy, so that unlike in other fields of public law, layers of history remain on the books. Frickey despaired at the internal contradictions of the “maze of Indian statutes and case law tracking back 100 years” and observed that they operated to marginalize native concerns with the field, which Justice Harlan purportedly once characterized as comprised of “chickenshit cases” (1993, 382-83, citing Justice Blackmun in *County of Yakima*, 112 S. Ct. at 694 (concurring in part and dissenting in part) and Bob Woodward and Scott Armstrong (1979, 58) (purporting to quote Justice Harlan)). He astutely summarized the historical context of this legal area by writing, “Its principles aggregate into competing clusters of inconsistent norms, and its practical effect has been to legitimate the colonization of this continent--the displacement of its native peoples--by the descendants of Europeans” (2002, n.20). In 2004, Justice Thomas, concurring in the judgment of *U.S. v. Lara*, cut through the Court’s pretensions of consistency by asserting that the whole field was “at odds with itself;” he opined that “until we begin to analyze these questions honestly and rigorously, the confusion . . . will continue to haunt our cases.” 541 U.S. 193, 225, 226 (2004).

³⁷ To the same point, David Getches has written that federal Indian law amounts to “a rudderless exercise in judicial subjectivism” (1996, 1576); Frank Pommersheim has noted that the Supreme Court has a “bifurcated, if not fully schizophrenic, approach to tribal sovereignty” (1991/1992, 403); and Laurie Reynolds has commented that the Court has created “an almost daunting set of inconsistencies” in assigning adjudicatory jurisdiction (1997, 578) (see also Watson 1998, 439).

Apparently distinct, unrelated histories of removal thus coexist in this broader context of marginalization of American Indian law, of the portions of the history of conquest that it codifies, and of the non-relation it has been assigned to other areas of American law—those that, unlike immigration and American Indian law, do not deal with “special” populations.” On one hand, the history of removal I have related above is known only too well to the tribes who suffered it and to scholars of Native American law and history, and the related field of settler colonial studies. On the other hand, most scholars of immigration continue to embrace the “immigrant paradigm” or the idea that the U.S. is a “nation of immigrants,” a narrative that states that the country embraced newcomers and maintained an open border until the anomalous turn toward exclusion that occurred in the late 19th century. This second narrative depends on the omission of the first. I have sought to show here that the difference between these two narratives—this breach—is a product of the politics of removal itself.

The suppression of the history of conquest not only continues to shape presumptions and practices in the field of immigration law, but also those of fields of study that have arisen in response to immigration law. This absence strongly influences contemporary debates concerning the overdetermined southwestern border between the U.S. and Mexico, for example. The academic field of critical border studies has exploded the concept of the border as a zone between two stable entities, upon which immigration law relies, and has reconstituted it as a space of heterogeneity and movement between liminal identities and the heart of empire (Anzaldúa; Gómez Peña 1996; Saldivar 1997; Rosaldo 1988). This literature cultivates this concept from material experiences and lived experiences on the Southwest border, and has emphasized the history of Mexico and Mexican-Americans against older border histories that focused on Anglo-Americans and framed the history of conflict in the Southwest as a confrontation between the United States and Spain (Weber 1982, xvi; e.g., Bolton 1921). Against naturalizations of a fixed, eternal border, these scholars have shown how permeable it is, and have highlighted the lives and economies that have been and continue to take place through regular border crossings (Kaplan and Pease 1993, 16-17). The Chicano and borderlands perspective also challenges the white supremacist and triumphalist frontier history produced by Walter Prescott Webb and his followers, who characterized the frontier as a space “where a civilized people are advancing into a wilderness, an unsettled area, or one sparsely populated by primitive people” (Webb, 1952, 3).

However, by consigning frontier literature to the dustheap as an artifact of dated racisms, border studies has also thrown out the study of the history of the *moving* border, the two-centuries long American history of conquest that illuminates how the border emerged and reemerged as a consequence of expansion, removal, “development” and displacement. This now-obsolete frontier literature still articulates American border history: Webb identifies the beginning of the “frontier process” in 1608, at the English settlement at Jamestown, Virginia (1952, 4)³⁸; and Turner recounts how different natural boundaries served as successive frontiers over the years, beginning with the “fall line” in the seventeenth century, the Allegheny Mountains in the eighteenth, the Mississippi during the first quarter of the nineteenth, the Missouri in the mid-nineteenth century, and the belt of the Rocky Mountains and the arid tract when he wrote, toward the century’s end, that “[e]ach was won by a series of Indian Wars” (Taylor 1972, 6). To the extent that border studies describes border conflict as between Mexico *or* imperial Spain and the U.S., it preserves the same “family of nations” logic of international

³⁸ He goes on to state that after these settlements were established, “[s]ince the process depended on the act of taking possession of new land, it would go on as long as there was new land to be taken” (Webb 1952, 4).

law under which Indian tribes were refused recognition and subsequently suffered both narrative and actual removal (see, e.g., Martinez 1988, 30, 39, 78). Furthermore, in focusing exclusively upon the southwestern, at the expense of other borders, border studies accords at least structurally with the asylum tradition's pretention that the border was fixed, or that the lands were vacant, waiting to be filled by a nation of immigrants.

The contours of the disciplines of immigration law and border studies thus demonstrate how disciplinary boundaries participate in the politics of history, and proliferate historiographical plurality. Histories grow within different fields concerning the same events; they do not take notice of their different courses of development, removing shared pasts from sight and access, splintering the historical narratives so central to different groups' sense of identity and relation to others. Disciplines and fields also unwittingly share commonplace presumptions, and the omissions and absences that their perspectives have normalized then move—or remove?—to other histories and disciplines to survive. By presenting this history of removal, I have sought to highlight its absence from familiar narratives. I have tried thereby to suggest that past motivations live on in concepts, and to demonstrate how different accounts of the past can create upheaval in what we think, and how we think.

Recognizing the history of indigenous removal in America, and thinking about this history in connection with contemporary removal practices, prompts us to reject an understanding of “removal” as “elimination.” It highlights the correspondence between our limited contemporary understanding of removal (limited, that is, to the idea of removing something present to create its *absence*) and the settler goal of indigenous erasure, as well as narratives of indigenous vanishing, disappearance, and extinction. If, instead, we recognize removal as displacement, we follow the movements of the uprooted and the dispossessed. We attend to the ways that indigenous people have been in “transit,” as Jodi Byrd has so compellingly highlighted, or “made to move” (2011, xvi). What became of the people who were “forced to move and relocate” (Byrd 2011, xvi)? They are still here, of course. According to the U.S. census in 2010, about 22 percent of American Indians live on one of over three hundred Indian reservations within the territorial limits of the U.S. today; roughly 4 million, or 78 percent of American Indians live off-reservation. In the border towns that surround land bases, indigenous people continue to be plagued by problems stemming from colonial encroachment upon indigenous sovereignties—namely, frontier racism, extreme poverty, lack of access to basic resources, criminalization and extreme violence against indigenous people (Estes 2014a, 2014b, 2015; Yazzie 2014). As Melanie Yazzie has argued, “[b]order town culture operates according to the common sense of colonization” (2014), within which indigenous people are supposed to no longer exist; where they are present in numbers, as they are in border towns, they embody a challenge to the very logic of the nation and the values it claims to represent. The northern U.S. border, like its southern border, also continues to present an especially complex terrain for the indigenous people whose homeland it continues to artificially divide (Simpson 2014; Marak and Tuennerman 2013).

As Audra Simpson writes, “Indigenous peoples did not lay down and die; they persist, and in so doing, they defy all expectations—working resolutely to assert their nationhood and their sovereignty against a settler political formation that would have them disappear or integrate or assimilate” (2011, 212). Indians were “forced” or “obliged” to flee their homelands, making them not only migrants of the colonial era and early republic, but *displaced* persons. Their displacement illuminates the dual senses of removal that operate with respect to removal practices: the conception of removal as eliminating or getting rid of an element, which represents

the settler colonist's perspective and refers to the "here" of the United States; and the movement of an element from one place to somewhere else. Recognizing the experience as *displacement* directs our attention to the question, *where did they go?* and thereby emphasizes their survival, their persistence, and their presence now.

Understanding *removal as displacement*, finally, helps us draw the disciplines of immigration law and American Indian law, which have been historiographically, practically and conceptually separated, back into relation with one another through a final analogy. This parallel suggests that there are comparable aspects to American Indian displacement and non-voluntary migration-- between indigenous people's experience under conquest and the "good" immigrants under contemporary immigration law, asylees and refugees. Indeed, as the immigration law practitioner and former U.S. Department of Homeland Security officer T.S. Twibell has argued, American Indian removal cannot be understood as anything other than forced migration (2008), and while forced migration does not carry the force of a specific legally protected entitlement, it is recognized categorically within the fields of international refugee and asylum law, with which U.S. asylum law proudly allies itself. The terms of the UN's Guiding Principles for Displacement, indeed, fit the circumstances of Indian removal precisely: natives were "forced" or "obliged" to flee their homes or places of habitual residence" because of armed conflict, situations of generalized violence, and violations of human rights or human-made disasters. Twibell identifies Internally Displaced Persons (IDPs) as the category in international law most applicable to American Indian displacement (2008, 167); and the UN has suggested that IDPs may be distinguished from refugees by virtue of the fact that IDPs did not cross an internationally recognized State border (Twibell 2008, 138, 186).³⁹ This distinction between international and domestic borders, however, grew *out of* the history of conquest related here, and out of spatial demarcations that in early America were ill-defined and in constant flux. The transnational character of the historical conflict between European immigrants and indigenous tribes makes the ramifications of this story, this final analogy, resonate in both realms.

Perhaps most notably, displacement in international law today frequently follows, both domestically and internationally, from projects of *development* and urban "redevelopment." Twibell points out that in the scholarship on international forced migration, forced displacement can stem from activities also understood as "*development*," generally understood as entrepreneurial activities that change landforms for the purpose of creating residential, commercial or agricultural real estate, and that build wealth by creating enclosures or increasing the value of existing enclosures (2008 150).⁴⁰ As we have seen, the colonists undertook their settlement activities of land enclosure, "cultivation," building and Indian Removal precisely as a means of producing wealth through the land market they created, in the name of civilization, development, and progress. In both literatures on gentrification and international development, the question of whether "development" without displacement is even possible remains an open debate. But meanwhile, the terms serve as alternatives to each other for advocates who wish to promote or denounce the activities that they name. For example, Twibell points out, some World Bank policies today express the belief that the more neutral term "development" should be used

³⁹ In 1977, Twibell writes, "the High Commissioner for Refugees requested the Executive Committee to clarify the distinction between refugees and displaced persons." No formal advice was tendered, although there was considerable support for the view that refugees had crossed an international frontier, whereas displaced persons had not" (2008, 137).

⁴⁰ In addition, "forced development" can lead to violations of human rights caused *by* development, or that occur, *within* the course of development, as do forced evictions, denial of freedom of movement, or arbitrary invasions of home privacy (Twibell 2008, 150).

to describe and to replace the language of forcible displacement because of this close relationship between development and displacement (2008, 176, note 252).⁴¹

The displacement that the nation's founding depended upon has both national and international reverberations in ongoing displacement today. Like each aspect of the history of conquest I have examined in the foregoing chapters, I hope that these dimensions of historical impact and connections can serve to generate further questions that might fruitfully be explored in the future by others. The analogies between historical and contemporary displacement and between historical and contemporary removal stand in direct counterpoint to the "immigrant paradigm," which styles settlers as historical "good immigrants," or refugees, and contemporary immigrants as an impending flood of "bad migrants," and which elides the story of native presence and survival altogether to cultivate the notion of indigenous disappearance, vanishing, and replacement.

Most basically, I wish to suggest that the removal practices so contested in contemporary immigration debates are not new, nor are they *sui generis*. What is novel and aberrational about state practices of regulating migration in the U.S., and what arises from historical precedent? Perhaps most significantly, American colonial strategies of self-deportation, unlike self-deportation strategies now, capitalized on the ecological upheaval set in motion by the colonists' arrival and sought to repeat the results of first contact again and again by encouraging the migration of whites. As a result of the vastly different historical contexts of the past and present, self-deportation today has a more deliberate initial design. European migration effected the displacement of indigenous people, and thereby encouraged more European migration, since Indian removal made more territory available for possession and increasing the numbers of white migrants also increased colonial security. Increased European migration in turn furthered indigenous removal, so that white immigration and removal facilitated one another through a productive feedback loop in the context of continuous expansion.

The remarkable circumstances that made it possible for Anglo-Americans to take possession of the continent expose the sheer irrationality of fears of an equivalent invasion across the U.S. Southern border in the near future. Such circumstances included the colonists' initial, devastating biological advantage, which destroyed their enemies without labor or other costs; their technologically superior armament, which the U.S. has not failed to maintain; the tremendous diversity and complexity of the indigenous world they faced, which comprised hundreds, and perhaps over a thousand distinct tribes, and against which settlers united as one centralized state war machine; and their remarkably strong collective determination to expropriate native lands, which superseded class and ethnic divisions, and was characterized by an exceptional repugnance to cultural and social integration of any sort. Today, in contrast, the United States' dependence for labor on the very population that anti-immigrant advocates warn will invade gives labor regulations a more controlling role in future migrations than the legal system of removal and displacement, and makes the intersecting histories of labor regimes including enslavement, indenture and guest worker permissions more relevant than this history of removal. The *fantasy* of an imminent immigrant invasion, however, points to the emotional dimension of current possessory interests in the U.S.

The roots of that fantasy lurk behind the analogy that the asylum paradigm of American immigration history draws between early white colonists and the "good" immigrants of today,

⁴¹ Similarly, development specialists have preferred to describe the relationship between the dispossession and displacement of indigenous people as "white land appropriation and resettlement schemes of violent and non-violent nature" (Twibell 2008, note 251).

whose condition of appearance is the erasure of indigenous peoples from immigration history. The history of indigenous removal and indigenous displacement highlight a different analogy between past and present in the immigrant invasion that came to conquer these lands: the fear, harbored largely by the descendants of those invaders, that history might repeat itself. The effacement of the history of conquest thus thoroughly informs the presumptions, parameters and historical narrative of immigration law, and suggests that the very construction of a discipline can itself constitute a replacement narrative. Though many today might not embrace Roosevelt's blunt proclamation that "[t]he war to exterminate the Indian created the 'Americans'" and the melting pot (Gerstle 1999, 1283), this discipline's construction so thoroughly embraces the master narrative of replacement that the presence of natives, past and present, is thoroughly subsumed by and alienated from the content of the discipline; the effacement, the narrative removal of indigenous people from history has gone so far as to remove the very event of their violent removal. These narrative erasures and the shape, dominance, and defensive posture of the immigration paradigm are traces of a continuing struggle, which sustains the ongoing project of Indian removal by working to blot out from memory and consciousness the surviving presence of the people who first occupied this land. In the landscape of narrative warfare, then, the unbelievably giant material empire that has arisen from Indian removal appears to be built on a fragile narrative, one whose long-held divisive power may be derived more from habit than its power to persuade.

Conclusion

The powers who controlled the United States didn't want the people to know their history. If the people knew their history, they would realize they must rise up.

-- Leslie Marmon Silko, *Almanac of the Dead*

What is occupied time? What burden does it place on those under its watch?

-- Nadia Awad, *Nostalgia for the Future*

In the histories of the early colonization of America addressed in this dissertation, I showed how legal institutions now hailed as foundational to the nation emerged out of practices of *settlement*, generating a state of emergency for native peoples. In the contact economy of New England, force trickled through small mundane channels, through the countless daily interactions between settlers and indigenous people that straddled lines defining the familiar, the strange, family, business, personal feuds and friendship. At the same time, the collective organization holding together the settler community, however inevitably imperfect in practice, was in effect a monolith-- a force of solidarity that erected a solid wall of implicitly threatened violence behind all transactions in the contact economy, making the constant risk of full-fledged *war* the foundation of their character. The structure of this threat created inequities of bargaining power that pervaded every aspect of settler-indigenous relations. In this environment, indigenous people lost more and more leverage over time as they found themselves increasingly outnumbered and impoverished. They were constantly confronted with the choice between full assault, low-intensity assault, and removal. Often, circumstances of devastation and loss caused them to prioritize survival, making the inducements strategically offered by settlers seem appealing. In other words, the emergency circumstances generated by settlement left indigenous people in dire straits, a position from which a place to live, some income, some spatial distance from the white settler community, and some claim to land, were better than none. The very design of settlement activities cornered indigenous peoples, thereby creating the conditions of possibility for the activities and the outcomes that I looked at above—foreclosure, price gouging, conversion, native enlistment, and removal.

Within the structure of this environment, the kindnesses and connections between individuals that ran against these trends and surely occurred in the course of everyday life, would have produced confusions and ambiguities that anchored people in their immediate networks of relationships. Such aspects of colonial relations indeed flag the difference between an imaginary and a lived system, between the purity of an idea and the complex messiness of material life; they are a sign, too, of the contingency of events and the possibility of other worlds endemic to any system. However, insofar as they did not become the principle of collective relationships, social growth, or governance practices, they occurred on a different order than the events that created the patterns of institutional structure during the time of conquest.

I have tried to show here how the same processes of settlement that created a *state of emergency* for indigenous people gave rise to the *emergence* of a new settler *state*. In Chapter 3, we saw how Brenner and Johnson described the options confronting survivors of epidemics that induced them to convert to Christianity, live in a Praying Town, or fight for colonial forces against other colonizing forces and enemy tribes (Brenner 1980; Johnson 1977). And in her

invaluable study of Natick, Jean O'Brien notes how within this state of emergency, many natives adopted the English proprietary system, concluding that "only by working through these mechanisms could they meet the objective of perpetuating Indian landownership into the future" (1997, 151; Ch. 4). Subsequently, Indians began to create deeds assigning their lands to their kin, and entered them into colonial registration systems—a "Book of Indian Deeds" within the Records of the Colony of New Plymouth, for example, begins with records in 1674, just before Metacom's War broke out (Pulsifer 1861). Many Indians in New England also adopted practices of animal husbandry and stationary agricultural life, which David Silverman describes as a "quiet strategy" of survival and persistence that historians have long overlooked (2003, 514). After attempting armed resistance in Metacom's War, and losing, indigenous people negotiated with the terms left to them, understanding that if they wished to stay on their homelands, "so long as they did not put their land to what colonists deemed proper use, they were at risk of losing it, by means" that Silverman calls both "fair and foul" (2003, 513-14).

While these actions enabled some individuals to gain recourse under colonial laws to protest settlers' encroachments, by the same stroke, their lands fell into the English land market as commodities. English legal and bureaucratic procedures constrained but by no means eliminated the fundamental influence of bargaining power and coercion upon outcomes. Under the control of this system, Indians gained title, but at the same time, their land became a means of income and repaying debts, and subject to seizure for unpaid fines (O'Brien 1997, 104; Jennings 1975, 62; Ch. 1). The deed has limited power, and did not stop colonists from exerting myriad pressures upon Indians to leave; indeed, land ownership encouraged such activities, which included allowing livestock "to roam into an Indian's crops until he despaired and removed," destroying the fences of Indians who planted crops or kept grazing animals, and pressing debt collection cases when Indians fell into debt from everyday needs, financial overextension, illness, injury, and litigation (Jennings 1975, 144-45).

Above all, this recognition of Indian title was a narrow and specific form of juridical recognition, which served above all else to bring Indian lands and people under the jurisdiction and power of the settler state. For this reason, Audra Simpson describes such inclusion as a post-conquest performance, a "trick of toleration" and "multicultural solution" designed to "manage Indians and their difference." Refusing to capitulate to the law's narrative and world-building practices of setting the terms, Simpson insists instead on retaining an understanding of recognition that entails being "seen by another *as one wants to be seen*"—and the corollary, which is to be treated as one would wish to be treated (2014, 22-23). Her insistence reminds us that trade is, by its nature, a mutual relationship, and moreover one of mutual dependence. *By trading with another, on a collective and individual relationship, one contributes to building a relationship* that opens parties up to a lasting, material and psycho-affective link with one another that will be characterized by aid or harm, by mutuality or lack of it, and which can change in character over time, whether by effort or accident, but will never erase the history out of which it arose.

As Coulthard writes, state practices of recognition expressed in deeds and delineations of sovereignty, as well as in tribal and indigenous status, as Joanne Barker has eloquently shown, entail "profoundly *asymmetrical* and *nonreciprocal* forms of recognition either imposed on or granted to [indigenous people] by the settler state and society" (Coulthard 2014, 25; Barker 2011). Within the settler legal framework, Indian deeds in colonial land registration systems, like settlers' legal definition of indigenous "sovereignty," formally recognized indigenous people and tribes for the purpose of forming contractual "agreements" and treaties with them on the ground.

These acts of recognition, which forced indigenous' peoples assimilation into colonial legal systems, enabled colonial expansion and the establishment of colonial states. These practices arose historically from colonists' efforts to supplant Indian legal systems with the English legal system, from colonists' insistence on their courts as forums for interracial disputes to the establishment of English-style courts for plantation Indian villages. The colonists' determination not to fall under Indian jurisdiction was evident from the early treaties colonists made with tribes, which indicated that "only English law would hold sway over New England—red and white" (Axtell 1973, 220-21; Kawashima 1986, 227). In the seventeenth century, the Massachusetts General Court first provided that the villagers could choose their own magistrates to hear and determine minor civil and criminal cases, but after Metacom's War, Plymouth passed an act that it expanded into a code in 1682, appointing white justices of the peace to try civil and criminal cases in Indian towns, excluding land claims and homicides (Kawashima 1986, 28, 32; Banner 2005, 82-83). This piecemeal method of undermining of tribes' ability to adjudicate for and govern themselves continued for the next three centuries, in the arc of erosion of tribal sovereignty under U.S. law, finally reaching the declaration of Congress' plenary power over tribes in *Kagama* (1886).

Legal subjection thus meant assimilation in America. Like assimilation, under conditions of constraint, legal subjectivity was both imposed and "voluntarily" adopted. It therefore operated at once as an affirmation of the sovereignty of the settler state and as a means of survival. Coulthard and Simpson, in writings about the Canadian state, both point to that governmental system's similarly characteristic seeking of power through monopoly. In America, the state's particular structural inability to tolerate plurality, as we have seen, was borne out of a historical practice of expanding its power by deciding the *rule* and controlling the forum that determines the outcome. Coulthard describes its force as imposing "consistency," and Simpson, as "homogenizing." The processes of settlement historically gave rise, that is, to institutions that sought to render the political and legal environment—*not* the social or economic environment—"consistent," uniform, or "homogenous" by assimilating difference into settler civic institutions. Through the history of these processes, Coulthard writes, the state came to insist on "*one* political formation— namely, colonial sovereignty— and *one* mode of production— namely"— eventually— "capitalism" (2014, 66). I add "eventually," because American capitalism only took its shape through the history that I relate here.

My purpose is less to identify capitalism's point of origin than to explore how practices that we indisputably identify as capitalist today arose out of historical colonizing practices in America. These colonizing practices, once more, were largely legal practices, and these practices engendered legal principles in a very particular way—according to patterns of omission, spotlighting, projection, or the narrative strategies of justification and replacement that we examined above. During the time period discussed in this dissertation, economic practices were more various, less entrenched, more shot through with potential to lead to other formations. Regarding the early twenty-first century, too, I think the term "capitalism" cannot capture the complexity of practices as they interface with local lifeways and histories in different parts of the world, though they have observably become consolidated and acquired greater uniformity as they have been disseminated across the globe.¹

¹ In contrast, William Cronon has written, "the abstract concept of the commodity [...], an object of commerce... owned for the sole purpose of being traded away at a profit [...] informed colonial decision-making about the New England environment right from the start." Cronon describes this understanding as different from the earlier English understanding of the word to signify a "commodious article" (1983, 168).

The chapters above addressed the disjuncture between the material transactions and narrative productions of colonial activity in America, for legal practice has occurred in the space of this disjuncture to shape and affirm both. The material *transactional* practices of settler engagement with indigenous people are distinct from the narrative practices that have cultivated the prevailing *nonrecognition* in historical memory of settler-indigenous relations, although both constitute the conditions of everyday life today. Through narrative practices, people become attached to words and concepts, giving them life beyond the material and discursive practices in history that initially created them. Together, the material and the ideological thereby create a largely tacit consensus to acquiesce in ongoing violence, which appears distant to us in time and space as a result of centuries of narrative technique and disciplinary formation. The concepts that historical narratives inhabit have proliferated so widely across disciplines, practice areas and social communication that the stories of conquest they have suppressed have become further submerged, usually by mere traces and shadows of the discourses that suppressed them. Subsequently, the history of dispossession has become one about which many people, in the general public, academia, and in legal practice, do not even know enough to inquire, and whose impact on the dynamics and shape of events in contemporary life few can imagine.

If your world were built on dispossession, how would you know? In the histories of colonization through settlement narrated above, I endeavored to go against the grain of academic conventions in historical and legal scholarship. I constructed arguments by looking at historical and legal materials across time periods, disciplines, and discourses *together*, in part to show how disciplinary boundaries, discursive separation and the passage of time in colonizing projects justify events by shaping concepts and language. By working in this way, I aim to reveal a more intimate and complex picture of the relationship between the present and the past. As I considered broad arcs of narrative, or the *longue durée* and the shapes that unfold there, I have also sought to attend to the unfolding interplay of motivated historical narratives across disciplines, including practice fields and the scholarship addressed to these fields. I have explored how laws work together across practice areas to produce common effects, and to ask what the work of narrowing frameworks accomplishes.

The chapters above have traced the violent exploitation of uneven bargaining power in the development of contracts, property and value creation, and federalism in the history of colonization by settlement in America. Focusing on a few practices developed for conquest—foreclosure and the correlation of systems of private incentives with that of public law enforcement—I showed how colonists elaborated the difference they perceived between themselves and indigenous people through trade practices and the structures of the institutions they created. Again, these illustrations of how practices from the colonizing period resonate in the contemporary world could be followed with studies of the development of jurisdictional mapping, procedural “justice,” and racial criminalization during this period, among other issues. I suggest that not only were laws of Indian affairs categorically indistinct from laws of settlement and early laws of contracts, property, and immigration during the colonial period, but that the violence and rapid expansion these legal tools achieved in the colonial period have continued to inform American legal practices and institutions to the present, in an unbroken line of descent.

Indeed, the historians of the frontier who most celebrated American expansion unequivocally acknowledged that conquest and the legal and political practices that grew from it were responsible for the great American “boom.” Walter Prescott Webb, for example, wrote that “[t]he boom we have had *was a frontier boom*, and the institutions devised and the methods of living adopted were highly specialized to meet that particular type of life” (1952, 414). By 1952,

when Webb wrote, the removal of Indian removal from historical memory had become a self-evident project, so that these institutions and “methods of living” did not involve violence because the frontier had been *empty*. “Who lives in it?” he asked, to emphasize this point, and answered himself, “practically nobody. Outside of a few primitive inhabitants, whose rights need not and will not be respected, it is all vacant country” (12). In an earlier footnote, however, he made the qualification, “I am ignoring the scattered Indian population who did present some resistance but were not a major problem except for the few people who were in contact with them on the farthest fringes of settlement” (3). Webb thus concluded that “frontier man became the only active agent on the scene, and his acts were unrestrained by other men,” and similarly, that “the frontier upset the ratios by supplying a *surplus* of land and a *surplus* of capital” (32, 16).

Webb, like Frederick Jackson Turner before him, perceived the territorial borders of the U.S. to provide natural limitations to the process of conquest and expansion, and he wondered would become of the society and legal system predicated on this mode of endless growth. Turner, observing the formal close of the frontier, commented with concern on the habit of expansion and surplus consumption that Americans had developed: “[m]ovement has been its dominant fact, and, unless this training has no effect upon a people, the American energy will continually demand a wider field for its exercise.” “*But,*” he continued, “never again will such gifts of free land offer themselves” (27; emphasis mine). Webb too not only described modern institutions as “boom-born institutions, economic systems, political systems, social systems,” but sought to underscore what he perceived as the discordance between the conditions under which these institutions were created and the conditions they now faced. He observed that “the present superstructures of Western civilization—are today founded on boom conditions” (14), but more than half a century ago, pressed the concern, “*Will the boom caused by the opening of the frontier continue now that the frontier has closed?*” (414) Like Hurst, Webb notes the short-term orientation of governmental institutions and the practices that they formed to further conquest out of a process of expansion, which he mistakenly believed was or would soon be complete. In a tone anticipating the end of a great era, he wrote, “we have succeeded perhaps beyond expectations”:

In making this conquest, we rarely looked back but rather pressed forward eagerly to what was before us... The question before us now is whether we can manage what we have so eagerly taken. That is our challenge and our opportunity. We should not be so obtuse as to believe that the means of management are the same as those of conquest, or that frontier institutions will necessarily serve a metropolitan society. Our challenge consists in finding out what modifications should be made, and our opportunity will come in making them. (418)

Notwithstanding their ability to assess the physical limits to national expansion, the concerns that Webb and Turner expressed are best described as sustainability concerns with transnational dimensions.² The institutions built to support conquest, they recognized, were designed to grow

² Though Enrique Dussel and Anibal Yanez describe what Turner calls “gifts” as exploitation and spoliation, Turner and Webb would not have disagreed with their claim, citing the Haitian economist Pierre-Charles, that dependency was created by “the extracting of surplus-value for the benefit of the center” (1979; Dussel and Yanez 1990, 92, 71). They share an acknowledgement of the process of wealth accumulation in the early stages of such capital

and to waste; in Turner's observation that the frontier had always provided a "safety valve" that released the tensions generated in the metropole by giving the poor, the "surplus" population somewhere else to go, he seemed also to discern that the violence of these institutions produced a society at war with itself. From their clear view of the history and logics of expansion, they concluded that conflict between these dynamics and the physical limits of the continental territory or the planet was imminent. But without this history of how immigrants poured into, spread across, and took possession of 2.3 billion acres of land in a century, "expansion" comes to sound like a tendentious term for "growth," and the idea of limits seems merely theoretical.

The rate of expansion through colonization by *settlement* has dramatically slowed since the late nineteenth century, although the settlement—the claims to the land achieved by conquest—requires perpetual renewal. American strategies of economic expansion have become increasingly global and involve new practices, new structures, and new labor needs. They have changed the relationship between labor, immigration, and property. An account of the history of expansion techniques that followed the first two and a half centuries of conquest by settlement would be beyond the scope of this dissertation. Here, I have tried to provide an account of the dynamics and techniques of the practices that shaped these later centuries, that may help illuminate what is persistent and what is novel in current practices. Whatever American strategies of economic expansion have become, they originated in techniques of colonization by settlement—sometimes called "settler colonialism," a form of colonialism in which colonists come to stay (Wolfe 1999; Veracini 2010). The studies of settlement strategies that I offered above have shown some strong recurrent characteristics: the central role of violence, channeled through threats made possible by uneven bargaining power; the exacerbation of uneven bargaining power through the institutional elaboration and exploitation of difference and dependency; a drive to monopolize determination of the rules and forum for disputes, and consequently, the primacy of the settler legal system and its homogenizing force; the elimination of administrative costs by institutional design focused on the manipulation of private incentives; short-term interests of wealth accumulation in a speculative market, based on a highly specific numerical understanding of wealth; and last, but not least, the peculiarly strong possessory interests that result from the nature of the claims of colonists who come to stay, and their avid production of replacement narratives, or fictions about their own being and nativity that *require* indigenous effacement.

This broader set of characteristics finds manifestation in its linguistic correlate in contemporary legal practice—that is, in the legal settlement, which is the way that the vast majority of legal disputes are concluded today. The claim that 95 percent of cases reach settlement, rather than go to trial, is popular and widespread; and though studies shows that the numbers vary depending on the type of suit and how cases are counted, the figures nonetheless indicate "settlement is the modal civil case outcome" (Eisenberg and Lanvers 2009, 111). By settling, parties eliminate the costs of going to trial for themselves and courts, and agree on a payment in exchange for dismissing a lawsuit. As Joanne Barker has noted of the historical phenomenon of settlement, the word implies a "reconciliation," a coming together, making consistent (2011b). Settlement *does* force consistency, in the homogenizing fashion of the settler legal system we noted above: while settlement avoids trial, its dynamics are shaped by the pending threat of trial, and no less by inequities in bargaining power, both material and as distributed by the relevant laws. In Robert Mnookin and Kornhauser's words, settlement

development through the extraction of mineral and other national resources (93), and the unequal exchange of raw materials for industrial products and interest payments on a credit system controlled by one party.

negotiations are “bargaining in the shadow of the law” (1979). The dynamics of settlement, determined by the legal system outside whose formal boundaries they lie, are, like the dynamics of that system, shot through with force; as we saw in Ch. 2, “inclusion” in the laws of “civil society” also entailed subjection to violence, since the legal procedures that reduced violence within a community (to intensify the violence it directed outside) also operated by threat of force. In short, settlement means “reconciliation” just as “contract” means mutual agreement, and as “social contract” means the triumph of reason and cooperation over social violence. Settlement in the context of litigation further highlights two more facets of the coercion that it channels: first, disparities in *money* are equivalent to disparities in bargaining power, and thus of force; and second, a settlement agreement forces a claim to die, at least within the legal venue—by settling, you relinquish any further claims related to the matter at hand.

If your world was built on dispossession, what could you do? The kinds of redress that people seek include lawsuits for civil damages and demands for reparations, apologies and reconciliation processes. The outcomes of settlement described above—the forced relinquishing of grievances for a one-time sum determined by the respective monetary and military bargaining power of the parties—precisely characterize the results of the 2012 settlement in *Cobell v. Salazar*. *Cobell* was a class-action suit under the Claims Resolution Act for historical dispossession resulting from settler conquest, specifically, against the Interior and Treasury Department for mismanagement of American Indian trust accounts that had been created under the General Allotment Act of 1887. While the claimants sought substantial reforms in addition to a full accounting of unpaid trust funds for about 500,000 beneficiaries between 1887 and 2000, the government did not undertake any reforms and paid a pittance of the claim-- \$3.4 billion of \$137.2 billion calculated on the basis of the Bureau of Indian Affairs’ income from claimants’ allotments with the addition of interest (see also Goldstein 2014). In accordance with the logic of settlement, this payment terminated the possibility of recognizing the wrong that had been brought into a public forum with this remarkable lawsuit within the judicial system. The scope of the *Cobell* suit in terms of time, the number of claimants and the way its claim grazed the surface of American foundational violence made it a highly unusual case to appear at all. On the one hand, it captured such a broad arc of history as U.S. lawsuits rarely do— as Robert Westley notes, many reparations claims are rejected as time-barred (2005, 88-91). In *Cobell*, the government’s accounts were so insufficient to rebut the claims made against it that the record showed plainly that this was not business in the usual course, but a nominal business face for indigenous dispossession. The state thus gives the claims forum, but does *not* distinguish historical foundational violence qualitatively from other civil lawsuits arising from disputes.

The legal performance of the court constitutes a *refusal* to reckon with the great violence collectively organized by the settler state. The payoff is nevertheless a significant sum, more than any reparation claim yet made in the U.S., and reflects the anxiety of the state to make some symbolic recognition of past harm and to quiet the grievances of the dispossessed. The logical arguments that Westley describes for barring reparations claims—including fairness to the defendant, or preserving his repose, promoting accuracy in fact-finding and curtailing plaintiff misconduct—also convey a *refusal* to distinguish between harm in the course of everyday business, and harm stemming from foundational historical violence. While “repose” might suggest an interest with broad, historical scope—“settled interests”-- courts dismiss the harms stemming from historical wrongs against the weight of this repose. These patterns are not significantly different even when the state, through its different arms, acknowledges historical grievances stemming from the violence of settlement and offers formal apologies and

reconciliation processes (Kauanui 2014; Bhandar 2007). State-sanctioned “reconciliation,” Brenna Bhandar argues, “demands a settled, unified notion of what transpired,” and acknowledges past injustices “only in order to close off and contain this past” (2007, 94, 99). “Reconciliation” in the settler state creates “consistency” by deciding the terms of the dispute, and of the settlement, both narratively and in terms of value. Under the logic of settlement, claims, reparations and damages are calculated monetarily. Thus, calls for redress or reparations that articulate their demands in dollars, and calculations of lost earnings, unjust enrichment, and other damages, stake out a specific goal and battleground—a redistribution within the empire (*Cobell*; Bittker 1973; Coates 2014; Neumann and Loeffelholz 2015).

In the chapters above, we saw that money and narrative wield tremendous force within the landscape of settlement. Though the forum of the settler court of law moves inexorably according to the logics of settlement, the opportunities for redistribution and for the public articulation of narratives that have been warped and buried in that space are tremendous. Furthermore, because settlement entailed slow, economic warfare by legal means that is still ongoing, native communities remain under attack; they must engage the law to defend themselves against legal assault, and to do otherwise would be tantamount to laying down arms before the barrels of an army of guns. Thus, Joanne Barker writes that the question “is not why Native peoples would use the law as a means of reformation but how, in those uses, they seek to rearticulate their relations to one another, the United States, and the international community” (11).

At the same time, the call for reform of the system in *Cobell*—and the state’s refusal to require it—was critical. For the logic of monetary claims alone acquiesces in the consistency forced by settlement, and its obfuscation of the other forms of value and relationship that settlement destroyed. Indeed, monetary calculations alone can also produce the suggestion by a popular business school textbook, quoted at the top of Chapter 1, that “the Indians may have gotten better end of the deal” when Peter Minuit purchased Manhattan for \$24 in goods and trinkets—since if they had found an investor to invest at 10 percent, it would have grown to the sum of \$207 quadrillion. Indeed, for these authors, the strange hole left by the erasure of conquest, or the missing and difficult-to-access story of how speculation grew and developed through conquest itself, becomes a joke: “it would not have been easy to locate an investment that would pay 10 percent every year without fail for the next 385 years” (Ross, Westerfield and Jordan 2013). This casual aside, in what is essentially a training manual for American business, is rather gruesome in its gloss of the history of suffering and loss that the creation of the speculative market entailed; and yet it is also, somehow, perfectly indicative of settler common sense.

Since the logic of this market of jokes carries “the same destructive and disrespectful impulses that they did 500 years ago,” as Taiaiake Alfred observes, “questions of justice—social, political and environmental—are best considered outside the framework of classical European thought and legal traditions” (Alfred 1999). Despite the monopolizing, homogenizing drive of colonial settlement, there is huge margin between its logic and all of life. Just as its monetary calculations and language of apology cannot capture the losses that conquest or enslavement inflicted, individually or systemically, neither can it capture the rich character of most relationships, or *most* understandings of wealth and value. The structures I explored above are powerful, and we cannot fail to engage with them, but they themselves—and we—remain awash in the plurality of ideas, traditions, and ways of being ourselves and with one another that have surrounded them from their earliest stages of development. Even if we swim in the liberal

narratives of the settler state, the ideals these have cultivated, however divorced from history, have also reinforced a general longing for an alternative to the violent conditions of the present. In this dissertation, I have tried to draw our attention to all that fills and pushes at the order of these institutions, and to bear witness to the disjunctures between these literatures, institutions, and understandings of history. I would venture that the feeling of living in realities radically disjointed from those with whom we share the world, the city, a bus, the streets—of inhabiting different conceptual universes, informed by different sensibilities, norms, and especially, understandings of our shared past and present—is a common one today. I have tried here to write a story about how that past matters for everyone, in order that we might be encouraged to ask why.

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