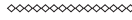


NOTES



INTRODUCTION

Epigraphs: George Manuel, in George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Minneapolis: University of Minnesota Press, 2019), 55–56; Sagoyewatha, aka Red Jacket, “We Are Determined Not to Sell Our Lands,” in *Great Speeches by Native Americans*, ed. Bob Blaisdell (New York: Dover, 2000), 47.

- 1 A point of clarification on terminology and naming. The “Great Sioux Nation” is one English rendering of the confederacy of the Oceti Sakowin, more literally the people of the “Seven Council Fires.” The confederacy has historically been composed of several autonomous tribes that speak three different dialects, the Lakota, Dakota, and Nakota. My understanding of the Oceti Sakowin, their history and contemporary politics, is heavily indebted to the Lakota scholar Nick Estes, in particular *Our History Is the Future: Standing Rock versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* (New York: Verso, 2019).
- 2 “Citing 1851 Treaty, Water Protectors Establish Road Blockade and Expand Frontline #NoDAPL Camp,” Indigenous Rising, October 23, 2016, <http://indigenusrising.org/citing-1851-treaty-water-protectors-establish-road-blockade-and-expand-frontline-nodapl-camp>.
- 3 “Dakota Access Pipeline Opponents Occupy Land, Citing 1851 Treaty,” Reuters, October 24, 2016, <http://ca.reuters.com/article/topNews/idCAKCN12O2FN>.
- 4 On controversies over use of the terms *genocide* and *concentration camp* in this context, see Waziyatawin, *What Does Justice Look Like? The Struggle for Liberation in Dakota Homeland* (St. Paul, MN: Living Justice Press, 2008), esp. chap. 1.

- 5 James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013).
- 6 James Mooney, *The Ghost Dance: Religion and Wounded Knee* (New York: Dover, 1973). For an analysis of how the long history of Wounded Knee intersects with the specific question of property and profit, see Nick Estes, “Wounded Knee: Settler Colonial Property Regimes,” *Capitalism, Nature, Socialism* 24, no. 3 (2013).
- 7 On “compulsory enfranchisement” as a colonial tool, see Robert Nichols, “Contract and Usurpation: Compulsory Enfranchisement and Racial Governance in Settler-Colonial Contexts,” in *Theorizing Native Studies*, ed. Audra Simpson and Andrea Smith (Durham, NC: Duke University Press, 2014).
- 8 Paul Chaat Smith and Robert Allen Warrior, *Like a Hurricane: The Indian Movement from Alcatraz to Wounded Knee* (New York: New Press, 1997).
- 9 Jeffrey Ostler, *The Lakotas and the Black Hills: The Struggle for Sacred Ground* (New York: Penguin, 2010).
- 10 See Étienne Balibar, “The Reversal of Possessive Individualism,” in *Equaliberty: Political Essays* (Durham, NC: Duke University Press, 2014), chap. 2; Daniel Bensaid, *The Dispossessed: Karl Marx, The Wood Thieves, and the Right of the Poor*, trans. Robert Nichols (Minneapolis: University of Minnesota Press, forthcoming); Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Malden, MA: Polity, 2013); Nancy Fraser, “Expropriation and Exploitation in Racialized Capitalism,” *Critical Historical Studies* 3, no. 1 (Spring 2016); David Harvey, *The New Imperialism* (Oxford: Oxford University Press, 2005); Edward Said, *The Politics of Dispossession: The Struggle for Palestinian Self-Determination, 1969–1994* (New York: Random House, 1994). See also Catherine Kellogg, “‘You May Be My Body for Me’: Dispossession in Two Valances,” *Philosophy and Social Criticism* 43, no. 1 (2017).
- 11 Harvey, Butler, Athanasiou, and a host of commentators continually reference the hundreds of millions of Indigenous peoples who constitute the “Fourth World,” but they rarely think with or alongside them. In Harvey’s work, Indigenous peoples make a brief appearance in a long enumeration of the processes of dispossession, which are said to include “the commodification and privatization of land and the forceful expulsion of peasant populations; the conversion of various forms of property rights (common, collective, state, etc.) into exclusive property rights; the suppression of rights to the commons; the commodification of labour power and the suppression of alternative (indigenous) forms of production and consumption; colonial, neo-colonial, and imperial processes of appropriation of assets (including natural resources); the monetization of exchange and taxation, particularly of land; the slave trade; and usury, the national debt, and ultimately the credit system.” The list expands: “Biopiracy . . . the pillaging of the world’s stockpile of genetic resources . . . the escalating depletion of the global environmental commons . . . the commodification of cultural forms, histories, and intellectual creativity . . . the corporatization and privatization of hitherto public as-

sets,” and so on. Harvey, *The New Imperialism*, 145, 148. For Butler and Athanasiou, their appearance is even more fleeting. We hear speak of “the dispossession of indigenous peoples and the occupation of Palestinian lands and resources,” and of “prevailing assumptions about what constitutes land as colonial settler space,” but these remain fragments, glimpsed only momentarily in a dense thicket of examples, comparisons, and analogies that operate in a frustrating range of locales and theoretical registers. Butler and Athanasiou, *Dispossession*, 11.

- 12 The concept of dispossession is central to work in settler colonial and Indigenous studies across a wide range of academic disciplines—including history, anthropology, political theory, performance studies, etc.—as well as in nonacademic, activist, and community organizing circles. For a small sample of the voluminous academic literature in which the term appears prominently, see Brenna Bhandar and Davina Bhandar, eds., “Reflections on Dispossession: Critical Feminisms,” special issue, *Darkmatter* 14 (2016); Jean O’Brien, *Dispossession by Degrees: Indian Land and Identity in Natick, Massachusetts, 1650–1790* (Cambridge: Cambridge University Press, 1997); Julie Kaye, *Responding to Human Trafficking: Dispossession, Colonial Violence, and Resistance among Indigenous and Racialized Women* (Toronto: University of Toronto Press, 2017); Stephanie Fitzgerald, *Native Women and Land: Narratives of Dispossession and Resurgence* (Albuquerque: University of New Mexico Press, 2015); Allen Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* (Cambridge: Cambridge University Press, 2018); Lindsay Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands* (Oxford: Oxford University Press, 2007); Adele Perry, “The Colonial Archive on Trial: Possession, Dispossession, and History in *Delgamuukw v. British Columbia*,” in *Archive Stories: Facts, Fictions, and the Writing of History*, ed. Antoinette Burton (Durham, NC: Duke University Press, 2005); Paige West, *Dispossession and the Environment: Rhetoric and Inequality in Papua New Guinea* (New York: Columbia University Press, 2016). On the more activist side, in a series of blog posts, the Delaware scholar Joanne Barker connects recent violence against African Americans and Native Americans. See Joanne Barker, “Dispossessions in Ferguson,” *Tequila Sovereign* (blog), August 21, 2014, <https://tequilasovereign.com/2014/08/21/dispossessions-in-ferguson/>.
- 13 Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 7. Audra Simpson defines settler colonialism as “an ongoing structure of dispossession that targets Indigenous peoples for elimination.” Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Durham, NC: Duke University Press, 2014), 74.
- 14 For a set of sharp exchanges along these lines, see Bonita Lawrence and Enakshi Dua, “Decolonizing Antiracism,” *Social Justice* 32, no. 4 (2005); Nandita Sharma and Cynthia Wright, “Decolonizing Resistance, Challenging Colonial States,” *Social Justice* 35, no. 3 (2008–9); Jared Sexton, “The *Vel* of Slavery: Tracking the Figure of the Unsovereign,” *Critical Sociology* 42, nos. 4–5 (2016); Iyko Day, “Being or

- Nothingness: Indigeneity, Antiracism, and Settler Colonial Critique,” *Critical Ethnic Studies* 1, no. 2 (Fall 2015).
- 15 This approach is informed by James Tully, “Public Philosophy as a Critical Activity,” in *Public Philosophy in a New Key*, vol. 1 (Cambridge: Cambridge University Press, 2008). I have paraphrased his gloss on Wittgenstein’s objection to a general theory of language (26).
 - 16 Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015).
 - 17 Keith Windshuttle, “The Fabrication of Aboriginal History,” *New Criterion* 20, no. 1 (September 2001): 46. See also Keith Windshuttle, *The Fabrication of Aboriginal History* (Sydney: Macleay Press, 2002).
 - 18 “Nowhere in the Tasmanian language, or indeed mindset, was there ‘land’ in the sense that we use it, that is, as a two-dimensional space marked out with definite boundaries, which can be owned by individuals or groups, which can be inherited, which is preserved for the exclusive use of its owner, and which carries sanctions against trespassers. In other words, in Tasmania there was nothing that corresponded to Frank Brennan’s notion of ‘land to which no other persons have any moral claim.’” Keith Windshuttle, “Chapter 11: *Mabo* and the Fabrication of Aboriginal History,” *Upholding the Australia Constitution: Proceedings of the Samuel Griffith Society* 15 (2003): 120.
 - 19 Moreton-Robinson, *The White Possessive*, 150.
 - 20 I analyze this argument at length in Robert Nichols, “Indigeneity and the Settler Contract Today,” *Philosophy and Social Criticism* 39, no. 2 (February 2013).
 - 21 Jeremy Waldron, “Indigeneity? First Peoples and Last Occupancy,” *New Zealand Journal of Public and International Law* 1 (2003): 57, quoting W. H. Oliver, “The Fragility of Pakeha Support,” in *Kokiri ngatahi/Living Relationships: The Treaty of Waitangi in the New Millennium* ed. Ken S. Coates and P. G. McHugh (Wellington: Victoria University Press, 1988), 223.
 - 22 Sharma and Wright, “Decolonizing Resistance, Challenging Colonial States,” 121. This article is a reply to Lawrence and Dua, “Decolonizing Antiracism.”
 - 23 Sexton, “The *Vel* of Slavery.” For a rejoinder, see Iyko Day, “Being or Nothingness: Indigeneity, Antiracism, and Settler Colonial Critique,” *Critical Ethnic Studies* 1, no. 2 (Fall 2015).
 - 24 For an argument that follows a similar logic, applied now to the Canadian context, see Tom Flanagan, Christopher Alcantara, and André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen’s University Press, 2010).
 - 25 For an overview, see Michael Corballis, *The Recursive Mind: The Origins of Human Language, Thought, and Civilization* (Princeton, NJ: Princeton University Press, 2011), chap. 1.
 - 26 Max Horkheimer, quoted in James Bohman, “Critical Theory,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2015 ed., <http://plato.stanford.edu/entries/critical-theory/>.

- 27 Bohman, “Critical Theory.”
- 28 Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), 5. This approach to critical theory is resonant with that of James Tully; see Tully, *Public Philosophy in a New Key*, esp. vol. 1, part 1.

1. THAT SOLE AND DESPOTIC DOMINION

Epigraph: William Blackstone, *Commentaries on the Laws of England*, 9th ed., ed. William Sprague (Chicago: Callaghan, 1915), vol. 2, chap. 1, “Of Property in General.”

- 1 My understanding of this historical context is indebted to Susan Reynolds, *Before Eminent Domain: Toward a History of Expropriation of Land for the Common Good* (Chapel Hill: University of North Carolina Press, 2010); Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500–2000* (Cambridge: Cambridge University Press, 2014), esp. chaps. 1 and 2; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), esp. chaps. 1 and 2; Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge: Cambridge University Press, 2007). For more detailed comparative historical work on the reception of the idea of “expropriation” in the Classical Greek, Roman, and early medieval world, see *L’Expropriation/Expropriation*, Recueils de la Société Jean Bodin 67 (Brussels: DeBoeck Université, 2000). On the specific use of expropriation (and related terminology) in Roman law, see J. Walter Jones, “Expropriation in Roman Law,” *Law Quarterly Review* 45 (1929); Fritz Schulz, *Classical Roman Law* (Oxford: Clarendon, 1951), part IV.
- 2 See Daniel Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* (Chicago: University of Chicago Press, 2007); Silvana Siddali, *From Property to Person: Slavery and the Confiscation Acts, 1861–1862* (Baton Rouge: Louisiana State University Press, 2005).
- 3 The distinction here between expropriation and confiscation is indebted to Susan Reynolds, *Before Eminent Domain*, introduction. For two large, comparative studies, see Johan Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Portland, OR: Hart, 2017); Malin Thunberg Shunke, *Extended Confiscation in Criminal Law: National, European, and International Perspectives* (Cambridge, UK: Intersentia, 2017).
- 4 Hugo Grotius, *On the Law of War and Peace* (Cambridge: Cambridge University Press, 2012), chap. 14, para. 7, 226.
- 5 Blackstone, *Commentaries*, 1:138, quoted in Reynolds, *Before Eminent Domain*, 102.
- 6 The framework of feudal hierarchy was particularly important in France. See *L’Expropriation/Expropriation*, chaps. II–V.

- 7 Language becomes awkward here, as it is nearly impossible to discuss the topic without imposing a contemporary framework of (subjective) rights to property. The extent to which we can ascribe such conceptual vocabulary to Roman law is itself a source of endless debate, which is not discussed here.
- 8 Considerable controversy persists over the extent to which *res nullius* can be spoken of as a category of Roman law itself, or only as a later development that has been retrospectively imposed onto the Roman world. Here, I follow Andrew Fitzmaurice, who argues that “the term *res nullius* is absent . . . in the Roman law discussions of occupation,” while conceding that the idea is “implicit” therein. At any rate, the term was itself “employed in medieval civil law, but it was not a widely used and reified tool in the law of nations before the eighteenth century.” Fitzmaurice, *Sovereignty, Property, and Empire*, 51.
- 9 John Locke, *The Second Treatise of Government*, 2nd ed. (Cambridge: Cambridge University Press, 1988), 286, § 25.
- 10 In *Encyclopédie*, Diderot cites Grotius, Pufendorf, and Montesquieu when he defines “le domaine eminent” as the sovereign’s right to take property for the public good. See Denis Diderot and Jean le Rond d’Alembert, *Encyclopédie, ou, Dictionnaire raisonné des sciences, des arts et des métiers* (Paris: Briasson, 1751).
- 11 See Arthur Lenhoff, “Development of the Concept of Eminent Domain,” *Columbia Law Review* 42 (1942); John Lewis, *A Treatise on the Law of Eminent Domain in the United States* (Chicago: Callagan, 1888); Philip Nichols, *The Law of Eminent Domain: A Treatise on the Principles of Which Affect the Taking of Property for the Public Use*, 2 vols., 2nd ed. (Albany, New York: Matthew Bender, 1917); Ellen Frankel Paul, *Property Rights and Eminent Domain* (New Brunswick, NJ: Transaction Books, 1987); William B. Stoebuck, “A General Theory of Eminent Domain,” *Washington Law Review* 47, no. 4 (August 1972); Raymond Rice, “Eminent Domain from Grotius to Gettysburg,” *American Bar Association Journal* 53, no. 11 (November 1967).
- 12 P. Nichols, *The Law of Eminent Domain*, 4. Around the turn of the century, Philip Nichols defines eminent domain as a collective power, ultimately held by the people as a whole, which, he complains, has been “seriously abraded . . . [and] subordinated in so many vital features to the rights of individual ownership . . . often without the express consent of the people” (4).
- 13 Peter Linebaugh, *The Magna Carta Manifesto* (Berkeley: University of California Press, 2008), appendix 1, 289. The original Latin reads: “Nullus liber homo capiatur vel imprisonetur aut disseisiat aut utlagetur aut exuletur aut aliquo modo destruatur, nec super eum ibimus nec super eum mittemus nisi per legale iudicium parium suorum vel per legem terre.”
- 14 E.g., “If one plant, sow, build, or possess a convenient Seat, others may probably be expected to come prepared with forces united, to dispossesse, and deprive him, not only of the fruit of his labour, but also of his life, or liberty. And the Invader again is in the like danger of another.” Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1996), 87.

- 15 G. O. Sayles, *The Medieval Foundations of England* (London: Methuen, 1966), 339; "Assize," in *Encyclopedia Britannica*, 11th ed., ed. Hugh Chisholm (Cambridge: Cambridge University Press, 1911).
- 16 At least this was true for sovereignty as it had been predominantly known and experienced by Europeans to that point.
- 17 As Alan Ryan summarizes the Rousseauian view: "Large property leads to corruption as the rich man tries to buy his fellow citizens; moveable property leads to corruption as it allows men to take their wealth wherever they choose, and it allows them to escape the censorship of their fellow citizens; the rise of money and commerce leads to corruption as it exacerbates these tendencies by creating a dependent urban mob who will follow the bidding of their corrupters." Alan Ryan, *Property and Political Theory* (New York: Basil Blackwell, 1984), 49.
- 18 Jean-Jacques Rousseau, *Discourse on the Origin and Foundations of Inequality among Men, or Second Discourse* (1755), in *Rousseau: The Discourses and Other Early Political Writings*, ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), 161.
- 19 Thomas Paine, "Agrarian Justice," in *Rights of Man, Common Sense, and Other Political Writings* (Oxford: Oxford University Press, 1995). Its full title is "Agrarian Justice, Opposed to Agrarian Law, and to Agrarian Monopoly. Being a Plan for Meliorating the Condition of Man, Etc."
- 20 Paine, "Agrarian Justice," 419.
- 21 Paine, "Agrarian Justice," 418.
- 22 Paine, "Agrarian Justice," 420.
- 23 *Return of Owners of Land*, 2 vols. (London: Her Majesty's Stationery Office, 1873).
- 24 Pierre-Joseph Proudhon, *General Idea of Revolution in the Nineteenth Century* (1851; repr., New York: Haskell House, 1969), 195.
- 25 Cf. Pierre-Joseph Proudhon, *What Is Property?* (1840; repr., Cambridge: Cambridge University Press, 1993).
- 26 Peter Kropotkin, *The Conquest of Bread and Other Writings* (Cambridge: Cambridge University Press, 1995), 48, 65–66; Peter Kropotkin, *La conquête du pain* (Paris: Les Éditions invisibles, 2009), 28: "L'expropriation, tel est donc le problème que l'histoire a posé devant nous, hommes de la fin du XIXe siècle. Retour à la communauté de tout ce qui lui servira pour se donner le bien-être."
- 27 Some of Marx's earliest writings on the topic are found in his 1842–43 articles for the *Rheinische Zeitung*. See Karl Marx, "Debates on the Theft of Wood," in Ben-said, *The Dispossessed*, appendix.
- 28 As he put it in an 1865 letter, the deficiency of Proudhon's work "is indicated by its very title. The question is so badly formulated that it cannot be answered correctly. . . . The upshot is at best that the bourgeois legal conceptions of 'theft' apply equally well to the 'honest' gains of the bourgeois himself. On the other hand, since 'theft' as a forcible violation of property presupposes the existence of property, Proudhon entangled himself in all sorts of fantasies, obscure even to himself,

- about *true bourgeois property*.” Karl Marx, “Letter to J. B. Schweizer [5 Feb. 1865],” in Karl Marx and Friedrich Engels, *Collected Works*, vol. 20 (New York: Progress, 1985), 32.
- 29 Max Stirner, *The Ego and Its Own* (1844; repr., Cambridge: Cambridge University Press, 1995), 223.
 - 30 The period of the 1872 French translation of *Das Kapital* is a telling transitional moment in this movement between Germanic and Latinate terms. In at least one edition of *Das Kapital* from 1872 (i.e., after the publication of the French translation), most of the references to “expropriation” have been replaced with “enteignung.” So, for instance, the subtitle for part VIII, chapter 2, becomes “Enteignung des Landvolks von Grund und Boden” rather than “Expropriation des Landvolks von Grund und Boden.” See Karl Marx, *Das Kapital* (Cologne: Anaconda, 2009). I have still not been able to determine why these changes were made. For a sense of the meanings behind these terms in Germany and Austria, see Rudolf Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht* (Berlin: Springer Verlag, 1985); Franz-Stefan Meissel and Paul Oberhammer, “Die Entwicklung des Enteignungsrechts in Österreich seit dem 18. Jahrhundert,” and Markus Steppan, “Der Entzug des Nutzungseigentumes in den bäuerlichen Weistümern und den Landesordnungsentwürfen,” both in *L’Expropriation/Expropriation*, *Receuil de la Société Jean Bodin* 67 (Brussels: DeBoeck Université, 2000).
 - 31 E.g., “Der Prozeß, der das Kapitalverhältniß *schafft*, kann also nichts anders sein als der *Scheidungsprozeß des Arbeiters vom Eigentum an seinen Arbeitsbedingungen*, ein Prozeß, der einerseits die gesellschaftlichen Lebens- und Produktionsmittel in *Kapital verwandelt*, andererseits die unmittelbaren Produzenten in *Lohnarbeiter*. Die sog. *ursprüngliche Akkumulation* ist also nichts als der *historische Scheidungsprozeß von Producent und Produktionsmittel*.” Karl Marx and Friedrich Engels, *Marx-Engels Gesamtausgabe* (Berlin: Dietz, 1975), II,5, *Das Kapital: Kritik der Politischen Ökonomie*, Erster Band (Hamburg, 1867) (1967), 575.
 - 32 This subsumption is unpacked in detail in the next chapter.
 - 33 This issue is recently explored by the Biniza scholar Isabel Altamirano-Jiménez in *Indigenous Encounters with Neoliberalism* (Vancouver: University of British Columbia Press, 2013). On the other side of deracination, Audra Simpson frequently pairs dispossession with containment: e.g., “the political project of dispossession and containment, as it actually works to contain, to fetishize and entrap and distill Indigenous discourses into memorizable, repeatable rituals for preservation against a social and political death that was foretold but did not happen.” Simpson, *Mohawk Interruptus*, 99; see also 16, 105.
 - 34 Patricia Monture-Angus, *Journeying Forward* (Halifax: Fernwood, 1999), 36, quoted in Andrea Smith, “Native Studies at the Horizon of Death,” in *Theorizing Native Studies*, ed. Audra Simpson and Andrea Smith (Durham, NC: Duke University Press, 2014), 222.
 - 35 See chapter 3 and the conclusion in particular.

- 36 For a useful overview, see C. B. MacPherson, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978), chap. 1.
- 37 See Derek Hall, *Land* (Cambridge, UK: Polity, 2013). This conceptual point is further elaborated in relation to Hegel and Marx in the next chapter.
- 38 For a useful unpacking of the various alternative meanings attached to the term from an Indigenous (Seneca) perspective, see Mishuana Goeman, “From Place to Territories and Back Again,” *International Journal of Critical Indigenous Studies* 1, no. 1 (2008).
- 39 Notice, for instance, that *Johnson v. M’Intosh* (1823)—probably the single most important U.S. Supreme Court decision on Indigenous title—did not involve any Indigenous participation. Instead, it was a conflict between Anglo settler parties who had acquired their land from Indigenous peoples (in this case, the Piankeshaw Nation) in two different ways: direct purchase vs. government lease. Both claimants and plaintiffs had an interest in supporting a form of Indigenous property right but only to show that it had been alienated to them in the proper manner. In fact, there is evidence to suggest that no actual conflict between these settler claims took place and that it was entirely contrived to generate a justiciable case. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681, 1823 U.S. LEXIS 293; Robertson, *Conquest by Law*.
- 40 Vine Deloria Jr., *Custer Died for Your Sins*, rev. ed. (Norman: University of Oklahoma Press, 1988), 7, 30, emphasis added. For a recent, brilliant explication of Deloria’s contributions to political theory, see David Temin, “Custer’s Sins: Vine Deloria Jr. and the Settler-Colonial Politics of Civic Inclusion,” *Political Theory* 46, no. 3 (2018).
- 41 For a philosophical elaboration of this idea, see G. W. F. Hegel, *Hegel’s Philosophy of Right*, trans. and with notes by T. M. Knox (Oxford: Oxford University Press, 1967), §§ 53–70, pp. 46–57.
- 42 In this chapter, I have focused on the issue of property over that of sovereignty, on *dominium* over *imperium*. This is not to say that the latter is unimportant, or that a similar logic did not also there obtain. Consider *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, at 1017: “Aboriginal title is a burden on the Crown’s underlying title. The Crown, however, did not gain this title until it asserted sovereignty and it makes no sense to speak of a burden on the underlying title before that title existed. Aboriginal title crystallized at the time sovereignty was asserted.” And, of course, these two issues are deeply interrelated in any practical context.
- 43 On the rise of the Anglophone world in the nineteenth century, see James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783–1939* (Oxford: Oxford University Press, 2009). On the “metaphysical revolution,” see John Weaver, *The Great Land Rush and the Making of the Modern World, 1650–1900* (Montreal: McGill-Queen’s University Press, 2006), 93.
- 44 Weaver, *The Great Land Rush*, 92–93.
- 45 Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944; repr., Boston: Beacon, 2001), 187.

- 46 “It was in this context that British settlers first used the argument of occupation to make claims against both the Indians and the Crown. But just as the British diplomatic middle ground was a Frankenstein monster, so was the middle ground of property rights that was now created by the settlers. Rather than being based upon negotiation and accommodation, it left no room for the Indians; indeed, it was predicated upon their dispossession and dehumanisation.” Fitzmaurice, *Sovereignty, Property, and Empire*, 189.
- 47 Edward L. Glaeser, “A Nation of Gamblers: Real Estate Speculation and American History,” *American Economic Review: Papers and Proceedings* 103, no. 3 (2013): 2. This reflects a long-standing narrative of historical progress in the development of land policy in the United States; see, e.g., Marion Clawson, *Man and Land in the United States* (Lincoln: University of Nebraska Press, 1964); Marion Clawson, *Uncle Sam’s Acres* (New York: Dodd, Mead, 1951). See also Charles Grant, “Land Speculation and the Settlement of Kent, 1738–1760,” *New England Quarterly* 28, no. 1 (1955).
- 48 Richard T. Ely, “Land Speculation,” *Journal of Farm Economics* 2, no. 3 (1920).
- 49 Payson Jackson Treat, *The National Land System, 1785–1820* (New York: E. B. Treat, 1910).
- 50 Glaeser, “A Nation of Gamblers,” 10. See also Paul Frymer, *Building an American Empire: The Era of Territorial and Political Expansion* (Princeton, NJ: Princeton University Press, 2017); Gordon Chappell, “Some Patterns of Land Speculation in the Old Southwest,” *Journal of Southern History* 15, no. 4 (1949).
- 51 Treat, *The National Land System*.
- 52 Murray Rothbard, *The Panic of 1819: Reactions and Policies* (Auburn, AL: Ludwig von Mises Institute, 2007).
- 53 Purchasers were then expected to pay up to one-fourth within forty days of purchase, and the remainder in annual installments, beginning two years after the purchase date.
- 54 Thomas Greer, “Economic and Social Effects of the Depression of 1819 in the Old Northwest,” *Indiana Magazine of History* 44, no. 3 (1948).
- 55 See Homer Hoyt, *One Hundred Years of Land Values in Chicago* (Chicago: University of Chicago Press, 1933). Adjusted to 2012 prices, land is estimated to have increased from approximately \$800 to \$320,700 per acre from 1830 to 1836. Adjusted values are from Glaeser, “A Nation of Gamblers,” 17.
- 56 On the Chicago boom and bust, see Robert Siller, “Historic Turning Points in Real Estate: Presidential Address,” *Eastern Economic Journal* 34, no. 1 (2008).
- 57 Belich, *Replenishing the Earth*, 345.
- 58 Roxanne Dunbar-Ortiz, *An Indigenous Peoples’ History of the United States* (New York: Beacon, 2015), 140.
- 59 K-Sue Park, “Money, Mortgages, and the Conquest of America,” *Law and Society Inquiry* 41, no. 4 (2016).
- 60 Dunbar-Ortiz, *An Indigenous Peoples’ History*, 97.
- 61 Dunbar-Ortiz, *An Indigenous Peoples’ History*, 124. See also Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007), 14.

- 62 Knox goes on to argue that the United States will be able to more effectively and cheaply acquire lands from the “Indian Tribes” through a mixed approach, one that uses coercion but primarily as a means to force contract and sale: “As the settlements of the whites shall approach near to the Indian boundaries established by treaties, the game will be diminished, and the lands being valuable to the Indians only as hunting grounds, they will be willing to sell further tracts for small considerations. By the expiration, therefore, of the above period, it is most probable that the Indians will, by the invariable operation of the causes which have hitherto existed in their intercourse with the whites, be reduced to a very small number.” Henry Knox, “Report on the Northwestern Indians (June 15, 1789),” in *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774–1875*, American State Papers, *Indian Affairs*, 1:13–14, <https://memory.loc.gov/ammem/amlaw/lwsplink.html>.
- 63 “Congress in 1785 felt compelled to issue a proclamation forbidding unlawful settlement and authorized the Secretary of War to remove those who had settled on the public domain in violation of the law. . . . In 1791 a congressman stated that 300,000 families (highly exaggerated) had settled south of the French Broad and Big Pigeon rivers in present eastern Tennessee.” Everett Dick, *The Lure of the Land: A Social History of the Public Lands from the Articles of Confederation to the New Deal* (Lincoln: University of Nebraska Press, 1970), 50. See also Amelia For, *Colonial Precedents of Our National Land System*, Bulletin of the University of Wisconsin, History Series II, no. 2 (Madison: University of Wisconsin, 1910).
- 64 Dick, *The Lure of the Land*, 51.
- 65 Act of March 3, 1807, “An Act to prevent settlements being made on lands ceded to the United States, until authorized by law,” in *A Century of Law-Making for a New Nation: Congressional Documents and Debates, 1774–1875*, 9th Congress, 2nd Session (Washington, DC: Annals of Congress, 1807), <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=016/llac016.db&recNum=640>.
- 66 Dick, *Lure of the Land*, 53.
- 67 Walter Benjamin, “The Critique of Violence,” in *Reflections: Essays, Aphorisms, Autobiographical Writings* (New York: Schocken Books, 1978), 277–300. For an application of Benjamin’s distinction to U.S. colonial violence against Indigenous peoples, see Joan Cocks, “The Violence of Structures and the Violence of Foundings,” *New Political Science* 34, no. 2 (2012).
- 68 Judge Harry Toulmin to the president, January 20, 1816, in *The Territorial Papers of the United States, Mississippi Territory*, vol. 6, ed. Clarence Carter (Washington, DC: Government Printing Office, 1938), 644–47, cited in Dick, *Lure of the Land*, 53. One is put in mind here of the famous line from Bertolt Brecht’s *Threepenny Opera*, spoken by the criminal Macheath: “What is the robbing of a bank compared to the founding of one?” Bertolt Brecht, *The Threepenny Opera* (1928; repr., London: Methuen Drama, 2005), act 3, sc. 3.
- 69 Dick, *The Lure of the Land*, 51. See also William Lester, *Decisions of the Interior Department in Public Land Cases* (Philadelphia, 1860), 28–30.

- 70 I have consulted the following Congressional legislation in the composition of this section: Ordinance of April 23, 1784, in *Journals of the Continental Congress, 1774–1789*, ed. Worthington C. Ford et al. (Washington, DC, 1904–37), 26:275–79; Ordinance of May 20, 1785, in *Journals of the Continental Congress, 1774–1789*, ed. Worthington C. Ford et al. (Washington, DC, 1904–37), 28:375–82; Ordinance of July 13, 1787, in *Journals of the Continental Congress, 1774–1789*, ed. Worthington C. Ford et al. (Washington, DC, 1904–37), 32:332–43; Ordinance of May 26, 1790 (1st Congress), 1 Stat. 123; Act of March 3, 1801 (6th Congress), Ch. XXIII, 2 Stat. 112–14; Act of April 25, 1812 (12th Congress), Ch. LXVIII, 2 Stat. 716–18; Act of September 4, 1841 (27th Congress), Ch. XVI, 5 Stat. , 453–58; Act of September 27, 1850 (31st Congress), Ch. LXXVI, 9 Stat. 496–500; Act of July 17, 1854 (33rd Congress), Ch. LXXXIV, 10 Stat. 305–6; Act of July 22, 1854 (33rd Congress), Ch. CIIL, 10 Stat. , 308–10; Act of March 2, 1855 (33rd Congress), Ch. CXXXIV, 10 Stat. 626; Act of March 3, 1855 (33rd Congress), Ch. CCVII, 10 Stat. , 701–2; Act of May 20, 1862 (37th Congress), Ch. LXXV, 12 Stat. 392–93; Act of March 3, 1865 (38th Congress), Ch. CIX, 13 Stat. 530–32; Act of March 3, 1865 (38th Congress), Ch. XXVII, 13 Stat. 541–63; Act of June 21, 1866 (39th Congress), Ch. CXXVII, 14 Stat. 66–67; Act of March 3, 1873 (42nd Congress), Ch. CCLXXVII, 17 Stat. 605–6; Act of March 3, 1875 (43rd Congress), Ch. CXXXII, 18 Stat. 402–20; Act of February 2, 1887 (49th Congress), Ch. CXIX, 24 Stat. 33–36 [“The Dawes Act”]; Act of March 3, 1891 (57th Congress), Ch. DLXI, 26 Stat. 1095–103. See also Dick, *The Lure of the Land*, 56; Lester, *Decisions*, 64–65.
- 71 Dick, *The Lure of the Land*, 56; Lester, *Decisions*, 64–65.
- 72 Roy Robbins, *Our Landed Heritage: The Public Domain, 1776–1936* (New York: Peter Smith, 1950), 50.
- 73 Robbins, *Our Landed Heritage*, 89–90.
- 74 See *Johnson v. M’Intosh*; Robertson, *Conquest by Law*.
- 75 On homesteading and allotment possibilities for Indians, see Act of March 3, 1865 (38th Congress), Ch. CIX, 13 Stat. 530–32; Act of March 3, 1865 (38th Congress), Ch. XXVII, 13 Stat. 541–63; Act of May 20, 1862 (37th Congress) Ch. LXXV, 12 Stat. 392–93 [“The Homestead Act”].
- 76 Act of March 3, 1875 (43rd Congress), Ch. CXXXII, 18 Stat. 402–20. The litany of funding provisions for “Indian relations” in this appropriations bill is a veritable survey of the range of U.S.-Indigenous relations at the time. It includes specific funding provisions for the “suppression of Indian hostilities” in Montana; educational and social benefits and subsistence monies for the Seminole, Kickapoo, Navajo, Apache, and Northern Sioux; the sale of bonds to the Pottawatomic and Choctaw; and the forced removal of the Pia Ute.
- 77 Act of February 2, 1887 (49th Congress), Ch. CXIX, 24 Stat. 33–36 [“The Dawes Act”].
- 78 David Chang, “Enclosures of Land and Sovereignty,” *Radical History Review*, no. 109 (Winter 2011): 108. See also David Chang, *The Color of the Land: Race,*

- Nation, and the Politics of Landownership in Oklahoma, 1832–1929* (Chapel Hill: University of North Carolina Press, 2010).
- 79 Fitzmaurice, *Sovereignty, Property, and Empire*, 189; see also 172.
- 80 Patrick Wolfe has called this waiting period the “lethal interlude.” Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, no. 4 (2006): 393.
- 81 “To the frontiersman, whether orderly settler or venturesome ‘squatter,’ the land was a not a fiscal resource but a potential national asset which his own enterprise and resourcefulness alone could capitalize for the nation.” Chester Martin, *Dominion Lands Policy*, ed. Lewis Thomas (Toronto: McClelland and Stewart, 1973), 118.
- 82 My understanding of the comparative dimensions of these processes has been greatly aided by the work of Brenna Bhandar. See, in particular, Brenna Bhandar, “Possession, Occupation and Registration: Recombinant Ownership in the Settler Colony,” *Settler Colonial Studies* 6, no. 2 (2016); Brenna Bhandar, “Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony,” *Journal of Law and Society* 42, no. 2 (2015); Brenna Bhandar, “Property, Law, and Race: Modes of Abstraction,” *UC Irvine Law Review* 4, no. 1 (2014).
- 83 Weaver, *The Great Land Rush*, 19. Weaver is citing, and correcting, Donald Worster, *Dust Bowl: The Southern Plains in the 1930s* (New York: Oxford University Press, 1979), 87.
- 84 This is not true of important regions in the country. In some parts of Eastern Canada, as well as the majority of British Columbia in the west, no such formal treaties were signed. On the distinctiveness of the latter case, see Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver: University of British Columbia Press, 1990).
- 85 E.g., C. E. S. Franks, “Indian Policy: Canada and the United States Compared,” in *Aboriginal Rights and Self Government*, ed. Curtis Cook and Joan Lindau (Montreal: McGill-Queen’s University Press, 2000), chap. 9; J. R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).
- 86 Lillian Gates, *Land Policies of Upper Canada* (Toronto: University of Toronto Press, 1968).
- 87 Martin, *Dominion Lands Policy*, 119.
- 88 The Dominion Lands Act, 35 Vic. c.23 (1872). There were some differences between the two pieces of legislation. The Canadian law only applied to male farmers; it allowed for the purchase of more adjacent lands than the U.S. version and contained specific provisions against settling lands near railroad lines or other key public lands. Martin, *Dominion Lands Policy*, esp. chap. 7, “The Free-Homestead System: The Background in the United States,” 116–27. As Martin goes on to elaborate: “In any event the direct influence of the United States, by precept and example, was too powerful in the early seventies to be withstood. Their experience

in dealing with many of the same problems on a much larger scale was a veritable quarry for Canadian policy. Not only were the chief problems—expansions, transportation, settlement—the same, but many of the policies that were appropriated, the nomenclature applied or misapplied to them, the analogies, usually false and misleading, that were cited for federal control, were to be found ready-made in the United States.” Martin, *Dominion Lands Policy*, 117.

- 89 Gates, *Land Policies of Upper Canada*, esp. chaps. 14–16.
- 90 Sidney Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998).
- 91 Cole Harris, “How Did Colonialism Dispossess? Comments from an Edge of Empire,” *Annals of the Association of American Geographers* 94, no. 1 (2004).
- 92 Sarah Carter, *Lost Harvests: Prairie Indian Reservation Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990); Daschuk, *Clearing the Plains*.
- 93 An Act to Encourage the Gradual Civilization of Indian Tribes in This Province, and to Amend the Laws Relating to Indians, 20 Vic. c.26 (1857); An Act Respecting the Civilization and Enfranchisement of Certain Indians, 22 Vic. c.9 (1859); An Act to Amend and Consolidate the Laws Respecting Indians (1876) [“The Indian Act”]. I have analyzed this process of “compulsory enfranchisement” in Nichols, “Contract and Usurpation.”
- 94 Eight Indigenous men were hanged: Kah-Paypamahchukways (Wandering Spirit); Pah Pah-Me-Kee-Sick (Walking the Sky); Manchoose (Bad Arrow); Kit-Ahwah-Ke-Ni (Miserable Man); Nahpase (Iron Body); A-Pis-Chas-Koos (Little Bear); Itka (Crooked Leg); Waywahnitch (Man Without Blood). For analysis from an Indigenous perspective, see Howard Adams, *Prison of Grass: Canada from a Native Point of View*, 2nd ed. (Markham, ON: Fifth House Books, 1989).
- 95 *St. Catharines Milling and Lumber Company v. R.*, CanLII 3, 13 SCR 577 (1887); UKPC 70, 14 App Cas 46 (1888), 49. See also Harring, *White Man's Law*, chap. 6.
- 96 *St. Catharines Milling*, 69.
- 97 Weaver documents the main steps in transitioning to sales in Canada. Weaver, *The Great Land Rush*, esp. 213–14. On the specific convergence of property laws, see John McLaren, A. R. Buck, and Nancy Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: University of British Columbia Press, 2005). On the more general convergence of U.S. and British imperial methods, see Julian Go, *Patterns of Empire: The British and American Empires, 1688 to the Present* (Cambridge: Cambridge University Press, 2011).
- 98 In this section, I draw from work by historians Stuart Banner, James Belich, and Miranda Johnson. See Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous Peoples from Australia to Alaska* (Cambridge, MA: Harvard University Press, 2007), esp. chaps. 2 (“New Zealand: Conquest by Contract,” 47–83) and 3 (“New Zealand: Conquest by Land Tenure Reform,” 84–127); James Belich, *New Zealand Wars and the Victoria Interpretation of Racial Conflict* (London: Penguin, 1998); Miranda Johnson, *The Land Is Our History* (Oxford: Oxford University

- Press, 2016). See also P. G. McHugh, Richard P. Boast, and Mark Hickford, *Law and Confiscation: Essays on the Raupatu in New Zealand* (Wellington, NZ: Victoria University of Wellington, 2016).
- 99 Banner, *Possessing the Pacific*, 59.
- 100 Banner, *Possessing the Pacific*, 57, citing BPPNZ, I Commons 42, W. L. Rees, *Reports of Meetings Held, and Addresses Given, by Mr. W. L. Rees, in Poverty Bay and Tologa Bay, upon the Subject of Native Lands* (Gisborne: Henry Edwin Webb, 1879).
- 101 Banner, *Possessing the Pacific*, 62.
- 102 Recent commentators have tried to narrow the gap between these two traditions. As one New Zealand judge put it, trying to explain the potential overlaps between the English common law system and that of the Māori: “It has always struck me for example that even amongst English people in talking, what they say is not necessarily what their own society as a body politic believes in, for example, I don’t know whether you own your own house, but if you did and I asked, ‘do you own your own house?’ you would probably say ‘Yes, I own my own house.’ . . . Yet the underlying belief system is that you don’t, you hold it in fee simple. . . . You in fact hold it in fee from the Crown which has a larger authority over you, you have the right to use it but you don’t absolutely own it, it is not an allodial title. . . . There is something bigger above you.” Johnson, *The Land Is Our History*, 150–51.
- 103 Banner, *Possessing the Pacific*, 67.
- 104 Banner, *Possessing the Pacific*, 83.
- 105 The violence and uncertainty of this protracted period of war should not be underestimated. As James Belich has shown at length, Victorian visions of a smooth and certain victory of “civilized” peoples over “savages” is historically inaccurate. For extended periods of time, over many conflicts in the nineteenth century, the Māori held the upper hand. It was only in the 1863–64 Waikato War, when the British committed an additional eighteen thousand troops, that the Māori were forced into subservience. Belich, *New Zealand Wars*.
- 106 Banner, *Possessing the Pacific*, 125.
- 107 Banner, *Possessing the Pacific*, 126–27.
- 108 “A paradox of the postcolonial critique of liberalism, and of its critique of Western political thought more broadly, is that it argues for a relatively coherent European political and legal understanding of international society and the non-European world, and in so doing slips into precisely the kind of rationalist universalism that it decries.” Fitzmaurice, *Sovereignty, Property, and Empire*, 13.
- 109 See also Weaver, *The Great Land Rush*.

2. MARX, AFTER THE FEAST

Epigraph: Karl Marx, *Capital: Volume 1*, trans. Ben Fowkes (London: Penguin Books, 1976), chap. 1, section 4, 168; hereafter cited as C, page #. Unless otherwise noted, references to the original text are from Karl Marx and Friedrich Engels,

Marx-Engels Gesamtausgabe, II,5, *Das Kapital: Kritik der Politischen Ökonomie*, Erster Band (Hamburg, 1867) (1967).

- 1 Polanyi, *The Great Transformation*, 187.
- 2 Polanyi, *The Great Transformation*, 187.
- 3 For a survey and critique of the language of “enclosures” as applied to the colonial context, see my conclusion.
- 4 Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen (New York: Telos, 2006); *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 2nd ed. (Berlin: Duncker and Humblot, 1974). A *nomos* is, in Schmitt’s rendering, the “first measure of all subsequent measures” (Schmitt, *The Nomos of the Earth*, 67). Schmitt differentiates this into two key aspects: *Landnahme* and *Landteilung*, or land appropriation and land division. However, in later works, he expands this to the tripartite configuration of appropriation, distribution, and production. Appropriation refers to the original acquisition or taking (*Nehmen*) of land, how it comes to be under the jurisdiction of a particular political order; distribution refers to the manner of internal division (*Teilen*) within that order; and production is the work done on and to the land (Schmitt’s word for this is *Weiden*, literally pasturage). So *Nehmen*, *Teilen*, and *Weiden* are said to be the three fundamental modes of relating to the earth underlying any particular spatial order (or *nomos*) listed in descending chronological and normative order. Original appropriation must take place before internal division, which in turn sets out the possibilities of production. Extrapolating from Schmitt, we might also consider these three different standpoints from which to view “land”: as the spatial or jurisdictional extent of sovereignty and public law, as a juridical object of private law, and as an object of use value and/or exchange value. In short: sovereignty, property, and economy.
- 5 “This is why a Marxist analysis should always be slightly stretched [*légèrement distendues*] when it comes to addressing the colonial issue.” Frantz Fanon, *The Wretched of the Earth* (New York: Grove, 2004), 5.
- 6 The two main contexts in which Marx discusses expropriation prior to *Capital* are his 1842 articles for the *Rheinische Zeitung* on *die Holzdiebe* and his episodic remarks on Ireland. See Bensaïd, *The Dispossessed*, appendix. On Ireland, see Kevin Anderson, *Marx at the Margins: On Nationalism, Ethnicity, and Non-Western Societies* (Chicago: University of Chicago Press, 2010), chap. 4. Marx also discusses Ireland in *Capital*, 854–70.
- 7 In one of his more famous formulations, Marx refers to capitalism as based in “the theft of alien labour time,” but since labor time is the medium of expressing labor power, this is tantamount to saying that the capital relation is predicated upon the systematic theft of labor power. See Karl Marx, *Grundrisse* (London: Penguin Books, 1993), 705. Elsewhere, Marx even suggests that paying the worker a “fair” wage (i.e., relatively to the value of her labor power) is still tantamount to theft: “Although equivalent is exchanged for equivalent, the whole thing still remains

- the age-old activity of the conqueror, who buys commodities from the conquered with the money he has stolen from them" (*C*, 728).
- 8 I am aware, of course, that the debate within Marxism over "exploitation" is vast, complex, and hardly settled. In discussing exploitation here, I am not intervening into this other field but rather using it purely to set up a contrast with the problem of expropriation or dispossession. My understanding of exploitation in Marx's *Capital* has been greatly assisted by William Clare Roberts's discussion in *Marx's Inferno: The Political Theory of "Capital"* (Princeton, NJ: Princeton University Press, 2017), esp. chap. 4.
 - 9 *Vogelfrei* is often rendered as "free as a bird" in English, although this is limited since it retains little of the negative connotations Marx intended. The German phrase does connote independence but also vulnerability, especially as a result of being cast out from normal society, i.e., alone and/or subject to being "hunted down." In English common law, the phrase *caput great lupinum* is something of an equivalent. Literally, "may he be a wolf's head" or "may his be a wolf's head," the phrase condemned subjects to the status of outlaw and pariah. It is the origin of the modern English phrase "a lone wolf." See Colin Dayan, *The Law Is a White Dog* (Princeton, NJ: Princeton University Press, 2011), 30.
 - 10 Capital appears in the moment of the emergence of the self-valorization (*Selbstverwertung*) of money (*C*, 255).
 - 11 I have purposely avoided the normative evaluation of exploitation as this is not my focus here.
 - 12 "Mit einem Wort: die Masse der Menschheit *exproprierte sich selbst* zu Ehren der 'Accumulation des Kapitals'" (*MEGA*, II,5, 613). In at least one German edition (based on the 1872 edition of *Das Kapital*), this has been changed to "*enteignete sich selbst*" (Marx, *Das Kapital*, 710).
 - 13 Rosa Luxembourge, *The Accumulation of Capital* (1913; repr., New York: Routledge, 2003), 349–50.
 - 14 For a provocative use of the analogy between state formation and organized crime, see Charles Tilly, "War Making and State Making as Organized Crime," in *Bringing the State Back In*, ed. Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985).
 - 15 We have here a nascent theory of "uneven development": "A consistent foundation for capitalist agriculture could only be provided by large-scale industry, in the form of machinery; it is large-scale industry which radically expropriates the vast majority of the agricultural population and completes the divorce between agriculture and rural domestic industry, tearing up the latter's roots, which are spinning and weaving. It therefore also conquers the entire home market for industrial capital, for the first time" (*C*, 912–13). On "uneven development," see Neil Smith, *Uneven Development: Nature, Capital, and the Production of Space*, 3rd ed. (Athens: University of Georgia Press, 2008).
 - 16 For a critical overview of these debates, see Ellen Meiksins Wood, *The Origin of Capitalism: A Longer View* (New York: Verso, 2002).

- 17 Peter Kropotkin, "Western Europe," in *The Conquest of Bread and Other Writings*, 221.
- 18 This emphasis on state power is perhaps the main reason why expropriation is the primary category of analysis in *The Conquest of Bread*. For instance, in a section that reads as though commentary on the contemporary Occupy movement (especially in the United States, where such focus has been placed on struggles over housing and foreclosures), Kropotkin writes in *Conquest of Bread* that "earnest revolutionists will work side by side with the masses, that the abolition of rent, the expropriation of houses, may become an accomplished fact. They will prepare the ground and encourage ideas to grow in this direction; and when the fruit of their labours is ripe, the people will proceed to expropriate the houses without giving heed to the theories which will certainly be thrust in their way—theories about paying compensation to landlords, and finding first the necessary funds. . . . For the expropriation of dwellings contains in germ the whole social revolution" (77, 81).
- 19 "While combating the present monopolization of land, and capitalism altogether, the anarchists combat with the same energy the state, as the main support of that system. Not this or that special form, but *the state altogether*." Kropotkin, "Anarchism," in *The Conquest of Bread and Other Writings*, 235. In 1876 Kropotkin met with German Lopatin, one of the two men to translate *Capital* into Russian. In their discussion, Kropotkin raised concerns about the basic theoretical claims underpinning Marx's analysis of capital, especially the labor theory of value. To this, Lopatin is reported to have replied that "the theory of value was not important" and that "Marx's main task was *to establish the historical origins of capital*." For Kropotkin at least, this reading shifted the emphasis away from the critique of political economy and toward the matter of primitive accumulation. See Kropotkin, "Western Europe," 221. (The first foreign translation of *Capital* was the Russian edition, a translation started by German Lopatin and completed by Nikolai Frantsevich Danielson, published in 1872.) Later, after the Russian Revolution, Kropotkin would write directly to Vladimir Lenin pleading the case for a decentralized, anarchist communism over against the authoritarian state socialism he feared was taking root. See Peter Kropotkin, "Message to the Workers of the Western Work," "Two Letters to Lenin," and "What Is to Be Done?," in *The Conquest of Bread and Other Writings*, 248–59.
- 20 Luxemburg, *The Accumulation of Capital*, 348–49.
- 21 Luxemburg, *The Accumulation of Capital*, 349.
- 22 For instance, Luxemburg's work earns unexpected praise from Hannah Arendt on precisely this point regarding primitive accumulation. See Hannah Arendt, *Imperialism: Part Two of the Origins of Totalitarianism* (New York: Harvest, 1979), 27–28. For a less surprising contemporary use, see David Harvey, *The New Imperialism* (Oxford: Oxford University Press, 2003).
- 23 Ranajit Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (Delhi: Oxford University Press, 1983); Ranajit Guha, *Dominance without Hegemony*

- (Cambridge, MA: Harvard University Press, 1998). See also Vivek Chibber, *Post-colonial Theory and the Specter of Capital* (New York: Verso, 2013), for a recent reinvigoration these debates.
- 24 More recently, Nancy Fraser has provided a renewed analysis of the feminist insight that the reproduction of social life constitutes a constitutive outside to capitalist accumulation in its primary mode (i.e., the exploitation of waged labour), explicitly drawing analogies to Rosa Luxemburg and the reworked theory of primitive accumulation. See Nancy Fraser, *Fortunes of Feminism: From Women's Liberation to Identity Politics to Anti-Capitalism* (New York: Verso, 2013).
 - 25 Silvia Federici, *Caliban and the Witch: Women, the Body, and Primitive Accumulation* (New York: Autonomedia, 2004), 12–13. In my analysis of primitive accumulation as an ongoing feature of capitalist reproduction and expansion, I have also benefited greatly from the following works: Robin Blackburn, *The Making of New World Slavery* (London: Verso, 1997); Glen Coulthard, “From Wards of the State to Subjects of Recognition? Marx, Indigenous Peoples, and the Politics of Dispossession in Denendeh,” in *Theorizing Native Studies*, ed. Audra Simpson and Andrea Smith (Durham, NC: Duke University Press, 2014); Massimo De Angelis, “Separating the Doing and the Deed: Capital and the Continuous Character of the Enclosures,” *Historical Materialism* 12, no. 2 (2004); Massimo De Angelis, “Marx and Primitive Accumulation: The Continuous Character of Capital's ‘Enclosures,’” *The Commoner*, no. 2 (September 2001); Todd Gordon, “Canada, Empire, and Indigenous Peoples in the Americas,” *Socialist Studies* 2, no. 1 (2006); Onur Ulas Ince, “Primitive Accumulation, New Enclosures, and Global Land Grabs: A Theoretical Intervention,” *Rural Sociology* 79, no. 1 (March 2013); Michael Perelman, *The Invention of Capitalism: Classical Political Economy and the Secret History of Primitive Accumulation* (Durham, NC: Duke University Press, 2000); Retort Collective, *Afflicted Powers: Capital and Spectacle in a New Age of War* (New York: Verso, 2005).
 - 26 Coulthard, *Red Skin, White Masks*, 10.
 - 27 See, in particular, Kevin Anderson, “Marx's Late Writings on Non-Western and Pre-capitalist Societies and Gender,” *Rethinking Marxism* 14, no. 4 (2002); Gareth Stedman Jones, “Radicalism and the Extra-European World: The Case of Karl Marx,” in *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought*, ed. Duncan Bell (Cambridge: University of Cambridge Press, 2007).
 - 28 Karl Marx, “A Letter to NK Mikailovsky,” in *Selected Writings*, by Karl Marx, ed. David McClelland (Oxford: Oxford University Press, 1987), 618. Marx makes the same point in his “Letter to Vera Zasulich,” in *Selected Writings*, 623–27.
 - 29 For a discussion of these, and key references, see Werner Bonefeld, “Primitive Accumulation and Capitalist Accumulation: Notes on Social Constitution and Expropriation,” *Science and Society* 75, no. 3 (July 2011); Jim Glassman, “Primitive Accumulation, Accumulation by Dispossession, Accumulation by ‘Extra-economic Means,’” *Progress in Human Geography* 30, no. 5 (2006); Derek Hall,

- “Primitive Accumulation, Accumulation by Dispossession and the Global Land Grab,” *Third World Quarterly* 34, no. 9 (2013); Derek Hall, “Rethinking Primitive Accumulation: Theoretical Tensions and Rural Southeast Asian Complexities,” *Antipode* 44, no. 4 (2012). Two oft-cited discussions on these distinctions include a special issue of *The Commoner*, no. 2 (September 2001), featuring contributions from the Midnight Notes Collective, Massimo De Angelis, Werner Bonefeld, Silvia Federici; and a special issue of *Rethinking Marxism* 23, no. 3 (July 2011), with contributions from Sandro Mezzadra, S. Charusheela, and Gavin Walker.
- 30 Harvey, *The New Imperialism*, 161.
- 31 On the “frontier” metaphor, see Anna Lowenhaupt Tsing, *Friction: An Ethnography of Global Connection* (Princeton, NJ: Princeton University Press, 2005); Sandro Mezzadra, “The Topicality of Prehistory: A New Reading of Marx’s Analysis of ‘So-Called Primitive Accumulation,’” *Rethinking Marxism: A Journal of Economics, Culture and Society* 23, no. 3 (2011). For influential renderings of “enclosures,” see E. P. Thompson, *Customs in Common* (New York: Merlin Press, 1991); *Midnight Notes*, no. 10 (1990).
- 32 Michael Levein, “The Land Question: Special Economic Zones and the Political Economy of Dispossession in India,” *Journal of Peasant Studies* 39, nos. 3–4 (2012): 940.
- 33 E.g., Wendy Wolford, Saturnino M. Borrás Jr., Ruth Hall, Ian Scoones, and Ben White, “Governing Global Land Deals: The Role of the State in the Rush for Land,” *Development and Change* 44, no. 2 (2013); Saturnino M. Borrás Jr. and Jennifer C. Franco, “Global Land Grabbing and Trajectories of Agrarian Change: A Preliminary Analysis,” *Journal of Agrarian Change* 12, no. 1 (2012).
- 34 For an influential critique of this historicism, see Dipesh Chakrabarty, *Provincializing Europe* (Princeton, NJ: Princeton University Press, 2000).
- 35 Ince, “Primitive Accumulation,” 106.
- 36 This point has already become apparent through the historical examples given in chapter 1.
- 37 “Der Prozeß, der das Kapitalverhältniß schafft, kann also nichts anders sein als der Scheidungsprozeß des Arbeiters vom Eigentum an seinen Arbeitsbedingungen, ein Prozeß, der einerseits die gesellschaftlichen Lebens- und Produktionsmittel in Kapital verwandelt, andererseits die unmittelbaren Produzenten in Lohnarbeiter. Die sog. ursprüngliche Akkumulation ist also nichts als der historische Scheidungsprozeß von Producent und Produktionsmittel.” Karl Marx and Friedrich Engels, *Marx-Engels Gesamtausgabe* (Berlin: Dietz, 1975), II.5, *Das Kapital: Kritik der Politischen Ökonomie*, Erster Band (Hamburg, 1867)] (1967), 575.
- 38 E.g., Peter Linebaugh, *Stop, Thief! The Commons, Enclosures, and Resistance* (Oakland, CA: PM Press, 2014).
- 39 Robert Somers, *Letters from the Highlands; Or, The Famine of 1847* (London: Simpkin, Marhsall, 1848).
- 40 Marx, *Capital: Volume 1*, chap. 33. To see the intentionality behind Wakefield’s analysis, one need only read his 1849 work, *A View of the Art of Colonization* (repr.,

Cambridge: Cambridge University Press, 2010), which is expressly offered as a theory of systematic colonization.

- 41 It is “independent” of the processes of proletarianization and market formation only in the sense given here—in other words, analyzable as a separate variable that can be configured in relation to these other categories in a variety of ways, , not a priori determined by them.
- 42 Even here, however, we should be careful not to impose a false chain of equivalence. To say that land can be conceptualized as a commodity is not to say that it is a commodity *like any other*. The very conception of “commodity” already denotes a mysterious dual-sided character, disclosed dialectically. Commodities are expressed as both use value and exchange- value, and in this sense all commodities must be both *alike* and *unlike*. So to notice that the land can be a commodity is not to deny the possibility (indeed, the certainty) that land must retain some trace of its use value, making it both *like* other commodities and also importantly *unlike* them.
- 43 My understanding of Marx on “nature” is indebted to Alfred Schmidt’s *The Concept of Nature in Marx* (1962; repr., New York: Verso, 2014), as well as the discussion of this work in N. Smith, *Uneven Development*, and John Bellamy Foster, *Marx’s Ecology: Materialism and Nature* (New York: Monthly Review Press, 2000).
- 44 Polanyi, *The Great Transformation*, chap. 6.
- 45 G. A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995), 146. It should be noted that Cohen (and others working in this tradition) does not typically use the term *dispossession*. Rather, he tends to speak of the “unfair” or “unequal” original distribution of “productive resources.” For instance, Cohen writes:

In the standard Marxian version . . . the exploitation of workers by capitalists, that is, the appropriation without recompense by capitalists of part of what workers produce, *derives entirely from the fact that workers have been deprived of access to physical productive resources* and must therefore sell their labour power to capitalists, who enjoy a class monopoly in those resources. Hence, for Marxists, capitalist appropriation is rooted in *an unfair distribution of rights in external things*. The appropriation has its causal origin in *an unequal distribution of productive resources*, and it suffices for considering it unjust exploitation that it springs from that initial unjust inequality. (119, emphasis added)

We can see here that although Cohen does not speak directly about dispossession or primitive accumulation, he nevertheless gives us an interpretation of it, choosing to speak instead of “unfair” and “unequal” distribution of “external things” and, most importantly, of “productive resources.”

- 46 Cohen, *Self-Ownership*, 197.
- 47 Cohen, *Self-Ownership*, 201.

- 48 It is also worth noting that Cohen does not view exploitation as *only* arising from something like primitive accumulation or expropriation. He argues that it is perfectly possible to imagine the exploitative relationship characteristic of capitalism effectively without any prior moment of primitive accumulation, calling this “cleanly generated capitalist relationships” (Cohen, *Self-Ownership*, 161).
- 49 “Hence the Marxist contention that the capitalist exploits the worker depends on the proposition that people are the rightful owners of their own powers” (Cohen, *Self-Ownership*, 146). Even those Marxists who remain untroubled or uninterested in the problem of self-ownership might nevertheless find the above clarification useful since it does seem to have some bearing upon what normative vision might guide a postcapitalist society. Arguably, if it were possible to found a society on a radically egalitarian distribution of access to the means of production, that society would still need to determine what it would do with inequalities that would inevitably arise subsequently through a variety of other means. Marx does suggest, at least in the early or transitional stage of socialism (i.e., before full communism), that people would receive benefits and socially produced goods “proportional to the labour they supply”: Karl Marx, “Critique of the Gotha Programme,” in Karl Marx and Frederick Engels, *Selected Works in One Volume* (London: International Publishers, 1968), 324. Cohen calls this the “socialist proportionality principle” (*Self-Ownership*, 123). This certainly seems to leave room for unequal distribution of social goods, since Marx recognizes unequal individual endowments. In the few glimpses we get of Marx’s vision for a full communist society, this shifts entirely. In the most famous of these passages, we are told that although each will produce according to his abilities, each will receive “according to his needs,” thus expressly not proportionate to contribution (not an argument from desert). Cohen’s interpretation of this is that Marx is relatively unconcerned about sorting this out through something like a “theory of (post-capitalist) justice” because he is so convinced that, by this point, scarcity itself will be overcome and, as a result, everyone will be able to basically have as much of what they wish without loss to others. Marx states that the development of productive forces will make competition “superfluous,” which some have interpreted as the answer to why he thought the very problem of justice would be overcome (i.e., that conflict would be rendered obsolete, therefore theories of justice too) (Cohen, *Self-Ownership*, 132, 153). Cohen’s attempt to explicate these abstract normative questions from the standpoint of a possible postcapitalist society is so far removed from my own approach—which aspires to keep it as close as possible to a concrete historical and social theory of modernity—that it is difficult to meaningfully engage this argument in a summary form here.
- 50 Michael Dawson, “Hidden in Plain Sight: A Note on Legitimation Crises and the Racial Order,” *Critical Historical Studies* 3, no. 1 (Spring 2016): 151.
- 51 Fraser, “Expropriation and Exploitation,” 166.
- 52 Fraser, “Expropriation and Exploitation,” 169.
- 53 Marx, *Grundrisse*, 88, 497.

- 54 Paine made a similar point, arguing that private property in land is a function of a certain practical impossibility, namely, of “separating the improvement made by cultivation from the earth itself, upon which that improvement was made.” Land and labor have become dialectically intertwined, as two faces of the same historical process of improvement. We can distinguish these two features but only analytically, for it is no longer possible to identify in any *particular* plot of land the element of it remains “outside” human labor, even while we recognize as a matter of principle that this endures as a feature of it (since we otherwise cannot account for how it exists *at all*). Paine concludes therefore that, although the common right of all to the earth and the individual right to the fruits of one’s labor remain “distinct species of rights,” they have “become confounded” in all practical terms. This general analytic claim is combined with a historical narrative. Paine, “Agrarian Justice,” 418.

3. INDIGENOUS STRUCTURAL CRITIQUE

Epigraphs: Unnamed Woman and Red Jacket (Seneca), “We Are the Owners of This Land, and It Is Ours!,” in Blaisdell, *Great Speeches by Native Americans*, 35; Goeman, “From Place to Territories and Back Again,” 28 (for a more extended analysis of these ideas, see Mishuana Goeman, *Mark My Words: Native Women Mapping Our Nations* [Minneapolis: University of Minnesota Press, 2013]; Susan Hill, *The Clay We Are Made Of: Haudenosaunee Land Tenure on the Grand River* (Winnipeg: University of Manitoba Press, 2017), 5.

- 1 Wolfe’s work on this question spans some twenty years. Here, however, I focus on one article as it is a particularly succinct condensation of his project as a whole.
- 2 Wolfe, “Settler Colonialism and the Elimination of the Native,” 388.
- 3 Ruth Gilmore, *The Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007), 28.
- 4 On the idea of “structural” domination, see Jennifer Einspahr, “Structural Domination and Structural Freedom: A Feminist Perspective,” *Feminist Review* 94, no. 1 (2010); Sally Haslanger, “Oppressions Racial and Other,” in *Racism in Mind*, ed. Michael P. Levine and Tamas Pataki (Ithaca, NY: Cornell University Press, 2004); Sally Haslanger, “Distinguished Lecture: Social Structure, Narrative and Explanation,” *Canadian Journal of Philosophy* 45, no. 1 (2015); Clarissa Hayward and Steven Lukes, “Nobody to Shoot? Power, Structure, and Agency: A Dialogue,” *Journal of Power* 1, no. 1 (2008); William Sewell Jr., “A Theory of Structure: Duality, Agency, and Transformation,” *American Journal of Sociology* 98, no. 1 (1992); Young, *Justice and the Politics of Difference*, 15–65.
- 5 Theodore Roosevelt, *Winning the West*, 4 vols. (1889–96); excerpted in Isaac Kramnick and Theodore Lowi, eds., *American Political Thought: A Norton Anthology* (New York: W. W. Norton, 2009), 908.

- 6 See Duncan Bell, *The Idea of Greater Britain: Empire and the Future of World Order, 1860–1900* (Princeton, NJ: Princeton University Press, 2007).
- 7 Wolfe’s contribution in particular helps us respond to arguments regarding the supposed “supersession of historical injustice” since his juxtaposition of “structure not an event” is a useful device in highlighting the *endurance* of the colonial relationship of domination over Indigenous peoples. If colonization were a discrete “event” locatable at a specific historical moment, then the passage of time would seem to place increasing distance between us and the relevant locus of concern, thus diminishing the normative force of the critique of colonization. If, however, colonization is reframed as an enduring structure of domination, then the passage of time would seem to compound, rather than dilute, the normative concern. I have developed and deployed this argument in R. Nichols, “Indigeneity and the Settler Contract Today.”
- 8 Leanne Simpson, *As We Have Always Done* (Minneapolis: University of Minnesota Press, 2017), 45.
- 9 An additional, unintended consequence of adopting the language of “structure” has been to impute a glacial ahistoricity to settler colonialism, that is, to define it analytically rather than historically. For if we define colonization as a “structure of domination” that endures over vast swathes of time, this risks depriving us of the analytic tools required to make sense of the dramatic differences between early modern and later modern forms—particularly as settler colonialism was transformed by global capitalism. Among other issues, the danger here is that the command relation characteristic of colonization comes to be framed in terms of a *failure to transition*, that is, as a residue of premodern, precapitalist relations of domination.
- 10 The most novel and (in)famous politicized use of *diremption* comes to us from Georges Sorel, who used it to describe a radical rupture in social reality, one that evaded all attempts at reconciliation. He thus uses the term to oppose all characterization of society as an organic whole (which position he associates with Hegel). For instance:

“Social philosophy, in order to study the most significant phenomena of history, is obliged to proceed to a *diremption*, to examine certain parts without taking into account all of the ties which connect them to the whole, to determine in some manner the character of their activity by pushing them towards independence. When it has thus arrived at the most perfect understanding it can no longer attempt to reconstitute the broken unity.” (*Reflections on Violence* [Cambridge: Cambridge University Press, 1999], 263)

Elsewhere Sorel writes,

“Man cannot create unity in his thought unless he allows himself to give up part of reality. In order to construct a new metaphysics that corresponds to our needs, it must be admitted that in coming into contact with the world,

our mind divides itself into distinct ideologies, which deal with areas that become more separate as we gain a broader knowledge [connaissance] of the real. Humanity has always acted as though it understood this metaphysics and the evidence of history legitimizes the enterprise of those who seek to create this *philosophy of diremption* to replace that of *unification*.” (“Léon XIII,” *Études socialistes* 1, no. 5 [1903]: 265; quoted in Eric Brandom, “Georges Sorel’s Diremption: Hegel, Marxism, and Anti-Dialectics,” *History of European Ideas* 42, no. 7 (2016): 937–50)

- It does not appear that Hegel used the term in this political sense, however, reserving it almost exclusively for discussions of logic and metaphysics (for instance, as it is employed periodically throughout G. W. F. Hegel, *Encyclopädie der philosophischen Wissenschaften im Grundrisse* [Leipzig: Verlag von Felix Meiner, 1905]). This has been further confused in the English reception of Hegel, since the term *Zerreiβung* has also been translated as “diremption,” as it is in Nisbet’s *Philosophy of Right*, e.g., “In this realm, [the process of] differentiation comes to an end with the infinite diremption [*Zerreiβung*] of ethical life into the extremes of *personal* or private self-consciousness and *abstract universality*”: G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen Wood, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 379. The same passage is translated by Knox as: “In this realm, differentiation is carried to its conclusion, and ethical life is sundered without end into the extremes of the private self-consciousness of persons on the one hand, and abstract universality on the other”: Hegel, *Hegel’s Philosophy of Right*, 221.
- 11 See, for example, Karl Marx, “Economic and Philosophic Manuscripts of 1844,” in *The Marx-Engels Reader*, ed. Robert Tucker (New York: W. W. Norton, 1972), 52–103.
 - 12 The term *alienation* refers then to different aspects of identification and control.
 - 13 Rahel Jaeggi, *Alienation* (New York: Columbia University Press, 2014), 1. Jaeggi elaborates: “According to this formulation, alienation does not indicate the absence of a relation but is itself a relation, if a deficient one. Conversely, overcoming alienation does not mean returning to an undifferentiated state of oneness with oneself and the world; it too is a relation: *a relation of appropriation*” (1).
 - 14 Alexis de Tocqueville, *Democracy in America*, trans. Harvey Mansfield (Chicago: University of Chicago Press, 2000), vol. 2, book 4, chap. 6, 663–64.
 - 15 John Stuart Mill, *On Liberty* (Saddle River, NJ: Prentice-Hall, 1997), 7.
 - 16 Mill, *On Liberty*, 7.
 - 17 Mill, *On Liberty*, 7. Or, consider Thomas Paine’s critique of landed aristocracy as a form of dispossession: “The fault, however, is not in the present possessors. . . . *The fault is in the system*” (“Agrarian Justice,” 420, emphasis added).
 - 18 Karl Marx and Friedrich Engels, *The Communist Manifesto* (New York: Penguin, 1985), 85–86.
 - 19 Moishe Postone, *Time, Labor, and Social Domination: A Reinterpretation of Marx’s Critical Theory* (Cambridge: Cambridge University Press, 1996), 30.

- 20 For an insightful parsing of these different modes of critique, see Rahel Jaeggi, “What (If Anything) Is Wrong with Capitalism? Dysfunctionalism, Exploitation and Alienation: Three Approaches to the Critique of Capitalism,” *Southern Journal of Philosophy* 54, no. 51 (2016).
- 21 Max Horkheimer and Theodor Adorno, *The Dialectic of Enlightenment* (Palo Alto: Stanford University Press, 2007).
- 22 Cf. Jason Moore, *Capitalism and the Web of Life: Ecology and the Accumulation of Capital* (New York: Verso, 2015).
- 23 Another instance of this can be found in the recent work of Anita Chari. In *A Political Economy of the Senses: Neoliberalism, Reification, Critique* (New York: Columbia University Press, 2015), Chari deftly reconstructs a conception of reification appropriate to contemporary neoliberal times. Drawing from Marx, Georg Lukács, and Adorno, Chari conceives of reification as a form of depoliticization with two “faces”: (a) the rigidification of the political—“this feature of capitalism that stratifies the institutional structure of forms of self-rule”—and (b) the bracketing of the political, which refers to “the obfuscation of the relationship between the political and economic spheres” (95). As is often the case, emphasis on reification and alienation of society from itself via its own pathological modes of social organization leads to a downplaying of the internal division of that society, manifest in forms of domination and class struggle. For example, Chari defines *expropriation* as a kind of impersonal domination. For her, it refers to “the idea that we live dispossessed of the world and of the meaning of things and that we can borrow signs and objects in order to compose something that makes sense, which brings us back to something we experience” (172). The definition of expropriation and dispossession here comes from the artist Claire Fontaine, as cited by Ruba Katrib and Tom McDonough, *Claire Fontaine: Economies* (Miami: Museum of Contemporary Art, 2010), 10.
- 24 Coulthard, *Red Skin, White Masks*, chap. 1.
- 25 Lewis Henry Morgan, *Ancient Society* (1877; repr., Tucson: University of Arizona Press, 1985), 552.
- 26 “After the struggle is over, there is not only the demise of colonialism, but also the demise of the colonized. This new humanity, for itself and for others, inevitably defines a new humanism” (Fanon, *The Wretched of the Earth*, 178).
- 27 Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007), ix.
- 28 Perhaps most famously, the Haudenosaunee confederacy was able to expand and consolidate its power over a number of rival Indigenous nations such as the Wyandot (Huron) over the course of the late sixteenth century in part through shrewd military alliances with European allies.
- 29 For an extensive treatment of the role of the leadership of Haudenosaunee women in the eighteenth century, and an analysis of the obstacles to reconstructing such an account, see Hill, *The Clay We Are Made Of*, chap. 2.

- 30 Unnamed Woman and Red Jacket (Seneca), "We Are the Owners of This Land," 35.
- 31 Gregory Dowd, *A Spirited Resistance: The North American Indian Struggle for Unity, 1745–1815* (Baltimore: Johns Hopkins University Press, 1992), 30.
- 32 "The term *nativism* discomfits some because it derives from the word *native*, which has in the past carried a host of inaccurate and even demeaning connotations. But native peoples of some of the regions that experienced colonialism, Native Americans among them, have in recent decades revived the term *native*, and it seems permissible to follow their lead" (Dowd, *A Spirited Resistance*, xxi).
- 33 Dowd, *A Spirited Resistance*, 27.
- 34 Dowd, *A Spirited Resistance*, 37.
- 35 Dowd, *A Spirited Resistance*, 21.
- 36 Miller, *Compact, Contract, Covenant*, 67; Jack Stagg, *Anglo-Indian Relations in North America to 1763* (Ottawa: Indian and Northern Affairs Canada, 1981), 334–37.
- 37 Fitzmaurice, *Sovereignty, Property, and Empire*, 188. See also Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815* (Cambridge: Cambridge University Press, 1991), 322.
- 38 For a study of the Crow and their leader during much of the process of transitioning to reservation life, Plenty Coups, see Jonathan Lear, *Radical Hope: Ethics in the Face of Cultural Devastation* (Cambridge, MA: Harvard University Press, 2008).
- 39 He is sometimes thought to share this honor with the Sauk leader Blackhawk. See Blackhawk, *Life of Black Hawk, or Mā-ka-tai-me-she-kiā-kiāk* (London: Penguin, 2008). Blackhawk narrated his biography in 1833.
- 40 The "Nullification crisis" refers to a conflict between South Carolina and the U.S. federal government in 1832–33. South Carolina deemed a series of tariffs imposed by Andrew Jackson's administration to be an unconstitutional violation of states' rights and therefore null and void within its boundaries. Only one year later, Apess would use the language of "nullification" to contend that, without the express consent of the Mashpee within their territory, U.S. laws were more generally void. See William Apess, "Indian Nullification," in *On Our Own Ground: The Complete Writings of William Apess, a Pequot*, ed. Varry O'Connell (Amherst: University of Massachusetts Press, 1992), 167–274.
- 41 For a reading of Apess in relation to American political thought more generally, see Adam Dahl, *Empire of the People: Settler Colonialism and the Foundations of Modern Democratic Theory* (Lawrence: University Press of Kansas, 2018).
- 42 William Apess, "The Experiences of Five Christian Indians of the Pequot Tribe," in *On Our Own Ground*, 157.
- 43 Chief Joseph, "An Indian's View of Indian Affairs," in Kramnick and Lowi, *American Political Thought*, 930–31, 941.
- 44 Within critical theory, the idea of a form-of-life critique has of late been revived and given new complexity in work by such thinkers as Rahel Jaeggi and Daniel Loick. See Rahel Jaeggi, *Kritik von Lebensformen* (Frankfurt am Main: Suhrkamp,

- 2013); Daniel Loick, “21 Theses on the Politics of Forms of Life,” *Theory and Event* 20, no. 3 (July 2017): 788–803.
- 45 My understanding of immanent and externalist critique is especially indebted to the formulation given by Jakeet Singh in “Beyond Free and Equal: Subalterneity and the Limits of Liberal-Democracy” (PhD diss., University of Toronto, 2014).
- 46 Laura Cornelius Kellogg, *Our Democracy and the American Indian and Other Works* (Syracuse: Syracuse University Press, 2015), 74.
- 47 Kellogg, *Our Democracy*, 93, 100.
- 48 Kellogg, *Our Democracy*, 89.
- 49 Kellogg, *Our Democracy*, 97.
- 50 Kellogg, *Our Democracy*, 102.
- 51 Kellogg, *Our Democracy*, 76.
- 52 Kellogg, *Our Democracy*, 77.
- 53 For a more comprehensive survey of thinkers in this tradition, see Kiara Vigil, *Indigenous Intellectuals: Sovereignty, Citizenship, and the American Imagination, 1880–1930* (Cambridge: Cambridge University Press, 2015); David Martínez, ed., *The American Indian Intellectual Tradition: An Anthology of Writings from 1772 to 1972* (Ithaca, NY: Cornell University Press, 2011).
- 54 Miranda Johnson, *The Land Is Our History: Indigeneity, Law, and the Settler State* (Oxford: Oxford University Press, 2017), 3–4.
- 55 Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (New York: Routledge, 2016).
- 56 George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Don Mills, ON: Collier-Macmillan Canada, 1974).
- 57 Coulthard, *Red Skin, White Masks*, 7.
- 58 A. Simpson, *Mohawk Interruptus*, 74.
- 59 For many years now, the “politics of indigeneity” in the English-speaking world has been dominated by a “cultural recognition paradigm.” The basic logic of this framework has it that the normative force of Indigenous political claims derives from a claim of *cultural particularity*. Key thinkers such as Charles Taylor and Will Kymlicka have argued that we can derive the normative content of Indigenous claims from a universal need for the recognition (Taylor), or from the importance of preserving a cultural milieu that allows one to process meaning (Kymlicka). These thinkers typically argue that there is an important link between personal identity and agency of citizens and the respect or esteem given to their cultural or ethnic community. If this is the case, then the equal respect and dignity of individuals within liberal democratic societies require the (state) recognition of culturally distinct sub-state communities. Since Indigenous nations constitute distinct historically transmitted cultural entities, they are worthy of affirmative recognition on the basis of our general interest in respecting fellow citizens. This has come under such sustained critique for many decades now that I will not rehearse it here. See, e.g., Joanne Barker, ed., *Sovereignty Matters: Locations of*

- Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska Press, 2005); Coulthard, *Red Skin, White Masks*; Richard Day, "Who Is This We That Gives the Gift? Native American Political Theory and the Western Tradition," *Critical Horizons* 2, no. 2 (2001); Richard Day, *Multiculturalism and the History of Canadian Diversity* (Toronto: University of Toronto Press, 2000); Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham, NC: Duke University Press, 2002); Dale Turner, *This Is Not a Peace Pipe* (Toronto: University of Toronto Press, 2006).
- 60 Moreton-Robinson, *The White Possessive*, xvii–xviii.
- 61 Jodi A. Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: University of Minnesota Press, 2011).
- 62 Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham, NC: Duke University Press, 2011), 19.
- 63 For a useful overview of these debates, see Maile Arvin, "Analytics of Indigeneity," and Kim Tallbear, "Genomic Articulations of Indigeneity," in *Native Studies Keywords*, ed. Stephanie Nohelani Teves, Andrea Smith, and Michelle Raheja (Tucson: University of Arizona Press, 2015), 119–29 and 130–55.
- 64 This perspective shares some overlap with an alternative paradigm for theorizing Indigenous politics, namely, those who argue Indigenous claims should be seen as a subset of reparations claims for past injustice. See Courtney Jung, *The Moral Force of Indigenous Politics* (Cambridge: Cambridge University Press, 2008); Janna Thompson, "Historical Injustice and Reparation: Justifying Claims of Descendants," *Ethics* 112, no. 1 (October 2001). While more sympathetic to this framework than either the multicultural or "first occupancy" models, I remain skeptical that Indigenous politics can be reduced to normative claims-making of this sort. For rejoinders to this "reparations" framework, see, e.g., Paul Patton, "Historic Injustice and the Possibility of Supersession," *Journal of Intercultural Studies* 26, no. 3 (August 2005); Paul Patton, "Colonisation and Historic Injustice—The Australian Experience," in *Justice in Time: Responding to Historical Injustice*, ed. Lukas H. Meyer (Baden-Baden: Nomos Verlagsgesellschaft, 2004).
- 65 "Sooner or later, however, the colonized intellectual realizes that the existence of a nation is not proved by culture, but in the people's struggle against the forces of occupation" (Fanon, *The Wretched of the Earth*, 159).
- 66 For a useful overview of this concept and its recent history, see Friedrich-Wilhelm Eickhoff, "On *Nachträglichkeit*: The Modernity of an Old Concept," *International Journal of Psychoanalysis* 87, no. 6 (December 2006).
- 67 Jacques Lacan rendered it as *après-coup* in French. See Jean Leplanché, "Après-coup," *Dictionnaire international de la psychanalyse* (Paris: Hachette Littératures, 2005).
- 68 J. Kēhaulani Kauanui, "'A Structure, Not an Event': Settler Colonialism and Enduring Indigeneity," *Lateral: Journal of the Cultural Studies Association* 5, no. 1 (Spring 2016), <https://doi.org/10.25158/L5.1.7>.

4. DILEMMAS OF SELF-OWNERSHIP, RITUALS OF ANTIWILL

Epigraphs: Hortense Spillers, "Mama's Baby, Papa's Maybe: An American Grammar Book," *Diacritics* 17, no. 2 (Summer 1987): 67; Saidiya Hartman, *Lose Your Mother: A Journey along the Atlantic Slave Route* (New York: Farrar, Straus and Giroux, 2007), 74.

- 1 See, e.g., Marisa Fuentes, *Dispossessed Lives: Enslaved Women, Violence, and the Archive* (Philadelphia: University of Pennsylvania Press, 2018).
- 2 This view is most closely associated with Robert Brenner. His touchstone article is "Agrarian Structure and Economic Development in Pre-Industrial Europe," *Past and Present* 70, no. 1 (February 1976).
- 3 Eric Williams, *Capitalism and Slavery* (1944; repr., New York: Putnam, 1966).
- 4 W. E. B. Du Bois, *Black Reconstruction in America* (1935; repr., Oxford: Oxford University Press, 2007); Cedric Robinson, *Black Marxism: The Making of the Black Radical Tradition* (1983; repr., Chapel Hill: University of North Carolina Press, 2000); Orlando Patterson, *Slavery and Social Death* (Cambridge, MA: Harvard University Press, 1982); George Lipsitz, *The Possessive Investment in Whiteness*, rev. ed. (Philadelphia: Temple University Press, 2006).
- 5 Robinson, *Black Marxism*, 116. Robinson does equivocate at times on the precise nomenclature, at times referring to slavery as a condition of "super-exploitation" (140).
- 6 For an example of work that emphasizes this dimension, see Stephanie Smallwood, *Saltwater Slavery: A Middle Passage from African to American Diaspora* (Cambridge, MA: Harvard University Press, 2007).
- 7 See Saidiya Hartman, "The Belly of the World: A Note on Black Women's Labors," *Souls: A Journal of Black Politics, Culture, and Society* 18, no. 1 (2016); Patricia Hill Collins, "Work, Family, and Black Women's Oppression," in *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (New York: Routledge, 2009), 51–75; Jennifer Morgan, "Archives and Histories of Racial Capitalism: An Afterword," *Social Text* 33, no. 4 (2015).
- 8 Patterson, *Slavery and Social Death*, 99.
- 9 Frank Wilderson, *Red, White, and Black: Cinema and the Structure of U.S. Antagonisms* (Durham, NC: Duke University Press, 2010). The historian Edward Baptist has emphasized the political-economic importance of seemingly gratuitous violence in this context as well. See Edward Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (New York: Basic Books, 2015).
- 10 Patterson, *Slavery and Social Death*, 13.
- 11 The opening lines of Douglass's *Narrative* read: "I was born in Tuckahoe, near Hillsborough, and about twelve miles from Easton, in Talbot county, Maryland. I have no accurate knowledge of my age, never having seen any authentic record containing it. By far the larger part of the slaves know as little of their ages as horses know of theirs, and it is the wish of most masters within my knowledge to

- keep their slaves thus ignorant.” Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (New York: Penguin, 1982), 17.
- 12 Hartman, *Lose Your Mother*, 74; Shatema Threadcraft, *Intimate Justice: The Black Female Body and the Body Politic* (Oxford: Oxford University Press, 2016), 57; Fuentes, *Dispossessed Lives*.
 - 13 Athena Athanasiou, in Butler and Athanasiou, *Dispossession*, 32, 55. For a critique of Butler and Athanasiou’s elision of Blackness as a foundational category for thinking through such bodily possession/dispossession, see Sabine Broeck, *Gender and the Abjection of Blackness* (Albany: State University of New York Press, 2018), chap. 6.
 - 14 For a survey of such arguments, see Duncan Ivison, *Rights* (Montreal: McGill-Queen’s University Press, 2008), esp. chap. 3, “Rights as Property.”
 - 15 Carole Pateman has argued that “property in the person” and “self-ownership” should not be used interchangeably since the latter obscures fundamental problems related to the alienability of personhood. For my initial purposes, however, I shall use the terms synonymously. See Carole Pateman, “Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts,” *Journal of Political Philosophy* 10, no. 1 (2002).
 - 16 Locke, *The Second Treatise of Government*, 19. Locke, it should be noted, tried to get around the problem of alienability by positing that our property in the person was actually a gift from God. Thus, we are actually *his* property, which means we can only use ourselves in accordance with his design, not our own. Thanks to Torrey Shanks for pressing me on this point.
 - 17 C. B. MacPherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962), 3.
 - 18 For a philosophical elaboration of this idea, see Hegel, *Hegel’s Philosophy of Right*, §§ 65–70, pp. 52–57.
 - 19 Robert Nozick, *Anarchy, State, and Utopia* (New York: Harper Row, 1974); G. A. Cohen, *Self-Ownership, Freedom, and Equality*. See also Attracta Ingram, *A Political Theory of Rights* (Oxford: Oxford University Press, 1994); Carol Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, CO: Westview, 1994); Peter Halewood, “On Commodification and Self-Ownership,” *Yale Journal of Law and the Humanities* 20, no. 2 (2008); Laura Brace, *The Politics of Property: Labour, Freedom, and Belonging* (New York: Palgrave Macmillan, 2004).
 - 20 J. Philmore, “The Libertarian Case for Slavery,” *The Philosophical Forum* XIV (1982): 48; quoted in Carole Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988), 71, emphasis added. J. Philmore is in fact a pseudonym for David Ellerman, who wrote “The Libertarian Case for Slavery” as a satirical take on Nozick’s libertarianism, an attempt to reveal its absurdity by taking it to its logical conclusion. See David Ellerman, *Intellectual Trespassing as a Way of Life: Essays in Philosophy, Economics, and Mathematics* (Landham, MD: Roman and Littlefield, 1995), chap. 3.
 - 21 Anne Phillips, *Our Bodies, Whose Property?* (Princeton, NJ: Princeton University Press, 2013); Cressida Heyes, *Self-Transformations: Foucault, Ethics, and*

Normalized Bodies (Oxford: Oxford University Press, 2007); Alexandra Wald, "What's Rightfully Ours: Toward a Property Theory of Rape," *Columbia Journal of Law and Social Problems* 30, no. 3 (Spring 1997). Wald argues that women need to be recognized as property owners over their bodies in order to be recognized as persons. See also Donna Dickenson, *Property, Women, and Politics: Subjects or Objects?* (Cambridge, UK: Polity, 1997); Ruth Perry, "Mary Astell and the Feminist Critique of Possessive Individualism," *Eighteenth-Century Studies* 23, no. 4 (1990); Rosalind Pollack Petchesky, "The Body as Property: A Feminist Re-Vision," in *Conceiving the New World Order: The Global Politics of Reproduction*, ed. Faye Ginsburg and Rayna Rapp (Berkeley: University of California Press, 1995); Ngaire Naffine, "The Legal Standing of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed," *Journal of Law and Society* 25, no. 2 (1998); Pateman, "Self-Ownership and Property in the Person"; Martha Nussbaum, "Objectification," *Philosophy and Public Affairs* 24, no. 4 (1995). See Jennifer Nedelsky, *Law's Relations* (Oxford: Oxford University Press, 2011), for a productive engagement with these debates and insightful way around them via the concept of relational autonomy.

- 22 Stated conversely, the more central a right is to my personhood, the less alienable it appears to be. Counterintuitively, this means that core rights (e.g., life and liberty) appear as truncated or diminished property. Less important proprietary claims (such as over external objects) seem more expansive, in the sense that they have everything the core rights have, plus alienability.
- 23 Frederick Douglass, "Address to the Annual Meeting of the New England Woman Suffrage Association," in *The Essential Douglass: Selected Writings and Speeches*, ed. Nicholas Buccola (Indianapolis: Hackett, 2016), 305.
- 24 Douglass, "Address," 307, emphasis added.
- 25 Douglass, "Address," 313.
- 26 See Hayes Peter Mauro, *The Art of Americanization at the Carlisle Indian School* (Albuquerque: University of New Mexico Press, 2011).
- 27 Frederick Douglass, "Self-Made Men," in Buccola, *The Essential Douglass*, 332–49. The visit is referenced in Carlisle's newsletter: *The Indian Helper* 8, no. 30 (Friday, April 14, 1893). He is mentioned again in *The Indian Helper* of the following week, which discusses the process by which his speech was turned into a printed pamphlet for circulation and study by the residents of the school: *The Indian Helper* 8, no. 31 (Friday, April 21, 1893). Douglass also visited the town of Carlisle in March 1872 and August 1847 (traveling with William Lloyd Garrison at the time). During his 1872 stop, Douglass gave a speech at Rheem's Hall, evidently speaking in favor of the plan to annex "San Domingo." He was later denied the right to eat in the public dining hall of the Bentz House hotel, where he was staying, which is the focus of two local reports on his stay: *American Volunteer*, March 7, 1872; *Carlisle Herald*, March 14, 1872. These articles have been reprinted in David Smith, "Frederick Douglass in Carlisle," *Cumberland County History* 22, nos. 1–2 (Summer/Winter 2005): 53–60.

- 28 Douglass, “Self-Made Men,” 344.
- 29 See John W. Blassingame and John R. McKivigan, eds., *The Frederick Douglass Papers*, series 1, vol. 5 (New Haven, CT: Yale University Press, 1992), 545–46.
- 30 Julius E. Thompson, James L. Conyers, and Nancy J. Dawson, eds., *The Frederick Douglass Encyclopedia* (Santa Barbara, CA: Greenwood, 2010), 115. Carlisle’s own newsletter reports it thus:

“On Thursday night last the school had the great privilege of seeing and listening to the Hon. Frederick Douglass, in his far famed speech, ‘Self-Made Men.’ Mr. Douglass is a man of 76 years of age, and has lost the fire so marked in his delivery twenty years ago, but the beautiful language of the address was all there. . . . During the course of Mr. Douglass’ eloquent lecture, he said warmly, ‘Usually I am Negro, but to-night I am Indian out and out,’ and great was the honor felt at this high compliment.” (*The Indian Helper* 8, no. 30 [April 14, 1893])

On “identifying with Indians” in nineteenth-century Black thought, see John Stauffer, *The Black Hearts of Men: Radical Abolitionists and the Transformation of Race* (Cambridge, MA: Harvard University Press, 2001), chap. 6.

- 31 Edward Tyler, *Slaveholding a Malum In Se, or Invariably Sinful*, 2nd ed. (Hartford, CT: Case, Tiffany, 1839), 12.
- 32 Tyler, *Slaveholding a Malum In Se*, 24.
- 33 William Lloyd Garrison, “Declaration of Sentiments of the American Anti-Slavery Convention,” Philadelphia, December 6, 1833: “Because the holders of slaves are not the just proprietors of what they claim—freeing slaves is not depriving them of property, but restoring it to the right owner—it is not wronging the master, but righting the slave—restoring him to himself. . . . If compensation is to be given at all, it should be given to the outraged and guiltless slaves, and not to those who have plundered and abused them.” William Lloyd Garrison, *Selections from the Writings of W. L. Garrison* (Boston: R. F. Wallcut, 1852), 69.
- 34 As Alex Gourevitch has extensively documented, this language was also instrumental in the crafting of “labor republican” arguments against the “slavery” of waged work. Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* (Cambridge: Cambridge University Press, 2015).
- 35 For a reading of Douglass that emphasizes the role of self-ownership in his thought, see Buccola, *The Political Thought of Frederick Douglass*. On Douglass’s thought more generally, see James Colaiaico, *Frederick Douglass and the Fourth of July* (New York: Macmillan, 2006); Reginald David, *Frederick Douglass: A Precursor to Liberation Theology* (Macon, GA: Mercer University Press, 2006); Waldo Martin, *The Mind of Frederick Douglass* (Chapel Hill: University of North Carolina Press, 1984); Peter Myers, *Frederick Douglass: Race and the Rebirth of Classical Liberalism* (Lawrence: University Press of Kansas, 2008).

- 36 Fred Moten, *In the Break: The Aesthetics of the Black Radical Tradition* (Minneapolis: University of Minnesota Press, 2003), 1.
- 37 Stefano Harney and Fred Moten, "Improvement and Preservation: Or, Usufruct and Use," in *Futures of Black Radicalism*, ed. Gaye Theresa Johnson and Alex Lubin (New York: Verso, 2017), 84–85.
- 38 In an aside, Harney and Moten speculate at a "militant preservation of what you (understood as we) got, in common dispossession" ("Improvement and Preservation," 86).
- 39 Frantz Fanon, "The Lived Experience of the Black Man," in *Black Skin, White Masks* (New York: Grove, 2008), 89, 107.
- 40 G. A. Cohen, *Self-Ownership, Freedom, and Equality*, 214, 215.
- 41 Patterson, *Slavery and Social Death*, 48.
- 42 Patterson, *Slavery and Social Death*, 51.
- 43 E.g., "If the indigenous relation to land precedes and exceeds any regime of property, then the slave's inhabitation of the earth precedes and exceeds any prior relation to land—landlessness. And selflessness is the correlate. No ground for identity, no ground to stand (on). Everyone has a claim to everything until no one has a claim to anything. No claim. This is not a politics of despair brought about by a failure to lament a loss, because it is not rooted in hope of winning. The flesh of the earth demands it: the landless inhabitation of selfless existence." Sexton, "The *Vel* of Slavery," 11.
- 44 In other words, in my view the problem with the strict ontological distinction is not simply that it is a false claim; it is the wrong *kind* of claim.
- 45 In some branches of (especially Anglo-American, analytic) philosophy and political theory, the term *naturalism* means that an inquiry is modeled after, or at least consistent with, the methodology of the natural sciences. The study of human beings is not, in this view, different in kind from the study of other natural phenomena. A second sense of the term, however, means something closer to "nonideal" or "realist." It is a form of analysis that takes it as axiomatic that to study a particular concept requires situating it into the concrete relations, institutions, and social practices that constitute it in a given time and place. A naturalistic account is nominalist and context dependent. Duncan Ivison has recently provided an attractive version of a naturalistic account of rights when he argues that "the language and practice of rights is conventional in certain crucial respects." In this view, our social and political institutions "are not 'natural' in the sense of conforming to (or being caused by) any deep facts about human nature, but rather in so far as they are the product of the collusion between 'bare' nature—the basic, innate equipment all human beings have—and 'second nature'—the particular interactions, relations of power and sociability characteristic of a particular community or society" (*Rights*, 22–23).
- 46 Cheryl Harris, "Whiteness as Property," *Harvard Law Review* 106, no. 8 (June 1993).
- 47 For a useful overview, see MacPherson, *Property*, chap. 1.

- 48 Or, in an inverted form, in a commitment to “unconditional self-possession” such as one finds in Chris Lebron’s analysis of the intellectual precursors to Black Lives Matter, where he adduces “the lesson of *unconditional self-possession*” as core to the Black feminism of Anna Julia Cooper and Audre Lorde. Chris Lebron, *The Making of Black Lives Matter: A Brief History of an Idea* (Oxford: Oxford University Press, 2017), xxi; see also chap. 3 in that work.
- 49 Patricia Williams, *The Alchemy of Race and Rights*, 217.
- 50 My thinking on what it means to be “in slavery’s wake” has been pushed and challenged by Christina Sharpe’s *In the Wake: On Blackness and Being* (Durham, NC: Duke University Press, 2016).
- 51 Patterson comes down clearly on one side of this distinction: “The slave was a slave not because he was the *object* of property, but because he could not be the *subject* of property” (*Slavery and Social Death*, 28).
- 52 Hortense Spillers, “Introduction—Peter’s Pans: Eating in the Diaspora,” in *Black, White, and in Color: Essays on American Literature and Culture* (Chicago: University of Chicago Press, 2003), 20, quoted in Alexander Weheliye, *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Durham, NC: Duke University Press, 2014), 10.
- 53 On the specifically U.S. context for this, see Alison Parker, *Articulating Rights: Nineteenth-Century American Women on Race, Reform, and the State* (DeKalb: Northern Illinois University Press, 2010); Barbara Welke, *Law and the Borders of Belonging in the Long Nineteenth-Century United States* (Cambridge: Cambridge University Press, 2010).
- 54 To be sure, elements of this concern predate the period I am focused on here. For instance, in the *Second Discourse*, Rousseau raises concerns with the ideological structures of “voluntary servitude”: “If one continued thus to examine the facts in terms of Right, the voluntary establishment of Tyranny would prove to be no more substantial than it is true, and it would be difficult to show the validity of a contract which obligated only one of the parties, in which one side granted everything and the other nothing, and which could only prove prejudicial to the one who commits himself” (178).
- 55 Karl Marx, “On the Jewish Question,” in *Selected Writings*, ed. Lawrence Simon (Indianapolis: Hackett, 1994), 16.
- 56 “The ideal would be for the convict to appear as a sort of rentable property: a slave at the service of all. . . . In the old system, the body of the condemned man became the king’s property, on which the sovereign left his mark and brought down the effects of his power. Now he will be rather the property of society, the object of a collective and useful appropriation.” Michel Foucault, *Discipline and Punish*, 2nd ed. (New York: Vintage, 1995), 109.
- 57 Friedrich Nietzsche, *On the Genealogy of Morals* (New York: Vintage, 1967), 64–65.
- 58 It is worth recalling that this is the same era in which Fyodor Dostoevsky had his “Grand Inquisitor” cry out: “Nothing has ever been more unendurable to man

and to human society than freedom!” This section of *The Brothers Karamazov* is perhaps one of the best-known passages in modern literature to deal with the vicissitudes and paradoxes of freedom, both the desire to flee the demands of freedom and the binding force of being forced to act *as if* one is free in a context that surely betrays this fiction. Fyodor Dostoyevsky, *The Brothers Karamazov*, vol. 1, trans. David Magarshack (1880; repr., New York: Penguin, 1958), 296.

- 59 On this, see Daniel Loick, “Juridification and Politics: From the Dilemma of Jurification to the Paradoxes of Rights,” *Philosophy and Social Criticism* 40, no. 8 (2014).
- 60 Nietzsche, *On the Genealogy of Morals*, 64.
- 61 According to Marx, constrained now “only by their own free will,” the worker is free to “bring his own hide to market” whenever he pleases, only now he “has nothing else to expect but—a tanning.” In this way a worker under capitalist conditions “must constantly treat his labour-power as his own property, his own commodity, and he can do this only by placing it at the disposal of the buyer, i.e. handing it over to the buyer for him to consume, for a definite period of time, temporarily. In this way, he manages both to alienate [*veräussern*] his labour-power and to avoid renouncing his rights of ownership over it” (*C*, 280, 271).
- 62 Carole Pateman has interpreted the problem of property in the person along similar lines in her reply to Charles Mills on the utility of the concept. As she puts it, “Property in the person cannot be contracted out in the absence of the owner. If the worker’s services (property) are to be ‘employed’ in the manner required by the employer, the worker has to go with them. The property is useful to the employer only if the worker acts as the employer demands and, therefore, entry into the contract means that the work becomes a subordinate. The consequence of voluntary entry into a contract is not freedom but superiority and subordination.” Carole Pateman and Charles Mills, *Contract and Domination* (Cambridge, UK: Polity, 2007), 17.
- 63 On law and “negative personhood,” see Dayan, *The Law Is a White Dog*.
- 64 Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (Oxford: Oxford University Press, 1997), 80.
- 65 Quoted in Hartman, *Scenes of Subjection*, 66.
- 66 Hartman, *Scenes of Subjection*, 69.
- 67 Hartman, *Scenes of Subjection*, 85.
- 68 Du Bois, *Black Reconstruction in America*, 580. As Du Bois famously put it, in the reconstruction era, “the slave went free; stood a brief moment in the sun; then moved back again toward slavery” (24). On Du Bois’s contributions to theorizing property and (white) possessive individualism, see Ella Myers, “Beyond the Psychological Wage: Du Bois on White Dominion,” *Political Theory* 47, no. 1 (2019).
- 69 Ida B. Wells, “The Reason Why the Colored Man Is Not in the World’s Columbian Exposition” (1893), in *The Selected Works of Ida B. Wells-Barnett* (Oxford: Oxford University Press, 1991), 61. See also Sarah Haley, *No Mercy Here: Gender,*

- Punishment, and the Making of Jim Crow Modernity* (Chapel Hill: University of North Carolina Press, 2016).
- 70 Quoted in Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Perennial Classics, 2002), 70–71.
- 71 As Wells notes, the American case has parallels elsewhere. Most notably, in March 1861, Russian czar Alexander II issued his own emancipation manifesto, freeing the serfs. There too, access to land ownership was the primary medium in which freedom was articulated. Although massive redistribution of ownership was promised, it was slow, complex, and expensive. By the 1880s, the majority of former serfs had received some land allotment, but the process tended to entrap them into large redemption payments. These were not abolished until the 1905 revolution. As a small indicator of how this theme circulated in Russian literary culture of the time, consider that Leo Tolstoy's parable "How Much Land Does a Man Need?," published in 1886 (the same year Douglass visited the New England Woman Suffrage Association, seven years before Wells's above-cited essay), speaks to the peasantry's desperate need for land, as well as the dangers of unchecked avarice for more than one needs. (The answer to the titular question comes at the end of the story, when the protagonist dies in his pursuit of more than he can use: "Six feet from his head to his heels was all he needed.") See Leo Tolstoy, "How Much Land Does a Man Need?," in *The Kreutzer Sonata and Other Short Stories* (New York: Dover, 1993), 14.
- 72 Foner, *Reconstruction*, 71.
- 73 William Cohen, *At Freedom's Edge: Black Mobility and the Southern White Quest for Racial Control, 1861–1915* (Baton Rouge: Louisiana State University Press, 1991), esp. chaps. 1 and 2.
- 74 Patterson, *Slavery and Social Death*, 241. On the idea of "political manumission" more generally, see 234–36.
- 75 Hartman, *Scenes of Subjection*, 131.
- 76 Ira Berlin, *Slaves without Masters: The Free Negro in the Antebellum South* (New York: New Press, 1992).
- 77 Michelle Alexander, *The New Jim Crow* (New York: New Press, 2010); Angela Davis, *Are Prisons Obsolete?* (New York: Seven Stories, 2003).
- 78 P. Williams, *The Alchemy of Race and Rights*, 219. She is discussing, in regard to similar experiences, the Women of All Red Nations' work on behalf of Indigenous women who had been subjected to forced sterilization.
- 79 I am indebted here to the methodological contributions of Brenna Bhandar, Alyosha Goldstein, K-Sue Park, and Nikhil Pal Singh (among others).
- 80 For a small sample of the growing literature that relates Indigenous and Black struggles, see Tiya Miles, *Ties That Bind: The Story of an Afro-Cherokee Family in Slavery and Freedom* (Berkeley: University of California Press, 2005); Tiya Miles, *The House on Diamond Hill: A Cherokee Plantation Story* (Chapel Hill: University of North Carolina Press, 2010); Barbara Krauthamer, *Black Slaves, Indian Masters: Slavery, Emancipation, and Citizenship in the Native American South*

(Chapel Hill: University of North Carolina Press, 2013); Shona Jackson, *Creole Indigeneity: Between Myth and Nation in the Caribbean* (Minneapolis: University of Minnesota Press, 2012).

- 81 Thank you to Nick Estes for pushing me to think more about this issue and pointing me to key sources such as Laura Gomez, *Manifest Destinies: The Making of the Mexican American Race* (New York: New York University Press, 2018).
- 82 Weheliye, *Habeas Viscus*.
- 83 Weheliye, *Habeas Viscus*, 77.
- 84 Weheliye, *Habeas Viscus*, 78.
- 85 *Martin v. Lessee of Waddell*, 41 U.S. (16 Peters) 367, 409 (1842), emphasis added.

CONCLUSION

Epigraphs: L. Simpson, *As We Have Always Done*, 43; Karl Marx, *Capital: Volume 3* (New York: International Publishers, 1967), 776.

- 1 My thinking on both expressivist and insurgent forms of resistance has been greatly enriched by Banu Bargu's *Starve and Immolate: The Politics of Human Weapons* (New York: Columbia University Press, 2014).
- 2 Government of New Zealand, Te Urewera Act (2014), section 11, <http://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html>. For a useful summary and set of commentaries on the case, see "Whiringa-ā-nuku," special issue, *Māori Law Review* 9 (October 2014).
- 3 Government of New Zealand, Te Urewera Act (2014), section 17 (a).
- 4 Government of New Zealand, Te Urewera Act (2014), sections 12 and 13.
- 5 See Bryant Rousseau, "What in the World: In New Zealand, Lands and Rivers Can Be People (Legally Speaking)," *New York Times*, July 13, 2016.
- 6 Eleanor Ainge Roy, "New Zealand Gives Mount Taranaki Same Legal Rights as a Person," *The Guardian*, December 22, 2017.
- 7 On the legal history of the Whanganui River dispute, see Johnson, *This Land Is Our History*, chap. 6.
- 8 Eleanor Ainge Roy, "New Zealand River Granted Same Legal Rights as Human Being," *The Guardian*, March 16, 2017.
- 9 My understanding of the treaty and its contemporary implications is indebted to Malcolm Mulholland and Veronica Tawhai, eds., *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Wellington: Huia, 2010); I. H. Kawharu, ed., *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989); Vincent O'Malley, Bruce Stirling, and Wally Penetito, eds., *The Treaty of Waitangi Companion: Māori and Pākehā from Tasman to Today* (Auckland: Auckland University Press, 2010); Matthew Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008).
- 10 Translation from Kawharu, *Waitangi*, appendix, 319–21.

- 11 Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake against the State* (Minneapolis: University of Minnesota Press, 2017). The Canadian Supreme Court has also recently entertained similar arguments from the Ktunaxa Nation on behalf of a mountain: *Ktunaxa Nation v. British Columbia (Forests, Lands, and Natural Resource Operations)* (2017) SCC 54; Sean Kilpatrick, “Jumbo Mountain Ski Resort Approval Upheld by Supreme Court of Canada,” *Huffington Post*, March 11, 2017.
- 12 See Protect Bears Ears, “Bears Ears: A Native Perspective on America’s Most Significant Unprotected Cultural Landscape,” March 2016, http://www.bears ears coalition.org/wp-content/uploads/2016/03/Bears-Ears-bro.sm_.pdf. Closer to my immediate context, the White Earth Band of Ojibwe have recently moved to recognize the legal rights of Manoomin, or “wild rice.” See Winona LaDuke, “The White Earth Band of Ojibwe Legally Recognized the Rights of Wild Rice. Here’s Why,” *Yes! Journalism for People Building a Better World*, February 1, 2019, <https://www.yesmagazine.org/planet/the-white-earth-band-of-ojibwe-legally-recognized-the-rights-of-wild-rice-heres-why-20190201>.
- 13 Patricia Monture-Angus, *Journeying* 222 (also discussed earlier, in chapter 1, section II).
- 14 Glen Coulthard, *Red Skin, White Masks*, 13.
- 15 Vine Deloria Jr., *God Is Red: A Native View of Religion*, 30th anniv. ed. (New York: Fulcrum, 2003); Winona LaDuke, *All Our Relations: Native Struggles for Land and Life* (New York: South End Press, 2008).
- 16 E.g., Keith Basso, *Wisdom Sits in Places: Landscape and Language among the Western Apache* (Albuquerque: University of New Mexico Press, 1996); Paul Nadasdy, *Hunters and Bureaucrats* (Vancouver: University of British Columbia Press, 2003); Shiri Pasternak, *Grounded Authority*.
- 17 For a small sample of this large literature in anthropology, see Julie Cruikshank, *Do Glaciers Listen? Local Knowledge, Colonial Encounters, and Social Imagination* (Vancouver: University of British Columbia Press, 2005); Daniel de Coppet, “. . . Land Owns People,” in R. H. Barnes, Daniel de Coppet, and R. J. Parkin, eds., *Contexts and Levels: Anthropological Essays on Hierarchy* (Oxford: JASO, 1985), 75–90; Marisol de la Cadena, *Earth Beings: Ecologies of Practice across the Andean Worlds* (Durham, NC: Duke University Press, 2015); Fred Myers, *Pintupi Country, Pintupi Self: Sentiment, Place, and Politics among the Western Desert Aborigines* (Berkeley: University of California Press, 1991); Mark Nuttall, *Arctic Homeland: Kinship, Community, and Development in Northwest Greenland* (Toronto: University of Toronto Press, 1992).
- 18 L. Simpson, *As We Have Always Done*, 43. On this theme, see also Goeman, “From Place to Territories and Back Again.”
- 19 Stephen T. Garnett et al., “A Spatial Overview of the Global Importance of Indigenous Lands for Conservation,” *Nature Sustainability* 1 (July 2018): 369.
- 20 Joanne Barker, “Decolonizing the Mind,” *Rethinking Marxism: A Journal of Economics, Culture and Society* 30, no. 2 (2018).

- 21 Shiri Pasternak, "How Capitalism Will Save Colonialism: The Privatization of Reserve Lands in Canada," *Antipode* 47, no. 1 (January 2015).
- 22 Garrett Hardin, "The Tragedy of the Commons," *Science* 162, no. 3859 (December 1968): 1247.
- 23 For an overview, see Ian Angus, "The Myth of the Tragedy of the Commons," *Monthly Review*, August 25, 2008, <https://mronline.org/2008/08/25/the-myth-of-the-tragedy-of-the-commons/>.
- 24 Onur Ulas Ince, "Property," in *Encyclopedia of Political Thought*, ed. Michael Gibbons (Oxford: Wiley-Blackwell, 2014), 1.
- 25 Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990), 1. Ostrom is the first (and so far only) woman to win the Nobel Prize for economics (which she shared with Oliver Williamson), which is all the more remarkable for the fact that she won it as a political scientist and not an economist.
- 26 Much of this influential work was done by the International Association for the Study of the Commons and the *International Journal of the Commons*, both of which closely identified with Ostrom. See, for instance, Bonnie J. McCay and James M. Acheson, "Human Ecology of the Commons," in *The Question of the Commons: The Culture and Ecology of Communal Resources*, ed. Bonnie J. McCay and James M. Acheson (Tucson: University of Arizona Press, 1987). For a useful survey of Ostrom's impact, see Tim Forsyth and Craig Johnson, "Elinor's Ostrom's Legacy: Governing the Commons and the Rational Choice Controversy," *Development and Change* 45, no. 5 (2014).
- 27 Carol Rose, "The Comedy of the Commons: Commerce, Customs, and Inherently Public Property," *University of Chicago Law Review* 53, no. 3 (Summer 1986). See also Rose, *Property and Persuasion*.
- 28 E. P. Thompson, *Customs in Common*; Midnight Notes Collective, ed. "The New Enclosures," *Midnight Notes* 10 (1990); Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000), *Multitude: War and Democracy in the Age of Empire* (New York: Penguin, 2004), and *Commonwealth* (Cambridge, MA: Harvard University Press, 2009). For previous historical debates on the "commons," see R. H. Tawney, *The Agrarian Problem in the Sixteenth Century* (London: Longmans, 1912); J. A. Yelling, *Common Field and Enclosure in England, 1450–1850* (London: Macmillan, 1977); J. M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* (Cambridge: Cambridge University Press, 1993); Linebaugh, *Stop, Thief!*
- 29 For work that employs the language of "enclosures of the commons" as a means of understanding colonialism, see Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Boston: Beacon, 2000); Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill: University of North Carolina Press, 1975), 82–83; Gary Nash, *Red, White, and Black: The Peoples of Early North America*, 4th ed. (Upper Saddle River, NJ: Prentice Hall,

- 2000); Patricia Seed, *American Pentimento: The Invention of Indians and the Pursuit of Riches* (Minneapolis: University of Minnesota Press, 2001); Nancy Shoemaker, *A Strange Likeness: Becoming Red and White in Eighteenth-Century North America* (New York: Oxford University Press, 2004); Stuart Banner, *How the Indians Lost their Land: Law and Power on the Frontier* (Cambridge, MA: Harvard University Press, 2005); Charles Geisler, "Disowned by the Ownership Society: How Native Americans Lost Their Land," *Rural Sociology* 79, no. 1 (March 2014); Derek Wall, *The Commons in History: Culture, Conflict, and Ecology* (Cambridge, MA: MIT Press, 2014).
- 30 For a critique of this sort, see Sharma and Wright, "Decolonizing Resistance."
- 31 David Schorr, "Savagery, Civilization, and Property: Theories of Societal Evolution and Commons Theory," *Theoretical Inquiries in Law* 19 (2018).
- 32 See, e.g., Melanie Johnson-DeBaufre, Catherine Keller, and Elias Ortega-Aponte, eds., *Common Goods: Economy, Ecology, and Political Theology* (New York: Fordham University Press, 2015).
- 33 For an extensive critique of the application of a "commons" framework to colonialism, see A. Greer, *Property and Dispossession*, esp. chap. 7.
- 34 Bonnie Honig, *Public Things: Democracy in Disrepair* (New York: Fordham University Press, 2017), 89.
- 35 For an insightful intervention along these lines, see Sandy Grande, "Accumulation of the Primitive: The Limits of Liberalism and the Politics of Occupy Wall Street," *Settler Colonial Studies* 3, no. 4 (2013).
- 36 Giorgio Agamben, *The Highest Poverty: Monastic Rules and Form-of-Life* (Stanford: Stanford University Press, 2013), xiii.
- 37 See Noël Ing, *Bona Vacantia* (London: Butterworths, 1971).
- 38 Fitzmaurice, *Sovereignty, Property, and Empire*, chap. 2.
- 39 Blackstone, *Commentaries on the Laws of England*, book V, chap. XVII. In other words, you cannot "steal" a corpse because the dead are not the property of anyone. For a brief discussion of this, see Dayan, *The Law Is a White Dog*, 34.
- 40 For another example, see Jill Frank's recovery of an Aristotelian conception of property that does not fit neatly into contemporary distinctions between public and private but rather models an ideal of "holding things as one's own for common use." Jill Frank, *A Democracy of Distinction: Aristotle and the Work of Politics* (Chicago: University of Chicago Press, 2005), chap. 2.
- 41 Locke, *The Second Treatise of Government*, 286.
- 42 Locke did not use the specific language of *res nullius* to define this category. Many subsequent commentators and legal practitioners did however. More recently, it has found its way into international law. See Randall Lesaffer, "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription," *European Journal of International Law* 16, no. 1 (2005). This points us to a more general irony attending discussion of *res nullius* in European legal and political thought: although the phrase *res nullius* is possible in Latin, it is only very rarely used in actual Roman law. Instead, as Andrew Fitzmaurice has demonstrated,

laws used a wide range of proximate expressions and phrases, which tend to afford greater specificity and precision. In particular, these alternative formulations help differentiate between “inappropriate” and “not-yet appropriated.” For instance, see Fitzmaurice, *Sovereignty, Property, and Empire*, 51–59, citing Dig. 1.8.1: “What is subject to divine right is not anyone’s property” (*quod autem divini iuris est, id nullius in bonis est*); Dig. 1.8.6.2: “Things sacred or religious or sanctified are no one’s property” (*Sacrae res et religiosas et sanctae in nullius bonis sunt*); Inst. 2.1.7: “What belongs to heaven is part of no man’s estate” (*quod enim divini iuris est, id nullius bonis est*); Gai. 2.9: “What is under divine law cannot be private property” (*quod nullius sit, occupantis fit*). Thus, although the concept appears to have an extended provenance, it is in fact a relatively recent, modern invention, one that has been projected backward into antiquity. Lamenting the instability and imprecision of modern uses of the phrase, Fitzmaurice does not consider the political *function* of this common conflation.

- 43 David Delgado Shorter, “Spirituality,” in *Oxford Handbook of American Indian History*, ed. Frederick Hoxie (Oxford: Oxford University Press, 2016), 444.
- 44 A. Simpson, *Mohawk Interruptus*, 3.
- 45 Barker, *Native Acts*, 11.
- 46 Neera Chandhoke, “Realising Justice,” *Third World Quarterly* 34, no. 2 (2013): 312.
- 47 My understanding of this art form comes from Joyce Szabo, *Howling Wolf and the History of Ledger Art* (Albuquerque: University of New Mexico Press, 1994); Janet Catherine Berlo, ed., *Plains Indian Drawings, 1865–1935* (New York: The American Federation of Arts, 1996); and from Donald Montileaux’s artist statement, accessed March 3, 2019, <http://www.donaldfmontileaux.com>.
- 48 Quoted from Donald F. Montileaux’s website, accessed March 3, 2019, <http://www.donaldfmontileaux.com>.