# Europe Meets America: Property Rights in the New World

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When Europeans arrived in the Americas and began to claim the rich lands they encountered, they brought with them an equally rich European tradition of property law and justifications for establishing property rights. Today these are often mistakenly lumped together into the law of conquest, sometimes in an attempt to cast modern titles into doubt by rooting them in violence. However, the ideas about property that the Spanish, Portuguese, French, Dutch, and especially English colonists brought to the Americas were far more complex than "might makes right." Many of those ideas became established in American soil and some were transformed by their encounter with the New World. In some of the new nations of the Americas, the result has been a long tradition of respect for property rights. In others, an opposing tradition of contempt for property rights took root.

One of the most enduring myths of the pre-European Americas is that the cultures were a kind of property-less Eden, in which various peoples existed in harmony with one another and with nature. Even a brief survey of the major pre-Columbian civilizations of the Inca, Aztec, Maya, and North American tribes quickly demonstrates that such a view neglects well-

established customs that included recognizable forms of property in scarce resources, from weapons to hunting territories, as well as conflicts among tribes and other groups over control of territories.

Native Americans encountering Europeans may have been unfamiliar with their particular forms of property ownership, but such unfamiliarity did not long survive extended contact between Europeans and Native Americans. In part these differences were the result of the differences between Europe and the Americas. For example, Europe was more crowded than the eastern seaboard of North America, and so land was scarce. Population estimates of the pre-contact populations vary wildly, but it seems clear that even the highest estimates put the population density well below contemporary European levels. As a result, land was more abundant than it was in Europe, so its allocation was less likely to be worth the effort to make boundaries and claims precise. But the scarce resources in any particular area, such as good hunting grounds, were the subject of property rights.

In short, many if not all of the pre-contact residents had their own well-developed systems of property rights before the arrival of Europeans. Those property rights evolved in response to European contact, with new rights delineated as trade with the Europeans made previously undelineated rights valuable. Harold Demsetz's classic 1967 article, "Toward a Theory of Property Rights," for example, showed how rights to beaver pelts developed among North American tribes in response to the European demand for fur.

The Europeans added a wide range of ideas about property to the mix. The European feudal tradition made property contingent on grants from the monarch. Vassals held their land, known as a "feud," on condition of providing service and homage to the lord above him. William the Conqueror brought feudalism to England, redistributing English estates to his supporters in 1066. (Nine of these received almost all the land in England.) The king could reclaim his property if the feudal tenant failed to comply with his obligation, committed treason, or died. In some parts of Europe this absolutist conception of property rights as dependent on the state survived relatively unchallenged. In *Property and Freedom* historian Richard Pipes ties the lack of political and economic liberty in tsarist Russia to the weakness of property rights in that society.

A second tradition, more friendly to liberty, also existed in Europe, one which saw property as independent of the monarchy and the state. Particularly in England, but also among groups of thinkers ranging from the Spanish Scholastics to those in the Dutch Republic, many Europeans saw property as a natural right. While Americans are most familiar with John Locke's statement of this argument in his Second Treatise, continental writers including Hugo Grotius and Samuel Pufendorf also developed influential natural-rights theories of property. Among the colonies in America this idea took strongest root in the North American English colonies. In particular, the Puritans argued that land was held not of the king but as a gift from God alone. As a result, the owners of these "allodial" (the opposite of feudal) land holdings owed no service to any lord.

American colonists from Britain brought with them both this natural-rights heritage and a significant set of common-law principles dealing with property in general and property in land in particular. In his 1765 essay "A Dissertation on the Canon and Feudal Law," for example, John Adams argued that American land titles were not feudal. And Thomas Jefferson, in his 1774 instructions to the Virginia delegation to the Continental Congress, "A Summary View of the Rights of British America," went even further, linking the colonists' allodial titles to Americans' "Saxon ancestors" who had held their land "in absolute dominion . . . disencumbered with any superior." For Jefferson and many others, the Norman Conquest had produced only a temporary exception to the English tradition of liberty and allodial ownership rather than a permanent reduction in rights.

Further, even with respect to the feudal institutions introduced by William the Conqueror, British land law had evolved—and the point that it evolved rather than developing through pronouncements from on high is important—into a complex set of arrangements that enabled individuals to engage in a wide range of property transactions. Land originally held "of" the king and transferred from generation to generation only by the king's grace became a commodity that the owner could sell and leave to his heirs without permission of the Crown. By the 1700s the evolution of English property toward more marketable forms had reached the point that the idea of an individual having a freehold estate in land independent of the government was both philosophically well grounded in natural law and practically established in property law.

## Evolution Was Not Inevitable

How did English property law come to evolve in this direction? There was nothing inevitable about an evolution toward property rights, as Russia demonstrates. Pipes has documented how Russian property rights withered under the sustained assault of the tsarist autocracy, leaving Russians dependent on the central government's forbearance rather than independent of the state.

There was no grand liberal design by the English aristocracy behind the evolution of property rights in England. Rather, two factors appear critical. First, the English crown was relatively poor and so dependent on the aristocracy for regular support. Even successful English monarchs like Elizabeth I struggled for funds. Elizabeth, for example, left her successor, James I, a virtually empty treasury containing only £200 and 3,000 dresses. Crucially, it was not England that was short of resources but the monarchy. Indeed, James, coming from impoverished Scotland, termed his arrival in England "a Christmas time" because of the far greater wealth he found there. This dependence forced even absolutist English monarchs such as the Stuarts to summon Parliaments and to regularly concede power to them simply to obtain the resources necessary to rule.

Second, England had a competitive system of courts. Multiple jurisdictions existed, including common-law and equity courts, merchant courts, and canon-law courts, each seeking business from litigants. This competition bred independence, giving litigants a fairer chance

against the Crown in litigation than in many other European states. Further, the competition among courts allowed lawyers opportunities to develop tactics that brought their clients greater security of property rights. Indeed, legal historians agree that the primary focus of medieval common law was land law, what William Camden, a Stuart-period historian, summed up, saying, "[T]he declaring of the meum and tuum [mine and thine] . . . is the very object of the laws of England."

The result of this combination was supremacy of law. Parliament, courts, and lawyers regularly pushed the boundaries of royal power back, expanding liberty by protecting property rights in the pursuit of the resolution of private conflicts. The monarchy's need for cash forced England's kings and queens to repeatedly acquiesce in limits on their power. In both cases, because land was the key form of wealth, the result was strengthening of property rights and steady evolution toward higher estates.

The highest estate, and the form in which American land came to be held almost universally, was the fee simple. It included rights we often take for granted today but that were hard-won rights of Englishmen: the descent of land to the heir without reversion to the state, perpetual tenure, complete freedom to transfer by contract or will, the ability to change the use of the property, and freedom from "incidents uncertain," making the state of title known at the time of transfer. The ultimate result was, as Jonathan Hughes has written, to turn the American understanding of property "inside and out" by making property rights so complete that the Fifth Amendment did not even bother to specify the content of the rights it guaranteed.

Of course, Europeans brought not only natural-law justifications of property rights but also philosophical critiques of them. Both the Jamestown colonists and the Plymouth colonists initially attempted to hold property in common. In Jamestown land was to be held and managed collectively and each colonist was to receive an equal share of the colony's production regardless of his contribution. Two-thirds of the initial 104 colonists died of starvation and disease before the first winter, and the population, after soaring as hundreds of new colonists arrived from England, plummeted to 60 after the winter of 1609. When Governor Thomas Dale visited the colony in 1611 he found living skeletons bowling in the streets while fields went untended. After Dale partially converted the communal lands to individual three-acre tracts in 1614, productivity increased seven-fold. The remainder of the communal land was privatized by 1617.

Similarly, the Plymouth colonists began in 1620 with communal land and were near starvation when land was privatized in 1623. As William Bradford noted, the change "made all hands very industrious, so as much more corn was planted than otherwise would have been." Taken together, natural-rights theories, legal doctrines, and practical experience combined to give the American colonists a strong sense of the role of private property rights in ensuring their survival and prosperity.

## Competing Claims to Property

The problem of establishing property rights in the New World rested not only on the relationship between individual and monarch but also on the relationship between monarchs. As Europeans began exploring the continent, competing claims to property in the Americas quickly appeared. Not only did various Native American tribes hold claims to different areas (and sometimes more than one had a claim to a particular area), but the European monarchs had conflicting claims to various territories. Individual European settlers also began to assert claims based on both the fact of their settlement or their own contracts with native peoples. Desiring to avoid conflicts over the new territories, the European powers reached an accord dividing much of the Americas among them. Spain and Portugal negotiated a partition of territory (based on a division by Pope Alexander VI). European powers more generally recognized a rule of discovery, granting to the European power that first found a new land the right to determine how to acquire the territory from the native inhabitants, whether by conquest or contract. The implementation of this principle varied from country to country. Britain generally prohibited individuals from making their own bargains with the native peoples, while France permitted such bargains.

Despite the claim to rights based on discovery, British colonists often acquired land by contract. For example, almost all of Massachusetts was acquired by purchase from local tribes. The primary exceptions there, Salem and Boston, were uninhabited areas, having been depopulated earlier by the diseases the colonists unwittingly brought with them. Although the British crown claimed the sole right to negotiate transfer of land rights from the Native Americans, many colonists thought otherwise and regularly made individual arrangements with various tribes to secure land. Such contracts led to one of the seminal cases in American land law, *Johnson v. M'Intosh*, an 1823 Supreme Court opinion by Chief Justice John Marshall that is still a foundation stone of law-school property classes. Although Marshall unfortunately sided with the state over the individual in that case, the principle of self-initiated land transactions proved hard to eradicate and continued as a means of establishing private property rights well into the nineteenth century as the frontier moved westward.

As noted, while European settlers brought their ideas about property to America, they also encountered something new here: vast tracts of fertile land. To acquire a parcel, one needed only to head west past the settled edge, find a desirable spot, possibly contract with a local tribe, and then build a farm. Instead of Europe's scarcity, America offered abundance. In 1800 an English laborer had to spend a third of his income to rent ten acres, while an American farm laborer could rent the same amount with only 1 percent of his income.

This abundance was not costless even if no cash had to change hands. Property-law casebooks used in the first year of law school often begin with a quote from John Locke's Second Treatise—"In the beginning all the world was America"—most often as a way of introducing the question of how property rights are initially established. However, Locke's point was not that America was unowned but that property's value depended on there being a means of storing value to encourage trade. In a world without money, he asked, what value would there be even for the best land? "[W]hat would a man value ten thousand, or an

hundred thousand acres of excellent land, ready cultivated, and well stocked too with cattle, in the middle of the inland parts of America, where he had no hopes of commerce with other parts of the world, to draw money to him by the sale of the product? It would not be worth the enclosing, and we should see him give up again to the wild common of nature, whatever was more than would supply the conveniencies of life to be had there for him and his family."

Only then did Locke say, "Thus in the beginning all the world was America, and more so than that is now; for no such thing as money was any where known. Find out something that hath the use and value of money amongst his neighbors, you shall see the same man will begin presently to enlarge his possessions."

Locke's grasp of Native American societies was questionable, for as noted earlier there is ample evidence that Indians had both well-developed property systems and measures of value. However, his central point that property was valuable only to the extent it was embedded in a market economy, where the goods produced on it could be exchanged for other goods, is critical to understanding the role of property in the economy.

The economic impact of secure property rights comes about because property makes possible positive-sum transactions between individuals. Those who own property will hire labor from those who do not, enriching both parties through trade. Likewise someone with property suited to growing apples will exchange with another whose property is suited for growing corn and is likely to do so on the property of a third person that is situated at a convenient crossroads between the apple orchard and cornfield.

Land's abundance in America also offered an important limit on the power of government. Fixed assets such as land have traditionally been vulnerable to expropriation and confiscatory taxation because it is hard
for their owners to escape the state's grasp. In colonial America, excessive taxes could be readily evaded by moving west. Because property owners could move more readily than they could in Europe, American governments were constrained in their ability to tax.

America's vastness also offered enormous opportunities for land speculation. In *Our Enemy, The State*, libertarian writer Albert Jay Nock wrote that "land-speculation may be put down as the first major industry established in colonial America." While speculation can serve an entrepreneurial role, rewarding those who see possibilities in undeveloped land, it can also all too often become yet another exercise in political rent-seeking. Unfortunately, in many cases, land speculators in the New World were able to turn to governments to gain access to land resources or to locate valuable state institutions in such a way as to increase the value of their lands.

## Property on the Frontier

English property concepts and law thus survived their transplant to American soil. Indeed they did more than survive; they thrived. As settlers pushed further west into new territories, they were faced with the problem of establishing property rights far from "civilization." They did so repeatedly, expanding first the colonies and ultimately the United States westward, as Jonathan Hughes put it, cutting settlements "into the wilderness primarily by privately motivated frontiersmen making small family farms acquired by purchase or homesteading."

After the Revolution, the new federal government faced the problem of determining how to govern the western territories the states ceded to it. Although it took until after the War of 1812 to finally settle all the U.S. land claims with Britain, even before then, American territory was advancing through the 1803 Louisiana Purchase.

Jefferson devised a system for the new lands, embodied first in the Ordinance of 1784 and then in the Northwest Ordinance of 1787. Not only did the ordinance create the mechanism by which territories could become states, it also explicitly guaranteed property rights. Following English law, the Northwest Ordinance provided for intergenerational land transfers both by will and by contract, with provisions that took into account the frontier difficulties in registering deeds with distant officials. The Ordinance also promised "the utmost good faith" toward the Indians, including within that term "that their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress. . . ."

Like many other aspirations of the new nation, the Northwest Ordinance's promises of fair treatment for Native Americans were ultimately unfulfilled, and the division of land in the Northwest Territory had its share of fraud and corruption. Ultimately, however, the combination of European notions of natural rights, the transformed and transplanted English common law of property, and American conditions led to the land's distribution into private hands with secure titles, forming the basis for the expansion of a free society westward.

When the modern Peruvian economist Hernando de Soto set out to discover why some nations were rich and some were poor, he found that the legal and economic experts he consulted could not satisfactorily explain the success of the West. One reason, he determined, was what he termed the "missing lessons of U.S. history." These lessons are not simply American, however, but universal lessons from history. What de Soto discovered was that the experts had failed to recognize the centrality of secure property rights in the development of the United States and the West in general. Rather, they mistakenly believed that prosperity grew out of the thicket of regulations and rules that exist today. Recapturing those missing lessons is important if we are to avoid inadvertently destroying the foundations of our freedom and prosperity. What then are the lessons of the colonial experience with property rights?

The first is simple: property matters. The second is the power of ideas. Property rights derived from British law and natural-rights philosophy developed into stronger, more effective guarantees of liberty over time. First in Britain and then in America, ideas introduced into the law evolved beyond their original, limited scope. Though gradual, this expansion of property rights ultimately produced a significant force for liberty.

Third, institutions that facilitate positive-sum transactions flourish. Such institutions produce peaceful and prosperous societies, a combination that is no accident. Property rights instantiate no particular vision of how property is to be used, leaving that to individual property owners to determine through voluntary transactions and so reducing social conflict over resources. Individual ownership in turn creates a powerful incentive for entrepreneurs who, envisioning a new, more valuable use for a piece of property, may purchase it and realize the gain. Change occurs peacefully in such circumstances because it is a byproduct of trade rather than the result of the decision of an autocrat. That peace and prosperity flow from property is the ultimate lesson, one that too few remember today.

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