ONE

That Sole and Despotic Dominion

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right.
>
> —WILLIAM BLACKSTONE, *Commentaries on the Laws of England*, 1765

This chapter develops two genealogies of dispossession. The first, presented in section I, is a largely intra-European account whereby the concept emerges in relation to a host of shifting proximate terms, such as expropriation, confiscation, and eminent domain. I argue that although the term originally operates within very long-standing and abstract debates concerning the nature of property per se, by the turn of the nineteenth century it takes on a much narrower, practical function as a tool of critique in relation to battles against feudalism. Section II turns to a second context: Indigenous struggles against colonization. In this part of the chapter, I seek to differentiate this conception from the first by attending to its unique recursivity. The

chapter concludes in section III by substantiating this argument by providing specific historical examples in the form of nineteenth-century Anglo settler property law concerning squatters and homesteaders.

I

In Western European legal and political thought, there is widespread and long-standing recognition of the right of the sovereign to appropriate the property and assets of subjects, forcibly if necessary. Rather than finding a single unifying concept under which to subsume this notion, one encounters instead a complex and confusing array of terms that vary according to time, location, custom, and vernacular. For the purposes of analytic treatment, however, this cacophony can be roughly organized into a set of four linguistic "families" in modern English that, while overlapping and interrelated, can help parse distinct conceptual inflections. They include expropriation, confiscation, eminent domain, and dispossession.

The Latinate term *expropriation* was introduced into European vernacular languages by the revival of Roman legal vocabulary by medieval civil and canon jurisprudents in the eleventh and twelfth centuries. Since then, it has come to name the right of the sovereign to appropriate property for the sake of the "common good" in some sense or another (*publica utilitas*, *communis utilitas*, *commune bonum*, etc.). The paradigmatic expression of this power has long been the compelled seizure of land required for the building and maintenance of public infrastructure such as roads or castle walls. For many centuries, of course, it was the sovereign who held ultimate interpretative power over who counted as within the "public" or what was in the "common good." As a result, expropriation was a highly flexible power; it could be expanded or contracted to suit a variety of schemes.[1]

Precisely because expropriation has had this variable scope, it has also had a retributive function. It this way, it has bled into *confiscation.* Derived from the Latin *confiscare*—"to seize for the public treasury"—this term refers to the coercive seizure of property from subjects for the purposes of punishment. It has been used, for example, to strip criminals of their assets in the wake of conviction for crimes, or as retribution for political and religious insubordination. For instance, during the American Civil War, the Union passed two "Confiscation Acts" (1861, 1862) as a means of seizing southern lands and slaves as a punitive response to treason.[2] Confiscation is sometimes treated as a species of expropriation, since legal enforcement

might reasonably be thought a function of serving the "common good." The two remain nevertheless partially distinct since confiscation commonly singles out a particular individual or group of individuals on the basis of their actions or standing relative to the sovereign. It is a mode of punitive forfeiture, tailored to a specific case.[3]

In 1625 the Dutch jurist Hugo Grotius intervened in these debates and in so doing coined a new term. In *On the Law of War and Peace*, generally considered to be a foundational text in the history of international law, he introduced the term *eminent domain* as part of his argument that "through the agency of the king, even a right gained by subjects can be taken from them in two ways, either as a penalty, or by the force of eminent domain [*dominium eminens*]. But in order that this may be done by the power of eminent domain, the first requisite is public advantage; then, that compensation from the public funds be made, if possible, to the one who has lost his right."[4] Grotius did more than introduce a novel term, however. He also helped shift the register of the debate. His key contribution, followed by later thinkers such as John Locke and Samuel von Pufendorf, was to connect the specific right of expropriation to a general theory concerning the origin and nature of property *as such*. If the sovereign has a particular right to seize property for the common good, this would seem to presuppose a superior claim on his part. Hence "eminent domain" has come to be used (rather confusingly) as both an act and as the underlying form of title that justifies that act. But how did the sovereign acquire that title in the first place?

One answer to this question was provided by various feudal theories of title hierarchy. In this framework, the sovereign holds a special right of expropriation because his title has *priority*, in both senses of the term: it was both older and superior. In his famous compendium of English common law (1765–79), William Blackstone summarized the feudal framework in the following way: "that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feodal services."[5] Claims of this sort appear to have been strongest in medieval and early modern France, as well as on the Iberian Peninsula, where expropriation was justified as an exercise of seigniorial power.[6] In a different idiom, this was part of Robert Filmer's defense of absolutist monarchy in England, famously pilloried by Locke in *The Two Treatises*.

Within these rather expansive theories of expropriation, special attention was paid to the matter of "originary title," that is, the question of how one could acquire a proprietary interest in something that had no previous owner, for which there was no prior claimant.[7] In medieval and early modern European jurisprudence, this came to be known as the problem of res nullius.[8] Standing behind this concept is a relatively simple intuition: an object with no prior owner becomes the property of she who takes control over it first, who is said to have a right of *preemption.* Partially through the Roman revival, the idea that "preemptive acquisition" was a qualitatively distinct form of proprietary claim entered into European civil and canon law. Explaining and justifying this distinct moment was important, it was thought, because all subsequent property claims were derivative of this "originary" moment. The matter touched upon very grand theoretical questions, such as how humans could come to assert legitimate private property claims in an originally common inheritance (from God), even absent "any express Compact of all the Commoners" (as Locke put it),[9] but the matter was also put to very practical purposes. In the early modern English context, for instance, it validated novel acquisition over previously unclaimed or unused lands (for instance, by the draining of swamps). So the question of "originary possession" served a dual function, as part of a narrative about the origins of civil society and property per se and as a topical and practical intervention into the property relations of the present. In this context, concepts of expropriation emerged as a means of explaining the sovereign's prerogative to forcibly appropriate property and assets from subjects. The sovereign had a right of expropriation because he or she was the rightful inheritor of the originary possession of the land.

Grotius's theory of eminent domain was motivated in part by a desire to displace this feudal theory of original possession. For him, although the sovereign still possessed a special right of expropriation, this had to be justified on different grounds. Rather than a seigniorial power, eminent domain was part of a contractualist, delegation theory of sovereignty. The sovereign holds the right to seize assets for the public good not in virtue of personally possessing a superior title but rather in light of his being empowered to adjudicate and legislate over the common good. Eminent domain was an extension of governmental authority, exercised on behalf of subjects who held an equiprimordial natural right to property. Among other contributions, this theory provided an independent normative benchmark by which to distinguish legitimate from illegitimate forms of expropriation. Subjects

were empowered to ask whether any particular exercise of expropriation or eminent domain was authentically undertaken for the common good.

Eminent domain remained for several centuries a relatively minor language of property seizure. It was used by a host of legal and political theorists—from Pufendorf to Emer de Vattel and Denis Diderot—but never became the dominant idiom, least of all in English.[10] This changed in the latter half of the eighteenth century, however. At that point, Anglo settler elites in British North America were searching for intellectual resources that might help them in their bid for greater autonomy from imperial London. As a result, they reached for continental European theorists who had been relatively overlooked in Britain. The result was that the language of "eminent domain" entered into legal and political theory of Anglo-America and, to this day, remains the dominant way to express the idea of compulsory seizure of private assets for the public good in the United States (unlike in Great Britain, where it still has little traction).[11]

Anglo-American thought of this period is driven in no small part by a desire to defend the power of eminent domain on more purely liberal-Lockean grounds; that is, the sovereign holds this power only because he is acting as a representative and executor of the common will. One way to establish these liberal bona fides was to exaggerate the distinction between modern, liberal notions of eminent domain and Roman, medieval, or early modern feudal conceptions of expropriation. The standard form of this argument holds that, since the modern power of eminent domain is expressly about *overriding* individual private property interests, it cannot be said to have existed until such interests were already recognized. Hence, early American theorists of eminent domain commonly assert that, in this technical sense, it did not exist "before the title of the individual property owner as against the state was recognized and protected by law." On this basis, modern eminent domain can be differentiated from earlier theories of expropriation in which "the right to take land for public use was merged in the general power of the government over all persons and property within its jurisdiction."[12]

Under close inspection, however, this clean division does not hold up. One way to render their overlap visible is simply to note that, in the vast majority of cases, the sovereign right of expropriation carried a corresponding duty to compensation. Across medieval and early modern Europe, widespread convention held that subjects were owed fair recompense for their sacrifices to the common good, however necessary these sacrifices might be. This is tantamount to recognition that subjects, however "common" they

might be, held some valid proprietary interests that were being overridden. Those whom a specific act of expropriation disadvantaged were, after all, part of the collective in whose name it was being enacted. (One significant exception to this general rule was the case of expropriation as a form of punishment, which is why confiscation remains a partially distinct term of art.) In short, the general form of the argument across this period was that sovereigns held a right to expropriate not predominantly because they held ultimate and primordial title to the land but because they had a special responsibility to care for the community as a whole and to rule for its common good.

This framework provided two normative benchmarks: expropriation must be for the sake of the "common good" and attended by fair compensation. These two features are important because they also provide leverage for a critique of illegitimate expropriation. This is where our final term enters the discussion, since *dispossession* has most often been used to mean "unjust expropriation." The contemporary term can be traced backward through the Middle English *disseisine* to the Anglo-Norman *dessaisine* (itself a variant of Old French). For many centuries, these terms were used to name forms of wrongful seizure or removal. This was, in a literal sense, a condition characterized by a deprivation of *seizine*, meaning possession of land or chattel. The term has very old roots as well. For instance, in the Magna Carta of 1215, section 39 states, "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will be proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."[13] In the original Latin, the first line is "Nullus liber homo capiatur vel imprisonetur aut disseisiatur." Although the term *disseisiatur* is sometimes rendered as "stripped," it is more literally "disseised" or, in modern English, "dispossessed." This etymological link endured for many centuries in English legal and political thought. It was used by Hobbes in *Leviathan* (1651)[14] and, much later, remained evident in the 1833 *Assize of novel disseisin*, which dealt with recovering lands "recently dispossessed" from the plaintiff.[15]

We have then a clutch of concepts: expropriation, confiscation, eminent domain, and dispossession. Although overlapping, intersecting, and highly mutable, when taken together these terms nevertheless compose a scene regarding the shifting powers of property in the early modern European world. Collectively, they express a dual desire: to name the legitimate right of the sovereign (and his delegates) to seize property for the common good

and, conversely, to condemn the abuse of this power. Whereas eminent domain is typically used only in service of the former positive sense, dispossession has more often operated in the latter, critical register. Most confusingly, expropriation has long been employed for both.

As I have already indicated, although each of these terms refers initially to a specific question of property acquisition, each is already implicated in broader theories of political legitimacy. This became all the more explicit as the concept of dispossession was expanded and radicalized in the late eighteenth and early nineteenth centuries. This is an important period in the story that occupies our primary concern here because it was at this point that it became possible to argue not simply that the sovereign had performed a specific act of illegitimate property seizure but that sovereignty was *itself* the effect of a massive act of "unjust expropriation."[16]

The entry point for this expanded notion of dispossession was the central role that struggles over *land tenure* held in the context of revolts against feudalism. Rising republicanism of the mid to late eighteenth century led to an increased concern with delegitimizing the very *idea* of a permanent landed aristocracy. In the service of this critique, republican thinkers reached back to a rich (albeit quasi-mythological) Greco-Roman tradition, which placed great emphasis on the virtues of fixed agricultural property, not only for the property holders but also for the political community as a whole. Fixed agricultural holdings, especially when held in small units by independent farmers, were thought to be the fount of republican excellence. Such farmers were relatively autonomous in both a material and ethical sense: their unmediated access to land could provide them not only basic subsistence but also a medium for virtuous labor. Modern republicanism could critique feudalism on the basis of its perversion of this relationship, since the majority of landholders were no longer independent farmers but proprietors of large estates funded by rent. This concern is quite clear in the analysis of Jean-Jacques Rousseau, for instance, who was most critical of the kind of large landholdings that formed the foundation of the European nobility; but, as we shall see, it can also be seen in a host of later anarchist and utopian socialist thinkers, from Marx to contemporary critical theory.[17] So, although such questions entered into early modern European legal and political thought as an extension of very general and abstract questions about property as such, they soon came to function as tools in an urgent contemporary political struggle.

In this, the emphasis shifted from criticizing this or that particular act of unjust expropriation (e.g., as implausibly for the sake of the common good) toward a critique of feudal aristocratic rule as itself founded upon a massive act of dispossession. Because the language of expropriation had long been entangled in debates over the origins of property as such, many of those who would later seek to use it as a critical weapon against the feudal estates backdated the event of dispossession to "time-immemorial" and the first moment of property formation. They therefore did not necessarily view the landed aristocrats of their own time as the primary *agents* of expropriation but rather as the *inheritors* of an original injustice, which had taken place in some long-distant past. This is most clear in the words of Rousseau, who famously claimed:

> The first man who, having enclosed a piece of ground, to whom it occurred to say *this is mine*, and found people sufficiently simple to believe him, was the true founder of civil society. How many crimes, wars, murders, how many miseries and horrors Mankind would have been spared by him who, pulling up the stakes or filling in the ditch, had cried out to his kind: Beware of listening to this imposter; You are lost if you forget that the fruits are everyone's and the Earth no one's.[18]

The fact that Rousseau bound the origins of civil society together so tightly with this quasi-mythological original expropriation meant that his argument generated divergent and contradictory responses. Some, such as many anarchists of the nineteenth century, called for the radical restructuring of state and society through the total abolition of actually existing property relations. Others contended that, precisely because human society as such was so tightly bound to an original expropriative act, the institutions of feudal tenure must be defended on the basis that abolition would entail the unraveling of civilization itself. A third position equivocated, calling for more moderate reform of existing institutions, accompanied by complex schemes that might compensate the rural peasantry, who, in their eyes, were the inheritors of the original dispossessed.

Thomas Paine's rather overlooked work "Agrarian Justice" (1797) is an illustrative case of the latter position.[19] In it, Paine argued that there was no natural or original case of "property in land," an institution that, for instance, he thought absent from biblical societies. This changed with the advancement of cultivation. Cultivation permitted individuals to improve the land in such a way that it came to be transformed far beyond its original state. Those improvements were sown back into the earth, producing further

increases in productivity. This generated inequalities, which eventually congealed into landed aristocracy. In one of the first instances of the English term being used in these debates, Paine claimed that the resulting land monopoly had "*dispossessed* more than half the inhabitants of every nation of their natural inheritance, without providing for them, as ought to have been done, as an indemnification for that loss, and has thereby created a species of poverty and wrechedness [*sic*] that did not exist before."[20]

As one can see, there are in fact two normative concerns operating within Paine's account. He is concerned, first, with the original moment of dispossession as intrinsically objectionable. As Paine puts it, in nature there is "no such thing as landed property." Those who first claimed it had "no right to *locate as [their] property* in perpetuity any part" of the land.[21] Second, this original act of theft enabled a set of resultant evils, namely, widespread poverty among the decedents of the original dispossessed. So, for Paine, dispossession was objectionable both intrinsically and consequentially.

"Agrarian Justice" was written while Paine was living in the midst of revolutionary France. He had at this point already served in the French National Assembly and had gone through a trial that nearly led to his execution. The text came out of a set of proposals he wrote at the time arguing in favor of a basic inheritance right, which he framed as compensation for the effective exclusion of the masses from the ownership of land. It was part of a reformist agenda that sought to bridge radical and conservative positions. For Paine, although the aristocracy had certainly taken advantage of its monopoly privilege, current holders of land titles were not themselves directly responsible for the context itself, in either a moral or legal sense. "The fault," as he put it, "is not in the present possessors. . . . The fault is in the system, and it has stolen imperceptibly upon the world, aided afterwards by the Agrarian law of the sword." The key then was to transform the underlying system of ownership, ideally "without diminishing or deranging the property of any of the present possessors," a process that might require "successive generations."[22] Paine's proposed solution was a new taxation system that would serve a compensatory and redistributive function, providing indemnification to the dispossessed for their regrettable, albeit unavoidable, historic loss. This general compensatory approach to the exclusion of the rural poor from landholding enjoyed significant support in the eighteenth and early nineteenth centuries. It played a role in utopian socialist projects aimed at giving the poor opportunities to return to agrarian living or, failing that, to receive support in the form of Poor Law redistributions. In Great Britain, it eventually led to the *Return of Owners of Land* (1873), a modern

"Doomsday book" project that sought to document the concentration of aristocratic land ownership in that country.[23] As shall be discussed at length in the sections to come, it also played a role in the justification of settler colonization schemes abroad, which held out similar promises of return to independent self-rule through individualized landholding, perhaps finding its purest theoretical advocate in Thomas Jefferson.

Debates of this sort reached something of a zenith in the classical anarchism of the mid to late nineteenth century. At that time, several prominent thinkers (including Pierre-Joseph Proudhon and Peter Kropotkin) advanced the claim that modern European nation-states were the emanations of acts of massive theft, specifically the theft of land from the rural peasantry. As Proudhon put it at that time: "Through the land the plundering of man began, and in the land it has rooted its foundations. The land is the fortress of the modern capitalist, as it was the citadel of feudalism, and of the ancient patriciate. Finally, it is the land which gives authority to the government principle, an ever-renewed strength, whenever the popular Hercules overthrows the giant."[24] As we can see here, like Rousseau, these thinkers envisioned the original partition of the earth to constitute an ancient violation, a "plundering." And, like Paine, they were attentive to its contemporary ramifications. Unlike liberals such as Paine, however, they drew a more radical conclusion, expressly repudiating the notion that dispossession could be remedied "without diminishing or deranging the property of any of the present possessors." Instead, they concluded that modern property relations were illegitimate in a more general sense, since other forms of inequality were derivative of the originary seizure of communal land. Hence, the famous slogan of nineteenth-century anarchists: *Property is theft!*[25] In this, terms such as *expropriation* came to play an increasingly important role in naming this ongoing, structured theft. By the end of the nineteenth century, the term had expanded and radicalized to the point that Kropotkin could worry only of "not going far enough," that is, of "carrying out expropriation on too small a scale to be lasting." Instead, he argued in his 1892 text, *The Conquest of Bread*, that "expropriation should be general," equating it with "a universal rising."[26]

In sum, then, the concept of expropriation entered into European legal and political thought as a means to stabilize and legitimize extant power relations and sovereign authority. It was, however, simultaneously inverted and redeployed as a tool of social criticism, that is, to destabilize and transform power and property. In this, it was joined to a host of other concepts, most notably dispossession and eminent domain. There is a discernable

shift in the transition from early modern to late modern European thought (from roughly the early seventeenth century to the late nineteenth), in which the terms came increasingly to be freed from their original uses and set to new, more radical and critical purposes. Eventually, it became possible and even plausible to use these as terms in the condemnation of established property relations rather than in their vindication. Perhaps most dramatically, it was eventually possible to accuse the sovereign not merely of a specific act of illegitimate expropriation but of himself being the effect of a prior dispossession: the *sovereign as thief*.

Marx represents something of a turning point in this critical history. Although initially impressed by the anarchist critique,[27] Marx eventually came to view this analysis as inadequate and improperly formulated. By positing that classical, feudal, and modern forms of domination all emanated from the same fount (i.e., land appropriation), anarchists generated a falsely abstract and ahistorical conception of "expropriation," one that failed to grasp the specificity of modernity and capitalism. Moreover, in hitching their critique to the language of theft, they had adopted a restrictively legal and moralistic category, one that in fact presupposed and naturalized a similarly abstract and ahistorical conception of property. For Marx, the anarchist slogan "Property is theft!" was therefore self-refuting, since the concept of theft presupposes the existence of property.[28] Even before Marx arrived at this conclusion, Max Stirner made a similar observation. In his major work, *The Ego and Its Own* (1844), he wrote: "Is the concept of 'theft' at all possible unless one allows validity to the concept 'property'? How can one steal if property is not already extant? What belongs to no one cannot be *stolen*; the water that one draws out of the sea he does *not steal.* Accordingly property is not theft, but a theft becomes possible only through property."[29] In effect, these critics were pointing out that property must be logically, chronologically, and normatively prior to theft. The latter cannot be foundational to either property relations or civil society more generally.

In the shuttling back and forth between anarchist and Marxist positions on the question of property and theft, we can observe an interesting correlate movement of conceptual and linguistic translation. Within classical anarchism, the French term *expropriation* came to function as a placeholder for the processes of large-scale "theft" that were viewed as constitutive of the modern state system itself. When Marx engaged these debates, he used both the Germanic term *Enteignung* and the Latinate *Expropriation*, somewhat inconsistently.[30] Finally, and somewhat confusingly, when *Das Kapital* was translated into English, the relevant terms were often, but incon-

sistently, rendered as *dispossession* (sometimes used interchangeably with expropriation, sometimes as distinct). From this point on, the latter term enters English-speaking debates and now enjoys wide circulation across a variety of critical traditions and thinkers, from David Harvey to Judith Butler.

As these key terms were translated linguistically, so too were they renovated conceptually. Anarchist thinkers had posited that the seizure of communal lands was itself a violence committed against the feudal peasantry by the aristocratic nobility, and that this was essentially theft: it was a coercive and illegitimate transfer of property from the original owners. Although Marx continued to speak of *Expropriation* and *Enteignung*, he changed the meaning of these terms when he provided a more abstract definition. For him, dispossession came to refer to the initial "separation-process" (*Scheidungsprozeß*) that separated "immediate producers" from direct access to the means of production, thus forcing them into new labor conditions, now mediated by way of the wage.[31] This implied a conceptual shift away from viewing dispossession in terms of "theft," strictly speaking. Whereas the original anarchist argument presented the rural peasantry as the original "owners" of the land, Marx sought to shear this critique from its normative investment in property.

In the next chapter, we will unpack the logic of Marx's engagement with the concepts of expropriation and dispossession in greater detail. For now, it suffices to highlight two results of this broader critique of anarchist thought. First, these categories were slowly displaced as tools of radical politics, becoming narrowly legalistic terms. The expansive normative and critical sense with which Rousseau, Paine, or Proudhon spoke of dispossession, for instance, was collapsed into the earlier, more technical and legalistic categories of expropriation and eminent domain with which we are familiar today (serving now, somewhat ironically, to legitimate state seizure of private property). Second, insofar as the category did persist as a tool of social criticism, it was subsumed beneath other, more fundamental concepts.[32] The historical result of this has been that, within the more Marxian-inspired lineages of critical theory, the question of dispossession has been subordinated to other concerns, specifically its role in generating a class of proletarianized workers. In terms of a historical-descriptive narrative, dispossession moves from being a story of "originary theft" toward a more localized claim about the rise of the modern capital relation. In the terms of normative theory, it loses any sense of its intrinsic injustice, and is instead rendered objectionable only in terms of its consequences,

specifically the way it enables exploitation and/or class domination (points to which I will return).

II

The concept of dispossession has enjoyed a renaissance of sorts. As was outlined in the introduction, it has come to be seen as a useful analytic device in contemporary debates surrounding colonialism (in both its historical and present-day manifestations), particularly in the Anglo settler world. In this new usage, echoes may be heard of the previous intra-European debates sketched above. Most obviously, in its deployment by Indigenous peoples, dispossession retains connotations of "land theft" long associated with struggles against European feudalism, albeit transposed now to name the specific territorial acquisition logic of settler colonization. However, as is hopefully clear by now, when the term *dispossession* migrates into discussions on colonization, a certain danger emerges. On the one hand, it is potentially problematic to adopt the classical anarchist strategy of construing dispossession as a case of straightforward theft since this leaves one vulnerable to both traditional objections from the Marxian camp and more opportunistic critiques from the right (discussed in the introduction). On the other hand, however, the route provided by the Marxist reply to anarchism may also prove inadequate, since this drags the heart of the whole matter away from expropriation toward exploitation. It would seem very odd indeed to suggest that the dispossession of Indigenous peoples from their lands is problematic because it enables their exploitation as laborers, since this is empirically not a very accurate description of the experience of colonization faced by many Indigenous peoples (especially in the Anglo settler world), but more to the point, it seems to distort the underlying logic of these struggles.

I contend that this dilemma is a function of the paucity of historical reconstructive work of the actual institutions of landed property in the Anglo settler world and their impact on the development of Indigenous traditions of resistance and critique. In short, we must understand more precisely how landed property came to function as a tool of colonial domination in such a way as to generate a unique "dilemma of dispossession," which is not reducible to the one experienced by European radicals.

Before turning to that alternative genealogy, however, it is important to note that, just as the term had a complex variety of uses and proximate

terms in the European debates, so too it does in this (colonial) context. Indeed, an alternative route around the above dilemma is to point out that, for many Indigenous peoples, dispossession is not really about possession at all. In this strategy, although the *word* is used to describe something specific about the territoriality of Indigenous social and political orders or its role in settler colonization, the "possessive" part of dispossession is rendered rather more incidental. In this case, we might really mean something like deracination or desecration. The first of these terms denotes a form of "uprooting" and carries connotations of displacement and removal. It can have literal and more metaphorical uses (as is the case with, say, dislocation) and has a certain intuitive appeal since the expropriation of the territorial foundation of a society will clearly have a massively negative, disruptive effect on that society. Dispossession qua deracination carries its own ambiguities and dangers, of course. It may, for instance, suture indigeneity to territorial fixity, an issue I will not explore here.[33] However, the language of deracination does seem at least to lead us away from implying that that relationship to land must in its original form be a propertied one.

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

> Although Aboriginal Peoples maintain a close relationship with the land . . . it is not about control of the land. . . . Earth is mother and she nurtures us all. . . . Sovereignty, when defined as my right to be responsible . . . requires a relationship with territory (and not a relationship based on control of that territory). . . . What must be understood then is that Aboriginal request to have our sovereignty respected is really a request to be responsible. I do not know of anywhere else in history where a group of people have had to fight so hard just to be responsible.[34]

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

I explore these alternative formulations in greater detail in later chapters.[35] Let us set them aside for the moment, however, in order to give our original problematic a more thorough treatment. If I do so, it is not because the rendering given by thinkers such as Monture-Angus is not important or convincing. Rather, we may wish to explore alternatives because, for instance, not all Indigenous peoples and communities will view their relationship to the Earth in this way. What is more, as any engagement with the actual writings and works of such people reveals, there is a palpable sense in which Indigenous communities in the Anglo settler world have experienced, and continue to experience, colonization as a form of theft. Notwithstanding all the complications just raised, then, there is a certain claim here to the effect that *this land is stolen*, a claim that cannot be simply sidestepped if we wish to remain responsive to the specific historical experience at stake. We may wish then to persist in grappling with the language of theft out of an interest in engaging these claims as they are presented to us, perhaps precisely because the issue at hand does not fit neatly into expected frames of reference. Continuing to speak of dispossession qua "theft of land" would then not simply be important as part of a rhetorical strategy, or as a principle of solidarity (although these may also be important considerations). Rather, it would be worth retaining these terms because they in fact express an appropriate and conceptually complex apprehension of the nature of problem at hand.

Part of what continues to motivate the use of the term *dispossession* in these contexts, I contend, is the real sense that colonization (especially settler colonization) does involve a unique species of theft for which we do not always have adequate language. First, dispossession of this sort combines two processes typically thought distinct: it transforms nonproprietary relations into proprietary ones while, at the same time, systemati-

cally transferring control and title of this (newly formed) property. It is thus not (only) about the *transfer of* property but the *transformation into* property. In this way, dispossession creates an object in the very act of appropriating it.

How exactly does this work? How can dispossession be said to fuse the making and taking of property? The answer depends on clarifying what it means to "make" property. Part of the confusion around this derives from the persistent ambiguity in the ordinary language sense of property. Most of the time, when we speak of our "property," we think of a collection of objects: cars, houses, clothing, and the like. However, as almost all critical-theoretical treatments of the category begin by reminding us, in point of fact, property does not refer to a set of things. Rather, it refers to a species of *relations*.[36] To claim property in something is, in effect, to construct a relationship with others, namely, a relation of exclusion. Most often, to assert property in something is to make an enforceable claim to exclude someone from access to some thing. The fact that property is really a form of social relation (and not a particular kind of object) is made most dramatically visible when we consider that there need not be any physical tangible entity in which the claim is lodged. You can have property in an idea, a technique for doing something, even an expectation. The object in which you have a claim need not be, therefore, a physical entity. But it must be cognizable as a distinct juridical object, something that can in principle be rendered the repository of an enforceable claim against others. So "making" property refers not to the creation of a new material object but to a new juridical and conceptual object—an abstraction—that serves to anchor relations, rights, and, ultimately, power.

In this context we are concerned with how "land" was rendered as "property." Although it may first appear as a perfectly obvious, empirical object, "land" is in fact a concept, and a highly abstract one at that.[37] We are essentially talking about taking a portion of the Earth's surface—excluding the subsurface and troposphere beyond some often vaguely formulated or unspecified distance—and bundling a complex diversity of proprietary claims within it such that a person could, in principle, acquire control over all objects and activities within that zone. As a legal and marketable object of this sort, land in this sense is a highly culturally and historically specific object in which one could invest property claims. It is not the case that all societies—even most societies—have had such a concept, let alone a set of legal and political institutions to enforce claims around it, or a market through which it could be traded.

As we shall see in periodic historical reconstructions throughout this book, when European colonizers encountered the diverse societies of the so-called New World, they frequently found that Indigenous peoples had no conception of land in this abstract and narrow sense. (Rather than viewing this in terms of a simple lack, many Indigenous thinkers have considered it a positive feature of their societies that they did not partition Earth in this manner.[38]) Accordingly, the process of dispossessing them entailed a rather complex gesture of ascribing this peculiar property form to them but in such a way as to facilitate its divestiture. Put more generally, we can say that dispossession is a process in which novel proprietary relations are generated but under structural conditions that demand their simultaneous negation. Those impacted by this process—the dispossessed—may even come to attach to these new relations, experiencing them (or elements of them) as a positive development in the sense that the process entails a nominal expansion of their proprietary rights; that is, they have gained a new form of property (in this case, "land"). However, they can also come to experience a deep conflict between the abstract form of the proprietary right and the conditions for its realization. The reason for this is that the dispossessive process has also changed background social conditions such that the actualization of the proprietary right in question is necessarily mediated in such a way as to effectively negate it. In effect, the dispossessed may come to "have" something they cannot use, except by alienating it to another.

This formulation helps explain the paradoxical phenomenon we find in the history of settler colonialism of colonizers who simultaneously affirm and deny Indigenous proprietary interests in land. In the long and complex history of the European colonization of the (now) Anglo settler world, we of course find numerous examples of colonial figures who simply deny outright the very possibility of Indigenous property in land, typically as a function of Indigenous peoples' supposedly lower levels of socioeconomic development, rationality, techniques of cultivation, enclosure, and the like. As has been well documented, thinkers from Vattel to Locke to Immanuel Kant have all doubted whether Indigenous peoples have ever had the socioeconomic and technological development required to truly take possession of land. Alongside these blanket denials, however, we also find various forms of partial recognition and selective affirmation of Indigenous proprietary interests. Historically, settlers have routinely affirmed certain forms of Indigenous property rights because they have recognized that, in a consolidating colonial-capitalist context, Indigenous peoples can only actualize their property rights through alienation.[39] The Lakota (Standing

Rock Sioux) philosopher Vine Deloria Jr. pointedly summarizes this feature of dispossession in his landmark 1969 work, *Custer Died for Your Sins*.

> One day the white man discovered that the Indian tribes still owned some 135 million acres of land. To his horror he learned that much of it was very valuable. . . . Animals could be herded together on a piece of land, but they could not sell it. Therefore it took no time at all to discover that Indians were really people and should have the right to sell their lands. Land was the means of recognizing the Indian as a human being. It was the method whereby land could be stolen legally and not blatantly. . . . Discovery negated the rights of the Indian tribes to sovereignty and equality among the nations of the world. It took away their title to their land *and gave them the right only to sell*.[40]

Deloria is putting his finger here on a peculiar nominal or "negative property" right enjoyed by Indigenous peoples in colonial contexts: the right "only to sell." In phrasing matters this way, Deloria is drawing upon a long and rich heritage (discussed at greater length in chapter 3). Above all, he lays bare the specific mechanics of dispossession, whereby Indigenous property is only cognizable by Western law in and through its alienation.

It serves to recall that the standard form of a property right is a tripartite conjunction of exclusive rights to acquisition, use and enjoyment, and alienation.[41] In the context of evolving forms of settler colonial capitalism, however, the structure of "Indigenous property" emerged as an already paradoxical conjunction, a truncated form of property that could only be fully expressed in the third moment, that is, alienation. In other words, *it is fully realized only in its negation*. This is what Deloria is pointing to in saying that "Indians" have only a "right to sell." In this case, Indigenous peoples are not fully excluded from holding property per se but instead have come to possess an empty or truncated proprietary interest, one that cannot be actualized except through divestment.

This is why the claims of Indigenous peoples may appear question-begging from our standpoint in the present. Indigenous peoples are figured as the "original owners of the land" but only *retroactively*, that is, refracted backward through the process itself. In this case, then, Indigenous original propertied interests in this object called "land" are only rendered cognizable in a retrospective moment, viewed backward and refracted through the process of generating a distinct form of "structurally negated" property right in it. The original proprietary interest is only visible after it has been lost. Viewed in this way, Indigenous claims to the land are not mistaken

or confused at all but rather reflect the paradoxical fact that, in this context, possession does not precede dispossession but is its effect. Rather than avoid the problem of a negatively defined concept, we should therefore highlight precisely the *recursive* logic at work here as the essential feature of the specific process under consideration.

In sum, the recursive movement at work here may be plotted as one of *transformation* (making), *transference* (taking), *and retroactive attribution* (belated ascribing). When worked out in relation to this specific context, this reformulated conception helps us avoid some of the false dilemmas sketched above since it can name a process of dispossession without presuming an original possession or requiring a theory of "first occupancy." Contrary to Stirner's direct assertion, what belongs to no one can in fact be stolen. It is to the long and sordid history of this peculiar mode of theft that Indigenous authors and activists are referring when they employ the language of dispossession today.[42]

Ultimately, however, if we are to conceive of dispossession as consisting in a relationship between a juridical structure of right and the social context that actualizes that system of right in a "negative" manner, we cannot remain at the level of theoretical assertion. It must be demonstrated, not stipulated. A full account will need to explain both that de jure structure and its de facto actualization. We will need to demonstrate precisely how proprietary interests can be "structurally negated" by a background social context. It is to this background horizon that we now turn.

III

Settler colonialism in the Anglophone world has always been inextricably linked to a transformation in human relations to land. The eventual "rise of the Anglosphere"—particularly dramatic in the nineteenth century—was a "metaphysical revolution."[43] In and through this process, land came to be understood as something that could be not only individuated in measured, discrete units but also abstracted and registered in legal codes that could be circulated, traded, and pledged. As these ciphers were organized into a "market," their relation to the actual physical spaces they were meant to represent was increasingly attenuated. As historian John Weaver puts it, "By an astonishing conceptual revolution, worked out in both old- and new-world settings, the most tangible and non-moveable property conceivable was organized into interests and condensed into paper assets that, in

good market conditions, could be cycled quickly from person to person, person to corporation, corporation to corporation, corporation to person, and so on."[44] This was a process that took place in both "old" and "new" world settings, in Europe and its colonies. It was part of the global process that Karl Polanyi theorized as the "Great Transformation," which he linked (albeit in peripheral ways) to colonization.[45] What makes the Anglo settler colonial world such a unique and important lens through which to study this, however, is that it was a space where state formation and market formation not only took place simultaneously—the emergence of a modern legal, governmental apparatus was coeval with the emergence of a market in land—but also that this was done in explicit opposition to Indigenous forms of life that presented radically distinct and divergent visions of the relationship between human societies and the lands on which they lived. Thus, the structure of property in land that took hold in the Anglo settler world was systematically oriented toward the dispossession of Indigenous peoples in a unique and noncontingent manner.[46]

That Anglo settler colonialism is inextricably linked to the emergence of a market in land is most obviously true in the case of the United States. As one contemporary economist rather unapologetically boasts: "America has always been a nation of real estate speculators. . . . Real estate speculation was an integral part of the 'winning of the west,' the construction of our cities, and the transformation of American home life, from tenements to mini-mansions."[47] In one sense, this is correct. Many of the leading figures of the American Revolution made their fortunes in real estate speculation. They specialized in acquiring vast swaths of land from a public entity (originally from the Crown), parceling it out and selling it to smaller investors at large profits. This group included George Washington, Benjamin Franklin, and Thomas Jefferson but also lesser-known figures such as Robert Morris, Nathaniel Phelps, Oliver Gorham, and other influential financiers of the revolutionary period. Through land speculation companies such as the Ohio Company, the Vandalia Company, and the Loyal Land Company before it, the Anglo settler elite of the eighteenth and nineteenth centuries was built upon the commercial trade in land.[48]

There were huge amounts of money to be made in the earliest rounds of land acquisition and sale. In the early 1790s, Alexander Hamilton estimated that 30 cents per acre was a fair price for government frontier land. Only a few short years later, the 1796 congress considered a $2 minimum sale price to be reasonable.[49] By 1850 New York State land was valued at $29 per acre. Adjusted to contemporary prices, that is a change from

approximately $7.50 to $35 to $854 in sixty years.[50] The role of government was to regulate and control the pace of expansion so as to prevent the formation of real estate bubbles, which could cause recessions when they burst. Periodic real estate collapses did, of course, bankrupt many (including Robert Morris, who was imprisoned for his debts in 1798) and by 1819 left an estimated $21 million owed to the federal government from defunct land speculators, approximately $12 million of which was linked to the newly opened Alabama territory alone.[51] The U.S. government responded with a variety of relief measures, including releasing new forms of credit available for the purchase of public land.[52] The most important credit policy of the boom period between 1797 and 1819 was the Land Act of 1800, which enabled purchasers to acquire public land by fronting a mere one-twentieth of the initial cost.[53]

The great Chicago land boom and bust of the 1830s and 1840s is often held up as an exemplary case of the general pattern of U.S. westward expansion through speculation. In the 1820s, there was virtually no market for land in that area of the frontier, and thus land was effectively worthless as a commodity.[54] By 1830 it was some of the most expensive real estate on the continent and, by one estimate, increased by nearly 40,000 percent in that decade alone.[55] In 1840 a partial collapse of this bubble generated a wave of foreclosures by the Bank of Illinois, which itself promptly declared bankruptcy in 1842.[56] In the thirty years following the initial land boom, Chicago's population went from a few hundred to approximately 109,000 inhabitants. In the next thirty years after stabilizing the land market, it repeatedly doubled, reaching 1.1 million by 1890.[57]

The Civil War did little to slow westward expansion. It was during this period that Congress passed the Morrill Act, setting aside huge swaths of newly acquired public lands for the establishment of a network of new land grant universities, and the Pacific Railroad Act, which provided private companies with an estimated two hundred million acres of Indigenous land, often in direct contravention of treaty obligations.[58] Indigenous peoples were slowly brought into the land market but only under highly unequal terms, often through agreements that today would be recognized as forms of predatory lending.[59] For example, the Choctaws were forced by such pressures to sell a majority of their lands for $50,000 in 1805. The Chickasaws followed suit soon after, releasing all their land north of the Tennessee River for $20,000.[60]

Both the public and private sides of the new economic order were deeply enmeshed in the emerging land market. Private individuals could

make huge profits, but the federal government was also dependent on sales. As Roxanne Dunbar-Ortiz puts it, in the first few decades of U.S. independence, "land became the most important exchange commodity for the accumulation of capital and building of the national treasury."[61] This created tensions between different aspects of the state building process, that is, between territorial expansion, capital accumulation, and the rule of law. This often played out in terms of competition between government agents (such as surveyors, bureaucrats, and auctioneers), homesteading squatters, and financier-speculators, consideration of which necessarily engages broader questions of how to theorize the relationship between state and capital formation in settler colonial contexts. These different agents had distinct and often mutually conflicting immediate goals and objectives. However, over long-term cycles, they were nevertheless able to generate a certain resonance (even if not total consonance) between their different projects so as to produce a relatively stable effect: dispossession.

Once set into motion, the dispossessive logic of settler colonization proved difficult to control. Issuing a warning in the precise vocabulary with which we are here concerned, the secretary of war under George Washington, Henry Knox (no friend to Indigenous peoples generally), argued in 1789 that, because Indigenous peoples were prior occupants, they "possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation."[62] Echoing and concretizing this sentiment, in 1785 Congress issued a proclamation forbidding unlawful settlement and authorizing the secretary of war to remove those in the breach.[63] In 1806 the term *squatter* was used for the first time in congressional debates to refer to the growing problem of claims obtained outside the formally recognized and legally sanctioned process.[64] Formal, legislative prohibition peaked in the form of the Intrusion Act of 1807, which forbid U.S. citizens not only from unlawfully taking possession or making settlements but also from surveying, designating boundaries, or even marking trees in such a way as to facilitate a future claim. It moreover reauthorized the president and his officials "to employ such military force as he may judge necessary and proper" to remove offenders.[65]

Congress faced two obstacles in its attempt to curtail settler expansion by legislative means. First and foremost, legislative control over illegal squatting was practically unenforceable. By the early nineteenth century, settlers had grown in numbers and technical competences to be an independent

social force that could effectively overrun the state in its official capacity. This was proven time and again as the new republic struggled to enforce its frontier laws. Army officers were sent out to the countryside, charged with handing out and collecting fines as well as enforcing foreclosures and jail sentences. In July 1827, federal troops were sent into Indian land in Alabama, where they forcibly removed squatters, burning their homes and crops. Repeated periodically throughout the 1830s and 1840s, this came to be known as the "Intruders' War."[66] Among other difficulties of enforcement, soldiers were generally sympathetic to squatters, not a surprise given that cheap frontier land was a common reward for service.

The second problem was more abstract. State measures against intrusion relied on a clear understanding of the *legality* of settlement for their consistent application and enforcement. Here we encounter a unique conceptual problem. Anglo settler states have historically faced a complicated gesture of simultaneously avowing and disavowing the rule of law, that is, of squaring their reliance on extralegal violence as constitutive to their founding and continued expansion with their self-image as distinctly free societies governed by the rule of law. The distinction between legality and illegality that operates in the land acquisition process of a settler state is particularly fraught and unstable. It requires positing the state as the legitimate source of law, while acknowledging, even fostering, the extralegal mechanisms that make this possible. On the one hand, the state is figured as the originator of law, which is meant to secure its validity and its distinctiveness from other nonstate forms of coercion (which have not been publicly validated and thus cannot avail themselves of the status of law). On the other hand, the state itself must arise out of extralegal force, for there is no prior law that can validate founding itself; that is, to draw upon the language of Walter Benjamin, a shift from law-preserving to law-positing violence (*rechtserhaltende* to *rechtsetzend Gewalt*).[67] In Anglo settler societies, the solution to this has often been to redeem the validity of founding through a *recursive mechanism*, one that sees the state acting "as if" it is a source of publicly validated law until such time that it properly becomes one (a point on the horizon that is, of course, ever receding). The state's claim to a monopoly over legitimate violence exhibits a performative quality: the assertion is an act that works to make reality conform to the aspiration.

Consider the Intrusion Act of 1807, which expressly applied to squatters on already acquired public lands, that is, illegal possession *within* the extant ambit of U.S. law. However, since squatters, by definition, do not observe the bounds of law, the act acknowledged that they were also found

in land "not previously recognized and confirmed by the United States." These were squatters beyond the territorial bounds of the United States but nevertheless (and somewhat inexplicably) within the reach of the law. The act equivocates then between two different problems. One way to express this tension is through a distinction between *illegality* and *extralegality*. Whereas squatters on recognized and claimed U.S. public lands are clearly located within a sphere of illegality—itself readily cognizable and justiciable by the law—squatters beyond the territorial bounds of the extant state are in a space of *extralegality*. Their activities are "outside" U.S. law but not necessarily in conflict with it. The slippage between these two is vexing from a legal standpoint (for instance, as a problem of justiciability) yet especially productive and integral to the dispossessive process, since the prohibition against squatting in lands "not yet recognized" as within the bounds of the state presumptively figures these lands as awaiting incorporation, as *potential but not yet fully actualized* public lands. In this way, the lands beyond the frontier are merely at a temporally earlier stage in the recursive process of legitimation by which public lands came to be subsumed beneath settler state law, since even the territory from which the law currently speaks (the settler metropole) is but a previous era's quasi-legal frontier lands that have been retroactively validated. As such, we see judges and jurists of early nineteenth-century America struggling with the issue of frontier illegality not only as a problem of enforcement but of law's ultimate legitimacy. As one Mississippi federal judge complained in a letter to President James Madison: "How can a jury be found in Monroe County to convict a man of *intrusion*—where every man is an *intruder*?"[68]

The solution to this was to incorporate a measure of illegality into the operation of the law, an illegality that, it was hoped, could be retroactively redeemed through a recursive device. In the early nineteenth century, this took the form of *preemption*. The word *preemption* refers to a preference or prior right of acquisition by a specific claimant, typically the occupant. In the early colonial period, it referred to a right claimed by one European power against others to "first occupancy," assigning a special status to the original "discoverer" of a new territory. In the wake of U.S. independence, the principle was recognized by the Continental Congress and reformulated to apply to settlers on the western frontier. Effectively, it gave squatters a right of first bid on territory they occupied, often at a significantly reduced price, provided they had dwelled on the land for a given period of time and had sufficiently "improved" it. In the period between staking an initial claim and redeeming that claim through purchase, squatters were deemed

"tenants at will."[69] If they sufficiently improved the land and raised enough capital eventually to buy it from under themselves at auction, they were effectively exonerated of the crime of trespass. If not, the state could remove them and sell the lands to more worthy competitors. In this way, a gray zone of illegality was preserved within the confines of the law itself in the form of delayed or belated enforcement: the distinction between an "illegal squatter" and "valid tenant at will" could only be known in light of the retrospective gaze.

Between 1799 and 1838, thirty-three special or temporary preemption acts were passed.[70] Originally contained as clauses within legislation whose primary intent was to restrict illegal squatting (e.g., within the Intrusion Act of 1807), such provisions were expanded and formalized in their own right over the course of the 1820s, 1830s, and 1840s. In 1830 the first properly titled "Preemption Act," which included a general pardon for all inhabitants of illegally settled lands, was passed by Congress. Initially intended to be a temporary measure, it set a new precedent. By that point, settlers recognized that they could effectively disregard the previous Intrusion Act since there was a high degree of probability they would simply be exonerated by later preemption legislation.[71] In practice, then, the strange recursive relation between the Intrusion and Preemption Acts actually encouraged illegal settlement. By 1835 the preemption bill was coming up for renewal as frequently as annual appropriations.[72]

In 1841, revisions to the policy of preemption sought to remove its awkward retroactivity. From that point on, Congress did not even consider settlement prior to purchase as trespass per se, subject to some provisos. "Homesteaders" (as they were now more positively deemed) had to be the head of a family, a widow, or a single man over twenty-one years of age and a citizen of the United States (or current applicant for citizenship). They could not already be the proprietor of 320 acres or more of land in any state or territory, and must reside on the plot in question and "improve" it.[73] In this way, the Preemption Act not only gave legislative cover for squatting; it continued the Lockean ideal of restricting appropriation based on good standing, improvement, and sufficiency.

Squatters, homesteaders, and "tenants at will" thus came to possess a sui generis form of right—the retroactively legitimized, quasi-legal claim of preemption. As a hybrid racial-legal category of people, "Indians" possessed a corollary form of right that, not coincidently, was also referred to as "preemption." In the 1820s and 1830s, American Indian law came to codify

"Indians" as those who did not possess full rights to sovereignty and land ownership.[74] Theirs was a sui generis right of "occupancy" or "tenancy" and, in this sense, was not entirely dissimilar to squatter rights. The Indian form of preemption was, however, the inverted mirror reflection of that accorded to settler homesteaders. Whereas homesteaders possessed the preemptive right to *purchase*, Indians held the preemptive right to *sell*. This truncated property right (i.e., the right to alienate) was, in effect, one of the first "Indigenous rights."

This does not mean that individuals once coded as "Indians" could never purchase land. It did require, however, that they could not legally own "homesteads." For instance, legislation from 1865 provided for the first time the possibility for some Indians to receive homesteads under the 1862 Homestead Act.[75] An 1875 appropriations bill expanded and further entrenched this possibility but did so only through an explicit requirement that said Indians had "abandoned" their "tribal relations" (including providing "satisfactory proof of such abandonment").[76] An 1884 revision to this further clarified that "Indian homesteads" would be held in trust by the federal government for twenty-five years. The Dawes Act came into effect in 1887 and, for the forty-seven years it was in effect, it provided the legislative mechanism by which approximately 90 million additional acres of lands were appropriated from Indigenous nations and distributed to "homesteaders"—an area larger than present-day Germany.[77] In his extensive documentation of this process, the historian David Chang concludes, "Allotment combined the making of land into private property and the taking of that private property from Indians."[78] In a strict sense definitional, then, "Indians" alienated proprietary claims to land, whereas "homesteaders" actualized them. A single person could perform both roles but not at the same time: one was *either* an Indian *or* a homesteader.

Attending to the movement of Intrusion→Preemption→Homesteading enables us to specify and concretize what it means to say that new property rights in land "left no room for the Indians" or were "predicated upon their dispossession and dehumanisation."[79] Moreover, we can better grasp the recursive logic of dispossession that made this possible. First, we can observe in it a kind of bootstrapping procedure that generates legal possession out of avowedly extralegal seizures. The admixture of legality and illegality inherent in this expressed itself in both spatial and temporal terms, as both a zone and a time, as the *frontier* and the *waiting period* between initial trespass and retrospective redemption through purchase.[80] By Congress's own

lights, extralegal seizure was the primary mechanism by which the United States expanded and consolidated its underlying system of proprietary title: theft quite literally produced property.

Second, this gives us a clear glimpse of the reconfigured relation between state and market. While the new republic attempted to deploy the traditional mechanisms of state control to contain the socioeconomic processes unleashed in the decades following independence, sending military and police agents to restrict illegal squatters, this proved ultimately futile. Paradoxically, the state was both a central agent of market formation and in thrall to it. The land market that was created over the course of the nineteenth century did not spring out of thin air as a model of self-organizing economic relations. Rather, it was a construct generated as much by the coercive power of the state apparatus as by "private" interests and individuals. The new market for land was, after all, predicated on the military conquest of Indigenous peoples, their forced removal from the territories in question, and their de jure and de facto exclusion from the market through legislation explicitly designed to ensured Indians could not compete with white settlers when it came time to (re)purchase land at auction. At the same time, however, state officials quickly found they could not fully contain or control market forces once they took hold. They could not fully control squatters, nor the proliferation of "Claims Clubs," which colluded to drive down land prices through collective bidding—practices that gained increased respectability and legal protection through such organizations as the National Land Association (founded in 1844 by George Henry Evans) and the Free Soil Party (active from 1848 to 1852). What, after all, was the United States itself if not a particularly large and well-armed claims club? Thus, we find less a colonization process driven by state demands for territorial sovereignty *or* economic drives for capital accumulation than a complex meeting of both. The two were interwoven since, much as government officials might complain of meddlesome squatters, settlers were the primary mechanism by which the state was able to convert frontier land from a threatening external wilderness to a fiscal resource and national asset.[81]

Third and finally, we have begun to identify the mechanism of transmission by which the dispossessive process became a global phenomenon. Although initially wary of following the U.S. model, British colonial administrators in other regions of the world took note of the wealth and power it was capable of generating.[82] The new market in land, they recognized, was inherently (not contingently) expansionist and could not be controlled by agreements between gentlemen statesmen. One was either forced to adapt

or risk being drowned by the wave of "manifest destiny." Thus, the dispossessive process begun in the new U.S. republic pressed upon colonization processes elsewhere, reshaping Anglo settler policy across the globe into an increasingly convergent form. As John Weaver puts it, "'The expansionary drive of American culture' was not just American."[83] It is beyond the scope of the present study to provide a full treatment of this complex field, but two brief illustrative examples from Canada and Aotearoa/New Zealand will be useful.

The success of the U.S. model of territorial expansion placed immediate pressures on the Canadian colonies, which were under constant threat of being overtaken by the republic to the south from the time of the revolution through much of the nineteenth century. Not only was the United States more populous and more powerful; it was also a more attractive destination for many European migrants precisely due to the high availability of land. Additionally, the Canadian example is often held up in contrast to that of the United States, in part because, in the majority of the country at least, the territorial acquisition process operated through a series of treaties signed between Anglo colonial officials and Indigenous leaders.[84] These came in two waves. From 1871 to 1877, Treaties 1 through 7 secured the southern half of the western "prairie" provinces. Then, from 1899 to 1921, Treaties 8 through 11 incorporated a vast expanse of land in the northern half of those provinces, plus portions of what is now British Columbia, Ontario, the Northwest, and Yukon territories. Since these were highly formal, ceremonial affairs between the official representatives of the Crown and those of the respective Indigenous nations, they seem to have more to do with agreements between nations than transactions between subjects, more about sovereignty than property. In one respect, this is true. These agreements were understood to operate on this nation-to-nation basis, and in many cases still are. Considered from the standpoint of high constitutional theory, the treaty system governing Indigenous-Canadian relations has been regarded as a model of cooperation and consent.[85] Viewed from the vantage of political economy, however, the Canadian and U.S. models converge in important ways.

Colonial administrators in "British North America" have long understood that the agreements between sovereigns would be practically meaningless if they were not able to move large numbers of settlers into disputed regions so as to practically displace Indigenous peoples' presence and

forestall U.S. annexation. For this, they needed more than treaties between sovereigns; they needed property. Property served as both a legal mechanism to anchor Crown title materially and an economic incentive to motivate (re)settlement. Thus, although "the Canadas" retained a distinctive legal and political system, it was not long before administrators there realized that grafting this onto an American-style system of landed property ownership would be vital to maintaining and expanding British North America.[86]

This largely took the form of transitioning from a feudal and seigneurial "land grant" system to a market system of direct purchase and sale. An early moment in this transition arose in the late 1830s. In 1838 the Whig politician and eventually governor general and high commissioner of British North America, John Lambton, 1st Earl of Durham, was sent to the Canadian colonies to investigate the 1837–38 rebellions there. Accompanied by Edward Gibbon Wakefield and Charles Buller, the trio eventually composed a *Report on the Affairs of British North America*, commonly known as *Lord Durham's Report.* Much of the report contained recommendations for changing the governance structure of the Canadas, and it is generally credited with ushering in "responsible government" through the devolution of powers to local, elected legislatures. What concerns us here, however, are the sections of the *Report* dealing with land tenure. On this front, Lord Durham observed:

> The system of the United States appears to combine all the chief requisites of the greatest efficiency. It is uniform throughout the vast federation; it is unchangeable save by Congress, and has never been materially altered; it renders the acquisition of new land easy, and yet, by means of price, restricts appropriation to the actual wants of the settler; it is so simple as to be readily understood; it provides for accurate surveys and against needless delays; it gives an instant and secure title; and it admits of no favouritism, but distributes the public land amongst all classes and persons upon precisely equal terms. That system has promoted an amount of immigration and settlement of which the history of the world affords no other example.[87]

Accordingly, the report recommended transitioning the Canadian land appropriation and distribution system to mimic that of the United States. Since the landed gentry had a greater hold on the Canadas than was the case in the more republican-oriented nation to the south, this took some time. However, over the next decades, the public lands system was radi-

cally transformed. By 1872 the new government of Canada formalized this in the Dominion Lands Act, which was extensively copied from the U.S. Homestead Act of 1862.[88] From that point on, the Canadian landed property system began to substantially converge with that of the United States.

One major irony of this transition was that, although the model for a homesteading market in land came from the United States, colonial administrators in British North America (later Canada) were wary of adopting it for fear of being overtaken by waves of American citizens moving north. In other words, they recognized that de jure changes to the legal system of land acquisition and distribution could potentially lead to their de facto annexation by the United States.[89] British colonial administrators knew this well because it was precisely what they were attempting to do vis-à-vis Indigenous peoples. Just as had occurred south of the (newly formed) border, landed property incentivized the mass movement of Euro-American settlers and, also like the U.S. case, the demographic shift had a corresponding effect on legal interpretation. As the "treaty rights" of Indigenous peoples increasingly came into conflict with the public and private law of Anglo settlers, they were incrementally hollowed out and subordinated to settler interests.[90] In short, dispossession did not proceed through macro assertions of sovereignty but through microlevel practices that worked to dismantle one infrastructure of life and replace it with another.[91] Beneath and beyond the lofty agreements encoded in the treaties, Canadian administrators worked to destroy the economic foundation of Indigenous societies, using starvation to drive them into submission.[92] It was also at precisely this time that legislation codified the legal-racial category of "Indian," which included property restrictions for those unwilling to adopt European ways or unfit for full enfranchisement.[93] Together, these measures produced several waves of resistance, including the Red River Rebellion in 1869–70 and Northwest Rebellion in 1885 by Métis, Cree, and Assiniboine peoples. These resistance movements were defeated by Canadian military and police forces and—again following the U.S. model established in the Dakota Wars—led to the largest public mass execution in Canadian history: the Battleford hangings.[94]

This hybrid public/private form of dispossession was given full judicial backing in the Canadas in *St. Catharines Milling and Lumber Co. v. R* (1888). In that case, the majority (explicitly citing Vattel, Montesquieu, and Adam Smith) held that Indian title should be understood as "mere occupancy for the purposes of hunting." It could not be taken in the sense of full

tenure, for the Indigenous peoples "have no idea of a title to the soil itself. It is over-run by them rather than inhabited." In a succinct articulation of the "negative" logic of Indigenous proprietary interests, the court concluded that aboriginal title was "a right not to be transferred but extinguished."[95] The court clearly ascribed to "Indians" a certain right that could only be actualized through alienation. Even the dissenting opinion did not dispute the underlying negative nature of aboriginal title. Justice J. A. Patterson objected to the majority, writing that Indigenous peoples should be "admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion." He even contended that this constituted a form of sovereignty "in a certain sense." When pressed to elaborate upon this "certain sense," Patterson clarified, however, that he meant only that Indigenous peoples "might sell or transfer [the land] to the sovereign who discovered it." They were still rightfully "denied authority to dispose of it to any other persons, and, until such a sale or transfer, they were generally permitted to occupy it as sovereigns de facto."[96] This decision remained the principle legal decision on aboriginal title in Canada until the 1970s.

The convergence of U.S. and British modes of dispossession was not restricted to North America. Rather, as John Weaver points out, as the colonies turned from land grants to land sales, distinctions between British and American settler colonies eventually "consisted principally of instrumental details; no longer did they express a fundamental divergence in convictions about land, social order, and power."[97]

The case of Aotearoa/New Zealand illustrates this point all the more.[98] Although Europeans had had knowledge of the Aotearoa islands since the seventeenth century, concerted efforts at colonization did not begin until the early nineteenth century. British colonists were initially impressed with Māori levels of sociocultural development, often contrasting them favorably with the Australian Aborigines, whom they held in lower regard. Of particular importance was the widespread practice of settled agriculture among the Māori, which the British took as a sign of civilizational development. Consequently, British colonial administrators generally accepted that the Māori held proprietary rights to the land and that Aotearoa was not, in any meaningful sense, vacant or unclaimed land. As Ernst Dieffenback reported in 1843: "Every inch of land in New Zealand has its proprietor."[99] The result of this recognition was that the British colo-

nial government there expanded its territory primarily by acquiring land through purchase—acquisition by agreement, not by "occupation alone."

Within this general framework, two serious obstacles remained. First, as historian Stuart Banner explains, although the British generally recognized that the Māori had *some* preexisting system of property, the radical difference of that system continued to elude and frustrate them. The Māori did not tend to allocate property rights to land through a geospatial "grid" system, as was common in the Anglophone world. A particular Māori person could not "own" a discrete and distinct zone of space, over which they could exercise exclusive control. Instead, property rights were traditionally allocated on a functional basis. Individuals—or, as was more common, families—could claim a proprietary interest to a certain kind of activity within a circumscribed context, for example, a right to fish from *this* stream, or collect fruit from *that* tree, at this time of year, and so on. Since proprietary interests were functional in this way, they overlapped and coexisted in the same geographic space. Moreover, since they were typically apportioned based on familial lineages, recitation of genealogy was more important to the reconstruction of one's property rights than British geospatial techniques of enclosure, fencing, and mapping. British colonists of the period frequently expressed frustration at their inability to grasp the myriad interlay of proprietary claims within a single space and, in particular, the difficulty in bundling them together so as to acquire total control over all objects and activities within a single zone of space (as was their own custom). As E. G. Wakefield complained to a committee of the House of Commons: "The right of individual property has never existed in New Zealand."[100]

The second problem was determining the extent of Māori territorial claims. Although many British colonial administrators were willing to concede that the Māori possessed proprietary interests in the land, which could not be unilaterally revoked without some cause, they disagreed over whether those interests extended to all of New Zealand or only to those parts that the Māori were physically occupying and "improving" at the time of contact with the Crown. Even the 1840 Treaty of Waitangi, meant to clarify such matters, left considerable ambiguity on this point. For while it did confirm that the Māori were to enjoy "full exclusive and undisturbed possession" of their lands, it did not specify *which* lands fell under that designation. By the late 1840s, the general consensus among British colonial elites was that the Māori could only lay claim to truly "possess" lands they had enclosed and cultivated in good Lockean fashion. As Earl Grey, the

new secretary of state for the colonies, put it in 1846, the Māori had legitimate claims "to that portion of the soil, which they really occupied," that is, where they "practised to a certain extent a rude sort of agriculture." This, he was clear, was very limited: "The savage inhabitants of New Zealand had themselves no right of property in land which they did not occupy."[101] In the end, then, the colonial government did recognize some Māori rights to land but only by a narrow, British standard.[102]

After the 1840s, the strategy switched to affirming Māori rights to land so as to secure the mechanism of transfer by direct purchase. By 1865 this included direct purchase from individuals; it no longer required the collective assent of the tribe (despite the fact that, by then, the British had grasped that Māori property rights were not individuated in such a way that a particular individual could sell off a geographic space by him- or herself). A confusing mess of purchases resulted, which generated nearly endless appeals. Of the 9.3 million acres of land originally submitted to review by dispute tribunals, 8.8 million acres were deemed to have been transferred improperly.[103]

In response to this confusion, the Crown began to assert its right of preemption more aggressively. It effectively imposed a monopoly over sales, prohibiting settlers from engaging in private purchases directly from the Māori. This reaped enormous financial benefits for the Crown, which made huge profits by serving as the go-between in settler-Maori land sales of the 1840s and 1850s. This also meant, however, that settlers were eager to circumvent the system and buy more cheaply directly from Māori without colonial intervention (and without taxation on sales). At the same time, the Crown worked hard to prevent the Māori from forming a single organization that could control and regulate sales from their end. British colonial officials were highly adept at playing one tribe against another, a policy that often included the selling of weapons to enemy groups.

The Māori recognized that the British monopoly over the point of sale was to their great disadvantage and that, if they could coordinate a similar monopoly, they might be able to slow the land appropriation process and exercise more effective control over it. To this end, different Māori tribal groups began to converge and coordinate such that, by the late 1850s, they were able to orchestrate an effective moratorium on land sales in the North Island. In direct response to this, the British changed tactics in two important ways. First, they altered the market for land. After 1865, colonial authorities began to impose high tariffs on land transactions. Māori sellers were expected to pay these indirect costs, which severely undercut their

profits and bargaining position. By contrast, the government artificially subsidized the process on the buyers' end, effectively preventing the Māori from passing on new costs to settlers. The second tactic was borrowed from a very old imperial playbook. British colonial officials sold muskets to favored Māori tribes, while imposing a moratorium on sales to those who resisted the new market measures. The resulting military asymmetries generated intense intra-Māori rivalry and, eventually, war. To some degree this was a continuation of an older strategy. Between 1807 and 1845, an estimated three thousand battles had already been fought between various Māori groups in the so-called Musket Wars. This intensified again in the 1860s, however, when the British focused on breaking up efforts by Māori leaders to halt land sales through the "King movement." When full-scale war finally broke out, one Māori commentator, Teni te Kopara, summed up "the cause and the evil" in one word: "land."[104]

The overall effect of this twin strategy was devastating for the Māori, who lost control over the vast majority of territory, with little monetary benefit to show for it.[105] British colonial officials could boast on two fronts. They had acquired almost the entirety of New Zealand and had done so not through force and conquest but through contract and purchase. If the Māori were resentful or regretful, this was interpreted as a symptom of their own failure to transition to modern economic realities. As Attorney General Robert Stout explained, Māori dispossession was due to the fact that "the Natives cannot equal the Europeans in buying, or selling, or in other things. They have not gone through that long process of evolution which the white race has gone through."[106]

In less than one hundred years, British colonizers had managed simultaneously to convert the underlying property regime of Aotearoa and transfer ownership of it. As Banner argues, if they were able to do so, it was a function of two attributes the British possessed that the Māori lacked. First, the British were able to effectively organize themselves as a single actor within the emerging land market, whereas the Māori were splintered into several smaller units. This generated a structural asymmetry in the bargaining relationship, such that transfer was, in the long run, unidirectional. This would appear to be an attribute of the market system itself. However, it was ultimately generated by a second, extra-economic attribute. As Banner points out: "The market looked the way it did because the British were powerful enough to design it and to rebuff Maori efforts to impose a different structure. That power rested on the military and technological superiority that allowed the European states to colonize much of the world

rather than vice versa. The British had the muscle to select exactly which property rights they would enforce and how they would be enforced."[107] As a result, although the dispossession process in New Zealand operated primary through a market mechanism, it was no less a function of coercive force than the more openly-declared wars and thefts that characterized the Australian or U.S. cases. In effect, the British constructed a set of legal, political, and economic institutions in which the Māori literally could not refuse to alienate their rights. Consent was legible only as assent to this system of self-extinguishment.

The above analysis provides specific, concrete examples of how the emergence of a system of landed property in the United States, Canada, and New Zealand came to serve as a tool of dispossession in those locales. These examples are, however, neither exhaustive in detail nor comprehensive in scope. Much more could be said about each case, and the cases could be expanded to include (at least) Australia or South Africa. What I have provided is, however, sufficient for the immediate aims of my argument. For we have established two important claims. First, one can now readily observe that, despite the internally complex and heterodox field of Anglo settler legal and political thought, a relatively uniform effect is nevertheless observable with regard to the impact these processes had on Indigenous peoples. While the United States, Canada, and New Zealand have very different formal modes of authorizing and anchoring their legal claims to territory, the actual situation on the ground as experienced by Indigenous peoples in these different locales reveals considerable overlap. This matters because it offers an important rejoinder to the concern that anticolonial critique imposes a false uniformity and coherence upon Western legal and political thought, and "in so doing slips into precisely the kind of rationalist universalism that it decries."[108] In this case, the problem lays not in the uniformity of de jure assertions but in the convergent de facto materializations. This cannot be understood without taking into account the political-economic processes that actualize settler colonial legal and political claims, nor without reorienting the vantage point one brings to bear upon the whole and including Indigenous perspectives (points that are unpacked in greater detail in chapter 3).

Moreover, we are in a better position now to see why there are, in fact, two contexts and two conceptual lineages behind the language of dispossession: one European and one Anglo-colonial. In the first, dispossession

operates as a conceptual tool in describing and critiquing the transition from feudalism to capitalism. In the latter, it functions to analyze how the expansion of Anglo-European systems of land ownership worked as a tool of "legalized theft" in the apprehension of Indigenous territory. Through a variety of these methods and techniques, over the course of the nineteenth century alone, Anglo settler peoples managed to acquire an estimated 9.89 million square miles of land, that is, approximately 6 percent of the total land on the surface of Earth in about one hundred years: the single largest and most significant land grab in human history.[109] An additional complication remains, however. These are not *parallel* stories that run in isolation from one another but rather intertwined and practically co-constituting. What remains then is to think them in tandem, which is the aim of the next chapter.