From Squatter to Settler: Applying the Lessons of Nineteenth Century U.S. Public Land Policy to Twenty-first Century Land Struggles in Brazil

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Brazil’s policies affecting its land in the Amazon region have assumed global significance, in part due to the pressing realities of deforestation and climate change. Domestically, the allocation and utilization of Amazonian land has important implications for Brazil’s social and political stability, economic development, environmental conservation efforts, and cultural preservation efforts. The area known as the “legal Amazon” for planning purposes comprises more than 57 percent of Brazil’s national territory; the manner of settlement and occupation of land in this region is a contentious issue.

This Note explores the history of public land settlement in the Brazilian Amazon and the recent debates in Brazil over a federal law that enables about 300,000 current occupants of public land in the legal Amazon to acquire legal title. For perspective, the Note compares the potential consequences of this law to those of a series of retrospective titling laws passed in the United States during the half century leading up to the Homestead Act. The U.S. preemption laws sought to provide the opportunity for squatters on the U.S. public lands to acquire title without
competition from moneyed speculators or corporate interests. Yet the U.S. preemption laws engendered severe criticism due to their inability to differentiate between bona fide settlers needing agricultural land to sustain a livelihood, and speculative interests taking advantage of the settlement laws purely for pecuniary gain. This Note demonstrates that a desire for the settlement laws to benefit bona fide settlers over speculators dominated the policy discourse and may have been a key element in the United States’ transition from its early, limited preemption laws to a broader set of forward-looking preemption laws and eventually the Homestead Act.

Similarly, the question of whether Brazil should embrace continued settlement in the Amazon region by awarding squatters with land ownership must be assessed in light of the policy preference to support land acquisition by poorer squatters, known as posseiros, as opposed to large-scale land speculators or land grabbers, known as grileiros. Some 35 percent of land in the legal Amazon is registered to private owners; yet a significant portion of these lands are presumed to be illegal landholdings of grileiros. The Brazilian government has reviewed thousands of these large land claims and has suspended title for those suspected to have been fraudulently or illegally claimed. Meanwhile, the vast number of small-scale occupations of public land in the legal Amazon by squatters or posseiros has fueled a grassroots movement for land reform and government recognition of the right to acquire title to occupied public land.

The continued pressure to limit illegitimate, private claims to the public lands by grileiros raises the question of whether a contemporaneous policy that rewards encroachment on the public lands with the right to ownership will prove counterproductive to Brazil’s goals. This Note suggests that in order for Brazil’s public land distribution and land reform program to be successful, the law must contain mechanisms that protect the interests of its preferred beneficiaries, the posseiros. So long as ambiguities exist in the public land titling laws affecting the legal Amazon, sophisticated speculators will continue to take control of large areas of Amazonian land, endangering Brazil’s goals for land reform, environmental conservation, and other objectives such as the demarcation of indigenous land and the creation of extractive reserves.
INTRODUCTION

The management and distribution of Brazil's vast rural and forested lands has presented Brazil's federal government with enormous challenges. The Amazon region, with its seemingly endless ability to provide land and economic opportunity to the poor and the landless, has the potential to alleviate several of the country's woes. Waves of road building, infrastructure and development projects, and exponential growth of the cattle and soybean industries have drawn multitudes of settlers and speculators to the region. Today, hundreds of thousands of
Brazilians struggle to subsist or successfully thrive off of informal or illegal occupations of land in the Amazon.¹

For many, this life comes at a price of social unrest and violence, a substantial part of which stems from conflicts over land ownership. An underdeveloped land titling and registration system, rampant fraud, and an unequal distribution of land and political power between the landless poor and the landed rich have resulted in calls for reform. Two prominent areas of government land reform efforts in Brazil are procedures to quiet title and settle questions of ownership of land claimed illegally or under questionable title, and laws to extend land ownership or usufruct rights to squatters residing upon and living off of the public lands.² The process of quieting title and settling land claims in areas subject to both legal and illegal settlement practices provides a basis for agencies to move forward with social and environmental projects, and to enforce the rule of law in the land settlement process.³

In tension with land reform efforts is a deeply entrenched pattern of government action that has rewarded claimants with ownership over questionably obtained land. Settlement of Brazil's public lands is marked by a post-hoc legitimization process⁴ which commonly leads to overlapping and conflicting claims, claims made on ineligible land, such as conservation or indigenous lands, and the reward of land to speculators who have used fraudulent or illegal methods to stake their claim. Non-governmental organizations working for more sustainable and effective settlement practices criticize policies that reward speculative "land grabbers," known infamously in Brazil as grileiros,⁵ with legal title.

3. Government programs that aid settlement in the Amazon have been known to negatively impact environmental conservation, especially with regard to the establishment of protected areas. See Paulo Barreto et al., World Res. Inst., Human Pressure on the Brazilian Amazon Forests 16 (2006), available at http://www.globalforestwatch.org/common/pdf/Human_Pressure_Final_English.pdf. However, without government processes to quiet title to conflicted lands and regulate settlement methods, there is little hope of stemming the uncontrolled flow of persons seeking land into sensitive areas. Fearnside, supra note 2, at 1361.
4. See Fearnside, supra note 2, at 1362.
5. The Brazilian term grileiro will be used throughout this Note to refer generally to a subset of land speculator known to engage in illegal methods of acquiring land, such as by obtaining fraudulent title, or by using threats and/or violence to force poorer squatters and vulnerable indigenous and forest-dwelling communities off of the land they occupy. The associated term that refers to the act of taking and occupying land in this illegal manner is grilagem.
to their claims. A federal law enacted in Brazil in 2009 that extends title rights to occupants on the public lands highlights the mounting tension there between curbing abusive land grabbing practices and establishing property rights for needy settlers and communities in the Amazon.6

The United States, during its westward expansion, similarly struggled to find an effective way to encourage land settlement without promoting fraud and speculation.7 Early preemption laws gave settlers with possessory land claims preemptive rights over others seeking to take title,8 initiating a system not unlike the post-hoc legalization process in effect today in Brazil. By the 1840s, preemption became a national and prospective policy,9 greatly expanding the opportunities for settlers to transform public domain into private title by settling upon and improving an area of land.10 Yet as westward expansion continued, preemption’s vulnerability to serious abuse, both by corporate speculators and by small-scale settlers, led to increasing pressure to take preemption off the statute books.11 After the introduction of the Homestead Act, which eventually incorporated various attributes of preemption policy, the preemption laws suffered a decline into obsolescence.12

The developments during this era of U.S. public land disposal were not linear and rarely represented a unified government policy. Although rhetoric at the time pitted the “settler” against the “speculator,” it is not clear, in reviewing historical developments, whether those groups were so diametrically distinct.13 Nonetheless, the perception of the bona fide

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9. The country’s arrival at a national policy of preemption was in large part a result of the consistent disregard of established property laws by an ever-increasing settler population: “although [the settlers’] actions were initially met with condemnation by the legal establishment, their persistent lawbreaking ultimately paid off. Over the course of the nineteenth century, the law slowly but surely adapted itself to the reality the settlers had created on the ground.” Eduardo Moisés Peñalver & Sonia K. Katyal, Property Outlaws, 155 U. PA. L. REV. 1095, 1106 (2007).
10. See GATES, supra note 8, at 238 (discussing passage of the Preemption Act of 1841, which “abandoned the view that all settlement on unoffered public land was illegal” while still limiting settlement to surveyed land only).
11. See id. at 471.
13. Note on Terms: The terms “settler” and “speculator” lack a single or uniform definition, yet are central to this Note. My use of these words intends to reflect the way in which they would have been understood in a general sense. A “settler” was “bona fide”—actually intending, in good faith, to improve his claim and remain on it, using it as the basis upon which to raise a family and earn a livelihood. A “squatter” who unlawfully occupied a plot of land could become a “settler” once the law made provisions to legitimize the claim through a titling process. A “speculator” may have engaged in squatter or settler practices, but only to the extent necessary to acquire a claim or right to title with the intention of holding it for a profitable sale.
settler versus the greedy speculator fed into the legal framework of the preemption and homestead laws, identifying actual settlers as the preferred beneficiaries of the right to acquire title to public lands.\textsuperscript{14} The transition from preemption to homesteading, marked by the repeal of the preemption laws in 1891, can be viewed, in part, as an attempt to realign settlement policy with the interests of the bona fide settler and away from the speculator.

This Note seeks to expose the parallels between current efforts to meet settlement needs and prevent abuses of the public land system in the Amazonian region of Brazil and the historical evolution of land settlement policy in the United States.\textsuperscript{15} I propose that a major obstacle for Brazil is the practical impossibility of distinguishing between settlers and speculators while relying on policies that legitimize public land claims through a retrospective titling process. Institutional barriers to verifying that claimants meet the legal criteria for obtaining land further reduce the likelihood that Brazil's law, in its current form, can distinguish legitimate claims from those of grileiro land grabbers. As in the U.S. example, policymakers in Brazil must consider whether the goals for the distribution of public lands could be better met by ending those policies that legalize land claims without adequate means of ensuring whether the claims are legitimate. Brazil may look to the United States' experience of transitioning from preemption to homesteading to provide a valuable illustration of the possible outcomes of similar public land settlement policies in Brazil.

Usually, "speculator" implied a moneyed businessperson or entity that competed for claims with poorer settlers. Speculators were associated with the acquisition of vast and numerous tracts of land, whereas the settler was legally obliged to maintain a claim upon one, or at times two, tracts of land.

Although these definitions suggest a distinction based only on wealth, the difference between settler and speculator was based also upon the subjective intent of the claimant. Many "settlers" were equally entrepreneurial and took advantage of loopholes in the land laws and their enforcement to engage in speculation. The practical difficulties in creating a legal framework for land settlement that can distinguish between a "favored" group (usually "settlers") and a "disfavored" group (usually "speculators") is the very subject of this Note, as it poses a significant challenge in Brazil today.

\textsuperscript{14} See SATO, supra note 12, at 162.

\textsuperscript{15} The comparisons drawn do not intend to suggest that the social, economic, political, or environmental challenges faced by contemporary Brazil are exactly like those of the nineteenth century United States. As expressed by Samara D. Anderson in Colonialism Continues: A Comparative Analysis of the United States and Brazil's Exploitation of Indigenous People's Forest Resources, 27 VT. L. REV. 959, 962 (2003), the "United States developed through the exploitation of its forestry resources and indigenous people . . . before the world could bear witness and speak out against the resulting negative effects." In contrast, Brazil's development is taking place "in the international limelight." These dissimilarities, however, do not diminish the significant parallels that exist, an exploration of which may prove useful to policymakers addressing land reform in Brazil today.
In Part I, I review the historical development of land ownership in the Amazonian region of Brazil, focusing upon recent efforts to reform the land titling system and extend legal ownership to long-term squatters. As a case in point, I review the objectives of and challenges for Brazil’s federal legislation, passed in 2009, that speeds up the titling process for those claiming possession of public land in the Amazon. In Part II, I survey the United States’ transition from a system of preemption laws that responded in a post-hoc fashion to the presence of squatters on public lands, to a system of homestead laws that sought to grant land systematically to bona fide settlers. I draw attention to the tensions that arose in the course of the United States’ experience, in particular between policy preferences for actual settlers who intended to work the land as a homestead over speculators engaged in resale of the land for profit. In Part III, I analyze the manner in which both the United States’ historical laws and surrounding rhetoric, and Brazil’s recent legislation and active debates over proper development of the legal Amazon, juxtapose the role of squatter or “bona fide settler” against that of moneyed or landed speculator. I ask whether the policy effort to distinguish between preferred beneficiaries of public land disposal has an effect on the actual implementation of titling rights in favor of the preferred group. In the Conclusion, I propose that the distinction is significant for Brazil because it may serve as the basis for future changes to the public land settlement laws. I propose that such future changes should narrow the eligibility and qualifying procedures to acquire title to the public land in a manner that realizes the policy goal of extending ownership only to the preferred beneficiaries and, in so doing, reduces opportunities for abuse of overly generous titling laws by the disfavored group.

I. LAND REFORM IN BRAZIL AND THE MODERN SETTLEMENT OF THE AMAZON

Land reform is not new to Brazil. Since the passage of the Land Statute in 1964 and the creation of a federal agency to implement land

16. The area known as the “legal Amazon” for development and planning purposes comprises more than 50 percent of all of Latin America’s contiguous tropical rain forest and 57 percent of the Brazilian national territory, including all or some of nine Brazilian states. See Evaristo Eduardo De Miranda & Christina Mattos, Brazilian Rain Forest Colonization and Biodiversity, 40 AGRIC., ECOSYSTEMS & ENV’T 275, 279 (1992); DENNIS J. MAHAR, GOVERNMENT POLICIES AND DEFORESTATION IN BRAZIL’S AMAZON REGION 3 (1989).

reform in 1970, the various government agencies have worked on land-related agrarian reform. The need for agrarian reform stems from Brazil's notoriously unequal distribution of land, with 1 percent of the population controlling 47 percent of real estate. Land reform is especially important to the Amazonian region, since large landholders control a significant percentage of land, usually under questionable title, making the land unavailable for settlement and difficult for the government to regulate for other purposes, such as conservation. The size of the Brazilian Amazonian region and the importance of regulating its land use patterns in the era of climate change further increase the stakes for the success of land reform.

A. Historical Settlement of Land in the Amazon Region

At the time of colonization, all land in Brazil was declared public land belonging to the Portuguese Crown, and some was distributed to elite private owners through large land grants or allotments. These distributed public lands often were leased to third parties or eventually abandoned, in which case they returned to the public domain as vacant or "returned lands." After independence from Portugal in 1822, no existing law governed land ownership, and land was claimed merely by physical occupation. In 1850, Brazil passed its first Lands Act, legalizing private
ownership of the land allotted under the colonial system, and allowing those in physical occupation or possession of land (posseiros) to seek legal title if they could show that they had established residence and cultivated the land. At that time, the nearly impenetrable Amazon forests were thought to be of little value: early European settlers found the land unproductive for agriculture and difficult to exploit for its natural resources. Except for a wave of migration to the Brazilian Amazon brought about by the rubber boom of the late 1800s, the region remained relatively isolated until the 1960s, when the Brazilian government turned its attention to the legal Amazon for development.

In the 1960s, seeking to enforce Brazil's territorial sovereignty over the region, and to respond to unrest amongst the landless poor, the government began a campaign to build infrastructure to transport people into and extract value out of the forests. The international community contributed financial assistance to Brazil for this large-scale development, especially the multilateral development banks. Meanwhile, the Brazilian federal government encouraged settlement and agricultural production by offering substantial fiscal incentives, such as subsidies and low-interest loans, to individuals or entities who could establish productive use of the land. This period of settlement and expansion increased the population in the Amazonian region to more than twenty million, setting the stage for increased competition over claims to the land.

28. Posseiro is the Portuguese word for squatter, including a long-time occupant of land who has yet to obtain legal title or occupancy rights. I will use posseiro to refer to the segment of the population in the legal Amazon that is the primary subject of recent land reform efforts.

29. See ENVTL. L. INST., supra note 24, at 81; SODERO, supra note 25, at 198.

30. See ENVTL. L. INST., supra note 24, at 3.

31. During Brazil's rubber trade boom, migrants came to work the rubber plantations, and many remained after the collapse of the trade in 1912, subsisting on forest products and tapping rubber for local merchants. See De Miranda & Mattos, supra note 16, at 282; ENVTL. L. INST., supra note 26, at 3. Today, these communities have experienced severe pressure from land seekers trying to take control of now valuable Amazonian land, resulting in a movement to establish the usufructory rights of the original communities in the form of extractive reserves. See ENVTL. L. INST., supra note 24, at 5–7, 10–12; Peter C.L. Roth, The Emerging Role of the Extractive Reserve in the Enforcement of Brazilian Deforestation Controls, 2 COLO. J. INT'L ENVTL. L. & POL'Y 247, 273 (1991). Extractive reserves provide an example of regulated land use in the Amazon that depends on effective implementation of other settlement and titling laws to peaceably resolve conflicting claims to ownership or use of the public land.


33. See ENVTL. L. INST., supra note 24, at 4.

34. See Levin, supra note 18, at 1027–28; MAHAR, supra note 16, at 26.

35. See De Miranda & Mattos, supra note 16, at 283. Contrast this population with Brazil's pre-colonial indigenous population, which may have consisted of up to 6.8 million inhabitants, but has been decimated to less than 200,000 today. See ENVTL. L. INST., supra note 24, at 3. Although not the subject of this Note, the effects of such rapid expansion in population and agricultural development on the region's indigenous populations and forest resources should not be ignored. For further exploration of this topic, see Bradley S. Romig, Agriculture in Brazil and
Violent conflicts emerged as indigenous communities and poorer settlers lost land, and often lives, to grileiros who flooded the region to take advantage of the financial subsidies and loans tied to improving the land. Although some public land was offered in sales or provided through government-sponsored settlements (assentamentos), the majority of public land came into private hands through illegal occupations, which were then recognized by a post-hoc process of governmental “regularization” or “legalization” of the claims. Like early preemption laws in the United States, this system may have formalized expectations in the region that taking possession of land would eventually lead to an opportunity to acquire legal title.

In 1973, the government passed the Public Registries Act, which established hundreds of county-level real estate registry offices. The registry offices were set up to determine whether lands were privately or publicly owned, and to record who held legal title. Because many indigenous and forest-dwelling communities did not hold legal title to their lands, and their claims were based on traditional occupation and communal ownership practices unrecognized by law, the better-organized and more politically powerful grileiros took title to most of the disputed land. This situation led to calls for reform of the land titling system, spurring the need for government reforms to address the over-concentration of land in the hands of large landholders and speculators. Organizations formed to represent the interests of disenfranchised landless peasants, and began aggressively to exert pressure on large landowners.

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36. ENVTL. L. INST., supra note 24, at 4, 7.
37. See Fearnside, supra note 2, at 1362.
39. See ENVTL. L. INST., supra note 24, at 81.
40. See id.
41. A claim to the land through adverse possession may have been available to many of these long-time rubber tappers; however “such claims were usually overwhelmed by the more sophisticated immigrants, who had obtained written titles.” Id. at 5.
42. See id. at 6–7.
43. See id. at 6.
44. See, e.g., Romig, supra note 35, at 93–94 (referencing one such organization).
45. Similar activism by forest-dwelling communities eventually led to the establishment of the first extractive reserve in 1988. Extractive reserves provide a protected means for established communities to live in and derive a livelihood from the Amazon forest. See Roth, supra note 31, at 270–71.
B. The Land Reform Movement and the Government’s Response

The National Institute of Colonization and Agrarian Reform (INCRA) ("Instituto Nacional de Colonização e Reforma Agrária") is the Brazilian federal agency established in 1970 to oversee agrarian reform and rural resettlement. INCRA's general definition of agrarian reform is a series of measures intended to promote a more equitable, sustainable, and productive distribution of land by modifying existing systems of ownership and use. These measures include government expropriation of underutilized or illegally claimed "private lands," some to be redistributed to landless peasants in the form of government settlements; and distribution of land that is still in the public domain and not designated for other purposes, such as by legalizing title for posseiros or establishing extractive reserves or conservation areas. In the 1990s, INCRA, under former Brazilian President Fernando Henrique Cardoso, resettled over 600,000 families. Under the recent administration of President Luiz Inácio Lula da Silva ("Lula"), INCRA implemented fewer resettlements: in 2003 and 2004, INCRA helped settle only 118,000 families. INCRA's settlement projects are based on laudable principles of social justice, but are heavily criticized for their high failure rates, measured by abandonment or resale of lots once settlers exhaust government subsidies, and for their adverse environmental impacts.

The "landless movement," represented by such groups as the Landless Workers Movement, or Movimento dos Trabalhadores Rurais Sem Terra ("MST"), has actively pressed for faster and more effective reforms. The movement is known for tactics such as identifying

46. See Chronology of INCRA, INSTITUTO NACIONAL DE COLONIZAÇÃO E REFORMA AGRÁRIA (INCRA), http://www.incra.gov.br (follow "Institucional" hyperlink; then follow "Histórico do INCRA" hyperlink) (last visited Jan. 6, 2011); see also MAHAR, supra note 16, at 26.
47. See Reforma Agrária [Agrarian Reform], INCRA, http://www.incra.gov.br (follow "Institucional" hyperlink; then follow "Histórico do INCRA" hyperlink; then follow "Reforma Agrária" hyperlink) (last visited Jan. 6, 2011).
48. See Fearnside, supra note 2, at 1362.
50. See Romig, supra note 35, at 99.
51. See id. at 95–96.
52. See id. at 98.
53. See BARRETO ET AL., supra note 3, at 31; Fearnside, supra note 2, at 1365. The agro-extractive reserve, granting environmentally sensitive usufructuary rights to forest-dwelling communities is arguably a more environmentally sustainable model, albeit one that does not involve granting title to the land. See Roth, supra note 31, at 255.
54. See Fearnside, supra note 2, at 1363-65 (describing the role played by the MST in 1999–2000 in land invasions and in criticizing government settlement policies); Romig, supra note 35, at 93, 95–96 (citing intensified tactics by the MST in response to a perceived failure of the
unproductive or underutilized land and taking physical occupation of it or camping nearby, while pressuring INCRA to appropriate the property for settlement. These "invasions" of land can incite violent responses from large landholders and the local governments aligned with large landholder interests. Deaths associated with rural land disputes ranged from 50 to 300 per year in the 1980s. The MST claims to have lost thousands of members to violent reprisals; for instance, an infamous 1996 attack on peaceful protestors by Brazilian police left nineteen dead and fifty-one injured. And in 2002, twenty-six rural labor leaders were killed in separate land-related conflicts.

One of INCRA's most difficult tasks in instituting agrarian reform is the re-appropriation of improperly held or illegally claimed public land. This process is essential to both social and environmental reforms in the Amazon, where 62 percent of privately held land is in holdings greater than 1000 hectares, a significant portion of which is believed to be under questionable title. INCRA reports that in all of Brazil, an estimated one hundred million hectares of land, equivalent to the entire area of Central America and Mexico, are suspected grilagem, or fraudulently titled land. In the Amazon region, the percentage of illicit claims is larger: in the state of Amazonas, nearly one-third of the entire area is suspect. The concentration of public, or sometimes private, land in the hands of grileiros requires the acquiescence, or even active participation, of local government in 2002 to institute land reform quickly). The "landless movement," as represented by groups such as the MST, is distinct from the activism of forest-dwelling communities discussed briefly above. However, both movements play a role in and are affected by agrarian reform policy and titling programs, like that discussed infra Part I.C. 

55. See Romig, supra note 35, at 93. The role of the MST and other similar groups presents a prime example in Brazil of what Peñalver and Katyal refer to as the power of "property outlaws" to "play[] a powerful and visible role as catalysts for needed legal change." Peñalver & Katyal, supra note 9, at 1099.

56. The movement's methods of lawbreaking are both "acquisitive," or oriented primarily to achieving direct appropriation, as well as "expressive," embracing civil disobedience tactics intended to send "a strong message about the perceived injustice of existing property arrangements." Peñalver & Katyal, supra note 9, at 1102.

57. See ENVTL. L. INST., supra note 24, at 7.
58. See Martin, supra note 17, at 126–127.
59. See BARRETO ET AL., supra note 3, at 25.
60. See Fearnside, supra note 2, at 1362. Conversion: 1,000 hectares = 2,471 acres.
61. See id.; INCRA, LIVRO BRANCO DA GRILAGEM DE TERRAS 2 [WHITE PAPER ON ILLEGAL LAND GRABBING], available at http://www.incra.gov.br (follow "Publicações" hyperlink; then follow "Livros, Revistas, e Cartilhas" hyperlink; then follow "Livro Branco da Grilagem de Terras" hyperlink) (last visited Jan. 6, 2011) [hereinafter INCRA, WHITE PAPER ON ILLEGAL LAND GRABBING].
62. See INCRA, WHITE PAPER ON ILLEGAL LAND GRABBING, supra note 61, at 2. See also BARRETO ET AL., supra note 3, at 25 (reporting that, as of 2003, 47 percent of the land in the Legal Amazon was public, but with unclear tenure status).
63. See INCRA, WHITE PAPER ON ILLEGAL LAND GRABBING, supra note 61, at 2.
A study by INCRA in 1999 found evidence of fraud in thirty-nine registry offices in five different Amazonian states. The inadequacy of local registries' ability to maintain reliable records of ownership or transfers of title further impedes agency efforts to quiet title to disputed land or re-appropriate properties. As a result, the Brazilian government passed a law in 2001 to initiate the creation of a National Registry of Rural Properties that will provide centralized access to all of the data stored at rural real estate registry offices. However, only in 2007 did the government actually begin the pilot phase for the national registry.

To address the problem of fraudulently held public land, INCRA has undertaken “re-registration” of rural properties, wherein the agency suspends registration for a select group of properties, based on size or irregularities in the local registry, and sends notification to the alleged owners to “prove up” their claims with the requisite documentation. Suspension does not affect possession or use of the land, but triggers numerous restrictions, making the property unavailable for public financing or credit, and restricting its legal sale or transfer. Those claims found to be illegitimate may be subject to the permanent cancellation of title and potential re-appropriation, although many purported owners have sued INCRA to prevent such action, resulting in ongoing legal battles.

64. See id.


68. See Barreto et al., supra note 65, at 52; INCRA, White Paper on Illegal Land Grabbing, supra note 61, at 33.

69. The term for this process in Brazil is recadastramento de imóveis rurais.

70. See BARRETO ET AL., supra note 65, at 11. A number of ministerial directives, known as portarias, and internal agency decrees direct INCRA’s specific re-registration processes. The 1999 re-registration actions cited above were initiated by INCRA's Portaria No. 558 (Dec. 15, 1999), which has since been revoked by later ministerial directives. The text of INCRA’s ministerial directives can be found on its website, http://www.incra.gov.br (follow “Legislação” hyperlink; then follow “Atos Internos” hyperlink; then follow “Portarias”).

71. See BARRETO ET AL., supra note 65, at 19.

72. See id. at 24.


74. The status of these suits in Brazilian jurisprudence is unclear, with some courts finding that judicial proceedings are necessary before a claim can be voided, and others holding administrative adjudication to be sufficient. This legal question may require resolution by Brazil's Federal Supreme Court. See BARRETO ET AL., supra note 65, at 23, 31.
the registration of 4322 properties throughout the country, totaling an astounding 125 million hectares.\textsuperscript{75} Approximately 78 percent of the affected hectares were located in the legal Amazon.\textsuperscript{76} According to studies by the Amazon Institute of Man and the Environment (IMAZON), thus far 28 percent of the 1999 properties and 11 percent of the 2001 properties were proven legitimate, while 47 percent and 72 percent respectively are in a state of uncertainty, either gathering documentation, undergoing georeference surveying, or locked in judicial proceedings.\textsuperscript{77} Another 10.5 percent and 5.5 percent have had their titles permanently canceled due to irregularities, with 2 percent and 0.5 percent destined for re-appropriation.\textsuperscript{78} The remaining properties are lacking information or are in some other state of flux.\textsuperscript{79}

The re-registration processes are directed at large landowners whose claims are suspected to be grilagem;\textsuperscript{80} they do not directly address small occupations by posseiros, who instead may be viewed as potential subjects for settlement programs on the lands being re-appropriated.\textsuperscript{81} The question remains whether these actions to quiet title to large swaths of illegally claimed land and assign the land to distinct uses, such as conservation or resettlement, are undermined by concurrent policies that reward even small-scale entry on public lands with the right to title. As one policy reduces fraudulent and conflicting claims, the other provides an opportunity for new claims to emerge.

\textbf{C. The Need for Better Agrarian Reform Laws and Policy}

Changes in land-tenure procedures will be central to all efforts to redirect development to paths that are more sustainable, socially beneficial and environmentally sound than the present ones. The current pattern of land occupation unfolds as an environmental symptom of the absence of rule-of-law, including woefully inadequate property law and a system of financing that is characterized by routine fraud.\textsuperscript{82}

The re-registration efforts targeted at larger land claims are, in part, an effort to reassert government control over what has long been a

\textsuperscript{75} See BARRETO ET AL., supra note 65, at 23, 31. In its white paper on grilagem de terras, or illegal land claims, INCRA provides numerous examples of properties for which it has suspended registration and initiated further judicial or administrative action to cancel the fraudulent title. See INCRA, WHITE PAPER ON ILLEGAL LAND GRABBING, supra note 61, at 29–32.

\textsuperscript{76} See BARRETO ET AL., supra note 65, at 23, 31.

\textsuperscript{77} See id. at 23, 33.

\textsuperscript{78} See id. at 24, 34.

\textsuperscript{79} See id. at 23–24, 31–33.

\textsuperscript{80} See INCRA, WHITE PAPER ON ILLEGAL LAND GRABBING, supra note 61, at 1.

\textsuperscript{81} See id. at 35.

\textsuperscript{82} Fearnside, supra note 2, at 1361.
lawless land grabbing process dominated by grileiros and marred by violence and fraud. These efforts also seek to reconcile land reform policies with environmental protection. Yet, at the same time, ongoing development and the resulting incentives for migration to the Amazon increase the difficulty of synchronizing the cancellation of illegal land claims with policy action to support needy, migrant settlers. Based on historical land-titling practices, migrants to the region may carry legitimate expectations that occupation of public land will ultimately result in the right to title and the associated benefits of property ownership. Therefore, even while INCRA undertakes massive efforts to cancel the registration of illegal landholdings, the continued extension of legal recognition to occupants of public land contradicts the message to landholders regarding unlawful ownership claims. This tension appears to be unresolved and is expressed in recent public land legislation.

I. Retroactive Rights to Occupied Land

A provisional measure passed by the federal government in May 2009, which became law in June 2009, has modified the process to

83. See GREENPEACE, STATE OF CONFLICT, supra note 73, at 8, 12.
84. See INCRA, WHITE PAPER ON ILLEGAL LAND GRABBING, supra note 61, at 33. The government under Lula worked directly with non-governmental organizations to monitor and enforce deforestation violations, as well as to expand protected areas. See Romig, supra note 35, at 91–92. The legal foundation for environmental protection can be found in the Brazilian constitution, adopted in 1988, which contains an entire chapter on environmental protection and calls for the protection of Brazil’s forests as a “national patrimony.” See CONSTITUIÇÃO FEDERAL [CONSTITUTION] art. 225, § 4 (1988) (Braz.), available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao%C3%A7ao.htm; Kellman, supra note 32, at 152.
85. Professor Fearnside maintains that “no program to deal with land-tenure and environmental problems in [the highly-impacted Amazon region] can expect to be successful without ending the export of people from source areas.” Fearnside, supra note 2, at 1371.
86. In arguing that governmental legalization of certain types of illegal occupations of land is desirable under some circumstances, Peñalver and Katyal also note several negative “spillover effects” that accurately describe those seen in Brazil, including (1) property owners may resort to violence to protect their properties from encroachment, (2) post-hoc legalization erodes any deterrent effect the law may have and encourages further acquisitive behavior by “property outlaws,” and (3) legalization may generally undermine respect for the rule of law. See Peñalver & Katyal, supra note 9, at 1149. On the other hand, post-hoc legalization may ultimately “increase order and respect for [the] rule of law and property rights by bringing the official law into greater conformity with people’s sense of justice and fairness.” Id. at 1151.
acquire title to occupied land in the legal Amazon. Law 11.952 simplifies INCRA's titling process, as expressed in the Ministry of Agrarian Development's administration of a program entitled, "Legal Land: Accelerated Quieting of Title to Land in the Legal Amazon." The goal of the Legal Land program is to address the unresolved title status of more than 300,000 families living on unrestricted public lands in the legal Amazon, which affects more than 67 million hectares of land. This goal is considered fundamental to the government's broader objective of ascertaining the title status of disputed lands in order to charge owners with responsibility for deforestation and illegal exploitation of forest resources.

Law 11.952 and the Legal Land program apply retroactively to occupants already claiming possession of otherwise undesignated public lands. The right to acquire title to occupied areas is available only to claimants who have been in possession of their claim since 2004. For those who are eligible, Law 11.952 extends the opportunity to acquire title to properties of up to 1500 hectares without sale or auction, based on proof of occupation or utilization. For small properties up to 100 hectares, the grant of title is free. Alleged owners of medium properties of 100 to 400 hectares must pay a below-market price, set by the federal agency, to confirm title. Owners of the largest properties must pay market price, but are exempt from competing in public sale or auction.

89. See id. art. 1.
90. See Saiba mais sobre o Terra Legal [Know More About the Legal Land Program], MINISTÉRIO DO DESENVOLVIMENTO AGRÁRIO [MINISTRY OF AGRARIAN DEV.], http://portal.mda.gov.br/terralegal/ (follow “Conheça o Terra Legal” hyperlink) (last visited Jan. 6, 2011) [hereinafter Know More About the Legal Land Program, MINISTRY OF AGRARIAN DEV.].
91. The Legal Land program addresses the need to legalize occupants' title to public land that has not been designated as conservation or park land, indigenous reserve, or border and military land. See id.
92. See id.; INCRA, TERRA LEGAL UNIRÁ COMBATE À GRILAGEM E PRESERVACÃO DA SOCIOBIODIVERSIDADE [LEGAL LAND WILL UNITE THE FIGHT AGAINST SPECULATION AND FOR ENVIRONMENTAL AND CULTURAL PRESERVATION] (2009) (describing the Legal Land program’s application to land across the nine Brazilian states with territory comprising the legal Amazon).
94. See INCRA, LEGAL LAND WILL UNITE THE FIGHT AGAINST SPECULATION AND FOR ENVIRONMENTAL AND CULTURAL PRESERVATION, supra note 92.
95. See Know More About the Legal Land Program, MINISTRY OF AGRARIAN DEV., supra note 90.
96. See Lei No. 11.952, de 25 de Junho de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.06.2009 (Braz.), art. 5.IV.
97. See id. art. 6, § 1.
98. See id. art. 11.
99. See id. arts. 11–12.
100. See id. art. 12.
Several limitations under the law narrow the scope of its application. For instance, a claimant may not own rural land in any other part of the country or have been a previous beneficiary of land reform. And small-scale beneficiaries of the law, claiming less than 400 hectares of land, have a ten-year limit on the sale or inter-vivos transfer of their claim. Yet other provisions grant greater flexibility, facilitating the speed at which title may be confirmed. For example, registrants of up to 400 hectares need only provide a declaration describing their possession; the registration agency is not required to verify the claim via onsite inspection. The release of agencies from onsite inspection, a requirement that previously slowed the ability to process claims, represents the principal deviation from earlier titling procedures. However, claims upon larger areas, between 400 and 1500 hectares, must undergo onsite inspection.

Claims need not only stem from direct occupation and use of the land, but may also result from "indirect occupation" or "indirect utilization" by way of a third party or employee. On claims where payment is owed, claimants are given twenty years plus a three-year extension to complete payment. And although a claimant who violates the conditions to title, by, for example, failing to comply with applicable environmental laws, will lose the right to the property (which will revert to the public domain), the claimant will be indemnified for the value of improvements, thereby still benefiting from any investments made. Even a party occupying an area greater than the 1500-hectare cutoff can acquire title, but must register for only 1500 hectares and relinquish any claim to the remaining area.

The immediate impact of Law 11.952 is an extension of legal property rights to settlers (posseiros) who have been squatting on Amazonian lands for at least five years. As the size of a claim increases up to the maximum 1500 hectares, the burden of cost and procedures

101. See id. art. 5.II, V.
102. See id. art. 15.V, § 3.
103. See id. art. 13.
104. See Legal Land: Accelerated Quiet Title Processing in the Legal Amazon, supra note 93; INCRA Vai Acelerar Regularização de Títulos Expedidos em Faixa de Fronteira [INCRA Is Going to Accelerate the Regularization of Titles Issued on the Borders of the Legal Amazon], INCRA, http://www.mda.gov.br/portal/noticias/item?item_id=5733862 (last visited Jan 6, 2011).
105. See Legal Land: Accelerated Quiet Title Processing in the Legal Amazon, supra note 93.
106. See Lei No. 11.952, de 25 de Junho de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.06.2009 (Braz.), art. 2.II, .IV.
107. See id. art. 17.
108. See id. art. 18; see also BRITO & BARRETO, RISKS AND PRINCIPLES FOR QUIETING TITLE TO LAND IN THE AMAZON, supra note 87, at 3.
placed upon the claimant also increase.\textsuperscript{110} In contrast, the registration process for a free grant, for claims smaller than 100 hectares, is substantially less onerous. This reflects an effort by the federal government to prefer small-scale settlers of humble means, those who "live and produce in the Amazon," rather than to enable large-scale, speculative land grabbing.\textsuperscript{111} However, skeptics from within the government and especially from non-governmental organizations have raised doubt about whether the measures will primarily benefit those intended.

2. Settler versus Speculator: Who Benefits from a Retroactive Right to Title?

Provisional Measure 458 and the subsequent Law 11.952 have spawned an outpouring of public opinion and debate in Brazil regarding the wisdom of continuing a government policy of retrospective legalization to claims on public land.\textsuperscript{112} Proponents of the law refer to it as a breakthrough, finally granting title to resilient settlers and communities who have long forged their livelihood in the Amazon.\textsuperscript{113} As a Senator from the Amazonian state of Rondônia explained:

[This provisional measure brings encouragement . . . to the people of the Amazon, who have been there for the past twenty, thirty years. . . . Lacking any federal agency support, they settled themselves, occupying the lands of the Amazon, and for twenty or thirty years, they have waited for a solution such as this—for a titling process, documentation of the lands—in order that they can call themselves the legitimate, true owners of land they have occupied. . . .\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{110} See generally id. arts. 11–13.
\item \textsuperscript{111} See Terra Legal: Câmara Aprova MP 458 [Legal Land: House Approves MP 458], INCRA, http://www.mda.gov.br/portal/noticias/item?item_id=3591630 (last visited Jan 6, 2011); Know More About the Legal Land Program, MINISTRY OF AGRARIAN DEV., supra note 90.
\item \textsuperscript{112} See, e.g., Jose Pedro Martins, Brazil: Environmentalists and Church Protest Legalization of Fraudulently Obtained Lands in the Amazon, NOTISUR—S. AM. POL. & ECON. AFF., Aug. 7, 2009.
\item \textsuperscript{113} See, e.g., Cassel Apresenta o Terra Legal em Audiência na Câmara [Cassel Presents the Legal Land Program to the House of Representatives], INCRA (April 15, 2009), http://www.incra.gov.br (follow “Notícias” hyperlink; then follow “Notícias” hyperlink again; then type “Cassel Apresenta” into the search box labeled “palavra chave”; then follow “Cassel Apresenta O Terra Legal” hyperlink) (statement by the Minister of Agrarian Development, Guillherme Cassel, to the members of the legislature, encouraging the passage of MP 458 in order to guarantee the rights of small-scale agriculturists in the Amazon, and to protect the environment).
\end{itemize}
Proponents also argue that legalization of claims will help distinguish actual settlers engaged in productive and sustainable use of the land from *grileiros* involved in illegal land grabbing and exploitation. They argue that granting meritorious occupants legal ownership, thereby extending access to the government’s support services for settlers to them, will serve to combat renewed deforestation and land grabbing, with its associated violent disputes.

INCRA, the agency responsible for implementing the titling process, provides support for this view of Law 11,952 and the Legal Land program: it has calculated that more than 80 percent of the properties covered under the program are no larger than 400 hectares, implying that the benefits primarily go to small landholders. Provisions in the law itself seek to guarantee that only claimants who assert peaceful occupation or utilization of the land, exercised continuously and without opposition, will be able to acquire title. The government’s website for the Legal Land program even invites any citizen to make anonymous “denouncements” of irregularities related to the titling program, which will be relayed to the appropriate agency to investigate.

Yet the opponents of Law 11,952 are quick to point out that the 80 percent of landholdings under 400 hectares only comprise 36.6 percent of the land area registered under the law thus far. They contend that large tracts, occupied by only 7 percent of the purported settlers, comprise up to 72 percent of the land area covered by the law, suggesting that large landowners are the primary beneficiaries of the new law. Since large landholdings in Brazil are associated with the illegal and exploitative

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116. *See id.* The Legal Land program will help bring federal and state government services into the households that obtain legal status, supporting the success of small-scale, family agriculturalists, and presumably increasing the likelihood that families will continue to cultivate the same area rather than quit and encroach on new land.


118. *See Terral Legal: Mais Recursos, Balança e Anúncio de Metas [Legal Land: More Resources, Results and Setting Goals],* INCRA, http://www.incra.gov.br (follow “Notícias” hyperlink; then follow “Notícias” hyperlink again; then type “Mais Recursos” into the search box labeled “palavra chave”; then follow “Terra Legal: Mais Recursos, Balança e Anúncio de Metas” hyperlink) (last visited Jan. 6, 2011).

119. *See* Lei No. 11,952, de 25 de Junho de 2009, *DIÁRIO OFICIAL DA UNIÃO [D.O.U.]* de 26.06.2009 (Braz.), art. 2.VI.


121. *See* Legal Land: More Resources, Movement, and Announcement of Goals, supra note 118.

122. *See* Martins, supra note 112.
practices of grileiros, numerous organizations representing environmental, landless workers, and human rights interests are critical of the measures. Opponents of the law emphasize the need for policies that discourage new entries onto forested land, respect the demarcation of conservation and indigenous land, and prevent grileiros from acquiring legal title to land that could otherwise go toward conservation or settlements for the landless.

Instead, its opponents fear that Law 11.952 provides perverse incentives for land seekers to invade new land with an expectation of the right to title. Marina Silva, a senator from the Amazonian state of Acre, calls the law “a free pass such that from now on, those who are already preparing to occupy new areas come with the expectation that, in a few years, the areas they have occupied will be legalized.” According to its critics, the law also may fuel takeovers of smaller, legalized plots by grileiros and agribusiness seeking to benefit from the increased land values due to legalization. The MST, a staunch promoter of agrarian reform, cites potential abuse by grileiros who extort poor tenants to serve as occupants for land claimed by absentee landholders as a danger unaddressed by the legislation.

Opponents of the accelerated titling procedures under Law 11.952 point to loopholes in the law which may create opportunities for abuse, such as the availability of title for those claiming “indirect” use or occupation of a claim, and the dispensation of the requirement for onsite inspection of the property. According to Senator Marina Silva, onsite


124. See Landless Workers Movement, supra note 123 (relating the critique that MP 458 enables large landholders to get “amnesty” under the new law and withholds land that should be designated for other purposes in accordance with agrarian reform policy).


127. See Martins, supra note 112.


129. See, e.g., BRITO & BARRETO, THE DANGERS OF GENEROUS PRIVATIZATION OF LAND IN THE AMAZON, supra note 1, at 1–2; Landless Workers Movement, supra note 123; see also Lei No. 11.952, de 25 de Junho de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 25.06.2009 (Braz.), art. 2.II.,IV; id. art. 13.
inspection is a "fundamental" means of identifying lawful occupation of land, as well as signs of conflict that often signify a trouncing of the rights of the small and isolated settler.\textsuperscript{130} She argues that inclusion of the legalization of indirect forms of occupation blurs the criteria for what types of occupation serve the public interest and increases the likelihood of assigning title to speculators or grileiros who have merely hired hands to work an area.\textsuperscript{131}

These critiques point toward a central problem: the law may not adequately protect the interests of the posseiros, the poorer squatters who depend upon their small-scale occupations of public land for subsistence and agricultural productivity, and who are the intended beneficiaries of the program.\textsuperscript{132} Put differently, the mechanisms of guaranteeing speedy transfer of title to occupants may not provide any clear way of distinguishing posseiros from grileiros.\textsuperscript{133}

There are thus two primary critiques that can be made of Brazil’s Legal Land program and Law 11.952. One is that the laws presumably developed to support poor squatters, who in good faith have settled upon and made productive use of the public land, may instead, or additionally, provide a means for powerful landowners and speculators to claim more Amazonian land. The second is that the continuation of post-hoc policies legalizing claims on the public lands is counterproductive to Brazil’s ultimate goals of agrarian reform and environmental protection. These critiques highlight potential problems for Brazil that closely mirror many of the challenges experienced over nearly a century of settlement of public land in the United States. The similarities between the trajectory of public land distribution policies in the United States and those in


\textsuperscript{131} See Silva, Open Letter to the President, supra note 130.

\textsuperscript{132} Senator Marina Silva expresses this as the danger that "those who commit the crime of appropriating vast stretches of the public lands [will] benefit from policies originally designed to aid only those settlers in good faith, whose rights are guarded by the Federal Constitution." Silva, Open Letter to the President, supra note 130. This is closely linked to the related critique that the legalization of encroachments on the public land will have a major, adverse effect on the government’s ability to regulate deforestation and mandate compliance with conservation laws. See Brito & Barreto, The Dangers of Generous Privatization of Land in the Amazon, supra note 1, at 1. Specifically, the law continues a policy that induces intensified exploitation of public land by settlers and grileiros hoping to stake claims for future rounds of legalization, to the detriment of environmental conservation efforts. See id; Brito & Barreto, Risks and Principles for Quietting Title to Land in the Amazon, supra note 87, at 2–3.

\textsuperscript{133} "Também não estabelece claramente os mecanismos de separação entre posseiros e grileiros." ["Law 11.952 also does not clearly establish mechanisms to separate between squatters and speculators."] Federal Senate, Legislative Activity, Statement of Senator Marina Silva, supra note 126.
Brazil today inspires the use of the U.S. experience as an imperfect example to which Brazil may refer in measuring the challenges that it faces and refining its own solutions.

II. PARALLEL IN THE NORTH: EVOLUTION OF PUBLIC LAND LAW IN THE UNITED STATES

Mr. Speaker: Perhaps there is no question affecting the civil administration of the Government which more deeply concerns the people of the United States than that which is submitted in the bill I have had the honor to report from the Committee on Public Lands. It touches all the springs of our national life and well-being. It makes its appeal to every landless citizen of the Republic, and to every foreigner who comes to our shores in search of a home. It reaches down to the very foundations of democratic equality...

Not unlike the ongoing struggles over the disposition of the public lands in Brazil, some of the fiercest debates in the United States, from independence through the twentieth century, have centered around land policy: in what manner to settle, for whose benefit and at whose cost, and about the nature of land ownership and democracy itself. But the historical development of U.S. laws providing for the settlement of the public lands took place in a far different international context. Many practices common during the U.S. experience, from forcing Native Americans to give up their lands to the widespread deforestation of virgin forest, would be subject to an extremely different type of scrutiny today. These differences likely undermine any attempt to make the U.S. experience a direct lesson for policymakers in Brazil. Common themes nonetheless exist which may serve to promote understanding of the immensity of the task that Brazil faces, and to invoke dialogue as to what ultimate ends land reform should seek to accomplish.

This Part reviews the evolution of public land policy in the United States during the disposal era, and explores the reasons for the shift away from preemption as a favored policy.


135. The U.S. response to the “Indian problem” involved a two-step strategy: pressure tribes to “voluntarily” leave their land under threat of military conquest; then conquer them using military force and remove tribes to reserved territory, or exterminate them. See Mark E. Brandon, Home on the Range: Family and Constitutionalism in American Continental Settlement, 52 EMORY L.J. 645, 671 (2003); see also Anderson, supra note 15, at 965–969.

136. Until the late nineteenth century, there was no overarching timberland policy to restrict or direct management of the United States’ valuable timber resources. See GATES, supra note 8, at 417.
A. Historical Context and Early Territorial Expansion: The Seeds of Preemption

Like the Portuguese claim to Brazil, the British asserted sovereign ownership over the land comprising the original thirteen colonies. A long period of relatively little control by Britain over grants and sales of land in the colonies ensued until the Proclamation of 1763, when Britain sought to halt land grants by colonial governments and to establish a controlled system of survey and auction for the disposal of land. This move to limit the rights of the colonies to grant land or to allow self-initiated settlement by colonists met with resistance. The Crown’s interference with what had been the colonies’ continued “privilege of moulding their own land systems” and allowing settlers to freely appropriate land west of the Appalachians fueled resentment that helped lead to the American Revolution. Thomas Jefferson wrote in 1774 that land must be subject to allotment by the representatives of the society to which it belongs, and, if not so allotted, “each individual of the society may appropriate to himself such lands as he finds vacant, and occupancy will give him title.”

The notion that settlement and improvement of land implicates a right to claim title is reflected in early laws passed by several of the colonial governments. Virginia’s Land Act of 1779, which represents the first use of the term “preemption,” allowed for an occupier who built improvements on the land to post a notice of preemption, thereby preventing any other claims to the land for a period of ten months, and allowing the settler time to gather the funds necessary for purchase of the land. Most of the middle and southern colonies’ land systems were

137. Gates, supra note 8, at 1.
138. See id. at 1–3, 47.
139. See id. at 3.
141. Gates, supra note 8, at 3.
142. It is important to distinguish those laws promoting settlement of purportedly unoccupied public land from the body of laws relating to adverse possession and the limitations on a landowner’s rights to evict squatters or other uninvited occupants. Although these bodies of law are distinct, they undoubtedly share some commonalities, such as a purpose or effect of protecting squatters, and/or encouraging active use of the land. See Manaster, supra note 7, at 101–02, 111. The purposes behind adverse possession laws, however, are rarely stated clearly in the law, and most often serve to protect “small, isolated squatting situations,” as opposed to large groups or squatter movements. See id. at 107–08, 118. Manaster has framed the U.S. preemption laws as a more effective federal measure than local adverse possession laws for addressing widespread squatting. See id. at 118. Because this Note addresses the large-scale allocation of land via settlement regimes, I do not discuss adverse possession in this Note.
143. See Gates, supra note 8, at 39.
open to such settlement, which "favored squatters . . . and . . . encouraged irregular surveys, as well as carelessness in the recording of titles."\textsuperscript{144}

In contrast, the New England colonies engaged in a more systematic method of granting land to groups of settlers in surveyed townships.\textsuperscript{145} The benefits of the New England system included "security of title which facilitated an orderly settlement of new lands," while the squatter-friendly systems of Virginia and the southern states "encouraged initiative and resourcefulness."\textsuperscript{146} Even New England systematization did not dispel tensions between the two conflicting values of protecting the occupancy rights of squatters and raising revenue by selling land to speculators.\textsuperscript{147} Massachusetts's policies reflected this struggle: by favoring speculators, colonial law "antagonized pioneer settlers" to seek out lands further west, and, "by protecting squatters . . . repelled investors."\textsuperscript{148} The "political cleavage between homesteaders and speculators" would persist as an influential theme as the colonies, and later the U.S. government, sought to build a coherent public land policy.\textsuperscript{149}

The inconsistent systems of grants, and sales of unsurveyed land with indefinite boundaries between neighboring colonies, also resulted in innumerable conflicting claims between settlers owning duplicative or indefinite land grants with boundaries that "stretched" over time.\textsuperscript{150} According to public land scholar Paul W. Gates, while recognition of occupation and improvement, adverse possession, and preemption may have provided some aid to settlers seeking to claim title to land, "what was most needed was a system of prior survey before selection of or settlement on land, and careful recording of titles by legal description."\textsuperscript{151} Instead, settlers were the subjects of a tumultuous century of changing public land policies, the discourse over which never strayed far from the question of whether laws supporting needy settlers merely encouraged lawlessness and fraud.\textsuperscript{152}

\begin{itemize}
\item \textsuperscript{144} ROBBINS, supra note 140, at 7.
\item \textsuperscript{145} See GATES, supra note 8, at 43-44.
\item \textsuperscript{146} ROBBINS, supra note 140, at 7 (quoting PAYSON J. TREAT, THE NATIONAL LAND SYSTEM 25 (1910)).
\item \textsuperscript{147} See GATES, supra note 8, at 44-45 (describing how New England township grants in the eighteenth century became the subject of "extensive speculation," resulting in increasing conflict between the interests of "proprietors" versus "settlers").
\item \textsuperscript{148} See \textit{id.} at 45.
\item \textsuperscript{149} See Brandon, supra note 135, at 652.
\item \textsuperscript{150} See GATES, supra note 8, at 42-43.
\item \textsuperscript{151} \textit{id.} at 47.
\item \textsuperscript{152} The debates over settlement of public land were linked closely to other contentious topics, especially the expansion of slavery. Stalemates over moving forward on plans for western territorial settlement often were linked to intractable positions and fears that free land would expand representation in the non-slave states and disrupt the tense political tug-of-war that dominated Congress up until the Civil War. See ROBBINS, supra note 140, at 109.
\end{itemize}
The shift from British, and then American colonial, practices regarding land settlement to a federal system became possible after the gradual cession of western land claims by the thirteen original states. Following years of heated controversy and resistance, a public domain—land held in title and trust by the U.S. government—emerged by 1784. A congressional resolution determined that "the ceded lands should be disposed of for the common benefit of the United States, and be settled or granted according to the manner agreed to in Congress." Settlement of the lands was a high priority, for Congress sought to secure the land, expand the reach of government through the establishment of townships and counties, and "shore up the national treasury." The power to act with regard to the public domain "was . . . of paramount importance in the growth of national power" for the new federal government, but also vested the government with difficult responsibilities. Numerous transitions in public land disposal policy took place in the ensuing years, culminating in preemption.

1. Public Land for the Public Purse

In the years following the formation of the United States of America, the "[p]ublic lands were . . . the common purse . . . the treasury of the nation." The country needed to generate revenue in order to discharge the considerable national debt, and it looked to the sale of public lands as the means to that end. Even Thomas Jefferson, champion of free land, eventually proposed sale of the western public

154. See ROBBINS, supra note 140, at 4–5; Currie, supra note 153, at 786–87.
155. SATO, supra note 12, at 133; GATES, supra note 8, at 51. The language of the cession grants reinforced this expectation. See, e.g., Currie, supra note 153, at 788 (noting that Virginia's 1784 Deed of Cession for the Northwest Territory, 16 JOURNALS OF THE CONTINENTAL CONGRESS 115 (1784), available at http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc02653)), provided that lands ceded would be "considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation").
156. It is again worth noting that this priority to settle the "unoccupied and unexploited continent" was not representative of, and was devastatingly at odds with, Native American interests. See Peñalver & Katyal, supra note 9, at 1106, 1137.
157. Brandon, supra note 135, at 672.
158. GATES, supra note 8, at 56.
159. Id. at 56–57 (describing the federal government's inheritance of conflicting claims to land granted by prior regimes and Indian land conflicts, and its resolution of military bounty claims).
160. SATO, supra note 12, at 128.
161. See id.
land without restriction on large purchases. The terms of this measure, favorable to the speculator and without provision for either credit-based sale or preemption to aid the poorer settler, were replicated in the Land Ordinance of 1785, passed by Congress as a “last resort” to address the mounting financial problems of the new nation. The Land Ordinance of 1785 established, most significantly, a rectangular system of land survey that has been retained ever since: provision for sale to the highest bidder at public auction; a minimum price of $1 per acre; and no limit on the amount of land individuals or companies could purchase, nor any requirement for improvement or settlement of that land. The pioneer settler, inevitably outbid by the speculator under the adverse terms of the new law, could fall back on the riskier but well-practiced settlement method of squatting.

Although numerous states by this time had adopted preferential policies for squatters through preemption measures like that in the Virginia Land Act, there was strong federal congressional sentiment against encouraging squatter settlement, perceived as counterproductive to the goal of deriving income from land sales. Income from speculators who could afford purchase at auction was prioritized over supportive measures for needy settlers. The mark of “constant friction between the squatter and the speculator, each seeking indulgences from the national government on the pretext that he was doing more than the other in developing the nation’s resources,” was already visible in the formulation of public land policy.

In contrast to expectations for the 1785 ordinance, the years following produced minimal funds for the government. Congress continued to seek ways to dispose of land for revenue. Passage of the Land Act of 1796 incorporated many features of the 1785 ordinance, but increased the price to $2 per acre and allowed for one year of credit

162. See GATES, supra note 8, at 62–63.
163. Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory, in 29 JOURNALS OF THE CONTINENTAL CONGRESS 923, available at http://memory.loc.gov/cgi-bin/query/r?ammem/bdsbib:@field(NUMBER+@odl(bdsdcc+12401)) (last visited Jan 6, 2011).
164. See id; Gates, supra note 8, at 62–63.
165. See Gates, supra note 8, at 64–65; see also Currie, supra note 153, at 788.
166. See ROBBINS, supra note 140, at 9.
167. See Gates, supra note 8, at 66–67; Manaster, supra note 7, at 119 (“A dispute had raged, since the time of the cessions of land to the new government by the original states, over whether the public lands should be disposed of cautiously, with the purpose of producing as much revenue as possible, or liberally, for the purpose of facilitating actual settlement.”).
168. See ROBBINS, supra note 140, at 10. Both sides of the debate, but especially the settlers, won favor by framing their position in moral terms. See Peñalver & Katyal, supra note 9, at 1107.
169. By 1795, the rate of sales producing actual payment would have required an additional 100 years of public land sales in order to pay off the public debt. See GATES, supra note 8, at 121–22.
170. Land Act of May 18, 1796, ch. 29, 1 Stat. 464 (1796).
purchase.171 The Act also began to create administrative offices for the survey and sale of lands.172 Still, land sales continued to languish,173 and policymakers sought to prevent illicit squatting on federal lands.174 As the nation expanded further into the West, dissatisfaction with the system of land disposal led to increasing calls for the government to adopt measures that would support actual settlers and discourage speculators and private landholders from underselling the government.175 Squatters who found themselves outbid at auction engaged in other tactics to further their cause, including the formation of “settlers’ associations” to lobby local and federal government and threaten those who interfered with squatter-occupied land.176

2. Public Land for the Common Person: Early Preemption

The call to liberalize the land laws began to have an effect on Congress as western delegates gained traction there and consensus grew amongst Westerners that squatter occupation was preferable to the absentee landlordism of speculators and the government itself.177 The western delegates’ “major objective . . . was preemption, the right of a settler to proceed upon the public lands, improve them, and later acquire them at the minimum price without having to worry that a speculator might outbid him at the auction.”178 Preemption was not a “free grant of land, but a privilege granted to a settler in purchasing a tract of land as against competitors . . . a preference for actual tilling and residing upon a piece of land.”179

Preemption’s first appearances in the federal land laws were narrow in scope and limited in duration. The Frontier Land Bill, or Land Act of 1800, represented a valiant attempt to expand options for settlers, ultimately failing to reduce the price of land, but succeeding in expanding

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171. See Currie, supra note 153, at 788; GATES, supra note 8, at 125.
172. See GATES, supra note 8, at 126.
173. See GATES, supra note 8, at 128; ROBBINS, supra note 140, at 16–17.
174. For example, the Intrusion Act of 1807 authorized a U.S. Marshal to forcibly remove from the public land any person who occupied, took possession of, settled, or made incursions upon (as by marking trees or laying boundaries) “any lands ceded or secured to the United States,” unless that person applied to the proper register and requested permission to remain on the land until the government determined to sell or otherwise dispose of it. See Act of March 3, 1807, ch. 46, 2 Stat. 445 (1807); Manaster, supra note 7, at 118–19.
175. See GATES, supra note 8, at 128–29; ROBBINS, supra note 140, at 18.
176. See Peñaiver & Katyal, supra note 9, at 1108.
177. See Peñaiver & Katyal, supra note 9, at 1109–10. Congress’s shifts may have been based as well upon a recognition by the federal government that the pro-speculator stance was untenable in the face of settlers’ pervasive refusal to obey the law. See id.
178. GATES, supra note 8, at 129.
179. SATO, supra note 12, at 159 (quoting the Public Domain); Manaster, supra note 7, at 119.
credit sales for up to four years. It offered a limited preemption right to persons who, prior to passage of the Act, had "erected, or begun to erect, a grist-mill or saw-mill upon any of the lands herein directed to be sold." Other early acts similarly provided limited aid to certain groups of settlers, such as a group suffering for their land purchase from a speculator who had never actually acquired title. At least two measures and five separate acts involving limited preemption privileges passed between 1808 and 1820.

During this time frame, Congress also began liberalizing the broader system by reducing the section size of surveyed land available for purchase and extending the time frame of credit sales. The result was a sharp increase in the sale of public lands, although most of these sales did not directly benefit the common settler, and Congress was forced to pass continual relief acts, further extending credit for those unable to meet payments. By 1820, serious reform of the credit system was necessary. Congress ended credit sales outright, lowered the minimum purchase price and size of a lot, but still made no provision for general preemption. This failed to appease the settler, who "needed to retain such capital as he still had on his arrival in the West to buy the necessary tools, seed, and livestock and to carry himself for a year or more until he could begin to draw his living from his land." Settlers turned to petitioning the President, Congress, and the Commissioner of the General Land Office for reprieve, often with the aid of local legislatures. The time had come for Congress to flirt more seriously with preemption.

3. Preemption as a Matter of Course

Congress passed the first general preemption measure in 1830, allowing "every settler or occupant of the public lands" who was "in possession, and cultivated any part thereof" to register a claim of up to 160 acres, payment of the minimum $1.25 per acre to be due before the

180. See GATES, supra note 8, at 129–30.
181. Id.
182. See id. at 129–30; see, e.g., Act of March 3, 1801, ch. 34, 1 Stat. 728 (1801) (providing "a pre-emption to certain purchasers and settlers" who had contracted "in writing, with John Cleves Symmes, for the purchase of lands").
183. See GATES, supra note 8, at 222.
184. See id. at 131.
185. See id. at 132, 134–36.
186. See id. at 140.
187. Act of April 24, 1820, ch. 51, 3 Stat. 566 (1820); see GATES, supra note 8, at 141; Brandon, supra note 135, at 674.
188. GATES, supra note 8, at 141.
189. See id. at 145–46, 221; see also ROBBINS, supra note 140, at 75.
government auction of that same land. The measure was retroactive in nature, applying only to claims on surveyed land which was already occupied and improved prior to the measure's passage. It also required "proof of settlement or improvement" and prohibited any assignments or transfers of the preemption right, prior to final issuance of a patent. Most importantly, the act was set to expire within one year.

Some scholars view the introduction of preemption as Congress' "long step forward in freeing the settler from the hand of the speculator," while others criticize "the dichotomous images of settler and speculator" as "essentially fallacious." As Congress passed subsequent preemption acts that extended the tentative 1830 measure, the debate intensified: Was preemption the key to furthering productive settlement of the lands by propping up poor pioneers, or a tool for abuse by greedy, lawless squatters and speculators?

The U.S. General Land Office, responsible for administering the land auctions, was highly critical of preemption for allegedly turning settler into speculator, diminishing income from land sales, and endangering appropriations for continued surveying of the lands. According to the Land Office Commissioner, the preemption privilege allowed "the adventurer to appropriate to himself the choicest of lands . . . at a vast cost to the public," and created a "system of terror that threaten[ed] the competitor for the purchase of public land with the vengeance of the settler with whose usurpation he may [have] interfere[d]." The retort from the West was to consistently laud the "brave, hardy, and enterprising people . . . who, so far from speculating upon the bounties of the Government, had on all occasions evinced the most disinterested patriotism and ardent love of country." The western politicians rallied behind preemption as "a symbol of concern for the settler." By 1840, the growing chorus of requests for further preemption measures, not just retrospective, but prospective, won out over the virulent criticisms.

190. Act of May 29, 1830, ch. 208, § 1, 4 Stat. 420 (1830); Gates, supra note 8, at 225.
191. See Act of May 29, 1830, ch. 208, § 1.
192. See id. ch. 208, § 3.
193. See Gates, supra note 8, at 225; Brandon, supra note 135, at 674; Manaster, supra note 7, at 119–20.
194. Gates, supra note 8, at 227.
197. Id. at 231.
199. Id. at 228 (quoting Joseph Duncan, Illinois Congressman, 8 Reg. Deb. 2269 (1832)).
200. See id. at 236.
The Preemption Act of 1841 culminated years of discussion over the plight of the public lands, and, although it passed only as a result of political logrolling and compromise between the parties at hand, proved to be a "triumph to frontier America." The greatest change from prior preemption acts was prospective: settlers could legally enter surveyed (but unoffered) public lands, stake a claim by inhabiting and improving the land, and thereby exclude any other from bidding or claiming title until the time came to "prove up" and pay the $1.25 per acre price. While the prior measures were of a "temporary character," the Act of 1841 made preemption a "permanent as well as general system." It also marked the irreversible "end of the old conservative land policy established in 1785" by embracing a preference for settlement of the public domain over competitive revenue and abandoning the notion that squatting was illegal. The Preemption Act provided not only a reprieve for the settler who had been squatting on the public lands, but an opportunity for landseekers to stake a claim, gather funds, and gain the chance at title; "[i]t was at last intended that the actual settler be placed on an equal basis with the speculator in competition for land." In theory, the law's multiple purposes—curbing speculation in government land sales, securing rights to existing claims, and encouraging future settlement—were "basically sound and workable." Yet the years following were laden with challenges for the Land Office in administrating the preemption privilege and countering abuses. Settlers struggled to make the $1.25 per acre payment in time to

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202. See ROBBINS, supra note 140, at 88.
203. See Preemption Act of Sept. 4, 1841, ch. 16, § 10, 5 Stat. 453 (1841). The Act embodied four key principles: first, it prioritized the settlement of land over the generation of revenue from land sales; second, it sought to limit the distribution of public land to persons who owned little to no land; third, it sought to limit the amount of land available per family or individual, stretching the benefit of legal ownership to as many people as possible; and fourth, the Act provided a reasonable amount of time, between the filing of a claim and actual purchase, for the settler to gather the requisite funds. See id §§ 10, 13; ROBBINS, supra note 140, at 89. This fourth principle amounted to a "grace period," during which time no other purchaser (settler or speculator) could enter a claim to the land. See Manaster, supra note 7, at 120–21.
204. SATO, supra note 12, at 162–63.
205. ROBBINS, supra note 140, at 91.
206. See Pefialver & Katyal, supra note 9, at 1113.
207. ROBBINS, supra note 140, at 91.
208. See Manaster, supra note 7, at 121. Yet what constituted "settlement" or "improvement" of a claim under preemption policy lacked clear definition, a fault that likely contributed to the difficulty of the General Land Office in enforcing only legitimate claims. See id.
209. The 1841 Act sought to limit abuse by requiring citizenship or a declared intent to become a citizen of the claimant, who also had to be the head of a family, a widow, or single man over the age of twenty-one; a prohibition against any person who already owned 320 acres or more, or who abandoned residence on his own land to stake a claim on the public land; a limit of one preemption per claimant; and a 160-acre limit to any claim. See Preemption Act of Sept. 4,
retain their preempted claim to the land, and continued to seek expansion of preemption to unsurveyed lands, or for free land altogether. Meanwhile, the Land Office complained of rampant abuses of the preemption system, principally by the settler who filed a declaratory statement of entry, then found a purchaser for the claim and moved on to stake another. To dissuade such transactions, the law required the claimant to “make oath before the receiver or register of the land district that . . . he or she ha[d] not, directly or indirectly, made any agreement or contract, in any way or manner . . . by which the title which he or she had acquired from the Government . . . should inure . . . to the benefit of any person except himself or herself.” But the registry offices were ill equipped to catch or prevent such infractions. The system also suffered from conflicting preemption and cash sale claims, claims that unknowingly infringed upon reserved lands, and settlers who attempted but failed to fulfill the prerequisites to preempt their claim.

To address the growing number of suspensions that resulted from these problems, Congress authorized the Land Office in 1846 to undertake adjudications “upon principles of equity and justice, as recognized in courts of equity,” to settle conflicting patent claims. Lacking a better solution, Congress extended this adjudicatory authorization numerous times through 1863. In 1862, along with the Homestead Act, Congress altered the filing and payment requirements to force payment within twelve months after entry. This responded to concerns that “the frontier preemptor had little incentive to use his capital to pay for his land while he was protected in his right to it,” and rejected the appeals for a grace period that would cushion the shock of payment. These steps signaled a tightening of the law in an attempt to protect Congress’s purpose while limiting abuse.

1841, ch. 16, § 10, 5 Stat. 453 (1841); GATES, supra note 8, at 238–39; ROBBINS, supra note 140, at 89.
210. GATES, supra note 8, at 244.
211. See id. at 243, 390–91; SATO, supra note 12, at 170–71.
212. See GATES, supra note 8, at 240.
213. See id. at 245.
214. See GATES, supra note 8, at 240–41.
215. Id.
216. Act of Aug. 3, 1846, ch. 82, 9 Stat. 51 (1846); see GATES, supra note 8, at 241–42.
217. GATES, supra note 8, at 242.
218. See id. at 245.
219. Id.
The most significant expansion of preemption as a system of public land disposal, before it began to pass out of usefulness toward the turn of the nineteenth century, occurred when Congress bowed to western pressure and passed temporary measures for several territories and states that allowed preemption on unsurveyed lands. This liberalization of the preemption privilege, in contrast to the mechanisms that tightened other aspects of the law, set the stage to reinvigorate preemption alongside homesteading, which initially became available only on surveyed land. Therefore, even while Congress made changes to the preemption laws in response to its susceptibility to abuse, it expanded the availability of preemption to its broadest geographical application ever.

4. Public Land for the People: Preemption and Homestead Rights

Clamors for the public lands to be freely granted to the people grew louder in the years following the Preemption Act of 1841. The fervor was, in part, the result of activism by labor leaders who rallied behind the public lands in the West as a source of salvation for poor workers and immigrants living in crowded squalor in the urban industrial centers. The land reformers, as they were called, received support from politicians who were deeply affected by the humanitarian crisis of poverty and who joined forces with the burgeoning land reform movement in calling for a homestead act. Horace Greeley, a famous reformer, newspaper editor, and politician, criticized the system under preemption that still required purchase of the land:

[S]hame on the laws that send an able, willing man to the almshouse or to any form of beggary when the soil on which he would gladly work and produce is barred against poverty and accorded by this

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220. See, e.g., Act of May 30, 1862, ch. 86, § 7, 12 Stat. 409 (1862) (extending the privilege of settlement upon unsurveyed lands to California); GATES, supra note 8, at 244.

221. See GATES, supra note 8, at 244.

222. The extension of the preemption privilege to unsurveyed land may have, or, some would argue, should have had the effect of curbing speculation in those areas, given that unsurveyed land could only be “marked” as claimed based upon the physical evidence of occupation or improvement. See Manaster, supra note 7, at 122 (citing B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 167 (1924)). Whether that may have been one of the purposes behind the extension of the privilege is unclear.

223. See GATES, supra note 8, at 243; ROBBINS, supra note 140, at 102.

224. See GATES, supra note 8, at 390–91. The connection between labor and land reform also is present in Brazil, as demonstrated by the rural workers movements, like the MST, whose rhetoric similarly points out the inefficiencies of a system that does not make potentially productive, government-owned land available to the working poor. See Wendy Wolford, Neoliberalism and the Struggle for Land in Brazil, in NEOLIBERAL ENVIRONMENTS: FALSE PROMISES AND UNNATURAL CONSEQUENCES 243–54 (Nick Heynen et al. eds., 2007).
government of freedmen to those alone who have money to pay for it, and therefore are to some extent able to do without it.225

The natural rights theories earlier espoused by Thomas Jefferson and others inevitably influenced the land reformers, and, throughout the 1850s, the movement for free homesteads gathered converts.226 Numerous homestead bills emerged and faltered in Congress,227 suffering from the pro-slavery movement's fears that free homesteads would attract settlement to western territories bent on becoming free states.228 The Homestead Act of 1862, therefore, did not garner enough votes to pass until Lincoln's presidential victory and the southern states' secession.229

The Homestead Act entitled any person who was the head of a family, or at least 21 years of age, and was a citizen or who had filed a declaration to become a citizen, to enter up to 160 acres of land.230 Like the oath for preemption, the homestead applicant had to "make affidavit ... that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever."231 The homesteader could acquire title after five years of continued residency and improvements, testified to by "two credible witnesses," or by paying the minimum $1.25 per acre after six months of actual residence (commutation).232

Soon after passage of the Homestead Act, Congress authorized preemption on all unsurveyed lands that no longer carried Indian title.233 Preemption thus became the only means to legally acquire title to unsurveyed lands during the early homestead years.234 And, because

225. ROBBINS, supra note 140, at 102 (quoting Horace Greely, N.Y. WEEKLY TRIB., Jan. 26, 1846).
226. See GATES, supra note 8, at 390–92.
227. Currie places the debates leading up to passage of the Homestead Act within the broader context of Congress's struggle to decide the constitutional scope of its powers to dispose of the public domain. Homesteading opponents argued that "to dispose of the public lands meant to sell them, not to give them away," while proponents saw "settlement and cultivation" as one of the very purposes behind the acquisition of territory. It thus followed from Congress' power to acquire territory that it could "dispose of" it to "accomplish and carry out the very object for which [it] acquired it." See Currie, supra note 153, at 812–13 (quoting excerpts of the debates in Congress, Cong. Globe, 32d Cong., 1st Sess. 1020–23 (1852)).
228. The impact of slavery and the North-South struggle for political domination of the timing and politics of public land reform cannot be understated. "[N]ational policy towards settlement was inextricably bound to growing sectional conflict over the status and fate of slavery in the order." Brandon, supra note 135, at 652; see also GATES, supra note 8, at 392 (discussing wrangling of the political parties over their support for slavery versus free homesteads).
229. See GATES, supra note 8, at 393–94; ROBBINS, supra note 140, at 204–06.
231. Id. ch. 75, § 2.
232. Id. ch. 75, §§ 2, 8; GATES, supra note 8, at 395; ROBBINS, supra note 140, at 206–07.
233. See Act of June 2, 1862, ch. 94, 12 Stat. 413 (1862); GATES, supra note 8, at 394.
234. See GATES, supra note 8, at 244.
neither preemption nor homestead precluded the other, settlers could lay claim to 160 acres of land under each, although not simultaneously, since both measures required, in theory, residence on the land.235

Struggling to administer the multitudes of claims and conflicts under the laws, the Land Office blamed the Preemption Act for fertilizing the worst abuses and called numerous times for its repeal.236 Congress, however, expressly retained preemption for the flexibility it added to the land disposal system, just as retention of cash sales assured competitive buyers and corporations a role in disposal.237 It appears that in the early years, from 1862 through the early 1870s, this combination was fairly successful, and "abuse of the legislation was less serious than the success in making it possible for the man with little capital to get started on the road to farm ownership."238 But by the 1880s, the Land Office was forced to face abuse beyond the bounds of what had been seen previously.

Corporations employed "dummy" claimants to file preemption claims on what were actually timber or mining tracts; after extracting the valuable resource, the corporation would simply fail to have their claimant conclude the transaction.239 Prime forests in California, Idaho, Oregon, Washington, and Minnesota were taken in this manner, with officials later discovering that the sole "improvements" made under the preemption or homestead claims were uninhabitable huts.240 Large areas of valuable forests "had been taken under pretenses of settlement and cultivation . . . which were the purest fictions . . . but of which 'due proof' had been made under the laws."241 The Land Office responded with regulations that considered abandonment of a settlement claim, after the timber had been removed, to be "presumptive evidence" that the claim was made primarily for the purposes of harvesting timber, rather than for genuine settlement.242 Estimates of fraudulent entries in some regions ranged from 50 to 90 percent.243 Even preemptors who fulfilled the requirements for purchase, and who swore genuinely that it was neither for speculation nor for transferring title to another, may have been "likely to succumb to speculators when the going was rough."244 Nothing

235. See id. at 394–95; ROBBINS, supra note 140, at 237–38.
236. See GATES, supra note 8, at 245, 399; ROBBINS, supra note 140, at 238; SATO, supra note 12, at 167.
237. See GATES, supra note 8, at 399.
238. Id. at 416.
239. See ROBBINS, supra note 140, at 240.
240. See GATES, supra note 8, at 418.
241. Id. (citing GEN. LAND OFF., ANNUAL REPORT 6–7 (1874), available at http://hdl.handle.net/2027/mdp.39015067316771); GEN. LAND OFF., ANNUAL REPORT 9–11 (1875); see also ROBBINS, supra note 140, at 243–45.
242. See GEN. LAND OFF., supra note 213, at 35.
243. See GATES, supra note 8, at 473; ROBBINS, supra note 140, at 245.
244. Manaster, supra note 7, at 123.
in the law prevented legal transfer of title, once the settler acquired the patent.\textsuperscript{245} By the 1880s, these abuses seriously undermined the credibility of preemption as an honest disposal mechanism. The Land Office Commissioners dedicated themselves to highlighting and quashing abuses, and to pressuring Congress for additional resources to carry out the task.\textsuperscript{246} In 1884, the Office cancelled 680 entries, "held" an additional 782 entries for cancellation hearings, and suspended 5000 entries in want of investigation.\textsuperscript{247} These years saw an increase in pressure upon Congress to rewrite the land laws, close loopholes that encouraged fraud and evasion, and set aside timberland as forest reserves.\textsuperscript{248} The actions of the U.S. Land Office during this period are analogous to the large-scale "regularization" and quiet title processing that INCRA has undertaken in Brazil over the past decade, as are the political pressures to withdraw land from encroachment by settlers and close loopholes in the laws.

Two principal suggestions to curb abuse of the 1880s settlement laws were to repeal preemption and the commutation provision of the Homestead Act.\textsuperscript{249} These two means to title gave claimants significant leeway to register and commute a claim for sale, without verifying, beyond an easily falsifiable affidavit, that basic requirements, such as actual residency, were being met.\textsuperscript{250} The Land Office Commissioner in 1885 made a sweeping order to suspend nearly all original entries on public land.\textsuperscript{251} He based his decision on agency reports "detailing one common story of widespread, persistent, public land robbery."\textsuperscript{252} Political pressure in support of western settlement nevertheless prevented the Land Office from successfully halting claims under preemption. The enormity of the administrative task at hand and the inadequacy of Land Office resources also contributed to the laxity with which land officers verified the legality of claims, and the ease with which settlers discovered the laws could be "adapted" to their needs.\textsuperscript{253}

Alongside fraudulent practices by actual settlers and small-scale speculators, corporations found ample ways to exploit the preemption laws, often interfering with the availability of land for settlers. By the 1880s, "the settlement of the public domain [was] becoming more and

\textsuperscript{245} See id.
\textsuperscript{246} See GATES, supra note 8, at 468–69.
\textsuperscript{247} See id. at 470–71.
\textsuperscript{248} See id.
\textsuperscript{249} See GATES, supra note 8, at 468, 470.
\textsuperscript{250} See id.
\textsuperscript{251} See id. at 473.
\textsuperscript{252} Id. (quoting WILLIAM A.J. SPARKS, GEN. LAND OFF., ANNUAL REPORT 44 (1886), available at http://hdl.handle.net/2027/mdp.39015073170139) (internal quotation marks removed); ROBBINS, supra note 140, at 292–93.
\textsuperscript{253} See ROBBINS, supra note 140, at 241.
more monopolistic and less and less democratic. The actual settler . . . was not in a favored position; in fact, corporations and speculators were definitely in the ascendancy.\textsuperscript{254} Neither the text of the laws nor the agency charged to carry them out could prevent speculator interests from taking advantage of various loopholes and difficulties in administration.\textsuperscript{255} In the 1884 report of the General Land Office, the Commissioner argued that “the great abuses flowing from the illegal acquisition of land titles by fictitious pre-emption entries, and the exactions made upon \textit{bona fide} settlers, who are often obliged to buy off such claims in order to get access to the public lands, render the repeal [of preemption] . . . a matter of public necessity.”\textsuperscript{256}

This was not the first time that the very agency charged with executing the law called for its abolishment. As early as 1871, the Commissioner of the Land Office and the Secretary of the Interior had recommended immediate repeal of the preemption laws.\textsuperscript{257} The years following only seemed to strengthen the resolve of the Land Office that preemption had outlived its utility and had become a source of hardship to \textit{bona fide} settlers. But the staunch position taken by the Land Office during this period, heavily focused on the failings of preemption and its administration, may have blinded the agency to the successes that were also undeniable.\textsuperscript{258}

The censuses of 1870, 1880, and 1890 revealed the creation of great numbers of farms, and between 1881 and 1891, over 250,000 homestead and timber culture entries were finalized, alongside an additional 254,000 preemption and commuted homestead-to-cash entries.\textsuperscript{259} Although fraudulent registrations, made for the purpose of exploiting resources or reselling claims, were prevalent, “it is not correct to assume that none of these . . . entries [between 1881 and 1891] were made for the purpose for which the laws were framed.”\textsuperscript{260} The two most highly criticized features of the settlement laws—preemption and commutation—still brought the opportunity to acquire land and build a farm or homestead to hundreds of thousands of Americans. The complicating factor may have been that “[s]ome contemporaries were not certain whether the first occupation of

\begin{itemize}
  \item \textsuperscript{254} Id. at 268.
  \item \textsuperscript{255} See id.
  \item \textsuperscript{256} SATO, \textit{supra} note 12, at 167 (quoting GEN. LAND OFF., \textit{ANNUAL REPORT} 5–6 (1884), \textit{available at} http://hdl.handle.net/2027/mdp.39015067316649) (internal quotation marks removed).
  \item \textsuperscript{257} See ROBBINS, \textit{supra} note 140, at 285.
  \item \textsuperscript{258} See GATES, \textit{supra} note 8, at 480–81.
  \item \textsuperscript{259} See id. at 480 (referring to claims or “entries” upon the land that were finalized successfully under the relevant settlement laws).
  \item \textsuperscript{260} Id.
\end{itemize}
pioneers was farm-making or land speculation." Many actual settlers found ways to benefit from the "practical impossibility" of the Land Office's ability to "scrutiniz[e] critically the entries made under the various land laws."262

C. Reformation of the Settlement System: The End of Preemption

Notwithstanding consistent recommendations by the Land Office, Congress was not immediately prepared to act to repeal preemption.263 Introduction in 1875 of the first bill to eliminate preemption, which the bill's proponents had dubbed the "speculator's law" as opposed to the "settler's law," marked an early attempt to react to allegations that preemption served the wrong interests.264 The bill and subsequent efforts failed. But by 1880, settlers saw the passage of several bills that extended privileges associated with preemption to homesteading.265 These brought several important modifications to the two systems, including the option to commute a homestead claim to preemption, and vice versa; the right to homestead on unsurveyed lands; and a "relation back" effect for homesteading, so that, like preemption, a claim would relate back to the date of actual entry on the land, not the filing date.266 It "placed homesteaders on equal footing in all respects with preemptors."267 For bona fide settlement purposes, there was no practical need for the existence of both systems.268 Preemption policy's primary attractions for the settler—the legal right to move onto a plot of surveyed or unsurveyed public land before registration of any claim, relation back of the claim to the date of entry, and the opportunity to acquire title more quickly through purchase—could be met via the modified homestead laws.269 Without actually repealing the preemption laws, Congress set the groundwork for their obsolescence by expanding the flexibility of the homestead laws to meet settlers' needs.

These changes marked an important step towards bringing reforms to the entire land settlement system. Concurrent with the expansion of homesteading to unsurveyed lands came the first timberland laws, which initiated a system for classification and legal sale of timberlands, as well

262. Id. at 32.
263. See GATES, supra note 8, at 468–69.
264. See ROBBINS, supra note 140, at 285.
265. See id. at 285–86.
266. See Act of May 14, 1880, ch. 89, 21 Stat. 140 (1880).
267. ROBBINS, supra note 140, at 285.
268. See id. at 285; SATO, supra note 12, at 167 ("The homestead law has eclipsed pre-emption, and pre-emption has now outlived its usefulness.").
269. See ROBBINS, supra note 140, at 285–86.
as provisions for legal cutting, for their own use, of timber by bona fide settlers and miners. In 1879, Congress appointed the first Public Land Commission, whose charge included investigating and reporting on the land system, codifying the laws, classifying public lands, and recommending disposals of remaining land. Political pressure to eliminate the preemption laws did not abate, however, and as noted above, several bills to eliminate preemption were introduced between 1885 and 1890. Finally, in 1891, Congress passed the General Revision Act, ending the saga of preemption on U.S. public lands. The Act repealed the preemption laws, preserving the rights of those who had registered a claim prior to the Act's passage, and further amended the Homestead Act to emphasize its settlement purpose.

The amended Homestead Act denied homestead rights to owners of more than 160 acres, ended public land auctions, and authorized the President to set aside timberlands as forest preserves. Aiming to reduce fraudulent homestead and commutation claims, it also required a more detailed affidavit to be filed with the homestead application. The would-be homesteader had to swear that the application was “honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation,” and “that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered . . . or the timber thereon,” and that the application was not “for the purpose of speculation, but in good faith to obtain a home for himself, or herself.” The amended Act further modified the residency requirement so that homesteaders had to reside the entire fourteen months upon their claim before it could be commuted, in contrast to the previous requirement of only six months.

After the repeal of preemption, the Homestead Act thus continued to serve as a means for settlers to acquire land for settlement where arable land was still available. Unperturbed by the required affidavit or other safeguards, speculative action and transfers of homestead claims to loggers and ranchers continued: the “western people . . . favored transferring the public lands to private ownership as rapidly as possible

271. See ROBBINS, supra note 140, at 289.
272. See id. at 296.
274. See id. §§ 4–5; ROBBINS, supra note 140, at 297; GATES, supra note 8, at 484.
276. See id.
277. Id. ch. 561, § 5; see also GEN. LAND OFF., supra note 213, at 13.
278. See General Revision Act of March 3, 1891, ch. 561, § 6; see also GEN. LAND OFF., supra note 213, at 25.
and were not very squeamish as to how that alienation was achieved."279 The Land Office and the Public Lands Commission continued to investigate fraudulent entries and recommend further alteration of the commutation provision, so its benefits would go to the "actual home builder."280 In 1907, President Roosevelt ordered that a patent of ownership should not issue until a field examination of the claim, or information of equivalent reliability, had been obtained.281 Notwithstanding the decreasing number of bona fide agricultural homesteaders who were utilizing the Homestead Act as intended,282 the Homestead Act remained on the books until the Federal Land Policy and Management Act of 1976 shifted public land policy permanently away from settlement and disposal.283 An Alaskan homesteader filed the last homestead entry in 1974.284

III. SETTLER VERSUS SPECULATOR: NOT A MEANINGLESS DISTINCTION IN FRONTIER LAND POLICIES

The preemption laws' trajectory through U.S. public land history may signify an ascent and decline unique to the social circumstances, politics, and economic pressures of the time. Over the course of a century, Congress's approach to public land policy changed dramatically. At no time was there a single, cohesive framework under which the land disposal laws operated. Until concerted efforts at the turn of the twentieth century to review the land laws and identify forward-looking and long-term policy goals, the U.S. experience seems to have been largely one of trial and error. Brazil's current struggle to synchronize land reform efforts in the Amazon with a long-range vision for sustainable development and the protection of cultural and environmental resources is also not likely to be resolved quickly. Regulatory efforts to control illegal exploitation and large-scale taking of land using fraudulent means285 are in tension with pressure to legitimize the presence of

279. GATES, supra note 8, at 488.
280. Id. at 489–91.
281. See id. at 492.
282. See id. at 490 (describing the findings of a review commission, appointed by President Roosevelt in 1902, that commutation of homestead entries went primarily to benefit a party other than the entryman making the claim on the land, and that, in some areas, less than 10 percent of commuters were agriculturalists).
283. 43 U.S.C. § 1701(a)(1) (2010) ("The Congress declares that it is the policy of the United States that the public lands be retained in federal ownership.").
hundreds of thousands of poor migrants currently occupying public lands in the Amazon. 286

One shared characteristic between these vastly different realities is the highly publicized juxtaposition of the merit of the settler, often characterized as a poor squatter, or posseiro in Brazil, against the danger of the speculator, or grileiro, characterized as one who manipulates land titling rights for exploitative purposes. In the United States, the preemption laws were heavily criticized for their role in empowering speculators and corporate interests to claim public land that should have been titled only to bona fide settlers. In Brazil, recent measures intended to extend legal land rights to posseiros on 67.4 million hectares of Amazonian land have come under attack for their purported laxity in preventing grileiros from exploiting the generous titling mechanisms. 287

Two questions that emerge from these diametric perceptions of settler and speculator are: Does the law in question indeed suffer from an inability to benefit the settler without empowering the speculator? If so, is the remedy to abandon that legal mechanism altogether?

A. The U.S. Historical Experience

Professor Gates has summarized some of the purposes of the U.S. preemption laws to be freeing public lands sales from an emphasis on revenue; supporting the needs of settlers to raise funds and avert being overbid by speculators at auction; enabling small-scale speculation by farmer-settlers; freeing settlers from punitive action for moving onto and exploiting the public land; and encouraging migration and accelerated settlement. 288 Ultimately, preemption “encouraged many who might otherwise have remained hired hands or tenants to move up the ladder of ownership.” 289

U.S. preemption laws, especially in the early years, may have contributed to the expectation of legalization of title for settlers willing to risk squatter status. 290 The successive enactments of individual, retrospective laws created an expectation that encroachers on the public lands could successfully clamor for relief. In the words of a contemporary observer:

286. See generally Know More About the Legal Land Program, MINISTRY OF AGRARIAN DEV., supra note 90.
287. See, e.g., Martins, supra note 112; Assoc. Braz. of Agrarian Reform Launches Manifesto Against MP 458, supra note 128; Ruralists Initiate their Greatest Offensive Against Environmental Laws, supra note 128.
288. See GATES, supra note 8, at 246.
289. Id.
290. See Peñalver & Katyal, supra note 9, at 69 (regarding the possible spillover effects of government action that encourages an “expectation of legalization”).
pre-emption explicitly stipulates that its benefit is meant to be confined to actual settlers who were found on the public lands at the time of the passage of the act; and yet adventurous and unscrupulous men emigrated to the West and settled on unsurveyed public lands with the view of procuring another enactment and of extending preemption right.291

Once preemption transformed into a prospective law and eventually expanded to include unsurveyed land, the settler could venture onto public land where Indian title had been extinguished, assured that entry of a claim and improvement would guarantee the right to title as long as the minimum payment could be timely met. At its height, preemption coincided with an expansionist mentality that relied upon settlers to carry out land disposal objectives and increase the wealth of the nation through agricultural and natural resource development.

Notwithstanding the important role of these laws in enabling the acquisition of land by poorer settlers, preemption fell prey to speculative practices. Both preemption and homestead laws predicated valuable land rights on settlers’ declarations, supported by witness affidavit.292 But the administrative infrastructure was inadequate to ensure faithful implementation of the laws. It was inconceivable for local land offices to corroborate the truthfulness of every declaration or inspect every claim to verify residency and improvement.293 Colorful descriptions adorn the history books, of:

"‘bona fide farmers thrown together with ne’er do wells, forever shifting westward; . . . and a heavy sprinkling bent only on “proving up” their titles . . . with the minimum improvement required by law and selling out at a profit. . . ."

How did they manage to file on land in each of their several migrations, since the law allowed only one right to an individual? This disturbed them not at all. Bill Jones of the Wisconsin boom thought of himself as Hank Brown in Minnesota, then shifted to John Smith for his filing in Dakota."294

Preemption was also the “easiest way for cattle, mining, and timber companies using dummy entrymen to gain ownership of many quarter-sections quickly.”295 The problem, then, was not that preemption was an illegitimate means of acquiring title to land for bona fide settlers, but

291. SATO, supra note 12, at 162.
292. See General Revision Act of March 3, 1891, ch. 561, § 5, 26 Stat. 1095 (1891); GEN. LAND OFF., supra note 213, at 13 (describing the required contents and affidavit for a homestead application).
293. See ROBBINS, supra note 140, at 241.
294. GATES, supra note 8, at 479 (quoting a mortgage company agent who loaned, and often lost, money to settlers who preferred to skip out on their claim and disappear with the mortgage funds, as described by Seth K. Humphrey in Following the Prairie Frontier (1931)).
295. Id. at 485.
rather that even bona fide settlers often engaged in small-scale speculation, and that large-scale speculation by landholding corporations could not be practicably prevented. It was "[t]he persistence of fraud and evasion of the purpose of the measures and the difficulty of distinguishing legitimate from fraudulent entries [that] convinced every Commissioner of the Land Office from 1874 and reformers in Congress of the necessity of repealing all preemption laws." Preemption was not repealed, however, until the amended Homestead Act overtook it in serving the needs of actual settlers. The homestead and preemption systems shared a similar foundation, in that both were developed to support actual settlement of the vast public domain. Both laws granted a right of entry to an individual or head of household, without any serious, up-front financial investment. Both served to acquire up to the same amount of land. And both required actual inhabitance and improvement of the land, and prohibited transferring interest in the land until an actual patent title was secured.

Yet there were differences that may have been crucial in deciding the fate of each. Homesteading, as its name connotes, was geared toward the long-term investment in a home. An attorney with the General Land Office in 1912 described the policy of homestead as "a holding for a term of years by an actual settler with a view to acquiring a home for himself. In encouragement of such settlers and none others ... homesteads have been freely granted by the government." The requirement of five years of continuous occupation, climactic or other hardships notwithstanding, asked for a serious settlement commitment—more so than the twelve-month window required under

296. See Brandon, supra note 135, at 676 (calling "erroneous" the "conventional distinction" of the settler only working the land and the speculator seeking only to resell for profit: "farmers... habitually claimed more land than they could farm" in order to resell at a profit (quoting DANIEL FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS 31 (1984))).

297. GATES, supra note 8, at 485–86.

298. See SATO, supra note 12, at 166, 170.


301. Id.

302. Congress did not simply give away land for free, but rather "expected to receive something in return," that being the occupation and improvement of the land. Currie, supra note 153, at 813.

303. JOSEPH R. ROHRER, QUESTIONS AND ANSWERS ON THE UNITED STATES PUBLIC LAND LAWS AND PROCEDURES 33 (1912) (citing Adams v. Church, 193 U.S. 510 (1904)).

304. "The law contemplates continuous maintenance by the homesteader and his family of an actual home on the land to the exclusion of a home elsewhere; and ... while no specific amount of either cultivation or improvements is required, there must be actual annual
preemption.305 The fact that preemption required far less of a long-term settlement commitment was due to the fact that its path to title hinged upon a monetary commitment as well.306 A handbook advising settlers in the various methods of acquiring title to public land described "[t]he principal difference between the homestead and the pre-emption privilege [as] . . . nothing is paid for the land homesteaded, whereas $1.25 or $2.50 per acre in money or its equivalent must be paid for the land preempted."307 Preemption allowed, because of payment, a faster means to title. Yet the commutation provision of the Homestead Act effectively leveled the playing field by adopting a characteristic that previously had been unique to preemption.308

This same pattern emerged with later changes to the homestead laws. Initially, the homestead right "commenced from date of entry at the local land office, while the pre-emption right was initiated by settlement on lands subject thereto."309 The "relation back" aspect of preemption was beneficial for any party who first made physical entry or claim of the land, and only later found the ways or means to file an entry at the registry office. This benefit became a feature of homesteading with amendments to the law in 1880.310 Even the preemptors' privilege to legally settle upon unsurveyed lands was extended to include homesteaders.311

Why did Congress progressively alter the homestead laws in a manner that eventually supplanted preemption? This question may be impossible to answer, given the time span over which the changes took place,312 the broader and complex political context, and the difficulty of reading intent into laws enacted over a century ago. But at least one reason for the successive shift to homesteading was the preference for the bona fide settler. Although many of the leniencies of preemption that invited abuse were eventually integrated into the homestead system,313

cultivation of some portion of the land . . . and such continuous improvement as will show the
good faith of [the] entryman." ROHRER, supra note 303, at 35.
305. See GATES, supra note 8, at 238.
306. See SATO, supra note 12, at 166.
307. COPP, supra note 299, at 66.
308. An individual could "change his filing into a homestead, if he continue[d] in good faith
to comply with the pre-emption laws until the change [went into effect]." COPP, supra note 299,
at 76. The same applied to commutation from homestead to preemption. See id.
309. Id. at 66.
311. See id. ch. 89, § 3.
312. Over a half-century spanned from the earliest enactment of a general, federal
preemption law in 1830, through the passage of the Homestead Act in 1862, and through the
integration of some aspects of preemption into homesteading, until the ultimate repeal of
preemption in 1891.
313. Lenient aspects of the preemption laws that were incorporated into the homestead laws
included reliance on affidavits and settler "good faith"; allowing entry on unsurveyed land; and
homesteading stood for a prospective system intentionally designed to support the needs of the poor and hardy settlers.\(^3\) Whether it succeeded in this design is still under debate.\(^3\) There is no question, though, that the Homestead Law took hold after nearly a century of congressional struggle over how best to dispose of the public domain and may have represented the culmination of trial-and-error policymaking in its field. A number of factors that spelled out the end of U.S. preemption policy are visible in modern Brazil’s land settlement struggles today.

### B. The Modern Brazilian Challenge

Like the United States during the era of preemption’s declining effectiveness, Brazil is under pressure to balance competing objectives relating to its public land policies. Increasing settlement opportunities for landless workers and granting title to public land occupied by posseiros is in tension with the process of reviewing and canceling questionable title to large landholdings and managing land in the Amazon for environmental conservation.\(^3\) After a half century of mostly unchecked encroachment upon public land in the legal Amazon, during which time grileiros were able to establish questionable claims over vast tracts of valuable land, Brazil has begun to scrutinize its land titling policies and to allowing commutation of a claim for faster patent. See GATES, supra note 8, at 468, 470; ROBBINS, supra note 140, at 241.

314. Gates discusses the ways in which the national land reform movement sought to ensure the homestead law’s application to bona fide settlers by pushing for stringent limitations on alienability and any sales of arable farmland. See GATES, supra note 8, at 391–92. Although these restrictions never became part of the law, the Homestead Act of 1862 nonetheless “breathed the spirit of the West, with its optimism, its courage, its generosity and its willingness to do hard work.” Id. at 394.

315. In addition to the fact that loopholes in the law benefited settler-speculators and even non-settlers, many scholars note that the amount of land made available to homesteaders paled in comparison to the land that Congress granted the railroad corporations. See, e.g., Brandon, supra note 135, at 683.

316. Settlement programs have been found to be detrimental to the increasingly important environmental objectives of slowing deforestation and conversion of forest into grazing and degraded land. Since 1996, INCRA has not initiated new settlements in forested areas of the legal Amazon. See Fearnside, supra note 2 at 1369. Even so, studies have correlated high deforestation rates to already-existing INCRA settlement areas. AMINTAS BRANDÃO JR. & CARLOS SOUZA JR., INST. OF MAN & THE ENV’T IN THE AMAZON, DEFORESTATION IN LAND REFORM SETTLEMENTS IN THE AMAZON 1 (2006), available at http://www.imazon.org.br/novo2008/publicacoes_ler.php?idpub=125.

Support for extending title rights to squatters is always in some tension with environmental protection because squatting practices often exacerbate the destruction of forestland. Many environmental groups, however, support titling policies that also provide for the enforcement of environmental regulation. For example, Brazilian law currently requires landowners to leave 80 percent of forested land intact as a “legal reserve.” See BARRETO ET AL., supra note 3, at 20. Creative property regimes, such as extractive reserves, provide an alternate means for addressing both the question of ownership, or usufruct rights to the land, and protection of environmental and biodiversity resources. See, e.g., Roth, supra note 31, at 255, 271.
review and cancel fraudulent ownership claims. At the same time, public sentiment generally supports extending legal title rights to poor and vulnerable posseiros, squatter-settlers who, in some cases, have been scraping a living off of the public land for twenty or thirty years without any legal protection of their claims. Similar sentiment exists for the indigenous and rubber-tapping and forest-dwelling communities who, like the posseiros, suffer from threats and acts of violence by grileiros seeking to establish control and ownership over the Amazon’s valuable natural resources.\footnote{317}

Poor migrants from other regions in Brazil, drawn by the promise of land, add to the pressure for land settlement and distribution solutions.\footnote{318} New migrants may themselves become posseiros squatting on public land or encroaching on less populated regions inhabited by indigenous and forest-dwelling communities,\footnote{319} or may join invasions of large landholdings in an attempt to force or speed up a transfer from the alleged owner to the landless.\footnote{320} Migrants are vulnerable to exploitation by grileiros, who use them to engage in a new cycle of illegal activities on the public land.\footnote{321}

Certain policies recently promulgated by the federal government address this state of affairs. INCRA’s ambitious programs for reviewing and quieting title to land claims across the Amazon require documentation of claims of ownership and condemn illegal claims.\footnote{322} The Legal Land program enacted in 2009 and guided by the provisional measure M.P. 458 and subsequent Law 11.952 directs the Ministry of Agrarian Development to simplify and speed up the land titling process for posseiros whose claims meet the requirements of the law.\footnote{323}

Like the early, retrospective preemption laws in the United States, the Legal Land program technically does not invite new claims, but only applies to those squatters already occupying public land.\footnote{324} In theory, only good faith claimants who do not own other rural properties and who have not benefited from other government titling programs qualify.\footnote{325}

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\footnote{317}{See, e.g., ENVTL. L. INST., supra note 24, at 11–12.}
\footnote{318}{See Fearnside, supra note 2, at 1367–68.}
\footnote{319}{See BRITO & BARRETO, RISKS AND PRINCIPLES FOR QUIETING TITLE TO LAND IN THE AMAZON, supra note 87, at 4.}
\footnote{320}{See Fearnside, supra note 2, at 1366–77.}
\footnote{321}{Abuse and enslavement of workers takes place in areas in the legal Amazon subject to claims by grileiros and associated illegal resource exploitation. See GREENPEACE, STATE OF CONFLICT, supra note 73, at 14; INCRA, WHITE PAPER ON ILLEGAL LAND GRABBING, supra note 61, at 2.}
\footnote{322}{See BARRETO ET AL., supra note 65, at 11.}
\footnote{323}{See INCRA, LEGAL LAND: ACCELERATED QUIET TITLE PROCESSING IN THE LEGAL AMAZON, supra note 93.}
\footnote{324}{See Lei No. 11.952, ch. 2, art. 4, § 5, de 25 de Junho de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.06.2009 (Braz.).}
\footnote{325}{See id. §§ 2, 5.}
with suspiciously larger claims than the maximum size of 1500 hectares must abandon the excess portion, which will revert to its unclaimed status in the public domain. These complimentary policies challenge and check large landowners' illegitimate claims, while providing a means for smaller-scale occupants to establish legitimate claims for the first time. The Minister of Agrarian Development, upon the enactment of M.P. 458, proclaimed that the program "is able to achieve what we have never yet managed to do in this country, which is to quiet title on a massive scale in the legal Amazon in order to prevent violence and deforestation." 

Yet vocal opposition challenges the government's position, particularly the claim that the new measures will support deserving posseiros and counteract the control of contested lands by grileiros. Not unlike the most significant shortcoming attributed to preemption laws in the United States, Brazil's measures granting post-hoc titling rights do not contain mechanisms for the implementing agencies to verify that grileiro speculators are not using the law to amass land claims. This is especially true in areas where large landholders exert significant influence over local government and registry office officials, and have had ongoing success influencing law enforcement in their favor. And although the law prohibits the transfer of smaller claims for up to ten years, which should minimize small-scale speculation by the settlers themselves, it is unclear whether the prohibition is enforceable. Like in most developing regions of the world, government oversight and enforcement of environmental and other laws in the Brazilian Amazon rarely has proved sufficient to exact compliance.

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326. See Lei No. 11.952, art. 14, § 1, de 25 de Junho de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.06.2009 (Braz.).
327. Cassel Presents the Legal Land Program to the House of Representatives, supra note 113.
328. See statement by Senator Marina Silva, Federal Senate, Legislative Pronouncements, supra note 126.
329. See BRITO & BARRETO, RISKS AND PRINCIPLES FOR QUIETING TITLE TO LAND IN THE AMAZON, supra note 87, at 1–2. Contrast this with Manaster's observation that an "essential feature of a modern statute similar to the Preemption Act would be ... [land] use requirements ... specific enough to be enforceable effectively." Manaster, supra note 7, at 121.
330. See INCRA, WHITE PAPER ON ILLEGAL LAND GRABBING, supra note 61, at 4; BARRETO ET AL., supra note 65, at 40.
331. See Lei No. 11.952, art. 15.V, § 3, de 25 de Junho de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.06.2009 (Braz.). The ten-year restriction on alienation has come under criticism for holding claimants "hostage" in being unable to negotiate to sell or transfer land, even after the other requirements of the law have been met. Federal Senate, Legislative Activity, Statement of Senator Jayme Campos, DEM/Democratas (April 28, 2009), available at http://www.senado.gov.br/sisatividade/pronunciamento/detalhes.asp?id=378974 (follow "texto integral" hyperlink). Consider, though, the fact that the U.S. laws did not place direct restrictions on alienability of title, and thus may have contributed to the problems of settler-speculation. See Manaster, supra note 7, at 124–25.
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qualifying land that falls into the largest category of claims creates additional doubt that the retrospective right to title laws will not benefit powerful landholder interests.

However, Brazil can counteract the environmentally and socially harmful effects of speculation and grilagem of land through programs that verify and quiet title to claims across the Amazon. Quieting title to land with disputed or uncertain ownership lays the foundation for the advancement of social and economic development by requiring property ownership to be consistent with the rule of law. Meanwhile, settlement programs that extend ownership rights to squatters on public land, like the Legal Land program, may need to be modified in order to assure that the actual beneficiaries are those intended to benefit. Without a mechanism like Law 11.952 to address the need for long-time posseiros in the Amazon to gain recognized landowner status, they are left vulnerable to violent takeovers by grileiros and have no access to the credit or government aid integral to improving their economic status. The question for Brazilian lawmakers is how to avoid the outcomes faced by their U.S. counterparts over one hundred years ago, when preemption’s benefits to bona fide settlers became overshadowed by rampant fraud and abuse resulting from speculation on a grand scale.

C. Reflections on Supporting Settlement while Curbing Speculation

The grileiro versus posseiro distinction is very real for Brazilians, who have experienced severe power imbalances in the economic, political, and social life of the country. This dichotomy between bona fide settler and ruthless speculator is emphasized across the spectrum of reformist interests, from articles published on the website of the Landless Workers Movement to government analyses of land rights in the Amazon. Law 11.952 expressly excludes claimants who already own

that contribute to the frequent failure of environmental regulation in developing countries, and the failure of the “rule of law” in developing reliable legal institutions.

333. See Legal Land: More Resources, Results and Setting Goals, supra note 118 (describing the percent of qualifying land under the Legal Land program belonging to smaller landholdings).
334. For example, INCRA’s large-scale effort to examine and cancel title to land obtained illegally. See supra Part I.B.
335. See BRITO & BARRETO, RISKS AND PRINCIPLES FOR QUIETING TITLE TO LAND IN THE AMAZON, supra note 87, at 1.
336. Manaster’s analysis of modern applications of preemption and homestead-like laws for developing countries arrives at a similar conclusion. He notes that enforceability is related to specificity in the law: “the more precise the use requirements for the granting of preemption rights, the greater the chances of affording secure rights to the land to squatters,” or, in our case, to rightful settlers. See Manaster, supra note 7, at 121.
337. See, e.g., INCRA, WHITE PAPER ON ILLEGAL LAND GRABBING, supra note 61, at 2 (“Since the beginning of the nineteenth century, grileiros advanced upon the federal and state lands, falsifying property titles with the acquiescence of registry offices and administrators, and using violence to expel posseiros and indigenous communities.”).
rural land, or who have been a previous beneficiary of land reform, from acquiring title. According to the legislative proponents of the bill, the limitation on alienation of some titled properties for ten years is expected to reduce the risks of re-concentration of landholdings and of unregulated land speculation on the agricultural frontier, and to aid control of deforestation in the legal Amazon. These measures embrace the notion that Brazil’s objective is to extend land ownership rights and opportunities to poor squatters and settlers, and to prevent large landholders and speculators from acquiring more land.

Similarly, the developments in the American West, framed as a struggle between speculator and settler, and present in every level of rhetoric, reflected the dominant understanding of the settlement landscape at the time. Preemption laws all contained prohibitions on a single individual converting a claim to a patent more than once, seeking to prevent speculation based on patterns of acquisition and resale. Notwithstanding the many ways in which the dividing line between “settler” and “speculator” were blurred considerably in the United States, as previously discussed, the distinction was central to the way that lawmakers designed the preemption, and eventually homestead, laws.

This distinction is active once again, this time in Brazil’s formulation of its own public land settlement regulations. Because of its centrality, the loss of the settler-speculator distinction in actual, on-the-ground

340. Even President Theodore Roosevelt responded to settlers’ complaints about the homestead laws by saying: The man who “relinquished” his claim...at the first favorable opportunity, to those who are seeking investments in timberlands... [He] is entitled to no sympathy... This is the man who skins the country and moves on... To the real homesteader who tills the soil and builds a home to live in, nothing should be grudged.”
341. *Gates, supra* note 8, at 488 (quoting President Roosevelt in *4 The Letters of Theodore Roosevelt* 1217–18 (Morison ed., 1951)).
342. For examples of this blurred distinction in U.S. history, see *Gates, supra* note 8, at 479; *Brandon, supra* note 135, at 676. In Brazil, see Fearnside’s discussion of migrants to INCRA settlements who are “subsidized by urban shopkeepers in neighboring towns,” who purchase the land from the migrant once INCRA has conveyed title. *Fearnside, supra* note 2, at 1367.
implementation may serve as a red flag for policymakers. Efforts like the U.S. preemption laws and Brazil's Law 11.952 are intended to benefit vulnerable squatters, but instead are manipulated by powerful landholders. Any attempt to remedy this mismatch between policy intent and outcome requires at least two levels of analysis. First, those who are formulating the relevant public land settlement policies must reach consensus on who the policy is targeting and how it must be structured in order to ensure accuracy in implementation. Second, the agencies vested with the task of administering the laws must have the institutional capacity to do so. Institutional barriers to effective administration, such as under-resourced land registry offices, or the prevalence of corruption amongst administrative officials, can render the most well-formulated laws impotent.

In the case of the United States, the target for preemption was clear, but neither the law itself, nor its implementation, contained adequate safeguards against misuse. Future research might seek to answer the question of whether abuse of the preemption laws actually increased over time, or whether changing priorities of the General Land Office, Congress, and the public called more attention to what had always been shortcomings in implementation. Regardless, by the time of its repeal, most observers agreed that the outcomes of preemption policy had diverged significantly from its raison d'être. Yet it took Congress many years, from the first attempt in 1875 until the actual repeal in 1891, to remove preemption from the statute books. Given its reputation as the "speculator's law" during these years, why was there so much resistance to ending the policy?

I suggest that preemption remained in effect because its obvious failures did not negate the original reason for its existence, which had not yet been fully addressed. Bona fide settlers, comprised of an entrepreneurial population of landless workers and would-be agriculturalists, continued to press for land upon which to start a farm and raise a family. During the years when preemption and homestead

343. A prominent critique of the manner in which Brazil's M.P. 458 and subsequent Law 11.952 were passed points to the lack of public participation in the policy development process. See BRITO & BARRETO, THE DANGERS OF GENEROUS PRIVATIZATION OF LAND IN THE AMAZON, supra note 1, at 1.

344. See MCALLISTER, supra note 332, at 1. Rigorous environmental protection laws in developing countries often experience regulatory failure due to a lack of funding and agency capacity. This may, however, create other opportunities for the implementation of environmental laws through the participation of other legal actors such as public prosecutors and the courts. Id. at 1–2.

345. See SATO, supra note 12, at 167 (quoting the 1884 General Land Office Report that "the great abuses flowing from the illegal acquisition of land titles by fictitious pre-emption entries" necessitated its repeal).

together allowed a single settler to claim 320 acres of land, preemption played a key role for settlers and Congress to maximize the potential transfer of public land into private hands. Only after changes to the Homestead Act conferred many of the benefits of preemption to homesteaders did the longstanding policy pass out of usefulness, and soon thereafter, out of the statute books. The homestead laws, adjusted in several ways to respond to the abuses that became infamous under preemption, may have surpassed preemption in supporting the needs of true settlers. Homesteading provided a free grant of land, with the option to speed up titling by purchase, but only after continued residency for a specific period of time was established. Congress did not terminate preemption until the needs of the original target population—would-be settlers without the means to pay for land—were met.

The U.S. experience suggests that although the how (implementation) may fail, the who (intended beneficiary) is still important. For Brazil, this means that if the retrospective titling laws fall to significant abuse by grileiros, policymakers must give careful thought to the people behind their passage in the first place—the posseiros. Many Brazilian organizations that are familiar with circumstances in the Amazon region argue that by expanding opportunities for posseiros to gain title to land, Brazil's public lands become more vulnerable to continual and expanding abuses. The argument is not that all settlement of public land in the legal Amazon should come to a halt, but that by continuing post hoc methods of land titling, the country cannot control adequately what land is taken, nor who aims to take advantage of the opportunity to claim it. These problems closely mirror those that arose from U.S. preemption laws; yet Brazil's solutions must be uniquely tailored to its own circumstances. Certain aspects of the U.S. experience of transitioning from preemption to homesteading may serve as useful indicators for Brazilian policymakers.

In Brazil, the opponents to provisional measure 458 and its subsequent law have been focused largely on three controversial

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347. See Act of May 14, 1880, ch. 89, 21 Stat. 140 (1880) (extending numerous rights under preemption laws to homesteaders).
350. An analysis of the factors affecting the success or failure of settlement programs like those operated by INCRA reveals that if settlement programs are not structured carefully, their failure leads to the "reappearance" of prior patterns of production and land use, including "more skewed" land distribution, "with increases both in the number of very large farms and in squating." A.S. Oberai, Land Settlement Policies and Population Redistribution in Developing Countries: Performance, Problems and Prospects, 125 INT'L LAB. REV. 141, 156 (1986).
provisions. One of them was vetoed before the final enactment. The other two provisions are those that most directly threaten the effectiveness of Law 11.952, based on the understanding that the measure should only benefit small-scale, good faith *posseiros* who are already established on their claims. These are the dispensation of a requirement for on-site inspection of a claim, and the allowance for titling of claims that are only "indirectly" occupied by the would-be owner. Both of these provisions may hamper the government's ability to verify the validity of claims. The preemption laws, and later the homestead laws, suffered from the same shortcoming: reliance upon an affidavit of the individual without the requirement or means for the land office to inspect all claims directly.

It is unclear, from the research conducted for this Note, whether the institutional capacity of the U.S. Land Office was ever sufficient to rein in fraudulent claims based upon false affidavits. Yet as Congress expanded funding of the Land Office and provided authorization to administratively adjudicate suspended claims, it strengthened the ability of the agency to carry out its administrative functions. If Brazilian lawmakers do not act directly to close loopholes in the laws, such as by amending the criticized provisions of Law 11.952, they must at least take steps toward strengthening the Ministry of Agrarian Development's ability to oversee titling programs in as detailed a manner as possible.

Brazil should also maximize the use of other existing mechanisms, through its agrarian reform program, for groups of settlers to prospectively acquire legal rights to land for productive purposes. These programs can serve a purpose similar to the U.S. Homestead Act, perhaps in a more narrowly tailored manner. For example, INCRA's extensive work to verify the validity of large landholdings across the Amazon, canceling title to those deemed invalid, involves comprehensive geo-reference surveying, inspection of documents and deeds, and

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351. Art. 7 of Law 11.952, vetoed before its final enactment, would have extended the titling right to companies already owning other rural property. See Marina Silva, Open Letter to the President, *supra* note 130.

352. *Marina Silva Qualifies as a Setback the Approval of MP 458, supra* note 130.


354. *See Act of Aug. 3, 1846, ch. 78, 9 Stat. 51 (1846).*

355. Even where government actions that legalize squatter regimes are effective, a "comprehensive system of government-sponsored redistribution" may be more efficient and result in fewer societal costs and spillover effects. *See Pefialver & Katyal, supra* note 9, at 1179. So in Brazil, expansion of its re-appropriation activities and establishment of mechanisms like the extractive reserve should, in theory, require *posseiros* to rely less on illegal squatting. *See also Oberai, supra* note 350, at 157–58 (finding that land settlement programs, at best, operate as "palliatives" and do not take the place of comprehensive land reform).
communication with purported landowners. This process is crucial to establishing patterns of legal land ownership in the Amazon, and for dispelling expectations that the government is lax in cracking down on illegal land claims. Most importantly, the reappropriated land becomes available for planned settlement, creating opportunities for needy settlers who would otherwise resort to squatting on pristine forestland, or participating in dangerous land “invasions.” Although it does not provide a solution for the posseiros who have long squatted on public lands, it does serve as a means for the government to open areas, in a prospective manner, to migrants still flooding into the Amazon, and perhaps send a message to would-be posseiros that there are other ways to acquire ownership rights to productive land.

Ultimately, retrospective, post-hoc methods to extend legal ownership rights to squatters already occupying public land are not conducive to controlling outcomes, based on the difficulty of distinguishing legitimate from illegitimate claims. Continuing extensions of retrospective measures also encourage new waves of invasions on the public land by land seekers carrying expectations of future legalization. However, some retrospective measures may be necessary in order to resolve outstanding issues for long-time occupants of the public lands who suffer from a dearth of legal rights and government services. The key policy question thus becomes how to adjust or formulate new policy that is truly limited in application to the actual, intended beneficiary. Curbing the extent to which Brazil’s current measures invite abuse by grileiros and focusing more government resources on canceling and redistributing questionable landholdings together will discourage new cycles of illegal encroachment and will address the need for legalization of the poorest settlers’ claims.

CONCLUSION

Preemption in the United States was “a law of historical growth” that “arose directly from the necessities of actual settlers, especially those of limited means.” Congress engaged in considerable trial and error, beginning tentatively with retrospective and limited relief measures.

356. See Barreto et al., supra note 65, at 19; INCRA, Legal Land: Accelerated Quiet Title Processing in the Legal Amazon, supra note 93.
357. See Brandão & Souza, supra note 316, at 3-4.
358. See id. at 3.
359. Romig, supra note 35, at 96.
360. Brandão and Souza offer several suggestions to minimize the environmental degradation and deforestation of planned settlements. In some instances, the creation of extractive reserves may provide a good alternative to traditional government settlements. See Brandão & Souza, supra note 316, at 3-4; see also De Miranda & Mattos, supra note 16, at 287.
361. SATO, supra note 12, at 166.
Rooted in the needs of settlers, policymakers and administrators grew disenchanted with preemption once its intended beneficiaries had other means to acquire a homestead, and its actual beneficiaries included the likes of speculators, cattle ranchers, and timber barons. The century-long U.S. experiment with preemption rights, all in the context of an even more protracted struggle to define the country’s public land settlement policies, illustrates the challenge that a country with expansive amounts of federally owned public land faces in providing land ownership opportunities to an eager or desperate population.

Brazil’s vast Amazon region did not open to settlement until the government’s expansion and infrastructure efforts that began in the 1960s. Seeing the Amazonian frontier as a source of opportunity, settlers and speculators have fought to claim land rights in a wide variety of ways, often violent. Recent measures demonstrate the government’s efforts to regulate the right to title on the public lands, to review large and often fraudulent ownership claims, and to respond to calls for settlement options for the poor and the landless. The challenge is immense and complex, due to conflicting domestic pressures and to international scrutiny of how land policy impacts the Amazon rainforests and the indigenous communities that live within.

Brazil’s success in balancing competing pressures on its public lands will depend upon its own level of scrutiny—how closely it monitors the effects of recent laws that extend legal property rights to posseiros occupying claims on the land. Although intended to support poor settlers who have lived on the land for many years, certain aspects of these recent measures increase the likelihood that large landholders and speculators will abuse the laws to expand their fraudulent ownership claims to valuable forest lands. Additionally, continuing extension of title rights may create perverse incentives for new encroachments on the public lands, with the expectation of future legitimization. If, as in the U.S. experience, Brazil’s post-hoc titling measures are not successful in serving their intended purpose, Brazil should evaluate a narrowing of its laws to ensure that the intended beneficiaries are the actual subjects of titling rights, and that those rights do not incentivize settlement activities contrary to Brazil’s public policy goals.

As a proponent of the recent measures reminded his fellow legislators, “the transformation of the provisional measure [M.P. 458] into law [Law 11.952] does not in any way close off the issue of regularization and titling of land in the Amazon.” This sentiment may

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be useful for Brazilian lawmakers in light of pressure to modify current law to shift away from titling policies that do not clearly demarcate between posseiros and grileiros, and that encourage encroachment on lands that may better serve the public interest in other capacities. What Brazil lacks in institutional capacity to verify legitimate claims on the ground, it can recapture to some degree with laws that are clearly directed at supporting actual settlers living on the land, and at discouraging new rounds of illegal land occupation. Legal tools that are already developed, such as INCRA’s investigation of and enforcement action against questionable claims, and redistribution of reappropriated land to landless settlers, can further ensure that more public land in the valuable Brazilian Amazon does not fall prey to uncontrolled speculation and exploitation.

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