

# Property in Land in the Early United States

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Claire Priest's impressive book emphasizes the lack of legal restrictions on the remedies of creditors in what would become the United States.<sup>1</sup> She stresses Parliament's passage of the Debt Recovery Act in 1732, a distinctly pro-creditor enactment. An important part of her narrative addresses security interests in slaves. By 1785, South Carolina had established a county system for the voluntary recording of mortgages on slaves.<sup>2</sup> The focus of this essay, by contrast, is entirely on property in land, including mortgages on land. Priest's book cites Alice Hanson Jones's finding, based on an examination of probate records at the time of the Revolution, that real estate, not slaves, constituted a solid majority of personal wealth, even in Southern States. Priest asserts that Jones found that "land constituted 81.1% of wealth in New England, 68.5% in the mid-Atlantic region, and 48.6% of wealth in the South, with slaves constituting 35.6%."<sup>3</sup>

There is a small literature on real estate transactions in early America. Standouts include John Frederick Martin's *Profits in the Wilderness* (1991), on town formation in seventeenth-century New England, and Elizabeth Blackmar's *Manhattan for Rent, 1785-1850* (1989).<sup>4</sup> Nonetheless, much remains to be done. Land records, rarely explored by historians, provide potential troves of information. In this brief essay, I comment on two topics related to real estate: the role of land speculators in the eighteenth century and the development of Manhattan real estate during the lifetime of John Jacob Astor, who at his death in 1848, was one of the richest men in the world.

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1. CLAIRE PRIEST, *CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA* (2021).

2. *Id.* at 55-56.

3. *Id.* at 42. *See also* ALICE HANSON JONES, *WEALTH OF A NATION TO BE: THE AMERICAN COLONIES ON THE EVE OF THE REVOLUTION* 98 & tbl.4.5 (1980).

4. *See also, e.g.*, HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* (1993); DAVID THOMAS KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692* (1979).

## SPECULATORS IN RURAL LAND

It is hardly news that many of the Framers of the U.S. Constitution actively sought to invest in the rural lands of their fast-growing nation. Charles A. Beard, in his famous 1913 book *An Economic Interpretation of the Constitution of the United States*, devotes almost eighty pages to a description of the interests of the founders in both land and slaves.<sup>5</sup> Beard identifies fourteen of the fifty-five delegates to the Constitutional Convention of 1787 as having “invested in lands for speculation.”<sup>6</sup> Chief among them was none other than George Washington, who had invested in lands in many existing states, the Northwest Territories, and had toyed with buying land in Florida.<sup>7</sup> Other famous delegates who shared the rural land bug included Elbridge Gerry, Alexander Hamilton, James Madison, George Mason, Robert Morris, and James Wilson.<sup>8</sup> (Several notable non-delegates, such as Aaron Burr, Patrick Henry, and John Marshall, similarly had invested in rural land.)<sup>9</sup>

According to Beard’s count, fifteen of the delegates were slave owners—one greater than his count of the land speculators.<sup>10</sup> As noted, in colonial times, even in the South, most wealth was held in land, not slaves. Following the example of Charles Beard, scholars could scour land records to enrich understanding of the Founders’ various land investments.

## JOHN JACOB ASTOR

Astor usefully counterbalances what heretofore has been an overly rural emphasis on real estate issues. One of the richest men in the world at the time of his death in 1848, Astor had gained much of his fortune through adroit investments in land in Manhattan. In 1931, Kenneth Wiggins Porter published a revealing two-volume biography of Astor.<sup>11</sup> Since that time, historians have regrettably largely ignored Astor’s business dealings.

Originally famous for his involvements with the fur trade, Astor amassed most of his fortune by investing in undeveloped land in Manhattan.<sup>12</sup> He assumed that Manhattan would continue to grow rapidly in population. His

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5. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 73-151 (1913).

6. *Id.* at 151.

7. *Id.* at 144-46. On Washington’s interest in buying land in Florida, see *The Founders and the Pursuit of Land*, LEHRMAN INST., <https://lehrmaninstitute.org/history/founders-land.html> (last visited Dec. 13, 2021).

8. BEARD, *supra* note 5, at 95-99 (Gerry); 100-14 (Hamilton); 127-29 (Mason); 132-36 (Morris); 147-48 (Wilson). Beard seems to have been unaware of Madison’s investments in lands in New York’s Mohawk Valley. *Id.* at 125-26; cf. LEHRMAN INST., *supra* note 7 (discussing Madison’s Mohawk Valley holdings).

9. See II KENNETH WIGGINS PORTER, JOHN JACOB ASTOR: BUSINESS MAN 920 (1931); LEHRMAN INST., *supra* note 7.

10. BEARD, *supra* note 5, at 151.

11. PORTER, *supra* note 9.

12. *Id.* at 910-12.

basic strategy was to buy farms or lots at the fringe of existing development. In that era, this meant, for example, land in present-day Greenwich Village, as opposed to lands near the Battery or Wall Street. Astor was confident that Manhattan would continue to expand rapidly. The completion of the Erie Canal in 1825 confirmed his optimism. There is an economic puzzle, of course. Why did those who sold land at the urban fringe to Astor not charge him a higher price? Possibilities include that Astor was significantly smarter, luckier, or less risk-averse than those who sold land to him.

John Jacob Astor was born in Germany in 1763. As a teenager he traveled to London in 1779 to learn English, and he immediately began saving to pay for a voyage to the United States. He arrived in the United States at age twenty, joining Henry, a brother nine years older, who had long lived in Manhattan. At age twenty-five, in 1789, Astor bought his first Manhattan lots,<sup>13</sup> but he soon turned to other business endeavors, particularly the fur trade. Nonetheless, Astor kept his hand in real estate, buying lands in Florida, Missouri, Ohio, Wisconsin, and upstate New York.<sup>14</sup> As mentioned, after 1800, he made a large fortune in Manhattan real estate. To dispose of his many holdings, he was willing both to execute long-term leases and to sell in fee simple.<sup>15</sup>

Porter, Astor's biographer, had the wisdom to consult land records to chronicle Astor's real estate activities. In the early twenty-first century, real estate entrepreneurs commonly use limited-liability corporations (LLCs) to disguise their transactions. Astor, by contrast, tended to transact using his own name, or at least Porter so assumes.<sup>16</sup>

Especially after 1835, when he was seventy-two, Astor began to lend money secured by a purchase-money mortgage.<sup>17</sup> He may have foreclosed on as many as one-third of these mortgages.<sup>18</sup> Before the 1830s, when lending institutions started to emerge,<sup>19</sup> richer people with capital tended to engage in what Naomi Lamoreaux calls "insider lending," that is, making loans to friends, family, and close business acquaintances.<sup>20</sup> That Astor began to offer mortgages in the 1830s appears to fit into the larger temporal pattern. Transactions increasingly became arms-length as the nineteenth century progressed.

Astor seldom developed the lands that he owned and instead preferred to sell or lease land on favorable terms. A major exception, in 1836, was his building the six-story Park Hotel (later called Astor House) at Broadway

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13. *Id.* at 39-41, 356-59.

14. *Id.* at 852-73, 876-92.

15. *Id.* at 932.

16. *Id.* at 913, 944 n.5.

17. *Id.* at 931.

18. *Id.* at 930-32.

19. Steven J. Kochever, *The Rise of Institutional Mortgage Lending in Early Nineteenth-Century New Haven*, 124 *YALE L.J.* 158, 161 (2014).

20. NAOMI R. LAMOREAUX, *INSIDER LENDING: BANKS, PERSONAL CONNECTIONS, AND ECONOMIC DEVELOPMENT IN INDUSTRIAL NEW ENGLAND* 4 (1994).

and Vesey Street in lower Manhattan.<sup>21</sup> Then a man in his seventies, Astor, ever the entrepreneur, was ready for new challenges.

#### INTO THE ARCHIVES

By 1785, South Carolina had established a system for recording mortgages on slaves.<sup>22</sup> Public records of this sort are a potential goldmine of information. I conclude by urging scholars of all stripes to make greater use of these sorts of public documents.

Land records, in particular, are largely untapped. In the United States, state statutes usually direct county governments to maintain them. To update Charles Beard's study, for example, a social scientist could investigate what land records reveal about the Founders' investments in rural lands in the eighteenth century. In 1931, Kenneth Wiggins Porter, while writing his biography of Astor, used land records to good effect. A modern-day social scientist, however, likely could apply more sophisticated statistical techniques. Because law professors tend to be familiar with land records, a few pioneers have investigated their contents. Examples from over a half-century ago include William Hines's study of joint tenancies in Iowa<sup>23</sup> and Helen Monchow's and Zigurds Zile's empirical studies of the use of restrictive covenants.<sup>24</sup> Many property professors regard the creation of a legal life estate, or a defeasible fee, to be unwise. Only an empirical study of land records would reveal how commonly attorneys create these disfavored interests. In using land records to divine prevailing legal practices, there is a contemporary role model: Maureen Brady. In 2021, Harvard Law School awarded her tenure. Brady has delved into land records to criticize the layout of New Haven's Nine Squares<sup>25</sup> and to investigate the use of metes and bounds descriptions in deeds.<sup>26</sup> Lawyers, economists, and historians would be wise to follow her lead.

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21. II PORTER, *supra* note 9, at 991-96.

22. See PRIEST, *supra* note 1, at 55-56.

23. N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 586 n.16 (1966) (finding that joint tenancies increased in Iowa from less than 1% in 1933 to 46% in 1954).

24. HELEN C. MONCHOW, *THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENT* (1928) (examining 84 U.S. covenant schemes); Zigurds L. Zile, *Private Zoning on Milwaukee's Metropolitan Fringe, Problems of Drafting—Part II*, 1959 WISC. L. REV. 451 (examining covenants in Waukesha County, Wisconsin).

25. Maureen E. Boyle, *The Failure of America's First City Plan*, 46 URB. LAW. 507 (2014).

26. Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872 (2019).