The Tragedy of the Wastes:

Property and the Making of Nation-States in Eighteenth Century America

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Abstract:

This article considers how transformations of property concepts during the mid-eighteenth century influenced the evolution of territorial jurisdiction. Offering the most comprehensive study yet undertaken of the concept of waste property, the article argues that because waste property was a legal concept found in French, British and Spanish systems, the concept played a substantial role as imperial powers articulated and resolved claims to land around the now forgotten Appalachian Mountain boundary. Prior to the eighteenth century, the idea of waste property encouraged a zonal boundary in the Appalachian Mountain range, roughly dividing land claims and leaving the mountains as common ground. Yet the Appalachian waste was short-lived. Evidence compiled here indicates that during the early to mid-eighteenth century, waste property was eliminated because, first, technology in surveying and cartography replaced the social function of waste as a land use-based boundary, and second, developing agricultural technology combined with increasing industrialization to drive a substantial revaluation of land as competition rose for natural resources such as coal and iron ore. I demonstrate that the end of the wastes was, in critical part, a factor in the development of concepts of territorial jurisdiction, which promoted stable claims to natural resources.
In his classic treatise on international law, Norman Hill wrote, “Before the nineteenth century, statements of claims [to territory], when made at all, were much less elaborate than they are today. This was because the more common practice was to seize the coveted territory without bothering to justify the action.” Following Hill’s example, leading theories of international law have regarded competing imperial claims to territory in the eighteenth century as lacking “any significant legal component.” Within American scholarship, this view has been strengthened by the U.S. Supreme Court’s declaration of colonists’ “clear title” to native lands in *Johnson v. M'Intosh.* While *Johnson* accepted doctrines of discovery and conquest as methods of acquiring territory, this aspect of the decision has been rejected by modern scholars for “failure to pin down the legal basis.” While colonial conquest is has been accepted as a method of legally acquiring territory under international law, the doctrine is also traced to Marshall’s opinion. While this view of territorial claims as a non-legal enterprise has endured for more than a century, recent work has begun to challenge this perception. Patricia Seed’s history of European claims has demonstrated that the imperial powers applied elements of their respective

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1 Norman Hill, *Claims to Territory in International Law and Relations* (London: Oxford University Press, 1945), 35.
3 21 U.S. 543 (1823).

While colonial conquest is has been accepted as a method of legally acquiring territory under international law, the doctrine is also traced to Marshall’s opinion. Elena Cirkovic, "Theoretical Approaches to International Indigenous Rights: Self-Determination and Indigenous Peoples in International Law," *American Indian Law Review* 31(2006-07): 384.
domestic legal systems to articulate claims of possession. Similarly, Ken MacMillan has elucidated the role of Roman law to provide shared legal norms among the imperial powers.

Still, the role of law in territorial claims has remained questionable. While both Seed and MacMillan demonstrate that imperial powers were preoccupied with establishing possession, this may not be conclusive. Possession, discovery and conquest have been considered less doctrines of law and more post hoc rationalizations for territorial ambitions. At the same time, the legal nature of territorial claims has also been implicitly questioned by the work of Lauren Benton whose realist investigation of the eighteenth and nineteenth centuries limits sovereignty to “enclaves and corridors” where states are able to establish effective control—thereby again reducing law to post hoc justification.

One of the central purposes of this article is to establish that imperial powers of the eighteenth century articulated territorial claims with a deep attention to law. In particular, this article demonstrates the role of property in the establishment of territorial jurisdiction. The primary claim is that the mid-eighteenth century movement toward territorial jurisdiction was, in critical part, a result of the disappearance of a cross-cultural legal concept of waste property, which was, in turn, driven by a combination of developments in survey technology and rising industrialization. This shared concept of waste property existed in domestic contexts in Britain, Spain and France, as well as in the international context, as in the French-Spanish Pyrenees Mountain border. As a property designation, waste was an economic assessment of the land, rather than a reference to a specific type of landscape; waste property was land that could produce no profit.

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In the first section, this article demonstrates that because there was no incentive to control waste lands, waste property encouraged common or unspecified ownership and often existed as a boundary between rival domestic divisions as well as between international neighbors. In light of Peter Sahlins’ work on the French-Spanish boundary, the discussion focuses on the existence of a similar concept of waste property within the British common law and continues with an examination of the Christian heritage of waste. Emphasis falls on the social function of waste as a boundary, both domestically and internationally, also drawing on the use of the term waste for the oceans.

The second Part examines how the concept of waste was imported by imperial powers to North America and applied to establish a zonal boundary through the Appalachian Mountains, between French, British and Spanish claims. This portion of the article then argues that waste property disappeared, along with the Appalachian zonal boundary, allowing territorial jurisdiction to snap to rigid lines. This disappearance of wastes, it is argued, results from first, the ability of surveys and maps to replace the social function of wastes as boundary lines, and second, the revaluation of land that accompanied industrialization and emphasized natural resources over agriculture.

Lastly, the third Part details how imperial powers responded to the end of agreed-upon wastelands, drawing specifically on the example of competing land claims in the Appalachian Mountain range and explaining how imperial powers were forced to transform legal concepts to be able to argue rightful claim to lands that were not settled (and therefore neither conquered nor possessed). Underlying this argument is another, more basic thesis: that ideas matter and that law is more than effective control. Pushing back against Benton’s account, I demonstrate how

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the imperial powers established an enduring boundary line in Appalachia—a line that would survive through legal arguments rather than by military force—even while control was surely sporadic and uneven.

I. The Meaning of the Wastes

Virtually nothing has been written in the secondary literature on the concept of waste as a category of property in the common law. While the term is known to every first-year law student, waste calls to mind primarily the notion of a cause of action, roughly a tort against property, brought by a land owner against a tenant for some form of destruction during the leasehold. This more enduring usage has overshadowed a second meaning, as a form of property: wastelands.

As a property designation, waste was an economic assessment of the land, rather than a reference to a specific type of landscape. Waste land was “unprofitable” and could yield no rent, as one writer explained.8 Waste referred to non-arable areas of forest, moor, and mountain used for gathering firewood, thatch, stones and dead wood for building, fences, etc. For example, James Brome, writing in 1694, described the digging of stone from the wasteland by commoners for use in chimneys.9 While some waste was also used for pasturing, waste was both legally and

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9 James Brome, "An Historical Account of Mr. Rogers's Three Years Travels over England and Wales Giving a True and Exact Description of All the Chiefest Cities, Towns and Corporations in England, Dominion of Wales, and Town of Berwick Upon Twede: Together with the Antiquities, and Places of Admiration, Cathedrals, Churches of Note in Any City, Town or Place in Each County, the Gentleman above-Mentioned Having Made It His Whole Business (During the Aforesaid Time) to Compleat the Same in His Travelling: To Which Is Annexed a New Map of England and Wales, with the Adjacent Parts, Containing All the Cities and Market Towns Bound in Just before the Title.," (Early English Books, 1694), 37.
functionally distinct from the commons—areas of shared pastures and fields.\(^\text{10}\) Waste might be “Boggy and surrounded Ground.”\(^\text{11}\) Indeed, the term often referred to land that was not only uninhabitable, but also fairly hostile to crossing on foot or horseback.\(^\text{12}\)

Unfortunately, scholars have often used the term “waste” broadly to refer to more than one scenario for usage and legal claim.\(^\text{13}\) While some manors and villages claimed specific areas of wastes as theirs alone, wastes also formed swaths of territory in between manors, villages and townships in Britain.\(^\text{14}\) Even scholars in the eighteenth century began to complain of the unspecific terminology.\(^\text{15}\) However, careful writers distinguished two primary types of waste—“parochial wastes,” which were within the space and usage of a single township or village and “forest lands and other extensive waste,” which was either unclearly claimed or, alternatively,

\(^{10}\) While some towns and villages specifically claimed areas of wastes, in others, it would have been difficult to tell precisely where the commons ended and the waste began. H.S. Bennett, *Life on the English Manor: A Study of Peasant Conditions 1150-1400* (Cambridge: Cambridge University Press, 1965). Additionally, the extent, usage and geography of wastelands varied greatly across the kingdom. E.C.K. Gonner, *Common Land and Inclosure* (London: MacMillan and Co., Ltd., 1912). Additionally, other writers use the terms “forests” and “heaths” at times to refer to wastelands, although each of these also has a more precise meaning. “An Essay on Wastes in General and Mosswald in Particular,” (Norwich: Crouse & Stevenson, 1792), 15.

\(^{11}\) Unknown Author, "The Case of the Mannor of Epworth in the Isle of Axholm, in the County of Lincoln, Concerned in the Bill for an Act for Setting the Level of Hatfield Chase Humbly Presented to the Right Honorabler the Commons of England in Parliament Assembled," (Early English Books, 1695). The term waste was commonly applied to land that was “either under water, or subject to drowning.” Nicholas Breton, "An Olde Mans Lesson, and a Young Mans Love," (Early English Books, 1605), 13.

\(^{12}\) Thus a course might be “cutte off by the waste.” Unknown Author, "Advertisements from Britain, and from the Low Countries, in September and October," (Early American Books, 1591), 5.

\(^{13}\) This continuing problem is alluded to in Gonner, *Common Land and Inclosure*, 287. Indeed, a legal writer in 1700 also complained that “Waste is uncertain, and may comprehend Land of any Quality,” and indeed it did include land that varied from areas that were quickly becoming arable with new technology to lands regularly flooded. ———, "The Law of Ejectments, or, a Treatise Shewing the Nature of Ejectione Firme the Difference between It and Trespass, and How to Be Brought or Removed Where the Lands Lie in Franchises ... As Also Who Are Good Witnesses or Not in the Trial of Ejectment ... Together with the Learning of Special Verdicts at Large ... Very Necessary for All Lawyers, Attornies, and Other Persons, Especially at the Assizes &C. ," (Early English Books, 1700), 55.

\(^{14}\) While many villages and manors specifically claimed an area within their bounds as “wastes” for the town, more commonly wastes were between and around wastes. Percival Birkett, "Commons and Open Spaces: Their Origin, History and Utility with Suggestions for Facilitating Their Preservation,” in *LSE Selected Pamphlets* (1893), 5-8.

claimed and used by multiple jurisdictional units and which lay between such units. Thus, it was possible for Jonas Adames to write in 1599 that “all the vacant and waste land within the Manour, is to the Lord of the Manour,” thereby limiting the Lord’s claim to only the wasteland given to the manor itself. The two types of waste were explained by Thomas Blount in his 1670 treatise, Nomo-Lexikon. Blount explained that some waste was the “Lords Waste,” which was kept “for the use of himself and his Tenants,” and on which the tenant might have a right to dig. In the second meaning, other wastes were “those Lands which are not in any one Mans occupation, but lie in common, which seem to be so called, because the Lord cannot make such profit of them.” Ownership of these is common because there is no economic incentive to establish ownership. As one legal treatise explained, “waste ground is such as no man doth challenge as his own; and lieth unenclosed and unbounded with hedge and ditch.”

The common ownership of these wastes is evident in a case reported from 1682, and brought before the Spiritual Court, where there was “a great Waste” upon which the defendant had placed his cattle. The issue in the case was to which parish the defendant owed tithes for the cattle. The court concluded that “tithes of cattle feeding in a Waste or Common, where the

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16 Marshall, *On the Appropriation and Inclosure of Commonable and Intermixed Lands*. Further evidence of these divisions of waste may be found in Uninclosed Select Committee Appointed to Take into Consideration the Means of Promoting the Cultivation and Improvement of the Waste, and Unproductive Lands of the Kingdom, "First Report from the Select Committee," ed. Parliament House of Commons (London1795), 13.
17 Jonas Adames, "The Order of Keeping a Court Leete, and Court Baron with the Charges Appertayning to the Same: Truely and Playnly Deliuered in the English Tongue, for the Profite of All Men, and Most Commodious for Young Students of the Lawes, and All Others within the Jurisdiction of Those Courtes.,” (Early English Books, 1599), 163:07.
19 Ibid., 134.
20 Ibid., 142.
21 Common ownership was indicated by the use of the term wastelands to refer to the areas surrounding the highways. Daniel DeFoe, "An Essay Upon Projects," (Early English Books, 1697), 79-80.
Parish is not certainly known, shall be paid to the Parson, etc., of the Parish where the owner of
cattle lives.”23

The Christian Heritage of Waste

The notion of wastes originates in a Christian heritage—which was shared among British,
French and Spanish legal cultures—and roughly refers to an area that is not preferred for
settlement, one that is dangerous to the body and spirit. Notably, within Christian usage, a waste
did not refer to any particular landscape, but rather the quality of being dangerous to survival—a
place that was unsettled, unprofitable, or likely to be inhabited by demons. A lack of potable
water for consumption and cultivation indicated waste, as in Job’s “desolate and waste ground”
that would not allow the “tender herb to spring forth,”24 or Isaiah’s river that was “wasted and
dried up.”25 And yet a deep forest might also be waste; Deuteronomy references “the waste
howling wilderness.”26 Landscapes that were arable could become waste by neglect, as in
Isaiah: “And I will lay it waste; it shall not be pruned or dug, but there shall come up briers and
thorns. I will also command the clouds that they rain no rain upon it.”27 As demonstrated in
Isaiah 51:3, where God promised to “comfort all her waste places,” the waste was both the

23 Anthony Colquitt, "Modern Reports, or Select Cases Adjudged in the Courts of Kings Bench, Chancery,
Common-Pleas, and Exchequer since the Restoration of His Majesty King Charles Ii Collected by a Careful Hand,"
(Early English Books, 1682), 216.
24 Job 38:27.
25 Isaiah 19:5. This meaning is also used in Isaiah 42:15, where God says, “I will make waste mountains and hills,
and dry up all their herbs; and I will make the rivers islands, and I will dry up the pools.” See also Ezekiel 30:12:
“And I will make the rivers dry, and sell the land into the hand of the wicked; and I will make the land waste and all
that is therein, by the hand of strangers.”
26 Deuteronomy 32:10.
27 Isaiah 5:6.
“desert” and also the “wilderness.”28 Not only did the term apply to different types of landscapes, it also applied to cities that became waste by warfare and destruction, as suggested by the threat in Leviticus that “your land shall be desolate and your cities waste.”29

Yet, while waste was a flexible concept applied to different landscapes, there was a particular association with mountains. Ezekiel refers to “the mountains of Israel, which have been always waste.”30 Mountains were, by definition, “solitary and waste,”31 or “vacant, waste, and desolate,” surely uninhabited.32

Waste referenced a both human and economic element: a combination of a lack of both habitation and of profitable cultivation. This meaning is clear in Isaiah where the cities are described as “wasted without inhabitant, and the houses without man, and the land be utterly desolate.”33 When God would “maketh the earth empty and maketh it waste, and turneth it upside down, and scattereth abroad the inhabitants thereof.”34 Thus, when the highways were empty, they “lie waste,”35 and where a land was cursed it became waste and “none shall pass through it for ever and ever.”36

28 Wilderness, a term often used concurrently if not synonymously in Biblical texts with waste, has been linked in the cultural heritage with ideas of “the unknown, the disordered, the dangerous”—with an opposite of paradise. Roderick Frazier Nash, Wilderness and the American Mind, Fourth Edition ed. (New Haven: Yale University Press, 2001), xii.
29 Leviticus 26:33.
30 Ezekiel 38:8.
31 William Charke, "A Replie to a Censure Written against the Two Answers to a Jesuites Seditious Pamphlet," (Early English Books, 1581), 11.
32 Josiah Coale, "The Whore Unvailed, or, the Mistery of the Deceit of the Church of Rome Revealed Being a Brief Answer to a Book Entituled, the Reconciler of Religions, or, a Decider of All Controversies in Matters of Faith, Written by a Professed Roman Catholick Who Subscribes His Name A.S. In Which He Endeavoured to Prove the Church of Rome to Be the True Church ... / by a Servant of the Lord, Josiah Coale ; Whereunto Is Added the 14th Chap. Of A.S. His Book in Which He Declares the Protestant ... Not to Be True Preachers.," (Early English Books, 1665), 46.
33 Isaiah 6:11.
34 Isaiah 24:1. See also Jeremiah 2:15 and 4:7 (lands laid waste are left “without inhabitant”); Zephaniah 3:6 (“I made their streets waste, that none passeth by”); Ezekiel 36:33 (the rehabilitation of wastes leads to habitation again).
35 Isaiah 33:8.
36 Isaiah 34:10.
Notably, the economic component of Biblical waste was not regarded as a permanent state of being. Waste could be rehabilitated, and by humans, not solely by divine intervention. The people could “build the old waste places,” and be called, “the Restorer of Paths to dwell in.”

The idea of economic restoration is a common theme, repeated in many books of the Bible: “And they shall build the wastes of old, they shall raise up the former desolations, and they shall repair the waste cities, the desolations of many generations.”

It was this possibility of redemptive progress that separated the closely related ideas of wilderness and waste. European cultures tended to regard all of North America as wilderness before their settlement. This notion of wilderness is, of course, linked with the idea of terra nullis and the right of Christian, European nations to colonize the new continent. However, here the more important consideration is how the terms wilderness and waste were divergent. While the terms were often used together in biblical reference, waste was a concept used more specifically by the seventeenth and eighteenth centuries to refer to those areas that were less

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37 Isaiah 58:12.
38 Isaiah 61:4. See also Ezekiel 36:33 (“the wastes shall be rebuilt”); Ezekiel 36:35 (“This land that was desolate has become like the Garden of Eden, and the waste and desolate and ruined cities have become fortified and are inhabited.”); Amos 9:14 (“they shall build the wasted cities”).

Notably, when a curse is irrevocable, the area is described as “perpetual wastes,” suggesting that the modifier is necessary to confirm the inability to change the land’s status.
39 The association appears to indicate, again, the lack of economic profitability, and therefore a writer might say that a place “had laid waste like a Wildernesse.” Sir Richard Baker, "A Chronicle of the Kings of England, from the Time of the Romans Governor Unto the Raigne of Our Sovraine Lord, King Charles Containing All Passages of State or Church, with All Other Observations Proper for a Chronicle / Faithfully Collected out of Authours Ancient and Moderne, & Digested into a New Method," (Early English Books, 1643), 18.
40 John L. Comaroff, "Colonialism, Culture, and the Law: A Forward," Law & Social Inquiry 26, no. 2 (2001): 309. There is evidence that this attitude continued in American culture during the settlement of the west. See Mark David Spence, Dispossessing the Wilderness: Indian Removal and the Making of the National Parks (New York: Oxford University Press, 1999). Much has been written on the political and social life of the concept of wilderness, which continues to imply the absence of humans even while the concept is a decidedly social one. See, for example, William Cronon, Uncommon Ground: Rethinking the Human Place in Nature (New York: W.W. Norton & Co., 1995).
amenable to transformation through settlement and agriculture. Thus, the wilderness might be settled, but the waste would not be.

Usage of the term was continuous, not only through reading of Biblical texts, but also through sermons, which both quoted the Biblical texts and also frequently utilized the concept of waste more generally, and through religious books. Thomas Adams preached that one must not act “as if it concerned you not what ruine laid waste the Land.” Inspirational sermons meanwhile referenced the ability of God to rescue, to find one “in a Desart Land, in a waste howling Wilderness,” from which he led them out and “kept them as the apple of his eye.” The term also moved to a variety of general security uses, where it referenced unprofitable or unusable land, such as in descriptions of land abandoned due to the plague. William Caxton in The Chronicles of England, wrote that because of disease people “left the land all desert and waste so that there was not one man to [work] and till the land.” While continuing a link to Biblical stories, the term was increasingly used in a secular context where the primary element was an economic determination of land value.

*The Social Function of Wastes*

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42 See, e.g., Thomas Adams, "The Deuills Banket Described in Foure Sermons," (Early English Books, 1614).
44 Adams, "The Deuills Banket Described in Foure Sermons," 87.
45 Henry Adis, "A Fannaticks Alarm, Given to the Mayor in His Quarters, by One of the Sons of Zion, Become Boanerges to Thunder out the Judgements of God against Oppression and Oppressors, Together with Some Flashings of Pure Gospel-Lightnings, Really Intended for the Enlightning the Eyes of the Understanding, Even to the Beholding of Him Who Is Invisible," (Early English Books, 1661), 38.
46 Unknown Author, "Heraclitus Christianus, or the Man of Sorrow Being a Reflection on All States and Conditions of Human Life," (Early English Books, 1677), 116.
The practice of using barriers of waste was well developed in the British tradition—although primarily on the smaller scale of manors and townships. Unfortunately, the concept has received scant scholarly attention—and where attention has been given, scholars have concentrated on the disappearance of wastes as land was enclosed during the eighteenth and early nineteenth centuries. Even Blackstone neglects the subject in his Commentaries. Most importantly, little has been written on the social function of waste as a shared boundary area—precisely the function that was carried over into North America and is instructive on the British concept of jurisdiction.

The wastes that fell between settlements were, “no-man's-land, and frequently so vast in extent that no very clear delimitation of ownership had ever been made.” As odd as this may seem to the modern observer, it is important to recall that in this era land had not yet been accurately surveyed and mapped. Indeed in the early eighteenth century, a new royal map of France would reduce its lands by one-fifth due to increasingly accurate surveying and mapping. Similarly, Britain lacked surveys and maps of much of the countryside—particularly the wastes—and ownership of these lands was not entirely settled. Some scholars have argued that these lands were public with rights extending to all persons within the British Isles—not merely shared between the adjoining manors or villages. Whether or not such a broad claim would have been legally sound, certainly, at least neighboring manors and villages shared the forests

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48 However, Britain also used the concept of waste to outline a zonal, mountainous boundary between England and Scotland, which was poorly integrated into the kingdom. See Michael Biggs, "Putting the State on the Map: Cartography, Territory, and European State Formation," *Comparative Studies in Society and History* 41, no. 2 (1999). See also William Marshall, *The Rural Economy of the West of England*, vol. 2 (London1796), 2.2.


50 Biggs, "Putting the State on the Map: Cartography, Territory, and European State Formation."

51 Birkett, "Commons and Open Spaces: Their Origin, History and Utility with Suggestions for Facilitating Their Preservation," 3. This argument may be supported by seventeenth century accounts which classified wastes with roads, while separately labeling uninhabited moors, heaths and mountains. See J.N.L. Baker, "England in the Seventeenth Century," in *An Historical Geography of England before A.D. 1800*, ed. H.C. Darby (Cambridge: Cambridge University Press, 1936). This view was argued by commoners in the 1600s as well. See, e.g., Gerrard Winstanley, *An Appeal to the House of Commons, Desiring Their Answer: Wether the Common-People Shall Have the Quiet Enjoyment of the Commons and Wasate Land* (London1649).
and wastes lying between them—as can be seen in examples such as Hertfordshire, where five manors shared one waste,\textsuperscript{52} Epping where the forest was shared,\textsuperscript{53} the Manors of Hales and Clent which shared a commons between them,\textsuperscript{54} Malvern Hills, where a waste was shared by thirteen surrounding parishes,\textsuperscript{55} and both Whalley and New Forest, where numerous vills shared extensive waste acreage.\textsuperscript{56} These areas were, in George Homan’s words, “a debatable ground.”\textsuperscript{57} While some towns, villages, and manors were set apart by specific boundaries, others were not at all distinguished by specific lines.\textsuperscript{58} In this regard, comparison has been made between the British and the ancient Germanic system of settlement, which also appeared to lack defined boundaries until pressures of population increase and settlement demanded them.\textsuperscript{59} 

Even where there was an explicit grant, H.S. Bennett refused to count wastelands within a manor’s bounds, explaining that, “we constantly hear, for example, of permission being given by the King to lords to include considerable areas within their domains. These however, were not necessarily part of the manor since they formed part of the great empty wastes that lay between one village and another.”\textsuperscript{60} William Marshall, writing in 1801, agreed, describing wastes as being only “nominally attached to neighboring parishes.”\textsuperscript{61} As William Marshall explained in 1788, “There has no doubt been a time (and not perhaps many centuries past) when

\textsuperscript{52} Birkett, "Commons and Open Spaces: Their Origin, History and Utility with Suggestions for Facilitating Their Preservation," 9.
\textsuperscript{53} Ibid., 11-12.
\textsuperscript{54} George C. Homans, \textit{English Villages of the Thirteenth Century} (Norton, 1975), 328. Although this is described as a “commons,” it was used as wasteland was, to gather materials.
\textsuperscript{55} Birkett, "Commons and Open Spaces: Their Origin, History and Utility with Suggestions for Facilitating Their Preservation," 14.
\textsuperscript{56} Bennett, \textit{Life on the English Manor: A Study of Peasant Conditions} 1150-1400, 58.
\textsuperscript{57} Homans, \textit{English Villages of the Thirteenth Century}, 19.
\textsuperscript{58} John Entick, \textit{The Present State of the British Empire} (London: B. Law, 1775).
\textsuperscript{60} Bennett, \textit{Life on the English Manor: A Study of Peasant Conditions} 1150-1400.
\textsuperscript{61} Marshall, \textit{On the Appropriation and Inclosure of Commonable and Intermixed Lands}, 9. Still, some lords, particularly in later times, prosecuted those who imposed upon their claimed wastelands. As one such set of cases illustrates, while the lords were confident in their title, the commoners were equally confident in their own rights to the wastes. See Winstanley, \textit{An Appeal to the House of Commons, Desiring Their Answer: Wether the Common-People Shall Have the Quiet Enjoyment of the Commons and Wasate Land}. 

the entire country lay open; when common fields, common meadows, common pastures, open woods and extensive forests and wastes were the only division of lands in this kingdom.\textsuperscript{62}

The social function of wastes as boundaries is clear when the surveyor’s role is examined. John Norden’s Surveyor’s Dialogue, published in 1607, uses a fictional tale to describe the social role of the surveyor, who is a protector of the existing social order through maintaining the existing land use patterns, which themselves serve as the boundaries.\textsuperscript{63} Because survey technology was limited through the seventeenth century, land use itself was central to determining rightful legal boundaries of ownership.\textsuperscript{64} Changes to land use were prohibited not simply because there might be an issue of destroying existing interests, but also because existing patterns served to record what might not be accurately reflected by lines on paper.

Waste as a division of territory was also reflected in the international context, particularly in the use of the term waste to refer to the oceans. Although some countries established corridors where they claimed an exclusive right to travel, there was also a tradition of natural law argument supporting the oceans as common property,\textsuperscript{65} which resonated with the use of the term wastes. For example, there was a “lawe of shipwracke and waste,” governing the ownership and control of resources near the coast.\textsuperscript{66} “All the waste of the Ocean Sea”\textsuperscript{67} was an area

\textsuperscript{62} Marshall, The Rural Economy of Yorkshire, 48.
\textsuperscript{64} Ibid., 221.
\textsuperscript{65} Lauren Benton, A Search for Sovereignty: Law and Geography in European Empires, 1400-1900 (Cambridge: Cambridge University Press, 2010), 106.
\textsuperscript{67} Richard Broughton, "The Second Part of the Protestants Plea, and Petition for Preists and Papists Being an Historie of the Holy Preisthood, and Sacrifice of the True Church of Christ. Inuincibly Prouing Them to Be, the Present Sacrificing Preisthood: Prouing Also the Sacrifice of the Masse, Vsed in the Catholike Roman Church: And That These Were Promised, and Foretold by the Prophets, Instituted by Christ, and Exercised by All His Apostles. Morouer That They Have Euer from the First Plantinge of Christianitie in This Our Britanye, in the Dayes of the Apostles, in Every Age, and Hundred of Yeares, Beene Continued and Preferued Here. All for the Most Part,
unproductive and unclaimed, except in those areas nearest the shores. Translations of Eusebius, circa 340 reference, “the Ocean sea, being wide and waste.” Referencing common ownership specifically, poet John Dennis wrote about “the world’s uncultivated waste, the Ocean.”

Another major portion of uncultivated and difficult to use land was found in the mountains, which were also frequently regarded as wastes. This view was reinforced by a historical preference for major landscape features such as mountains and rivers as boundaries, particularly between less than friendly neighbors. Scholars, beginning with N.J. Pounds in the 1950’s, documented the influence of the concept of natural boundaries in seventeenth and eighteenth centuries within Europe. Peter Sahlins emphasizes the psychological power of natural boundaries by detailing the story of French cartographer Pierre Duval’s map. Duval’s map depicted a number of villages ceded to France, and “traced a line of mountains where there were none” to emphasize the separation between two enemy nations. The notion of natural boundaries appealed cross-culturally and was celebrated by rulers from France and Spain, to Russia, Korea and China. Landscape features could mark a boundary permanently without creating a fence, ditch, or boundary stone or relying on the availability of maps—and the inter-cultural acceptance of the symbolic value of natural landmarks meant lower transaction costs for the governments.

Warranted by the Writinges and Testimonies of the Best Learned Protestant Doctors, and Antiquaries of England, and Others. , (Early English Books, 1625), 56.

69 John Dennis, "Rinaldo and Armida, a Tragedy," (Early English Books, 1699), 3.
70 Sahlins, Boundaries: The Making of France and Spain in the Pyrenees, 94.
71 See also N.J.G. Pounds, "The Origin of the Idea of Natural Frontiers in France," Annals of the Association of American Geographers 41(1951). ———, "France and 'Les Limites Naturelles' from the Seventeenth to Twentieth Centuries," Annals of the Association of American Geographers 44(1951). Peter Sahlins, "Natural Frontiers Revisited: France's Boundaries since the Seventeenth Century," American Historical Review 95, no. 5 (1990). In the latter piece Sahlins discusses in greater detail the notion that concepts of natural boundaries were abused, applied to justify territorial expansions. I would agree with Sahlins’ conclusion that while such abuses did exist, there was also a substantial influence from the underlying concept of natural boundaries.
72 Sahlins, Boundaries: The Making of France and Spain in the Pyrenees, 60.
73 Hill, Claims to Territory in International Law and Relations, 37, 45.
This sense of separation by mountains was, however, valuable as a dividing line. From ancient times through the middle of the nineteenth-century nations exploited unsettled areas—and particularly mountainous ones—as “buffer” areas between nations. Historically such an unsettled buffer existed, for example, between England and Scotland, Norway and Russia, and Korea and China. Similarly, the Scandinavian Alps were regarded as “a physical obstacle to advance on either side,” providing “a broad band of rugged waste, desolate and free from human occupation,” and serving as “neutral if not common property.” While such areas were sometimes considered within the realm of one nation, the area was frequently considered neutral, even common, property.

II. Waste and the Appalachian Mountain Range

British colonization spread westward from the coasts to spill into the Appalachian Mountain range. Simultaneously, French explorers and settlers moved into the Mississippi River Valley area on the western side of the Appalachian Mountains by avoiding the range altogether. French settlers disembarked in their territory of Louisiane and travelled north, using the great Mississippi and Ohio Rivers as highways, or alternatively, crossed the great lakes and moved south from the Canadian territories into the Mississippi Valley. Spanish settlements spread upward from Florida and Georgia toward the base of the mountains. The Appalachian Mountain

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75 Ibid., 91-92.
76 Ibid.
77 Ibid., 92.
Range with its endless forests and unmapped territories became the largely unsettled region between the colonial powers.

Within England zonal shared areas of wastes persisted through till the end of the 1600’s, and even well into the 1700’s, and therefore such concepts formed a part of the governmental and territorial framework that British colonists brought to the new world. Indeed, the amount of waste land within England may have exceeded 10 million acres during this era.

Initially, the European rivals viewed Appalachia as a mountainous waste area that would form a useful boundary between French, British and Spanish claims. Repeatedly, maps gestured generally towards the range, rather than mapping the territory in any specific detail. The French Bellin map of 1744 shows coastal lines and rivers with great precision, but leaves the mountain range without detailed description:

Bellin Map of 1744: Detail of Appalachian Mountains

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80 John Bellers, "Essays About the Poor, Manufactures, Trade, Plantations, & Immorality and of the Excellency and Divinity of Inward Light, Demonstrated from the Attributes of God and the Nature of Mans Soul, as Well as from the Testimony of the Holy Scriptures," (Early English Books, 1699), 7.
When represented on a map, the mountain range was deceptively linear, when it in fact covered thousands of square miles.

As Robert Livingston, the first U.S. Secretary for Foreign Affairs would explain later, while attempting to hammer out a settlement of the American Revolution, the territory in between settlements was a “waste land,” not clearly claimed by any of the parties.81

In 1719 Governors and other influential colonists advised the Board of Trade in London that the Appalachian mountains was the best western boundary for the British colonies—and did so relying explicitly on the idea of mountains as natural dividers.82 Despite the constant pressure to push westward and later protesting by the British colonists of the Appalachians as the border, the idea of natural boundaries remained influential.83 Thus, Thomas Jefferson, in a letter to

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83 As the French-Indian War persisted, there is evidence that some—although perhaps as much British as colonist—began to fight the idea of natural boundaries since the French used this as a reason to limit the British to the eastern
James Madison, explained the Appalachian boundary saying, “The country for 180 miles beyond that is an absolute desart, barren & mountainous which can never be inhabited, & will therefore be a fine separation between us & the next state.”\textsuperscript{84} Such reasoning depended on the idea of waste property—a section of land that was agreed upon as having no significant economic value.

\textit{The End of the Wastes}

The grounding of waste in an economic evaluation ultimately entailed its destruction as technologies of transportation and agriculture developed. In the English history, wasteland was often improved and became a new village or township by charter—thereby indicating the wastes’ nature as unclaimed areas of royal lands between existing units of government.\textsuperscript{85} Thus, “even in the more favoured lowland parishes, where every farm- and hamlet-name was already written and had been since the time of Edward III, there were still new field-names to be written in the spaces between ancient names.”\textsuperscript{86} By the mid fifteen hundreds, a rise in population triggered public exhortations to the King and Parliament to allow those who “all this time before spent in idelnnes and unprofitable labours,” might become “employed upon the tillage of the waste & slopes of the Appalachian Mountains. "Postscript: This Day Arriv'd the Mail from Holland; Constantinople, April 2," \textit{London Evening Post}, May 8 1755. In this article, the writer explains, “Besides (continue the French) the Apalachian Mountains are, and ought ever to be, the natural bounds of the English Possessions.” See also “Consequences of the French Encroachments,” \textit{Lloyd's Evening Post and British Chronicle}, Sept. 30, 1757. Indeed, the idea of natural boundaries was so persistent that it would continue through the early decades of American history. Thomas Jefferson supported the separation of Kentucky from the large Virginia colony because “Kentucky, separated from Virginia by mountains, seemed a natural state, which should be organized under its own state government.” Frederick Merk, \textit{Manifest Destiny and Mission in American History: A Reinterpretation}, First Paperback Edition ed. (Cambridge: Harvard University Press, 1963), 10. Madison favored the Mississippi River as the natural dividing line of the continent. Frederick Jackson Turner, “The Significance of the Section in American History,” in \textit{The Frontier and the Section}, ed. Ray Allen Billington (Englwoods Cliffs, N.J.: Prentice Hall, 1961), 59. John Quincy Adams, while generally favoring full continental expansion, later expressed doubt as to the Pacific area past the Rockies, noting that he would expect such a region to “soon separate from this Union.” Merk, \textit{Manifest Destiny and Mission in American History: A Reinterpretation}, 17.


\textsuperscript{85} Seebohm, \textit{The English Village Community}. See also Dunsford and Harris, "Colonization of the Wasteland in County Durham, 1100-1400," 41. Similarly, Gonner argues that waste land was improved both with and without new grants. Gonner, \textit{Common Land and Inclosure}.

\textsuperscript{86} Hoskins, "The Reclamation of the Waste in Devon, 1550-1800," 85.
desolate groundes." In other words, “more hands would quicken industry, and improve waste ground." Or in Daniel Defoe’s words, “we have in England more Land lies unimproved, common and waste, than would feed a vast many People more than we have.”

Thus, by 1610, we see a slight shift in the usage of the term waste, as is evidenced in St. Augustine’s use of the term for a land that is “unmanured.” Another author, in 1630 suggested that land was “lying waste, somewhere for want of water, somewhere for want of manurance, somewhere for abundance of light sand and sterile Dust”—thereby mixing both lands that technology could make arable and others that it likely could not. Michel Baudier laments that because too many man are at war, “much good Land lies waste, for want of men to till it.” John Bonoel, writing in 1622, defines waste as simply that part of land that is not “put to some good use or other.” Echoing the sentiment across the water, Jean Bodin exhorts that “lands should not remain waste, the poor wanting cattle and means to till it.” While it was legally risky, in terms of the investment in an undetermined property interest, apparently some farmers applied their “great charge and industry and good culture” to plant and improve the wastelands.

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87 Unknown Author, "Pyers Plowmans Exhortation, Unto the Lordes, Knightes and Burgoysses of the Parlyamenthouse," (Early English Books, 1550), 11.
89 Daniel DeFoe, "Lex Talionis, or, an Enquiry into the Most Proper Ways to Prevent the Persecution of the Protestants in France," (Early English Books, 1698), 25.
90 Giovanni Botero, "Relations of the Most Famous Kingdomes and Common-Wealths Thorowout the World Discoursing of Their Situations, Religions, Languages, Manners, Customs, Strength, Greatnesse, and Policies. Translated out of the Best Italian Impression of Boterus. And since the Last Edition by R.I. Now Once Againe Inlarged According to Moderne Observation; with Addition of New Estates and Countries. Wherein Many of the Oversights Both of the Author and Translator, Are Amended. And Unto Which, a Mappe of the Whole World, with a Table of the Countries, Are Now Newly Added.," (Early English Books, 1630), 423.
By 1682, the English government had resolved to transfer 10,000 acres of land in the area of Dean from waste to forest. The action was taken “for the growth and preservation of timber.” The shift in the ownership and rights of profits and access to the land is reflected in the statute’s notation that the lands would henceforth “be under the regard and Government of Forest Law.” Another bill in Parliament planned for the “recovery of three hundred thousand acres of waste Marsh and watery grounds” through drainage work. In addition, “very substantial tracts of moorland survived… well into the eighteenth century when the coal reserves suddenly endowed the wastes with value, which led very rapidly to their enclosure and to disputes over their ownership.”

There was not, however, a straight trajectory of wastelands reducing through time as population increased; wars and invasions frequently generated new areas of wasteland. Indeed, such traumatic events were often the source of vills which sprung up within the wasteland having no attachment to a particular manor. In such circumstances, it was not unusual for single colonists to obtain large grants in return for rehabilitating wastes.

Indeed, in 1699, John Bellers argues that the wasteland of England should itself be populated in the same manner of the colonies. He suggests that those who are “now accounted burdensome” should be “gathered and formed into little Bodies” who might need employment and should be planned “as if going to plant a new Country.” Bellers says that the result “would

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95 Nicholas Cox, "The Gentleman's Recreation in Four Parts," (Early English Books, 1686), 158.
96 Simonds Sir D'Ewes, "The Journals of All the Parliaments During the Reign of Queen Elizabeth Both of the House of Lords and House of Commons," (Early English Books, 1682), 536.
97 Dunsford and Harris, "Colonization of the Wasteland in County Durham, 1100-1400," 46.
be as gaining several new Provinces to the Kingdom” by using the wastelands.\footnote{Bellers, "Essays About the Poor, Manufactures, Trade, Plantations, & Immorality and of the Excellency and Divinity of Inward Light, Demonstrated from the Attributes of God and the Nature of Mans Soul, as Well as from the Testimony of the Holy Scriptures," 4.} He estimates that there is 1.5 million acres which is currently not worth much more than could be made on it in a single year by its cultivation.\footnote{Ibid.}

This elimination of wastelands was occurring domestically in France and Spain as well.\footnote{Sahlins, \textit{Boundaries: The Making of France and Spain in the Pyrenees}.} French political philosopher, Jean Bodin argued that the common lands, which sustain the poor, should be protected, but that the waste lands, which he described as lands that “no man will hire” and which “brings no benefit to the commonwealth,” should be sold, that the citizens might invest in transforming the land and could “profit by the tilling thereof.”\footnote{Bodin, "The Six Bookes of a Common-Weale. Vwritten by I. Bodin a Famous Lawyer, and a Man of Great Experience in Matters of State. Out of the French and Latine Copies, Done into English, by Richard Knolles," 653.}

Simultaneously, survey technology was rapidly developing, allowing for much more accurate renditions of boundary lines, both domestically and internationally. In 1602 Sir Robert Johnson was able to observe that value of lands in Britain itself was “seldom known” because even across ten manors, there would not be one accurate survey.\footnote{As quoted in Peter Barber, "England Ii: Monarchs, Ministers, and Maps, 1550-1625," in \textit{Monarchs, Ministers, and Maps: The Emergence of Cartography as a Tool of Government in Early Modern Europe}, ed. David Buisseret (Chicago: University of Chicago Press, 1992), 79.} Yet, very quickly surveys and cartography would become a quintessential part of the colonization process,\footnote{Christopher Tomlins, "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century," \textit{Law & Social Inquiry} 26, no. 2 (2001).} allowing for the neat squares of vast land grants. No longer would land use be necessary to mark the boundaries of ownership.

\textit{Claiming Appalachia}
By the mid-eighteenth century, Appalachia was recognized as far more than a waste—particularly by those who were thinking towards industrialization. In such a mountainous region, which was filled with animals, natural cane fields, and mines of salt, lead, coal, iron ore, gold and silver, the lands lying between settlements could be enormously more valuable than the settlements themselves. Numerous contemporary sources described the region from the western slopes of the Appalachian mountains to the Mississippi River as one of the richest in the New World, if not the world entirely.\(^{107}\) Newspapers, maps and atlases all detailed the riches of the region, noting mines holding lead, copper, iron ore, gold, silver, and coal, as well as timber, excellent soil and weather conditions, and massive herds of animals. Moreover, the Ohio and Mississippi Rivers could be used to rapidly transport such resources to the coast.\(^{108}\) As one American colonist and writer proclaimed, the best reason for settlement in the Appalachian Mountains was “the great probability of finding mines, I mean not of gold and silver… but of iron, copper, lead and coal, which, the three first especially, may become branches of industry.” The writer put all of his faith in the mechanized future, quipping, “Leave Spain to dig gold.”\(^{109}\)

European rivalry quickly shattered the ideal of Appalachia as a zonal barrier. There were very substantial pressures pushing the British colonists further westward, at least to the Mississippi River. Colonists regarded the French as a security threat and preferred not to be “hemmed in” by the mountains.\(^{110}\) As Minister J. Sterling explained before the Maryland Governor and Assembly in 1754, “we lie exposed” to the west. Sterling believed the French

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\(^{107}\) “Sketch or Short Description of Several of the Countries,” *Freeman's Journal or The North-American Intelligencer*, Sept. 4 1782. “Edenic” descriptions were common. See also Stephen Aron, *How the West Was Lost: The Transformation of Kentucky from Daniel Boone to Henry Clay* (Baltimore: Johns Hopkins University Press, 1996), 72.

\(^{108}\) For a contemporary account of the value of this region strategically for progress and development, see J.? Ridley, “The Advantages of a Settlement Upon the Ohio in North America,” in *Eighteenth Century Collections, Gale* (London1763).

\(^{109}\) Ibid.

\(^{110}\) “A Letter from a Member of the Opposition to Lord B--,” 1763.
would not remain on the Mississippi, but “are ever and anon edging on us from the west, and striving to confine us to a comparatively narrow slip of land by hemming us in between the Appalachian hills and the ocean.” Most importantly, the mines found in the western parts of the Virginia colony suggested that even more wealth lay in the Appalachian Mountains for discovery. Reports from the colonies and reiterations of these spread through England, nothing “known Mines of Iron, and of Copper, and of other richer Mines also have more than hopes.” An area as vast and rich as these mountains invited conflict rather than inspiring a neutral commons. But, even in the mid-eighteenth century, standard indicators of rightful possession to the mountains failed to materialize. None of the rival imperial powers successfully conquered or settled the region. Mapped claims and royal grants and charters overlapped, forts changed hands repeatedly and indigenous alliances shifted. Moreover, traditional concepts of jurisdiction focused on persons and settlements, yielding little help as the imperial powers coveted largely unsettled lands.

III. Lands not Possessed: Creating Jurisdiction

British colonists in North America inherited a framework of jurisdiction that was not foundationally territorial. Traditional manorial courts were understood as having jurisdiction over tenants, over the persons rather than the lands, over the settlements but not the wastes lying

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111 James Sterling, "Zeal against the Enemies of Our Country Pathetically Recommended: In a Remarkable Sermon Preached before His Excellency the Governor of Maryland and Both Houses of Assembly," in Eighteenth Century Collections, Gale, ed. Lower House of Assembly (London: Whiston & White, 1754).
between them. Such an approach worked more smoothly since “manors, insofar as they could be regarded as pieces of property were never static units.” Legal claims to manors frequently shifted as the crown confiscated lands from those who were disloyal to the regime, and often villages and towns belonged to more than one lord. Additionally, the feudal kingdom was a mobile unit, more clearly identified with the people than the property, which was both changing and unevenly administered. As T. A. Bishop explained, “the manor was founded as much upon the population as upon the land.” The spatial contours of the state followed from the relationships between king, lord, and commoner, resulting in governance of a collection of smaller and larger units rather than a continuous territory. Administering government through individual inhabited settlements rather than open-spaces or wastes between them, the British had little reason to separate personal from territorial jurisdiction. Indeed, it appears that they—at least until the dawn of the eighteenth century—imagined the two as inextricably woven together.

When it came to arguing their claims of possession in the New World, the British relied upon specifically not discovery, marking or conquest, but rather habitation of the land—on the presence of persons, particularly as illustrated through home-building. English law favored most strongly the constructing of a dwelling place as evidence of the right to possession. They also favored the planting of a garden as marking of territory—again representing

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114 Ibid.: 306.
117 Biggs, "Putting the State on the Map: Cartography, Territory, and European State Formation."
119 Biggs, "Putting the State on the Map: Cartography, Territory, and European State Formation."
120 Seed, *Ceremonies of Possession in Europe’s Conquest of the New World 1492-1640*, 17-20.
121 Ibid., 19.
continuous occupation of a place by persons. Edmund Burke, writing in 1757, explained the boundaries of the colony of Virginia, saying, “To the westward the grants extend it to the South-Sea; but their planting goes no farther than the great Allegheny mountains, which boundaries leave this province in length two hundred and forth miles, and in breadth about two hundred, lying between the fifty-fifth and fortieth degrees of North latitude.” Although Burke acknowledges the charter’s more grand ambitions, when he describes the “boundaries” of the province, he refers only to the inhabited areas.

A satirical Robert Livingston, in a letter to Benjamin Franklin, explained the British position. Writing on the problem of claiming the territory across the Appalachian Mountains, Livingston forms the question as “asking whence Great Britain derived her right to the waste Land in America.” Livingston’s answer is through the person: “Evidently from the allegiance which a Subject is supposed to carry with him wherever he goes, even though he dislikes his constitution, and seeks one that pleases him better. Upon this false principle the oppressed Subjects of Great Britain, seeking freedom in the Wilds of America, were supposed to extend to it the Sovereignty of the Kingdom they had left.” While Livingston hardly supported this theory of jurisdiction, he accurately portrays the British argument—and concisely illuminates how the jurisdiction was inscribed upon the person and only secondarily the land.

As Peter Sahlins explained in *Boundaries: the Making of France and Spain in the Pyrenees*, jurisdiction in France and Spain emphasized practices of administration and taxation, focusing on the person, rather than on the territory or established boundaries. A king controlled a series of towns, villages, or counties, without much regard to the land that would fall

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122 Ibid., 27-29.
124 Letter of Robert Livingston to Benjamin Franklin, Jan. 7, 1782, in {Giunta, 1996 #703@285-86}.
125 {Sahlins, 1989 #84}
in between them.\textsuperscript{126} In terms of mapping, this meant that rather than drawing boundary lines, a mapmaker would simply make some designation of individual areas of jurisdictional control. For example, a 1680’s map of the contested Cerdanya territory between France and Spain provides in its legend that “the villages marked blue are of France, those marked red are of Spain… the valley of Andorra is not marked with any color.”\textsuperscript{127} Thus, there was no effective concept of territorial sovereignty extending between individual towns—and particularly no sense of each state having sole and exclusive control of the vast unsettled regions.\textsuperscript{128}

These understandings of jurisdiction carried forward in the colonization process. Even, Spain, which grounded its claims to land through “conquest,”\textsuperscript{129} relied on an understanding of personal jurisdiction. While very few Spaniards inhabited their colonial regions—in contrast to the English, they did not prefer displacing indigenous populations—the Spanish essentially deputized the indigenous population, making them, in the words of Queen Isabel in 1501, “subjects and vassals,” who were taxed upon the person.\textsuperscript{130} Similarly, the French claimed to obtain jurisdiction by tying legal possession to the “consent” of the indigenous people—however slight or implied that consent may have been—therefore tying French claims to allied persons and their lands.\textsuperscript{131}

The earliest maps adhered to the idea of a personal or habitation-based and narrow jurisdiction, drawing no boundaries between French and British claims, but rather allocating individual towns and forts, marking “a French Fort” or “an English Fort,” on the map to reference the claims of the two empires.

\textsuperscript{126} For a detailed discussion of progressions within Europe of jurisdiction from person to city-state to nation, see {Poggi, 1978 #698}
\textsuperscript{127} {Sahlins, 1989 #84}
\textsuperscript{128} {Poggi, 1978 #698@92}
\textsuperscript{129} {Seed, 1995 #721@88-89}
\textsuperscript{130} {Seed, 1995 #721@81}
\textsuperscript{131} {Seed, 1995 #721@56}
Other maps suggest that colonial jurisdictions began to mirror the settlements and units of native tribes, thus using the existing indigenous political framework to acquire new territory. Again, the claim to territory was based on the allegiance of the indigenous persons, rather than vice-versa.

With limited settlements in the mountains, the imperial rivals began to utilize surveys and maps to extend jurisdictional claims to continuous territories rather than persons. Henry Popple’s famous *Atlas of 1733* details “the British empire in America with the French and Spanish settlements adjacent thereto,” employing shaded lines to separate claims of the empires.

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132 {Hatfield, 2003 #147}

133 Reproductions of Popple’s map are available in {Schwartz, 2001 #572} Coloring differs among versions of the map with some being fully colored and others having shading only along the borders, as the one pictured here, which is courtesy of the Yale University Maps Library, Henry Popple Atlas of 1733, *71 +1733.*
Henry Popple Map of 1733

The shift to using colors is beautifully illustrated in the French equivalent to Popple’s map—one drawn by Bellin. Multiple editions of Bellin’s map exist, including ones from 1744 and 1755. While the 1744 map uses no color, in his 1755 *Carte de la Louisiane et des Pays Voisins* Bellin utilizes colored lines to indicate the territorial divides between Spanish, British and French territories. By the time Bellin drew his map, French and British commissioners had already been in negotiations for years attempting to arrive at a solid agreement on a precise border in the vicinity of the Appalachian range.134

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Perhaps the best example, however, is Huske’s 1755 map of North America, which straddles the shift in the two legal formulations of jurisdiction—undoubtedly with strategic intent. Huske draws the French forts and surrounding areas as small white blocks, wholly surrounded by the British colonies, which are brightly colored, covering continuously all of the
territory within the provisions of the colony charters. Huske did not challenge the territory explicitly held in possession by the French, but he claimed for the colonies all of the open, unexplored or unimproved spaces that had traditionally been unclaimed under concepts of personal jurisdiction and possession only through habitation. Huske even titles his map, “A new and accurate map of North America, wherein the errors of all proceeding British, French and Dutch maps, respecting the rights of Great Britain, France & Spain, and the Limits of each of His Majesty’s provinces are corrected.”

Huske’s 1755 Map of North America: Detail of charter lines
The continuity of territory and the establishment of sharp lines would come with the Treaty of Paris, signed in May of 1763 between Great Britain, France and Spain. The Treaty of Paris set the line between the colonial claims at the Mississippi River, granting the Appalachian Mountain Range to the British, and leaving French and Spanish claims to the west and south. What is perhaps most remarkable is that international agreement established territorial jurisdiction, even while there was neither conquest nor possession and virtually no settlement of citizens. The legal theory of jurisdiction was stretching to accommodate a new arrangement, which did not require the presence of persons nor the effective control of the lands. Jurisdiction was something legal—a powerful idea that could be separated from force, from citizenship, and from effective control. Jurisdiction could establish a legal order of property, ownership of

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135 For a discussion of the land shifted in the treaty and its importance as of 1763, see {Hill, 1945 #638}
natural resources, by the operation of an international concept.\textsuperscript{136} And while jurisdiction in such circumstances might be regarded as aspirational, it was also effective in the long term.

While the notion of stable and transferable borders is generally traced to later dates and to the South American experience, the neglected Mississippi River line demonstrates that the line established by the mid eighteenth century would hold in international law as Spain challenged the boundary during the American Revolution. While the Peace of Paris has received a great deal of scholarly attention through the years, very little attention has been paid to its subsequent interpretation and application at the end of the American Revolution.\textsuperscript{137}

As the American Revolution was ending, the critical question became the boundaries of the new nation. The situation was complicated by the Proclamation of 1763, which had been issued by the British king, forbidding colonists from settling beyond the Appalachian Mountain watershed—even while the Treaty of Paris gave Britain possession west to the Mississippi River.\textsuperscript{138} The proclamation established the land between the watershed and the river as an Indian Reservation under the protection of the crown—a logical choice for a British government that had waged the French and Indian war for years. Maps of this era, such as John Cavil’s Map of the Frontiers of the Northern Colonies, published in 1768, drew the Appalachian line again, reserving territory to the native tribes.\textsuperscript{139} Indeed, publicly maps supported the proclamation’s official text, with newspapers and magazines such as Gentleman’s Magazine and the Annual Register reproducing drawings of the renewed line along the watershed.\textsuperscript{140} Such representations of the western line became, quite foreseeably, a complication for the new American government,

\textsuperscript{136} The relationship between jurisdiction and property is further explicated in \{Tomlins, 2003 #560@474\}
\textsuperscript{137} For discussions of the Peace of Paris as of 1763, see, e.g., \{Latane, 1927 #92\}
\textsuperscript{138} For a history of the development of the Proclamation, see \{Humphreys, 1934 #146\} For a history of the effect within the Appalachian Mountain range, see \{Drake, 2001 #309@40-50\} For an overall history of the proclamation see \{Calloway, 2006 #635\}
\textsuperscript{139} Cavil, John, “Map of the Frontiers of the Northern Colonies,” 1768, West Virginia State Archives, Charleston, W.V., Ma 150-2.
\textsuperscript{140} \{Dunbabin, 1998 #573@107\}
which sought the boundaries established by the Treaty of Paris. As the American Revolution came to a close, Spain emphatically challenged the right of the new Americans to the Indian Reservation.\textsuperscript{141} The Americans, of course, wanted desperately to push westward past the watershed, but had very little ground to argue a right to the land in question based on either possession or conquest.\textsuperscript{142}

Scholars disagree about the willingness of the colonists to abide by the Proclamation of 1763. Prior to the Proclamation, there were already both substantial land grants and settlements of colonists west of the watershed line. While the Proclamation ordered the return of settled colonists to within the new borders, there is little evidence of compliance—and indeed some scholars suggest that individual settlers continued to move westward, disregarding the line entirely.\textsuperscript{143} Enforcement of the Proclamation did not effectively exist for those individual settlers and more than once the colonial governments issued large land claims, particularly to military veterans.\textsuperscript{144} Logically, however, the decision would not have been so easy for surveyors and organized land companies, who would be taking an economic and legal risk if they settled beyond the line. Additionally, many regarded the boundary as a temporary measure to pacify the native tribes, and therefore expected that with a little patience an investment might still be made in the western lands.\textsuperscript{145} Indeed, the very text of the Proclamation was altered during the process of drafting to include explicit suggestions that the line was temporary in nature.\textsuperscript{146} Therefore, as

\textsuperscript{141} \{Latane, 1927 #92@32-34\}
\textsuperscript{142} The inability to move west beyond the watershed has often been argued to have been a central cause of the Revolution.
\textsuperscript{143} See, e.g., \{Del Papa, 1975 #190\} More generally, for a discussion of the rhetoric of border maintenance when compared with the reality, see \{Baud, 1997 #578\}
\textsuperscript{144} \{Blethen, 2004 #575\}
\textsuperscript{145} The treaties of Fort Stanwix and Hard Labor of 1768 were considered by many to alter the existing line and some surveyors and speculators moved west of the Appalachians in reliance on the treaties. See \{Abernethy, 1967 #586\}.
\textsuperscript{146} \{Humphreys, 1934 #146\}
might be expected, there is significant evidence that the Proclamation was effective in preventing
organized settlement—at least until the American Revolution. 147

Yet, while the newly minted Americans lacked substantial evidence of possession of the
area between the Appalachian watershed and the Mississippi River, they were adamant that their
boundaries would flow to the Mississippi River on the west as had been established by the Treaty
of Paris. As Robert R. Livingston explained in a letter to Benjamin Franklin, “I believe it will
appear that our extension to the Mississippi is founded in justice… your situation furnishing you
amply with the various documents, on which Great Britain founded her claim to all the Country
east of the Mississippi.” 148 Spain, unsurprisingly, disagreed, 149 reconsidering its own territorial
ambitions to the region between the Appalachian watershed and the Mississippi River in light of
the weak and new American nation. 150

The new Americans argued that upon separation from the mother country, they were
entitled to all of the benefits of the boundaries established by Britain by virtue of treaties. 151 As
for the Indian Reservation, they considered the Proclamation of 1763 null and void as an action
of the now-removed royal power. 152 Most notably, the Americans were not arguing that they
had conquered all of the territory to the Mississippi—and there was much evidence that, in fact,
they had not done so. 153 Rather, as the French diplomat to the U.S. noted in his correspondence

147 {Holton, 1994 #192}
148 {Livingstone, 1994 #975@285}
149 France supported Spain’s legal arguments, but ultimately refrained from involvement in the intended conquest
simply because to preserve amicable relations with the U.S. See {Latane, 1927 #92} For a more thorough
discussion of all of France’s possible motives in supporting Spain, see {Corwin, 1916 #93}
150 {Weber, 1997 #585}
151 {Prescott, 1987 #601@194} Many of the settlers undoubtedly would have argued that they were indeed the ones
who fought in the French and Indian War on the western frontier and thereby had sacrificed to establish the
Mississippi River boundary.
152 See Letter of Robert R. Livingston to Benjamin Franklin, Jan. 7, 1782, in {Giunta, 1996 #703@285-293}
153 See Letter of Don Juan de Miralles to Don Jose de Galvez, Feb. 1, 1780, {Giunta, 1996 #703@19-20 Miralles
would later argue that “they did not possess the smallest part of that territory,” a statement clearly untrue given the
substantial records of settlement within the Kentucky territory, as noted in Livingston’s letter. Miralles’ claim
points to the idea that he was referencing conquest and military possession rather than the scattered citizens that the
home, the Americans “have no doubt whatsoever concerning their rights to all the lands that extend to the bank of the Mississippi and that they consider them their property, not by virtue of the right of conquest,” but by virtue of legal arguments contained in documents such as “their charters [and] the Treaty of Paris.” Indeed, many of the congressional delegates believed in the legal right to the territory between the Appalachian mountain watershed and the Mississippi River even if they were deprived of possession.

In a letter adopted by Congress and dispatched to the diplomats of France and Spain, James Madison explained their position. Madison argued that the United States was indeed entitled to the benefits of the Treaty of Paris of 1763 by virtue of inheriting the British position, including all territorial rights. Madison’s argument on this point was not unique, but rather echoed the young country’s arguments on many other points, such as fishing rights off the coast, where the U.S. also laid claim to the rights previously enjoyed by Great Britain before the war. In the eyes of the Congressional delegates, the Treaty was more than a contract—that it was an instrument of peace and international law. They claimed that “the peacemakers had considered the Mississippi as a natural boundary, and that it should be agreed that powers that were truly lovers of peace could not wish to change this border.”

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154 Letter of Chevalier de la Luzerne to Comte de Vergennes, Feb. 11, 1780, in {Giunta, 1996 #703@27-33}
155 Letter of Chevalier de la Luzerne to Comte de Vergennes, Feb. 11, 1780, in {Giunta, 1996 #703@28-29}
156 Also of interest are Madison’s notes on the arguments as reproduced in {Giunta, 1996 #703@122-24}
157 Madison was not the only one who made this argument; for a British version, see {Fabius, 1786 #608}
158 See Proceedings of Congress as to the Conditions of Pacification, and particularly as to the Mississippi and the Fisheries, May 8, 1779, in {Moore, 1888 #584}
159 Letter of Chevalier de la Luzerne to Comte de Vergennes, Feb. 11, 1780, in {Giunta, 1996 #703@32}
The new Americans expressed outrage at Spain’s interpretation of the developing laws of international boundaries. In a letter dated May 1, 1787 and published in newspapers, one citizen expressed the general sentiment. In referring Spain’s arguments, he asks, “Is it possible, that men who are awake, and in their sober states, should retain the impressions of such evening dreams?” The writer begins with the colonial charters, granting land from sea to sea, and moves to the treaties signed by Great Britain, claiming their benefits and thereby affirming the U.S. border at the Mississippi River. He has little respect for Spain’s arguments, asking “what are the reasons that Spain gives for refusing to let us enjoy the navigation of the Mississippi, provided she has condescended to give any reason at all, besides the old royal argument, Sic Volo [because they want to].”\textsuperscript{160}

France, however, largely agreed with Spain and regarded the boundary as a product of a treaty or contract—and therefore binding only between the signatories. The French diplomat Luzerne argued, “By the Treaty of Paris, we had ceded to the King of England, and not to the colonies, which could not have taken part in this Treaty.”\textsuperscript{161} Thus, “the Americans cannot cede this land, but can only renounce ever acquiring it in favor of Spain.”\textsuperscript{162}

While arguing that the Treaty of Paris gave no rights to non-signatories, the French and Spanish governments did not solely limit themselves to this approach. Diplomats also used the Proclamation of 1763 as a justification for limiting the United States to the eastern side of the Appalachians, claiming that since settlement had been prevented by the Proclamation, those lands were still subject to the British crown and therefore could be conquered by another imperial power without reaching the borders of the United States. Invoking the Proclamation, France and Spain argued that “it was clear that on this occasion the Watershed had been

\textsuperscript{160} Letter of Chevalier de la Luzerne to Comte de Vergennes, Feb. 11, 1780, in {Giunta, 1996 #703@31}
\textsuperscript{161} Letter of Francois Barbe/ de Marbois to Comte de Vergennes, Oct. 21, 1780, in {Giunta, 1996 #703@126-128}
considered as forming their boundary to the West, and that there were in fact certain and
unalterable limits.” In this way, the Spanish government used the Americans arguments
against them—if they were entitled to the boundaries given to them by the mother country, than
they were bound by the Proclamation. By distinguishing the new colonists from their mother
country, Spain argued that possession of the Appalachia-to-Mississippi territory was
questionable. Although many settlers within this region—particularly in the area that would
soon separate as the state of Kentucky—identified themselves as American and supported the
new government, there were also forts along the Mississippi that remained in British control.

James Madison and the Continental Congress responded by arguing that the Proclamation
was merely a method of regulating affairs with the native tribes and thus was effectively an
internal or colony boundary rather than an external or international boundary, and therefore,
those lands were retained by the United States. Similarly, U.S. Secretary for Foreign Affairs,
Robert Livingston relied on the various violations of the proclamation to claim that the
proclamation was both an interior boundary and a flexible, temporary one.

While Congress could perhaps refute Spain’s arguments about the Proclamation’s effect,
establishing an affirmative right to the region was much more problematic. The new American
government could not effectively argue either possession or conquest. While there were
American settlements in the region, possession was not exclusive but rather shared with Spanish
settlements and native ones. Indeed for a time, some American settlements contemplated

163 Letter of Chevalier de la Luzerne to Comte de Vergennes, Feb. 11, 1780, in {Giunta, 1996 #703@32}
164 Letter of Don Juan de Miralles to Don Jose/ de Galvez, Feb. 1, 1780, in {Giunta, 1996 #703@19-20}
165 Ibid. (Regarding the existence of British forts.) See Letter of Robert R. Livingston to Benjamin Franklin, Jan. 7,
1782, in {Giunta, 1996 #703@285-293:288} (Regarding the existence of American settlements.)
166 Quoted in {Latane, 1927 #92}
167 Letter of Robert R. Livingston to Benjamin Franklin, Jan. 7, 1782, in {Giunta, 1996 #703@285-293:286-87}
switching their loyalties to Spain. Additionally, continued native settlements and clashes with those settlements meant that there was no definite conquest of the region.

With title having historically relied foremost on possession and control, the new American government could argue neither and thus formulated a new argument based on sovereignty and territorial jurisdiction. The argument was the beginning of ideas of a legal right to territory, which “to have any real significance… must on occasion be capable of subsisting even when divorced from possession.” Congress argued the western territorial claims were valid because “emigrants had established in good faith that their intention was to remain under the dependency of the English Colony where they had settled… that this was the way that most of the regions of America had been acquired from one sovereignty rather than from another,” and therefore that the borders of the new nation would extend westward continuously to encompass such settlements. The argument could even be formulated as a governmental obligation: “Spain having by the treaty of Paris ceded to great Britain all the country to the north eastward of the Mississippi, the people inhabiting these States while connected with Great Britain… are friendly to the revolution and being citizens of these United States and subject to the laws of those to which they respectively belong, Congress cannot assign them over as subjects to any other power.” The alternative was ludicrous, they argued: “Upon this false principle the oppressed Subjects of Great Britain were supposed to extend to it the Sovereignty of the Kingdom they had left!” Congress was positive that “it was necessary to regard this

168 {Whitaker, 1969 #710}
169 {Schwarzenberger, 1967 #709} As Schwarzenberger said in his treatise on international law, “In this primordial stage, effective control of a territory and power to defend it was the title-deed, which, of necessity, counted most.” {Schwarzenberger, 1957 #708@291}
170 {Jennings, 1963 #705@5}
171 Letter of Chevalier de la Luzerne to Comte de Vergennes, Mar. 13, 1780, in {Giunta, 1996 #703@46}
172 Instructions to John Jay from the Continental Congress, Oct. 4, 1780, unanimously agreed to, in {Giunta, 1996 #703@119-120}
173 Letter of Robert R. Livingston to Benjamin Franklin, Jan. 7, 1782, in {Giunta, 1996 #703@285-293:286}
occupation accompanied by *acts of jurisdiction as equivalent to a conquest*.174 Although settlements only dotted small portions of the Mississippi-to-Watershed territory, the new American government was able to successfully argue for a legal right to the land by virtue of a continuous and established territorial jurisdiction.

While surely there was more of an evolution to come in the concepts of sovereignty and territorial jurisdiction, the establishment of the Mississippi River as a western boundary for the new United States was a critical moment in the developmental process. The new country was able to not only successfully claim territory but also to establish a recognized national boundary through acts of jurisdiction and where only small settlements held limited ground among other, hostile ones. I believe this moment also casts doubt on the understanding of sovereignty put forth in Benton’s recent work. Benton generated what might be termed a realist account of sovereignty—arguing that even through the nineteenth century, imperial powers did not seek continuous, bounded territories.175 Benton’s aims to demonstrate uneven control and operation of law—to show the “peculiar and enduring lumpiness of imperial legal space.”176 Benton argues that “although empires did lay claim to vast stretches of territory, the nature of such claims was tempered by control that was exercised mainly over narrow bands, or corridors, and over enclaves and irregular zones around them.”177 She suggests that shaded maps are misleading because they do not reflect “changing and locally differentiated qualities of rule within geographic zones.”178

174 Ibid. (emphasis added).
175 {Benton, 2010 #829@xii}
176 {Benton, 2010 #829@xiii}
177 {Benton, 2010 #829@2}
178 {Benton, 2010 #829@3}
Benton makes excellent points with respect to the uneven control and operation of law within colonial territories. At the same time, the Mississippi River boundary, established before the turn of the nineteenth century, provides ample evidence that, in at least some cases, imperial powers did seek to establish control over a continuous, bounded territory—and that they were able to do so even in the absence of an evenly settled and controlled land. The Mississippi River boundary dispute presented issues at the very heart of sovereignty—subjecthood, possession, and territorial jurisdiction—and resolved those through legal argument, without resort to violence and while admitting the lack of any state’s effective control of the lands in question. I would suggest, therefore, that by focusing too narrowly on a realist view of control within imperial lands, Benton has significantly discounted the power of legal ideas to shape events.

Indeed, this changing nature of jurisdiction would result in a shift in the common law of property as it was imported into the United States—a shift that was required to align common law notions of possession requirements for ownership with the new ideas of jurisdiction without possession. *Johnson v. M’Intosh* claimed that “according to the theory of the British constitution, all vacant lands are vested in the Crown, as representing the nation,” and alleged that “the validity of the titles given by either has never been questioned in our courts.” Yet, less than a decade earlier, the question, in fact, had been raised in the Supreme Court, by *Green v. Liter*, a case that at a quick glance appears to be a meditation on seisin, but on closer examination poses the question of whether a land grant of vacant land is valid without actual entry upon the land. While *Green v. Liter*, has wholly escaped scholarly notice, the case is a fascinating reflection on the idea of waste as inherited from the common law. While written by

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179 The British government described even native-occupied lands as “vacant.” *Johnson v. M’Intosh*, 596.
180 Ibid. at 595.
181 Ibid. at 587-88.
182 12 U.S. 229, 247 (1814).
Justice Story, the decision in *Green v. Liter* is deeply unpersuasive. In an attempt to have the cake and eat it too, Story avoids acknowledging a major shift in the law by arguing both that the common law has never completely required entry to acquire title, and simultaneously, that any reason existing in the common law to require entry upon the land is inapplicable in waste lands.\(^{183}\)

Beginning with the question of whether the common law required entry upon land for title to properly vest, Story’s opinion argues that “even at the common law there are cases in which there is constructive seizin in deed.”\(^{184}\) Yet, when Story attempts to iterate those common law exceptions, he is only able to reference cases where in the transfer of lands already held in good title, entry was prevented.\(^{185}\) None of the cases deal with a Crown land grant or patent upon which there was never an actual entry; in other words, none of the cases Story cites in the common law are cases of a first possession of vacant land—the very issue that is raised in the case of wastes.

From this argument, Story moves to discussing the idea of notice in land claims, finding that the “law deems the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage.”\(^{186}\) Yet, he moves quickly to saying that, “even if, at common law, an actual *pedis ipositio*, followed up by an actual perception of the profits, were necessary to maintain a writ of right, which we do not admit, the doctrine would be inapplicable to the waste and vacant lands of our community.”\(^{187}\) He argues that since there are few settlers to observe the fences built and lines drawn, “the reason of the rule itself ceases when applied to a mere

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\(^{183}\) Ibid. at 245, 248.

\(^{184}\) Ibid. at 245.

\(^{185}\) Ibid. at 245-46.

\(^{186}\) Ibid. at 247.

\(^{187}\) Ibid. at 249.
wilderness.” When Story relates what he considers to be the most essential fact of the case, it becomes clear why he feels the need to mold the common law to his purposes. Story describes Kentucky as “a wilderness… the haunt of savages and beasts of prey. Actual entry or possession was impracticable, it could answer no beneficial purpose… An entry therefore would have been a vain and useless and perilous act.” Story could not tolerate the idea that a grant or patent was imperfect without entry and occupation for precisely the same reason that the European powers had found it necessary to eliminate waste: because claiming this land was highly profitable, but settlement of the land was quite impractical. Story was struggling to harmonize new legal developments, which allowed property and jurisdiction to be less tangible, but still active and effective, with the more traditional elements of the common law. His struggle is evidence of the deep shift in legal concepts that had occurred by the early 1800s.

Conclusion

If we have learned anything from the recent work of Christopher Tomlins, Jennifer Nedelsky, Nicholas Blomley and Michael Walzer, it is that the spatial components of law and, in particular, the relationship between law and boundaries deserves sustained attention. Yet, Johnson v. M’Intosh has fostered virtually no inquiries into concepts of jurisdiction and

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188 Ibid. at 249. Ironically, there is a solid argument to suggest that this is precisely why actual settlement is needed. In the back country, there was little news of land grants or claims and as settlement moved forward the physical entry and occupation of land was the only clear guideline for the community as to what land was available for the taking.
189 Ibid. at 248.
190 See, e.g., {Tomlins, 2001 #784}
191 See, e.g., {Nedelsky, 1990 #102}
192 {Blomley, 2001 #269}
193 {Walzer, 1984 #830}
boundaries as they were determined between competing European powers.\textsuperscript{194} \textit{Johnson} stipulates the western boundary line,\textsuperscript{195} and finds that “conquest gives a title which the courts of the conqueror cannot deny,”\textsuperscript{196} without asking how other external courts might have responded. Rather than asking how Europeans developed concepts of jurisdiction and sovereignty vis-à-vis each other, \textit{Johnson} sets such problems aside. Following \textit{Johnson}’s lead, legal scholarship has focused on land claims of Europeans vis-à-vis the native tribes, elucidating the law of conquest and notions of native title without questioning how inter-European land claims were articulated and argued in the international community, thereby avoiding questions of sovereignty and jurisdiction.

In contrast, this exploration of the colonization of Appalachia has emphasized the transformation of traditional legal concepts of jurisdiction. As imperial rivals mounted more and more extensive expeditions into the mountainous, unmapped areas that lay between each European colonial domain, conflicts escalated over coveted natural resource wealth. Prior to the eighteenth century, French, Spanish and British legal theory had focused jurisdiction on the person, on scattered administrative units rather than continuous territory. Legal claims to rightful possession therefore were highly tied to settlement and habitation—or at least to establishing an alliance with or dominance over a settled indigenous population. Settlements were commonly separated by zones of unclaimed or shared lands, termed “wastes” by the British. Rights to resources within these areas were shared and often unclear.

British, French and Spanish colonists and their governments imported their traditional concepts of jurisdiction as the settled in North America, initially making their

\textsuperscript{194} 21 U.S. 543 (1823).
\textsuperscript{195} Ibid. at Stipulated Facts, 3d, 17th; Ibid. at 585.
\textsuperscript{196} Ibid. at 588.
claims to rightful possession of land contingent on settlement and habitation and employing mountainous areas such as Appalachia as wastes or zonal barriers between settled areas. However, quickly colonial rivalries for natural resource wealth crystallized the question of ownership and control of the lands that stretched between towns and larger settlements. British colonists, who had arrived with ideas of legal claim resting on habitation and who utilized zones of shared wastes to form a wide, rough boundary between settlements, discovered a world in which such concepts were a disadvantage. Similarly, French and Spanish colonists found themselves challenged to make new arguments in order to lay claim to the riches of North America. Concepts of personal and territorial jurisdiction began to unravel into the two distinct concepts that characterize domestic and international law today.

European powers exploited the rise of cartography in the eighteenth century to fashion more extensive claims to coveted lands. Continuous claims to territory were inscribed on maps through the development of techniques such as shaded lines to separate territories, and later, saturated coloring to signify an enclosed and homogenous region. While French political philosophy and strategy may have been strongly influential, Appalachia provided a strong practical incentive for shifts in even centuries-old legal traditions. Encountering a situation where claims to unsettled lands were more important than claims to settled lands, states were motivated to dispense with zonal waste and scattered claims to settlements, fostering instead mutual respect for continuous, bordered territory and jurisdiction evenly inscribed across the land.

While lines had been drawn by Popes centuries earlier, the process of claiming land in North America illustrates that models of personal jurisdiction still prevailed.
during the seventeenth and early eighteenth centuries. The process of establishing lines in Appalachia throughout the eighteenth century is perhaps most remarkable because the concepts of jurisdiction finally made a significant shift to linear boundaries and continuous lands—as demonstrated by the endurance of the Mississippi River line after the American Revolution. No longer would a man carry sovereignty with him, spreading it upon the ground that he tilled. Sovereignty would rest upon the land itself and citizenship altered as necessary to fit the lines drawn.  

197 In the French-Spanish boundary settlement in the Pyrenees, citizens were given a choice to either move to fit the new boundaries or to switch citizenship. Similarly, in the Kentucky region during the Revolutionary war era, there was much discussion of switching the citizenship of persons residing there to Spain. Ultimately, one of the arguments the new American government used to retain the Appalachia-to-Mississippi-River Region suggested that such required switches of citizenship were traitorous on the part of a government.