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The Widening Gyre: Legal Formalism and International Law's Sense of Place

Christopher R. Rossi

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The Widening Gyre: Legal Formalism and International Law's Sense of Place

Cover Page Footnote

Christopher Rossi teaches international law at the University of Iowa Law College

THE WIDENING GYRE: LEGAL FORMALISM AND INTERNATIONAL LAW'S SENSE OF PLACE

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I. INTRODUCTION

Amid the dense forest and 120 villages that spread across the Rayagada and Kalahandi districts of the Niyamgiri Hills in southwestern Odisha, India, reside the 10,000 members of the Dongria Kondh. They are a small community of horticultural mountain dwellers who hold sacred the mountain and its deity, Niyam Raja (“the giver of law”).¹ They inhabit a 250-square kilometer area known for its unadulterated landscapes and pure streams.² They are an ancient people, and references to them appear in the Hindu myths and classics, notably the *Purānas* (Sanskrit: पुराण).³ The Indian government regards them as one of the country’s few Particularly Vulnerable Tribal Groups.⁴ They refer to themselves as *Jharma*, the protectors of the stream.⁵

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1 Kundan Kumar, *The Sacred Mountain: Confronting Global Capital at Niyamgiri*, 54 GEOFORUM 196, 196 (2014).

2 MEENAL TATPATI ET AL., THE NIYAMGIRI STORY: CHALLENGING THE IDEA OF GROWTH WITHOUT LIMITS? 5 (2016).

3 Sanjeeta Kumari Devi, *Socio-Economic Status of the Dongria Kondhs: A Primitive Tribal Group of Niyamgiri Hillis in Eastern Ghats of Orissa*, 2 INT’L J. RSCH. 60, 63 (2016).

4 Gandham Bulliyya, *Ethnographic and Health Profile of the Dongria Kondh: A Primitive Tribal Group of Niyamgiri Hills in Eastern Ghats of Orissa*, 1 AFRO ASIAN J. ANTHROPOLOGY & SOC. POL’Y 11, 15 (2010). India has over 700 official (“scheduled”) tribes and the largest number (sixty-two) inhabit Odisha (formerly Orissa). *National Commission for Scheduled Tribes*, GOVERNMENT OF INDIA, <https://ncst.gov.in/content/frequently-asked-questions>. In addition to the Dongria Kondh, Orissa has twelve other Particularly Vulnerable Tribal Groups (formerly called Primitive Tribal Groups), the highest number in India. *See Other Information Relating to Tribals: Name of Particularly Vulnerable Tribal Groups (PTGS) (Earlier Called as Primitive Tribal Groups)*, <https://ncst.gov.in/content/other-information-relating-tribals> (last visited Dec. 9, 2020).

5 *See* Anurag Mallick & Priya Ganapathy, *The Tribes of Odisha*, OUTLOOK TRAVELLER (Nov. 7, 2017), <https://www.outlookindia.com/traveller/ot-getaway-guides/the-tribes-of-odisha/> (noting their name is derived from “dongar,” meaning “mountain;” however, they refer to themselves as *Jharnia*, meaning “protectors of the stream.”).

In 2003, a legal controversy arose when the London-based conglomerate Vedanta Aluminum Limited signed a Memorandum of Understanding with Odisha officials to construct an alumina refinery at the mountain's base.⁶ The plan included an open-pit, three million ton per annum, bauxite mining operation atop the sacred mountain and a seventy-five megawatt coal-based power plant to smelt the ore.⁷ India is one of the world's leading bauxite producers, and the state of Odisha is India's leading producer of this ore.⁸ Bauxite is the principal ore of aluminum and is one of the world's most important non-ferrous metals.⁹ It is intensively used throughout modern industry.¹⁰

On April 18, 2013, the Supreme Court of India rendered judgment in a contentious land use case, which has obvious environmental and human rights implications.¹¹ A lower court concluded that the construction work undertaken by the petitioner began "without obtaining environmental clearance," violating environment impact assessment notification provisions of India's Environment (Protection) Act.¹² The Supreme Court affirmed the finding¹³ and prevented the corporation from mining bauxite.¹⁴ Its judgment also focused on the rights of indigenous peoples ("Scheduled Tribes") and "Traditional Forest Dwellers." Reviewing constitutional definitions of such peoples,¹⁵ the Court recognized their "very old" and "well defined" status,¹⁶ agrarian livelihood,¹⁷ and "great emotional attachments to their lands."¹⁸ The Court observed that "[l]and is their most important natural and valuable asset and imperishable endowment from which the tribal derive their sustenance, social status, economic and social equality, permanent place of abode, work and living."¹⁹ The Court held that the relevant statute in question, India's Forest Rights Act (2006), did not merely pertain to property rights or areas of habitation; it widened to include social welfare provisions that protected the customary rights of forest dwellers "to use forest land as a community forest resource."²⁰

6 Anjali George, *Claiming Niyamgiri: The Dongria Kondh's Struggle Against Vedanta*, RITIMO (Dec. 18, 2014), <https://www.ritimo.org/Claiming-Niyamgiri-the-Dongria-Kondh-s-Struggle-against-Vedanta>.

7 *Id.* (recounting the tribe's dispute with the mining company).

8 *Bauxite*, INDIAN MINERALS YEARBOOK 2017 3-2, 3-10 (56th ed. 2018), [https://ibm.gov.in/writereaddata/files/06262018131044Bauxite\(AR\)2017.pdf](https://ibm.gov.in/writereaddata/files/06262018131044Bauxite(AR)2017.pdf). For general information, see *National Commission for Scheduled Tribes*, GOVERNMENT OF INDIA, <https://ncst.nic.in/>.

9 Hobart M. King, *Bauxite*, GEOLOGY.COM (2020), <https://geology.com/minerals/bauxite.shtml> (discussing bauxite, its composition and properties, and industrial uses).

10 *Id.*

11 *Orissa Mining Corp. Ltd. v. Ministry of Env't & Forest & Others*, (2013) W.P.(C) No. 180/2011 (India), available at <https://indiankanoon.org/doc/153831190/> [hereinafter *Orissa Mining*]. For a report on the environmental impact of the mining operation produced by India's Central Empowered committee, which reports to the Indian Supreme Court to monitor regulations on hazardous waste and complaints about environmental waste, see CENTRAL EMPOWERED COMMITTEE, REPORT IN IA NO. 1324 REGARDING THE ALUMINA REFINERY PLANT BEING SET UP BY M/S VENDANTA ALUMINA LIMITED AT LANJIGARH IN KALAHANDI DISTRICT, ORISSA, (Sept. 21, 2005), <http://www.indiaresource.org/issues/globalization/2005/CECSep2005cancellicense.html>.

12 See *Orissa Mining*, *supra* note 11, at ¶¶ 2, 11, 43.

13 *Id.* at ¶ 30.

14 *Id.*

15 *Id.* at ¶ 31 (discussing arts. 366(25) and 342 of the Indian Constitution).

16 *Id.* ¶ 49 (iii) (d).

17 *Id.* ¶ 33.

18 See *Orissa Mining*, *supra* note 11, at ¶ 33.

19 *Id.*

20 *Id.* ¶ 43.

The Court remanded the case to the State of Orissa to place the bauxite mining project before the Gram Sabhas,²¹ or surrounding village assemblies, to determine if the project, “in any way, affects their religious [and cultural] rights . . . in the hills top of the Niyamgiri range.”²² Within three months, all 12 Gram Sabhas had voted against the mining project, foreclosing Vedanta’s bauxite mining plans atop Niyamgiri Mountain, sparking David and Goliath comparisons²³ and vindicating the Dongria Kondh in their decade-long dispute with global capitalism.

Their cause attracted world-wide attention and support.²⁴ Amnesty International hailed the decision as a “landmark victory” recognizing indigenous rights in India.²⁵ Norway’s trillion-dollar Government Pension Fund²⁶ excluded Vedanta as an investment option “due to unacceptable risk of complicity” involving “environmental damage and systemic human rights violations.”²⁷ The Church of England divested holdings in the company following complaints to the British government under the Organization of Economic Co-operation and Development guidelines for multinational companies.²⁸

The international and comparative legal implications of this dispute may be hard to extrapolate from Indian constitutional law, which embraces a variant of federalism that is based on asymmetric relationships.²⁹ The dynamics of India’s

21 *See id.* ¶¶ 58–63.

22 *Id.* ¶ 58. For reference to consideration of cultural claims, see *id.* ¶ 59.

23 Sophie Boehm & Carole Excell, *The Man Who Stopped the Mine. Q&A with Prafulla Samantara, 2017 Goldman Environmental Prize Winner*, WORLD RESOURCES INSTITUTE (Apr. 24, 2017), <https://www.wri.org/blog/2017/04/man-who-stopped-mine-qa-prafulla-samantara-2017-goldman-environmental-prize-winner> (referencing the comparison to the battle between David and Goliath).

24 See Samantha Balaton-Chrimes, *Desiring the Other and Decolonizing Global Solidarity: Time with and Space in the Anti-Vedanta Campaign*, 10 HUMANITY J. 239, 239 (Aug. 3, 2019), (assessing Survival Internationals’ worldwide campaign to support the Dongria Kondh struggle to prevent the conglomerate from acquiring their sacred mountain); Kumar, *supra* note 1, at 202 (charting the key actors, activists, and organizations aligned to assist the Niyamgiri struggle).

25 *India: Landmark Supreme Court Ruling a Great Victory for Indigenous Rights*, AMNESTY INT’L (Apr. 18, 2013), <https://www.amnesty.org/en/latest/news/2013/04/india-landmark-supreme-court-ruling-great-victory-indigenous-rights/>.

26 NORGES BANK INVESTMENT MGMT., <https://www.nbim.no/> (last visited Dec. 9, 2020). The fund was established in 1969 to manage the wealth benefits of revenue generated by Norway’s oil and gas resources and is currently valued at more than \$1.12 trillion (10,000 billion kroner).

27 COUNCIL OF ETHICS, GOVERNMENT PENSION FUND-GLOBAL, RECOMMENDATION OF MAY 15, 2007 38–39 (2007), https://www.banktrack.org/download/recommendations_on_vedanta/recommendation_vedanta.pdf.

28 See Jo Woodman, *India’s Rejection of Vedanta’s Bauxite Mine is a Victory for Tribal Rights*, THE GUARDIAN (Jan. 14, 2014), <https://www.theguardian.com/global-development/poverty-matters/2014/jan/14/india-rejection-vedanta-mine-victory-tribal-rights> (discussing the precedential value and effects of the landmark decision).

29 In *S.R. Bommai v. Union of India*, (1994) 3 SCC (Jour) 1, ¶ 15, India’s Supreme Court recognized the United States as a model for federal structure. However, Article 3 of India’s Constitution allowed for asymmetries between the Union and its respective states due to circumstances substantially different “from the federal set-up established in the [U.S.]” *Id.* at ¶ 16. “‘Asymmetric federalism’ is understood to mean federalism based on unequal powers and relationships in political, administrative and fiscal arrangements spheres between the units constituting [India’s] federation.” M. Govinda Rao & Nirvikar Singh, *Asymmetric Federalism in India* 2–3 (U.C. Santa Cruz Int’l Econ., Working Paper No. 04-08, 2004). On the importance of asymmetric federalism as a tool for societal coherence in India, see Louise Tillin, *United in Diversity? Asymmetry in Indian Federalism*, 31 J. FEDERALISM 45 (2006). India’s sudden repeal of Art. 370 in August 2019 in the disputed region of Jammu and Kashmir has sparked a keen constitutional debate. For general background on Jammu and Kashmir’s former special (asymmetric) status, see Sonia Dasgupta, *Article 370: An Example of Asymmetrical Federalism?*, 11 NUALS L.J. 27 (2017).

internal or domestic complexity, not international law itself, engineered this decision. However, questions of transnational resource management, neoliberal economics, globalization, human rights, and domestic and international social mobilization dynamics—all questions involving international law—pervaded the case and intersected with the proceedings.

While problems of transnational globalization focus much attention on the emerging rights of indigenous peoples, this conversation also implicates neoliberalism and its market-based influences on development economics, extraction politics, and emerging economies.³⁰ The incorporation of indigenous protections may result in a dramatic restructuring of international law. The 2007 United Nations (UN) Declaration on the Rights of Indigenous Peoples indicates this movement is underway.³¹ However, such restructuring has been described as “explosive” given “the ever-expanding economic role of transnational enterprises as part of the emergence of global capitalism.”³²

James Anaya, the former UN Special Rapporteur on the Rights of Indigenous Peoples, recognized “[t]he growing awareness of the actual or potential negative impact of industry operations on the rights of indigenous peoples.” However, he labeled “natural resource extraction and other development projects on or near indigenous territories . . . [as] possibly the most pervasive source of the challenges to the full exercise of their rights.”³³ Embedded in these tensions is international law’s collision course with the question of place.

This article recognizes the often-discussed neoliberal implications of transglobalism. However, it focuses on the lesser considered place-based factor that affects international law’s construction. The diminishment of human spatial geography in the development of international law continues to weigh down the expression of human and indigenous rights, overshadowed as it often is by extraction politics.

The place-based rise of challenges to exploitative resource development suggests an important, interactive turn in the sociological development of international law, a turn increasingly associated with international law’s spatial construction. The Dongria Kondh campaign represents an emblematic grassroots resistance movement that stretches across the transnational resource-extraction map. As dramatic as the Dongria Kondh’s victory may have been, its world-wide impact remains in question. Domestic and international legal systems currently confront numerous conflicts involving extraction politics, land use issues, and indigenous rights.³⁴ Notable struggles include Kalinga and

30 See generally THE ROAD FROM MONT PÉLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE (Philip Mirowski & Dieter Plehwe eds., 2009) (presenting essays on salon-styled neoliberal outgrowth of the Mont Pèlerin Society and the voluntarist advantages of open society as opposed to statist versions of interventionism).

31 See G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (2007), <https://undocs.org/A/RES/61/295> (recognizing, inter alia, “the urgent need to respect and promote the inherent rights of indigenous peoples . . . especially their rights to their lands, territories and resources”).

32 Joshua Kleinfeld, *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV. 1755, 1755 (2016).

33 James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries Operating Within or Near Indigenous Territories*, ¶ 55–56, U.N. Doc. A/HRC/18/35 (July 11, 2011).

34 Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Aust.), 1992 I.C.J. REP. 240 (Preliminary Objections, Judgment) (concerning violations pertaining to the U.N. Trusteeship system

Bontok protests against the Chico River Basin Development Project in the Philippines, Wet'suwet'en responses to the tar sands and gas pipelines project in British Columbia, Guarani resistance to commercial plantations in Brazil, Wajan and Jagalingou efforts to prevent coal mining in Australia,³⁵ Mapuche resistance to water diversion projects in Chile,³⁶ Queche struggles against mineral extraction in the Andean Cone,³⁷ the confederated Native opposition to the Dakota Access Pipeline across burial grounds of the Standing Rock Sioux Nation,³⁸ and the Inuit Circumpolar Council's protest declaration against the Ilulissat signatories' self-professed stewardship of Arctic terrain and waters.³⁹

These samplings of the domestic and transnational consequences of Native movements highlight a growing awareness of indigenous rights as a prominent, relatively recent resistance movement in international law,⁴⁰ and the growing normative and conventional legal emphasis on place-based peoples.⁴¹ These samplings also evidence the continuing challenges to the idea of place, or what the humanities describes as a sense of place.

This article investigates the persistence of this problem. It argues that international law's organization of nineteenth century space informs the

and principles of self-determination based on environmental damage claims brought by the Republic of Nauru against Australian phosphate extraction). The parties later reached a settlement and discontinued the proceedings. *Certain Phosphate Lands in Nauru* (Nauru v. Aust.), 1993 I.C.J. Rep. 322, 322–23 (Discontinuance Order of Sept. 13, 1993). For a discussion linking the Nauruan claim to indigenous rights, see Antony Anghie, *"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445, 485–90 (1993).

35 See Tattapati, *supra* note 2, at 2.

36 See Diane Haughney, *Defending Territory, Demanding Participation: Mapuche Struggles in Chile*, 39 LAT. AM. PERSP. 201, 207–10 (2012) (discussing the indigenous people's campaigns against conglomerate hydroelectric projects).

37 See Helle Abelvik-Lawson, *Indigenous Environmental Rights, Participation and Lithium Mining in Argentina and Bolivia: A Socio-Legal Analysis* 35 (May 2019) (Ph.D. dissertation, University of Essex).

38 Amber Penn-Roco, *Standing Rock and the Erosion of Tribal Rights*, 73 NAT'L LAW. GUILD REV. 176, 176 (2016) (involving more than 100 tribes).

39 Art. 2 (2.6), A Circumpolar Inuit Declaration on Sovereignty in the Arctic, Apr. 2009, available at <https://iccalaska.org/wp-icc/wp-content/uploads/2016/01/Signed-Inuit-Sovereignty-Declaration-11x17.pdf>. (accusing the five coastal Arctic states—Norway, Denmark (Greenland), Canada, U.S., and Russia—with negligence). See also Sophie Theriault, *Northern Frontier, Northern Homeland: Inuit People's Food Security in the Age of Climate Change and Arctic Melting*, 15 SW. J. INT'L L. 223, 243 n.90 and accompanying text (discussing the meeting in Nunavik leading up to the Declaration).

40 Alexandra Xanthaki, *Indigenous Rights in International Law Over the Last 10 Years and Future Developments*, 10 MELB. J. INT'L L. 27, 27 (2009). On the acceleration of indigenous rights issues beginning in the 1970s, see Adolfo de Oliveira, *Introduction: Decolonising Approaches to Indigenous Rights*, in *DECOLONISING INDIGENOUS RIGHTS* 1, 3 (Adolfo de Oliveira ed. 2009); Peter Jull, *The Politics of Sustainable Development*, in *INDIGENOUS PEOPLES: RESOURCE MANAGEMENT & GLOBAL RIGHTS* 21, 25–7 (Svein Jentoft et al., eds. 2003) (discussing the rise of indigenous internationalism beginning in 1973); Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 414 (1998) (noting the transformative significance of "indigenous peoples" since the early 1970s); BRADLEY REED HOWARD, *INDIGENOUS PEOPLES AND THE STATE: THE STRUGGLE FOR NATIVE RIGHTS* 95 (2003) (discussing the early 1970s separation of the category of "indigenous populations" from that of "minorities"); Hurst Hannum, *New Development in Indigenous Rights*, 28 VIRGINIA J. INT'L L. 649, 649–50 (1988) (discussing more aggressive assertions of indigenous rights in the 1980s).

41 See U.N. Declaration on Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); International Labour Organization Convention (No. 169), Concerning Indigenous and Tribal Peoples in Independent Countries, June 28, 1989, 1650 U.N.T.S. 383, entered into force Sept. 5, 1991 (revising ILO Convention 107 on Indigenous and Tribal Populations); U.N. Doc. A/Res/51/78 (Feb. 25, 1997) (deciding to include activities agenda establishing the International Decade of the World's Indigenous People).

discussion. During this period, international law developed under the sway of geographic emphases that conformed to a Eurocentric mindset of entitlement and formalistic rulemaking. These emphases differed from the pragmatic polycentric regional legal landscapes that preceded the rise of European dominance,⁴² and even paradigmatic Augustinian notions of peace that extended to the end of the eighteenth century.⁴³

Colonialism catalyzed international law's nineteenth and early twentieth century universalization, which established a "right to rule" in conformity with the unclear yet strongly asserted *droit public de l'Europe* and the *ius publicum europaeum*.⁴⁴ The effects of this historical encounter did not end with decolonization, projecting instead its widening gyre to the formerly colonized newborn republics.⁴⁵ A "post-colonial paradox—guised as a "Greek Gift"—arose in relation to hemispheric spatial organization with the acceptance of formalistic law. The price paid by newborn republics for independence carried with it the costs and schematics of a public international law that European powers almost exclusively shaped as the makers of colonialism.⁴⁶

This legacy continues to constrain international law and its interplay with domestic legal systems. The highlands of the Niyamgiri Hills in India seem remotely connected to the demise of metropolitan rule in the Americas, except in consideration of the development of legal formalism, remnants of which impede a fuller embrace of indigenous rights everywhere in international law.

This article contends that legal formalism helps to explain why the incorporation of human geography and place-based considerations into international law have been so difficult to achieve. Identifying legal formalism's key role, while avoiding its treatment as "a heresy driven underground" by the "derogatory comments of its detractors,"⁴⁷ clarifies difficulties affecting developments in international law. The question of place and its relation to international law extends beyond the ambit of indigenous rights. It pervades the study and application of international law generally. Addressing this question helps to explain international law's dismissive encounter with the idea of topophilia—the human sense (love) of place that undergirds much controversy involving self-determination and indigenous rights.⁴⁸ The argument here is that legal formalism and its nineteenth century rise helped to construct the imaginaries of America's frontier expansion and its union with international law's "civilizing influence."

42 Jörn Axel Kämmerer, *Imprints of Colonialism in Public International Law: On the Paradoxes of Transition*, 18 J. HIST. INT'L L. 239, 241–42 (2016).

43 See HARALD KLEINSCHMIDT, *DISKRIMINIERUNG DURCH VERTRAG UND KRIEG: ZWISCHENSTAATLICHE VERTRÄGE UND DER BEGRIFF DES KOLONIALKRIEGS IM 19. UND FRÜHEN 20. JAHRHUNDERT 20* (2013).

44 *Id.* at 240.

45 See *id.* at 243–44 (discussing the formerly colonized shift toward discriminatory rule-making based on the Euro-suppression of non-European trans-communitarian rule-making).

46 *Id.* at 240.

47 Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950 (1988).

48 Humanist geographer Yi-Fu Tuan popularized the term to complicate geography's unwitting orientation toward topography and physical locale. See generally YI-FU TUAN, *TOPOPHILIA: A STUDY OF ENVIRONMENTAL PERCEPTIONS, ATTITUDES, AND VALUES* (1990); see also YI-FU TUAN, *SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE* (1977).

Formalism in the United States is often presented as a post-Civil War movement.⁴⁹ While this article picks up on this theme, which resulted in a major twentieth century confrontation with legal realism, it also traces formalism's antecedents to early nineteenth century judicial and political encounters with slavery and Indian removal. The early American Republic's ambivalent, if not contradictory, treatment of these inherent problems helped to construct formalism's pathway into international law, which conceptualized an international notion of place and space that emphasized sovereign rights and dominium at the expense of indigenous rights.

Where did legal formalism come from and how did it cross over into international law to diminish the significance of human geography and the rights of indigenous peoples? Addressing these questions uncovers a significantly American story.

Part II of this article traces the genealogy of formalism, highlighting its development from teachings of German historicism and legal science. Although subject to a variety of usages and definitions, formalism emphasized immanence—the elaboration of legal principles from within the self-contained domain of judicial reasoning. Part II also connects the rise of formalism to the maturation of American common law, the professionalization of legal teaching and practice, the doctrinal development of an American approach to international law, and connections to parallel movements in European international law in the latter part of the nineteenth century. Part III holds that the difficulty with formalism's judicial application in the United States began much earlier in the nineteenth century than is commonly thought. Questions relating to ending the international slave trade and Indian removal exposed unreconcilable tensions with republican virtue while simultaneously shaping the country's ambivalent orientation to its internal and expanding frontier and its widening encounter with international legal order. Part IV concludes this discussion by suggesting that formalism's incomplete treatment of spatiality and place nevertheless crossed over into the corpus of modern international law and continues to challenge the expression of indigenous rights and the spatial order in this current age of neoliberalism and transglobal resource extraction. Under such circumstances, the fuller expression of human rights and indigenous rights are likely to be forestalled until international law completes its turn to address questions of spatiality and place.

II. THE RISE OF FORMALISM

Formalism has been described as an unwieldy legal idiom with “so many meanings and valences” as to make it an “all purpose” term of “approbation and

49 See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9 (1995).

of disapprobation.”⁵⁰ Although often defined by its critics,⁵¹ advocates also agree that formalism emphasizes the rational deducibility of law.⁵² Its genealogy generally traces to the development of mid-nineteenth century German legal science, principally from Friedrich Carl von Savigny (1779-1861), Karl von Gareis (1844-1923),⁵³ and the German historical school.⁵⁴ German historicism attached meaning and context to the *situatedness* of law. Its adherents, called Pandectists, drew inspiration from the Pandects of Justinian’s *Digest*, which emphasized law’s self-contained completeness. They focused legal method on the deducibility of an applicable legal principle from an examination of the footprints *internal* to the development of place-based customs and practices, which only the study of history could reveal.⁵⁵ Its greatest English language expositor, Sir Henry Maine (1822-1888), understood legal formalism to be a progressive, depersonalized, and liberating evolutionary path that broke the chains of established status relationships and forged new links to voluntary contractual accords.⁵⁶ This de-linking and re-forging process, in Weberian terms, facilitated the projection of law as an instrument of logical formal rationality—emphasizing proprietary ownership over interpersonal status relationships, which had an overriding impact on Native and non-Native connections to land and place.⁵⁷

Max Weber’s (1864-1920) description of formalism captured its essential elements:

first, that every concrete legal decision be the “application” of an abstract legal proposition to a concrete “fact situation”; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a “gapless” system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be “construed” rationally in legal terms is also

50 Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180 (1986-1987). See also Philip Allott, *Comments on Jean D’Aspremont, Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, EJIL: TALK! (Dec. 12, 2012), <https://www.ejiltalk.org/comments-on-jean-daspremont-formalism-and-the-sources-of-international-law-a-theory-of-the-ascertainment-of-legal-rules/> (suggesting the word is so entangled in many different theoretical disputes that it might be better to avoid its usage).

51 Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 58 (2003).

52 Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, 16 LEGAL THEORY 11 (2010) (noting formalism’s reliance on syllogistic reasoning, as well).

53 INSTITUTIONEN DES VÖLKERRECHTS (1888); KARL GAREIS, INTRODUCTION TO THE SCIENCE OF LAW: SYSTEMATIC SURVEY OF THE LAW AND PRINCIPLES OF LEGAL STUDY (Albert Kocourek trans. 1911) (1921).

54 F. VON SAVIGNY, POSSESSION (Perry Erskine trans., 6th ed. 1848). Hermann Kantorowicz identified Savigny’s *Über den Feruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814) as the “starting point” of the German historical school. Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 L. Q. REV. 326, 332 (1937).

55 Yosef Lindell, *A Science like any Other? Classical Legal Formalism in the Halakhic Jurisprudence of Rabbis Isaac Jacob Reines and Moses Avigdor Amiel*, 28 J. L. & RELIGION 179, 181 (2012).

56 Henry Sumner Maine, *From Status to Contract*, in ANCIENT LAW (1861) (showing the evolutionary path of historical legal development that famously introduced Maine).

57 See MAX WEBER, *ECONOMY AND SOCIETY* ch. III (Guenther Roth & Claus Wittich eds., 1968).

legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an “application” or “execution” of legal propositions, or as an “infringement” thereof, since the “gaplessness” of the legal system must result in a gapless “legal ordering” of all social conduct.⁵⁸

Weber distinguished the systemic rationalization of legal formalism in civil law countries from the piecemeal, judge-made, writ-based historical development of the common law. The development of “legal science,” as discussed in late nineteenth-century American law schools, never could structurally embrace the systematic developments of “legal science” as liberally borrowed from continental, particularly German, legal discourse.⁵⁹ Gaps appeared, although somewhat earlier than common doctrinal presentations admit. These gaps represented stress fractures in the application of formalist principles given the contradictory interface between American republican virtue and the originary problems of chattel slavery and how to deal with indigenous peoples.

Whether influenced by common or civil law, historicists nevertheless distinguished themselves from natural law advocates, whom historicists claimed applied rational principles of justice and morality through speculative sources *external* to law. Formalists would adapt German historicist influences; however, they would reorient law’s deducibility away from the abstract touchstone of morality and toward law’s *internal* self-sufficiency as uncovered by judges. An economic offshoot of their legal school broadened formalism’s appeal and penetrated America in the 1870s and 1880s through the teachings of German-trained economists, who emphasized the historical power of place-based statistics to inform industrial and commercial policy.⁶⁰

Former judge and University of Chicago law scholar Richard Posner described legal formalism as the theory that “once lawmakers produce rules, judges should apply them to the facts of a case without regard to social interests and public policy.”⁶¹ Legal philosopher David Lyons labeled formalism as an expression of the sufficiency of law as a means for deciding any case that arises: “There are no ‘gaps’ within the law, and there is but one sound legal decision for each case. The law is complete and univocal.”⁶² This is the “fixed and final form” Roscoe Pound influentially criticized as the expression of “mechanical

58 *Id.* at 657–58.

59 BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 26 (2009).

60 Joseph Dorfman, *The Role of the German Historical School in American Economic Thought*, 45 *AM. ECON. REV.* 17, 1717 (1955); Panayotis G. Michaelides & John G. Milos, *Joseph Schumpeter and the German Historical School*, 33 *J. ECON.* 495, 507 (2009) (discussing key elements of Schumpeter’s relation to the German historical school, including the construction of economics as a social science based in part on economic statics). For an argument on the heterodoxy of the movement, making it neither German nor historical, see Heath Pearson, *Was There Really a German Historical School of Economics?*, *HIST. POL. ECON.* 547, 547–62 (1999).

61 RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 4–5 (2013).

62 David Lyons, *Legal Formalism and Instrumentalism—a Pathological Study*, 66 *CORNELL L. REV.* 949, 950 (1981).

jurisprudence,” where the rules were as fixed as Procrustes’ iron bed,⁶³ and the “cases were to be fitted [mechanically shortened or stretched] to the rules.”⁶⁴ Pound’s critique, along with many foes of the formalist period, attacked the “rigidly doctrinaire” style of syllogistic reasoning that misapplied abstract first principles to produce socially unacceptable results.⁶⁵

Legal philosopher Ernest Weinrib referred to this hallmark gap-avoiding attribute of formalism as *immanence*. “By suggesting that the rationality of law lies in a moral order immanent to legal material,” Weinrib held that formalism presented a self-contained internalist dimension—a *provenance* of plenitude or immanent moral rationality—where “juridical content can somehow sustain itself from within,”⁶⁶ where “law has a content that is not imported from without but elaborated from within.”⁶⁷ Therefore, the art of legal creativity actually restricted law ascertainment to a process of discovery, “most naturally expressed in adjudication,” through the internal application of pre-existing rules or principles to an emergent or ever-changing fact pattern.⁶⁸ This understanding of formalism—as a conscious form of rule application employed from normative principles internal to law—naturally emphasized the judicial process and the role of the judge.⁶⁹ Immanence promoted self-contained thinking, an “anglophone conception of law . . . tied into a sense of community values that could be objectively identified,”⁷⁰ where answers arose from unassuming connections to conquest and expansion, not from external considerations related to displaced human geography.

A. FORMALISM’S FERTILE GROUND

Formalism found fertile ground in the United States after the American Civil War and “rose to its zenith at the turn of the century,”⁷¹ roughly the same period that the European profession of international law began to take shape. American common law’s reliance on the “unique” role of judges (“generic to the whole western world”) and the capitalist form of business enterprise also began to converge.⁷² This braiding of institutions facilitated formalism’s domestic and international interface, while contributing to ending the “explosive

63 In Greek mythology, Procrustes resolved tensions of life by stretching or shortening the customer to perfectly fit suit (metaphorically cast as an iron bed), never pausing to consider the possibility of tailoring the suit to fit the customer. See generally NASSIM NICHOLAS TALEB, *THE BED OF PROCRUSTES: PHILOSOPHICAL AND PRACTICAL APHORISMS* xi–xii (2016).

64 Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908).

65 Charles C. Goetsch, *The Future of Legal Formalism*, 24 AM J. LEG. HIST. 221, 221–22 (1980).

66 Weinrib, *supra* note 47, at 955.

67 *Id.* at 956.

68 *Id.*

69 See William E. Nelson, *Judge Weinfeld and the Adjudicatory Process: A Law Finder in an Age of Judicial Lawmakers*, 50 N.Y.U. L. REV. 980, 982 (1975) (discussing “fact judge,” Judge Edward Weinfeld, and the formalist application of law).

70 PAUL MCHUGH, *ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATES, AND SELF-DETERMINATION* 30 (2004).

71 Goetsch, *supra* note 65, at 221. For contemporary depictions of the classical formalists, see, e.g., Duxbury, *supra* note 49, at 9; GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* 13–33 (1995); ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 136–59 (1982).

72 Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668 (1933).

contradictions” of plantation agrarianism and industrial capitalism’s coexistence in one country.⁷³

During this period, if not slightly before, a market-oriented transformation in American law also began to separate the common law from its previous concerns for the “substantive fairness of economic exchange;” American common law became “facilitative of individual desires” and reflective of economic and political power.⁷⁴ Land hunger already had motivated the drive to establish frontier settlements over the Appalachian Mountains, in violation of England’s Royal Proclamation (1763) prohibiting colonists’ land-grabbing migration over the range.⁷⁵ Claims to land appropriation, fueled by a burgeoning sense of Manifest Destiny, followed with the passage of the Northwest Ordinance (1787),⁷⁶ the Louisiana Purchase (1803),⁷⁷ the acquisition of West,⁷⁸ then Spanish Florida (1819),⁷⁹ the state-based, then federally-supported domination of the Native southeast and the removal the so-called Five Civilized Tribes (1830),⁸⁰ the secession and annexation of Tejas (Texas, 1836; 1845),⁸¹ the takeover of the Spanish southwest in the Mexican-American War (1846–1848),⁸² and the westward movement into Oregon Territory (1850).⁸³

Historian Greg Grandin metaphorically viewed this westward expansion as the “gate of escape,” the ever-expanding spatial portal deployed by the newborn, racially conflicted country to dominate land while forestalling confrontation with the contradictions of its own republican mythos.⁸⁴ By the end of the nineteenth century, historian Frederick Jackson Turner had located fully-formed American virtues in this expansionary spatial domain. These virtues were not inherited from European forbearers, they were bequeathed from internal, rugged, pragmatic, individualistic encounters with spatial engagements on the expanding

73 Jason W. Moore, *Remaking Work, Remaking Space: Spaces of Production and Accumulation in the Reconstruction of American Capitalism, 1865–1920*, 34 *ANTIPODE* 176, 177 (2002).

74 MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* 253 (1977).

75 *See Royal Proclamation, 1763*, INDIGENOUS FOUNDATIONS,

https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/ (prohibiting colonial settlements west of the Appalachian Mountains, prohibiting molestation of Native Tribes and protecting traditional tribal hunting grounds. The Proclamation followed England’s defeat of France and its Native North American allies in the Seven Years War (1756–1763).

76 *See generally* PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* (2019) (discussing the Ordinance following its July 13, 1787 adoption in terms of a blueprint for an American empire of continental dimensions).

77 *See generally Louisiana Purchase: Primary Documents in American History*, LIB. CONG. <https://guides.loc.gov/louisiana-purchase/digital-collections> (last visited Dec. 9, 2020) (showcasing seminal documents associated with territorial acquisition).

78 *See generally* ISAAC JOSLIN COX, *THE WEST FLORIDA CONTROVERSY, 1798–1813: A STUDY IN AMERICAN DIPLOMACY* (1918) (discussing the thirty-seven year now-misnamed border dispute between Spain and the United States over control of the Apalachicola and Mississippi river outlets).

79 Culminating in the Treaty of Adams-Onís (1819), 8 Stat. 252; TS 327; 11 Bevens 528; 3 Miller 3 (1819), including the U.S. annexation of West Florida (1810, later becoming part of eastern Louisiana).

80 *See generally* ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* (1940) (presenting a leading historical account of the removal of the Five Civilized Tribes).

81 *See generally* JUSTIN H. SMITH, *THE ANNEXATION OF TEXAS* (1911) (presenting an acclaimed history of Texas).

82 *See generally* K. JACK BAUER, *THE MEXICAN WAR, 1846–1848* (1995) (presenting a leading military history of the war, which is described as unavoidable).

83 Oregon Donation Land Act, 9 Stat. 496 (1850).

84 GREG GRANDIN, *THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA* 43 (2019).

American frontier.⁸⁵ They presented a unique and internal “American” rationale for spatial domination, which germinated seedlings of formalism.

As the problematic international law theorist Carl Schmitt later framed the connection,⁸⁶ the question of place inextricably connected soil (*Boden*) to law formation. In line with Lockean and Kantian conceptions of proprietary entitlement,⁸⁷ the concurrent processes of land appropriation (*Landnahme*) worked by human hands, demarcated by engravements embedded in soil and land division, created the immediate means by which people made spatially visible their political and social order. The European act of cultivation and enclosure, clearing and planting, became important measures by which Native claims to place were denied.⁸⁸ The perception of Natives’ nomadic way of life, which did not improve the land or make spatially visible their claim of *dominium*, contrasted with Jeffersonian Enlightenment philosophy and his Euclidean Public Land Survey System,⁸⁹ Christianity’s civilizing mission, and biblical directive.⁹⁰

Schmitt attributed psychological qualities to this land cultivation, separating nihilistic and abstract normative threats to one’s spatial orientation from the concrete, personal attachments that grow out of law’s more properly nurtured, bounded space. “True law,” according to Schmitt, arose through the division and situation of space through telluric touchstones. In a word, he called it *nomos*.⁹¹ If separated from this proper foundation, if adulterated by a distinctly political formulation, Schmitt forewarned of the hegemonic consequence of a *Großraum*,

85 Frederick J. Turner, *The Significance of the Frontier in American History*, in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION, 1893 (1894) (presenting the historiographically significant Frontier Thesis).

86 Although noted for his brilliance and for an emerging wealth of attention to his theories, Schmitt was deplored as the Crown Jurist (*Kronjurist*) of the Third Reich. Ernst Jünger coined the moniker in 1943. Schmitt had joined the Nazi Party in 1933, and was detained, interrogated, and released by American authorities, who contemplated putting Schmitt in the docket at the Nuremberg War Crimes Tribunal. See generally REINHARD MEHRING, CARL SCHMITT: A BIOGRAPHY (Daniel Steuer trans., 2014) (dispelling the thesis that Schmitt merely paid lip service to the Third Reich); JOSEPH J. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH (1983) (affirming Schmitt’s status as one of the most significant political theorists of the twentieth century and the most controversial).

87 See Christopher R. Rossi, *The Nomos of Climate Change and the Sociological Refugee in a Sinking Century*, 50 GEO. WASH. INT’L L. REV. 613, 620–21 (2018) (comparing Schmittian, Lockean, and Kantian perspectives on land appropriation).

88 The presidency of Andrew Jackson reflected this possessory claim as a defense for removing eastern Natives across the Mississippi River. See DAVID W. MILLER, THE TAKING OF AMERICAN INDIAN LANDS IN THE SOUTHEAST: A HISTORY OF TERRITORIAL CESSIONS AND FORCED RELOCATIONS, 1607-1840, at 175 (2011) (quoting as an example Jackson’s War Secretary, Lewis Cass: “the Creator intended the earth should be reclaimed from a state of nature and cultivated; that . . . a tribe of wandering hunters . . . have a very imperfect possession of the country over which they roam.”).

89 In 1785, Jefferson developed the Public Land Survey System, a land-based latticework which greatly facilitated the creation of a relentless grid to dispose of lands of the western territories. See 1785 - The Public Land Survey System (PLSS), American Period Maps, USGS 1, 4 (2017), https://digitalcommons.csUMB.edu/hornbeck_usa_1/23.

90 See A. Whitney Griswold, *The Agrarian Democracy of Thomas Jefferson*, 40 AM. POL. SCI. REV. 657, 661 (1946) (quoting Jefferson’s 1785 missive whereby he claimed “[t]he earth is given as a common stock to labour and live on”); STEVEN L. JAMES, NEW CREATION ESCHATOLOGY AND THE LAND: A SURVEY OF CONTEMPORARY PERSPECTIVES 52 (2017) (noting ‘land’ and the “growing appreciation of territorial orientation” is the “fourth most frequent noun or substantive in the Old Testament”); *Genesis* 1:28 (English Standard version) (“[b]e fruitful and multiply and fill the earth and subdue it, and have dominion over the fish of the sea and over the birds . . . and over every living thing.”).

91 CARL SCHMITT, THE *NOMOS* OF THE EARTH IN THE INTERNATIONAL LAW OF THE *JUS PUBLICUM EUROPAEUM* 66–69 (2006) (discussing *nomos*, nihilism, and the place-based origins of true law).

which he specifically pinpointed in the form of the Monroe Doctrine and liberalism's twentieth century pursuit of undifferentiated (*raumlose*) universal values. These values, according to Schmitt, became virulent; they metastasized the telluric and bounded mythos of Turner's romanticized frontier thesis, spreading a new form of hegemony while destroying Schmitt's equally cherished mythos of the bounded space he called the *jus publicum Europaeum*.⁹² Critics of transglobalism regard Schmitt's "multi-faceted political and spatial theories" as a polemic against technocratic capitalism, the displacement of indigenous peoples, and neoliberalism's general abnegation of personhood.⁹³

B. FORMALISM'S ALLIANCE WITH COMMON LAW AND LEGAL PROFESSIONALISM

The development of American common law reflected the spatial bequeaths of frontier mentality and European heritage. In the mid-nineteenth century, an alliance between the legal profession and commercial interests overturned paternalistic and anti-development common law values. The rise of legal formalism helped to establish the supremacy of the right of contract. This offshoot of individualism transformed the public purpose doctrine, which limited government takings of private property for public use, and turned it into a commercially friendly adjunct of economic entrepreneurialism for the administration of public lands.⁹⁴ It also promoted the politics and economics of land acquisition, as well, and large-scale Indian removal during the long nineteenth century.⁹⁵

Sixteenth-century Spain applied a remotely similar proto-corporatist form of legal entrepreneurialism—divisible sovereignty—to capture newfound wealth in the Americas and to spatially divide millions of hectares of territory described as *terra ultra incognita*.⁹⁶ The empire's political subdivisions, called viceroalties, relied on a system of private capital to extract gold and silver through the issuance of land titles purchased by entrusted Spanish noblemen, called *encomenderos*. This charter system, which established a central royal authority-by-proxy system, was overseen by a judicial board, the Council of the Indies (1524). Hemispheric control would thereafter unveil in a series of subdivisions. These partitions vested legal authority and administrative control in the operations of captaincies-general, presidencies, judicial and

92 Schmitt introduced the concept in a lecture before the Institute for Politics and international Law at the University of Kiel, weeks after the Nazi invasion of Czechoslovakia. See CARL SCHMITT, *VÖLKERRECHTLICHE GROSSRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE: EIN BEITRAG ZUM REICHSBEGRIFF IM VÖLKERRECHT* (1939). Although often literally translated as "great space," Schmitt's usage of *Großraum* more properly meant sphere of influence or geopolitical space. See Stuart Elden, *Reading Schmitt Geopolitically: Nomos, Territory and Großraum*, 161 *RADICAL PHILOSOPHY* 18, 19 (2010).

93 Rossi, *supra* note 87, at 630; see also *id.* at 631 (discussing how critics of transglobal capitalism read Schmitt).

94 Morton J. Horwitz, *The Rise of Legal Formalism*, 19 *AM J. L. HIST.* 251, 251 (1975).

95 Robbie Ethridge, *Reflections on the Long Nineteenth Century and Indian Removal*, 17 *AMERICAN NINETEENTH CENTURY HISTORY* 241 (2016). The "long" nineteenth century, so described, began with the rumblings of Native removal, which could be heard in the late eighteenth century and which "stretched well into the late nineteenth century and beyond."

96 See Martin Waldseemüller, *Universalis Cosmographia Secundum Ptholomaei Traditionem et Americi Vespuicii Alioru[m]que Lustrationes*, St. Dié, 1507, Geography & Map Reading Room, THE LIBRARY OF CONGRESS, <https://www.loc.gov/rr/geogmap/waldexh.html> (naming for the first time the New World as "America" and portraying much of the interior landscape as "*terra ultra incognita*").

administrative high courts (*audiencias*), and additional subunits, including rural districts, or *corregimientos*, magistrateships (*alcaldías mayor*), governorates (*gobernaciones*), and *subdelegaciones*—all of which reflected imported Iberian hierarchical and socio-economic spatial arrangements that required classes of compradors, bureaucrats, and *visitadors* to administer.⁹⁷ This “first step in the reconstruction of the Atlantic” and of the world⁹⁸ facilitated the territorial division of the New World and provided the proto-contours of legal formalism that would take hold after the retreat of the metropolitan powers in the early nineteenth century. The influential anthropologist and Native American scholar, Edward Spicer, reduced this spatial reordering to the fundamental observation that the cycle of imperial conquest of the Americas repeatedly overrode Native belief systems. Natives never accepted the fungibility of land or the dissoluble nature of the “bond between themselves and the land.”⁹⁹

Native interests were not solely affected by this transition. According to American legal historian, Morton Horwitz, “[b]y the middle of the nineteenth century the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society The rise of legal formalism . . . fully correlated with the attainment of these substantive legal changes,”¹⁰⁰ and its acceptance reoriented spatial conceptions of law’s domain.

According to Horowitz, “[m]ost of the basic dichotomies in legal thought of the nineteenth century—between law and politics, law and morality, objective and subjective standards, distributional and allocation goals—arose to establish the objective nature of the market and to neutralize and hence defuse the political and redistributive potential of law.”¹⁰¹ Legal formalism’s emergence inclined common law toward this standard of objectivity, and this transformation dramatically rearranged society. The transformation helped to solidify the professional standing of American legal practitioners, who self-represented as experts in the objective discernment and politically-neutral application of legal rules.¹⁰² The voice of this self-representation took the form of bar associations, which became more prominent around this time first in cities, then states, and shortly thereafter, nationally with the founding of the American Bar Association in 1878.¹⁰³

97 CHRISTOPHER R. ROSSI, REMOTENESS RECONSIDERED: THE ATACAMA DESERT AND INTERNATIONAL LAW 19-20 (2021).

98 Amy Turner Bushnell & Jack P. Greene, *Peripheries, Centers, and the Construction of Early Modern American Empires: An Introduction*, NEGOTIATED EMPIRES: CENTERS AND PERIPHERIES IN THE AMERICAS, 1500-1820, at 1 (Christine Daniels & Michael V. Kennedy, eds., 2002).

99 EDWARD H. SPICER, CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST 576 (1962).

100 HORWITZ, *supra* note 74, at 253–54.

101 *Id.* at 256.

102 *See id.* at 256–57.

103 The Galveston Bar Association formed first in 1868, followed by city associations in New York City (1870) and St. Louis (1874). The Iowa State Bar Association followed in 1874, and the American Bar Association formed in 1878. Simeon E. Baldwin, *The Founding of the American Bar*, 3 A.B.A. J. 658 (1917) (discussing the history of American bar associations). While the movement to professionalize the practice of law around the 1870s seems not to be in dispute, discussion as to the where and when “law associations” began to form remains somewhat of a question. Mississippi had something of an association as early as 1824, and an association of short duration seems to have formed in Massachusetts in 1849. Additionally, Philadelphia may have a claim as the oldest city bar association

The modern American professional practice of law congealed during legal formalism's rise around the 1870s. It built on an increase in lawyer demand, which census material indicated began to grow in 1850.¹⁰⁴ The former and loose-knit apprenticeship system that socialized lawyers into the trade gave way in the latter part of the nineteenth century to the reading of law through university law schools.¹⁰⁵ And it was through the development of rigorous and standardized legal education that the trade transformed into a profession—a transformation that would also ripple across the landscape of American graduate education as universities increasingly came to embrace German pedagogical influences.¹⁰⁶

Part of formalism's rise is well understood: From 1870 to 1895, Christopher Columbus Langdell served as Dean of Harvard Law School. There, he systematized American legal education through the study of settled cases.¹⁰⁷ He applied that practice to contract law and introduced the case method,¹⁰⁸ along with the Socratic method, which relied on repetitive questioning to tacitly reveal ignorance as a means of motivating student inquiry.¹⁰⁹ This methodology profoundly influenced the formalist pedagogy of American law. In his pathbreaking textbook on contracts, Langdell espoused the revelatory power of legal formalism, whereby “[l]aw, considered as a science, consist[ed] of certain principles or doctrines” reducible and ascertainable through the case method of study.¹¹⁰ To Langdell, the ascertainment of law involved a process of discovery, which lent itself to principles of scientific method, no better exemplified than by the teachings of Yale Law scholar, Walter Wheeler Cook, who professed the application of rational, mathematical principles to the study of law.¹¹¹

Formalism presented the thesis of classical orthodoxy and its antithesis became known as legal realism.¹¹² Formalism emphasized the role of the judge

(1802), followed by New Orleans. However, name changes, fragmentary proceedings, and realignments cloud this history. See A.J. Small, *Historical Sketch of the Early Iowa State Bar Association*, PROCEEDINGS OF THE IOWA STATE BAR ASSOCIATION 9–10 (1912).

104 Richard L. Abel, *The Transformation of the American Legal Profession*, 20 LAW & SOC'Y REV. 7, 8 (1986) (discussing the 1870s as the beginning of the contemporary American legal profession and “lawyer demand”).

105 A. Christopher Bryant, *Reading the Law in the Office of Calvin Fletcher: The Apprenticeship System and the Practice of Law in Frontier Indiana*, 1 NEV. L.J. 19, 21 (2001).

106 See Steven Muller, *Wilhelm von Humboldt and the University in the United States*, 6 JOHNS HOPKINS APL TECH. DIG. 253 (1985) (discussing the 1876 founding of The Johns Hopkins University based on Wilhelm von Humboldt's precepts of scientific inquiry and the unity of teaching and research).

107 See generally Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980) (discussing debates arising from Langdell's understanding of law as a fixed body of knowledge and his underrepresented complexity as possibly the first anti-Langdellian).

108 See *The Case Study Teaching Method*, HARVARD LAW SCHOOL, <https://casestudies.law.harvard.edu/the-case-study-teaching-method/> (last visited Dec. 18, 2020).

109 James C. Overholser, *Elements of the Socratic Method: I. Systematic Questioning*, 30 PSYCHOTHERAPY 67 (1993).

110 CHRISTOPHER C. LANGDELL, *SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (1871).

111 Charles E. Clark, *Walter Wheeler Cook*, 38 ILL. L. REV. 341, 342 (1944).

See generally Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303 (1927). U.S. Circuit Court of Appeals judge, and former Yale Law Dean, Charles Clark, noted Cook's objective approach owing to Cook's teaching background in fields of physics and mathematics. Charles E. Clark, *Walter Wheeler Cook*, 38 ILL. L. REV. 341, 342 (1944).

112 See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 3 (1983) (referencing legal realism [modern American legal thought] as the antithesis to classical orthodoxy principally represented by Oliver Wendell Holmes' famous aphorism: “The life of the law has not been logic; it has been experience.”) (internal citations omitted).

and the adjudication process as the autonomous means of determining the one and only outcome of a case, unadulterated by nonlegal normative considerations of law or political philosophy. Formalism emphasized the deductive correctness of a decision whereas realism emphasized the sociological soundness of a decision.¹¹³ American legal realism attacked formalism's purported acontextual, un-sociological and "mechanical" devotion to rationalism. The legal realist movement gained prominence in the 1920s and 1930s and included American judicial luminaries such as Oliver Wendell Holmes,¹¹⁴ Roscoe Pound,¹¹⁵ Benjamin Cardozo,¹¹⁶ Eugen Ehrlich,¹¹⁷ and Karl Llewellyn.¹¹⁸ Powerful European contributions were made by Axel Hägerström's Uppsala School (which included Karl Olivecrona and Vilhelm Lundstedt) and most significantly, Hägerström's student and chief representative of Scandinavian legal realism, Alf Ross.¹¹⁹ Legal realism responded to the dissonance caused by formalism's derivation of applicable rules, and the dispute continues. Recently, Jean d'Aspremont has attempted to refresh support of formalism out of concern that the movement to deformalize international law results in greater indeterminacy and ambiguity as to the ascertainment of proper law. To guard against the rise of quasi-law, his attention has turned to the organic and shared written or linguistic indicators found in the practice of international law, for instance, in the ritualistic language of Security Council, which fortifies formalistic law determination.¹²⁰

C. THE PROBLEM OF PERIODIZING FORMALISM

In 1974, Yale University law professor Grant Gilmore delivered the influential Storrs lecture that produced his book, *The Ages of American Law* (1977), which has been acclaimed as the "most influential modern formulation"

113 See Posner, *supra* note 50, at 181 (contrasting formalism's concern for correct and incorrect decisions versus realism's assessment of decisions based on sound or unsound reasoning).

114 See generally Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

115 See generally Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

116 See generally BENJAMIN N. CARDOZO, NATURE OF THE JUDICIAL PROCESS (1921); See also BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW (1924); See also BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928).

117 See generally EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Walter L. Moll trans., 1936).

118 His primary works include Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); see also KARL N. LLEWELLYN, BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY (1930); see also Karl Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); see also KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960). Other distinguished jurists fitting this mold, according to Richard Posner (who doubtless meets this qualitative assessment and subscribes to it as well) include Louis Brandeis, Learned Hand, Robert Jackson, Roger Traynor, and Henry Friendly. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); see POSNER, *supra* note 61, at 2.

119 See generally ALF ROSS, TOWARDS A REALISTIC JURISPRUDENCE: A CRITICISM OF THE DUALISM IN LAW (1946); see also ALF ROSS, ON LAW AND JUSTICE (1959). The latter work, regarded as his most important, appeared first in Danish, OM RET OG RETFAERDIGHED, in 1953, and devoted considerable attention to "legal politics" and the "applied sociology of law." Ross also wrote the highly regarded A TEXTBOOK OF INTERNATIONAL LAW (1947); see also Mauro Zamboni, *Alf Ross's Legal Philosophy*, A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE 401, 402 (E. Pattaro & C. Roversi eds., 2016) (for an account of Ross's intellectual debt to Hägerström while departing from his teachings).

120 See generally JEAN D'ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW—A THEORY OF THE ASCERTAINMENT OF LEGAL RULES (2011).

of legal formalism.¹²¹ Gilmore located a judicial turn toward formalism—away from the “Grand Style” of judicial flexibility that held sway since the Revolution—after the Civil War. “The post-Civil War juridical product” construed “law as a closed, logical system” that restricted the judicial function to discovering the extent that “true rules . . . are and indeed always have been.”¹²² Gilmore’s periodization of the Formalist Age generated criticism. Brian Tamanaha called it “dubious.”¹²³ He dated law’s ability to “furnish a rule of decision for every case . . . a mere fiction,”¹²⁴ as early as 1833. Tamanaha also implicated Jerome Frank and his important work, *Law and the Modern Mind* (1930) for perpetuating the “[b]asic [l]egal [m]yth” of the completeness of the common law,¹²⁵ and for distorting the view of early twentieth century Harvard Law and Chicago Law Dean Joseph Beale by characterizing him “as the leading contemporary representative of conceiving of law as composed of unchanging principles.”¹²⁶

Periodization questions infiltrate the study of history. However, the critique of formalism’s reliance on immanence—the internalist dimension of the judicial function that deduced applicable legal principles to create a gapless legal order—contained inherent conflicts between republican virtue and the spatial dynamics of chattel slavery and Indian removal. These two features of the hemispheric encounter with colonialism predate Professor Gilmore’s periodization of formalism and its rise after the Civil War.

D. FORMALISM’S PARALLEL MOVEMENT IN INTERNATIONAL LAW AND SEEDLINGS OF CROSS-OVER

When discussing antecedents to formalism’s rise in America, it is important to note that a parallel movement arose in public international law and launched on the continent around the 1860s and 1870s, partially supporting the Gilmore thesis removed to the plane of international legal discourse. As discussed by Martti Koskenniemi, an *esprit d’internationalité* began to solidify around the professionalized practice of international law. This spirit arose first through the scholarly articles presented in the *Revue de Droit International et de Législation Comparée*, first published in 1868, and then with the founding of the *Institut de droit international* in 1873, by what Koskenniemi referred to as a new breed—the ‘Men of 1873’. Leaders of this movement—such as the Belgian jurist and editor, Gustave Rolin-Jaequemyns; the holder of the Whewell Chair of International Law at Cambridge University, John Westlake; and the Swiss historicist, Johann Bluntschli—sought out a more systematic articulation of international legal science during this so-called *belle époque*.¹²⁷ By this time, Frédéric Passy had organized in 1867 the *Société des Amis de la Paix* (renamed

121 TAMANAHA, *supra* note 59, at 17, 19.

122 GRANT GILMORE, *THE AGES OF AMERICAN LAW* 62 (1977).

123 TAMANAHA, *supra* note, 59 at 17.

124 *Id.* at 18 (quoting an 1833 article on “Written and Unwritten Systems of Law”).

125 *Id.* at 14.

126 *Id.* at 16. Tamanaha argued that Beale’s position was far more pragmatic than the “purely conceptualist position” attributed to him by Frank.

127 See generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS—THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001). Mikael Rask Madsen, *Book Review: The Gentle Civilizer of Nations*, 47 ACTA SOCIOLOGICA 105 (2004) (reviewing the “*belle époque*” and the Men of 1873).

in 1889 the *Société française pour l'arbitrage entre nations*), which essentially launched the international peace movement. Passy's movement promoted a belief in the maturation of international law. It marked an important milestone in the rise of internationalism and new-born international organizations. For his efforts, Passy would receive the 1901 Nobel Peace Prize.¹²⁸

Historian Irwin Abrams wrote of two other "momentous events" in the 1870s that fortified the development of the internationalist agenda. The first was the Franco-Prussian War (1870-1871), which involved techniques of counter-insurgency that prompted calls to constrain war. The second was the arbitral resolution of a dispute between England and the United States regarding the *Alabama Claims* (1871-1872),¹²⁹ which reinforced the credibility of third party dispute resolution.¹³⁰

The rapid expansion of positive law and the professionalization of the legal practice warranted retrospective appreciation for the nineteenth century as the Golden Age of International Law, a commonplace ascription supported mostly by its "constant reiteration," but not without doctrinal support. International legal theorist Nicholas Onuf claimed Lassa Oppenheim, Hersch Lauterpacht, J.L. Brierly, and Hans Kelsen figured importantly in the extension of this age into the twentieth century, which, given their late nineteenth century intellectual upbringing, "had not yet come to a close."¹³¹ Several of these accounts emphasized the supreme standing of the state as the unit of analysis in international relations. Charles Hyde's 1922 treaties even went so far as to deny that tribal peoples ever held any juridical personality.¹³² According to Paul McHugh, "[t]his absolutist, highly positivistic approach . . . was symptomatic of the intellectual climate of the time, where it was believed that law could be scientifically identified and applied, and in retrospect of which the sovereignty of the territorial state was the notional foundation."¹³³

David Kennedy critically attacked formalism's contribution to the Golden Age and the historical illusions it supported: the distinction between public and private law; the international and the national; the sovereign and the individual; together with the "untroubled practice of deductive legal reasoning."¹³⁴ He reduced formalism to a set of unwitting contradictions, making its adherents anti-moderns—"creatures of faith, their international law an elaborate legal paganism."¹³⁵

128 *Frédéric Passy*, THE NOBEL PRIZE, <https://www.nobelprize.org/prizes/peace/1901/passy/facts/> (last visited Dec. 19, 2020).

129 Irwin Abrams, *The Emergence of the International Law Societies*, 19 REV. POL. 361, 363–64 (1957).

130 Tom Bingham, *The Alabama Claims Arbitration*, 54 INT'L COMP. L. Q. 1, 24 (2005) (connecting the success of the arbitration to Gustave Moynier's 1872 proposal to establish a permanent international criminal court, the call to enhance the effectiveness of international arbitration at the Hague Conferences of 1899 and 1907, and the creation of the Permanent Court of Arbitration and the Permanent Court of International Justice).

131 Nicholas Onuf, *Henry Wheaton and "The Golden Age of International Law,"* 6 INT'L L. THEORY 2 (2008).

132 MCHUGH, *supra* note 70, at 291 (referencing CHARLES HYDE, INTERNATIONAL LAW AS INTERPRETED AND APPLIED BY THE UNITED STATES 163–64 (1922)).

133 *Id.*

134 David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 Q.L.R. 99, 133–34 (1997–1998).

135 *Id.* at 134.

Perhaps no better illustration of the contradictions of this age arises with the publication of Henry Wheaton's *Elements of International Law* (1836), the first English language treatise devoted to international law. The eighth edition appeared in 1866 with Richard Henry Dana serving as editor, and it achieved canonical status as the leading international text of its age.¹³⁶ Its publication on the cusp of the Golden Age and its Men of 1873 helped to secure a respected North American doctrinal voice among the core of newborn European international legal elites. It has been characterized alternatively as a cogent and complete explanation for the rise of liberal internationalism and the practical and moral addition to international law's enshrinement of colonialism.¹³⁷

Wheaton benefitted from the rational re-working of English common law, principally William Blackstone's *Commentaries on the Laws of England* (4 vol., 1765-1769), and from the writings of James Kent, Chancellor of the New York State Court of Chancery. In 1826, Kent published the first of the fourteen editions of his *Commentaries on American Law*, which systemized a mature American approach to common law based on American precedent in addition to English customary law.¹³⁸ At the same time, Kent praised the "vast superiority" of the western Christian tradition for providing the foundation for North American strength.¹³⁹ Kent also devoted two hundred pages to his emerging American formulation of international law.¹⁴⁰ David Bederman further located elements of Wheaton's dualism in Joseph Story's publication of *Conflicts of Laws* (1834), which Bederman described as a "crucial moment" in the elevation of "a territorial basis for resolving conflicts."¹⁴¹ "Story's move to a territorial basis for resolving conflicts . . . was critical in establishing a difference between private and public international law. Henceforth, territorial sovereigns began to regard themselves as unrestrained by international law to decide such matters as prescriptive and adjudicatory jurisdiction."¹⁴²

Wheaton's formulation of international law was not as segmented as Story's public and private spheres. He presented an "admixture of natural and positive sources for obligation, of moral restraint and positive consent."¹⁴³ His empirical pragmatism, in part, moved away from the rising tide of Continental formalism and "positivist absolutism."¹⁴⁴ He recognized a society of independent nations that tethered law and justice to the promotion of the idea of community. However, he remained "overwhelming[ly] commit[ted] to states, as the sole subjects of international law."¹⁴⁵ What made international law congeal in

136 Mortimer Sellers, *The Element of International Law*, in *REPUBLICAN PRINCIPLES IN INTERNATIONAL LAW* 1, 72 (2006).

137 Onuf, *supra* note 131, at 4 (noting both descriptions); Lydia H. Liu, *Henry Wheaton (1785–1848)*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 1132 (Bardo Fassbender & Anne Peters eds., 2012) (associating Wheaton's approach to international law with colonial expansion and imperialism of the European powers).

138 See Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 *AM. J. LEG. HIST.* 440, 443 (1993).

139 Mark Weston Janis, *American Versions of the International Law of Christendom: Kent, Wheaton and the Grotian Tradition*, 39 *NETH. INT'L L. REV.* 37, 41 (1992).

140 *Id.*

141 David J. Bederman, *Intellectual Genealogies*, 6 *INT'L L. THEORY* 9, 11 (2008).

142 *Id.*

143 *Id.*

144 *Id.*

145 Sellers, *supra* note 136, at 77.

Wheaton's legal mind, according to Mark Janis, was the immanent morality of Christianity and Western civilization,¹⁴⁶ and the "circle of like-minded States bound by common traditions of culture, law and morals."¹⁴⁷ Zhiguang Yin claimed Wheaton thought "[b]eing a civilized nation [was] thus the foundation for becoming a sovereign nation," all of which came from the unity of Christendom.¹⁴⁸ Wheaton's presentation of an American treatise on international law helped to tie together disparate threads of immanent public and private-sphere rationality as initiated by Kent, Story, and the unfolding of the as yet unnamed significance of American frontierism. To Paul McHugh, Wheaton's attachment to the standard of civilization achieved its full presence in Anglo-American treatises from the second half of the nineteenth century, although the germination of Wheaton's support of the standard appear in the early part of the nineteenth century.¹⁴⁹

III. FORMALISM'S PROTO-PULLS: THE INTERNATIONAL SLAVE TRADE AND INDIAN REMOVAL

Another part of formalism's story involves its early nineteenth-century hidden history, which predates its later nineteenth-century influence on international law and the men of its Golden Age. Elements of formalism existed in an ambivalent American legal psyche before the arrival of German historical influences. They arose first in relation to the contradictions between newly emergent republican ideals and the "peculiar institution" of slavery,¹⁵⁰ and then in relation to the rationalized means by which hundreds of treaty commitments were abrogated to facilitate the Indian removal campaign east of the Mississippi River and south of the Ohio River. Obvious inconsistencies in judicial treatments of these issues indicated problems regarding formalism's early ascertainment. They also indicated tensions involving the derivation of guiding natural rights principles in an increasingly positivistic and material hemispheric world.

Legal historian Mark Tushnet expressed slavery's contradictions in terms of dichotomies, never completely reconciled, between the rise of a northern, industrial society based on bourgeoisie law and its division of labor based on market relations, and the sentimental totality of slave law and the social ordering on an economic system based on paternalism and entitlement.¹⁵¹ According to Tushnet, law's growing "autonomy," in the form of "generally shared principles," enforced the power of precedent as applied by "mediocre" judges who felt constrained to construct approaches to law that reduced latent social contradictions "to manageable proportions."¹⁵² Within common law's support for upholding precedent, a legal structure of formalism began to take shape early

146 Janis, *supra* note 139, at 60.

147 *Id.* at 37.

148 Zhiguang Yin, *Heavenly Principles? The Translation of International Law in nineteenth-century China and the Constitution of Universality*, 27 EUR. J. INT'L L. 1005, 1014 (2017).

149 MCHUGH, *supra* note 70, at 201.

150 The phrase comes from the title of the masterful work of KENNETH STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956).

151 See MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 89 (1981) (introducing stylized categories of bourgeois and slave law).

152 *Id.* at 29.

in the nineteenth century. Frontier expansion combined with a conflicted, but forming, judicial mindset that inclined toward the rational supremacy of the republic's civilizing mission and its immanent entitlement to geospace. This entitlement eventually contributed to the breaking of hundreds of treaty obligations based on the rationalistic conversion of the sovereign status of Native peoples to a condition of mere tenancy.

Formalism's judicial construction also reflected the increasingly important material economic concerns of the early nineteenth century. This material component of formalism drew from the economics of human bondage and land speculation associated with western expansion. It would widen from the ambit of judge-made law to all spheres of private law, where it would turn private law into an instrument of exchange. Formalism supported pro-entrepreneurial revisions to contract, tort, conflicts of law, usury, and negotiability, and became the engine for social and legal transformation. It could not but have an effect on the construction of hemispheric international law.

Common law began to "encourage[] disguised forms of judicially sanctioned economic redistribution," which increased inequality yet promoted freedom of exchange.¹⁵³ According to Horwitz, formalism's informal growth from early parts of the nineteenth century created double pulls across private and public spheres,¹⁵⁴ no more starkly observed than in early nineteenth century judicial struggles with the outlawry of the international slave trade, and the debate over tribal sovereignty in the United States.¹⁵⁵ While importation of teachings from German legal science boosted formalism's appeal in America, nascent formalistic rationale established a parallel, preliminary foothold in American juridical thought, although its 'informal' birth was disguised by contradictions that juxtaposed American republican ideals and slavery, followed by Indian removal.

This ambivalence regarding the outlawry of the international slave trade and the sovereign status of Native American republics eventually contributed to the rise of formalism by the mid-to-late nineteenth century, after which American approaches to international law began to reinforce formalism's hold world-wide. Early expressions of formalism's adherence to immanence and the internal, self-contained sufficiency of law helped to reconcile stark ironies and contradictions

153 HORWITZ, *supra* note 94, at 255.

154 *Id.* at 256.

155 *Compare* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (recognizing the Cherokee Nation as "a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia [allowing upon payment of a license fee whites to settle on Cherokee lands] can have no force"), with Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). In *Fletcher*, land speculators bribed much of the Georgia legislature to sell off 35 million acres of western territory extending to the Mississippi River (now Alabama and Mississippi). The sale impacted Native claims of dominion, as well. Outraged by the graft and cheap sale of land in what became known as the Yazoo Land Fraud of 1795, Georgians elected a new legislature, which invalidated the original sale. This Rescinding Act problematized relations with third-party purchasers, many located in Northern states. The Supreme Court ruled Georgia's repeal unconstitutionally infringed on federal protections guaranteed by the Constitution's Contract Clause, notwithstanding the fraudulent conveyance and claims of Native Americans. Constitutional law scholar Sanford Levinson read the case as suggesting that Marshall was motivated by the prudential consideration that "disruption of the land claims at issue in [the] case would have negative consequences to the pace of American economic development" Levinson, *infra* note 181, at 96. See also George R. Lamplugh, *Yazoo Land Fraud*, NEW GEORGIA ENCYCLOPEDIA (Sept. 12, 2002), <https://www.georgiaencyclopedia.org/articles/history-archaeology/yazoo-land-fraud>.

associated with American revolutionary ideals. These rationalizations profoundly influenced the development of international law in the Americas and its diminishment of place-based sensibility.

A. *THE SUPPRESSION OF THE INTERNATIONAL SLAVE TRADE*

The US outlawed the international slave trade on January 1, 1808,¹⁵⁶ ending a practice that was lawful in this part of the New World for nearly 200 years and marking “the first time in history that a slaveholding society voluntarily ceased to import new slaves.”¹⁵⁷ Legal historian Paul Finkelman described this termination of the African trade as “the most successful antislavery action of the founding generation at the national level,” and yet it contrasted sharply with the institution itself, which remained legal in the US and elsewhere in the New World, and “with the proslavery legislation providing for the return of fugitive slaves” and the failure to end slavery in the Northwest Territory following adoption of the Northwest Ordinance in 1787.¹⁵⁸ It also contrasted with the imagery of Thomas Jefferson’s ‘Empire of Liberty’,¹⁵⁹ set against Jefferson’s personal and lifelong desire to avoid the problem of slavery in light of his “profound negrophobia.”¹⁶⁰ And it personally bedeviled slaveholding defenders of American republican virtue, as reflected in a litany of slave cases that reached the Marshall and Taney Supreme Courts between 1801 to 1864, “not one decided in support of a freedom suit.”¹⁶¹ Even the revered Justice Joseph Story,¹⁶² who never owned a slave (Marshall, however, owned hundreds during his life¹⁶³), and at times professed open hostility toward the institution, wrote the opinion in *Prigg v. Pennsylvania* (1842),¹⁶⁴ that “made every black in the North, even if born free, vulnerable to being seized as a fugitive slave without any due-process hearing.”¹⁶⁵ Finkelman claimed that this decision “was as proslavery as anything Chief Justice Taney would conjure up in the *Dred Scott* case [1857],” which held that all people of African descent, free or slave, were not US citizens and that slaves were the legal property of their owner.¹⁶⁶ A formalistic obedience to the Constitution, which embedded pro-slavery provisions such as the three-

¹⁵⁶ Act Prohibiting Importation of Slaves, 2 Stat. 426 (1807), Pub. L. 9-22 (effective Jan. 1, 1808).

¹⁵⁷ PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 133 (3d ed. 2014).

¹⁵⁸ *Id.*

¹⁵⁹ The phrase appears in several of Jefferson’s correspondences. See From Thomas Jefferson to George Rogers Clark, 25 December 1780, *Founders Online*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-04-02-0295>; Thomas Jefferson to James Madison, 27 April 1809, *Founders Online*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-01-02-0140>.

¹⁶⁰ PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* 198 (1996).

¹⁶¹ PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION’S HIGHEST COURT* 220 (2018).

¹⁶² Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 *TULSA L.J.* 93, 99 (1995) (associating Story’s constitutional legacy with that of his contemporary on the bench, John Marshall); M.H. Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 *AM. J. LEGAL HIST.* 36, 56 (1985) (comparing Story to John Austin as one of the “most substantial legal intellects of the first half of the nineteenth century”).

¹⁶³ FINKELMAN, *supra* note 161, at 27, 31.

¹⁶⁴ 41 U.S. (16 Pet.) 539 (1842). The case held that the Fugitive Slave Act precluded a state law that prohibited the return of blacks from the free state of Pennsylvania to a slave state.

¹⁶⁵ FINKELMAN, *supra* note 161, at 7.

¹⁶⁶ *Id.* at 4. See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

fifths clause,¹⁶⁷ the Electoral College,¹⁶⁸ the slave-trade clause,¹⁶⁹ the fugitive slave clause,¹⁷⁰ the South's veto power over amending these provisions,¹⁷¹ helped to account for Story's problematic treatment of this subject, and eventually his silence on Marshall's bench on bondage cases argued before the Supreme Court.

In 1819, Congress granted the President the authority to return captives illegally brought to the US to Africa,¹⁷² in part due to the Abolitionist movement and in part due to the American Colonization Society's campaign to return illegally imported Africans to places such as Liberia.¹⁷³ A latent tension separated the interests of these two movements, as the intentions of the American Colonization Society also could be construed as an act of removal, not of the institution of slavery itself, but rather of free blacks back to Africa. Francis Scott Key, who penned the poem that would become the lyrics to the nation's national anthem (*The Star-Spangled Banner*),¹⁷⁴ helped to establish the society and supported this solution, which ultimately returned about 13,000 Africans to Africa's West Coast. Though Key's poem memorialized the "land of the free,"¹⁷⁵ he owned slaves and conceived of removing free African descendants as the only pragmatic (half) solution to an intractable problem.¹⁷⁵

Furthermore, interpretation of the Slave Trade Act produced questions and substantially different conclusions regarding interdiction of foreign slave vessels. A number of these cases reached the Supreme Court, mostly on

167 U.S. CONST. art. I, § 2, cl. 3 (providing that Congressional representation be based on "the whole Number of Free Persons" and "three fifths of all other Persons [slaves].") The clause increased the population of southern states, notwithstanding the fact that slaves were otherwise treated as property only, bolstered southern representation in Congress and the Electoral College, affected direct tax obligations among states, and enticed southern states, principally South Carolina and Georgia, to ratify the document. See Keith Dougherty, *Slavery in the Constitution: Why the Lower South Occasionally Succeeded at the Constitutional Convention*, 73 POL. RES. Q. 638 (2019).

168 See FINKELMAN, *supra* note 161, at 15 (noting "[t]he creation of the Electoral College was also directly tied to slavery," largely by the efforts of James Madison, who worked to tether the number of electors equal to a state's total congressional representation, which in part depended on the three-fifths clause).

169 U.S. CONST. art. I, § 9, cl. 1 (prohibiting the federal government from limiting the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit . . . until [1808]").

170 U.S. Const. art. IV, § 2, cl. 3 (recognizing that a "Person held to Service or Labour" escaping into another state be returned).

171 U.S. Const. art. V (requiring a three-fourths majority of states to ratify amendments to the Constitution).

172 1819 Slave Trade Act (The Act in Addition), ch.101, 3 State. 532 (1819).

173 See Eric Burin, *The Slave Trade Act of 1819: A New Look at Colonization and the Politics of Slavery*, 13 AM NINETEENTH C. HIST. 1, 2 (2012) (discussing the 1819 Act and the campaign to obtain federal assistance under the guise of helping to dispose of "recaptured Africans"). The Act was influenced by the Society for the Colonization of Free People of Color of America, which formed to promote the migration of free Blacks to Africa. For its history and important American historical figures associated with the movement, see EARLY LEE FOX, *THE AMERICAN COLONIZATION SOCIETY 1817-1840* (1917).

174 The song, although popular since set to John Stafford Smith's music, did not become the national anthem of the U.S. until 1931. See 36 U.S.C. § 301.

175 See generally MARC LEEPSON, *WHAT SO PROUDLY WE HAILED: FRANCIS SCOTT KEY, A LIFE* (2014) (noting Key's complicated profile with regard to slavery and race and tensions between the Abolitionists and the American Colonization Society); *The African American Mosaic: Colonization*, LIB. CONG., <https://www.loc.gov/exhibits/african/afam002.html> (last visited Dec. 19, 2020) (noting about 13,000 returnees by 1867); Francis Scott Key, *The Defence of Fort McHenry* [The Star Spangled Banner], third verse (noting the "foul footsteps" of the slaves who ran toward the British siege of Fort McHenry seeking freedom: "[n]o refuge could save the hireling and slave, [f]rom the terror of flight or the gloom of the grave").

technical issues of when a voyage began or questions of proof necessary to convict the trader.¹⁷⁶ The irony of the Supreme Court's slave-holding justices presiding over the disposition of such human cargo also did not go unnoticed,¹⁷⁷ but could be reconciled, at least in part, in terms sanctioning the appeal of formalism, which justified material agrarian interests associated with land management.

Interesting juxtapositions in terms of juridical treatment arose, however, particularly involving the interdiction of human cargo at sea. In the case of the *United States v. Schooner Amistad* of 1841, the Supreme Court recognized that native-born Africans afloat a Spanish vessel found in U.S. waters off the coast of Long Island, New York, had been kidnapped and enslaved in violation of the laws of Spain.¹⁷⁸ The Africans had taken control of the ship and had killed its captain and cook. The mutineers were set free, in large part due to the advocacy of former President John Quincy Adams before the Supreme Court. Adams' eight-and-one-half hour argument referenced, but eschewed, an appeal to external natural law, noting no other applicable law, statute, constitution, code, or treaty "applicable to the proceedings except that law" deriving from within the ethos of America's Declaration of Independence.¹⁷⁹ Similarly, in the *United States v. La Jeune Eugenie* of 1822, Justice Story, riding circuit in Massachusetts, upheld as valid the search and seizure of a French slave vessel disguised as a trader in palm oil.¹⁸⁰ He wrote that the slave trade aggregated "accumulated wrongs" that could hardly be consistent with the law of nations.¹⁸¹ Story assessed the foreign slave trade's legal status in federal courts according to a unitary connection between domestic and international law, presenting a rationally deducible natural law outcome that nevertheless implicitly recognized the sensitive political nature of the judgment when he allowed the slave vessel to be returned to the French rather than condemned and sold to support prohibition of the practice. In *The Antelope* of 1825,¹⁸² however, Chief Justice Marshall foreshadowed a more materialist construction of formalism and its rise by drawing a "sharp contrast between the *jurist* and the *moralist*."¹⁸³ Story silently concurred in what Finkelman described as Marshall's "dressing down [of] his closest colleague on the Court for arguing [in *La Jeune Eugenie*] that the trade violated" natural law and the law of nations.¹⁸⁴

176 Paul Finkelman, *Slavery in the United States: Persons or Property?*, in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* 105, 122 (Jean J. Allain ed., 2012); See generally FINKELMAN *supra* note 161. In total, the Marshall Court heard more than 50 cases involving slavery. FINKELMAN, *supra* note 161, at 27.

177 Proctors hired by Abolitionists to represent the interests of the Africans aboard the *Amistad*, as against the libel and admiralty claim of salvage rights for the ship and human cargo, argued: "each of them are natives of Africa and were born free, and ever since have been and still of right are and ought to be free, and not slaves." Proctors' Answer, *Gedney v. Schooner Amistad* (Jan. 24, 1840), <https://www.docsteach.org/documents/document/answer-proctors-amistad-africans> (last visited Dec. 19, 2020).

178 *United States v. Schooner Amistad*, 40 U.S. 518 (1841).

179 Argument of John Quincy Adams at 8, *United States v. Schooner Amistad*, 40 U.S. 518 (1841) https://avalon.law.yale.edu/19th_century/amistad_002.asp (last visited Dec. 19, 2020).

180 26 F. Cas. 832 (C.C. D. Mass. 1822) (No. 15,551).

181 *Id.* at 846.

182 *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

183 Sanford Levinson, *Slavery in the Canon of Constitutional Law – Symposium on the Law of Slavery: Constitutional Law and Slavery*, 68 *CHI-KENT L. REV.* 1087, 1096 (1997) (emphasis added).

184 FINKELMAN, *supra* note 161, at 129.

The Antelope had set sail under American flag from Baltimore in 1819, however it switched flags at sea after it was captured by pirates. It then proceeded to plunder ships off the coast of West Africa, accruing slaves along the way. It later commingled and consolidated human cargo claimed by Spain and Portugal, was intercepted by a U.S. revenue cutter, and taken to the port of Savannah, where a three-way dispute arose among Portugal, Spain, and the U.S. over the custody of the Africans. Chief Justice Marshall noted how “abhorrent” the slave trade was, even opining “[t]hat it is contrary to the law of nature . . . [because] every man has a natural right to the fruits of his own labor.”¹⁸⁵ Yet he recognized “it has been sanctioned . . . by the laws of nations . . . [as a] common commercial business . . . from long usage, and general acquiescence . . .”¹⁸⁶ and also as a right of conquest established by the customs and usages of war.¹⁸⁷ Although he denounced slavery and the international slave trade “as violative of natural rights, natural law, and Christian morality,”¹⁸⁸ he cautioned that the “Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law.”¹⁸⁹ Marshall wrote: “Whatever might be the answer of a moralist to this question [regarding the legality of the slave trade], a jurist must search for its legal solution . . . [and make] resort to this standard as the test of international law.”¹⁹⁰ Marshall treated the 258 Africans aboard the ship as commercial property, and a rough, pro-rated formula eventually divided the lot of Africans. The Court determined that the captives claimed by non-U.S. nations were slaves. Africans placed in the custody of the U.S. were returned to Africa; others sold to American slave owners with proceeds remitted to the Spanish and Portuguese to cover their losses.¹⁹¹ Importantly, Story’s approach in *La Jeune Eugenie* seemed to keep one eye squarely on the nation’s relations with an important ally, France, whereas Marshall’s approach in *The Antelope* ascertained the appropriate legal principle with one eye squarely on not upsetting Southern slave-holding sensibilities. A formative movement toward a formalistic, place-based rulemaking was in the making or at play in both cases, neither one of which respected human geography.

185 *The Antelope*, *supra* note 182, at 120.

186 *Id.* at 115. No nineteenth century justice more personally exemplified the turmoil of slavery than Justice Joseph Story, as he sided with the majority in *The Antelope* notwithstanding his opinion to the contrary in *La Jeune Eugene*. For an interesting and personal account of his legal struggle with the issues of slavery and the slave trade, see Paul Finkelman, *Joseph Story and the Problem of Slavery: A New Englander’s Nationalist Dilemma*, 8 MASS. L. HIST. 65, 69–76 (2002).

187 *The Antelope*, *supra* note 182, at 120 (opining from time-tested usages “in which all have acquiesced . . . that the victor might enslave the vanquished.”).

188 Levinson, *supra* note 183, at 1096.

189 *The Antelope*, *supra* note 182, at 114.

190 *Id.* at 121.

191 Four of the then six justices who sat on the Supreme Court, including Marshall, owned slaves, and the commingled composition of proprietary interests aboard the ship and sensitivities of American slave holders may have factored into the derivation of the pro-rated formula used to divvy up the chattel. See JONATHAN M. BRYANT, DARK PLACES OF THE EARTH: THE VOYAGE OF THE SLAVE SHIP ANTELOPE (2015).

B. INDIAN REMOVAL

The campaign against Natives, stimulated in part by the 1829 discovery of gold in Cherokee country (Georgia),¹⁹² resulted in the Indian Removal Act (1830), which displaced Natives of the five autonomous Gulf and southern republics—the Choctaw, Chickasaw, Creek, Cherokee, and the last to resist, the Seminole—to land west of the Mississippi River.¹⁹³ During this period, according to historian Angie Debo, the “age of military conquest was succeeded by the age of economic absorption, when the long rifle of the frontiersman was displaced by the legislative enactment and court decree of the legal exploiter, and the lease, mortgage, and deed of the land shark.”¹⁹⁴

Indian removal provided another portal through which formalism would enter into hemispheric international law. Although the process would congeal toward the end of the nineteenth century, the removal campaign between 1814–1858 spread Trails of Tears across the closing of the American frontier while massively redistributing Native homelands.¹⁹⁵ In one fourteen-year period beginning in 1850, “nearly the entire west coast of the United States transferred from Indian to American hands.”¹⁹⁶

A shading of this formalism appeared in the seventeenth century when England’s Charles II rescinded in 1680 his Carolinas land grant of 1629 and converted it into in a proprietary land charter to stimulate migratory land speculators and generate profit.¹⁹⁷ The King’s Bench already had established the common law principle of *jus soli* in *Calvin’s Case* of 1608, which laid the ground for assigning title to land based on birthright citizenship, which then extended property rights to the *postnati*.¹⁹⁸ Robert Williams claimed this case established the presumption of English superior rights over the Natives’ America.¹⁹⁹ It set off a long string of metropolitan engagements and conflicting possessory entitlements based on discovery and conquest that increasingly involved and diminished aboriginal space. Part of this reasoning rested on the diminished

192 See DAVID WILLIAMS, *THE GEORGIA GOLD RUSH: TWENTY-NINERS, CHEROKEES, AND GOLD FEVER* (1993) (detailing the first gold rush in U.S. history).

193 See Indian Removal Act, Pub. L. No. 21-148, 4 Stat. 411 (1830). An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi. Much has been written about the removal of these five tribes, which became known as the Five Civilized Tribes, given their intentional adaptation to European political and governance structures and dress. See also ANTON TREUER, *ATLAS OF INDIAN NATIONS* (2013). However, other nations of this region were also affected, including the Biloxi, Catawba, Chitimacha, Coushatta, Miccosukee, and Tunica. *Id.* at 84–87.

194 See generally DEBO, *supra* note 80, ix. On Native land cessions and removal resistance, leading to the protracted war between the United States and the Seminole in the swamps of Florida (1835-1842), see CARL WALDMAN, *ATLAS OF THE NORTH AMERICAN INDIAN* 223–24 (3d ed., 2009).

195 The expression “Trail of Tears” specifically attaches to the forcible removal to the west of 15,000 Cherokees during the Fall and Winter of 1838 and 1839. Four thousand Cherokees died during the forced march, which opened up 4,366,554 acres of land for white settlement. For a detailed map of the territory taken, surveyed for the state by John Bethune in 1831, see “A map of that part of Georgia occupied by the Cherokee Indians . . .”, *Geography and Map Division*, LIB. CONG. <https://www.loc.gov/resource/g3920.ct006918/> (last visited Dec. 19, 2020).

196 TREUER, *supra* note 193, at 18.

197 See MILLER, *supra* note 88, at 21.

198 (1608) 77 Eng. Rep. 389 (K.B.) (ruling by Lord Chief Justice Edward Coke that a Scotsman could claim testamentary bequests to land in England, although alien born, due to his bloodline).

199 ROBERT A. WILLIAMS JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 204 (1990).

capacity of Natives (*perpetui inimici*) to engage in relations with Christians, and part of the reasoning asserted that Natives occupied domain as tenants at will, never having settled, encumbered, cleared, or improved their land.²⁰⁰

There is double irony here. Native peoples of North America, bearers of the originary claim of *jus soli*, were subjected to its imperfect application by the European imaginary, even after the Cherokee “were one of the first tribal groups to acquire U.S. citizenship.”²⁰¹ Moreover, many Native peoples, particularly the Eastern Cherokee, converted toward agrarianism during the Monroe presidency. The Cherokee accepted missionary schools; developed their own alphabet in 1821, a remarkable syllabary designed by Sequoyah,²⁰² openly adapted European conventions and dress; converted matrilineal clan-based decision-making into representative councils and constitutional government; established newspapers, a diplomatic corps, and even developed forced labor plantations.²⁰³ These efforts earned them a measure of acceptance as a Civilized Tribe until material interests in frontier land accumulation and expansion necessitated the application of the *jus soli* principle to bring about their removal.

In 1831, the state of Georgia pressed its claim of superior rights when its land surveyors entered Cherokee territory. The Cherokee then brought suit before the Supreme Court, where Chief Justice Marshall denied them relief because the suit was improperly brought as that of a foreign nation, when, at best, the Natives’ status was that of “a domestic, dependent nation . . . in a state of pupilage.”²⁰⁴ The Treaty of Paris (1763) had ended the French and Indian War, settling metropolitan territorial disputes in favor of British rule over the northern Ohio Valley, territory east of the Mississippi River, and Spanish Florida. It did not, however, settle the question of expanding colonial interests over the southeastern territory, fomented by the mythos of American expansionism. According to historian Grandin, “[t]here was not one problem caused by expansion that couldn’t be solved by more expansion.”²⁰⁵ The idea of perfecting territorial acquisition through legal ritualism took shape. From 1774 until about 1832, treaties became the method for establishing land holdings, entitlements, and borders between individual sovereign American Nations and the U.S. government.²⁰⁶ Between 1778 and 1833, special Indian commissioners

200 Calvin’s Case, *supra* note 198, at 397; See Edward Cavanagh, *Infidels in English Legal Thought: Conquest, Commerce and Slavery in Common Law from Coke to Mansfield, 1603-1793*, 16 MOD. INT. HIST. 375 (2019).

201 TREUER, *supra* note 193, at 84 (according to a treaty provision of 1817, more than 100 years before the Indian Citizenship Act of 1924).

202 MILLER, *supra* note 88, at 172.

203 See TREUER, *supra* note 193, 76–85.

204 *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831).

205 GRANDIN, *supra* note 84, at 270.

206 See *American Indian Treaties, Native American Heritage*, NATIONAL ARCHIVES, <https://www.archives.gov/research/native-americans/treaties>. After 1832, until 1871, Native Nations were considered to be domestic, dependent tribes and negotiated treaties between tribes and the U.S. had to be approved by Congress. After 1871, the House of Representatives “ceased recognition of individual tribes within the U.S. as independent nations . . . , ending the nearly 100-year-old practice of treaty-making between the U.S. and Native tribes. *Id.*”

acting for the President under the supervision of the Secretary of War negotiated and concluded 374 treaties with indigenous peoples.²⁰⁷

However, underpinning this burgeoning reference to parchment was the immanent construct of interpretation provided by new rules associated with conquest and land conversion. In 1823, Chief Justice Marshall imparted legal significance to the discovery doctrine in the landmark Supreme Court case, *Johnson v. M'Intosh*.²⁰⁸ Marshall ruled that the Piankeshaw and Illinois Natives had no capacity to sell their land to private Eastern land speculators in part because they never owned it. They were “fierce savages . . . whose subsistence was drawn chiefly from the forest,” and because, in Lockean terms, they did not “improve the land” but “[left] the country a wilderness.”²⁰⁹ Marshall rationalized that Natives “could not be governed as a distinct society.”²¹⁰ Land appropriation “in the immediate neighbourhood of agriculturalists became unfit for them. . . . [Settlers] parcelled out and [took] possession of [the soil]; and the Natives fled, chasing game.”²¹¹ Marshall reasoned that the law regulating conquest applied to a static, not ambulatory, almost nomadic notion of what it meant to be conquered. That nomadic construction “was incapable of application.”²¹² He held the “unavoidable” need to “resort to some new and different rule, better adapted to the actual state of things.”²¹³ The Court ruled that Natives had no fee title to convey as they essentially only secured an “occupancy” interest in their land and thus held no real property interest to convey. Marshall reasoned that they lost the right of alienability as a legal consequence of discovery by colonizing European sovereigns. This right subsequently passed by conquest or purchase from the English Crown to the rightful holders of American land titles.²¹⁴ Marshall’s formalistic reasoning asserted the fundamental rule deducible from conquest and the Law of Nations: “However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle had 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 becomes the law of the land, and cannot be questioned.”²¹⁵

The rationale for the dependency doctrine had been laid out in an 1822 Indian Commission report by Jedidiah Morse to the Madison Administration.²¹⁶ The European settlers’ right to appropriate aboriginal land was based on the

207 *Ratified Indian Treaties 1722-1869*, NATIONAL ARCHIVES MICROFILM PUBLICATIONS (1973), <https://www.archives.gov/files/research/microfilm/m668.pdf>. The National Archives maintains a chronological list of 374 treaties signed between British, then US negotiators and Native Tribes (including “a few entries dated as late as 1883”).

208 *Johnson & Graham’s Lessee v. M’Intosh*, 21 U.S. 543 (1823).

209 *Id.* at 590.

210 *Id.*

211 *Id.* at 590, 591.

212 *Id.* at 591.

213 *Id.*

214 *See id.* at 587 (reasoning that “discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.”).

215 *Id.* at 591.

216 JEDIDIAH MORSE, A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES ON INDIAN AFFAIRS, COMPRISING A NARRATIVE OF A TOUR PERFORMED IN THE SUMMER OF 1820 UNDER A COMMISSION FROM THE PRESIDENT OF THE UNITED STATES, FOR THE PURPOSE OF ASCERTAINING, FOR THE USE OF THE GOVERNMENT, THE ACTUAL STATE OF THE INDIAN TRIBES IN OUR COUNTRY (1822).

latter's "qualified" occupancy of the land that provided "no power to convey" or own. The report held that "[t]he right of soil, or the absolute property, belong[ed] to the Sovereign, or State under whose authority the discovery and settlement were made."²¹⁷ The right of soil subsequently passed and "vested in the states of this Union."²¹⁸

The ruling in *M'Intosh* contrasted with Marshall's rationale in *Worcester v. Georgia* (1832),²¹⁹ indicating the early ambivalence associated with formalism. In that case, the Supreme Court ruled that the state of Georgia could not impose licensing laws on white Christian missionaries residing in Cherokee territory in Georgia. The state had attempted through this licensing law to stop sympathizers from associating with the Cherokee Nation, which the Court ruled violated the Constitutional provision that granted to Congress the authority to regulate commerce with Natives.²²⁰ Citing the Swiss authority on the Law of Nations, Emmerich de Vattel (1714-1767), Marshall noted that "Tributary and feudatory states . . . do not thereby cease to be sovereign and independent states" simply by associating with a stronger power.²²¹ "[T]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil."²²² The tensions and contradictions were apparent early in the nineteenth century. However, formalism's pull in support of material interests involving land management, expansionism, public and private distinctions, and the maturation of an American legal profession based on private contract, matched with a maturing international legal consciousness that imparted immanent authority to emerging liberalism, took hold after the Civil War, spreading its dominant construction of sovereign interests over the place-based and indigenous concern for human geography.

IV. CONCLUSION: SPATIAL IMPLICATIONS FOR INDIGENOUS RIGHTS TODAY

Discussion about indigenous peoples as a "global concept" only gained prominence in the 1970s.²²³ Even then, scholars debated the substantive sufficiency of the term. Some scholars deemed it an "unworkable and dangerously incoherent" normative construct.²²⁴ Others resisted the separation of minority rights from indigenous rights.²²⁵ Skepticism abated with the International Labor Organization's (ILO) definition in 1989, which connected tribal peoples to "social, cultural and economic conditions," as distinguished from other sectors of the national community, "on account of their descent from

217 *Id.* at 279.

218 *Id.*

219 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

220 *Id.* at 559.

221 *Id.* at 520, 561.

222 *Id.* at 559.

223 See Kingsbury *supra* note 40, at 414-15.

224 *Id.* at 415.

225 For a nuanced discussion of the problematic distinctions between minorities and indigenous peoples, see Dieter Kugelmann, *Protection of Minorities and Indigenous People Respecting Cultural Diversity*, in 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 233, 236-239 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2007) (noting difficulties regarding development of generally accepted definitions of both terms).

the populations which inhabited the country, or a geographical region . . . the time of conquest or colonization or the establishment of present state boundaries.”²²⁶

The ILO definition tethered indigenous peoples to considerations of time, place, and conquest. A history of subordination has turned indigenous rights into a world-wide resistance movement—a movement characterized by contested claims to spatial domain. This resistance movement may currently focus attention on peoples such as the Dongria Kondh and their struggles against transglobal capitalism’s encroachment into their sacred mountain domain; however, historically, it naturally focuses attention on the Americas, where the first “full impact” of modern European expansion began.²²⁷

A fuller consideration of indigenous rights—as something other than a resistance movement—has yet to occupy a central place in the progressive development of international law. The argument here is that early American contradictions between the republican virtues on which independence was founded conflicted with the institution of slavery and the mythos of frontier expansion, which facilitated the abrogation of treaties, land grabs, and Indian removal. Inconsistencies in important case law germinating from the prohibition of the international slave trade, together with the internalization of the *jus soli* principle to establish European birthright to land in the New World, oriented early American encounters with international law toward a problematic and still forming sense of immanence. This immanence vacillated between natural law and natural rights methods of ascertaining applicable principles, with rationalized European-descendant title accrued by means of conquest, land domination, and Christianity’s civilizing mission.

The prohibition of the international slave trade accommodated a foreign policy sensibility that promoted an international presence for the new country, but not at the expense of upsetting a complicated balance of power among seafaring nations, which did not include the United States. At the same time, a confusing if not irreconcilable recognition of regional slave practices in the South, which was at the core of the southern region’s economy, had to be accommodated in view of the outlawry of international slave trading, even as imperfectly practiced along the Atlantic hemispheric seaboard. Internal rationalizations produced formalistic legal principles that supported spatial constructs and pro-slavery provisions of the Constitution while imperfectly chipping away at the international slave trade.

With regard to Indian removal, the juridical mindset of immanence, reliant on German historicist influences of space and place—concepts also reflected in Lockean and Kantian (and later Schmittian) notions of land conversion and improvement—contrasted with presumptions of mere Native tenancy interests over their spatial domain, a tenancy interest exemplified by their unimproved stewardship and nomadic, non-agrarian or fenced-in relationship to place. These presumptions, however untrue, fed into a mythos of civilization and expansionism that generated the basis for vesting land title in European and American frontier understandings of sovereignty.

226 ILO Convention No. 169, June 27, 1989, 28 ILM 1382, 1384–85 (1989).

227 EDWARD H. SPICER, CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960, at 1 (1962).

The struggle over the meaning of legal formalism began much earlier than its usually fully-formed periodization as a post-Civil War movement. However, the expression of mature formalism supported the rational ascertainment of principles that turned common law into an instrument of material development and dominium. As the common law developed over the long nineteenth century, the reaffirmations of immanence gained support from the professionalization of legal practice and pedagogy, which witnessed during the latter part of the nineteenth century a parallel development of an international legal mindset as a mature, stand-alone discipline.

Writers of the Golden Age of international law fortified the independent status of international law and portaged its positivistic formality into the twentieth century. However, this incorporation also drew from Wheaton's admixture of pragmatic American common law, which itself projected a community ideal consistent with Christian and state-centric influences.

International law's difficult encounter with human geography helps to explain the impediments to the fuller expression of human rights and indigenous rights and why these projects will remain resistance movements until international law broadens its notion of place and takes more seriously spatiality's effect on the construction of international law.