

WARD CHURCHILL*

The Law Stood Squarely on Its
Head: U.S. Legal Doctrine,
Indigenous Self-Determination
and the Question of World
Order

It's a travesty of a mockery of a sham.
Groucho Marx

As anyone who has ever debated or negotiated with U.S. officials on matters concerning American Indian land rights can attest, the federal government's first position is invariably that its title to/authority over its territoriality was acquired incrementally, mostly through provisions of cession contained in some 400 treaties with Indians ratified by the Senate between 1778 and 1871.¹ When it is pointed out that the U.S.² has violated the

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¹ See *Indian Treaties, 1778-1883* (Charles J. Kappler ed., 1973) (a compilation of the texts of 371 ratified treaties). Another thirty ratified treaty texts, as well as the texts of 400 additional treaties, all of them unratified but many purportedly forming the basis for U.S. assertions of title to particular chunks of territory, can be found in *Documents of American Indian Diplomacy: Treaties, Agreements and Conventions, 1775-1979* (Vine Deloria, Jr. & Raymond J. DeMallie eds., 1999). On the pattern of U.S. treaty violations, see VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* (Univ. of Texas Press, Austin 1985) (1974).

² Deviation from THE BLUEBOOK abbreviation Rule 6.1 due to author's preference. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.6.1, at 49 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

terms of every one of the treaties at issue, thus voiding whatever title might otherwise have accrued therefrom, there are usually a few moments of thundering silence.³ The official position, publicly framed by perennial “federal Indian expert” Leonard Garment as recently as 1999, is then shifted onto different grounds: “If you don’t accept the treaties as valid, we’ll have to fall back on the Doctrine of Discovery and Rights of Conquest.”⁴ This rejoinder, to all appearances, is meant to be crushing, forestalling further discussion of a topic so obviously inconvenient to the status quo.

While the idea that the U.S. obtained title to its “domestic sphere” by discovery and conquest has come to hold immense currency among North America’s settler population, one finds that the international legal doctrines from which such notions derive are all but unknown, even among those holding degrees in law, history or political philosophy. The small cadre of arguable exceptions to the rule have for the most part not bothered to become acquainted with the relevant doctrines in their original or customary formulations, instead contenting themselves with reviewing the belated and often transparently self-serving “interpretations” produced by nineteenth century American jurists, most notably those of John Marshall, third Chief Justice of the Supreme Court.⁵ Overall, there seems not the least desire—or sense of obligation—to explore the matter further.

The situation is altogether curious, given Marshall’s own bedrock enunciation of America’s self-concept, the hallowed proposition that the U.S. should be viewed above all else as “a government of laws, and not of men.”⁶ Knowledge of/compliance with the law is presupposed, of course, in any such construc-

³ The customary law from which this principle is adduced is codified in the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. For analysis, see SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 1-21 (2d ed. 1984). For further amplification of the fact that the customary principles set forth in the Vienna Convention were very much in effect at the time U.S. Indian treaties were negotiated, see SAMUEL BENJAMIN CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* (2d ed. 1916).

⁴ For background on Garment, see PAUL CHAAT SMITH & ROBERT ALLEN WARRIOR, *LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE* 164-65, 174 (1996).

⁵ For a succinct overview of the series of opinions involved, see JILL NORGREN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* (1996).

⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). For analysis, see JEAN EDWARD SMITH, *JOHN MARSHALL: DEFENDER OF A NATION* 309-26 (1996) (for the

tion of national image. This is especially true with respect to laws which, like those pertaining to discovery and conquest, form the core of America's oft and loudly-proclaimed contention that its acquisition and consolidation of a transcontinental domain has all along been "right," "just" and therefore "legal."⁷ Indeed, there can be no questions of law more basic than those of the integrity of the process by which the United States has asserted title to its land-base and thereby purports jurisdiction over it.

The present essay addresses these questions, examining U.S. performance and the juridical logic attending it through the lens of contemporaneous international legal custom and convention, and drawing conclusions accordingly. The final section explores the conceptual and material conditions requisite to a reconciliation of rhetoric and reality within the paradigm of explicitly American legal (mis)understandings. It should be noted, however, that insofar as so much of this devolves upon international law, and with the recent emergence of the U.S. as "the world's only remaining superpower,"⁸ the implications are not so much national as global.

I

THE DOCTRINE OF DISCOVERY

Although there are precursors dating back a further 200 years, the concepts which were eventually systematized as discovery doctrine for the most part originated in a series of Bulls promulgated by Pope Innocent IV during the late thirteenth century to elucidate material relations between Christian crusaders and Islamic "infidels."⁹ While the pontiff's primary objective was to establish a legal framework compelling "Soldiers of the Cross" to

reference to the United States as a "nation governed by laws, not men," see page 325).

⁷ See WILCOMB E. WASHBURN, *RED MAN'S LAND, WHITE MAN'S LAW: THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* (Univ. of Okla. Press: Norman & London 1995) (1971).

⁸ For use of the phrase employed here, see WILLIAM BLUM, *ROGUE STATE: A GUIDE TO THE WORLD'S ONLY SUPERPOWER* (2000).

⁹ One prefiguration came in 1066 A.D., when Pope Alexander I recognized the conquest of Saxon England, vesting underlying fee title to English land in the Norman King William. See CARL ERDMANN, *THE ORIGIN OF THE IDEA OF CRUSADE 150-60* (Marshall W. Baldwin & Walter Goffart trans., Princeton Univ. Press 1977) (1935). On the Innocentian Bulls, see ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 43-49, 59-60, 64-67, 69-72 (1990).

deliver the fruits of their pillage abroad to such beneficiaries as the Vatican and Church-sanctioned heads of Europe's incipient states, the Innocentian Bulls embodied the first formal acknowledgment in Western law that rights of property ownership were enjoyed by non-Christians as well as Christians. "In Justice," then, it followed that only those ordained to rule by a "Divine Right" conferred by the "One True God" were imbued with the prerogative to "rightly" dispossess lesser mortals of their lands and other worldly holdings.¹⁰

The law remained as it was until 1492, when the Columbian "discovery" of what proved to be an entire hemisphere, very much populated but of which most Europeans had been unaware, sparked a renewed focus upon questions of whether and to what extent Christian sovereigns might declare proprietary interest in the assets of others.¹¹ Actually, the first problem was whether the inhabitants of the "New World" were endowed with "souls," the criterion of humanity necessary for us to be accorded any legal standing at all. This issue led to the famous 1550 debate in Valladolid between Frey Bartolomé de las Casas and Juan Ginés de Sepúlveda, the outcome of which was papal recognition that American Indians were human beings and therefore entitled to exercise at least rudimentary rights.¹²

As a corollary to the Valladolid proceedings, Spanish legal theorists such as Franciscus de Vitoria and Juan Matías de Paz were busily revising and expanding upon Innocent's canonical foundation as a means of delineating the property rights vested in those "discovered" by Christian (i.e., European) powers as well as those presumably obtained in the process by their "discoverers."¹³ In the first instance, Vitoria in particular posited the prin-

¹⁰ Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of American Indians in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983). See also ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (1954); HERBERT ANDREW DEANE, *THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* (1963).

¹¹ See, e.g., TZVETAN TODOROV, *THE CONQUEST OF AMERICA: THE QUESTION OF THE OTHER* 146-67 (Richard Howard, trans. Harper & Row 1984).

¹² For probably the best and most detailed analysis of the debate, see LEWIS HANKE, *ARISTOTLE AND THE AMERICAN INDIANS: A STUDY IN RACE PREJUDICE IN THE MODERN WORLD* (1959).

¹³ See generally JAMES MULDOON, *POPES, LAWYERS AND INFIDELS: THE CHURCH AND THE NON-CHRISTIAN WORLD, 1250-1550* (Edward Peters ed., 1979). See also L.C. GREEN & OLIVE P. DICKASON, *THE LAW OF NATIONS AND THE NEW WORLD* (1989); Etienne Grisel, *The Beginnings of International Law and General Public Law Doctrine: Francisco de Vitoria's De Indiis prior*, in 1 *FIRST IMAGES OF*

ciple that sovereigns acquired outright title to lands discovered by their subjects only when the territory involved was found to be literally unoccupied (*terra nullius*).¹⁴ Since almost none of the land European explorers ever came across genuinely met this description, the premise of *territorium res nullius*, as it was called, was essentially moot from the outset (albeit, as will become apparent, the English—and much more so their American offshoot—would later twist it to their own ends).

In places found to be inhabited, it was unequivocally acknowledged in law that native residents held inherent or “aboriginal” title to the land.¹⁵ What the discoverer obtained was a monopolistic right vis-à-vis other powers to acquire the property from its native owners, in the event they could be persuaded through peaceful means to alienate it. On balance, the formulation seems to have been devised more than anything as an attempt to order the relations between the European states in such a way as to prevent them from shredding one another in a mad scramble to glean the lion’s share of the wealth all of them expected to flow from the Americas.¹⁶

Under the right of discovery, the first European nation to discover American [or other] lands previously unknown to Europe had what is similar to an exclusive European franchise to negotiate for Indian land within the discovered [area]. International law forbade European nations from interfering in the diplomatic affairs which each carried on with the Indian nations within their respective “discovered” territories. The doctrine thus reduced friction and the possibility of warfare between the competing European nations.¹⁷

AMERICA 305-25 (Fredí Chiapelli ed., 1976); LEWIS HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* (1949).

¹⁴ See generally Antonio Truyol y Seira, *The Discovery of the New World and International Law*, 1971 U. TOL. L. REV. 305 (covering the original conception).

¹⁵ See Felix S. Cohen, *The Spanish Origin of Indian Rights in the United States*, 31 GEO. L.J. 1 (1942); Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947); Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980).

¹⁶ At least one scholar has contended that the arrangement was designed *only* to regulate relations between European states and carried no negative connotations vis-à-vis native standing at all. Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1.

¹⁷ Indian Law Resource Center, *United States Denial of Indian Property Rights: A Study of Lawless Power and Racial Discrimination*, in *RETHINKING INDIAN LAW* 15, 16 (Nat’l Lawyers Guild Comm. on Native American Struggles et al. ed., 1982). Such divvying up of turf amounted to a universalization of the principle expounded by Pope Alexander VI in his *Bull Inter Caetera* of May 4, 1493, dividing interests in

That this principle was well-developed in international law and understood perfectly by America's "Founding Fathers" is confirmed in an observation by no less luminous a figure than Thomas Jefferson:

We consider it as established by the usage of different nations into a kind of *Jus gentium* for America, that a white nation settling down and declaring that such and such are their limits, makes an invasion of those limits by any other white nation an act of war, but gives no right of soil against the native possessors.¹⁸

"[T]hat is to say, [we hold simply] the sole and exclusive right of purchasing [land] from [indigenous peoples within our ostensible boundaries] whenever they should be willing to sell."¹⁹ The requirement that the consent of indigenous peoples was needed to legitimate cessions of their land was what prompted European states to begin entering into treaties with "the natives" soon after the invasion of North America had commenced in earnest.²⁰ While thus comprising the fundamental "real estate documents" through which the disposition of land title on the continent must be assessed, treaties between European and indigenous nations also served to convey formal recognition by each party that the other was its equal in terms of legal stature ("sovereignty").²¹ To quote Jefferson again, "the Indians [have] full, undivided and independent sovereignty as long as they choose to keep it, and . . . this might be forever."²² Or, as U.S. Attorney General William Wirt would put it in 1828:

[Be it] once conceded, that the Indians are independent to the purpose of treating, their independence is, *to that purpose*, as *absolute* as that of any other nation. . . . Nor can it be conceded that their independence as a nation is a limited independence. . . . Like all other independent nations, they have the absolute power of war and peace. Like all other independent

the southern hemisphere of the New World between Spain and Portugal. See WILLIAMS, *supra* note 9, at 80-81.

¹⁸ WASHBURN, *supra* note 7, at 56 (quoting Thomas Jefferson).

¹⁹ *Id.*

²⁰ See EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 (Alden T. Vaughan ed., 1979). For further analysis, see DOROTHY V. JONES, LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA (1982).

²¹ See Vienna Convention, *supra* note 3, art. 2(1)(a) (stating "'Treaty' means an international agreement concluded between States in written form and governed by international law.>").

²² FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE TRADE AND INTERCOURSE ACTS, 1790-1834 141 (1970).

nations, their territory is inviolable by any other sovereignty. . . . They are entirely self-governed—self-directed. They treat, or refuse to treat, at their pleasure; and there is no human power which can rightfully control . . . their discretion in this respect.²³

From early on, the English had sought to create a loophole by which to exempt themselves in certain instances from the necessity of securing land title by treaty, and to undermine the discovery rights of France, whose New World settlement patterns were vastly different from those of England.²⁴ Termed the “Norman Yoke,” the theory was that an individual—or an entire people—could rightly claim only such property as they had converted from wilderness to a state of domestication (i.e., turned into town sites, placed in cultivation, and so forth).²⁵ Without regard for indigenous methods of land use, it was declared that any area found to be in an “undeveloped” condition could be declared *terra nullius* by its discoverer and clear title thus claimed.²⁶ By extension, any discovering power such as France which failed to pursue development of the sort evident in the English colonial model forfeited its discovery rights accordingly.²⁷

The Puritans of Plymouth Plantation and Massachusetts Bay

²³ *Op. Att’y Gen.* 613-18, 623-33 (1828). Later theorists, mainly positivists like Westlake and Hyde, argued that treaties with Indians and other “backward” peoples did not carry the same force and effect as treaties between “civilized” states. See, e.g., CHARLES C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES* 163-64 (1922). However, there is nothing in the interpretation of customary law codified in the Vienna Convention to support their views.

²⁴ In substance, where the English sought ultimately to displace or supplant indigenous peoples altogether, the French ambition was to harness modified versions of existing native economies to their own profit. See HUGH EDWARD EGERTON, *A SHORT HISTORY OF BRITISH COLONIAL POLICY* 164-65 (6th ed. 1920); see also CHARLES J. BALES, *THE TIME OF THE FRENCH IN THE HEART OF NORTH AMERICA, 1673-1818* (1992); KLAUS E. KNORR, *BRITISH COLONIAL THEORIES, 1570-1850* 63-104 (2d ed. 1963).

²⁵ WILLIAMS, *supra* note 9, at 233-80.

²⁶ The idea has yielded a still-lingering effect. Its basic premise plainly underlay the 1862 Homestead Act by which any U.S. citizen could claim a quarter-section (160 acres) of “undeveloped” land, merely by paying a nominal “patent fee” to offset the expense of registering it. Pub. L. No. 37-64, 12 Stat. 392 (1862). S/he then had a specified period of time, usually five years, to fell trees, build a house, plow fields, etc. *Id.* If these requirements were met within the time allowed, the homesteader was issued a deed to the property. *Id.* While it remains “on the books,” claims under the Act were last pressed to a significant extent in Alaska during the 1960s and early 1970s.

²⁷ Such reasoning formed a portion of the legal basis upon which England waged four wars against the French in North America: King William’s War (1689-1697), Queen Anne’s War (1702-1713), King George’s War (1744-1748) and the “Seven

Colony experimented with the idea during the early seventeenth century—arguing that while native property rights might well be vested in their towns and fields, the remainder of their territories, since it was uncultivated, should be considered unoccupied and thus unowned—but the precedent never evolved into a more generalized English practice.²⁸ Indeed, the Puritans themselves abandoned such presumption in 1629.²⁹

Whatever theoretical conflicts existed concerning the nature of the respective ownership rights of Indians and Europeans to land in America, practical realities shaped legal relations between the Indians and colonists. The necessity of getting along with powerful Indian [peoples], who outnumbered the European settlers for several decades, dictated that as a matter of prudence, the settlers buy lands that the Indians were willing to sell, rather than displace them by other methods. The result was that the English and Dutch colonial governments obtained most of their lands by purchase. For all practical purposes, the Indians were treated as sovereigns possessing full ownership rights to the lands of America.³⁰

So true was this that by 1750 England had dispatched a de facto ambassador to conduct regularized diplomatic relations with the Haudenosaunee (Iroquois Six Nations Confederacy)³¹ and, in 1763, in an effort to quell native unrest precipitated by his subjects' encroachments upon unceded lands, King George III issued a proclamation prohibiting English settlement west of the Allegheny Mountains.³² This foreclosure of the speculative interests in "western lands" held by George Washington and other members of the settler élite—and the less grandiose aspirations

Years War," which actually lasted fourteen years (1749-1763). See ALBERT MARIN, *STRUGGLE FOR A CONTINENT: FRENCH AND INDIAN WARS, 1690-1760* (1987).

²⁸ ALDEN T. VAUGHAN, *NEW ENGLAND FRONTIER: PURITANS AND INDIANS, 1620-1675* 113-21 (1965).

²⁹ Letter from the Massachusetts Bay Company to Governor John Endicott, Apr. 17, 1629, in 1 *RECORDS OF THE GOVERNOR AND THE COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND* 231 (Nathaniel B. Shurtleff, M.D. ed., 1853).

³⁰ FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 55 (Rennard Strickland & Charles F. Wilkinson eds., 1982).

³¹ See generally JAMES THOMAS FLEXNER, *LORD OF THE MOHAWKS: A BIOGRAPHY OF SIR WILLIAM JOHNSON* (Little, Brown & Co. 1979) (1959).

³² This was following England's final victory over France in the last of the so-called French and Indian Wars. See *supra* text accompanying note 27. On the Proclamation of 1763 (RSC 1970, App. II, No. 1, at 127) and subsequent legislation, see JACK STAGG, *ANGLO-INDIAN RELATIONS IN NORTH AMERICA TO 1763 AND AN ANALYSIS OF THE ROYAL PROCLAMATION OF 7 OCTOBER 1763* (1981). See also BRUCE CLARK, *NATIVE LIBERTY, CROWN SOVEREIGNTY: THE EXISTING ABORIGINAL RIGHT OF SELF-GOVERNMENT IN CANADA* 134-46 (1990).

to landed status of rank-and-file colonials—would prove a major cause of the American War of Independence.³³

Although it is popularly believed in the U.S. that the 1783 Treaty of Paris through which England admitted defeat also conveyed title to all lands east of the Mississippi River to the victorious insurgents, the reality was rather different. England merely quitclaimed its interest in the territory at issue. All the newly-established American republic thus acquired was title to such property as England actually owned—the area of the original thirteen colonies situated east of the 1763 demarcation line—plus an exclusive right to acquire such property as native owners might be convinced to cede by treaty as far westward as the Mississippi.³⁴ The same principle pertained to the subsequent “territorial acquisitions” from European or Euro-derivative countries—the 1803 Louisiana Purchase and the 1848 impoundment of the northern half of Mexico through the Treaty of Guadalupe Hidalgo, to cite two prominent examples—through which the present territoriality of the forty-eight contiguous states was eventually consolidated.³⁵

As a concomitant to independence, moreover, the Continental Congress found itself presiding over a pariah state, defiance—much less forcible revocation—of Crown authority being among the worst offenses imaginable under European law. Unable to obtain recognition of its legitimacy in other quarters,³⁶ the federal government was compelled for nearly two decades to seek it through treaties of peace and friendship with indigenous nations along its western frontier—all of them recognized as sovereigns in prior treaties with the very European powers then shunning the U.S.—meanwhile going to extravagant rhetorical lengths to demonstrate that, far from being an outlaw state, it was really the most legally-oriented of all nations.³⁷

³³ THOMAS PERKINS ABERNETHY, *WESTERN LANDS AND THE AMERICAN REVOLUTION* (Russell & Russell 1959) (1937).

³⁴ For the complete text of the Treaty of Paris (Sept. 3, 1783), see *THE RECORD OF AMERICAN DIPLOMACY: DOCUMENTS AND READINGS IN THE HISTORY OF U.S. FOREIGN RELATIONS* 39-42 (Ruhl F. Bartlett ed., 4th ed. 1964).

³⁵ For the text of the Treaty Between the United States and France for the Cession of Louisiana (Apr. 30, 1803), see *id.* at 116-17. On similar acquisitions, see generally DAVID M. PELCHER, *THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON AND THE MEXICAN WAR* (1973).

³⁶ See MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY* 300 (1970).

³⁷ See Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, in

The fledgling country could hardly peddle a strictly law-abiding image while openly trampling upon the rights of indigenous peoples. As a result, although George Washington had secretly and successfully recommended the opposite policy even before being sworn in as president,³⁸ one of the earliest acts of Congress was to pass the Northwest Ordinance, in which it solemnly pledged that “the utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed.”³⁹ For the most part, then, it was not until the U.S. had firmed up its diplomatic ties with France, and the demographic/military balance in the west had begun to shift decisively in its favor,⁴⁰ that it started to make serious inroads on native lands.

Economic Development in American Indian Reservations 22-28 (Roxanne Dunbar Ortiz & Larry Emerson eds., 1979). See also *supra* text accompanying note 6 for an example of hyperlegal posturing.

³⁸ This plan concerns a written plan submitted to the Congress in which the “Father of his Country” recommended using treaties with Indians in much the same fashion Hitler would later employ them against his adversaries at M \ddot{u} nich and elsewhere (i.e., to lull them into a false sense of security or complacency which placed them at a distinct military disadvantage when it came time to confront them with a war of aggression).

Apart from the fact that it was immoral, unethical and actually criminal, this plan placed before the Congress by George Washington was so logical and well laid out that it was immediately accepted practically without opposition and at once put into action. There might be—almost certainly *would* be—further strife with the Indians, new battles and new wars, but the end result was, with the adoption of Washington’s plan, inevitable: Without even realizing it had occurred, the fate of all Indians in the country was sealed. They had lost virtually everything.

ALLAN W. ECKERT, *THAT DARK AND BLOODY RIVER: CHRONICLES OF THE OHIO RIVER VALLEY* 441 (1995).

³⁹ 1 Stat. 50 (1789). For background, see generally PRUCHA, *supra* note 22.

⁴⁰ As the indigenous population was steadily eroded by disease and ad hoc attritional warfare all along the frontier, plummeting to only a few hundred thousand by 1812, the United States population had swelled to 7.5 million. While the U.S. could field 12,000 regulars and at least four times as many militiamen, even the broad alliance attempted by Tecumseh figured to muster fewer than 5,000 fighters in response. For U.S. population data, see 1 NILES WEEKLY REG. (Nov. 30, 1811). On native population size, see HENRY F. DOBYNS, *THEIR NUMBERS BECOME THINNED: NATIVE AMERICAN POPULATION DYNAMICS IN EASTERN NORTH AMERICA* (1983). On U.S. troop strength, see J.C.A. Stagg, *Enlisted Men in the United States Army, 1812-1815: A Preliminary Survey*, 43 WM. & MARY Q. 615 (1986). On Tecumseh’s alliance, see ALLAN W. ECKERT, *A SORROW IN OUR HEART: THE LIFE OF TECUMSEH* (1992).

II

THE MARSHALL OPINIONS

The preliminary legal pretext for U.S. expansionism, set forth by John Marshall in his 1810 *Fletcher v. Peck* opinion,⁴¹ amounted to little more than a recitation of the Norman Yoke theory, quite popular at the time with Jefferson and other American leaders.⁴² The proposition that significant portions of Indian Country amounted to *terra nullius*, and were thus open to assertion of U.S. title without native agreement, was, however, contradicted by the country's policy of securing by treaty at least an appearance of indigenous consent to the relinquishment of each parcel brought under federal jurisdiction.⁴³ The presumption of underlying native land title lodged in the Doctrine of Discovery thus remained the most vexing barrier to America's fulfillment of its territorial ambitions.

In the 1823 *Johnson & Graham's Lessee v. McIntosh* case,⁴⁴ Marshall therefore undertook a major (re)interpretation of the doctrine itself. While demonstrating a thorough mastery of the law as it had been previously articulated, and an undeniable ability to draw all the appropriate conclusions therefrom, the Chief Justice nonetheless managed to invert it completely. Although

⁴¹ 10 U.S. (6 Cranch) 87 (1810). To all appearances, the opinion was an expedient means to facilitate redemption of scrip issued to troops during the American independence struggle in lieu of cash. These vouchers were to be exchanged for land parcels in Indian Country once victory had been achieved (Marshall and his father received instruments entitling them 10,000 acres apiece in what is now Kentucky, part of the more than 200,000 acres they jointly amassed there). On the Marshalls' Kentucky land transactions, see JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 74-75 (1996). On the case itself, see C. PETER McGRATH, YAZOO: THE CASE OF FLETCHER V. PECK (1966).

⁴² Robert A. Williams, Jr., *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987). It should be noted that the notion that the concept of *terra nullius* might ever have been applied in any legitimate sense to inhabited areas was firmly repudiated by the International Court of Justice ("World Court") in its *Advisory Opinion on Western Sahara*, 1975 I.C.J. 12, 35. For analysis, see *Questions Concerning Western Sahara: Advisory Opinion of the International Court of Justice, 16 October 1975*, 10 INT'L LAW. 199, 199-203 (1976) (prepared by the Registry of the International Court of Justice); see also *Sovereignty Over Unoccupied Territories: The Western Sahara Decision*, 9 CASE W. RES. J. INT'L L. 135 (1977).

⁴³ See generally REGINALD HORSMAN, EXPANSION AND AMERICAN POLICY, 1783-1812 (1967).

⁴⁴ 21 U.S. (8 Wheat.) 543 (1823). For background, see NORGREN, *supra* note 5, at 92-95; see also DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MAKING OF JUSTICE 27-35 (1997).

he readily conceded that title to the territories they occupied was vested in indigenous peoples, Marshall denied that this afforded them supremacy within their respective domains.⁴⁵ Rather, he argued, the self-assigned authority of discoverers to constrain alienation of discovered lands implied that prepotency inhered in the discovering power, not only with respect to other potential buyers but vis-à-vis the native owners themselves.⁴⁶

Since the sovereignty of discoverers—or derivatives like the U.S.—could in this sense be said to overarch that of those discovered, Marshall held that discovery also conveyed to the discoverer an “absolute title” or “eminent domain” underlying the aboriginal title possessed by indigenous peoples.⁴⁷ The native “right of possession” was thereby reduced at the stroke of a pen to something enjoyed at the “sufferance” of the discovering (superior) sovereign.⁴⁸

[The] principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it.⁴⁹ . . . In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. . . . [T]heir rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive right to those

⁴⁵ *Johnson*, 21 U.S. at 574.

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The United States . . . maintain[s], as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of [the U.S. itself] allow [it] to exercise.

Id. at 587.

⁴⁷ *Id.* at 588.

⁴⁸ “It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends [however] to the complete ultimate [or absolute] title.” *Id.* at 603.

An absolute [title] must be an exclusive title, . . . a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown [now held by the U.S.], subject only to the Indian right of occupancy, [a matter] incompatible with an absolute and complete title in the Indians.

Id. at 588.

⁴⁹ *Id.* at 573.

who made it. . . .⁵⁰

“[T]he Indian inhabitants are [thus] to be considered merely as occupants. . . .”⁵¹ However extravagant [my logic] may appear,” Marshall summed up, “if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, . . . it cannot be questioned.”⁵² In other words, violations of law themselves become law if committed by those wielding enough power to get away with them. For all the elegant sophistry embodied in its articulation, then, the *Johnson v. McIntosh* opinion reduces to the gutter cliché that “might makes right.” In this manner, Marshall not only integrated “the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples” into the canon of American law, but did so with a virulence unrivaled even by European jurists upon whose precedents he professed to base his own.⁵³

There were of course loose ends to be tied up, and these Marshall addressed through opinions rendered in the “Cherokee Cases.”⁵⁴ In his *Cherokee Nation* opinion, the Chief Justice undertook to resolve questions concerning the precise standing to be accorded indigenous peoples. Since the U.S. had entered into numerous treaties with them, it was bound by both customary international law and Article 1 § 10 of its own constitution to treat them as coequal sovereigns. Marshall’s verbiage in *Johnson* had plainly cast them in a very different light. Hence, in *Cherokee Nation*, he conjured a whole new classification of politicolegal entity “marked by peculiar and cardinal distinctions which exist no where else.”⁵⁵

[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can,

⁵⁰ *Id.* at 574.

⁵¹ *Id.* at 591.

⁵² *Id.* at 591. For further analyses, see Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 *BUF. L. REV.* 637 (1978); see also David E. Wilkins, *Johnson v. McIntosh Revisited: Through the Eyes of Mitchell v. United States*, 19 *AM. INDIAN L. REV.*, 159 (1994); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing the White Man’s Jurisprudence*, 31 *WIS. L. REV.*, 219 (1986).

⁵³ Williams, *supra* note 9, at 317.

⁵⁴ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). See generally NORGREN, *supra* note 5, at 98-111, 114-22.

⁵⁵ *Cherokee Nation*, 30 U.S. at 16.

with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent nations*. They occupy a territory to which we assert a title independent of their will . . . Their relation to the United States resembles that of a ward to his guardian.⁵⁶

“The Indian territory is admitted to compose a part of the United States,” he continued.⁵⁷ “In all our maps, geographical treatises, histories, and laws, it is so considered. . . . [T]hey are [therefore] considered as within the jurisdictional limits of the United States . . . [and] acknowledge themselves [to be] under the protection of the United States.”⁵⁸ What Marshall had described was a status virtually identical to that of a protectorate, yet as he himself would observe in *Worcester* a year later:

[T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.⁵⁹

It follows that a protectorate would also retain its land rights, unimpaired by its relationship with a stronger country.⁶⁰

At another level, the Chief Justice was describing a status similar to that of the states of the union (i.e., subordinate to federal authority, while retaining a residue of sovereign prerogative). Yet he, better than most, was aware that if this were so, the federal government would never have had a basis in either international or constitutional law to enter into treaties with indigenous peoples in the first place, a matter which would have invalidated any U.S. claim to land titles accruing therefrom. Small wonder, trapped as he was in the welter of his own contradictions, that Marshall eventually threw up his hands in frustration, unable or unwilling to further define Indians as either fish or fowl. In the end, he simply repeated his assertion that the U.S./Indian relationship was unique “perhaps unlike that of any two people in

⁵⁶ *Id.* at 17 [emphasis added].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Worcester*, 31 U.S. at 561.

⁶⁰ There are numerous examples of this being so. See Vine Deloria, Jr., *The Size and Status of Nations*, in *NATIVE AMERICAN VOICES: A READER* 457 (Susan Lobo & Steve Talbot eds., 1998).

existence.”⁶¹

Small wonder, too, all things considered, that the Chief Justice’s *Cherokee Nation* opinion was joined by only one other member of the high court.⁶² The majority took exception, with Justices Henry Baldwin and William Johnson writing separate opinions,⁶³ and Justice Smith Thompson, together with Justice Joseph Story, entering a strongly-worded dissent which laid bare the only reasonable conclusions to be drawn from the facts (both legal and historical).⁶⁴

In Justice Thompson’s opinion:

[I]t is [the Indians’] political condition that constitutes their *foreign* character, and in that sense must the term *foreign* be understood, as used in the constitution. It can have no relation to local, geographical, or territorial position. It cannot mean a country beyond [the] sea. Mexico or Canada is certainly to be considered a foreign country, in reference to the United States. It is the political relation in which one . . . country stands to another, which constitutes it [as] foreign to the other.⁶⁵

Nonetheless, Marshall’s views prevailed, a circumstance allowing him to deploy his “domestic dependent nation” thesis against both the Cherokees *and* Georgia in *Worcester*.⁶⁶ First, he reserved on constitutional grounds relations with all “other nations” to the federal realm, thereby dispensing with Georgia’s contention that it possessed a “state’s right” to exercise jurisdiction over a portion of the Cherokee Nation falling within its boundaries.⁶⁷ Turning to the Cherokees, he reiterated his premise that they—and by implication all Indians within whatever borders the U.S. might eventually claim—occupied a nebulous quasi-sovereign status as “distinct [independent] political communities” subject to federal authority.⁶⁸ In practical effect, Marshall cast indigenous nations as entities inherently imbued with a sufficient measure of sovereignty to alienate their territory by

⁶¹ *Cherokee Nation*, 30 U.S. at 16.

⁶² Joining Justice Marshall was Justice John McLean. NORGREN, *supra* note 5, at 100.

⁶³ *Id.* at 106-07.

⁶⁴ Thompson wrote the dissent, and Justice Story endorsed it. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV., 500, 516-18 (1969).

⁶⁵ *Cherokee Nation*, 30 U.S. at 54-55 [emphasis added].

⁶⁶ NORGREN, *supra* note 5, at 117, 120-21.

⁶⁷ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 553-54 (1832).

⁶⁸ *Id.* at 557, 559.

treaty when and wherever the U.S. desired they do so, but never with enough to refuse.⁶⁹

As legal scholars Vine Deloria, Jr. and David E. Wilkins have recently observed, the cumulative distortions of both established law and historical reality bound up in Marshall's "Indian opinions" created a very steep and slippery slope, with no bottom anywhere in sight.

[T]he original assumption [was] that the federal government is authorized and empowered to protect the Indians in the enjoyment of their lands. Once it is implied that this power also involves the ability of the federal government by itself to force a purchase of the lands, there is no way the implied power can be limited. If the government can force the disposal of lands, why can it not determine how the lands are to be used? And if it can determine how the lands are to be used, why can it not tell the Indians how to live? And if it can tell Indians how to live, why can it not tell them how to behave and what to believe?⁷⁰

By the end of the nineteenth century, less than seventy years after *Cherokee Nation* and *Worcester*, each of these things had happened. Within such territory as was by then reserved for indigenous use and occupancy, the traditional mode of collective land tenure had been supplanted by federal imposition of a "more civilized" form of individual title expressly intended to compel agricultural land usage.⁷¹ Native spiritual practices had been prohibited under penalty of law,⁷² and entire generations of American Indian youngsters were being shipped off, often forcibly, to boarding schools where they were held for years on end, forbidden knowledge of their own languages and cultures while they were systematically indoctrinated with Christian beliefs and

⁶⁹ "Indian tribes are still recognized as sovereigns by the United States, but they are deprived of the one power all sovereigns must have in order to function effectively—the power to say 'no' to other sovereigns." VINE DELORIA, JR. & DAVID E. WILKINS, *TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS* 70 (1999).

⁷⁰ *Id.* at 29.

⁷¹ This was carried out under provision of the 1887 Indian General Allotment Act ch. 119, 24 Stat. 388-391 (1887) (codified at 25 U.S.C. § 331 (1994) (repealed 2000). For historical overviews, see JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887-1934* (1991). For legal background, see SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 142-74 (1994).

⁷² "The sun-dance, and all other similar dances and so-called religious ceremonies are considered 'Indian Offenses' under existing regulations, and corrective penalties are provided." *U.S. Dep't of Interior, Office of Indian Affairs, Circular 1665* (Apr. 26, 1921).

cultural values.⁷³ The overall policy of “assimilation,” under which these measures were implemented, readily conforms to the contemporary legal definition of cultural genocide.⁷⁴

Meanwhile, American Indians had been reduced to utter destitution, dispossessed of approximately 97.5% of our original land holdings,⁷⁵ our remaining assets held in a perpetual and self-assigned “trust” by federal authorities wielding what Marshall’s heirs on the Supreme Court described as an extra-constitutional or “plenary”—that is, unlimited, absolute, and judicially unchallengeable—power over our affairs.⁷⁶ Suffice it here to observe that nothing in the Doctrine of Discovery empowered any country to impose itself on others in this way. On the contrary, the “juridical reasoning” evident in the Marshall opinions and their successors has much in common with, and in many respects prefigured, the new body of law—repudiated first by an International Court of Arbitration opinion in the 1928 *Island of Palmas* case,⁷⁷ then more sweepingly in the 1945 United Nations Char-

⁷³ See generally DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928* (1995).

⁷⁴ Article II(c) of the 1948 Convention on Prevention and Punishment of the Crime of Genocide outlaws as genocidal any policy leading to the “physical destruction . . . in whole or in part, [of] a national, ethnical, racial or religious group, as such.” Convention on Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. II(c), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). Article II(e) specifically prohibits any policy devolving upon the forced transfer of children. *Id.* at art. II(e).

⁷⁵ For details, see CHARLES C. ROYCE, *INDIAN LAND CESSIONS IN THE UNITED STATES, 18TH ANNUAL REPORT, 1896-97* (1899).

⁷⁶ The implications of the term, first employed by the Marshall Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), were set forth more fully in *U.S. v. Kagama*, 118 U.S. 375 (1886), and finalized in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). In the latter case, Justice Edward D. White opined that “Congress possess[es] full power [over Indian affairs, and] the judiciary cannot question or inquire into [its] motives. . . . If injury [is] occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.” *Lone Wolf*, 187 U.S. at 568. By 1942, the courts were even more blunt, stating that Congress wielded “full, entire, complete, absolute, perfect, [and] unqualified” power over indigenous nations within its borders. *Mashunkashey v. Mashunkashey*, 134 P.2d 976, 979 (1942). For background, see Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L.L. REV. 507 (1987); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. (1984); David E. Wilkins, *The Supreme Court’s Explication of ‘Federal Plenary Power’: An Analysis of Case Law Affecting Tribal Sovereignty, 1886-1914*, 18 AM. INDIAN Q. 349 (1994).

⁷⁷ A territorial title deriving from discovery cannot prevail over a title based in a prior and continuing display of sovereignty. See Philip C. Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT’L L. 735 (1928) (reporting the *Island of Palmas* case (*United States v. Netherlands*, Permanent Ct. Arb., Hague, 1928)).

ter⁷⁸ and the U.N.'s 1960 Declaration on the Granting of Independence to Colonial Countries and People⁷⁹—purported to legitimate the imperialism manifested by Europe during the early twentieth century.⁸⁰

III

RIGHTS OF CONQUEST

Although they are usually treated as an entirely separate consideration, conquest rights in the New World accrued under the law of nations as a subpart of the discovery doctrine. Under international law, discoverers could acquire land only through a voluntary alienation of title by native owners, with one exception—when they were compelled to wage a “Just War” against native people—by which those holding discovery rights might seize land and other property through military force.⁸¹ The U.S. clearly acknowledged that this was so in the earlier mentioned Northwest Ordinance, where it pledged that indigenous nations would “never be invaded or disturbed, unless in just and lawful wars authorized by Congress.”⁸²

The criteria for a Just War were defined quite narrowly in international law. As early as 1539, Vitoria and, to a lesser degree, Matías de Paz asserted that there were only three: the natives had either to have refused to admit Christian missionaries among them, to have arbitrarily refused to engage in commerce with the discovering power, or to have mounted some unprovoked physical assault against its representatives/subjects.⁸³ Absent at least

⁷⁸ U.N. CHARTER Ch. XI, 59 Stat. 1031 (1945), T.S. No. 993.

⁷⁹ For the full text of the Declaration, see G.A. Res. 1514(XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961).

⁸⁰ See generally MARK FRANK LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW: A TREATISE ON THE LAW AND PRACTICE RELATED TO COLONIAL EXPANSION* (1926); ALPHEUS HENRY SNOW, *THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS* (Metro Books 1972) (1919). On the material process leading to repudiation, see FRANZ ANSPRENGER, *THE DISSOLUTION OF COLONIAL EMPIRES* (1981); STEWART C. EASTON, *THE RISE AND FALL OF WESTERN COLONIALISM: A HISTORICAL SURVEY FROM THE EARLY NINETEENTH CENTURY TO THE PRESENT* (1964).

⁸¹ For a broad exploration of the concept, see MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1977).

⁸² Northwest Ordinance, July 13, 1787, available at <http://www.yale.edu/lawweb/avalon/nworder.htm> (last modified Jan. 31, 2002); see also DOCUMENTS OF UNITED STATES INDIAN POLICY 10 (Francis Paul Prucha ed., 1975).

⁸³ Franciscus de Vitoria, *De Indis Recenter Inventis*, in *DE INDIS ET DE JURE BELLI REFLECTIONES* 151 (1917); Silvio Zavala, *Los Doctrinas de Palacios Rubios y*

one of these conditions, any war waged by a European state or its derivative would be “unjust”—the term was changed to “aggressive” during the twentieth century—and resulting claims to title unlawful.⁸⁴ One searches in vain for an example in American history where any of the criteria were realized.

A more pragmatic problem confronting those claiming that the U.S. holds conquest rights to native lands is that, while the federal government recognizes the existence of approximately 400 indigenous peoples within its borders, its own count of the number of “Indian Wars” it has fought “number [about] 40.”⁸⁵ Plainly, the United States cannot exercise “conquest rights” over the more than 300 nations against which, by its own admission, it has never fought a war. Yet, as is readily evident in its 1955 *Tee-Hit-Ton* opinion,⁸⁶ the Supreme Court, mere facts to the contrary notwithstanding, has anchored U.S. land title in a pretense in which exactly the opposite is true.

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.⁸⁷

Particularly in his *Johnson* opinion, but also in *Cherokee Nation*, John Marshall sought to transcend this issue by treating dis-

Matías de Paz ante la Conquista America, in MEMORIA DE EL COLEGIO NACIONAL (1950). For background, see WILLIAMS, *supra* note 9, at 85-108.

⁸⁴ SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 52-56 (1996); MATTHEW M. McMAHON, *CONQUEST AND MODERN INTERNATIONAL LAW: THE LEGAL LIMITATIONS ON THE ACQUISITION OF TERRITORY BY CONQUEST* 35 (1940).

⁸⁵ On the present disposition of “federally recognized tribes,” see FRANCIS PAUL PRUCHA, *ATLAS OF AMERICAN INDIAN AFFAIRS* (1990). For the official count of “Indian Wars,” see U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, *REPORT ON INDIANS TAXED AND NOT TAXED 1890* 637-38 (1894). For details on the wars themselves, see ALAN AXELROD, *CHRONICLE OF THE INDIAN WARS FROM COLONIAL TIMES TO WOUNDED KNEE* (1993).

⁸⁶ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 273 (1955).

⁸⁷ *Id.* at 291.

The Alaska natives [who had pressed a land claim in *Tee-Hit-Ton*] had never fought a skirmish with Russia [which claimed their territories before the U.S.] or the United States To say that the Alaska natives were subjugated by conquest stretches the imagination too far. The only sovereign act that can be said to have conquered the Alaska native was the *Tee-Hit-Ton* opinion itself.

Newton, *supra* note 15, at 1244.

covery and conquest as if they were synonymous, a conflation evidencing even less legal merit than the flights of fancy discussed in the preceding section. In fact, the high court was ultimately forced to distinguish between the two, acknowledging that the “English possessions in America were not claimed by right of conquest, but by right of discovery,”⁸⁸ and, resultingly, that the “law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, [is] incapable of application” by the U.S. to American Indians.⁸⁹

A further complication is that as early as 1672, legal philosophers like Samuel Pufendorf had mounted a serious challenge to the idea that even such territory as was seized in the course of a Just War might be permanently retained.⁹⁰ Although Hugo Grotius, Emmerich de Vattel, William Edward Hall, John Westlake and other such theorists continued to aver the validity of conquest rights through the end of the nineteenth century,⁹¹ a view very similar to Pufendorf’s had proven ascendant by the 1920s.

Oddly, given its stance concerning American Indians, as well as its then-recent forcible acquisitions of overseas colonies like Hawai‘i, Puerto Rico, and the Philippines,⁹² the U.S. assumed a leading role in this respect. Although the Senate refused to allow the country to join, President Woodrow Wilson was instrumental in creating the League of Nations, an organization intended “to substitute diplomacy for war in the resolution of international disputes.”⁹³ In some ways more important was its centrality in

⁸⁸ *Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367, 1409 (1842).

⁸⁹ *Johnson & Graham’s Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 591 (1823).

⁹⁰ See generally SAMUEL PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO* (William Abbott Oldfather trans., 1931) (1672); SAMUEL PUFENDORF, *DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALE LIBRI DUO* (Frank Gardner Moore trans., 1927) (1682); SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688).

⁹¹ See EMMERICH DE VATEL, *THE LAW OF NATIONS* (Joseph Chitty ed., 1883) (1758); HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (James Brown Scott ed., 1925) (1625); WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* (1904).

⁹² See generally NOEL J. KENT, *HAWAII: ISLANDS UNDER THE INFLUENCE* (2d ed. 1993); STUART CREIGHTON MILLER, “BENEVOLENT ASSIMILATION”: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903 (1982); JULIUS W. PRATT, *THE EXPANSIONISTS OF 1898: THE ACQUISITION OF HAWAII AND THE SPANISH ISLANDS* (1936).

⁹³ On Wilson’s role and Senate obstruction, see FRANCIS ANTHONY BOYLE, *FOUNDATIONS OF WORLD ORDER: THE LEGALIST APPROACH TO INTERNATIONAL RELATIONS, 1898-1922* 47-48, 53-54 (1999).

crafting the 1928 General Treaty on the Renunciation of War, also known as the “Kellogg-Briand Pact” or “Pact of Paris.”⁹⁴

With the [treaty], almost all the powers of the world, including all the Great Powers, renounced the right to resort to war as an instrument of state policy. By Article 1, “[t]he High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.” By Article 2, the Parties “agree that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.”⁹⁵

In 1932, Secretary of State Henry Stimson followed up by announcing that the U.S. would no longer recognize title to territory seized by armed force.⁹⁶ This new dictum of international law, shortly to be referred to as the “Stimson Doctrine of Non-Recognition,”⁹⁷ was expressly designed to “effectively bar the legality hereafter of any title or right sought to be obtained by pressure or treaty violation, and . . . [to] lead to the restoration to [vanquished nations] of rights and titles of which [they] have been unjustly deprived.”⁹⁸ Within a year, the doctrine’s blanket rejection of conquest rights had been more formally articulated in a League of Nations Resolution and legally codified in the Chaco Declaration, the Saaverda Lamas Pact, and the Montevideo Convention on the Rights and Duties of States.⁹⁹ In 1936, the Inter-American Conference on the Maintenance of Peace also declared a “proscription of territorial conquest, and that, in consequence, no acquisition made through violence shall be rec-

⁹⁴ See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963); Lothar Kotzsch, *THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW* (1956).

⁹⁵ KORMAN, *supra* note 84, at 192.

⁹⁶ For Stimson’s statement, see U.S. DEP’T OF STATE, *DOCUMENTS ON INTERNATIONAL AFFAIRS* 262 (John W. Wheeler-Bennett ed., 1932). For discussion, see ROBERT LANGER, *SEIZURE OF TERRITORY: THE STIMSON DOCTRINE AND RELATED PRINCIPLES IN LEGAL THEORY AND DIPLOMATIC PRACTICE* (1947).

⁹⁷ KORMAN, *supra* note 84, at 238-39. See also LANGER, *supra* note 96.

⁹⁸ KORMAN, *supra* note 84, at 239 (quoting letter from Secretary of State Henry Stimson to Senator W.E. Borah (Feb. 23, 1932)).

⁹⁹ League Assembly Resolution (Mar. 11, 1932); Chaco Declaration (Aug. 3, 1932); Saaverda Lamas Pact (Oct. 10, 1933); Montevideo Convention (Dec. 26, 1933). See generally KORMAN, *supra* note 84, at 240-41.

ognized.”¹⁰⁰ The principle was again proclaimed in the Declaration on the Non-Recognition of the Acquisition of Territory by Force advanced by the Eighth Pan-American Conference in 1938.

[A]s a fundamental of the Public Law of America . . . the occupation or acquisition of territory or any other modification or territorial or boundary arrangement obtained through conquest by force or non-pacifistic means shall not be valid or have legal effect. . . .

The pledge of non-recognition of situations arising from the foregoing conditions is an obligation which cannot be avoided either unilaterally or collectively.¹⁰¹

By the time the Supreme Court penned its bellicose opinion in *Tee-Hit-Ton*, the Stimson Doctrine had already served as a cornerstone in formulating the charges of planning and waging aggressive war pressed against the major nazi¹⁰² defendants at Nuremberg and the Japanese in Tokyo (tribunals instigated and organized mainly by the U.S.).¹⁰³ It had also served as a guiding principle in the (again, effectively U.S. instigated) establishment of both the Organization of American States and the United Nations, entities which in their very charters, like the ill-fated League of Nations before them, are devoted to “the progressive codification of [international] law . . . for purposes of preventing war.”¹⁰⁴ Correspondingly, Stimson’s “new dictum” found its most refined and affirmative expression in the charters’ provisos, reiterated almost as boilerplate in a host of subsequent U.N. resolutions, declarations, and conventions, concerning the “equal rights and self-determination of all peoples.”¹⁰⁵

¹⁰⁰ LANGER, *supra* note 96, at 78 (quoting Declaration of Principles of Inter-American Solidarity and Cooperation, Dec. 21, 1936).

¹⁰¹ KORMAN, *supra* note 84, at 241-42 (quoting Declaration on Non-Recognition of the Acquisition of Territory by Force, 34 AM. J. INT’L. L. 193 (1940)). In its 1945 Act of Chapultepec, the Inter-American Conference on Problems of War and Peace not only asserted non-recognition of conquest rights as customary law but declared that the principle of “non-recognition had been incorporated into the [black letter] international law of American States since 1890.” *Id.*

¹⁰² Deviation from standard capitalization due to author’s preference.

¹⁰³ ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987); BRADLEY F. SMITH, *THE ROAD TO NUREMBERG* (1981).

¹⁰⁴ On the U.S. role in founding the United Nations, see PHYLLIS BENNIS, *CALLING THE SHOTS: HOW WASHINGTON DOMINATES TODAY’S UN* 1-13 (2d ed. 2000). On the OAS, see BOYLE, *supra* note 93, at 119-22. On the League, see 1 F.P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* (1952).

¹⁰⁵ Declaration on the Granting of Independence to Colonial Countries and Peo-

Contradictory as the *Tee-Hit-Ton* court's blatant conquest rhetoric was to the lofty posturing of the U.S. in the international arena, it was even more so with respect to a related subterfuge unfolding on the home front. By 1945, the United States was urgently seeking a means of distinguishing its own record of territorial expansion from that of the nazis it was preparing to hang for having undertaken very much the same course of action.¹⁰⁶ The workhorse employed in this effort was the so-called Indian Claims Commission (ICC), established to make retroactive payment to indigenous peoples whose property had been "unlawfully taken" over the years.¹⁰⁷ The purpose of the Commission was, as President Harry Truman explained upon signing the enabling legislation on August 14, 1946, to foster an impression that the U.S. had acquired *none* of its land base by conquest.

This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transac-

ples, *supra* note 79, at ¶ 2. As stated in Article 1(1) and (2) of the U.N. CHARTER, "The Purposes of the United Nations are [t]o maintain international peace and security . . . [by] adjustment or settlement of international disputes or situations which might lead to a breach of the peace," mainly by developing "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U.N. CHARTER, *supra* note 78. Elsewhere, it is simply stated that "[A]ll peoples have the right of self-determination." See, e.g., *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 1(1) U.N. Doc. A/6316 (1966); *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, art. 1(1), U.N. Doc. A/6316 (1966). Article 1 of the OAS Charter, 2 U.S.T. 2394, 119 U.N.T.S. 3 (1948), declares the organization to be "a regional agency" subject to provisions of the U.N. Charter. Article 3(a) declares the elements of law promulgated by the U.N. to be binding upon all OAS member states. *Id.*

¹⁰⁶ Hitler, for one, was quite clear that the nazi "lebensraumpolitik" was based, theoretically, practically and quite directly, on the preexisting model embodied in the U.S. realization of its "manifest destiny" vis-à-vis American Indians and other racial/cultural "inferiors." ADOLF HITLER, *MEIN KAMPF* 403, 591 (John Chamberlain et al. eds., 1939) (1925); HITLER'S SECRET BOOK 46-52 (Salvatore Attanasio trans. 1961). Another iteration will be found in a memorandum prepared by an aide, Col. Friedrich Hössbach, summarizing Hitler's statements during a high-level "Führer Conference" conducted shortly before Germany's 1939 invasion of Poland. 25 TRIAL OF THE MAJOR NAZI WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 402-13 (1947). The relationship between nazi and U.S. theory/practice is closely examined in Frank Parella, *Lebensraum and Manifest Destiny: A Comparative Study in the Justification of Expansionism* (1950) (unpublished M.A. Thesis, Georgetown University, available at <http://muse.jhu.edu/demo/aiq/24.3friedberg.html>). See also NORMAN RICH, *HITLER'S WAR AIMS: IDEOLOGY, THE NAZI STATE, AND THE COURSE OF EXPANSION* 8 (1973); JOHN TOLAND, *ADOLF HITLER* 802 (1976).

¹⁰⁷ For the most detailed overview of the ICC, see HARVEY D. ROSENTHAL, *THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION* (1990).

tions with the Indian tribes we have . . . set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 percent of our public domain. . . .¹⁰⁸

The game was rigged from the outset, to be sure, since the ICC was not empowered to return land to native people even in cases where its review of the manner in which the U.S. had acquired it revealed the grossest sorts of illegality. The terms of compensatory awards, moreover, were restricted to payment of the estimated value of the land at the time it was taken—often a century or more before—without such considerations as interest accrual or appreciation in land values during the intervening period.¹⁰⁹ Still, despite its self-serving and mostly cosmetic nature, the very existence of the ICC demonstrated quite clearly that, in terms of legality, U.S. assertion of title to/jurisdiction over Indian Country can no more be viewed as based in “conquest rights” than in “rights of discovery.” All U.S. pretensions to ownership of property in North America must therefore be seen as treaty-based.

IV

THROUGH THE LENS OF THE LAW

When Congress established the ICC in 1946, it expected within five years to “resolve” all remaining land rights issues concerning American Indians.¹¹⁰ The Commission was to identify and catalogue the basis in treaties, agreements and statutes by which the U.S. had assumed lawful ownership of every disputed land parcel within its purported domain, awarding “just compensation” in each case where the propriety of the transaction(s) documented might otherwise be deemed inadequate.¹¹¹ By 1951, however,

¹⁰⁸ Statement by the President Upon Signing Bill Creating the Indian Claims Commission (Aug. 13, 1946), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN*, 1946 414 (1962).

¹⁰⁹ All the ICC accomplished was to “clear out the underbrush” obscuring an accurate view of who actually owns what in North America. DELORIA, *supra* note 1, at 227. See also Ward Churchill, *Charades Anyone? The Indian Claims Commission in Context*, 24 *AM. INDIAN CULTURE & RES. J.* 43 (2000).

¹¹⁰ *Hearings on H.R. 1198 and 1341 to Create an Indian Claims Commission Before the House Comm. on Indian Affairs*, 79th Cong. 81-84 (1945).

¹¹¹ See Thomas LeDuc, *The Work of the Indian Claims Commission Under the Act of 1946*, 26 *PAC. HISTORICAL REV.* 1 (1957); John T. Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 *N.D. L. REV.* 325 (1969); Wilcomb E. Washburn, *Land Claims in the Mainstream of Indian/White Relations*, in *IRREDEEM-*

the 200-odd claims originally anticipated had swelled to 852.¹¹² The lifespan of the ICC was extended for another five years, then another, a process which was repeated until the “third generation” of commissioners finally gave up in exhaustion.¹¹³

By the time the Commission suspended operations on September 30, 1978, it had processed 547 of the 615 dockets into which the 852 claims had been consolidated, none in a manner satisfactory to the native claimants (nearly half were simply dismissed).¹¹⁴ Title to virtually the entire state of California, for instance, was supposedly “quieted” in the “Pit River Land Claims Settlement” of the mid-1960s by an award amounting to forty-seven cents per acre, despite the fact that the treaties by which the territory had ostensibly been ceded to the U.S. had never been ratified by the Senate.¹¹⁵

Most importantly, in its final report the ICC acknowledged that after three decades of concerted effort, it had been unable to discern a legal basis for U.S. title to what the federal Public Lands Law Review Commission had already described as “one third of the nation’s land.”¹¹⁶ The fact is that about half the area of the country was purchased by treaty or agreement at an average price of less than a dollar per acre; another third of a [billion] acres, mainly in the West, was confiscated without compensation; another two-thirds of a [billion] acres was “claimed by the United States without . . . pretense of [even] a unilateral action extinguishing native title.”¹¹⁷

There can be no serious question of the right of indigenous

ABLE AMERICA: THE INDIANS’ ESTATE AND LAND CLAIMS 21 (Imre Sutton ed., 1985).

¹¹² *Hearings on the Independent Office Appropriations for 1952 Before the House Subcomm. of the Comm. of Appropriations*, 82d Cong. 28-37 (1951).

¹¹³ *Amending the Indian Claims Commission Act of 1946 as Amended Before the House Comm. on Interior & Insular Affairs*, 92d Cong. (1972).

¹¹⁴ The remaining sixty-eight dockets were turned over to the U.S. Court of Claims. Russel Barsh, *Behind Land Claims: Rationalizing Dispossession in Anglo-American Law*, 1 *LAW & ANTHROPOLOGY* 15 (1986).

¹¹⁵ Howard Friedman, *Interest on Indian Land Claims: Judicial Protection of the Fisc*, 5 *VAL. U. L. REV.* 26 (1970); Robert F. Heizer & Alfred L. Kroeber, *For Sale: California at 47¢ Per Acre*, 3 *J. CAL. ANTHROPOLOGY* 38 (1976); M. Annette Jaimes, *The Pit River Indian Land Claim Dispute in Northern California*, 4 *J. ETHNIC STUDIES* 47 (1987).

¹¹⁶ U.S. INDIAN CLAIMS COMMISSION, *FINAL REPORT* (1978); PUB. LAND LAW REVIEW COMM’N, *ONE THIRD OF THE NATION’S LAND* (1970).

¹¹⁷ Russel Lawrence Barsh, *Indian Land Claims Policy in the United States*, 58 *N.D. L. REV.* 7, 7 (1982).

nations to recover property to which their title remains unclouded, or that their right to recover lands seized without payment equals or exceeds that of the United States to preserve its "territorial integrity" by way of paltry and greatly-belated compensatory awards.¹¹⁸ Restitution rather than compensation is, after all, the guiding principle of the tort provisions embodied in international public law.¹¹⁹ Nor is this the end of it. Within the area ostensibly acquired by the U.S. through treaties or agreements, many of the instruments of cession are known to have been fraudulent or coerced. These must be considered invalid under Articles 48-53 of the Vienna Convention on the Law of Treaties.¹²⁰

A classic illustration of a fraud involves the 1861 Treaty of Fort Wise, in which not only did federal commissioners forge the signatures of selected native leaders—several of whom were not even present during the "negotiations"—but the Senate altered many of the treaty's terms and provisions *after* it was supposedly signed, then ratified the result without so much as informing the Indians of the changes.¹²¹ On this basis, the U.S. claimed to have obtained the "consent" of the Cheyennes and Arapahoes to its acquisition of the eastern half of what is now the State of Colo-

¹¹⁸ The territorial integrity of all member states is guaranteed in Chapter I, Article 2(4) of the U.N. CHARTER, *supra* note 78. The guarantee presupposes, however, that there was a degree of basic *legal* integrity involved in the territorial acquisitions by which member states composed themselves in the first place. In cases where this is not so, the rights to self-determination of involuntarily subordinated or usurped peoples *always* outweighs the right to preserve territorial integrity. See LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (1978); Ved Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981).

¹¹⁹ On international torts, see Eduardo Jimenez de Arechaga, *International Responsibility*, in *MANUAL OF PUB. INT'L L.* 564 (Max Sorensen ed., 1968).

¹²⁰ SINCLAIR, *supra* note 3, at 14-18. Treaty fraud, which is specifically prohibited under Article 49 of the Convention as a matter of *jus cogens*, has been defined by the International Law Commission (ILC) as including "any false statements, misrepresentations or other deceitful proceedings by which a State may be induced to give a consent to a treaty which it would not otherwise have given." *Id.* at 173-74. Coercion, which is prohibited under Articles 51-52, also as a matter of *jus cogens*, involves "acts or threats" directed by one nation involved in a treaty negotiation against another (or its representative[s]). *Id.* at 176-81. The ILC has concluded that "the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in . . . international law," and that the nullity of treaties invalidated on this basis is absolute. *Id.* at 177 (quoting Y.B. OF THE INT'L LAW COMM'N 246 (1966)).

¹²¹ See STAN HOIG, *THE SAND CREEK MASSACRE* 13-17 (1961).

rado.¹²² Comparable examples abound (e.g., the above-mentioned California treaties).

Examples of coercion are also legion, but none provides a better illustration than does the 1876-77 proceeding in which federal authorities suspended distribution of rations to the Lakotas, who at the time were directly subjugated by and therefore dependent upon the U.S. military for sustenance, and informed them that they would not be fed again until their leaders had signed an agreement relinquishing title to the Black Hills region of present-day South Dakota.¹²³ Thus did the Congress contend that the 1851 and 1868 treaties of Fort Laramie, in each of which the Black Hills were recognized as an integral part of the Lakota homeland, had been “superseded” and U.S. ownership of the area secured.¹²⁴

Without doubt, North America’s indigenous nations are no less entitled to recover lands expropriated through such travesties than they are the territories already discussed. Although it is currently impossible to offer a precise estimate regarding the extent of the acreage involved—to do so would require a contextual review of each U.S./Indian treaty, and a parcel-by-parcel delineation of the title transfers accruing from invalid instruments—it is safe to suggest that adding it to the approximately thirty-five percent of the continental U.S. which was never ceded would place something well over half the present gross “domestic” territoriality of the United States at issue.¹²⁵

The U.S., of course, holds the power to simply ignore the law in inconvenient connections such as these. Doing so, however,

¹²² Treaty with the Arapaho and Cheyenne, 1861, February 15, 1861, 12 Stat. 1163, reprinted in KAPPLER, *supra* note 1, at 807.

¹²³ Treaty with the Sioux—Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho, 1868 15 Stat. 635, reprinted in Kappler, *supra* note 1, at 998. On the “negotiation” process at issue, see EDWARD LAZARUS, BLACK HILLS, WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT 71-95 (1991). See also *The Earth Is Our Mother: Struggles for Indian Land and Liberation in the Contemporary United States*, in FROM A NATIVE SON: SELECTED ESSAYS IN INDIGENISM, 1985-1995, at 37 (Ward Churchill ed., 1996).

¹²⁴ U.S. title was formally asserted in an Act (19 Stat. 254) passed by Congress on Feb. 28, 1877. It should be noted that while the express consent of three-quarters of all adult male Lakotas was required under Article 12 of the 1868 treaty for any future land alienations by that people to be legal, the signatures of barely fifteen percent were obtained on the Black Hills cession agreement.

¹²⁵ See WARD CHURCHILL, STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION 10 (2d ed. 1999).

will never serve in itself to legitimate its comportment. Instead, its continued possession of a vast expanse of illegally-occupied territory¹²⁶—an internal colonial empire, as it were¹²⁷—only destines it to remain what it was at its inception: an inherently criminal or “rogue” state.¹²⁸ It is through this lens that U.S. pronouncements and performance from Nuremberg to Vietnam must inevitably be evaluated.¹²⁹ So, too, President George Herbert Walker Bush’s 1990 rhetoric concerning America’s moral/legal obligation to kill more than a million Iraqis while militarily revoking their government’s forcible annexation of neighboring Kuwait.¹³⁰

On the face of it, the only reasonable conclusion to be drawn is that the unsavory stew of racial/cultural arrogance, duplicity and abiding legal cynicism defining U.S. relations with indigenous nations from the outset has come long since to permeate America’s relationship to most other countries. How else to understand Bush’s 1991 declaration that the display of U.S. military might he’d ordered in Iraq was intended more than anything else to put the entire world on notice that, henceforth, “what *we* say,

¹²⁶ For a related development of the thesis, see RODOLFO ACUÑA, *OCCUPIED AMERICA: THE CHICANO’S STRUGGLE TOWARD LIBERATION* (1972).

¹²⁷ See Robert K. Thomas, *Colonialism: Classic and Internal*, 4 *New Univ. Thought* 44 (1966-67), reprinted in *THE WAY: AN ANTHOLOGY OF AMERICAN INDIAN LITERATURE* 60 (Shirley Hill Witt & Stanley Steiner eds., 1972); Ward Churchill, *Indigenous Peoples of the United States: A Struggle Against Internal Colonialism*, 16 *BLACK SCHOLAR* 29 (1985); LEAH RENAE KELLY, *The Open Veins of Native North America: A Question of Internal Colonialism*, in *IN MY OWN VOICE: EXPLORATIONS IN THE SOCIOPOLITICAL CONTEXT OF ART AND CINEMA* 112 (Ward Churchill ed., 2001).

¹²⁸ See BLUM, *supra* note 8; see also NOAM CHOMSKY, *ROGUE STATES: THE RULE OF FORCE IN WORLD AFFAIRS* (2000).

¹²⁹ As Justice Robert H. Jackson put it while serving as lead U.S. prosecutor at Nuremberg, “[w]e are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.” BERTRAND RUSSELL, *WAR CRIMES IN VIETNAM* 125 (1967); see also Robert H. Jackson, *Opening Statement for the United States before the International Military Tribunal, November 21, 1945*, in *FROM NUREMBERG TO MY LAI* 28 (Jay W. Baird, ed., 1972). As concerns U.S. replication of the major offenses of which the nazis were convicted, see Quincy Wright, *Legal Aspects of the Vietnam Situation*, in *THE VIETNAM WAR AND INTERNATIONAL LAW* 271 (Richard Falk ed., 1968); RALPH STAVINS ET AL., *WASHINGTON PLANS AN AGGRESSIVE WAR* (1971).

¹³⁰ On the human toll ultimately extracted by the U.S. in its “roll back” of Iraq’s “naked aggression”—which had, at most, resulted in the deaths of “several hundred” Kuwaitis—see RAMSEY CLARK, ET AL., *WAR CRIMES: A REPORT ON UNITED STATES WAR CRIMES AGAINST IRAQ* (1992); International Action Center, *Challenge to Genocide: Let Iraq Live* (1998); U.N. Food & Agric. Org. & Ramsey Clark, *The Impact of Sanctions on Iraq: The Children are Dying* (1996).

goes”?¹³¹ In what other manner might we explain the fact that while Bush claimed the “New World Order” he was inaugurating would be marked by nothing so much as “the rule of law among nations,”¹³² the United States was and remains unique in the consistency with which it has rejected both the authority of international courts and any body of law other than its own.¹³³

For the past fifty years, federal policymakers have been increasingly adamant in their refusal of the proposition that the U.S. might be bound by customs or conventions conflicting with its sense of self-interest.¹³⁴ More recently, American delegates to the United Nations have taken to arguing that new codifications of international law must be written in strict conformity to their country’s constitutional and even statutory requirements, and that, for interpretive purposes, the distortions of existing law advanced by American jurists such as John Marshall be considered preminent.¹³⁵ In effect, the U.S. is seeking to cast an aura of legitimacy over its ongoing subjugation of American Indians by

¹³¹ Noam Chomsky, “*What We Say Goes*”: *The Middle East in the New World Order*, in *COLLATERAL DAMAGE: THE “NEW WORLD ORDER” AT HOME AND ABROAD* 49 (Cynthia Peters ed., 1992); NOAM CHOMSKY, *WORLD ORDERS, OLD AND NEW* (1994). See also *ALTERED STATES: A READER IN THE NEW WORLD ORDER* (Phyllis Bennis & Michael Moushabeck eds., 1993).

¹³² Examples of such Bushian rhetoric during the second half of 1990 are legion, culminating in his announcement during a thirty-four state summit conference conducted in Paris during November, 1990, that the effect of international legality itself could be “neither profound nor enduring if the rule of law is shamelessly disregarded” in the Persian Gulf. *Gulf Crisis at a Glance*, ATLANTA CONST., Nov. 20, 1990, at A.

¹³³ The U.S. formally repudiated the jurisdiction of the International Court of Justice in 1986, when the ICJ ruled against it in *Nicaragua v. United States*, 1986 I.C.J. 14 (June 27, 1986); *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*, 86 U.S. DEP’T OF STATE BULL. (Jan. 1986). It has subsequently refused to accept jurisdiction of the newly-established International Criminal Court (ICC), unless its policymakers and military personnel are specifically exempted from prosecution. GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 321-24, 446-48, 450 (1999). On the U.S. refusal of international law, per se, see BLUM, *supra* note 7, at 184-99; BENNIS, *supra* note 102, at 279-82.

¹³⁴ For an in-depth study of this process at work, see LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* (1991).

¹³⁵ Article I(2) of the so-called Sovereignty Package attached to its much-belated 1988 “ratification” of the 1948 Genocide Convention pledges the U.S. to comply only insofar as “nothing in the Convention requires legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.” *Lugar-Helms-Hatch Sovereignty Package*, S. Exec. Rep. 2, 99th Cong. (1985), adopted Feb. 19, 1986, reprinted in LEBLANC, *supra* note 134, at 253-54. Such comportment has become so routine that otherwise establishmentarian analysts have begun to remark upon the traditional Washington stance that the U.S. is above international law. See *id.* See generally Glenn T. Mor-

engineering a normalization of such relations in universal legal terms.

A salient example will be found in the ongoing U.S. rejection of language in the United Nations Draft Declaration on the Rights of Indigenous Peoples—and a similar declaration drafted by the OAS—reiterating that self-determination is guaranteed to *all* peoples by the U.N. Charter.¹³⁶ Instead, American diplomats have been instructed to insist that indigenous peoples the world over must be accorded only a “right of *internal* self-determination” which is “not . . . synonymous with more general understandings of self-determination under international law” but which conforms perfectly with those set forth in the United States’ own Indian Self-Determination and Educational Assistance Act of 1975.¹³⁷ Most specifically, as was stated in an official cable during January 2001, “the U.S. understanding of the term ‘internal self-determination’ indicates that it does not include a right of independence or permanent sovereignty over natural resources.”¹³⁸

The standard “explanation” offered by U.S. officials when queried about the legal basis for their government’s position on native rights has been that “while the United States once recognized American Indian [peoples] as separate, distinct, and sovereign nations, it long since stopped doing so.”¹³⁹ This, however, is the same, legally speaking, as saying nothing at all. According to no less an authority than Lassa Oppenheim, author of the magisterial *International Law*, voluntary relinquishment is the sole valid means by which any nation may be divested of its

ris, *Further Motion by the State Dep’t to Railroad Indigenous Rights*, 6 *FOURTH WORLD BULL.* 3; Robertson, *supra* note 133, at 327.

¹³⁶ See generally Morris, *supra* note 135; Isabelle Schulte-Tenckhoff, *The Irresistible Ascension of the UN Draft Declaration on the Rights of Indigenous Peoples: Stopped Short in Its Tracks?*, 9 *EUR. REV. NATIVE AM. STUDIES* 5 (1995).

¹³⁷ National Security Council cable dated Jan. 18, 2001, reprinted in WARD CHURCHILL, *PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLES AND ANGLOAMERICAN LAW* 427 app. (2002). For background on U.S. posturing at the U.N. with its Indian Self-Determination Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 405), see S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 86-87, 157 (1996).

¹³⁸ CHURCHILL, *supra* note 137.

¹³⁹ Leonard Garment offered the formulation during a panel sponsored by Americans for Indian Opportunity, and televised by C-Span in 1999. See generally *supra* note 4 and accompanying text.

sovereignty.¹⁴⁰ Otherwise, “recognition, once given is irrevocable unless the recognized [nation] ceases to exist.”¹⁴¹ As always, the U.S. is simply making up its own rules as it goes along.

As should be obvious, the implications of such maneuvers are by no means confined to a foreclosure upon the rights of native peoples. The broader result of American “unilateralism” is that, just as it did with respect to North America’s indigenous nations, the U.S. is now extrapolating its presumptive juridical primacy to global dimensions.¹⁴² The initiative is especially dangerous, given that the place now held by the U.S. within the balance of world military power closely resembles the lopsided advantage it enjoyed against American Indians during the nineteenth century.¹⁴³ The upshot is that, should the present trend be allowed to continue, the United States will shortly have converted most of the planet into an equivalent of “Indian Country.”¹⁴⁴ In fact, especially with regard to the so-called Third World, this has already, for all practical intents and purposes, come to pass.¹⁴⁵

V

THE NATURE OF MODERN EMPIRE

“It’s an old story, really,” writes Phyllis Bennis, one of “a strategically unchallenged dominion, at the apogee of its power and

¹⁴⁰ 1 LASSA OPPENHEIM, *INTERNATIONAL LAW* 120 (H. Lauterpacht ed., 8th ed. 1955).

¹⁴¹ Robert T. Coulter, *Contemporary Indian Sovereignty*, in *RETHINKING INDIAN LAW*, 109, 117 (Nat’l Lawyers Guild Comm. on Native Struggles ed., 1982) (citing M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* § 1, at 2 (1963)).

¹⁴² As U.S. Ambassador to the United Nations, later Secretary of State, Madeleine Albright put it in the mid-1990s, “the U.N. is [merely] a tool of American foreign policy.” Catherine Toups, *Albright Cites ‘Moral Imperative’ for Bosnia Mission; Says Public Needs to be Sold on Plan*, *WASH. TIMES*, Dec. 13, 1995, at A1. See generally BENNIS, *supra* note 104, at 245-312.

¹⁴³ As the matter was recently framed by French Foreign Minister Hubert Vedrine, “the predominant weight of the United States and the absence for the moment of a counterweight . . . leads it to hegemony.” John Vinoceur, *Going It Alone, U.S. Upsets France; So Paris Begins a Campaign to Strengthen Multilateral Institutions*, *INT’L HERALD-TRIB.* (Paris), Feb. 3, 1999, at A1. See also Jan Morris, *Mankind Stirs Uneasily at American Dominance*, *L.A. TIMES*, Feb. 10, 2000, at B9.

¹⁴⁴ For an early—and rather prescient—assessment of this prospect, see Sandy Vogelgesang, *AMERICAN DREAM GLOBAL NIGHTMARE: THE DILEMMA OF U.S. HUMAN RIGHTS POLICY* (1980).

¹⁴⁵ See EDUARDO GALEANO, *THE OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT* 225-83 (Cedric Belfrage trans., Monthly Review Press, 1973) (1971); see also *EMPIRE AND REVOLUTION: THE UNITED STATES AND THE THIRD WORLD SINCE 1945* (Peter L. Hahn & Mary Ann Heiss eds., 2001).

influence, rewriting the global rules for how to manage its empire. Two thousand years ago, Thucydides described how Mylos, the island the Greeks conquered to ensure stability for their Empire's golden age, was invaded and occupied according to laws wholly different from those governing democratic (if slavery dependent) Athens. The Roman empire followed suit, creating one set of laws for Rome's own citizens, imposing another on its far-flung possessions. In the last couple of hundred years the sun-never-sets-on-us British empire did much the same thing. And then, at the end of the twentieth century, having achieved once unimaginable heights of military, economic, and political power, it was Washington's turn."¹⁴⁶

The American-style *fin de 20th siecle* law of empire took the form of the U.S. exempting itself from UN-brokered treaties and other international agreements that it demanded others accept. It was evident in Washington's rejection of the International Criminal Court in 1998, its refusal to sign the 1997 Convention against anti-personnel land mines, its failures [to accept] the Convention on the Rights of the Child, the Law of the Sea, the Comprehensive Test Ban Treaty and more.¹⁴⁷

Actually, the roots of the current U.S. posture run much deeper than Bennis suggests. As its record concerning the earlier-mentioned California Indian treaties readily demonstrates, the United States had by the mid-1850s already adopted a policy of selectively exempting itself from compliance with treaties to which it asserted others were nonetheless bound.¹⁴⁸ The Supreme Court's 1903 opinion in *Lone Wolf v. Hitchcock* effectively extended this procedure to encompass all treaties and agreements with indigenous nations.¹⁴⁹ From there, it became only a matter of time before the U.S. would begin to approach the remainder of its foreign relations in a comparable manner.¹⁵⁰

¹⁴⁶ BENNIS, *supra* note 104, at 262-63. Deviation from THE BLUEBOOK quotation Rule 5.1 due to author's preference. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.5.1, at 43-44 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

¹⁴⁷ *Id.*

¹⁴⁸ See *supra* note 108. See also FLORENCE CONNOLLY SHIPEK, PUSHED INTO THE ROCKS: SOUTHERN CALIFORNIA INDIAN LAND TENURE, 1769-1986 (1988).

¹⁴⁹ See *supra* note 76. For additional discussion of the peculiarly one-sided and legally unfounded notion of treaty abrogation implicit to the opinion, see BLUE CLARK, LONE WOLF V. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 4-5, 70-74, 110 (1994).

¹⁵⁰ During the 1997 conference in Ottawa which resulted in promulgation of the Convention on Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction, to cite one notorious example, U.S.

As well, the attitude, first explicated with regard to Indians and now displayed quite prominently on the global stage, that America is endowed with a plenary authority to dictate the “permissible” forms of other countries’ governmental and political processes, the modes of their economies and so on.¹⁵¹

Legal scholar Felix S. Cohen once accurately analogized American Indians as a “miner’s canary” providing early warning of the fate in store for other sectors of the U.S. populace.¹⁵² The principle can now be projected to worldwide proportions. Given the scale of indignity and sheer physical suffering the U.S. has inflicted—and continues to inflict—upon indigenous peoples trapped within its “domestic” domain,¹⁵³ it is self-evidently in the

representatives argued straightforwardly that the treaty should bind *every* country in the world *except* theirs. When the 129 signatory states in attendance refused to accept the premise that the U.S. should be uniquely exempted from compliance, the U.S. delegation withdrew in a huff. ROBERTSON, *supra* note 131, at 198-99; BENNIS, *supra* note 104, at 279-80. As of this writing (Feb. 2003), the U.S. has still not endorsed the Convention, although it went into force in March 1999. Instead, it has indulged in a flagrant violation by dropping thousands of cluster bombs—outlawed under the treaty—on Afghanistan since October 2001.

¹⁵¹ Upon even cursory examination, it becomes evident that virtually every one of the multitudinous post-World War II U.S. military/paramilitary interventions abroad has been harnessed to these ends. *See, e.g.*, NOAM CHOMSKY, *DETECTING DEMOCRACY* (Hill & Wang, 1992) (1991); NOAM CHOMSKY, *YEAR 501: THE CONQUEST CONTINUES* (1993). It should be noted that, according to no less authoritative a figure than Secretary of State Colin Powell, the U.S., having employed criminal means to replace Afghanistan’s Taliban régime with a government of its own choosing in late 2001, is now gearing up to do the same in Iraq (Iran and North Korea have been named as likely follow-ups). It should also be noted that military force has not been the only means employed to accomplish the subordination of other countries, nor have the victims necessarily been confined to the Third World. *See, e.g.*, STEPHEN MCBRIDE & JOHN SHIELDS, *DISMANTLING A NATION: THE TRANSITION TO CORPORATE RULE IN CANADA* (2d ed. 1997).

¹⁵² Felix S. Cohen, *The Erosion of Indian Rights, 1950-53: A Case Study in Bureaucracy*, 62 *YALE L.J.*, 348, 390 (1953).

¹⁵³ Despite our retention of the largest landholdings on a per capita basis of any North American population group, and despite that land being some of the most mineral-rich in the world, internal colonial exploitation of our resources by the U.S. has left American Indians in a material circumstance so degraded that by the late 1990s our average lifespan was one-third less than that of the settler population. Overall, the

Indian health level is the lowest and the disease rate the highest of all major population groups in the United States. The incidence of tuberculosis is over 400 percent higher than the national average. Similar statistics show that the incidence of strep infections is 1,000 percent, meningitis is 2,000 percent higher, and dysentery is 10,000 percent higher. Death rates from disease are shocking when Indian and non-Indian populations are compared. Influenza and pneumonia are 300 percent greater killers among Indians. Diseases such as hepatitis are at epidemic proportions, with an 800

best interests of very nearly the entire human species to forcefully reject the structure of “unjust legality” by which the U.S. is attempting to rationalize its ambition to consolidate a position of planetary suzerainty.¹⁵⁴ The only reasonable question is how best to go about it.

Here, the choice is between combating the endless array of symptoms emanating from the problem or going after it at its source, eradicating it root and branch, once and for all. Again, the more reasonable alternative is self-revealing. Unerringly, then, the attention of those desiring to block America’s increasingly global reach must be focused upon unpacking the accumulation of casuistic jurisprudence employed by the U.S. as a justification for its own geographical configuration.¹⁵⁵ Since, as has been established herein, there is no viable basis for the United States to assert territorial rights based on the concept of *terra nullius* or any other aspect of discovery doctrine, and even less on rights of conquest, it is left with a legally defensible claim to only those parcels of the continent where it obtained title through a valid treaty. As has also been shown herein, this adds up to something less than half its professed North American territoriality. To its “overseas possessions” such as Guam, Puerto Rico, and Hawai‘i, the U.S. holds no legal right at all.¹⁵⁶

percent higher chance of death. Diabetes is almost a plague. And the suicide rate for Indian youths ranges from 1,000 to 10,000 percent higher than for non-Indian youths; Indian suicide has become epidemic.

RENNARD STRICKLAND, *TONTO’S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY* 53 (1997). Entirely comparable data applies to the Kanaka Maoli (Native Hawaiians). See Kekuni Blaisdell & Noreen Mokuau, *Ka‘iāka Maoli, Indigenous Hawaiians*, in *HAWAI‘I: RETURN TO NATIONHOOD* 49 (Ulla Hasager & Jonathan Friedman eds., Greenwood Press 1991).

¹⁵⁴ The term employed originates with Jürgen Habermas. See JAMES L. MARSH, *UNJUST LEGALITY: A CRITIQUE OF HABERMAS’S LAW* (2001).

¹⁵⁵ For further development of the themes sketched in this section, see Ward Churchill, *I Am Indigenist*, in *WARD CHURCHILL, ACTS OF REBELLION: A WARD CHURCHILL READER* 275 (2002); see also Ward Churchill, *The New Face of Liberation*, in *CHURCHILL, ACTS OF REBELLION*, at 263.

¹⁵⁶ The U.S. Congress actually issued a statutory apology to the Kanaka Maoli on the 100th anniversary of its admittedly illegal participation in the armed overthrow of Hawai‘i’s constitutional monarchy. S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993). Signed by President Bill Clinton on Nov. 23, 1993, *id.*, Public Law 103-150 made no offer to restore the native people’s property and other sovereign rights. Nor did it mention that Hawai‘i’s being declared a U.S. state in 1959 was accomplished in a manner violating the requirements of Chapter IX of the U.N. Charter, and was thus simply another illegality. See HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I* 27-32 (2d ed. 1999). On Guam, see CHAMORRO SELF-DETERMINATION (Robert Underwood & Laura

Viewed from any angle, the situation is obvious. Shorn of its illegally-occupied territories, the U.S. would lack the critical mass and internal jurisdictional cohesion necessary to impose itself as it does at present. This is all the more true in that even the fragments of land still delineated as Indian reservations are known to contain up to two-thirds of the uranium, a quarter of the readily-accessible low sulfur coal, a fifth of the oil and natural gas, and all of the zeolites available to feed America's domestic economy.¹⁵⁷ Withdrawal of these assets from federal control would fatally impair the ability of the U.S. to sustain anything resembling state-corporate business as usual. By every reasonable standard of measure, the decolonization of Native North America must thus be among the very highest priorities pursued by anyone, anywhere who is seriously committed to achieving a positive transformation of the global status quo.¹⁵⁸

A major barrier to international coalescence around this sort of "deconstructionist" agenda, among sworn enemies of the U.S. no less than its allies, has been the exclusively statist "world order"¹⁵⁹—or "world system," as Immanuel Wallerstein terms it¹⁶⁰—in which both sides are invested. Only *states* are eligible

Souder eds., 1987). On Puerto Rico, see RONALD FERNANDEZ, *PRISONERS OF COLONIALISM: THE STRUGGLE FOR JUSTICE IN PUERTO RICO* (1994); see also FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001). By far the best overview of federal holdings, including such little-considered places as "American" Samoa and the "U.S." Virgin Islands, will be found in ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* (1989).

¹⁵⁷ Ronald L. Trosper, *American Indian Mineral Agreements*, in AMERICAN INDIAN POLICY REVIEW COMMISSION, *TASK FORCE SEVEN FINAL REPORT: RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION* 137 app. (1976); PRESIDENTIAL COMM'N ON INDIAN RESERVATION ECONOMIES, EXECUTIVE OFFICE OF THE PRESIDENT, *REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES* (1984).

¹⁵⁸ My use of the word "seriously" here is intended in opposition to the liberal notion that solutions to the kinds of intractable socioeconomic, political, and environmental problems generated by the existing system can somehow be obtained through recourse to the system itself. Regardless of the rhetorical militancy in which such propositions are often larded, they are inherently superficial and ultimately reinforcing of systemic hegemony. See ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* (2d ed. 2001).

¹⁵⁹ For some of the better descriptions of the statist system, see BOYLE, *supra* note 93; see also HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977); FRITZ KRATOCHWIL, *FOREIGN POLICY AND INTERNATIONAL ORDER* (1978).

¹⁶⁰ IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM I: CAPITALIST AG-*

for membership in the United *Nations*, for instance, a conflation which once caused American Indian Movement leader Russell Means to quip that “the organization would more rightly have been called the United States, but the name was already taken.”¹⁶¹ Although it may be no surprise to find a veritable U.S. appendage like Canada citing John Marshall’s *McIntosh* opinion as “the *locus classicus* of the principles governing aboriginal title” in the formulation of its own judicial doctrine,¹⁶² it is quite another matter to find the then-still decolonizing countries of Africa adopting the thinking embodied in *Cherokee Nation* to ensure that the “national borders” demarcated by their European colonizers would be preserved in international law.¹⁶³

RICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY (1974); IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM II: MERCANTILISM AND THE CONSOLIDATION OF THE EUROPEAN WORLD-ECONOMY, 1600-1750* (1988); IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM III: THE SECOND ERA OF GREAT EXPANSION OF THE CAPITALIST WORLD-ECONOMY, 1730-1840s* (1989). For further discussion, see *THE WORLD SYSTEM: FIVE HUNDRED YEARS OR FIVE THOUSAND?* (Andre Gunder Frank & Barry K. Ellis eds., 1993).

¹⁶¹ Russell Means, Address at the Four Winds Community Center, Denver, CO (Oct. 7, 1996) (notes on file with author). Concerning the distinction at issue, see HUGH SETON-WATSON, *NATIONS AND STATES: AN ENQUIRY INTO THE ORIGINS OF NATIONS AND THE POLITICS OF NATIONALISM* (1977). See also Bernard Nietschmann, *The Fourth World: Nations versus States*, in *REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE 21ST CENTURY* 225 (George J. Demko & William B. Wood eds., 2d ed. 1999).

¹⁶² *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313, 380. In concluding that the federal government of Canada enjoys a unilateral prerogative to extinguish indigenous rights, the court noted that it had been “unable to find a Canadian case dealing precisely with this subject” and that it would therefore rely on a U.S. judicial interpretation found in *Idaho v. Coffee*, 556 P.2d 1185 (Idaho 1976). See *Ontario v. Bear Island Found.*, [1989] O.R. 2d 394, 412-413, *aff’d*, [1991] S.C.R. 570. The first example of this sort will be found in the 1867 Québec case *Connolly v. Woolrich*, [1867] 17 R.J.R.Q. 75, in which the court, considering the validity of a marriage effected under native tradition for purposes of determining inheritance rights, repeated verbatim a lengthy passage from Marshall’s *Worcester* opinion. See John Hurley, *Aboriginal Rights, the Constitution and the Marshall Court*, 17 *REVUE JURIDIQUE THEMIS* 403 (1983); STAN PERSKY, *DELGAMUUKW: THE SUPREME COURT OF CANADA DECISION ON ABORIGINAL TITLE* (1998).

¹⁶³ At the Berlin Conference of 1884-85, the European powers partitioned Africa in accordance with their own interests on the continent. The resulting demarcation of colonial boundaries conforms rather precisely to borders claimed by most “postcolonial” African states today. See JOHN M. MACKENZIE, *THE PARTITION OF AFRICA, 1880-1900, AND EUROPEAN IMPERIALISM IN THE NINETEENTH CENTURY* 28 (1983) (containing a map of the 1885 colonial boundaries). For background on the Berlin Conference, see THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA, 1876 TO 1912: THE WHITE MAN’S CONQUEST OF THE DARK CONTINENT* (1991). For observations on the outcome(s), see BASIL DAVIDSON, *THE BLACK MAN’S BURDEN: AF-*

This came about during United Nations debates concerning its 1960 Declaration of the Granting of Independence to Colonial Countries and Peoples. Belgium, in the process of relinquishing its grip on the Congo, advanced the thesis that if terms like decolonization and self-determination were to have meaning, the various “tribal” peoples whose homelands it had forcibly incorporated into its colony would each have to be accorded the right to resume independent existence. Otherwise, the Belgians argued, colonialism would simply be continued in another form, with the indigenous peoples involved arbitrarily subordinated to a centralized authority presiding over a territorial dominion created not by Africans but by Belgium itself.¹⁶⁴ To this, European-educated Congolese insurgents like Patrice Lumumba, backed by their colleagues in the newly-emergent Organization of African Unity (OAU), counterpoised what is called the “Blue Water Principle,” that is, the idea that to be considered a bona fide colony—and thus entitled to exercise the self-determining rights guaranteed by both the Declaration and the U.N. Charter—a country or people had to be separated from its colonizer by at least thirty miles of open ocean.¹⁶⁵

Although the Blue Water Principle made no more sense during the early 1960s than it had when Justice Smith Thompson rebutted John Marshall’s initial iteration of it in 1831, it was quickly embraced by U.N. member states and Third World revolutionary movements alike.¹⁶⁶ For the member states, whether capitalist (First World) or socialist (Second World), adoption of the princi-

ERICA AND THE CURSE OF THE NATION-STATE (1992); ANTHONY D. SMITH, *STATE AND NATION IN THE THIRD WORLD: THE WESTERN STATE AND AFRICAN NATIONALISM* 124-35 (1983).

¹⁶⁴ The “Belgian Thesis,” as it was called, had been articulated for more than a decade prior to the U.N. debate. See, e.g., FOREIGN MINISTRY OF BELGIUM, *THE SACRED MISSION OF CIVILIZATION: TO WHICH PEOPLES SHOULD THE BENEFIT BE EXTENDED?* (1953).

¹⁶⁵ On the Blue Water Principle itself, see Roxanne Dunbar Ortiz, *Protection of American Indian Territories in the United States: Applicability of International Law*, in *IRREDEEMABLE AMERICA*, *supra* note 111, at 247, 260-61. For insights on the eurocentrism of the logic guiding Lumumba and his counterparts, see Partha Chatterjee, *Nationalism as a Problem in the History of Political Ideas*, in *NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE* 1 (1986).

¹⁶⁶ Indeed, some Third Worlders felt that both the principle and its OAU endorsers did not go far enough. Rather than simply preserving the individuated-state structure inherited from European colonialism, Pan-Africanists like Kwame Nkrumah sought to forge a single continental “megastate” along the lines of the U.S. or the USSR. See ELENGA M’BUYINGA, *PAN-AFRICANISM OR NEO-COLONIALISM: THE BANKRUPTCY OF THE O.A.U.* (Michael Pallis trans., Zed Press 1982) (1975);

ple served to consecrate the existing disposition of their “internal” territoriality, irrespective of how it may have been obtained. For the Third World’s marxian revolutionaries, it offered the same prospect, albeit quite often with regard to positions of “post-colonial” state authority to which they were at the time still aspiring.¹⁶⁷ For either side to acknowledge that a “Fourth World” comprised of indigenous nations¹⁶⁸ might possess the least right to genuine self-determination would have been, and remains, to dissolve the privileged status of the state system to which both sides are not only conceptually wedded but owe their very existence.¹⁶⁹

The stakes embodied in this denial are staggering. There are twenty different indigenous peoples along the peninsula British colonizers called Malaya (now Malaysia), 380 in “post-colonial” India, and 670 in the former Dutch/Portuguese colony of Indonesia.¹⁷⁰ In South America, the numbers range from thirty-five in Ecuador to 210 in Brazil.¹⁷¹ There are scores, including such large nationalities as the Yi, Manchus and Miao, encapsulated within the Peoples Republic of China.¹⁷² In Vietnam, two dozen-odd “montagnard tribes” of the Annamese Cordillera have been unwillingly subsumed under authority of what the Vietnamese constitution unilaterally proclaims “a multinational state.”¹⁷³

KWAME NKRUMAH, *NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM* (Int’l Publishers, 1966) (1965).

¹⁶⁷ See NATIONAL LIBERATION: REVOLUTION IN THE THIRD WORLD (Norman Miller & Roderick Aya, eds., 1971). More theoretically, see Ward Churchill, *False Promises: An Indigenist Examination of Marxist Theory and Practice*, in CHURCHILL, *ACTS OF REBELLION*, *supra* note 155, at 247.

¹⁶⁸ See generally Nietschmann, *supra* note 161; GEORGE MANUEL & MICHAEL POSLUNS, *THE FOURTH WORLD: AN INDIAN REALITY* (1974). At least one writer has referred to the Fourth World as being a “Host World” upon which the other three have been constructed. Winona LaDuke, *Preface: Natural to Synthetic and Back Again*, in *Marxism and Native Americans*, at i (Ward Churchill ed., 1983).

¹⁶⁹ See FRANZ SCHURMANN, *THE LOGIC OF WORLD POWER* (1974); JACQUELINE STEVENS, *REPRODUCING THE STATE* (1999).

¹⁷⁰ Nietschmann, *supra* note 161, at 240.

¹⁷¹ *Id.* For background, see GREG URBAN & JOEL SHERZER, *NATION STATES AND INDIANS IN LATIN AMERICA* (1991).

¹⁷² For a partial overview, see June Tenfel Dryer, *The Problem of Nationality: China’s Quest for a Socialist Solution*, in *PROBLEMS OF COMMUNISM* 51 (1975), reprinted in WALKER CONNOR, *THE NATIONAL QUESTION IN MARXIST-LENINIST THEORY AND STRATEGY* 70 (1984) (referring to a map of China’s “minority nationalities”).

¹⁷³ *Id.* at 116. For more on the Montagnards, see generally CHURCHILL, *ACTS OF REBELLION*, *supra* note 155, at 247.

The same situation prevails for the Hmongs of Laos.¹⁷⁴ Not only the Chechens of the south but at least three-dozen smaller northern peoples remain trapped within the Russian rump state resulting from the breakup of the Soviet Union.¹⁷⁵ In Iraq and Turkey, there are the Kurds;¹⁷⁶ in Libya and Morocco, the Bedouins of the desert regions.¹⁷⁷ Throughout sub-Saharan Africa, hundreds more, many of them partitioned by borders defended at gunpoint by statist régimes, share the circumstance of the rest.¹⁷⁸ Similar situations prevail in every quarter of the earth.¹⁷⁹

Observed from this standpoint, it's easy enough to see why no state, regardless of how bitterly opposed it might otherwise be to the United States, has been—or could be—willing to attack the U.S. where it is most vulnerable. The vulnerability being decidedly mutual, any precedent thus established would directly contradict the attacking state's sense of self-preservation at the most fundamental level. Hence, the current process of militarily-enforced politico-economic “globalization”¹⁸⁰—world imperialism, by any other name¹⁸¹—must be viewed as a collaborative en-

¹⁷⁴ See generally Glenn T. Morris & Ward Churchill, *Between a Rock and a Hard Place: Left-Wing Revolution, Right-Wing Reaction and the Destruction of Indigenous Peoples*, 11 CULTURAL SURVIVAL Q. 17 (1988).

¹⁷⁵ On Chechnya, see Bradford L. Thomas, *International Boundaries: Lines in the Sand (and Sea)*, in REORDERING THE WORLD, *supra* note 161, at 72. With respect to the smaller peoples, see *Indigenous Peoples of the Soviet North*, IWGIA Doc. No. 67 (July 1990). On the nations which gained a measure of genuine independence as a result of the Soviet breakup, see HÉLÈNE CARRÈRE D'ENCAUSSE, *THE END OF THE SOVIET EMPIRE: THE TRIUMPH OF THE NATIONS* (Franklin Phillip trans., 1993); *THE POST-SOVIET NATIONS: PERSPECTIVES ON THE DEMISE OF THE USSR* (Alexander J. Motyl ed., 2d ed. 1992).

¹⁷⁶ See generally *A PEOPLE WITHOUT A COUNTRY: THE KURDS AND KURDISTAN* (Gerard Chaliand ed., 2d ed. 1993).

¹⁷⁷ JONATHAN BEARMAN, *QADHAFT'S LIBYA* (1986); TONY HODGES, *WESTERN SAHARA: THE ROOTS OF A DESERT WAR* (1983).

¹⁷⁸ See generally 9 CULTURAL SURVIVAL Q. (1985) (a special-focus issue entitled *Nation, Tribe and Ethnic Group in Africa*). See also MALCOLM N. SHAW, *TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES* (1986).

¹⁷⁹ SADRUDDIN AGA KHAN & HASSAN BIN TALAL, *INDIGENOUS PEOPLES: A GLOBAL QUEST FOR JUSTICE* (1987); JULIAN BURGER, *REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES* (1987).

¹⁸⁰ See RICHARD FALK, *PREDATORY GLOBALIZATION: A CRITIQUE* (1999). See also James H. Mittleman, *How Does Globalization Really Work?*, in *GLOBALIZATION: CRITICAL REFLECTIONS* 229 (James H. Mittleman ed., 1997); See generally *GLOBALIZATION: CRITICAL REFLECTIONS* (James H. Mittleman ed., 1997).

¹⁸¹ See FRANK FÜREDI, *THE NEW IDEOLOGY OF IMPERIALISM: RENEWING THE MORAL IMPERATIVE* (1994); see also JAMES PETRAS & HENRY VELTMAYER, *GLOBALIZATION UNMASKED: IMPERIALISM IN THE 21ST CENTURY* (Douglas Beall ed., 2001); ASH NARAIN ROY, *THE THIRD WORLD IN THE AGE OF GLOBALIZATION:*

deavor, involving even those states which stand to suffer most as a result (and which have therefore been most vociferously critical of it). It follows that genuine and effective opposition can only accrue from locations outside “official” venues, at the grassroots, among those who understand their interests as being antithetical, not only to globalization, per se, but to the entire statist structure upon which it depends.¹⁸²

VI

RETURNING THE LAW TO ITS FEET

It's not that native peoples are especially accepting of their lot, as has been witnessed by such bloody upheavals as Katanga and Biafra since 1960.¹⁸³ In 1987, cultural anthropologist Bernard Nietschmann conducted a global survey in which he discovered that of 125 armed conflicts occurring at the time, fully eighty-five percent—amounting to a “third world war,” in his view—were being fought between indigenous nations and states claiming an inherent right to dominate them.¹⁸⁴ Among the sharper clashes have been the ongoing guerrilla struggles waged by the Kurds,¹⁸⁵ the Nagas of the India/Burma border region,¹⁸⁶ the southern Karens and northern Kachens of Burma (Myanmar),¹⁸⁷ the Tamils of Sri Lanka (formerly Ceylon),¹⁸⁸ the Pacific islanders of

REQUIEM OR NEW AGENDA? (1999). See generally ALBERT SZYMANSKI, *THE LOGIC OF IMPERIALISM* 123-216 (1981).

¹⁸² For an interesting iteration of more-or-less the same perception, see GUSTAVO ESTEVA & MADHU SURI PRAKASH, *GRASSROOTS POSTMODERNISM: REMAKING THE SOIL OF CULTURES* (1998). See also JOHN ZERZAN, *ELEMENTS OF REFUSAL* (2d ed. 1999).

¹⁸³ See, e.g., JULES GERARD-LIBOIS, *KATANGA SECESSION* (Rebecca Young trans., The Univ. of Wis. Press 1966) (1963); HERBERT EKWE ELWE, *THE BIAFRA WAR: NIGERIA AND THE AFTERMATH* (1990); CHUCKUEMEKA ODUMEGWE DJUKWU, *BIATRA* (1969).

¹⁸⁴ Bernard Nietschmann, *The Third World War*, 11 *CULTURAL SURVIVAL Q.* 1 (1987).

¹⁸⁵ See generally *A PEOPLE WITHOUT A COUNTRY*, *supra* note 176.

¹⁸⁶ See ISAK CHISI SWU & TH. MUIVA, *FREE NAGALAND MANIFESTO* (1993). See generally 13 *CULTURAL SURVIVAL Q.* (1989) (a special-focus issue entitled *India: Cultures in Crisis*).

¹⁸⁷ See Edith T. Mirante, *Ethnic Minorities of the Burma Frontiers and Their Resistance Organizations*, in *SOUTHEAST ASIAN TRIBAL GROUPS AND ETHNIC MINORITIES* 59 (1987). See also 13 *CULTURAL SURVIVAL Q.* (1980) (a special-focus issue devoted to the situation in Burma).

¹⁸⁸ *The Tamils in Sri Lanka*, *IWGIA Newsletter* (Int'l Work Group for Indigenous Affairs, Copenhagen, Den.), Aug. 1989, at 10. See also LAKSHMANAN SABARATNAM, *ETHNIC ATTACHMENTS IN SRI LANKA* (2002).

Belau, Fiji and elsewhere,¹⁸⁹ the so-called Moro peoples of the southern Philippines,¹⁹⁰ the Timorese and Papuans of Indonesia,¹⁹¹ as well as the Miskito and other native peoples of Nicaragua's Atlantic coast.¹⁹² To this list may now be added the series of revolts in Chechnya¹⁹³ and the recent Mayan insurgency in the Mexican province of Chiapas.¹⁹⁴

The list extends as well to the venerable states of western Europe. In Spain, the Basques, and to a lesser degree the Catalans, have been waging a protracted armed struggle to free themselves from incorporation into a country of which they never consented to be a part.¹⁹⁵ In France, aside from the Basques around Navarre, there are the Celtic Bretons of the Channel coast.¹⁹⁶ The Irish are continuing their eight-century-long military campaign to reclaim the whole of their island,¹⁹⁷ while, on the "English Isle" itself, the Welsh, Scots and Cornish—Celtic peoples all—have increasingly taken to asserting their rights to autonomy.¹⁹⁸ So, too, the Celtic Manxmen on the Isle of Mann.¹⁹⁹ Far to the north, the

¹⁸⁹ See DAVID ROBIE, *BLOOD ON THEIR BANNER: NATIONALIST STRUGGLES IN THE SOUTH PACIFIC* (1989).

¹⁹⁰ See JOSEPH COLLINS, *THE PHILIPPINES: FIRE ON THE RIM* 129-202 (1989).

¹⁹¹ See, e.g., JOHN G. TAYLOR, *INDONESIA'S FORGOTTEN WAR: THE HIDDEN HISTORY OF EAST TIMOR* (1991).

¹⁹² See generally BERNARD NIETSCHEMANN, *THE UNKNOWN WAR: THE MISKITO NATION, NICARAGUA, AND THE UNITED STATES* (1989). See also Mottis & Churchill, *supra* note 174.

¹⁹³ For a good overview, see JOHN K. COOLEY, *UNHOLY WARS: AFGHANISTAN, AMERICA AND INTERNATIONAL TERRORISM* 174-84 (2d ed. 2000).

¹⁹⁴ See JOHN ROSS, *THE WAR AGAINST OBLIVION: THE ZAPATISTA CHRONICLES* (2000).

¹⁹⁵ See, e.g., ROBERT P. CLARK, *NEGOTIATING WITH ETA: OBSTACLES TO PEACE IN THE BASQUE COUNTRY, 1975-1988* (William A. Douglas ed., 1990); JOHN SULLIVAN, *ETA AND BASQUE NATIONALISM: A FIGHT FOR EUSKADI 1890-1986* (2d ed. 1988); CYRUS ERNESTO ZIRAKZADEH, *A REBELLIOUS PEOPLE: BASQUES, PROTESTS, AND POLITICS* (William A. Douglas ed., 1991); JOSEBA ZULAIKA, *BASQUE VIOLENCE: METAPHOR AND SACRAMENT* (William A. Douglas, ed., 1988).

¹⁹⁶ On the "French Basques," see PADDY WOODWORTH, *DIRTY WAR, CLEAN HANDS: ETA, THE GAL AND SPANISH DEMOCRACY* 87-99 (2001). On the Bretons, see PETER BERRESFORD ELLIS, *THE CELTIC REVOLUTION: A STUDY IN ANTI-IMPERIALISM* 54-75 (1985).

¹⁹⁷ CIARAN DE BAROID, *BALLYMURPHY AND THE IRISH WAR* (2d ed. 2000); PADRAIG O'MALLEY, *THE UNCIVIL WARS: IRELAND TODAY* (Beacon Press, 1990) (1983).

¹⁹⁸ On the construction of the English domain, see MICHAEL HECTOR, *INTERNAL COLONIALISM: THE CELTIC FRINGE IN BRITISH NATIONAL DEVELOPMENT, 1536-1966* (1975). On the liberation struggle, see ELLIS, *supra* note 196, at 28-53, 76-97, 134-48. See also GWYNFOR EVANS, *FIGHTING FOR WALES* (1991); H.J. HANHAM, *SCOTTISH NATIONALISM* (1969).

¹⁹⁹ ELLIS, *supra* note 196, at 139-64.

Saamis (“Laps”) are also pursuing their right to determine for themselves the relationship of Saamiland (their traditional territory, usually referred to as “Lapland”) vis-à-vis Norway, Sweden, Finland and Russia.²⁰⁰ In Greenland, the primarily Inuit population, having already achieved a “home rule” arrangement with their Danish colonizers, are pushing for full independence.²⁰¹ In Canada, there have been armed insurgencies by native peoples at Oka, Gustafsen Lake and elsewhere, as well as the emergence of a tentatively autonomous Inuit territory called Nunavut.²⁰²

Those who see dismantlement of the present U.S. territorial/power configuration as the pivot point of constructive change are thus presented with the prospect of linking up with a vibrantly global Fourth World liberation movement, one which has never been quelled, and which cannot be satisfied until what Leopold Kohr once called the “breakdown of nations”—by which he actually meant the breakdown of *states*—has been everywhere accomplished.²⁰³ Dire predictions concerning the horrors supposedly attending “the coming anarchy,”²⁰⁴ blink the fact that the hegemony of statism has generated an estimated fifty million corpses from wars alone over the past half-century.²⁰⁵ Adding in those lost to the “underdevelopment” and “diseconomies of scale” inherent to the world system as it is now constituted would increase the body count at least twenty times over.²⁰⁶ Also to be

²⁰⁰ For a map of Saamiland, see *IWGIA Newsletter* (Int'l Work Group for Indigenous Affairs, Copenhagen, Den.), No. 51/52 Oct./Dec. 1987, at 84.

²⁰¹ Jens Dahl, *Greenland: General Election Supports Continuing Decolonization*, *IWGIA Newsletter* (Int'l Work Group for Indigenous Affairs, Copenhagen, Den.), Oct./Dec. 1987, at 41-44.

²⁰² See OLIVE PATRICIA DICKASON, *CANADA'S FIRST NATIONS: A HISTORY OF FOUNDING PEOPLES FROM EARLIEST TIMES 414-15* (1992); JANICE G.A.E. SWITLO, *GUSTAFSON LAKE: UNDER SIEGE: EXPOSING THE TRUTH BEHIND THE GUSTAFSON LAKE STAND-OFF* (1997); GEOFFREY YORK & LOREEN PINDER, *PEOPLE OF THE PINES: THE WARRIORS AND THE LEGACY OF OKA* (1991).

²⁰³ LEOPOLD KOHR, *THE BREAKDOWN OF NATIONS* (1957).

²⁰⁴ See ROBERT D. KAPLAN, *THE COMING ANARCHY: SHATTERING THE DREAMS OF THE POST COLD WAR* (2000). Kaplan and others of his ilk delight in pointing to the bloodbath in the former Yugoslavia as previewing far worse to come, were the statist system to disintegrate. See, e.g., BOGDAN DENITCH, *ETHNIC NATIONALISM: THE TRAGIC DEATH OF YUGOSLAVIA* (1994). Ignored altogether in such analyses are the facts that the animus provoking such bloodletting is a legacy of statist imposition on the one hand, and efforts to reimpose centralized state authority on the other.

²⁰⁵ BENNIS, *supra* note 104, at 274.

²⁰⁶ See, e.g., SAMIR AMIN, *MALDEVELOPMENT: ANATOMY OF A GLOBAL FAILURE* (1990); JAMES D. COCKCROFT ET AL., *DEPENDENCE AND UNDERDEVELOPMENT: LATIN AMERICA'S POLITICAL ECONOMY* (1972); LEOPOLD KOHR, *THE*

considered is the radical and rapidly accelerating truncation of fundamental rights and liberties undertaken by all states—the “freedom-loving” U.S. far more than most of those it condemns as “totalitarian”—in order to concretize and reinforce their imposition of centralized authority.²⁰⁷ As well, the massive and unprecedented degree of cultural “leveling” entailed in the systematic and state-anchored transnational corporate drive to rationalize production and unify markets the world over.²⁰⁸

Rectifying John Marshall’s seminal inversion of international legal principle—negating his negation, so to speak²⁰⁹—and thus “returning the law to its feet”²¹⁰ would serve to undermine one of the most potent components of the master narrative through which statism and its imperial collaterals have been presented as though they were natural, inevitable and somehow beneficial to all concerned.²¹¹ General exposure, in their own terms, of the

OVERDEVELOPED NATIONS: THE DISECONOMIES OF SCALE (Schocken Books 1978) (1977); NEIL SMITH, UNEVEN DEVELOPMENT: NATURE, CAPITAL AND THE PRODUCTION OF SPACE (1984). See generally IAN ROXBOROUGH, THEORIES OF UNDERDEVELOPMENT (1979).

²⁰⁷ See FRANK HARRISON, THE MODERN STATE: AN ANARCHIST ANALYSIS (1983); CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS (1999); ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (Univ. of Cal. Press 1998) (1970).

²⁰⁸ As Antonio de Nebrija famously put it in 1492, language might be seen as “a perfect companion to empire” in the sense that the colonizer’s imposition of his own tongue upon the colonized would serve to undermine the latter’s cultural integrity and concomitant capacity to resist subordination. See PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE’S CONQUEST OF THE NEW WORLD, 1492-1640, at 8 (1995). By the 1880s, linguistic imposition had progressed to a program of systematically supplanting indigenous languages. See, e.g., DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928, at 137-42 (1995) (estimating that today, fully half the world’s 6,000-odd languages are in danger of disappearance within the next few years, and half the remainder over the coming generation); MARTIN CARNOY, EDUCATION AS CULTURAL IMPERIALISM 69-72 (1974).

²⁰⁹ See MICHAEL ALBERT & ROBIN HAHNEL, UNORTHODOX MARXISM: AN ESSAY ON CAPITALISM, SOCIALISM AND REVOLUTION 14-16 (1978).

²¹⁰ Glenn T. Morris, Lecture at Alfred University (Oct. 14, 1990) (tape on file with author).

²¹¹ On the concept of “Master Narratives”—also known as “Great” or “Grand” Narratives, as well as “metanarratives,” see FREDRIC JAMESON, POLITICAL UNCONSCIOUS: NARRATIVE AS SOCIALLY SYMBOLIC ACT (1981). In the sense the term is used here, it figures into the Gramscian notion of hegemony. See WALTER L. ADAMSON, HEGEMONY AND REVOLUTION: A STUDY OF ANTONIO GRAMSCI’S POLITICAL AND CULTURAL THEORY 170-79 (1980); Judith Butler, *Restaging the Universal: Hegemony and the Limits of Formalism*, in JUDITH BUTLER ET AL., CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT 11 (2000).

falsity intrinsic to such “truths” stands to evoke a “legitimation crisis” of such proportions and intractability that the statist system could not sustain itself.²¹² This “end of world order”²¹³—or, more accurately, transformative reordering of international relations²¹⁴—in favor of a devolution of state structures into something resembling the interactive clusters or federations of “mini-nationalisms”²¹⁵ which were the norm before the advent of European hegemony,²¹⁶ restoring human scale and bioregional sensibility to the affairs of peoples, can only be seen as a positive trajectory.²¹⁷

Putting a name to it is a more difficult proposition, however. Insofar as its thrust centers in a wholesale (re)assertion of the rights of Fourth World peoples, such a path might correctly be depicted as an “indigenist alternative.”²¹⁸ Still, given that so sweeping a reconfiguration of humanity’s relationship with itself and its habitat must encompass those who are of the Fourth World in neither identity nor present orientation, the old standby of “anarchism” might well prove a more apt descriptor.²¹⁹ Regardless of its labeling, the result will inevitably be far more just, and thus more liberatory, than that it will replace. And to that we might *all* aspire.

²¹² JÜRGEN HABERMAS, *LEGITIMATION CRISIS* (1973).

²¹³ Richard Falk, *Political Prospects, Cultural Choices, Anthropological Horizons*, in *THE END OF WORLD ORDER: ESSAYS IN NORMATIVE INTERNATIONAL RELATIONS* 315 (Richard Falk ed., 1983).

²¹⁴ See, e.g., David B. Knight, *People Together, Yet Apart: Rethinking Territory, Sovereignty, and Identities*, in *REORDERING THE WORLD*, *supra* note 161, at 209-26.

²¹⁵ LOUIS L. SNYDER, *GLOBAL MINI-NATIONALISMS: AUTONOMY OR INDEPENDENCE?* (1982).

²¹⁶ JANET L. ABU-LUGHOD, *BEFORE EUROPEAN HEGEMONY: THE WORLD SYSTEM A.D. 1250-1350* (1989). For an overview of the transition to the current world system, see WALLERSTEIN, *supra* note 160; *CONQUEST AND COALESCENCE: THE SHAPING OF THE STATE IN EARLY MODERN EUROPE* (Mark Greenglass ed., 1991).

²¹⁷ KIRKPATRICK SALE, *DWELLERS IN THE LAND: THE BIOREGIONAL VISION* (1991); KIRKPATRICK SALE, *HUMAN SCALE* (1980).

²¹⁸ See 2 *THE INDIGENOUS VOICE: VISIONS AND REALITIES* (Roger Moody ed., 1988).

²¹⁹ See Richard Falk, *Anarchism and World Order*, in *END OF WORLD ORDER*, *supra* note 213, at 277-98. See also HARVEY STARR, *ANARCHY, ORDER, AND INTEGRATION: HOW TO MANAGE INTERDEPENDENCE* (1999). For a more concrete exploration of how an anarchist arrangement of international relations might look in practice, see JUAN GÓMEZ CASAS, *ANARCHIST ORGANIZATION: THE HISTORY OF THE F.A.I.* (Abe Bluestein trans., 1986).