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Land Tenure in the United States

3.1 Origins of U.S. Land Law

With investment in land resulting from intensive use, the defense of land claims became more important. In early human society, physical defense of claimed territory was necessary. But as society evolved, laws were developed that defined the concept of ownership and allowed the use of a legal system in lieu of a physical defense. Such laws varied with different regions of the world.

As the New World was settled by a variety of European powers, each brought its own system and concepts of land tenure, along with their methods of conveyancing, surveying, and terminology. This gave rise to the use of a variety of mathematical units along with the establishment of localized legal systems. As disputes arose, they were resolved by various courts in accordance with the rule in effect at the time. Some of these adjudications remain in effect today, and in determining and locating land boundaries, they must be considered in their own context.

Land law in the United States is a combination of both civil and common law. Civil law is generally codified, based on a comprehensive compilation of legal rules and statutes. Jurisdictions that follow that tradition have comprehensive legal codes specifying almost any matter that can be litigated. The judge’s role in such a system is to establish the facts of the case and apply the provisions of the code. Thus, the judge’s decision is less crucial in shaping civil law than are the decisions of legislators who draft the law. In contrast to the civil law, common law is generally uncodified and not based on a comprehensive collection of rules and statutes, although it does rely on some statutes. Rather, the common law is largely based on the precedent of judicial decisions previously made in similar cases. Judicial opinions are maintained as a body of law in yearbooks and reports. The precedent to be applied in each case is determined by the presiding judge. Thus, judges have a significant role in shaping the common law.

The two legal traditions vary considerably with location. The civil law tradition has its roots in the early Roman legal writings and spread to continental Europe. It was applied in the colonies of European imperial powers such
as Spain and Portugal and was also adopted in the 19th and 20th centuries by countries formerly possessing distinctive legal traditions, such as Russia and Japan, in efforts at legal system reform in search of the economic and political power comparable to that of Western European nation-states. The common law tradition emerged in England during the Middle Ages and spread to the many British colonies across the continents. Figure 3.1 illustrates the legal traditions prevailing throughout the world.

Although the legal system of the United States generally follows the common law tradition brought to the North American colonies from England, traces of the civil law tradition and its importance in the hemisphere may be found within state legal traditions across the country. Combinations of English common law with Roman, Spanish, French, Russian, and Dutch Civil Law exist in various states (Figure 3.2). An example of this is Louisiana, where state law is based on civil law due to Louisiana’s history as both a French and a Spanish territory. Many of the southwestern states also have traces of civil law influence in their state constitutions and codes due to their early legal status as territories of colonial Spain and Mexico. California has a state civil code organized into sections similar to traditional Roman civil law categories; yet, the law within California’s code is mostly common law.

This diversity presents an interesting twist to traditional boundary retrace- ment for the practicing surveyor. Since “a boundary, once established, must remain fixed in position through any series of mesne conveyances” (Griffin 1960), the original creating documents must be interpreted in accordance with the conditions and circumstances at the time. Proper rules and laws must be considered as well as correct interpretation of units of measurement. For example, in Spanish-settled regions, as well as smaller areas of Spanish
influence, the vara is the standard unit of measurement of length used for land boundaries. There are several definitions of the vara, depending on where it was used. The same may be said for the French arpent, the English rod, and other units of land measurement. To assume one definition for any unit of measurement may result in an erroneous measurement.

In addition to geographical differences, historic differences must be taken into account when considering land tenure. Titles and boundaries were established under several different systems before the adoption of concepts in place at present time. Since the establishment of title is the very foundation of land tenure, and the establishment of boundaries locates and defines the extent of land tenure, it is of vital importance to fully understand the basic building block from whence it came. As aptly stated by the New York Court in *Dolphin Lane Associates, Ltd., v. Town of Southampton*, “the past must be explored to understand the present.”

A significant retracement case involving early grants is that of *U.S. v. Champion Paper Company*, wherein the original grants were measured in varas. A later case involving earlier original grants is the Maryland case of *Ski Roundtop v. Wagerman*, wherein the two parties had identified an overlap of their respective boundaries. The Court of Appeals wrote that neither party could claim title to the area in question, since it was not a part of the original grant establishing either ownership. Citing a Maryland coal case, the court stated that a prerequisite for valid title is a continuous chain of title back to the sovereign, in this case as represented by the Calvert family. The opinion further stated that “no amount of successive transfers nor mere passage of time can metamorphose good title from void title.”

The following seven sections illustrate the various bodies of law that have influenced current land law in the United States. Together, these collections of both common and civil law represent the great diversity of philosophies that are embedded within the current legal systems of the United States.
3.1.1 English Common Law

English common law began with the Magna Carta, first confirmed into law in 1225, as part of the centralizing of powers of the King during the middle ages after the Norman conquest. An important component of that document is the declaration of certain individual liberties, including the writ of habeas corpus, which prohibits a freeman being imprisoned or punished without the judgment of his peers. The common law coexisted with the civil law in England until the 17th century, when Parliament established a permanent check on the power of the English king and claimed the right to define the common law itself. That movement toward codification of the common law led to the writing of a key treatise on English common law, William Blackstone’s *Commentaries on the Laws of England*, which still functions in American law as the definitive source for common law precedents prior to the existence of the United States.

The common law is a body of general rules prescribing social conduct enforced and applied by the court system. It evolves to meet changing social needs and improved understanding. The common law develops its principles from the grounds of decision in actual legal controversies. It is marked by its extensive use of the jury to provide the court with facts necessary for deciding a case. It is also marked by a doctrine of the supremacy of law (Hogue 1966).

Treatise writers and historians of the common law have long given custom a prominent place among the sources of this body of general rules. Maitland and Montague (1915) traced the evolution from customs originating in the “common wisdom and experience of society,” through the stage of becoming “established customs,” to the point at which they receive “judicial sanction in courts of last resort” (Hogue 1966).

Blackstone (1783) stated: “This unwritten, or common law, is properly distinguishable into three kinds: 1) General customs, which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification; 2) Particular customs, which for the most part, affect only the inhabitants of particular districts; and 3) Certain particular Laws, which, by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction. All these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.”

At common law, possession is the root of all titles to land. A title rooted in possession entitles the possessor to an interest in the land. The kind of interest acquired depends on the nature of the interest available for acquisition at the time possession was taken. An interest acquired by possession, however, is not limited to the uses relied upon to establish the possession.

3.1.2 Roman Civil Law

Roman civil law is best illustrated by the Roman Civil Code known as the *Institutes of Justinian*, prepared under the direction of Emperor Justinian in
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529 AD. That document serves as the root of today’s civil law, including many of today’s procedures for determining water boundaries. The following translations (Sandars 1874) of pertinent excerpts from that code illustrate the detail and the similarity of that code to modern water law.

Book II, Title I

Section 1. By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the sea-shore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations... The sea-shore, that is the shore as far as the waves go at furthest, was considered to belong to all men.

Section 2. All rivers and ports are public; hence the right of fishing in a port or in rivers, is common to all men.

Section 3. The sea-shore extends to the limit reached by the greatest winter flood.

Section 4. The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons, therefore, are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself. But the banks of a river are the property of those whose land they adjoin; and consequently the trees growing on them are also the property of the same persons.

Section 5. The public use of the sea-shore, too, is part of the law of nations, as is that of the sea itself; and therefore any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man, but are subject to the same law as the sea itself, and the ground or sand beneath it.

Section 20. Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase; and that is added by alluvion, which is added so gradually that no one can perceive how much is added at any one moment of time.

Section 21. But if the violence of a river should bear away a portion of your land and unite it to that of your neighbour, it undoubtedly still continues yours. If, however, it remains for a long time united to your neighbour’s land, and the trees, which it swept away with it, take root in his ground, those trees from that time become part of your neighbour’s estate.

Section 22. When an island is formed in the sea, which rarely happens, it is the property of the first occupant; for before the occupation it belongs to no one. But when an island is formed in a river, which frequently happens, then it occupies the middle of the river, it belongs respectively to those who possess the lands near the banks on each side of the river, in portion to the extent along the banks of each man’s estate. But if the island is nearer to one side than the other, it belongs to those persons only who possess lands contiguous to the bank on that side. But
if a river divides itself at a certain point, and lower down unites again, thus giving to any one’s land the form of an island, the land still continues to belong to the person to whom it belonged before.

Section 23. If a river, entirely forsaking its natural channel, begins to flow in another direction, the old bed of the river belongs to those who possess the lands adjoining its banks, in proportion to the extent along the banks of their respective estates. The new bed follows the condition of the river, that is, it becomes public. And, if after some time the river returns to its former channel, the new bed again becomes the property of those who possess the lands along its banks.

Section 24. The case is quite different if any one’s land is completely inundated; for the inundation does not alter the nature of the land, and therefore, if the water recedes, the land remains indisputably the property of the same owner.

As may be seen, the Roman code addresses many of the same issues relating to the ownership and boundaries of water bodies pertinent in today’s society, including issues such as public ownership of navigable waters, the location of the boundary between publicly owned waters and privately owned littoral or riparian land, public access to navigable waters, riparian rights to newly formed lands, and ownership of newly formed islands (Robillard and Wilson 2014). Application of the Roman law to U.S. law regarding water boundaries is discussed more thoroughly in Section 7.3 of this book.

In addition to issues relating to water boundaries, the Roman civil code also addressed a wide range of issues relating to civil rights. These include ownership of property, familial relationships, inheritance rights, etc.

### 3.1.3 Spanish Civil Law

Most of the Spanish law influencing property rights in the United States today is derived from an early codification of civil law related to the Roman Institutes of Justinian. That collection of early Spanish law, entitled Las Siete Partidas, is a Castilian statutory code compiled in the 13th century during the reign of Alfonso X of Castile. As with the Roman Institutes of Justinian, Las Siete Partidas addressed a wide range of issues relating to civil rights. As implied by the title (Siete Partidas), this code is divided into seven parts, addressing various broad topics including natural law, public and military law, judicial organization, domestic relations, contracts, and criminal law. Several of the sections appear to have been based on the Roman Institutes of Justinian. The Spanish code is remarkably comprehensive, even covering topics such as who has the authority to hear confessions or perform baptisms and rules for tithing.

As an outpost of the kingdom of New Spain, the province of Texas shared with Mexico the aforementioned law of the parent sovereign, that of Castile.
This law remained essentially unchanged during Mexican Texas, which spanned the years 1821 to 1836. After the Texas Revolution, the Republic of Texas adopted the law of England. One of the exceptions was the law affecting land titles and certain water rights. Some of the elements of the Spanish legal system worked very well, and settlers were comfortable with it, since it was less complicated than English procedure. However, after the Civil War came an influx of common law lawyers and teachers trained in the Anglo-American system.

As a result of the continued application of the Spanish doctrine to land grants made before the Act of 1840, and those made thereafter, results in different rules may apply to adjacent tracts depending on the origin of the grant. For example, along the seashore, where the shore is flat, a common law grant may extend farther toward the ocean than an adjacent Spanish law grant due to the different system of measuring the coastal boundary. There is also a difference with regard to grants along rivers. Grants made under Hispanic rules extend only to the bank of a navigable waterway, as the sovereign was the owner of the bed of the river. Later common law grants extend to the center of a navigable waterway. The law for Spanish grants is also more restrictive regarding rights of irrigation, as Spanish grants do not contain such rights unless specifically granted.

Spanish law and its influence may also be found in the states of Arizona, New Mexico, California, and in southern Colorado, all of which were part of the Spanish territory, overseen and governed by the Spanish and Mexican governments. Land grants were made under those systems, establishing original grant boundaries, as well as influencing later subdivisions after the areas became part of the United States and the several states.

As with the Roman Institutes of Justinian, the primary impact of Las Siete Partidas on contemporary property rights in the United States is in dealing with the ownership and boundaries of waters. Translations of portions of the code addressing the boundary of the public owned coastal waters are as follows (Scott 1931):

The things which belong in common to the creatures of this world are the following, namely; their, the rain-water, and the sea and its shores, for every living creature can use each of these things, according as it has need of them. For this reason every man can use the sea and its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage.

…and all that ground is designated the shore of the sea which is covered with the water of the later at high tide during the whole year, whether in winter or in summer.

Thus, the Spanish Civil Law appears to continue to call for both the sea and the seashore to be publicly owned. Yet, it appears to depart from the Roman Civil Law in that it calls for the consideration of the tidal cycles as
opposed to seasonal high waters as with the Roman code. See Section 6.3 of this book for a complete discussion of this topic.

### 3.1.4 French Civil Law

Louisiana private law is primarily a Napoleonic system and is the only U.S. state partially based on French and Spanish codes and, ultimately, Roman law. In Louisiana, private law was codified into the Louisiana Civil Code; however, the law has considerably merged with American law, especially in the public law and in the judicial system. In fact, any innovation, whether private or public, has been decidedly common law in origin.

French civil law is based on the Napoleonic Code of 1804, named after the emperor. That Code consists of three sections: the law of persons, property law, and commercial law. Rather than a collection of statutes or listing of case law, that code sets out general principles as rules of law. Sections of the French Civil Law, including laws regarding property, contacting, and business entities, were strongly influenced by the Roman Civil Law.

The influence of the French Civil Law is especially noticeable in the state of Louisiana. Actually, the first Louisiana Civil Code Digest of 1808 was written in French, although then translated into English. Therefore, significant differences exist between Louisianan civil law and the common law found in most other American states. Nevertheless, Louisiana law does have many of the terms and concepts unique to American law, including forced heirship, redhibition, and lesion beyond moiety.

In Quebec, whose private law is also primarily of French civilian origin, development has been along the same lines, having adapted in the same way as Louisiana to the public law and judicial system of Canadian common law. By contrast, Quebec private law has innovated mainly from civilian sources. To a lesser extent, other states formerly part of the Spanish Empire, such as Texas and California, have also retained aspects of Spanish civil law into their legal system, for example, community property. The legal system of Puerto Rico exhibits the same inclinations that Louisiana has shown, that is, the application of a civil code whose interpretations rely on both the civil and common law systems. Because Puerto Rico's Civil Code is based on the Spanish Civil Code of 1889, available jurisprudence has tended to rely on common law innovations due to the code’s age and, in many cases, obsolete nature.

While the French settled in several areas, including Maine, northern New Hampshire and Vermont, Michigan, Ohio, and especially along the Mississippi River, French law did not develop fully, nor was it widely applied. The French influence did, however, affect the establishment of titles and their boundaries and therefore had an impact on tenure.

In Massachusetts, the Supreme Court adopted from the French Civil Code the rule as to riparian rights, which is now found throughout the common law world. Ohio took over from the civil law its doctrine as to cases regarding agency relationships.
3.1.5 Russian Civil Law

Russian America was the name of the Russian colonial possessions in the Americas from 1733 to 1867. Several settlements crossed parts of what are now the U.S. states of California, Alaska, and two ports in Hawaii. Formal incorporation of the possessions by Russia did not take place until the Ukase of 1799, which established a monopoly for the Russian-American Company and also granted the Russian Orthodox Church certain rights in the new possessions. Many of its possessions were abandoned in the 19th century. In 1867, Russia sold its last remaining possessions to the United States.

With grants, the chief administrator of the Russian-American Company would assign a plot of land for housekeeping and fishing, taking special care only “to avoid contestations between the settlers and the natives.” These assignments were not accompanied by any written titles or other legal documents. Rather, “the first occupation and using of a certain locality, whether by an individual or by a community, notwithstanding the lack of formalities, conferred unquestionable right of possession.” No one, not the Russians nor the Alaska natives, had anything more according to Russian law.

The provisions of Russia’s 1844 Charter remained in force until the time of cession to the United States in 1867. They constituted a part of the laws in force in the territory subsequently acquired by the United States and are therefore subject to judicial notice by the American courts. The opinion of Judge Wickersham in United States v. Berrigan, 2 Alaska 446, states as follows:

Where territory has been acquired by the United States from a foreign power, its courts will take judicial notice of the laws which prevailed there up to the time of such acquisition. They are not, as to such acquired territories, foreign laws, but laws of an antecedent government. (United States v. Perot, 98 U.S. 428, 25 L. ed. 251; Fremont v. United States, 17 How. (U.S.) 542, 15 L. ed. 241)

3.1.6 Dutch Civil Law

The first constitution of New York in 1777 prohibited interference by the state with “any grants of land within the state, made by the authority of the king or his predecessors prior to 1775.” Therefore, the quality and extent of “any grants of land within the state made by the authority of said king” must be determined by the rules of law that operated upon the grant at the time the grant was made and title passed under it (N.Y. Const. of 1777, § 36).

Prior to the English taking over what is now Pennsylvania and the Delaware, the Swedes and the Dutch each in turn set up a government. Considered under Dutch rule, the first period extended from 1609 to 1638; the Swedish rule extended from 1638 to 1655; and the Dutch rule, the second period, extended from 1655 to 1664. The Swedish settlement was governed
solely under Swedish law, but when the Dutch gained control of the Delaware, this was placed under the authority of the director and council of New Amsterdam. The Dutch organized local governments and set up courts, which seem to have been required to oversee only rather trivial matters.

For a time after authority was transferred, the Delaware lands were allowed to maintain the authority of their Dutch courts, but in 1676, the district was called upon to enforce the code of laws adopted in 1664 at Hemsted on Long Island. This is known as the Book of Laws of the Duke of York. The preamble to this code states that the measures contained within it were “Collected out of the several laws now in force in his Majesties American Colonies and Plantations.” But it was the laws of Massachusetts and New Haven especially that influence Gov. Nicholls and his associates in the preparation of the code of 1664.

With the coming of William Penn, a new era began in the legal system in that region. Out of his own bitter experiences with the English law came certain conceptions of justice that he hoped would be adopted in the new world. While still in England, he had drawn up a fundamental body of laws, and the Great Law of Chester adopted in 1682 contained these juristic ideals.

The Quakers showed great reluctance in the earlier period to applying the harsh sanctions set up by the mother country and so occupied themselves with law making and otherwise set themselves against the application of the laws of Great Britain, declaring through their superior court that English statute law could not be applied. This sentiment gradually passed away, and in the next century, by the Act of 1718, a large body of English law was expressly made applicable to Pennsylvania, “because the statutes of Parliament did not extend to this province” (Gipson 1915).

3.1.7 Aboriginal Law

Aboriginal land law is the common law doctrine holding that indigenous people have customary land tenure rights over a territory even after the assumption of sovereignty by a colonizing power. The primary basis for such indigenous land rights is continuous and exclusive occupancy of land over an extended period. In addition, additional basis for many aboriginal claims in the United States are the action of governments which antedate the current government (e.g., a grant from Great Britain and Spain), treaties with the United States, acts of Congress, executive actions, or purchase (Morisset 2001).

Aboriginal law as it relates to aboriginal title derives much from aged international law in part not only because of the tendency of contemporary judges to construct it accordingly but also because almost all of these claims have a factual background traceable back a century or more. Aboriginal title has been defined as a species of land ownership that is unique to aboriginal law and that, as the present flow of the law implies, comes with a very unique set of conditions for it to be recognized and enforceable, very different from
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the law of freehold. It is also known as indigenous title, native title (particularly in Australia), original native title (particularly in the United States), and customary title (particularly in New Zealand). Aboriginal title jurisprudence is related to indigenous rights, influencing and influenced by nonland issues, such as whether the government owes a fiduciary duty to indigenous peoples. While the judge-made doctrine arises from customary international law, it has been codified nationally by legislation, treaties, and constitutions.

An important concept in understanding such aboriginal land rights is that indigenous people’s relationship with land does not easily adapt to western concepts of real property and economics. Rather, it is intrinsically connected to cultural, physical, and spiritual well-being in addition to more obvious economic benefits. Native Americans historically did not have a concept of private ownership of land but instead followed a system of tenure of land for the perpetual use and occupancy of the respective tribe. Consequently, Indian and non-Indian cultures held significantly divergent views concerning their uses of and relationships with the land. Where Europeans had an extremely well-defined body of property law based on clear ideas of individual ownership, Native American tribes generally held land communally with shared benefits and burdens. Even when European settlers and developers acquired lands from the Indians by trade and by purchase, each saw the result in a different light. The purchasers, based on their knowledge and understanding of land ownership, believed they were acquiring a title to the land in fee simple. Native Americans, based on their beliefs, believed that they were allowing purchasers the right of use and occupancy of the lands and welcomed that shared use. Without having same concepts and beliefs of land ownership, it was not possible to agree on the ultimate result. This obviously led to significant problems and disagreements.

The colonizing European nations developed the Doctrine of Discovery to justify the process of dominion and subsequent settlement. That doctrine has been described as holding that newly arrived Europeans “immediately and automatically acquired legally recognized property rights in native lands and also gained governmental, political, and commercial rights over the inhabitants without the knowledge or the consent of the Indigenous peoples.” The discovery doctrine remains a foundational legal principle in the United States, New Zealand, Australia, and Canada, as well as elsewhere.

European views of aboriginal land rights were by no means uniform. English, French, Spanish, Dutch, and Swedish concepts varied considerably in their emphasis on discovery, papal authority, royal grant, feudal right, possession, and purchase. The English believed that, based on feudal tenure concepts, the fundamental principle is that the king was the original proprietor and the only possible source of title. The English charters, with the exception of Rhode Island, denied the property rights of the Indians. The Pennsylvania charter of 1681 gave William Penn full rights in his territory, including rights of assigning and granting. However, some Puritans,
along with William Penn, were careful to buy from the Native Americans the lands they wished to occupy. Even so, as described previously, the Native Americans believed they were assigning, or conveying, only the right of shared use in the lands. Concerning the French, there are but few examples of grants of Native American lands to Frenchmen, either in public or private capacity. The Dutch based their claims on purchase rather than discovery, or royal or papal patents. They believed that right of discovery of that held by another was wrong. Consequently, records of the Dutch West India Company show that their patents to Dutch settlers transferred ultimate right of ownership only after the grantee had purchased from the local Native American tribes. The policy of the Swedes was similar to that of the Dutch. The Spanish, on the other hand, did not see the same importance as other European powers concerning land ownership. Spaniards thus acquired land from the Native Americans by purchase, royal grant, and forced seizure. Natives could, and did, sell land to private individuals.

The United States was the first colonial nation to recognize aboriginal land rights with early opinions, such as *Johnson v. M’Intosh*. Such opinions were based on the concept that Native Americans did not have full title to the land because they did not have a concept of individual property rights. Rather, because of the discovery and conquest of this previously unclaimed continent (*terra nullis* or vacant land) by Europeans and the subsequent revolution and treaties, the United States had exclusive title to all land not previously conveyed by the European sovereigns. Yet, under such policy, Native Americans might have the right of possession of the land on which they live as *usufruct* (the right to enjoy something owned by someone else), but only at the pleasure of the United States.

Beginning in 1830, the U.S. Indian Removal Acts formalized a policy that resulted in almost complete extinction of aboriginal land interests in the eastern states. Passage of that law in 1830 came after considerable debate and a close vote in Congress, with notables such as Abraham Lincoln and Davy Crockett arguing against the law. Basically, the law provided for Native American tribes to cede their land in the east for payment and land in the west. Some tribes, such as the Seminoles, did not leave peaceably, resulting in the three Seminole Wars. Subsequently, a series of legislation and treaties continued to alienate Native American land and designate the boundaries of reservations for the various tribes.

Currently, there reportedly are 310 Native American reservations in the United States (*Figure 3.3*), although there are 550 recognized tribes, with a total acreage of 55,700,000 acres or 2.3% of the area of the United States. Thus, Native American tribes now do have sovereign rights over the land on reservations that have been granted through treaties with the United States.

An important concept of Indian Tribal rights and the duty of the United States to enforce them is the concept of trust responsibility, which was first expressed in a decision by Chief Justice John Marshall in *Cherokee Nation v. Georgia*. 
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FIGURE 3.3
Indian reservations in the continental United States. (Courtesy of the U.S. Bureau of Indian Affairs and the National Park Service.)
In Cherokee Nation, the tribe filed an original action in the Supreme Court to enjoin enforcement of state laws. The Court refused original jurisdiction, finding that the tribe was not a state of the United States nor a foreign state, and thus not entitled to bring suit directly before the Court. The Court concluded rather that tribes were “domestic dependent nations” and that their relationship to the United States resembled “that of a ward to his guardian.”

Based on that decision and subsequent ones, the trust responsibility doctrine has developed. That doctrine has guided federal action toward Native Americans in governmental actions in treaties, agreements, statutes, executive orders, and administrative regulations, and the trust relationship has become one of the primary cornerstones of aboriginal law in the United States.

In *New York v. Shinnecock*, Justice Bianco wrote extensively on the law of aboriginal title, borrowing from many previous cases: “Aboriginal title refers to the Indians’ exclusive right to use and occupy lands they have inhabited from time immemorial, but that have subsequently become discovered by European settlers. Aboriginal title derived from the doctrine of discovery provided that discovering nations held fee title to these lands, subject to the Indians’ right of occupancy, and use. Aboriginal title can be extinguished by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise. For extinguishment to occur, the sovereign must intend to revoke the Indians’ occupancy rights. The intent to extinguish aboriginal title must be plain and unambiguous based on either the face of the instrument or surrounding circumstances. Extinguishment cannot be lightly implied. The foundational underpinning of this standard is the policy of the federal government from the beginning to respect the Indian right of occupancy. Thus, given this strong policy, any ambiguity on the issue of whether aboriginal title has been extinguished must be resolved in favor of the Indian tribe.”

Practically nowhere, at least in the United States, are the customs of a people so entrenched and protected as in the State of Hawaii. Regarding this, the court noted in the case of *Public Access Shoreline Hawaii by Rothstein v. Hawai‘i County Planning Commission by Fujimoto*:

We perceive the Hawaiian usage exception to the adoption of the common law to represent an attempt on the part of the framers of the statute to avoid results inappropriate to the isles’ inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law. The statutory exception is thus akin to the English doctrine of custom whereby practices and privileges unique to particular districts continued to apply to the residents of those districts even though in contravention of the common law. This is not to say that we find that all the requisite elements of the doctrine of custom were necessarily incorporated in § 1-1. Rather we believe that the
retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area.

Aboriginal title may not be alienated, except to the federal government or with the approval of Congress. It must be stressed that Aboriginal title is distinct from the lands that Native Americans own in fee simple and occupy under federal trust.

In recent times, the Alaska Native Claims Settlement Act (1971) extinguished all aboriginal title in Alaska, although the legitimacy of the act remains disputed by some Alaskan natives. Indian Land Claims Settlements extinguished all aboriginal title in Rhode Island (1978) and Maine (1980).

Most other colonized nations have also struggled with aboriginal land rights. As an example, Australia began to experience native land rights litigation in the 1970s, when indigenous Australians became more politically active. After litigation (e.g., *Milirrpum v. Nabalco Pty Ltd.*) on behalf of Aborigines claiming all of the country, the Aboriginal Land Rights Act 1976 returned approximately 40% of the Northern Territory to Aboriginal ownership. Another Land Rights Act enacted in 1981 had a similar effect in South Australia.

Based on those acts and others, current indigenous land holdings have been estimated to currently include about 15% of the Australian continent. Those land holdings are available for the use, benefit, and residence of both Aboriginal and Torres Strait Islander people. While some holdings are alienable, leasehold, or Crown reserve, much are inalienable freehold land, which cannot be sold or mortgaged. While that restriction is often considered a barrier to business development, it does ensure continuation of indigenous ownership for future generations.

The Canadian experience with aboriginal land rights has been somewhat different from that of both the United States and Australia. The Canadian policy began with a 1763 English royal proclamation. While that proclamation claimed ownership of what is now Canada by the English King, it recognized that indigenous peoples already on the lands had a prior claim, not extinguished by the arrival of the Europeans, and the Crown had a fiduciary duty to protect it for the Aboriginal peoples.

That policy recognizes Aboriginal rights as *sui generis*, or unique collective rights based on the land being the ancestral territory of indigenous groups. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. Such rights are not granted from an external power but are the result of the occupation of and relationship with their territory as well as their social customs and political systems. In an early judicial ruling to protect such rights, the 1763 Royal Proclamation also stated that such Aboriginal rights could only be extinguished by treaty with the Crown and not ceded directly to settlers.
Subsequent to the 1763 proclamation, Crown representatives and leaders of Aboriginal groups executed treaties throughout most of Canada in efforts to resolve issues of land rights. Those treaties typically traded tenure to land for annuities and certain privileges and legal exemptions. Not all groups signed such treaties, and groups that have never signed treaties can still lodge land claims against the government. As an example, in most of British Columbia, Aboriginal title has never been transferred to the Crown. The British Columbia Treaty Commission defines Aboriginal Rights, which are separate from Treaty Rights, as the practices, customs, and traditions unique to First Nations that were participated in prior to contact with Europeans. Aboriginal Rights, such as the right to hunt and fish, are constitutionally protected and cannot be extinguished by any government. In addition, a number of Indian reserves have been established in Canada where the legal title is held by the federal government for the use and benefit of an Indian group. Currently, there are over 2700 such reserves covering 3,123,550.8 hectares (7,715,170 acres). Also, in the new territory of Nunavut (“our land”), which includes the Arctic Islands and which was carved out of the North West Territories in 1999, title to about 350,000 square kilometers (of the total area of Nunavut of 1.9 million square kilometers) was returned to the Inuit.

As may be seen from the previous discussion, Aboriginal land law generally holds that indigenous people have customary land tenure rights over a territory even after the assumption of sovereignty by a colonizing power. Those rights were not granted by formal title, rather they are the result of the occupation of and relationship with their territory as well as their prevailing social customs. The recognition of such rights has varied widely among colonizing nations and has evolved considerably with time and social mores. Most aboriginal people see their rights as being inherent, collective, and well defined, encompassing such areas as land ownership, education, and the right to self-government.

The overall concept of Aboriginal Title is well summarized by the following 1997 quote from Justice La Forest, then Chief Justice of the Canadian Supreme Court: “In my view, the foundation of aboriginal title (is) the fact that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means. Aboriginal peoples have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. As well, the inescapable conclusion from the Court analysis of Indian title up to this point is that the Indian interest in land is truly sui generis. It is more than the right to enjoyment and occupancy although it is difficult to describe what more in traditional property law terminology.”

### 3.1.8 Tribal Law

As distinguished from aboriginal law, tribal law is that associated with the right of self-governance and self-sufficiency typically maintained by Native...
American tribes. Tribal law recognizes the inherent sovereignty or authority of indigenous tribes to govern themselves within the borders of the United States. The U.S. federal government recognizes tribal nations as “domestic dependent nations” and has established a number of laws attempting to clarify the relationship between the federal, states, and tribal governments. While Native American tribal sovereignty is partially limited as “domestic dependent nations,” the same may be stated about the sovereignty of the federal government and the individual states, each of which is limited by the other. Therefore, tribal sovereignty is another form of parallel sovereignty within the U.S. constitutional framework, constrained by, but not subordinate to, other sovereign entities.

Such rights can affect not only Native Americans but also non-Native Americans and property outside of reservations held by others. Because of the supremacy of Native American treaties under the U.S. Constitution, tribal law may be superior to rights based on state or common law (Morisset 2001). Since treaties with Native Americans have their roots in the U.S. constitution, tribal law has its basis in that document and is usually considered to preempt state law. Further, since the United States maintains fee title to much Native American property, that fact also dictates federal law preeminence. Tribal sovereignty is dependent on, and subordinate to, only the federal government, not states, under Washington v. Confederated Tribes of Colville Indian Reservation (1980), and tribes are sovereign over tribal members and tribal land under United States v. Mazurie (1975). It should be noted, however, that the United States retains control over the scope of tribal law making and that laws adopted by Native American governments must also pass the Secretarial Review of the Department of Interior.

A large component of cases dealing with tribal law involves habitat and property. As an example, it has been held in some cases that Native American reserves extend to and include adjacent water, submerged land, and tidelands (e.g., Alaska Pacific Fisheries v. United States, State v. Edwards). Even where shorelines are not within or adjacent to a Native American reservation, the state still may be required to regulate in accordance with tribal rights. Tribal law also applies to hunting and fishing rights. Generally, Native Americans have exclusive rights to hunt and fish on their reservations. In addition, those rights may extend to off-reservation sites, which are their usual and accustomed locations for such activities, even extending to areas where the underlying submerged lands or tidelands are in private ownership in some cases (U.S. v. Washington). In addition, it has been held in some cases that the treaty right to hunt or fish includes implied rights to have the fishery resource protected by appropriate preservation of habitat or by proper design and construction of culverts and roads. Similar rights have also been held to include on and off-reservation water rights to consumptive uses of groundwater and surface waters in some instances.

Tribal government regulatory powers have been held to include health, zoning, and land use regulations on reservations, including civil jurisdiction...
over non-Native Americans and fee lands not held by Native Americans. A 1981 case, *Montana v. U.S.*, ruled that Native American tribes have inherent power over their internal affairs as well as civil authority over nonmembers as necessary for the protection of the political integrity, the economic security, or the health and welfare of the tribes.

### 3.2 Origins of Land Tenure in the Original Colonies

In the United States, the origins of most currently recognized title to land in the areas covered by the original colonies are royal grants from the sovereign of the several European nations claiming land based on “discovery.” By almost any standard, the basis of the claims should be more appropriately considered as a conquest rather than a discovery since there were reportedly more than 800,000 Native Americans in 330 tribes living in what is now the United States at the time of the European “discovery.” Furthermore, the Native Americans were certainly aware of rights to land based on the following comment in report sent to the British Lords of Trade in 1714: “Each Indian nation is perfectly well acquainted with its exact bounds; the same is again divided into due proportions for each tribe and afterwards subdivided into shares to each family, with all which they are most particularly acquainted. Neither do they ever infringe upon one another or invade their neighbors’ hunting grounds.” Nevertheless, the Europeans did not recognize the ownership rights of the Native Americans. Some settlers made token “purchases” for small sums, but those transactions were only to pacify the Native Americans or to give the settlers grounds for the defense of their claims against other settlers. The U.S. Supreme Court has continued this policy in its decisions, which have recognized only those Native American land rights that have been confirmed by the government of the United States by treaty or congressional actions. Regardless of the fairness of the acquisition by the Europeans, it has withstood the test of time, and as a result, current title to land in the area covered by the original colonies has as its basis, royal grants from European sovereigns.

Although there were overlapping European claims, the dominant claim was that of King James I of England for all of the land in America between the French settlement on the St. Lawrence and the Spanish settlement in Florida. That claim was based on an exploration cruise in 1498 by John Cabot along that coastline when he went as far south as Cape Hatteras.

Typical of the royal grants to the original colonies was the first British grant in 1606 from King James I to Sir Thomas Gates and three other British noblemen for an area lying 50 miles south and 50 miles north from the seat of the first location in America (Jamestown, Virginia) and directly into the mainland for 100 miles, together with all islands within 100 miles of the
coastline between 34° and 41° north latitude (Figure 3.4). Each member of the Jamestown colony was promised one share of stock in the company and title to 100 acres of land at the end of an initial 7-year period during which all resources were to be shared.

Following the initial grant, there were numerous additional British royal grants, many of them overlapping, as well as changes to the initial grant. The next permanent British colony after Jamestown was the settlement of the pilgrims on the Mayflower at Plymouth in 1620. Those immigrants purchased land from the Virginia Colony prior to departure from England. Due to either storms en route or poor navigation, they landed to the north of the limits of that grant near Plymouth Rock in Cape Cod Bay. There, they found an abandoned Native American village with remnant cornfields and began their settlement. Seven years later, they were able to purchase that land that they occupied from a company that had obtained a royal grant to that area.

Following the Plymouth colony, the number of British colonies in the New England area multiplied rapidly, with colonies being established in Maine, Salem (Massachusetts), Connecticut, Rhode Island, New Hampshire, and Vermont. In addition, in 1663, the British took, by force, the Dutch colony in New York after years of disputes, as well as a former Swedish colony along the Delaware River. The original Dutch grants preceding the takeover were confirmed by the British when they took possession. During the same period, other colonies developed, including the current state of Pennsylvania based on a grant to William Penn, Maryland based on a grant to George Calvert (Lord Baltimore), to New Jersey based on a grant to Berkeley and Carteret, as well as grants covering many of the trans-Appalachian regions.

In another grant during that period, on March 24, 1663, Charles II issued a new charter to a group of eight English noblemen, granting them the

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**FIGURE 3.4**

Limits of 1606 Jamestown Grant (land within 100 miles of the coastline between 34° and 41° north latitude).
land of Carolina, as a reward for their faithful support of his efforts to
gain the throne of England. The eight were called “Lords Proprietors” or simply “Proprietors.” That charter granted the Proprietors title to all land between the southern boundary of the Virginia Colony (36° north latitude) to 31° north latitude, along the coast of present-day Georgia. In 1665, the charter was revised to extend the northern boundary to 36° 30 minutes north to include lands of settlers along the Albemarle Sound, who had left the Virginia Colony. That revision also extended the southern boundary southerly to 29° north, which is just south of Daytona Beach, Florida. That revision had the effect of including an existing Spanish settlement in St. Augustine, Florida. The charter granted all of the lands between those bounds from the Atlantic Ocean westerly to the Pacific Ocean.

**ROYAL CHARTER**

George the second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth. To all to whom these presents shall come, greeting.

Whereas we are credibly informed, that many of our poor subjects are, through misfortunes and want of employment, reduced to great necessity, insomuch as by their labor they are not able to provide a maintenance for themselves and families; and if they had means to defray their charges of passage, and other expenses, incident to new settlements, they would be glad to settle in any of our provinces in America where by cultivating the lands, at present waste and desolate, they might not only gain a comfortable subsistence for themselves and families, but also strengthen our colonies and increase the trade, navigation and wealth of these our realms....

And whereas we think it highly becoming our crown and royal dignity, to protect all our loving subjects, be they ever so distant from us; to extend our fatherly compassion even to the meanest and most unfortunate of our people, and to relieve the wants of our above mentioned poor subjects; and that it will be highly conducive for accomplishing those ends, that a regular colony of the said poor people be settled and established in the southern territories of Carolina....

Know ye, therefore that we greatly desiring the happy success of the said corporation, for their further encouragement in accomplishing so excellent a work have of our aforesaid grace, certain knowledge and mere motion, given and granted by these presents, for us, our heirs and successors, do give and grant to the said corporation and their successors under the reservation, limitation and declaration, hereafter expressed, seven undivided parts. The whole in eight equal parts to be divided, of all those lands, countries and territories, situate, lying and being in that part of South Carolina, in America, lying and being in that part of South Carolina, in America, which lies from the most northern part of a stream or river there, commonly called the Savannah, all along the sea coast to the southward, unto the most southern stream of a certain other great water or river called the Altamaha, and westerly from the heads of the said rivers respectively, in direct lines to the south seas; and all that share, circuit and precinct of land, within the said boundaries, with the islands on the sea, lying opposite to the eastern coast of the said lands, within twenty leagues of the same, which are not inhabited already, or settled by any authority derived from the crown of Great Britain....

All which lands, countries, territories and premises, hereby granted or mentioned, and intended to be granted, we do by these presents, make, erect and create one independent and separate province, by the name of Georgia, by which name we will, the same henceforth be called.

**FIGURE 3.5**

Excerpts from the Royal Grant of 1732 for the Colony of Georgia.
All of these were based on British royal grants to individuals or companies, who were essentially land speculators with the primary objective of financial gain. An exception to this was one of the later colonies in the current state of Georgia. King George II bought back a portion of the Carolinas and granted the Georgia area to General James Oglethorpe in 1732 for the purpose of establishing a colony for people of respectable families who were confined in prisons as insolvent debtors (Chandler 1945). That philosophy is reflected in excerpts from the royal grant for the colony (Figure 3.5).

As may be seen in the description contained in the charter, the granted land was described as lying between the Savannah and Altamaha rivers, up to their respective headwaters and then extending westerly “to the south seas.” At the end of the French and Indian War, a British royal proclamation in 1763 fixed the northern border of Florida. Three months later, Georgia’s southern boundary was further defined as the north boundary of Florida, and its western boundary was fixed at the Mississippi River, including portions of what is now Alabama and Mississippi (Figure 3.6). The area between the Altamaha and St. Marys rivers was annexed to Georgia by the same proclamation.

In all of the areas covered by the original colonies, the origins of most currently recognized title to land in the areas are royal grants from the sovereign of the European nations. Those large royal grants were typically subdivided into smaller land tracts by the grantees and sold to the original settlers.

In the New England colonies, the settlement was typically planned prior to distribution of the land. The land was usually subdivided by survey, with lots grouped along roads and around a village square. Formal subdivision plats of each settlement were typically prepared, which allowed land to be

FIGURE 3.5
1732 Royal grant for the Georgia colony (land lying between the Savannah and Altamaha rivers, up to their headwaters and then extending “to the south seas”).
described in reference to the plats. As the land was conveyed to the individual settlers, land records were carefully recorded. As a result, settlement patterns were relatively regular, with few gaps left between lots within each township or the townships themselves (Linklater 2002).

In other colonies, differing approaches were used. For example, in Virginia, settlers were allowed to choose their parcel of land and then have it surveyed and registered. Thus, highly irregular settlement patterns resulted, with gaps left between the more desirable tracts. In the Carolinas and Georgia, the proprietors of the original sovereign grants planned to presurvey their colonies into rectangles, with lines run in cardinal directions. Despite such plans, the urgent demand for land resulted in a complete breakdown of those plans. Newly arriving settlers were given “head rights” that entitled them to a certain quantity of land at a location of their choosing as long as it was not occupied. Settlers were supposed to have their land surveyed and the title recorded after they selected the land, but often, these processes were not accomplished. As a result, an irregular, scattered pattern of settlement developed with frequent land disputes (Clawson 1968).

3.3 Origins of Land Tenure in Public Domain Lands

Unlike the land within the original 13 colonies, most of the remainder of the land currently within the United States was acquired after the colonial period and passed through formal ownership of the United States. Thus, over three quarters of the current land of the nation was once considered public domain land (Figure 3.7).

Cessions Land—A portion of these public domain lands were acquired by cessions from the original colonies as a condition of statehood. The cessions land includes the current states of Ohio, Illinois, Michigan, Wisconsin, and portions of Alabama, Mississippi, and Tennessee.

Louisiana Purchase—The most dramatic increase in the territory of the United States occurred in 1803, when President Thomas Jefferson purchased the Louisiana Territory from France. That purchase involved over 800,000 square miles covering all or part of 13 states, including Arkansas, Colorado, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and Wyoming. The purchase almost doubled the size of the United States. The land in the purchase was especially strategic for the United States in that it included New Orleans and its control of navigation on the Mississippi River and, thus, access to much of the inland areas of the continent. The purchase also had significance in international politics. It almost totally removed France from the Americas and reduced the likelihood of any other European power getting a foothold in North America.
Land Tenure in the United States (Clawson 1964). France agreed to the purchase due to that nation’s sore need for money caused by its involvement with European wars. Furthermore, with its attention required in Europe, France feared that it would not be able to defend and hold its claims in North America.

Red River Basin—To resolve territorial issues remaining after the Treaty of Ghent, which had ended the war of 1812, a new treaty was executed with Great Britain in 1818 that clarified the northern boundary of the Louisiana purchase. The additional land acquired under the new treaty was called the Red River Basin. That land later became parts of the states of Minnesota and North Dakota.

Florida Cession—In 1819, just 16 years after the Louisiana Purchase, the United States purchased, from Spain, the area within the current state of Florida and portions of Alabama and Mississippi. Spain agreed to the sale for some of the same considerations as those associated with France and the Louisiana Purchase. Spain had not been especially successful in settling the area and feared eventual loss of the territory to the aggressive new nation based on several border incidents.

Oregon Compromise—The area within the present states of Idaho, Oregon, and Washington and parts of Montana and Wyoming was of interest to both the United States and Britain. For the period between 1818 and 1844, the territory was the subject of a joint settlement and control treaty between the nations. That arrangement proved unsatisfactory to the settlers from the
United States due to the dominance of Britain’s Hudson’s Bay Company. As a result, the United States pressed for, and in 1845 obtained, a treaty providing for sole ownership of the territory by the United States.

**Mexican Cession**—Following the annexation of Texas in 1845, the relationship between the United States and Mexico was unsettled. Ultimately, this resulted in the U.S. declaration of war with Mexico in 1846. As part of the peace treaty following the decisive defeat of Mexico, the United States purchased the area within the present states of California, Nevada, and Utah and significant parts of Arizona, Colorado, New Mexico, and Wyoming.

**Purchase of Lands from Texas**—Following its existence as an independent republic from 1836 to 1845, Texas became a part of the United States by treaty. One term of that treaty was that the public lands within the new state would belong to the State and not the United States. Thus, the lands within the State of Texas have never been part of the U.S. public domain. Nevertheless, in 1850, the United States purchased, from Texas, its claim to almost 79 million acres lying within the present states of Colorado, Kansas, New Mexico, Oklahoma, and Wyoming.

**Gadsden Purchase**—In 1853, the United States purchased, from Mexico, a strip of land that had been the subject of a continued dispute. That land lies across southern Arizona and New Mexico.

**Alaska**—The last great territorial acquisition of the United States was the purchase, from Russia in 1867, of what is now the State of Alaska. Although the Russians had long claimed that territory, their primary interest had been in furs. As a result, there had been limited settlement attempts. Therefore, when the sea otter became nearly extinct and other fur species depleted, Russia was agreeable to the sale of the territory (Clawson 1964).

With the public domain lands (**Figure 3.8**), it was in the interest of the United States to encourage settlement in those areas. The presence of

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**FIGURE 3.8**
Public domain lands of the United States (Alaska not shown).
settlers would solidify the nation’s claim to the area and help defend the area. In addition, revenue from the sale of the land would be a source of revenue for the new nation. Therefore, it was essential to conduct surveys to subdivide the land into sellable parcels and to provide for the orderly sale and settlement of the land. These public domain lands were typically surveyed prior to settlement using the rectangular land survey process known as the U.S. Public Land Survey System. That system subdivided the land into six-mile square townships with boundaries in the cardinal directions and further subdivided each township into 36 one-mile square sections.

For a time after the sale of public domain lands began with the Land Ordinance of 1785, land was sold in town-sized parcels to imitate the New England system of land development. This was in accordance with the argument of Treasury Secretary Alexander Hamilton with the goal of obtaining maximum revenue from the land. After it was realized that only speculators had funds for purchasing such large tracts, the method of selling public domain land gradually shifted to favor direct purchase by the settlers. At first, the minimum size for land sales was a section of land (640 acres). In 1800, to further assist settlers, the Congress dropped the minimum sale size to a half section (320 acres) and then to a quarter section (160 acres) in 1804. Ultimately, the minimum was reduced to a quarter-quarter section (40 acres), the amount of land considered necessary for sustaining a family, which inspired the slogan of “40 acres and a mule.”

As each sale was made, a formal patent was issued by the local government land office and entries made in registers for the territory. Such patents serve as the basis of title to most lands within the states now composing the public domain lands.

It should be noted that certain lands in the public domain states were not conveyed in this process. Sovereign grants to individuals preceding acquisition by the United States were typically confirmed and accepted by the United States under terms of the acquisition treaty and never became part of the public domain. Navigable waters were reserved from the lands that were sold as part of the public land survey as highways of commerce and became the property of the public of each state with statehood. After passage of the Swamp and Overflow Land Act of 1850, lands that were deemed unfit for cultivation were also segregated by the surveys from the lands to be sold. Such swamp and overflowed lands were patented to the individual states, as opposed to private citizens. The states were, in this manner, provided the opportunity to reclaim the lands and then sell them to private individuals for revenue for the operation of state government. Additional lands were also granted to the states for public purposes, including Section 16 of each township, which was reserved for funding public schools. Grants were also made for the purpose of railroads and other functions to facilitate development of the territories.
Recommended Additional Reading on Land Tenure in the United States


