Introduction

To enjoy a due portion of land

After the Americans had won their war for independence, Wyandot and Delaware chiefs thought it prudent to offer as graciously as they could a part of their Ohio lands to the victors. 'No', the American officers replied, 'it is quite the contrary', the land was for the new United States 'to *give*, not to receive'.[1] The treaty the soldiers then imposed, only the second between the United States and any Native American nations, would allot – but not give – about half of the Ohio Country to the Wyandot and Delaware nations as a commons 'to live and to hunt on', while the chiefs 'in behalf of all their tribes as of themselves' agreed all their other territories belonged to the United States. The treaty also confirmed that two Delaware men, Kelelamand and Hengue Pushees (or the Big Cat) as well as the family of a third, Wicocalind (also called Captain White Eyes), 'who took up the hatchet for the United States', could return to Ohio and 'enjoy their due portions of the lands given to the Wiandot and Delaware nations in this treaty'.[2]

What it meant to enjoy a due portion of land is the subject of this work. To know that you may be on a particular piece of land and to know what you may do there together make up a basic idea about the relationship of people and land. Still, though the relationship is essential, as everyone must have a place to sleep, and a spot on which to earn a living – ideas about it can be fluid and conditional, especially when political control over territory changes or when that land is a commons. So in 1785, when the American general George Rogers Clark formally demanded that Kelelamand, Hengue Pushees and Wicocalind's family be able to enjoy their due portions, he did not say what he (or they) might mean by the term. He made that demand, however, at a significant time and at a significant place. The newly independent United States had just won control over the territory west of the Allegheny Mountains, which had been land that was reserved by Great Britain as a commons for Native American peoples. The extent of that

[1] 'The Fort McIntosh Treaty Journal', Timothy Pickering Papers, Vol. 59, pp. 122-23, Massachusetts Historical Society, Boston.

[2] Treaty of Fort McIntosh (21 January 1785), Articles 4 and 6, 7 Stat. 16. None of the three participated in later treaties or land cessions of the Delaware. See the separate Treaties of 1803, 7 Stat. 74; of 1804, 7 Stat. 81; of 1805, 7 Stat. 91; of 1809, 7 Stat. 113 and of 1818, 7 Stat. 188.

territory and the number of people who could for the first time freely act on their desire to move there made the winning of trans-Allegheny lands an event unlike any earlier change in the political status of any other commons. The question of how to occupy and use that land would be unresolved for decades to come, and would help shape ideas about land generally – even for people on the other side of the Atlantic. Here, then, the question is: What did the people on those commons think and feel about land and their place upon it? And how did the people who governed them, judged them and constructed ideology for them, and for the world at large, interpret their thoughts and acts? These are two of the research questions to be answered in this thesis.

Those thoughts, feelings and interpretations were neither clear-cut nor fixed. A due portion of the land beyond the Alleghenies might mean a patch of land an individual bought, or one he or she simply took by squatting on it, or a stretch of woods or prairie or riverbank that neighbours shared. it could mean a plot of corn no one else could touch or the right to hunt miles from your homestead. A due portion could be held exclusively or it could be shared, and it could mean either or both whether to settlers, Native Americans or, for that matter, to a politician or political economist watching from afar. All freely changed their notions of rights to gain access and use land, depending on what they saw or thought they saw on any particular piece of land at any particular time. Few of the newcomers breaking prairie sod wrote down their thoughts about their due portions, however. Neither did the Native American women who tended their family plots of corn, or the hunters who ranged so many miles through the trans-Appalachian forests. What they thought is instead revealed by how they used the land, how they shared or did not share its resources, as well as by what they argued in frontier courts and what they said in their petitions to governments for redress.[3] These indirect reflections of shifting and amorphous mental pictures cannot be reduced to a simple hunger to own. To do so is to overlook the commons that the people of the farthest western fringe of the nineteenth century Atlantic world sometimes acknowledged and that they regularly wanted. It is to

[3] The cases of land disputes I cite were drawn from a large pool of roughly 200 lawsuits, mainly from frontier states and territories from the late eighteenth century to the 1870s. I compiled the pool by searching the legal databases of Lexis-Nexis and Westlaw, using search terms related to commual land tenure, disputed claims to land and squatters' rights. The cases I cite were those with the most complete statements of the facts of the case at issue.

confuse what these people actually thought with a set of concepts that their contemporaries, watching from afar, were begining to formulate. Those concepts were that a commons could not be exploited rationally, that society had a minimal stake in what people did with their land and that what mattered about land was its role as a kind of capital rather than its origin as a gift of Nature or of God. None were necessarily what people settling the west, governing the United States or even accumulating capital believed. How those concepts emerged, despite what ought to have been the evidence of real commons that real people wanted to hold, is another research question for this thesis.

This study starts with a moment when several different groups of people – would-be settlers, land speculators and government officials – asked themselves what to do with a particular commons; that is, the 1770s and '80s when Americans contested for control of the huge western territory that Great Britain had reserved for Native Americans. It ends with formal recognition of the place of commons in British statutes and western American resource and land law in the 1870s, a high point of belief in the utility of at least some commons. I end here deliberately, for to stop a few years later, when the Dawes General Allotment Act of 1887 mandated the division of Native American commons into parcels held by individuals, would obscure the essential point that people continued to look at a commons as one of the ways they might enjoy a due portion of land. To conclude with the Dawes Act, or with the Dawes Commission of 1893, which carried allotment out so comprehensively in Oklahoma, would be to suggest that severalty triumphed, almost inevitably, over the commons. Yet a few decades later, the Indian Reorganization Act of 1934 would effectively overturn the Dawes Act, at least outside of Oklahoma, and protect a much reduced Native American commons. Moreover, even as the the Dawes Commission carved up the rich farmlands and oil fields of Oklahoma's Native American nations, a municipal and national parks movement already well underway by the 1860s was growing rapidly, pointing to a still potent interest in shared space. Ending in the 1870s avoids the misleading conclusion that the commons had become a relict form and instead clears the way to focus on my central interest. This will be a history of ways of looking at the land, rather than of how people held and used land. Geography here is largely virtual. The writing desk of a London philosopher-banker as much as the field ploughed by a squatter on an Illinois prairie, or the alkaline Kansas

plains of a deported Native American band are all elements of this geography of mind.

Because my aim here is to explore interior worlds of thought and the interpretation of perceptions (and misperceptions) about land, this is not a history of a nation's Manifest Destiny or of any other broad political or social movement. It is not even really a history of the commons, or the changing social and economic factors that shaped each of the many variations that emerged across the Atlantic World after the American Revolution. I am instead interested in the ideas and feelings of those who were caught up in such movements – how they understood their situation rather than what impelled the change going on all around them. I do not expect to do any better than they did in explaining the cause of change. I argue instead that their sense of their place on the land, for all the ambiguity and conditional nature of their ideas, explains why there was (and remains) a tension in political discourse between individuals' beliefs in their property rights and community interests. The approach I adopted during research was to consider what I was finding about attitudes and practices on commons to be, in effect, exceptions to the rule of the primacy of a supposed ideal of outright ownership. From the start, I thought such exceptions were important to note. After seeing enough such exceptions in such a variety of circumstances, it struck me that I was seeing a kind of ebbing and flowing of intensity of belief in (and attachment to) the commons, and as a result a waxing and waning of tension between private wants and community needs. What was at issue seemed to be more than a question of whether land ought to be owned or shared. That is why the critical verb here is 'to enjoy' and the critical object not merely 'my land' versus 'our land', but rather the idea of 'a due portion of land'. The tension between private rights and community needs, as well as the desire to enjoy more than the property a person owned, helped shape political and economic change across the Atlantic World in ways incompletely explained by any theory that the real motor was simply a desire to own property. In short, my thesis is that the desire to enjoy a due portion of land, and not merely a simple hunger to own, shaped concepts about land, power and economics in the Atlantic World after the American Revolution, and that the variations of that desire depended on what people saw – and did not see – when looking at the trans-Allegheny commons.

Two voices, one from the time this study starts, the other a kind of coda,

underscore the elusiveness of the ideas of land explored here, as well as their not infrequent disconnection with actual use and control of land. The first voice is that of Hector St. John de Crevecoeur, soldier of New France, farmer of New York, aristocratic advocate of American independence, who wrote:

> The instant I enter on my own land, the bright light of property, of exclusive right, of independence, exalt my mind. Precious soil, I say to myself, by what singular custom of law is it that thou wast made to constitute the riches of the freeholder? What should we American farmers be without the distinct possession of that soil?[4]

Crevecoeur published his fictitious farmer's thoughts in London, years after leaving his farm in the heart of America's only remaining feudal enclave, in the Hudson River valley. His lyrical feeling about a way of life that he chose to leave behind him came from his good fortune to be able to purchase a large, rich farm, a circumstance far more comfortable than those of his tenant farmer neighbours or the squatters tentatively and illegally clearing cornfields not too many miles away. Whatever it was that motivated them kept them on the land for their entire lifetimes – and probably kept them far too busy to write about the reasons why.

The coda is from an elderly Ojibwe man named Aleck Paul, speaking of his youth in the 1860s and 1870s and of tales his grandfather told him then. In his grandfather's days, Aleck Paul recalled, the low rocky hills and spruce woods around Lake Temagami had been divided among families; the borders were this river or that pond or those hills or a spot so many days' walk in that direction. 'We Indian families used to hunt in a certain section for beaver', Aleck Paul told a visiting anthropologist. That hunting ground 'would be parcelled out among the sons when the owner died' with the command: '"You take this part; take care of this tract; see that it always produces enough"'.[5] Frank Speck, the University of Pennsylvania anthropologist who published Aleck Paul's recollection in 1915, came away from that Ontario lakeshore convinced that in at least some hunting-gathering cultures, individuals could feel they owned land. It was a conclusion contrary

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[4] Hector St. John de Crevecoeur, *Letters from an American Farmer*, New York, 1963 (1782), p. 48.

[5] Frank G. Speck, 'The Family Hunting Band as the Basis of Algonkian Social Organization', *American Anthropologist*, New Series, Vol. 17, No. 2, 1915, p. 294.

to two centuries of social theory and the assumptions that accepted as necessary the dispossession of Native Americans for so many decades.[6] Yet, chatting with Aleck Paul there on the shore of Lake Temagami, Speck seems not to have paused to notice that at that moment he sat in the middle of a commons – one of North America's earliest forest reserves, a huge swath of woods set aside a generation earlier to preserve a community resource, the stands of tall, never-cut white and red pine.[7] Access to that commons allowed Aleck Paul to continue a way of life much like his grandfather's, making him a useful source for Speck. Speck, however, did not see that commons. The fact of the forest reserve would have interfered with the mental model he was building of hunters' land tenure. And in this study, there will be others who do not notice the commons in front of their eyes as they resolve varied, ambiguous and at times self-contradictory concepts about land into a simpler, but incomplete, view.

After two voices, then, three definitions should help. Commons here means shared space. How different communities shared space and, most importantly, the resources contained therein, varied widely. The English pastures, moors and copses lost to the accelerating enclosure movement of the eighteenth and nineteenth centuries were used and governed in quite different ways than were the white pine forests around the Great Lakes, the buffalo hunting grounds of the Missouri River valley or the mineral lands of California. Access varied: some were open, some closed. Governance varied. Some were managed by community consensus, some by tradition, some by force and some not at all. Different people looked at the same commons in different ways, as did the Mesquakie of Iowa and the squatters who planted themselves there in the days before it was legal to settle in that territory. Some commons persisted, some were established by formal decisions of government, some simply emerged and some were contested. There were open access commons, closed access ones, claimed and unclaimed ones and the common pool resources of air, ocean and (sometimes) streams and wildlife. Economists

[6] As just one example of fairly typical analysis of the time, consider land economist Flora Warren Seymour's view that 'the attitude toward land ownership which long centuries had bred into our race was still lacking in the Indian'. Flora Warren Seymour, 'Our Indian Land Policy', *The Journal of Land & Public Utility Economics*, Vol. 2, No. 1, 1926, p. 97.

[7] Bruce W. Hodgins, Jamie Benidickson and Peter Gillis, 'The Ontario and Quebec Experiments in Forest Reserves 1883-1930', *Journal of Forest History*, Vol. 26, No. 1, 1982, pp. 20-33.

and lawyers may debate what is or is not a commons, a semi-commons or quasi-commons.[8] They find it useful (and it can be) to categorise commons, whether on the basis of access, of formal governance structure or of use, for the nature of a commons exploited for hunting, grazing, timber or mining varies.[9] Yet the basic question with any of these variations is whether one person thinks another can be excluded from a particular piece of land or not. In other words, is this piece of land mine or ours? This is the question I want to focus on; my intention here is to explore how people thought about occupying and using land, or what I call their idea of their place on the land. The construction and evolution of ideas of one's place on the land can be uncovered by his or her actions and reactions on a commons in the broadest definition; whether any particular commons is governed communally or is contested, whether it is claimed or unclaimed and, most especially, when it is unseen.

In contrast to a commons is severalty, or a right of possession that is not shared, and fee simple tenure, or ownership that gives an individual exclusive control and use of a defined piece of land. Such control has come to mean the ability to sell, to mortgage, to exclude others and even to waste what one owns. When these rights are obscure, or significantly constrained or contested, it is more accurate to speak of people holding, rather than owning, land that they occupied or possessed. The term 'to hold land' was, in fact, the one favoured by political economists of the early nineteenth century. As late as 1848 (as Chapter 6 will show), John Stuart Mill discussed the critical role of holders – not owners – of land in food production. To be a proprietor of land (the term generally preferred by the same economics writers over the word owner) was to be in a particular

[8] Hanoch Dagan and Michael A. Heller, 'The Liberal Commons', *Yale Law Journal*, Vol. 110, No. 4, 2001, pp. 549-623; Carol Rose, 'The Comedy of the Commons: Custom, Commerce, and Inherently Public Property', *University of Chicago Law Review*, Vol. 53, No. 3, Summer, 1986, pp. 711-81; Robert C. Ellickson, 'Property in Land', *Yale Law Journal*, Vol. 102, No. 6, Apr., 1993, pp. 1315-1400 and Henry E. Smith, 'Semicommon Property Rights and Scattering in the Open Fields', *Journal of Legal Studies*, Vol. 29, No. 1, 2000, pp. 131-69.

[9] L. Dudley Stamp, the eminent geographer who led the Royal Commission on Common Land in its 1955-58 study, enumerated seven different varieties of commons or almost-commons. L. Dudley Stamp, 'The Common Lands and Village Greens of England and Wales', *Geographical Journal*, Vol. 130, No. 4, Dec., 1964, pp. 458-59. Even so, he does not cover the commons of ocean and air, the public domain, flowing waters (rivers and streams) or *terra nullius.* The effort to define commons precisely in terms of formal ownership and use rights, I believe, focuses attention on only part of relationship of people and the land.

legal relationship that entitled one to a particular attribute of land: the rent it generated.

Finally, the phrase 'to enjoy a due portion' emerges just often enough to help to frame the issue.[10] It is important here to remember that the words leave the size of a portion undetermined and the question of exactly how it is to be enjoyed unexplained. In doing so, the term then implies resolution at some point in the future. It implies, as well, that any resolution will be fair, and that it will be enough, although those are not the same thing. The portion at issue is of an unmeasured, or yet to be measured, good, as when a 1777 devotional manual said one might 'enjoy a due portion of common sense', or an 1818 medical essay said one needed to enjoy 'a due portion of quiet' to be healthy.[11] In 1829, Sir James Kempt, Governor General of the Canadas, proposed forcing Native Americans into large villages and 'assigning them a due portion of land for their cultivation and support', when the land at issue had not yet been measured and surveyed. In 1836, the United States Treasury Secretary, Levi Woodbury, urged that 'the enterprising, industrious, and needy, might, for fair compensation, be liberally secured in the purchase and enjoyment of a due portion of land for immediate cultivation' of an only partially surveyed west.[12]

The due portions that settlers sought, that statesmen promised and that Native Americans wanted to protect were not just specific tracts. A due portion was also an idea. It was a frame for mental models of how people ought to use and control the fundamental basis of human life: the land and its yield. These were questions that engaged people far away from the land that Britain had reserved as a commons for Native American peoples in the Proclamation of 1763 and the Quebec Act of 1774, and that General George Rogers Clark won in battle and through treaty for the United States. The answers to those

[10] As a legal term, 'due portion' arises in inheritance cases and in squabbles over taxation; see, for example, Willard v. Wetherbee 4 N.H. 118 (1827); Wallace v. Dold's Executors, 30 Va. 258 (1831); Cass v. Martin, 6 N.H. 25 (1832); Kavanaugh v. Thacker's Administrator, 32 Ky. 137 (1834); State v. Union Bank, 17 Tenn. 119 (1836) and Walters' Estate, 2 Whart. 246 (1837).

[11] Jonas Hanway and John Bew, *Virtue in Humble Life*, London, 1777, p. 338; Andrew Carmichael, 'Essay on Dreaming', *Transactions of the Association of Fellows and Licentiates of the King's and Queen's College of Physicians in Ireland,* Vol. II, 1818, p. 84.

[12] Sir James Kempt to Sir George Murray, 16 May 1829, State Papers of Lower Canada reprinted in *Report on Canadian Archives*, House of Commons Sessional Paper 80, Ottawa, 1900, p. 591; Levi Woodberry, 'Report on the Finances, December 1836', in *Reports of the Secretary of the Treasury*, Vol. 3, p. 688.

questions evolved over time, reflecting changing needs to use and varying desires to possess. Yet the changes in ideas of the land, particularly as commons faded from view, reminded at least some of the value of shared space, and of the need to protect it and to govern it appropriately. It is a reminder to consider, even today.

My research questions start with this: How did ideas about shared space form and change as a vast new commons on the far western fringe of the Atlantic World became available and the final few commons remaining on the other side of the ocean seemed about to disappear? Then there is the question of how did people fit their ideas about enjoying their due portions of land with life on or near those commons. How were their ideas, as revealed by their actions, understood in law and in social and economic theory? To what extent did the formal ideas of law and theory become part of the mental world of people living by a commons or seeking something from a commons? To what extent did the formal ideas of theory and of law change popular notions about what it meant to enjoy a due portion of land?

In the interstices of other histories are hints of this story about the concept of enjoying a due portion of land. They are hints only, mainly to be found in what has been elided and in what is overlooked. Whether histories of farming, of the law of property, of settlement and frontier conflict, or of political and economic thought, they all share a tendency to see the way people thought about the land as simple and as fixed. They assume that what people say they thought was, in fact, what they felt and that what they said directed how they acted. Ideas, at least the ideas that people wrote down, explain acts in these histories. Yet acts can illuminate unexpressed ideas, as well as those elaborated in books or essays, at least in the context of something as basic as people and the land they live upon. What people see – and what they overlook – can be critical when tracing the development of as basic a concept as a person's place on the land.

Consider, for instance, the small history of one kind of commons, the narrow strip of seashore below high-tide line. In 1825, a Long Island oysterman named Rogers found one version of that history, harking back to Henry II, which he used to claim the right to dig 100 oysters off Lloyds Neck Beach.[13] The Supreme Court of Judicature of New York

[13] Rogers acted as his own lawyer in the case of Rogers v. Jones, Town Clerk of Oyster Bay, 1

State accepted that history, but ruled that the specific exception to it in the Town of Oyster Bay's 1653 patent carried the story to a different conclusion than Rogers'. He had to pay his $12.50 fine for digging oysters where he should not have. Some 165 years later, the United States Supreme Court ignored a similar history of royal grants, state constitutions and custom to limit a state's power to manage the seashore, if doing so might cut nearby property values.[14] What mattered, the justices ruled, was the history of the constitutional ban on governments taking private land without compensation, because that history showed that a primary function of government power was the protection of private property.[15] In making their choice of histories, though, the justices wanted to ask about the purpose of government, rather than how people thought about using or

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Wend. 237, decided in 1828 by New York's Supreme Court of Judicature, the state's final court of appeal. Other cases exploring the history of the shore include Hooker v. Cummings, 20 Johns. 90 (1822, New York); Carson v. Blazer, 2 Binn. 475, (1810, Pennsylvania); Arnold v. Munday, 1 Halst., 2 (1821, New Jersey); Briggs Thomas v. The Inhabitants of Marshfield, 27 Mass. 364 (1832, Massachusetts) and Inhabitants of Barnstable v. Edward Thacher & others, 44 Mass. 239 (1841, Massachusetts).

[14] Lucas v. South Carolina Coastal Commission, 505 US 1003, (1992); Lucas moved beyond the initial expansion of the takings definition in Nolan v. California Coastal Commission, 483 US 825 (1987) to define taking of property as constraining any economic benefit, and to decry notions of a public interest in private land, Paul Kens, 'Liberty and the Public Ingredient of Private Property', *The Review of Politics*, Vol. 55, No. 1, Winter, 1993, pp. 112-13.

[15] Richard A. Epstein, *Takings, Private Property and the Power of Eminent Domain*, Cambridge, Mass., 1985, p. 128. The 'law and economics' school, inspired largely by Ronald Coase's 'Problem of Social Cost', *Journal of Law and Economics*, Vol. 3, 1960, pp. 1-44 and the work of Nobel laureate Gary Becker, initially dominated the 7th US Circuit Court of Appeals in Chicago, where Judge Richard A. Posner's decisions, as with such scholarly writings as his *Economic Analysis of Law*, Waltham, Mass., 1998; see also Epstein's 'Takings: Descent and Resurrection', *Supreme Court Review,* 1987, pp. 1-45; and 'History Lean: The Reconciliation of Property and Representative Government', *Columbia Law Review*, Vol. 95, 1995, pp. 591-600; James W. Ely, Jr., '"That Due Satisfaction May be Made": The Fifth Amendment and the Origins of the Compensation Principle', *American Journal of Legal History*, Vol. 36, No. 1, 1992, pp. 1-18. From these analyses, many economists argue that material progress depends in an initial instance on system of individual ownership, with exclusive rights minimally limited. See for example, Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, New York, 2000; Douglass North, *Institutions, Institutional Change and Economic Performance*, Cambridge, 1990. Olivier Delahaye, on the other hand, argues that these views of the central role of individual land ownership grow from a distinctively American history, see 'Some Questions about Land Economics', *Land Economics*, Vol. 75, No. 2, May 1999, pp. 327-32. Terry L. Anderson and Peter J. Hill argue that even American notions of individual property rights in land evolved from the time the first colonists arrived, Terry L. Anderson and Peter J. Hill, 'The Role of Private Property in the History of American Agriculture, 1776-1976', *American Journal of Agricultural Economics*, Vol. 58, No. 5, Dec., 1976, pp. 937-45.

occupying land.[16] By looking at the history of writing a constitutional proscription, instead of at the longer history of legislation and adjudication that detailed how governments, in fact, took land, this historiography missed seeing that the control of land remained a contested issue. The justices missed seeing the possibility of changing ideas about land. Rogers, on the other hand, saw a stretch of mud, underwater half the day, that just like other commons of the seashore, had always been open to all.

Adam Smith, too, considered the strand and its history as a commons when he outlined his ideas on land rent. Seeing Scots landlords demanding rent from kelp-gatherers 'upon such rocks only as lie within the high water mark', Smith missed the point that the rent was a toll for cutting across the landlord's fields rather than a fee for taking his seaweed.[17] Smith did not need to consider the rent-as-toll interpretation because his concern in this small history (like Karl Marx's larger story as *Capital* traced the path from feudalism through enclosure to capitalist agriculture) was to explain how proprietors of land claimed a share of someone else's work, not how they or their neighbours thought about that land. The acts of distribution of income, were (and remain) what interested economists. David Ricardo's *Principles of Political Economy and Taxation* hinted at, but did not pursue, historical analysis, as he wrestled with the challenge that low American rents and high American wages posed to his theory of

[16] Harry N. Scheiber, J.F. Hart and William M. Treanor, on the other hand, argue that the acts of governments in expropriating land for roads and public facilities, shows Americans believed in clear constraints on rights of property in land: Harry N. Scheiber, 'Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910', *Journal of Economic History*, Vol. 33, No. 1, Mar., 1973, pp. 232-51; J.F. Hart, 'Colonial Land Use Law and Its Significance for Modern Takings Doctrine', *Harvard Law Review*, Vol. 109, No. 6, Apr., 1996, pp. 1252-1300 as well as William M. Treanor, 'The Original Understanding of the Takings Clause and the Political Process', *Columbia Law Review* Vol. 95, 1995, pp. 782-887 and 'The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment', *Yale Law Journal*, Vol. 94, 1985, pp. 694-716.

[17] Adam Smith, *An Inquiry Into The Nature and Causes of The Wealth of Nations*, 1776, Book 1, Chap. 11, paragraph 3; Rent-seeking is a redistribution of income or wealth away from a producer by the exercise of power, as discussed in Gary Becker, 'Nobel Lecture: The Economic Way of Looking at Behavior', *Journal of Political Economy*, Vol. 101, No. 3, 1993, p. 391; James Buchanan, 'Rent Seeking, Noncompensated Transfers and the Law of Succession', *Journal of Law and Economics*, Vol. 26, No. 1, Apr., 1986, pp. 71-85; Gordon Tullock, 'The Welfare Costs of Tariffs, Monopolies, and Theft', *Western Economic Journal*, Vol. 5, 1967, pp. 224-32; Anne Krueger, 'The Political Economy of the Rent-Seeking Society', *American Economic Review*, Vol. 64, No. 3, Jun., 1974, pp. 291-303.

value.[18] History would not have helped his argument. His American critics did pursue that history, and used it to argue that Ricardo's theory could not be universal.[19] Both sides of the debate, however, used just enough history (or mock-history) to make their point, as when, for instance, as Chapter 8 will note, the American economist Henry Carey hypothesised that people in a new country preferred to settle uplands rather than along rivers.[20]

In explaining change, all these political economists assumed that people had an unchanging desire to possess land. They wrote not of a change in what people thought they wanted but change in the ability to realise that want. The idea that people might change their minds seemed irrelevant to writers who wanted to explain the way their world worked at the time they wrote. Change in the mentalities of the mass of people seemed irrelevant, too, to the historians of economic thought. Their interest was narrower, focused on the way analysis of human behaviour has changed. Change in economic behaviour is of interest within this frame only when it changes economic theory or when it responds to that theory. The assumption that people want what they want because they have always wanted it tends to turn the history of economic thought

[18] David Ricardo, *Principles of Political Economy*, New York, 2006 (1817), p. 129.

[19] The American challenge to Ricardo's theory is discussed in H.C. Baird, 'Carey and Two of His Recent Critics, Eugen V. Böhm-Bawerk and Alfred Marshall', *Proceedings of the American Philosophical Society*, Vol. 29, 1891, pp. 166-173; Joseph Schumpeter, *History of Economic Analysis*, New York, 1954, pp. 517-8; John Roscoe Turner, *The Ricardian Rent Theory in Early American Economics*, New York, 1921; Frank A. Fetter, 'The Early History of Political Economy in the United States', *Proceedings of the American Philosophical Society*, Vol. 87, No. 1, Jul., 1943, pp. 52-6; Paul K. Conkin, *Profits of Prosperity, America's First Political Economists*, Bloomington, 1980; R.J. Morrison, *Henry C. Carey and American Economic Development*, Philadelphia, 1986, pp. 43, 50-56, 58, and Cathy D. Matson, 'Capitalizing Hope: Economic Thought and the Early National Economy', *Journal of the Early Republic*, Vol. 16, No. 2, Summer 1996, pp. 273-91. On colonisation generally and the challenge it posed to Ricardian theory, see Edward R. Kittrell, 'Wakefield and Classical Rent Theory', *American Journal of Economics and Sociology*, Vol. 25, No. 2, Apr., 1966, pp. 141-52; R.N. Ghosh, 'The Colonization Controversy: R. J. Wilmot-Horton and the Classical Economists', *Economica*, New Series, Vol. 31, No. 124, Nov., 1964, pp. 385-400 and Donald N. Winch, 'The Classical Debate on Colonization: Comment', *Southern Economic Journal*, Vol. 32, No. 3, 1966, pp. 341-45. Alexander James Field 'Land Abundance, Interest/Profit Rates, and Nineteenth-Century American and British Technology', *The Journal of Economic History*, Vol. 43, No. 2, Jun., 1983, pp. 405-43 has a comprehensive discussion of the way differing capital-labour ratios in America and in Britain affected analyses of rent and land.

[20] Henry C. Carey, *Principles of Political Economy*, Philadelphia, 1837, p. 39.

into a teleological story of progress. It is a history of the correct steps taken, and the disappointing detours followed, on the path to a modern theory of value that holds that the last increments of cost to make an additional item, and the final addition to a consumer's satisfaction in obtaining that additional item, are what determine the value of goods.[21] Much of the progress, in this story, came from the Oxford University Drummond Professor of Political Economy, Nassau Senior, as well as in John Stuart Mill's *Principles of Political Economy*, with nods to Senior's successors, Richard Whatley and William Forster Lloyd.[22]

Lloyd is important to this history of the unseen commons, which covers that gap between the way people behaved on shared spaces and what theory writers like Speck understood about that behaviour, because Lloyd, in fact, looked at the commons. To be precise, he is important because he looked at a memory of a commons. Discussing a central difficulty with Ricardo's theory, the problem of population growth, he declared in

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[21] Schumpeter, *History of Economic Analysis*, pp. 474, 517, 673-76; Alfred Marshall, *Principles of Economics*, 8th edition, London, 1920, p. 633; Edward R. Kittrel, 'The Development of the Theory of Colonization in English Classical Political Economy', *Southern Economic Journal*, Vol. 31, No. 3, 1965, pp. 189-206. For a discussion of Ricardo's labour theory of value and the 19th century reaction it provoked, see for example Ronald L. Meek, 'The Decline of Ricardian Economics in England', *Economica*, New Series, Vol. 17, No. 65, 1950, pp. 43-62, as well as Samuel Hollander, 'The Reception of Ricardian Economics', *Oxford Economic Papers*, Vol. 29, No. 2, July 1977, pp. 221-257; 'The Post-Ricardian Dissension: A Case-Study in Economics and Ideology', *Oxford Economic Papers*, New Series, Vol. 32, No. 3, Nov., 1980, pp. 370-410 and 'Smith and Ricardo: Aspects of the Nineteenth-Century Legacy', *The American Economic Review*, Vol. 67, No. 1, 1977, pp. 37-41. Key to the new analysis of Senior and Mill, as well, was the idea that tomorrow's production comes from today's act of saving, whether of the fertility of land or deferred consumption-turned-capital, which means that a machine was, in essence, the same kind of thing as a field of wheat. When loom and land were fungible, and the special natures of particular kinds of capital and of land were dissolved by the solvents of money and markets, the place of land ownership, as Ben Fine points out, vanishes into irrelevance: Ben Fine, 'Landed Property and the Distinction between Royalty and Rent', *Land Economics*, Vol. 58, No. 3, Aug., 1982, pp. 344-48.

[22] Important discussions of Nassau Senior and his colleagues are found in Maxine Berg, 'Progress and Providence in Early Nineteenth-Century Political Economy', *Social History*, Vol. 15, No. 3, Oct., 1990, pp. 365-375, especially p. 371; Marian Bowley, 'Nassau Senior's Contribution to the Methodology of Economics', *Economica*, New Series, Vol. 3, No. 11, Aug., 1936, pp. 281-305 and *Nassau Senior and Classical Economics*, London, 1937; R.D. Black, 'Trinity College, Dublin, and the Theory of Value, 1832-1863', *Economica*, New Series, Vol. 12, No. 47, Aug., 1945, pp. 140-48; Robert B. Ekelund Jr. and Robert F. Hébert, 'Retrospectives: The Origins of Neoclassical Microeconomics', *The Journal of Economic Perspectives*, Vol. 16, No. 3, Summer 2002, pp. 197-215 and Alexander Gerschenkron, 'History of Economic Doctrines and Economic History', *American Economic Review*, Vol. 59, No. 2, May 1969, p. 6.

his *Two Lectures on Population* that people acting in their own self-interest would inevitability ruin a commons.[23] When he emerges in histories of economic thought, however, it is because of his next work, the *Lecture on the Notion of Value,* which was one of the first works to link the value of a good to the declining satisfaction from each incremental unit consumed – what economists now call marginal utility, which is the shaper of the demand curve of elementary economics classes.[24] The historians of economic thought who discuss his work, however, have not noted a clear connection to his commons paradox. In his population lectures, Lloyd discussed the impact of each additional cow on a commons and the mismatch of incremental cost and incremental return to the cow's owner.[25] Nor have historians remarked that his discussion of the incremental effects of extra cows on a common foreshadows the concept of deferred consumption – saving – which was a central element in Senior's and Mill's theories. Historians of economic thought also ignore the extensive discussion of Native Americans by Mill and several other important theorists.[26] What political economists thought about commons, and about what Native Americans did on their commons, would be critical in shaping ideas of the land.

The Supreme Court's historiography of the seashore and the Fifth Amendment,

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[23] William Forster Lloyd, *Two Lectures on Checks to Population*, London, 1833.

[24] William Forster Lloyd, *A Lecture on the Notion of Value as Distinguished Not Only From Utility, but also from Value in Exchange Delivered before the University of Oxford, In Michaelmas Term, 1833*, London, 1834.

[25] Lloyd, *Two Lectures*, pp. 30-2. For Lloyd's place in the development of economic theory, helpful discussion is found in: E. R. A. Seligman, 'On some neglected British economists-II', *Economic Journal*, Vol. 13, No. 51, Sept., 1903, pp. 356-63; Schumpeter, *History of Economic Analysis*, pp. 463, 1055; B. J. Gordon, 'W. F. Lloyd: A Neglected Contribution', *Oxford Economic Papers*, New Series, Vol. 18, No. 1, Mar., 1966, pp. 64-70; Richard M. Romano, 'W. F. Lloyd-A Comment', *Oxford Economic Papers*, New Series, Vol. 23, No. 2, Jul., 1971, pp. 285-290 and Ekelund and Hébert, 'Retrospectives: The Origins of Neoclassical Microeconomics', pp. 197-215. All, however, discuss Lloyd as among the forerunners of marginal utility analysis, without tracing his thinking on utility back to the commons paradox in *Two Lectures*.

[26] I have so far found no works discussing the significant place discussion of western settlement and Native American life-ways played in the works of political economists in the nineteenth century. Ronald K. Meek, *Social Science and the Ignoble Savage*, Cambridge, 1976, does examine comprehensively and thoughtfully how the encounter of Europe and Native America shaped political philosophy and social science through the eighteenth century, however. I believe the nineteenth century economists' linkage of Native American life with dependence on a commons, and Native American poverty with attitudes about property and its accumulation were central elements in their analyses.

like the tale of progressive improvement in analysis that is told by the historians of economic thought, offers a clarity and certainty of vision. They justify a particular current pattern of thought about property rights, but do so in ways that raise the question of whether they are projections back in time of that pattern. They overlook the commons. Lloyd, after all, had written about kind of commons that had largely vanished by the time when he concluded that there was no check to an individual's impulse to waste them. So, too, did the twentieth century ecologist Garrett Hardin, unearthing Lloyd's long-forgotten population lectures in his own extraordinarily influential 1968 paper on the 'Tragedy of the Commons'.[27] Yet even as Hardin evoked the idyll of green English pasture and ancient woods, he (like Lloyd) missed the historical point that English villagers managed quite effectively to exploit without spoiling their commons for many centuries before enclosure, as D.N. McCloskey describes.[28] Similarly, Harold Demsetz, arguing for the irrationality of a commons by citing the exclusive territories of Montagnais and

[27] Garrett Hardin, 'The Tragedy of the Commons', *Science*, Vol. 162, 1968, pp. 1243-48. Harold Demsetz, 'Toward A Theory of Property Rights', *American Economics Review*, Vol. 57, No. 2, May 1967, pp. 347-59 makes the same point, but extends the point to make a more explicit case that private property rights are necessary, as do Gary D. Libecap, *Locking up the Range, Federal Land Controls and Grazing*, Cambridge, Mass., 1981, and Terry L. Anderson and Donald R. Leal in *Free Market Environmentalism*, New York, 2001. Earlier explorers of the paradox include Jens Warming in 'Om "Grundrente" af Fiskegrunde', in *NationalØkonomisk Tidsskrift*, Vol. 49, 1911, translated in Peder Andersen, '"On Rent of Fishing Grounds", A Translation of Jens Warming's 1911 Article, with an Introduction', *History of Political Economy*, Vol. 15, 1983, pp. 391-96 and H. Scott Gordon, 'The Economic Theory of a Common Property Resource: The Fishery', *Journal of Political Economy*, Vol. 124, No. 2, Apr., 1954, pp. 124-42. It is interesting that Hardin, like Lloyd, was concerned with population when writing about the commons, as Michael Goldman, '"Customs in Common": The Epistemic World of the Commons Scholars', *Theory and Society*, Vol. 26, No. 1, Feb. 1997, pp. 1-37, points out when he argues that Hardin's analysis reflects a conservative strand among conservationists in the 1960s and 1970s alarmed by rapid population growth in the developing world. Hardin himself was clear that population growth was his concern, commenting 'Freedom to breed', he wrote, referring to human beings, 'will bring ruin to all'. Hardin, 'Tragedy of the Commons', p. 1248.

[28] Traditional English open field agriculture with pasture and woodland commons could in fact be rational responses to market signals; D.N. McCloskey, 'The Enclosure of Open Fields: Preface to a Study of its Impact on the Efficiency of English Agriculture in the Eighteenth Century', *Journal of Economic History*, Vol. 32, No. 1, Mar., 1972, pp. 15-35, describes both the open field system and enclosure as market-resolved answers to changing economic conditions, reflected in profits from rent and interest on debt, and so also pointing to returns for the power to decide – basically, a management fee – as a driving factor of change. See also Anupam Chander and Madhavi Sunder, 'The Romance of the Public Domain', *California Law Review*, Vol. 92, No. 5, Oct. 2004, p. 1332, and E.P. Thompson, *Customs in Common, Studies in Traditional Popular Culture*, New York, 1993, p. 108, for criticism of Hardin's historiography.

Algonkian trappers, neglected to link the hunt for beaver with the arrival of European fur traders.[29] A historical view might have asked whether a commons did not work because commons can never work, or because the newly arrived buyers of fur had no particular interest in the sustainability of supply from those particular lands. It is important to ask if some actual commons worked when people – for instance, the Office of Indian Affairs officials of Chapters 7 and 8 – saw they had an interest in another feature of a commons: the difficulty speculators had in profiting from it.

When economic historians from W.J. Ashley and W.E. Tate on asked about change over time as they explored the disappearance of English commons through enclosure, they found a desire for better management. The motivation to enclose was not so much a failure of the old system as the possibilities of an emerging new one, they argued.[30] Henry Smith, for instance, suggests landlords' push for more direct control was a response to a new technique (using clover and turnips to reduce the need for fallowing), while Joel Mokyr and John Nye describe enclosure of commons as the exercise of power to secure a transfer of unearned income.[31] From Karl Marx, in his extended historical discussion of enclosure, to M.J. Daunton, J.D. Chambers and G.E. Mingay, enclosure has been linked to new opportunities for capital – to change over time, in other words – rather than to any inherent inability to accommodate the needs of a community.[32] Questions of how people felt about the land they used, or how their concepts of it had changed, or

[29] Harold Demsetz, 'Toward a Theory of Property Rights', *American Economics Review*, Vol. 57, 1967, pp. 347-50.

[30] W.J. Ashley, 'Comparative Economic History and the English Landlord', *Economic Journal*, Vol. 23, No. 90, Jun., 1913, p.178 and W.E. Tate, 'The Cost of Parliamentary Enclosure in England (with special reference to the county of Oxford)', *Economic History Review*, 2nd series, Vol. 5, 1953, pp. 258-65.

[31] Henry E. Smith, 'Semicommon Property Rights and Scattering in the Open Fields', *The Journal of Legal Studies*, Vol. 29, No. 1, 2000, p. 160; Joel Mokyr and John V.C. Nye, 'Distributional Coalitions, the Industrial Revolution and the Origins of Economic Growth in Britain', *Southern Economic Journal*, Vol. 74, No. 1, Jul., 2007, pp. 57-58; Mokyr and Nye argue that a shifting of attention of the rent-seeking landed class to the possibilities of investment in manufacturing, transport and commerce shaped the pace and timing of the Industrial Revolution.

[32] Karl Marx, *Capital*, Book 1, Pt. 8, Ch. 27, 'Expropriation of the Agricultural Population from the Land'; J.D. Chambers, 'Enclosure and Labour Supply in the Industrial Revolution', *Economic History Review*, New Series, Vol. 5, No. 3, Sept., 1953, pp. 319-43; M.J. Daunton, *Progress and Poverty: an Economic and Social History of Britain, 1750-1850,* New York, 1995, especially pp. 92-124; G.E. Mingay, *Parliamentary Enclosure in England, an Introduction to its Causes, Incidence and Impact 1750-1850*, London 1998.

whether actions matched rhetoric, were not the issue.

Historians from the Hammonds to K.D. Snell to Peter King and Leigh Shaw-Taylor all describe the essential role of the commons in the household economy.[33] E.P. Thompson, Karl Polanyi and Robert C. Ellickson go beyond to suggest the commons shaped rural people's view of the world in fundamental ways, expressed, for instance, in the patterns of village ritual and norms. I want to take the additional step here of asking how contention for control of commons affected the mental world of people on and away from a shared space.[34] Polanyi wrote of a 'commercialisation of the soil' that came with the ending of the open field commons of manorial villages, while Ellickson argued that 'commodification' occurred at least 4000 years before, and was a deeply rooted human aspiration, citing Mesopotamian boundary stones and medieval English yeoman farmers' real estate dealings as evidence.[35] Both see a single transformation of thought with universal implications, but I do not. After all, yeomen (who, in fact, owned land, unlike villeins who merely had rights to use a manor's open fields, garden plots and pasture) did not study Sumerian inscriptions.

For judges and economists alike – even, perhaps, Long Island oystermen – clarity of analysis comes more easily when what one sees now seems natural, or at least inevitable. So, the history of American settlement routinely – even casually – conflates land hunger with a hunger to own land. William Scott's classic history of American

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[33] Peter King, 'Legal Change, Customary Right, and Social Conflict in Late Eighteenth-Century England: The Origins of the Great Gleaning Case of 1788', *Law and History Review*, Vol. 10, No. 1, Spring, 1992, pp. 7, 23; J.L. and Barbara Hammond, *The Village Labourer, 1760-1832, A Study in the Government of England Before the Reform Bill*, London, 1966; K.D.M. Snell, *Annals of the Laboring Poor, Social Change and Agrarian England, 1660-1900*, Cambridge, 1985; Leigh Shaw-Taylor, 'Parliamentary Enclosure and the Emergence of an English Agricultural Proletariat', *Journal of Economic History*, Vol. 61, No. 3, Sept., 2001, pp. 640-62; S.J. Thompson, 'Parliamentary Enclosure, Population, Property and the Decline of Classical Republicanism in Eighteenth Century England', *Historical Journal*, Vol., 51, No. 3, Sept., 2008, pp. 621-42.

[34] E.P. Thompson, *Customs in Common,* (especially Ch. 3, 'Custom, Law and Common Right', pp. 97-184); Karl Polanyi, *The Great Transformation*, Boston, 2001 (1944). Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes*, Cambridge, Mass., 1991, discusses the role of social norms in regulating a commons and sustaining it over time; as does Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge, 1990.

[35] Polanyi, *The Great Transformation*, p. 179, Robert C. Ellickson, 'Property in Land', *The Yale Law Journal*, Vol. 102, No. 6, Apr., 1993, p. 1377.

property concepts and Jennifer Nedelsky's study of the writing of the United States Constitution, for instance, argue that the United States was formed by men who believed in an exclusive, individual right to property, particularly property in land, and believed that was a natural and an absolute right, citing John Locke as their authority.[36] Malcolm Rohrbough sees the politics of the General Law Office as largely an effort to accommodate the race to acquire land and keep it from spiralling out of control.[37] John Weaver sees a similarly eternal impulse to own as driving what he calls the Great Land Rush on several continents, with English attitudes on land ownership being particularly impassioned – and set well before emigration overseas.[38] The powerful metaphor linking the hedgerows that enclosed English commons and the fences around English emigrants' newly claimed holdings overseas embodying an urge to to own is an important theme in the histories of British dispossession of Native Americans by Francis Jennings, Stuart

[36] William B. Scott, *In Pursuit of Happiness, American Conceptions of Property from the Seventeenth to the Twentieth Century,* Bloomington, 1977; Jennifer Nedelsky; *Private Property and the Limits of American Constitutionalism. The Madisonian Framework and its Legacy,* Chicago, 1990. The same point is made by Willi Paul Adams, *The First American Constitutions, Republican Ideology and the Making of State Constitutions in the Revolutionary Era*, Chapel Hill, 1980. On the other hand, Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*, Lawrence, Kan., 1985, pp. 22-24; William Treanor, 'The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment', *Yale Law Journal*, Vol. 94, 1985, pp. 694-95 and Lawrence Friedman, *A History of American Law*, New York, 1973, p. 51, all suggest the writers of the Constitution saw the state as having continuing power to dispose of and police the use of land even as they saw liberty and property protection as intimately linked. While the idea of individual liberty and progress rooted in settlement of the frontier is a major theme in the school of frontier historiography pioneered by Frederick Jackson Turner, it is worth noting that Turner characterised the motivating force of western expansion as a simple move from land exhausted by poor agricultural practice to cheap, fertile and virgin land, rather than a compelling urge to own or sense of natural right to land. Frederick Jackson Turner, *The Frontier in American History,* New York, 1921 (reprint of 1893 essay), pp. 21-22, Turner is quite critical of railroad and mineral landownership in Ch. 12; Turner has his critics, but his basic approach remains important, as in Ray Allen Billington, *Land of Savagery, Land of Promise, the European Image of the American Frontier in the Nineteenth Century*, New York, 1981.

[37] Malcolm Rohrbough, *The Land Office Business, The Settlement and Administration of American Public Lands*, *1789-1837*, New York, 1968.

[38] John C. Weaver, *The Great Land Rush and The Making of the Modern World, 1650-1900*, Montreal, 2003. Samuel Eliot Morison's *Oxford History of the American People*, New York, 1994 (1965) might stand for many works in seeing a need for private landownership as well as a desire for it as making settlement and nationhood possible, see, for instance, Vol. 1, p. 88 on Jamestown, or pp. 265-66 and 281-82 on western land hunger and the slide to the war for independence.

Banner and Peter Linebaugh and Markus Redicker.[39] This view, however, in merging the desire to own land with the desire to farm it, melds several different visions of land – source of political power or at least independence, provider of sustenance, item for speculation – in one hunger to own. Allen Greer has taken an important step towards disentangling these several streams, noting that the commons – actually several varieties of shared spaces – were a basic way of landholding on both sides of the Atlantic in the early modern period.[40] Greer's focus on the different types of commons, particularly his distinction between 'inner commons' for agriculture and the 'outer commons' where European and Native American hunters first contested for resources, argues (as do other scholars, including Derek Walls and Brian Donohue) for the commons as a rational adaptation to specific environmental or economic circumstances.[41] Taylor Spence shifts his attention to the persistence of tradition when he argues that collision between English notions of rights to the commons and settlers' hunger for land in the United States and British North America caused frontier rebellions and created an opening that allowed the formation of an independent Native American nation in western New York State.[42] Clearly, though, squatters contending with distant speculators for the right to stay on a farm did not see land in the same way. Neither did the Office of Indian Affairs officials arguing over whether to keep Native American lands as commons, or a political

[39] Francis Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest*, Chapel Hill, 1975; Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier*, Cambridge, Mass., 2005; Peter Linebaugh and Markus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners and the Hidden History of the Revolutionary Atlantic*, Boston, 2000.

[40] Allen Greer, 'Commons and Enclosure in the Colonization of North America', American Historical Review, Vol. 117, No. 2, April 2012, pp. 365-386.

[41] Brian Donohue, *The Great Meadow: Farmers and Land in Colonial Concord*, New Haven, 2007 and 'Environmental Stewardship and Decline in Old New England,' *Journal of the Early Republic*, Vol. 24, No. 2 (Summer 2004), pp. 234-241 argues that an ever-denser web of market connections eroded a focus on stewardship and the creation of a relationship with the land that would be sustainable for generations, drawing on his analysis of patterns in New England, and in particular in eastern Massachusetts, in the early nineteenth century. His focus is very much on agricultural technique, though, rather than concepts of land tenure. Derek Walls, *The Commons in History: Culture, Conflict, and Ecology*, Cambridge, Mass., 2014, covers a much wider range over time and space, but he sees the status of commons as a result of the imperatives of ecology, economics or set social structure rather than from changes in ideas about the place of people on the land were changing.

[42] Taylor Spence, *The Endless Commons: Contested Borders, Land-Right Cultures, and the Origins of American Expansion, 1783-1848*, PhD dissertation, Yale University, 2012.

economist attempting to explain the distribution of wages and profit. There was neither general consensus about what enjoying a due portion entailed, as Weaver would argue, nor a kind of dialectic of two colliding beliefs. Instead, there were a variety of less rigid notions, many of them changing shape and emphasis as they interacted. It is in this diversity, rather than in a single, simple and agreed system of belief, that the dynamic of settlement and of political and social change were energised.

The complexity and changeability of ideas of land, however, come from a simple source, for a piece of land was more than something to be exploited. What Richard Maxwell Brown calls the homestead ideal linked landholding in the backcountry with independence, though the people of the frontier understood landholding as a conditional right one earned by labour and limited by need, rather than an absolute right in law.[43] On the edges of American settlement, a distillation of what people understood of English ideas of land tenure, R. Cole Harris proposes, tied family formation with subsistence farming on land from which one could not be easily uprooted.[44] A fascination with simplicity itself emerged as people in more settled parts of the Atlantic World wanted the kind of civic and military virtue they associated with Roman gentry or Saxon freeholders, and saw in the western commons a kind of laboratory to test theories of the state and politics, J.G.A Pocock, Bernard Bailyn and Jack Greene, among others, argue.[45]

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[43] Richard Maxwell Brown, 'Backcountry Rebellions and the Homestead Ethic in America, 1740-1799', in Richard Maxwell Brown and Don E. Fehrenbache (eds), *Tradition, Conflict, and Modernization: Perspectives on the American Revolution*, New York, 1977, p. 76.

[44] R. Cole Harris, 'The simplification of Europe overseas', *Annals of the Association of American Geographers*. Vol. 67, No. 4, Dec., 1977, pp. 471-74, 480-82. To the point that settlers focused on subsistence rather than other ways of participating in the economy, consider George Washington's complaint that settlers on the Vermont and Pennsylvania frontiers would not improve their land beyond what was needed to raise food for their families, as noted by Gregory Nobles, 'Breaking into the Backcountry: New Approaches the American Frontier, 1750-1800', *William and Mary Quarterly*, 3rd series, Vol. 46, No. 4, Oct., 1989, p. 656. Simplification, as Jack P. Greene suggests when he counters Harris' model with the kind of common assumption of a wholesale export of English political and legal culture that Weaver proposes, is a natural enough result of trans-Atlantic discourse: Jack P. Greene, 'Social and Cultural Capital in Colonial British America: A case study', *Journal of Interdisciplinary History*, Vol. 29, No. 3, Winter 1999, p. 496.

[45] J.G.A. Pocock, 'The Machiavellian Moment Revisited: A Study in History and Ideology', *The Journal of Modern History*, Vol. 53, No. 1, Mar., 1981, pp. 50, 65-67 and 'Between Gog and Magog: The Republican Thesis and the Ideologia Americana', *Journal of the History of Ideas,* Vol. 48, No. 2, Apr.-Jun., 1987, pp. 340-43. See also Bernard Bailyn, *To Begin the World Anew,*

Simplicity, however, would also be associated with the primitive and violent. As Ronald Meek notes, the Comte de Buffon and William Robertson would each discover the 'ignoble savage' (without ever having met a Native American) and steer eighteenth-century social science thought, including theories of economics and law, towards a model of staged development from hunting to herding to farming.[46] The historiography of American simplicity yielded a model that linked human progress with the way people used land – to be precise, whether or not they cultivated it. It is a reminder that it was a modest aspiration to make a home and feed one's family that was the hope that led so many westward. In this history of reduction of the complexities of Old World rights and obligations, there is a hint, too, that possession of land nevertheless retained, and redefined, the obligations of stewardship that Barry Shain describes and that Aleck Paul details in recalling his grandfather's words.[47] Strongly rooted in religious feeling and the desire to provide for one's children, simple and emotion-laden linkages of subsistence, family forming and stewardship had no necessary connection with key defining elements of severalty and fee simple tenure, particularly the ability to sell and the freedom to waste, these histories suggest. Neither capability matters much if your aim is simply for your son to take over the farm.

There were still other feelings at play on the far western fringes of the Atlantic World. The prospect of open land stretching vastly westward gave birth to what the Lakota Sioux scholar Elizabeth Cook-Lynn calls that 'idea most dear', a New World, unoccupied and 'lying as a jewel waiting to be plucked by its European discoverers'.[48] It was a vision that contrasted starkly with the sclerotic society and constrained horizons

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the Genius and Ambiguities of the American Founders, New York, 2003, p. 73.

[46] Ronald Meek, *Social Science and the Ignoble Savage*, Cambridge, 1976. On the Native Americans in trans-Atlantic history, see also Nicholas Canny, 'Writing Atlantic History: Or, Reconfiguring the History of Colonial British America', *Journal of American History*, Vol. 86, No. 3, Dec. 1999, p. 1101; Ian K. Steele, 'Exploding Colonial American History: Amerindian, Atlantic and Global Perspectives', *Reviews in American History*, Vol. 26, No. 1, Mar., 1998, pp. 70-95.

[47] F. Barry A. Shain, *The Myth of American Individualism: The Protestant Origins of American Political Thought*, Princeton, 1994, p. 183.

[48] Elizabeth Cook-Lynn, 'In the American Imagination, the Land and its Original Inhabitants, an Indian View', *Wicazo Sa Review*, Vol. 6, No. 2, Autumn, 1990, p. 44.

Americans believed saw when they looked east across the Atlantic.[49] That vision of a New World was of an empty land. The jewel was to be plucked, not shared. The unseen commons was obscure in large part because it could not be acknowledged. Whether in the histories of such writers as Buffon and Robertson, or in the lengthy essay on the discovery and settlement of America that United States Supreme Court Chief Justice John Marshall included in the central decision on Native American lands and central government power, Johnson v M'Intosh in 1823, the claims and attachment of Native Americans to the land had to be diminished.[50]

Those histories of Native Americans wandering over vast territories without owning them stood largely unchallenged until, back from Lake Temagami, Speck turned to oral histories he compiled from several Algonkian-speaking peoples of northeastern North America to support his argument that they felt they owned their land. He found examples from Labrador to the Great Lakes and south to Virginia.[51] Others (mainly anthropologists), responding to his arguments, saw hints of the same in the accounts of traders, missionaries and colonial officials.[52] In contrast, Eleanor Leacock (along with several historians of Puritan New England) believed family territory systems formed after Native American peoples' first contact with European traders seeking beaver fur.[53]

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[49] For American views on the constraints of the English system, see Jennifer Clark, 'The American Image of Technology from the Revolution to 1840', *American Quarterly*, Vol. 39, No. 3, Autumn 1987, p. 438, where she argues that the agrarian ideology in antebellum America grew in large part from Americans' discomfort looking across the Atlantic at the turmoil of enclosure and the poverty of factory towns; open land was a panacea and possessing land was what gave citizens a state in their society, assuring stability.

[50] Johnson v. M'Intosh, 21 US (8 Wheat.) 543 (1823).

[51] Frank Speck and Loren C. Eiseley, 'Significance of Hunting Territory Systems of the Algonkian in Social Theory', *American Anthropologist*, New Series, Vol. 41, No. 2, Apr.-Jun., 1939, pp. 269-80; Frank G. Speck and Wendell S. Hadlock, 'Report on Tribal Boundaries and Hunting Areas of the Malecite Indians of New Brunswick', *American Anthropologist*, New Series, Vol. 48, No. 3, Jul.-Sept., 1946, pp. 355-74.

[52] John M. Cooper, 'Is the Algonquian Family Hunting Ground System Pre-Columbian?' *American Anthropologist*, New Series, Vol. 41, No. 1, Jan.-Mar., 1939, pp. 66-90; William Christie MacLeod, 'The Family Hunting Territory and Lenáape Political Organization', *American Anthropologist*, New Series, Vol. 24, No. 4, Oct.-Dec., 1922, pp. 448-63; Anthony F. C. Wallace, 'Political Organization and Land Tenure Among the Northeastern Indians, 1600-1830', *Southwestern Journal of Anthropology*, Vol. 131, 1957, pp. 301-21.

[53] Eleanor Leacock, 'The Montagnais "hunting territory" and the fur trade', *American Anthropological Association Memoir* No. 78, 1954; Francis Jennings, *The Invasion of America*, New York, 1976; Kathleen J. Bragdon, *Native People of Southern New England 1500-1650,*

William Cronon takes much the same view in his groundbreaking analysis of Native American management of resources in New England before English settlers dispossessed them of their land.[54] Use rights, rather than possession, framed New England Native American ideas of the land, he argues. While records from the Massachusett and Wampanoag communities suggest some sense of a personal or family claims to specific plots, this evidence is from a time of transition and is only suggestive.[55] In a sense, what is most interesting in the ethnographic effort to pin down pre-contact ideas about land, is how undefined some of the formalities of land tenure were in practice. Perhaps Cronon's use rights are really a kind of unseen severalty?

One signpost to the history of the unseen commons and how it shaped ideas of land is suggested by Alden T. Vaughan's view that there was some overlap in Puritan and Native American notions of property.[56] Although Vaughan did not argue this, his insight applies farther west, to other newly settled territories. Vaughan's idea, though challenged by other historians of early New England, is supported by Glenn Trewartha's critical point that early settlements in New England were separated by many miles of woods that were open to all. There was space in the early days of settlement to delay or to negotiate conflict over particular pieces of land or particular trespasses.[57] Histories of New England

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Norman, 1996; Jean M. O'Brien, *Dispossession by Degrees, Indian Land and Identity in Natick, Massachusetts, 1650-1790*, Cambridge, 1997; Neal Salisbury, *Manitou and Providence, Indians, Europeans, and the Making of New England 1500-1643*, Oxford, 1982.

[54] William Cronon, *Changes in the Land: Indians, Colonists and the Ecology of New England*, New York, 1983.

[55] See for example, Document 28 in Ives Goddard and Kathleen Bragdon (eds), *Native Writings in Massachusett,* Philadelphia, 1988, Vol. 1, pp. 108-9, in which Wunnatickquanum transfers a portion of woods he obtained from Tawanquatuck to John Momanequun 'forever and forever it is firm' in exchange for two shillings, or or Document 51, in which Baul Noos and Quequenab disavowed in 1691 a claim on a portion of Nantucket island because the land belonged to an unrelated individual named Kachubbanid, pp. 184-5. A series of transfers in the Natick town records from 1700 describe similar transactions and avowals, pp. 272-337.

[56] Alden T. Vaughan, *New England Frontier, Puritans and Indians 1620-1675,* New York, 1979.

[57] Glenn T. Trewartha, 'Types of Rural Settlement in Colonial America', *Geographical Review,* Vol. 36 No. 4, Oct., 1946, pp. 573, 577. The extensively explored early history of the Praying Indian town of Natick, Mass., illustrates the point that with enough space, different ideas about land might co-exist, see for example, O'Brien, *Dispossession by Degrees*, Daniel Mandell, '"To Live More Like My English Neighbors": Natick Indians in the Eighteenth Century', *William and Mary Quarterly*, 3rd series, Vol. 48, No. 4, Oct., 1991, pp. 552-79, and Neal Salisbury, 'Red Puritans: The "Praying Indians" of Massachusetts Bay and John Eliot', *William and Mary Quarterly*, 3rd Series, Vol. 31, No. 1, 1974, pp. 27-54. Often lost in the discussion of clashes with

town divisions, governance and growth, meanwhile, make clear that settlers' ideas about land tenure and land use were evolving.[58] So, too, does the history of debtor-creditor law in America, as well as that of the land-warrants used as bonuses for ex-soldiers. They show American legislatures and courts regularly tinkering with packages of rights associated with land that did not always clearly include the ability to sell, transfer or borrow against it with ease, legal scholars have found.[59] Ideas were in flux, and they spread. In England, historians of the law have traced a more slowly unfolding and quite

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English towns over straying cattle and theft is the fact that Natick existed as a new kind of Native American community, surrounded by English settlers, for roughly a century.

[58] Among the instances and discussions of changing Puritan views and how they played out in interactions with New England Native Americans are David Grayson Allen, *In English Ways: The Movement of Societies and the Transferal of English Local Law and Custom to Massachusetts Bay in the Seventeenth Century*, Chapel Hill, 1981, pp. 30-38, 61-66; Virginia D. Anderson, 'King Philip's Herds: Indians, Colonists, and the Problem of Livestock in early New England', *William and Mary Quarterly*, 3rd Series, Vol. 51, No.4, Oct., 1994, pp. 613-19; Ray Allen Billington, 'The Origin of the Land Speculator as a Frontier Type', *Agricultural History,* Vol. 19, No. 4, Oct., 1945, especially p. 207; J.M. Bumsted, 'Religion, Finance and Democracy in Massachusetts, the town of Norton as a Case Study', *The Journal of American History*, Vol. 57, No. 4, Mar., 1971, pp. 817-31; Edward M. Cook Jr . 'Social Behavior and Changing Values in Dedham, Mass. 1700-1775', *William and Mary Quarterly*, 3rd Series, Vol. 27, No. 4, Oct., 1970, pp. 546-580; Bruce C. Daniels, 'Connecticut's Villages Become Mature towns: The complexity of Local Institutions, 1676-1776', *William and Mary Quarterly*, 3rd Series, Vol. 34, No. 1, 1977, especially pp. 87-88; David T. Konig, 'Community Custom and Common Law: Social Change and the Development of Land Law in Seventeenth Century Massachusetts', *American Journal of Legal History*, Vol. 18, No. 2, Apr., 1974, pp. 145-67; Kenneth A. Lockridge and Alan Kreider, 'The Evolution of Massachusetts Town Government, 1640 to 1740', *William and Mary Quarterly*, 3rd series, Vol. 23, No. 4, Oct., 1966, pp. 549-74; Lion G. Miles, 'The Red Man Dispossessed: The Williams Family and the Alienation of Indian Land in Stockbridge, Massachusetts, 1736-1818', *The New England Quarterly*, Vol. 67, No. 1, Mar., 1994, pp. 51-52; Amy D. Schwartz, 'Colonial New England Agriculture: Old Visions, New Directions', *Agricultural History*, Vol. 69, No. 3, Summer, 1995, especially p. 461; Peter Thomas, 'Constrastive Subsistence Strategies and Land Use as Factors in Understanding Indian-White Relations in New England', *Ethnohistory,* Vol. 23, No. 1,Winter, 1976, p. 13 and Harold W. van Lonkhuyzen, 'A Reappraisal of the Praying Indians, Acculturation, Conversion and Identity at Natick, Massachusetts,1646-1730', *New England Quarterly*, Vol. 63, No. 3, Sept. 1990, pp. 411-25.

[59] Claire Priest, 'Creating an American Property Law: Alienability and Its Limits in American History', *Harvard Law Review,* Vol. 120, 2006, p. 387. Gordon S. Wood, *The Radicalism of the American Revolution*, New York, 1991, p. 269, links the broadening of voting rights beyond freeholders with the view of land as mere commodity and argues both were products of the Revolution. Philip Girard, 'Land Law, Liberalism and the Agrarian Ideal: British North American 1750-1920', in John McLaren, A.R. Buck and Nancy E. Wright, (eds), *Despotic Dominion, Property Rights in British Settler Societies*, Seattle, 2004, pp. 120-21, puts the end of restrictions on land sales in the early 19th century with the abolition of dower rights and conditional estates: Horwitz, *Transformation of American Law*, p. 131, does as well.

piecemeal series of land reform measures extending into the 1920s, all changes in how people thought about land that clearly followed the emerging American pattern that would end entail and facilitate mortgaging land.[60] It took decades – until the 1830s – for settler societies in Georgia and in New South Wales to clearly resolve upon a jurisprudence of jurisdiction when new settlers clashed with Indigenous peoples. In both cases, they would tie political sovereignty with specific territory and an unqualified authority to judge, sanction and command, Lisa Ford notes.[61] The passage of time, and the cumulative effect of generations of action, antagonism and accord shaped law and the mental constructs underpinning it. It is the length of time involved, and not merely the end result, that strikes me as a critical point.

Yet, even as legislatures clarified the right to sell and to mortgage, American judges' reviews of the histories of commercial, nuisance and adverse possession law showed them that there were clear limits on the rights buyers of land might claim. Rights of possession, in the matter-of-fact historiography of judges and lawyers, were subject to the public good, as David Schultz notes, recalling the 1777 Vermont Constitution's declaration: 'Private Property ought to be subservient to public uses, when necessity requires it'.[62] Judges also found obligations to neighbours (and even trespassing squatters) that had to be accepted.[63] Even the private good of others might limit such a basic right as that to exclude a neighbour's cows, as the history of the fence in the works of Clarence

[60] Eileen Spring, 'Landowners, Lawyers, and Land Law Reform in Nineteenth-Century England', *The American Journal of Legal History*, Vol. 21, No. 1, 1977, pp. 40-59.

[61] Lisa Ford, *Settler Sovereignty, Jurisdiction and Indigenous People in America and Australia, 1788–1836*, Cambridge, Mass., 2010.

[62] David Schultz, 'Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding', *The American Journal of Legal History*, Vol. 37, No. 4, Oct., 1993, pp. 488, 493; note 173, p. 490 cites the Vermont Constitution.

[63] William M. Treanor, 'The Original Understanding of the Takings Clause and the Political Process', *Columbia Law Review*, Vol. 95, 1995, pp. 782-887; 'The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment', *Yale Law Journal*, Vol. 94, 1985, pp. 694-716; J.F. Hart, 'Colonial Land Use Law and Its Significance for Modern Takings Doctrine', *Harvard Law Review*, Vol. 109, No. 6, Apr., 1996, pp. 1252-1300; Scott M. Reznick, 'Land Use Regulation and the Concept of Takings in Nineteenth Century America', *University of Chicago Law Review*. Vol. 40, 1973, pp. 854-72; Harry L. Watson, '"The Common Rights of Mankind": Subsistence, Shad, and Commerce in the Early Republican South', *The Journal of American History*, Vol. 83, No. 1, Jun. 1996, pp. 13-43.

Danhof, Earl Hayer, Peter Karsten and others suggests.[64] In looking at the micro-politics of neighbours and nuisance, as opposed to the grander theatre of national affairs, American lawyers and judges found a history that insisted on the impulse of trying to reduce and balance harm to landowner and to neighbours.[65] Seeking to reduce harm and balance injury forced attention back to the idea of use, not mere ownership, of land, in these most practical of histories. With that shift in focus, even lawyers could see overlapping claims that made some spaces look like shared spaces.

In these several histories – whether the small ones of the strand or the fence, or the larger ones of economic theory or the trans-Atlantic political philosophy of rights and liberties – some general themes emerge. One, that how people looked at land was complex, but tended to focus primarily on the uses they and others might put it to. Two, that property rights were subject to significant limits, whether formally stated, as in the Vermont Constitution, or acknowledged in practice, as court cases on squatter trespasses or nuisances, or simply in ambiguity and contradiction in formulation. Finally, concepts of land were in flux, as indicated by one more history, that of the United States' policy towards Native American lands, with the evolution from setting a border between nations to assimilation through agriculture and Christian prayer, to deportation to, finally, the forced division of commons lands into individual allotments, leaving only a small remnant of commons land and gutted traditional polities.[66]

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[64] Clarence H. Danhof, 'The Fencing Problem in the Eighteen-Fifties', *Agricultural History*, Vol. 18, No. 4, Oct., 1944, pp. 168-186; Earl Hayter, 'Livestock-Fencing Conflicts in Rural America', *Agricultural History*, Vol. 37, 1963, pp. 11-20; Shawn Everett Kantor, 'Razorbacks, Ticky Cows, and the Closing of the Georgia Open Range: The Dynamics of Institutional Change Uncovered', *Journal of Economic History*, Vol. 51, No. 4, Dec., 1991, pp. 861-86; Shawn Kantor and Morgan Kousser, 'Common Sense or Commonwealth? The Fence Law and Institutional Change in the Postbellum South', *Journal of Southern History*, Vol. 59, 1993, pp. 201-42; Stephen Hahn, 'A Response: Common Cents or Historical Sense', *Journal of Southern History*, Vol. 59, 1993, pp. 243-58; Peter Karsten, 'Cows in the Corn, Pigs in the Garden, and "The Problem of Social Costs": "High" and "Low"; Legal Cultures of the British Diaspora Lands in the 17th, 18th, and 19th Centuries', *Law & Society Review*, Vol. 32, No. 1, 1998, pp. 63-92; Nicolas Sanchez and Jeffrey B. Nugent, 'Fence Laws v. Herd Laws: A Nineteenth-Century Kansas Paradox', *Land Economics*, Vol. 76, No. 4, Nov., 2000, pp. 518-33.

[65] John G. Spranking, 'The Anti-wilderness Bias in American Property Law', *University of Chicago Law Review*, Vol. 63, No. 2, 1996, pp. 553-54.

[66] Francis Paul Prucha, *The Great Father, The United States Government and the American Indians*, Lincoln, 1984, and *American Indian Policy in the Formative Years: Indian Trade and*

The chapter that follows starts with a point about a tradition; that in one's mental world, the idea of a place on the land embodied the security that comes from a sense of the permanence of things, of being rooted where one is. By the 1780s, that sense of being rooted had been badly rattled. One reason, of course, was the enclosure of commons and open fields in England (to be precise, the new process of enclosure by Act of Parliament instead of by consensus of the community). The other, though, was the disturbing apparent lightness of connection of Native Americans to land. Offended tradition, disregarded rootedness, gave energy to the search for definition of the place of people on the land. The desire for permanence underlying land conflicts of the eighteenth century Atlantic world left definition of peoples' place on the land vague and open to negotiation or conflict.

The next chapter looks at the thinking that justified the taking of land as political control of the trans-Appalachian lands was contested and resolved. The key to this story of what people thought is a half century long war of words over the unusual purchase by a private group of vast tracts of Native American lands in Illinois. The political and legal debates over conflicting claims of squatter and landowner speculator will also make clear that a tension between claims from purchase and claims from occupancy and use continued. Exacerbating this tension were the conditional claims to land created by the crude derivative securities that the first state governments and new federal government issued, a point it is important to stress since historians have overlooked the features those securities held in common with modern derivatives. At a time before many Americans crossed the Appalachians to settle in the west, there were plenty of notions – often in conflict – about that land.

The ideal of severalty would be severely tested in the years after the War of 1812, Chapter 3 will note. As increasing numbers headed west, and as a new flood of land warrants came to market, some American officials toyed with the idea that Native

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Intercourse Acts, 1790-1834, Cambridge Mass., 1962; Vine E. Deloria Jr. and David E. Wilkins, *Tribes, Treaties and Constitutional Tribulation,* Austin, 1999; Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York, 1990; Frederick Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920*, Lincoln, 1984; D'Arcy McNickle, *They Came Here First, The Epic of the American Indian*, New York, 1975; Angie Debo, *A History of the Indians of the United States*, Norman, 1970.

American individuals might also own their own due portion of the western commons. The failure of these efforts and the successes of squatters in retaining at least some of their holdings when challenged suggest a deep ambivalence about the theoretical rights of property in land, which is an unease suggesting that ideas about holding and using land were still evolving, and evolving in response to increasingly urgent contention between native and newcomer.

Chapter 4 will stress the close connection of theories of land tenure with concepts of power and participation in society. A group of people caught between their Native American maternal relatives and the United States of their fathers – the people Americans labelled with the ugly term 'half-breed' – should allow a particularly pointed exploration. Their struggles to secure a place for themselves in the nineteenth century Atlantic World will be an important window through which to watch awareness of the commons fade, and the resulting change in ideas about see ideas about the land and a person's place upon it.

Chapters 5 and 6 explore how tales of both settler and Native American life on the trans-Appalachian commons shaped formal theories of labour, investment and how natural resources might generate wealth. Much of the discussion here will focus on the concept of rent, namely, income deriving from controlling a natural resource, including land. As political economists looked at Native Americans on their commons and at the settlers encroaching on them, land would seem less and less important. The commons, meanwhile, would come to seem irrational and ruinous. As a result, it would be harder – though not impossible – for the people settling on the American commons to see the utility of a commons, and harder for American officials to understand how to preserve a space for Native American peoples.

The peculiar situation of the people caught between their Native American and white families forced them, their neighbours and their government to consider how the idea of enjoying a due portion was changing, the theme of Chapters 7, 8 and 9. American officials would debate for decades over whether land reserved as the Half Breed Tracts of Iowa, Minnesota and Nebraska should or should not remain commons. In the end, the idea of severalty would not secure land for them. Ironically, the idea of ownership opened

a way for a small Iowa band to recreate a commons for itself, as Chapter 10 will show. That chapter, too, will explore later efforts, in the 1870s and 1880s, to protect or re-establish commons, both in the United States and in Britain. Finally, in conclusion, and pausing to listen once more to Aleck Paul and Speck, it will be time to ask whether, in the end, the dilemma inherent in the desire to enjoy a due portion – the question of mine or ours – was ever really resolved.

There is an overlooked space where the histories of colonisation, of enclosure and dispossession and of ideas about property and capital approach one another. In it stand Native Americans, settlers and speculators of the trans-Appalachian west. In this space, Kelelamand would eventually lead a handful of Christian converts. Hengue Pushee would raze an American village and make slaves of the settlers there while Wicolind's son would go to Princeton University.[67] In that space, too, brokering conflicting interests in, and conceptions of, the land, are the people who shaped the political and economic thought of a still-forming nation, and of its parent across the sea. In this space, which was fading from view to become an unseen commons, all sought an understanding of the fundamental relationship of individuals and land – as well as of human society and the gifts of Nature. That it was not always quite the same understanding, and that it was not always simple and was not unchanging, is the point.

[67] Kelelamand had settled at the Moravian Mission at Salem, Ohio, by this time, where he would convert to Christianity, and become a leader of a small Delaware Christian community. He died in Goshen, Ohio in 1811. Scott Paul Gordon, *Two William Henrys: Indian and White Brothers in Arms and Faith in Colonial and Revolutionary America,* Nazareth, Pa., 2010, pp. 1–6, Francis Jordan, *The Life of William Henry, of Lancaster, Pennsylvania, 1729-1786, Patriot, Military Officer, Inventor of the Steamboat; A Contribution to Revolutionary History*. Lancaster, Pa., 1910, pp. 7-18. Hengue Pushees settled around the Auglaize River in western Ohio, a diverse community of Native Americans and traders. He was among the Delaware who attacked the Big Bottom settlement on 2 January 1791, capturing a New Hampshire emigrant, James Patten, and three others and burning the settlement. James Patten to Samuel Patterson, 10 September 1797, James Patten papers, William L. Clements Library, The University of Michigan, Ann Arbor. Wicolind died before the treaty was signed. Two years earlier, the Continental Congress agreed to educate 12-year-old son George White Eyes, then under the care of a Col. George Morgan, who advised Congress he thought doing so would encourage the Delaware to sign a treaty. *Journal of the Continental Congress*, Vol. 25, pp. 660-61 (8 October 1783).

Chapter 1

A nostalgia for being rooted: Antecedent ideas about people and land

Part of what bothered Europeans so much about the American commons beyond the mountains, unlike those with which they were more familiar, was how lightly its native peoples seemed to stand upon it. 'They neglect Agriculture, live in Woods, and on the Wild Beasts they find there … their Forests destroy the Sweetness and Substance of the Earth', wrote the economist and banker Richard Cantillon in his *Essai sur la Nature du Commerce* in 1730.[1] It was, Cantillon thought, what people did with land, and not land itself, that had value – indeed, it was what people made, not what they made it from, that was what had beauty. The uncultivated, the lightly held, was disconcerting. Cantillon and his contemporaries believed people were supposed to stay put. The sense that one was rooted in a particular patch of land was what framed the basic elements of daily life. Whatever feelings of well-being people might have, whatever aspirations they might hold, were anchored in a sense that they belonged in a particular place.

To say you belong somewhere was not the same thing as saying that a particular place belongs to you, however. The melding of these separate concepts into one – that mental equation that says: 'I belong here because I own it' – came as an answer to the question of what it meant to enjoy a due portion of land after the United States took control of the trans-Allegheny commons. This chapter surveys where those two concepts – belonging to a place and owning it – stood at that time. Traditionally, of course, a sense of belonging came easily because people stayed put. They knew where they belonged, as well, because of more-or-less precisely defined rights of use of the land. That sense of belonging was part of what emigrants brought with them to North America, and was part of what they suggested to their children about the way a community organised its economic life and political affairs.

That sense of belonging was reinforced by the sheer pleasure of knowing a place intimately, a feeling clearly reflected in English poetry of the time. The poems mark a

[1] Richard Cantillon, *Essai sur la Nature du Commerce en General*, (Henry Higgs, tr.) London, 1959 (1730), Book I, Ch. xv, paragraph 5. <http://www.econlib.org/library/NPDBooks/Cantillon/cntNT.htm>

good place to start, as the emotion they express will be an important theme in this chapter, though it ventures as well into the far drier and purportedly dispassionate writing of political economists. Even economics, however, could not mute feeling. Emotional connections to land were intensified in the agony of the dispossession of thousands of people because of the enclosure of commons in England. In America, that desire to feel at home was frustrated because Native Americans and settlers could not always mesh their ideas about when to share space and when to exclude others. In the decades before American soldiers could compel repeated deportations of Native American peoples, differences over what to share and where to exclude were resolved, when they were resolved, by compromise or negotiation. The results of those interactions hint at how thoughts about land and individuals' place on it were changing, though the poets who might have spoken to the deeper, emotional meaning of those changes were Native Americans, whose words are lost now. Still, writers such as Locke, Rousseau, Blackstone and Smith struggled to make sense of what was happening in the American west and on English commons, and people on both sides of the Atlantic read their works, seeking models for a rapidly changing world. This chapter moves from the feelings poems reveal to ask how the question of the land was posed, and answered, in the books of law, political theory or economics that the people of the Atlantic World carried with them as they headed west. They found no simple answers there. Those were to come only much later.

The shock of the uprooting of what had once seemed permanent echoes through the poems of John Clare, a farm labourer's son who wrote of his Northamptonshire home:

> … O it turns my bosom chill
> When I think of old 'sneap green' puddocks nook and hilly snow
> Where bramble bushes grew and the daisy gemmed in dew
> And the hills of silken grass like to cushions to the view ...
> All leveled like a desert by the never weary plough
> All vanished like the sun where that cloud is passing now.[2]

Childhood memories and the sensuous delights of meadow, stream and copse fill his

[2] John Clare, 'Remembrances', in Arthur Symonds (ed.), *Poems by John Clare*, London, 1908, p. 126.

work, as when he recalled the moors outside his home village of Helpstone

> Bespread with rush and one eternal green
> That never felt the rage of blundering plough
> Though centurys wreathed spring's blossoms on its brow [3]

The green had seemed eternal, the flowers had bloomed for centuries, and even a simple rural labourer's son might savour them and regret their disappearance. The Suffolk tailor's son, Nathaniel Bloomfield, embittered by the enclosure of the last commons of his home village of Honington, also invoked memory of loss of what had been a place of beauty and of peace. He, too, was shaken when what had seemed a haven of security turned out not to be, when he recalled:

> many rich pastures were near
> Where Cowslips and Daffodils grew …
> It was bliss interrupted by Fear –
> The Fear of their Owner's dread voice,
> Harshly bawling 'You've no business here'[4]

The grass his cow could crop, the flowers he could savour were what Bloomfield thought assured him of a place. The stern voice of ownership, the dictate from another that he had no right to do anything at that place, was what stunned the poet. What he had always thought could be shared – even the pleasure of the flowers – could not be. From rural Dorset, the poet William Holloway, too, would recall a commons, cottage and how:

> Behind, the thorn-fenc'd garden spreads its store,
> The rill, for ever gurgling, flows before.
> Delightful spot! where my forefathers spent
> Their honest days in labour and content.[5]

Land had a meaning for these poets and the people who read their poems that had nothing to do with owning it, or with excluding others from it. They wrote about commons, and about aspects of those shared spaces that enriched life, beyond just sustaining it. They wrote, in short, about the possibility of enjoying a due portion of land that neither they nor the reader of their works owned. A sense of intimacy, of deep knowledge and

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[3] John Clare, 'The mores', from <http://ecohist.history.ox.ac.uk/readings/clare-poems.pdf >

[4] Nathaniel Bloomfield, 'Elegy on the Enclosure of Honington Green', *An Essay on War in Blank Verse*, London, 1803 np <http://www.gutenberg.org/files/11564/11564.txt> (accessed 20 March 2012).

[5] William Holloway, 'The peasants' fate, rural poem', <http://spenserians.cath.vt.edu/TextRecord.php?action=GET&textsid=39450> (accessed 20 March 2012).

affection are as striking as the nostalgia that infuses the words of these peasant poets. They had loved the land from which they had been cast aside, for a place in the world that had been a parent's and grandparent's place but that was theirs no longer. If anything, for these poets and the people for whom they spoke, the exercise of rights to own involved a loss of the right to enjoy a due portion.

Except, at least for some, in America. 'Here was every thing to delight the eye, and especially of one like me, who seems to have been born to love rural life, and trees and plants of all sorts', the essayist William Cobbett wrote, recalling a ramble in New Brunswick in the last years of the eighteenth century.[6] There, as night fell, and fearing the bears he could hear growling nearby, 'I found a large and well-built log dwelling house', surrounded by rich fields of wheat and maize, where 'The master and the mistress of the house … were like what an English farmer and his wife were half a century ago'. Forty years later, he still regretted not taking up an invitation to stay and remembered the family, their farm and the contrast with the England of his times as 'something that was destined to give me a great deal of pleasure and also a great deal of pain … both of which, in spite of the lapse of forty years, now make an attempt to rush back into my heart'.[7] Nostalgia for the feeling of being well-rooted in the land – of having a homestead nestled securely in fields of grain as a fortress against the lonely night – could be inspired even in a newly settled place. It was the connection to the land, the feelings that a particular piece of land inspired and that were made manifest in how people treated their land and what they were willing to share of it, that appealed. That connection, when seen, appealed to a deeply felt need for people on either side of the Atlantic, particularly when they faced the turmoil involved in making a new nation or finding a place in an emerging industrial economy. It appealed whether or not one had a connection to newly encountered land, as Cobbett had not in New Brunswick, despite his regrets.

Not many country people took up pens to write about their feelings, so it is important to underline what those writers who sought to speak for them are saying. One point: people established their connection to land through their senses. The daffodils you

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[6] William Cobbett, *Advice to Young Men*, London, 1829, p. 143, <http://www.gutenberg.org/files/15510/15510-h/15510-h.htm> (accessed 1 March 2012).
[7] *Ibid*., pp. 144-45.

saw, the gurgling creek, the moonlit clearing were like hooks that caught and held you to the land. Another: the ways they used land – even if it was to dream the morning away in a dell – defined their place. What upset the order of things was when a person whose connection to the land had a somewhat different shape could suddenly say they had no business on it. This implies two other points: connections forged by sense and use were longstanding – they had to have been if their overturning was a shock – and that those connections did not require exclusion of others from the land. You could be connected to a commons. It was natural to be so connected, as natural as taking pleasure in the warm breezes of spring. And the desire to be connected persisted, even if the connection broke.

Undermining the desire to be rooted in the land were the challenges of technology and of finance. In Britain, this meant an acceleration of enclosure, the conversion of communal space into large-scale farms or pasture reserved for one person's herd. American agriculture, meanwhile, was notoriously – and inevitably – extensive, a question of not much labour and lots of land. When a family holding was large enough, Americans preferred to divide lands among all their sons (and even at times their daughters) in order to root them close to home, rather than to use the ancient institutions of entail and primogeniture to preserve an initial grant of land.[8] In the early days of settlement, it was not just the extent of American lands that was important, but also the pattern of American spaces, with newly cleared farms surrounded by the shared space of as yet-unapportioned land. Space and patterns of occupation allowed the traditional practice of inheritance of land, or of one's place as a tenant on land, to be broken. In the mind's eye, the concrete nature of a specific place could, and did, trump the dictates of

[8] James A. Henretta, 'Families and Farms: Mentalité in Pre-Industrial America', *William and Mary Quarterly*, 3rd Series, Vol. 35, No. 1, 1978, pp. 10-11. The almost-irresistible pressure to divide is discussed in, J.M. Bumsted, 'Religion, Finance and Democracy in Massachusetts, the town of Norton as a Case Study', *The Journal of American History*, Vol. 57, No. 4, Mar., 1971, pp. 817-31; Edward M. Cook Jr., 'Social Behavior and Changing Values in Dedham, Mass. 1700-1775', *William and Mary Quarterly*, 3rd Series, Vol. 27, No. 4, Oct., 1970, pp. 546-80; Bruce C. Daniels, 'Connecticut's Villages Become Mature Towns: The Complexity of Local Institutions, 1676-1776', *William and Mary Quarterly*, 3rd Series, Vol. 34, No. 1, 1977, pp. 83-103. Glenn T. Trewartha, 'Types of Rural Settlement in Colonial America', *Geographical Review*, Vol. 36, No. 4, Oct., 1946, pp. 568-69, emphasises how few settlements there were in New England, and how separated by unclaimed – commons – land they were. Allen Greer notes that the pressure to divide land and claim 'outer commons' for livestock and as farms for children was less intense in New France, a matter of low population growth and the challenge of grazing cattle through long winters; Greer, 'Commons and Enclosure', p. 383.

tradition – even one as fundamental as inheritance of a landed estate by a first-born son. It is true that the continuing press for new land for new generations, particularly for land that might be exploited without much investment of scarce capital, began to fray feelings of connection to a homeplace. But the idea that you could create your own connection to land, rather than simply accept a pre-determined relationship, remained a part of Americans' mental world. Moreover, a tension between that desire to plant your children on nearby land and the recognition that it might not be possible to do so began to colour Americans' perceptions about land. A basic feeling that relationships to land were conditional, and therefore subject to negotiation and redefinition, was also taking hold.

The scarce capital that kept Americans' attention focused on land that was easy to exploit also prompted colonial governments to enact debt-collection laws that breached the bulwarks of legal protections of landholding erected by English judges. Ultimately, Parliament went along with the 1732 Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America, allowing land and houses to be seized to repay debts.[9] The effect was 'to make land, in some degree, a substitute for money, by giving it all the facilities of transfer, and all the prompt applicability of personal property', Justice Joseph Story of the United States Supreme Court commented decades later in a discussion of American property law.[10] This was emphatically not the way English law looked on land. Nor was the change in American law immediately or easily accepted.

One reason Americans baulked at the idea that land was money was that they still tended to think about land in terms of what they did on it. 'The earth belongs in usufruct to the living', as Thomas Jefferson explained, adding: 'No man can, by natural right,

[9] Claire Priest, 'Creating an American Property Law: Alienability and Its Limits in American History', *Harvard Law Review*, Vol. 120, 2006, p. 389.

[10] Joseph Story, *Commentaries on the Constitution of the United States*, Boston, 1833, Sec.182. <http://www.constitution.org/js/js_000.htm> (accessed 15 May 2013). Revolutionary North Carolina incorporated the Debt Recovery Act into its statutes in 1771, and republican New York did in 1787, Priest, 'Creating an American Property Law', pp. 441, 445. The right of creditors to take a debtor's land was upheld in Bell v. Hill 2 NC (1 Hayw.) 72 (1794) by North Carolina's supreme court, in D'Urphey v. Nelson, 3 SCL (1Brev.) 289 (1803) by South Carolina's Constitutional Court, as well as in Waters v. Stewart, 1 Cai.Cas. 46 (1804) by New York's Supreme Court of Judicature; Ford v. Philpott, 5 H&J 312 (1812) by Maryland's Supreme Court and Ingersoll v. Sawyer, 19 Mass (2 Pick.) 276 (1824) by the Supreme Judicial Court of Massachusetts.

oblige the lands he occupies, or the persons who succeed him in that occupation, to the paiment [*sic*] of debts'.[11] Parliament had acted unjustly when it moved to protect English creditors of American farmers, as with the Debt Recovery Act, because the lands they worked were 'the most sacred part of any man's property', and it was wrong to 'dispose of them for the use of private persons' who lived in England, William Knox, Georgia's agent in London, complained.[12] His concern was who had use of the land; it was the right to physically be on the land and use it for oneself that was the sacred part of having property in it. 'It is good policy to make that property most the object of attention, which the most effectually attaches its proprietor to the country he lives in', North Carolina Superior Court Judge John Haywood held in 1794, echoing the argument of a hard-pressed frontier farmer in a decision rebuffing a creditor's attempt to take his land.[13] There was virtue in staying put. People still saw that. Nevertheless, it also was clear that the rooted connection to land that Cobbett thought he saw in New Brunswick could be undermined by economic considerations in North America, just as it had been by enclosure in Britain. It was the desire to recreate that permanent connection, a desire Judge Haywood reflected in his decision, that led so many west and that directed their actions once in their new homes.

For those seeking to plant themselves securely on land but who were not yet completely rooted, the image of a wanderer was particularly troubling. Workhouse and prison were where a Parliament dominated by landed gentry held that the displaced rural poor of England should go – better that than to wander and beg. Native Americans, too, were disdained, with 'their perpetual wanderings' seen as part and parcel of 'their immense sloth, their incapacity to consider abstract truth' making it clear that 'The feroce manners of a native Indian can never be effaced', as one Massachusetts cleric put it in 1764.[14] 'When an Indian Child has been brought up among us, taught our language and habituated to Our Customs, yet if he goes to see his relations and make one Indian Ramble with them, there is no perswading him ever to return', Benjamin Franklin

[11] Thomas Jefferson to James Madison, 6 September 1787, *The Papers of Thomas Jefferson*, Princeton, 1958, Vol.15, pp. 392-93.
[12] William Knox, *The Claims of the Colonies to an Exception from Internal Taxes imposed by Authority of Parliament*, London, 1765, pp. 10-11.
[13] Baker v. Webb, 2 N.C. 54 (1794).
[14] William Wood, *New England's Prospec*t, Boston, 1763, p. 94.

complained in 1753.[15] Wanderers seemed to reject all the connections to place that promised security, an idea so unsettling that it was easy to assume that their uprooting was a matter of their wilfulness, rather than something imposed on them. The English workhouse and, later, the deportation of Native Americans, were the result. It was an easy step, mentally, to push the wanderer aside and free up his or her space for your own use, and an easier step to then justify that action, if your intention was to stay put on that land. From that mental dispossession, actual dispossession might naturally follow. And did.

It was not just the wandering but also the vast extent of land Native Americans implicitly claimed in their wandering that disturbed Europeans. When his king's colonial officials contended with the Iroquois nations for control of the Great Lakes waterway, the economist Cantillon complained in his *Essai sur la Nature du Commerce* that the Iroquois people of the Province of New York each required fifty acres of land. 'These Savages have not the industry to grow grass by cutting down the trees but leave everything to nature', he complained.[16] Too much land, too lightly held, meant not only poverty for Native Americans, but also disorder. 'A small Tribe of these Indians will have 40 square leagues for its hunting ground. They wage regular and bitter wars over these boundaries', while in contrast, '[t]he Europeans cultivate the Land and draw Corn from it for their subsistence. The Wool of their sheep provides them with Clothing', Cantillon wrote, not bothering to comment on the source of European wars.[17] Native Americans simply took up too much land, the legal scholar Emmerich de Vattel also argued. Such societies 'usurp more extensive territories than, with a reasonable share of labour, they would have occasion for', Vattel wrote, adding that they 'have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands'. The land was there to feed people, Vattel declared: 'the whole earth is destined to feed its inhabitants, but this it would be uncapable of doing if it were not cultivated'.[18]

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[15] Benjamin Franklin to Peter Collinson, 9 May 1753, in *Papers of Benjamin Franklin*, (Barbara Oberg, ed.) <http://www.franklinpapers.org/franklin/framedvol.umes.jsp> (accessed 1 May 2012).
[16] Cantillon, *Essai sur la Nature du Commerce*, I, xi, 13.
[17] *Ibid.*, I, xv, 6-7.
[18] Emmerich de Vattel, *The Law of Nations,* Philadelphia, 1853 (1758), p. 36.

There are three essential elements of these widely shared European views of land that emerge here. The first, to move from place to place, even within one's land, showed a lack of connection to the land. The second, that cultivated, not wild, land was the best state, the ideal vision against which all others should be measured. The third, to control more land than one cultivated was to be as greedy as Aesop's dog in the manger. Ownership in itself was not a necessary condition for any of these, though to occupy land and to use it were. In fact, the idea that it was wrong to hold land you did not cultivate left and intend to occupy permanently opened the logical (if unelaborated-upon) conclusion that there were moral limits to ownership.

It is important to stress that in these European ideas about land that writers detailed and emigrants made concrete, it was human action that made land valuable, rather than the natural endowments of land or the fact of ownership. Also important here is that for these writers, as for any English countryman or countrywoman, the human relationship to land was ideally a permanent one – that was why what they had heard about Native American patterns of wandering disturbed them so. As Cantillon put it, '[l]and is the matter and Labour the form of all produce and Merchandise'.[19] The wheat flour in bread and the cloth in coat embodied land, in other words. That embodiment in goods was what mattered about land. Owning land was not seen as what necessarily generated well-being; owning the goods that came in part from land was. The mental model Cantillon and his contemporaries constructed recognised that an owner need not (and usually did not) cultivate land himself or herself. That was clear enough in Europe. The American examples they would have known (but did not cite in their writings) would have supported that understanding, since they ranged from the seigniorial estates of New France, to slave- and indentured servant-farmed land grants of Tidewater Virginia, to the fading but still viable township-proprietors of New England. Owners who farmed only their own small properties were exceptions to the rules that mattered in analysing a society and an economy, particularly for writers like Cantillon, François Quesnay or Anne-Robert Jacques Turgot, all of whom sought to explain the ties between people that tended to social stability.[20] Their interest was in political power. Theirs was also the

[19] Cantillon, *Essai*, I, x, 12.
[20] François Quesnay argued in his *Tableau economique* that it was people who worked the land

interest of a bystander, an observer, rather than of an actual person on an actual piece of land. For that individual, the first step towards an idea of his or her place on the land was through the senses: seeing that field or those flowers, hearing that brook. For Cantillon, Quesnay or Turgot, it was looking at their bread, their clothing or their rent. Here, as with Speck on the shores of Lake Temagami, it was the unseen that shaped ideas about the land.

Turgot's historical sketch of land ownership, inspired in part by reflecting on the Native American example, is particularly clear that it is power over others that is the source of property in land. 'The earth was ever the first and the only source of all riches', he wrote, and 'in times when there was yet a large quantity of uncultivated land, and which did not belong to any individual, cattle might be maintained without having a property in land'.[21] The first peoples to cultivate the earth, he added, had first tamed animals, and 'by this been drawn from the wandering and restless life of hunters and fishers … Perhaps it is for this reason, that the Asiatic nations have first cultivated the earth, and that the inhabitants of America have remained so long in a savage state'.[22] That is, first a people tame Nature – or at least some of its creatures – then they stop wandering, and then they farm. Turgot believed ownership of cattle and slaves preceded possession of land. Without the income cattle and slaves generated, people would lack the wherewithal for the seed and equipment needed to cultivate. 'The facility of

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and the resources of Nature – whether on farms, in mines or the fisheries – who created wealth. Their 'net product' – the difference between what they produced and what they consumed while producing – went to a proprietary class including the king, noble landowners, and those with a claim to tithes. The remainder, whether makers of goods, merchants or servants were the sterile class, who did not create wealth but merely transformed it into items other than food or the capital needed to produce food. For discussion of this point, see Yves Charbit and Arundhati Virmani, 'The Political Failure of an Economic Theory: Physiocracy', *Population*, Vol. 57, No. 6, Nov.-Dec., 2002, pp. 855-56, 860; Ian Ross, 'The Physiocrats and Adam Smith', *British Journal for Eighteenth-Century Studies*, Vol. 7, No. 1, 1984, pp. 177-89 and Norman J. Ware, 'The Physiocrats: a study in economic rationalization', *American Economic Review*, Vol. 21, 1931, pp. 607-19, especially p. 618. For Quesnay's *Tableau* itself, see Arthur Eli Monroe, *Early Economic Thought*, (Cambridge, 1923, pp. 336 ff. <http://www.marxists.org/reference/subject/economics/quesnay/1759/tableau.htm> (accessed 10 December 2011).

[21] Anne-Robert Jacques Turgot, *Reflections on the Formation and Distribution of Wealth,* London, 1793 (1774), Refl. No. 120, 122 <http://www.econlib.org/library/Essays/trgRfl1.html> (accessed 3 November 2011).

[22] *Ibid*., Refl. 122

accumulating ... those two sources of riches, and of making use of them abstractedly from the land' was what allowed people to first value and then arrange to own the land.[23] Animate property came first. Land was to be used – and shared – until one had amassed enough power and wealth to possess it exclusively.

For Turgot and the other economist-servants of the state and of finance, '[w]hich way soever a Society of Men is formed the ownership of the Land they inhabit will necessarily belong to a small number among them', as Cantillon said.[24] Once a people had stopped wandering, and some had acquired the wealth that allowed them to own land, those owners were the source – the continuing source – of a moral and stable social order. It was up to them, 'to give the most advantageous turn and movement to the whole', as 'everything in a State depends on the Fancy, Methods, and Fashions of life of the Proprietors of Land'.[25] Proprietors and their descendants were entitled to land by the grants of princes, 'according to their Merit or his Pleasure'.[26] Yet they were not the only ones entitled to be on the land, nor were they the only ones necessary to be there for the good of the country. As Cantillon said, proprietors' land 'would be useless to them if it were not cultivated … Proprietors have need of the Inhabitants as these have of the Proprietors'.[27]

The same should apply even in America, a land Cantillon knew from his successful speculations in securities of the Mississippi Company colonisation scheme. 'In … Camps of Indians who go from one place to another', Cantillon wrote, 'it is necessary that the Captain or King who is their Leader should fix the boundaries of each Head of a Family', for '[o]therwise there would always be disputes over the Quarters or Conveniencies, Woods, Herbage, Water'.[28] Similarly, in European colonies, 'the Land of a new country belongs to a small number of persons'.[29] In fact, Cantillon continued, if the land:

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[23] *Ibid.*, Refl. 124.
[24] Cantillon, *Essai*, I, ii, 1.
[25] *Ibid*., I, xii, 9.
[26] *Ibid*., I, ii, 3.
[27] *Ibid.*, I xii, 9.
[28] *Ibid*., I, ii, 2. It is worth noting that Cantillon here describes the same kind of allocation that led Speck to conclude that hunter-gather peoples did in fact have a sense of exclusive individual 'ownership' of land.
[29] *Ibid.*, I, ii, 6.

> belongs to no one in particular, it is not easy to conceive how a Society of men can be formed there: we see, for example, in the Village Commons a limit fixed to the number of animals that each of the Commoners may put upon them; and if the Land were left to the first occupier in a new conquest or discovery of a country it would always be necessary to fall back upon a law to settle Ownership in order to establish a Society.[30]

What Cantillon is saying here is that land might belong to a person but might still be shared, as in the traditional European commons that settlers had established in some places in North America. Cantillon here did not make clear how shared space was governed. In particular, he does not say it is the landlord who limits the number of cattle on a commons. In fact, ownership, to Cantillon, does not necessarily bring the power to manage. That role he saw for the farmer, the 'undertaker who promises to pay to the Landowner, for his Farm or Land, a fixed sum of money ... without assurance of the profit he will derive from this enterprise'.[31] The landowners' role is limited to managing income from the land, and landowners' impact on the land is limited to changes in their demand. 'If for instance he decreases the number of his domestic servants and increases the number of his Horses … there will be too much Corn for the needs of the Inhabitants, and so the Corn will be cheap and the Hay dear', prompting farmers to keep more fields in grass.[32] The land may be owned, but its owner's relationship to it is as passive as it is permanent, in this view.[33] Those who control and use the land – farmer, commoner, labourer – do not own it, though they must pay the owner his or her due. Ownership was not the only way land belongs to people, or people to the land. Ownership involved only a financial relationship.

This notion that the nature of land ownership was essentially passive had deep roots. That point is also reflected in how English-speaking people used the term

[30] *Ibid.*, I, ii, 8.
[31] *Ibid*., I, xiii, 1, see also I xii, 3-7 and II, iii, 3-7.
[32] *Ibid.*, I xiv, 6-7.
[33] Cantillon does suggest that the most successful merchants might amass wealth enough to lend to landowners, and secure an income similar to a rent through a mortgage, and in so doing 'may live still better than the small Landowners and even buy the Property of some of them', *Essai*, I xiii, 14, but mentions this possibility only once, and in only a hypothetical way, in the *Essai*. For a labourer to become a farmer is possible only 'If by great oeconomy and pinching himself somewhat of his necessities he can gradually accumulate some little capital' and then forgoing the usual farmer's profit in order to finance the venture going forward, *Ibid*., II ix, 4.

'property'. As late as the eighteenth century people still described their relationship to items, or land, they claimed not so much by saying 'mine', but rather by saying 'I have property in it', or 'the property of it is to (or with) me'.[34] The term 'property' described a feature of an object. It was not the object itself. Nor was it an attribute of the owner. Even in that sense, to have property in land seems to have been a later notion, for in medieval and Tudor law books, definitions of property had been refined in discussions of disputes over livestock and movables rather than any involving land.[35] The power to pass on land to one's heirs was considered somewhat conditional at the time that the English turned their attention to the riches across the Atlantic.[36] Other rights of property were even less clear. It would not be until the seventeenth century, for instance, that the concept of ownership could embody actions of trover and ejectment – the writs to recover items in others' hands.[37] Only with *Les termes de la ley,* in 1624, would property be defined as 'the highest right that a man hath or can have to any thing', with the qualification that 'none in this Kingdome can bee said to have in any lands or tenements, but only the king in the right of his Crowne'.[38] William Style's *Regestum practicale* in 1657 first mooted the idea of rights from ownership of land that might supercede the crown's in a discussion of who gives whom the rights of passage of the King's Highway, while William Sheppard's 1656 *An Epitome of All the Common and Statute Laws of this Nation* noted: 'So a man may have a Possession of Lands, to which he hath no Right at all'.[39] The English men and women who first came to America, and who first framed the Atlantic World's conceptions of the new land, did not cross the ocean with long legal tradition that said individuals could have exclusive control of a piece of land. It is hard to

[34] David J. Siepp, 'The concept of Law in Early Common Law', *Law and History Review*, Vol. 12, 1994, pp. 33-34.
[35] *Ibid.*, pp. 29-31.
[36] Andrew Reeve, 'The Meaning and Definition of 'Property' in Seventeenth-Century England', *Past & Present*, No. 89, Nov., 1980, pp. 139-42.
[37] W. S. Holdsworth, *A History of English Law*, 3rd edition, London, 1945, Vol. 4, p. 443.
[38] G.E. Aylmer, 'The Meaning and Definition of "Property" in Seventeenth-Century England'. *Past & Present*, No. 86, 1980, p. 90.
[39] *Ibid.*, p. 94, citing Style's commentary: 'He that hath the Land on both sides of the Highway, hath the Property of the soils of the Highway in him, although the King hath the priviledge for his people to pass through it at their pleasures; for the Law presumes that the way was at the first taken out of the Lands of the party that ownes the Lands that lye upon both sides of the way', and referring to a decision given by Chief Justice Rolle in 1646; William Style, *Regestum practicale: or, The Practical Register,* London, 1657, p. 256.

see how those emigrants could be driven by the mental abstraction of a hunger to own land, if the concept remained so vague for so long, especially to those who did not actually own land before.

What gives a person property in something, particularly the right to possess as well as to merely use, would become the question not long after the first emigrants crossed the Atlantic. In America, Europeans saw, or thought they saw, undivided and unappropriated land. Native Americans were wanderers, casually reaping the riches of wilderness, a thinly populated, almost Edenic world, yet also turning their backs on the divine command that humans take dominion of it. Such abandonment, the poet John Donne preached to the Virginia Company in 1622, entitled English venturers to take possession, as the company had in 1607. Just 'as a man does not become proprietary of the Sea, because he hath two or three Boats, fishing in it', Donne said, 'so neither does a man become Lord of a maine Continent, because he hath two or three Cottages in the Skirts thereof'. Still, the company also had the assurance of 'your *Commissions*, your *Patents*, your *Charters*, your *Seales*, from *him* upon whose acts, any private Subject, on Civill matters, may safely rely'.[40] Right to land was at least confirmed by the sovereign, which was a subtle variation of the legal consensus (as expressed in the contemporaneous *Les termes de la ley*) that only the King had absolute rights in land. To occupy land and claim exclusive use of it, therefore, was justified by staying put upon it and by doing more with it than merely gathering what it yielded naturally, like the fish in the sea. The right to possess it, however, remained the King's to grant. There is, in the way Donne piles up his justifications to take Virginia land, a hint of how uncertainly people felt about their right to move onto land they were not then using.

The legal scholar, Hugo Grotius, also traced property in land from God's command to society's conventions, noting 'God gave to mankind in general, dominion overall the creatures of the earth, from the first creation of the world', and adding the elaboration that 'an example of a community of goods … may be seen in some nations of

[40] John Donne, *A Sermon Preached to the Honourable Company of the Virginian Plantation*, (London: Thomas Jones, 1622, p. 11, <http://contentdm.lib.byu.edu/cdm/compoundobject/collection/JohnDonne/id/3178/rec/1> (accessed 12 August 2012). The ocean, of course, was and is almost universally understood to be a commons.

America'.[41] The first division of land was among nations, after the fall of the Tower of Babel, yet '[s]till after this a community of lands for pasture, though not of flocks, prevailed among men', as there remained plenty of space for all.[42] It was only 'as men increased in numbers' that 'they could no longer with convenience enjoy the use of lands in common, and it became necessary to divide them into allotments for each family', Grotius wrote.[43] 'Property therefore must have been established either by express agreement, as by division, or by tacit consent, as by occupancy', Grotius concluded.[44] It was not just a question of using the land as God commanded. Ownership of land came at the moment when sharing was no longer practical and individuals needed to be able to keep others out. Its roots were not the grant of a sovereign or derived from the power or potential unleashing of violence at the command of king or liegeman.

Later, John Locke also would see property in land as a consequence of human progress, rather than a gift of power. He put the moment that private property in land emerges as the time when people started farming and ran out of room to wander, for '[a]s much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property'.[45] Although 'the things of Nature are given in common, yet Man (by being Master of himself, and Proprietor of his own Person, and the Actions or Labour of it) had still in himself the great Foundation of Property', Locke added.[46] Here is the basis of a right, and a broader one than that rooted in the power of a sovereign monarch, for it was a useful axiom that all individuals (except, evidently, for slaves) might have property in themselves. It was by working and using any good, including land, that a person might earn property in it as well. To underline this point, Locke turned to Native Americans. 'The Fruit, or Venison, which nourishes the wild Indian, who knows no Inclosure, and is still a Tenant in common, must be his', Locke held, for:

The Labour of his Body, and the Work of his Hands, we may say,

[41] Hugo Grotius, *De Jure Belli ac Pacis*, London, 1814, Book II, Ch. ii, para. 1 <http://www.constitution.org/gro/djbp.htm> (accessed 15 August 2012).
[42] *Ibid*., II, ii, 3-4.
[43] *Ibid.*, II, ii, 4.
[44] *Ibid*., II, ii, 6.
[45] John Locke, *Two Treatises of Government*, London, 1764, Book II, para. 32 <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=222> (accessed 1 April 2011).
[46] *Ibid*., II, 44.

> are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men.[47]

For Locke, what people did to things, including land, created property – property in the sense that English-speakers meant when they used to say they had property in an object. Property was an attribute of a thing, rather than of the proprietor, and it was created by human actions. The things of Nature that the poet Clare felt once belonged to him could belong to nobody, in this view.

Ownership of land came as a consequence of change, in other words. People started on a commons – all the world was a commons when, as Locke put it, 'in the beginning all the world was America' – and progressed from owning themselves, to owning the berries they picked and ate, or the deer they had hunted, to owning land.[48]

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[47] *Ibid*., II, 26-27.

[48] *Ibid.,* II, 49. In locating the division and appropriation of land at a particular point in time, the moment when people begin bumping into one another as they pursued their livelihoods, and in linking appropriation to the infusion of labor into an object, as opposed to the earlier notions of a vague, negotiated process of consent, Locke found in the process of appropriation a moral root, see Karl Olivecrona, 'Appropriation in the State of Nature: Locke on the Origin of Property', *Journal of the History of Ideas*, Vol. 35, No. 2, Apr.-Jun., 1974, pp. 211-30, who emphasises the central role of the process of appropriation in Locke's moral thought. Walton H. Hamilton, 'Property, According to Locke', *Yale Law Journal*, Vol. 41, No. 6, Apr., 1932, pp. 867-68 links Locke's view that property comes through the infusion of an individual's labour with his view of the sacredness of human life. for the more usual view of Locke on the natural rights of property and liberty, and how he shaped American political ideas see Carl Lotus Becker, *The Declaration of Independence: A Study on the History of Political Ideas,* New York, 1922, especially Ch. 2 'Historical Antecedents of the Declaration: The Natural Rights Philosophy' (accessed from http://oll.libertyfund.org/title/1177/208846/3398548 on 4 April 2011); Merle Curti, 'The Great Mr. Locke, America's Philosopher', *Huntington Library Bulletin*, Vol. 11, 1939, pp. 107-51; Joyce Appleby, 'The Social Origins of American Revolutionary Ideology', *The Journal of American History*, Vol. 64, No. 4, Mar., 1978, pp. 935-58, 'Modernization Theory and the Formation of Modern Social Theories in England and America', *Comparative Studies in Society and History*, Vol. 20, No. 2, Varieties of Modernization, Apr., 1978, pp. 259-85, and 'What Is Still American in the Political Philosophy of Thomas Jefferson?' *The William and Mary Quarterly*, Third Series, Vol. 39, No. 2, Apr., 1982, pp. 287-309; Jerome Huyler, *Locke in America: The Moral Philosophy of the Founding Era*. Lawrence, Kans., 1995. Other scholars see the *Treatises of Government* as essentially political essays, concerned mainly with the battle to assert individual – to be precise, landed individual's rights in opposition to the crown, as in, for example, Judith Richards, Lotte Mulligan, John K. Graham, '"Property" and "People": Political Usages of Locke and Some Contemporaries', *Journal of the History of Ideas*, Vol. 42, No. 1,

The sense of permanence of tenure that pervades Cantillon's picture of a well-ordered society (one that happens to look so much like the French *ancien regime* in which he prospered), is absent in Locke's earlier discussion of property. So is any mention of a king's ultimate rights to land. Nor is Locke discussing a hierarchy of claims to property, as in Cantillon's pyramid of proprietor, farmer and labourer, although clearly such a hierarchy existed in England when he wrote and was to be established in his patron's South Carolina grant. There, in the 'Fundamental Constitutions' that Locke helped draft, the eight signiories of the colony's lord proprietors and the eight baronies they could then grant 'are to be perpetually annexed', while 'the signiories or baronies thereunto annexed must forever all entirely descend with and accompany that dignity', and 'all the children of leet-men shall be leet-men, and so to all generations'.[49] A Carolina noble might sell his manor, including leet-men, in its entirety, but could not grant portions of it 'for any longer term than three lives, or one-and-twenty years'.[50] And, of course, 'Every freeman of Carolina shall have absolute power and authority over his negro slaves'.[51] In the Fundamental Constitutions, for the same purpose of good order that motivated Cantillon, Locke sought to anchor a new society in a familiar – and fading – connection of people and land. He wrote the Fundamental Constitutions after he published his model for appropriation of the commons in *Two Treatises of Government.* What mattered to him in South Carolina was what mattered to him in *Two Treatises* when he linked property rights with human liberty: that people have a secure and permanent place on the land. Neither baron nor leet-man nor their children were supposed to move from their homes in Carolina. *Two Treatises* focuses on the apportionment of land, not its exchange.

In America, and specifically among Native Americans, Locke found a universal, permanent right of property, but only when he considered all kinds of claims to goods, not just land. For:

1981, p. 36.

[49] Fundamental Constitutions, of Carolina, March 1, 1669, sections 4, 15, 23. <http://avalon.law.yale.edu/17th_century/nc05.asp> (accessed 31 August 2011). Herman Lebovics, 'The Uses of America in Locke's Second Treatise of Government'. *Journal of the History of Ideas*, Vol. 47, No. 4, Oct.-Dec., 1986, p. 576 noted Locke's American business connection as well as his extensive references to American experience in the *Treatises.*

[50] Fundamental Constitutions, sections 18, 19.

[51] *Ibid.*, section 110.

> what would a man value ten thousand, or an hundred thousand acres of excellent land ... in the middle of the inland parts of *America*, where he had no hopes of commerce with other parts of the world … It would not be worth the inclosing, and we should see him give up again to the wild common of nature, whatever was more than would supply the conveniencies of life.[52]

Without the possibility of interaction with others and a place in a social system – Locke's 'hopes of commerce' – to own land has no value and no real meaning, then. The utility of land to people, individuals and societies, and the way land is used are what matter. One did not have to own the land, either, to have a claim on it. Locke's property also might be 'the Grass my Horse has bit; the Turfs my Servant has cut', presumably from a commons.[53] So, too,'the Hare that any one is Hunting, is thought his who pursues her during the Chase', as was a fish hauled from 'the Ocean, that great and still remaining Common of Mankind'.[54] A person might have property in the produce of a commons, without necessarily needing to appropriate the commons itself, in Locke's view. In addition, Locke suggests that there should be limits to the land any person might own: 'As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property. He by his Labour does, as it were, inclose it from the Common'.[55] A person's work on a land 'excludes the common right of other men', though Locke notes that is the case 'at least where there is enough, and as good, left in common for others'.[56]

Property need not prevent others from sharing a good, in other words. The extent of one's claims to property in a thing, particularly land, was limited as well. 'The earth, and all that is therein, is given to men for the support and comfort of their being', Locke wrote, 'yet being given for the use of men, there must of necessity be a means to

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[52] Locke, *Two Treatises*, II, 48.
[53] *Ibid*., II, 28.
[54] *Ibid*, II, 28, 30.
[55] *Ibid*., II, 32.
[56] *Ibid*., II, 27. Locke's idea that right to appropriate land are discussed in Kristin Shrader-Frechette, 'Locke and Limits on Land Ownership', *Journal of the History of Ideas*, Vol. 54, No. 2, Apr., 1993, pp. 202, 207-08, 210-11, 215, 217, while Robert Nozick, *Anarchy, State, and Utopia,* New York, 1974, pp. 174-75; C. D. Stone, *Earth and Other Ethics*, New York, 1987, pp. 212-13 argue that Locke's limitations apply only to the division of a commons.

appropriate them some way or other, before they can be of any use, or at all beneficial'.[57] Nevertheless, to go beyond the appropriation of an apple or acorn to have property in land was not a matter of absolute right or natural law (despite this common interpretation of Locke). 'Thus, at the beginning', Locke noted:

> Cain might take as much ground as he could till, and make it his own land, and yet leave enough to Abel's sheep to feed on; a few acres would serve for both their possessions. But as families increased, and industry inlarged their stocks, their possessions inlarged with the need of them ... then, by consent, they came in time, to set out the bounds of their distinct territories, and agree on limits between them and their neighbours.[58]

The roots of property in land were not found in God's command or in natural law, Locke suggested here. The law of property was human, for in a state of Nature, '[t]he enjoyment of the property he has in this state is very unsafe, very unsecure', Locke notes. 'This makes him willing to quit a condition, which, however free, is full of fears and continual dangers'.[59] People wanted a secure place on their land, so much so that they could live with tyranny. It is the modification of commons rights and not the taking of what is unowned, or some kind of natural right to what is unclaimed, that Locke discusses.[60] That message reached even to the frontier of settlement, as when school teacher Elisha Sylvester told the Pejebscot Proprietors of the Casco Bay region of Maine in 1801, that 'the celebrated Lock [*sic*] says, that he who makes any improvement to land in a State of Nature has a better claim to it than any pretended purchaser'.[61]

America and its natives forced the question of rights to land across the Atlantic World. Jean-Jacques Rousseau looked west across the ocean to ask if 'setting one's foot on a piece of common land be sufficient to claim it at once as one's own …was this enough to dispossess all the inhabitants …?'[62] But he would ask in vain. Rousseau could

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[57] *Ibid.*, II, 26.
[58] *Ibid.*, II, 38.
[59] *Ibid.*, II, 123.
[60] See Schrader-Frechette, 'Locke', p. 208.
[61] Alan Taylor, *Liberty Men and Great Proprietors: The Revolutionary Settlement on the Maine Frontier, 1760-1820*, Chapel Hill, 1990, p. 101.
[62] Jean-Jacques Rousseau, *On the Social Contract*, Book 1, Ch. ix, para 4, in *The Basic Political Writings*, Indianapolis, 1987, p.152.

contend that 'the right of first occupant, so weak in the state of nature' was confirmed 'not by an empty ceremony, but by working and cultivating it'.[63] He could argue that 'owners are considered trustees of the public good', who have acquired what they have through their compact with the whole community.[64] In the end, though, despite the elegance of his arguments for communal control of land, writers who sought ways to limit the power of kings would find, as David Hume would put it, that '[t]he convention for the distribution of property and for the stability of possession' still felt like a fundamental guarantee of social order.[65] 'We find verified in the American tribes, where men live in concord and amity among themselves ... the state of society without government is one of the most natural states of men', Hume believed. 'Nothing but an encrease of riches and possessions could oblige men to quit it'. Still 'though it be possible for men to maintain a small uncultivated society without government', Hume concluded, 'it is impossible they should maintain a society of any kind without … the stability of possession'.[66] Permanence mattered.

This mental yearning for stability of possession was not merely pragmatic. Nothing, said the great legal commentator William Blackstone, so 'strikes the imagination, and engages the affections of mankind', as a right of property that embodies 'sole and despotic dominion … over the external things of the world, in total exclusion of the right of any other individual in the universe'.[67] He was writing here of feeling and emotion, not of need or of utility. It is in imagination that the concept arises, it is passion – feeling – that it inspires. And though Blackstone started this often-quoted passage by writing about the meaning of property in things in general, he clearly seems to have property in land uppermost in his mind. He quickly added (in a rarely-cited qualification): 'There is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land'.[68] In fact, he continued, 'natural law is that the earth

[63] *Ibid.*, I, ix, 2, p. 151.
[64] *Ibid.*, I, ix, 6. P. 152.
[65] David Hume, *A Treatise of Human Nature*, Book III, Pt. ii, Sec 2, para 12 <http://www.gutenberg.org/files/4705/4705-h/4705-h.htm> (accessed 12 August 2012).
[66] *Ibid.*, III, ii, 8, 2.
[67] William Blackstone, *Commentaries on the Laws of England*, Oxford, 1758, Book 2, p. 2. <http://avalon.law.yale.edu/subject_menus/blackstone.asp> (accessed 2 December 2011).
[68] *Ibid.*, This observation is much less often quoted, as Carol Rose points out in her 'Canons of

is "the general property of all mankind … from the immediate gift of the creator … as may be collected from the manners of many American nations when first discovered by the Europeans'.[69] At the core of the desire to root oneself in a particular spot of ground, there was a gaping, if glossed-over, uncertainty. It was an uncertainty that prevailed even in the abstract world of absolutes that comprises legal commentary.

Though Blackstone held that 'the most common and usual way' of holding land is severalty, and that 'all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise', he actually has little to say about it.[70] 'He that holds lands or tenements in severalty', Blackstone wrote, 'is he that holds them in his own right only, without any other person being joined or connected with him in point of interest'.[71] Beyond a paragraph defining it, Blackstone's only other comment about severalty was to note that lands held in common can only be dissolved '[b]y uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty', or '[b]y making partition between the several tenants in common, which gives them all respective severalties'.[72] When lawyers and courts stepped in was when people share things or must divide things, though, Blackstone added 'there are some things which are in their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided'.[73] There are also 'some few things', which 'must still unavoidably remain in common', because they may only be used, but not appropriated: 'Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences'. Even some lands, such as forest or moor or marsh, which might possibly be assigned permanently to particular individuals (presumably to be held in severalty, though Blackstone did not bother to use the term) were 'frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience'. With these, Blackstone continues, because of the possibility of conflict to claim their bounty, the law 'cut up the root of dissension', giving them to the Crown or

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Property Talk, or Blackstone's Anxiety', *Yale Law Journal*, Vol. 108, No. 3, Dec. 1998, p. 603.
[69] Blackstone, *Commentaries*, Book 2, pp. 3-4.
[70] *Ibid*., p. 179.
[71] *Ibid*., p. 180.
[72] *Ibid.,* pp. 180, 194.
[73] *Ibid.*, p. 190.

its representatives, usually the lords of manors, 'steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner'.[74]

English common law, which applied to an entire nation, provided for the allotment of all land to individuals by the sovereign, as a gift of power in order to preserve social peace, in other words. In Blackstone's view, and in the view of the advocates of American rights and later American independence who so often invoked him, common law, and its view of land, applied generally because its purpose was national. Individual possession of land was a channel for the sovereign's power to touch all people, and the law relating to it touched only that aspect of land, not the use of land. That is why common law constrained the ability of proprietors of land to dispose of land with its provisions about entail and primogeniture. Use was governed by custom which, unlike common law, was local, and therefore specifically tailored to specific pieces of land. Custom, said Blackstone, to be good law must 'have been used so long, that the memory of man runneth not to the contrary', and 'though established by consent, must be (when established) compulsory'.[75] Any particular custom had to be certain, accepted and consistent with other custom, which meant any dispute over local custom almost necessarily fails the tests of acquiescence, certainty and consistency. Common law, which was written down and enforced by agents of the sovereign, met those tests and was therefore superior to custom, at least in the eyes of Blackstone and of the lawyers and judges who made their livings from the common law.[76] Since they were the men who also led legislatures, negotiated constitutions and wrote pamphlets justifying their positions, the linkage of exclusive rights of property in land with political power assumed a commanding position in the mental world of the eighteenth-century Atlantic World.

Yet the rights of ownership were constrained. 'A commoner to attend his cattle, communing on the estate' was allowed to trespass, while '[a]lso it hath been said, that by the common law and custom of England the poor are allowed to enter and glean upon

[74] *Ibid.*, p. 15.
[75] *Ibid.*, pp. 76-77, (emphasis in original).
[76] *Ibid*., pp. 68-63.

another's ground after the harvest'.[77] Although a landlord might own the land, even in severalty, a commons might overlay it – 'if the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estoves (the right of gathering firewood), this is an injury to the commoner', an injury, Blackstone decreed, for which there was legitimate redress in court. A commoner might let his cattle loose graze on the moor, a villager might glean after a harvest, as long as custom provided so and the use does not damage the property.[78] Absolute and sole dominion was an aspiration. But it was not the law. Not even Blackstone, aware as he was of the practical necessity of various commons rights and the lack of any natural basis for exclusive ownership of land, believed that.

What one writes, of course, is not always what others read. In 1725 the Rev. John Bulkley held that Locke's *Two Treatises* justified taking Native American lands – though Native Americans occupied the land, his fellow Connecticuters laboured on it, Bulkley said, and so had a higher claim.[79] Take land those Connecticuters did, as several members of the Niantic nation noted in 1743 when they complained to Connecticut's legislature that English settlers '[c]laime the Grass Say is theirs and Say they will Turn in their Cattle upon for they say we have no right only to plant'.[80] On the island of Martha's Vineyard, colonial Massachusetts' Guardians of Indians seized the pasture commons by Menemsha Pond that belonged to the 165 people of the Wampanoag village of Aquinnah, leasing it to English settlers for just £2 a year.[81] 'Defend us much more', Aquinnah's people petitioned the General Court. Although the meadows east of the Pond may have seemed to the English to be free for the taking, as they were roughly six miles by cowpath from Aquinnah itself, '[w]e would plant our gardens on (the land) that the

[77] *Ibid.*, p. 213.
[78] *Ibid.*, pp. 214, 216.
[79] John Bulkley, preface to Roger Wolcott, *Poetical Meditations,* New London, 1725, p. xii, cited in Herman Lebovics, 'The Uses of America in Locke's Second Treatise of Government', *Journal of the History of Ideas*, Vol. 47, No. 4, Oct.-Dec., 1986, p. 579.
[80] Act of 9 October 1746 and Connecticut Indian Series, Vol. 1, Document 251b, cited in John F. Hart, 'Colonial Land Use Law and Its Significance for Modern Takings Doctrine', *Harvard Law Review*, Vol. 109, No. 6, Apr., 1996, pp. 1264-65.
[81] Petition from the native proprietors of Gay Head to the Commissioners of the New England Company and to the General Court of Massachusetts concerning the leasing of Gay Head lands, 5 September 1759, Massachusetts Archives, Vol. 31, p. 634, translation in Ives Goddard and Kathleen Bragdon (eds), *Native Writings in Massachusett,* Philadelphia, 1988, Vol. 1, p. 173.

Guardians have leased out for six years', the petition continued. 'No longer do we have pasturage freely where our animals can feed, except if we rent pasturage. Previously it was not so'.[82] The taking in both cases was a seizure of commons. On Martha's Vineyard it was a seizure of a grazing commons, established on the English pattern by people who had not raised livestock before the English came. In Connecticut, it was the taking of cultivated land – the divinely commmanded use – in order to use it for what Grotius, Locke and Cantillon would have considered the inferior claim of a herder. The point here is to stress the murkiness of the settlers' concepts of abstract rights to land. What they cared about was using the land for their own benefit, not who had a right to the land. Nor were their ideas about land fixed enough yet to include any claim of ownership. They did not care who owned the land. They just wanted to run their cattle on it, just as they might have done on the moorland commons outside an English village. In a sense, all America beyond their own fields remained a commons in their eyes.

In England, too, ideas about the place of people on land remained unfixed, as two carefully organised pieces of legal theatre from the late 1780s show. The issue was the custom of gleaning (gathering grain left behind by reapers after the harvest) in the Brecklands region of Suffolk. In the first test, when a farmer (not the landowner) named Worlledge won £26 from a Mr Manning, the court based its decision on the narrow grounds that Manning had not properly demonstrated he lived in the parish and could so by custom claim the gleaning right.[83] The farmers' campaign offended the public generally, however. Even the great advocate of the movement to enclose commons, Arthur Young, was prompted to urge a more generous attitude to gleaners.[84] In 1788, the Brecklands farmers tried again, this time careful to declare that their aim was not to aside a charitable custom 'but only to prevent the poor from improperly trespassing on the farmers' fields and arrogantly assuming as a privilege, what the law of the land has

[82] *Ibid.* The six year lease may have been a deliberate attack on Wampanoag claims, for their planting and fallowing cycle ran over that length of time. Conflicts between English and Native American grazing and horticulture practices are discussed in Peter Thomas, 'Constrastive Subsistence Strategies and Land Use as Factors in Understanding Indian-White Relations in New England', *Ethnohistory,* Vol. 23, No. 1, Winter, 1976, p. 13 and in Harold W. van Lonkhuyzen, 'A Reappraisal of the Praying Indians, Acculturation, Conversion and Identity at Natick, Massachusetts, 1646-1730', *New England Quarterly*, Vol. 63, No. 3, Sept. 1990, p. 423.
[83] King, 'Legal Change', p. 6.
[84] Letter, *Bury & Norwich Post*, 7 June 1786, cited in King, 'Legal Change', p. 5.

denied'.[85] Attitude and a claim of right were the issues. The farmers were not protecting their rights as owners, for they rented their farms. They sought definition of rights of use of land.

When the shoe-maker's wife Mary Houghton, who had inherited a tiny freehold of her own, came to pick fallen grain from the field that farmer James Steel leased from Lord Cornwallis, the syndicate moved – possibly particularly eagerly since Houghton's land was a key piece in the jigsaw puzzle Cornwallis' agents were putting together to gain control of a thicket they wished to enclose.[86] In the end, three judges of the Court of Common Pleas held there was no gleaning right, while one judge held that there was. Yet even two of the three felt unease about this case, with Judge Heath hinting that his finding against the right to glean was a near thing, and noting: 'the inconvenience arising from the custom being considered as a *right* by the poor, would be infinite; and in doubtful cases, arguments from inconvenience are of great weight'. Judge Wilson, finding against Mrs Houghton, said he was 'of the opinion that the law should not interfere in this case but that every man's conscience should be the law'.[87]

There are three points to underline. First, that the suit was for trespass on a piece of land, but the issue for the judges was a property right. For some of the judges, that right was the one Mary Houghton believed she had to take grain left on the ground after the harvest. For the others, the right was to the land that Steel rented, not owned.[88] Second, the judges' prime concern was good order, and specifically (as Judge Heath

[85] Notice, *Bury & Norwich Post*, 17 September 1788, cited in King, 'Legal Change', p. 7.
[86] King, 'Legal Change', pp. 26-27.
[87] Steel v. Houghton, Report of Cases, Vol. 1, pp. 61, 64; Heath described gleaners as 'insolent poor', and noted that during the harvest they might act to enhance their later gleaning by shaking the wheat too hard as they cut, *Ibid*., p. 61.
[88] The judges' confusion of property rights in soil, in grain and to the income from the land is clear in Judge Wilson's rebuttal that: 'the subject is the scattered corn which the farmer chooses to leave on the ground, the quantity depends entirely on his pleasure. The soil is his, the culture is his, the seed his, and in natural justice his also are the profits … there can be no abandonment, while the property remains on the soil of the owner, It might with as much reason be urged, that a man had abandoned the property of his horse, who having right of common, had turned him out to pasture'. *Ibid.*, pp. 62, 64. Judge Gould, the sole member of the court to find for a right to glean, tried to find a property right in fallen grain when he cited Selden's *De Jure Naturali et Gentium* and *History of Tythes* to argue that grain left on the ground 'was vested in the poor unless they absolutely neglected the collection, and then it belonged to the owner of the field, *Ibid*., p. 55.

wrote) trying to keep neighbourhood disputes from continually coming before the court.[89] Third, that some of the judges were deeply uneasy about the implications of the legal theory that 'the nature of property … imports exclusive enjoyment', as Lord Loughborough, the chief justice, put it.[90] The decision was not defining what owning land entailed, but was about how to share a space and its resources in an orderly and efficient way. It was about people and what they did with and on the land. Ownership, per se, was not on trial in Steele's lawsuit.

Where ownership in and of itself – that is, divorced from human effort – mattered, and mattered most urgently, was as claim to income from the land. 'As soon as the land of any country has all become private property, the landlords … love to reap where they never sowed', Adam Smith noted, with the result that wood and forage 'and all the natural fruits of the earth', which might be gathered for free from a commons, now have a price.[91] This rent was not at all related to what a landlord spent to improve land, or to a

[89] In Steel v. Houghton the question before the bar was not only one of the control of land, but also which of conflicting types of law – the national common law or local custom – should prevail. 'It is our province to take notice of all general customs', said Judge Heath – that is, only the practices of the entire nation, carried out precisely the same way everywhere, *Ibid*., p. 58.The English judges' finding against a right to glean all dismissed claims of a customary basis in the Old Testament – 'the political institutions of the Jews cannot be obligatory on us', Loughborough wrote, 'since even under the *Christian* dispensation the relief of the poor is not a legal obligation but a religious duty' – in order to uphold the common law of reported, published legal decisions, *Ibid*., p. 53 (emphasis in the original). Custom aimed to broker compromise when claims to rights conflicted, public law, generally applied, created a predictable formal structure to assign, not share, rights, the judges emphasised, as when Judge Wilson wrote: 'No right can exist at common law, unless both the subject of it, and they who claim it, are certain ... if there be a *right*, there must also be a *remedy* if that right be infringed', *Ibid*., pp. 62-63, (emphasis in original). The point for the judges was to uphold a system, the common law, which they saw as essential to public order.

[90] Loughborough made clear that there were cases in which ownership did not nullify use rights, and sought as well a practical basis for the right of exclusive enjoyment when he noted 'nothing which is not inexhaustible, like a perennial stream, can be capable of universal promiscuous enjoyment' that 'there can be no right of this sort enjoyed in common, except where there is no cultivation'. *Ibid.*, pp. 52, 53.

[91] Adam Smith, *An Inquiry Into The Nature and Causes of The Wealth of Nations*, (5th edition) New York, 1905 Book I, Ch. 6, paragraph 8. From the earliest days of modern economic theory, rent and interest were defined by the social position of their recipients – landowners or merchants – rather than by their actual nature or place in an economy, leading to confusion and imprecise definition, Frank Fetter argues. Frank Fetter, 'The Relations between Rent and Interest', *Publications of the American Economics Association*, 3rd Series, Vol. 5, No. 1, Feb. 1904, p. 178.

landlord's needs but only to what a tenant could afford.[92] It was independent of the particular characteristics of a specific piece of land. It was, however, determined by the potential to change who was on the land. Rent was determined by how much a person would pay for the right to use land. The value of a piece of land now had nothing to do with the permanence of an individual's connection to it. Just the opposite, in fact.

In part, for Adam Smith, this new view of land and permanence was the result of gazing across the Atlantic (as he had to, in order to pursue his central argument in *Wealth of Nations* on the benefits of free trade). There he stumbled into contradiction about rent. In Britain's North American lands, Smith reported, '[e]very colonist gets more land than he can possibly cultivate. He has no rent … No landlord shares with him in its produce'.[93] Rent was not inevitable, and when it seemed as if people could occupy as much land as they cared to, it did not exist. How the colonist held the land, however, did not matter in Smith's analysis. The American 'gets' land, and whether that is the result of purchase, or grant or simply squatting is irrelevant. So, too, is the question of title or right to the land. It is simply got, and there is so much of it that the potential for its occupier's displacement is irrelevant.

Nevertheless, Smith did acknowledge a continuing emotional connection to land. A European smallholder, 'who knows every part of his little territory', and 'views it all with the affection which property ... naturally inspires', is because of the pleasure taken in being on the land 'generally of all improvers the most industrious, the most intelligent, and the most successful', Smith wrote. Even so, feeling for the land was no longer enough, since '[t]o purchase land is every-where in Europe a most unprofitable employment of a small capital'.[94] This made as little sense as the American pattern, where, Smith noted, when an artisan earns a profit, he does not use the money to expand his business 'but employs it in the purchase and improvement of uncultivated land'.[95] The land and the ability to root oneself on the land were what engaged the emotions and imagination. To have a place on the land gave people something – Smith believed it was an individual's autonomy, the poet Clare found other gifts – that remained valuable. For

[92] Smith, *Wealth of Nations,* I, xi, 5.
[93] *Ibid.*, IV, vii, 24.
[94] *Ibid.*, III, iv, 19.
[95] *Ibid.*, III, i, 5.

Smith, land was worth what people would pay for it.

Yet political economists felt there must be something more to value, and that there had to be inherent value that market prices reflected or moved towards. So, Jean-Baptiste Say would hold that it was in the capacity to supply goods that people needed that the real value of land might be found. America, yet again, was the case study. 'Travellers, who have explored the interior of America … make repeated mention of tracts of the richest land', that nevertheless produce nothing, he noted, adding:

> But no sooner is a colony established … or by some means or other, a market found where the products of the soil will, in the way of exchange, pay the usual rate of interest upon the requisite advances, than cultivation begins immediately.[96]

For Say, what came first was a return to capital – his 'requisite advances', in other words. Only later, as demand for farm produce grows enough to generate more than an average rate of return, does the land generate rent to its owner.[97] Land was valueless at first. It was, in fact, inherently valueless. What people earned from holding it came only after its transformation into a productive asset. The inability to see worth in land when untouched by people remained a fundamental part of the ways intellectuals of the Atlantic World thought about land.

Say's views resonated with those Americans who read his work – just as the works of Locke, Hume and Rousseau had. Thomas Jefferson, for instance, took time from his presidential duties in 1804 to write to Say, asking if his theory supported Jefferson's view that America should concentrate on farming, not manufacturing, in order to exchange American grain for European clothes and other comforts'.[98] Like Say, Jefferson saw a nation's agricultural surplus as a generator of riches. Both also believed that what Nature provided in the land itself meant little – in economic terms almost nothing – without the application of human work and capital in the form of tools, livestock and improvement to the land. The bounty of Nature had no value worth

[96] Jean Baptiste Say, *A Treatise on Political Economy,* Philadelphia, 1855, 6th edition, (1803), Book II, Ch. ix, para. 6. <http://www.econlib.org/library/Say/sayT.html> (accessed 10 January 2012).
[97] *Ibid.*
[98] *Ibid.*

payment: 'The wind turns our mill; even the heat of the sun co-operates with human industry', said Say, 'but happily no man has yet been able to say, the wind and the sun's rays are mine, and I will be paid for their productive services'. The sun and wind were, that is, a kind of commons. The difference with land was that 'Capital and industry will be expended upon it in vain, if all are equally privileged to make use of it' – not that the land's natural endowments made it worth purchasing.[99]

In fact, Say continued, there was living proof of his point – yet again, in America. The most-recently described 'savage tribes' of the northwest coast of America, 'where the land is unappropriated', barely survived on fish and game 'and are often reduced to devour worms', he wrote, while 'in Europe, where the appropriation is complete, the meanest individual, with bodily health, and inclination to work, is sure of shelter, clothing, and subsistence, at the least'.[100] His conclusion, apparently based on descriptions of the explorer George Vancouver, missed any signs of capital accumulation and wealth (such as the large, sea-faring canoes the Haida people made, the potlatch ceremonies in which they shared their surplus production, the organised military power that allowed them to take and hold slaves and the elaborate sculptures they erected in their villages). Say, as did so many, accepted without question the general perception of Native Americans summarised by such writers as William Robertson, whose oft-cited *History of America* described them as 'strangers to industry and labour ... imperfectly acquainted with the notion of property'.[101] Property-less, the Native American was 'wrapped up in his own thoughts and schemes … a serious melancholy animal', who when forced to work 'sunk under tasks which the people of the other continent would have performed with ease', wrote Robertson, secure in his assertion because he had never actually met a Native American.[102]

Robertson, who published his *History* in 1777, two years after the American

[99] *Ibid.*, II, ix, 3.
[100] *Ibid*.
[101] William Robertson, *The History of America*, in *Collected Works*, London, 1817, Vol. 9, p. 52. Robertson's was practically the only work in English discussing Columbus, the Spanish Conquest and Indians in Spanish America, says Frederick Stimson, arguing that the history influenced American nationalist and romantic writers of the early nineteenth century, particularly on the place and treatment of Native Americans; Frederick S. Stimson, 'William Robertson's Influence on Early American Literature', *The Americas*, Vol. 14, No. 1, Jul., 1957, p. 43.
[102] Robertson, *History*, pp. 62-63, 230.

Revolution started, also linked a high (and in his view inappropriate) sense of independence and equality with a lack of a concept of private property. 'In America, man appears under the rudest form in which we can conceive him to subsist', and people 'scarcely relinquished their native liberty', he wrote.[103] The Dean of Gloucester, Josiah Tucker, framing frontier disputes in terms of England's enclosure movement, declared '[t]he Savage Indians occupy no land in *severalty'* so that 'the whole Country lies before them, in the Nature of a Great COMMON'. The result, he continued, was menacing and violent, for 'it is the Invasion of this (supposed) *public Property* which furnishes them with Pretences for their frequent, bloody and scalping wars'.[104] The example of America's native peoples, like that of its colonists, helped clarify an emerging view about the land: without ownership, there was no order. Independence, whether of social norms or of the British Crown, both of which Robertson and Tucker deplored, were in their view the result of a lack of commitment to the idea of exclusive possession. It was not the idea of rights of property in land that fuelled American independence, but rather the idea that the land was for the community to share, at least for these writers – and, evidently, for those Americans who had already started heading across the mountains to begin squatting on the trans-Allegheny commons.

In the conservative view that upheld the rights of the Crown, to occupy without owning undermined order. The desire to occupy, even without owning, underpinned the view that the Crown was a burden to be shed. Seeing others losing the right to occupy, meanwhile, shocked some who were themselves unaffected by dispossession into liberal

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[103] *Ibid.*, pp. 51, 132-33. On the four stage theory in social thought, see Ronald Meek, *Social Science and the Ignoble Savage*, Cambridge, 1976; and Daniel Walker Howe, 'Why the Scottish Enlightenment Was Useful to the Framers of the American Constitution', *Comparative Studies in Society and History*, Vol. 31, No. 3, Jul., 1989, p. 577. Robertson's linkage of a desire for independence and an ideology of human equality with an *absence* of a private property concept is an intriguing counterpoint to a conventional view that it was to protect property rights that Americans sought independence; see for example Willi Paul Adams, *The First American Constitutions, Republican Ideology and the Making of State Constitutions in the Revolutionary Era*, Chapel Hill, 1980; Richard Epstein, 'History Lean: The Reconciliation of Property and Representative Government', *Columbia Law Review*, Vol. 95, 1995, pp. 591-600; Adrienne Koch, *The Philosophy of Thomas Jefferson*, New York, 1943; Jennifer Nedelsky; *Private Property and the Limits of American Constitutionalism. The Madisonian Framework and its Legacy,* Chicago, 1990.

[104] Josiah Tucker, *A Treatise of Civil Government in Three Parts*, London, 1781, p. 197, (emphases in original).

views of political and civil rights. For some, liberalism was not a product of property rights in land but grew from distaste for the power of ownership. In Cricklade, Wiltshire, William Cobbett found displaced rural labourers whose 'dwellings are little better than pig-beds', digging for frost-damaged potatoes in tiny roadside plots. 'It seems as if they had been swept off the fields by a hurricane, and had dropped and found shelter under the banks on the road side! ... In my whole life I never saw human wretchedness equal to this'.[105] While Cobbett spoke of the roadside poor of Wiltshire eating worse food than farmers slopped to their pigs, it is their place – those hovels on the verge of the highway – that stunned him. It is also that that place for them was new, that they had been displaced there from their real homes, which appalled him so. The overturning of what had been a permanent order was what had created misery, in the view of the world to which Cobbett gave voice. The displaced, and their advocates, wished to return to the traditional pattern of having a place on the land, a home to occupy, a commons to share. They did not necessarily wish to become landowners themselves.

It is striking that the riot and insurrections of the eighteenth-century English countryside did not move to demand a breaking up of estates, but focused instead on the price of grain and the mechanisms of its marketing.[106] Even at a time of armed revolt during the English Civil War the demand of such radical Levellers as Richard Everard, was not for land but simply that 'no tenure, estate, charter, degree, birth, or place do confer any exemption from the ordinary course of legal proceedings'.[107] The popular ballad of eighteenth-century Lincolnshire, 'When this old hat was new', makes clear that what the displaced people of rural England wanted was their commons:

> When Romans in this land did reign
> The commons they did give
> Unto the poor in charity
> To help them for to live ...
> The commons they are taken in
> And the cottages pulled down,

[105] William Cobbett, *Rural Rides*, 7 November 1821, <http://www.visionofbritain.org.uk/text/chap_page.jsp?t_id=Cobbett&c_id=1>
[106] E.P. Thompson, *Customs in Common*, p. 237.
[107] Richard Everard, *An Agreement of the People for a Firm and Present Peace upon Grounds of Common Right,* London, 1647 <http://www.constitution.org/eng/conpur074.htm> (accessed 13 November 2012).

Moll has got no wool to spin
Her linsey-wolsey gown.
The weather's cold and clothing thin
And blankets are but few,
But we were clothed both back and skin
When this old hat was new.[108]

Though the theorists of power and politics found a clear link between severalty and stability, and though the displaced might want to be rooted, venturers onto new lands did not always find individual ownership particularly useful or attractive. The English settlers of Rowley and Hingham, Massachusetts, for instance, allocated narrow strips of a common field of cropland to families.[109] The Praying Indians of Natick, accepting missionary John Eliot's injunction to work and farm as the English did, had 'fenced & broaken vp two great Feilds [*sic*]' for the whole community to cultivate cooperatively, in the traditional open-field system of an English manor.[110] The Natick Indians also let pigs range in common woods and cows in the meadows in the same way Puritan settlers in neighbouring Dedham did, when they complained 'that cattle in the woods have been torn by their dogs'.[111] Farther south, in the late 1760s, as Cherokee communities of North Carolina and Georgia established themselves in the booming deerskin trade with Britain, James Adair found a dual system of private plots and larger community fields in Cherokee communities of North Carolina and Georgia. There were private garden plots near dwellings from which a village headman would summon people at dawn to the communal fields with a call 'he who expects to eat must work'.[112] The American

[108] 'When this old hat was new', cited in Alun Howkins. 'Agrarian Histories and Agricultural Revolutions', in William Lamont (ed.), *Historical Controversies and Historians*, London, 1998, p. 86.
[109] Barry C. Field, 'The Evolution of Property Rights', *Kyklos*, Vol. 42, 1989, pp. 319, 333-4; David Grayson Allen, *In English Ways: The Movement of Societies and the Transferal of English Local Law and Custom to Massachusetts Bay in the Seventeenth Century*, Chapel Hill, 1981, pp. 30-38, 61-66.
[110] Dedham Town Records, Vol. 4, p. 273; van Lonkhuyzen, 'A Reappraisal', p. 425.
[111] Indian Records, 1602-1705, Vol. 30, p. 261a (1681), Massachusetts Archives, Boston. See also van Lonkhuysen, 'A Reappraisal', pp. 408-9; Virginia D. Anderson, 'King Philip's Herds: Indians, Colonists, and the Problem of Livestock in early New England', *William and Mary Quarterly*, 3rd series, Vol. 51, 1994, pp. 613-19.
[112] James Adair, *The History of the American Indians, Particularly Those Nations Adjoining to the Mississippi, East and West Florida, Georgia, South and North Carolina, and Virginia.* New York, 1968 (1775), pp. 435-37.

naturalist, William Bartram, writing of roughly the same time, reported that in the common fields, where the Cherokee planted corn, potatoes, squash and pumpkins, 'the part or share of every individual family or habitation is separated from the next adjoining, by a narrow strip of verge of grass or any other natural or artificial boundary', with some of the produce going to the household granary, but a portion of it to a common store.[113]

Setting up commons for pasture, timber and cultivation seemed an obvious solution to the challenges of an outpost economy faced by the first permanent settlers arriving in Missouri in the 1760s. For two years after the first traders arrived at the mouth of the Missouri River, they fenced in a common field; a year later, in 1767, the residents of St. Louis fenced in a second.[114] Some of the commons were simply pasture or reserves for firewood and timber, while others were cropped for hay – but some were large fields for cultivation, with mile-and-a-half-long strips within the fenced commons assigned to individuals.[115] For nearly half the year, after harvest, individuals did not have the right to exclude others from their strips, as the community used the whole field to graze its animals.[116] The Missourians 'cannot bear the idea of separation, To live in the country without a neighbour in less than half a mile is worse than death', Frederick Bates complained in a letter shortly after he assumed office as Secretary of the Louisiana Territory in 1807.[117] The American traveller, John Bradbury, complained that 'if one attempts to reason with them on the subject, their constant reply is, "As it was good enough for our fathers, it is good enough for us"'.[118] Both missed seeing what a traveller from timber-short Germany noticed right away: 'as the prairie has no timber upon it, the trouble and expense of fencing would be very considerable, they have therefore but one

[113] William Bartram, *Travels Through North & South Carolina, Georgia, East & West Florida, the Cherokee Country, the Extensive Territories of the Muscogulges, or Creek Confederacy, and the Country of the Chactaws*, Philadelphia, 1791, pp. 400-01.
[114] Testimony of Baptiste Riviere, in *Hunt's Minutes*, Vol. 2, p. 102 (typescript evidence taken in 1825 by Theodore Hunt, Recorder of Land Titles for St. Louis, Missouri Historical Society), cited in Stuart Banner, 'The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri 1750-1850', *American Journal of Legal History*, Vol. 41, No. 1, 1997, p. 68.
[115] John Bradbury, *Travels in the Interior of America in the Years 1809, 1810 and 1811,* Cleveland, 1904, pp. 259-60.
[116] Stuart Banner, 'Political Function', p. 69.
[117] Frederick Bates to Richard Bates, 17 December 1807, in Thomas M. Marshall (ed.), *The Life and Papers of Frederick Bates*, St. Louis, 1926, Vol. 1, p. 243.
[118] Bradbury, *Travels*, p. 260.

fence around the whole'.[119] Both missed the point that the Nature of a specific piece of land could dictate individual versus communal control. In Missouri, the resources of fertile bottomland, but relatively sparse timber, dictated a closed common rather than separated, individually held fields for crops. The community owned and assigned the strips each family cultivated, as well as managing access by livestock after harvest so that animals might feed and soil might be fertilized. Once the fields were sown for the next crop, livestock grazed on the seemingly endless, open commons beyond the fences. The Missouri commons were organised to efficiently tap resources of rich soil, limited fencing and vast grasslands.

Theorists seeking to redefine the relations of individual and state in the eighteenth century sought abstraction and generalisation, as theorists are wont to. They linked progress with property – though with significant qualifications as to the extent of any individual's rights of property. Theorists were careful to define limits to those rights for the same reason that some of their contemporaries would still turn to the traditional organisation of a commons as they tried to solve the concrete challenges on specific pieces of land. To ignore the specific nature of particular pieces of land in order to create a generalised theory was to neglect the interior, mental world of individuals on the land, that is, the thoughts and emotions that governed behaviour. To ignore that mental world was to forget the feeling that comes from being rooted in the land; an attachment that Adam Smith could still recall, even as he thought it silly. It made it easier to dismiss as backward the Missourians who found one fence around a shared field worked better than many fences around many fields. It made it easier for those who found inspiration in Locke, Rousseau and Blackstone to think they saw absolute principles about property – and to feel hesitant when realising that adopting those principles might create, rather than resolve, social stress. As control of what was the largest accessible commons of the eighteenth century of the Atlantic World was about to change hands, the traditional mixture of ideas about land and the proper place of people on the land was in flux. Yet the questions of what owning land really meant, whether sharing land was really possible

[119] Christian Schultz, *Travels on an Inland Voyage through the states of New York, Pennsylvania, Virginia, Ohio, Kentucky and Tennessee and through the Territories of Indiana, Louisiana, Missouri and New Orleans, Performed in the years 1807 and 1808; including a tour of nearly 6000 miles*, New York, 1810, Vol. 2, p. 55.

and what the real value of the natural endowments of land remained unresolved. How they would begin to be decided, in law and in business dealings on the North American commons, is the subject of the next chapter.

Chapter 2

Taking the land: Belief and practice on the frontier

On 3 July 1773, a frontier trader named William Murray landed his biggest deal yet in the Illinois Country. It was not just for the usual load of fur and skins or sale of dry goods supplied by his Pennsylvania principals, but for two huge tracts of land, each stretching hundreds of miles along the rivers that were the region's only real highways. For the sale of 500 pounds of gunpowder, two tons of lead, several brass kettles and enough shirts, blankets and stockings for the several dozen Kaskaskia, Cahokia and Peoria people – the Illiniwek – living around the tiny British post of Kaskaskia, all to be shared among those individuals, Murray obtained a deed to hundreds of thousands of acres stretching south along the Mississippi and up the Ohio River as well as a tract along the Illinois River from its mouth at the Mississippi to the outskirts of Chicago – roughly speaking, about a quarter of what is now the State of Illinois.[1] The commander at Kaskaskia, Captain Hugh Lord told Murray he 'should not suffer him to settle any of the lands as it was expressly contrary to his Majesty's orders', but nevertheless signed the deed as a witness.[2] When Lord later declared the sale invalid, the Illiniwek chiefs, according to Murray, 'after some deliberation' replied 'that they had sold the lands to me and my friends not for a short time, but, as long as the Sun rose and set', and declared that Murray 'had paid them what they had agreed ... and more than they had asked for'.[3] Yet thirty years later, in 1803, the next generation of chiefs of the Kaskaskia, Cahokia and Peoria would cede the same land to the United States.[4] After another twenty years, the United States. Supreme Court formally ruled Murray's title invalid.

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[1] *American State Papers, Public Lands*, Vol. 2, pp. 91, 96.

[2] Murray's abstract, is found in United Illinois and Wabash Company Memorial to Congress, 1796, pp. i-ii, and is cited in Eric Kades, 'History and Interpretation of the Great Case of Johnson v. M'Intosh', *Law and History Review*, Vol. 19, No. 1, Spring, 2001, p.81; Capt. Hugh Lord to Haldimand, 3 July 1773, *American State Papers, Public Lands*, Vol. 2, p. 97.

[3] Murray's abstract, United Illinois and Wabash Company Memorial, p. ii.

[4] Treaty with the Kaskaskia, Aug 1, 1803, 7 Stat. 78. The Kaskaskia, identified as representing all the Illiniwek, received in exchange an annuity of $1000 a year, as well as promises that the United States Governent would build a house for the chief, enclose a field and make payments toward a priest's salary and construction of a church. The Illiniwek's right to hunt on ceded lands was preserved.

Murray's deed of sale sought to fix an understanding of a changing relationship with a specific piece of land. It reflects the confusions and contradictions of each party's ideas about the use and control of land, which were ambiguities typical of the time. Some of this confusion arose because ownership of land was an idea still in flux, as the last chapter suggests, and some because the commons remained the most practical answer for people living in the Illinois Country, Much of this chapter will examine the nature of that informal, if at times unrecognised commons. Some of the confusion inherent in Murray's deed was the result of a common feeling on the frontier, which was a sense that the mere act of arrival entitled one to it.[5] The sense of entitlement to take and use what seemed due to an individual, will be a major theme here. It can be seen every time a squatter cleared a portion of the commons. It was the generator of the court battles over land this chapter examines for what they reveal about conflict and evolution in ideas of the rights to land. It was, moreover, not quite the same as the belief that work on the land earned a place on the land that was so central to ideas of the land explored in the last chapter. The sense of entitlement was a claim to land in its natural state, that is, to land that had not yet been worked on. It was a claim to potential value. And that abstraction from the actual – the particular piece of land that you in fact cultivate – to the possible was mirrored in a new type of financial instrument. Those were the land warrants for military bounty lands meant to honour a new nation's obligations to its old soldiers. Vague definitions of ownership, a belief in entitlement to land and a shift in focus to the potential of land, whether in the mind's eye of a squatter or the warrant purchased by a speculator, were the elements that let people create an idea of their place on the western commons that did not necessarily involve owning it.

The squatters did not have the most secure place. A sheriff or a judge could force

[5] This sense emerged in the earliest days of English settlement in North America, as when Massachusetts Bay governor John Winthrop declared repeatedly that the Puritans possessed their land as *vacuum domicilium* (an empty home); see John Winthrop, *The Journal of John Winthrop 1630-1649*, Cambridge, Mass., 1996, pp. 122, 283, 527. Similarly, this sense of entitlement to land can be seen in American frustration with the Quebec Act of 1774, which checked grandiose land schemes beyond the Appalachian Mountains and was a major grievance driving the American Revolution, as the Declaration of Independence notes when it charges King George III with 'abolishing the free System of English Laws in a neighbouring Province ... and enlarging its Boundaries', as well as when it complained that the king 'endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages'.

a squatter off the land. Financial paperwork embodying claims to land could be (and were) sold, and in any event were only conditional rights that had to be formally exercised, usually with an additional payment of money. A fundamental tension between feeling you had a place and feeling unsure of your place, so clear in a squatter's situation and the speculator's game, drove the lawsuits and legislative debates outlined in this chapter. That tension was reflected in the truces struck over commons rights on either side of the Atlantic that are also to be discussed here. This basic tension of hope and fear kept the conceptual frameworks defining the place of people upon the land unsettled and full of nuance – despite the blunt, concrete fact that people did settle on the land. It is the nuance that reveals the variability and mutability of the idea of severalty, the fading from view of the commons and the beginning of the path that would reduce the land into something less than what men and women had once loved.

A nuance of Murray's deed to the Illinois lands, for instance, is the role of the ten chiefs who signed the document. They are described in the text as chiefs and sachems (a term eighteenth- and nineteenth-century Americans understood as meaning paramount chief) of three peoples, the Kaskaskia, Peoria, Cahokia, together known as the Illiniwek nation. In their marks agreeing to the sale, six are named as 'a chief' of the Kaskaskia, three of the Peoria and one of the Cahokia, but none is identified as a sachem. If there were paramount chiefs as the deed suggests, their agreement is not documented. In the deed, the ten sell the land, minerals, trees, waters, rents and rights they have in the tracts, as well as those 'of all and every other person and persons whatsoever belonging to the said nations'.[6] The several petitions that Murray's partners in the United Illinois and Wabash Company, which was formed to hold the deeds, later made to Congress all insisted that Murray negotiated over extended periods, with many members of the three nations in attendance, and that eventually other individuals received shares of the goods paid for the land.[7] The time and numbers of people involved made clear that the deed

[6] *American State Papers, Public Lands*, Vol. 2, p. 97. The *Oxford English Dictionary*, 2nd edition, cites the *Relations of the Plantation of Plymouth* as defining in 1622 a 'sachim' as 'Governor of the Wampanoag'; William Hubbard's *Narrative* of 1677 describes Miantonimoh as 'the chief Sachem or Lord of the Narhagansets', and Timothy. Dwight in his *Travels in New England and New York*, published in 1821, noted 'Their principal chiefs were called Sachems'.

[7] *American State Papers, Public Lands*, Vol. 1, pp. 21-2 (1792), p. 63 (1796), p. 143 (1803), p. 173 (1804), Vol. 2, pp. 88-89, p. 91 (1810).

recorded a legitimate, valid agreement, the company said.

Yet what that agreement actually meant tended to shift each time the company elaborated on Murray's dealings. The memorials variously claim – in contradiction with one another – that the men named in the deeds were the owners of the land, or (using the archaic syntax) that 'the property of the lands in question was, at the time of purchase, in the natives', or alternatively that the ten chiefs were sovereign as 'the native lords and absolute proprietors of the soil' even if none were sachems.[8] The members of Congress who weighed these petitions at times agreed the chiefs owned the land, and at others believed the land belonged to all the Illiniwek, always questioned whether the chiefs 'were authorised by the Indian nations to make the sale'.[9] Eventually, legislators concluded that when individuals purchased lands directly from Native Americans, the results were 'frauds' and 'collision of claims', so that 'Government, at a pretty early date interfered and assumed a kind of guardianship', and banned individuals from buying land directly from Native Americans.[10] It was not clear, in other words, whether the grantors named in the deed had the ability to dispose of what they granted. It is not clear who the grantee paid. It is, in short, a deed that does not contain essential elements of a deed, and the reason was that none of the people who agreed to the document – including Murray and his wealthy backers – understood the necessary components of the kind of deals that deeds record.

Nuanced too, then, is the question of individuals' rights to land. While the United Illinois and Wabash Company argued variously that the chiefs were outright owners and that they were agents for the owners, the official United States position was that only the Illiniwek Nation could dispose of its lands, since the lands were commons that belonged to all. Yet even this view was qualified. In an 1803 treaty in which the Illiniwek ceded lands, including those in Murray's deed. to the United States, Washington agreed to pay cash annuities to the Illiniwek Nation, but also reserved its right to divide the money among families.[11] In a sense, the land was a commons, governed communally, and so the

[8] *American State Papers, Public Lands,* Vol. 1, pp. 22, 63.
[9] *Ibid.*, pp. 22, 173.
[10] *Ibid.*, Vol. 2, pp. 219-20.
[11] Treaty with the Kaskaskia (13 August 1803), 7 Stat. 78, Article 4.

Illiniwek nation could convey it, but the land belonged to families, who the United States might reimburse, if that were to become more convenient (for instance, if it suited the United States to simply dissolve Illiniwek government).[12] On the matter of what was perhaps the right most important to the Illiniwek – the right to hunt, fish and gather food on the land – Murray's deed was silent, and Illiniwek men and women continued to hunt and harvest on the land undisturbed, using what Greer might call an outer commons, or what was in fact an open commons where the resources of game seemed at the time to be more than enough for all who passed through. The 1803 treaty followed the pattern set by the first United States treaty for Ohio country land and specifically said the Illiniwek retained hunting and gathering rights on ceded land, at least until the government sold it.[13]

If the United States was unwilling to completely deny commons rights in its deal with the Illiniwek, Murray's deed also was unclear about rights to the land after the sale. Confusingly, Murray's deed declared that he and his twenty-one partners acquired the land in severalty. According to the usual definition, then, that meant the twenty-two individuals, not a company, each had separate and individual rights to possess the undivided land, and that those were not shared with any other person.[14] The apparent illogic of that, however, never ended up in court.[15] Both the United Illinois and Wabash

[12] The Kaskaskia, originally designated as the representatives of the Illiniwek, in fact did vanish as recognised nations, as did the Cahokia, while the Peoria nation remained viable, and would therefore be deported to Oklahoma later on.

[13] The Treaty of Fort Harmar with the Wyandot, Delaware, Chippewa, Ottawa, Potawatomie and Sac in Ohio (9 January 1789), 7 Stat. 38, reserved hunting rights in the first cession to the United States. So did, the Treaty with the Kaskaskia, 7 Stat. 78; the Treaty with the Sauk and Foxes, (3 November 1804), 7 Stat. 84; the Treaty with the Wyandot (4 July 1805), 7 Stat. 87; the Treaty of the Rapids of the Miam (17 September 18170, 7 Stat. 160; the Treaty with the Quapaw (24 August 1818), 7 Stat. 176; the Treaty with the Miami (23 October 1826), 7 Stat. 300. The Treaty of Prairie du Chien, with the Chippewa, Ottawa and Potawatomie in Wisconsin (29 July 1829), 7 Stat. 320, is the last treaty to include this right. In the 1830s, cession treaties typically included requirements to move to reservation.

[14] *American State Papers, Public Lands*, Vol. 2, p. 97.

[15] A general indifference to precise definition of the nuances of severalty is reflected in the fact that New Jersey and Connecticut never got around to declaring land ownership would be allodial – free of any superior claim – until fourteen and seventeen years after independence, see Act concerning Tenures, 18 February 1795, *New Jersey Revised Laws*, Trenton, 1821, p. 166; Act of 1798, Title 56, Ch. 1 Section 1, *Connecticut Revised Statutes*, Hartford, 1821. South Carolina has never overturned its 1712 law declaring that land would be held in socage. South Carolina's

Company and the United States managed to simultaneously see the Illinois Country as a shared space and as land divided up in some unspecified way among families or individual investors. And in any event, both were perfectly content to let the Illiniwek continue using the land.

Other nuances involve the pace of events, and the odd mix of haste and inaction. Though Murray said he worked on the deal through June 1773, during which 'to avoid any insidious suggestion of malignant persons, I prevented the Indians from getting a drop of spirituous liquor', he could only have done so for a short time that month.[16] (His mention of alcohol was intended to rebuff a standard objection to land deals with Native Americans, which was that they had been negotiated when one side was intoxicated). On May 15, he was still at Fort Pitt, nearly 1000 miles away, writing to his principals back in Philadelphia about a land deal on the western New York State frontier. He was eager to tell them that a British battalion was on its way to Illinois 'as they have at last found it to be the master-key to Canada', and advised, incorrectly, that Britain's Attorney General and Solicitor General had held it was legal to buy land from Native Americans.[17] 'So courage, my boys', Murray wrote, 'I hope we shall yet be satisfied for past vexations attending our concern at the Illinois. If troops are sent, we cannot fail doing something worthy of our attention'.[18] What that something might be, though, was not completely fixed. If Murray and his partners had hoped for the profits that came from settling others on land, they did nothing to further that.

There would be no rush to Illinois. The land across the Mississippi River in Spanish Louisiana was much more attractive. The governor of that territory had barred its

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socage tenure law remains on the books as Sec. 27: 5-10 of the South Carolina Code. New York State decreed in 1787 that all future land grants would be allodial, but the state did not act to break up the feudal holdings of the Hudson Valley patroons until its 1846 constitution; even so, life leases with heavy rents on those lands continued until the 1860s, Martin Bruegel, 'Unrest: Manorial Society and the Market in the Hudson Valley, 1780-1850', *Journal of American History*, Vol. 82, No. 4, Mar., 1996, pp. 1421-23.

[16] *American State Papers, Public Lands,* Vol. 2, p. 91.

[17] William Murray to Michael Gratz, 15 May 1773, in William Vincent Byars (ed.), *B. and M. Gratz, Merchants in Philadelphia 1754-1798: Papers of Interest to Their Posterity and the Posterity of Their Associates*, Jefferson City, Mo., 1916, p. 132. Murray seems to have stretched an opinion on land dealing in India, as London's instructions to Capt. Lord made clear.

[18] Murray to Gratz, 15 May 1773.

still-lucrative fur trade to outsiders, was able to maintain a government and courts (as Americans were unable to do at first in the Illinois Country), and allowed slave-holding after the North West Ordinance formally banned human bondage on American territory.[19] By 1787, General Josiah Harmer reported that there were roughly 800 French settlers, plus a small stockade of American traders still farther north in Illinois.[20] By 1800, the Census showed only 1103 settlers in Randolph County, which encompassed Murray's tract along the Mississippi and Ohio rivers, as well as the town of Kaskaskia, outside the tract.[21] That total excludes the remnants of the Native American peoples who dealt with Murray and who remained in Illinois, and who may have numbered 500 by the early 1800s, when, thirty years after Murray's deals, a new generation ceded the same lands to the United States.[22] Nobody was in a hurry to venture into the emptiness of Illinois. It was a land largely wide open for the imagination to play, a blank slate for big plans that had little to do with any actual knowledge of the land of the handful of people already there.

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[19] Arthur Clinton Boggess, *The Settlement of Illinois, 1778-1830*, Chicago, 1908, pp. 42, 53-58.

[20] Robert P. Howard, *Illinois, A History of the Prairie State*, Grand Rapids, 1972, p. 55; Boggess, *The Settlement of Illinois*, p. 51.

[21] Census of 1800. The northern two-thirds of Illinois, which included the Illinois River tract as well as the town of Cahokia, the lead-mining district around Galena, all of Wisconsin and the Michigan Upper Peninsula, numbered 1255. Most of the land along the Illinois River was prairie and was not settled before 1830.

[22] Emily Blasingham. 'The Depopulation of the Illinois Indians, Part 2, Concluded', *Ethnohistory*, Vol. 3, No. 4, Autumn, 1956, p. 372. President Thomas Jefferson, in dispatching William Henry Harrison to the west to negotiate land cessions, contended that the United States had title to land of extinct tribes, adding '[t]he Cahokias having been extirpated by the Sacs, we have a right to their lands in preference to any Indian tribe, in virtue of our permanent sovereignty over it'. He also claimed for the United States the 'strip along the southern bank of the Illinois River (that is, the Illinois and Wabash Company's tract) ... because it was the property of the Peoria Indians who had become extinct'. The Kaskaskias, Jefferson added, were 'a few families, exposed to numerous enemies, and unable to defend themselves, and would cede lands in exchange for protection', Thomas Jefferson to William Henry Harrison, 29 December 1802, 'Hints on the Subject of Indian Boundaries, Suggested for Consideration', in *Writings of Thomas Jefferson*, Washington, 1917, Vol. 17, p. 375. Harrison, in negotiating the Illinois cessions, apparently dealt only with Jean Baptiste Ducoigne's band of the Kaskaskia, a people that numbered with just thirty adult men in 1796. His treaty describes itself as being with 'the head chiefs and warriors of the Kaskaskia tribe of Indians so called, but which tribe is the remains and rightfully represent all the tribes of the Illinois Indians, originally called the Kaskaskia, Mitchigamia, Cahokia and Tamaroi', though the only two of six signers for the Kaskaskia with names in an Illiniwek language, Ocksinga and Keetinsa, are described as a Mitchigamia and Cahokian respectively, Treaty with the Kaskaskia, 13, 7 Stat. 78.

Where Murray and his backers were slightly more active was in politics. In 1774, Murray won the support of Virginia's royal governor, Lord Dunmore, for Illinois land ventures by allowing him to participate in purchasing two tracts along the Wabash River.[23] In 1787, fourteen years after the United Illinois and Wabash Company thought it bought the land, it moved to confirm the transaction by getting an affidavit from Kaskaskia resident Bernard Tardiveau saying he had seen deeds and that 'the Inhabitants of that Country speak of the said Purchase as being made in the most publick manner'.[24] In 1792, 1796, 1802, 1803, 1810 and 1816, the company petitioned Congress to confirm its claim to the land.[25] Finally, in 1822 – nearly a half a century after its first purchase – an heir of one of the company's investors sued an Indiana speculator over title to sections of land the Indianan had purchased from the government. Oddly enough, the dispute was over land that may not actually have been within the Illinois and Wabash tracts.[26] Oddly, too, it was a lawsuit in which no facts were disputed and where the defendant may have participated in drafting the complaint and in which he waived his right to require the plaintiff to post an appeals bond.[27] The lobbying, the lawsuit and the peculiar passivity of the business of the United Illinois and Wabash Company for over a half a century are signs of what economists might now call rent-seeking behaviour, which is remuneration that comes strictly from possession or political position and the power to deny access. So, too, was the way William McIntosh, a former treasurer of Indiana Territory, used his connections to acquire his tracts just before the first public sale of land in Illinois in

[23] Eric Kades, 'The Dark Side of Efficiency, Johnson v.M'Intosh and the Expropriation of American Indian Lands', *University of Pennsylvania Law Review*, Vol. 148, No. 4, Apr., 2000, p. 1082.

[24] Minutes of the United Companies, 104, 23 January 1787, cited in Kades, 'The Great Case', p. 88.

[25] *American State Papers, Public Lands,* Vol. 1, pp. 21-22 (1792), p. 63 (1796), p. 143 (1803), p. 173 (1804), Vol. 2, pp. 88-89, p. 91 (1810).

[26] Kades, 'The Dark Side of Efficiency', pp. 1067, 1091 notes that William McIntosh's tracts, the property at issue, lay outside the tracts in Illinois and Wabash deeds. The population of the four counties in the Mississippi and Ohio rivers tract was about 4400 in 1820; in the Illinois River tract, a fraction of the 1,470 people counted in Madison, Bond and Clark counties, which included portions of the tract in their far-northern fringes, Census of 1820.

[27] Kades, 'The Dark Side of Efficiency', pp. 1092-93, citing National Archives Microfilm Series 216, Roll 1, frames 420-21.

1815.[28] The company and McIntosh argued over paper claims to future profits, two deeds on the one hand, some Land Office patents on the other.

This is the most important nuance of all. Both the slow pace of the company's actions, and its focus on politics show the business of the United Illinois and Wabash Company had almost nothing to do with the land itself. It was a business of paper, and claims, and vaguely defined possibilities. The company was content to let matters lie for years. Its business from its earliest days had been to position itself between the land and the people who wanted to live on the land. Its focus on entrenching its paper claim was intended to establish an impediment with which settlers would have to deal. That was why the place it actually did business was Washington, not Illinois. It did not bother with the marketing of land, transport of settlers or financing of land that Murray and his Pennsylvania principals already knew from their own experiences in central Pennsylvania could be profitable. Illinois was an idea; little more than a space on a map. The United Illinois and Wabash Company's effort to to secure that abstraction of Illinois for itself was one of words on paper, a conflict of ideas about the Illiniwek and the future of the west, far removed the actual work of settlers who were just barely beginning to clear fields and raise cabins in the woods of southernmost Illinois, far from the Company's lands. What Murray had in mind when he negotiated his deed was a product of that vague understanding of ownership evident in its confusing language about severalty. It was a belief in entitlement to land without work on the land and a vision of undefined possibilities in ideal land rather than what was actually to be seen on real land. It was this odd new mix of notions that was beginning to generate a new concept of connection to land. When the lobbyists for the United Illinois and Wabash Company went to

[28] McIntosh, the defendant in the appeal to the Supreme Court case was a partner with Harrison in land purchases farther up the Wabash River in 1802, before becoming treasurer of the Indiana Territory when he 'jumped in at the very beginning of residence in the new territories to acquire claims', Paul W. Gates, *History of Public Land Law Development*, Washington, 1968, p. 92. While McIntosh fell out with Indiana Territorial Governor Harrison, he had an important ally in the Kaskaskia Land Office after successfully lobbying the for Michael Jones' appointment as Register there, Michael Jones to Secretary of the Treasury Albert Gallatin, 18 May 1804 in *Territorial Papers of the United States*, Washington, 1939, Vol. 7, p. 194. McIntosh made a living brokering land deals before public sales, apparently at time 'By magnifying the difficulty of obtaining confirmations and other vile deceptions, upon those illiterate and credulous people, he succeeded frequently in obtaining 200 out of 400 acres for barely presenting the claim', a letter to *The Western World* newspaper claimed, *Territorial Papers,* Vol. 8, pp. 93-94.

Washington, they saw nothing like the poet John Clare's green fields, nor even anything like the human labour that created value for economists like Cantillon or Turgot. They saw some clever dealings that might be confirmed by some fast talking.

What the Illiniwek saw, meanwhile, was a chance for protection from enemies. They wanted, Murray wrote later, that 'I and my friends should come and settle upon the lands; that they would help to protect us against our enemies, and hoped we would do the same for them'.[29] They noted the same in their 1803 treaty with the United States Government.[30] They did not see the possibility of leaving their homeland. The Illiniwek, in fact, would retain the right to live on the land, and hunt on it, until the tiny remnants of a once-powerful people agreed in 1832 to leave Illinois and settle along the Osage River in western Missouri.[31] But until then, from the Illiniwek point of view, peace and order were a matter of defining who owned and who might use specific lands, first with the deed of sale to Murray's investors, then with a treaty between nations.[32] Mediated by the exchange of goods and money, the agreements required reiterated refinement of the rights of ownership that the parties exchanged, as occurred when the Treaty of 1818 with the Illinois tribes renewed promises of peace and protection, provided $2000 of goods and confirmed the terms of the 1803 treaty, including the hunting rights.[33] (Separate treaties with the Potawatomie, Sac and Fox would also confirm hunting and other use rights to Illinois Country lands).[34] Both the United States and the Illiniwek took care to describe

[29] Murray's abstract, in United Illinois and Wabash Company Memorial to Congress, 1796, p. iii.

[30] Article 2 of the Treaty with the Kaskaskia, 7 Stat. 78, also invokes the Illiniwek's desire for protection.

[31] Treaty with the Kaskaskia, 7 Stat. 78, Preamble and Articles 4 and 5, Treaty with the Kaskaskia and Peoria tribes (27 October 1832), 7 Stat. 403, Articles 1, 3, 5 and 7. In return for moving to Missouri, the Illiniwek received an annuity of $3000.

[32] Both the 1803 and 1832 treaties are described as being between the United States and the Illinois Indian nation, though US officials also routinely recognised the Kaskaskia, Cahokia, Michigamia and Peoria as separate peoples.

[33] Treaty with the Peoria, Kaskaskia, Michigamia, Cahokia and Tamarois, 24 September 1818, 7 Stat. 181.

[34] Treaty of St Louis (3 November 1804), 7 Stat. 84, reaffirmed in Treaty of Portage des Sioux (14 September 1815), 7 Stat. 135; Treaty with the Sauk (13 May 1816), 7 Stat. 141; The Treaty of St. Louis (with the Sioux and Chippewa, Sac and Mesquakie, Menominie, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa and Pottawatomie tribes) (19 August 1825), 7 Stat. 272, ceded all claims in the state of Illinois south of the Rock River in the far northwestern corner of the state, and specifically stated that hunting rights were limited to the territories the

Illiniwek rights to use. The United Illinois and Wabash Company, for its part, did little to exercise any right to exclude and nothing to either use or sell the land. It was as if the land had no physical realty to anyone except the dwindling numbers of Illiniwek.

Their reality, of course, mattered less and less. There was little mutual consent when Illiniwek and agents of would-be settlers met. Though the 1803 Illiniwek cession, like Murray's purchase, fixed (at least on paper) the understanding of a particular moment, it nevertheless was actually written by only one of the parties to the deal; that is, the American officials and army officers sent to negotiate for Washington. (So, too, was Murray's deed, though he did not have the power the American officers did to simply take what he wanted, had the Illiniwek rejected agreement). The 1803 cession supposedly represented a mutual movement towards a shared understanding. It in fact resulted from the negotiation of four chiefs, representing just a few dozen families, with a territorial governor who could order entire regiments of soldiers to action if he did not get what he wanted. Though the confused definitions of tenure contained in Murray's deed reflected a more even balance of potential violence, the 1803 treaty was not much clearer. If payment could go either to the Illiniwek nation as a whole or to separate Illiniwek families, who did the Americans think actually controlled the land? A stronger negotiating position did not bring firmer ideas about the nature of the deal. The point is that neither agreement reflected Illiniwek ideas about land, except for the essential one that they needed places to hunt and to find food. Both agreements grew out of the Americans' ideas. So another point is that the ambiguities in the treaty reflected still-unsettled ideas of what tenure actually involved. That was why in both agreements there were not clear answers to questions of whether the men who sold the land were owners or agent, or whether those who purchased it owned it jointly or severally. They were ambiguities not unlike those Blackstone explored in discussing private wrongs of trespass and waste in the context of property's right of sole dominion – because in Illinois, as in

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Native American nations retained north of the Rock River. All the nations' peoples were to be free to hunt anywhere in those lands; apparently, the US negotiators hoped that agreement would end the conflict among the peoples of the upper Mississippi River valley that the treaty was supposed to resolve. As a practical matter, many Sac continued to live in Illinois until the Black Hawk War of 1832, and their cession of all rights to lands east of the Mississippi River in the Treaty of Fort Armstrong (21 September 1832), 7 Stat. 374, Article 1.

England, people continued to use the commons. Uncertainty about that right of sole dominion was a trans-Atlantic phenomenon, rooted in a shared system of law and of commerce.

In a new country, the source of any right of sole dominion would be particularly troublesome. Deep in the turpentine pine woods of North Carolina's Tyrell County, a settler named M'Kie took possession of two tracts in 1770, including untouched forest granted to another man nearly fifty years earlier, simply by clearing part of the land. For M'Kie, the court record makes clear, establishing a place on the land was a matter of wielding an axe and planting corn between the tree stumps. The court record also makes clear that for settlers in North Carolina, as in Illinois, ownership was not an urgent question. The Supreme Court of North Carolina would not settle the issue for another three decades, saying M'Kie's claim was more valid.[35] Even when the law moved more quickly to resolve the issue, in American courts possession was often a matter of who worked the land, rather than who had filed paperwork to claim it. Justice Jasper Yeates of Pennsylvania's highest court ruled in 1810 that Thomas Croyle established the best claim to land at the mouth of Snake Spring Creek by clearing a field there fifty-six years earlier. That work was worth more in law than the patent and land survey that the influential land operator, George Croghan, commissioned for the same territory.[36] Yeates in fact made a broader ruling than he needed to. He had the option to find for Croyle on the narrow grounds that he had never abandoned the property and time had run out for Croghan to have acted to remove him. But Yeates was moved to add that labour put into land was important. 'I have always thought the preference given to the improvers of vacant lands, beneficial to the community, and founded on the combined principles of equity and sound policy', Yeates wrote.[37] To labour on land in order to improve gave a superior right to land, that is. Even in law, where rights of ownership were most clearly defined, if not

[35] Borretts v. Turner, 3 N.C. 273, 274 (1800). M'Kie was not a party, because he had lost the land in a sheriff's sale.

[36] Lessee of Bonnet v. Devebaugh and Smith, 3 Binn. 175 (1810). Ironically, in this case, the jury earlier found against the settler's claim, though by the time of that jury trial in 1808, it would have been 34 years since Croyle had sold his farm. Croghan was the man who had joined with William Murray and his Philadelphia backers on a New York State land deal just before Murray headed west and arranged the Illiniwek deeds.

[37] *Ibid.*, 189.

declared to be absolute, the right to possess and occupy and sue came from what a person did on the land, just as in the mental world of rural England before enclosure and in the models economists constructed.

Still, settlers pressed for an even more certain foundation than a judge's sympathetic ear on which to rest their right to take and use what they took to be a commons. They had grounds for unease. 'For a few years after the American revolution, the sentiments of some of the judges of this court ... were unfriendly to settlers and improvers', Yeates had noted in ruling on the Snake Spring land. In order to be 'expressive of the general sense entertained of improvements', legislatures had to step in repeatedly to protect settlers without strictly formal paper title.[38] Even judges less inclined to favour squatters were troubled by the conflict between those who farmed and those who held paper, and sought a kind of certainty through compromise. In far western Maryland, Charles Cheney kept farming on part of his ninety-six acres of the old Conogochiegue Manor, even after his patent for the land was refused in 1767 and John Morton Jordan obtained a grant for a tract that included Cheney's place. Both men lived on their farms and cut timber in the surrounding woods for twenty seven years before Jordan sued to secure the whole of his grant. Maryland judges split the difference: Cheney could keep his enclosed fields, but the rest was Jordan's, including the unenclosed woods they had shared the use of for so many years.[40] When Pennsylvania Chief Justice William Tilghman ruled that settler John Shaw was a trespasser during twenty one years of residence and cultivation on land that another family later claimed but never occupied, he also held Shaw could keep land he had fenced, even though he was not entitled to the whole tract.[41] 'The law of possession', Tilghman ruled, 'is not

[38] *Ibid*.

[40] Cheney v. Ringgold, 2 H. & J. 87, 91 (1807).

[41] Miller and others v. Shaw, 7 Serge. & Rawle 129 (1821). Similar ruling came in an 1818 Pennsylvania state case, Hall v. Powell, as well as in federal court ruling in Philadelphia that year in Potts's Lessee v. Gilbert, 19 F. Cas. 1203. Courts also limited squatter rights to enclosed lands in Brandt v. Ogden, (Supreme Court of New York, 1 Johns. 156, (1806); Jackson ex. dem. Hardenberg and wife v. Schoonmaker, 2 Johns. 230 (1807); Davidson's Lessee v. Beatty, in the Court of Appeals of Maryland, 3 H. & McH. 594, (1797) and by the US Supreme Court in Barr v. Gratz, 17 US 213, 4 Wheat. 213. (1819). Still later, Kentucky's Court of Appeals, also limiting a squatter's claim to the enclosed portion, overturned a lower court's ruling that the whole tract belonged to a settler who had been undisturbed by an absentee claimant for more than seven

quite the same in countries long settled and thickly inhabited, and in those where lands in a state of Nature are purchased of the Government', though it still did not allow a person to stay on land another owned.[42] In Shaw's case, Tilghman said, he had 'set himself down as a settler, although he was in truth a trespasser, and nothing more', because the 1790 survey had appropriated the land to someone else.

Occupation was not enough, even though 'it is complained of, as a very hard thing, that a man who expends his time and labour on a tract of woodland, should be confined to the limits of his inclosure', and could only gain title to that after twenty one years of unchallenged possession. 'This is looking only on one side of the question', Tilghman held. 'Is it not also hard, that a man who has bought and paid for his land, should be deprived of it without consideration?'[44] In his concurring opinion, Justice Gibson agreed that purchase gave an absentee owner or speculator exclusive rights. Yet he also insisted that empty land might be claimed by labour. 'The occupant of land, seated on a part of it, clearing, ploughing and sowing other parts, and exercising acts of ownership over the rest ... shall be taken to be in possession of the whole tract', on land the state had not yet granted or sold.[45] In the Pennsylvania justices' effort to nail down a clear rule for a troubling conflict, a claim derived from labouring on the land applied only on a particular kind of commons, the wild, undivided lands of the west\. Such a claim might also stand, sometimes, where a virtual commons existed because an absentee owner left land untouched. The Pennsylvanian justices upheld the idea that finding a piece of commons could be sufficient grounds to take it for oneself. The sense of being entitled had legal validity.

Access to commons mattered to judges as well as settlers, and had significance beyond the merely economic. It touched deeper feelings of place, entitlement and nostalgia – emotions that could energise political passion. Sometimes that was why entitlement to a due portion meant being entitled to share. The Frog Pond in

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years. Harrison v. McDaniel, 32 Ky. 348 (1834) – the idea of a settlement right persisted on frontier juries and in a constrained sense even on appeals courts.

[42] Miller v. Shaw, 7 Serge. & Rawle, 134.

[44] *Ibid*.

[45] *Ibid.*, 137-38.

Newburyport, Massachusetts, a watering spot for cattle at the edge of the salt-marsh commons that the townspeople used as pasture, was in the late eighteenth century preserved as a space where youth would promenade and flirt and where the people of a new, dense-packed seaport town could remember a different landscape, of swimming ducks and darting swallows, in the words of a newspaper poet.[46] A Pennsylvanian named Blazer felt his right to fish in the Susquehanna River allowed him to break into the Dauphin County farm of one Carson 'with force and arms', where he 'trod down his grass to the value of ten dollars', and took 1000 shad from the river. Dismissing Carson's claim – which was based in large part on the fact that he had dredged a pool in the river precisely in order to take shad himself, Pennsylvania Supreme Court Justice Hugh Henry Brackenridge noted that '[w]ading up a brook … or pushing a canoe, or throwing out a hook and line, and angling for fish, would not seem a trespass … What is there to hinder me from calling a lizard's length of land my own?'[47] The people of South Carolina's Orangeburg District complained of being 'totally cut off from availing themselves of the common Rights of Mankind', when a Mr. Ferguson dammed the Edisto River for his saw-mill.[48] People along the Broad and Pacolet rivers asked the South Carolina legislature to ensure that 'every person have an equal chance [for fish] as intended by the god of nature', as mills and weirs sprouted there.[49] The rights of people and Nature itself required a commons along rivers.

Even in the huge spaces of a barely settled west, people still opted for the commons. Villagers in Cahokia, Illinois, formally reserved a commons for themselves in 1808, preserving traditional rights to pasture livestock and collect wood. At the same time, since no royal grant gave the bottomlands of the Mississippi River shore to any noble or seigneur, the villagers felt free to apportion individually-held fields for

[46] Martha J. McNamara, 'From Common Land to Public Space: The Frog Pond and Mall at Newburyport, Massachusetts 1765-1825', *Perspectives in Vernacular Architecture*, Vol. 6, 1997, pp. 81, 83.

[47] Carson v. Blazer 2 Binn. 475, 494 (1810) Pennsylvania Supreme Court.

[48] 'Petition from the Orangeburg District, on the Edisto River, General Assembly Petition August 1, 1787', cited in Harry L. Watson, '"The Common Rights of Mankind:" Subsistence, Shad, and Commerce in the Early Republican South', *The Journal of American History*, Vol. 83, No. 1, Jun., 1996, p. 13.

[49] 'The Petition of the Commissioners of Navigation on Broad and Pacolet Rivers and other citizens', 29 November 1810, 'cited in Watson, 'The Common Rights of Mankind', p. 28.

cultivation. They continued to manage their individual holdings and the commons in this way for decades: a challenge by others in their parish seeking rights to the land was rejected by the state Supreme Court as late as 1860.[50] Illinois' first state constitution, in 1818, declared that '[a]ll lands which have been granted as a common … shall forever remain common to the inhabitants … and the said commons shall not be leased, sold or divided under any pretense whatever'.[51] In England, too, commons rights inspired passionate defence. Just a few months after Mrs Houghton was fined for gathering Mr Steel's barley (in the case reported in Chapter 1), about 100 villagers from Aldham in Essex gathered at a Mr Francis' farm and 'in a tumultuous manner insisted on gleaning wheat', while Francis was assaulted a few days later when he tried to chase away another group of gleaners.[52] In Fordham, 'a great number' came onto farmer John Kingsbury's field after he ordered five women off 'and had insisted on gleaning and taking away a considerable quantity'.[53] The resistance continued long after Steel won his case: in 1799, when an Essex farmer told a village woman to stop gleaning, she refused, saying the scattered grain 'was not his property but belonged to her', returning to the field the very next day with more than thirty neighbours.[54] In 1819, *The Farmer's Lawyer* advised that the poor had a right to glean if there were 'an immemorial custom or usage in the parish', while *The Farmer's Magazine* the following year said a farmer might use force to keep

[50] John B. Hebert et al v. Francois Lavalle, 27 Ill. 448, 455 (1861). The Canadian emigrants who settled Cahokia quickly established themselves as commercial farmers supplying the fur trade; their perceptions about the value of their wheat as well as the contrast between unclaimed land in Illinois and the already-apportioned lands of New France seems to have led to a different solution to land use than settlers who came up the Mississippi River to Missouri a half century later.

[51] Illinois Constitution, 1818, Art. 8, Sec. 8. The Illinois Constitution of 1848, Art. 11, allowed commons trustees to divide and allocate commons. The persistence of French ideas about access, control and use of land is suggested by the 1820 report by Edward Coles, Edwardsville, Ill., Land Office Registrar, on his efforts to settle unclear land titles in Peoria dating 'previous to the recollection of any of the present generation'. Coles had to settle 70 claims, many based on use of land by different families in different years 'without any grant or permission from the authority of any government'. He resolved these disputes by granting title to the people who were on the land at the time. Edward Coles to Secretary of the Treasury William Crawford, 10 November 1820, *American State Papers, Public Lands,* Vol. 3 p. 478, and Edward Coles, 'Report', *American State Papers, Public Lands*, Vol. 3, pp. 480-5.

[52] Peter King, 'Gleaners, Farmers and the Failure of Legal Sanctions in England 1750-1850', *Past & Present*, No. 125, Nov., 1989, p. 121.

[53] *Ibid.*

[54] *Ibid.,* pp. 120-21.

gleaners away only before the harvest, for after that 'the custom of the country, although not strictly supported in law, would protect the intruders'.[55]

Commons rights frustrated the Pennsylvania state legislature when it decided, in 1818, to endow a new university with forty acres of vacant land just across the Allegheny River from the booming river port of Pittsburgh, and barely upstream from where it joins the Monongahela to form the Ohio River. That land, though, was part of the 100 acres that the 1783 charter for the Town of Allegheny had reserved 'without the said town ... for a common pasture', and that the state commissioners who surveyed and sold lots in the new settlement had designated 'commons to the town of Allegheny, but none to Pittsburg, and that cattle might run there'.[56] Deeds for town lots expressly gave holders 'the free use, liberty, and privilege of the said common ground'. The grant to the proposed university's trustees, the townspeople complained, would be ruinous to them, and in 1824, the year after Marshall's ruling on the Illiniwek deeds, the Pennsylvania Supreme Court agreed. Chief Justice William Tilghman overturned a legislative grant of part of a common pasture next to Pittsburgh in 1824, ruling: 'The grant of common, in this case, looked forward to future generations. Even if sufficient were left for the present lot-holders … it might be quite insufficient fifty years hence'.[57] For Tilghman, permanence of a place on land, including commons land, was still an important element in his idea of human connection to land. It is significant that this was so in the case of a judge whose job it was to uphold a common law that included both the idea of state sovereignty over land and statutory law that made it easier to buy and sell land.

A commons did not always inspire a desire to share, of course. The contentious upcountry South Carolina cotton planter John Singleton insisted on his right to ride

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[55] T.W. Williams, *The Farmer's Lawyer*, London, 1819, p. 207; *Farmers Magazine*, Vol. 21, 1820, p. 414, cited in King, 'Gleaners, Farmers', p. 139.

[56] The Trustees of the Western University of Pennsylvania v. Robinson and others, 12 Serge. & Rawle 29, 32 (1824). Centuries-old commons rights also were upheld in Briggs Thomas v. The Inhabitants of Marshfield, 27 Mass. 364, an 1830 Massachusetts case involving pastures; Inhabitants of Barnstable v. Edward Thacher & others, 44 Mass. 239, an 1841 case involving berry picking; Andrew Simpson v. Joseph Coe, 4 N.H. 301, a grazing case from New Hampshire; Rogers v. Jones, 1 Wend. 237, the 1828 case from New York on shellfish gathering discussed in the Introduction.

[57] Western University of Pennsylvania v. Robinson and others, 12 Serge. & Rawle 32.

beyond his 700-plus acres to hunt in the nearby woods and on worn out, apparently abandoned, fields. He did so often enough, apparently, to have provoked his neighbour, Edward Broughton, to forbid him with a formal notice. However, in two separate cases before the South Carolina Constitutional Court, Singleton successfully made his case that to do so was his right (though the court did order a separate trial on Broughton's complaint that Singleton told a hunting companion to shoot him). 'The forest was regarded as a common, in which they entered at pleasure, and exercised the privilege … and surely no action will lie against a commoner for barely riding over the common', Justice David Johnson ruled in the first Singleton case.[59] In deciding against Broughton's claim of trespass against Singleton two years later, Johnson reflected on the differences between England, 'where almost every foot of soil is appropriated to some specific purpose', and Carolina, where 'the greater part consists in unclothed and uncultivated forest, and a part in exhausted old fields, which have been abandoned'. In England, those who held the land needed protection from petty trespasses, while 'here, it is wholly impracticable; and I think unnecessary' since the result would be a flood of lawsuits 'destructive of the interest and peace of the community'.[60]

A New York woodcutter named Westbrook felt perfectly entitled to go on the land that had been in J.E. Hornbeck's family for eighty-two years, because after moving to Rochester in 1800, he had learned that Cornelius Hornbeck's 1728 deed allowed his neighbours to gather firewood from unfenced parts of his plot.[62] In Maine, Obadiah Call felt entitled to a part of the woods owned by the Proprietors of Kennebeck Purchase in Maine, and in 1792 claimed it by blazing the trees bordering a nearly 1900-by-1100 yard tract, erecting a shed in 1792 and later putting up a brush fence. He had no deed or grant but stripped the land of most of its timber over several years before the proprietors hauled

[59] M'Conico v. Singleton, 2 Mills S.C. Const. R 244 (1818). Singleton's 1824 will indicates he owned a 640 acre plantation and a tract of land estimated at 100 to 200 acres, as well as eleven slaves, a large plantation for the Upcountry. <http://www.afrigeneas.com/slavedata/SC-Singleton-Will-1824.html> (accessed 10 January 2013).

[60] Broughton v. Singleton, 2 Nott & McCord's R. 338, 340 (1820) South Carolina Constitutional Court.

[62] J.E. Hornbeck v. Westbrook, 9 Johns. 73 (1812) Supreme Court of Judicature of New York. The court did not agree, noting that Westbrook had in one of three trespasses crossed over a fence and agreeing with Hornbeck that the proviso in the 1728 deed had long since expired.

him into court.[63] In the minds of many, to come to a place where there was no one immediately to be seen was a license to take what the land might yield. 'Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right', Thomas Jefferson declared.[64] If Blackstone struggled, and failed, to see a natural right to hold land, his American admirers seemingly did not. In some cases, as with Singleton, that sense of entitlement was so strong that potentially fatal violence in its defence seemed perfectly appropriate. This was a view that, taken as far as Singleton took it, could see the world beyond one's own land as a commons free to be used. In combination with the ambivalence about rights of ownership, this feeling of entitlement to take land for oneself had a profound impact. Those venturing into the great commons beyond the Appalachians simply did not question that they had had a natural right to occupy land.

At the same time, however, many of those moving west had a clear sense that there were, or ought to be, limits to the land (if not the wood or game on land) that people could take. The speculators snapping up land warrants might try to make real estate empires, but in western Pennsylvania's Monongahela Valley in the 1770s, for instance, settlers considered individual holdings of more than 400 acres to be a wrongful seizure of land, Joseph Doddridge recalled. 'My father, like many others, believed that having secured his legal allotment, the rest of the country belonged of right to those who chose to settle in it', Doddridge wrote, many years later. Though his father had the right to claim 200 acres of vacant land next to his farm, and even had a warrant to do so, 'his conscience would not permit him'.[65] For Dodderidge's father and his neighbours, a right to land was based on the use of land. If you could not use it, then it was not yours.

This frontiersman's notion was a view still more widely shared where there was no longer land for taking, but where there was, perhaps, not quite enough land to go

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[63] The Proprietors of Kennebeck Purchase v. Obadiah Call. 1 Mass 382 (1805) Supreme Court of Massachusetts, Kennebeck. The court held Call owed the proprietors for the timber he took.

[64] Thomas Jefferson to James Madison, October 1785 (no date given), in *Papers of Thomas Jefferson*, Princeton, 1950, Vol. 8, p. 682.

[65] Joseph Dodderidge, *Notes on the Settlement and Indian Wars of the Western Parts of Virginia and Pennsylvania, from 1763 to 1783, inclusive: Together with a View of the State of Society, and Manners of the First Settlers of the Western Country*, Albany, 1876, p. 133.

around. The Scots pamphleteer, William Ogilvie, declared that 'the earth having been given to mankind in common occupancy, each individual seems to have by nature a right to possess and cultivate an equal share'.[67] Thomas Paine, the great agitator for American independence, elaborated that the right to occupy land and cultivate it did not include a right to stake out land as one's property in perpetuity, for 'neither did the Creator of the earth open a land-office, from whence the first title-deeds should issue'.[68] All people had a right to 'natural property ... such as the earth, air, water', Paine declared, for 'the earth, in its natural, uncultivated state was, and ever would have continued to be, the common property of the human race', as, he noted, Native Americans understood.[69] Though Native Americans, Paine believed, did not farm, made little and missed out on the intellectual world of the arts and sciences, they did not 'suffer those spectacles of human misery which poverty and want present to our eyes in all the towns and streets of Europe'.[70] If it was possible to have too much land, and if having too much meant having more than any one family could farm, then the property right that mattered was not a right to own, but rather a right – that ancient and traditional right – to use. Against the idea of ownership and entitlement, the old idea of a place earned by work on the land still had a powerful hold on the mind. So did the idea that the duration of that right depended on continuing to cultivate land.

Hard work was moral, uncultivated land was wasteful, and no matter what a judge might say, most settlers and many of those who dreamed of the west believed it was labour that gave title to land. On the other hand, old ideas about work and rights to land were formed in an old country, and defined a continuing relationship of people and the land. Without formal rules, how did one establish a right to new land – except, perhaps, by taking it? 'Our ancestors', wrote Thomas Jefferson, 'who migrated hither, were farmers, not lawyers', and (lawyer Jefferson continued) if there were no law allowing them to settle on empty land, it was natural justice that a settler 'may appropriate to

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[67] William Ogilvie, *An Essay on the Right of Property in Land*, Glasgow, 1781, p. 11.

[68] Thomas Paine, *Agrarian Justice*, Paris, 1797, Para. 14. <http://www.gutenberg.org/files/31271/31271-h/31271-h.htm> (accessed 1 February 2012).

[69] *Ibid.*, para. 14.

[70] *Ibid.*, para 3.

himself such lands as he finds vacant, and occupancy will give him title'.[71] The ease with which would-be settlers felt they could simply take a farm often swept aside any questioning. At times even the people whose commons they took seemed not to mind.

As a young man, the doctor and naturalist Gideon Lincecum had trekked for twelve days through the dense woods west of Tuscaloosa, Alabama, in search of his own place in 1818, when 'delighted with the appearance of the low bluff and the canebrake', he abruptly decided he had found a new home.[72] Within three days, he'd put up a cabin, before burning the reeds and scrub from six acres, planting corn between the stumps, and waiting for a fine group of 150 bushels.[73] He traded with the nearby Choctaw, who did not contest his right to be there. 'Cut off from the law, we were there 18 months before we saw an officer of any kind', he remembered, and until the day a dozen years later when he finally sold his farm for $200, nobody challenged his title (futile as it would have been, as the state legislature had by then assigned him to appoint the county's first justices of the peace).[74] There was, however, something in Lincecum's notion of a right to take that canebrake that was not like the plans of the United Illinois and Wabash Company or the schemes from a few years earlier of multi-million-acre land grants, such as Benjamin Franklin's Vandalia or Richard Henderson's Transylvania Company. The difference was that for the people like Lincecum, who actually went to the land and saw it, it was their willingness to work the land that generated the idea that they had a right to be there. They took one step more – to decide they were willing to work on the land – than did the more grandiose dreamers. The plans of a Franklin or Henderson involved sending others out to work, and pay for, their land. Yet the idea of a right that Lincecum and his fellow squatters formulated was also not quite what Locke saw when he wrote of the infusion of labour creating property rights in a thing or in a portion of land. The additional step that made Lincecum's notion of his right to land different than Locke's

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[71] Thomas Jefferson, *A Summary View of the Rights of British America*, 1773, para. 20 <http://avalon.law.yale.edu/18th_century/jeffsumm.asp> (accessed 15 January 2012).

[72] Gideon Lincecum, 'The Autobiography of Gideon Lincecum', *Publications of the Mississippi Historical Association*, Vol. 8, 1904, p. 469. Lincecum's father had moved the family a half dozen times already, sometimes buying, sometimes squatting on land in South Carolina and Georgia.

[73] *Ibid*., pp. 471-72.

[74] *Ibid.*, p. 474.

was not actually labour. Instead, it was that he intended to labour. Willingness to work was an idea, not an act. From that idea squatters constructed the larger idea about their place on the land. It was an idea about a right to take, in addition to a right to continue to hold. To take, was a thought, while to hold, was action – the continuing work of cultivating your land.

At the same time though, some sought an even easier way. Instead of the physical work of burning a canebrake or chopping down trees, yet another idea would provide a path: the conditional promises of finance. If for thousands of settlers, and perhaps tens of thousands of who thought of migrating but who never quite dared, the lands beyond the mountains seemed free for the taking, to their government, western lands looked like potential revenue. Squatters interfered with that, but the government lacked the armed forces or the political authority to remove them. Dissatisfied with the result of wholesale transactions disposing of hundreds of thousands of acres at a time, American officials turned to new financial instruments – essentially, primitive derivatives – that in concept allowed settlers to claim land for little or nothing, with full payment later should things work out.[75] Here, the notion of willingness to work that engendered a right to take land had, in theory, concrete form. Here, too, the dreams of wealth from vast holdings that others farmed could also seem more real – at least on paper.

As with other derivative instruments, speculators quickly seized upon these land warrants. The first version was the 'headrights' that the colonial government of Virginia had granted planters who promised to settle servants on the land once their indentures expired. Those rights, to fifty acres for each servant, had become irrelevant in a society that had turned to African slaves for labour. That, however, did not keep such well-off advocates of American liberties as George Mason from buying headrights and claiming

[75] The Ohio Company of Associates was unable to pay in full for its 1.5 million acre purchase of lands in southern Ohio in 1785, but even the 964 000 acres it ended up with after managing only the first of seven $500 000 payments owed weighed on the land market for many years, while Rep. John Cleves never paid for the million acres the government sold to him in 1787. In the end, he gained title in 1794 to 248 000 acres with a payment of $70 455 (face value) of deeply discounted government securities as well as warrants for military bounty lands he had acquired, George W. Knepper, *The Official Ohio Land Book*, Columbus, 2002, pp. 28-29, 30-31. Sales by such speculators hindered the government's General Land Office from realizing its $2 an acre, 640-acre minimums. Malcolm Rohrbough. *The Land Office Business, The Settlement and Administration of American Public Lands, 1789-1837*, New York, 1968, p. 22.

'strict Right' to 50 000 acres of Ohio Valley lands, a claim rejected by the Executive Council of the colony in 1774.[76] Similarly, Patrick Henry bought the bounty rights to land granted to veterans of the Seven Year's War by Governor Dunmore (who himself would speculate by buying into William Murray's Wabash Company and its 1775 land purchase in that western river valley).[77]

During the American Revolution, Virginia took the additional step of selling warrants directly in order to raise money. Like its colonial headrights, the warrants established a claim to an unspecified tract of land. Like a modern derivative instrument, such as a futures contract or currency swap, they required additional payment in order to be exercised. They were conditional claims: in a sense, an idea about an idea. By the end of the war, Virginia issued about 4000 warrants for 1.3 million acres, with one shilling, two pence securing a claim to 1000 unspecified acres, a far smaller sum than outright purchase of distance land.[78] The conditional nature of the claim did not bother the speculators who ventured into the game. Patrick Henry gambled £40 on warrants for 10 000 not-yet located acres, even as he opined that £10 for 100 acres of well located Kentucky land was too little.[79]

The result was chaos – and, in effect, the creation of fictional land. By 1780, John Floyd, an agent for a group of Virginia warrant buyers, warned that warrants already in hand were 'sufficient to cover all the vacant land of a tolerable quantity' around the Falls of the Ohio (now Louisville, Kentucky). He reported that an additional 1.6 million acres had not even been recorded, which was the first step of four steps needed to use the warrants to turn a claim to land into possession.[80] At the same time, Virginia's legislature (pushed by Jefferson) in May 1779 authorised the grant of settlement and preemption rights, allowing people who had built a cabin beyond the mountains rights to buy up to

[76] Woody Holton, 'The Ohio Indians and the Coming of the American Revolution in Virginia', *The Journal of Southern History*, Vol. 60, No. 3, Aug., 1994, p. 472.

[77] *Ibid.*, p 471.

[78] Isaac Harrell, 'Some Neglected Aspects of the Revolution in Virginia', *William and Mary Quarterly*, 2nd series, Vol. 5, No. 3, Jul., 1925, pp. 159.

[79] *Ibid.*, p. 164.

[80] John Floyd to William Preston, May 5, 1780, cited in C.H. Laub, 'Revolutionary Virginia and the Crown Lands (1775-1783)', *William and Mary Quarterly*, 2nd Series, Vol. 11, No. 4, Oct., 1931, p. 311.

1400 acres at discounted prices. It was also at this time that the legislature re-enacted the lapsed ban on individual purchases from Native Americans.[82] The political import of the 1779 land laws was (as US Supreme Court Chief Justice John Marshall insisted decades later when considering the Illiniwek deeds) a declaration of sovereignty over the land – but in selling mere rights to unlocated lands, Virginia had in effect created an abstraction of land, fungible with other financial assets and divorced from any of the features that made any one tract of land more or less valuable than another. The warrants were as much an idea as was money itself, and the land to which they laid conditional claim was a mere notion, as well.

The disconnection between any particular piece of land and the financial instrument allowed Virginia to issue warrants for thousands more tracts of Kentucky land than actually were available, or so believed George M. Bibb, who as a lawyer in Lexington and later a judge on the Kentucky Court of Appeals regularly had to sort out conflicting claims.[84] Kentucky's legislature complained that the state's people had been 'continually alarmed' by speculators, whose claims served 'eventually to cast out naked on the world, numerous well settled and industrious families'. It enacted a law declaring that squatting farmers who paid taxes on their land could get clear title if nobody challenged their possession for seven years.[85] Seven years of taxes amounted to far less than the purchase price of land, of course. The legislature went further to constrain absentee landowners, with legislation in 1812 that said when improvements accounted for more than three-quarters of the value of property when assessed for taxes the settler could stay on a farm by posting a bond that promised to pay the value of the raw land.[87] Legislation in 1820 said settlers did not even have to do that, and could not be charged rent until the landowner paid for the value of improvements.[88] It was overturned in a series of decisions, including a US Supreme Court ruling holding that the common law

[82] Stephen Aron, 'Pioneers and Profiteers: Land Speculation and the Homestead Ethic in Frontier Kentucky', *Western Historical Quarterly*, Vol. 23, No. 2, May 1992, p. 191.

[84] Paul Gates, 'Tenants of the Log Cabin', *Mississippi Valley Historical Review,* Vol. 49, No. 1 (June 1962, p. 4.

[85] *Acts of Kentucky, 17th General Assembly*, Frankfort, 1809, p. 85.

[87] *Acts of Kentucky, 20th General Assembly*, Frankfort, 1812, p. 117.

[88] *Acts of Kentucky, 29th General Assembly*, Frankfort, 1820, pp. 148-151.

and overriding principles of equity require that trespassers pay landholders any profit earned during an illegal possession. In response, Kentucky's legislature defiantly declared 'Property rights were not absolute, above limitation', citing tax laws, laws requiring improvements on land or roadwork and nuisance laws to make their point.[89] The legislature had already abolished the state Court of Appeals in 1821 because it would not enforce the stays on debt collection and foreclosure that the legislature had enacted.[90]

To recap, the root of Kentucky's legal revolution was virtual land created by the flood of paper – grants and warrants – that had no clear and unconditional tie to actual pieces of land. The notional claims to this virtual land often clashed with one another, as well as with the claims settlers had established by virtue of other ideas: that land could be taken because of willingness to work and actual use of land secured a continuing place on it. Inaccurate surveys and multitude of overlapping land grants in the new west put one of the most basic necessities of all, a place to live, at risk in a venue, the courthouse, where many felt lost and 'dare not assert their rights, from a fear of being obliged to pay considerable indemnifications', as traveller François Michaux reported in 1802.[91] People often felt they remained only most uneasily and uncertainly upon the land. Still, they stayed. An idea stronger, or at least more basic, than the formal requirements of law tied them to their homes.[92] The idea was the idea of home itself.

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[89] *Acts of Kentucky, 30th General Assembly*, Frankfort, 1821, pp. 45-46.

[90] Gates, 'Tenants of the Log Cabin', p. 15.

[91] François A. Michaux, *Travels to the Westward of the Alleghany Mountains*, London, 1805, p. 201, cited in Gates, 'Tenants of the Log Cabin', p. 5. By 1779, authorities in Kentucky confirmed title to more than 4.3 million acres based only on settlement and improvement. C.H. Laub, 'Revolutionary Virginia and the Crown Lands', p. 310.

[92] The clash of settler and speculator elsewhere prompted similar, if less dramatic moves to protect the people actually on the land. Settlers with uncertain title, and no title at all, won protection in Tennessee's first state constitution, where Section 31 of its Bill of Rights declared 'that the people residing south of French Broad and Holsten between the Rivers Tennessee and Big Pigeon are entitled to the right of Preemption and Occupancy of that tract'. Constitution of Tennessee of 1796 <http://teva.contentdm.oclc.org/landmarkdocs/transcripts/90.transcript.pdf> 1796 (accessed 10 December 2012). In that new state, where fewer than half of adult men held secure enough title to land to pay land tax, the legislature also tackled the issue of overlapping or conflicting claims and surveys by declaring anyone who lived on a tract for seven years – one third the time Pennsylvania required – and had a deed had a perfect title; 'Act of October 28, 1797', *Laws of Tennessee, Including Those of North Carolina, 1715-1820*, Knoxville, 1821, Vol. 1, pp. 612-15. See also Lee Soltow, 'Land Inequality on the Frontier: The Distribution of Land in East Tennessee at the Beginning of the Nineteenth Century', *Social Science History*, Vol. 5, No.

Even so, a new framework for visualising other western lands, the grid of square-mile sections dictated for the North West Territory by the Land Ordinance of 1785, created yet another new abstraction. It tended to turn land into uniform squares, generally worth the floor price of $2 an acre ($1.25 after 1820). All land, that is, was the same. Land was described only by a number like a street address, which allowed a buyer hundreds of miles away to find where it was without ever seeing it or knowing anything about its soil, its timber or topography. The aim was to make it easier for the United States Government to sell western land. The effect was that a buyer need not have any idea of what the land was like. At the same time, the land ordinance allowed ex-soldiers to assign their warrants for military bounty lands, even by selling that paper.[93] Financiers quickly saw opportunity. Correspondence of the land company promoters in Ohio suggests they saw dealings in Revolutionary War veterans' warrants for military bounty lands as transactions similar to trading in federal, state and foreign bonds, as well as notes and bills of companies and of individuals.[94] Land bounties to soldiers who served in the War of 1812 also became mere securities. They were derivatives of the underlying transaction of actually taking possession of land. The warrants – rights to land in designated Military Tracts in Illinois and Missouri – could be presented at the General Land Office which, through a drawing of lots, would assign a half or quarter-section. Intended as both an inexpensive pension for soldiers and as a tool to distribute western

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3, Summer 1981, pp. 276-78. Such title by occupancy held, even if an absentee owner had an earlier deed and said squatters turned off their land were entitled to be paid for any improvements they had made. Vermont and Virginia enacted laws allowing settlers to preempt paper claims; *Laws of Vermont to 1807*, Randolph, 1808, Vol. 1, pp. 204-8; *Hening's Statutes at Large*, Richmond, 1821, Vol. 9, p. 349. In 1807, the US Congress formally granted land to some 2500 squatters in northern Alabama, R. S. Cotterill, 'The National Land System in the South: 1803-1812', *The Mississippi Valley Historical Review*, Vol. 16, No. 4, Mar., 1930, p. 501, and in 1813, allowed Illinois Territory squatters to preempt absentee holders' claims by buying up to 160 acres around their cabins, 'Act of February 5, 1813', 2 Stat. 797. In the months after the Kaskaskia Land Office survey was finished in 1814, some 165 squatters bought their farms, the following year, more than 640 followed suit. Squatter purchases are calculated from the $53 000 in preemption sales reported at Kaskaskia in 1814 and the $207 000 reported in 1815 in Arthur H. Cole, 'Cyclical and Sectional Variations in the Sale of Public Lands 1816-1860', in Vernon Carstensen (ed.) *The Public Lands: Studies in the History of the Public Domain*, Madison, 1969, p. 234.

[93] *Journal of the Continental Congress*, Vol. 28, pp. 375-377, 380 (20 May 1785).

[94] Archer Butler Hulbert, 'The Methods and Operations of the Scioto Group of Speculators', *The Mississippi Valley Historical Review*, Vol. 1, No. 4, Mar., 1915, p. 508.

lands broadly, the warrants instead became vehicles for speculation. Numbered squares of land, conceptually identical because of their shape and price, embodied claims to unspecified squares of land that generated ideas about land that had little to do with a desire for a home or a hope for the rewards of a harvest of grain. So, too, did land warrants that could be bought and sold hundreds of miles away from the Military Tracts themselves.

Actual sales of government land across the west were relatively modest, peaking at just under 582 000 acres in 1805 – equivalent to just 3637 quarter-section homesteads of 160 acres each, assuming no speculative buying of large tracts, which was common.[95] General Land Office sales would not exceed that, generally ranging between 275 000 to 500 000 acres a year until the War of 1812 ended, when in 1814, it sold just under 1.2 million, or the equivalent of 7296 farmsteads, across the entire west, but mostly in Ohio.[96] For perspective, it is worth recalling that the population of the territories and states where the Land Office operated was 375 000 in 1810 and 1 037 000 in 1820.[97]

The people who headed west accounted for about five percent of the nation's population in 1810 and about a quarter of its net growth between 1810 and 1820, were not buying land, though they were clearly on it. The abstractions created by the grid of squares and the conditional claims of warrants had little appeal to those who wanted to plant themselves on land, even if they could, in theory, have made that planting easier. The claims that settlers made on the land were derived from their work upon it, planting fields, cutting timber and building homes. They occupied and possessed land, but they did not necessarily own it and they often did not purchase it. Ownership was not as fundamental as presence on the land and use of it.

The settlers' way of understanding their place on the land can be seen by looking beyond their homesteads and cornfields. Their claims to land also included some that in a sense their livestock made, as those animals ranged freely beyond cultivated fields into

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[95] Malcolm Rohrbough, *The Land Office Business, The Settlement and Administration of American Public Lands, 1789-1837*, New York, 1968, p. 48. The calculation of the potential number of farmsteads is mine.

[96] *Ibid.*, pp. 59, 61.

[97] *Historical Statistics of the United States, Colonial Times to 1970*, Washington, 1975, Pt. 1, pp. A195-209.

commons of forest and prairie. In addition, westerners who hunted and fished and trapped furs also had a kind of claim to land. Even back east, ownership seems to have been far from universal and not really necessary to securing a place on the land. In Virginia tax rolls from 1787 show half to three quarters of free males were landless, even when town dwellers are excluded, while seventy percent of free males in Prince George's County, Maryland, were tenants.[98] Nor did men necessarily gain freeholds by venturing to the agricultural frontier: a generation after Virginia's Shenandoah Valley opened to settlers more than half of free families there were tenants.[99]

It was possible to have a place on the land without owning it. For the more than one million people on the western fringe of the Atlantic World who took their portions of the great commons beyond the Appalachians in the first two decades of the nineteenth century, actual occupation mattered more than formal ownership. They took land often enough without the formality of purchase because they felt entitled to it – entitled to it by an idea. Some land they held as their homesteads, exclusive to them; much, they used as commons. Yet if possession was something they earned through their work in making farms in a wilderness, their belief that they had an entitlement to take land came first. The acts of arriving and finding a place entitled one to take it, as did the intention of working on it. There was a fundamental conditionality to their initial claim to land, and it was based on their potential to change the land and to make something different of it. Conditionality was reflected, too, in the new device of land warrants used by Revolutionary Virginia to raise money, by the new federal government as a way to reward soldiers it could not afford to pension and by financiers as a vehicle for speculative trading.

Land reduced to paper or speculative possibility was – and is – a concept that fit uncomfortably with the notion of a real individual's real connection with a real piece of land. So, too, is land seen only for its potential, since such potential is not what is actually

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[98] Jackson T. Main, 'The Distribution of Property in Post-Revolutionary Virginia', *Mississippi Valley Historical Review*, Vol. 41, No. 2, Sept., 1954, p. 243; S. Sarson, 'Landlessness and Tenancy in Early National Prince George's County, Maryland', *William and Mary Quarterly*, 3rd series, Vol. 57, No. 3, Jul., 2000, pp. 571-21.

[99] Robert Mitchell, 'The Shenandoah Valley Frontier', *Annals of the Association of American Geographers*, Vol. 62, No. 3, Sept., 1972, p. 475.

there, but merely a guess at what it might become. It is just an idea, as are land warrants, patents and deeds of title. These were mental constructs – Virginia's land warrants, after all, in effect created millions more acres than actually existed in Kentucky. So, too, was the idea of entitlement that led people to take land on the American commons. The desire to be rooted on that land that brought people west included mental images of farms still to be created and homes in the future, not the now. Just like the speculators buying and selling land warrants, the takers of the commons did not necessarily see the land as it was, but just an idea of what it might be. That vision left little room for any commons as it actually existed.

Chapter 3

'All has fallen to the ground': Severalty proposed, 1817-1830

The two friends, one an Army major on a peace-keeping mission, the other a would-be chief of the Sac (Sauk) nation known as The Lance, had travelled together for a few miles, against the headwinds and strong currents of the Mississippi River that sultry June morning in 1819. When The Lance decided to ease his canoe back over to the Missouri side and home, 'I gave the old man a few little things for his own family, for which he was grateful', Major Thomas Forsyth recalled months later, reporting the would-be chief's death. It was a blow to the major's efforts to keep peace along the river. On the very morning of their last journey together, The Lance had helped Forsyth calm unrest over the murder of a Sac man, by arranging a blood money payment to the victim's brothers. As they paddled together up the river, close to the Illinois shore, The Lance mentioned yet another idea. 'The old man had commenced to develop to the Sauks a plan of dividing property; that is to say, to have their lands surveyed, and each family to have a proportion according to their numbers', Forsyth reported. 'He had already made many proselytes; but with the death of the old man, all has fallen to the ground'.[1]

The Lance was a politician, if not a good one, for he never made it to those councils of his people that held the power to distribute the annuities from Washington. Still, he seems to have picked up a sense from the distant capital about the future of the western commons – the emerging sentiment that will be the focus of this chapter – and saw opportunity in repeating it to a key agent of federal policy. Even so, as the story of the Wyandot, Seneca and Delaware land dealings in Ohio and Indiana after the War of 1812 that follows will show, Americans remained uneasy with the idea that Native Americans ought to live on separated, individual farmsteads, similar to those that settlers and squatters were carving out. The idea of apportioning of land that would be urged by The Lance, as well as two United States presidents, was intended to promote stability and security. The Wyandot, Seneca and Delaware were to be the first exemplars, but Congress baulked. The effort failed because Americans were beginning to understand

[1] Major Thomas Forsyth to William Clark, 28 September 1819, *Collections of the State Historical Society of Wisconsin*, Vol. 6, 1872, p. 218.

that allotting land to individuals was no guarantee that they would stay put. A permanent place was still what most people in the Atlantic World primarily wanted in their relationship to land. When that was not assured, as it could not be when all the rights of fee simple ownership were unregulated, they looked to other frameworks to define connections to land, including the commons. In the end, the Wyandot and the other Native American peoples of Ohio and Indiana would have a commons – a much smaller commons – for the few decades they remained.[2]

The idea of securing peace by granting Native American individuals private property in land was a compelling one in the years after the War of 1812 had resolved the military threat posed to the United States by the British in Canada. 'The care of the Indian tribes within our limits has long been an essential part of our system', President James Monroe said at his second inauguration in 1821. 'We have treated them as independent nations, without their having any substantial pretensions to that rank', Monroe continued, but '[t]he progress of our settlements westward ... has constantly driven them back, with almost the total sacrifice of the lands which they have been compelled to abandon'. Justice and magnanimity demanded that '[w]e should become their real benefactors', for as so many treaties said, the President was the Great Father, he said. He proposed permanent funds to pay for schooling Native American children, for instructing Native American men in farming and to install civil government in their communities – not a gift but rather an exchange, no more than fair compensation for the land they had lost. There ought, however, to be one more element of an exchange of land for peace, Monroe said. In return, 'Their sovereignty over vast territories should cease, in lieu of which the right of soil should be secured to each individual and his posterity in competent portions'.[3] Native American nationality would end and Native Americans should become landowners, in severalty. Without Native American polities to govern the commons – for some entity has to say how a shared space will in fact be shared – the west could progress to severalty, as the President from the completely apportioned lands of Orange County, Virginia, saw matters. And with the end of Native American power to govern commons, which was a power irrelevant to individuals with exclusive rights to

[2] The smaller commons for those nations did not extend into Indiana.

[3] *Annals of Congress*, Vol. 37, p. 1509 (6 March 1821).

land, Native Americans would join the United States. Land empowered and framed participation in society.

Monroe's vision of Native American severalty was not quite the policy from the days before the War of 1812, when the British in Canada and their Native American allies still posed a serious threat to the new United States Governent's ability to control its territory south of the Great Lakes and along the Mississippi River. In the very first decades of nationhood, the handfuls of Americans who ventured west were as likely to range over the land like a Sac or Sioux hunter as they were to plant themselves as farmers – or for that matter to contemplate speculation in million-acre ventures. When Secretary of War, Henry Knox, suggested in 1789 that 'were it possible to introduce among Indian tribes a love for exclusive property, it would be a happy commencement of the business' of making peace, he did not mention land. Nor, for that matter did he mention Native American men and women in general.[4] Instead, he said, the concept of ownership, and any impulse it inspires to maintain order, 'might be brought about by making presents, from time to time, to the chiefs or their wives, of sheep and other domestic animals', adding that the British approach of handing out medals and gorgets seemed to have the desired effect. While Knox proposed sending missionaries west to teach Native Americans the ways of peaceful life, including husbandry, he did not see tilling the soil as an act that required ownership of land. Instead, he wrote: 'it would reflect honor on the new Govt, and be attended with happy efforts, were a declarative law to be passed that the Indian tribes possess the right of the soil of all lands within their limits'.[5] So, even as the United States Governent sought to encourage Native Americans to become more like their settler neighbours by going to school and church, as well as by enclosing fields in order to farm, Knox proposed that Native American communities, rather than individuals, would own land. In his proposal, Native Americans would hold land in common, and the outer bounds of their authority over their land would be set as if on a nation-to-nation basis by treaty with the United States.

After the War of 1812, as Land Office surveyors extended their grid of square-

[4] *American State Papers, Indian Affairs*, Vol. 1, p. 53.
[5] *Ibid.*, p. 54.

mile land sections westward, the logic of slotting Native Americans into that great checkerboard appealed to at least some of those politicians who still believed in the Jeffersonian idea of the yeoman farmer. 'The facility is increasing for extending that divided and individual ownership, which now exists in moveable property only, to the soil itself', President James Madison said in one of his last messages to Congress, in 1816. Doing so, he continued, would establish 'the true foundation for a transit from the habits of the savage to the arts and comfort of social life'.[6] There was, as the nation's first Professor of Economics, John McVickar, put it, evidently 'a natural prejudice, slowly overcome, that the Earth "common mother of all" belongs equally to all her children, and is not capable of individual appropriation'.[7] It was a concept to be seen, he added, 'among our Northern Indians', where 'land, though held by individuals, is the property of the nation at large', and the consequence was that 'insecurity thus attached to improvements laid out upon it, may be considered one of the greatest barriers to their civilization'.[8] As the man responsible for Native American policy, Secretary of War William H. Crawford, explained to Sen. John Gaillard of South Carolina, the President *pro tempore* of the Senate, the basic idea was that 'no man will exert himself to procure the comforts of life unless his right to enjoy them is exclusive'.[9] At about the same time, Jefferson himself, looking south from his estate at Monticello would see in the not-so-new farms of the Cherokee and in the consolidation of authority in their National Committee a confirmation of his ideal of government empowered by self-sufficient citizens – people on individual holdings.[10] It is worth noting that none of these men had spent time in a Native American community. Their ideas about how Native Americans thought about their place on the land and acted on those ideas came from books.

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[6] *Senate Journal*, 14th Congress, 2nd Session, Dec. 3, 1816, p 13.

[7] John McVickar, *Outlines of Political Economy*, New York, 1825, p. 5. For McVickar's place in early United States academia, see Gladys Bryson, 'The Emergence of the Social Sciences from Moral Philosophy', *International Journal of Ethics*, Vol. 42, No. 3, Apr., 1932, p. 310, n.12.

[8] McVickar, *Outlines of Political Economy,* p. 5.

[9] William Crawford to John Gaillard, March 13, 1816, *American State Papers*, *Indian Affairs*, Vol. 2, p. 27.

[10] Thomas Jefferson to Francis Gilmer, 7 June 1816, *The Works of Thomas Jefferson*, New York, 1905, Vol. 11, pp. 533-5; Theda Perdue and Michael D. Green, *The Cherokee Nation and the Trail of Tears*, New York, 2007, pp. 37-39. Ironically, the Committee's consolidation of authority was a process sparked years earlier by Jefferson's own efforts to push the Cherokee to cede lands in northwest Georgia.

For instance, those family plots of corn, beans and squash in Cherokee Nation lands were not held in the same way Jefferson held his own Virginia plantation. The Cherokee plots were indeed the centre of the traditional economy, since they were the source of most of the food people ate. They had been that way for a while, as Bartram and Adair described a traditional pattern that existed sixty years before Jefferson's comment. What they reported, but what Jefferson did not notice, was that the women who cultivated that land did so with exclusive rights to use a portion of what was seen as the community's land. The year after Jefferson's declared Cherokee farms proved the link between individual landholding and self government, the Cherokee National Committee's 1817 Articles of Government reiterated that Cherokee land was held in commons but with rights of exclusive use allowed.[11] Later still, the 1825 Constitution of the Cherokee Nation would make clear that the land was the common property of the nation, with only the improvements on the land belonging to the people who made them.[12] The idea of an improvement – a water well or a cleared field, for example – that was owned separately from a tract of land would not have seemed odd in a time when western state legislatures and courts were busily specifying what squatters were entitled to take with them if evicted from their farms.[13] Nor was the concept of an improvement as something separate from the land an idea that seemed incongruent to lawyers familiar with English common law and its careful delineation of what a landlord owed a tenant if a lease expired and how a tenant might transfer a lease through a will.[14]

The possibility of conflict seemed imminent when in 1817, the acting Secretary of War, George Graham's, instructions for negotiations with the Native American nations of Ohio and Indiana urged him to dictate the kind of land tenure that Madison had proposed and that the new President, James Monroe (like Graham, a member of Madison's inner circle), would adopt for his own.[15] Graham wanted to ensure the Wyandot and Seneca

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[11] *Laws of the Cherokee Nation, Adopted by the Council at Various Periods*, Tahlequah, 1852, pp. 4-5.

[12] *Ibid*, p. 45.

[13] See pp. 89, 94 *supra*.

[14] See, for example, Blackstone, *Commentaries*, Vol. 3, p. 178.

[15] George Graham to Lewis Cass, 23 March 1817, *American State Papers*, *Indian Affairs*, Vol. 2, p. 16. Graham had been chief clerk of the War Department since 1814, when Monroe was named

peoples already settled on tracts straddling both the Greenville-to-Sandusky road and the Sandusky River (the two main ways through the north-central part of Ohio) would not block settlers moving into and through the state. He sought, as well, to assure peace with the Shawnee and Ottawa on two branches of the Auglaize River, which was the main water route south from Toledo, and with Shawnee and Seneca bands in the next valley south of the Auglaize headwaters, hard by the Greenville Treaty line that had marked the border of Native American territory. If any of these peoples were to stay, conflict seemed inevitable unless they would change their ways.

Madison's idea of rooting assimilation through severalty was no longer a mere question of theory. 'The negotiations', Graham instructed, 'should be founded on the basis that each head of family who wishes to remain should have a life estate in a reservation of a certain number of acres, which should descend to his children in fee'. For those 'who do not wish to remain on those terms', the answer would be deportation 500 miles to the west – or, as Graham said, they 'should have a body of land alloted to them on the west of the Mississippi'.[16] Some elaboration that Graham did not make is critical here. First, that the possession he described was a life estate; that is, a right to be on the land for as long as an individual lived, though it was also a right that that (male) individual's children could inherit. It was, in other words, permission, not possession. Essentially, it was the same relationship a holder of commons rights in rural England had to land before enclosure. Second, the grammar is imprecise: what Graham described could be either a life interest in a certain number of acres, or an interest in a reservation of land for a community of Native Americans of a still-to-be-determined acreage. It was clear whether that would be an individual plot or a place on a commons. Third, even if Graham intended possession to mean exclusive use of a defined tract, he did not contemplate that Native Americans would have the right to sell their land. What Graham (and for that matter Madison and Monroe) wanted was farmers who were planted

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Secretary of War, while at the same time carrying out his former responsibilities as Secretary of State for Madison. Monroe formally resumed the title of Secretary of State in 1815 after minister to France William H. Crawford returned to the United States to serve as Secretary of War; when Crawford moved on to the Treasury in 1817, Graham was named interim Secretary of War.

[16] Graham to Cass, 23 March 1817, *American State Papers*, *Indian Affairs*, Vol. 2, p. 136. No treaty to this point had included a provision to deport Native Americans across the Mississippi River.

permanently on a part of territory that Native American nations controlled. This last point raises a final matter of context. Graham's instructions contemplated, for the first time, deportation across the Mississippi River for Native Americans who chose not to participate in American society on the terms of the United States Governent. The goal in Ohio was to recreate a traditional Atlantic World relationship of individuals to land based on permanent occupation and cultivation extending through the generations. That traditional tie was still the most desired connection, even among those who believed that the fundamental guarantor of liberty was to hold land.

Treaty negotiations were difficult since the heart of the matter was the cession of the last lands of the Wyandot, 'once a powerful, and still a high-spirited people', as the two US negotiators, Michigan territorial governor Lewis Cass and Ohio politician and land speculator Duncan McArthur, reported back.[17] The Wyandot chiefs accepted a tract twelve miles square – four entire townships, or enough for about 290 half-section farms – to be held by the chiefs in 'fee simple'; that is, with an absolute right to control, possess and use.[18] But the treaty also said each farm was for exclusive use by one of 192 men specifically named in an annex.[19] The treaty continued to say that the chiefs 'may, at any time they may think proper' convey land to the 192 or to their heirs, but also 'may refuse so to do'.[20] Similarly, Seneca chiefs were to have some 30 000 acres farther down the Sandusky River to be held in the same way, with the same ability (but not requirement) to convey to ninety specifically identified men. The Delaware received nine square miles next to the Wyandots, for sixteen individuals, while the treaty also provided for two tracts totalling 125 square miles on the headquarters of the Auglaize to two groups of Shawnee (called Shawnese in many documents of this time) for 173 men, and a forty-eight square mile tract on the Greenville Treaty line for 133 Shawnee and Seneca men.[21]

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[17] Lewis Cass and Duncan McArthur to George Graham, 30 September 1817, *American State Papers*, *Indian Affairs*, Vol. 2, p. 139.

[18] Treaty of the Rapids of the Miami, with the Wyandot, Seneca, Delaware, Shawanese, Pottawatomees, Ottawas and Chippeway (29 September 1817), 7 Stat. 160. The Potawatomie and Chippewa (Ojibwe) gave up tentative claims in Ohio and pledged peace, in return for annuities.

[19] *Ibid.,* Article 7, Annex.

[20] *Ibid.*, Article 7.

[21] *Ibid*., Annex.

Whether or not the chiefs conveyed the land, 'the use of the said land shall be in the said person', but if the land were to be conveyed by the chiefs to an individual, 'he may convey the same to any person whatever'. Confusingly, in addition to this unrestricted right to sell after the chiefs conveyed land, the treaty went on to say that 'any one entitled … to a portion of the said land, may, at any time, convey the same to any person, by obtaining the approbation of the President of the United States, or of the person appointed by him to give such approbation'. The unrestricted right, then, was not really unrestricted. The President's agent in that case would 'make an equitable partition' of the individual's share of unconveyed land, whatever that meant.[22] Full title, with the right to sell and move, was subject to the chiefs' collective decision to convey a parcel. Exercising the rights embodied in such a title came though petition to the President or his agent. There was neither requirement nor incentive for either to grant that capability. In the interim, or if the chiefs refused to convey, the individuals named in the treaty annex had use rights to the land. Whether those use rights were to be exclusive and for specific plots of land was unclear, for the language about equitable partition suggested the United States Governent would have to be involved, but would only do so in the case of a sale of land not conveyed by the chiefs. The basic elements of severalty were not present, in other words. The treaty said nothing about individuals' rights to specific tracts, or their rights to exclude others or sell their land. Though calling for landholding in fee simple, what the treaty described was clearly not.

The treaty contemplated other variations of tenure, too. The Ottawa were allowed the right to use 34 square miles on two tracts along a branch of the Auglaize downstream from the Shawnee, although this land was specifically not granted to them.[23] The treaty also gave land to six 'half-breeds' and eight American citizens who had married Native American men or women.[24] 'In every case, it was the urgent wish of the Indians that land should be granted to these persons', Cass and McArthur wrote later.[25] Horonu, or the Cherokee Boy, a Wyandot chief, also received a 640-acre section of land, which included

[22] *Ibid.*, Article 7.

[23] *Ibid.*, Article 20.

[24] *Ibid*., Article 8.

[25] Cass and McArthur to Graham, 30 September 1817, *American State Papers, Indian Affairs*, Vol. 2, p. 139.

his improvements. Horonu, like many of the Seneca on the Sandusky whose grant would have to be redefined because it did not include their improvements, had apparently already started farming. In all cases, the lands granted were anchored on already-established villages and farms.[26] The grants were for particular places, specified because of the work individuals had already invested in those spots. Here, too, labour infused a kind of property right into the land.

The Wyandot, Seneca, Shawnee, Ottawa and Delaware, on the other hand, were surrendering broader (and overlapping) territories used primarily for hunting. As long as they held those, their presence discouraged settlement. They presumably even posed a military threat to critically important transportation routes into the new country. Yet, as with many treaties (for instance, the 1803 treaty with the Illiniwek or the 1804 treaty with the Sac and Fox that opened the northern half of the Illinois Country to American settlement), the Rapids of the Miami treaty that Cass and Duncan negotiated affirmed Native American rights to hunt on ceded land.[27] It confirmed other use rights, noting in particular that the nations retained the right to gather maple sugar on unsold lands of the United States. Despite the conditional and confusing state of land tenure outlined in the treaty, this was not supposed to be a treaty of boundary-setting but rather one of assimilation and accommodation.

Cass and McArthur did not incorporate the directive from Graham, which was one never before included in a treaty with a Native American people and that would have required removal across the Mississippi for those who would not hold land in the American manner.[28] 'We are somewhat apprehensive that it may be supposed we have

[26] Treaty of the Rapids of the Miami, Article 8.

[27] Treaty with the Kaskaskia (1803) 7 Stat. 78, Article 6; Treaty with the Sac and Fox (1804) 7 Stat. 84, Article 7; Treaty of Fort Industry (1805), 7 Stat. 87, Article 6; Treaty with the Piankeshaw (1807), 7 Stat. 100, Article 5; Treaty of Detroit (1807), 7 Stat. 105, Article 5; Treaty with the Chippewa (1808), 7 Stat. 112, Article 5. Treaties signed with Native American nations north of the Ohio River in the first two years after the War of 1812 confirmed generally all the terms of the earlier treaties. The 1817 Treaty of the Rapids of the Miami was the first post-war treaty to specifically restate hunting rights, however. Treaties with Cherokee, Choctaw and Chickasaw peoples of Georgia, Tennessee and the Territory of Mississippi during this time did not include the language on hunting rights.

[28] While the United States granted land west of the Mississippi to some Cherokee communities in 1817, the Treaty with the Cherokee (18 July 1817), 7 Stat. 156, the first language compelling

been too liberal in the terms which we have allowed to the Indians', Cass and McArthur reported back to Washington.[29] But, they continued, '[t]he country is beautiful and valuable, fertile, well watered and handsomely situationed'. The Wyandot were 'fully aware of its importance to us and to them', as well as of the recent rise in prices of Ohio farmland as speculators cashed in their earlier bets. More to the point, Cass and McArthur continued, ceding the land 'will make it necessary for those Indians to change the manners and customs of their whole nation; from this day, they cease to be hunters, and most depend upon their own industry and the produce of their reservations for support'. It was a revolution, moreover, of which the Wyandot, Seneca and Shawnee were fully, and regretfully, aware: 'Changes in the manners and customs of nations are generally slow and gradual', Cass and McArthur wrote. 'When, therefore, we demand of the Indians an absolute relinquishment of every thing which gives zest to savage life, we must expect that this demand will be received with regret and with reluctance'.[30] The preservation of conditional rights to use commons for hunting and sugaring was a deliberate attempt to ease transition. Like the imprecisely defined allotment of lands, it suggests that all parties were trying to adjust their concepts of land tenure and use in response to one another, and were trying to avoid boxing one another in.

Mutual revision of ideas about land during the talks is likely why Cass and McArthur reported later that 'in the progress of our negotiations with the Indians, we have experienced much difficulty in adjusting the quantity, tenure, and conditions of the reservations to their and our satisfaction'. Once the treaty was signed, in fact, objectives

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removal applied to those Cherokee people who had already moved west of the river to Arkansas under the 1817 treaty, Treaty with the Western Cherokee (6 May 1828), 7 Stat. 311.

[29] Cass and McArthur to Graham, 30 September 1817, *American State Papers, Indian Affairs*, Vol. 2, p. 139.

[30] *Ibid.* The same linkage of land tenure and traditional cultural practice was also made some 300 miles to the east, when the Seneca on the Allegany Reservation debated dividing their lands; in 1817 the Council at Cattaraugus provided for it, 'in order to ensure to the said occupant & heirs' while at the time banning sales to Americans, 'Proclamation of the Seneca Council at Cattaraugus', cited in George S. Snyderman, 'A Preliminary Survey of American Indian Manuscripts in Repositories of the Philadelphia Area', *Proceedings of the American Philosophical Society*, Vol. 97, No. 5, Oct., 1953, p. 600. Gaiänt'wakê (Cornplater) objected, and the debate that followed pitted Christian converts, favoring dividing lands, and non-Christians. By the summer of 1819, Sagoyewatha (Red Jacket), chief of the Wolf clan, won a majority on the council for the removal of all Americans from the reservation 'for the avowed purpose of preserving their antient Laws & Manners', T.L. Ogden to Jacob Taylor, 10 July 1819, cited *Ibid.*

thought to have been satisfied turned out not to be. The Wyandot, for instance, thought the Americans had agreed to payments 'far exceeding any thing which is secured to them by the treaty', Cass and McArthur wrote.[31] Within six weeks of signing the treaty, a Wyandot delegation was in Washington, arguing that it left them in an unsustainable position: not enough land to support the cattle-raising life they planned.[32] There was also the problem that some Native American families, particularly among the Seneca on the lower Sandusky, had already settled on land outside the bounds the treaty had alloted.[33] Graham responded with alacrity. 'It is the wish of your father the President that the reservations which have been made for you should be sufficient to afford every Indian family a tract of good land of not less than 640 acres', he told the delegations.[34] There was simply not enough land to do that: the Wyandot tract, for instance, had enough land for no more than 144 such allotments, forty-eight fewer than needed for all claimants, even setting aside the double portions reserved for the chiefs. In the urgent desire of both sides to define their relationship to the land and to each other, some basic arithmetic was overlooked. Neither the definitions of tenure nor the numbers added up.

Graham told the delegation that the government would allow families living outside the reserved tracts to remain on lands ceded to the United States until the Land Office surveyed and began auctioning the land, 'and at the public sales any of you will have the same right to purchase as the white people'.[35] At that point, however, the right of settlers who had not bought their land to preempt claims of a later purchaser was just beginning to be established – and the right to preempt another's land purchase was not the same as the capability to do so, as that required money. It would be three years before Congress and President Monroe accepted the idea that the minimum price and parcel size

[31] Cass and McArthur to Graham, 30 September 1817, *American State Papers, Indian Affairs*, Vol. 2, p. 139.

[32] George Graham, 'Talk Addressed to the Wyandot, Seneca and Delaware Nations', 18 November 1817, *American State Papers*, *Indian Affairs*, Vol. 2, p. 140; Jeremiah Morrow, 'Amendments proposed to the Treaty with the Wyandots', 29 December 1817, *Ibid.*, p. 148, describes the Wyandot's cattle herding plans.

[33] Message of the President (11 December 1817), *Senate Executive Journal*, 15th Congress, p. 17, on the Seneca's desire to stay on lands already settled.

[34] Graham, 'Talk Addressed to the Wyandot', *American State Papers*, *Indian Affairs*, Vol. 2, p. 140.

[35] *Ibid.*

for public lands was simply too high. For the Seneca families farming outside the tract reserved for them by the treaty, the purchase right Graham confirmed meant they would need to raise at least a $320 down payment and repay the remaining $960 owed over four years. Graham's promise to the Seneca represented a high level of confidence in their rapid integration with barely formed commercial markets for western farm products, a transition that many settlers on smaller farms with smaller debt burdens, found unsustainable. It was either disingenuous or, as the conflicting description of tenure and careless math of the treaty suggests, a sign of inattention and unexamined assumptions about the real situation of actual people on specific pieces of land.

Though there is a long history of deliberate misrepresentation in the United States Governent's dealings with Native Americans, the issue here involves the negotiators' lack of thought about how the Wyandot, Shawnee, Delaware and Seneca were to live on the land. For Graham, the key to the treaty and the new direction in policy he wanted to effect was that when Native American men received their 640-acre holdings 'they should live on it, cultivate it, and be protected by the laws of the United States, in the same manner and in every respect as (the President's) white children are; and he will make no difference between them'.[36] Graham's comments make clear he saw a fundamental link between the commons and the characteristics that separated Native Americans from the people of the United States. Here, he mirrors the writers of the Cherokee Nation constitution. Both believed Native American nations governed use of a commons and warred in order to secure the boundaries of that common resource. For Graham, that meant that without a commons to defend, and without a nation to defend them, conflict must end, with forest becoming farms where civilisation and crops might flourish. 'The hunter state', Monroe mused in a December 1817 speech, 'can exist only in the vast and uncultivated desert', which must give way to 'the more dense and compact form and greater force of a civilized population'.[37] (Monroe clearly found no charm in Ohio's oak forests or the prairie grasslands to the west.) It was right farmers take over, he added, 'for

[36] Graham to Cass and McArthur, 17 October 1817, notes 'This treaty may be considered in its fiscal, political and moral effects, as the most important of any we have hitherto made with the Indians', *American State Papers*, *Indian Affairs*, Vol. 2, p. 140; Graham, 'Talk Addressed to the Wyandot', *Ibid*.

[37] *Journal of the House of Representatives,* 15th Congress, 1st Session, (2 December 1817), p. 13.

the earth was given to mankind to support the greatest number of which it is capable; and no tribe or people have a right to withhold from the wants of others more than is necessary for their own support and comfort'.[38]

Like Locke, Monroe saw the division of the commons as the natural consequence of God's gift of the Earth to human beings, and of the divine command to be fruitful and multiply. That was why, he continued, '[i]t is gratifying to know … that the reservations of land made by the treaties with the tribes on Lake Erie, were made with a view to individual ownership among them, and to the cultivation of the soil, by all', referring specifically to the treaty Cass and McArthur had just negotiated.[39] He went on to urge Congress to act to prevent speculators from amassing large tracts in the ceded lands.[40] Yet, in glossing over – or perhaps not even noticing – how Native American tenure was limited in the treaty, Monroe, like Graham, saw ownership as giving individuals a right to stay permanently on land, with any other rights over land, such as the right to sell, not even worth notice. The right to stay was also an obligation to cultivate and so make use of land in a way useful to oneself and to the nation. Why should a right to sell land matter (or, in another context, the right to eject a squatter supercede the squatter's right to enjoy the produce of his labour) if the point of holding land was to cultivate it to support oneself? What relevance was there in the narrower idea of political economists that ownership was essentially the power to collect a rent? Monroe and Graham's ownership, like the economists' notion of landholding, defined a physical relationship, not a financial one.

The Wyandot had asked for an additional 112 square miles and the other nations sought proportional increases in their lands. Though Monroe noted that '[s]ufficient information is not now in the possession of the Executive, to enable it to decide, how far it may be proper to comply with the wishes of these tribes', he nevertheless asked that the treaty be approved.[41] Ohio Sen. Jeremiah Morrow, Chairman of the Public Lands

[38] *Ibid.*, pp. 13-14.

[39] *Ibid.*, p. 14.

[40] *Ibid.*, p. 15.

[41] *Senate Executive Journal*, 15th Congress, 1st Session, (11 December 1817), p. 95. Monroe here noted that the Wyandot and Seneca had asked for additional land, but urged ratification of the treaty with the idea of legislation in 1818 to expand the area of land reserved.

Committee, was amenable, even willing, to accept the expansion of the reservation as the Wyandot suggested. The soil was poor and an estimated population of 1000 could not sustain themselves 'in the mode of life and occupation they intend to pursue – that of pasturage, for rearing and feeding of cattle', on holdings of less than 500 acres each, his Dec. 29 report on the treaty noted. There was, as well, an issue of fairness, Morrow said. 'The grant appears in disproportion to the cession of land they have made, when compared to the cessions of other tribes', he told his fellow senators. 'The Wyandots have ceded their whole territory, except the tract to be regranted', he noted, adding, 'it further appears that, although they were not averse from a cession of their lands, they were not cordial in their agreement to the terms on which they actually surrendered them'.[42] Morrow said the issue with the Seneca lands on the Sandusky was that the land the treaty reserved was on the other side of the river from the lands the Seneca had improved. His suggestion was to leave the treaty land in the hands of the Seneca while also reserving the land they actually occupied to the west of the river in their possession, essentially granting them a use right for as long as they cared to remain, rather than making a permanent grant.[43]

Morrow (in one colleague's words) 'knew thoroughly the wants of the settlers, and possessed the firmness, independence and moral courage to resist the lobby-scheming of land speculators'. [44] He shared his settler-constituents' view that regulation of land sales was vital. On a frontier where sales on credit were still allowed, many over-extended newcomers (and voters) were still at risk of losing their farms to speculators. Ownership through purchase did not necessarily mean much to them. Mindful of their concerns for security and their disdain for speculators, Morrow also had to balance two potentially contradictory goals as Chairman of the Public Lands Committee. The first was to generate revenue for the federal government. The second was to promote settlement in the west. Morrow was convinced that an orderly and deliberate division of relatively small parcels might best meet both aims. A leader of a Democratic-Republican Party still

[42] Morrow, 'Amendments proposed', *American State Papers*, *Indian Affairs*, Vol. 2, p. 148.

[43] *American State Papers, Indian Affairs*, Vol. 2, p. 149.

[44] William Henry Smith, 'A Familiar Talk About Monarchists and Jacobins'. *Ohio Archaeological and Historical Quarterly,* Vol. 2, 1888, pp. 199-200.

faithful to the idea that America's farmers were the fundamental defence of its republican nature, Morrow did not want to see either government land sales or Native American land grants opening any kind of door to speculation or to those with the capital to control large acreages for later sale or to rent out. He believed that clustered settlement enhanced the value of land, and he would make that point in discussing the treaty. In Morrow's view, this approach to apportioning land left no room for speculative purchases of several tracts. It meant planting small communities – clusters of permanently rooted settlers – in the west. His aim was stability, both on western lands and in national politics, and settlers who belonged to the land assured that. Land belonging to people who did not settle on it would not.

So, while content to expand the Wyandot grant, Morrow was not reassured by the language in the treaty that gave the President or a designee the authority to disapprove sales by individual Native Americans. The treaty language that said they 'may convey the same to any person whatever', Morrow said, was unprecedented. 'The laws have regulated their trade ... and have also prohibited the sale of their lands' except to agents of the government, 'thus presuming their incapacity to transact their business ... in order to protect them'.[45] Morrow was concerned that 'the lands regranted by the treaty are valuable, and, from the progress of cultivation and improvement in their vicinity, will soon become more so'.[46] He said that if the treaty did not limit the right of owners to sell their land, 'treaties with the chiefs would soon be commenced by unauthorized persons for the allotment of the lands among the individuals of the tribes, and with the individuals, for the alienation of their rights'.[47]

Capital, he argued (significantly, using precisely that still not-yet-common term), would be employed 'different from that which is usually applied to the purchase of public lands, for settlement and cultivation; and that the chiefs and other members of the tribes would not long resist (whatever their present resolutions may be)'.[48] In other words, outsiders would use their capital for speculative purchase of unimproved land. Morrow

[45] *American State Papers, Indian Affairs*, Vol.2, p. 149.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*

proposed amending the treaty's Article 7 to say that individuals could not sell land to anyone except another Native American without the approval of the tribe, the President and the advice and consent of the Senate.[49] Although he was apparently concerned that the chiefs might not formally convey land to individuals, and thereby commit them to a farming life, Morrow did not recommend constraining the chiefs' powers. His focus was on the economists' abstract concept of capital, as if it were an invisible force that would undermine the kind of settlement he wanted to see in the west. Morrow's focus on barring some kinds of land sales came from his worries about the potential for speculation to derail federal land policy. Yet they also show his sense that the package of rights the law and conventional understanding might assign to ownership was not immutable and could be tailored to the specific needs of specific lands. The concern, and that willingness to qualify ownership rights, would frame the debate in the Senate.

Morrow presented amendments to reflect his concerns on 9 January 1818. While the Senate formally accepted for consideration the proposal to expand the Wyandot tract and clarify the Seneca rights west of the Sandusky River, it deferred action on Morrow's sales restriction, which he raised again on January 15.[50] The Senate began debate on the treaty as a whole on January 23, but decided it needed more time to resolve the matter.[51] On January 30, the Senate returned to the treaty, and brushed off a motion by Sen. James Barbour to simply approve the treaty without amendment by a vote of 3 to 30.[52] Barbour, a Virginian who believed the prospect of land ownership encouraged honesty, zeal and other virtue, and who opposed deportation of Native Americans, convinced only fellow

[49] *Ibid.*, p. 150. When the Senate began debate on the treaty, on 9 January 1818, Morrow proposed inserting this language after the sentence granting the chiefs the power to convey land to the specified individuals: 'But no such person, whose share of land may have been conveyed to him by the chiefs, nor person who may receive a grant of land, in virtue of any article of this treaty, shall have the right or power to sell, convey, or lease the same, to any person whatever, other than an Indian, unless he shall be authorised so to do, by an agreement entered into between the tribe to which he belongs, convened in public council, and an agent or commissioner of the United States, authorised for that purpose; and such agreement ratified by the President, with the advice and consent of the Senate'. *Senate Executive Journal*, 15th Congress, 1st Session, (9 January 1818), p. 112.

[50] *Senate Executive Journal*, 15th Congress, 1st session (9 January and 15 January 1818), pp. 112, 113.

[51] *Ibid.*, p. 115. The *Annals of Congress* for that day does not bother to report the discussion.

[52] *Ibid.*, p. 117-18.

Virginian John W. Eppes (Jefferson's son-in-law) and Ohio's Benjamin Ruggles to join him.[53]

The problem was the unrestricted right to sell that the treaty granted individuals if the chiefs conveyed the land. With the rejection of Barbour's motion, the focus of debate was now Morrow's proposal to limit sales of conveyed land to Native Americans, except with the express permission of tribe, President and Senate. Yet even these restrictions, Morrow now sensed, were not enough to win the two-thirds vote required to ratify the treaty. The cession of northwest Ohio lands so critical to his state's future was at risk, and Morrow knew he had to do something. To keep the treaty alive, then, Morrow proposed to insert a simple ban on individual sales to anyone without his three-part process of review and approval. This passed by a vote of 29 to 4, opposed only by an oddly assorted group: South Carolina's aggressive and newly elected advocate for slavery, William Smith, with anti-slavery stalwart Rufus King, of New York and fellow Federalists Harrison Gray Otis of Massachusetts and Connecticut's David Daggett.[54] Rhode Island Federalist James Burrill then forced the issue, with a proposal to strike the clause that would have still allowed sales approved by the tribe, President and Senate. Morrow, still hoping to save the treaty, supported it. Eighteen Senators joined him. Burrill voted against, along with King, Smith and Daggett, another five other Federalists, South Carolina's other senator and four eastern Democrats (two from New Hampshire, one from North Carolina and one from Pennsylvania). Burrill's proposal failed, as he intended, because it did not receive the two-thirds vote required for a treaty.[55] After Burrill's machinations, the treaty now stood roughly where Morrow first proposed. Rather than testing Morrow's idea of allowing the Wyandot and Seneca to sell only to

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[53] *Senate Executive Journal*, 15th Congress, 1st session, (30 January 1818), p. 118. 'Address of James Barbour', *American Farmer*, Vol. 7 (2 December 1825), pp. 290-91, cited in Paul S. Taylor, 'The Plantation Laborer Before the Civil War', *Agricultural History*, Vol. 28, No. 1, 1954, p. 5. Barbour's address to the National Republican Convention on 24 December 1831 attacked Cherokee removal and President Andrew Jackson's decision not to protect the Cherokee from Georgia's incursions by withdrawing federal troops, see Joseph C. Burke, 'The Cherokee Cases: A Study in Law, Politics and Morality', *Stanford Law Review,* Vol. 21, No. 3, 1969, p. 520.

[54] *Senate Executive Journal*, 15th Congress, 1st session, (30 January 1818), p. 118.

[55] *Senate Executive Journal*, 15th Congress, 1st session, (30 January 1818), p. 118. Otis did not vote on this proposal, however.

one another, Mississippi Senator Thomas Hill Williams moved that the Senate send it back to committee, probably because a quick nose-count showed that version, too would fail. A week later, the Senate voted unanimously to ask Monroe to renegotiate a treaty that would reserve land to the Wyandot, Seneca and the others to be held in common, 'in a like manner as has been practised in other and similar cases'.[56] It was a downbeat and confused reply to the President's lofty invocation of the virtue of severalty for all, the first time that call was actually embodied in a treaty with Native American nations.

How to make sense of it? The place to start is recognising that although almost all senators refused to accept the risk that Native Americans might sell land freely once conveyed by the chiefs, as the treaty first contemplated, most seemed inclined to allow some sales – but were not so convinced of it that they avoided Burrill's trap. Their motives are obscure, for no debate was reported. Ownership could include, but need not always include, complete freedom to dispose of land. For whom could rights be limited? The association of the South Carolinians with Daggett (who as Connecticut's chief justice would later oppose a school for African American girls on the grounds that free blacks and Native Americans were not citizens) could suggest simple racism, especially since Daggett believed landowning ought to mean the right to vote.[57] On the other hand, both King and Burrill were staunch opponents of slavery, and Burrill would, during the controversy over Missouri statehood, make the point that the Constitution included no provision for racial discrimination.[58] Landholding assured participation in governing society; disqualification from participation was not always and for everyone a matter of

[56] *Ibid.*, p. 121.

[57] Daggett's ruling on the school and the rights of African- and Native Americans is in Crandall v. State of Connecticut, 10 Conn. 339 (1834). On voting rights, he wrote: 'Landholders have an enduring interest in the welfare of the community', and that giving everyone the right to vote was 'an effort to wrest from the farmers of Connecticut that control over the elections which is their only fortress of safety', Jonathan Steadfast (David Daggett), *An Address To The People Of Connecticut, On Sundry Political Subjects, And Particularly On The Proposition For A New Constitution*, New Haven, 1804.

[58] Both King and Burrill would shortly oppose the admission of Missouri as a state because its constitution allowed slavery and did not recognize rights of freed African-Americans who might come to Missouri from other states; see *Annals of Congress*, 16th Congress, 2nd Session, (7 December 1820, p. 44 for King; on p. 48, Burrill is quoted saying: 'All distinctions among citizens which arise from color, rested … on State laws alone – there was nothing in the Constitution of the United States which recognised distinctions'.

race – though it clearly was for many Americans.

The unanimity of the Federalist senators on Burrill's motion could suggest mere partisan mischief. Yet they were joined by Democrats, and had had no particular pattern of objecting to other treaties. What was different with this treaty, however, was the land tenure question. The confusion of the contradictory votes suggests the fundamental issue was far from resolved for many. It suggests, as well, that questions about the nature of land tenure were not necessarily matters of ideology about markets, commerce or governance. In the end, the easiest answer was to do what had been done before. The senators hesitated when trying to define what ownership might mean for the Wyandot, because most had not thought much at all about the implications of what either severalty or commons rights entailed generally. For the senators, ownership was not all that important an ideal, at least not for all people. Ownership was not the point. What they cared about was drawing a border around the Wyandot and Delaware. They feared the treaty would allow those Native Americans to cross such a boundary with impunity.

Cass and McArthur went back to Ohio and tried again. The renegotiated treaty would give more land to the Wynadot, Seneca and Shawnee – though not as much as Morrow proposed, with only eighty-seven additional square miles, for instance, for the Wyandot.[59] It kept the lower Sandusky River tract for the Seneca on the east side of the river, and did not say anything about rights to lands occupied on the western shore.[60] It also said that the lands left to the Native Americans previously 'granted by the United States ... for the use of the individuals of the said tribes' would, in fact, not be granted, 'but shall be … reserved for the use of the said Indians, and held by them in the same manner as Indian reservations have been heretofore held'.[61] Though this seemed to mean the land would revert to commons, the treaty also said individuals' lands would be 'held by them and their heirs forever, unless ceded to the United States'.[62] In addition, the eight American spouses of Native Americans and six children of Native American women and white traders who in the original treaty had been '[a]t the special request of the said

[59] Treaty of St. Mary's Falls (17 September 1818), 7 Stat. 178, Article 2.
[60] *Ibid.*
[61] *Ibid.*, Article 1.
[62] *Ibid.*

Indians' granted lands to be held in fee simple, would still receive land under the new treaty. But that land 'shall never be conveyed, by them or their heirs, without the permission of the President of the United States'.[63] Monroe was satisfied. Musing on his Native American policy generally, he declared 'recourse will be had to the acquisition and culture of land, and to other pursuits tending to dissolve the ties which connect them together as a savage comunity and to give a new charactor to every individual'.[64] The revised treaty, allowing individuals the right to use land and to pass that right on to children but not to sell, won ratification in the Senate in December without fuss or amendment, with a unanimous vote and apparently with no debate.[65] The Senate had once again shifted position on Native American land tenure, without really thinking much about it.

And that is the issue. The directives of policy were clear. Plant the Wyandot, Seneca, Delaware and Shawnee on the land. Let them raise corn and cattle like their American neighbours. Ensure peace and stability in a corner of Ohio that was about to be bypassed by settlers looking farther west. The Senate, like the President and his negotiators, wanted Native Americans to stay put, get busy with the work of turning what they saw as desert into the fruitful state that God ordained. To get there, the officials wanted Native Americans to hold land. Yet the way they wanted the Wyandot and the others to hold land did not include all the rights that outright, fee simple ownership of land could have involved. The senators could opt for individual holdings without ownership because that option had long existed in the Atlantic World. The constraints on

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[63] *Ibid.,* Article 3.

[64] *Journal of the House of Representatives*, 15th Congress, 2nd session (17 November 1818), p 16.

[65] *Senate Executive Journal*, 16th Congress, 1st session, (18 December 1819), p. 158. In the end, the Wyandot, Seneca, Shawnee and Ottawa all ceded their Ohio lands by 1842: the 'Wyandots have become fully convinced that, whilst they remain in their present situation in the State of Ohio, in the vicinity of a white population, which is continually increasing and crowding around them, they cannot prosper and be happy, and the morals of many of their people will be daily becoming more and more vitiated', as the Treaty with the Wyandots of 19 January 1832, 7 Stat. 364, put it. The treaties all call for reimbursing individuals for chattel – movable property and improvements, *Ibid.*, Article 3; see also Treaty with the Wyandots (17 March 1842), 11 Stat. 581; Treaty with the Seneca (20 July 1831), 7 Stat. 351; Treaty with the Shawnee (8 August 1831), 7 Stat. 355; Treaty with the Ottawa (30 August 1831), 7 Stat. 359; Treaty with the Seneca and the Shawnee (29 December 1832), 7 Stat. 411.

land sale embodied in entail and primogeniture still existed in Britain and had been overturned only recently in America. The ‘bright light of property’ that Crevecoeur felt when arriving at his briefly owned parcel of New York’s Hudson Valley did not yet illuminate a clear and universally applied definition of individuals’ relationship to the land. A President might urge, an elderly would-be chief might suggest, and hundreds of Wyandot might be willing but the idea of extending severalty and fee simple ownership to the frontier of American law and power was not unconditionally accepted into the third decade of the nineteenth century. By forcing the issue of what to do with a commons, those arguing for Native American severalty reopened the question of how much say people thought they ought to have in what their neighbours did with their land. That a certainty of tenure encouraged industrious labour, cleared fields, yielded rich harvest seemed clear to all. Yet the right to occupy implied the power to control land, including the ability to dispose of it and to move on. The ideal of a community of well-rooted yeomen farmers had a flip side. In fact, the rights that could in theory attach to ownership, particularly the right to sell land as if it were any other kind of property or financial asset, were unsettling in an Atlantic World still trying to define exactly how people ought to fit in with societies slowly moving towards greater political democracy and industrial production of goods.

Chapter 4

The caught-between people

If The Lance and Major Forsythe had continued travelling together another day or two up the Mississippi River to its southernmost rapids, they would have had to beach their canoes and carry them and their gear along the trail by the bluffs, passing close to the farm and trading post of a man named Maurice Blondeau. The son of a French-Canadian voyageur and a Fox (Mesquakie in their own language) chief's daughter, Blondeau had staked a claim to the natural bounty of what is now southeastern Iowa. He settled at an inevitable stopping point for Native Americans with furs to sell. There, he made a prosperous farm of his own, with long rows of corn running up a hill from the riverbank and a large, comfortable house for his family. It was completely against the law for him to be there – at least, as long as he considered himself a citizen of the United States rather than a member of his mother's Mesquakie people. He was about to try to change that.

Blondeau's dilemma is the focus of this chapter. It is a dilemma about a place on the land and a place in society. In aspiring to a particular way of being on the land, people like Blondeau, the children or grandchildren of Native American women and American, British or Canadian traders, also had to choose between two peoples, one ascendent, the other, their mothers', not. The story of the people Americans called 'half-breeds' is important because it shows how an idea about the land can empower or prevent participation in a community.[1] In particular, the status of those like Blondeau, who were caught between two peoples, meant that it was not only their own notions about land and participation that mattered. Others – both American and Native American – had their own

[1] Americans may have referred to these people as 'half breeds' but I will not, except in direct quotation. This term, as well as the term 'mixed race', feels unsatisfactory to me. The French-Canadian term '*metis*', used in historiography and in defining a self-governing community empowered to interact with governments, gets a bit closer to what I think would be useful: a recognition of the racial attitudes that marginalised a community. Still, it was, as I hope to point out, a lack of clarity about political status – citizenship and allegiance – and not only racial prejudice that created the peculiar status of these people. It is their unclear political status that provides a window into the uncertain nature of land tenure at this time, which is why I will focus on that aspect of their relationship with the United States and settlers. That is why I have opted for calling them the caught-between people.

ideas and influence, whether by example, through dictate or by the powers of money or threatened violence. This chapter, which begins with the reservation of land for the caught-between, as in later chapters on the long process of resolving their dilemma of land and participation, again emphasises the amorphous and protean nature of ideas of land generally in the early nineteenth century, as well as the central, continuing importance of the sense that connection to the land was naturally a permanent and emotional one. Here, too, the stories of squatters who also sought land and empowerment will underline that point. With the squatters, however, the construction of ideas of land and participation was not a matter of simply taking land and thereby becoming an empowered member of a community. There was instead a simultaneous interaction of notions about the land and about participation, with each shaping the other.

It was not sufficient to have land to gain the ability to participate, as the experience of the Wyandot, Seneca and Delaware showed in the last chapter. Acceptance of a person's potential to participate was part of what allowed the holding of land, even if formal ownership remained an open question. Those who ventured west from the core of the Atlantic World, from the eastern states or from Europe had lower hurdles to jump to gain place and participation than did Blondeau and the caught-between people – but all had to jump. Both groups had to respond to notions held by the Atlantic World's already-landed and already-empoweerd. It was not only people of the frontier who had stakes in the issue of land and empowerment. The whole nation did, a point that was made explicit in the United States Supreme Court decision that settled the disputed claims of the United Illinois and Wabash Company from Chapter 2. In starting the history of the caught-between and the Half Breed Tracts that the United States and their maternal relatives set aside for them, and concluding with the Supreme Court decision on William Murray's Illinois deeds, the theme here is the mental connection between what people saw themselves doing on land that was still mostly a commons and how they saw themselves fitting in with their neighbours and with their nation.

The failed 1817 treaty with the Wynadot, Delaware and Seneca was the first to grant land to children of white adventurers and their Native American wives on the basis

of their parentage, proposing to do so for a group of six individuals in all.[2] It was the 'urgent wish' of the Native American chiefs negotiating the treaty that the group of six get land separate from that the chiefs sought for their own peoples.[3] The group of six, however, was not a party to the treaty. Though the six had a claim to United States citizenship, it was their maternal relatives who sought to fix their place on the land. The United States Governent was not concerned with the six or with their protection, but rather with the disposition of land and what that grant might achieve. The process of request and agreement in their case was, in fact, the mirror image of the kind of dialogue that ensued in almost all other treaty negotiations, when United States commissioners sought, on behalf of their fellow-citizens, repayment by Native Americans of trade debt or compensation for alleged thefts. The Native American nations' request, and the United States grant, suggested that both saw the caught-between people as more Wyandot, Delaware, Seneca or Shawnee than American. It was, at this point, Native American diplomats who defined who was one of the caught-between, as well as what their place on the land would be. United States officials were content to ratify those definitions. Both sides agreed the six should have a place fixed for them by their maternal relatives. But, critically, that was not to be a place among their relatives. Equally critically, the six were not to find a place among the citizens of the United States.

In effect, their place on the land, had they, in fact, received it, would have reflected their increasingly ambivalent status on the frontier. Their traditional role as brokers between Native Americans and the Atlantic commercial system was eroding, as the relative prominence of the great staples of the North American trade, fur and deerskins, shrank with the expansion of commercial agriculture and the timber trade. The position that some children of traders and Native American women had assumed among Native American communities as the visible face of the settlers' state faded as soldiers like Major Forsyth took over that function. The caught-between were beginning to lose the ability to say for themselves who they were and what their place on the frontier was to be, as their maternal relatives pushed them away and as both the United States and

[2] Treaty of the Rapids of the Miami, 7 Stat. 160, Article 8.

[3] Cass and McArthur to Graham, 30 September 1817, *American State Papers, Indian Affairs*, Vol. 2, p. 139.

Native American nations turned to their own diplomats and military leaders to regulate relations in the shared spaces of the west. The caught-between had become an awkward presence. 'In our pioneer days', Isaac Campbell, an early neighbour of Blondeau's in Iowa, recalled, 'there was not the reserve or restraint in society that there is today ... in winter, whites and half-breeds mingled in the dance; their favourite dancing tune, being original, was called *Guilmah* or *Stump-tail Dog'*.[4] What was easy for a few dozen people in an isolated trading post would become less easy as more settlers came, as Native Americans moved on and as a more diverse frontier economy induced formality in social and legal relationships. The result was that caught-between were nudged aside by their new American neighbours, just as their maternal relatives were doing.

Yet they remained. The trading posts dotting the shores of the Mississippi, Ohio and Missouri rivers and their tributaries were their homes, often handed down by their fathers. Some prospered in the trade for a time, while others earned their livings doing the hard work of carrying trade goods and furs into and out of the country, and still others in raising food for a new generation of American traders on the frontier. 'It is important that some permanent provision should be made for the half breeds who are scattered through that country', Lewis Cass and Thomas L. McKenney, appointed as commissioners to negotiate a cession of most of northern Michigan by the Chippewa (usually known now as the Ojibwe), reported to Secretary of War, James Barbour.[5] (Barbour was the Senator from Virginia and had supported the 1817 Treaty of the Rapids of the Miami and the rights it granted Wyandot and Seneca individuals to sell land freely; Cass was one of the commissioners who negotiated that treaty.) Good order required a permanency of connection to the land. The traditional desire for permanency, the same that poets John Clare and Nathaniel Bloomfield missed so intently, was if anything intensifying in Washington.

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[4] Isaac Campbell, 'Letter to the Iowa Historical Society', *History of Lee County, Iowa*, Chicago, 1879, p. 331.

[5] Lewis Cass and Thomas L. McKenney to James Barbour, 11 September 1826, *American State Papers*, *Indian Affairs*, Vol. 2, p. 682. No treaty before the failed 1817 Treaty of the Rapids of the Miami specifically mentioned mixed race people, and only a handful, including the 1795 Treaty with the Wyandot 7 Stat. 49; The Treaty with the Chickasaw (23 July 1805), 7 Stat. 89 and the Treaty with the Choctaw (16 November 1805), 7 Stat. 98 reserved rights for specific traders, who may have had Native American mothers or grandmothers, to hold land.

Cass and McKenney proposed settling a group of the caught-between in one neighbourhood and encouraging them to look away from 'the laborious duties of the Indian trade' in order to become farmers. 'Situated as they are now, they have neither fixed residence, certain employments, nor such habits as regular business would give them', the two commissioners wrote.[6] Still, the caught-between were an important enough presence that 'the moral force they could exert upon the Indians is still stronger to secure their permanent attachment to our government', Cass and McKenney continued. As one of the commissioners who negotiated the 1817 treaty that failed to win Senate approval precisely over the point of individual land tenure for Native Americans, as well as the 1818 substitute, Cass was clearly knew how difficult it would be to create Native American landholding communities. People whose relatives included both Native American and United States citizens might be a bridge, he and McKenney suggested: 'Upon the immediate fate of these persons depends the issue of all of the experiments upon this subject which we are making in this quarter'.[7] If the United States were to define where those individuals might live, and how they were to make their livings, it could consolidate control over the trans-Appalachian west, Cass and McKenney believed.

One idea, then, kept their fathers' country from simply letting the children of traders and Native American women slip into the shrinking world of their mothers. That idea was the hope that they could be examples of the industry that Americans were proud to believe was a distinctly American trait. That idea was why the substitute for the failed 1817 treaty with the Wyandot and other Ohio Native Americans set aside land for some of the children of traders and why the Treaty of Saginaw that Cass negotiated with the Chippewa in 1819 made specific grants to the three Riley brothers and for the children of a woman named Bokowtonden.[8] Neither the Ohio nor the Chippewa treaties, however, granted land outright, as the failed 1817 treaty would have. Instead, land was to be 'reserved for the use' of those individuals and their heirs. The caught-between were not to be simply Americans, like any other citizen of the United States.

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[6] Cass and McKenney to Barbour, 11 September 1826, *American State Papers*, *Indian Affairs*, Vol. 2, p. 682.

[7] *Ibid*.

[8] Treaty of Saginaw (24 September 1819), 7 Stat. 203.

Over the next few years, however, the idea of individual holdings of land emerged as an option for relatives of the Quapaw, in Arkansas, where a treaty of 1824 confirmed a dozen private holdings to people variously described as 'of Indian descent' and 'half breeds', while the 1825 treaties with the nearby Osage and Kansa granted land to sixty-seven spouses or adult children of US citizens.[9] North and east of the Ohio and Mississippi rivers, two treaties with the Potawatomie granted land to forty-eight adult children of American traders and Native American women as well as fifty-eight students at the Carey Mission School, a later treaty with the Chippewa granted land to thirteen 'half breeds' and a treaty with the Winnebago confirmed forty separate claims to mineral lands.[10] The United States negotiators and Native American diplomats together tried to define those individuals' status, but treaty language speaking only of grants of land, merely suggested, without confirming, the same kind of rights to land that any settler who purchased land from the General Land Office might claim.

The idea of a special role for those caught between Native Americans and the United States by virtue of having parents from both camps was also, Cass and McKenney said, the reason behind the reservation of a large tract of land for Sac and Fox (Mesquakie) 'half breeds', negotiated in 1824.[11] Their case had been urged by one of their own, Maurice Blondeau, who accompanied the chiefs to Washington for their negotiations. The treaty negotiations in which his language skills played so large a role, ended with an agreement to reserve an enormous territory of roughly 119,000 acres as a Half Breed Tract – including the farm Blondeau held without clear title.[12] Unlike the

[9] Quapaw Treaty (24 August 1824), 7 Stat. 232, Article 7; Treaty with the Osage (1825), 7 Stat. 240, Annex naming 43 individuals, including one family of 12 children and three grandchildren of one trader); Treaty with the Kansa (3 June 1825), 7 Stat. 244, Article 6.

[10] Treaty with the Potawatomie (16 October 1826), 7 Stat. 249, Article 9; Treaty with the Potawatomie (20 September 1828), 7 Stat. 317, Article 4; Treaty with the Chippewa (29 July 1829), 7 Stat. 320, Article 4, includes several grants in what is now the Chicago area and Treaty with the Winnebago (1 August 1829), 7 Stat. 323, Article 9. These treaties and several others of the period also specifically reserve to Native American peoples the right to hunt on ceded lands.

[11] Treaty with the Sauk and Fox (4 August 1824), 7 Stat. 229.

[12] Blondeau is described as a 'half Indian of the Fox tribe', in the treaty, which he witnessed and which granted him $500 for property taken in recent skirmishes with the Sac (and which managed to spell his name three different ways), Treaty with the Sauk and Foxes, 7 Stat. 229, see Article 3 and signatures. Isaac Galland, a doctor who moved to the Half Breed Tract in 1829, says Blondeau was the first to enclose a farm in Iowa, 'ploughed and cultivated in corn in the usual

Ohio and Michigan treaties Cass negotiated, or the treaties with the Quapaw, Osage, Kansa, Potawatomie, Chippeawa and Winnebago that reserved eleven specifically defined 80 to 640-acre farms or mineral claims, the treaty with the Sac and Mesquakie did not enumerate who would have land.[13] It did not provide for use rights to individual plots, or for any mechanism to allocate such rights. Instead, it said the whole tract was 'intended for the use of the half-breeds belonging to the Sock and Fox nations; they holding it, however, by the same title, and in the same manner, that other Indian titles are held'.[14] The treaty dodged the vexed question of citizenship, and so of the rights of these people – for while a child of a United States citizen was a citizen, a child of a Native American was not. So the Half Breed Tract was a grant by the Sac and Mesquakie nations, not the United States. The reserved land was to be held by a community, on land not subject to sale by the Land Office, as were the lands the Sac and Mesquakie ceded to the United States. The community undefined by the treaty, its members unnamed, and its governance unclear. It was caught in a limbo.

The Iowa Half Breed Tract reserved for that community in limbo was a triangle of land between the Mississippi and Des Moines rivers.[15] It was probably the largest single block of land within the boundaries of the United States not under the formal control of either the United States General Land Office or any Native American nation. Near its southern tip, just above the point where the two rivers meet, was the first set of rapids that boatmen travelling up the Mississippi from the trading centers of St. Louis or New Orleans had to portage. The Des Moines was the main route into central and northern

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way'. He describes Blondeau as mixed race, while Col. James Campbell, who came to the Half Breed Tract in 1830, and who credits Blondeau with convincing the treaty negotiators to reserve the Half Breed Tract, describes him as a 'jolly good Frenchman', weighing more than 200 pounds and living in a double log cabin, with elk horns over the gate. In a sense, Blondeau's position as a middleman in the fur trade, a landholder, and interpreter and a supplier of foodstuffs to traders from the eastern States and Canada allowed him to define himself, indifferent to whether those with whom he dealt saw him as half Native American or French. Isaac Galland, *Galland's Iowa Emigrant, Containing a Map and General Descriptions of Iowa Territory*, Chillicothe, Ohio, 1840 p. 2l; James Campbell, 'Recollections of Early Days', *History of Lee County*, p. 494.

[13] Treaty of St. Mary's, 7 Stat. 178; Treaty of Saginaw, 7 Stat. 203, Treaty with the Quapaw, 7 Stat. 232; Treaty with the Kansa, 7 Stat. 244; Treaty of Fond du Lac (5 August 1826), 7 Stat. 290.

[14] Treaty with the Sauk and Fox, 7 Stat. 229, Article 1.

[15] The Tract was what is now the southeasternmost corner of the state of Iowa, the southerly pointing triangle that dips below the main east-west line dividing Iowa and Missouri.

Iowa. At a time when rivers were the easiest way of travelling, the Tract was at particularly important spot, made even more desirable because it was a thickly forested enclave in a prairie country hungry for wood for houses, fences and fuel. It was a spot that mattered and a stretch of land that would eventually have to attract attention.

Yet the treaty's declaration about who had the right to be on the Half Breed Tract changed little about life there for several years, by leaving open the question of who would say which individuals were in fact entitled to live on the Tract. Maurice Blondeau could (and did) stay on a farm that had before been illegal, because the United States prohibited any settlement on Native American lands, which included the whole of Iowa, along with the rest of the lands west of the Mississippi River and north of the state of Missouri. His title to that farm and even his right to be on that particular spot, however, were unresolved. While he had a right to be on the tract, there was no process by which he could make formal a right to his particular piece of it. He could not buy it, could not obtain a Land Office patent for it, nor could he try to establish a title through the courts by virtue of the fact of his possession of it in the way that squatters did. Still, he maintained his trading post and farm, 'a fine fertile one … His corn is on the side hill, covered a great space, and looked finely', while the man himself acted as if he were lord of vast acres beyond.[16] 'He took a great fancy to me that nothing would do but I go with him to his farm', the French traveller, Charles Larpenteur, recalled, adding that Blondeau 'took me all over the half breed reservation, as fine country as I ever saw and finally remarked that he would give me all the land I wanted if I should happen to make a match with his niece, Louise Dauphin'.[17]

Except for Blondeau and a seasonal village at the head of the Mississippi River rapids occupied by forty to fifty Mesquakie during the spring and summer, the Half Breed Tract was a place through which people passed on their way elsewhere. Only a

[16] Caleb Atwater, *Remarks made on a Tour to Prairie du Chien: thence to Washington City, in 1829*. Columbus, Ohio, 1831, p. 59. He describes his host as Philip Blondeau, though the location of the farm, midway on the portage around the Mississippi River rapids is where Maurice lived, and Atwater describes his host as a former Office of Indian Affairs sub-agent, married to a Native American woman, as Maurice Blondeau was. No other account of early Iowa mentions a Philip Blondeau.

[17] Charles Larpenteur, *Forty Years a Fur Trader on the Upper Missouri, the personal narrative of Charles Larpenteur, 1833-1872*, New York, 1898, pp. 5-6.

small stand of sour apple trees marked the homestead that Louis Honoré Tesson abandoned in 1803 when he sold his Spanish grant of title to a creditor.[18] Several years after the treaty, the American Fur Company set up a post at the southernmost end of the Tract, by the mouth of the Des Moines River, about ten miles south of the Mesquakie village. At the post, the traveller Caleb Atwater estimated there were just twenty households and reported '[m]any Indians were fishing and their lights on the rapids in a dark night were darting about appearing and disappearing like so many fire flies'.[19] Though the bluffs of the Mississippi seemed to Atwater to be a place where 'Princes might dwell … and possess handsomer seats than any of them can boast of in the old world', most visitors, like Larpenteur and Atwater himself, moved on.[20] Valencourt Vanausol, who lived at the American Fur Company post as a boy, recalled the tract as 'an Indian wild – nothing more – into which a few Indian traders … occasionally found their way'.[21]

The rights of possessors of land were still problematic even on lands long out of Native American hands to the east of the Mississippi River. The reason was a continuing lack of agreement about what entitled an individual to use a piece of land, to hold it and to exclude others from it. A jury of Indiana farmers in 1821 ruled that their neighbour, a

[18] The case of Marsh et al v. Brooks, 9 US 223, outlines Tesson's Spanish grant and his sale of the land. Tesson remained in the area after selling his land, serving as interpreter to Zebulon Pike in 1806 during his travels along the Mississippi River. Tesson's wife, Therese Crely, however, lived apart, for she was granted land in the Missouri River valley west of St. Louis in 1803, 'secured to her and her children, being out of the power of any of her husband's creditors', *American State Papers, Public Lands*, Vol. 7, p. 819. Tesson died in 1807, Register of Old Cathedral Parish, St. Louis, St. Louis, Missouri (burial record, 18 April 1807) but his son, Louis Honoré Tesson Jr. was a witness to the 1824 Treaty with the Sauk and Foxes, 7 Stat. 229.

[19] Atwater, *Remarks*, pp. 58-59. By 1831, when Isaac Campbell drifted down the Mississippi to the American Fur post, it had a manager, three clerks and two interpreters. Four itinerant peddlers, all with Native American wives, had settled in the hamlet, too, along with five French-speaking farmers and tradesmen and Dr. Samuel Muir, a Scots immigrant who had shortly before resigned a United States Army commission rather than separate from his Mesquakie wife – 'May God forbid', he declared then, holding up his infant daughter before soldier of Fort Armstrong, Ill., 'that a son of Caledonia should ever desert his child or disown his clan'. Isaac Campbell, 'Letter', *History of Lee County*, p. 331. James Campbell, 'Capt. Campbell's Address', *Ibid*., p. 493-94, counted 40 people in all.

[20] Atwater, *Remarks*, p. 64; Larpenteur nearly accepted Blondeau's lordly offer, 'for Louise was one of the handsomest girls I ever saw – it cost me many long sighs to leave her, and more afterward', Larpenteur, *Forty Years*, p. 6.

[21] Valencourt Vanausol, 'Recollection of Valencourt Vanausol', *History of Lee County*, p. 335.

Mr West, might remain on his Harrison County farm, allowing the judge to seize upon the technicality that the man who held a deed to the land had not been formally traced through four transactions to the original federal patent.[22] Even some higher courts removed from the frontier of settlement and unacquainted with any squatters, agreed with the logic of settler juries. In the complex set of suits and counter suits over Walter Franklin's estate, for instance, New York State's Supreme Court noted that the executors left large tracts of land in Vermont 'exposed to intruders and settlers' so that the land 'became covered with settlers or actual occupants, commonly called squatters, all of whom claimed title to the lands which they occupied, and many of whom had probably acquired a good title, by lapse of time and length of possession'.[23] Alabama's Supreme Court agreed with the notion of a Greene County squatter named McGehee that could not be forced off the farm he had carved out on land the federal government had granted to a group of French emigrants, since the other claimants had never actually possessed it.[24] On the other hand, a year later, when Durrett White cut timber from Alexander St. Guirons' French Association tract and then threw St. Guirons off the property, a Tuskaloosa County jury and later Alabama Supreme Court justice, Reuben Saffold, brushed off White's contention that the Frenchman had never settled on the land nor planted the acre of vines he was supposed to secure his title.[25] Even in the same state, even before the same court and even at about the same time, judges lacked certainty about who ought to be able to exclude whom from land, although individuals actually on the land were clear enough about how they saw their place on it. The idea of what

[22] Doe, on demise of Wood v. West, 1 Blackf. 133 (1821). Indiana's Supreme Court overturned the lower court, however.

[23] Franklin et. al. v. Franklin et. al.,14 Johns. 527 (1817) Supreme Court of Judicature, New York.

[24] James Childress against Francis McGehee; 1 Minor 131 (1823). The Alabama Supreme Court based its ruling on a state law detailing the powers of Justices of the Peace in trespass cases that noted: 'that the Act shall not extend to any person who has had uninterrupted occupation, or been in quiet possession for the space of three whole years together immediately preceding such complaint, and whose estate in the lands, &c. is not ended or determined'. *Ibid*, 132-33.

[25] White v. Saint Guirons, 1 Minor 331 (1824). Taking timber was a particular sore point across the frontier, as settlers routinely treated absentee landowners' property as commons; see Carlson, *The Illinois Military Trac*t. p. 59. Paul W. Gates, 'Frontier Landlords and Pioneer Tenants', *Journal of the Illinois State Historical Societ*y, Vol. 38, 1945, p. 145 and Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry of Wisconsin 1836-1915*, Madison, 1984 (1964), pp. 82-84, 89-90 describe absentee owners' frustrations with the effective lack of legal redress for timber theft.

secured a person a place on the land was unfixed, even in the venue where fixing on answers to such questions was its very purpose.

No wonder, perhaps, that Tennessee Supreme Court Justice John Haywood bemoaned the way his state's judges kept changing their minds on the right to land, noting 'A rule was established in this state ... founded upon a previous decision of the late supreme court, that a grant upon a military warrant of land out of the military district was void, but this rule was altered in three years afterwards'. He went on to rule that 'the cool and impartial answer' to a disputed lot was to reverse an earlier decision and hold that a landholder need not have an unbroken chain of title, but merely seven years possession to secure title to the land.[26] In Illinois, a supposed trespasser named Goodtitle argued that the Lawrence County Circuit Court improperly excluded his General Land Office certificate as evidence of title, while allowing plaintiffs Fail and Nabb (all the names clearly contrived, apparently a not-uncommon practice in Illinois) to introduce a sheriff's deed that had been improperly processed. State Supreme Court Justice Samuel Lockwood held both title documents should have been considered.[27] He did not say which should trump which, despite the heavy hints in the supposed parties' names.

The law of land and titles to land could seem a game; a lawsuit, or a kind of gamble. A Mississippi man named Poindexter may have thought the unusually hefty price of $10 000 he paid for 765 acres near the Pearl River would give him 'quiet and peaceable possession', but a Louisianan named Stephen Henderson said he had a claim, and sold the land himself. When Poindexter complained, his suit was thrown out of court, because he had admitted that another person actually lived on the land, Mississippi Supreme Court Justice Powhatten Ellis ruled. 'There was no necessity for the defendant to answer, because the plaintiff has admitted everything necessary to enable him to avail himself of the law', Ellis wrote.[28] In Kentucky, the Court of Appeals ruled that squatters might transfer their rights to land, even without 'color of title' (an incomplete or mistaken title), in a case in which the original squatter's cabin and claim had been transferred four

[26] Barton's Lessee v. Shall, 7 Tenn. 214, 232 (1823) Supreme Court of Tennessee.
[27] Fail and Nabb v. Goodtitle, 1 Ill. 201 (1826) Supreme Court of Illinois.
[28] Poindexter v. Henderson 1 Miss. 176; 178 (1824) Supreme Court of Mississippi.

times in eight years.[29] Buyers of land and holders of title deeds did not always win, and squatters did not always lose. One reason was that the ways people acquired land titles – and even more significantly, conditional titles to land – were as disorganised and informal as any squatter's taking of land. Judges wanted good order and stability, and the traditional notion of permanence mattered. That notion did not mesh well with the conditional claim embodied in land warrant, head-right or grant of unsurveyed and never-occupied land.

Still, the farther removed a judge was from the frontier (and from the squatters who elected legislatures and in some cases trial judges) the better a piece of paper looked as evidence of an individual's rights to a portion of land. In 1823, when the United States Supreme Court tackled the land title mess in Kentucky still left hanging from Virginia's Revolutionary era warrant-issuing spree, Justice William Johnson noted 'the very peculiar nature of the land titles created by Virginia and then floating over the State of Kentucky', adding that '[l]and they were not, and yet all the attributes of real estate were extended to them'.[30] Nevertheless, the court baulked at Kentucky's effort to protect settlers by requiring reimbursement for any improvement made while on land someone else owned. 'Of what value is that title which communicates no right or interest in the land itself?' asked Justice Joseph Story, ruling that grants from Virginia predating Kentucky statehood should stand, and brushing aside the problem of the same territory being often granted several times.[31] (Story was the scholar, quoted in Chapter 1, who commented that American law broke with Britain's by tending to see land and money as fungible.) The Kentucky laws 'create a direct and permanent lien upon the lands for the value of all lasting improvements made upon them', Story added, continuing: 'It requires no reasoning to show that such laws necessarily diminish the beneficial interests of the rightful owner in the lands'.[32]

The land, in other words, was not valuable for what people had done with it, but for its theoretical potential to the holder of its paper abstraction. It was conceptual land

[29] Bowles v. Sharp 7 Ky. 550; (1817) Kentucky Court of Appeals.
[30] Green v. Biddle, 21 US (8 Wheat.) 1, 100 (1823).
[31] *Ibid*., 13.
[32] *Ibid*., 16.

that, in Justice Bushrod Washington's opinion on the Kentucky case, embodied within itself 'the right to enter on it when the possession is withheld from the right owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it'.[33] Jousts like that over Goodtitle's paperwork in Illinois were the concern of courts. In Alabama, the squatter McGehee's labour mattered a few months before Story's ruling; White would be out of luck, and the absentee holder St. Guirons would succeed in the same court after the United States Supreme Court pronounced.[34] The issue with a title to land, as Justice Washington wrote, was power – in a most basic and most intimate form, and one that mattered among neighbours, the power to make another person go away. In the Kentucky case, the Supreme Court held that power was derived from law and its formalities, including the paperwork of land titles. It was not a gift of the state.

Deciding who could be on land involved one notion of place and power. The power implicit in transferring rights to land was also an issue. It arose later that same year when William Murray's Illiniwek deal (along with his purchase of Wabash River valley lands from Piankeshaw chiefs in 1774) came before the Supreme Court. In the Illinois case, Chief Justice John Marshall, who excused himself from hearing the Kentucky case because of his family's land interests there, stepped in to fix a fundamental flaw he saw in that ruling. Marshall wanted to go beyond asserting that the right to control land was anchored in law and was a matter of neighbourhood power. In the Illinois case, he would insist that the right to control land was anchored in the power of the state, which was the entity that enforces law.

Law on the books was not the point for Marshall, who wrote the court's decision on the Illiniwek and Piankeshw deeds himself. He brushed off the arguments from technicality made by attorneys Daniel Webster and Robert Goodloe Harper that Murray's deeds should stand because a statute banning individual purchases had temporarily lapsed at the time of the deal. Similarly, he dismissed Webster's and Harper's point that the

[33] *Ibid*., 75.

[34] White v. St. Guirons, cites neither the earlier Alabama case nor Green v. Biddle, however. Still, both cases exemplify a trend of thought toward favouring legal formalism over other claims, whether in a country courtroom or the national capital.

Illiniwek and Piankeshaw were not subjects of Britain when it issued the Proclamation of 1763 that reserved the lands west of the Appalachians for Native American nations. Britain's assumption of sovereignty after its conquest of New France, the exercise of power that allowed it to issue the Proclamation, was what mattered.

On the other hand, power alone did not determine a right to land. Marshall was not going to rule that the Illliniwek and Piankeshaw held land simply because their warriors could, and would, keep outsiders off their territory. Here, he certainly would have agreed with the arguments of arguments of the prominent Maryland lawyers William Winder and Henry Murray that the Illiniwek and Piankeshaw could not sell the land to the United Illinois and Wabash Company because they did not hold the land legitimately. 'It is a violation of the rights of others to exclude them from the use of what we do not want, and they have an occasion for', the Marylanders argued. 'Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over'.[35] Their argument made clear that the idea that it was labour that earned the right to land remained very much part of the mindset of the times, not just on the frontier but even for people from long-settled Maryland. 'According to every theory of property', they wrote:

> the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators.[36]

Because Native American territory was a commons (if undefined as to whether it was inner, outer, open or closed), their 'right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it', the two lawyers added.[37] Winder and Murray's problem, however, was that they needed to show the Illiniwek and Piankeshaw had rights to land that they ceded to the United States in 1803. They did so by arguing '[t]he measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their

[35] Johnson v. M'Intosh, 21 US (8 Wheat.) 543, 569-70 (1823).
[36] *Ibid.*, 570.
[37] *Ibid*., 571.

capacity of using it to supply them'.[38] Their point was that the way people used land could legitimately define their rights to it, even if the rights of a wandering, supposedly non-farming community were limited to mere occupancy. The problem for Marshall and the Supreme Court, of course, was that that approach would have meant it was the Kentucky squatters the justices had just rebuffed who had the best claim to land.

Marshall cut through the dilemma by declaring the starting point for all appropriation of land in North America was the state – that is, the same kind of right the Crown had had in Britain, at least before Style's *Regestum practicale* held (in 1657) that there were rights of landowners that superceded the King's. (Blackstone, after all, held that 'that occupancy is the thing by which the title was, in fact, originally gained … Property, both in lands and moveables, being thus originally acquired by the first taker'.)[39] While Marshall wrote:

> We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny.

The heart of his decision was that 'a principle of universal law' is that:

> if an uninhabited country be discovered by a number of individuals ... the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parcelled out according to the will of the society, expressed by the whole body.[40]

He then blandly noted that 'no distinction was taken between vacant lands and lands occupied by the Indians'.[41] In the eyes of the law (or at least in the eyes of a chief justice), it was as if not seeing the commons that Native Americans used and managed for themselves rendered tens of thousands of men and women invisible. And that was the point. Marshall in essence declared Native American men and women could not

[38] *Ibid.*, 569.

[39] Blackstone, *Commentaries*, Book 2, Ch. 1, p. 9.

[40] 21 US (8 Wheat.), 588, 595.

[41] *Ibid.*, 595.

participate in his society – could not even been seen to be recognised by his society – because they held no land in any sense that he would allow himself to see. They were as invisible as ghosts to him because they were not subjects of the United States, and in any case, never citizens.[42] Moreover, because they did not participate in the life of the United States – and could not because they had, in his view, no perceivable connection to the land – they also were unable to ever get hold of any lands of the United States. His concept of Native Americans' place on the land and with respect to the United States, that is, of a presence without legitimate occupation, allowed him to put aside all claims about Native American landholding in the Illinois case. 'The person who purchases lands from the Indians, within their territory, incorporates himself with them and holds their title under their protection, and subject to their laws', he wrote. The investors claiming under Murray's deed had come to the wrong court. It was not up to any United States judge to try to interpret what the Illiniwek and Murray had agreed and whether the deed had any meaning at all.[43]

The way Marshall connected a right to land with rights to participate put the national government at the centre of the matter. He was not outlining a model like Locke's, of a natural and parallel emergence of rights of property in land with government. Government and the nation came first, and it came from control of the land. In his mind, land created nations. Control of territory was the essence of nationhood. Native American men and women, then, were ghosts in a limbo because their nations had been defeated by the military power of the United States. Clear as it was to any trespasser chased from an Illiniwek or Piankeshaw hunting ground that those commons were governed, the lack of a state structure formal enough to be seen from the Supreme Court

[42] One indication that the case had unusual import was the extraordinarily well-orchestrated path it followed: heard in the United States District Court for Illinois on 20 December 1820, no facts were contested – nor were the tracts of land at issue proved to be within territory covered by Murray's deeds, as in fact they were not. The case was decided by a bench trial with no formal opinion; the appeal was filed 'with consent' in February 1822, while McIntosh waived his right to force Johnson to post an appeal bond. The Supreme Court received the trial records a year before actual argument, but decided the case eight days after argument – unanimously and with a 59 page decision. District Court Records, Johnson v. M'Intosh, National Archives Record Group 267, Microfilm M214, frames 347, 414; United States Supreme Court Docket Sheets, National Archives Microfilm Series 216, Roll 1, frame 408, cited in Kades, 'The Great Case', pp. 101-02.

[43] 21 US (8 Wheat.), 593.

bench dissolved any Native American man or woman's right to land, in Marshall's view. For what it was worth, Marshall added: 'We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty'.[44] So much for the hopes of Madison, Monroe and The Lance. Rights of possession, especially Native American possession even if in the form of tenure in severalty, were subordinate to the sovereign claim of his nation to conquered land.

Marshall, thus, did not follow the logic that held that paper title, however inadequate or imprecise, was what secured land. Nor did he hold that occupancy or use were sufficient, either. Upholding the paper title Murray's deeds embodied, indeed, would have undercut the authority of the national government, while accepting the Illiniwek and Piankeshaw right to cede their land to the government would have established the kind of rights from occupancy that squatters claimed. That would not do. Still, he understood that for many Americans, use and occupation were what generated right to land. So Marshall then took one more step and declared that Native Americans had already, in effect, surrendered their claim to land because they had stopped using it. 'As the white population advanced, that of the Indians necessarily receded', he wrote, speaking here of institutions and groups, rather than of individuals, and noting that such collective movement meant:

> The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown.[45]

Use still mattered in claiming a right to land, despite the chief justice's refusal to address the question of whether farmers had better claims than hunters. Yet Marshall's abstraction about users, writing of populations and not men and women, also had the effect of removing individual decisions and individual acts from consideration. He wrote about an intangible and unnamed process, rather than of the settler's axe and plow, and in

[44] *Ibid*.

[45] 21 US (8 Wheat.), 590-1

doing so mirrored the same kind of abstractions that made paper grants and titles stand for land that turned carving half a continent – woods and prairie, meadow, and marsh alike – into a grid of numbered squares.[46] Just as the General Land Office's survey's had, Marshall's impersonal process of advance and retreat made land more an idea that actual soil, place and life.

From beneath the vaulted, shallow half dome of the Supreme Court chamber in the north wing of the Capitol where the Supreme Court sat, the prairies and woods of the Illiniwek were merely places on a map. When the justices looked west, they barely saw the squatters struggling to teach themselves how to live and farm on those same grasslands and groves. The justices had, after all, barely acknowledged – before rejecting – the traditional source of a right to land that Kentucky's legislators had made their state's formal law: that working on the land was what entitled you to possess it. For the Supreme Court justices' deliberations, paper titles to more acreage than existed in Kentucky had more reality than any fenced off portion of the Bluegrass plains by the Falls of the Ohio. So, too, did a treaty between nations, even one as tiny and as the Illiniwek in 1803. The justices rejected the United Illinois and Wabash Company claims

[46] The primary codifier and commentator on federal laws governing Native Americans, Felix Cohen, believed that in asserting the legitimacy of national power, aimed at a humane compromise between outright expropriation of land and the alternative of granting full title – and full civil rights – to Native Americans; see Felix Cohen, 'Original Indian Title', *Minnesota Law Review*, Vol. 32, 1947, pp. 48-49. I do not believe Marshall was particularly concerned with protecting Native American rights or lands, as I believe the language of decision itself makes clear when he, for instance, says: 'the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness', 21 US (8 Wheat.), 590. His central intent was not so much to settle on a rule for land tenure as it was to underline that even the whim of a sovereign could change the rules, as. Nell Jessup Newton, 'At the Whim of the Sovereign; Aboriginal Title Reconsidered', *Hastings Law Journal,* Vol. 31, 1980, p. 1223, argues. Less dramatic rulings – perhaps dealing simply with the processes of recording land deals, or requiring the Illiniwek and Wabash Valley peoples who had, evidently, sold the same lands twice, to recompense Murray's investors for their loss – would have settled the matter, but would not have carried Marshall to the key point he needed to make about sovereignty and power, Kades, 'Dark Side of Efficiency', pp. 1114-15, 1138, 1150-67. In reaching for grounds beyond the merely technical for his ruling, Marshall perhaps was replaying the 1792 case that cost his father a speculation in Kentucky lands, which also turned on the nature of 'Indian title of occupancy' – perhaps, too, he sought, without acknowledging he did, the legal framework for a system that through the first half of the century efficiently acquired land at the least possible costs by gaming Native American diplomatic concerns and habitat destruction to get inexpensive territory quickly settled. Marshall v. Clark, 4 Call 268 (1792).

because they believed any treaty was weightier than any agreement between mere groups of people governing rights and access to shared space – which was, in the end, about all that the Illiniwek and Murray had really agreed upon. (The Illiniwek had, after all, as Chapter 2 noted, invited Murray and his partners to join them on their land, to protect them from their enemies.)[47] But the court simply would not see that commons.

When, down the Capitol corridor from the Supreme Court, the Senate ratified the treaty with the Sac and Mesquakie nation that set aside the Iowa Half Breed Tract, the aim, too, was to create a commons that would bring stability to a changing west, just as the Illiniwek had sought. The caught-between people would have a place, acting perhaps as a buffer, or perhaps an exemplar for their maternal relatives. But they were not necessarily going to participate in the life of the United States, and so an idea of commons would suffice. What writers and ratifiers did not see, however, was that all commons, including the Half Breed Tract, needed some kind of framework for its governance. The nature of anyone's place on the land – whether it was a place secured by treaty for rivals of the United Illinois and Wabash company or on the unregulated limbo of the Half Breed Tract's commons – determined, and was determined by the way you participated (or were excluded from participating) in a community. In not seeing that a commons has to be defined by communal accord about its use (even as brutal an accord as an unwilling acquiescence to the threat of violence), American officials had created a problem of control of land that would take decades to resolve. In so doing, and of interest in a history of the idea of land, they also created a kind of blank slate on which changing ideas might be expressed.

Where and how Native Americans might live, and how rights to their commons might be reallocated, were the most urgent questions about land use in the English-speaking Atlantic World once the end of the War of 1812 secured the sovereignty of the United States over its western frontier. It was an urgent question because so many across the Atlantic World thought they wanted to be there. It was urgent, too, because the government responsible for securing peace and maintaining order in that land and through its environs, the government of the United States, was not yet certain it could

[47] Murray's abstract, in United Illinois and Wabash Company Memorial to Congress, 1796, p. iii.

manage that task. What Washington wanted, as much as did any displaced English countryman, was for people to simply stay put. A basic unease about mere ownership would begin to be expressed in the 1820s in the form of hesitation and reluctance to resolve the uncertain situation of squatters, absentee landowners and a group caught between Native American nations and the United States, the children of the white trappers and traders who first ventured west and their Native American wives and mistresses. For this last group, the effort to define a place on the land would be prove to be particularly troublesome. The question of their place on the land would, in the years to come, force the issues of permanence and empowerment. Both are implicit in defining the nature of land tenure in theory and in its application, though neither one is necessarily obvious. Both, however, would have to be addressed for this caught-between group of people and their maternal relatives alike.

Chapter 5

The rent of land: attempting a theory of the value of things

It must have felt like entering a new country, stepping from the glum woods and thickets of the Wabash River valley bottomlands onto the Boltenhouse Prairie of Illinois. 'To our astonishment', wrote Morris Birkbeck, whose works on farming won him a wide audience in early nineteenth-century England:

> we beheld a fertile plain of grass … The scene reminded us of some open, well-cultivated vale in Europe, surrounded by wooded uplands: and forgetting that we were, in fact, on the very frontiers beyond which few settlers had penetrated, we were transported in idea to the fully peopled regions we had left so far behind us.[1]

It was a vision hard to resist – a wilderness that looked like the lush parklands and farms of southern England, but where a farmer need pay no landlord's rent. Birkbeck's account of his 1817 journey to Illinois, and his plans to establish a colony of English farmers there, went through eleven editions. 'Have you read Birkbeck's short account of his expedition to the back settlements in the Illinois Country?' Hutches Trower wrote to his friend, the economist David Ricardo.[2] Yes, replied Ricardo, Birkbeck's account was 'highly interesting', especially the point that, as Ricardo put it: 'the natural advantages of a new and fertile country to attract capital to a place where profits are so high that with moderate industry a certain provision may be made for a family'.[3] In an England where rents and the price of bread raced each other upward, the notion of a smallholding that yielded a reliable living was compelling.

The prairie where Birkbeck found 'every beauty, fresh from the hand of nature, which art often labours in vain to produce' raised anew a basic question about land in the early nineteenth century: from what did it derive its value?[4] Birkbeck looked at a prairie

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[1] Morris Birkbeck, *Notes on a Journey in America from the coast of Virginia to the Territory of Illinois*, London, 1817, p. 117.

[2] Hutches Trower to David Ricardo, 28 February 1818, in Piero Sraffa (editor), *The Works and Correspondence of David Ricardo*, Vol. 7, p. 257.

[3] *Ibid.*, pp. 259-60.

[4] Birkbeck, *Notes on a Journey,* p. 133.

and saw an idyllic image of England, but one where farmers might shed the heavy burden of rent. Political economists after Ricardo would look at the American commons and see a challenge to his concept of rent and what it had taught them about land. Rent will be at the centre of this chapter because it was the way that the writers who had defined economics had calculated the worth of natural resources generally, and land in particular. Yet the western commons posed this problem to the concept: If a person could simply take a portion of land to use, as squatters and Native Americans did, there was no room for rent, for nobody seemed to receive any.

This chapter will start with those political economists (including Ricardo) who argued that despite the free and easy use of the American commons, there really was rent, or that it would soon come, in America. It then asks about those who were not satisfied that a supposed law of economics had such a large exception. One response was to look to America and conclude that rent expressed merely a relationship between a person who controlled access to a piece of land and the people who used it, rather than saying anything important about land itself. A second response was to say the distinction between what an American farmer earned from his labour, from his equipment and from the natural endowments of land was an unimportant one, since land was like any tool that people used. Both trends of thought suggest that what Nature provided mattered less and less in economic thought and in the lessons others took from economists' works in the early nineteenth century. The declining importance of Nature, particularly as represented by land, came in response to what political economists saw of the natural bounty of the American commons. This view of Nature also generated an exhilarating metaphor that human enterprise alone makes land valuable – and economists saw proof in the results of settlement of the American commons. Yet that perception was only a metaphor, an idea. It is essential to remember that the idea emerged from moments not unlike Birkbeck's first step on the Boltenhouse Prairie, imagining wheat as he gazed at a stretch of tough bluestem grass stretching to the horizon. Political economists' ideas about land, like Birkbeck's much more romantic abstraction, were shaped by unclear and incomplete glimpses of the American commons.

'Farming will be as good a business here, I think, as in England, with this difference: instead of paying rent for our land, our land will pay rent to us, by its

increasing value', Birkbeck declared in his second book on Illinois, writing at roughly at the time Trower and Ricardo exchanged letters about his first report on the territory.[5] 'Nothing but fencing and providing water for stock is wanted', he wrote, adding, 'as the necessary outgoings are trifling, *a small sum will do'*.[6] About 150 people, many of them Birkbeck's farmhands, took up his invitation and joined him in the colony he and George Flower established in Edwards County, Illinois.[7] The land was rich, yielding at times over 100 bushels an acre of corn (maize) during the first years of the settlement, and the rent Birkbeck said the land paid its cultivators truly seemed to be what both he and Ricardo meant by the term: the gift of Nature.[8] That idea of rent was so deep-rooted that even Birkbeck, who had so detested having to pay it to his landlord in Surrey, could not shake it as a way of framing his prospective relationship with his new land and its natural abundance. The natural endowments of land had to be accounted for. Birkbeck, imagining the prairie as farmland, was nevertheless acutely aware of its potential riches.

The stinginess of Nature, on the other hand, was a central theme for David

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[5] Morris Birkbeck, *Letters from Illinois*, London, 1818, p. 58.

[6] Birkbeck, *Notes on a Journey*, pp. 131-32. It was not until settlers began trying to break the matted roots of the prairie's grasses that promoters of prairie farming found how much capital really was required. A letter from Birkbeck's friend and collaborator in the state Agricultural Society, Edward Coles, suggested first a pass with an ox team and coulter, followed by another with a bar shear, followed by two harrowings. *Illinois Gazette*, 5 May 1821.

[7] George Flower, *History of the English Settlement in Edwards County, Illinois*, Chicago, 1882, pp. 96, 100-01. As most of the settlers did not have the funds to buy land at first, they in fact started off having to pay rent to Birkbeck and Flower, though the colonists considered this as a kind of installment payment toward purchase. This settlement set a pattern others would follow on the Illinois prairie, in which a group of settlers from a particular community – some from New England towns, others from Germany, Scandinavia or French Canada – would band together to settle near one another. Often a promoter, like Birkbeck, would have purchased a large tract for the colony, but not always. The end was for settlers to have their own farms, though. These were not communitarian ventures, like those at New Harmony, Indiana, or Brook Farm, Massachusetts. See for example, Robert P. Howard, *Illinois, A History of the Prairie State*, Grand Rapids, Mich., 1972, pp. 221-25; William V. Pooley, *The Settlement of Illinois from1830 to 1850*, Madison, 1908, pp. 493-501, 526-37, Charles B. Campbell, 'Bourbonnais, or the Early French Settlements in Kankakee County', *Transactions of the Illinois State Historical Society*, Vol. 34, 1941, pp. 303-33.

[8] While the literature of land promotion, like Birkbeck's efforts for Illinois, can overstate the richness of new land, it is hard to resist the recollection of the colony's co-founder George Flower, long after he left Illinois in 1840, of how his pigs would saunter through his peach orchard 'giving to an ordinary peach a contemptuous turn with their little snouts, not deigning to taste one unripe or deficient in flavor', Flower, *History*, pp. 304-05.

Ricardo, who started his analysis of the national economy by asking about the income produced by land, specifically rent. In agriculture, that meant thinking about the fertility of the soil.[9] He considered rent as the return for what he called the permanent and indestructible productive agents of land, despite what any farmhand could have told him: that fields wear out, unless renewed.[10] Rent, to Ricardo, was determined simply by the difference between the income that the least fertile field in production yielded and the income received by owners of better land. Those who held the best land had the highest rent. Rent was not, as for Adam Smith, a monopoly price determined by what the tenant can afford, but rather derived from the character of the land itself.[11] Land was fixed, but '[i]n the progress of society and wealth, the additional quantity of food required is obtained by the sacrifice of more and more labor', and the ever-costlier wheat produced generated all the more money for rent.[12] In effect, by declaring it the return for the original and permanent productive capacity of land, Ricardo's model removed rent as a variable that was determined by the economy.[13] Doing so allowed Ricardo to create a model that, in effect, provided a solution to a set of simultaneous equations (though Ricardo did not model his system algebraically) – perhaps the first real model of an economy moving through time to a state of equilibrium.[14] By deriving rent from the fixed

[9] David Ricardo, *Principles of Political Economy*, New York, 2006 (1817), pp. 45, 58. Ricardo's view of Nature's parsimony is discussed in Theodore W. Schultz's 'A Framework for Land Economics: The Long View', *Journal of Farm Economics*, Vol. 33, No. 2, May 1951, p. 204. Ricardo also noted that rent was earned from mineral deposits, varying with their richness.

[10] Ricardo, *Principles*, pp. 45-46. Frank Fetter notes that Ricardo's definition, which became the standard in economics well into the twentieth century, glosses over the history of the rent contract: that it relied on the legal fiction that a renter or tenant would return property, whether land, cattle or house, in the same condition as when it was first rented; it is important to remember, he argued, that the contract involved temporary use of someone else's wealth. Fetter, 'Relations of Rent and Interest', pp.183, 185.

[11] *Ibid*., p. 47; see Smith, *Wealth of Nations*, I, xi, 5.

[12] Ricardo, *Principles of Political Economy*, p. 47.

[13] Ben Fine, 'Landed Property and the Distinction between Royalty and Rent', *Land Economics*, vol. 58, No. 3, Aug., 1982, p. 344.

[14] Ricardo's equilibrium model, his theory of value and elegant argument for free trade are what made him such a central figure in the history of economic thought. A quick sketch of how these arise from his theory of rent looks like this: With demand for food necessarily rising with the population, with the need to turn to ever-less fertile land to supply it, the price of food – and, therefore, the real wages of labourers – had to rise; profits, then, had, in Ricardo's words, a 'natural tendency' to fall, while rent accounted for an ever larger share of what we would now call national income. He argued that free trade would bring in cheaper grain. That would allow

and indestructible nature of the land, he recognised a special status for land and for natural resources – but, as a given in his system, he also made it impossible to ask if they were misused or even wasted.[15] He also, of course, created a generalisation about land. It was a category of input in his economic model. It was an idea.

To write universal laws, though, Ricardo had to deal with America. Wages and profits were higher there than in Britain. The problem was that in Ricardo's system, rent forced an inverse relationship between wages and profits. They both should not be high. In an early letter to T.R. Malthus, Ricardo tried one way around the problem by arguing that high American profits were just a temporary phenomenon, which 'must necessarily be so in all countries which are most rapidly increasing in riches', because of abundant fertile land that yielded more than producers could consume.[16] In this initial effort by Ricardo, three years before his masterwork, *On the Principles of Political Economy and Taxation,* a producers' surplus was the source of capital as well as the pool from which rent is drawn. He could conflate capital and land here – as he would not later – by concluding that there was so much fertile land in America that it 'may be had by any one who chooses to take it'.[17] Ricardo's choice of verb here is significant. He wrote of land that might be taken, as a squatter would (and as they, in fact, did), rather than of land that had been purchased or that was simply owned or inherited. On land that one could take, as with the oceans people fished, 'the whole produce, after deducting the outgoings belonging to cultivation, will be the profits of capital, and will belong to the owner of such capital, without any deduction whatever for rent'.[18] The land when so abundant that

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wages and profit to rise, allowing more rapid accumulation of capital for future growth. William R. Camp, 'The Limitations of the Ricardian Theory of Rent', *Political Science Quarterly*, Vol. 33, No. 3, Sept., 1918, pp. 331-32. Samuel Hollander, 'Smith and Ricardo: Aspects of the Nineteenth-Century Legacy', *The American Economic Review*, Vol. 67, No. 1, Papers and Proceedings of the Eighty-ninth Annual Meeting of the American Economic Association, 1977, p. 37; Frank Knight, *On the History and Methods of Economics*, Chicago, 1956, pp. 37-88; Joseph Schumpeter, *History of Economic Analysis*, New York, 1954, pp. 474, 568, 673n.

[15] While other economists, from Cantillon to Quesnay to Smith, saw rent as a return from the land or from control of a natural resource, they tended to see those who received rent as the primary actors in the economy, as when Cantillon discusses the impact of a proprietor's shifting preference for having horses instead of servants, *supra*., p. 41.

[16] Ricardo to Malthus, August 30, 1814, Ricardo, *Works*, Vol. 6, pp. 128-29.

[17] *Ibid*., p. 129.

[18] David Ricardo, *An Essay On the Influence of a Low Price of Corn On the Profits of Stock*,

it might be simply taken was, in essence, as much a commons as the ocean was. When it was no longer free for the taking, then there would be rent.

Yet American law also made it easy to buy and sell land, Ricardo noted.[19] American lands were not always free. On reflection, Ricardo would not be satisfied that the explanation for simultaneously high wages and profits was that the land was basically a commons. 'By the by', Trower asked Ricardo, not long after their exchange about Birkbeck's book, when an essay in the *Quarterly Review* raised one of the first challenges to Ricardo's rent theory by suggesting an American counter-example, 'how is the fact with respect to America? Does *no land pay any rent', a*s Ricardo's critic suggested when 'he speaks of the boundless extent of fertile and unoccupied land'.[20] No, replied Ricardo, for while he had written elsewhere that no rent is paid on common resources, such as air and water, 'In America I should think that there was no land for which a rent was not paid'. With the government selling uncultivated land at $2 an acre, '[r]ent then must account in America to the interest which 2 dollars would make per acre, at least; but this fact makes no difference in the principle'.[21] His glance at the American west had shifted to take in the General Land Office and its notional price for land, rather than the settlers deep in the woods who never bothered paying that price. If land in a natural state had a price, it necessarily had a value. All American land generated rent, since some was offered for sale.

Ricardo's friend Malthus also tried to understand why wages and profits should both be high in America. To Malthus, the American pattern seemed to leave no room for rent. It was as if once the labourer and capital owner were paid, there could be nothing left over for the landlord. In his first attempt at a theory of economic progress, before his correspondence with Ricardo, Malthus had thought the mechanics of land markets might offer an explanation. In the United States, in addition to 'the plenty of good land … the political institutions that prevailed were favourable to the alienation and division of

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London, 1815, p. 1.

[19] Ricardo to Malthus, 30 August 1814, Ricardo, *Works*, Vol. 6, p. 128.

[20] Trower to Ricardo, 23 August 1818, Ricardo, *Works*, Vol.7, p. 289 (emphasis in the original).

[21] Ricardo, *Principles,* p. 46; Ricardo to Trower, 18 September 1818, Ricardo, *Works*, Vol. 7, p. 297.

property', he wrote.[22] In contrast, in Britain, 'From the law of primogeniture, and other European customs, land bears a monopoly price', and capital could 'never be employed in it with much advantage to the individual'.[23] Later, however, he dropped his point about the significance of constraints to sale in Britain. In the major expansion and revision of his *Essay on the Principle of Population* in 1826, he argued that the ease of applying capital to American land made the difference.[24] 'The command of thirty or forty pounds', said Malthus:

> is considered as necessary to enable an active young man to begin a plantation of his own in the back settlements. Such a sum may be saved in a few years without much difficulty in America, where labour is in great demand and paid at a high rate.[25]

Malthus' idea of an American settler looked very much like the men and women Birkbeck aimed to lure to Illinois: well-off English tenant farmers and their more thrifty farmhands. Neither man remarked on squatters like Braxton Parrish, who walked with his new wife to Illinois from North Carolina with all his belongings stowed in a 'wallet', two connected sacks, one slung over his back and the other hanging from his chest. 'When I arrived here, I had but 18-3/4 cents in money – it troubled me to know how to dispose of it to best advantage, more than any money has troubled me since', he recalled.[26] His story, of borrowing a crude plough, rigging a harness from tree bark and corn husks, and

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[22] Thomas Malthus, *An Essay on the Principle of Population*, London, (1st edition), 1798, Ch. vi, paragraph 4.

[23] *Ibid*., xvii, 10.

[24] Thomas Malthus, *An Essay on the Principle of Population*, London, (6th edition), 1826, Book II, Ch. viii, paragraphs 6-7. Malthus' focus here is not on the functioning of an active land market but rather in the initial distribution of land, with a discussion focused on land grants in colonial days and their revocation when grantees did not develop their holdings; typically, this would happened by settling immigrants, often tenants, on their grants. Many Britons clearly were fascinated by the breadth and relative equality of the distribution of land in the United States, as James Maitland, the Earl of Lauderdale noted, discussing the different potentials for English trade because of differences in the nature of wealth overseas: 'In the United States of America, on the other hand, property is more equally divided than in perhaps any other country. Almost every man possesses not only the means of procuring the mere necessities of life, but his wealth is such as to extend his demand to some articles of comfort in clothing, furniture and habitation; and there is hardly such a thing as a princely or overgrown fortune', James Maitland, Earl of Lauderdale; *An Inquiry into the Nature and Origin of Public Wealth, and into the Means and Cause of its Increase*, Edinburgh, 1804, p. 322.

[25] Malthus, *Essay,* (6th edition), I, ix, 14.

[26] Braxton Parrish, 'Pioneer Life in Egypt', *Golden Era*, 4 September 1874.

carrying fence rails on his shoulder because he lacked a wagon, was far from unique. It was not a story about saving the money needed to start a farm. It was a story – to be fair, not often told at the time – of taking one's due portion of a commons, which was a story repeated over and over on the lands west of the Appalachians, more often than the story of a young man saving his £30 to start a farm.

Stories about a different set of people on the trans-Appalachian commons – Native Americans – also seemed to Malthus to support his conclusion that easy, even cost-less, access to land mattered less than the ability to accumulate and apply capital. Before settlers came, he wrote, American lands were inhabited by 'small independent tribes of savages', who lived 'like beasts of prey, whom they resemble'.[27] Native Americans were 'wonderfully improvident, and their means of subsistence always precarious, they often pass from the extreme of want to exuberant plenty … their vigour is accordingly at some seasons impaired by want, and at others by a superfluity of gross aliment', he continued.[28] Part of the problem was that Native Americans did not settle in one spot, since 'even those which have made some progress in agriculture' would head off to the woods to hunt.[29] (Hunting, of course, seemed more of a pastime than a necessity to a man of late eighteenth-century England.) Work, hard work, and not idle, easy exploitation of Nature was what sustained human life, in Malthus' view. That had been, in fact, his conclusion even in the first edition of his *Essay*, before his more extended discussion of Native Americans. Malthus' concern in his *Essay on Population* was morality, and with the way people ought to be behave. His analysis of Native American life in later editions of the *Essay* was intended to prove already-determined conclusions about human industry, thrift and marriage. As a result, and almost necessarily given his predetermined conclusions, the land, and its rent, became almost trivial factors.

In the first edition of the *Essay*, Malthus used the term rent to discuss income in excess of wages from manufacturing and trade. In the revisions for later editions, he argued that the American example showed that to focus analysis on the money rent

[27] Malthus, *Essay*, I, iv, 4.
[28] *Ibid*., I, iv, 12
[29] *Ibid.*, I, iv, 32 and 34

landlords receive is 'undoubtedly to consider the subject in a very contracted point of view'. His focus was the surplus produce of the land beyond what is needed to sustain the people who work directly on it, whether in the form of wages (such as those that allowed American farmhands to amass the necessary capital to strike out on their own) or rent or profits on the capital employed to cultivate the land and process its produce.[30] Even so, he argued, 'the best directed exertions, though they may alleviate, can never remove the pressure of want', and that even the new colonies would sooner or later come to a point where the produce of the land barely supported a nation's people'.[31] Rent, as a separate category of income, was not essential to Malthus' analysis. Yet, like Ricardo, he saw land as a limiting factor – and America an exception that would eventually, as its population grew, fall into the general pattern.

In fact, for many British political economists, the most straightforward way to understand what they thought they saw in America was to view the new country as a temporary aberration from Ricardo's system and to cling to the common view of an ungenerous Nature. The barrister (and later judge) Sir Edward West noted that 'in the progress of the improvement of cultivation, the raising of rude produce becomes progressively more expensive'; that is, each additional farmhand working a piece of land, each additional animal grazing a pasture, or each additional plow set to work would add less to total production than the one immediately before, even if total production rose.[32] The rising cost of wheat ought to mean higher prices, which meant a labourer's wages did not buy as much – in effect, they fell. Rising prices meant room for higher profits from investing in additional equipment or higher rent from the land. The reason there could be both high wages and high profits in America, West suggested, was that North Americans had not fully exploited all available land – diminishing returns did not apply. America

[30] *Ibid*, III, viii, 21.

[31] Malthus, *Essay* (1st edition), x, 3 and xvii, 10.

[32] Edward West, *Essay on the Application of Capital to Land, with observations showing the impolicy of any great restriction of the importation of corn, and that the bounty of 1688 did not lower the price of it*, London, 1815, pp. 1-2. West's significance for historians of economic thought is that, starting with an assumption of diminishing returns in agriculture, he created an economic model linking the growth of population and capital and allowing simultaneous determination of wage and profit, Anthony Brewer, 'Edward West and the Classical Theory of Distribution and Growth', *Economica*, New Series, Vol. 55, No. 220, Nov., 1988, p. 505.

was still able to produce increasing amounts of wheat at a pace that matched population growth; wheat prices declined, and so wages effectively rose.[33] England's falling wages, the effect of rising wheat prices and rising rents pointed to a time when slowing incremental additions to the harvest in England would mean a growth in production that lagged behind population growth. Nature would no longer be able to supply all of what humans needed.

Or could it? Sir Henry Parnell, of the House of Commons Committee on the Corn Trade, hailed a recent doubling of English rents as an encouragement to bring more land under the plow, arguing that would eventually bring grain prices down. Unlike Ricardo, but like most of his fellow members of the landed gentry, he saw no need to open England's markets to foreign grain.[34] The crusty retired colonel and free-trader, Robert Torrens, replied that expansion onto marginal lands meant 'all the component parts of the natural price of corn would be increased', adding that Parnell had forgotten that 'England has not, like the continent of America, vast tracts of first class and unoccupied land, from which, at a modest cost, abundant crops might be produced'.[35] The way to reduce the price of wheat was to raise it on the best soil – even if that meant importing grain from America – and Torrens argued that the rate of return on investment, whether in land or in machinery, ought to determine where and which land was farmed. American new land was not an exception to Ricardo's rule about rent and wages and profit, but instead an alternative field for investment. American Nature might still feed Britain, in Torrens' view – that is, if legislators looked at things the right way.

In this early hint of an alternative to Ricardo's notion of rent as a production cost that was determined outside an economic system (by the endowments of Nature, in other words), Torrens contrasted two hypothetical Atlantic systems. In the first, 350 Americans were fed and clothed by the work of 100 farmers and 200 weavers, while in Britain, poorer soils and better machinery meant 200 farmers and 100 weavers did the same. If, given the same yields from soil and machine, 300 Americans farmed and 300 Britons

[33] West, *Essay on the Application of Capital to Land*, p. 43.

[34] *Hansard*, Vol. 36, pp. 644-45.

[35] Robert Torrens, *Essay on the External Corn Trade*, London, 1815, p. 121

wove cloth, the surplus they could produce above their own needs would be far higher.[36] Looking across the Atlantic (if, however, unrealistically painting a picture of a nation whose working people were divided one-third to two-thirds between farm and factory), Torrens insisted that the rate of profit from capital alone, rather than rent from land, was the driver of change. It was not what one held, but how one chose to add to it that mattered. Regulating the pace of addition to one's holding were both the desire for a higher return and also a tendency for the rate of profit to settle at a common point. The way a capitalist ran an enterprise was the most important determinant of profit, for 'a greater degree of skill and economy in the application of labour may completely counteract the effect of resorting to inferior soils, and … the rate of profit may rise'.[37] Capitalists might invest in land or in capital goods as they saw their opportunities for profit – profit earned by the capitalist's sound reason and wise investment. In this case, rent, as a special return from land, is subsumed into profit. In doing so, Torrens took a first step to seeing land as merely a kind of capital.

The acts of people, rather than the endowments of Nature, ought to be the starting point of analysis, according to Torrens and a growing number of other critics of Ricardo's theory. If, said the English economist, John Craig, 'every man could procure as much land as he could occupy, there could be neither rent nor value of land', and the difference between land and other capital goods was simply that 'whereas machinery is gradually deteriorated by use, land is generally improved'.[38] Samuel Bailey, the English

[36] Torrens argued that 300 Americans producing for 350, and 300 Britons producing for 350 in the first hypothetical translated to a profit rate of 16 percent, that is that the excess of what was produced over what was needed was 16 percent. His second hypothetical was that 200 Americans might produce all the food needed to feed 700 Americans and Britons, while 200 Britons could clothe the same 700.The profit rate then, he said, would be 75 percent. The math does not quite work out: 200 producing for 700 means a surplus of production above the producers' needs of 71 percent.

[37] Torrens, *Essay*, p. 120.

[38] John Craig, *Remarks Upon Some Fundamental Doctrines in Political Economy Illustrated by a Brief Inquiry into the Economical State of Britain Since the Year 1815*, Edinburgh, 1821, pp. 118, 126, 142. Craig's fundamental point was his objection to Ricardo's conclusion that wages and profits were inversely related: that when the one went up, it was necessarily at the expense of the other. To make his case, he argued that Ricardo's model of rent was wrong, requiring two assumptions that did not necessarily reflect relative: that there was an orderly process of cultivating the more fertile land first, with farmers moving precisely and step by step, down to slightly less fertile two assumptions seem to be necessary and also that there was plenty of land to

economist who, perhaps uniquely for his time, had been in business on both sides of the Atlantic, also made this point, though without specific reference to American conditions. Scarcity, he said, was a key to value that Ricardo underestimated, 'the very same principle which enabled the owner of land, or of mines, of more than common fertility to raise the value of their articles beyond what would afford the customary profit'.[39] The American experience, wrote Francis Wayland, President of Brown University, in his *Elements of Political Economy* (one of the most-read economic texts in America during the first part of the nineteenth century), showed that 'In the first settlement of a country, land is of no exchangeable value; for every one may have as much as he pleases'.[40] Rent, as a separate payment for Nature's yield, had no meaning, he continued, explaining that 'land would bring no rent; since no one would pay another for the use of that which he could have for nothing'.[41] It is worth underlining here that he spoke of use of land, not possession of it. For Wayland, as for Ricardo, when there was so much land that people could simply take it, that land was as much commons as the ocean. Like the oceanic commons, it did not yield a rent. If nobody could charge rent, in other words, there could be no rent. If that were so, there could be no accounting for the contribution of natural resources to human wealth. And if that were so, it was an easy step to conclude human action alone was what mattered, but that Nature did not.

Even when political economists discussed ownership, possession of land seemed to be of secondary importance. Reflecting on how his farming neighbours ran their affairs, the American economist, Daniel Raymond, asked: 'Suppose a pair of oxen were purchased for the double purpose of work and sale, what sort of capital would they be? Suppose land is bought for sale and not to keep, is it fixed or circulating capital?'[42]

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meet demand, both points the American economist Henry C. Carey would emphasise, see Thor W. Bruce, 'The Economic Theories of John Craig, A Forgotten English Economist', *The Quarterly Journal of Economics*, Vol. 52, No. 4, Aug., 1938, p. 704.

[39] Samuel Bailey, *A Critical Dissertation of the Nature, Measures and Causes of Value*, London, 1825, p. 299. For his American connection through his father's merchant business, see Leslie Stephens, 'Samuel Bailey', *Dictionary of National Biography*, Oxford, 1885, Vol. 2, p. 409.

[40] Francis Wayland, *Elements of Political Economy*, 4th edition, Boston, 1870, pp. 340-41 (1st edition 1837, 4th edition 1841). Some 50,000 copies of Wayland's *Elements* were printed. Bryson, 'Emergence of the Social Sciences', p. 311.

[41] Wayland, *Elements*, p. 341.

[42] Daniel Raymond, *The Elements of Political Economy*, Baltimore, 1823, p. 365.

Natural law said the right to property came with labouring on it; possession only because of occupancy was a creation of human institutions.[43] Samuel Read, the one English economist of the time who put the ability to sell property at the centre of his analysis, believed 'land is naturally and quite conveniently held in common', until people start cultivating the earth and must therefore begin infusing their capital into it, rather than just their labour, at which point the disinclination of people to share their wealth makes a commons 'altogether impossible and impracticable'.[44] Pausing to cite Say on the poverty of the fishing Indians of the northwest coast of North America, Read argued their example showed that individuals whose wealth comes from their work on the land 'must be allowed the exclusive right to it, else they would never accumulate such wealth'. Exclusive right, he added, included 'the right to sell, bequeath or bestow it on whom they please'.[45] Read could not conceive of how to allocate a return from improved land if the land was commons; a problem the traditional but by then vanishing manorial village society had solved (as for that matter did the Native Americans of the northwest coast in allocating access to village fishing weirs, which were collectively built and owned capital). For Read and other political economists, the roots of the right to own land lay not so much in the use of land but the possibility of conflict over land. The right to own was artificial, just a creation of law or of a contract to sell. Ownership was an idea, and one that like Chief Justice John Marshall's theory linked possession and power, but that also imbued land with inherent value.

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[43] *Ibid.*, p.371. Raymond also noted here that ancient Romans considered the right of property, in the absence of actual possession, to be of the slenderest nature, trumped by other social needs.

[44] Samuel Read, *Political Economy: An Inquiry into the Natural Grounds of the Right to Vendible Property*, Edinburgh, 1829, p. 106. Agriculture required private property, Read argued, noting 'should a wandering *tribe* determine to cultivate the ground, and choose and unappropriated tract of land for their settlement, and should another tribe come to dispossess and despoil them of their crops, or of their land, they would not be slow to resist the attempt, and resent it as one of the very highest injustice –, so naturally and reasonably does the idea of *right* arise out of the prepossession and labour bestowed in cultivating the land. Even tracts which are only traversed by the hunter and shepherd, and which are left by them for months together, and sometimes for half a year, are often considered by them as their right and patrimony. But here they are evidently in error; for nothing but cultivation and permanent occupation can give any exclusive natural right to property in the land ... the desert must be resigned to the people who will *cultivate'*. *Ibid.*, p. 100. As a result, 'it is only the bare uncultivated earth, where it is unappropriated and unimproved by labour, to which and equal and common right can be pretended, for no man can have natural right to the wealth produced by others', *Ibid*., p. 107.

[45] *Ibid.*, p. 107.

The act of taking a piece of land from the vastness of interior America challenged the concept of rent, but to some political economists so did the way individuals constructed a social system once they had taken the land. 'European writers always speak of the proprietor and cultivator of land as distinct persons, and so they are in Europe generally … Not so in the United States, where almost every cultivator is proprietor of the land he cultivates', wrote the American economist Willard Phillips.[46] The dead hand of rent was, Ralph Waldo Emerson said, 'a nightmare bred in England'.[47] It was a product of both fortune and force, rather than of virtue. 'The first comers take up the best lands', Emerson continued, 'and each succeeding wave of population is driven to poorer, so that the land is ever yielding less returns to enlarging hosts of eaters'.[48] In England, wrote the Virginia agrarian, John Taylor of Caroline, 'two great interests, landlords and tenants … are extensively computed in moulding her system of political economy', while in the United States, 'the yeomanry ... are land-owners ... wherefore rents are not an item of any importance, in moulding our system of political economy'.[49] Taylor believed European writers generalised laws of economic behaviour from their own local conditions, and so needed to discuss rent as a separate category, because the Europeans who actually cultivated land or ran cattle and sheep over it did not own the land. In England, he noted, 'the landed interest … is distinct from agriculture, and associated with the aristocracy of capitalists', and he feared the United States was falling in thrall to the money interest by forgetting, as the English economists had, 'that the land is the only, or

[46] Willard Phillips, *A Manual of Political Economy with Particular Reference to the Institutions, Resources and Condition of the United States*, Boston, 1828, pp. 107-08.

[47] Ralph Waldo Emerson, 'Farming', in Edward W. Emerson (editor), *The Complete Works of Ralph Waldo Emerson*, Boston, 1904, Vol. 7, pp. 150.

[48] *Ibid*., p. 151.

[49] John Taylor, *Tyranny Unmasked*, Indianapolis, 1992, Vol. 1, p. 106 (originally published 1822). Much of the American reaction to the English economists was sparked by Ricardo; it is worth noting that Ricardo's *Principles* was published in an American edition far more quickly than were other economists' works, with a first American edition coming just two years after the work's initial publication in London in 1817, while the first American edition of Smith's *Wealth of Nations* was printed 23 years after its initial publication. While it was 11 years before Malthus' *Essay on Population* was published in America, his *Principles* was printed in Boston in 1821, just a year after its London publication. J.R. McCullough's glosses on Ricardo were also printed just a year or two after their first British publication. It was 18 years before Say's *Traité* was published in translation, in 1821, though as we have seen, Jefferson was familiar with it. Esther Lowenthal, 'Reprints of Economic Writings 1776-1848', *American Economic Review*, Vol. 42, No. 5, Dec. 1952), pp. 878-79.

at least the most important source of profit'.[50] Rent to Taylor was an artifact of a relationship between individuals, each playing a particular role in an elaborate – but not inevitable – social structure. That relation between individuals obscured the critical point about the relationship between a nation's people and their land: that it is in the land that real wealth (and Taylor would insist real virtue) is to be found.

In fact, Taylor worried that he already saw signs that farmers and settlers in the United States were blind to the land and their obligations to it, in contrast to the Native American peoples they were displacing: 'The Indians certainly made better crops to the acre, and preserved the earth in better heart than we do', he wrote, contrasting their care of land – particularly with respect to manuring – with the American settler, who would 'lay out all his skill and energy in killing the land, and as little as possible in improving it'.[51] The problem was that people were not rooted. 'Under the frequent emigration of owners from State to State, and of overseers from plantation to plantation', Taylor wrote, adding: '[i]mpoverishment will proceed, distress will follow and famine will close the scene'.[52] Taylor saw a general, national interest in how people used their land, calling for public regulation of landholders' drainage works in order to manage the common resource of running water.[53] He argued that unless settlers learned to take better care of their land, and become as understanding of its needs as were Native Americans, 'the terrible facts … determine our agricultural progress to be a progress of emigration and not improvement; and lead to an ultimate recoil from this exhausted resource, to an exhausted country'.[54] For Taylor, the English alliance of landlord and capitalist – those he called the money interest – made land a mere asset, that was exchangeable for any other. The yield of land, expressed in money, was as impermanent and wasting as the yield of any other asset, rather than something that might be sustained by nurture and care. Like any other asset, the land's possessors were free to let it drop and move on to something better – the connection of a person or family to a piece of land was no longer

[50] John Taylor, *Arator*, Georgetown, D.C. 1814, p 46; *Tyranny Unmasked*, Vol. 2, p. 66.

[51] Taylor*, Arator*, pp. 70, 136. Taylor's view about Native Americans is unusual – few writers, particularly European writers, even acknowledged that Native Americans raised crops.

[52] *Ibid*., p. 70.

[53] *Ibid.*, p. 221.

[54] *Ibid*., p. 10.

permanent. He was as troubled by this as was the poet John Clare revisiting the commons of his childhood, or Cantillon fretting about the wanderings of an Iroquois band.

Taylor was beginning to be out of step with the times. As speculative interest in western lands rose, Phillips, for instance, saw the buying and selling of land as simply another kind of investment, and the main danger was not destruction or wastage of a resource, but rather a tendency to value land too highly. Any return earned from the land – or, to be precise, on money that had been used to acquire land – ought to be less than the return that one might make by lending funds because the borrower's efforts might fail and the lender might not be repaid, while 'the renter of land … runs no such risk as the land cannot be lost', Phillips argued. [55] He is here equating the banker's return on a loan to a landowners' return – the rent – on the sum spent acquiring the land, which was the equation that had allowed Ricardo to decide all American land yielded rent. However, the land in Phillips' analysis (as opposed to Ricardo's) is merely an alternative to other kinds of assets rather than an essential input of an economic system. Its value and yield may be measured and compared to any other asset, denominated as it can be in money terms. Its inherent quality, that is, its productive possibilities, or what Ricardo called fertility, did not matter once people entered the scene. 'The earth being the original source of wealth, labour is the original cause that produces it', he wrote.[56] This was an insight Phillips believed English writers missed, for there 'the individual who owns the property, land, or capital, can obtain a quantity of the necessaries and comforts of life without his own labour'.[57] For Phillips, like Taylor, the interpersonal relationship that he believed was

[55] *Ibid.*, p. 256. A conceptual melding of land ownership with other kinds of property ownership also emerged in the utilitarian economists who tended to focus on demand for goods, rather than on production and growth of output: 'An article of property, an estate in land, for instance, is valuable, on what account? On account of the pleasures of all kinds which it enables a man to produce, and what comes to the same thing the pains of all kinds which it enables him to avert. But the value of such an article of property is universally understood to rise or fall according to the length or shortness of the time which a man has in it: the certainty or uncertainty of its coming into possession: and the nearness or remoteness of the time at which, if at all, it is to come into possession'. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, (2nd edition), London, 1823, Ch. IV, paragraph 17.

[56] Phillips, *Manual*, p. 95.

[57] *Ibid.* There was of course an American landed gentry class: owners of large plantations worked by slaves, as well as the landlords who dominated American frontiers from the earliest days on. John Pynchon, son of the founder of Springfield, Mass., who tenants numbered more than a third of adult male residents of the settlement in the early eighteenth century, Stephen Innes, 'Land

embodied in the English theorists' conception of rent blinded them to the real source of wealth. In Phillips' view, that: source was the work of industrious individuals. That conclusion was, he believed, made most triumphantly concrete in American fields and factories.

It was through the ability to buy and sell real estate, Phillips continued, that land became valuable, and had the potential to have its value enhanced by the application of labour. Goods that are free for the taking have no value, so there is no reason to hold them, either to save for future use, to accumulate as capital, or exchange for something else, for 'one can sell or exchange only what he has an exclusive right to, and ... only so far as he can invest another with this exclusive right'.[58] Where that right does exist – critically, 'where lands are alienable, and, as in the United States, change possessors as often, almost, as ships ... each successive purchaser pays a price predicated upon the net income', Phillips said.[59] The notion of rent as a distinct kind of income vanishes – not, as for Ricardo, by placing it to one side, as something determined by Nature, but by seeing land as a kind of capital good that can be exchanged nearly (but not quite) as often as a ship, which was probably the single biggest piece of capital of the time.

It is only when land is constrained from sale that 'the augmentation of … income from land is more invidious, and the disadvantage to other interests of the community is more distinctly felt', Phillips said, adding that 'if the lands are alienable at will, no distinction will appear between the landholder and any other capitalist'.[60] Britain's laws of entail proved that point, in Phillips' view. Similarly, the South Carolinian newspaper editor and economist, Jacob Cardozo, argued in his book on political economy 'if land cannot be brought freely into market ... it will not be pretended that it will sell or rent for

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Tenancy and Social Order in Springfield, Massachusetts, 1652 to 1702', *William and Mary Quarterly*, 3rd series, Vol. 35, No. 1, Jan. 1978, pp. 33-56, or William Scully, the mid-19th century landlord whose 47,000 acres in central Illinois, called 'Scullyland' were infamous for the poverty of tenants farming there. Scullyland remained a blight late into the 19th century, where 'miserable tenants' lived in 'mere sheds' on the 'most forlorn-looking estate in Illinois', Bloomington *Pantagraph*, March 21, 1887, cited in Paul W. Gates, 'Land Policy and Tenancy in the Prairie States', *The Journal of Economic History*, Vol. 1, No. 1, May 1941, p. 76.

[58] Phillips, *Manual*, p. 28.

[59] *Ibid*., p. 119.

[60] *Ibid*., p. 118.

a competition price, or that price which is in proportion to its natural fertility'.[61] Cardozo held that theories 'that do not admit the agency of Nature concurrently with the labour and ingenuity of Man in the creation of value' were wrong.[62] He elaborated by saying 'land, from its abundance, may be of *little* value', but that, unlike water or air, would yield rent because it could be appropriated while those gifts of Nature could not.[63] 'The real question is this: when land can be made to yield more than the ordinary profits of stock or wages of labour, will any one be suffered to appropriate or occupy it without price or rent?' Cardozo held.[64] As long as 'neither taxation, commercial restrictions nor a vicious division of land' keeps people from earning a fair return on their capital – whether ploughs and oxen or a mill – and on their labour, including labour on a farm, 'rent will never exceed … the original productive powers of the soil', Cardozo concluded.[65] Any piece of land's value reflected alternatives to its purchase, and income from it could include a return on funds spent or borrowed for buying the land, Cardozo said, adding 'we may call this rent or not as we may please'.[66]

By insisting that land prices reflected a choice among potential streams of net income – the revenue from what humans produced from the land after paying for the costs of production – rather than the differing fertility of land that Ricardo saw as determining rent, Phillips and Cardozo could integrate land into their analyses rather than carve it out. In a nation where 'the greatest part of lands in the northern and middle states, has been cleared by proprietors themselves of one or two hundred acres', Phillips wrote, 'every young man considers it his first object to become the proprietor of a tract of land, cultivated or wild, small or extensive, according to the amount of his capital'.[67]

Those young men, though, often were not proprietors and rarely had any capital. Nor did they always, or even often, see their first object as acquiring land. All in all, for

[61] Jacob N. Cardozo, *Notes on Political Economy*, Charleston, S.C., 1826, pp. 26-27.
[62] *Ibid*., p. 5.
[63] *Ibid.*, p. 31. Cardozo did not note, as I will, that the air is a commons; so is the ocean and so are many streams and rivers.
[64] *Ibid.*, p. 32.
[65] *Ibid.*, p. 34.
[66] *Ibid.*, p. 38.
[67] Phillips, *Manual*, p. 73.

instance, holders of warrants for military bounty lands, perhaps the biggest bloc of potential landholders in the 1820s, exercised some 17 000 of the securities within the first two years of issue (almost all for lands in the Illinois Military Tract, lying between the Illinois and Mississippi rivers, about 200 miles west of Birkbeck's prairie). But hardly any ex-soldiers actually moved west and took up their land, preferring instead to sell their paper interest in western land to speculators.[68] When taxes came due in 1823 (the bounty lands were exempt from taxation before that date), non-resident out-of-state landholders gave up more than a million acres in Illinois by failing to pay taxes. The state Auditor of Public Accounts advertised nearly 9000 quarter-sections for sale in December 1823 and 7000 quarter-section (or 160-acre) tracts that the Auditor sold went for as little as $1.96 of unpaid back taxes.[69] Still more surrendered their land in 1825 and 1826, eventually more than a million acres, or half the tract, would be auctioned off for taxes. The large gap between the price at which title might be acquired – as little as two or three years' worth of back taxes at rates between a penny and 1.5 cents per acre – and the minimum $1.25-an-acre price to be paid once Land Office sales started, drew speculators from all over the country.[70] In Illinois, where connection to land was so impermanent and so tenuous that it could be traded through a warrant that represented only a conditional claim, the result was neither the wastage that Taylor feared nor the overvaluation Phillips

[68] Theodore L. Carlson, *The Illinois Military Tract, A Study of Land Occupation, Utilization and Tenure*, Urbana, 1953, p. 25. In Henderson County, Ill., only four soldiers settled on their lands; Newton Bateman et. al. *Historical Encyclopedia of Illinois and History of Henderson County*, Chicago, 1911, Vol. 2, p. 624. In Peoria County, only 10 percent of ex-soldiers with title to land tried for a time to do so Milo Custer, *Soldiers of the War of 1812 Whose Bounty Land Grants Were Located in Peoria County, Ill*., Bloomington, 1913. The 1840 census would show only 14 pensioners from the War of 1812 living anywhere in the Illinois Military Tract, *Census of Pensioners of Revolutionary and Military Service*, Washington, 1841, pp. 186-88.

[69] Carlson, *The Illinois Military Tract*, p. 41, n.6; Tax sale advertisement in *Illinois Intelligencer*, 6 September 1823, report of sales 1 October 1824.With the expiration of the tax exemption on Military Tract land, nearly 84 percent of property taxes collected in the whole state came from people who lived outside the state, mainly for land in the tract, and the percentage exceeded 92 percent for the next decade; there were large-scale absentee landowners who lived in Illinois, as well. Calculated from Robert M. Haig, *A History of the General Property Tax in Illinois*, Champaign, Ill., 1923, p. 61. Illinois resident John Tillson acquired more than 450 square miles on the Military Tract by 1833, James Stapp had 57 square miles, while Gov. Ninian Edwards owned 14. Carlson, *The Illinois Military Tract*, table 9, p. 58.

[70] Nearly 6000 quarter sections in Illinois went on the block for back taxes two years later, in 1827, the state advertised more than 8000 tracts; *Illinois Intelligencer*, 25 October 1825; 7 October 1826.

warned about. Instead, land was merely something cheap. It was becoming an idea with which to toy.

In the extreme case of the Illinois Military Tract, the land, once reduced to a paper asset that was conceptual rather than a concrete generator of real goods, was coming to resemble what the theory of a Phillips or Cardozo or Torrens suggested. That is, land seemed simply a variety of capital rather than the essential economic input of Ricardo's model (or for that matter, of Cantillon's, Turgot's and Smith's). Cheap land was not the distinctive and temporary condition that allowed high wages and high profits to co-exist, as the English economists had thought. It did not lure many settlers to venture across the Illinois River into the Military Tract. In the hotly contested 1824 referendum on the state constitution, fewer than 350 people cast ballots in the tract.[71] In theory, the ten counties formed in 1825 meant another 3500 people had moved into the tract, since Illinois required 350 people to form a county, but 1830 census figures show four with well under than number, with Mercer County boasting just twenty-six residents and Henry County, forty-one.[72] In Kentucky, the uncontrolled issue of warrants had created a kind of fictional land in the form of paper titles to thousands more acres than existed. The paper had value, and was actively bought and sold. The land was rarely even located or surveyed. In Illinois, the result was virtual counties – full-elaborated political structures with hardly anyone to govern. Each had a place to register ownership of land, a place to argue about conflicting claims, and men who could collect fees for doing so. What they were missing was people actually living on the land. The view out the door of those log-cabin courthouses (windows were luxuries) was of conceptual land.

Rent was an idea, and a way of organising models of how another idea – a national economy – worked. It was a way of accounting for Nature, and, by the second decade of the nineteenth century, allowed David Ricardo to explain the source of the value of things, the distribution of a nation's produce and the necessity for free trade. It

[71] Vote total for the Tract is for the counties of Pike and Fulton, which then encompassed the entire Military Tract, reported in Clarence Alvord, 'Governor Edward Coles', *Collections of the Illinois State Historical Society*, Vol. 15, 1920, p. 156. Nine additional counties would be created the following year.

[72] Adams, Calhoun, Hancock, Henry, Knox, Mercer, Peoria, Putnam, Schuyler and Warren counties were formed in 1825.

did not, however, fit the American economy. Trying to force the idea to match the fact, political economists tried saying the American situation reflected a temporary abundance of land, or that the distinction between rent and profit was trivial when the same person owned and worked on land, or that the ease of buying and selling land meant it was simply one more kind of capital. All these notions converged at one point – the same point reached on the Illinois Military Tract – thanks to yet another concept, the one that said a person's connection to land might profitably consist of a conditional claim in a financial security. Land was merely an idea awaiting the industry of men and women in order to become something real and valuable.

There remained, however, other people on the actual land, which was the commons. 'Indiana is a vast forest, larger than England, just penetrated in places, by the backwood settlers, who are half hunters, half farmers ... there are many Indians in the neighbourhood', a nervous Elias Pym Fordham would write as he accompanied Birkbeck west. They, too, were an idea, though. He did not actually encounter any. A few days later, his relief palpable, Fordham noted '[i]n looking at the map, I find I am wrong in saying, that the Indians inhabit the neighbourhood. Their boundary line is 30 miles hence, but they often hunt here'.[73] Native Americans imagined, and then unmapped, affected his view of the land. In the shared space of Indiana, where the Illiniwek and Delaware still hunted and where 'there are tracts they may "squat" upon for nothing', the promise of land made it worth the cost of buying, Fordham wrote.[74] 'LAND is the basis of wealth', he noted, and:

> The possession of it is sure to enrich the purchaser if he has selected it with any judgment. The enhancement of its value does not depend on any contingent circumstances, but on the never ceasing and progressive increase of the human race.[75]

Once he saw the map, that is, a conception of the land, Fordham was able to see land as the source of riches. When his traveling companion, Birkbeck, dreamily looked at land and saw wheat when there was nothing but bluestem and switchgrass, he shared that

[73] Elias Pym Fordham. *Personal Narrative of Travels in Virginia, Maryland, Pennsylvania, Ohio, Indiana; and of a Residence in the Illinois Territory 1817-1818*, Cleveland, 1906, pp. 96, 109.

[74] *Ibid.*, p. 211.

[75] *Ibid*., p. 122 (emphasis in the original).

traditional view: good land was a good value. Yet even as they walked from the dark, gloomy woods of southern Indiana and Illinois into the sunny prairie, finding the possibility of property from that stark contrast between two real places, others looked west and saw merely concepts. For political economists, it was a category, a factor to be accounted for when explaining how a system worked. For many venturers in the west, it was paper to be bought and sold, and bought again. Some looked at that western commons and saw in specific pieces of it something worth holding because it was worth working on. Some saw only vast and undifferentiated space. Some, though, would look and see a commons. And in doing so, would start to see a new way of thinking about the value of land, of Nature and the things that humans made.

Chapter 6

From rent to price: Land as an asset

Imagine (as an aspiring economist fresh from the backwoods of Upper Canada would write) a Native American hunter paddling across a lake to shelter for the night on a small island. Making his way across the pages of what would be a quietly influential text of 1830s, the hunter lights a fire, wraps himself in his blanket, leans up against a sturdy tree, suffers through a night of wind and rain – and '[i]n the morning, he spends some hours ... (with) branches and bark, he makes something like one half the roof of a house', John Rae's 1834 tale starts. For those hours, Rae continued, the fisherman was undertaking the most essential economic task: looking ahead. This was no casual matter for the fisherman, since 'though this time may be distant, for it may not rain or blow so as to inconvenience him for another week or two, nevertheless to provide against it he gives a good many hours (of) present labour', Rae continued. To emphasise the point, Rae continues his tale to say that before the fisherman sets out in his canoe, 'he discovers a small wild plumb (*sic*) tree. He relishes the fruit, but there is little of it ... he lops the branches of surrounding trees to give this room to spread, and expects thus to find next year a more abundent crop'. Even in a wilderness commons, where the bounty of Nature was there for the plucking, Rae noted, '[t]he proceedings of man are every where very similar'.[1]

Rae here is unusually lyrical for an economist, and unusually concrete, too, in a way rarely seen since Adam Smith's famous description of pin-makers that illustrated the division of labour. Yet Rae would not be alone in setting his hypothetical economic actor loose on that forest commons. Political economists of the 1830s and 1840s regularly turned to Native Americans (and other users of different kinds of commons) to demonstrate fundamental patterns of economic behaviour – of foresight, saving and investment. These writers would conclude from their pen-sketches of idealised people on theoretical commons that they need not struggle (as Ricardo had) to find a way of

[1] John Rae, *Statement of Some New Principles on the Subject of Political Economy, Exposing the Fallacies of the System of Free Trade, And of some other Doctrines maintained in the 'Wealth of Nations',* Boston, 1834, p. 83.

accounting for Nature's contribution to human well-being. That, in turn, changed how they looked at land and what they taught society at large to think about land. Here it is particularly important to stress some easy-to-miss patterns. One is that political economists across the Atlantic World paid a fair amount of attention to Native Americans. Another is that theory-makers did not start with the idea that a commons prevented individuals from making their lives better – although they would end up there. Their scepticism about commons would anchor a basic view about the value of goods that focused on the decisive importance of the last increments of inputs and of utility, which is the still-current foundation of microeconomic analysis. Finally, as economists found it harder to see the real capacity of a commons to support human life, they would also find it difficult to see any real value in land, particularly in its natural state, except as merely one kind of generally inferior capital asset. It would be hard for economists to feel that land was inherently worth much of anything at all. The idea that Nature might generate something useful – measurable as rent – was disappearing from view.

Rae, a Scots physician turned Canadian school-teacher, thought he saw something in the way backcountry people, native and newcomer alike, actually lived on the land they shared that could explain the fundamental value of goods – explain, that is, why exchanges on a market eventually moved towards settled prices. The plum tree could become more valuable, not only because of the fisherman's labour, but because that labour was based on knowledge and deliberate decision to work now for future reward. Without those, what Nature could provide was only potential. With his storm-drenched fisherman, Rae started down a path of analogy already suggested by other North American writers who, like him, could look at land and see potential rather than constraint, and who, like him, looked to Native Americans in order to better understand all peoples. When the newspaper editor, Jacob Cardozo, turned to writing economic theory in 1826, he noted that the wood, rawhide and flint that Native Americans made into bows and arrows 'possess value in their rude state … which do not cease to be component part of value which the weapon acquires after being fashioned for the purpuse intended', and making clear that he saw the bow and arrows as capital.[2] 'The deer skin, the parched corn, the jerked venison, of an Indian cabin', as well as the cabin itself, were

[2] Cardozo, *Notes on Political Economy*, pp. 7-8.

property created by labour, wrote Thomas Cooper, the radical President of the University of South Carolina. His conclusion was that the Native American who made those things 'has laboured beyond what his immediate necessities called for, and his wealth consists of what has not been consumed … the capital thus accumulated is wealth'.[3] Native Americans, like any farmer or capitalist, gained wealth by work and thrift, Cooper acknowledged. Their actions, rather than the resources of the land they occupied, made them more or less well-off. They created capital.

Rae, however, thanks to his Native American fisherman and the frontier farmers who filled his pages, went on to say that it is not just labour and not just accumulation of goods surplus to immediate needs that generate value. Knowledge of Nature's potential, expectation of future want and the act of choosing among options were what drove human progress, he argued. Rae, though mocked for it in a critically important review of his work, opted to make that point with a Native American. Knowledge, choice and time would be at the centre of Rae's description of capital, and of how it is applied to land, and his follow-up example to his fisherman's lean-to shows that actual ownership is not necessarily the issue. The plum tree was not made the fisherman's property by the work of clearing space around it. He hacked away at the surrounding growth after 'resolving to return in succeeding seasons', not because he is claiming the tree or the land it is rooted in as his property. People everywhere, even on the lake shores of Upper Canada, Rae argued, proceed in broadly similar ways to similar ends. 'A knowledge of the qualities with which nature has endowed the materials within his reach', allowed Rae's fisherman, like all people, to create instruments to meet their future needs.[4] But the issue was not the ownership of those instruments; rather, it was the translation from concept to the concrete.

Ownership was not decisive – nor even mentioned. This is a critical point when asking about the range of early nineteenth-century attitudes to land, but it is one of omission rather than one of explicit statement, at least for Rae. (Later, a much more prominent economist, John Stuart Mill, who based much of his theory of capital on Rae's

[3] Thomas Cooper, *Lectures on the Elements of Political Economy*, Columbia, S.C., 1826, p. 54.
[4] Rae, *New Principles*, p. 83.

work, would dismiss property rights in land as unnecessary.) Ownership did not particularly matter since Rae's interest (and Mill's) was in the formation of capital rather than the mechanics of its acquisition. That interest led Rae to consider the case of Mohawk families on Lac St. François on the St. Lawrence River upstream from Montreal and the small plots of maize they cultivated on islands in the lake. The Mohawks had started doing that after abandoning a commons next to their village when neighbours' cattle damaged the crops, Rae noted, before making what was for him the essential observation that the Mohawks worked harder at hoeing weeds than their settler neighbors did, though they did not manure and did not clear additional plots as the settlers did. Rae stressed those practices because he saw in them a satisfaction with a slower return on capital and a lower wage for their labour.[5] He was interested in the consequences of that satisfaction, and inclined to accept it as a cultural difference, that did not require any more explanation than to note that different peoples had different attitudes.

He did not say, as perhaps Samuel Read or Willard Phillips might have, that the Mohawks' attitudes were a result of a decision about ownership and commons. Rae does not even raise that issue. The Mohawks all used the islands because their neighbours' cattle could not swim to them to graze on the corn, not because some individuals might have owned the islands, since Rae did not make clear who owned the islands. The issue, which Rae discusses in terms of investing in order to fence a commons, is not one of ownership. It is instead one of establishing and governing shared space, like the shores of Lac St. François, especially when one group has political power and the other does not. That fence, if it had been built, would have been the result of an act of many to protect a communal asset, rather than to divide that commons. The fact that the abandoned land was a commons did not diminish what was to Rae the more important fact, which was fencing it would have been an investment. Neither did the fact the Mohawks held the land as a commons prevent them from making an investment. In Rae's view, it was their propensity to be satisfied with a lower wage and slower return on capital that blinded them to the utility of a fence.

The fence would also have been what Rae calls an instrument, by which he meant

[5] *Ibid*., p. 137.

something created by human reason and effort that makes possible the supply of future needs. 'In this sense a field is an instrument', because of 'the leveling and if necessary making the surface dry by means of ditches and drains, the removing stones from it', as well as the work of plowing, harrowing and manuring, he wrote.[6] Rae then took an additional analytical step, objecting to the way Adam Smith and David Ricardo treated capital – for Rae's instruments are in effect capital – as homogeneous. That assumption of homogeneity is why, Rae noted, Ricardo could argue that profit must fall as wages or rent rise. What Rae said instead was that instruments can be ranked by the amount of time it takes them to yield double the cost of their construction before they are exhausted – an insight that he makes clear has North American roots. 'An individual, say an Indian trader, is obliged to reside on a particular spot in the interior of North America', Rae's parable on ranking capital instruments starts. The trader arrives in the autumn, and spends twenty days enclosing and digging up a piece of land, thus making it an instrument. In the spring he hires some Native American women to plant, hoe and harvest his maize. 'After deducting their portion, he has twenty bushels for himself', so that the field is an instrument of the highest rank, since it repays its maker the soonest. But then, Rae continues, the trader clears, or has cleared, another field, where 'the soil being overrun with small roots, and it being necessary to wait till they partially rot before a crop can be put on it, he is aware that it cannot be planted until the second year'.[7] The delay in his payoff – the same amount of maize that took twenty days' labour in the first field to produce – makes the second field an instrument of a lower rank of worth.

Being concrete with his North American example, Rae underscores the facts that the land from which an instrument – capital – is made has varying qualities, and that the capitalist trader is aware of this as he makes his investment decision. Rae continues, noting that '[i]n the same way it is possible to conceive the formation and exhaustion of other instruments … the capacity of them all being double the cost of formation, and the times intervening between the periods of formation and exhaustion, being respectively three, four, five, &c years', thus moving from North American concrete to the more

[6] *Ibid*., pp. 87-88.
[7] *Ibid.*, p. 101.

typical abstraction of economics prose.[8] Here, too, as with Rae's Mohawk farmers or any Kentucky squatter, the question of ownership is moot – it does not matter whether the trader owns his plot or simply camps out on the shared ground of a commons. The issue simply is not addressed, and in the context of life in the wilderness, is not particularly important.

Farmland, Rae continues, is 'a unique instrument, never exhausted', which nevertheless must be made capable of being cultivated before it is cultivated. 'When an individual has converted a portion of morass or forest, into a field fit for the operations of tillage, it does not return again to the state of morass or forest', Rae said.[9] Yet at that stage, it is not quite an instrument for producing crops, as 'the farmer, by manuring it, by sowing certain seeds in it, and tilling it' makes it so. 'The changes he thus effects however pass away', for:

> The seeds he sows, growing into plants of different kinds, are carried off; the manure yields part of its substance to them, and is in part dissipated; the soil that had been loosened and pulverized by the plough and harrow, is gradually again compacted and hardened.[10]

Rent is what one earns for forming the field, rather than, as Ricardo and his followers had argued, for owning the land (or, for that matter, the coal vein, the ore deposit, or the falling water at a mill-site). For Rae, rent is a special category of income only because the field itself is an inexhaustible instrument. It will not revert to its original, natural condition because the field, as a field, will continue to yield as long as people take the additional steps of tilling, fertilizing and seeding, making an instrument of the instrument. The field itself, or the creation of land that could be farmed, 'considered as an instrument actually subject to the operations of the husbandman, does not differ from any other instrument', Rae argued.[11] Land, once human action makes it possibly productive, is capital. While that action could be claiming it or buying it, the examples Rae described from the North American frontier focus instead on clearing it and preparing it, even if in

[8] *Ibid.*, p. 102.
[9] *Ibid*., p. 107.
[10] *Ibid*., pp. 107-08.
[11] *Ibid*., p. 108.

the middle of a wilderness commons. It is conceivable, and within Rae's logic, though he does not use this example, to consider the rules that govern a pasture commons, or the size of permitted catches of fish, or a mining camp's agreement on the size of placer claims, to be human action creating capital in a commons.

Ownership, in fact, might suppress what Rae called the effective desire of accumulation, the willingness to spend now for a future return. 'Thus', he wrote:

> suppose an English land-holder … asked why he does not apply his means to enclosing and draining some sea marsh, his answer probably would be, it would not pay. It would only yield me two percent when finished and landed property ought to yield four, I can always find estates to purchase, which will produce that. Ask him, why, instead of stone fences round his fields, which decay, or hedges, which require constant trimming and dressing, he does not put iron railings, he will give the same answer, 'it would not pay'. ... Were there fewer prodigal land-holders, in England, estates could not be so easily got, and part of the funds of those who buy estates, would be laid out in improving land at present unproductive, and the salt marsh might be drained.[12]

On the other hand, an English farmer, as opposed to a landowner, who comes to North America 'almost always commences on the same system which he followed in Britain', Rae wrote. The English immigrant put in more capital, at a higher cost, than needed. Yet any gain in yield would not necessarily be worth the cost of delaying the time when the instruments must be replaced.[13] The balancing of this year's return, future return, rate of exhaustion and the relation between costs of capital and revenue of production ought to drive investment and land use decisions, Rae argued. The instrument of land as capital is part of the whole economic system, and need not be abstracted out, as Ricardo did. Yet neither was land an abstract thing. When the concrete characteristics of a particular piece of land are not acknowledged, as when those English immigrants worked their American farms exactly as they had done in England, the result is irrational and inefficient, in Rae's view. Land is not an abstract category here, and to understand its value Rae says it is essential to understand the nature of each particular portion (like the roots in the second

[12] *Ibid*., p. 206.
[13] *Ibid*., p. 207.

field Rae's trader cultivated) and the options people have for how to enjoy it.

Frustrated by his Boston publisher's attitudes, mired in local school politics and rebuffed in a bid to teach at what would become Queen's University in Kingston, Rae had little notion of his impact on English economists. 'In no other book known to me is so much light thrown … on the causes which determine the accumulation of capital', John Stuart Mill wrote in his *Principles of Political Economy*, as he began his central argument on the growth of capital.[14] In Mill's text, perhaps the most important and the most extensive summation of liberal economic thought of the time, he quoted Rae's description of the Lac St. François Mohawks at length to make his point that accumulation of capital 'involves the sacrifice of a present, for the sake of a future good'.[15] It was, said Mill, 'a defect of providence, not of industry, that limits production … among the semi-agriculturalised Indians'.[16] (By this, he means what Rae, less judgmentally, called a willingness to accept a lower wage and slower return on capital.) Following Rae, Mill held that a low return will tend to lengthen the time frame a capitalist will wait for a return, meaning a higher effective accumulation. Yet as long as the effective desire to accumulate was high, he said, capital would continue to grow, and its growth would not reduce the profit it yielded. 'This question carries the mind forward to the remaining one of the three requisites of production', Mill continued, concluding his critical chapter on capital, which started with Rae, by noting:

> The limitation to production, not consisting in any necessary limit to the increase of the other two elements, labour and capital, must turn upon the properties of the only element which is inherently, and in itself, limited in quantity. It must depend on the properties

[14] John Stuart Mill, *Principles of Political Economy*, London, 1848, Book 1, Ch. xi: section 2, paragraph 2. <http://www.efm.bris.ac.uk/het/mill/book1/index,htm> (accessed 10 November 2011). In Mills' 19 September 1854 draft of a response to a January 1854 letter from Rae, he notes: 'I have made more use of your treatise than you appear to have been informed of, having quoted largely from it, especially from your discussion of the circumstances which influence the "effective desire of accumulation", a point which you appear to me to have treated better than it had ever been treated before', in 'John Rae and John Stuart Mill: A Correspondence', *Economica*, New Series, Vol. 10, No. 39, Aug., 1943, p. 255.

[15] Mill, *Principles*, I, xi, 2, 3 and I, xi, 3, 2-3.

[16] *Ibid.*, I, xi, 3, 8.

of land.[17]

Both the beliefs and the acts of human beings brought progress. The land – the undifferentiated land, the abstraction of land – was the brake, in Mill's development of Rae's view. Distance from the American commons and their natural wealth meant the old idea of Nature as a constraint could persist. Yet whether a political economist had just returned to the writing desk from the backcountry, or was content to read accounts of the west in others' works, land itself was not important anymore.

Mill also echoed Rae's indifference to ownership, without citing him, when he analysed rent and land. Farming might require exclusive landholding, at least 'for the time being', since 'the same person who has ploughed and sown must be permitted to reap', but on the face of it, there was no reason why an individual's right to farm a particular field could not be limited to a single season, or why land might not be redivided as population increased, Mill wrote. The 'holder' of land – Mill's term, which he used rather than 'owner' – would not invest funds or work in improvement 'when strangers and not himself will be benefited by it', Mill wrote, adding, '[i]f he undertakes such improvements, he must have a sufficient period before him in which to profit by them'.[18] The rights of a proprietor, Mill continued, shifting his focus from the holder of land to its formal owner, 'are only valid, in so far as the proprietor of land is its improver', and when the proprietor is not the one improving land 'political economy has nothing to say in defence of landed property'.[19] One could earn a return from land only if it had been improved. Rent, then, was not a return on a natural resource but merely represented a scarcity value, similar but not quite the same as the value of Old Master paintings or Greek sculpture.[20] Rent was as tenuous and unimportant as any income that owning a piece of art might yield. It was a leftover, only a side issue, just as, in Mill's model, were any physical attributes of the land itself.

Mill's grand summation of theory does not discuss commons land, except for a

[17] Ibid., I, xi, 4,4.

[18] *Ibid.*

[19] *Ibid.*, II, 2, vi, 1.

[20] *Ibid*., III, 6, i, 9; for the painting and sculpture analogy see III, 2, ii, 1. Mill says land is potentially absolutely limited in supply, can in effect be 'in countries fully occupied and cultivated'.

brief proposal, 'with small hope of its being soon adopted', that Britain's remaining commons be enclosed by assigning tiny portions 'of five acres or thereabouts' to 'individuals of the labouring class who would reclaim and bring them into cultivation by their own labour'.[21] On the other side of the Atlantic, however, the commons of Native Americans remained an issue, perhaps because there was so much, with such rich (and so far unexploited) resources. 'The forest of an Indian tribe is held in common', wrote the American economist, Francis Wayland, adding that a commons, 'where every one, at will, may pasture his cattle' or a forest 'from which every inhabitant may procure his fuel', was no more than 'encouragements to indolence, and serve to keep a community poor'.[22] To American political economists and politicians of the time, it was as if the concept of ownership was beyond the grasp of Native Americans. 'The savage tribes, on this continent, all claim exclusive property in those portions of territory in which they have been accustomed to hunt', wrote George Tucker, the former Congressman who took the Chair of Political Economy at the University of Virginia in 1825, adding:

> they assert their right as fiercely and tenanciously to this as to any other property. But no individual of the tribe has any right to any part of the soil, except that which he occupies, though all of them cultivate small pieces of Indian corn and a few other vegetables.[23]

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[21] *Ibid.*, II, 13, 4, 2. Mill did not note that it might be difficult, for a family to raise much more than its immediate food needs, or to support even a couple head of cattle or sheep, on five acres, but rather assumed an industrious and deserving person might be able to repay the parish or state for any advances for tools, fertilizer or seed, and even, after several years, be able to buy the plot.

[22] Francis Wayland, *Elements of Political Economy*, 4th edition, Boston, 1870, pp. 109-110 (1st edition 1837, 4th edition first published 1841). Some 50,000 copies of Wayland's *Elements* were printed, Gladys Bryson, 'The Emergence of the Social Sciences from Moral Philosophy', *International Journal of Ethics*, Vol. 42, No. 3, Apr., 1932, p. 311.

[23] George Tucker, *The Laws of Wages, Profits and Rent, Investigated*, Philadelphia, 1837, p. 18. Tucker, in a later work intended for a popular audience, was even more explicit about what he saw as an inability of Native Americans to progress, and linking that to their supposed ideas about land tenure, as follows: 'He exhibits great courage in braving danger, and yet more in enduring pain when subjected to torture by his enemies; but when tempted by pleasure, he is incapable of self-command. … Though, in this stage of society, no individual had an exclusive right to any portion of the soil, except during his temporary occupation of it, yet the whole community claimed property in the large district which constituted their hunting-ground, and which had its boundaries assigned by rivers, mountains, and other physical marks. These claims were firmly maintained, and constituted the most frequent cause of war with neighboring tribes. They have always been recognised by the United States, and have been the foundation of many a treaty of cession by the Indians for large pecuniary considerations', Tucker, *Political Economy*

It is striking that political economists could see, and even acknowledge in their works, that Native American peoples east of the Mississippi River farmed, while still insisting that Native Americans had no notion of an individual's right to land. It is striking, too, that economists like Tucker could not see that their descriptions of a Native American individual cultivating corn on a plot of land put that individual in precisely the situation of any squatter on the public lands of the United States.

Still, except for Rae, political economists lived and wrote far from the trans-Appalachian commons. Perhaps the clearest example is Edward Gibbon Wakefield, who pretended to be writing from Australia while jailed in England as he described an American west he had never seen. '[I]n all new countries', he wrote, where 'the most fertile land can be obtained for nothing, the superior fertility of land is worth nothing'.[24] What if, however, the United States General Land Office asked £9 per acre, instead of its 9 shilling ($1.25) price for what Wakefield called waste (that is, commons) lands? 'There would be no buyers, you think', he answered, 'of course not, until the people had increased so as to render land, already appropriated, worth more than nine pounds per acre'.[25] Rent was real, Wakefield argued, but it was not merely a return for the bounty of Nature. Rent also reflected how close land was to towns and their markets. In New South Wales, 'the most fertile land will not, unless near a town, yield any rent at all', Wakefield wrote.[26] He insisted that an attribute of specific, real pieces of land – where they were located – might generate value, even in a new country. The £9 per acre price he proposed 'would gradually cause appropriated land to yield a rent in the sense of Mr. Ricardo … This would be an enormous benefit conferred upon the American landlords', he argued.[27] Rent, in turn, could be used to finance immigration, and immigrants' desire for land would keep rents on the rise.[28] It would be a self-funded process of growing national wealth, Wakefield argued, though careful control over commons would be vital. In the

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for the People, Philadelphia, 1859, p. 47.

[24] Edward Wakefield (under the pseudonym Robert Gouger), *A Letter from Sydney, the Principal Town of Australasia*, London, 1829, p. 175.

[25] *Ibid.*, pp. 170-71.

[26] *Ibid.*, p. 176.

[27] *Ibid.*, p. 177.

[28] *Ibid.*, p. 178.

project he would soon promote for a new colony in South Australia, the need for that control would be made explicit. The South Australia Act of 1834, which established the colony that Wakefield so tirelessly promoted, emphatically reserved the Colonization Commissioners authority not only 'for the surveying and sale of such public lands', but also 'for the letting of the common of pasturage of unsold portions'.[29] Value was to be sustained by governing the use and control of land, especially commons land. In seeing a place for rent – for the natural endowments and location of real portions of land – Wakefield also saw a place for the commons. Value was not only to be derived from purchase and ownership.

Wakefield, in effect, aimed to rescue Ricardo's notion of rent as a stream of income from a natural resource, and therefore of an underlying value of land based on its natural state. He did so by insisting on the continued role of a commons in a new country as a kind of reserve bank of resources for the future. The government of a new country had the job of managing use and disposition of a common resource in a way meant to secure the sustainability of the resource and of the whole community. This would be the central concern of American legislators whose efforts to rein in frontier speculation would shape United States land policy, as the next chapter will explore. Like Wakefield, they would be sceptical about unconstrained free markets in land, where land continued to be bought and sold after its initial appropriation, and where the value of land was tied to the rest of the economy. Wakefield hoped to root people on the land, as the mental linkage of security and stability with possession of land was still strong.[30] It was in the

[29] An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide for the Colonisation and Government thereof (4 & 5 Will. IV c. 95).

[30] Wakefield's ideas were strongly opposed by one of the most prominent political thinkers of the day, James Mill, who argued instead for freer markets in all production inputs. In an 11 January 1831 letter he commented: 'First, if the question were unincumbered with that of the removal of paupers from the mother country, and related only to what was best for independent settlers who had resorted to the colony with their own means, I should say that the rule of freedom, which is best for other people, would be best also for them, they should be allowed to bestow their capital and industry wherever they found it most advantageous. The advantages of concentration are so obvious, that contiguous land would be always cultivated, when the inferiority of soil was not more than a counterbalance. The government should exact no price for the land, and for a certain number of years, no rent. After these years, it should be let on lease, for a convenient number of years and the rent determined by public auction. If the colony flourished the rent thus accruing would soon exceed the expences of the government; but the rent of the land should always be considered as the fund from which the whole of the expences of the State should be defrayed.

desire for such safe havens, that the value of land remained so much higher than did the price of, for instance, a Kentucky or Illinois Military Tract land warrant. Wakefield's rooted connection of individual and land was, however, a different mental image and a different base of value than the blooming plum tree that Rae's fisherman envisioned in the clearing he had made. The analysis that Rae constructed from his story of the fisherman's plum tree would have a much greater impact on what economists would teach about the value of land.

When the prominent Scots Liberal, Albert Primrose, Lord Dalmeny, mentioned Rae's work to the political economist, Nassau W. Senior, 'he also began to praise it furiously, claiming to be the man who discovered it and showed it to (John Stuart) Mill'. When Dalmeny asked how Senior could say that about a book which urged tariff protection and opposed free trade, Senior reportedly replied: 'Oh, I never looked at that part of the book; what I am referring to as so excellent is a certain chapter on the accumulation of capital, and other discussions of a like kind'.[31] When Senior returned to Oxford as Drummond Professor of Political Economy after service on the Poor Law Commission, he apparently regularly referred to Rae in lectures.[32] For Senior, it was time and abstinence that created capital – the same interplay of productivity, useful life and the trade-off of income now versus greater income over time that Rae outlined. Senior, discussing capital, made the same point Rae had about farmland, namely '[a] piece of land prepared for tillage, and the corn with which it is to be sown, are among the implements by whose use the harvest is produced'.[33] For Senior, the distinctive nature of this land-as-implement notion was the diminishing return received as more and more people worked on it, or as holders put more and more capital into it; this diminishing return in agriculture, which he did not see occurring in manufacturing, was one of his

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Secondly, I see no advantage in loading the colony with the expence of removing a redundant population from the mother country', Horton Papers: Letters from James Mill, 1829-1833, cited R. N. Ghosh, 'The Colonization Controversy: R. J. Wilmot-Horton and the Classical Economists', *Economica*, New Series, Vol. 31, No. 124, Nov., 1964, pp. 393-94.

[31] Sir Francis Hastings Doyle, *Reminiscences and Opinions of Sir Francis Hastings Doyle*, New York, 1886, p. 133, cited in R. Warren James, 'The Life and Work of John Rae', *The Canadian Journal of Economics and Political Science*, Vol. 17, No. 2, May 1951, p. 155.

[32] Marian Bowley, *Nassau Senior and the Classical Economics*, London, 1931, p. 161 n.

[33] Nassau Senior, *An Outline of the Science of Political Economy*, London 1836, pp. 153, 156.

four basic principles of political economy.[34]

Senior, though, was careful to say his fourth principle was generally true, but not universally so. The prime exception, he said, was when 'the negligence or ignorance of the occupier, or proprietor, or obstacles of ownership', keep land idle or poorly farmed. At last, ownership did matter. The yield of the land could increase with additional labour, Senior wrote, 'when an estate becomes unfettered, after the title has been long so circumstanced that the farmers could not rely on the duration or renewal of their leases'.[35] But still bigger gains beyond those obtained for more secure ownership also were possible, argued the man who led Britain's Poor Law Commission to conclude that enclosing a commons often made land more productive.[36] Senior here took two decisive analytical steps where Mill had hesitated on issues – of ownership and commons – that Rae had ignored as unimportant to his argument about knowledge, time and the formation of capital. Ownership and the elimination of commons could be as potent as a new technology of tillage or a new, high-yielding crop to defeat the constraint of diminishing returns.

Rent, meanwhile, existed 'even in colonies within a very few years after their foundation', but in a limited way, as the surplus that 'certain Lands, from peculiar advantages of capital and industry' yield as income from a specific amount of capital and labour, Senior wrote. If a proprietor of land cultivates it, that surplus is rent, but in any event, 'it is very seldom that any given commodity, or the produce of any one productive exertion, is thus actually divided' between wage, profit and rent, Senior said. What

[34] *Ibid.*, p. 163. Basically, Senior's argument was that while a manufacturer could never make more than a pound of finished goods out of a pound of raw cotton, more capital and labour could mean higher quality goods, with less waste at a lower unit cost. Because he focuses attention on the incremental, or marginal, changes in inputs, Senior is generally seen as a major, early precursor to modern microeconomics, as here: 'The advantage possessed by land in repaying increased labour, though employed on the same materials, with a constantly increasing produce, is overbalanced by the diminishing proportion which the increase of the produce generally bears to the increase of the labour. And the disadvantage of manufactures in requiring for every increase of produce an equal increase of materials, is overbalanced by the constantly increasing facility with which the increased quantity of materials is worked up', *Ibid*.

[35] *Ibid*., p. 164.

[36] *Ibid.*, For his recommendation on commons, see *Report from His Majesty's Commissioners for Inquiring into the Administration and Practical Operation of the Poor Laws*, 1834, Pt. 11, section 2, paragraph 5 (the recommendation was all capitalised for emphasis).

Nature paid the worker or the capitalist was hardly worth calculating. The rare occasion when it might, was when 'producers belonging to different classes become partners, and agree that the produce of their joint exertions shall be sold and the price divided between them', because 'much depends on the zeal of the labourers', Senior wrote. The clearest example, he continued was whaling in the Greenland fishery: 'The men seldom receive preascertained wages, but, on the termination of the voyage, the blubber is sold, and the price divided between the owners and the crew'.[37] To say part of that income came from Nature and part from the labour of the whalers made no sense. Since no one owned the ocean, that great commons in which the whales swam, there was no way of differentiating claims to the proceeds of the venture.

In a similar way, the time between sowing and harvest, or staking a claim and selling ore, had the effect of melding interests, for 'neither the landlord nor the labourer, as such, can wait during all this interval for their remuneration', Senior said. 'The doing so would, in fact, be an act of abstinence', that is, an investment of capital. Usually, though, what happens is that the capitalist – a banker – advances money, 'and becomes solely entitled to the whole of the product'.[38] But in any event, in order to use Nature, Nature must become capital. The time required for exploitation required it, Senior argued. Rent, 'all pure gain', depends on nobody's effort, but simply on how a capitalist felt about waiting for a return of an invested sum. Rent 'is subject to no general rule. It has neither a minimum nor a maximum'. That is why, Senior added, turning to America for his primary example of the irrational nature of rent, '[t]here is, probably, now land near New York selling for £1000 an acre, which a century ago could have been obtained for a dollar'.[39] While ownership mattered, and allowed a claim for rent, the owner was passive; what mattered was ownership of a capitalised thing, of land in which the owner's own investment, even of time, or the capitalist's funds, created what Rae called an instrument, and Senior an implement: capital. Senior found a place in his system for ownership of land, even as he removed a place for the endowments of Nature.

The writing of Rae, Mill and Senior on abstinence and accumulation, inspired in

[37] Senior, *An Outline*, p. 167.
[38] *Ibid*.
[39] *Ibid*., p. 186.

part by what they saw (or thought they saw) in America, had introduced an element of time to economic thinking. A system might change over time, rather than find the stable balance contemplated in a *Tableau economique* or settle into the equilibrium state Ricardo sought to determine. New attention to time meant a focus on the latest actions of individuals and, therefore, to incremental change. This view would begin to lead economists to think that it was not the disposition of the sum of the accumulation one controlled that mattered as much as what one did with the latest piece of that accumulation. Thinking about increments necessarily meant thinking about how a person acquired or disposed of them – about ownership.

One of the first to grapple with the elusive concepts of incremental change was William Forster Lloyd, Drummond Professor of Political Economy at Oxford University after Senior's term. He saw in the commons a way to explore the importance of the incremental, asking:

> Why are the cattle on a common so puny and stunted? Why the common so bare-worn and cropped so differently from the inclosed fields? No inequality, in the way of natural or acquired fertility will account for the phenomenon. The difference depends on the difference of the way in which an increase of stock in the two cases affects the author of the increase. If a person puts more cattle into his own field, the amount of subsistence which they consume is all deducted from that, which was at the command of his original stock; and if, before, there was no more than a sufficiency of pasture, he reaps no benefit from the additional cattle. But if he puts more cattle on a common, the food which they consume forms a deduction which is shared between all cattle, as well that of others as his own, in proportion to their number, and only a small part of it is taken from his own cattle.[40]

[40] William Forster Lloyd, *Two Lectures on the Checks to Population, delivered before the University of Oxford in Michaelmas Term 1832*, Oxford, 1833, pp. 30-31. Lloyd's commons, a closed common for grazing, had pretty much disappeared by the time he wrote. Because he did not note that such a pastoral commons was typically part of a system of commons that included use rights to timber, fuel and arable, he did not acknowledge, and may not have known, of the systems for governing such shared spaces. Lloyd's view of the commons allowed him to make a critical contribution to modern economic thought, Edwin Seligman argues, because his 1834 essay *A Lecture on the Notion of Value as Distinguished Not Only From Utility, but also from Value in Exchange Delivered before the University of Oxford, In Michaelmas Term, 1833*, London, 1834, clearly outlined a notion of marginal utility. Starting, unusually, with consumers

The commons, Lloyd believed, broke the connection between individual action and either cost or benefit. It forced attention away from the increment and its impact. This happened exactly the same way as when two people agreed to share equally the product of their work. The effect was that if either worked a bit harder 'only half the additional benefit would fall to his share, were he to relax, he would bear only half the loss'. The more people worked jointly and shared, the smaller the benefit from any one person's additional effort – a third, say, of the additional output when one of three people worked harder, a fourth of the loss if one of four eased off – until 'beyond a certain point of minuteness, the interest would be so small as to elude perception, and would obtain no hold whatever on the human mind'.[41] It was necessary for an individual to be able to track his or her contribution to production in order to claim his or her proper share. It was necessary for each to know what each owned.

Lloyd, in his first publication when he took his turn as Drummond Professor, was looking at the issue of population growth. He was motivated by the still widely held fear that Britain's population was spiralling upward, out of control and about to exhaust the nation's capability to support itself. Lloyd saw the income available from land, and therefore the proper allocation of land, as a population regulator. What Lloyd called the theory of population showed that:

> since the earth can never maintain all who offer themselves for maintenance, it is better that its produce be divided into shares of

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rather than producers, Lloyd wrote that the impact of not obtaining a first and only ounce of food was more significant than not getting the second, third or fourth ounce; at some point, he said, giving up an ounce would be a matter of indifference. Lloyd, *Lecture on the Notion of Value*, 1834, p. 12; Edwin Seligman, 'On Some Neglected British Economists, Part 1', *The Economic Journal*, Vol. 13, No. 51, Sept., 1903, pp. 356-57. Joseph Schumpeter, though, while describing Lloyd's marginal utility argument as 'quite straightforward', and noting that 'several writers brushed against it... it must have been known to a number of people', holds 'the fact that Lloyd's argument exerted no influence' is because 'the economists who read it were blind to the analytic possibilities enshrined in it', Schumpeter, *History of Economic Analysis*, pp. 463-64 n; The teleological approach of historians of economic thought, almost that of a fan cheering on the racers toward the goal of marginal analysis, is reflected when Seligman awarded Lloyd the 'proud position' of discovering marginal utility or when Schumpeter notes there was no inherent deterrent to others taking the right direction from Lloyd's work. E.P. Thompson, meanwhile, dismisses Lloyd as 'a propagandist of parliamentary enclosure', E.P. Thompson, *Customs in Common*, New York, 1993, p. 107.

[41] Lloyd, *Two Lectures on the Checks to Population*, p. 18.

> definite magnitude, sufficient each for the comfortable maintenance of a family ... than that all, who can possibly enter, should first be admitted, and then the magnitude of each share be determined from the number of admissions … that the owners of land should be able to command definite shares, is a necessary consequence of their ownership.[42]

There was a limit to how many people could divide the land, just as there would be a declining gain with each additional animal set out on a commons, Lloyd wrote. It was, that is, by equating herds of theoretical cattle with the undifferentiated millions of the world's population that he reached this point, and it was in reference to an almost-vanished pattern of the rural economy that he framed his argument. He saw the rough outlines of a theory of marginal revenue and marginal cost when he looked at the English commons but did not see the system of governance that had made it work for so many centuries before.

From the failure that Lloyd saw when he looked at the commons, he took the point that 'prudence is a selfish virtue'.[43] An exemplar, indeed, was (once again) to be found across the Atlantic:

> An American, we will suppose, settles in the woods, marries and has a family. He clears his ground, builds a house, plants an orchard, encloses his fields. As time rolls on ... his orchard becomes more productive, the cultivation of his land becomes more easy, he improves his habitation … in a word, his daily enjoyments depend much more on accumulation than on the daily labour of himself or of his family.[44]

Or for that matter, than on his land. Land was a limited factor of production, because it could not be created by human effort, but not necessarily the limiting factor, for capital made it productive. Property rights to it meant accountability for action that ensured the

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[42] Lloyd, *Two Lectures on the Checks to Population*, pp. 71-72. It may be worth remembering that Cantillon, Quesnay and the other Physiocrats saw the a regulatory connection between the produce of the land and population in their models of an economy in a stable equilibrium balanced on the fulcrum of the landed nobility's place in society, and reflecting that Lloyd wrote at a time when the ferment of Reform, and the political rights of those without land, was at a height in Britain.

[43] *Ibid*., p. 20.

[44] *Ibid.* p. 7.

proper use of capital and – for Lloyd was writing about checks to population – suggested that the ability to accumulate capital, even the modest capital a labourer might manage, could be the way to balance the number of people and the supply of food.[45] The land itself was merely the stage on which the balance beam stood.

Unhappy with Ricardo's model, where rent was the income Nature yielded, economists struggled for universal generalisations of the way the economy worked. Since Ricardo's theory of the relationship of rent, wages and profits provided an unsatisfactory explanation of the American pattern, his critics routinely turned their attention to American examples. Seeking generalisation, they generalised. So, for Wakefield, the vast commons of a new country could be a tool for managing the value of settled land. For Rae, the commons was where Native Americans' behaviour might reveal the real source of value, which allowed him to set aside what Nature contributed – because it was shared by all – in order to focus on what human beings did. Mill and Senior, taking what Rae found in the shared spaces of Upper Canada, tackled rent, wages and profit by simplifying the natural out of their systems. Land was capital – an element in a great and abstract category of goods. Ownership made the decision about where a capitalist deployed investment within that abstract category simpler, but it would take a prejudiced glance at a disappearing commons to say ownership made such decisions rational. Lloyd took that step, and so helped focus the attention of economists on the increments of cost and revenue. What Lloyd saw when he looked at the extra cow a cottager set out upon a village commons was not a bounteous Nature. It was barely Nature at all, and far from the riches the poet Clare found when he was a boy exploring Helpston's shared fields and pasture and woods. But bounty, there for the taking, was still what many saw when they looked at the vast commons of a still-unallocated American west. How they applied, or ignored, the abstractions of theory when considering the commons is the question now.

[45] *Ibid*., pp. 72-75.

Chapter 7

Lingering commons: Resisting severalty on the Iowa Half Breed Tract

If William Forster Lloyd, hoping to clear his mind for his next lecture, decided on a stroll through the Oxfordshire countryside, he would have seen few, if any, commons. His disdain for the commons of his imagination was for what he considered to be a primitive way of ordering relations between two well-established categories of people: the landed and the poor. His was, however, not yet a universally accepted schema across the Atlantic World. While the United States Congress drew a boundary around what it considered primitive when it refused to allot portions of a commons to Wyandot and Seneca individuals in Ohio, this was not quite the same as saying the commons itself was too primitive to be practicable for others. When, in 1824, with the Treaty with the Sauk and Fox that Maurice Blondeau helped negotiate, the United States Governent recognised children of white men and Native American women as a category of people, it specifically and formally decreed that they would hold their land as a commons.[1] Beginning in 1830, Congress would also move to protect the rights of squatters to stay on the western commons, essentially saying they could share in that land. What would seem obvious in Oxfordshire would be much less so in the United States, along western shores of the Mississippi River, on the Iowa Half Breed Tract.

Here, the question is why that was. The place to start is back at the Iowa Half Breed Tract; the time, five years after its designation and the person to watch is once again the man, Maurice Blondeau, who had lobbied for it. By 1829, Blondeau had come to feel that it was not enough to have territory reserved for people like him, who were those caught between the societies of their Native American mothers and the Atlantic seaboard world (American and European) of their fathers. He wanted certainty. To secure that, he joined with a group of men and women who were entitled to live on the Half Breed Tract but who had not yet planted themselves there, to ask Congress for due portions of that land. Their petition, like similar, contemporaneous requests to secure squatters' farms or the territory of the Cherokee Nation far to the south, sought certainty

[1] The term used in the treaties was 'Indian tenure' and not commons. While not defined, this essentially meant an open, outer commons used for hunting.

of place. They asked for their right to stay put from a Congress where many still felt the proper relationship of individuals to land involved a permanent connection – but not necessarily a connection of ownership. Members of Congress, like many of the people who elected them, sensed that permanency was at risk in a system of exclusive ownership of defined tracts – severalty and fee simple ownership – when they did not completely trust the owners to settle rather than sell. That lack of trust would hang over American land policy for decades. It explains the continuing protection of squatters and the distaste for land speculation in a nation supposedly founded in order to protect property rights. It was a distrust so at odds with the story Americans told (and tell) themselves about the formation of their country that it could barely be acknowledged. Yet it existed, and was able to, because (like the political economists of Chapter 5) Washington did not take it as read that severalty and fee simple tenure were necessarily the same thing as permanent ties to land. The United States would establish two more Half Breed Tracts, in Minnesota and in Nebraska, in order to permanently settle the caught-between people. But it insisted those tracts be commons, as well. The ideal relationship of people and land celebrated by John Clare – the emotional connection cemented by intimate knowledge of a shared space – still had some resonance through the 1830s. The relationship of people to land still defined – and was defined by – who might participate in society, as outsiders like Blondeau could clearly see. Yet for Blondeau's American neighbours, as for those from the far side of the Atlantic moving onto the western commons, permanency was still more important than any notion of an absolute right of property in land.

In 1829, Maurice Blondeau and twenty-six other Iowa Half Breed Tract claimants petitioned Congress to clarify titles to the Iowa Half Breed Tract, saying that they could not flourish there without help. In their request, they staked an important claim of their own, which was to fully participate in American society, and hoped to do so through the ability to dispose of a huge amount of land. They claimed a right of participation by the very act of petitioning Congress, assuming a right guaranteed in the first amendment to the Constitution, as well as by suggesting that they and the government shared a need to do something about the strife caused as citizens of Missouri

moved onto the Half Breed Tract.[2] The letter seeks to assure Congress it would not assume a large new body of citizens, since it estimated that there were no more than thirty-five or forty people entitled to land on the reservation, many of whom were living with their Sac or Mesquakie (Fox) relatives, following Native American lifeways. For the others, who were generally living on farms or in settler communities away from the tract – that is, already citizens by virtue of how they used the land – 'it is believed would not be induced to abandon civilized life and settle upon the reserved lands, holding their possession by the same title and the same manner that other Indian titles are held'.[3] In essence, the petition made clear that most of those who could have claimed a place on the Half Breed Tract had already found places elsewhere by defining themselves as belonging with their mothers' people. The handful who did not, the petition suggested, had by the way they chose to live shown themselves to be their fathers' children. They had defined themselves in terms of their parentage, in order to claim rights to the Tract, but also as citizens of the United States. The petitioners went on to say that 'tenure by mere right of occupancy in common would present to the civilized half breed no other alternative than to foresake civilized society & give up all claims under the reservation'.[4] The linkage of severalty with the way of life of American farmers and settlers is explicit, in the same way that Monroe had been and that the Senate could not be eleven years before in considering the Treaty of the Rapids of the Miami. The simple equation in the Iowa petition of the primitive and the commons foreshadows Lloyd's point that the shared resources of a commons did not suit a modern economic system.

There is an intriguing mix of messages in the Iowa petition. One is that, while the petition repeatedly insists that the reservation 'was made for all children of Sac and Fox (*by white men*) … whether civilized or savage', it argues for those who had already opted

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[2] 'Petition to clarify half-breed land parcel', 25 August 1829, Dougherty Papers, Kansas State Historical Society, Microfilm reel MS-99.

[3] *Ibid.*, p. 5. There is a blank space where the number or proportion of people living with Native American relatives was to be, but was not in fact, inserted. In declaring there were only a few dozen claimants, the petitioners were also seeking to ensure that each would be able to dispose of thousands of acres of land, becoming at a stroke extremely large scale operators in the land business.

[4] *Ibid.*, p. 6.

against remaining with their Native American families.[5] The racial qualification is a reminder of a citizenship that the Sac and Fox could not claim (neither, of course, could almost any African-American). In mentioning the choice of a way of life, the petitioners suggest that it was not only race that determined incorporation with American society. Their suggestion, easily derived from the notion that one earned a right to occupy land by labouring on it, is a way around the question of whether one's father or mother determined one's citizenship. Participation in the American way of living did. Following this same general line of thought, the petitioners also suggest that they could help lead their Native American relatives and neighbours into a closer and more stable relationship to the United States. The petitioners say that granting them allotments of land would encourage 'the happy effect which the progressive improvement of the half breeds may and probably would have on the indians [sic] in the vicinity'.[6] On the other hand, the petition notes, it would be folly 'to place the educated and civilized half breeds in situations and under circumstances constraining them in some degree to adopt the customs & habits of the Indians', though it says that would be the 'obvious' result of not clarifying their title.[7] Not acting to provide for severalty, the petitioners suggest, would leave the tract in the hands of the small number of claimants who continued living in Iowa with their Native American families – who had ceded the tract and under the terms of the 1824 treaty were not supposed to be there on that particularly strategic piece of land. The petitioners were careful to distinguish themselves from the bulk of the people for whom the 1824 treaty had reserved the tract. They aimed to shut out the others, to force a choice on the Tract between being an American or being Sac or Mesquakie (Fox, to the Americans).

It was important for the petitioners to say they offered stability, since their claims conflicted with citizens who had more certain rights to Washington's protection. The petitioners said 'they have been informed and believe' – but had not seen – that Missourians had staked out a large tract within the reservation, on the basis of old French

[5] *Ibid.*, p. 5 (emphasis in the original).
[6] *Ibid.,* p. 7.
[7] *Ibid.*, pp. 5-6.

or Spanish grants.[8] The petitioners asked the government to say whether those claims were valid and then to act so that 'provision be made for the division & allotment of the lands among the rightful claimants' – that is, to them. The petition said dividing the land 'will stimulate the industry and consequently promote the improvement and advance the happiness of the settler'.[9] They hint here at an issue that only a few economists had started to raise: that people needed a formally recognised right to hold and use land over a long period of time if they were to invest in improving it.[10] The petition's emphasis on the Missourians' recent arrival, and the fact that most of the petitioners would have to uproot themselves to settle on the tract, were both reminders of the unstable situation in the region. So, too, was the petition's suggestion that encouraging the petitioners to plant themselves permanently on the Half Breed Tract would also keep out any less reliable potential claimants who might wander through the tract, bringing their Native American relatives – and the possibility of conflict with the Missourians – with them. It would make the tract a more completely integrated part of the United States, instead of what was, in effect, still Native American territory. The petitioners were petitioning to become American. They were doing so by asking for what they saw as an American style of holding and using land.

Another message, one the petitioners had to handle carefully, was their suggestion that only a small number of people might properly make a claim to a piece of the tract – which, after all, was 185 square miles of rich soil, thick stands of timber difficult to find elsewhere in Iowa and commanding a critical Mississippi River portage as well as the best river route into Iowa, by the Des Moines River. Only those Missourians with Spanish or French titles – the handful who were already there, in other words – along with that fraction of the Half Breed Tract claimants who chose to farm would be entitled to a piece of the tract. Those due portions, clearly, would be a lot larger than the 80 or 160-acre farmsteads the Land Office was auctioning on the other side of the Mississippi

[8] *Ibid.*, p. 6. The language suggests most of the petitioners were not living on the Half Breed Tract.

[9] *Ibid.*, p. 7.

[10] John Stuart Mill was the most prominent economist making this point, see p. 170, *supra*.

River, in Illinois.[11] The petitioners did not stress this point, but by suggesting allotting the whole tract to them, they were bidding to become landowners on a large scale. The tract was not to come under the General Land Office, but it was to be the first and perhaps only land west of the Mississippi River and north of the slave state of Missouri where Americans – real Americans, as the petitioners insisted they were – could legally make farms. The petition carefully linked citizenship with the nation's security and the petitioners' right to land – earned, they said, by working the land but allowing, they did not emphasise, the ability to deal in land on a large scale. Blondeau and his fellow petitioners were offering a deal that offered all parties what they really wanted: stability on a part of the borderlands between the United States and Native American territory. At the same time, the deal could clear the way for what many in Washington did not favour: land speculation. Ambiguity about land tenure left that possibility open.

The petition went to a capital where attitudes to Native Americans were hardening. The year before the petition, legislators could still be persuaded to a measure of sympathy when Rep. Samuel Vinton of Ohio opposed legislation to deport the Cherokee from Georgia. 'No passion is so strong as his love of home; and, when he quit it to make way for the white man, it is in agony and bitterness of soul', he told his fellow members of Congress.[12] Vinton, Chairman of the Public Lands Committee, reminded his colleagues that after the Wyandot and Seneca lost the chance to hold their Ohio land in severalty 'it was afterwards with great difficulty that they could be prevailed upon to take a much larger reservation of land'.[13] In the event, he added, they did not stay on that reservation. '[M]any of these same Indians are now dying with hunger beyond the Mississippi', he noted.[14] The story of the Wyandot and Seneca, Vinton argued, proved the need for Native American severalty, which he called 'the right of individuality of property', elaborating:

> the Indian has an innate sense of dignity; and those among them

[11] If, of the 35 to 40 people who had potential claims, only half actually farmed, they would each have been granted nearly 10 000 acres under this line of thought.

[12] *Register of Debates*, 20th Congress, 1st Session, (20 February 1828), p. 1580.

[13] *Ibid.*, p. 1583.

[14] *Ibid.* Vinton's mention of the 1817 treaty and the state of the peoples who signed it is in a footnote, as an addition to the record after his speech.

> who have property, feel their personal importance, and are everywhere treated with respect. Personal dominion over property never fails to impart to its possessor a feeling of personal consequence … give him property, and make him feel that his means of subsistence are within his own command, and you lift him up at one from his prostrate condition.[15]

Vinton, then, had proposed an unqualified right to hold land. In doing so, he stressed the way that right would anchor Native Americans to a place. He spoke of passion for home, of the feelings that possession inspired, and of the connection of property and status, but not of the link between a right to stay and the decision to invest that economists saw. For men like Vinton, the idea that if a person held land, the land in turn held that person in place was still fundamental. It was why he resisted the efforts of Congress to make it easier for squatters on western commons to secure title to their holdings, arguing that the law let people pick and choose spots to claim without making a serious enough demand that they settle there for the long term.[16] Vinton was more interested in allotting land from a commons to individual Wyandot and Seneca than he was in allowing squatters on commons to secure title to their lands, because of what he felt about the Native Americans' desire to plant themselves permanently.

The debate resumed two years later, after Andrew Jackson finally won the White House and sought to apply the different lessons about Native Americans he felt he had learned fighting the Creek and Seminole nations. Vinton rose again on the floor of the House to oppose a Cherokee removal bill. Calling it a 'direct and gross violation of all justice', he reiterated his arguments for allowing Native American individuals to hold land in severalty in a two hour speech (which, unfortunately, the editors of the *Register of Debates* opted to summarise in just a paragraph).[17] His extended discussion of severalty

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[15] *Ibid*., p. 1582.

[16] Vinton elaborated on this point in the *Register of Debates*, 22nd Congress, 1st session (15 June 1832), pp. 3509-10. He opposed the first national preemption act in 1830, Register of Debates, 21st Congress, 1st session (10 May 1830), p. 922, saying protecting squatters' rights would discourage any interest in buying public land, which would be a blow to federal revenue.

[17] *Register of Debates*, 21st Congress, 1st session (24 May 1830), p. 1122. His daughter, Madeleine Vinton Dahlgren, recalled he spoke for two hours against removal of the Cherokee and again advocated giving them 'the right of individuality in property', Madeleine Vinton Dahlgren, 'Samuel Finley Vinton, a Biographical Sketch', *Ohio Archaeological and Historical Society Publications*, Vol. 4, 1895, p. 242. Although legislation for the 'removal' of the Cherokee and

makes clear that the issue for him, as for many of his fellow anti-Jackson members of Congress, was control and use of land – just as it was for the advocates of removal. The bill he opposed would have allowed the state of Georgia to buy Cherokee improvements, exactly as a buyer of an Illinois Military Tract warrant might do with a squatter's shack and fence – to 'deal with him individually for the little portion on which he may have built a cabin; and, by bribing him with a small sum of money to sell his improvement', as Rep. John Test of Indiana put it.[18] Since 'everyone knows that all Indian lands are held in common', Test continued, 'to deal with the individual, is calculated to drag from the nation its lands, piece by piece'.[19] (Under the Cherokee constitution, in fact, the land belonged to the Cherokee Nation but the improvements were the individual's, and the individual had an exclusive right to occupy his or her tract, though they did not have the right to sell the land.)[20] Test opposed the deportation, and, in so doing, was perfectly willing to protect a commons. A commons, seen clearly, could mean a permanent place on the land and stability on the frontier, Test and the frontier voters who sent him to Washington believed.

Those arguing for deportation focused on use of land and its tenure, just as Vinton and Test had. Rep. Henry S. Lamar of Georgia, pushing for the deportation of the Cherokee, told Congress that chiefs and the wealthy actually did own land, even as he decried the effect of what he felt was their abusive control. 'The notions of separate property', Lamar told his fellow members of Congress, 'engenders feelings of avarice', while the 'intellectual superiority' of the chiefs and the supposed handful of others who owned land 'enables them to gratify this propensity ... the property of the nation is concentrated in the hands of few, while nine-tenths of them are proportionably miserably

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other southern Native American nations was enacted in 1830, the forced deportation of the Cherokee did not occur until 1838.

[18] *Register of Debates*, 21st Congress, 1st session, (19 May 1830), p. 1110.

[19] *Ibid.* Test's concern here is a different aspect of the rent versus profit challenge that bedeviled economists. Though Test would not have said it this way, the prices paid for improvements – that is for the stream of future income from the capital invested in the land – might have seemed low because the rent – that which was earned from the natural endowment of the land – was high: basically, the sovereignty and independence of the Cherokee Nation.

[20] Article 1, Constitution of the Cherokee Nation, 1825, in *Laws of the Cherokee Nation,* Tahlequah, 1852, p. 45.

poor, abject, servile and degraded'.[21] For those who were not farming, 'their game is destroyed, they are unfavorably situated to advance', he added.[22] Fellow Georgian Richard Wilde, also speaking for legislation to purchase Cherokee lands and deport the nation's people, claimed that twenty-five to forty families controlled the Cherokee national government and that about 200 families, some of them not Native American, 'have some property … the committee are not aware that a single Indian of unmixed blood belongs to either of the two higher classes but they suppose there may be a few such among them'.[23] (In fact, the census of eastern Cherokee made just five years later showed that of 2669 households, all but 173 had land, with an average holding of eighteen acres.[24]) Severalty, in other words, had not helped the Cherokee. It did not necessarily result in industrious behaviour or economic progress. For these firm Congressional advocates of the property rights of white men in African-American slaves, property in land was not an unqualified right.[25] There were higher goods than the right of one's neighbours to control their land – at least, if one wanted the land onseself. In the debate over deportation, members of Congress projected onto Cherokee County their own ideas about how people held land. Those, like Test, who believed that Cherokee farmers' place on the land was not all that different from the frontier squatters who elected them, were willing to argue either for full severalty or to protect the commons. Those who believed Cherokee lands were owned by a greedy and powerful elite (perhaps not all that different from the slaveowners who wanted the territory for themselves), were perfectly willing to abrogate rights of property in land. Vinton may have thought severalty made

[21] *Register of Debates*, 21st Congress, 1st session (19 May 1830), p. 1119.

[22] *Ibid*. Lamar's echo of Locke's staged theory of human progress, from hunting to herding to agriculture, clearly does not contemplate a generalised pattern of Cherokee land ownership and agriculture happening quickly enough to ensure Cherokee sovereignty over the Georgia lands.

[23] *Register of Debates*, 21st Congress, 1st session (19 May 1830), p. 1096.

[24] David M. Wishart, 'Evidence of Surplus Production in the Cherokee Nation Prior to Removal', *Journal of Economic History*, Vol. 55. No. 1 (March 1995, pp. 126-27. On p. 135, he notes most non-landholders were elderly widows or minors. While many, like their settler neighbours, were subsistence farmers, 816 reported corn sales averaging 122 bushels each. Some 208 households had slaves, while the total number of farms exceeded the number of households by more than 300, indicating that some Cherokee had invested in additional farms. *Ibid.*, p. 125.

[25] It is interesting to reflect that Lamar, like John Taylor of Caroline, was willing to challenge some implications of severalty, in particular the power to buy and sell land freely, when sensing a threat to plantation agriculture based on slave labour.

sense for Native Americans, but many in Congress still believed (as had their predecessors in rejecting the 1817 treaty with the Wyandot) that Native Americans should be content with a commons – albeit a steadily shrinking one or one far from where they then were living.

As the Georgians plotted for the deportation of the Cherokee, some of the maternal relatives of Blondeau and the other Iowa Half Breed Tract petitioners were on the move, inspired by grand – and potentially disruptive – plans for the upper Mississippi River and middle Missouri River valleys to the north and west of the Half Breed Tract. In 1828, Keokuk, a Sac war leader, ventured west with a group of 100 to 200 for a council with the Otoe.[26] His show of force in the meadows by the Elkhorn River was meant to stake a claim to a vast stretch of what is now western Iowa. Ranging the Otoe chiefs around him in a circle, Keokuk declared that 'the red head', or St. Louis Superintendent of Indian Affairs William Clark, 'told me that all the land lying on the left bank of the Missouri belonged to the Sackes, Foxes and Ioways'. He claimed that Clark had said 'that if the Otoes and Omahas contined to hunt upon said land, I should order them off and then go even were I obliged to Kill them'.[27] At about the same time, at Keokuk's urging, many Sac who had lingered in Illinois began crossing the Mississippi to settle in lands of the Mesquakie.[28]

The lands between the Mississippi and the Missouri – what is now Iowa – were long shared as hunting grounds by several peoples. Now, at the start of the 1830s, the land trembled on the edge of war. 'This is the best hunting ground in the region; and the *joint* right of hunting on it may be had easily and for a trifle', argued Robert Stuart, head of the northern division of John Jacob Astor's American Fur Company. He estimated that $3000 to $4000 a year, paid 'for a few years' to the Sioux, Omaha, Otoe and Ioway people who lived to the north and west would secure the territory as a commons for hunting, and, critically for his own interest, trapping fur.[29] From Washington, the head of

[26] Dougherty to William Clark, November 1828 (no date given), National Archives, Office of Indian Affairs, Microfilm roll 833.

[27] *Ibid*.

[28] Michael Green '"We Dance in Different Directions": Mesquakie (Fox) Separatism from the Sac and Fox Tribe', *Ethnohistory,* Vol. 30, No. 3, Summer 1983, p. 132.

[29] Robert Stuart to John H. Eaton, Secretary of War, 9 February 1830, Petitioners' Exhibit 108,

the Office of Indian Affairs, Thomas L. McKenney, urged Clark to negotiate a treaty that would leave the country between the Des Moines and Missouri rivers in western Iowa 'as the common hunting ground for the Sacs and Foxes and others who may be designated'.[30] The aim was to keep the Sac and Fox (Mesquakie) west of the Mississippi River. Indian Affairs officials saw Iowa's future as a commons for several Native American peoples, rather than as a territory for American settlement, and the still potent political influence of the fur trade confirmed them in that view.

From across a great semi-circle of prairie, stretching from Nebraska through Minnesota to Wisconsin, Native American nations dispatched their diplomats to the old Mississippi River post of Prairie du Chien. It took two months to assemble everyone. The council began with a Menominee chief's complaint about the killing of his nephew by Sac and Mesquakie (Fox) warriors, but soon turned to the heart of the matter, which was the issue of how to manage the commons, when Ioway chief Pai-tan-saw complained that the Sac and Mesquakie 'hunted on their lands till there is nothing left and they have to hunt on the lands of the Ottoes and Mahas'.[31] Watching carefully were fur traders, particularly Robert Stuart of the American Fur Company, whose post on the Iowa Half Breed Tract had just marked its third anniversary. The company 'had set their faces sternly against all missionary effort ...or the formation of agriculture farms for the poor, as game rapidly decreased', recalled Major Lawrence Taliferro, the Office of Indian Affairs Agent to the Sioux.[32] A powerful interest, with an important voice in Washington and in the nation's economic affairs, had declared for the commons.

Taliferro feared the company's attitude – driven by its need to get the furs it

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The Iowa Tribe et. al. v. United States, Indian Claims Commission Docket 138, McCarter and English Records on US Indian Claims Cases, Box 2, Folder 9, Department of Rare Books and Special Collections, Princeton University Library.

[30] McKenney to Clark, 5 April 5, 1830, National Archives, Office of Indian Affairs, Letter Book, Vol. 6, p. 444.

[31] National Archives, Office of Indian Affairs, Treaty File, Box 3, (7 July 1830); Clark and Morgan to Eaton, 11 July 1830, *Senate Documents*, Vol. 8, 23rd Congress, 1st session, p. 78.

[32] Lawrence Taliaferro, 'Autobiography of Major Taliaferro', *Minnesota Historical Collections*, Vol. 6, 1894, p. 211; Taliaferro is remembered as 'a splenetic, conceited, opinionated but honest and incorruptible man' who 'had generally managed to keep up a standing quarrel with every trader, accusing them of malpractices', J.F. Williams, 'Memoir of Henry Hastings Sibley', *Minnesota Historical Collections*, Vol. 6, 1894, p. 274.

needed from the western commons – would keep tensions high across the upper Mississippi and Missouri river valleys. In his manoeuvring at Prairie du Chien to rein the company in, Taliferro had allies among the smaller-scale independent fur traders, many of whom (like Blondeau himself) were children of French trappers and Native American women. One, Joseph Renville, in fact, accompanied the major to the treaty talks.[33] During the negotiations at Prairie du Chien, two other independent fur traders served in the critical role of interpreters: Michel Barada, who had settled in the Omaha country and was married to a chief's sister named Ta-ing-the-hae, and Antoine LeClaire, son of one of Lafayette's soldiers and a Potawatomie woman, who had a small trading post in Wisconsin.[34] The result, as one early historian of Minnesota sourly commented, was '[t]he inevitable half breeds were present and secured the insertion of provisions permitting the Indian chiefs to bestow on them certain grant of land', where the Mississippi widens to form Lake Pepin in what is now southeastern Minnesota.[35]

Lake Pepin was another particularly strategic spot. It was fed by rivers from the fur- and timber-rich territories of what is now Minnesota and northern Wisconsin and flowed into the Mississippi River itself. There were as well rumours of copper deposits around the lakeshore. The American Fur Company wanted the area very badly, arguing that it would be suitable recompense for its probably trumped-up financial claims against the Sioux – 'the tool put forward to serve their cupidity', as Taliferro put it. Taliferro, working closely with the interpreters, and pressed hard to keep the company out.[36] With his support, the Sioux 'earnestly solicited that they might have permission to bestow upon

[33] Joseph Renville, son of a Canadian fur trader and the daughter of one of the principal men of the Kaposia band of a Mdewakaton (Dakota) Sioux, settled at Lac Qui Parle, Minn. in 1827 where he built a stockaded trading post and was host to a band of Sioux warriors. E.D. Neill, 'A Portrait of Joseph Renville, a "Bois Brule" and early trader in Minnesota, written in St. Paul 1853', *Minnesota Historical Collections*, Vol. 1, 1872, pp. 198, 201; Gertrude Ackermann, 'Joseph Renville of Lac qui parle', *Minnesota History*, Vol. 12, 1931, p. 231.

[34] Lewis C. Edwards (ed.)., *History of Richardson County, Nebraska; Its People, Industries and Institutions,* Indianapolis, 1917, pp. 190-91; Barada was listed as Michael Burdeau in the 1825 Treaty of Friendship with the Otoes and Missourias, 7 Stat. 277 and Michel Berda in the 1830 Treaty of Prairie du Chien, 7 Stat. 328. LeClaire is listed as interpreter for the Sac and Fox in 1830, 7 Stat. 328; see also Harry E. Downer, *History of Davenport and Scott County, Iowa*, Chicago, 1910, p. 395 for LeClaire's background.

[35] W.W. Folwell, *History of Minnesota*, Vol. 1, St. Paul, 1921, pp. 158-59.

[36] Taliaferro, 'Autobiography', pp. 211-12.

the half breeds of their Nation', and shrugging off the American Fur Company's over-reach in seeking the Lake Pepin lands, the United States formally agreed 'to suffer said Half Breeds to occupy' the land. As with the Iowa Half Breed Tract, the Prairie du Chien treaty only allowed for use rights to the Lake Pepin Tract, ignoring the Sioux relatives' request to hold the land in severalty. The treaty instead said the Sioux relatives there would be 'holding by the same title, and in the same manner that other Indian Titles are held'.[37] The United States, that is, was content for the land to remain a commons – as long as it ran things there. Ownership, whether by the Sioux relatives or the American Fur Company, was a problem, where mere occupation by powerless people was not. Trusting neither the American Fur Company nor the caught-between to simply stay put by Lake Pepin, the United States treaty commissioners believed that keeping the land as a commons was the best guaranty of stability.

Similarly, after the Omahas (Mahas), Ioway (Iowa), Missourias and Otoe 'earnestly requested that they might be permitted to make some provision for their half-breeds', the United States reserved a tract across the Missouri River from Barada's home, again to be held in 'the same manner, and by the same title that other Indian titles are held'. This clause, however, added that the 'President of the United States may hereafter assign to any of the said half-breeds, to be held by him or them in fee simple', up to a square mile of land. Awkwardly, this grant to the relatives of the Omaha, Otoe, Missourias and Ioway appended language that the President's power to give land in fee simple would also apply to the relatives of the Sioux who might settle at Lake Pepin.[38] It was as if severalty had been so far from being a real option that it was not even worth the trouble of rewriting a paragraph.

Although the American Fur Company did not get the Lake Pepin Tract in 1830, it ended up with everything else it wanted. The great peace treaty that resulted from the negotiations ceded most of what is now Iowa to the United States Governent. Yet it also declared that the relinquished lands 'are to be assigned and allotted ... to the Tribes now living thereon, or to such other Tribes as the President may locate thereon for hunting,

[37] Treaty of Prairie du Chien (15 July 1830), 7 Stat. 328, Article 9.
[38] *Ibid*., Article 10.

and other purposes'.[39] The land was to be a commons, but governed by the United States. The Sac and Fox (Mesquakie) were to leave Illinois in order to secure peace there. Yet the treaty confirmed to them, along with the Sioux, the right to use land that the Omaha and Ioway people considered their homes. The treaty's clause referring to other nations the President might send there, the presence of Menominee and Winnebago diplomatic chiefs at the negotiations, and the role played by LeClaire with his ties to the Pottawatomie, make clear that the United States negotiators saw the Iowa commons as the solution for moving all the Native American peoples of Illinois, Indiana, Michigan and Wisconsin out of the way, west of the Mississippi. The commons of the upper Mississippi River valley was set to shrink even more, and what remained was to be a lot more crowded.

Theory said this commons was an appropriate primitive tenure for primitive people. 'Land being in abundance compared to the population, has never become the object of exclusive property among them', as Thomas Cooper, holder of the Chair of Political Economy as well as President of the University of South Carolina, put it in his sketch of Native American economic life.[40] 'Whatever be the existing regulations concerning property, particularly landed property, in any country, they are the mere creatures of society', Cooper added.[41] For the Native American, wrote the economist Willard Phillips, '[t]he soil, its spontaneous productions, and the animals it nourishes, belong equally to him and to the rest of his tribe, and are as free to his use, as the air and the light', but despite this bounty of the commons, Indians remained poor.[42] That which is free to use or take, Phillips concluded, has no value. But it was up to the national government to make 'a grant or confirmation of title by which, is requisite to the validity of all private rights in the soil'.[43] Rights to land, in the view of these prominent American economists, were matters of mere convention. They did not arise from natural law, in other words, but from behaviour.

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[39] *Ibid.*, Article 1.

[40] Thomas Cooper, *Lectures on the Elements of Political Economy*, Columbia. S.C., 1826, p. 54.

[41] *Ibid.*, p. 55.

[42] Phillips, *Manual*, p. 10.

[43] *Ibid.*, p. 28.

On the Iowa Half Breed Tract, meanwhile, when the Prairie du Chien treaty failed to bring peace, the United States Governent would act to reassert its sovereign right of control, but without any grant to individuals of exclusive rights to land. The spark was a round of skirmishing across the Mississippi River from the tract. Clashes between the Menominee and the Sac and Fox brought out the Illinois militia. Its attempt to expel the several hundred Sac who were supposed to have left the village of Saukunuk in the state of Illinois (a promise made and repeated in the treaties of 1804, 1824 and 1830) sparked the three-month Black Hawk War in 1832.[44] The final peace settlement, memorialised in the 1834 Treaty of Fort Armstrong, won from the Sac and Fox (Mesquakie), including those who sat out the war, the cession of a forty mile wide strip along 250 miles of the Iowa shore of the Mississippi, a six million acre (24 000 square kilometre) territory for which Washington paid eleven cents an acre. (This land was just to the north of the Half Breed Tract.) In that cession, the Sac and Mesquakie also effectively gave up their 'reversionary right' to the Iowa Half Breed Tract – language that said the land would go back to those Native American nations if not taken up by caught-between children of Sac and Mesquakie women. Now, the land would revert to the United States, to be added to the public domain for eventual sale if no claimants to the tract settled there.[45]

They had not so far. The petitioners of 1829 included only two of the roughly forty people early settlers later remembered as residents of the Iowa Half Breed Tract in 1832 and 1833: Maurice Blondeau and John Connolly, who signed on behalf of another claimant, presumably a daughter of his Sac or Mesquakie wife.[46] The claims,

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[44] Patrick J. Jung, *The Black Hawk War of 1832,* Norman, Okla., 2007 p. 49; John W. Hall, *Uncommon Defense: Indian Allies in the Black Hawk War,* Cambridge, Mass., 2009, pp. 111, 113-15.

[45] Treaty of Fort Armstrong, 7 Stat. 374, Article 1. The treaty does not specifically mention the tract, but it is included within borders of the ceded land. The treaty also barred the Sac and Mesquakie from settling, hunting, fishing or planting on any of the ceded lands: They were supposed to remain on a 400 square mile reservation just to the west of the Forty-Mile Strip, sandwiched between it and the commons set aside for them, the Sioux, the Otoe, the Ioway and the Omaha in the 1830 treaty.

[46] 'Petition to clarify half-breed land parcel', p. 9. The petition was prepared by John W. Johnson and all the names on the signature page are in his handwriting. For counts of the tract's population, see Isaac Campbell, 'Letter to the Iowa Historical Society', *History of Lee County, Iowa*, Chicago, 1879, p. 331, James Campbell, 'Capt. Campbell's Address', *Ibid*., p. 493, and Caleb Atwater, *Remarks made on a tour to Prairie du Chien: thence to Washington City, in 1829*. Columbus, Ohio, 1831, p. 58.

nevertheless, were still hanging. In April 1834, Rep. John Y. Mason of Virginia, a staunch Jacksonian and junior member of the Public Lands Committee, reported to Congress that 'sundry half-breed Indians of the Sac and Fox tribes' had petitioned that the United States give up its newly gained reversionary rights in the Iowa tract. Mason said the relinquishment was allowed by treaty and 'certain half breeds of the Sac and Foxes who had now become amalgamated with the white population' now 'desired to hold their land in fee'. Vinton, the Ohioan who had argued so forcefully for Native American severalty and against dispossession of the Cherokee, asked whether there would be measures to ensure 'no advantage was about to be taken of these Indians'.[47] Mason and Rep. William H. Ashley of Missouri, a former fur trader and current land speculator, apparently reassured him, though the *Register of Debates* does not say how.[48] The bill proceeded through the House, with no other debate reported, despite a couple of postponements of votes until it was passed on a voice vote two months later.[49] The Senate quickly followed suit.[50]

In Vinton's initial reluctance over the reversion issue is a clue about the mixed feelings and contradictory analyses that continued to characterise Atlantic World thought about the place of people on the land. Ashley, then a junior member of the Public Lands Committee, had convinced the man who had lost the chairmanship of that body when his political party lost control of the House of Representatives to support the right of Half Breed Tract claimants to own land there, but the two would clash a few days before the House finally voted on reversion. The issue at that time was legislation to continue giving squatters preemption rights – that is, the right to buy their land even if someone else had purchased it. It was a revealing exchange. Here, as in his question about the tract, Vinton made clear his concern about who would control the land, and particularly whether that would be the settler or the speculator. 'Only those who can raise two hundred dollars can avail themselves' of the preemption act, he said.[51] It was not the impoverished squatter,

[47] *Register of Debates*, 23rd Congress, 1st session, (8 April 1834), p. 3539.

[48] *Ibid*. Ashley does not appear to have been involved in any overt speculation in the Iowa Half Breed Tract lands, as he is unmentioned in any court records on land division or title there.

[49] *House Journal* (24 April 1834), p. 561; (7 May 1834), p. 591; (28 June 1834) p. 871.

[50] *Senate Journal* (30 June 1834), p. 404.

[51] *Register of Debates*, 23rd Congress, 1st session (13 June 1834), p. 4479.

seeking to claim his share of the commons by infusing his labour into the land who preemption would help, for only those with money could play the game of 'selecting all the choice spots, and then get them at the price of "refuse land"', he said.[52] (Refuse land was the least valuable; the idea was that the price of these tracts would be a floor, but they tended to be the ceiling, instead.) Vinton's concern was that those with money were not interested in settling, but in acquiring good land cheaply and then selling it, setting an unstable pattern of purchase and re-sale that would continue for decades. Ashley dismissed that argument, and carried the day, saying rich men did not head west, but that 'it was men who were unable to purchase in the settled parts of the country … Their doing so increased the value of the public domain and brought it sooner to market'.[53] Vinton feared that confirming a place for squatters on the opens would make it too easy for them to cash in and move out, and this ability of an owner to sell was a problem. Ashley believed that preemption would ensure that settlers would plant themselves permanently on the land. The ability to buy was the solution, for Ashley.

Yet the two agreed on Native American landholding. A few months after the preemption debate, in which Ashley's position carried the day, the Missourian joined Vinton in arguing against a proposal creating an organised federal Indian Territory for Native Americans unless individual Native American landholders formed the territorial council. Ashley declared for the Native American severalty that Vinton had urged for so many years, saying that he 'was in favour of giving a certain portion of land to each, limiting them to a certain territory, and leaving them to make their own laws and regulations'.[54] For both men, as for so many other Americans, the dream of transformation of a people by changing the way they lived on the land remained. The tie between permanent attachment to the land and participation in society here was explicit.

That kind of connection was what Vinton sought, but feared was at risk if claimants to the Iowa Half Breed Tract – or squatters on the Illinois Military Tract for that matter – were left as prey to speculators. Permanency was also what Ashley said he

[52] *Ibid*. By 'refuse land', which was not a formal, legal or technical term in Land Office dealings, he means land that nobody wanted for more than the minimum $1.25 an acre price.

[53] *Ibid*.

[54] *Ibid*., p. 1459.

wanted. Both men found common cause when the question of stability, governance and land tenure was more sharply, and more urgently, drawn on the issue of an organised territory for Native Americans that granted actual power of government to them. In that case, they agreed, Native American severalty was the answer. Vinton and Ashley disagreed when the issue was the property rights of men and women – the squatters – already empowered to govern their own affairs. The issue there was whether those rights would undermine stability. It was the fact that claimants to the lands of the Iowa Half Breed Tract, like the Native Americans who were to be incorporated into a new territory, did not already have any power of self government that made the grant of the rights inherent in severalty something that both Vinton and Ashley could live with. The two could not agree whether one group, the squatters, who were entitled to full participation in American life, would stay put. They believed that those who still sought to participate would.

For westerners like Vinton and Ashley, it was also a given that the work of their farmer-constituents created a much more valid claim to land than did any financial deal. For Vinton, that belief was why he feared what speculators would do. For Ashley, it was why he said he trusted squatters to make a wild commons American territory. Though a speculator, he was content to let a squatter preempt would-be buyers' claims to land, feeling (as Wakefield might have) that a squatter's farm made all the wild commons around it more marketable. Both Vinton and Ashley accepted the national myth that to work the land was a status invested with a moral significance far more important than any financial promise or economic justification. The settler seemed heroic, even – or especially – when venturing where land was not for sale. 'A few years since, Arkansas was a remote and unexplored wilderness', a memorial from the Territorial Legislature noted, but 'the bold and the fearless' still came and 'here they have established their homes, and here they are rearing a hardy race of sons'.[55] The Illinois General Assembly asked Congress to extend the temporary relief of the 1830 preemption act on behalf of those 'many worthy heads of families' squatting on the commons of the public domain, 'whose most industrious exertions afford them but little more than the means requisite to

[55] 'Application of Arkansas for Preemption Rights for Actual Settlers', (11 January 1830) *American State Papers*, *Public Lands*, Vol. 6, p. 33.

their support; while holding by precarious possession the improvements which they have made'. Squatters, the legislators continued, 'made openings in the forests … and by reducing the public land to cultivation have furnished inducement to others to vest capital in the land'.[56]

The suggestion here of individual squatters acting for a greater, collective good of national expansion westward is significant. 'In no other country of the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America', Alexis de Tocqueville reported after visiting the American frontier.[57] Squatters routinely gathered to share the work of barn-raising and harvest, and Americans have ever since incorporated tales of husking-bees into folk history of a time when work, not purchase, gained families their farms.[58] Intriguing echoes from English commons, such as the harvest home feast or the Ontario custom (by way of Vermont) of binding up the last sheaf of wheat, called 'the maiden' or 'the Lord's sheaf', and leaving it for the poor, suggest the people of the frontier still saw themselves as sharing the space they used and the produce they gathered.[59] Sometimes, indeed, a whole corner of the last field was left standing for the poor to glean or for 'the Lord's birds', as if giving back to Nature itself.[60]

The squatters' propensity to cooperate on the land was at times exploited by

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[56] 'Application of Illinois for Preemption Rights for Actual Settlers on the Public Lands within her Limits', *Ibid.*, p. 561.

[57] Alexis de Tocqueville, *Democracy in America*, New York, 1946 (1835), Vol. 1, p. 191.

[58] The way settlers joined together to achieve a shared goal was a distinctive characteristic of the American frontier, the historian Frederick Jackson Turner argued, as when he wrote: 'The logrolling, the house raising, the husking bee, the apple paring, the camp meeting, and the association of squatters whereby they protected them selves against the speculators in securing title to their clearings on the public domain, are a few of the indications of this attitude', Frederick J. Turner, 'Middle Western Pioneer Democracy', *Minnesota History Bulletin*, Vol. 3, No. 7, Aug., 1920, p. 400. Frontier settlements were laboratories for developing and testing forms and techniques of collective community effort, argued Currin V. Shields, in an early challenge to the historiography of the rugged individualist. Currin V. Shields, 'The American Tradition of Empirical Collectivism', *American Political Science Review*, Vol. 46, No. 1, Mar., 1952, pp. 104-120.

[59] Daniel Vickers, 'Competency and Competition: Economic Culture in Early America', The William and Mary Quarterly, 3rd Series, Vol. 47, No. 1, 1990, p. 27; H. Rose, 'Ontario Beliefs', *Folklore*, Vol. 24, No. 2, Jul., 1913, p. 225.

[60] Rose, 'Ontario Beliefs', p. 225.

speculators. In northern Mississippi, for instance, a land company agent named Robert J. Walker moved quickly to rig bids for lands just ceded by the Chickasaw Nation. The General Land Office called the auction with just one month's notice, which was too short a time for many squatters to get the money they would need to outbid the speculators. But Walker did not want to pay more than the $1.25-an-acre floor price. He set up shop at the door of John Smith's tavern, thirty yards from the Land Office itself, and announced if settlers refrain from bidding on their land on the morning of the auction, his company would transfer the land and improvements to them in the afternoon, arguing 'the arrangement would enable the people and the company to get the land at $1.25 per acre, and that was all the government wanted'.[61] Smith would later say most of the squatters in the region, who had made their farms while living amongst the Chickasaw, believed the timing and notice of the sale had been arranged to ensure the land would go to the companies. Fearing the financial muscle of the companies, most settlers went along with the collusion to hold down prices, Smith said, though 'it struck me at the time as something very singular, being, as I thought, contrary to law'.[62]

Squatters did not usually secure their homes when the speculators swooped in. That was why so many western members of Congress were so cautious about policies that made fee simple ownership more accessible. They knew too many squatters, relied too much on their votes. When the Land Office came to sell land a squatter farmed, Rep. Bailie Peyton of Tennessee declared, 'he might bid to the last cent he had in the world', but what all to often happened was that

> when he had bid his very last cent, one of these speculators would stand by his side and bid two dollars more. And thus he would see his little home, on which he had toiled for years, where he hoped to rear his children and to find a peaceful grave, pass into the hands of a rich moneyed company.[63]

The government needed to protect the 'poor man who had blazed the trees and planted

[61] *American State Papers, Public Lands*, Vol. 7, pp. 495, 503 (Testimony of Green Hastings and James Sims).

[62] *Ibid*., p. 502 (Testimony of John Smith).

[63] *Register of Debates*, House of Representatives, 23rd Congress, 1st session (13 June 1834) p. 4480.

the potatoes had chosen that spot as the home of his children', Peyton continued. The squatter had done his part for the national good. Now his place on the land was at risk. 'He had toiled in hope … and he loved the spot', as Peyton put it. 'It was his all'.[64] Hope, love, home: a potent mental picture of the essence of anyone's life, and one, the story that people of the Atlantic World told themselves, that people headed west to seek and to secure.

Despite Congress' votes in 1832 and 1834 to extend the preemption act beyond its original term, squatters would exercise only 220 preemption rights by 1840 on the vast Illinois Military Tract, the region most available to preemptors because military warrant holders had swelled the ranks of those with unclear or incomplete title to land.[65] Easy connection to the cities and ports of entry on the Atlantic seaboard, through the Erie Canal and Great Lakes, along with growing confidence that prairie sod could be broken and cultivated, also directed migrants' focus there. Yet security was hard to come by on the Military Tract, as Samuel Turner discovered when he came back from a trading trip to St. Louis to find another man settled in his cabin. Rather than simply throw the intruder out, Turner gamely set out to raise another cabin and clear a farm in the Buena Vista Township, only to lose it in 1834 to a man with a more perfect title. (Turner moved one more time to a farm 'which he had to pay for no less than three times before securing a perfect title'.)[66] Paper counted more than possession, in that hotbed of dealings in land warrants and tax titles.

In Indiana, rights to land federal officials granted to Potawatomie families and bands quickly evolved into a kind of derivative security called 'floats'. Speculators purchased them for a fraction of the Land Office minimum price before the agency began auctions in the region, using the conditional titles of the floats as a basis to promote towns that were never built. In what speculation had made a kind of no-man's land, squatters swarmed in, cut all the marshy country's timber, and quickly moved on – as the

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[64] *Ibid.*

[65] Abstract of Land Sales 'A', Auditor of Public Accounts Records, Vol. 278, cited in Carlson, *Illinois Military Tract*, p. 65, note 78.

[66] W.R. Brink (editor), *Combined History of Schuyler and Brown Counties, Illinois*, Philadelphia, 1882, p. 60.

Pottawatomie already had, selling their land back to the United States.[67] To the north, loggers kept cutting, and trespassing, on the Michigan lands the Chippewa and Ottawa ceded in 1836, declining to buy what would remain a barely supervised commons for decades to come. Many Ottawa stayed on too, even though the treaty said they were not supposed to, eking out livings making maple sugar and salt.[68]

On the Iowa Half Breed Tract, so unpoliced that the defeated Sac war chief Black Hawk could live unmolested in the heavy timber along Devil Creek, and a handful of squatters also drifted on, and off, the land.[69] All that marked John Tollman's few years by Sand Prairie was a field of flowers (fondly remembered by later settlers) beneath the bluffs over the Des Moines River; William Skinner stayed just three years in a pole-and-bark shelter Black Hawk had abandoned at his old sugar camp, and even the Blondeaus moved on.[70] Theory might say commons should be divided, whether for more rational

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[67] The 'floats', were for more than 185 square mile parcels in northern Indiana, some approximately specified, others not at all, that were to be reserved for 23 Pottawatomie families, 26 bands and two individuals under terms of Article 2 and Article 4, First Treaty of Tippecanoe Camp (20 October 1832), 7 Stat. 378, as well as Article 2, Second Treaty of Tippecanoe Camp (26 October 1832), 7 Stat. 394 and Article 2, Third Treaty of Tippecanoe Camp (27 October 1832), 7 Stat. 399. The floats and their impact on settlement by the southern shore of Lake Michigan are discussed in John Bowers, A.C. Taylor, Sam Woods, *History of Lake County*, Chicago, 1929, pp. 177-78, and Alfred H. Meyer, 'Circulation and Settlement Patterns of the Calumet Region of Northwest Indiana and Northeast Illinois (The Second Stage of Occupance-Pioneer Settler and Subsistence Economy,1830-1850)', *Annals of the Association of American Geographers*, Vol. 46, No. 3, Sept., 1956, p. 320. In a series of 13 treaties in 1834 and 1836, the Potawatomie sold 178 square mile tracts back to the United States, Treaties with the Potawatomie, 7 Stat. 467, 468, 469, 490, 499, 500, 505, 514, 515. In the Treaty of Washington (11 February 1837), 7 Stat. 532, leaders of the Potawatomie Nation confirmed those sales, while one chief sold an additional five square mile section and all agreed to move to the Osage River Valley in western Missouri.

[68] George Blackburn and Sherman L. Ricards, Jr., 'A Demographic History of the West: Manistee County, Michigan, 1860', *The Journal of American History*, Vol. 57, No. 3, Dec., 1970, pp. 602-3; Byron M. Cutcheon, *History of Manistee County, Michigan with Illustrations and Biographical Sketches of some of its Prominent Men and Pioneers*, Chicago, 1882, p. 88

[69] 'Fragments', *History of Lee County*, p. 398. The Sac are often called Sauk in nineteenth century documents, but I opt here for the nation's current preference.

[70] A.W. Harlen, 'Gleanings from the Memory of A.W. Harlen', *History of Lee County*, p. 411; William Skinner, 'Pioneer Times in Skinner's Neighborhood', *History of Lee County*, p. 389; and 'Going to Mill under difficulties', *Ibid*., p. 405. No one from the Blondeau family was on an 1840 list of claimants to Half Breed Tract land, found in Wright v. Marsh, 2 Greene 94, footnote at p. 119. Blondeau's sister, Mary St. Amant, disposed of at least a quarter of a share in the Tract before its division to speculator Wilson Overall, Powell v. Spaulding, 3 Greene, 443, 450, 451, (1852) Iowa Supreme Court.

exploitation or to ensure peace and good order, but practice was something else. Theory might say the ability to own land would root people to it permanently, but in practice, and in the view of Americans who saw that permanency as the goal of land policy, that conclusion was very much unproven.

Still, if unproven, the idea was hard to shake. So, Blondeau sought the empowerment inherent in the right to stay on the land he worked and the right to participate in American society. The other petitioners of 1829 promised to do the same in return for that same right. In Washington, many elected officials felt that to be a lot to ask because it implied the right to sell and to move away. Officials shelved the petition, and specified that lands on the Minnesota and Nebraska Half Breed Tracts would be held in common. They also declared that the commons of the Iowa tract would revert to the United States and be sold if the people for whom it was reserved did not come and plant themselves there. But the idea – a permanently planted people, empowered by citizenship – still stirred the imagination. It melded notions as ancient as the secure place an English commoner to pass on to his or her children in the form of a right to pasture a cow or cultivate a strip of common field, with newer notions about individual autonomy and freedom of action. The problem, of course, was that to open new possibilities – new land, for instance, on the western commons – would necessarily undermine social stability. A secure place on the land empowered one, but could empower people to decline to participate in maintaining a proper community.

Many did. Not every squatter thought permanency was worth the modest price set out in the preemption laws. For many, the right to stay and the right to participate in a community's political and economic life were matters of indifference, as in the case of the Indiana float-buyers or the timber-cutters on what once was Chippewa and Ottawa land. For others, it made no sense to pay for what they thought their labour earned them – and there were plenty in Washington and in the capitals of the new states who agreed. When many did not want to stay on land they bought, and others did not want to buy the land on which they stayed, ideas of one's place on the land and one's right to stay remained unresolved. In a sense, the land beyond the mountains remained a shared space. On the Half Breed Tract, in the Capitol, on lands Native American nations had ceded and lands they still held, what many still wanted was the right to belong to the land as well as

to have land that belonged to them. What they did not yet agree on was whether ownership assured that or whether a commons prevented it.

Chapter 8

Loosening the ties of people to the land: The assault on the Half Breed Tracts

By the mid-1830s, the Prairie du Chien's murky language on severalty and the proposed relinquishment of reversionary rights in Iowa left the three Half Breed Tracts in the kind of uncertain state that particularly delighted speculators. Though neighbouring Illinois was still largely empty and offered attractions of its own for those who played the game of dealing in conditional claims to land, the possibilities in the Half Breed Tracts were enticing. The potential mark-ups were high – one trader at Agency City, Iowa, reportedly purchased claims worth several thousand dollars for a horse, a pony, a saddle, or a barrel of whiskey.[1] The pace was fast. After a man named Na-ma-tau-pas deeded a 160-acre quarter-section of still-unsurveyed (and so never-precisely located) Iowa Tract land to John Bond in March 1837, Bond flipped the land less than three weeks later to a Theophilus Bullard, who turned around and sold it in March 1838.[2] The ability to profit from an unreal claim to land that one did not care about (and may not have been able even to find) was not merely financial, either. Even the Sac war chief, Keokuk, after sitting out the Black Hawk War, used the Iowa Half Breed Tract and the game of claims for his own ends. He busied himself signing certifications that would-be sellers of parcels of the Half Breed Tract were, in fact, the children of Sac women, each one a confirmation of his power to say who was subject to his authority.[3] Land and power were intimately linked, whatever one thought about the way people ought to hold land.

The three Half Breed Tracts in Iowa, Minnesota and Nebraska would become theatres where conflicting conceptions about land would play out through the 1840s. They are particularly good vantage points to watch change in ideas about land. In part, that is because they were set up as enclaves of commons. In part, it is because they were reserved for a population with little power to bargain by treaties they were not parties to. Undivided and unallocated, but belonging to powerless people (so invisible to

[1] B.L. Wick, 'The Struggle for the Half Breed Tract', *Annals of Iowa*, Vol. 7, 1905, p. 20.

[2] Webster v. Reid, 52 US 437, 442 (1850).

[3] 'Claims to half breed lands', United States Office of Indian Affairs, Central Superintendency, St. Louis, Missouri., Vol. 32, pp. 58, 60, 62, 63, 79-80; also letter of M. Aldrich to Superintendent William Clark, 18 July 1834, *Ibid*., pp. 82-84.

Washington that counting them would become an issue), the Half Breed Tracts were wide open canvases on which individuals able to manipulate law and finance gave free play to their own evolving ideas about land. Yet the effective licence to those actors to do what they wanted on the Half Breed Tracts did not prompt any particularly clear expression of a generally accepted idea about land. When the legal division of the Half Breed Tract in Iowa eventually came, it would do so in a largely secretive contest in which the principals avoided saying what their aims were. The tactics of that contest, like the vacillations of officials on the question of dividing the Half Breed Tracts in Nebraska and Minnesota outlined in this chapter, point to a continuing sense of contingency and ambivalence about the nature of the connection of people to the land, even as theories of law and economics were coalescing around the idea that a commons was irrational, land was capital, and its easy sale was to be desired. The result was the dispossession of those who belonged on the Iowa Tract and a state of limbo on the other two Half Breed Tracts that would continue for more than two decades.

There was no rush to claim land on the Iowa Half Breed Tract after Rep. Mason's 1834 legislation relinquishing the United States Government's rights became law (detailed in Chapter 7). Most of the Sac and Mesquakie relatives entitled to the land had long since left the area. The Office of Indian Affairs' central superintendency recorded affidavits for twenty-five individual claimants in 1834, with only seven of them sworn in nearby Hancock County, Illinois, while almost all of the rest were from Prairie du Chien or St. Louis, more than 200 miles away. Only one of the twenty-five claimants, Louis Brosseau, was actually living on the Half Breed Tract at that time.[4] In a later lawsuit, Elizabeth de Louis did declare in an 1845 that she had lived on her portion of the Tract ever since the treaty established it in 1824, though neither the 1830 nor 1834 surveys made note of her.[5] If she had been living on the Tract, she, like Brosseau, would have been the rare exceptions to the rule. What seems to have been more typical was to be simply unaware of any interest in it. Julien Cardinell, the sole surviving grandson of

[4] United States Office of Indian Affairs, Central Superintendency, St. Louis, Missouri, Vol. 32, *Claims under 1824 Sac and Fox Treaty,* pp. 53, 55, 56, 58, 59, 67, 70-72. The number of claimants had declined from the total of thirty-eight reported in 1830; Thomas Forsyth to William Clark, 8 June 1830. *Ibid.*, pp. 14-18.

[5] De Louis et. al. v. Meek et. al. 2 Greene 55, 56 (1845) Iowa Supreme Court.

Euphrosine Antaya, for instance would say later that as late as 1840, when he was living in Prairie du Chien, he had no idea the tract was to be divided that year.[6] Neither did Denis, Adeline and Joseph Delaime, who were children living near St. Louis at the time of the division and who finally failed in their bid eighteen years later.[7]

Even those who believed they had rights in the Tract had no official confirmation of their claim to any particular part of it. No court or government official ever said the land that Na-ma-tau-pas sold was his, even to hunt upon, to say nothing of living on it or selling it.[8] His name does not appear in the St. Louis Superintendency of Indian Affairs' listings of claimants. The shares of the tract that he and others did sell were as ephemeral and conditional as any of the warrants for military bounty lands in Illinois or the paper claims that had so confused landholding in Kentucky. While most of those who for whom the Sac, Mesquakie and the United States Governent had reserved the Iowa Half Breed Tract were unaware that they could live there, there were people – like Na-ma-tau-pas and the men who bought his share – with a vested interest in confusion over the commons and uncertainty over its apportionment. Nobody could say who belonged on the land or to whom it belonged. No owner and no sovereign entity could (or would) say how the commons of the Iowa Half Breed Tract was to be shared and used or who might be excluded from it. Any and all on the land were there only conditionally, awaiting an exercise of power – of any kind of power – to confirm their place.

Part of the confusion that dispossessed the children and grandchildren of Sac and Mesquakie (Fox) women and that empowered speculators was that nobody knew who, exactly, was entitled to live on the Iowa Half Breed Tract. The treaty only said the Sac and Mesquakie nations wanted to set aside part of their land for these relatives. The United States Government, by reserving the right to take back the land if nobody in that class of people actually settled on the tract, had little incentive to formally recognise any claimants. The possibility that the tract would come back to United States also meant there was little incentive to grant land to Blondeau and the others who signed the 1829 petition. United States officials were not swayed by the petitioners' suggestion that they

[6] Coy v. Mason, 58 US 580, 581 (1855).

[7] Powell v. Spaulding, 3 Greene 443, 452 (1852) Iowa Supreme Court.

[8] Webster v. Reid, 52 US 437, 442.

were entitled to the tract and were disinclined to say who else might have a claim to any of the land. Nor was the question of defining who could live on the Half Breed Tract the only open question. Nobody could say what, exactly, a 'share' in the commons of the tract actually was. The result was the kind of title mess particularly beloved by frontier lawyers who had sharpened their skills sorting out warrant and tax claims in Illinois and Ohio or overlapping land titles in Kentucky. Some soon drifted to the tract and the nearby courthouse towns of Burlington and Fort Madison. Speculators, too, saw potential profit. By 1836, Dr Isaac Galland, who had settled (illegally) in Iowa in 1829, formed such a syndicate, called The New York Company, to buy land in the tract, survey it and divide it into farmsteads and town sites.[9] Galland saw division and sale of the land as inevitable, even though the tract at that time was still a commons for the Sac and Mesquakie (Fox) relatives, and even though the United States had relinquished its right to the land. The absence of any system of governance of the commons was, he saw, his opportunity.

Without constraints of either formal law or informal license from a community, The New York Company's scope was sweeping. 'This is not a mere trust to hold the title to lands, for the use and benefit of persons incapable of contracting', an Iowa judge later commented. 'The design of the association is to get gain and profit by the purchase and sale of lands'.[10] The company, then, was potentially a mechanism to accomplish what two treaties and an Act of Congress had not yet been able to do: establish individual title to defined portions of the 119,000 acre commons. It was intending to be the entity that controlled sale of the land, despite the Sac and Mesquakie relatives' claims. The company would be able to do so because the United States' relinquishment of its reversionary rights to the Iowa Half Breed Tract had created a kind of no man's land where the General Land Office system of small-scale sales to settlers did not apply. Galland and The New York Company understood that without a way to govern the commons, there was no mechanism for allocating it. They understood that a place on the land and power over it came to people hand-in-hand. It was not land first, then a place in

[9] Until the 1834 Treaty of Fort Armstrong, with the cession of the Forty Mile Strip in eastern Iowa, Iowa was considered Native American territory and settlement there was against the law. The New York Company' history is outlined in Barney v. Chittenden et. al. 2 Greene 165, 173 (1849) Iowa Supreme Court.

[10] Barney v. Chittenden, 2 Greene 165, 173.

society, as Blondeau had theorised (and for that matter, as had the Jeffersonian myth of the yeoman farming roots of self-government). Land and power facilitated each other.

Galland was not the only one to see implications of the peculiar lack of governance for the Iowa Half Breed Tract commons. Others, too, saw opportunity. In 1838, the territorial legislature of Wisconsin stepped in, appointing three commissioners to determine the validity of claims to Half Breed Tract lands.[11] They were to partition the land among claimants, or sell claimants' land on their behalf. The three commissioners, Edward Johnston, Thomas S. Wilson and David Brigham, set up shop in the hamlet of Montrose – where Honoré Tesson had so long ago planted his apple orchard – in May 1838. They continued there through November, when the legislature of the newly formed Iowa Territory met for the first time. That new body had ideas of its own about the Half Breed Tract. After 'a considerable pressure was brought to bear', the Iowan law-makers (including Hawkins Taylor, sheriff of the county that included the tract) repealed the Wisconsin act empowering the commissioners to validate claims.[12] Instead, the Iowans said the commissioners might sue to recover their expenses from the holders of Half Breed Tract lands – landholders, that is, whose claims had not yet been validated by the Wisconsin process or who had ever been identified by treaty or statute. The legislation allowing the suit said the commissioners did not have to identify whom they were suing, beyond the description 'owners of the half-breed lands lying in Lee county'. Those unnamed owners were to have notice of the suit only through a newspaper notice eight weeks before the trial, which the law specifically said would not be a jury trial. The commissioners' claims would be a lien on the lands, and they would be entitled to interest at a stunning rate of twelve percent.[13] With unknown defendants, no real public notice, no jury trial, and an impossible interest rate, the legislature had rigged a process that allowed an uncontested financial claim for unpaid expenses to become a legal claim to a real – and very large – piece of land. A tight circle of courthouse hangers-on, including the commissioners, the law partner of one, the sheriff who pushed the law that specified the

[11] At this point, what is now Iowa and Minnesota was a part of the Wisconsin Territory.

[12] Wick, 'Struggle', p. 22. Johnston's name is sometimes recorded as Johnstone.

[13] 'An act to provide for the partition of real property', Statutes of Iowa p. 458, cited in Webster v. Reid, 522 US 437, 438.The Half Breed Tract accounted for about half the area of the newly-formed Lee County.

process and a friendly judge could launch a quiet takeover any time they wished.

But they did not move immediately. Settlers still were barely interested in actually living on the rich lands of the tract, and without people to live there, the commissioners' contingent control of the land meant little. No settlers meant there was nobody willing to pay to stay on the land. A first settlement at Sugar Creek was established only in 1839, and a scattering of others temporarily occupied land elsewhere on the reservation, like the half-timbered, half-prairie 320-acre half-section that John Wright took up in 1837.[14] In 1840, trying to woo people to the Half Breed Tract, the Iowa territorial legislature decreed that any settler there could select an entire 640 acre section – that is, four times the usual size of farmsteads sold at Land Office auctions.[15] The fact that the tract was still a commons reserved by treaty for a specific group did not matter to the Iowa legislators – they had set up a way to get past that by allowing the commissioners to put their liens on the land. The 1840 law aimed to encourage settlers by saying that as long as they paid taxes and did not interfere with any other settler's claim, they were entitled to the land 'until perfect title is ascertained' – the settler did not even need to enclose the entire square mile section.[16] That perfect time, of course, could not be established until the as-yet unrevealed liens on the land were cleared.

Still, there was no land rush after this easing of the rules for securing a claim. Nor were those who came interested in working on the land. In 1840, about one of every six people in Lee County, which included the tract, was a farmer, compared to an average of one in four for the Iowa Territory.[17] Sheep grazing, with large flocks of several hundred animals each freely ranging over prairie commons, was the primary economic activity in the county.[18] Labour was not going to be the way anyone earned a place on the Iowa Half Breed Tract. Sheep, meanwhile, would occupy the commons, as they had in Britain.

Instead, another machination of the courthouse circle moved forward. On 14 April

[14] Wick, 'Struggle', p, 27; De Louis v. Meek, 2 Greene 55.

[15] Laws of 1840, p. 19, section 1.

[16] *Ibid*., section 2.

[17] The US Census of 1840 reported 1061 farmers out of a total population of 6093 in Lee County, and 10 469 out of a population of a total of 43 113 for the whole territory. The Half Breed Tract represented about one third of the area of Lee County.

[18] John B. Newhall, *A Glimpse of Iowa in 1846*, Iowa City, 1857, pp. 22-23.

1840, a purported settler named Josiah Spalding and twenty-two others petitioned the Lee County District Court to divide the tract. The law firm formed by the old Wisconsin commissioner, Johnston, and an adventurer from Indiana named Hugh T. Reid, filed the petition.[19] The petition named one Sac relative, Euphrosine Antaya, and several others 'whose names and places of residence are unknown to your petitioners' as defendants.[20] The petition claimed 5135 acres of land on behalf of the twenty-three petitioners, who had purchased shares or part-shares in the tract from Sac and Mesquakie relatives, as well as twenty-three and one-third of what the petition claimed were 101 legitimate shares of the tract.[21] None of the petitioners were among the claimants who signed the 1829 petition or who had filed affidavits with the Office of Indian Affairs that they were, in fact, children or grandchildren of Sac or Fox women and American, British or Canadian traders or trappers. The numbers are interesting. The acreage suggests most of the petitioners held farmsteads of 160 acres, with a handful owning larger parcels. The twenty-three-and-one-third shares were what the petitioners felt was their proportionate holding of the total of 101 claims that they contended were all that existed and that the court eventually recognised – each 'share', therefore supposedly entitling the holder to 0.99 percent of the Tract, or nearly 1200 acres. The amount of land sought, in other words, was far beyond what a single family might cultivate. The petitioners were setting themselves up as land-dealers, outside the Land Office system. Any and all other claimants to shares in the tract were advised by an advertisement in the *Iowa Territorial Gazette* to appear in Lee County District Court to prove their right to Half Breed Tract land, with the court's ruling to 'be binding and conclusive on them for ever'.[22] A particularly strategic territory, including a long portage around the southernmost Mississippi River rapids and the mouth of the Des Moines River, the easiest path into central Iowa, was about to become available, but only to those in the know.

[19] De Louis v. Meek, 2 Greene 55, 58-59. Elizabeth De Louis, daughter of a Sac or Mesquakie woman and a trader named Hunt, was never identified as a claimant, even though she said she and her husband had lived on the Half Breed Tract since the treaty of 1824.

[20] Wright v. Marsh, 2 Greene 94, 99-100 (1849) Iowa Supreme Court. Spalding's name is sometimes spelled Spaulding in other cases.

[21] *Ibid*. As nobody had ever counted how many children of Mesquakie or Sac women might have a claim to the tract, it is not clear how Spalding derived the figure of 101 shares. None of the court cases elaborate on this point.

[22] *Ibid*.

Reid and Johnston, however, were also acting for the biggest defendant, the New York Land Company's trustees, who would end up with forty-one of the 101 shares. They also entered an appearance in court on behalf of defendant John Wright, without any legal authority to do so.[23] When Wright, who lived on the Half Breed Tract and (unlike Euphrosine Antaya's grandson, Julien Cardinell) actually had a chance to read the legal notice and travel to the court, showed up to prove his claim, one of the lawyers representing the petitioners (as well as The New York company and Wright himself) told him the matter would not be tried.[24] Wright went home and so was unable to defend his own interest when the court, in fact, tried the case. He ended up with a quarter-share, which represented a bit less acreage than his homestead and less than a quarter of what the 1840 Iowa law said a settler might hold until a court determined perfect title. The two lawyers' unusual approach to any known canon of legal ethics was possible because the land, the people actually on it and the people who had a right to it were in such a state of limbo. On the Iowa Half Breed Tract, working the land did not give an individual like Wright a right to be there, a view still offensive to American attitudes rooted in Locke. Nor, for that matter, did the 1824 and 1830 treaties assure a man like Na-ma-tau-pas any particular right to land, other than a right to live somewhere on the 119 000 acres of the tract. The treaties declared the land a commons, but unlike any other commons there was no means of governing use or access until the Lee County court stepped in. When it did, conditional claims, created out of thin air, were what mattered. And they did so because nobody – neither judge, nor squatter nor child of a Sac or Mesquakie woman – had any clear view of the nature of the particular commons of the Iowa Half Breed Tract.

Representing both petitioners and defendants, Reid and Johnston pushed their allocation of the Half Breed Tract through, wiping out any other claims to the land. Those squatters on the Half Breed Tract commons, like Wright, whom Reid and Johnson supposedly represented, generally ended up with 160-acre farms. Sac and Mesquakie relatives generally missed out. Both groups, of course, were supposed to be entitled to as much as a square mile, or 640 acres, of land. Reid and Johnston were able to pull off their coup precisely because nobody in the territorial legislature or the courts, and no one who

[23] De Louis v. Meek, 2 Greene 55, 59.
[24] *Ibid*., p. 60.

negotiated the treaty or who ratified it or sought to refine it in Congress, ever thought to specify exactly what rights to the tract actually entailed. Nobody, that is, really agreed on what a right to occupy or a right to possess on that commons actually meant.

A petition racing through a friendly court and brokered by very interested parties would, instead, be sufficient. 'Every man interested in the property had ample opportunity to appear and assert his rights', declared the Iowa Supreme Court, led by the judge, Charles Mason of the Lee County District Court, who was the judge who first approved the Iowa Half Breed Tract allocation. 'The door was open to all, the notice was extended to all, an abundance of time given', the court ruled, adding that the proceedings 'have been conducted with calmness, with deliberation, and with a commendable regard to the requirements of law and the ends of justice'. The judge, that is, approved his own acts when those acts came under review, while his fellow judges nodded their agreement. The only person without a lawyer, Antaya herself, had her rights protected, the Iowa Supreme Court held, though the actual language of the court order was that her claim was subject to proof.[25] In fact, though the court made no note of it, she was unable to represent herself, as she had died before the case was filed and her only surviving descendant, grandson Julien Cardinell, never realised he had lost his opportunity to turn his claim into land. The sham of a dead, unrepresented primary defendant, of lawyers free to simultaneously represent petitioners and defendants, of a judge whose ruling was subject to no independent review (and who would himself later buy The New York Company's shares in the Tract), were all only possible when no one had any fixed idea about rights to land.[26] Nor, it seems, were ideas particularly fixed when it came to the rights and wrongs of participation in the new political and legal structures of the Iowa Territory and of Lee County. In this confusion and ambiguity, the lawyers and the friendly judge put an end to the commons, a step that neither the Office of Indian Affairs or the Congress was quite prepared to take at that time. A tight circle of individuals with privileged access to just one critical mechanism of state power, a court of initial jurisdiction, had seized the power to define the rights of the caught-between, and not

[25] Wright v. Marsh, 2 Greene 94, 112.

[26] The United States Supreme Court, after reviewing the matter, found no fraud in the way the lawyers or the Iowa courts handled Cardinell's claim, see Coy v. Mason 58 US 580 (1854).

surprisingly had effectively defined those rights out of existence.

The conflict of interests within that circle, however, did not stop once the Iowa Supreme Court approved the division. Even as they represented both sides in the land division case, Reid and Johnston played a parallel game of land titles. After the Lee County District Court ordered the division of the tract, Johnston and fellow Wisconsin commissioner, Brigham, sued for the unpaid fees and interest that the 1839 Iowa legislation allowed them to claim. Reid was their lawyer. They won judgments at the August 1841 term of the District Court of Lee County, promptly executed by a sympathetic Sheriff Hawkins Taylor (the sheriff who had led the legislature's effort in 1839 to overturn the Wisconsin process and allow the commissioners to sue). One lien was in behalf of Edward Johnston, for $1290; the other in behalf of David Brigham, for $818.[27] Sheriff Taylor quickly put the lands – the entire tract – up for sale to satisfy the liens, and Reid snapped up the entire Tract for $2884.66.[28] At just under 2.5 cents an acre, it made even Washington's purchase prices for Native American lands look lavish in comparison.

Two contending machinations, involving some of the same actors, for one of the largest single tracts of land available at any time in at least a half-century had thus erased any claims by any Sac and Mesquakie relatives. The gaming for control of that commons, too, suggests how casual attitudes about ownership rights and title remained at this time, and in a place far from where legislators or the theorists of political economy also floundered, trying to define what it really meant to hold land, to occupy it or to own it. In such general confusion, the rights and rules governing any shared space – however informally set out – could be completely overlooked. In effect, the essence of a commons vanished. The legal game in Lee County showed how easily a commons, as it faded from view, could become a kind of blank slate on which one could inscribe the most grandiose schemes, at no real cost. That blank slate also displayed how unclear and various ideas about right to land really were.

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[27] Reid v. Wright, 2 Greene 15, 19 (1849) Iowa Supreme Court.

[28] Webster v. Reid, 52 US 437, 440. Assuming Brigham and Johnston really did spent just under $1,500 in their brief stint as Wisconsin's commissioners, Reid's purchase price meant they together netted a more than $700 profit, on top of the 12 percent interest the payment also covered.

Enough people, indeed, felt so free to act on their notions of their right to take land that the courts now had to sort out the confusion. Reid sued three times to remove people who had purchased land from people allotted land in the 1840 petition, winning in the two earlier cases in the friendly court in Lee County, before the resignation of Judge Charles Mason from the Lee District Court and Iowa Supreme Court in 1847 allowed a fresh look at Reid's claim.[29] Once that happened, judges found the peculiar language of the 1839 Iowa act allowing the commissioners to sue the owners of lands on the tract without naming them as individuals, and to do so without having to make their case to a jury, to be insupportable.[30] Would-be landowners challenged the lack of notice and jury in the 1841 division as well, presenting plausible evidence of fraud by Reid and his law firm. Still, courts, all the way up to the United States Supreme Court in its 1850 decision in Webster v. Reid, opted to let that decision stand.[31] By that point, none of the Sac or Mesquakie relatives for whom the Half Breed Tract was intended were bothering to seek their land. The last to try the courts to protect her rights was Elizabeth De Louis, one of the few who even claimed to have actually lived on the tract after the 1824 treaty reserved the land. She failed in her effort in 1845.[32]

Charles Mason, the judge who, on the bench in Lee County and in his appellate reviews of his own decisions on the Iowa Supreme Court, upheld Reid's claim to the entire tract (even though it mooted his 1841 division of the tract), had switched allegiance again. After stepping down from the bench and acting as lawyer for The New York Company in one challenge to its title to 480 acres, Mason bought out the company's

[29] In Sprott v. Reid, 3 Greene 489 (1852). The Iowa Supreme Court overturned an unreported 1846 Lee County District Court decision affirming Reid's claim to an 80 acre farm; in Webster v. Reid, 1 Morris 467 (1846) the Iowa Supreme Court, with Mason sitting, upheld Mason's decision as a district court judge that Reid had title to a 160-acre farm that Webster had purchased in 1838. This was the case that, on appeal to the US Supreme Court, ended with a decision definitively upholding the 1841 division. It was not until Reid challenged a man named Wright's title to a 160-acre farm that the district court balked, and was upheld in Reed v. Wright, 2 Greene 15 (1849).

[30] Reed v. Wright, 2 Greene 15, 22.

[31] Coy v. Mason, 58 US 580; Brace v. Reid, 3 Greene 422 (1852) Iowa Supreme Court; Powell v. Spaulding, 3 Greene 433; Webster v. Reid 52 US 437.

[32] De Louis v. Meek, 2 Greene 55.

claims (though by 1852 he had still not paid a balance due of $100 000).[33] Mason's approach was to buy and start re-selling land without paying for it upfront (in essence a version of what twentieth century mergers and acquisition bankers would call a leveraged buyout). For Mason, as for Reid, landholding on the tract was contingent. Both men held paper that might, or might not, come into the money depending on how well they worked their legal connections and sources of finance. They were as lightly tied to the land as any warrant holder for Illinois Military Tract land.

Contingency, too, is reflected in the pattern of settlement on the Iowa Half Breed Tract. In 1850, before the United States Supreme Court's definitive rejection of Reid's claims, the census reported only 1350 farms, or an eighteen percent increase from the number of people reported to be farming in 1840 in Lee County. Iowa overall saw a forty-one percent increase.[34] It was only with Webster v. Reid that paper claims became real and settlement in Lee County began to keep pace with other parts of the Iowa frontier, by this point lying far to the west and north. In its ruling confirming the allocation of the Iowa Half Breed Tract commons, the Supreme Court made one of its clearest, and largest-scale, confirmations that rights of holders of financial papers for possession of land were superior to rights earned by labouring on land.

The Half Breed Tract's division represents an extreme example of the conditional nature of landholding on the western commons, whether through paper title or right of occupancy guaranteed by two treaties and an act of Congress. Still, the sense that one was on the land only contingently was not unknown elsewhere on the frontier. The footloose ways of timber-cutters, the churn of warrant- and tax sales dealing on the Illinois Military Tract, and the limited ability of farmers to defend fenced fields against the trespass of livestock, would be followed in the late 1830s and 1840s by the formation of clubs and

[33] Wright v. Marsh, Lee and Delevan, 2 Greene 94 (1849) Iowa Supreme Court; Coy v. Mason, 58 US 580, 583. By June 28, 1852 Mason bought 'all and singular the right, title, interest, property and estate' of Marsh Lee and Delevan 'not heretofore sold and conveyed by them', on the Half Breed Tract, listing several hundred specific parcels, Barney v. Miller, 18 Iowa 460 (1870) Iowa Supreme Court.

[34] The 1850 US Census reported that Iowa had 14 805 farms. The 1840 Census counted the number of people employed in farming, that of 1850 the number of farms, so the 1840 figure for the state and county may be inflated by hired hands who worked on but did not actually operate a farm.

squatters unions, particularly once the Sac, Mesquakie and Sioux ceded the rest of their claims to Iowa.

The ad hoc clubs and unions sometimes were associations of neighbours defending homesteaders' labour-earned right to land from a claim-jumping speculator. Sometimes, though, they were really syndicates of speculators. In Appanoose County, Iowa, the claim club acted to point newcomers to good and unimproved land that might be owned but that the club considered surplus to the absentee owner's needs. In the view of Appanoose settlers, surplus land apparently was any holding of more than 160 acres plus some timber land.[35] On the other hand, William Donnel reported the Marion County, Iowa, claim club forced him to buy a club member's claim to part of his farm, tracking him twenty-five miles to Oskaloosa, Iowa, to insist on the payment for land which was unimproved, and which he had been told was unoccupied. A relative, J.C. Donnel, had to clear a claim to eighty acres of his farm with a note of $35 (latter settled for fifty cents on the dollar, as the noteholder was loathe to test his luck in district court).[36] Of 325 individuals who signed the Johnson County Club's compact or filed claims or participated in claim club transactions between 1838 and 1843, a total of forty-three were involved in four or more claims and one, Samuel Bumgardner, was involved in twenty-two, suggesting they were, in fact, speculators in claims, while only thirty percent simply filed a claim entry to secure their farm.[37]

Squatter sovereignty governed, and the claim clubs' members sitting on juries felt free to ignore even United States Government patents to land, recalled David M. Pearce, who came to settle in Clinton County, Iowa in 1838. 'Some of the chivalry, or gentlemen of elegant leisure, followed the business of making claims and selling them to emigrants as they came through', he sarcastically recalled in a memoir written shortly before his death in 1878.

As soon as a new settler arrived, the above named gentry would

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[35] Staff of Western Publishing Company, *History of Appanoose County*, Chicago, 1878, pp. 365-66.

[36] William Donnel, *Pioneers of Marion County*, Des Moines, 1872, p. 49.

[37] Allan G. Bogue, 'The Iowa Claim Clubs: Symbol and Substance', *The Mississippi Valley Historical Review*, Vol. 45, No. 2, Sept., 1958, p. 243.

> ascertain his "pile", by some means best known to themselves. They would then have a claim to suit the newcomer's purpose and purse, and, if he demurred paying anything to them, contending that his right to the public land was as good as theirs, they would very soon convince him of his error. He would be summoned to appear before a justice of the peace as a trespasser, or, as they called it, a "claim jumper". The magistrate issuing the summons belonged to the fraternity, and the poor settler would have to sell out or leave.[38]

The Clinton County association operated in much the same way as the courthouse circle did when it moved to corner the Half Breed Tract, though somewhat more efficiently. A claim to land through many of the Iowa clubs, had become less a means of securing a homestead than a business opportunity – exactly the result of the conversion of the Iowa Half Breed Tract commons and the dispossession of the Sac and Mesquakie relatives from it. Yet members of the claim clubs, unlike the lawyers, speculators and the judge in the Half Breed Tract case, still held to the notion of a right to land from the working of it. Even the holders of many lots worked on at least one of them. What the larger operators using claim clubs dropped was the idea that working on the land forged a permanent connection to it. It was as radical a shift as that on the Half Breed Tract, when men of the law could overturn the words of two solemn treaties between nations to end another permanent claim.

On the Nebraska Half Breed Tract, the status of potential claimants' holdings also remained uncertain, and the land barely settled. In 1836, the Otoe, Omaha, Missourias and Ioway nations petitioned Washington to say their relatives were still 'anxious to settle' on the tract, but unwilling to start farms 'without some guarantee they will be permitted to hold them'.[39] But Washington had other ideas. Here, as in Iowa, the supposed goals of promoting settlement and progress through individual holdings faltered in the face of a differing vision of the land. The Office of Indian Affairs was looking for a northern counterpart to the Indian Territory (in what is now Oklahoma) to which the

[38] Patrick B. Wolfe, *Wolfe's History of Clinton County, Iowa*, Indianapolis, 1911, Vol. 1, p. 51.

[39] Letter from Iaton, Otoe chief, Mah-che-gi-suq, of the Missourias, Big Elk, of the Omaha and Little Dish, of the Sioux to William Clark, 15 October 1836, William Clark Papers, Vol. G, p. 27, Kansas State Historical Society, Topeka, Kans.

United States had started deporting the Choctaw in 1831. With the deportation of the Choctaw, Cherokee and other Native Americans from the southern states, the nation's policy towards Native Americans was shifting from one of co-existence and possible assimilation to one of deportation to the dry lands of the shortgrass prairie, like Nebraska and Oklahoma – country that in the 1850s few believed could ever be farmed.[40] There, a commons made sense to officials because of what they saw of the nature of the land. It suited hunting peoples, which was how officials viewed Native Americans they believed – or said they believed – had so blindly resisted becoming farmers. At best, Americans expected that what they called The Great American Desert, the plains west of about the 100th meridian of longitude, would support grazing, which a commons would also suit.

The new approach in Native American policy – deportation to a commons of land unsuited for cultivation – prompted Indian Affairs Commissioner, Carey A. Harris, to authorise Agent John Dougherty in 1838 to extinguish all titles to land in the Nebraska Half Breed Tract.[41] For moral cover, the draft treaty Dougherty negotiated in May 1838 declared that the Omaha, Otoe, Missourias and Ioway chiefs believed many of those entitled to the tract were orphans or destitute, so that the land 'had not and would never afford aid and relief intended for Half Breeds'. The chiefs, implicitly claiming the power to define who was entitled to the tract, proposed that the United States pay them – the chiefs, that is – $1 an acre for the land, and that the government then sell the land and use the money to pay an annuity amounting to five percent of the proceeds to the people for whom the tract was reserved.[42] That annuity would have been about $1750, if all the land were sold at the usual $1.25 per acre price for Land Office auctions.[43] 'This is as good

[40] This was the first act in the infamous Trail of Tears, the mass deportation of Native Americans from the arching swath of land stretching from western North Carolina south and west to what is now the state of Mississippi.

[41] Harris to Dougherty, 2 February 1838, National Archives, Office of Indian Affairs, Letter Book, Vol. 23, pp. 365-66.

[42] Treaty of 5 May 1838, National Archives, Office of Indian Affairs, Council Bluff Agency, C-711.

[43] The calculation is mine, based on the approximate (and at the time contested) extent of the Nebraska Half Breed Tact at 138 000 acres. As an indicator of how seriously anyone considered fairness in dealing with the issue of claims to the tract, it is worth remembering that nobody know how many people might share that munificent sum. At this time, there was still no list of those entitled to live on the Tract or any process set for determining who they might be.

land in every respect, as can be found in the whole Missouri country ... I think you will concede that $1.00 per acre is not too much', Dougherty wrote to William Clark, the superintendent for Indian Affairs for the central region, adding, 'it will become a most excellent country for the Pottawatomies and one too, which I doubt not will please them well'.[44] Merely securing political control of the tract was worth almost as much, in other words, as the sum the government received from Land Office sales of tracts where its control was certain, at least as measured in dollars-per-acre terms. Land to be held as commons was still almost as valuable as land intended for severalty.

In so devaluing everything else land might represent – a home, a flow of income far into the future, the sense of being rooted – Washington aimed for generosity, or what it thought was generous. So, a confluence of interests – the chiefs because they were getting some $138 000 and the Office of Indian Affairs in getting land on which they might settle Native Americans from Wisconsin and Michigan – seemed on the verge of sweeping aside the people for whom the tract was intended. What seemed to be the needs of a larger policy – to concentrate Native Americans from across the northern half of the nation into Nebraska – was at least as important as any pieties about owning farms and creating American-style settlement. Control of the land mattered to the Office of Indian Affairs in Nebraska, just as it did to the claim clubs in Iowa when they insisted that to hold land securely was as important as being able to profit on its sale.

The land grab in Nebraska went nowhere, however. Neither President Martin van Buren nor his allies in Congress were ready simply to push the Half Breed Tract claimants off. Van Buren's newly appointed Indian Affairs Commissioner, the Pennsylvania Jacksonian Democrat Thomas Hartley Crawford, told his boss, Secretary of War Joel Poinsett, that he was concerned that only two Omaha or Otoe relatives, Joseph Brazeau Jr. and Baptiste Brazeau, had signed the treaty, and that others had not been

[44] Dougherty to Clark, 29 May 1839, William Clark Papers, Kansas Historical Society, Vol. G, p. 118 (microfilm reel MF 3116). He made the same case to Sen. Thomas Hart Benton, of Missouri, noting 'this tract lies immediately on the bank of the Missouri River, directly in front of an extensive tract extending west, already owned by the United States, which, with this half-breed scrip, will afford a first rate country for the location of any of the Indians tribes yet to Emigrate', Dougherty to Senators Thomas Hart Benton and Lewis Linn, 10 December 1838, cited in Berlin B. Chapman, *The Otoes and the Missourias, A Study of Indian Removal and the Legal Aftermath*, Oklahoma City, 1965, p. 56.

asked for their consent.[45] President van Buren forwarded the 1838 treaty proposal to the Senate on January 24 with the decidedly unenthusiastic comment that '[i]t appears that the consent of the half-breeds of the above-mentioned tribes and bands is wanting', adding, '[t]his tract of land ... cannot be taken from them even for such a valuable consideration as will relieve their wants without their assent'.[46] The Senate agreed. It rejected the treaty, and with it the chiefs' claim to speak for those entitled to the tract, with a unanimous vote on 1 March 1839.[47] Even if the people for whom the tract was intended had not settled there yet, they had a right to the place, the senators decided. It was easier to see the rights of the caught-between people to a place on the Nebraska Half Breed Tract than it had been in Iowa because, unlike Iowa, there were not any speculators eyeing the commons between the Great and Little Nemaha rivers.

In rejecting the treaty, though, the Senate left open the question of whether the caught-between people ought to settle permanently on the tract or to have the chance to sell their land rights to others who would stay put there. It mirrored the fundamental question forced by the claim clubs, and still not completely resolved in the theories of those political economists, like Mill, who saw little basis for a right to own land if there were no commitment to farm it. The Senate was not yet ready to dissolve the Nebraska Half Breed Tract commons, since senators saw no sign anyone was really interested in cultivating the land. If no potential claimants wanted to farm, the senators were reluctant to have the United States step in to say who was in the category of the caught-between entitled to the tract. American officials generally were inclined to preserve commons on territory reserved for Native Americans, by this point mostly shortgrass plains believed impossible to farm. The thread that unified both attitudes, like the idea behind the claim clubs, was to forge permanent, stable connections to land, whether held in commons or by individuals. A commons was preferred when cultivation looked to be a dubious prospect.

Up in Minnesota, claimants to the Half Breed Tract by Lake Pepin and their allies

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[45] Crawford to Secretary of War Joel Poinsett, 9 January 1839, cited in Chapman, *Otoes and Missouria*s, p. 56.

[46] *Senate Executive Journal*, 25th Congress, 3rd session (28 January 1839), p. 185.

[47] *Ibid*., (2 March 1839), pp. 216-17.

moved in a more focused way to secure their reservation, petitioning in August 1837 to have the tract 'surveyed and divided among the proper claimants as soon as practicable'. The claimants, as opposed to their maternal relatives among the Sioux, asked Col. S.C. Stambaugh, a lawyer and former Indian Agent, to represent them in Washington. A month later, they petitioned the government to give Stambaugh the job of dividing the reserve, and thirteen months after that, convinced an army lieutenant posted nearby to petition the commissioner of Indian Affairs to divide the reserve.[48] The response from Commissioner Crawford was blunt: no. He complained that the petition improperly claimed land for people with only one white grandfather – 'quarter breeds', as Crawford termed them. In addition, he said the treaty did not contemplate a general distribution of land 'for its language is, that the President may hereafter assigned to *any of the said half-breeds,* to be held by him or them in fee simple, &c., this leaving it discretionary with him to grant to those to whom it would be beneficial'.[49] Just two months before rebuffing a bid to deny the Nebraska Half Breed Tract commons to its designees, Crawford here blocked a bid to divide the Minnesota Tract commons. Any division into individual holdings was to be an exception to the rule. The rule was that of the United States, and the power to enforce it, or to make an exception to it, belonged to the national government, not to the community for whom either Half Breed Tract was intended.

By differentiating between the right to occupy and a grant of land to be held in severalty, Crawford was able to insist that the reservation would revert to the United States if those entitled to settle there did not actually plant themselves on the land.[50] Here, as opposed to the case in Nebraska, the balance swung for reversion and against the potential holders of the Minnesota Half Breed Tract because the area already had attracted speculators. Lake Pepin was on the easiest route to the uppermost reaches of the Mississippi River, and there were rumours of copper deposits. Like the Iowa Tract, the possibilities of the land seemed plain to see. That was so much so that in March 1839, rumblings of growing interest in the Iowa and Minnesota tracts grew so strong that the

[48] 'Sioux Lands or Reservation in Minnesota Territory', *Reports of Committees of the House of Representatives Made During the First session of the Thirty-third Congress,* Washington, 1854, Vol. 2, Report 138, p. 3.

[49] *Ibid.,* pp. 3-4.

[50] *Ibid.,* p. 5 (emphasis in the original).

Secretary of War, Poinsett, ordered a notice be published in Mississippi River valley newspapers saying no sale of the still-undivided interest in the half breed reservations would be recognised as valid by the President.[51] This was a more broadly published notice than the ones the Iowa court had published for any of its cases to divide the Iowa Half Breed Tract. The difference was that Washington wanted to keep the speculators out.

Still, the pressure to divide and allocate the Half Breed Tracts was intense. In December 1839, Wisconsin's Governor, Henry Dodge, wrote to the territory's delegate to the House of Representatives urging him to lobby for a survey and authority to apportion the Lake Pepin reserve in fee simple, while the Iowa territorial legislature followed suit in February 1840.[52] Crawford again tried to make clear his concern: Lake Pepin, he wrote to Poinsett, 'was a donation by the Indians to their mixed bloods', and 'therefore, was limited to the Indian right – that is, to hold by occupancy; to this the United States consented, and so far only is there any contract or right, upon which they could insist, vested in the half breeds'. Granting title in severalty to the Lake Pepin claimants – whoever they were – would cost the United States control of the tract, since the claimants then would be free to sell their land, Crawford said. 'I see no public good, or probable advantage to them that would result from so doing', he added.[53] Crawford wanted stability on the tract, whether through reversion if it remained unsettled, or if those entitled to it settled on it permanently, holding it as a commons. A commons, that is, was the only way to ensure permanent possession and stability, he believed.

As Stambaugh, the lobbyist for the Sioux relatives, continued to push for division of the Minnesota Half Breed Tract, he seems to have hurt his own cause by suggesting that opposition to the request was a fabrication by the Office of Indian Affairs' Sioux Agent, Lawrence Talliferro, because of his own supposed interests in the Lake Pepin lands. The hint that speculators were ready to swoop in and buy up the tract was not reassuring in a Washington where Congress continued to enact preemption laws that

[51] *Ibid.,* p. 8.
[52] *Ibid.*
[53] *Ibid.,* p. 7.

made permanent the squatters' rights to nullify speculators' purchases.[54] When Sen. James Buchanan of Pennsylvania objected to Crawford's stance on dividing Lake Pepin, and in particular his position that people with three Native American grandparents would not be entitled to land, Poinsett replied that he was worried that the estimated 150 claimants would soon lose their land to speculators. Congress would have to act to prevent that, he added.[55] Buchanan backed off. In a letter to Rep. John Bell, Chairman of the House of Representatives' Indian Affairs Committee, Poinsett said the War Department 'is of the opinion that, without some restriction, these lands would, if divided as prayed for, in a short time fall into the hands of speculators'.[56] In effect, Crawford and Poinsett, like the legislators who enacted the various preemption acts, saw the sale of land by individuals as interfering with the government's goals of peace and orderly settlement of the frontier. If the government did not sell land, the best way to assure permanent settlement was to let squatters preempt anyone else's claim. For those who would not farm, the commons still seemed a way of encouraging the kind of permanent connection of people and land that remained a fundamental element of the Atlantic World's mentality into the 1850s. Crawford wanted people to stay put on the Nebraska and Minnesota Half Breed Tracts.

The goal of orderly settlement, however, was complicated by the fact that nobody had yet tried to determine how many people had claims to a place on the Half Breed Tracts. Here, as so often when Americans considered the commons, the problem grew out of an inability to see the nature of a particular commons clearly. All three Half Breed Tracts, after all, had been granted to communities of people never precisely defined – as Crawford's complaint about the claims of 'quarter breeds' indicates. No American treaty or official seems to have considered how to set rules of use or access, which are so essential to defining any commons. No one knew whether the Half Breed Tracts were large enough – or too large – for the needs of the people for whom they were intended. Poinsett had guessed 150 in Minnesota, and Crawford soon corrected that figure to 200,

[54] *Ibid*., p. 6. Congress had first granted such preemption rights in Illinois in 1813 and had affirmed in temporary measures in 1830, 1832 .It finally made the right permanent in 1841.

[55] *Ibid.,* pp. 5-6.

[56] Poinsett to Bell, 27 March 1840, cited in 'Sioux Lands', p. 8.

but Stambaugh contended there were 330.[57] The Office of Indian Affairs dispatched Rev. Isaac McCoy, a former Baptist missionary to the Pottawatomie in Indiana and Michigan, to report on the status of the Omaha, Otoe, Missourias and Ioway relatives with claims to live on the Half Breed Tract (as well as any Sioux who might prefer the Nebraska lands between the Great and Little Nemaha rivers to Lake Pepin). The United States, that is, was now saying it would determine the family and political status of individuals in order to determine their rights to the tract. McCoy counted 121 with an interest in the Nemaha lands, though 'there are doubtless others concerning who I have not received information', and adding 'none have ever occupied this land, and most of the claimants, I presume, scarcely know such a reservation has been made'. McCoy, an impassioned advocate of the deportation of Native Americans to the west, hoping that settlement there as farmers would allow them to form a missionary-guided state within the Union, was notably unimpressed by the claimants to the Half Breed Tracts. 'The condition of these people is such that bargaining with them would be mere form without substance', he wrote, suggesting the United States buy each person's claim for just $300. (Once the issue of securing control shifted from the chiefs, who were to get $138,000 in 1838, to the conditional claims of individuals, the perceived value of the land dropped by nearly three-quarters; McCoy was suggesting the government could gain control of the tract for about $36 000.) McCoy, like his sponsors in the War Department, felt '[i]t is exceeding unfortunate that such was a reservation was made', adding 'extinguishment of their claims is important in view of the settlement of other Indian tribes'.[58] The idea of a farming colony of the caught-between as an exemplar for all Native American nations was fading.

When four years after McCoy's survey, some of the Nebraska Half Breed Tract claimants had the temerity to petition for their land, Commissioner Crawford declared that 'a general indiscriminate assignment to all the participants in the bounty of the treaty was never contemplated', adding that it was 'against sound policy' to grant individual, exclusive title to them, 'which would enable the half breed to sell it, and would place him

[57] *Ibid*., p. 6, pp. 8-9.

[58] Isaac McCoy to Sen. John C. Spencer, 22 December 1841, National Archives, Office of Indian Affairs, Misc. N 267-842.

in a position to be a ready prey to the designing'.[59] Crawford reiterated the view he had expressed in rejecting Sioux relatives' petitions for the division of the Lake Pepin Half Breed Tract. The Prairie du Chien treaty contemplated only grants, at the President's discretion, to selected individuals. How this was to be done was the open question, and one no one was motivated to answer.

More than fifteen years after the United States and Native American nations agreed to create the first of the Half Breed Tracts, then, all three remained no-man's lands. Those with rights to occupy them generally did not. Those who were on the land had no clearly legal way to be there – only the most egregious rigging of the Iowa territorial court, with one law firm representing contesting interests before a judge with interests of his own in the Half Breed Tract, could construct the flimsy paper foundation for division and sale of the land. The three lay on the fringes of a rapidly filling Iowa Territory – intended once as a Native American commons but no longer fated to remain one – and buffered it from large Native American nations. The Half Breed Tracts, like the people they were for, were caught-between.

The tracts were established as commons, but for communities much less clearly defined than the European villagers who once shared their open fields, common pastures and woods. All three were gateways to the country beyond, with richer resources (particularly of timber) than those lands contained, too. Any impulse of generosity to a caught-between community at treaty negotiation time was by the 1840s qualified by officials' sense that they had reserved a lot of particularly valuable land, perhaps more than their predecessors had needed to. That fact was why the question of counting claimants was so central in the 1830s and 1840s. The supposed difficulties of counting, resolved so arbitrarily in Iowa, would become excuses for inaction on resolving the status of the Nebraska and Minnesota Half Breed Tracts.

That inaction, however, was not merely a problem with conducting censuses, but rather reflected much deeper ambivalences about land and its place in American mentalities. One of those ambiguities counterpoised the idea that owning land anchored

[59] Crawford to James Bowlin, 3 March 1845, National Archives, Office of Indian Affairs, Letter Book, Vol. 36, pp. 246-47.

one in a specific place against the idea that owning land gave one a free hand to do what one wanted with land. What was particularly troublesome about that free hand was the ability to sell a piece of land or speculate with it. In a way, these contrasting views about ownership and commons mirrored the contrast between American economists' notions that land was worth only what people would pay for it, and Wakefield's idea that the real value of land could be realised only through strictly controlled sales and management of surrounding commons.

The other critically important ambiguity turned on the interests of society in land and in what was done with and on the land – the question that made land tenure a matter that legislator had to consider, applying the precepts political economists proclaimed across the Atlantic World. Both ambiguities remained unresolved – obviously so on the Half Breed Tracts. If it was hard to focus on the community, it was hard to see its commons – for any commons is a creation of a community and its actions to share space. And if the commons was hard to see, so was the next step.

Chapter 9

Commons lost: Taking the Nebraska and Minnesota Half Breed Tracts

Negotiating with the Mdewakanton and Wahpakoota bands of the Sioux over their claims to most of Minnesota and northern Iowa, Minnesota Territorial Governor, Alexander Ramsey, and United States Indian Affairs Commissioner, Luke Lea, thought of a way to sweeten a fairly stingy offer of a roughly 20-mile-by-50-mile reservation along the Minnesota River, to be held as a commons.[1] To pad out the $220 000 lump sum and modest annuity they offered for millions of acres of Sioux lands, Ramsey and Lea threw in some cash to buy out the Sioux interest in a place they had already left: the Minnesota Half Breed Tract. Ramsey and Lea argued, inaccurately, that since no Sioux relatives had moved onto either the Minnesota or Nebraska Half Breed Tracts, the Sioux should surrender the Lake Pepin lands to the United States, in exchange for a $150 000 payment, rather than take the land back themselves.[2] It seemed a fair deal to the Sioux, but not the United States Senate, after the senators learned that despite Ramsey's and Lea's assertions, at least ten Sioux relatives had been settled on the Lake Pepin tract for years.[3] Others had sold occupancy rights to settlers who 'have made permanent establishments', and were destroying the best timber land, Territorial Governor Willis Gorman, the Whig Ramsey's Democratic successor, reported.[4] What to do with the no-man's land of the Half Breed Tracts still confounded everyone concerned. No one in Washington, in the west, or on the tracts themselves knew how to assign a value to them. Unable to say what the land was worth, and barely able to know who was on it, people were unable to say what should be done with it.

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[1] The Sioux bands gave up their land (basically, everything west of the Mississippi river and north of Iowa's Skunk River, stretching off indefinitely into the Dakotas) in return for a $220,000 cash payment and a promise to pay annuities in cash, goods and services of $58,000 a year for 50 years. Treaty of Mendota, (5 August 1851), 10 Stat. 954. Specifying that reservation land was to be held in common was a relatively recent substitution for the traditional description of tenure in the 'Indian manner'. The first treaty to specifically state that reservation land was to be held in common was Treaty with the Chippewa, 4 October 1842, 7, Stat. 591.

[2] Treaty of Mendota, 10 Stat 954.

[3] 'Sioux Lands', p. 10

[4] *Ibid,* pp. 10-11.

The Sioux relatives whom Ramsey and Lea did not see were not consulted about the Minnesota Tract. Once again place on the land and the power to participate eluded them. Yet within a half-a-dozen years, questions of place and power would be settled for them, and for the people meant for the Nebraska Half Breed Tract. In this story emerge familiar themes – what people saw, and did not see, on commons; the way abstractions of paperwork, particularly the instruments of conditional claims, reframed ideas about land; and an idea of land that said Nature had no value and human effort and foresight all. The impetus to action on the Half Breed Tracts, moreover, was a change in mental maps. By the 1850s, the tracts no longer looked like buffers between peoples but instead more like enclaves. Native American nations' command over the vast stretches of commons was more attenuated. The Sioux were content to give up Lake Pepin for cash because it was 200 miles across others' land from their new and shrunken heartland on the Minnesota River. The tiny sums offered them, and later the Otoe, Omaha and Missourias peoples for their lands in Nebraska, served to confirm the consensus in economic thought that land was worth nothing inherently. The disappearance of the commons of the caught-between people signalled a larger erasure underway in the mentality of the Atlantic World.

The turning point came in 1854. That was the year that Congress hoped to quiet increasingly bitter clashes over slavery with the Kansas-Nebraska Act, by saying settlers' votes would determine whether any future state would be slave or free. The bill's focus was Kansas, where free soil and slaveholder guerrillas battled for control, but it formally opened Nebraska to settlement (Nebraska was to be a kind of free soil counterbalance to a Kansas that could opt for slavery, giving slave states control of the Senate; opening the possibility of Nebraska statehood was a way of winning enough Northern legislators' support to carry the measure.) With that act, intended to preserve the union, the United States gave up the idea of leaving millions of square miles in Nebraska to Native Americans, which was the vision that had, in 1838, prompted Indian Affairs Commissioner Harris to try to acquire the Nebraska Half Breed Tract.

The years since Harris' failure had been difficult for the Omaha, Otoe, Ioway and Missourias. Pushed from Iowa to the drier lands west of the Missouri River, they saw American settlers and buffalo hunters already encroaching on their now more limited territory, where the women's plots yielded less of the staples of corn and beans on which

they all depended. In 1853, Commissioner George Manypenny reported that 'individuals from the States had been exploring … with the intention, as it is understood, of attempting to make locations (that is, to claim farmsteads) and settlement'.[5] Pressed by the Sioux to the north, and squatters from the east, the Omaha, Otoe, Missourias, Ponca and Pawnee rumbled about grand councils to 'confederate for defense against white people'. Manypenny reported he was able to reassure them, with a promise of money for the sale of their land, while discouraging them from counting on retaining reservations unless they moved south. He noted, however, that '[t]here are some Indians … who are occupying farms, comfortably situated, and who are in such an advanced state of civilization, and desired to remain, that privilege might well, and ought perhaps to be granted'.[6]

As it turned out, though, there would be no such grants. In 1854, the year of the Kansas-Nebraska Act, the United States purchased the lands of the Omaha, Otoe and Missourias peoples west of the Missouri River for $1.2 million, to be paid in installments over fifty years.[7] That translated to 19.6 cents an acre for the Omahas and 37 cents for the Otoes and Missourias.[8] The Half Breed Tract was now just an enclave, a commons surrounded by land destined for sale to individuals or grants to the railroad. The signal from the price Washington paid for the rest of Nebraska made clear the tract also would be an enclave of little value if it remained in the state – that of a commons – set by the treaty that established it.

The low value the United States Government put on Nebraska was an object lesson for the influential American economist, Henry C. Carey, who noted in his popular textbook, *Principles of Social Science*, that the government 'has recently made a purchase of many millions of acres, for which it has contracted to pay to the Indian proprietors what appears a very low price'. In Carey's view, that was perfectly appropriate since 'the

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[5] Commissioner George Manypenny, 'Annual Report', 9 November 1853, *Senate Executive Documents*, 33rd Congress, 1st session, p. 269.

[6] *Ibid*., p. 270.

[7] Treaty with the Oto and Missouri, (15 March 1854), 10 Stat. 1038; Treaty with the Omaha, (16 March 1854), 10 Stat. 1043, Articles 1 and 4.

[8] The Omaha Tribe of Nebraska v. United States, 4 Indian Claims Commission, 661, (1957); Otoe and Missourias Tribe of Indians v. United States, 2 Indian Claims Commission, 42, (1953).

whole value of that land is that our own people have been making roads leading to it'. That was exactly the same situation that prevailed fifty years earlier in the Illinois, Missouri, Michigan and Wisconsin, he added. The purchases from Native Americans confirmed the lessons about land sales in more settled areas, Carey continued, for '[e]very one is familiar with the fact that farms sell for little more than the value of the improvements'. Even then, though, the price of land omitted the biggest improvements, for there was 'nothing put down for clearing and draining the land, for the roads that have been made ... or for a thousand other conveniences and advantages that give value to the property', he added.[9]

Carey, '[l]ying in bed one morning, picturing to himself the settlers on the sides of the hills, moving down into the valleys', had determined that the usual model of how people used land was wrong.[10] 'The soils first cultivated are very frequently not those of the highest fertility', since settlers avoided the thick woods by rivers and picked land less thickly covered by vegetation, he wrote.[11] Carey argued that capital, not Nature, had made land potentially profitable. For Carey, the value of a piece of land, even as land, did not reflect its natural endowments. It did not even necessarily reflect the farmer's own investment. 'The application of capital in the form of a steamboat' could double the value of a farm by allowing the farmer to ship produce; a canal would help even more by opening additional market.[12] There really was no such thing as the kind of rent economic

[9] Henry C. Carey, *Principles of Social Science*, Philadelphia, 1858, p. 168.

[10] Henry Carey Baird, 'Carey and Two of His Recent Critics, Eugen V. Böhm-Bawerk and Alfred Marshal', *Proceedings of the American Philosophical Society*, Vol. 29, No. 136, Jul.-Dec., 1891, p. 171.

[11] Henry C. Carey, *Principles of Political Economy*, Philadelphia, 1837, p. 39. Carey insisted on what this somewhat bizarre description of settlement history because it allowed him to argue that Ricardo's idea of rent as a payment for natural productivity made no sense. Ricardo held rent was determined by the difference in fertility of the first-cultivated, best soil and lesser-quality land cultivated afterward. This attack on Ricardo's method was a key point for Carey to establish in his overriding purpose of attacking Ricardo's advocacy of free trade. For Carey's protectionist thinking, see Rodney J. Morrison, 'Henry C. Carey and American Economic Development', *Transactions of the American Philosophical Society*, New Series, Vol. 76, No. 3, 1986, pp. 43-59; Paul Conkin, *Prophets of Prosperity, America's First Political Economists*, Bloomington, Ind., 1980, pp. 287-90, 295, 303.

[12] *Ibid*., p. 45. American wage, profit and rent exceptions to Ricardo's system were nothing new, and Carey wanted to be sure his theory about the interrelationship of Nature and human work was not dismissed as a mere special case. In Scotland's Highlands, Carey recalled, as the enclosures of the late eighteenth century that displaced so many thousands of people in favour of sheep, 'we

theory described: income derived only from a gift of Nature, Carey argued. 'What are called natural advantages, like fertile soils', he wrote, 'are dependent for their value wholly upon the application of labour and capital, and we cannot attribute to them the payment of rent'.[13] Coal when still underground, as Carey noted, 'has all the qualities it possesses when it is brought into use in New York or Philadelphia, yet acres of land containing thousands of tons may be purchased for fifty cents'.[14]

The fallacy of seeing value in mere land, Carey wrote, was clearly evident in the history of the Swan River colony in Western Australia. There, colonists left their tools to rust on the riverbanks because 'the labourers believed land had value in itself … and were anxious to exercise "the power of appropriation" to which the power to demand rent is attributed', Carey said.[15] Land, at $1.25 an acre in Illinois, sixty cents in Van Dieman's Land, at thirty times its annual rent in England, or for free in Iowa, had value at the moment only because of investments already made. It had potential value in the future only because of the immediate choices individuals made about where to be and how to live – choices that failed when all that they relied upon was a natural endowment, and

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have fertile land abundant and cultivated in an "unexpensive" manner, yet we find abject poverty and distress', *Ibid.*, p.66, while in Ireland, where 'only the superior soils' were cultivated, '[t]he poverty of the people forbids the employment of the machinery requisite to make them yield what they are capable of doing', *Ibid.*, p.67. In Van Dieman's Land, where only the most fertile land was farmed, settlers were unable to afford either the five shilling ($1.20)-an-acre price, financed at five percent a year or the two shilling sixpence (60 cents) price for a cash purchase, because while good lands were abundant, 'they have no value, for want of the capital required for their improvement by roads, bridges & c'., *Ibid.*, pp. 54-55. In fact, according to Carey, the *Van Dieman's Land Annual* reported in 1834 that only one person, a retired officer, had purchased a farm at the five shilling price. 'The whole real property of Australia', Carey concluded, 'would not sell for as much as the Government of Great Britain has expended upon it, leaving entirely out of view the vast amount invested by individuals', *Ibid.*, p. 119. The sums an English farmer spent to rent land for a year were enough to go to New South Wales or Van Dieman's land and obtain thousands of acres of the most fertile land, in fee simple, with all the property rights of an English landlord, Carey contended. 'Why should he remain at home when such advantages are held out to him?' Carey asked – and answered: 'Because the rent he pays is only interest on capital expended for the improvement of the land, and he can pay it and yet make more than he could do by taking wild land in those countries for nothing', *Ibid*., p. 55.

[13] *Ibid*., p. 46. In contrast, Ricardo held that the most fertile soil was farmed first, and that as cultivators turned to less fertile soil, the difference in yields was the source of rent, and therefore of differences in value between different pieces of land. Mill, too, held this, though his point was that it was a trivial matter.

[14] *Ibid*., p. 21.

[15] *Ibid*., pp. 49-50.

choices easily reversed by moving on, even if that meant selling one's Swan River dream for a shilling an acre.[16]

The conclusion to be drawn, Carey held, was that '[l]anded property must be subject to the same laws which govern the accumulated product of labour invested in the form of axes, ploughs and other implements'.[17] While '[i]t would appear extraordinary' that people pay $50 or $100 an acre 'for little more than a bed of sand in New Jersey', as long as that land was near New York or Philadelphia, 'yet it is done hourly, and by those who have sufficient common sense to manage their affairs', Carey wrote, adding:

> They do it on the same principle that they pay for water, ice and coal. It is cheaper for them to pay for the use of capital employed in bringing water and coal to them, than to do and seek them where they may be had gratis.[18]

Land, then, was like something you drank or burned. It was made fungible with them because it could be purchased.

What one purchased when buying land was control – just as when Ramsey and Lea negotiated with the Sioux, or Samuel Vinton hesitated over relinquishing the United States' reversionary rights to the Iowa Half Breed Tract, or when Chief Justice John Marshall threw out William Murray's Illiniwek land deeds. For Carey, the state did not necessarily enter into the matter, however; he did not see, as Wakefield had, the kind of inherent value that made state control of a commons important. As Carey's contemporary, the English logician and economist, Francis Newman, noted about income earned from land: 'The critical matter is, whether the landlord has a right of ejecting one

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[16] *Ibid.*, p. 50.

[17] *Ibid*., p. 48. Carey, ironically like Ricardo, believed in a labour theory of value, that is that the value of goods ultimately reflected the amount of labour that went into them. It was largely because such political economists as Mill, Senior and Lloyd sensed where a labour theory of value led – that is, to Marx – that they sought, and found an alternative. See for example, R.D. Black, 'Trinity College, Dublin, and the Theory of Value 1832-1863', *Economica*, New Series, Vol. 12, No.47, Aug., 1945, pp. 140-8; Frank W. Fetter, 'The Rise and Decline of Ricardian Economics', *History of Political Economy*, Vol. 1, No. 1, Spring, 1969, pp. 67-84; Barry Gordon 'Criticism of Ricardian Views on Value and Distribution in the British Periodicals, 1830-1860', *History of Political Economy*, Vol. 1, No. 2, Fall, 1969, pp. 370-78; Samuel Hollander, 'The Reception of Ricardian Economics', *Oxford Economic Papers*, Vol. 29, No. 2, Jul., 1977, pp. 221-57.

[18] Cary, *Principles of Political Economy*, p. 131.

tenant, and putting in another'.[19] In the view of these political economists, a right of property in the land, not the sovereignty of the state, governed questions of who used land, and how they did it.

Newman, interestingly, cited the Native American-settler relationship in explaining the origin of his very modern notion of rent as a return for the ability to deny access to a good. When settlers 'find the land over-run by tribes of hunters who will be more or less dangerous to them, it may be wise to disarm their hostility by Gifts', he wrote, adding that those gifts 'are mere exactions', that is, payment for preventing attack and therefore to allow settlers access to land.[20] The gifts stop when colonists feel themselves numerous enough to fend off attack, he added. 'Gifts for Protection may be indifferently called Rent, Tribute, or Taxes; and if viewed economically, are a compensation, not for the land, but for the trouble and expense of defending the cultivator', Newman wrote.[21] At the same time, still looking at America, Newman did not see income from land as deriving from ownership of land. While he felt American farmers almost always owned their own land (missing the point that many were squatters or tenants), Newman believed 'it is clear that no man has or can have a natural right to land except so long as he occupies it in person. His right is to the use, and to the use only'.[22] The value of land, reflected in rent, depended not on its characteristics, but on its owner's ability to control it. The landowner's total income depended on the way he or she used the land.

It is striking how ownership of land, in and of itself, seems until this point a matter of such indifference in works of political economy of the first half of the nineteenth century. Yet it is also striking how often, even by mid-century, economists said there is no natural right to own land. 'Imagine a continent like America to be gradually covered by tenant free-holders', Newman wrote, each:

> recognised *for the present* as absolute owner of the soil which he cultivates. You will yet see, that an increase of human population

[19] Francis William Newman, *Lectures on Political Economy*, London, 1851, p. 142.
[20] *Ibid*., p. 135.
[21] *Ibid*., p. 136.
[22] *Ibid.*, pp. 179, 137.

> might hereafter take place, so great, that the law must refuse any longer to admit the right of the freeholders to be absolute. For to allow anything to become a complete private property, it must either be needless to human life, as jewels, or practically unlimited in quantity, as water, or brought into existence by human labour, as the most important kinds of food.[23]

In this echo of Adam Smith's famous paradox of value – diamonds and water, the one unnecessary and costly, the other as essential as it is abundant, and therefore free – Newman suggests the water flowing over the earth is not a commons, while the earth itself essentially is. All people have a claim to the natural endowments of what is, in fact, a limited amount of land, and so by his logic no purchase of land can give an absolute right to it. If that is the case, then how much value can land, in and of itself, really have?

Carey was not alone in answering: not much. '*Nature* adds *value* to nothing', the American economist, Amasa Walker, wrote.[24] Noting that 'farms may, as a general rule, be bought … at much less than their cost', Walker said that an irrational situation arose because 'buildings are not generally put upon farms for the purpose of selling or letting them', but rather to make a home for the owner, and are 'erected according to the tastes of the owner and his family, rather than the direct profit of the farm'.[25] The result was that 'the amount expended on clearing, building walls around farms, and the like, do not, in the aggregate, return much rent or income compared with their cost', Walker wrote, adding '[t]hey become, in the progress of years, to a considerable extent, like the gift of nature, gratuitous'.[26] The sale of public lands, the American economist, Francis Bowen, argued, had become merely 'a means of creating fictitious values to any extent'.[27] Consider, added the French economist, Frederic Bastiat, the situation of Brother Jonathan, a water carrier from New York, who used his life savings to buy land in Arkansas for $1 an acre, and now sought to rent it, and told his would-be tenant:

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[23] *Ibid.,* p. 140.

[24] Amasa Walker, *The Science of Wealth: A Manual of Political Economy. Embracing the Laws of Trade, Currency, and Finance*, Boston, 1866, p. 16.

[25] *Ibid*., p. 300.

[26] *Ibid*., p. 301.

[27] Francis Bowen, *Principles of Political Economy,* (5th edition) Boston, 1868 (1st edition, 1856), p. 442.

> When you begin to farm my land, you will have not only my capital but also the natural and indestructible powers of the soil working for you. You will have at your disposal the marvellous effects of the sun and the moon,

only to be rebuffed by that tenant, who argued Jonathan's rent was too high, since

> the New York housewives refused to give you anything for the admirable process by which Nature feeds the spring … I shall go and clear some land beside yours. The sun and the moon will work for me there for nothing.[28]

Whether on the banks of the Mississippi, or in Australia, or the sugar colony of Guyana or in South Africa, 'harsh reality is not slow' to show the '[t]he illusion that leads men to believe that productive forces have a value of their own because they have utility', Bastiat concluded.[29] 'The land as a means of production, in so far as it is the work of God, produces utility, and this utility is gratuitous', Bastiat wrote. Value, he continued, comes from the work of preparing and enclosing land done by the landowner, the term Bastiat uses, and is one of the first economists to do so.[30] The connection between owning and value was becoming clearer, and more certain, in the works of economists on either side of the ocean – even when, as with Carey and Bastiat, they disagree on what they still considered the more important issue of free trade. This connection was becoming clearer, too, as the price the United States paid to secure control of Native American lands declined to mere pennies per acre.

Yet settlers in the west (and householders back east) saw land as worth having. 'Men are more disposed to invest capital in real estate, others things equal, than in any thing else', because it seems more secure than other assets and 'gives a certain degree of social importance to the holders in all countries', Walker wrote.[31] Place on the land and place in the community were still linked; the desire for permanence of place remained

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[28] Frederic Bastiat, *Economic Harmonies*, Paris, Guillaumin 1850. Ch. 9, paragraphs 111, 134-43 <http://www.econlib.org/library/Bastiat/basHar.html> (accessed 12 December 2012) Bastiat apparently was unaware that the minimum price of land at the time was $1.25 an acre, although he saw how easy it was to simply hold land as a squatter.

[29] *Ibid.*, para. 239-40.

[30] *Ibid*., para. 9, 111.

[31] Walker, *Science of Wealth*, p. 299.

important, as they traditionally had. The longtime Professor of Political Economy at the University of Virginia, George Tucker, saw an inflated valuation put on land arising from these deep-rooted feelings. He expressed that overvaluation in terms of the willingness to accept a lower yield than the average profits of capital for those same reasons of security and status.[32] A piece of land could 'come to possess permanent value' when 'the ownership of land gives a man the means of easily obtaining the loan of capital from others', wrote Sir George K. Rickards, Drummond Professor of Political Economy at Oxford.[33] Land was not capital, Rickards said, but its importance derived from its owner's ability to participate in the world of capital. The point is the same that Mill made: that if 'a holder' of land were to improve it, and thereby give it value, he or she needed time to make a profit on that investment. The value of land was not to be found in its nature, but in its use. The key was to secure time for a suitable return on the investment of work or capital they made in it. A matter of control, in other words. Ownership was simply an expedient to securing control.

It was an expedient, however, that still did not seem to be worth all that much, out on the commons of the American west. In 1853, the year before the Kansas-Nebraska Act, of the 10.7 million acres the General Land Office offered for sale at its minimum $1.25 an acre price, less than 1.1 million acres sold for cash, while 6.1 million acres changed hands through the exercise of land warrants granted to military veterans and generally sold to speculators for about seventy cents to $1.10 an acre.[34] Ownership was rarely worth $1.25 an acre. For roughly one third of the land on the market that year, ownership was worth nothing at all. When ownership had a value, buyers generally arrived at it through dealings in derivative securities – the warrants – which allowed speculators and settlers to feel their way cautiously to what ownership was worth to them.

[32] George Tucker, *Political Economy for the People*, Philadelphia, 1859, p. 64. Tucker's notion of inflated value probably ought to be weighed against his view said Native American claims to 'the large districts which constituted their hunting-ground, have been the foundation of many a treaty of cession by the Indians for large pecuniary considerations', *Ibid*., p. 47.

[33] George K. Rickards, *Population and Capital*, London, 1854, pp. 6-7. Rickards cited Carey as an influence several times in this work, pp. xi, 131-2 (here accepting Carey's controversial notion of increasing returns with the application of capital to land), pp. 139, 154.

[34] *Historical Statistics of the United States*, Washington, 1975, p. 430; Paul W. Gates, 'Charts of Public Land Sales and Entries', *The Journal of Economic History*, Vol. 24, No. 1, Mar., 1964, pp. 23, 28.

Would-be settlers and market-making speculators could do so because the warrants could be sold at any time when the holder felt the conditional claim embodied in the instrument was not worth the trouble. Commitment was minimal. The nature of the claim and the fact that one could cash out (at assured profit for the initial grantee and often enough without loss even for subsequent buyers), meant holders did not necessarily have any real sense of connection to land.

Congress read part of the signal from the warrants: the Land Office minimum put too high a value on the expediencies of ownership. It seems not to have seen the implications of the peculiar nature of dealings in warrants. Still hoping for permanency, and still believing that the real connection to land was forged through working on the land, Congress moved in 1854 to lower the price of public land, for the first time since 1820. But in what was also its first major initiative on the disposition of public lands since opting in 1841 to make preemption rights for squatters permanent, the 1854 act reduced the price of public land if it was not sold after set periods.[35] In doing so, however, the new act had two critical effects. First, it confirmed the growing certainty of economic theorists that land in its natural state had little value. Second, by introducing the element of passing time into the sales price of public land, however, Congress made choosing specific pieces of land – this $1.25 an acre plot just offered for sale or that long-unsold land for 25 cents – mirror dealings in any financial asset, where decisions about value involve the passage of time.

Three key notions, then, had become part of the mix of ideas about land for economists and would-be settlers alike, as Washington once again turned attention to the Minnesota and Nebraska Half Breed Tracts. They were, first, that land was essentially worth little or nothing. Second, that the point of buying it was for the security to earn a profit. Third, that conditional claims and the discounted prices of the 1854 allowed for a kind of financial analysis of the utility of holding land. One final element, which was critical now that the Sioux cession in Minnesota and the Kansas-Nebraska Act had, in effect, turned the tracts into islands where usual rules of land tenure did not apply, was the question of the commons itself and the place of the native peoples upon it. This was

[35] Graduation Act, 10 Stat. 574.

the subject Herman Merivale, who succeeded William Forster Lloyd as Drummond Professor at Oxford University, took up in his 1852 treatise on colonial policy. 'In our North American colonies', Merivale wrote, 'land seems to have been long regarded as a mere present made by nature' that governments felt could be 're-distributed as freely as it was given'.[36] There was, he added, nothing wrong with so devaluing land. Prince Edward Island, which was 'constantly cited' as a prime example of the abuses of free land, where the 'soil was granted away to a few large proprietors, of whom scarcely any ... paid the slightest attention to the improvement of their estates' had seen its population double in twenty years, with trade and revenue growing nearly as quickly, he wrote. The tiny colony's experience showed that those who receive free land that they could not or would not cultivate 'sooner or later find it in their interest to make them over in smaller portions to others who will', Merivale concluded.[37] It mattered not at all whether wild land, like the lands of Upper Canada or the Native American commons beyond the Mississippi, had no price – that is no value – at all. The gift of Nature to human beings would eventually, by human action, make land valuable. It was the old idea: a person's claim to Nature's bounty came from the effort and care that person invested in his or her land.

Yet such a gift of Nature to native peoples was, in Merivale's view, unlikely to inspire the acts necessary to create value. 'The vast surface of the Prairies was unable to receive the retreating myriads who had been expelled from the Forest', Merivale wrote, but 'the notion of retaining for them a property in a part of the soil they once occupied seems to have been hardly entertained'.[38] When it was, and the governments of the United States and British North America established reservations, 'the cupidity of the whites' encroaching on that land eventually lead to another removal.[39] Other times, 'a tribe, become agricultural, is thus placed in a country far more abounding in game than its former seats (is) exposed to the strongest temptation to relapse into the hunting condition', Merivale wrote. This was why, Merivale held, Sir Francis Bond Head, lieutenant-governor of Upper Canada, was right to rebuff the pleas of missionaries that he

[36] Herman Merivale, *Lectures on Colonisation and Colonies*, London, 1852, p. 95.
[37] *Ibid*., p. 97.
[38] *Ibid*., p. 172.
[39] *Ibid*., p. 173.

grant land title deeds to the Wyandot and the Saugeen Anishnabek for some three million acres in the centre of the colony, and instead propose deporting them to remote Manitoulin Island in Lake Huron. The land that Head refused to grant lay along the vital St. Clair River and the Toronto Portage route between Lake Simcoe and Georgian Bay, though Merivale did not make note of that fact. What was more important. in Merivale's view, was that several hundred miles of forest and muskeg unsuited for farming would allow the Wyandot and the Saugeen Anishnabek to continue hunting and fishing on a commons.[40] On the other hand, in New Zealand, where he said the Maori were 'agricultural in their habits', it was possible 'that, with proper management, they will occupy the reserved lots as permanent inhabitants', that was an exception to the rule. 'I am obliged to leave untouched' the idea of 'allowing the natives the power of purchasing and holding land', he concluded.[41]

In Washington, the Indian Affairs Commissioner, Manypenny, would touch the question. As he negotiated with the seven Omaha, five Otoe and two Missourias chiefs over the 1854 Nebraska land cession, the idea of Native American severalty re-emerged. His two treaties with those nations included identical language providing for a general allotment to individuals, which was the first time any treaty had done so since the failed Wyandot treaty in 1817.[42] The grants were to be at the discretion of the President himself and could be sold or leased after two years. On the other hand, 'if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned … or shall rove from place to place', the grant could be cancelled, at least 'until they shall have returned to such permanent home, and resumed the pursuits of industry'.[43] Permanency was still the goal, though the basic right of an owner to sell was, with

[40] *Ibid.*, p. 180.

[41] *Ibid*., pp. 183, 200. Merivale also proposed that servitude, despite '[t]he exaggerated dread of slavery which prevails in many quarters', might be a pathway for some native peoples to learn from their colonisers to farm and thereby eventually to see 'the surface of the land will be chequered with little native villages', on his New Zealand model, *Ibid.*, p.199.

[42] Treaty with the Omaha, 10 Stat. 1043, Article 6; Treaty with the Otoe and Missourias, 10 Stat. 1038, Article 6. While treaties with the Quapaw, Potawatomie, Chippewa and Winnebago in the 1820s provided for grants to specific people of 'Indian descent', those agreements did not include any general provision for individual ownership, and many, if not all, the individuals identified were the half breeds who United States officials were more inclined to see as landholders.

[43] *Ibid*. Both treaties use the same language.

constraints, an option. The grants, though, were merely theoretical. There would be no actual distribution of land until 1871, when the Office of Indian Affairs allotted parcels to about 334 Omaha men.[44] The land reserved for the Otoe and Missourias in the Nebraska territory that might have been allotted was sold in 1881, and the people deported to the Ponca Nation's lands in what is now Oklahoma.[45] There, in 1892, agent James L. Hatchett would report little progress in allotting lands.[46] It would be seventeen years before any members of only one of three nations got any land; the other two would wait nearly four decades for only the most minimal allotment. In their minds' eye, officials and Native Americans alike saw the time of the commons had passed, but they acted as if it had not.

For the Omaha, Otoe and Missourias, the gap between the ideal of severalty and any actual step towards it remained wide – just as did the gap between the political economists' valuation of land and that of the people actually dealing in it. So, too, was the gap between ideal and actual for the Sioux relatives who were to settle on the Minnesota Half Breed Tract. Those men and women, 'holding by the uncertain and precarious tenure of Indian title, have no inducement to improve their homes in said reservation; and thus the fairest portion of Minnesota bids fair to remain a desert', Rep. Daniel B. Wright, of the House Committee on Indian Affairs, reported in 1854.[47] The nature of their title to the land was an issue and could not be glossed over, Wright held. The very next day, 29 April 1854, Attorney General Caleb Cushing issued a formal finding that made clear the United States would have to deal with the matter, ruling that the Ioway, Omaha, Otoe, Missouria and Sioux relatives with interests in the Nebraska Half Breed Tract lands were a permanent community. Responding to a question from Rep. James L. Orr, Chairman of the House Indian Affairs Committee, Cushing said the right of occupancy granted in the Prairie du Chien treaty was not a mere life reservation

[44] Mark J. Swetland, '"Make-Believe White Men" and the Omaha Land Allotments of 1871-1900', *Great Plains Research*, No. 4, Aug., 1994, pp. 209-10.

[45] An act to provide for the sale of the remainder of the reservation of the Confederated Otoe and Missouria Tribes of Indians, in the States of Nebraska and Kansas, and for other purposes, 3 March 1881, 21 Stat. 380.

[46] James L. Hatchett to Commissioner Thomas J. Morgan, 5 December 1892, cited in Chapman, *Otoes and Missourias*, p. 209.

[47] 'Sioux Lands', p. 2.

to people alive at the time, but would descend to their children, and on through the generations.[48] Any idea that drift and the passage of time might moot the question of the Half Breed Tracts was therefore unsustainable.

Manypenny, too, weighed in: 'I am informed that many of the half-breeds are very competent to manage their own affairs, and that they have good improvements on the reserve', he reported to Congress.[49] Others were not, but '[s]ome of the thrifty half-breeds, it is said, have gone off of the reserve, and bought land and made improvements; being unwilling to do so on the reserve, because they could have land assigned to them in severalty', he added.[50] In short, the top Indian Affairs official, one of the very few people in Washington who needed to consider the nature of land tenure and who dealt with more than one pattern of holding land, had clearly linked the nature of land tenure with the behaviour – farming – that the agency purported to encourage. The Minnesota Half Breed Tract should be divided and held in severalty by the Sioux relatives, he decided. Yet Manypenny did not necessarily want the Sioux relatives to have complete control of their land. His goal for them, as for their maternal relatives, was the traditional Atlantic World ideal of being solidly rooted on a particular spot. As he would write years later, the foundation of the United States Government's policy towards Native American should be a covenant that land reserved for them should be good farmland and 'should be the permanent home of the tribe FOREVER'[51]. Each head of a family should be assigned a homestead, he continued, and 'he should be taught that he is the proprietor, with the right to exercise jurisdiction over his farm, and be secured in the enjoyment of all he produces upon it'. But 'title to the land should remain in the tribe, since the Indians are generally not prepared for fee-simple titles', Manypenny added. [52] Though such titles might eventually be granted, Native Americans would first need to change the way they lived – they would need to participate in the American economy (if not necessarily the political structure) in an American way. Perhaps the biggest change, Manypenny said, would be that 'the labour in the garden and the field must be done by the men and boys', and 'the

[48] *Attorney General Opinions*, Vol. 1, pp. 438-44.
[49] 'Sioux Lands', p. 11.
[50] *Ibid*., p. 12.
[51] George W. Manypenny, *Our Indian Wards*, Cincinnati, 1880, p. x (emphasis in the original).
[52] *Ibid.*, p. xiv.

habit of roaming must cease'.[53] Manypenny's model of exclusive control and use by a household of land that remained the property of the community was exactly that of the Cherokee before deportation. In insisting that men and boys work in fields, he not only acknowledged that women did that work, but also that Native Americans did farm and that there was at least some system of ensuring that the produce of that work went to the women's families. It was that system that had to change before fee-simple tenure, with its full rights of ownership, could be granted. Whether it was granted or not, though, the over-riding aim was straightforward – and traditional. People should stay put on their land, whether or not they owned it.

Manypenny's recommendation for the Minnesota Half Breed Tract came as his agency prepared to negotiate for newly valuable lands far to the north, the forests and low hills by Lake Superior. A soon-to-be completed canal at Sault Ste. Marie would make that country more accessible. The prospect of rich copper and iron deposits ensured that access would be exploited and the question of what to do about the Chippewa (Ojibwe) people still living there had become more urgent. On 1 May 1854, not quite two months after Manypenny recommended dividing the Minnesota Half Breed Tract, Congressman Orr proposed a bill to extinguish Chippewa title to land in Minnesota and Wisconsin. He proposed granting each household eighty acres of land instead, a 'new feature in our Indian relations', as Orr explained, because it would not require removal, would encourage cultivation and protect the Chippewa from exploitation by preventing them from selling these holdings.[54] Orr aimed to return to the long-forsaken policy of allotting land to individual Native Americans, which was a policy set aside in the 1830s when the United States turned to deportation to marginal land west of the Mississippi River (and to land west of the Missouri River in the 1850s). Orr, like Manypenny, wanted Native American individuals to have exclusive rights of access and use to defined parcels, instead of continuing to allow a community to have rights to a commons, particularly now that it seemed to have value to citizens of the United States. Orr, however, did not want the Chippewa to have all the rights of severalty. He did not want any of them to be able to sell their due portions of what was their people's commons because he wanted

[53] *Ibid.*, p. xv.

[54] *Congressional Globe*, 33rd Congress, 1st session (1 May 1854), p. 1032.

them to plant themselves permanently. The traditional notion that people belonged to the land that belonged to them still held sway.

Though it was not quite severalty, the bill took a critical step, argued Indiana Rep. Cyrus Dunham, the influential Chairman of the Committee on Roads and Canals. That step, he said, was 'giving each a distinct interest in his property. … the sheet anchor of his salvation, if there is to be any salvation'.[55] Like the words of the Bible, the words of a deed in fee simple granting individual and exclusive title to land – title without the right to sell the land, however – would transform Native Americans, Dunham argued. 'It must be obvious to every one, that we now offer no inducement for him to exert himself for his improvement and support', he said, adding:

> The idle, the lazy, the drunken and vicious fare just as well as the industrious one … So long as property is held in common, and individual interests are not recognized among them, there is no stimulus for his exertions, there is nothing to induce him to exert himself, either to acquire property or retain what he has acquired, or what the Government has paid him.[56]

Still, though morality commanded, the House did not act immediately. The Senate baulked because the bill seemed to be an arrogation by the House of the Senate's authority over treaty-making. But the Indian Affairs agency went ahead and negotiated for the Lake Superior lands on the basis of a swap of most of the territory for individual land grants.[57] The commons would be apportioned, but those portions were not to be owned by just anyone. They were due to the Chippewa, and only to the Chippewa, because Washington wanted them to stay put.

Mineral prospects had kept interest focused on Lake Pepin, as well. Manypenny's March 1854 report to Congress on the Minnesota Half Breed Tract noted a survey found signs of copper on the tract and reported there were already some 200 American settler

[55] *Ibid.*, p. 1034.

[56] *Ibid*.

[57] *Congressional Globe*, 33rd Congress, 1st session, (15 June 1854), p. 1404; Treaty of LaPointe, (30 September 1854), 10 Stat. 1109. Once the treaty was negotiated, the House and Senate passed the bill extinguishing Chippewa title and the Senate approved the treaty itself with no reported debate and with voice votes. *House Journal*, 33rd Congress, 2nd Session, (15 December 1854), p. 77, *Senate Journal*, 33rd Congress, 2nd Session (21 December 1854), p. 62; *Senate Executive Journal*, 33rd Congress, (10 January 1855), p. 400.

households on the tract.[58] Manypenny estimated there might be 200 Sioux relatives with treaty-based claims to the tract, which meant there was plenty of room for them.[59] (They would get well under half the reservation even if granted the full square-mile section promised in the Prairie du Chien treaty.)[60] On the other hand, the man elected by settlers on and off the tract to speak for them in Washington, Henry Mowers Rice, the Minnesota Territory's delegate to Congress, warned that the Lake Pepin Tract was not large enough to accommodate every claimant.[61] Since what was supposedly under the ground might be more valuable than any crop it might raise, the simple idea that the person who ploughed the land ought to be the one who held it gave particular urgency to the question of clarifying claims.

In the House Indian Affairs Committee, Congressman Wright proposed cutting through the knot of potentially conflicting claims by, in essence, turning the treaty claims of the Sioux relatives into a primitive derivative security: scrip. He pitched the idea by picking up a suggestion of Manypenny's that some of the more industrious claimants had already started farming land off the tract. 'They are those who have moved beyond the limits of Minnesota, who occupy their farms, who are cultivating them', he explained, adding that by issuing scrip (an instrument like a warrant that gave holders a conditional claim to land), 'they can avail themselves of the benefit of their own labor by securing the lands upon which they have settled'. Those who were not farming, and particularly those who lived with their Native American relatives, would get scrip, but would not be able to dispose of it until they had 'located' it – used it to conditionally claim a specific section of land – and only once a patent, or formal title, were issued would they 'have the power of disposing of their land, and of receiving the benefits to which they are entitled', as Wright explained.[62] The scrip, in other words, was paper that substituted for land. Like the warrants for military bounty lands, it allowed the grantee to cash out and sell his or

[58] Franklyn Curtiss-Wedge, editor, *History of Wabasha County, Minnesota*, Winona, 1920, pp. 21-22.

[59] 'Sioux Lands', p. 10.

[60] The tract had more than 340 000 acres, 200 households with a square mile each would take 128,000 acres.

[61] 'Sioux Lands', p. 10

[62] *Congressional Globe*, 33rd Congress, 1st session (5 May 1854), p. 1114.

her conditional claim to a portion of a commons, though it did not allow holders to displace any of the American squatters or Sioux relatives who already settled on the tract.[63] What it would do, since Wright did not expect grantees who were not already farming to begin to do so, would be to allow a division of the Half Breed Tract among people not entitled to it by treaty when it was a commons. In any event, once the legislation passed and the Land Office began to issue scrip in 1857, few of the claimants seem to have used the paper to secure a grant of land on the tract. A total of 687 individuals received scrip. Most, however, was exercised by someone else, which means the scrip had been sold.[64] Land abstracted into paper had value only in exchange. In their own way, the claimants to the Lake Pepin Half Breed Tract had endorsed the emerging consensus on land values among political economists.

Meanwhile, intensifying interest in a transcontinental railway would change the urgency of interest in the Nebraska Half Breed Tract. Manypenny advised the Secretary of the Interior, Robert McClelland, that the government should act 'in view of the expected changes in that country' to avoid what he called the 'embarrassment and difficulties that surround the Lake Pepin reserve'.[65] A group of sixty claimants to the Nebraska Half Breed Tracts had petitioned Manypenny a few months before to divide the lands along the Great and Little Nemaha rivers, which bordered the tract, where some were farming but where there were as yet no white settlers.[66] Manypenny convinced Senator William Sebastian of Arkansas to amend the annual Indian Appropriation Bill to authorise spending on a survey of the Nebraska Half Breed Tract, and in 1856 dispatched a special commissioner, Joseph Sharp, to conduct a census of claimants. Sharp visited among the Otoe, Omaha, Missourias, Ioway and Sioux and eleven months later, in April 1857, had compiled a list of 427 potential claimants, rejecting twelve because their

[63] *Ibid.*, p. 1115.

[64] 'Register of Sioux Half Breed Scrip Entries April 23 1857 to May 1 1861', US General Land Office Red Wing Land District, Minnesota Historical Society, State Archives, Minneapolis.

[65] George W, Manypenny, to Robert McClelland, 4 March 1854, 'Sioux Lands', p. 12.

[66] *Senate Executive Documents*, 33rd Congress, 1st session, No. 690, p. 247. In a 25 September 1854 letter from Great Nemaha Agent Daniel Vanderlize to Manypenny, he reported that Half Breed Tract claimants in the area were making slow progress with their farming, arguing that a survey and allotment to individuals would speed things along, cited in Chapman, *Otoes and Missourias*, p. 63.

fathers were Black and forty-two because they were also listed as claimants to land in the Lake Pepin Tract in Minnesota.[67] He also reported that several had settled on the tract, and made valuable improvements.

By the time Sharp had completed his count, though, approximately fifty to 100 squatters had settled in the area and had convinced the new Nebraska Territorial Legislature to petition for a survey of the still-undefined western boundary of the Half Breed Tract.[68] At about the same time, two Half Breed Tract claimants wrote to complain 'these white men are ever ready to traffic whisky to the half-breeds for the privilege of chopping and carrying off timber … in this way, thousands of dollars worth of the best timber has been destroyed and carried off'.[69] Commissioner Denver quickly dispatched special agent William Matthew Stark to select and assign land, instructing him that Omaha, Otoe, Ioway, Missourias and Sioux relatives could pick their allotments if there were no controversy, so that they could keep any improvements. Each also was to receive a generous 320 acres, half timber and half prairie.[70] (It is worth remembering that unlike most of the Nebraska Territory, which lay on the shortgrass prairie of the Great Plains, the Half Breed Tract was partially wooded, which made it particularly attractive to settlers who needed timber for their houses, barns and fences.) These allotments, however, did not complete the process of transferring a part of the tract to an individual; they were instead rights to a specific plot, to be confirmed when the Office of Indian Affairs transmitted its completed list of allotments to the Land Office and when it, in turn, issued a patent confirming title to the land. That did not occur until 1860, two and a half years after Stark issued his first five allotments in September 1857.[71]

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[67] *Congressional Globe*, 33rd Congress, 1st session (27 April 1854), p. 1004; Manypenny to Sharp, 14 May 1856, National Archives Office of Indian Affairs, Letter Book, Vol. 54, pp. 224-27; Sharp to Commissioner J.W. Denver (Manypenny's successor), 24 April 1857, National Archives, Office of Indian Affairs, Great Nemaha Agency, S323-1857.

[68] Chapman, *Otoes and Missourias*, p. 67.

[69] Charles Rulo and Joseph Tesson to J.W. Denver, 2 April 1857, National Archives, Office of Indian Affairs, Great Nehama Agency, R 216-1857, cited in Chapman, *Otoes and Missourias*, p. 64.

[70] Stark to Denver, 4 August 1857, National Archives, Office of Indian Affairs, Letter Book, Vol. 57, pp. 234-38.

[71] Indian Affairs Commissioner A.B. Greenwood to the General Land Office, 24 March 1860, National Archives, Office of Indian Affairs, Letter Book, Vol. 63, p. 172.

Those five allotments prompted immediate protest from white squatters, with Judge John C. Miller in the new town of Archer declaring 'we will continue to hold and occupy our lands at all hazards', daring the government to use force to remove them.[72] A petition to Denver asked that the lands be sold to the highest bidders: 'That is what they, the H. B'.s, want', A.D. Kirk, one of the promoters of the Archer town site, declared, adding that '[v]ery few of them wish to take charge or will improve the lands. The money is what they want. They are selling almost as fast as titles can be obtained. Indeed many will sell before they get their certificate'. Kirk said he and his fellow settlers feared being 'driven from our homes' if Washington simply gave land to individual Omaha, Otoe, Ioway and Sioux relatives.[73] Stark, too, echoed this, reporting to Denver that some of the first allotment grantees had by December already sold their claims, even though their title was not yet formally secured by a patent.[74] Denver said his hands were tied, but Senator Charles Edward Stuart of Michigan, Chairman of the Public Lands Committee disagreed. The settlers came when Congress opened the door with the Kansas-Nebraska Act, he said, adding 'There are some three hundred half-breed Indians there, and an abundance of land', and adding, '[y]ou cannot disturb these settlers at this time without producing immense mischief'.[75]

On the other hand, as the six children of Mary Neales, daughter of an Omaha woman and a fur trader from the United States wrote, the family had settled on a square-mile farmstead between the Great and Little Nehama rivers on the Nebraska Half Breed Tract, evidently not thinking it necessary to wait for a formal allocation. Their parents had both died within the past year, but '[a]ll that they had was invested in improvements on said Land. We are destitute of all other means of subsistence'.[76] For the Neales

[72] Stark to Denver, 10 December 1857, National Archives, Office of Indian Affairs, Great Nemaha Agency S470 1857; Archer meeting and resolution of 28 September 1857, cited in Chapman, *Otoes and Missourias*, p. 69.

[73] Kirk to Denver, 26 October 1857, National Archives, Office of Indian Affairs, Great Nemaha Agency, K79 1857.

[74] Stark to Denver, 10 December 1857.

[75] Denver to Kirk, 9 November 1857, National Archives, Office of Indian Affairs Letter Book, Vol. 58, pp. 29-30; *Congressional Globe*, 35th Congress, 1st Session (31 May 1858), p. 2543.

[76] Louis Neales et. al. to President Franklin Pierce, 1 January 1857. National Archives, Office of Indian Affairs, Great Nemaha Agency, W261-1857.

children, four of them still minors, the right to be on their due portion of the Nebraska Tract was established by the work they and their parents had done. They had done that work on land they took in almost the same way as any squatter, except that they understood that land to be part of a commons where their mother had a stake. They understood as well that the formal recognition of their claim to the land was in someone else's hands. They, as much as the squatters around the town of Archer, were in limbo.

In the end, it was the market that ruled, just as economist Henry Carey contended it ought. The land dealing could be fevered. George Washington, son of an Ioway woman, received his allotment on 15 April 1859. He sold it to Houston Nuckolls on April 16, who sold it to A.S. Ballard on 20 April, who in turn sold it on 16 September, to a man who sold it on 13 October to J.D. Hegler, an Ohioan who thought he owned the 320 acre farmstead. Then, on 10 September 1860, Washington received his fully executed patent for the land. With that paper in hand, Washington sold the same land six years later to August Schoenheit and Edwin C. Towle, who lived nearby.[77] Eleven years after that, Hegler sued for rent and profits on the land. Fifteen years after he filed suit, the US Supreme Court ruled that since Washington was twenty years old when he sold his unpatented allotment in 1859, he was a minor and unable to make a valid sales contract, so finding for the men who actually had settled on the land, instead of the speculator who bought a paper claim to it.[78] The patience of those with conditional claims to a former commons is as remarkable here as with the Illinois lands Murray had tried to secure in the 1770s. Impatience, however, was the norm for many. Louis Neales, after he and his brothers and sisters petitioned for title to their land in 1857, was the first man of the 389 to receive a patent when the General Land Office handed them out in 1860.[79] But Neales had sold his land back in 1857, taking the first opportunity to cash out.[80]

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[77] Hegler v. Faulkner et. al. 15 US 109, 111.

[78] *Ibid.*, p. 120.

[79] Bureau of Land Management, Nebraska Patents, Vol. 288, p. 1. Neales' name is spelled Lewis Neals on the patent.

[80] *Nebraska Advertiser*, 3 September 1857 reports Neales' sale. See also C.O. Snow, 'History of the Half Breed Tract', *Nebraska History Magazine*, Vol. 16, No. 1, Jan.-Mar., 1935, pp. 36-48. Neals was convicted of manslaughter in 1859, *Nebraska Advertiser*, 26 May 1859, and after his release from prison, enlisted in the Union Army in 1864 and drew a Civil War pension from 1890. Chapman, *Otoes and Missourias*, p, 78, n. 64.

Claimants to Half Breed Tract lands generally opted to participate in the brand-new markets by selling their paper abstractions of land, whether scrip or allotment. In the end, it did not really matter whether it was a financial instrument – the Minnesota scrip – or bureaucratic sluggishness over the Nebraska Tract that made their connection to the land so tenuous. Once connection became contingent, instead of secure, their decision about what their former commons meant to them meant accepting a particular view of land: that it, on its own, was of little value. That was why they could shed their land so easily, and for so little. That also was a view of land that had been emerging over some time. In the realm of theory, it was a view confirmed by the enormous sales of Native American commons to the United States in Iowa, Minnesota and Nebraska during the 1840s and 1850s for pennies an acre (as well as similar sales in Kansas and Oregon). Ironically, the view of land that a Henry Carey or a Herman Merivale might find confirmed in those vast purchases was even more deeply rooted in trends of thought that found much of their initial impetus in reflections on the nature of Native American life on the commons. The process of allotment on the Nebraska Half Breed Tract, like the issue of scrip by Lake Pepin, had the effect of alienating the people for whom they were intended from any connection to their land, and for most, the land had become a piece of paper they might turn into cash.

Still, this was not the universal view. Antoine Barada, son of one of the interpreters for the Prairie du Chien treaty, contentedly settled near the site of a fondly remembered winter hunt on the ice of the Great Nemaha River.[81] Barada and his family were among just a half dozen half breeds still holding any of the 389 parcels allotted in 1856 and 1857 when the enumerators of the 1860 Census came to make their tally.[82] He

[81] Barada's father was Michel Barada, one of the interpreters in the negotiations over the Treaty of Prairie du Chien in 1830, see p. 193 *supra*.

[82] Antoine Barada, 'Pioneer Exploits', in Lewis C. Edwards (editor), *History of Richardson County, Nebraska*, Indianapolis, 1917, pp. 733-34, recalled a winter hunt in which he and his party of fur trader killed 700 elk on the Great Nemaha River, on the southern edge of what would become the Half Breed Tract. In addition to members of Barada's family, who had several allotments, the Census listed allotment-holders Mary Benoist; Margaret Longdeau and her son Morris; Julia Livermore; Louis and William Menard; Elizabeth Story and Robert Whitecloud, from my cross-tabulation of the Nebraska Territorial Census, Richardson County enumeration and the list of Nemaha Half Breed Tract Allotments 1856-7, National Archives, Office of Indian Affairs, Survey and Allotments, No. 403-A.

would become a Nebraska legend: Barada the strong man, who invented artesian wells when he flung a derrick across the mile-wide Missouri, so hard that it drilled deep underground to tap the unexpected water.[83] The tale hardly seems to fit the modest man who, after a youth in the fur trade, quietly farmed his due portion of the Nebraska Half Breed Tract for three decades until his death. Perhaps the way Nebraskans made a hero of a man who wanted only to stay on land he loved suggests his emotional connection to his place resonated with others across the plains of that hard country.

Pausing for a moment with him there on the farthest western fringe of woods and prairie before the open plains sweep westward, it seems clear that that land, that particular patch, where he had once hunted on a vast commons, mattered to him in a way that the scrip so many others received did not. The apportioning of the Nebraska Half Breed Tract, like that of the Minnesota Tract, came at a time when the consensus of theorists was that land had little value, which was a conclusion that followed logically from William Forster Lloyd's notion that any commons was unsustainable – even though Lloyd's successor, Merivale, would contend that a commons was inevitable for many native peoples of colonial states. Barada, looking at what had been the commons of the Nebraska Half Breed Tract, also seems to have felt the sense of belonging that inspired Clare. Yet feeling that, he was a man out of time, which was perhaps why he would become as much a local folk tale as a real person to the people of Nebraska, as they struggled to divide the great commons of the harsh, dry country west of the Missouri River into 160-acre squares of corn, sod huts and bare subsistence.[84] Barada planted roots in his favourite corner of a commons. He stayed, but not many years after his death, in 1887, the exodus from the hard life of a too-small farm on a too-difficult land would begin; the population of the counties of the Half Breed Tract and the ceded Omaha, Otoe

[83] Roger L. Welsch, *A Treasury of Nebraska Pioneer Folklore*, Lincoln, 1984, p. 173.

[84] Barada was a great flinger of things. He is credited with discovering artesian wells, after throwing a timber derrick across the mile wide river into Iowa and then crossing the river to see what happened, striking the partly buried derrick with a fist so hard it disappeared deep into the ground, drilling a well that spouted water 50 feet into the air that would have drowned the region had not Barada sat on the hole to stop the flood, Welsch, *A Treasury of Nebraska Pioneer Folklore*, p. 173. Another variation of the story has him flinging a pile driver so hard and so far that he created the Breaks of the Missouri, the rocky, broken badlands of central Montana through which the Missouri River flows. Louise Pound, 'Nebraska Strong Men', *Southern Folklore Journal*, Vol. 7, 1943, pp. 133-43.

and Missourias lands peaked by 1900. It is time now to ask why people once felt rooted on a commons, but could not on the land they owned. The answer, of course, lies in how one see things.

Chapter 10

Commons found again: The Mesquakie and the Tama County exception

Steady rain through March and April 1843 delayed the departure of the Sac and Mesquakie from the valleys of the Iowa, Cedar, Skunk and lower Des Moines rivers they had ceded to the United States the year before. It was sugaring season and, despite the treaty, they moved to the maple groves they had tapped for decades, Indian Agent John T. Beach reported. There were no sugar-maples by the Raccoon River Agency of the Office of Indian Affairs, which was the place they had agreed would be their last temporary home before moving to a reservation in distant in Kansas. In the fall, the Mesquakie again drifted away from the Raccoon River to hunt along the wooded river banks of eastern Iowa, until settlers' complaints brought out the United States Dragoons. A squad of twenty-eight cavalry troopers chased them back to the west in February 1844, but they would not stay. The next year, after the same traditional round of sugaring and planting, the Mesquakie once again dispersed 'over the country for the purpose of hunting and remain so scattered until spring', camping in 'densely wooded bottom land', and 'visiting their old haunts upon the Iowa (River), to which they are much attached'.[1] By the following summer, as the deadline for their departure to Kansas approached, Beach grew more and more concerned the Mesquakie would baulk, and refuse to leave a country 'which from long possession, they [love] naturally'.[2]

A drift back to ceded land kept many Native American peoples in continuing conflict with the United States through the 1850s (and beyond), just as with the Mesquakie along the Iowa, Cedar and Skunk rivers. That drift argues for four generally overlooked points about ideas of place and property in the English-speaking Atlantic World. First, much of the frontier of settlement remained shared space, in fact, if not on paper. Second, in America, as in Britain, the idea of a commons remained a routinely

[1] John Beach to Gov. John Chambers, 1 September 1845, *Senate Documents*, Vol. 1, 29th Congress, 1st Session, p. 485.

[2] John Beach to Gov. John Chambers, 18 September 1845, Office of Indian Affairs, Land Records, Sac-Fox Emigration, roll 744, cited in Michael Green, '"We Dance in Opposite Directions": Mesquakie (Fox) Separatism from the Sac and Fox Tribe', *Ethnohistory*, Vol. 30, No. 3, Summer 1983, p. 135.

considered option for regulating shared space. Third, the way individuals used land still framed the way they saw their relationship to the land. Fourth, many still wanted to feel they belonged to a place. With those points in mind, this chapter starts on one of the peculiar commons of the west, specifically in Iowa in the mid-1840s, when Native Americans did not fully accept a dispossession that the United States could not immediately enforce. Here, a few days journey to the west of the Iowa Half Breed Tract, that blank slate on which one notion of severalty would take shape, a Mesquakie band and its settler neighbours would work out a way of sharing space that used a mechanism of full severalty – specifically, the purchase and sale of land – to create a commons that continues to this day. The critical issue was a right to stay, and even more, a right to stay put. The case is significant because it did not involve compulsion or violence. Resolution of contending claims for space did not come at the point of a bayonet nor did it mean forced removal, but was agreed by all the actors. Moving beyond that intriguing variation of western shared space, this chapter will ask about other instances in which communities chose commons, in England, in more settled parts of the United States and on the farthest edge of the frontier.

The point is that the possibility of a commons remained an option even as settlers carved the west into a grid of farms and even as owners of capital across the Atlantic World got the land they needed for their factories, railroads and other ventures. A commons met a still-fundamental desire for a connection to land that was not satisfied by ownership, and inspired, for instance, the mid-nineteenth-century effort to preserve England's remaining commons. A hunger for land did not necessarily mean only a hunger to own. There was something else that many mid-century Americans and Britons wanted when they looked at land. It can be sensed when listening to what they said about preserving specific tracts of land as commons, just as it is clear when looking at the sacrifices the Mesquakie made to preserve their commons. With attention fixed that way, on one stretch of Iowa riverbank or patch of open space by an English city, a desire for permanence and a wish to enjoy more than just the material yield of land could bring a previously unseen commons back into view. The old desire for a deep connection to land and the natural world it contained became clear, at least for some, when looking at a commons and seeing, as it came into focus, that it was about to vanish.

A good jumping-off point to look at this persistent desire for connection with a specific place is with some of the Mesquakie families who had so worried Beach. The 'red earth people' had always used lot of land, some as commons, but some as land reserved for the exclusive use of individuals or of households. They sheltered in riverside groves during the spring to make maple sugar, as Beach had noted. They moved to summer villages in open country to raise their corn and beans on plots held by individual women. In the autumn and winter, they moved again to the shelter of wooded country to their hunting grounds.[3] These last were apportioned for exclusive use of particular households, 'it being previously determined on in council what particular ground each party shall hunt on', United States Army Major Morrell Marston reported in 1820.[4] Their ideas about land had a basic structure, dictated by season and by economic need, but were not rigid. The Mesquakie regularly considered questions of who could be where and do what on land as they put up their summer lodges or allocated fall hunting grounds. They were not blind to the notion that ideas about land might change, particularly after their move into the Mississippi River valley in the eighteenth century introduced two additional patterns to the Mesquakie economy. There, in the hilly country around what is now the Illinois-Wisconsin state line, they gained access to horses for the first time. There, they also found peculiar, dull-gray metallic flakes in the soil: lead ore, or galena. Stolen or bartered horses allowed hunters to range much farther, deep into the open prairies to the south and west, chasing buffalo on a commons shared by several Native American peoples. At the same time, by digging in the earth for ore, in a way not too different from the way women had for so long hoed the gardens that were exclusive to each of them, the Mesquakie found a new source of wealth. Riding horses tended to push the Mesquakie outward, onto a great commons where they – and many others – chased the bison. Digging for lead tended to tie individuals to particular spots.

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[3] Jeanne Kay, 'Wisconsin Indian Hunting Patterns, 1634-1836', *Annals of the Association of American Geographers*, Vol. 69, No. 3, Sept., 1979, pp. 402-415 gives a concise summary of Mesquakie migration and land use.

[4] Morrell Marston to Rev. Dr. Jedidiah Morse, November 1820, cited in Emma Helen Blair, *The Indian Tribes of the Upper Mississippi Valley and Region of the Great Lakes,* Cleveland, 1912, Vol. 2, p. 148.

Mesquakie mining was no trivial enterprise, either. It was new to the Mesquakie, and required them to choose a pattern of land use, and over time adjust it. In 1816, the Illinois adventurer, John Shaw, found 'at least twenty furnaces' along the Fever River and the creeks branching off from it. 'There was no Indian town there, but several encampments, and no trading establishment', Shaw reported. The Mesquakie were jealous of their finds. The year before they had refused to let Shaw venture up the Fever River, saying 'the Americans must not see their lead lines'.[5] The work was done by women, who 'employ the hoe, shovel, pick-axe, and crow-bar, in taking up the ore', Henry Schoolcraft reported, also from the Fever River region of Illinois, adding, 'I descended into one of these, which had probably been carried down forty feet'.[6] They were enormous works, but they were carried out with the same tools women used to farm, as if the women were simply digging deeper to harvest a different crop. Like the corn and bean plots of a summer village, each hole was one woman's to work. Unlike the traditional summer village, her household scattered to be closer to her holdings. Her holding was exclusive, and her husband and sons controlled who could go there. Just as the women's hoes plunged deeper into the soil, so did Mesquakie notions of exclusive right to land.

These ideas, however, were not quite the same as the severalty that English writers had definitively set down not all that many decades earlier, nor were they fixed. When a Canadian fur trader named Julien Dubuque wanted to try mining on a more industrial scale than the Mesquakie did using slaves he brought up the Mississippi River from New Orleans, a council of five Mesquakie villages on the western banks of the Mississippi agreed to let him try on the Iowa hillside where a woman named Peosta had dug galena ore. That specially convened council seemed to have taken a step beyond the traditional notion that Peosta's mine was for her exclusive use, by allowing her right to be sold, but the right was to be sold by the community, not by Peosta.[7] The return from the

[5] John Shaw, 'Shaw's Narrative', *Collections of the State Historical Society of Wisconsin*, Vol. 2, 1856, p. 228.

[6] Henry R. Schoolcraft, *Narrative Journal of Travels from Detroit Northwest through the Great Chain of American Lakes to the Sources of the Mississippi River in the Year 1820,* Albany, 1821, p. 345.

[7] The grant reads: 'Copie de conseil tenu par Messrs. les Renards, c'est a dire, le chef et le brave

deal went to the broader community – five villages, in fact – and not Peosta or her family, for Dubuque smelted ore and bought lead from other Mesquakie families' mines.

The five villages had not, however, acted on an idea that all the Mesquakie accepted. Their tweak to the idea of a woman's exclusive right to her mine, by allowing Dubuque to settle next to them, take over the troublesome chore of smelting ore from the rest of their mines and paying them a higher price for ore for his smelter than they had been getting for the ore itself, sparked a different change to ideas about land on the other side of the Mississippi. It was only after the five villages let Dubuque mine ore in Iowa

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de cinque villages avec l'approbation du reste de leur gens ... permitte a Julien Dubuc, appelé par eux la petite nuit, de travailler a la mine jusqu' a qui lui plaira, des s'en retirer sans lui specifier aucun terme; de plus, qu'il lui vende et abandonne toute la cote et contenu de la mine trouve par le femme Peosta, que sans qu'aucuns blancs ni sauvages, ni puissent pretendre sans le consentment du Sr. Julien Dubuc et si en cas ne trouve rien dedans, il sera m etre de cherche o u bon lui semblera, et de travailler tranquillement, sans qu'aux qu'un ne puisse le nuire, ni portez aucune prejudice dans ses travaux; ainsi nous, chef et brave, par la voie de tous nos villages, nous sommes convenu avec Julien Dubuque, lui vendant et livrant de ce jour d'hui ... en plein conseil le 22 Septembre, 1788', cited in Henry Choteau v. Patrick Molony 57 US 203, 223 (Copy of the council held by the Foxes, that is to say, of the branch of five villages, with the approbation of the rest of their people ... permit Mr. Julien Dubuque, called by them the Little Cloud, to work at the mine as long as he shall please, and to withdraw from it, without specifying any term to him; moreover, that they sell and abandon to him all the hill and the contents of the mine discovered by the woman Peosta, so that no white man or Indian shall make any pretension to it without the consent of Mr. Julien Dubuque. And in case he shall find nothing within, he shall be free to search wherever he may think proper to do so, and to work peaceably without any one hurting him, or doing him any prejudice in his labours; thus we, chief and braves, by the voice of all our villages, have agreed with Julien Dubuque, selling and delivering to him this day,... at the Prairie due Chien, in full council, the 22d of September 1788). Though the document describes the transaction as a sale to Dubuque (lui vendant), it does not mention a price. The issue of whether it memorialises a sale or a grant of a particular piece of land – that is, of 'la cote' or hillside of Peosta's mine – or simply of the right to mine was part of what was in dispute when Dubuque and his partner Henry Chouteau claimed what is now the city of Dubuque, Iowa, shortly after the United States completed the Louisiana Purchase. US Treasury Secretary, Albert Gallatin, argued that it was a mere right to mine, 1 Clark's Land Laws, 958. The US Supreme Court would agree. It was not clear that the sale of either the mining rights or of the hill required the approval of the several village councils because they considered the mine was owned by all, though found (trouvé) by Peosta, or because it involved the admission of a foreigner into the middle of their territory or because they were responding to Dubuque's desire to formalise his claim based on his concept of who owned the mine and who had to right to exclude others from it. My inclination is to say the third is most likely. Dubuque's 1796 letter to the Governor of Louisiana Baron de Carondolet, petitioning to confirm his ownership of a much larger tract, on the grounds that 'having made a settlement ... in the midst of the Indian nations, who are the inhabitants of the country, (he) has bought a tract of land from these Indians, with the mines it contains', suggests to me that he went to the people he thought owned the land, by his own understanding, to confirm the rights he wished to acquire (the Carondolet letter is cited in Choteau v. Maloney, 57 US 203, 225).

that the Fever River Mesquakie grew so secretive about their holdings and started smelting their own ore.[8] A more intensive concern over exclusive access emerged, along with a new role for men in smelting the ore. As Mesquakie and American traders did business together, one response was to allow the transfer of a woman's holding, another was to insist more emphatically that outsiders be excluded. In both cases, a modified idea of tenure responded to economic change. The presence of a large buyer on the western shore who smelted ore into lead and offered a premium price for lead was what had inspired Mesquakie men along the Fever River to build their smaller furnaces. Both elaborations of the idea of women's holdings echoed elements of the English and American jurists' ideas of severalty – the power to sell and the right to exclude – and could have led the Mesquakie concept to evolve that way, but neither did. Mesquakie men continued to hunt on the prairie commons, Mesquakie bands continued to shelter together in riverside groves through the winter and move to the maple groves they shared come spring sugaring season. Elaboration of women's rights to their mines, which was an elaboration, in turn, of their right to their plots of corn, beans and squash, did not overturn the Mesquakie's earlier mental model of a mix of commons and individual women's holdings. It did, however, show how flexible ideas about land could be on a frontier where both commons and exclusive ownership co-existed.

The complex and varied patterns of access to land and exploitation among the Mesquakie and their neighbours played out with almost no law or government to formalise relationships or mediate disputes. The nearest state or territorial courts were hundreds of miles distant, and even then were served by travelling judges and lawyers from still farther away. The Mesquakie and their Sac allies, meanwhile, were 'sensible of neither civil nor military subordination', the traveller Jonathan Carver reported, adding that 'all injunctions that carry with them the appearance of a command are instantly rejected with scorn'.[9] While war chiefs might emerge when conflict erupted, village and hunting camp life was governed by councils of family heads and other men seen as having proved their abilities. The head of a designated totem group or clan might preside,

[8] John Shaw reported: 'They smelted the ore themselves, in a small walled hole, in which the fuel and mineral were mingled, and the liquid lead run out, in front, into a hole scooped in the earth', 'Shaw's Narrative', p. 228.

[9] Jonathan Carver, *Travels through North America*, Philadelphia, 1797, p. 142.

but essentially only as an arbiter, and decisions came by unanimous consensus in gatherings in which the whole community, men and women, might have a say, as they had in granting Peosta's mine to Dubuque.[10] Yet, despite the informality of Mesquakie governance, they had rules of use and access to define how they held land. They changed those rules when neighbours tested them. They did so because being on the land came with the right to participate in society and the power to make decisions for themselves and for their community. They wanted to keep what they had – land and the empowerment it brought – which was why the Mesquakie were not eager for men like Shaw even to be near the plots of ore-bearing land their women held. Wanting to keep a way of life after losing their Illinois and Wisconsin lands as a result of the treaty ending the 1832 Black Hawk War (the treaty that cleared a part for the eventual sale of the Iowa Half Breed Tract), the Mesquakie resisted being pushed out of the Iowa, Cedar, Skunk and Des Moines river valleys.

A Mesquakie man slipping across the Mississippi to hunt on land his nation had ceded or an American moving to an empty Iowa sugar camp to take a farmstead, each started with notions of their place on the land that were not all that different. Some land was for one person's exclusive use: a plot of corn and beans, a hand-hewn lead mine, or a squatter's farm. The prairies beyond were shared space, a commons. Concepts differed too, of course. Exclusive use was for Mesquakie women, and American men. Apportioning land and transferring it was a community affair for the Mesquakie, and an agreement between two individuals – buyer and seller – for the Americans. Ideas about borders and trespass, or the status of animals or personal property when in a shared space varied. More important, however, is this point: that in response to what individuals saw as the nature of particular pieces of land, ideas changed. Dubuque could get his mine, Shaw could gain permission to travel up the Fever River, and a squatter could make his farm without the agreement of anyone else. 'It is notorious, that when this territory was organized not one foot of its soil had ever been sold by the United States, and but a small portion of it (the half-breed tract) was individual property', the Iowa Supreme Court would note, asking rhetorically: 'Were we a community of trespassers ... were we

[10] Walter B. Miller, 'Two Concepts of Authority', *American Anthropologist*, New Series, Vol. 57, No. 1, 1955, p. 271.

organized as a colony of malefactors?'[11]

The snappish, defensive undertone of the Iowan judges signals a change in concept, too. For Iowa's settlers, exclusive right to land was something that another individual willed, leased or sold to you. That had been the concept that prevailed in eastern states for at least a couple of generations. Even for those crossing the Mississippi from Illinois, it would have been two decades since their fathers had squatted on the Military Tract. New Iowans who had just crossed the Atlantic would have known a world where their place on the land was most likely dictated by an individual landlord, and where buying land was impossibly beyond their means. Some, too, brought memories, more or less fresh, of commons used or of a conflict to retain those shared spaces. To simply take land and squat on it required a change in the way Iowans thought about their land. For them, the answer to the Territorial Supreme Court judges' question was: no.

The Iowans modified one element of their informal notions about the land, that is, the one about how control of land ought to change, by a more emphatic insistence on a more formal theoretical idea about the place of people on the Earth. Like Locke and his precursors, Iowa's American settlers believed they had a right to be there simply because they were there, and because they had made the effort to come and found there was room enough for them to use the land. Like Locke, the preachers they listened to told them that God made the world for them; in Iowa, the land clearly looked to them as if it were there for the taking. Moreover, once they had taken their land, the settlers' idea of place, and specifically of the reason they might stay on their place, was reinforced by two other, central elements of traditional ideas about land. The first, was labour on the land. The Iowa squatters believed they were entitled to their homesteads because they were Americans on American land, and because they had worked so hard on the land they took. The second element was that the way an individual might participate in political life, whether in a nation or a neighbourhood, depended on the nature of a person's place on the land. Their right to the land came from neither purchase nor grant by the state. It came from more exalted sources.

If the Iowans felt entitled to the land, they did not feel the Mesquakie and Sac

[11] Hill v. Smith, 1 Morris 70, 76-77 (1840) Iowa Supreme Court.

were. For one, they saw Native Americans as alien, and not part of any American community. On top of that, the Iowans did not see that the Mesquakie or Sac worked the land. With little cause to visit summer villages and notice the women's fields of corn and beans, Iowans (like most in the Atlantic World) were fixed on the idea that Native Americans were wandering hunters, barely attached to the land. Though Iowans, like the Mesquakie, held some land as individuals and used some as a commons, they did not see much possibility that their patterns of landholding might co-exist comfortably with what they thought was the Native American pattern. For the Iowans, then, the answer remained to push Native Americans out of the way.

That answer was justified in American eyes by what American Army officers told the Wyandot and Delaware immediately after the Revolutionary War (as noted in the Introduction). All the land was for the United States, not any Native American nation, to allocate, a matter of national sovereignty derived from conquest. It was a matter of power, in other words, and the connection of land and power was fundamental. The fact that the Iowans took their land rather than waiting for the government to grant it was immaterial. As participants in the political system of the United States, they would have seen themselves as proxies for the sovereign entity, in much the same way as the petitions from territorial and state legislatures asking Congress to grant preemption suggested with all the rhetoric of bold and fearless venturers securing the national territory noted in Chapter 7.[12] The repeated cessions of land (often the same tracts) by Native Americans in successive treaties with the United States merely confirmed that essential premise, as each did so only under more or less immediate duress. So, even after the 1832 Treaty of Fort Armstrong forced the cession of the Forty Mile Strip, a six million acre, forty- to fifty-mile wide band of land in eastern Iowa, the United States Government kept pressing for more Sac and Mesquakie land.[13] In 1842, in the fifth negotiation in a decade, Office of Indian Affairs negotiators convinced the chiefs (men recognised by the United States Government as chiefs, that is) to cede their remaining lands in Iowa, which consisted of

[12] See p. 200, *supra*.

[13] Treaty of Fort Armstrong (21 September 1832), 7 Stat. 374. This treaty, negotiated after the defeat of Sac war chief Black Hawk's abortive effort to reclaim lands along the Rock River in Illinois, also banned the Mesquakie and Sac from hunting, fishing or staying east of the Mississippi, and was the second treaty to compel removal to lands west of the Mississippi.

some eleven million acres. The Mesquakie and Sac nations were to get annual payments of five percent on an $800 000 endowment from the government, as well as Washington's promise to repay $258 566 in debt supposedly owed to traders.[14] For a lump sum of $258 566 and a running financing expense of $40 000 a year – that is, four cents an acre down and an annual payment of 2/3rds of a penny – Washington acquired land supposedly worth at least $13 million, at the Land Office minimum sales price of $1.25 an acre.

Those numbers, as an economist like Henry Carey might have noted, mattered. What they said was that to secure the nation's sovereignty, in fact, as well as in law, had a value. It was part, but far from the whole, of the theoretical value of an individual's right of exclusive access, use and sale of land, which was the package of rights embodied in the fee-simple title that the Land Office sold for $1.25 an acre. The problem was that not everybody on the land thought it worth that price. Control of the land was, in fact, not that certain. The Mesquakie would remain; speculators could buy a squatter's holding at a Land Office auction. For squatters who had no cash but still felt entitled to the farms they made, $1.25 was too high a price to pay for the full rights of fee-simple ownership. For them, it would be paying after the fact for the right of exclusive use they believed they had already earned. Land worth a few pennies an acre to the United States in order to secure its sovereignty – sovereignty over a commons, that is – was not worth any more than that to the squatters. In their view, they, and their fellow Americans, had already paid for the nation's control by virtue of their participation in American society even if they paid no taxes. With that control paid for, their work on the land was sufficient to secure their own rights to their own due portions of that American land.

The Fort Armstrong treaty called on the Mesquakie and Sac to leave the eastern half of the cession, marked by the 'Red Rock Line', by 1 May 1843 – that is, after the time they would ordinarily have returned to their summer villages and planted their corn. By the fall of 1845, they were to leave Iowa altogether, for a 'permanent and perpetual

[14] Treaty with Sauk and Foxes (11 October 1842), 7 Stat. 596. Iowa Gov. John Chambers authorised paying up to $10 000 in bribes to Mesquakie chiefs to convince them to sign the treaty, John Chambers to John Spencer, 13 October 1842, National Archives, Office of Indian Affairs, DRT roll 4, cited in Michael Green, '"We Dance in Opposite Directions"', p.134.

residence' upon an unspecified amount of land, on an unspecified part of the Missouri River or its tributaries that were 'suitable and convenient for Indian purposes'.[15] Washington eventually selected the upper reaches of the Osage River in eastern Kansas, far to the south of the Kansas River valley that had once marked the southernmost fringe of the lands the lands they had hunted, and some 350 miles south of their Iowa homes.

On 11 October 1845 – the very day of the deadline for leaving Iowa – some 2200 Mesquakies and Sacs packed up and left the bark lodge villages they had set up just west of the Red Rock Line along the Des Moines River, but several hundred headed north, away from Kansas. 'Found 200 Indians Hid On and Around This Mound', First Lt. Robert S. Granger, of the United States Dragoons detachment at Fort Des Moines, scratched onto a rock fifty miles north of the Mesquakie's temporary villages, on 10 December 1845. 'They Cried, No Go! No Go! But We Took Them to Ft. D'.[16] Lt. Patrick Noble chased two bands up the Skunk River, bring them into the fort on 7 March 1846, just a few days before he and his squad of troopers marched the arrested Mesquakie south to Kansas.[17] One band of more than 500 who had started to the south ended their march after about sixty miles, settling in the upper Nodaway River valley in southwestern Iowa.[18] Fewer than 250 out of the nearly 1300 Mesquakie who were supposed to move to the Kansas reservation were there the following year.[19] In Kansas, Beach reported, 'stream water is deemed fatal to the health', wells were difficult to dig and corn crops poor because the 'soil is so much worse than in Iowa'.[20] Drought and disease made the reservation unbearable. Many Mesquakie started spending most of the year in the still unsettled valleys of western Iowa, returning to Kansas only in the winter, to collect their annuities.[21] 'The country towards the south is too warm in summer, the water there is not

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[15] *Ibid*.

[16] J.G. Lucas, 'The March of the Dragoons', *Annals of Iowa*, 3rd series, Vol. 29, 1945, p. 95.

[17] 'Fort Des Moines, No. 2', *Annals of Iowa*, 3rd series, Vol. 4, 1899, p. 175 (no author's name given).

[18] Green, '"We Dance in Opposite Directions"', p. 135.

[19] Beach to Superintendent of Indian Affairs Thomas Harvey, 11 May 1846, Office of Indian Affairs, Letters Received, roll 732 cited in Green, '"We Dance in Opposite Directions"', p. 136.

[20] Beach to Harvey, 1 September 1846, *Senate Documents*, Vol. 1, 29th Congress, 2nd Session, p. 300; Beach to Harvey, 1 September 1847, *Ibid.*, p. 846.

[21] It was not until 1866 that the Bureau of Indian Affairs agreed to pay the annuities in Iowa, so

good to drink and the hot winds parch the soil and the plants that try to grow', the Mesquakie would recall years later, while 'The land westward is too much prairie, wood is scarce, and water is not always to be had'.[22] The Mesquakie measured the value of land in concept (and actually in Kansas) against what they knew, in fact, about the low wooded valleys and tall-grass prairies of eastern Iowa. After doing so, they wanted their Iowa lands back, even as white squatters continued to try planting their own roots there. They still saw the possibility of coexistence. They saw that possibility because land that was not worth $1.25 an acre to a squatter was for many Mesquakie worth an arduous trip from Kansas and months on the run from American soldiers.

With the Mesquakie's still-unbroken attachment to the Iowa River valley, a connection of feeling if not of formal title, nobody else's hold on central Iowa seemed secure. Joseph Cooper, whose father brought the family to Marshall County, Iowa, as squatters in 1848, recalled playing with Native American boys that summer, three years after the Mesquakie were supposed to have moved to distant Kansas.[23] He remembered how the growing numbers gathering at 'old Injuntown' in nearby Tama County would be dispersed by a squad of soldiers. Shortly before that, a teen-aged Cooper and his neighbours had stopped two Native American men headed past their farms on their way to Tama, and demanded to inspect their guns, 'while they sat on their ponies and shook like they had the ague', Cooper recalled. 'No doubt they were as badly scared as we were'.[24] In 1850, 1851 and 1852, United States Dragoons patrols captured Mesquakie families east of the Red Rock Line, in the Cedar, lower Des Moines, Iowa and Skunk river valleys.[25] Yet in 1852, two petitions from settlers along the Cedar River asked the state to allow the Mesquakie to stay and purchase land.[26] They wanted, in short, to define

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that the Tama Mesquakie would not have to trek down to Kansas to receive the money. Josiah Grinnell, *Men and Events of Forty Years: Autobiographical Reminiscences of an Active Career from 1850 to 1890*, Boston, 1891, p. 276.

[22] William Jones, 'Notes on the Fox Indians', *Journal of American Folklore*, Vol. 24, No. 2, 1911, p. 219. Jones himself was Mesquakie.

[23] Joseph Cooper, 'Address to the Historical Society, May 28, 1903', in William Battin, F.A. Moscrip (eds), *Past and Present of Marshall County, Iowa*. Indianapolis, 1912, Vol. 1, pp. 72-73.

[24] *Ibid.*, pp. 74, 75.

[25] Green, '"We Dance in Opposite Directions"', p. 137.

[26] 'Marion Resolution', 5 February 1852, 'Linn County Citizens' Petition', 1852 (not otherwise dated), Governors' Correspondence Indian File, State Historical Society of Iowa, Des Moines,

(and thereby limit) the Mesquakie presence in eastern Iowa, at a time when as many as several hundred Mesquakie were following a traditional summer farming, fall and winter hunting pattern. They were using, however lightly, a lot of space in a roughly 3500 square mile area inhabited by about 2500 settlers.[27] With well under one settler family for every six square miles, at a time when few westerners had the tools and hired hands to cultivate an entire quarter-mile-square farm, there seemed space enough to accommodate the Mesquakie, too, even if occasional encounters left members of either group shaking a bit with fear.

On the Mesquakie side, a man named Mam-nwa-ni-ki moved to formalise his people's place in Iowa. By 1856, he had amassed some $735 from the Office of Indian Affairs annuities payments to members of his band and headed back to Iowa from the Kansas reservation to look for land for the group, accompanied by a man named Ha-pa-ya-shaw.[28] By the winter, Ha-pa-ya-shaw recalled several years later, about eighty people had followed Mam-nwa-ni-ki to Iowa. They set up three winter camps in the traditional manner in a thicket by the Iowa and Cedar rivers, with 'much council and looking around' for a place.[29] In February while Mam-nwa-ni-ki was looking for a more permanent home, Iowa Governor James Grimes lent a hand by pushing through legislation in the special session of the state legislature, allowing him to act as trustee for the Mesquakie in holding land, as they were not considered legal persons able to make contracts under the law.[30] Mam-nwa-ni-ki, meanwhile, negotiated the purchase of eighty

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Iowa.

[27] Population estimate is from the 1850 US census for the counties of Benton, Black Hawk, Iowa, Marshall, Poweshiek and Tama, which straddle the Iowa and Cedar rivers, east of the Red Rock Line.

[28] Duren Ward, 'Musquakia', *Iowa Journal of History and Politics*, Vol. 4, No. 2, Summer 1906, p. 180.

[29] Ward, 'Musquakia', p. 180. Ha-pa-ya-shaw told Ward the band settled in three spots, with three wikiups on the Iowa in Tama County, near the land they eventually purchased and the old Indian town Cooper referred to in his recollection of squatting in Marshall County, as well as five more on the Iowa near what would be the town of Marengo, Iowa, and four more on the Cedar River, to the east.

[30] Laws of Iowa, 1856 (Extra Session), Ch. 30. The main purpose of the session was to elect a US Senator, after the US Senate declared James Harmon's election to be illegal. The legislature re-elected Harlan and also authorised counties and cities to sell bonds, and transferred the school fund to the state Treasury. Benjamin Gue, *History of Iowa from the Earliest Times to the Twentieth Century*, New York, 1903, Vol. 1, p. 285.

acres by the Iowa River in barely settled Tama County for $1000 from the brothers Philip, David and Isaac Butler.[31] The deed, dated 14 July 1857, was between the governor and the Butlers, although five Mesquakie men, including Mam-nwa-ni-ki (recorded as Mat na a qua) signed. While the deed records the sales price as $1000, the Mesquakie apparently paid $800 in cash and swapped eight horses for the land.[32] The $10-per-acre cash price plus the horses placed a value on the land well above the $1.25 per acre Land Office minimum. The reason for the premium price was that the Mesquakie were not merely buying land, but also buying the right to be at a particular place.

There are some key points to stress here. The Mesquakie were paying – and paying dearly – to feel themselves rooted on the banks of the Iowa River. They acted as a community, pooling annuities paid to each head of a household to raise the money needed to buy the land. They mobilised the Iowans' own land conveyance process in order to have their commons, but they did not take a lead from the ideas underlying land conveyance to consider severalty as an option in Tama County. Nor did they pick up similar conceptual hints implied in the way they received annuities, the land-holding pattern of Iowa settlers or their own notions of household landholding, that is, the women's cornfields or ore diggings, or the family's winter hunting ground that were so similar to the Iowans' idea of exclusive holdings. They wanted, instead, to create a shared space, a commons.

At the same time, the Mesquakie band's communal effort to create a place for themselves had involved their Iowa neighbours. Because Iowa law barred any Native American individual or entity from making a contract, the Mesquakie turned to, and were helped by, the territory's most powerful official to complete the purchase. The Mesquakie band's use of the legal process and the governor's acquiescence speak to a mutual effort by two communities to accommodate two different ways of being on the land. Both communities understood that their ideas about holding land differed. Both accepted that their two ways of being on the land could co-exist, and that one was not necessarily superior to the other. Iowans were content to have a Native American commons in the

[31] Ward, 'Musquakia', p. 182.

[32] George Davenport to Gov. Samuel J. Kirkwood, 25 September 1862, Governors' Correspondence, Indian File, State Historical Society of Iowa, Des Moines, Iowa.

midst of their farmsteads, even as they themselves used some of the still thinly settled land as commons for hunting or pasture. The Mesquakie were willing to leave the Iowans' cornfields to them, and the settlers of Tama County to let the Mesquakie live nearby.

The Mesquakie were not, however, turning themselves into Iowa farmers. With sixty-nine men, sixty-five women and fifty-one children reported on the eighty-acre tract in 1862, there was no room to farm, and precious little even for the women's plots of corn and beans. The Mesquakie had not bought a way to join American society, but only a place on which to try to anchor their traditional seasonal round, 'raising corn during the summer and hunting and trapping during the fall and winter to obtain meat for their families and furs with which to buy clothing for them', as Indian Agent George Davenport reported.[33] They did not confine themselves to the those eighty acres, becoming 'poor, morose, frequent beggars' in the nearby hamlets, recalled Governor Josiah Grinnell, who had campaigned as a legislator for the Mesquakies' right to stay in Iowa. 'They were proprietors of the soil, with money, school-house, teachers and agents furnished, taking liberties denied white men; building grove camp fires, hunting and fishing at all seasons', he added, with evident disapproval.[34] When conflict between settlers and Sioux to the north kept the Mesquakie from their usual winter hunts, the community sought to expand its home in Tama County, initially with a relatively inexpensive swap in 1865 of 130 trees for an additional forty acres. They paid premium prices after that, however. The Mesquakie made three more purchases over the next four years of 280 acres, for an average price of $25.35 an acre – at a time when the Homestead Act of 1862 allowed for an outright grant of 160 acres to adults who improved and farmed the granted land for five years.[35]

Even with this expansion of territory, there was not enough space for their homes and their farming. 'A little gardening on rented lots, a little hunting along rivers on white

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[33] *Ibid*.

[34] Grinnell, *Men and Events of Forty Years*, pp. 275-76.

[35] Ward, 'Musquakia', pp. 191-95. In 1867, the Mesquakie at Tama were receiving their annuity payments in Iowa, after politicians in the state repeatedly pressed Indian Affairs officials to stop insisting on distributing the payments only in Kansas. The payment amounted to between $13,000 and $15,000 a year, Grinnell, *Men and Events*, pp. 274-75.

men's property, a little making of beadwork and buckskin articles and sometimes a great deal of begging were their only resources', reported Duren Ward, the anthropologist who gathered Mesquakie oral histories a half century after their first settlement in Tama County.[36] 'The people are now in distress', a creation myth recorded a generation after the Mesquakie created their commons in Iowa, '[t]hey no longer reap the good of the land which is theirs; little by little it is slipping from their hands. Bird and animal kind is vanishing, and the world is not as it was in the beginning'.[37] To Grinnell, who aspired to be their great advocate, the answer seemed simple enough: severalty. 'Let one hundred and sixty acres of well-watered, fertile lands be set apart for each Indian family', he urged, completely misunderstanding the aspirations that led them to sacrifice to set up their commons and their willingness to stay despite their hardship. 'If he has a right to a home, it is accorded to him', Grinnell continued, '[i]f he claims millions of acres, over which to roam as hunting grounds, where did he get his title?' The middle Iowa River valley was filling up with American settlers who were content with their 160 acres, after all. There was still space, but 'I am with the herdsman who innocently drives across the reservation and consumes the grass', Grinnell continued. The cattleman who 'appropriated what the savage would not' stood for a fairer, more just way, he wrote, for 'shall the exuberant bosom of the common mother, amply adequate to the nourishment of millions, be claimed exclusively by a few hundreds of her offspring?'[38] To continue on a commons was selfish, in this view. In a more crowded Iowa, it was alright to destroy one kind of shared space – the one created by the Mesquakie-settler accord – and replace it with either the lawlessness of trespass or the traditional system of grazing livestock on a grassland commons. Such acts, in the view Grinnell gave voice to here, would be justified by the superior yield that resulted.

What Grinnell did not see was that it was the Iowa River, the bottomland groves and open prairie beyond, or the real deer and sugar maples not many days walk distant that made the commons that the Mesquakie had assembled in Tama County so valuable

[36] Ward, 'Musquakia', p. 184.

[37] William Jones, 'Notes on the Fox Indians', *Journal of American Folklore*, Vol. 24, No. 92, Apr.-Jun., 1911, p. 212.

[38] Grinnell, *Men and Events of Forty Years*, p. 281.

to them. In a way, what they said about Iowa almost seems to echo the feeling for land evoked in the lyric poetry of John Clare and the other early nineteenth-century writers about their lost commons. For the Mesquakie in Tama, land was:

> Mother-of-all-Things-Everywhere. This grass, these sprouts, and these trees are as the hair upon us, only upon her they are not hair but as mortal beings. ... The murmur of the trees when the wind passes through is but the voices of our grandparents. Often a whole forest hums with talk, and the trees can be heard at a distance. They have joys and trials like us.[39]

The Mesquakie commons was pieced together over decades by a community that paid premium prices that expressed in dollars and cents the value of a particular spot to those particular people. They did so with the agreement of their neighbours. Their neighbours sold them the land, lived alongside them for generations, enjoyed Mesquakie participation in the settler community's fetes and visited the Mesquakie land to watch their festivities. Those neighbours understood enough about the Mesquakie feel for the land to accept more or less willingly what others would have called the trespassing of a hunter in their fields. With land to live on and to plant and the winter hunt along the rivers and across the fields of their neighbours, the Iowa Mesquakie preserved language, religion and tradition in ways that dispossessed Native Americans on their distant reservations would find increasingly difficult to do. None of these gifts of the land were capable of measurement in an economist's theory of rent or their insistence that land was fungible with other kinds of capital assets. None of these gifts was something to be seen when members of Congress, or government officials or judges adopted (more or less accurately) the economists' models. Yet all were evident to the Iowa farm families who had settled themselves side-by-side with the Mesquakie of Tama County. Perhaps that was because the Iowans remembered what a Congressman camped in a Washington hotel might not, which was the fact so easily overlooked by an economist because it was so basic: the need of people to have a home. If so, the Iowans were more in tune with the mentality of the time.

'Man', wrote Horace Greeley, one of the first American public intellectuals, 'can

[39] Jones, 'Notes on the Fox Indians', p. 215.

only in truth enjoy the rights of "Life, Liberty and the pursuit of Happiness" by being guaranteed some *place* in which to enjoy them. He who has no clear inherent right to live *somewhere*, has no right to live at all'.[40] If people were going hungry, and there was land still going uncultivated, it was wrong to let the possessors of that land keep it idle, Greeley argued. 'The idea of buying and selling the elements of Nature with money, is a perfect absurdity', wrote John Pickering, an intellectual lawyer who became an authority on Native American languages. 'In fact', he continued:

> it is the foundation of all kinds of slavery. We should like to know upon what just right any man can found his claim to tax his fellow man for the use of that which is not the produce of human exertion, but is the free gift of God to all men in common, and to no man in particular.[41]

Reform politician L. W. Rychman told the World's Convention of Reformers that land was owned by society – that is, in common – and that 'the only true title to land is the obligation to cultivate'.[42] The view that a community's interest in land was more important than any individual's right to own and to deny use of a necessary good was not merely a quirk of people living in the wide open spaces of a frontier. Against the belief that rights of property were paramount, there remained a widely held conviction that every person deserved to have a physical place on the land, because every person had a place, however tenuous, in the community.

A place on the land did not only mean one spot, either. In Iowa, American settlers and Mesquakie families made fairly free use of the de facto commons surrounding their homesteads to hunt, to gather fuel or let livestock graze, just as the first settlers on the Atlantic coast had done two centuries earlier. City-dwellers on either side of the Atlantic wanted access to open space, and by the mid-century were ever more forcefully insisting on it. In Pennsylvania, where the much-encroached-upon Allegheny Commons had, by the late 1860s, become little more than a place where town residents dumped their trash, the town council stepped in.[43] A formally recognised commons, as Pennsylvania

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[40] Horace Greeley, *Hints toward Reform*, New York, 1850, p. 312, quoting the familiar phrase from the Declaration of Independence.

[41] John Pickering, *Working Man's Political Economy*, Cincinnati, 1847, p. 46.

[42] *New York Weekly Tribune*, 11 October 1845.

[43] Northside Leadership Conference, *Master Plan for Allegheny Commons*, Pittsburgh, 2002, pp. 5-6.

Supreme Court Chief Justice William Tilghman had noted in 1824, was a rare but nevertheless legitimate way of using land.[44] His ruling had not kept the State of Pennsylvania from carving off parts of the Allegheny Commons for a seminary, a railroad right-of-way and a prison, but residents of what had become a factory town still wanted their commons long after they stopped letting cows graze there.[45] The town council first appointed trustees to raise funds to improve the commons and then simply took the land in the name of the town itself, to make a park.[46] Boston had established this pattern when, motivated by a feeling that 'the intense love of beauty which the broad sky and wide green earth have inspired', the city government 'set apart this beautiful Common' shortly after the 1822 charter ended government by town meeting.[47] In 1846, Walt Whitman, as editor of *The Brooklyn Eagle*, successfully called for 'immediate measures' to 'preserve for ever from the hand of Mammon every remaining rood of ground' at Fort Greene.[48] The rapid growth of cities, and the generations that had passed since the formal establishment of commons in Boston and Allegheny, had transformed manageable commons (open and closed, respectively) into wasteland. In Brooklyn, where the shared space was essentially ungoverned, the challenge of regulating access and use was even more acute. The answer in all three of these cases was for the city government to take charge. This would increasingly become the pattern, though not necessarily the exclusive pattern, for governing commons in cities and towns.

The thought process that turned shared space into town space can be traced in the ways that legislators considered how to handle the old commons of French settlers around St. Louis. An 1812 statute declared that 'the rights, titles and claims, to town or village lots, out lots, common field lots and commons adjoining and belonging to' eleven Missouri communities were 'confirmed to the inhabitants of the respective towns or

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[44] The Trustees of the Western University of Pennsylvania v. Robinson and others, 12 Serge. & Rawle 29, 32.

[45] *Master Plan for Allegheny Commons*, p. 6.

[46] *Ibid*., p. 7.

[47] *The Boston Common or Rural Walks in the City by a friend of improvement*, Boston, 1838 , p. 13.

[48] *Brooklyn Eagle*, 8 June 1846.

villages aforesaid, according to their several right or rights in common'.[49] This could be read either as saying the commons belonged to those towns or to the people living in those towns – but also as casting a shadow over the title to a house lot in the towns.[50] While this might have been a case of imprecise drafting, it more likely reflects an assumption that a community and its members were the same, an assumption that would seem logical to a Congress and to an Atlantic World that believed in the idea that families ought to be able to establish a permanent place on the land. The imprecision reflected in the 1812 statute, however, would come to seem unworkable as the Missourians sought to protect their commons. Missouri's state legislature declared in 1824 that it was up to the town governments, and not the individual holders of commons rights or commoners collectively, to enforce rules about trespassing, unauthorized use or waste on the commons.[51] In 1832, the Missouri legislature formally declared that the commons and common-field lots of St. Charles belonged to the town, so that the town could sell them. Other legislative authorizations followed. What had been commons had become public domain, controlled by a government rather than by those with use rights to the land.

On the other side of the Atlantic, the frenzied growth of cities meant the price of potential building sites was soaring, and the owners of unenclosed commons 'who in olden times acted in the position of trustees or guardians for their tenants, maintaining order on the wastes ... abandoned this supervision, and allowed the Commons to become subject to nuisances', and a dissonance of concept and reality about the value of open land helped fuel a new political movement to protect commons.[52] The Earl Spencer, lord of the manor of Wimbledon in the suburbs of London, found by the 1860s that his manorial powers were inadequate to keep tramps off the commons, or to keep it from becoming a rubbish dump. He called a meeting of villagers in November 1864, to

[49] 2 Stat. 748-50 (13 June 13 1812)
[50] Stuart Banner, 'The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750-1850', *The American Journal of Legal History*, Vol. 41, No. 1 (Jan., 1997), p. 79.
[51] 'An Act concerning Commons' (1824), Laws of the State of Missouri, St. Louis, 1825, p. 211.
[52] G. Shaw Lefevre, *English Commons and Forests: The Story of the Battle During the Last Thirty Years for Public Rights over the Commons and Forests of England and Wales,* London, 1894, p. 18.

propose enclosing 700 acres of the commons, but to do so as a park, which was to be open to all the now-suburban community.[53] Hoping to keep two acres for himself and his own garden, he wanted to sell the remaining 300-odd low-lying, boggy acres as building lots, with the money to be used to pay for commons rights and to drain and fence the park. Spencer was to receive rent from the park's trustees, generated by leasing pasturage rights on the commons and from the operation of gravel pit.[54] Wimbledon residents liked the idea, though the necessary Parliamentary action was delayed as that body established a Select Committee led by Sir Henry Peek, Member of Parliament for mid-Surrey, to consider the state of open space around London generally.[55]

In 1866, residents of Wimbledon sued Spencer to force action. That same year, wood-cutter Thomas Willingdale sued to protect the right of commoners from the village of Loughton to lop off branches of trees in Epping Forest for firewood. His focus on the value of a particular right on a particular commons eventually led a Royal Commission to find enclosures of commons during the 1850s and 1860s had been illegal.[56] Spencer, meanwhile, won relief from the Wimbledon residents' lawsuit when Parliament enacted the Wimbledon and Putney Commons Act in 1871, under which a board of Conservators were to keep the common unenclosed and in a natural state.[57] There would be no sale of lots, no gravel pit and none of the old use rights, such as gathering wood or cutting turf. In return, Spencer and his descendants received a £1200 annuity, paid for by a property tax on nearby residents, which also covered the cost of maintaining the commons. The approach worked. Five years later, Home Secretary Richard Assheton Cross introduced legislation to regulate the disposition of commons generally, telling fellow Members of Parliament that '[t]hey must take into consideration that which the people of this country

[53] The Conservators of Wimbledon and Putney Commons, 'History', <http://www.wpcc.org.uk/historical1.html> (accessed 15 July 2013).

[54] Lefevre, *English Commons and Forest,* p. 18.

[55] Conservators of Wimbledon, 'History' <http://www.wpcc.org.uk/historical1.html>

[56] 'Loughton: Loughton and the preservation of Epping Forest', in W.R. Powell (editor), *A History of the County of Essex,* Vol. 4, London, 1956, pp. 115-16.

[57] Wimbledon and Putney Commons Act, Anno 34 & 35, Victoriae Reginae, Cap. XXIV. Section 34 requires the whole of the commons remain unenclosed, section 36 that they be maintained in their natural aspect, and section 37 ends commons rights of cutting turf, taking wood and digging gravel or clay.

wanted almost as much as food — the air which they breathed and the health which they enjoyed'.[58] The answer would be a commission that could appoint boards of conservators for each commons, and who could promulgate specific by-laws for each, though they would be subject to approval by one of the principal Secretaries of State.[59]

The scheme ensured that the essence of a commons, that it was shared space, would continue. So, too, would the necessary condition for its permanent establishment, which was that there be some system of governing its use, even if the traditional uses did not. What mattered was the relationship of individuals in a particular place to a particular portion of land in that place, and that their collective decision to keep land as a commons expressed their desire for a connection to that land. The demands of the people of Wimbledon, and those living by Epping Forest, Hampstead Health, the Hackney Marshes and the hundreds of other open spaces protected as commons by Assheton Cross' legislation, speak to the power of the idea of a commons and its ability to accommodate the need of individuals for a meaningful and permanent connect to the land.

When the people of Wimbledon or a man like Mam-nwa-ni-ki looked at the land they hoped to keep as commons, they saw specific pieces of land: this 700 acres of pasture and woods just outside London, or that stretch of cottonwood, maple and prairie along the winding Iowa River. In addition to connections forged by use, both of those pieces of land, like many other commons created or protected in the mid-century, shared a physical feature that is best called simply 'openness'. The brick and stone that hemmed in the people of London had not reached Wimbledon commons. There, as by the Iowa River, one could still see the dome of sky and the inviting horizon. As Illinois Supreme Court Chief Justice Lyman Trumbell reflected in 1848 when contemplating the damage Samuel Seeley's hogs had done after wriggling through the north fence of William Peters' Peoria County wheat field, the open prairie grassland seemed meant for all of a community to share, at least until the moment it was securely fenced in. Peters' field, 'where the hogs got in, was so badly fenced that hogs which were not breachy could go in and out at pleasure', and so, since Peters had not properly claimed his portion of open

[58] *Hansard*, Parliamentary Debates, House of Commons, 3rd Series, Vol. 227, c. 191.

[59] An Act for facilitating the regulation and improvement of Commons, and for amending the Acts relating to the Inclosure of Commons, 39 & 40 Vict., c.56, sections 15-17.

land, he lost his ability to claim harm from a trespass.[60] The mental link of sturdy fence and exclusive right of access and use was deep-rooted, as when (in Chapter 2), Maryland's highest court allowed Charles Cheney to keep the land he had fenced in on Conogochiegue Manor, or when Maine logger Obadiah Call tried (unsuccessfully) to claim a patch of someone else's woods by throwing up a sloppy line of brushwood as a notional fence.[61] Trumbell, however, took a step beyond any well-established link of fence and exclusive property right, recalling the way that Illinois' settlers had so carefully placed themselves on the land.

They had, after all, picked the fringes of the prairie, not the grasslands themselves. as their homesteads. They wanted wooded land for timber, and were as inclined to raise their first corn crops in cleared woodlands as they were to tackle the chore of breaking up the matted roots of the prairie. The grasslands were for their cattle. 'It has been the custom in Illinois so long, that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large', Trumbell wrote, carefully echoing Blackstone's words on the conditions when customary law was valid and might supersede statute. 'Settlers have located themselves contiguous to prairies for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon uninclosed ground is universally conceded', he added.[62] It was as if the sweep of prairie towards the distant edge of sky invited all to enjoy, as if the open land was everyone's due portion. A commons was the natural condition of open land, and only the artefact of a fence – and one regularly maintained – served to carve a piece of it away.

In a different way, on a different topography, an openness of land encouraged men and women to see commons still farther west. By the mid-1850s, Californians had 'dug for gold; excavated mineral rock; constructed ditches, flumes and canals for conducting water … felled trees; diverted water-courses', state Supreme Court Justice Solomon Heydenfeldt mused, before adding: 'can it be said, with any propriety of reason or common sense, that the parties to these acts have acquired no rights?' There was still

[60] Seeley v. Peters, 5 Gilman 142 (1848) Illinois Supreme Court.

[61] Cheney v. Ringgold, 2 H. & J., 87, 91 (1807) Maryland Supreme Court. The Proprietors of Kennebeck Purchase versus Obadiah Call, 1 Mass 382 (1805) Supreme Court of Massachusetts, Kennebeck.

[62] Seeley v. Peters, 5 Gilman 142, 143-44.

space enough for Californians were able to do all those things, and to undertake 'all that is usual and necessary in a high condition of civilized development'.[63] Yet, in California, those usual necessities did not always include the right to keep people off a piece of land if it was of use to others, or so Heydenfeldt and his fellow high court justices believed. Thinking that, they would rule that the owners of a saw-mill on the Yuba River Middle Fork had no right for compensation from a group of placer miners who had removed logs from the saw-mill yard and dug a flume ditch across the millowners' land. Just as a miner 'who has a few square feet for his mining claim which he cannot directly occupy, has possession, because he works it', Heydenfeldt wrote, so 'building a dam is taking possession of water as a usufruct'.[64] In the goldfields in the 1850s, miners wanted more than they could get from panning gold from a riverbank claim that might fit between a miner's spread-apart knees. But the tool that yielded more gold from their tiny claims, the sluice box, required a steady flow of water. Water, then, was too valuable to too many to be owned by one person or one company, or for access to it to be controlled by a person or company. It was so valuable, in fact, that the law in California took a step beyond merely banning a landowner from building a weir in the river or holding that a man was free to fish from another's Pennsylvania riverbank. In California, one could divert water flowing across another's land and use part of that land to make a new path for that water to flow. The water was so much a common property that to use it imbued the land it passed over with some features of a commons, too. After all, amid all the riches of a vast and barely settled state, there seemed more than enough to go around, and plenty of

[63] Conger v. Weaver, 6 Cal. 548, 557 (1856). In the shared spaces of California's gold belt after 1849, prospectors and miners inspired what became a widely-accepted notion that what was below the surface of the Earth belonged to public at large, but that an invididual's enterprise in finding minerals created a right to mine and take those underground resources. This was formalised in The Gold Field Act of 1855 in New South Wales, British Columbia's Mineral Tenure Act of 1859, the United Province of Canada's Act Respecting Gold Mines of 1864, California's Act granting the Right of Way to Ditch and Canal Owners of 1866, and the U.S. Mining Act of 1872. While some Canadian land grants under the Dominion Lands Act of 1872 did include subsurface rights, by the end of the century the pattern was to reserve mineral rights to the Crown, which would lease them in return for royalties, much as the U.S. Mining Act did. As a practical matter, the California Gold Rush idea that knowledge, enterprise and use entitled a person or a company to exploit a commons for its minerals framed the way individuals looked at this aspect of their place on the land, mentally separating it from rights to the surface. The state's role was to protect such use rights once claimed.

[64] *Ibid*., 558.

chances for even the humblest to strike it rich.

Considering an especially spectacular open space, Congress took time in the midst of the Civil War to set aside California's Yosemite Valley as land to be shared by the entire nation. When California congressman, James A. Johnson, argued that two squatters – would-be hoteliers – should be allowed to keep their land in the middle of the valley, he invoked the national tradition of title to land derived from settlers' work to argue that it had been wrong to allow 'the creation of fancy pleasure grounds by Congress out of citizens' farms'.[65] The Senate's Committee on Private Land Claims shrugged off that claim and, finding that Johnson's farmers were, legally speaking, squatters, declared that Yosemite, 'unrivalled in its majesty, grandeur, and beauty' was a place 'in which all of the people of the country feel a pride and an interest, and to which their equal right of access and enjoyment ought to be protected'.[66] A commons in other words.

Even where the land was more barren, and there were fewer resources to contest, the idea of a commons had a staying power that persisted for decades to come. In 1876, noting that 'Nature has denied to this state many of the advantages which other states possess', Nevada Supreme Court Chief Justice Thomas Porter Hawley ruled that 'the mineral wealth of this state ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining'.[67] In the deserts of Nevada, the community's need demanded a power to take wooded land if an owner would not sell. Without lumber, after all, miners could not make the bracing needed to shore up underground workings. What Nature yielded, concretely, and where that yield was actually to be found, was important. The 'entire people' of Nevada depended on mining, which required wood and water be brought long distances, as well as places to dump waste rock, Hawley ruled, and they were 'directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals'.[68] Whether considering real ore veins or particular

[65] *Congressional Globe*, 40th Congress, 2nd session, (3 June 1868), p. 2816.

[66] Sen. George Williams, Chairman of the Committee on Private Land Claims, 'Senate Report. 185, to accompany H.R. 1118', *Senate Documents*, 40th Congress, 2nd session, pp.1-2.

[67] Dayton Gold and Silver Mining Co. v. W.M. Seawell, 11 Nev. 394, 409 (1876).

[68] *Ibid*., p. 410.

pasturelands, the community's ability to manage resources was still important. More so, in fact, than mere ownership. Maintaining rights of use on a commons was vital if the community's primary resource, the mineral deposits, were to be exploited.

The idea of what is mine, as opposed to everyone else's, may have seemed basic, but there were exceptions when it came to land. A person's place on a specific piece of land is the starting point when constructing an idea of the land, far more important than a definition in a textbook or a statute. Looking, as did Illinois' Judge Trumbell, across a sea of waving bluestem grass to the edge of the sky is one frame. Watching a hopeful miner panning for gold beside a California river is yet another. Yet another came as the Mesquakie watched settlers carve the low meandering valley of the Iowa River into a grid of 160-acre farms and thought of the alkaline soil and bitter waters of Kansas that were to be their due portions. Neither Kansas nor the spreading grid of severalty in Iowa could accommodate the Mesquakie's summer villages and cornfields, or their autumn hunt or need to hunker down for the winter in the shelter of a riverbank woods. So, they created their own space, using the tools of severalty to make a commons. In so doing, they found an accommodation with their neighbours – one that has lasted to this day. The premium the Mesquakie paid reflected a value that those particular parcels, next to or near their first purchase, had as a haven for an increasingly difficult to maintain way of life, rather than as a source of sustenance or of livelihood. It was a value landowners in Tama were happy to accept, even if they did not share it. It was a value that others saw, even far away on the other side of the Atlantic, when they looked at the particular patch of open country that mattered to them.

Conclusion

The aim seems so simple: to enjoy a due portion of land. The ways that men and women of the nineteenth-century Atlantic World actually did so were not. Their actions and their thoughts about their actions, which did not always match, show that ideas about the connection of people to the land were not completely fixed as the new nation of the United States defined itself and as the structures of an industrial economy took shape on both sides of the Atlantic. The idea of 'my land that you cannot be on' co-existed with the idea of 'that land, which I am free to use alongside you', and did so even within any one person's mind, as perhaps the imperious (and nearly murderous) South Carolina planter John Singleton (in Chapter 2), so dramatically indicated. The idea of my land did not necessarily supplant a notion of our land.

There was no single pattern for balancing those often-opposed ways of thinking about land – mine and ours – either when Americans and Britons started on their separate nation-making paths in the late 1700s or a century later, after the factories of England's Midlands and America's New England, Mid-Atlantic and Great Lakes states had transformed life on both shores of the ocean. Ambiguity and self-contradiction within the many variations of ideas about land undermine any theory that agreement on an absolute and exclusive right of property in land was a necessary precondition to American nationhood or Atlantic capitalism. Professionals of ideology, the writers of pamphlets, the preachers of sermons, and the politicians in Congress and in new state assemblies, set down an idea of property that we can read now, but those who struggled to make farms, who wrestled with economic theory, and who sought a resolution of contending claims for shared spaces were far less certain. Their acts reveal a range of ideas about land, and ideas about land varied because perceptions of land varied with the circumstances of the perceivers and the nature of the land they perceived. There were, however, some widely shared elements to stress here.

The first is that the question of what a due portion of land was, and how it was to be enjoyed, has to be answered. At some point, everyone needs to lie down and sleep,

pause for a moment to eat, and be somewhere in order to find or make the material things that make life possible. Whether people did that by buying a quarter-section of public land, or renting a newly enclosed farm or huddling by a roadside, as Cobbett described (in Chapter 1), their place on the land ultimately rested with an idea they and their community had accepted about where they could be and what they could do there. With a need so fundamental, moreover, came another widely shared desire: that one's place on the land be certain, and ideally permanent – the reason Cobbett seems to have been more horrified by the hovels he saw than by tiny dribs of awful food the roadside landless ate. The pain of being shut out from the Helpstone commons that the poet John Clare recalled or that prompted the Mesquakie purchase of their Tama County commons speak to this, as well. Finally, the third essential element implied by the first two of these shared beliefs flowered grandiosely on the trans-Appalachian commons, is that men and women were entitled to land, and that they had a right to it so urgent that they could simply take it if they could.

With the last point, this inquiry becomes a matter of history, rather than of economics or psychology. An event, the transfer of political control over a vast commons beyond the Appalachians, forced the question of who might be on that land and how they should conduct their lives there. The notion of entitlement had room to emerge. The sheer scale of the question, like the stunning openness of the country once a man or woman had climbed the farthest ridges of those mountains and gazed west across the upturned bowl of the sky and the wild land below, was a shock to perceptions. Just as the view from the mountaintop made people dream large dreams, as William Murray and his Pennsylvania backers did in Illinois or Benjamin Franklin had with the Vandalia venture, so did the idea of a huge commons just waiting there.

Neither the view nor the idea, however, offered clear guideposts for what to do. When George Rogers Clark insisted that his three Delaware allies should enjoy their due portions of land, neither he nor they would say what the term actually meant. There was little in the political or economic theory of the time to help, beyond the general notion, as Jefferson would put it (in Chapter 1), that the world was given to men and women in usufruct – that is, with a right to use in order to live. Human beings were in a general way entitled to the Earth. The specifics, though, remained a challenge. Still, even Blackstone

saw a place for customary rights of use; even Locke, a limit to the right of property in land that was defined by what any one person could use. George Rogers Clark had negotiated for a portion of a commons without seeing it clearly enough to say whether the due portions he sought were for rights to a commons or ownership of a piece of them. The verb he used to connect people and their due portions, to enjoy, was ambiguous, encompassing so many different acts.

A century later, when the Ojibwe chief Aleck Paul's grandfather told him about a traditional pattern of use, the family hunting ground, the commons still would be hard to see. When Aleck Paul recalled what his grandfather told him, he spoke at times of rights to the animals on the land and at times of the right to keep other hunters away, which was a right to limit access in a way associated with exclusive control of a defined portion of land by an individual, severalty or fee-simple ownership, in legal terms. As he remembered and told of what he remembered, he sought to explain the traditional way of life he still followed, but followed within the bounds of a commons, which was a forest reserve belonging to the people of the Province of Ontario. The implication that it was a commons that allowed him to continue living by hunting and trapping and the fruits of the forest his wife and daughters gathered struck neither him nor the anthropologist, Frank Speck. Speck went on to theorise that hunters and gathers, like any capitalist, might have a sense of individual property in land. The commons of the forest preserve that Speck did not notice was in a sense what allowed him to use Aleck Paul's words to challenge the idea, dating back to Locke and Grotius, of a progression from commons to property-holding that moved in lockstep with the progress of technology and wealth. Ironically, in not seeing the commons then, Speck's insight opened the possibility of a clearer view of how people saw the commons all along the margins of the nineteenth-century Atlantic World.

Speck's suggestion from the midst of his unseen commons, as well as the hint in Alden Vaughan's *New England Frontier* that Massachusetts' Native Americans and its Puritan settlers shared notions about access and use of land, were what started me on this research. Other anthropologists and historians challenged both Speck and Vaughan, but it nevertheless felt to me as if those challenges were based on formalities of law or the nature of political structures. It seemed there might be different frameworks within which

men and women living on the land constructed their ideas about their relationship to the land, and that trying a path that ended up much like John Rae's, in contemplating his Native American fisherman clearing a space for a wild plum tree to flourish might uncover those ways of thought. It was in looking at the details of access and use of land that often-unexpressed ideas about the land might come into sight. Ideas about land might have been shaped by what both participant and distant observer saw in the seasonal round of farming, hunting, sheltering from the snow and sugaring that framed the Wyandot year (or the variation of a April camp by a Massachusetts river in time for the shad run, which was what first drew my attention). The gardens of corn and squash and beans of Wampanoag women in Massachusetts and Cherokee women in Georgia might show that their communities' conception of land could accommodate both individual landholding and a commons. The description of the Cherokee pattern by the outsiders Bartram and Adair showed that accommodation was not completely incomprehensible to English or American observers. The way that Mesquakie women took their concepts as well as their hoes from cornfield to ore vein made clear that evolution of thought did not necessarily mean replacing one model of landholding with another. Similarly, the choice of a cropland commons outside St. Louis, where there was not quite enough wood to fence every individual's field, like Illinois Judge Trumbell's view that the prairie was naturally available to all for pasture, or the reluctance of generations of members of Congress to convert the commons of the three Half Breed Tracts, showed that American settlers could see in their minds' eyes a place for commons as well as individual holdings.

Stepping back from cornfields and commons of native and newcomer to ask how more formal theory interpreted their use of land, I found two surprises. The first, that political economists of the early nineteenth century generally did not insist on rights of property in land as a precondition for creating wealth. The second was the extent to which they wrote about Native Americans. Both were, in a sense, reactions to theoretical convention (dating back to the Physiocrats) that saw land, and the holders of land, as the primary motors of a national economy, which was a view that culminated in David Ricardo's work. Ricardo based a model of the economy on a theory that differences in the attributes of particular pieces of land – what he called fertility – generated the general category of income called rent. Rent was what people earned from the bounty of Nature,

and was distinct from the profit earned from their efforts to enhance that bounty by improving land with plough or drain. The problem for the political economists who followed him was the difficulty in drawing the line between rent and profit – how much of the farmer's produce comes from the fertility of the soil and how much from the drainage ditch he dug? It was a more urgent question for those economists because their interest was shifting from farm to factory, and to how people assembled the means to build and run manufacturing enterprises. One consequence was that it would not be particularly important to many English economists after Ricardo, whether tenant farmer or landlord owner was the one who saved enough to invest in a new plough; the act of saving and investment was what mattered. American economists, also primarily interested in the accumulation of capital, raised the question of ownership only to the extent they could use American landholding patterns to challenge the argument for free trade that Ricardo had anchored on his theory of rent. 'Land, from its abundance, may be of *little* value', wrote the American economist. Jacob Cardozo. 'The proprietor of land in a new and fertile county, in the United States', he added, 'derives … in addition to the capital employed in cultivation, in proportion to his investment in the purchase of the land itself, and we may call this rent or not as we may please'.[1] The purchase of land was what was recompensed. So much, then, for the offerings of Nature that Ricardo had tried to understand.

American and English political economists shared an interest in how people found the wherewithal to invest and how they then invested. They shared as well the conviction that the motivation for both processes came from an expectation about what an individual could gain in the future rather than what one had at present – which leads to that second surprise in their writings: the large place granted to Native American examples as a kind of baseline proof of that point. 'The wealth of the savage does not consist in having plucked a bunch of grapes, or pulled a fish from the ocean, but in his capacity for plucking another bunch, or pulling another fish, when he shall be hungry', as the American economist, Daniel Raymond, put it.[2] In creating their idea of Native Americans as simple models of reasoned economic behaviour, it was enough for political economists

[1] Jacob N. Cardozo, *Notes on Political Economy*, Charleston, S.C., 1826, pp. 31-32, 38.

[2] Daniel Raymond, *The Elements of Political Economy,* Baltimore, 1823, Vol. 1, p. 104.

to say (with Locke) that the infusion of labour into Nature – the grapes that Native Americans kept plucking in books from Locke's to Raymond's – created goods to be consumed or saved for investment.

Abstinence – again, intriguingly, initially exemplified by Native American life – was what allowed people to accumulate the wherewithal to do more than subsist day-to-day, economist, John Rae, wrote. As he reflected on what he had seen of the farmers and traders he had met along the frontier of Upper Canada, Rae added that accumulation could take the form of a newly cleared field prepared for cultivation. Rae linked the degree of abstinence and the efficacy of capital that could be created because of that abstinence to the passage of time and the rate of return realised. From that linkage, specifically cited by the pre-eminent mid-nineteenth-century English economist John Stuart Mill, in his *Principles of Political Economy,* economists were able to separate the determinants of markets for capital and their ultimate measure, the rate of profit, from the rent that landlords commanded. Breaking the connection of profit and rent allowed Mill to reduce the place of natural endowments to triviality, with no significance to the pace of social progress or the overall equilibrium of an economic system. With Nature a triviality, when political economists turned their attention to Native Americans, they rejected earlier notions that Native Americans' way of life was entirely dependent on the bounty of Nature and found it was, instead, a result of human thought and human action. And at the same time that economists found their proof of a universal human behaviour that generated wealth, they confirmed their view that land, and the natural resources it contained, was of secondary importance – as was the question of differences in the way people held land.

When Rae considered Mohawk cornfields at Lac St. François, and when Mill reiterated his example, they did not see the Mohawk's move from mainland to islands as a failure of a commons, but as a failure to fence – to invest in – land that happened to be a commons. Commons or severalty did not matter. It would, however, to a holder of the most important English Chair of Political Economy, William Forster Lloyd, who specifically considered what he thought he saw on the commons to make his own point about abstinence. Commons were over-grazed and the cattle on them puny, because nobody had any reason to forbear from putting one too many animals out, he argued.

Here, he began to explore another critical notion in what would be the theorists' rejection of Ricardo: the central role of the last increment of production or of use in determining the best use of inputs and the best distribution. To see that last increment, and make it fit into a model of a system, is an act of abstraction that makes one piece of land look like another – and not essentially different from a lathe or loom. Lloyd, however, wrote about a commons that had largely disappeared, and in apparent ignorance of how communities actually managed such commons. What interested his fellow economists was his idea about incremental addition, not his view on the impossibility of managing a shared resource – shared resources could, in fact, be managed. So, though not repeating Lloyd's point about the commons, political economists in the years that followed would focus on the diminishing returns that Lloyd saw on his commons and echo Cardozo, stating that to simply hold that wild land was to hold something valueless.

Land, in economists' eyes, had become like any other item of potential capital. Land was merely something potential, like the sapling that might become a Native American's bow, or the clay that might become a factory's brickwork. The acts of people were alone what created inherent value; their ideas about its possibilities led them to the gamble of offering to put down real dollars or pounds for its use. If land was inherently without value, as economists argued, and if it was only an idea about its possibilities that put a price tag on it, then the notion that there might be utility in a commons was necessarily much harder to see. At least, it would be much harder to see if you were not actually on such a shared space, perhaps rounding up your cattle or chasing a deer or contending with another claimant to the land you had just ploughed. Ricardo, and those of his followers who had tried to define rent, had tried to construct conceptual land that reflected the fact that real pieces of land had real features that made them more or less valuable to the real people on them. Ricardo sought to construct a theory of inherent value, towards which prices emerging from purchase and sale might converge. When political economists gave up that frustrating work, they created an abstraction of land for which a dream about what it could become, rather than a clear sight of what it actually was, would be what mattered.

That dreaminess of vision would not be confined to political economists. At the critical time when many were challenging Ricardo's vision in the 1820s and 1830s, a

huge swath of an unfamiliar geography – the prairie of the Illinois Military Tract – would become a focus of would-be settlers' uncertain interest. Those who ventured onto land they feared might be a desert and that they did not know how to farm, expected, in the traditional notion, that their labour would secure them their due portions. Some bought land. The conditional and far less costly commitment embodied in a land warrant or unpatented claim, however, made the gamble on the possibilities of land one did not bother to go and see an easy and popular option. For a fraction of the Land Office's minimum price, with a piece of paper that might be held with far less effort than trying to break up the matted roots of prairie soil, one could imagine an empire – and let it slip away when the effort of going to Illinois or paying a few pennies an acre in tax was too steep. Land could be just paper – though there would remain juries and claim clubs enough to insist on the old-fashioned notion that work was what entitled one to land.

Just as the incompletely understood prairie of Illinois prompted some to squat and others to imbue a piece of paper with their dream of landed wealth, so would three other specific places confound convictions about the proper relation of people and land in the 1830s, '40s and '50s. Those places were the Half Breed Tracts of Iowa, Minnesota and Nebraska. Each was created as a commons for specific groups of marginal people. Each was located at junctions of critically important pathways to the westernmost fringes of the Atlantic World, with resources to make a prairie sod-buster's eyes gleam. Still, it would take decades for American officials to finally accept they should be divided and held by individuals in severalty.

On each of the Half Breed Tracts, the process of division and appropriation by individuals started with the people for whom the three tracts were reserved, and their request that the United States help them secure a permanent place on their land. With that, they also sought permission to participate fully in American life. They saw both permanence and participation as rights anchored in the ability of an individual to hold land. Perhaps the supposed dichotomy of Native American commons versus the American or European individual's cultivated lands, as described in social theorists' tracts, was something they had come to believe, perhaps because of what they knew about their women's plots of corn. The key point is that the decades of hesitation in response came not because of their ambivalence about what they wanted. Instead, it came

from the American side, from a fear of what might happen if those lands were freely bought and sold. Resolution would be possible only through a process that transformed real land into paper abstractions, or conditional claims to pieces of a whole – so unreal that the actual piece of land was not specified until the paper's holder exercised his or her claim. The holder, most often, was someone who had purchased the paper from an individual the government had finally identified as a member of the community for whom the Half Breed Tract had been reserved in the first place. So, there was arbitrary division into 101 shares that divided the Iowa Half Breed Tract in the 1840s, as well as the failed effort to take control of the whole through the device of buying the Wisconsin commissioners' liens. In the 1850s came the distribution of scrip, with its conditional claim to unfixed pieces of the Minnesota and Nebraska tracts – another form of derivative security that mostly was sold to the white settlers and speculators who for the most party ended up owning those lands.

The ideas of land as asset and land as essentially embodied in a paper security were a shift from the way someone like the poet John Clare saw land. The pasture commons and small copses that still had a hold on Clare so many years after they disappeared were not all that different from the edge of the wooded hills where the fur trader, Antoine Barada, took up his due portion of the Nebraska Half Breed Tract, a few miles south of a fondly remembered elk hunt in the country that used to be home to his mother's Omaha people. Barada's 160 acres, a tiny reconstruction of the great commons of woodland and prairie he had ranged over in his youth, was not large enough to allow him to continue that way of life, but it contained enough of the world he had known to root him to the spot. Barada's land was a real place to him, in a way that the land underlying the scrip held by most other claimants to the Half Breed Tract was not. There was enough on his 160 acres for Barada. There was not enough, however, to hold many of the settlers from afar who did not know or love the harsh Nebraska lands of the tract and the former reservations of the Omaha and Oto peoples, so they left.

Six decades earlier, when George Rogers Clark had sought due portions of a commons for his Delaware allies, he could not know quite what he, or they, meant because neither he nor they were talking about specific pieces of land. In a most important sense the difference between knowing a particular piece of land and talking of

a hypothetical one was what generated the ambiguities and confusions about land tenure. Once, people on either side of the sea were rooted in particular portions of the land, whether they owned it or not. An English countryman letting his cow loose upon the moor, before trudging to his strip of common arable to hoe his wheat, knew the patchwork of rights to use and rights of access, as certainly as his children knew where to net a fish, or find spring flowers. A Mesquakie family knew the upland meadows for their corn, the stand of maples sheltered by a river bluff that they could tap for sugar, a prairie salt lick a hundred miles away that bison favoured, and where to find the grey flakes in the soil that one could melt into lead. These were much different ways of knowing land than those seen from a writing desk, shaping a concept.

What the Mesquakie knew, and what the abstractions of theory – political, economic or legal – lost sight of during the first half of the nineteenth century, is the particular and the concrete. A fading vision of the actual – this piece of land that this person farms, that stretch of prairie where those people chase bison – was not succeeded by a well-defined mental construct of what land means to human beings. The reason was because clarity of concept would have required confrontation with the fact of the dispossession of hundreds of thousands of people, Native Americans and the families of rural English labourers, and their consignment to lives of brutal poverty. The dispossessed on either side of the Atlantic shared a dependence on commons; the commons, therefore, would not be seen. 'As far as I am aware, to eject the population in mass is a very modern enormity', the English economist, Francis Newman, wrote in 1851, reflecting on the eviction more than three decades earlier of some 16,000 men, women and children from the Sutherland estates in northern Scotland:

> all their villages were pulled down or burnt, and their fields turned into pasturage ... The human inhabitants were thus ejected, in order that sheep might take their place; because some one had persuaded these great land-holders that sheep would pay better than human beings! This is truly monstrous. It is probable that nothing so shocking could have been done, but for a juggling plea concerning the claims of Political Economy. [3]

Newman wrote, so many years later, not of mere greed here, but of the power of an idea –

[3] Francis William Newman, *Lectures on Political Economy*, London, 1851, pp. 131-32.

actually, the power of a perception of ideas, that plea concerning claims of theory.

Still, an Essex woodcutter's insistence on his rights to gather wood in Epping Forest or a judge's examination of a Nevada mountain's pinon pine could still reveal a commons, and a resource that remained vitally important to many people. Economists, on the other hand, looked at the vastness of the American commons or the few remaining smaller open spaces by English cities and saw an untapped expanse of land that led them to question Ricardo's derivation of rent, and from there to question the idea that land had value. Samuel Seeley, Weaver and the miners of the Yuba's Middle Fork, and the Nevada boomtown lawyer-turned-judge Thomas Hawley, all knew the vast spaces of their American commons, as well as the particular, scattered and often inaccessible apportioning of Nature's gifts. They understood there was inherent value in land once one focused on the concrete features of a specific piece of land. This value could not be always and only realised by its division and allocation and was not captured in the way the Atlantic World's economists looked at land. The aim was to balance individual, community and national interests in each commons rather than to find one answer for the use and control of all commons. A specific commons at a specific location with specific characteristics might or might not be the way to realise that kind of value. When it could, popular sentiment, armed with politically directed law, at times protected what economic theory would not.

Here, then, is the heart of the issue. The unseen commons – what Speck and Aleck Paul between them overlooked, what would so trouble the anthropologists who argued for decades afterwards about whether or not Algonkian peoples thought individuals owned land or not – was an unseen particularity. The way that one Ontario forest preserve allowed one small group of Ojibwe to live, or the way that an Illinois prairie allowed a new settler to run cattle, or a Scottish sheepfold might once have housed a family, all were creations of specific communities on specific pieces of land. All were shaped by the specific characteristics of those communities and those particular pieces of land. All were changed, some more than others, by a way of looking at land and human use of land that insisted on generalisation, on abstraction and on integration into models of how larger societies worked. Some, of course, vanished, in fact, as well as in view.

When everywhere is the same, it is hard to believe there is anything special about any one place. It is hard to count on enjoying one's due portion, as Push-e-to-neke-qua of the Iowa Mesquakie suggested in 1898, when he noted '[w]e have been thinking about the land we were to live on, and whether we are to remain'. There was, however, he noted, a moral guarantee, more important than what any individual might buy, of the promise of the creator of the world, the Ke-che Manitou: 'I think a deal of my earth, and I give to you for you to live on ... you need not think of being poor, for I will feed and clothe you from my rich earth'.[4] It was a promise made to people on a particular commons, part of which they had joined together to buy, part of which was a matter of routine (if not always willingly granted) consent to hunt along the Iowa, Cedar and Skunk rivers. There might no longer be deer, but there were rabbits and squirrels enough to survive, and to preserve a particular way of life in that corner of the world. The point was not the abstraction of owning land in general, but how to live on a piece of land in particular. The point was that one might share the land, even with a reluctant Iowa farmer. The point, was one that people of the Atlantic World understood as, on one side of the ocean, they started building a new nation, and on the other, a new economy.

That Push-e-to-neke-qua's point would become so hard to see, even though it never really went away, is what this work is all about. When Speck listened to Aleck Paul speak of 'the hunting grounds owned and used by the different families', and how his grandfather's land was divided between Aleck Paul's father and uncle, he heard a concept of ownership, though Aleck Paul was speaking about use. 'We were to own this land so no other Indians could hunt on it', Aleck Paul said. 'Other Indians could go there and travel through it, but could not go there to kill the beaver. Each family had its own district where it belonged, and owned the game'.[5] When an economist like Newman might say that the rent from a natural endowment, such as the salmon in a stream a duke leased to a club of wealthy anglers, is ultimately the same as the income generated by 'high Fancy prices' music lovers pay to hear the 1900-pipe Apollonicon organ, something basic about

[4] Horace M. Rebok, *The Last of the Mus-qua-kies and the Indian Congress of 1889*, Dayton, 1900, p. 47.

[5] Speck, 'The Family Hunting Band', p. 294.

land, its variability and utility, had been abstracted out of existence.[6] Ownership then is all that matters; ownership is what prevents Lloyd's paradox of the commons. The buying and selling of ownership rights – even the conditional ones of such early derivative securities as a Military Tract land warrant or Half Breed Tract scrip – is what determines value. Newman's equation of trout stream and pipe organ would lead the economist, William S. Jevons, to say there is no reason to differentiate craft from Nature. Jevons could then say that what determined the value of things was simply the last increment of cost to produce another item. From that would come the idea that the final incremental addition to utility that any particular item offered a person was what determined human well-being – a staple of standard economic theory that, applied to land or to any natural resource, leaves so much out.[7] In the end, considering the ravaged commons of ocean fisheries, or clear-cut forest, or sulphorous city air, it is worth recalling what one Mesquakie chief told an 1890s revival meeting in Tama:

> All of us are not alike. We are different races of people. Of course your God told you what you should do. Our Man-i-to put us here and we are following the ways that he told us. I suppose that is what you are doing.[8]

The question, then, is: are we?

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[6] Newman, *Lecture*, p. 145.

[7] William S. Jevons, 'Brief Account of a General Mathematical Theory of Political Economy', *The Journal of the Royal Statistical Society*, Vol. 29, June 1866, pp. 282-87. Jevons does not mention Newman in his Theory of Political Economy, in which he set out a general theory of economics based on analyses of the last increment of utility, costs and revenue. He wrote: 'If land yields an annual revenue of corn and wool, milk, beef, and other necessaries, houses yield a revenue of shelter and comfort. The sole end of all industry is to satisfy our wants; and if capital is requisite to supply shelter, and furniture and useful utensils, as it undoubtedly is, why refuse it the name which it bears in all other employments?' and also '[a]nother part of the current doctrines of Economics determines the rate of profit of capitalists in a very simple manner. The whole produce of industry must be divided into the portions paid as rent, taxes, profits, and wages. We may exclude taxes as exceptional. Rent also may be eliminated, for it is essentially variable and is reduced to zero in the case of the poorest land cultivated. We thus arrive at the simple equation: Produce = profit + wages'. Jevons, *The Theory of Political Economy,* (3rd edition) London, 1888 (1871), Ch. VII, para 61 and Ch. VIII, para 4. <http://www.econlib.org/library/YPDBooks/Jevons/jvnPE.html> (accessed 15 December 2012).

[8] Rebok, *The Last of the Mus-qua-kies*, p. 46.

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