World History Bulletin

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World History Association

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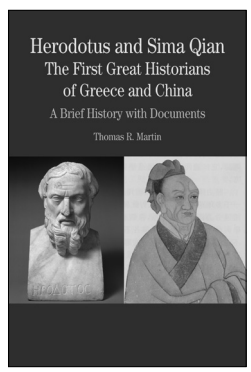

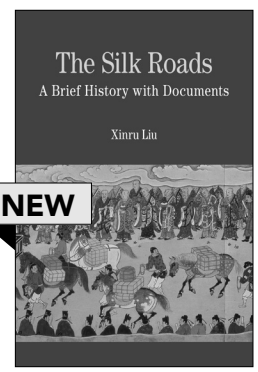

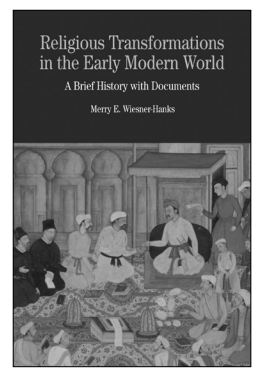

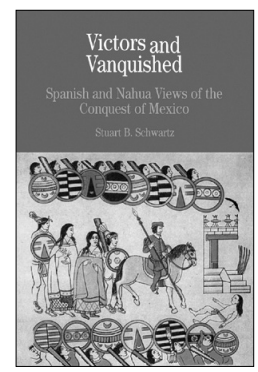

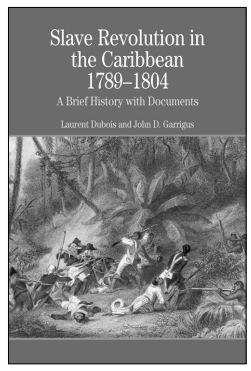

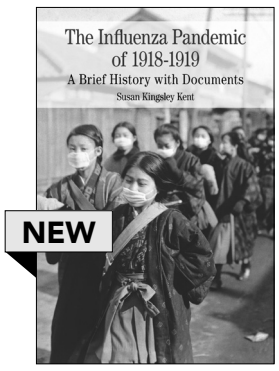

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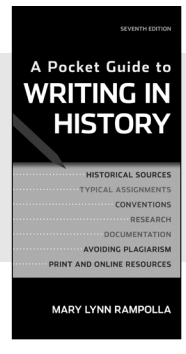

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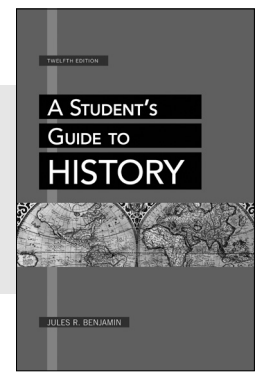

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Editor's Note:

We are excited to present in the Spring issue of the *World History Bulletin* a special section focusing on the theme of "Sovereignty and World History." The essays and contained in the section offer not only a compelling group of essays that probe the historical problem of sovereignty and the legal regimes that established its legitimacy, but also a fascinating entry from Professor Lauren Benton of NYU that explains how the topic enters the world history classroom. Together, these essays show how we can begin to develop new strategies of researching and teaching world history thorugh the lens of the law. This section of the *Bulletin* was guest-edited by H. Robert Baker of Georgia State University and Daniel S. Margolies of Virginia Wesleyan College. I deeply appreciate the thoughtfulness and rich variety of the section, and I thank Rob and Daniel – and the contributors – for their hard work.

As always, the *Bulletin* seeks to publish "short-form" essays on all aspects of historical scholarship including pedagogy, research, or theory. Topics may include the prehistoric, ancient, medieval, early modern, modern, and contemporary periods. Articles may include model syllabi or assignments, if applicable. Or, if you would like to guest-edit a selection of essays on a particular theme, please contact me at jpoley@gsu.edu.

With all best wishes,

Jared Poley

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The *World History Bulletin* is edited by the Southeast World History Association, which is housed in the History Department of Georgia State University.

Letter from the Executive Director of the World History Association

Dear WHA Members,

I hope this find you happy and healthy, enjoying life to the fullest. Thank you for your continued membership and support of the WHA.

One form of support for the WHA is from the many individuals who volunteer for the WHA in a wide-variety of capacities, essential for any vibrant and healthy membership-based association. As we all move more and more into a virtual world, different opportunities for the organization will develop, and volunteer service is vital for the success of the WHA to carry out its mission and goals. Please see the special note of thanks in this issue to the three such volunteers who served as members of the Executive Council for the past few years. If you are able and willing to volunteer to serve in some capacity or see a need yet to be met, please contact any officer of the association.

Another main form of support you give the WHA is through your financial contributions. The WHA survives financially by two major funding methods—your membership renewal and our conferences. This is why we sincerely thank you for continued renewal of your membership and ask you to encourage your colleagues to join as well.

Attendance at our conferences and symposia brings not only scholarship, learning, activities, collegial sharing, and a great time, but is the WHA's other main funding source. One terrific way to publicize WHA events at your workplace and to your colleagues is via promotional conference flyers, which are available online for each conference to print, post, or share via email. If there is anything that you see that we can or might be doing to facilitate membership or conference development, please let us know.

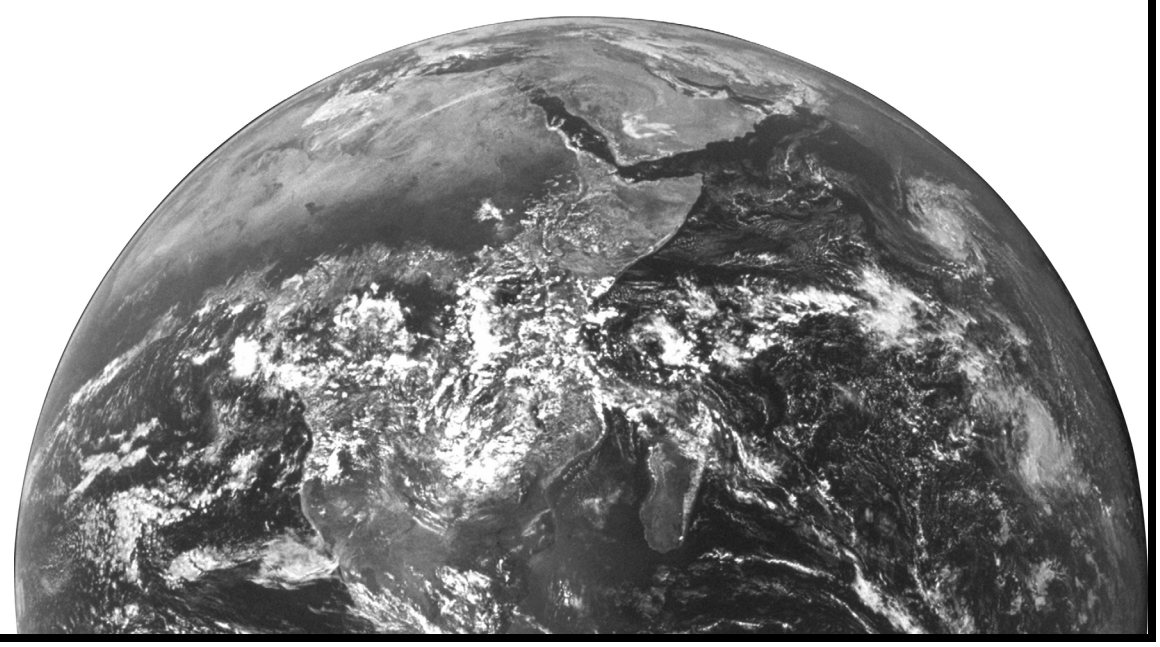
We also ask that you give generously to our annual fund drive, which provides for a critical gap in our funding needs, and covers costs not met by memberships and conferences alone. Finally, including the WHA in your estate planning makes a lasting contribution and tribute to advancing the goals and mission of the association.

WHA is planning several terrific events this year; we hope you will consider attending at least one of them. First is our upcoming annual conference in Minneapolis, to be held at North Hennepin Community College, a campus with over 15,000 students and only a short drive from downtown Minneapolis. This conference will build upon all the successes of past conferences and will be meeting in a purpose-built, state-of-the-art building ensuring a high quality experience. Warm hosts, dynamic keynote speakers, book exhibit partners, continuous coffee breaks, opening and closing receptions, and much more await you in Minneapolis.

Other upcoming symposia in Australia, Vietnam, Spain, and next year's annual conference in Costa Rica are all designed to be appealing in location and themes. While you may not be able to attend all of these events, it is our hope that by offering a wide-variety of venues and meetings throughout the year that you will be able to attend at least one of them, in a place or for a theme of particular interest.

As always, we welcome your comments and suggestions on how we may improve the organization or your membership experience, and thank you again for your dedication to the WHA.

Winston Welch
Executive Director



Letter from the President of the World History Association

Marc Jason Gilbert, Hawaii Pacific University

The Age of Outreach

The holding of the World History Association's 22nd Annual Conference at North Hennepin Community College in Minneapolis, Minnesota, represents a "first" in terms of local hosts, but, like its venue at a secondary school last year, it marks yet another step in the growth of the WHA as an institution serving the wider world history community at a time when such outreach is needed more than ever before. We are witnessing an increase of pressure upon community colleges to do even more with even less resources, often by being asked to carry the load for introductory and general education courses in world history where they are partners with their states' university systems. The WHA is addressing this issue by various means which we hope to address through the colloquium for community colleges to be held at our upcoming meeting in Minnesota that is designed to build bridges between and among them and also the WHA.

Another challenge facing the teaching of world history is the effort to reduce history courses to elective status among reduced social sciences course requirements that is a feature of many current education reform proposals for the schools. To address this issue, I have personally sought to increase WHA visibility through member participation in other history and social science conferences, by linkages with likeminded associations, such as the American Society for Environmental History (ASEH)), and participating in activities at and through the National Council for the Social Studies (NCSS) and the National Council for History Education (NCHE), which share our concern at the potential loss to students of the key analytical tools history education can provide.

More directly, I have asked WHA members to increase their participation in volunteer participation on panels such as those addressing the Common Core and parallel curricular reform initiatives. WHA members are now participating in discussions with NEH and up-coming grant-supported initiatives to improve and expand the delivery of world history content. It has also led to the WHA to seek new education alliances, such as with California's History Blueprint.

As a non-profit, the WHA is prohibited from activities such as lobbying. Nonetheless, over the past year, I have received numerous requests for support from teachers whose school systems are under pressure to weaken their world history. On these occasions, I have responded by sharing the WHA's longstanding concerns regarding necessity of maintaining the highest standards in the teaching of world history and other affirmations and resources as is permitted. Such requests for WHA support may become more strident in the future. I believe the WHA will prove be equal to the task of addressing them in a manner that falls within the boundaries of WHA's legal constraints.

The WHA Teaching Committee, under the leadership of its Chair, James Diskant, was asked to, and has eagerly risen to take on, fresh responsibilities, especially that of surveying and otherwise seeking out the needs of classroom teachers at all levels of instruction.

At the same time, the WHA is expanding its global reach and international profile by co-sponsoring panels and programs at the annual meeting of history educators in Europe (EuroClio), as Jonathan Schulman of the California World History Association and I recently did at our own expense at their recent meeting in Turkey.

The WHA is also expanding its sponsorship of symposia on world history issues: the next two years will see financially self-supporting symposia on "Faith and Empire" in Fremantle, Australia, Oct. 3rd-5th, 2013; on "Vietnam in World History" in Hanoi, Vietnam, Dec. 29th-31st, 2013; on "Port Cities in World History" in Barcelona, March 27th – 29th, 2014; as well as the WHA's every third year international annual meeting in Costa Rica on July 15th-18th, 2014, among whose themes will be the "Environment in World History." See the WHA website for further details on these and other symposia as they are announced.

While there happily appears to be no limits to the creativity and energy of your officers and many members, there are limits to our resources. To address that issue, the WHA introduced this past December a new income-based membership scheme. I am happy to say that this did not lead to a reduction in paid memberships, but it also did not lead to a hoped-for increase in memberships or revenue.

We have neither greatly grown nor shrunk over the past few years, which is not a bad situation given the current hard economic times. However, without a more robust and dynamic membership, we cannot be confident of continuing to meet the growing challenges we now face. For that, we must appeal to more of those who enjoy teaching world history and/or who wish to share their knowledge within this growing field to join the only professional association wholly devoted to assisting them in continuing to have the opportunity to do so.

To achieve that goal, the WHA needs to reach more in our field with the message that membership in the WHA, regardless of its individual benefits, is vital to the promotion of research in and the teaching of world history, to say nothing of preserving our profession. This is not a mere money issue, but should not the volunteer members who selflessly do outreach for the WHA have the resources to help them in this work—such as covering their registration fee for NCSS—and should they not have the ability to speak as one of an increasing number of members supporting these activities through their own memberships?

We can do so with your help, by making Amazon purchases using the WHA portal at no cost to you, by choosing an appropriate membership level when renewing (with such discounts for multi-year memberships!), by considering Life Memberships and asking non-member colleagues to join with and thus support those WHA members who volunteer to serve, develop and sustain vital WHA activities in support of global learning, global citizenship, and global understanding.

Marc Jason Gilbert
Hawaii Pacific University

Jerry Bentley Book Prize in World History

The American Historical Association invites donations to endow a Jerry Bentley Book Prize in World History, which will honor Professor Bentley's tireless efforts to promote the field of world history, and his signal contributions to it, over a career tragically cut short by his recent death.

Over the past twenty years, the field of world history has developed into one of the most vibrant and energetic areas of the discipline--with a growing volume of books and monographs published in the field, and an expanding presence in history departments and doctoral programs. Professor Bentley played an indispensable role in the development of the field. He began his career as a scholar of Renaissance Italy, but quickly became one of the leading figures in the world history movement of recent decades. He was the founding editor of the *Journal of World History*, and served as its editor from the first issue in 1990 until shortly before his death. He wrote one of the landmark works in the field in 1993, a study of cultural interactions within Eurasia entitled *Old World Encounters*. Through his work with the World History Association, the College Board Advanced Placement program, and his teaching at the University of Hawaii, he helped to elevate world history into a thriving field of both scholarship and pedagogy.

The Jerry Bentley Book Prize in World History will be awarded to the best book in each calendar year in the field of world history. Any book published in English dealing with global or world-scale history, with connections or comparisons across continents, in any period will be eligible. As with all of the book prizes that the American Historical Association awards, its elected Committee on Committees will choose members of a distinguished review panel to review all books submitted for the prize. Most books will be submitted by their publishers, but anyone can submit a book for consideration. The prize will be awarded at the AHA's annual meeting in the first week of January, as part of the Association's awards ceremony.

Donations can be submitted either online http://www.historians.org/donate/ or by check made out to the AHA and mailed to Bentley Prize c/o Robert B. Townsend, Deputy Director, American Historical Association, 400 A St., S.E., Washington, DC 20003. For further information, contact the fundraising co-chairs appointed by the AHA, Alan Karras (karras@berkeley.edu) or Merry Wiesner-Hanks (merrywh@uwm.edu); the prize committee also includes David Christian, Sharon Cohen, Karen Jolly, and Kerry Ward. All contributions are tax deductible.

22ND ANNUAL WORLD HISTORY ASSOCIATION CONFERENCE

Minneapolis | June 26-29, 2013

CONFERENCE THEMES:

Roads, Trails, and Rivers in World History

AND

Diasporas and Refugees in World History

Minneapolis Sculpture Garden

Guthrie Theater

Nicollet Island Pavilion

Old Stone Arch Bridge

WORLD HISTORY ASSOCIATION ANNUAL CONFERENCE

The World History Association is a community of scholars, teachers, and students who are passionately committed to the study of the history of the human community across regional, cultural, and political boundaries.

The **2013 World History Association Conference**, hosted by **North Hennepin Community College**, offers a wonderful opportunity to commune with an international community of world history scholars and teachers. Conference registration fee includes opening and closing receptions, coffee breaks, book exhibit, and much more. The opening reception will be held at the **Nicollet Island Pavilion**, a premier historic landmark located on the Mississippi Riverbank, a short walk from The Depot Renaissance, our official conference hotel.

SPECIAL CONFERENCE RATE ACCOMMODATIONS

The **Marriott Depot Renaissance Minneapolis Hotel** offers free parking, wireless internet access, fitness center, family-friendly water park, work area with large desk, swimming pool, and other amenities for WHA conferees. Located in the heart of downtown Minneapolis, convenient to many cultural attractions, superb dining, and two blocks to the Light Rail which connects to the Minneapolis-St. Paul Airport and the Mall of America. We encourage conferees to make their reservations early as room availability is limited. For those without vehicles, optional shuttle service will be provided between the hotel and the conference venue. There will be a separate fee for this service. Shuttle reservations can be made when registering for the conference.

For more information about the WHA and to register for the conference, visit: www.thewha.org.

WHY SHOULD YOU ATTEND?

- Cutting edge pedagogy
- Excellent keynote speakers
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World History Association

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Special Section: Sovereignty and World History

Sovereignty and World History

H. Robert Baker (Georgia State University) and Daniel Margolies (Virginia Wesleyan College)

Much thinking about sovereignty in our present day is done in deceivingly simple terms. It is framed in terms of authority, insofar as it presupposes the ability of a state to speak and enforce the law within its borders. It is also related to power, insofar as it entails the ability of a state to defend those borders against invasion and encroachment or to project power outside of them. Perhaps above all else, sovereignty bespeaks borders and limits, clearly defined, marked and understood by all. There may be some utility in thinking about sovereignty in this way. It provides a measure with which to judge a state's effectiveness and viability (hence, the problems with "failed states" for the United States State Department). It reaffirms established claims of territorial integrity, allowing states to oppose wars for territory on an objective standard. And imagining the world as a patchwork of sovereignties and inviolable states tied together by treaties and custom through which we can navigate with passports and visas lends stability to what might otherwise be (or is) a rather unnerving world of uneven and sometimes uncertain governance.

Sovereignty's facile utility as a concept, however, is also its undoing as a subject of historical analysis. Simply put, some have succumbed to the temptation to think of sovereignty in universal terms, as a "fact." This in turn beckons us down the narrowing path of teleology, searching for sovereignty's birth and maturation in the past rather than asking how the peoples of the past understood the term and its fitful operation and application in their own worlds over time.

The articles in this issue invite us to treat sovereignty differently and with greater nuance. Rather than search for its origins or discover when it reached its modern, static form, these articles probe how notions of sovereignty intermingled with articulations of empire, and how strategies to extend power have worked within ornate systems of law. Taken together, they offer new ways of conceiving sovereignty as a set of strategies that shifted according to emerging matrices of necessity or ambition. Conceptions of sovereignty operated within deep political, economic, and legal contexts which subsequently determined their meaning, development, and expression. These articles each explore the context within which sovereignty developed.

A useful idea that emerges in these articles is that definitions and conceptions of sovereignty had primary importance. European and American imperial efforts to possess the new world depended principally upon the ability of states to project power, and part of that power in turn became the justification of the possession. This justification revealed how imperial powers understood themselves and their own limitations. It also had practical and far-reaching consequences to which numerous territorial and jurisdictional claims litigated in the twentieth century attest. More immediately, the multiplicity of options available to imperial powers had consequences for how empires imagined their own relationship to territory and to indigenous peoples.

If sovereignty was an important concept, it was nonetheless not singular in its formulation or its application in the early modern world or its recapitulation or articulation in the modern world. The articles in this issue demonstrate variously how notions of sovereignty contain elisions and discrepancies. The articles also offer new and creative ways of conceptualizing sovereignty as a spatial and temporal construct. Because sovereign nations have had to deal with the movement of goods and persons that did not neatly conform with static notions of territorial boundaries, the creation of anomalous spaces has provided novel approaches to sovereign jurisdiction. Guantánamo Bay is just such a space, but so too were the bonded warehouses in U.S. ports in the nineteenth century. The creation of related zones of exclusion or exception has become a primary approach in U.S. imperial governance, much as it was earlier with Europeans.

Valentin Jeutner leads off this issue with an article exploring the symbols of sovereignty in the age of exploration. As European powers jockeyed for position in the territory race, so too did their justification for possession. While this produced its share of oddities—swimming to an island to erect a cross, for instance—Jeutner argues that such rituals signaled a new age in which possession depended upon specific action rather than religious justification or papal decree. Dylan Ruediger follows by contrasting different approaches to cross-cultural killings in British North America. What Virginia called a diplomatic issue Massachusetts called a crime, resulting in substantive difference in colonial policy and settlement. Sovereignty was not conceived of singularly by British colonists at all. The variance demonstrates that sovereignty embodied in legal practice differed significantly just at the point when philosophers like Thomas Hobbes and John Locke reimagined sovereignty in political terms. But liberalism would indeed have its effects. As Michael Schoeppner demonstrates in his contribution, black sailors in the early nineteenth century encountered a dizzying and contradictory set of regulations in United States ports. While they often faced jail time for their service upon ships that landed in southern ports, they could also engage lawyers in northern ports to enforce the terms of their contracts when taken advantage of by ship captains. Black mariners could find jurisdictional and conceptual spaces in which they could be treated as formal equals at law with whites.

Transnational history is the theme of the next three articles. Daniel Margolies considers sovereignty in terms of both time and space. By creating bonded warehouses in U.S. ports that were simultaneously within U.S. territorial borders but outside the reach of customs inspectors, the United States structured exceptions to sovereignty to strengthen sovereign intervention in the market. In a corresponding research note, Koji Furukawa considers the creation of similar jurisdictional elisions in Free Trade Zones in Okinawa. The spatialities of sovereignty are considered further by Mats Ingulstad and Lucas Lixinski, who examine how imperial powers asserted and wielded control over natural resources in South America even after the putative end of empire. In fact, the rise of Pan-Americanism in Latin America should be seen as a pro-sovereignty move made against the imperial (or at least *imperious*) policies of the United States

regarding the development of natural resources. Veta Schlimgen follows this theme of spatiality by looking at the legacy of American empire in the decision of the U.S. Supreme Court to extend U.S. jurisdiction over detainees held at Guantánamo Bay in *Boumediene v. Bush* (2008). Although legal commentators have focused on the Court's 5-4 holding that habeas corpus protections were available to detainees, Schlimgen points out just how much the case rests upon the language and law of nineteenth-century empire.

Our final article comes from Lauren Benton, whose scholarly work on empires and legal systems is well known. She poses a simple yet vexing question familiar to history teachers at any level, whether from kindergarten to graduate school: how do we get students to understand that the past is not merely prologue? Proper historical thinking requires that we understand sovereignty not as a fully formed and stable concept (clearly defined borders, control over those borders, etc.) against which we measure states and kingdoms of the past, but rather as an historically contingent phenomenon. When we think of sovereignty, we are almost inevitably thinking in contemporary terms of something that has only existed since (perhaps) the late-nineteenth century, and not in any universal form. We must be careful of simply grafting this concept onto interactions between empires and indigenous peoples, as well as international relations in previous centuries. Even when we are cautious, we can find that our students seem drawn to such anachronisms. Professor Benton offers us all a palliative. That graduate students (in cosmopolitan New York of all places) fall prey to anachronistic readings of sovereignty may surprise us, but it should also comfort us. The job of teaching historical thinking based on context, contingency, and change is vital and ongoing, and its work is never done.

Clearly sovereignty is not a settled concept, but rather a fluid one that is defined more by its exceptions and ambiguities than by any simple or singular definition. Each of the articles in this issue contributes to new thinking about the ways sovereignty has been formulated over time. Taken together, these articles offer several observations about sovereignty as a concept in world history and particularly as it relates to European imperial history. These articles help us gain a clearer picture of what sovereignty meant to people in the past, how it was shaped by both the political and diplomatic considerations of what was possible or desirable and the legal constraints of what was allowed, and how it was implemented. Political actors could not always use sovereign claims to achieve anything they wished, but they often found ways to bend sovereignty to fit political needs and wants. The legacy of these actions presents a view of sovereignty that resists easy definition but provides an important window for understanding how systems, states, empires, and individuals have interacted in complex ways.

It is worthwhile to note that this issue of the *World History Bulletin* has unwittingly emerged with a focus on the expansion of issues in Euro-American sovereignty and empire. Much work remains to be done on the substantial role that novel assertions of sovereignty played in Asian imperial systems over time, including the Mongol, Chinese, and Japanese empires, to pick some prominent and critical examples. Critical (and hopefully comparative) work on these topics remains to be done, and perhaps a future issue of World History Bulletin can highlight such approaches in new scholarship.

Of Islands and Sunny Beaches: Law and the Acquisition of Territory from the Fifteenth to the Nineteenth Centuries

Valentin Jeutner (University of Cambridge)

The weather had been bad for weeks. High waves and strong winds violently rocked the ship every day and night. For three days Captain Pedro Guzmán of Spain and his crew had attempted to take possession of a small, uninhabited island off the western coast of Mexico. But the conditions made it impossible to land on the beach without risking the loss of the ship. Eventually, the captain aborted all further attempts. However, unwilling to sail on with the prospect of the island falling to later explorers, Captain Guzmán ordered one of his crew members, Hernando Cherino, to swim ashore accompanied by two witnesses. They were ordered to erect a wooden cross and to cut a few tree branches. Upon the men's return to the ship, the island was named Ramos, their acts were duly recorded, signed and dated the 20th of March 1532.[1]

Throughout the late Middle Ages and up to the early nineteenth century we find similar accounts of colonial powers taking possession of previously unclaimed territories.[2] The practices they employed to claim sovereignty ranged from burying coins and erecting crosses to setting sheep free, from the building of small wooden huts to the performance of sophisticated rituals that included the reading of lengthy declarations. To some extent these acts[3] were attempts of conquerors to legitimize their conduct in their own eyes in accordance with their respective cultures and traditions.[4] This essay will consider, however, the significance of these often-cumbersome procedures in the legal context of defending claims to sovereignty vis-à-vis other colonial powers.

Sketching the customs of the main colonial powers such as Portugal, Spain, and France during three different periods, it is suggested that these practices are the manifestation of the colonial powers' conviction that territory could only be acquired in exchange for specific acts. Title to territory had to be *earned* by incurring expense or detriment in the process of acquisition. The acts an explorer engaged in with respect to a newfound territory on behalf of his sovereign provided the justification as to why his claim would be valid vis-à-vis subsequent discoverers. This thesis will be put to the test and illustrated with respect to the colonial powers' conduct regarding islands in three epochs, which correspond roughly to Wilhelm Grewe's accepted periodization of international law (the late Middle Ages, the Spanish Age, the French Age).[5] The forthcoming analysis shall thereby shed some light on the role law played in history in this specific context.

It should, however, be noted at the outset that this brief analysis of the practices of the main colonial powers is necessarily incomplete as constraints of time and space limit the scenarios that can be evaluated. Further, the evidence is not always unequivocal as to the state of the law during the epochs

under review. This means that although my thesis is strongly supported by the evidence, it might not be the only way to read the evidence. The uncertainty in this area is due to some extent to the fact that the actors on the international plane "did not act according to dogmatic legal considerations,"[6] but as we shall see, that does not mean that it is impossible to discern certain patterns.

Late Middle Ages (Fifteenth Century)

It is important to remember that the law of nations during the late Middle Ages did not exist in the same form as we know it today. Rather, customary practices and treaties addressing specific subject matters (e.g. consular relations) regulated the dealings between different princes. Similarly, the concept of territorial sovereignty did not yet refer to well-defined, contingent areas, but to spheres of influences and dominions of a prince.[7] Nonetheless, it is critical to consider the conduct of colonial powers during this time as it allows us to appreciate the development of international law throughout the next centuries.

In the late Middle Ages, Spain (Castile/Aragon) and Portugal were the most important powers engaged in the exploration of overseas territories. The main sources of title to newfound territory were papal grants based on paragraph 13 of the Donations of Constantine.[8] The Donations of Constantine,[9] supposedly contained in an imperial decree of 315/317 A.D., had allegedly conferred upon the Pope (at the time Pope Sylvester I, r. 314-335) the power to dispose of those parts of the world that were either completely uninhabited, or inhabited by infidels. Curiously, the Donations of Constantine also conferred upon the Pope the right to dispose of the world's islands.[10] Despite the document's later demise,[11] the Pope's authority to dispose of newfound territories was not questioned until after the discovery of the Americas[12] and Portugal and Spain relied upon papal grants on many subsequent occasions.

In response to the Spanish challenge of Portugal's title to the Canary Islands in the 1470s, the Portuguese, for example, invoked numerous papal decrees including Nicolas V's *Dum diversas* (1452),[13] *Romanus Pontifex* (1455),[14] and Calixtus III's *Inter Caetera* (1456).[15]

Similarly, it was clear that the Pope (at the time Alexander VI, r. 1492-1503) would determine the extent of Spain's rights to the newly-discovered American territories following Christopher Columbus' landing on Guanahani[16] on 12th October 1492. Upon Columbus' return in March 1493, Spain immediately entered into negotiations with Portugal, whose rights to Asia (Columbus believed he had discovered the most western point of Asia) Spain was believed to have violated. Both parties turned to the Pope. Lengthy discussions, lasting from April until November of 1493, ensued. Eventually, Portugal and Spain agreed to the Treaty of Tordesillas (2 July 1494), which fixed the boundaries between the Portuguese and Spanish spheres of influence.

The fact that Spain and Portugal repeatedly invoked papal edicts and that they submitted to lengthy negotiations under the Pope's supervision illustrate the importance both powers attached to the legality of their actions. Further, the Spanish decree ordering Columbus to "keep 100 leagues away from the Portuguese possessions"[17] before his departure shows the extent to which legal requirements shaped the kingdoms' actions.

Given that papal decrees were the source of the title to discovered territories, some might question whether Spain and Portugal really acquired sovereignty over those lands in exchange for a detriment or service as argued in the introduction. However, the detriment in these cases consisted of the kings' obligation to expand the territorial reach of Christendom and to convert the inhabitants of foreign countries to Christianity.[18] Further, the kingdoms' otherwise existing obligation to pay financial tribute to the Pope was generally dispensed with in light of the detriment "involved in the carrying out of exploratory expedition to the overseas regions."[19]

Nonetheless, it is evident that the character of detriment necessary to confer upon a colonial power a valid claim to a given territory *vis-à-vis* other powers differed in the late Middle Ages from the detriment required in later periods. This is due to the fact that, for the time being, the Pope was still considered to be the administrator of all newfound territories. As such, title[20] to newfound territory could be acquired directly from him. There was not yet the need to transform previously unclaimed territory into the exclusive property of one single power and to establish the superiority of that power's claim vis-à-vis the claims of other powers.

We shall see in the next section that in the aftermath of the discovery of America support soon grew for the views of writers such as Bartolus de Saxoferrato (1313-1357).[21] Powerful temporal leaders and early Protestant movements increasingly challenged the Pope's position as ultimate lord over the world's territories. Eventually, it was accepted that all newfound territories were no-man's land (*terra nullius*), which could be claimed by explorers if certain conditions were satisfied.

The Spanish Age: (Sixteenth and Seventeenth Centuries)

After the discovery of the American continent in 1492 and the rejection of the 1494 Treaty of Tordesillas by the other European powers whose interests the treaty ignored entirely, it became very clear to Spain and Portugal that papal grants of territory were no longer defensible sources of title. During a controversy over access to the Indies in 1580, Queen Elizabeth of England (r. 1558 – 1603) left no doubt that in her majesty's view "(t)he Pope had no right to partition the world and to give and to take kingdoms to whomever he pleased."[22] Increasing competition from the Dutch and English for colonial possessions led Spain and Portugal to relax reliance on papal grants. Instead they increasingly resorted to arguments based on the right of discovery.

Claims based on the right of discovery often buttress modern legal arguments to title and possession, although courts and arbitrators still struggle to reach unequivocal determinations. In the 1928 Islands of Palmas Case between the United States and the Netherlands, for example, the United States argued in favor of the "unquestioned validity of title based on discovery" in the seventeenth century,[23] while their Dutch counterparts denied this contention.[24] However, in 1875, Delagoa Bay was granted to Portugal based on Portugal's earlier discovery of the bay in the sixteenth century.[25] In the 1885 dispute between Spain and Germany over the Caroline Islands, Spain successfully relied on her earlier discovery of the islands as well.[26]

Nevertheless, and despite the fact that certain Spanish

and Portuguese claims based on discovery were at times recognized, "no state appeared to regard mere discovery, in the sense of 'physical' discovery or simple 'visual apprehension' as being in any way sufficient"[27] to establish valid claims to newfound territories.

That is why the colonial powers so often resorted to symbolic annexation, which was more than discovery in the sense of mere "visual apprehension", but less than effective occupation as required in later centuries and until today. Symbolic annexation could take many different forms. One example was mentioned in the introduction and involved the cutting of tree branches and erecting a cross, but taking earth or stones (Captain John Cunningham on Greenland on behalf of the King Christian IV of Denmark in 1605),[28] the recitation of a verbal formula (Captain Francis Drake on Santa Marta, Elizabeth and Santa Magdalena islands on behalf of the English Crown in 1578),[29] or the cutting of trees and display of the royal couple's picture wrapped around a tree so that "no Weather could hurt them" (Captain Thomas James on Charlton Island on behalf of the English Crown in 1632)[30] were apparently also sufficient. To similar effect the Spanish Crown had ordered Alonso de Hojeda in 1501 to erect signs wherever he landed "in order to stop the discoveries of the English by that route."[31]

The ceremonies and acts of taking possession of such islands must have been quite a spectacle. Of Captain Wyatt's landing on the island of Trinidad on February 3, 1595 it is reported:

> …wee caused the trumpets to bee sownded solemlie three several times, our company trooping rownde; in the midst marched Wyatt bearing the Queenes armes wrapped in a white silke scarfe, edged with a deep silver lace, accompanied with Mr. Wright and Mr. Vincet, each of us with our armes, having the Generall's coller displaid…thus marching up to the top of the mountaine unto a tree which grew from all the rest wheare wee made a stande. And after a general silence Wyatt red it unto the troope, first as it was written in Latin, then in English; after kissing it, fixed it on the tree appointed to bear it, and having a carpenter placed alofte with hammer and nailes ready to make it fast, fastned it unto the tree.[32]

Rituals like those performed by Captain Wyatt on Trinidad not only served to distinguish a specific territory like the island of Trinidad from the undifferentiated mass of *terra nullius* and to evidence an express intention to take possession of a given territory, but, as recent scholarship further suggests, the elaborate ceremonies and rituals marked the land in a way unique to the traditions and "cultural histories"[33] of the respective power claiming a given territory. That way the conquering power established a specific link between itself and the land.

However, even though the exact manifestation of the colonial powers' acts on newfound territories differed, they all shared the view that a legitimate claim vis-à-vis the other powers to a previously unclaimed territory could only arise from specific acts involving labor and expense. According to Grewe, "the nation which had shouldered the cost, the labor and the pain of the discoveries, [w]as the only one which in all fairness was entitled to harvest the fruits of this labor, sacrifice and pain."[34] Similarly, Abel Tasman of the Netherlands was instructed by the Dutch East India Company in 1642 to "take possession everywhere" to prevent "any other European Nation from reaping perhaps the fruits of our labor and expenses in these discoveries."[35] That would also explain why mere discovery was probably never sufficient to confer sovereignty over a territory. The "cost, labor and pain" involved in mere "visual apprehension" was simply not enough to justify an exclusive claim to a given territory.

It is not surprising then that soon even the practice of symbolic annexation, still short of exercising effective control over an island, came under intense pressure as younger colonial powers such as Great Britain, the Netherlands, and France entered the competition for the world's remaining unclaimed territories. Gradually, discovery and symbolic annexation, termed by John Milton in 1655 as giving rise to an *imaginarius titulus* (imaginary title),[36] were replaced with the requirement to take actual, effective occupation of a territory. A similar approach had already been favored by Bartolus de Saxoferrato (see *supra*), who in turn had borrowed the concept from Roman Civil Law.

Eventually, the attempt of the two older colonial powers, Portugal and Spain, to secure their predominant positions and to prevent their younger counterparts from interfering with their possessions on the American continent and elsewhere failed. Instead, the view prevailed that only those territories where "they [colonial powers] actually settled and continued to inhabit"[37], could be claimed to belong exclusively to one power.

The French Age (Seventeenth - Nineteenth Century)

From the beginning of the seventeenth century onwards, colonial powers were increasingly of the view that sovereignty over territory could only be acquired by exercising effective control over those territories. Louis XIV of France argued, for example, with respect to the dispute over Cayenne with Spain in 1701 that the law of nations permitted the acquisition of sovereignty only through effective occupation. Similarly, the English Crown instructed her explorers "to take actual, effective occupation of the land"[38] and the Swiss jurist Emerich de Vattell (1714-1767) stated that symbolic annexation and discovery gave merely rise to an inchoate title, which had to be perfected by "full possession."[39]

The exact shape of effective occupation depended on the character of the territory, which was sought to be acquired.[40] Especially with respect to small, uninhabited islands such as Ramos (see *supra*) there will not have been a significant difference between symbolic annexation and effective occupation. With respect to larger territories such as islands that could actually sustain human life, more was certainly required. Usually no less than a settlement would have been necessary to protect a European power's title to the land. However, controversies as to the precise legal requirements at the time continue until the present day. Many contemporary territorial conflicts are rooted in unresolved, original claims to territory dating back to the seventeenth century or even earlier.[41]

The Anglo-Argentine dispute over the Falklands/Las Malvinas islands, for example, revolves around competing

exercises of control over the islands in the seventeenth and eighteenth century and whether or not the control exercised by Argentina prior to 1833 sufficed to confer sovereignty over the islands to Argentina so as to preempt subsequent British claims.[42] Another example is the most recent dispute between Taiwan, China, and Japan over the Senkaku Islands in the East China Sea. The issue in this case is whether or not the islands were *terra nullius* at the time of Japanese occupation or whether they had previously been under the control of the Qing Empire.[43]

The rationale necessitating effective occupation in the context of acquiring territory is the same as that underlying the practices discussed in the previous sections. The powers that invested most in their attempts to exercise control over one particular territory where the ones who had the best justification to claim the land. The only difference in the French Age concerned the degree of control required to perfect a title to a territory. While a promise to extend the papal realm would have sufficed in the late Middle Ages and symbolic annexation was enough to confer sovereignty during the Spanish Age, the French Age required the actual taking of the land, including in most cases the establishment of settlements. One of the most important factors responsible for this shift, apart from the general demise of papal authority due to the emergence of Protestantism, appears to be the increased number of colonial players amongst whom the newfound territories had to be divided. Originally, only Spain and Portugal had to share the world beyond Christian Europe. By the beginning of the nineteenth century, however, almost all larger Western European powers had their own colonies and had to find mechanisms to divide the world between themselves.

Another effect of the enlarged number of colonial powers was the powers' increased and acute awareness as to their conduct with respect to newfound territories. Originally, any convenient way of claiming a territory would have sufficed. Even a mark on a map would at times have been enough. However, towards the end of the eighteenth century the colonial powers' procedures became more formalized and the writings of scholars such as Vattell served as important guidelines for explorers. The report of the taking of Ramos Island even explicitly states that the island was taken in accordance with the requirements of the law.[44] It is thus clear that law influenced the behavior of the colonial powers to a considerable extent.

Conclusion

Some argue that there is a discrepancy between the requirements of international law and the actual conduct of states and that, consequently, international law is of little to no significance when one attempts to understand the behavior of states. However, it is hoped that this brief expedition into the history of the acquisition of territory by colonial powers was able to indicate that the conduct of colonial powers was shaped by more than traditional habits, mere convenience, or considerations of brute force.

It is, of course, undeniably true that the prescriptions of international law are often deeply rooted in the practices of states and are in that sense flexible to some extent. However, the historical accounts equally reveal that once a certain mode to acquire territory had been accepted, most states attempted to act in accordance with those accepted standards.[45] Similarly, we have seen that certain attempts to modify the requirements of the law in favour of a few states failed, and that Spain and Portugal were as a result forced to justify their territorial claims by other means.

Further, it should have become apparent that the rationale underlying the different modes to acquire territory did not change significantly. The idea that territory could only be acquired in return for services (the spreading of the realm of Christianity/conversion of native inhabitants), expenses (costly expeditions), or labor (involved in the discovery, symbolic annexation, or effective occupation) remained unchanged. Specific rituals then served to establish a unique link between the conquering power and the claimed territory and to put the other powers on notice as to the rightful ownership of the land at hand.

As such the starting position has at least in theory always been that every Christian power had an equal right to conquer and claim territory.[46] The question was, however, how one power could justify laying claim to a specific territory to the disadvantage of another power. This question remained the same throughout the three different time periods we reviewed, but the answers differed depending on the accepted mode of acquisition at a specific point in time.

Ever since the discovery of the world was completed at the beginning of the nineteenth century, international law regarding the acquisition of territory remained largely unchanged. However, the progressing exploration of space and the deep sea might soon cause the old question of how to divide newfound territories between different powers to resurface. At that stage historical accounts may well prove to be of very helpful guidance during our generation's struggle to identify the best answers to these old questions.

1 Joaquín Francisco Pacheco et al., *Colección de documentos inéditos, relativos al descubrimiento ... de las antiguas posesiones españolas de América y Oceanía: sacados de los archivos del reino, y muy especialmente del de Indias* (Madrid, 1871), 15:320.

2 For a remarkable collection of state practice, see Arthur Schopenhauer Keller, Oliver James Lissitzyn, and Frederick Justin Mann, *Creation of Rights of Sovereignty Through Symbolic Acts, 1400-1800* (New York: Columbia University Press, 1938); Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* (Cambridge and New York: Cambridge University Press, 1995).

3 The most bizarre example of a power's attempt to legitimize is certainly the Spanish resort to the now infamous *requerimiento*; see, e.g., S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (New York: Oxford University Press, 2004), 36.

4 Seed, 179.

5 Wilhelm Georg Grewe, *The Epochs of International Law*, trans. and rev. Michael Byers (Berlin: Walter de Gruyter, 2000), http://bvbr.bib-bvb.de:8991/F?func=service&doc_library=BVB01&doc_number=008944595&line_number=0001&func_code=DB_RECORDS&service_type=MEDIA (accessed April 2, 2013).

6 Ibid., 233.

7 Alfred Verdross, *Völkerrecht* (Berlin: Springer, 1937), 66.

8 The text of the Donation (Latin) can be found here: http://www.thelatinlibrary.com/donation.html (accessed April 2, 2013). Interestingly, the original authority of the emperor to exercise control over the undiscovered parts of the world appears not to have been questioned.

9 Andre Vauchez, *Encyclopedia of the Middle Ages* (London: Routledge, 2001), 445; Johannes Fried, *Donation of Constantine and Constitutum Constantini: The Misinterpretation of a Fiction And Its Original Meaning* (Berlin: Walter de Gruyter, 2007).

10 Note, however, that there is some debate as to the meaning of the term "islands," which might have been intended to refer to any territory not under the control of a Christian prince; see Grewe and Byers, 123.

11 Nicholas of Cusa had already revealed that the Constantinian Donations were a forgery. Lorenzo Valla independently confirmed this thesis later in his essay *De falso credita et ementita Constantini Donatione declamatio* (1439/1440). See Nicholas of Cusa, *Nicholas of Cusa: The Catholic Concordance* (Cambridge and New York: Cambridge University Press, 1996).

12 Grewe and Byers, 233.

13 For excerpts, see Frances G. Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (Washington, D. C.: Carnegie Institution of Washington, 1917), 1:17.

14 Ibid., 18.

15 Ibid., 27.

16 Guanahani was the first name given to the island where Christopher Columbus and his crew landed in October 1492. The group of islands to which Guanahani belonged was later renamed San Salvador and the exact location of the original Guanahani is nowadays disputed.

17 Grewe and Byers, 234.

18 Erich Staedler, "Die Westindischen Investituredikte Alexanders VI," *Niemeyers Zeitschrift Für Internationales Recht* 50 (1935): 315.

19 Ibid.

20 Note that the relationship between the Pope and the explorers was at times more akin to that between an overlord and a vassal; see Grewe and Byers, 231.

21 Bartolus had questioned the Pope's authority to dispose of the world's territories as early as the fourteenth century and had argued instead that territory should belong to that power which exercised effective control over a given territory.

22 William Camden, *The Historie of the Most Renowned and Victorious Princesse Elizabeth, Late Queen of England* (London: B. Fisher, 1630), 2:116.

23 Island of Palmas Case, Scott, Hague Court Reports 2d 83 (1932), Perm. Ct. Arb. (1928), 2 U.N. Rep. Intl. Arb. Awards 829 (n.d.), United States Memorial, 1925, p. 53.

24 Grewe and Byers, 252.

25 Henri La Fontaine, *Pasicrisie Internationale* (Berne: Stämpfli, 1902), 170–172.

26 John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party, Together with Appendices Containing the Treaties Relating to Such Arbitrations, and Historical and Legal Notes* (Washington, D.C.: Government Printing Office, 1898), 5:5043.

27 Keller, Lissitzyn, and Mann, 148.

28 C. C. A. Gosch, *The Expedition of Captain Jens Munk to Hudson's Bay in Search of a North-West Passage in 1619-20,* vol. 2 of *Danish Arctic Expeditions* (Cambridge and New York: Cambridge University Press, 2010), 10.

29 Keller, Lissitzyn, and Mann, 57–58.

30 Thomas James and Walter Andrew Kenyon, *The Strange and Dangerous Voyage of Capt. Thomas James* (Toronto: Royal Ontario Museum, 1975), 89.

31 Fernandez de Navarrete, "Royal Letters Patent (cédula) of 8 June 1501," in *Collección De Los Viages* (1501): 3:86.

32 Wyatt (Capt.), Sir Robert Dudley, and Abram Kendall, *The Voyage of Robert Dudley, Afterwards Styled Earl of Warwick and Leicester and Duke of Northumberland, to the West Indies, 1594-1595* (London: Hakluyt Society, 1899), 27.

33 Seed, 6.

34 Grewe and Byers, 251.

35 Extract from the Book of Dispatches from Batavia, reprinted in Richard Henry Major, *Early Voyages to Terra Australis, Now Called Australia: a Collection of Documents, and Extracts from Early Manuscript Maps, Illustrative of the History of Discovery on the Coasts of That Vast Island, from the Beginning of the Sixteenth Century to the Time of Captain Cook* (London: Hakluyt Society, 1859), 54–55.

36 Grewe and Byers, 255.

37 William Camden et al., *Annales or, The History of the Most Renowned and Victorious Princesse Elizabeth, Late Queen of England: Containing All the Important and Remarkable Passages of State, Both at Home and Abroad, During Her Long and Prosperous Reigne* (London: Benjamin Fisher, 1635), 225 (Covering year 1580); Charles Knight, *The Penny Magazine of the Society for the Diffusion of Useful Knowledge* (London: Charles Knight, 1833), 416.

38 John Holland Rose, *The Cambridge History of the British Empire* (Cambridge: The University Press, 1929), 1:536; Grewe and Byers, 398.

39 Emer de Vattel, Charles Ghequiere Fenwick, and Carnegie Institution of Washington, *Le droit des gens ou principes de la loi naturelle: Reproduction of books I and II of edition of 1758* (Carnegie Institution of Washington, 1758), vol. 1, ch. 10, 207.

40 Island of Palmas Case, Scott, Hague Court Reports 2d 83 (1932), Perm. Ct. Arb. (1928), 2 U.N. Rep. Intl. Arb. Awards 829 (n.d.), 840; Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France/Mexico), Award [1932] 26 AJIL 390, 393–394 (n.d.); Legal Status of Eastern Greenland (Norway/Denmark), Judgment [1933] PCIJ Ser. A/B No. 53 1, 46 (n.d.).

41 And sometimes even earlier, see, e.g., Minquiers and Ecrehos (France/UK), Judgment [1953] ICJ 47 (n.d.).

42 Julius Goebel, *The Struggle for the Falkland Islands: A Study in Legal and Diplomatic History* (New Haven: Yale University Press, 1927).

43 Tao Cheng, "Sino-Japanese Dispute over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition," *Virginia Journal of International Law* 14 (1974): 221.

44 "…como mejor podia é de derecho debia", Pacheco

et al., *Colección de documentos inéditos, relativos al descubrimiento ... de las antiguas posesiones españolas de América y Oceanía*, 15:322.

45 The way in which the colonial powers implemented these standards differed to some extent on the colonial power's respective culture, and when and where a given territory was considered for acquisition. Consider, e.g., the Dutch-English exchange regarding Delaware Bay, Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640*, 171.

46 See also Vattel, Fenwick, and Washington, *Le droit des gens ou principes de la loi naturelle*, 209. "A nation that seized more than it was capable of populating and cultivating thus violated the law of nature and natural reason. If every nation from the beginning had tried to lay claim to a vast land, only in order to live from hunting, fishing, and eating wild fruit, our globe would not be large enough for the tenth part of human being living there today."

The Twin Swords of the Sovereign: Cross-Cultural Killings in Seventeenth-Century English America

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Homicide in Cross-Cultural Perspective

In the fall of 1707, Jeremiah Pate of New Kent County, Virginia was killed by a party of Tuscarora Indians. Virginia's government, decrying the killing as "barbarous murder," quickly ordered the apprehension and trial of the accused killers.[1] In retrospect, this response may seem self-evident, yet it poses a significant historical question: what does it mean to call a cross-cultural killing a crime? Recent historiography on the legal aspects of English colonialism has largely focused on property law as the key component of English claims to sovereignty and dominion.[2] However, *dominium* was not the only path to *imperium*. The law was a complex field of contestation over people as well as land. In what follows, I suggest that the study of criminal law and jurisdiction, and, in particular, treatment of cross-cultural killings, deserves greater integration into our understanding of the relationship between the law and colonialism. Previous scholarship on Indian interactions with criminal law has been concerned primarily with assessing the relative "fairness" of English courts to Indians.[3] This is a reasonable and interesting question, but it is not the question I pursue here. Instead, I argue that efforts to include or exclude Indians from jurisdictional space can serve as a barometer of different colonial approaches to power over people, one incorporative and aggressive in its assertion of sovereignty through jurisdiction, the other using military force to police subordinate, but autonomous, Indian polities.

Criminal law in Virginia was built on the edifice of English law, which placed killings within an economy of intentionality and circumstance through which they were classified as more or less serious acts, or, as in the case of self-defense, as outside the scope of criminality entirely.[4] Ferdinando Pulton's influential compendium of English law, *De Pace Regis et Regni*, included dozens of different categories of homicide, carefully delineating the interplay between motives, circumstance, and liability.[5] Murder, which Edward Coke considered the "most heinous" of felonies, was the pinnacle of this complex hierarchy.[6] But murder was about more than intent. As Thomas Hobbes and other English legal and political thinkers argued, to pronounce a killing a crime was to inscribe it within the realm of law, and thus, within the dominion of the sovereign.[7] The law, Bacon wrote, "is the great organ by which the sovereign power doth move," and the threshold of its jurisdiction marked the boundary of sovereignty.[8] In this sense, murder necessarily occurs within the power of the sovereign, in whose name the judicial system punishes individuals who have committed offenses against the King's peace. Significantly, Hobbes differentiated this interior power to punish subjects from the power to punish aliens, describing them as two distinct swords of the sovereign. The sword of justice signified the power to punish an individual guilty of an infraction within the sphere of the sovereign, while the sword of war represented the power to punish those who fell outside the sphere of the law.[9]

Hobbes treated the distinction between subjects and foreigners as self-evident, though within English law these categories had been the subject of recent controversy. In the colonies, a clear demarcation between subject and alien was even more problematic. Colonial charters were silent on the issue of whether Indians were to be treated as subjects, and Calvin's Case (1608), which had profound implications for the legal status of settlers, offered little clarity on the matter of Indians.[10] Over the course of the seventeenth century many Indians would sign treaties acknowledging their subjection to the King, yet this *de jure* status was often only loosely connected to any *de facto* reality, and Indians successfully countered many colonial attempts to treat them as subjects. Colonial frontiers could not be ordered by fiat, and, as a practical matter, the status of Indians remained contentious, ambivalent, and subject to cross-cultural negotiation. Given these legal ambiguities, we should interpret efforts by the English to treat a killing as "murder" as an active attempt to create or enforce sovereignty through a claim of jurisdiction.[11] Sir John Davies, solicitor-general for Ireland under James I, helps us to understand the specifically colonial dimensions of Hobbes' distinction. Davies argued that the power to punish under "ordinary law," rather than through military action was a necessary condition for any claim to sovereignty over a land and its people.[12] The boundary between Hobbes' twin swords, then, marks a border between two separable forms of colonial power, with distinctive stances towards subjection and sovereignty.

Ironically, the decision to treat a killing as proper to the sword of justice, and thus the sphere of law, frequently involved recourse to the sword of war. This reminds us, in the first instance, that colonial claims to jurisdiction cannot be considered as arising in a vacuum. Native Americans brought their own cultural norms to the question of cross-cultural killings, views with which colonial officials had to grapple.[13] While the intricacies of individual tribes' ideas about homicide are largely lost to history, scholars do agree on the broad cultural framework which structured Indian ideas about homicide in eastern North America. At its center was the idea that murder was an offense of one clan against another; in most instances the individual

identity of the victim or the killer was of secondary importance. Murder created an imbalance that compelled the victimized clan to respond, by killing a member of the offending clan, by obtaining satisfaction for the deceased in the form of material and spiritually charged goods, or, in some cases, by replacing the dead with a captive or slave who might then be adopted into the clan. Unlike the English, Indians did not consider questions of intentionality as crucial to the status of a homicide, and they recognized, in theory at least, no distinctions between types of culpability. In theory, every human-caused death was morally equal: "liability, not culpability, was the operative legal concept."[14]

These very different cultural and legal ideas about homicide incited contestations in which the stakes were quite high. Recent historiography on Indian-settler relations has stressed the development of middle-ground relationships in which both sides built fragile, but surprisingly durable, cross-cultural understandings relating to homicide and its redress. Violence and murder, as Richard White has noted, were among the central concerns of the middle-ground between the French and Algonquians in the *pays d'en haut*, where negotiated solutions and compromise were commonly used to cover the dead and avert escalations of violence.[15] This hybrid approach to cross-cultural killings could and did take place in the English colonies, though in other times, places, and situations, relatively 'pure' Native or European approaches prevailed.

My suggestion here is that the shifting terrain of law and jurisdiction over cross-cultural killings offers a new way of tracking the relative power and political strategies of competing cultural groups in colonial North America. As a preliminary way of broaching these issues, I will focus on the two oldest of the mainland English colonies in New England and Virginia, both of which developed distinctive answers to the question of colonial jurisdiction and different strategies of colonial power. In New England, colonists readily claimed jurisdiction over such cases, and, in so doing, tried to inscribe Indians as interior to a common sphere of law. In contrast, seventeenth-century Virginians treated cross-cultural killings as matters of war, in part because Virginians sought to enforce and sustain their power by holding Indians apart and managing their exteriority.

John Stone, The Pequot War, and the Sword of Justice

Despite lacking clear legal authority to do so, early English settlers in the New England Colonies demanded that their cultural norms would govern cases of cross-cultural homicide.[16] In Plymouth, English assertions of criminal jurisdiction were among the earliest claims the English made in cross-cultural diplomacy. The brief 1621 treaty between Plymouth Colony and Massasoit, a Wampanoag Sachem, included a non-reciprocal requirement that the Wampanoag turn over any Indian who "did any hurt" to an Englishman that "they might punish him."[17] Plymouth was not alone in making these demands. Just a few years later, both Plymouth and Massachusetts would go to war over the principle of English jurisdiction and murder. The circumstances surrounding the Pequot War provide an excellent opportunity, then, to understand the stakes involved in questions of violence and the law.

Curiously, the events which lead to war between the English and the Pequot began as a dispute between the Pequot and Dutch traders in which the Dutch kidnapped and executed a Pequot sachem named Tatobem, despite having received a ransom for him.[18] Shortly thereafter, a Virginian by the name of John Stone was killed by the Pequot along the coastal Connecticut River. Stone had a reputation as a trouble-maker, and had recently been banished from Massachusetts after being charged with piracy, drunkenness, and adultery. Political leaders there were initially inclined to consider his death a case of rough justice and look the other way, but decided instead to assert their rights over his killer.[19] Puritan demands that the Pequot "deliver up to us those men who were guilty of Stone's death" became the core issue of early diplomatic relations.[20] The Pequot readily accepted responsibility for Stone's death, but argued that they had mistaken him for a Dutchman. This was a plausible argument. The Pequot had no known relations with the English prior to Stone's death, and presumably little ability to differentiate English from Dutch. Pequot ambassadors ducked continual English demands to turn over the killers, probably believing that the wampum accepted by the English during negotiations was sufficient to settle the death.[21] The English had already developed an idea of wampum as a medium of exchange, but it is unclear if they had an awareness of its specific use to compensate for the dead, making it possible that they did not realize that in accepting the wampum, they were, from the Pequot's perspective, settling the matter of Stone's death.[22]

Over the following two years, the English would make repeated demands that the Pequot turn over the killers, demands which the Pequot either could not or would not meet. In 1636, Puritan threats gave way to force, after another Englishman, John Oldham, was killed by a group of Narragansett and their allies. The English, perhaps fearing that their failure to compel Pequot submission was sending a dangerous signal, dispatched a squadron of soldiers, commanded by John Endecott, to assault a community of Indians living on Block Island, where Oldham's murderers were believed to live. Endecott's orders were to attack Block Island and then advance on the Pequot, giving them one final chance to hand over Stone's killers, pay damages, and turn over hostages to guarantee future behavior.[23] Confronted by Endecott's forces, the Pequot made a final effort to inscribe the murder within their own cultural logic of kinship and just retribution, arguing that Stone had been slain by Tatobem's son, who had avenged his father's death by slaying someone he believed to be Dutch.[24] The English replied that "you have slaine the King of Englands subjects," and that they had come "to demand an account of their blood."[25] The Pequot War broke out soon after.

Historians such as Francis Jennings and Neal Salisbury have written influential accounts of the Pequot War which insist that its primary context is the struggle for control of Indian land in the Connecticut River valley.[26] Yet, the English consistently placed Stone's death, and the questions it raised about jurisdiction, at the center of their motivations for war.[27] Recent historiography has been increasingly inclined to take these assertions at face value. Alfred Cave has convincingly demonstrated that the inability of the Pequot to recognize the inflexibility of the English

demands and the Puritan's insistence on "total English control" over the resolution of "intercultural conflict" fueled the cultural tensions that erupted into war. [28] Daniel Richter has also noted the centrality of jurisdictional issues to the war, suggesting that Boston's insistence on "imposing the power of life and death over criminals" needs to be understood as the "most important indicator" of English "domination."[29]

If attitudes towards cross-cultural killings are indicative of larger stances regarding colonial power, then the events leading to the Pequot War indicate an early tendency in New England towards incorporatism and interiority as modes for exercising power. Questions about jurisdiction and criminal law were important components of this project. Indeed, one of the major outcomes of the war was that the jurisdictional integration of Indians into English law began in earnest, if unevenly and contingently. In the decades between the Pequot and King Philip's war, Indians living near the English were frequently charged in English courts for crimes ranging from theft to murder.[30] Katherine Hermes has recently characterized seventeenth-century New England as a legal middle ground in which still-sovereign Indians and the English mutually created a surprisingly functional cross-cultural jurispractice based on the ideas of reciprocity and substantive justice. Indians, she contends, voluntarily chose English courts as the location for most of these disputes. In Hermes' account, this middle ground dissolved slowly in the years leading up to King Philip's War, eroded from without by "the pressures of Anglo-European culture" which were then "reflected" in the demise of this now lost early American legality.[31]

The killings that led to the Pequot war suggest another history of law and colonial power in New England. Between the English and the Pequot, no middle ground was to be found. This was partially due to a lack of cultural brokers who might have mediated the dispute. But, it was also a product of the particular stress that homicide placed on both native and English ideas about what substantive justice might entail. Murder was the breaking point of the middle-ground in New England, a point at which Hermes' model of voluntary Indian involvement in English courts gave way to forced participation.[32] Once the English decided to treat the killings as murders, the space for negotiation and compromise collapsed within the logic of the law that defined murder as an infraction of an individual subject against the will of the sovereign. Andrea Robertson Cremer has recently suggested that the war was fought to make 'dependent subject[s]" out of unruly Pequot bodies.[33] The first stage in this battle was to claim their interiority to the jurisdiction of the law through the cultural renaming of homicide as murder.

Virginia, Tributary Indians, and the Sword of War

We should avoid thinking of this tendency to pursue power through the sword of justice, and with it the assumption of Indian interiority, as inevitable. Indeed, we need look no further afield than Virginia to find a very different strategy towards asserting and maintaining colonial power based on managing the alien-ness of Indians. These differences are not easily framed within the historiography focused on property and law, which has tended to describe sovereignty as springing from dominion, but come into focus when viewed through the lens of homicide and the sword of war.

Virginia's seventeenth-century history is noteworthy for its relative lack of interest in asserting jurisdiction over cross-cultural violence. In Virginia, acts which Massachusetts would have considered murder tended instead to be treated as acts of war.[34] Virginia's early history can help to explain why it developed along a divergent path from that taken by the New England colonies. Between 1610 and 1619, Virginia was organized politically and legally along explicitly military lines, which encouraged recourse to the 'sword of war' by establishing force as the primary mode of power within the colony, and by attempting to strictly segregate Indians from colonists.[35] These decisions were reinforced by the open warfare of the years between 1609 and 1614, as the English struggled to establish a colony in the middle of what was perhaps the most centralized and powerful Indian polity in the eastern half of the continent.[36] Much of the fighting, as well as the cross-cultural violence in the aftermaths of the famous 1622 and 1644 Powhatan 'uprisings,' consisted of "protracted series of brief attacks . . . with goals of revenge."[37] This type of warfare is noteworthy both for its clear resemblance to Hobbes' sword of war, and its conformity to Powhatan cultural responses to homicide. In the Virginia tidewater, as in the American woodlands more generally, cross-cultural killings were a major cause of endemic, if relatively low-level, warfare. Indian jurispractice included normative proscriptions which tended to limit retributive violence within communities. A clan would avenge the death of one of its members, restoring balance, and closing the matter. Inter-tribal violence was much more dangerous, as it lacked these normative limits. War, an ongoing cycle of killing and counter-killing that could be very difficult to constrain, was the frequent result.[38] In a tragic, but real sense, a common recourse to war as a tool for resolving cross-cultural violence operated as a kind of 'found' middle-ground between the English and Indians in Virginia. It also serves as a reminder of the profound influence that Indians had on shaping the power struggles of the early colonial era. The Powhatan, along with the English, were building a Virginia in which cross-cultural conflict tended to be mediated via warfare.

Cross-cultural conflict would remain primarily a military issue in Virginia until the end of the century. As was the case in New England, Virginia's approach to cross-cultural conflict can tell us something about the larger agendas of power pursued by different colonial cultures. In Virginia, efforts to assert power over Indians would concentrate overwhelmingly on the subordination of Indian polities rather than on the subjugation of individual Indians. Virginia's Indian treaties sought to maintain separate, largely self-governing English and Indian communities, policed collectively by military force, rather than individually through judicial power. None of Virginia's Indian treaties between 1614 and 1676 included provisions requiring Indians to turn over murderers to English courts.[39] Instead, Virginia sought to shape and maintain a level of Indian autonomy, as a corollary to dividing the landscape into Indian and English spheres. The authority of the Indian 'king' or 'queen' to "Govern their own People," was a necessary part of this arrangement, and treaty provisions from this period were overwhelmingly concerned with the separation of Indian from English space, and with limitations on English behavior.[40] Individual Indians were the

subjects of their own kings: only the kings themselves were personally subjects of the English monarch. Cross-cultural crime in such circumstances could not, strictly speaking, exist. In short, Indians' killing of settlers was a political, rather than criminal act. The subordinate, but still autonomous, polities that Virginia's tributary arrangements attempted to shape depended in part on jurisdictional distinction and the separation of Indians from the interiority of the law.

These patterns shifted towards the end of the seventeenth century, as Virginia began to channel cross-cultural killings through its courts. As the century closed, Virginia would increasingly insist on its rights over individual Indians, who suddenly became capable of committing murder. The Tuscarora and other tribes powerful enough to resist this incorporative logic did so with great resolve.[41] Virginia's efforts to force the Tuscarora to turn over the suspects in the murder of Jeremiah Pate dragged on for nearly two years, during which Virginia repeatedly threatened war and attempted an economic embargo of the Tuscarora and their Nottoway and Meherrin neighbors, yet eventually backed down. Only in the aftermath of the Tuscarora and Yamasee Wars, which substantially realigned Indian politics in the Southeast, would Virginia impose the name of crime on cross-cultural transgressions.[42]

1 H.R. McIlwaine, ed., *Executive Journals of the Council of Colonial Virginia* (Richmond: Virginia State Library, 1928), 3:159.

2 See, for example, David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000); Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France, c. 1500 – c. 1800* (New Haven: Yale University Press, 1995); Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006); and Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005).

3 See for instance, David Bushnell, "The Treatment of the Indians in Plymouth Colony," *New England Quarterly* 26, no.2 (June 1953): 203-7, and James Ronda, "Red and White at the Bench: Indians and the Law in Plymouth Colony, 1620-1691," *Essex Institute Historical Collections* 110, no.3 (July 1974): 200-215, both of whom argue that Indians did receive essentially fair treatment in courts, at least before King Philip's War. For a dissent, see Lyle Koehler, "Red-White Power Relations and Justice in the Courts of Seventeenth Century New England," *American Indian Culture and Research Journal* 3, no. 4 (1979): 1-31.

4 Warren Billings, "The Transfer of English Law to Virginia, 1606-50," in *The Westward Enterprise: English Activities in Ireland, the Atlantic, and America, 1480-1650,* ed. K.R. Andrews, N.P. Canny, and P.E.H. Hair (Liverpool: Liverpool University Press, 1978), 215; William Nelson, *The Common Law in Colonial America* (Oxford: Oxford University Press, 2008), 1:26; Arthur P. Scott, *Criminal Law in Colonial Virginia* (Chicago: University of Chicago Press, 1930), 194. In contrast, Michael Meranze has noted that colonists in fact only "selectively appropriated" English criminal law. Among the novelties of colonial law was its interaction with Indian ideas about justice. See Michael Meranze, "Penalty and the Colonial Project: Crime, Punishment, and the Regulation of Morals in Early America," in *The Cambridge History of Law in America*, ed. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 1:178-210, quote on p. 178. For a social history of crime in colonial Virginia, see James Horn, *Adapting to a New World: English Society in the Seventeenth-Century Chesapeake* (Chapel Hill: University of North Carolina Press, 1994), 349-68.

5 Ferdinando Pulton, *De Pace Regis et Regni* (London, 1609), 120r-128v.

6 Edward Coke, *The Third Part of the Institutes of the Laws of England* (London, 1644), 47.

7 Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett, 1994), 191.

8 Thomas Bayly Howell, ed., *Cobbett's Complete Collection of State Trials* (London, 1809), 2:580.

9 Thomas Hobbes, *De Cive*, ed. Howard Warrender (Oxford: Clarendon, 1983), 93-94, 181.

10 On the colonial implications of Calvin's Case, see James Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill: University of North Carolina Press, 1978); Christopher Tomlins, *Freedom Bound: Law, Labor, and Civil Identity in Colonizing English America, 1580-1865* (Cambridge: Cambridge University Press, 2010), 82-89; P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), 86-87.

11 Lisa Ford*, Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge: Harvard University Press, 2010), 1-29.

12 John Davies, *A Discovery of the True Causes Why Ireland Was Never Entirely Subdued,* ed. James P. Myers (Washington D.C.: Catholic University Press, 1988), 71-72, 76.

13 On Indian ideas about murder, see: James Adair, *The History of the American Indians*, ed. Kathryn Holland Braund (Tuscaloosa: University of Alabama Press, 2005), 184-5; John Philip Reid, *A Law of Blood: The Primitive Law of the Cherokee Nation* (New York: New York University Press, 1970), 73-112; Yasuhide Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630-1763* (Middletown, CT: Wesleyan University Press, 1986), 3-20; Daniel Richter, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (Chapel Hill, NC: University of North Carolina Press, 1992), 32-33.

14 Reid, *Law of Blood*, 76.

15 Richard White, *The Middle-Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991), 76. See also James Merrell, *Into the American Woods: Negotiators on the Pennsylvania Frontier* (New York: Norton, 1999), 42-53, and Reid, *Law of Blood*, 80-83.

16 The Massachusetts charter, like the earlier Virginia charters, included extensive descriptions of the political and legal authority of the colony, none of which grant jurisdiction over Indians. Plymouth lacked any formal authority from the Crown, having been founded without a charter. As MacMillan,

Sovereignty and Possession, has recently suggested, colonial charters need to be considered as precise and deliberate legal blueprints. Thus, the absence of a grant of jurisdiction over Indians needs to be considered as a limit on colonial power, rather than an oversight.

17 William Hubbard, *The Present State of New-England* (Bainbridge, NY: York Mail-Print, 1972), 7.

18 Mark Meuwese, "The Dutch Connection: New Netherland, the Pequots, and the Puritans in Southern New England, 1620-1638," *Early American Studies* 92, no.2 (Spring 2011): 313-14.

19 On Stone's reputation, see John Winthrop, *Winthrop's Journal: History of New England, 1630-1639*, ed. James Hosmer (New York: Scribners, 1908), 1:102, 108; Alfred Cave, *The Pequot War* (Amherst, MA: University of Massachusetts Press, 1996), 72-5, and Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (New York: North, 1976), 189-90.

20 William Bradford, *Of Plymouth Plantation, 1620-1647*, ed. Samuel Morrison (New York: Alfred A. Knopf, 1952), 291.

21 Cave, *Pequot War*, 76; Winthrop, Journal, 1:139.

22 Winthrop, *Journal*, 1:131, remarks that most of the fur acquired by the Colonies was in exchange for Wampum. For wampum as money, see Mary Herman, "Wampum as Money in Northeastern North America," *Ethnohistory* 3, no.1 (Winter 1956): 21-33. Daniel Gookin's famous observation on the use of wampum as compensation for murder was not written until 1674. Daniel Gookin, *Historical Collections of the Indians In New England* (Boston: Massachusetts Historical Society, 1792).

23 Winthrop, *Journal*, 1:186. On Oldham's death, see Andrew Lipman, "Murder on the Saltwater Frontier: The Death of John Oldham," *Early American Studies* 9, no.2 (Spring 2011): 268-94.

24 Cave, *Pequot War*, 115.

25 John Underhill, *Newes from America; or, A New and Experimentall Discoverie of New England* (London, 1638), 11-12, quotes on p. 12.

26 Jennings, *Invasion of America*, chap. 11-13; Neal Salisbury, *Manitou and Providence: Indians, Europeans, and the Making of New England, 1500-1643* (New York: Oxford University Press, 1982).

27 In addition to the accounts mentioned above, see John Mason, *A Brief History of the Pequot War* (Ann Arbor: University Microfilms, 1966), viii-x.

28 Cave, *Pequot War*, 121, 76.

29 Daniel Richter, *Before the Revolution: America's Ancient Past* (Cambridge: Harvard University Press, 2011), 162.

30 Alden Vaughan, *New England Frontier: Puritans and Indians, 1620-1675* (Norman: University of Oklahoma Press, 1995), 186-203.

31 Katherine Hermes, "Justice Will Be Done Us: Algonquian Demands for Reciprocity in the Courts of European Settlers," in *The Many Legalities of Early America*, ed. Christopher Tomlins and Bruce Mann (Chapel Hill: University of North Carolina Press, 2001), 123-50, and Katherine Hermes, "The Law of Native Americans, to 1815," in *Cambridge History of Law in America*, ed. Grossberg and Tomlins, 44-49. For the purposes of this paper, the most pertinent account of King Philip's war is Yasuhide Kawashima, *Igniting King Philip's War: The John Sassamon Murder Trial* (Lawrence, KS: University of Kansas Press, 2001).

32 Hermes recognizes this breaking point, noting that most examples of the colonies forcing Indians into court involved "serious felonies, such as murder." Hermes, "Justice Will Be Done Us," 139.

33 Andrea Robertson Cremer, "Possession: Indian Bodies, Cultural Control, and Colonialism in the Pequot War," *Early American Studies* 6, no. 2 (Fall 2008): 303.

34 Hermes, "Law of Native Americans," 47.

35 Edmund Morgan, *American Slavery/American Freedom: The Ordeal of Colonial Virginia* (New York: Norton, 1975), 79-80; William Strachey, *For the Colony in Virginea Britannia: Lawes Divine, Morall, and Martiall* (London: Walter Burre, 1612).

36 Frederick Fausz, "An Abundance of Blood Shed on Both Sides: England's First Indian War, 1609-1614," *Virginia Magazine of History and Biography* 98, no.1 (January 1990): 3-56; Helen Rountree, *Pocahontas's People: The Powhatan Indians of Virginia Through Four Centuries* (Norman, OK: University of Oklahoma Press, 1990), 43, 50-55; and Alfred Cave, *Lethal Encounters: Englishmen and Indians in Colonial Virginia* (Santa Barbara: Praeger, 2011), 45-101.

37 Frederic Gleach, *Powhatan's World and Colonial Virginia: A Conflict of Cultures* (Lincoln, NE: University of Nebraska Press, 1997), 161.

38 Reid, *Law of Blood*, 153-61; Gleach, *Powhatan's World,* 51-52. For a trenchant analysis of the vicious cycle of the mourning war, see Daniel Richter, "War and Culture: The Iroquois Experience," *William & Mary Quarterly* 40, no. 4 (October, 1983): 528-59.

39 See the 1614 Treaty with Chickahominy in Ralph Hamor, *A True Discourse of the Present State of Virginia* (London, 1615), 13-14. The 1646 Treaty is printed in William Waller Hening, ed., *The Statutes at Large, Being a Collection of all the Laws of Virginia* (New York, 1809-1823) 1:323-26, and the 1677 Treaty of the Middle Plantation is printed in W. Stitt Robinson, ed., *Early American Indian Documents: Treaties and Laws, 1607-1789,* (Frederick, MD: University Publications of America, 1983), 4:82-87, as well as the important, and hitherto largely overlooked, reorganization of colonial laws related to Indians in the aftermath of the Restoration, printed in Hening, *The Statutes at Large*, 2:138-43.

40 Quote is from the 1677 treaty in Robinson, *Early Indian Documents*, 4:85.

41 See, for example, H.R. McIlwaine, ed., *Executive Journals of the Council of Colonial Virginia* (Richmond: Virginia State Library, 1925-1966), 1:205-7, 216-7, 2:383-6, 388-91, 3:157-161.

42 See, for example, the early eighteenth century treaties with the Tuscarora, Nottoway, and other tributary groups in Robinson, *Early American Indian Documents*, 4:213, 217, 221.

Legal Redress for Transatlantic Black Maritime Laborers in the Antebellum United States: A Case Study

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By the 1880s, race-based, chattel slavery became a relic of Atlantic history as every jurisdiction around the Atlantic World prohibited property in human beings. Emancipation occurred unevenly over these hundred-plus years in part because different processes, from armed slave revolts, blanket judicial decrees, incremental legislative enactments to military directives eroded slavery's legal and practical stability in different ways. This piecemeal demise of Atlantic slavery led to inconsistencies in the incorporation of people of color into the formal bodies politic of the Atlantic world. These inconsistencies bred a host of thorny legal issues not just within states, but between them. Not least of these was the treatment of the transnational black maritime workforce. These sailors routinely crisscrossed the oceans and experienced differing treatment in Atlantic jurisdictions during this period of slavery's dismantling. In other words, by traveling to areas with more stringent racial regulations, these itinerant workers forced officials in slave jurisdictions to reconcile their own internal racial policies and objectives with the demands of international economics and diplomacy.[1]

This essay examines one of the legal issues faced by transnational black sailors. It examines two court cases that emerged almost simultaneously in the federal courts of the United States in the 1850s. Both cases involved transnational black sailors jailed under the Negro Seamen Acts. Put in place across the southern United States between 1822 and the 1850s, these laws typically subjected all black sailors who arrived in port to incarceration and potentially corporal punishment during their stay.

The two cases represent different avenues of legal redress sought by transnational black workers or agents working on their behalf. In *Roberts v. Yates* (1852), the British Foreign Office abandoned its previous dedication to diplomatic channels in addressing the blatant assault to national sovereignty that occurred when officials in the United States forcibly extracted black British sailors from their vessels and placed them in confinement. Seeking judicial intervention to remedy this flaunting of the Union Jack, the suit based its assertions on the rights claims of black Britons protected by treaties between the United States and Great Britain. In the second case, *Stratton et al. v. Babbidge* (1855), three black sailors brought suit against their captain for his attempt to use the threat of the Louisiana Seamen Act to drive down the wages of his crew. Rather than attack the Seamen Act in the language of citizenship rights, the sailors instead focused on the captain's breach of contract. By investigating these two cases and the history that produced them, we may gain a better understanding of how some sailors and governments understood and explicated the relationship between race, individual rights, and international law during the era of Atlantic emancipations.[2]

Case One: Roberts v. Yates

On May 19, 1852, the Nassau trading schooner *Clyde* sailed into Charleston harbor with a cargo of fruit and a black cook named Reuben Roberts onboard. Immediately upon its entry, a deputy sheriff boarded the vessel and arrested Roberts according to South Carolina's 1835 Seamen Act. Eight days later, Charleston Sheriff Jeremiah Yates returned Roberts to the *Clyde* just before the vessel left port. In the meantime, however, British Consul George Mathew sought legal representation and underwrote a lawsuit filed in U.S. Circuit Court against Sheriff Yates. The suit was "brought in the form a trespass for assault, battery, and false imprisonment, the damages being laid at 4000 dollars."[3]

The decision to sue in federal court marked a distinct change in British policies. Ever since 1824, the British Foreign Office had abandoned judicial remedies as it sought to dismantle the various state Seamen Acts. Whether pressuring federal or state officials, the British Foreign Office under Whigs and Tories alike preferred diplomatic over judicial action. For the most part, pragmatism determined the policy. British litigants had only won one case in any state or federal court since 1823, and that solitary victory only led to a more stringent statute thereafter. Though it only took two years for the British government to withdraw all plans to seek recourse via the courts, it took them nearly three decades to realize that formal diplomatic efforts had produced the same nugatory results. Though early negotiation with federal officials seemed promising during the 1820s, any hopes of federal intervention were dashed with the ascension of the Jackson Administration. In 1831 and 1832, consecutive U.S. Attorneys General – John M. Berrien and Roger B. Taney – declared the Seamen Acts beyond the reach of the federal executive, with all due apologies to the British Foreign Office. Subsequent Secretaries of State toed this Jacksonian line, even when serving under Whig Presidents.[4]

Rather than return to the courts after the failure of British efforts in Washington, the Foreign Office instead instructed British consuls to act as "quasi-diplomats" in southern port cities and state capitals. For the most part, these negotiations were informal and led to a liberalization of the Seamen Acts in Louisiana. Informality was important for two reasons. First, overt outside meddling in the "private affairs" of the southern states tended to rub southern lawmakers the wrong way. On more than one occasion in the 1840s, southern states refused to amend their Seamen Acts, viewing any such action as a threat to their vaunted sovereignty. Second, formal international negotiations were supposed to be the sole responsibility of federal officials. Despite the intentions of the Foreign Office to remain low profile, one British consul assumed the formal posture of a foreign diplomat commencing negotiations with the governor of South Carolina. When newspapers north and south learned of this "Official Correspondence," they berated both the injudicious "diplomatic" actions of the British Foreign Office and the gall of the "fiery-spirited little commonwealth" of South Carolina. By 1851, then, it seemed to the Foreign Office that diplomacy at both the state and federal levels had no chance of securing amendments to the Seamen Acts. Federal officials claimed that the Constitution forbade their intervention in state racial regulations. At the same time, state officials demurred that the Constitution forbade them from engaging directly with foreign nations.[5]

With all diplomatic (and quasi-diplomatic) roads leading to dead ends, the Whigs in the Foreign Office contemplated alternatives. One British consul suggested imposing trade restrictions or duties on southern exports to Great Britain. The recommendation fell on deaf ears in the Foreign Office, providing a sad commentary on the relative expendability of Britain's black maritime workforce in the eyes of the British government. The decision of the Foreign Office to return to the courts rested on recent developments in U.S. Supreme Court jurisprudence on the Commerce Clause. British officials were well aware of the High Court's recent decision in *The Passenger Cases* (1849) – where it struck down a pair of state laws that taxed interstate and international travelers – and its potential impact on the Seamen Acts. In fact, one British consul went so far as to quote two opinions from the decision in a letter to a southern politician regarding the likely unconstitutionality of laws targeting black sailors and their captains. This optimism in the British Foreign Office stemmed from *The Passenger Cases*' deviation from previous Taney Court decisions (i.e. *The License Cases* and *New York v. Miln)* that rested on the plenary power of the states to regulate their borders as they saw fit. So, with a newfound faith in the likelihood of a Supreme Court decision against the Seamen Acts, the British consul in Charleston requested funds to initiate a pair of lawsuits in hopes of capitalizing on the apparent change in jurisprudential direction. The Foreign Office obliged. A short time later, the *Clyde* sailed into Charleston, and Reuben Roberts was arrested.[6]

The suit in *Roberts v. Yates* was filed by local attorney James L. Petigru in the U.S. Circuit Court for South Carolina. The action in tort accused the sheriff of Charleston of false imprisonment because existing Anglo-American treaties explicitly entitled British subjects access to the port cities of the United States. Since Roberts was a British subject and thereby protected by the treaty, the sheriff was liable for damages attached to the mariner's unlawful arrest. The sheriff was represented by the State Attorney General Isaac Hayne and three other members of South Carolina's esteemed legal community, including U.S. Senator Andrew Butler. They maintained that Roberts' arrest was entirely legal, being done in strict compliance with the Seamen Act of 1835.

Roberts v. Yates was not the first time the U.S. Circuit Court in South Carolina encountered a black Briton suing the Charleston sheriff over an imprisonment sanctioned by the Seamen Act. Back in 1823, a Jamaican mulatto named Henry Elkison sought a writ of habeas corpus from Supreme Court Justice William Johnson, claiming that existing treaties protected him while in the United States. In his decision, Johnson robustly declared that black Britons were every bit as entitled to treaty protections as white Britons. While he was legally barred from issuing the writ to free Elkison, Johnson declared that federal treaties controlled state regulatory enactments. Despite the strong language against the law in Johnson's ruling, the Seamen Act remained in force and was even strengthened in subsequent decades.[7]

In *Roberts v. Yates,* the case was heard by Judge Robert B. Gilchrist, an elderly Jacksonian Democrat who initially received his commission as a recess appointment of Martin Van Buren in 1839. Gilchrist's tone could not have been more different than Johnson's. Because both sides in *Roberts* agreed to all the facts of the case, the trial was quick and straightforward. Gilchrist informed the jury that the 1835 Seamen Act did not violate existing treaties, was therefore constitutional, and thus, the sheriff was acting in a legitimate and official capacity when he detained the British mariner. As a consequence of these instructions, the jury found for the sheriff, with Petigru and the petitioner immediately filing an exception to Gilchrist's instructions, paving the way for an appeal to the U.S. Supreme Court.[8]

For Petigru and the Foreign Office, Gilchrist's instructions and the jury's verdict were not overwhelming defeats. In fact, Petigru was far more worried that the jury would find for Roberts, award him one dollar in damages, and thereby bar an appeal and prevent a lasting resolution at the same time. With this particular outcome in a lower federal court, Petigru could bring his case before the Taney Court.[9]

Petigru's excitement about the prospects of a Supreme Court hearing was not shared by many of his pro-Union friends in his increasingly radical state. Some fearful Unionists in South Carolina wanted the appeal to die before appearing on the Supreme Court docket. For them, no possible good could emerge from an appeal. If the Supreme Court struck down the Seamen Act, their argument went, South Carolina radicals would scream encroachment and, at best, ignore the decision. If the Supreme Court upheld the statute, then Britain would have no recourse other than war to ensure the liberty of their free black maritime laborers. Neither scenario seemed all that appealing.[10]

Luckily for these pro-Union men, the Supreme Court never heard the appeal from Gilchrist's courtroom. Fresh from their recent electoral victory, the leaders of the new Conservative ministry in London informed the British consul in Charleston, the man underwriting the costs of the suit, to drop the case against the sheriff. Rather than invite the Taney Court to rule on the legal status of a free person of color, the Foreign Office hoped to accumulate political capital amongst both Unionist and secession-minded officials in South Carolina by voluntarily ending the case. Fire-eaters, they hoped, would see the decision as a show of respect to South Carolina's esteemed laws while unionists would appreciate avoiding the unenviable position of potentially defending a Supreme Court decision infringing on state sovereignty. By withdrawing the suit, Foreign Secretary Aberdeen reasoned, Great Britain might convince state lawmakers of their interest in working outside Washington.

The effort backfired. For the next three years, the South Carolina Assembly flatly refused to reciprocate by easing the Seamen Act in exchange for the Foreign Office dropping *Roberts*. Only in December 1856 did South Carolina liberalize its regulations, and then only as a sign of solidarity with the rest of the Slave South, not as an act of reciprocity towards the Foreign Office.[11]

Case Two: Stratton, et al. v. Babbidge

In September 1854, three free black sailors named William Stratton, Henry Mansfield, and Isaac Ross contracted themselves to work aboard the U.S. vessel *Iddo Kimball* for

twenty-four dollars a month in wages. Their contract stipulated that they would leave Halifax, Nova Scotia, where they signed on, travel across the Atlantic to Britain, and then return to a "port of discharge in the United States." This contract was not the first between the sailors and the master of the *Kimball*, Captain Babbidge. The two sides had agreed to a similar contract less than a month earlier in New York City, though a rough storm off the coast of Newfoundland damaged the ship and sent it limping to Halifax. The men were released from their employment contract while the ship underwent repairs. When the ship was seaworthy, Babbidge once again solicited the services of the three mariners. However, these crafty tars had realized their increased market value in Halifax. When Captain Babbidge attempted to reenlist the sailors for the same rate he offered – and they had previously accepted – in New York, the men refused. They had originally signed for only fifteen dollars a month, as the abundance of ready ship hands in New York had driven the monthly wages of sailors down. In Halifax, the relative dearth of able-bodied sailors willing to make a transatlantic run enhanced the sailors' bargaining position. With little other choice, Babbidge signed a contract to pay the men twenty-four dollars a month, sixty percent more than their original agreement.[12]

From Halifax, the *Kimball* sailed to Sharpness, near Bristol, where the cargo was unloaded. Eager to take advantage of some downtime as Babbidge went about resupplying the vessel with food and other necessities, the sailors elected to receive a small advance on their pay to enjoy what the port city had to offer. The record does not reveal much about their exploits in Sharpness, but the stories of other transatlantic black sailors in Britain may shed some light. In his semi-autobiographical account *Redburn*, Herman Melville described his impression when he first encountered the African-Americans at a British port. "In Liverpool indeed the negro steps with a prouder pace, and lifts his head like a man." He witnessed several public displays of interracial affection, which, had they occurred in New York, would have resulted in a mob "in three minutes."[13]

For one of the sailors, at least, the stay in Sharpness was quite eventful. According to Captain Babbidge, Isaac Ross contracted an unspecified venereal disease through "illicit intercourse with women," though the symptoms apparently did not surface until weeks later, when the vessel was sent to re-cross the Atlantic. After leaving Sharpness, the *Kimball* then sailed across the Bristol Channel to Cardiff, where the vessel was loaded up for a transatlantic voyage. The new merchandise was headed for New Orleans, and the vessel was fitted with the necessary supplies, including foodstuffs and medical supplies, the latter to be a point of contention between Captain Babbidge and Isaac Ross, as we shall soon see.[14]

A few weeks later, the *Kimball* reached New Orleans. As the vessel approached the harbor, local officials informed Babbidge of Louisiana's Seamen Act, which demanded that the captain of every vessel post a bond for both the good behavior of their black crewmen and to ensure the removal of said crewmen from the state. If the captain refused to post the bond, he could be fined and incarcerated, as would the unbonded black crewmen. Captains could not recover their bonds until they were set to leave harbor and could prove to the magistrate's satisfaction that the crewmen he introduced to the state had left or were in the process of leaving.[15]

For the white tars onboard the *Kimball*, the arrival in New Orleans meant the end of their work for Captain Babbidge. They were summarily paid and discharged, leaving the docks for the enchantment of the Crescent City. For Stratton, Mansfield, and Ross, however, the Louisiana Seamen Act complicated their discharge. According to the captain's affidavit, he attempted to secure them employment on other commercial vessels and found several heading to ports in Europe. He hoped the men would accept a new contract so he could quickly recoup his bond. The men, however, refused to sign on with these alternative vessels, declaring their wish to head to a port in the northern U.S. This is where the testimonies diverge. The captain testified that the three black sailors finally agreed to re-sign on board the *Kimball* for fifteen dollars per month, the going rate for mariners in New Orleans and the rate that was originally offered when the men first left New York the previous summer. According to the captain, the men willingly signed on, as no other ship was headed to an agreeable port. The sailors told a different story. They claimed that Babbidge pressured them into signing a new contract with reduced wages by threatening to leave them in New Orleans. They only entered into the new contract because if they did not, they would have been incarcerated. If the stories pouring in from abolitionist presses were at all accurate, the men risked being a permanent feature of the New Orleans workhouse, quasi-slaves in the employment of city officials. Rather than an ideal solution, the new contract was actually signed under duress.[16]

Whatever happened in New Orleans, the *Kimball* with Captain Babbidge and the three future petitioners travelled north and soon arrived in Boston. Upon their discharge, the three sailors were paid their wages, including the fifteen dollars per month wage stipulated in the contract agreed to in New Orleans. After receiving their income, the sailors sought legal redress for the difference in wages between the Halifax contract and the New Orleans contract. Their attorney, F.W. Sawyer, filed a libel in the Federal Circuit Court of Massachusetts, where the noted maritime law expert Peleg Sprague heard the arguments. Their argument was straightforward. Because of the Louisiana Seamen Act, New Orleans could not be considered "a port of discharge in the United States" for sailors of color. Consequently, the original Halifax contract was still in force, since the men were never officially discharged. Thus, the new contract, signed under duress, was null and void, and the captain was legally required to pay the men the full twenty-four dollars per month as originally negotiated in Nova Scotia. In a supplemental libel, Isaac Ross also sued for the wages that the captain deducted during his incapacitation after contracting a venereal disease in England. According to Ross, the captain prevented Ross from being discharged in Cardiff so as to allow him to be admitted to a hospital and willfully refused to provide the necessary medication after the vessel left Europe.[17]

For the captain, Boston attorney and renowned maritime writer Richard H. Dana, Jr. argued to the contrary. In his answer, Babbidge claimed the men, without protest, voluntarily agreed to the new contract while in New Orleans, and only in Boston did the men make any mention of lost wages. The captain ought

to be congratulated, since he tried his best to secure the men new work, and even offered the new contract weeks before the *Kimball* set sail out of New Orleans just so the men might be kept from jail. If the court found for the libellants, then all shipmasters heading into New Orleans might be held hostage by their sailors and the $1000 per sailor bond, preventing captains from making appropriate employment negotiations. As for Ross's claim of malfeasance, the captain simply stated that Ross's allegations were spurious.[18]

For Judge Sprague, this was not his first encounter with a suit touching on the enforcement of the Seamen Acts in Louisiana. Eleven years earlier, in 1844, Sprague decided *Martin v. The Cynosure*, a case with some stark similarities to *Stratton*. William Martin, a free black sailor, sued his captain after he withheld from the mariner's wages the costs of incarceration that accrued while Martin sat in confinement in New Orleans. When Martin returned to Boston, he hired attorney Richard Henry Dana, Jr. – the same man who later would represent Babbidge – and sued his captain for the deducted wages and for damages attending to his extended incarceration. Sprague awarded Martin his lost wages, but denied his request for damages since the shipping articles explicitly listed New Orleans as a port of call.[19]

In his decision in *Stratton*, Sprague hinted, as he did in *Martin*, that the Louisiana Seamen Act was likely unconstitutional, but since the exact question of the statute's constitutionality was again not raised, his ruminations on its imbecility were only *dicta*. Nonetheless, he followed on *Martin* by awarding the difference in wages. "I am of opinion," Sprague wrote, "that a port in the slave states, where laws of this description prevail, is not a port of discharge for colored seamen…[because t]hey cannot be, in any just sense of the term, discharged from the vessel." Sprague continued, "They are not free to go where they please, and to find other voyages. They must be either in jail or on board this vessel, and…cannot even leave the vessel without the hazard of being made slaves." From the reasoning, the judge concluded, "they were entitled to proceed to Boston in the vessel at the original rate of wages [since] They did not waive this right freely…but made the new contract under duress and under protest, and for no consideration." Babbidge was forced to pay the back wages and court costs, less "certain deductions…for the sickness of a seaman by his own fault."[20]

Besides its value in comparison to *Roberts*, this case offers us a rare glimpse of the legal and economic sophistication of some transnational black workers. The three petitioners displayed incredible acumen. They successfully opted out of their original contract with Babbidge when their vessel was forced ashore at Halifax. They understood their enhanced market value in Nova Scotia, where they could demand sixty percent higher wages than they originally negotiated in New York. The sailors knew of their impending arrest in New Orleans if they could not find immediate work aboard a departing vessel. When they arrived in Boston, they sought out legal counsel and successfully sued for the difference in wages. Thus, these illiterate men displayed a masterful ability to navigate the geographic, economic, and legal landscape of the mid-nineteenth-century Atlantic World.[21]

As a postscript, this was not the final case to come before Judge Sprague based on the loss of wages by black sailors encountering the Seamen Acts. In 1859, in a very similar case, *The William Jarvis*, he ruled in favor of black crewmen whose captain had deducted wages during the men's confinement in New Orleans. With *Martin v. The Cynosure*, *Stratton et al. v. Babbidge*, and *The William Jarvis*, the U.S. District Court in Massachusetts had carved out a legal lifeline for black sailors whose captains hoped to double the indignity of the Seamen Acts by charging the mariners for their incarceration.[22]

Comparing the Cases

Within the span of two years, then, the federal courts in the United States heard two cases regarding the southern Seamen Acts. In *Stratton et al. v. Babbidge*, the libellants won their case by basing their claims on contract law and lost wages. In *Roberts v. Yates*, Reuben Roberts lost his case based on his citizenship claim and its corresponding attachment to the infringement of British sovereignty. Both cases had precedents that foreshadowed the outcome of their respective cases.

In the end, we see that the repeated protests of the Seamen Acts' insult to British sovereignty never affected the administration of the laws. Claims of British sovereignty and Afro-British rights had no impact. Absent any military or economic threats, these legal claims were completely ineffectual. When the issue of treaty rights, individual liberties, and freedom of movement for people of color came before federal tribunals, the sailors lost. However, the federal courts did offer a different sort of assistance for some sailors. When mariners sued for back wages or for being compelled to sign a contract under the duress the Seamen Acts posed, they won. This observation suggests something substantive about the American legal system during this age of emancipation. The complex history of race and citizenship that culminated in the *Dred Scott* decision and the Fourteenth Amendment was not confined within the borders of the United States. Rather, it was part of larger, international developments. The law of citizenship could not match the colorblindness increasingly being achieved in the law of contracts. In other words, sovereignty of the flag apparently paled in comparison to sovereignty of the contract. And perhaps most interesting, illiterate free black sailors took advantage while the British Foreign Office continued to face legal defeat.

1 For a macro analysis of Atlantic slavery, see David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford and New York: Oxford University Press, 2006).

2 On the enactment and enforcement of the Seamen Acts, see Michael Schoeppner, "Peculiar Quarantines: The Seamen Acts and Regulatory Authority in the Antebellum South," *Law & History Review* 31 (forthcoming, 2013) and Philip Hamer, "Great Britain, the United States, and the Negro Seamen Acts, 1822-1848," *Journal of Southern History* 1 (February 1935): 3-28.

3 *Roberts v. Yates*, 20 F. Cas. 937 (1853). Unfortunately, the case file is not among the other files for the U.S. District Court for South Carolina housed in the Southeast depository of the National Archives. The details of the case come from the decision cited above and from correspondence between Roberts'

attorney, James L. Petigru, and British officials. Those letters can be found in Foreign Office Papers, *Correspondence relative to the Prohibition against the Admission of Free Persons of Colour into certain Ports of the United States, 1823-1851*, Volume 579, Series 5, (Kew, England: Public Records Office), 260-274. Hereafter referred to as *Correspondence*.

4 Hamer, 9-12; Michael Schoeppner, "Status across Borders: Roger Taney, Black British Subjects, and a Diplomatic Antecedent to the *Dred Scott Decision*," *Journal of American History* 100, no. 1 (forthcoming, 2013); Philip S. Foner and Ronald Lewis, eds., *The Black Worker: A Documentary History from Colonial Times to the Present* (Philadelphia: Temple University Press, 1978), 1:437.

5 Philip Hamer, "British Consuls and the Negro Seamen Acts, 1850-1860," *Journal of Southern History* 1 (May 1935): 138-168. Some of the press responses were included in letters from British agents in the United States. See *Correspondence*, 174-180 and 182-185, with the quote from 178.

6 George Mathew to Viscount Palmerston, January 10, 1852, in *Correspondence*, 234-236; George Mathew to the Governor of South Carolina, December 10, 1851, in *Correspondence*, 218-222; *The Passenger Cases*, 48 U.S. 283 (1849); *The License Cases*, 46 U.S. 504 (1847); *New York v. Miln*, 36 U.S. 102 (1837); George Mathew to the Earl of Malmesbury, May 28, 1852, in *Correspondence*, 260; Earl of Malmesbury to George Mathew, June 16, 1852, in *Correspondence*, 261.

7 Michael Schoeppner, "Status across Borders." Interestingly, the State Attorney General and the man supposedly responsible for defending the Seamen Act in *Elkison* was none other than James Petigru. He refused to argue the case, leaving it to two private attorneys to defend the sheriff and the Seamen Act. On Petigru's role as State Attorney General, see William H. Pease & Jane H. Pease, *James Louis Petigru: Southern Conservative, Southern Dissenter* (Athens, GA: University of Georgia Press, 1995), 24-27. On the maintenance of the law post-*Elkison*, see Alan January, "The South Carolina Association: An Agency for Race Control in Antebellum Charleston," *The South Carolina Historical Magazine* 78 (July 1977): 191-201.

8 *Roberts v. Yates*, 20 F. Cas. 937 (1853).

9 James Petigru to George Mathew, February 4, 1853, in *Correspondence*, 265-266.

10 See, for example, the sentiments expressed in George Mathew to Viscount Palmerston, January 10, 1852, in *Correspondence*, 234-236.

11 By 1856, Alabama, Louisiana, and Georgia had amended their Seamen Acts to allow black sailors to remain aboard their vessels, and, in some instances, to come ashore after receiving explicit permission from municipal authorities. Some South Carolina officials, in hopes of creating a unified South, sought to coordinate racial policies. The leading proponent of liberalization in South Carolina, John Harleston Read, Jr., quipped, "Are we more subject to the assaults of northern incendiaries [than] our sister states [that already amended their Seamen Acts]? Are our institutions weaker than theirs?" See Alan January, "The First Nullification: The Negro Seamen Acts Controversy in South Carolina, 1822-1860" (PhD diss., University of Iowa, 1976), 386.

12 *Stratton, et al. v. Babbidge*, 23 F. Cas. 225 (1855). The case file is housed in RG 21.23.1, Records of the U.S. District Court of Massachusetts, Case Files, 1790-1911, NARA-Northeast, Waltham, MA.

13 Herman Melville, *Redburn* (London: Jonathan Cape, 1937), 231-232.

14 Case File, *Stratton, et al. v. Babbidge*, 23 F. Cas. 225 (1855).

15 *Acts of Louisiana* (1852), 193-194.

16 Case File, *Stratton, et al. v. Babbidge*, 23 F. Cas. 225 (1855); Schoeppner, "Peculiar Quarantines."

17 Case File, *Stratton, et al. v. Babbidge*, 23 F. Cas. 225 (1855).

18 Case File, *Stratton, et al. v. Babbidge*, 23 F. Cas. 225 (1855).

19 *Martin v. The Cynosure*, 6 F. Cas 1102 (1844). Before 1851, the Louisiana Seamen Act mandated the immediate incarceration of all free black sailors. In 1851, the law was amended to allow sailors to remain aboard their vessel, and even come ashore in certain cases. See Schoeppner, "Peculiar Quarantines."

20 *Stratton, et al. v. Babbidge*, 23 F. Cas. 225 (1855).

21 I am assuming the men were illiterate, since both Stratton and Ross signed their names with an "X."

22 *The William Jarvis*, 29 F. Cas. 1309 (1859).

"Factors of Universal Commerce:" Bonded Warehousing and the Spatialities of Mid-Nineteenth Century American Foreign Trade Policy

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Secretary of the Treasury Robert J. Walker's vision of an expansive American future is well known, but he also embraced some novel and little-studied approaches to achieving American commercial dominance. These plans were grounded in the materiality and mechanics of trade itself but included grand earnest visualization. In 1849, Walker clearly saw the destiny of the United States "as a moral and political necessity, which no human power can sever, or destroy… a light and example to all nations…destined to extend its benefits and blessings to every country and people of the globe." Like others mouthing this same vision both in his era and later, Walker insisted that "an ever extending internal and international commerce and intercourse are indispensable."[1]

To achieve this expanding commerce, he advocated the embrace of bonded warehousing as a central systemic feature of American trade policy. The key objective of this system was to build operative control over two related spaces in U.S. ports. One was the physical space of the port itself, where new kinds of bonded warehouses were newly built or newly designated and regulated. These bonded warehouses were designed to operate while standing administratively and legally outside of prevailing customs regulations and of the system generally. Goods moved into the warehouses from ships but did not legally move into customs jurisdiction. This suspension (or carving-out) of jurisdiction for the warehouse and its contents would last for a period of time set by law and regulated by the state.

The second space was more abstract but equally constructed, regulated, and significant. It was time itself. As Walker argued, "this question is one of great magnitude; in what country shall be chiefly stored the exchangeable products and fabrics of the world, during the period intervening between their growth, production, manufacture, and their use or consumption?"[2] This period of time served as another space of suspension where goods left the trade network without moving from the physical space of the port, all the while awaiting savvy reentry into the market. Such a space could be created and replicated, and coordinated with the appropriate physical spaces of warehouses, with sufficient government attention and regulation. Free profit, or "income realized on the products and fabrics of other countries" could be generated essentially out of the system itself on the basis of this control of space and time. Meanwhile, the mere proximity of U.S. goods to the bonded goods in warehouses would produce additional gains: "the foreign and domestic goods warehoused in adjacent stores, will, as it were, invite the exchange, and our merchants thus become the factors of universal commerce." To Walker, bonded warehouses provided, simply, "a perfect union of interest between our exports and imports, between our trade external and internal."[3]

This article considers ways U.S. sovereignty and territoriality were conceived, articulated, and implemented in foreign trade policy in the nineteenth century by characterizing the tenor of these trade regime structures and assemblages that linked the internal and external realm.[4] In so doing, this article interrogates the spatialities of sovereignty as related specifically to American commerce. This article observes mitigations and elisions in sovereign spaces within an idealized and commonly articulated description of the singularities of U.S. legal order. A great deal of law guided trade policy options, and sometimes even seemed to encase it.[5] But in practice the applications of legal norms to trade regimes was often lumpy, fitful, and idiosyncratic[6] and the exercise of sovereignty was larded with numerous exceptions in key ways.[7] In nineteenth century trade regimes, the fruit of more than a century of political and legal experimentation ripened in distributed and differential systems, in an array of economic and jurisdictional zones, and in territorial or extraterritorial exceptions.[8] This article examines this exception in practice. It traces a rhizomatic nineteenth century embrace of differential trade and regulatory regimes developing within a broad U.S. commitment to sovereign unilateralism.

Before the turn of the twentieth century the U.S. was rather wide- ranging in its approach to questions of jurisdiction.[9] In its pursuit of hegemony in an increasingly interconnected world, the U.S. adopted a potent combination of approaches: informal imperialism, military interventionism, and market penetration and rationalization centered on state-secured but privately-directed legal and financial realignment, all coupled with various regimes of citizenship and racial exclusiveness at home and abroad.[10] Through the *Insular Cases*, the U.S. combined strictly defined territorial sovereignty in its imperial possessions with fitful extension of the rights associated with this sovereignty, particularly related to trade policy and equal access to the continental common market.[11] These are the familiar examples, and we should read these bifurcated foreign policies to be structurally similar to domestic divisions from the same time period, all of which had distinct governance utilities: state/federal; public/private, legal/exception, foreign/domestic.[12] Similar efforts were at work on other scales and in other spaces, particularly in the ports.

Evaluation of the policies and legal structures of nineteenth century U.S. trade requires a sensitivity to spatialities and contingent legalities in policymaking in terms of the policy impact on what Christopher Tomlins calls "the appropriation, occupation, and transformation of place."[13] Laws governing the flow and situatedness of goods, like larger questions of national sovereignty, often turn on stunningly commonplace issues. This is especially true when it comes to daily trade interactions involving the exchanges and materials of everyday life. These interactions were in fact exercises of state power continually recapitulated in ports and at border crossings by officials who individually wielded quite limited power, but whose local interventions gained wide cumulative significance. Governance appears much more interventionist than it has appeared even in those works which argue for an activist nineteenth century state.[14]

Systemic proximity is essential in viewing trade issues. As Sergio Conti and Paolo Giaccaria write, "every system is a local system."[15] But at the same time, observing the global context clarifies the significant innovations in jurisdictional claims that later eased construction of global imperial power.[16] As

Walker put it, "commerce is a unit, it is the exchange of products and fabrics, whether foreign or domestic, whether transported inland or coastwise, upon the lakes or the ocean, upon the railroad or canal, and *whatever system assembles in any port for exchange*."[17]

Historians have basically overlooked the significance of spatial orders (this *system assembling*) in U.S. foreign trade policy as they have ignored many spatial aspects of the exercise of the foreign relations power more broadly in this and other eras. Yet there has been an ongoing spatial turn in other fields.[18] William Roseberry cautions that the "rush to 'theorize' this discovery" of space has led people "to have said many foolish things,"[19] but even so cautioned it is useful to apply spatial understandings to questions of sovereign reach that underlie historical interpretations of U.S. foreign policy formation.[20] Roseberry suggests an approach that "stresses context, that traces networks, and that defines its central terms and unites (including the 'local' and the 'global') as relations rather than essences."[21] Questions of spatiality in these relational terms are especially useful because they signal the basic organization or division of these relations for the purposes of governance and regulation, as well as the complexities of these determinations.[22]

In grappling with trade policy issues, indeterminacy of limits is often shorthanded today as "offshore" and "onshore." These are fluid concepts which run into a complex stew of territorial, jurisdictional, and theoretical questions that have existed since the nineteenth century and only intensified in the current era. Ronen Palan describes this division as "sovereign bifurcation, by which states intentionally divide their sovereign space into heavily and lightly regulated realms."[23]

So, having dangerously skirted Roseberry's cautions about saying foolish things, this short article can turn to examination of how questions of jurisdiction and space at the local level connected to the wider thrum of trade policy intent. For example, where was a port actually situated and what was the controlling authority in this place?[24] When was a ship really in port? In August 1875, should the British ships *Arlington* and *Brazil* have been considered as having entered the Port of Charleston when in fact they both stood anchored at a bar "six miles from the nearest land"? The Collector of Customs at Charleston required the entry of both vessels, which meant bringing them into the jurisdiction of the U.S. and therefore into the reach of its customs requirements, costs, and tonnage fees. Great Britain complained to the U.S. State Department that the laws governing arrival of a ship to a U.S. port "was strained in a manner which might be prejudicial to British vessels calling for orders" and asked, in turn, for "liberality" and future waivers. However Secretary of the Treasury B.H. Bristow noted that the United States Revised Statutes required that any ship "within four leagues of the coast" present its manifest to the Collector. In other places the Statues simply stipulated jurisdictional control "'after the arrival or any vessel at any port of the United States." The Treasury department had in fact created a policy of allowing a ship 24 hours to report and 48 hours to" make entry" into the port. Otherwise, the department feared that merchant vessels might "lie as long as may be desired, within easy reach of the port" and would possibly "result in affording opportunities for smuggling." This stationary position stood outside of national space as well as outside of time. Because of the diplomatic wrangle, however, Treasure agreed to end tonnage fees on vessels lying offshore in this manner.[25]

This raised questions as to when goods became legally visible to the state and when were they not. Sometimes questions arose as to when goods retained all the characteristics of a good, as when lead was shipped from London but made to look like something else "with a view to avoiding the duties on the metal in pigs." Exporters sent "leaden pumps" with pipes attached, so lead pipes would be considered to be part of a pump owing a duty of 15 % instead of five cents a pound for lead. Also "bronzed leaden busts are shipped, in the hope that they will be admitted as metal busts, duty free."[26]

Where, indeed, in spatial terms did the foreign policy power lie and where did it best operate? It was not uncommon to see Treasury officials dismiss complaints about the exercise of authority over these issues, which appeared daily in the Department's correspondence records, because they seem "to be addressed not to the administration of the law, but to the policy of the law itself." In such a case, as Secretary of the Treasury Hugh McCulloch told William Henry Seward in 1868, "I do not see what relief can be afforded them by either this Department or your own."[27] Governance occurred in spheres in which daily administration trumped concerns over the "policy of the law."

One space of trade that evoked these broad systemic implications for more than a century was the bonded warehouse system developed to provide jurisdictional elision for merchants. This system persisted until a wider and more encompassing system of trade zones in ports was established in the twentieth century. The idea for bonded warehouses percolated for decades in a political movement too complicated to detail here, but the major thrust of the effort was to achieve commercial dominance by novel approaches to spatial order. As early as 1827, Secretary of the Treasury Richard Rush argued that "amongst the expedients for augmenting the foreign trade of a country, otherwise than in the exports of its own productions, none are believed to be more important than the warehousing system." European nations, and especially Great Britain, had created an enviable special warehouse system to great advantage, and it was time for the U.S. to assert its natural dominance in similar fashion.[28] "The situation of the United States, locally; the number and position of their ports, along so extended a line of coast; the tonnage of which they are actually in possession, with the commercial experience of their people, point them out as peculiarly fitted to derive advantage from this system, and serve to recommend for it more liberal enactments than any of which it has yet been the subject."[29] The key idea, which was realized finally in 1846, was to increase the period of drawback wherein a merchant could re-export their goods without penalty, and to carve a space in territory and time for this to happen in the form of both public and private bonded warehouses.

Depending on which politician one reads, the warehouse system either provided the ideal support for American commercial dominance built within protection or it established a beacon of free trade purity. According to Rush, "a new commercial era is begun, of which this hemisphere is to be the

principal scene." He argued that "by this intercourse we may hope to see multiplied the commercial and pecuniary ties which it is fit should grow up and be cherished throughout the whole federal family, superadding themselves to all other ties, and harmonizing and compacting the elements of a great empire."[30]

Protectionist adherents also saw the value of pursuing new commercial policies in addition to support for manufactures and agriculture, and for this reason the warehousing system continued throughout the ebb and flow of trade politics of the late nineteenth century. The federal government had an instrumental and promotional role to play, particularly in building and supervising the new warehousing system "in the principal seaport towns" around the country. This effort also included some of the inland ports of entry like Louisville, where the issues of internal and external spatiality became ever more complex.[31] "The merchant, like the manufacturer, and other interests of the state, requires at proper times the assisting hand of legislation; regulation, in one form or other, being the great end of government, and useful or baffling to individual enterprise, as it is wisely or improvidently exerted…Where interests are multifarious, as in free, populous, and opulent communities must be the case, the hand of Government must be variously extended."[32]

Proponents of free trade had an opposite view of the value of the warehousing system which helped them to support it, though they obviously did not dwell on the active involvement of the state that came along with this promotion of commerce in the public warehouses. Instead, the warehouses were posited as free trade spaces in a protectionist sea. Walker declared bonded warehousing to be "the perfect success of this system, the principle of free storage and free competition for all but unclaimed goods."[33] Ironically, protectionists soon turned against warehousing as if they suddenly started believing the free trader's rhetoric. More likely they had begun to notice the impact on the growth of commerce.

In 1866, during a debate over extending the period of time between original importation or the paying of dues and consumption, Senator Peleg Sprague of Maine complained that "the whole system is wrong from the very foundation, in all its workings and all its results….This is a free-trade measure from the start."[34] Protectionists in the Senate looking at twenty years of warehousing in 1868 saw it as the product of "scheming and speculative mind[s]" that carved out trade laws as a means both to further free trade and to build "facilities to foreigners to command our markets." These opponents were especially alarmed by the operation of the second space of market control: "under the warehousing system a reservoir of goods is accumulated, to be poured upon the market at the first sign of improved prices in our domestic products. They are held by their foreign keepers '—like greyhounds in the leash,/Straining upon the start,' to be let loose upon our home manufacturers, whose fate is to be hunted like hares in their own thickets."[35]

Over time, the emphasis of the federal government turned assertively from public warehouses to private warehouses overseen by customs agents. It was the declared "policy of the government…to encourage the establishment of private bonded warehouses unless some good reason can be assigned," as McCulloch wrote in 1868.[36] The private status of the warehouses was tightly constrained by law ("which the department is not at liberty to disregard") and supervised by a large amount of bureaucracy.[37] The effect created what opponents in 1868 called a "vast machinery of structures and officials, and whose usages the mercantile communities at home and abroad have become familiar."[38] The customs agents responsible for supervising these warehouses were actually paid by the receipts from the buildings they supervised, a situation which was affirmed in an 1854 Maine case where Moses MacDonald, the collector of the customs in Portland and Falmouth, stood accused of retaining the "money accruing for the storage of merchandise deposited in private bonded warehouses." The government maintained that "to argue that public warehouse means private warehouse, is as hopeless a task as to argue that in a statute public way means private way, or public lands means lands of individual proprietors, or public buildings the houses of citizens."[39] The judge believed the question of the private or public status, was "in point of fact [was] the only question of any importance in the case." He concluded, in a decision affirmed by the U.S. Supreme Court, "that private bonded warehouses are public storehouses within the meaning of that act, and of all the subsequent acts of Congress upon the same subject."[40] This combined governmental and individual incentives in a conjoined public-private space of managed trade.

The physical and laboring spaces of the warehouse were defined and regulated, with a diversity of issues arising in ports in the major cities on the coasts and at internal ports. Once the warehouses were set up, Treasury dealt with details regarding establishment and smooth operation on a daily basis. The thousands of pages of daily correspondence dealing with bonded warehouses signal the enormity of this task, especially considering that the system encompassed buildings and ports across the country. The warehouse keepers were required to keep and register a "daily account" of all names, residences of clerks, foreman, and laborers or other employees, days worked, and other details. Different classes of warehouse held different goods, and had different rules. Some had to be stand-alone, others required a fence, barred windows, or a "substantially brick building without or without flooring." Being "fire-proof" was required, as were specialized locks and specified configurations for access. The collector of customs in Galveston, Oscar Meiner, was reminded in January 1868 that the New General Regulations of February 1, 1857 forbade portions of buildings to be bonded "except in certain cases," notably the storage of liquor. Thomas Russell, Collector of Customs for Boston, similarly notified Clark & Woodward and Nash, Spaulding, & Co. that "while the Department has no disposition to incommode the merchants of Boston in the transaction of their business, it cannot permit the establishment of such warehouses" which violate the many regulations of class 2 warehouses wherein "the entire store shall be appropriated for the sole purpose." In June 1868 Secretary McCulloch told Representative Charles O. Keith that "sometimes, when bonded warehouses for sugar and molasses were attempted to be built in cellars or vaults, which were only legal for liquor or wine, he had "felt constrained to refuse them, however much I may have desired to meet the wishes of the

merchants of Philadelphia."[41]

Some commodities held unique and occasionally controversial status in the bonded warehouses. Liquor, as other luxury goods, unsurprisingly produced a cascade of rules and supervision in bonded warehouses.[42] A particularly interesting article of both special taxation and focused spatial control was oleomargarine. Although now considered an entirely unremarkable product, it was once the focus of great controversy and has been described as "an ill-treated child of the law."[43] For a long time it was not even called by its actual name as a form of control and disapprobation.

Invented in France in 1870 and produced in the United States since 1873, oleomargarine became a unique target of legal and political assaults as well multiple taxation and disputes over definition and even coloration because of its perceived threat to the hegemony of real butter. Oleomargarine was the focus of an unusual campaign to control its distribution and even existence, a situation the jurisdictional suspension of warehousing served well. Anti-oleomargarine laws appeared in New York and Pennsylvania as early as 1877 and in Maryland the next year.[44] Pennsylvania and Massachusetts actually banned the sale of it entirely, though the U.S. Supreme Court limited the extraterritorial reach of this ban in 1898.[45] This issue remained highly contentious for years, and triggered some notably overblown rhetoric bordering on the hysterical. Butter's defenders like Albert J. Hopkins, U.S. Representative from Illinois, exclaimed that "the manufacture and sale of oleomargarine have played the part of the midnight assassin to the production of honest butter. The claim of its being a legitimate and honest industry as compared with dairy butter is about the same as that of the assassin that his hellish work should meet with the approval of law-abiding citizens and God-fearing men."[46] William W. Grout, Representative of Vermont, argued that "this stuff, even if not absolutely unwholesome, is not fit for a self-respecting American citizen to eat. It might answer for a digger Indian, who lives on snakes, or for the Mexican peon, who in his poverty consumes with avidity every organic part of the animal, excepting only the horns, hoofs, hair, and bones. It might answer for these, but it does not comport with our American civilization."[47] Nevertheless, oleomargarine was finally recognized as a lawful article of commerce in August 1886 and specially taxed by a law later that year.[48]

Even with the recognized legalization of oleomargarine, its import was tightly regulated, at least to the level of, and sometimes exceeding, the controls on liquor. All imported oleomargarine was required to rest in bonded warehouse storage until labeled with the appropriate fixed and cancelled stamps with both an import duty and internal revenue tax paid. Its movement, sale, distribution, and repackaging were tightly regulated at the hazard of high fines and required jail time.[49] Ever increasing amounts of oleomargarine were produced domestically as well as imported, from 21 million pounds in 1887 to a height of 69 million pounds in 1894, and taxation of the product increased to sometimes punitive levels seeking its actual elimination as an article of trade. Later, grappling with punitive taxation structures, the Supreme Court concluded, in defending the power to tax as the power to destroy, that "the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights."[50] The visibility of oleomargarine as an item of international trade in the bonded system increased as control legislation led producers to seek ever-cheaper sources of fats for production, including coconut oil and imported vegetable oils.

Because bonded warehouses offered temporary shelter from the punitive and even annihilatory effects of taxation at both the state and federal levels, they provided essential shelter for this beleaguered trade article. Beyond the scope of this short article, we can observe oleomargarine sitting in this exceptional space while finally wending its way to ubiquitous acceptance around the time the Foreign Trade Zone act of 1934 (FTZs) put whole areas within U.S. ports administratively and legally "outside of the customs territory of the United States."[51] This provided a key moment in postwar U.S. trade policy in edible oils and in the movement to new globalized manufacturing and distribution systems of all manner of products, as well as the creation of U.S. bi- and trilateral free trade systems in North America, South America, and Asia. But the system triggered by the FTZs were built upon more than a century of practice articulated domestically in warehousing, as well as in global models of suspended jurisdiction which will not be detailed here because of a lack of space.[52]

1 U.S. Department of the Treasury, Report from the Secretary of the Treasury on the Warehousing System, 30th Cong., 2d sess., House Executive Document 57: 15.

2 Ibid., 9-10.

3 Ibid.

4 My use of the word "tenor" is deliberate, picking up on the Deleuzian concept of the rhythmic motifs and counterpoints of territoriality becoming manifest in assemblages. "Territorial motifs form rhythmic faces or characters, and that territorial counterpoints form melodic landscapes….motifs and counterpoints that express the relation of the territory to interior impulses or exterior circumstances, whether or not they are given. No longer signatures, but a style." Deleuze and Guattari write further, "Nor can we say anything about the intra-assemblages without being on the path to other assemblages, or elsewhere." Gilles Deleuze and Félix Guattari, A Thousand Plateaus: Capitalism and Schizophrenia, trans. Brian Massumi (Minneapolis: University of Minnesota Press, 2011), 318, 323. My understanding of assemblages which underlay my thinking here about trade policy draws from Saskia Sassen, Territory, Authority, Rights: From Medieval to Global Assemblages (Princeton: Princeton University Press, 2008) and from the more speculative Manuel DeLanda, New Philosophy of Society: Assemblage Theory and Social Complexity (New York: Continuum, 2006).

5 As Lauren Benton memorably described it: "The mythic structural support for the world being turtles all the way down, the cultural context of norms is law all the way down." Lauren Benton, A Search for Sovereignty: Law and Geography in European Empires, 1400-1900 (Cambridge: Cambridge University Press, 2009), 290.

6 Minor but amusing examples are Treasury allowing

some foreign ministers to bring in duty free items and strongly forbidding consuls from doing the same. Treasury approved the importation duty free of 4000 cigars (in a single case) for the Italian minister in 1874, while the Turkish minister was allowed "one case of summer clothing" from Paris. In perhaps the largest single case, in 1874, the minister from Peru brought in, free of duty and charges, "one case of Saddlery, two cases of silver-ware, and eighty-seven cases of miscellaneous as per the bills of lading" brought in from London and Havre. A month later he was granted a case of duty free cigars from Havana.
J.F. Hartley to Hamilton Fish, 2, 3, 8, 11, 16 June, and 17 July 1874 and James Guthrie to Wyndham Robertson, 28 July 1854, NARA RG 56 General Records of the Department of the Treasury, Correspondence of the Office of the Secretary of the Treasury, Letters Sent to the State Department (The "B" and "BF" Series), 1866-1878, PI 187, ENTRY 12. On forbidding consuls' entry, see James Guthrie to G.P.R. James, 13, 22, April 1854, NARA RG 56 General Records of the Department of the Treasury, Correspondence of the Office of the Secretary of the Treasury, Letters Sent, 1789-1878; Letters Sent Relating to Foreign Matters ("O" Series), 1833-1855, A-1, Entry 29.

7 As Supreme Court Justice Oliver Wendell Holmes later clarified in the 1922 The Western Maid decision, the only laws the United States truly considered itself bound by were laws it chose as a sovereign to follow. As he memorably phrased it: "There is no mystic over-law to which even the United States must bow." The case combined three maritime tort cases. In re Western Maid, 257 U.S. 419, (1922). "We must realize that the authority that makes the law is itself superior to it, and that if it consents to apply to itself the rules that it applies to others the consent is free and may be withheld…. Sovereignty is a question of power, and no human power is unlimited…. But from the necessary point of view of the sovereign and its organs whatever is enforced by it as law is enforced as the expression of its will…When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules." Ibid., 432-433.

8 On the theoretical nature of sovereign exception, which I believe was a core policy attribute in this era, see Giorgio Agamben, State of Exception (Chicago: University of Chicago Press, 2005); Peter Fitzpatrick and Richard Joyce, "The Normality of the Exception in Democracy's Empire," Journal of Law and Society 34, no. 1 (March, 2007): 70n26.

9 The meanings of U.S. attitudes as expressed in jurisdictional disputes are covered in Daniel S. Margolies, Spaces of Law in American Foreign Relations: Extradition and Extraterritoriality in the Borderlands and Beyond, 1877-1898 (Athens: University of Georgia Press, 2011). The idea that "rules of legal spatiality in American law derive from configurations of power and interest, not from any overarching normative theory of legal geography" comes from Kal Raustiala, "The Evolution of Territoriality: International Relations and American Law," in Territoriality and Conflict in an Era of Globalization, ed. Miles Kahler and Barbara F. Walter (Cambridge: Cambridge University Press, 2006), 221; and more recently and richly detailed in Raustiala, Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law (Oxford: Oxford University Press, 2009); also Diana Wong, "The Rumor of Trafficking: Border Controls, Illegal Migration, and the Sovereignty of the Nation-State," in Illicit Flows and Criminal Things: States, Borders, And the Other Side of Globalization, ed. Willem Van Schendel and Itty Abraham (Bloomington: Indiana University Press, 2005), 69-99.

10 As has been well illuminated by a flurry of scholars such as Walter LaFeber, The New Empire: An Interpretation of American Expansion, 1865- 1898 (Ithaca: Cornell University Press, 1963); Thomas J. McCormick, China Market: America's Quest for Informal Empire, 1893-1901 (Chicago: Quadrangle Books, 1967); Matthew Frye Jacobson, Barbarian Virtues: The United States Encounters Foreign Peoples at Home and Abroad, 1876-1917 (New York: Hill and Wang, 2000); Emily S. Rosenberg, Financial Missionaries to the World: The Politics and Culture of Dollar Diplomacy, 1900-1930 (Durham: Duke University Press, 2003), 1-79. The most valuable historiographical discussion of American empire to date is Paul A. Kramer, "Power and Connection: Imperial Histories of the United States in the World," American Historical Review 116, no. 5 (December 2011): 1348-1391.

11 And of course in the process denying or curtailing the extension of American rights to the colonized, see Bartholomew Sparrow, The Insular Cases and the Emergence of American Empire (Lawrence: University Press of Kansas, 2006), 79-211; and the many excellent essays in Christina Duffy Burnett and Burke Marshall, eds., Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution (Durham: Duke University Press, 2001); Edward B. Whitney, "The Porto Rico Tariffs of 1899 and 1900," The Yale Law Journal 9, no. 7 (May 1900): 297-321; Hoxie, "The American Colonial Policy and the Tariff," The Journal of Political Economy 11, no. 2 (March 1903): 204-5; William Bradford Bosley, "The Constitutional Requirement of Uniformity in Duties, Imposts and Excises," The Yale Law Journal 9, no. 4 (February 1900): 164-169.
It was "the reconciliation of imperialism and protection." Pedro E. Abelarde, American Tariff Policy Towards the Philippines, 1898-1946 (Morningside Heights, N.Y.: King's Crown Press, 1947), 5-6; Winfred Lee Thompson, The Introduction of American Law in the Philippines and Puerto Rico, 1898-1905 (Fayetteville: The University of Arkansas Press, 1989); Luzviminda Bartholome Francisco and Jonathan Shepard Fast, Conspiracy for Empire: Big Business, Corruption, and the Politics of Imperialism in America, 1876-1907 (Quezon City: Foundation for Nationalist Studies, 1985), 211-218.

12 Formal empire simply clarified an evolving and longstanding sensibility among U.S. policymakers of the clear utilities of differential governance regimes and systems. Though the Constitution was naturally limited in its jurisdictional application within territorial boundaries, this power was found to be enormously flexible for local reshaping and repurposing. And, most critically, power was essentially not limited in the realm of foreign affairs outside of the borders. As George Sutherland, a Republican Senator from Utah who later became the principal architect of unconstrained power while on the Supreme Court, put it in 1910, "the consequence of denying to

the general government any specified power over external affairs is to preclude its exercise by governmental agency altogether." Any limits on foreign relations power were too many. He stressed the inherent and necessary lack of limits on a "fully sovereign nation" in foreign affairs, one that was "perfect in all its limbs, and not a cripple among the full grown governments of the world." George Sutherland, "The Internal and External Powers of the National Government," North American Review, March 1910, 374-375, 382. Sarah Cleveland concentrates on exactly Sutherland's utilization of sovereign territoriality claims to bolster an unlimited construction of federal power in relations with Indians, aliens, and in governing territory. She describes them as "the product of a unique convergence of late-nineteenth century ideological forces: doctrinal obsession with federalism and dual sovereignty…with peculiarly nativist, nationalistic, and authoritarian impulses among the nation's political elites that justified the subjugation of 'inferior' peoples." Sarah Cleveland, "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs," Texas Law Review 81, no. 1 (November 2002): 15. On Sutherland's later significance, see United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); G. Edward White, "The Transformation of the Constitutional Regime of Foreign Relations," Virginia Law Review 85, no.1 (February 1999): 49-56; Walter LaFeber, "The Constitution and United States Foreign Policy: An Interpretation," Journal of American History 74, no. 3 (December 1987):711-713.

13 On the concept of "legalities," this article follows the work of Christopher Tomlins, who emphasizes "legalities" rather than laws. The latter implies "universality of application, singularity of meaning, rightness" while "legality, in contrast, is a condition with social and cultural existence; it has specificity… They are the means of effecting law's discourses, the mechanisms through which law names, blames, and claims… Legalities, so powerful, are also fragile and contingent." Legalities should also be considered in terms of "the appropriation, occupation, and transformation of place." Christopher Tomlins, "Introduction: The Many Legalities of Colonization," in The Many Legalities of Early America, ed. Christopher Tomlins and Bruce H. Mann (Chapel Hill: University of North Carolina Press, 2001), 2-3, 14.

14 Thinking here of Brian Balogh, A Government Out of Sight: The Mystery of National Authority in Nineteenth Century America (Cambridge: Cambridge University Press, 2009). The view of customhouses as articulations of the state in the Revolutionary Era and the Early Republic is well argued in Gautham Rao, "The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution" (PhD diss., University of Chicago, 2008).

15 Sergio Conti and Paolo Giaccaria, "A Systemic Approach to Territorial Studies: Deconstructing Territorial Competitiveness," in The Changing Economic Geography of Globalization: Reinventing Space, ed. Giovanna Vertova (London: Routledge, 2006), 78.

16 On some of the possible Constitutional limits, see Gary Lawson and Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History (New Haven: Yale University Press, 2004).

17 "In truth commerce is the great handmaid of labor, the factor of its products finding for them the markets of the world." U.S. Department of the Treasury, Report from the Secretary of the Treasury on the Warehousing System, 30th Cong., 2d sess., House Executive Document 57: 10. Emphasis added.

18 The richest definitions of space are, perhaps, Doreen Massey, For Space (London: Sage, 2005) and Edward W. Soja, Postmodern Geographies: The Reassertion of Space in Critical Social Theory (New York: Verso, 2011). Also see Kal Raustiala, Does the Constitution Follow the Flag; Paul Schiff Berman, "The Globalization of Jurisdiction," University of Pennsylvania Law Review 151, no. 2 (December 2002): 311-545; Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, "Where (or What) Is the Place of Law?," in The Place of Law, ed. Sarat, Douglas, and Umphrey (Ann Arbor: University of Michigan Press, 2003), 2-6. Richard Ford notes "lines on a map may anticipate a jurisdiction, but a jurisdiction itself consists of the practices that make the abstract space depicted on a map significant." Richard Ford, "Law's Territory (A History of Jurisdiction)," in The Legal Geographies Reader, ed. Nicholas Blomley, David Delaney, and Richard Ford (Oxford: Blackwell, 2001), 202.

19 William Rosenberry, "Understanding Capitalism – Historically, Structurally, Spatially," in Locating Capitalism in Time and Space: Global Restructurings, Politics, and Identity, ed. David Nugent (Stanford: Stanford University Press, 2002), 72.

20 For example, there is a clear need to apply spatial thinking to the otherwise fine approaches highlighted in the essays in Alfred W. McCoy and Francisco A. Scarano, eds., Colonial Crucible: Empire in the Making of the Modern American State (Madison: University of Wisconsin Press, 2009). As William Novak has argued in his study establishing the reality of the strong state in this era, "This American state grew by developing effective mechanisms for policing an ever-expanding and diverse territory. Coming to terms with the American state requires a better understanding of this power on the periphery." In the borderlands of the U.S., as at the borderlands of sovereign jurisdictions, the infrastructural power that Novak highlights was implemented and contested on a daily basis. "The American system of government, with its peculiar array of distributive technologies of state action—divided sovereignty, separation of powers, federalism, delegation, incorporation, and the rule of law—allows for an extraordinary penetration of the state through civil society to the periphery." William Novak, "The Myth of the 'Weak' American State," The American Historical Review 113, no. 3 (June 2008): 763-767. John Fabian Witt has argued that Novak has in fact ignored histories of U.S. foreign policy as well as the "basic law and society tenet—the equivalent of Legal History 101—that law is at once substantially derived from and constitutive of the power of the state. It does not stand outside the state. It sits inside the state, simultaneously shaping and shaped by its power." John Fabian Witt, "Law and War in American History," The American Historical Review 115, no. 3 (June 2010): 769-770.

21 Rosenberry, 64.

22 For example, as Allan Ersbsen points out, the Constitution itself leaves the United States with borders "of indeterminate contours and indeterminate meaning….The place 'United States' is difficult to define for two reasons: the different meanings of United States may not be coextensive, and there are several plausible permutations of what the United States may encompass. First, the scope of the United States as an entity need not be coextensive with its scope as a place because an entity can own or exercise control over places that are not physically within itself. The Constitution seems to recognize this fact in at least two provisions." Allan Erbsen, "Constitutional Spaces," Minnesota Law Review 95 (2011): 13-20, http://ssrn.com/abstract=1785546 (accessed March 26, 2013). This is a related question of Constitutional spatiality and reach to Gerald L. Neuman's great question: "The Constitution begins with 'We the People.' Where does it end?" Neuman, "Whose Constitution?" The Yale Law Journal 100, no. 4 (January 1991): 910.

23 He argues that the development of the offshore world should be viewed as a key attribute of globalization and that "closer scrutiny will show that the United States has played a far more ambiguous role in the emergence and spread of the offshore economy than might at first appear." Ronen Palan, The Offshore World: Sovereign Markets, Virtual Places, and Nomad Millionaires (Ithaca: Cornell University Press, 2003), 4, 6-8

24 The Constitution does not limit, but rather broadly defines in article 3, section 2 that the judiciary controls "all cases of admiralty and maritime jurisdiction." "Under Justice Story's formulation admiralty jurisdiction 'extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea.'" This case was limited by North Pacific S.S. Co. v. Hall Brothers Marine Ry. & S. Co. 249 U.S. 119 125, 39 S.Ct. 221, 222, 63 L. Ed. 510 (1918); Robert Force, A. N. Yiannopoulos, and Martin Davies, Admiralty And Maritime Law (Washington D.C.: Beard Books, 2006), 2:73.

25 B.H. Bristow to Hamilton Fish, August 25, 1875, NARA RG 56 General Records of the Department of the Treasury, Letters Sent to the State Department (The "B" and "BF" Series), 1866-1878, Box 6.

26 J. Lebouëf, Jr., Vice Consul to Treasury, November 7, 1833, NARA RG 56 General Records of the Department of the Treasury, Correspondence of the Office of the Secretary of the Treasury, Letters Received from the U.S. and Foreign Consuls ("O" Series), 1833-1855, Volume 1, Letters from U.S. Consuls, April 1, 1833 to July 1, 1834.

27 So much of the Treasury Department correspondence with consuls is about following rules, listening to laws, procedures for filling out certificates, and other mundane procedural tasks. State correspondence with Consuls tends to me much more about policy trajectories and implementation. McCulloch to Seward, September 7, 1868, NARA RG 56 General Records of the Department of the Treasury, Letters Sent to the State Department (The "B" and "BF" Series), 1866-1878, Volume 1.

28 On the British model, see Henry Longlands, A Review of the Warehousing System as Connected with the Port of London Taken From Parliamentary Reports and Official Documents, 2nd ed. (London: Thomas Davison, Whitefrairs, 1824), also The Warehousing System: Extracts from Various Publications and Documents Relating to the Warehousing of Goods in the Port of London and the Out-Ports; with Observations upon the Impolicy and Injustice of Extending the Privilege to In-Land Towns or Up-Town Warehouses (London: W. Wilcockson, Whitefrairs, 1835).

29 "Report by Mr. Rush on the Finances," Reports of the Secretary of the Treasury of the United States (Washington: Blair & Rives, 1837), 2:407.

30 "Should it still be apprehended by any, that evils will be generated in a state of society where large manufacturing classes co-exist with a full population—to such minds, the reflection must prove consolatory and re-assuring, that in the public lands a check to these evils will be at hand for ages to come. This immense domain, besides embodying all the ingredients, material and moral, of riches and power, throughout a long vista of the future, may, therefore, also be clung to, under the various springs and conjoint movements of our happy political system, as a safeguard against contingent dangers. Its very possession is conceived to furnish paramount inducements, under all views, for quickening, by fresh legislative countenance, manufacturing labor throughout other parts of the Union." Ibid., 406.

31 For questions arising in the inland ports, see Y.O. [?] Porter to Robert J. Walker, November 21, 1846, NARA RG 56 General Records of the Department of the Treasury, Letters Received by the Secretary of the Treasury from Collectors of Customs, 1833-1869 M-174 , Series G: Letters from All Ports Except New York, 1846 (A-N), roll 34.

32 Ibid., 408-409.

33 "Report from the Secretary of the Treasury on the Warehousing System," 30th Cong., 2d sess., House Executive Document 57: 9.

34 Congressional Globe, March 12, 1866, 1321.

35 The Protective Policy and Warehousing System, A Report Submitted to the House of Representatives, June, 1868 by Mr. Morrell, of Pennsylvania, from the Committee on Manufacturers (Washington D.C.: Government Printing Office, 1868), 34-38.

36 NARA RG 56 General Records of the Department of the Treasury, Correspondence of the Office of the Treasury, Letters Sent, 1789-1878, Letters Sent Relating to Customs and Internal Revenue Warehouse ("GA" Series), 1868-70, NARS A-1, entry 24, box 1, volume 1.

37 As detailed in Circular No. 34, "Instructions to collectors and other officers of the customs," February 17, 1849, Report from the Secretary of the Treasury on the Warehousing System, 30th Cong., 2d sess., House Executive Document 57:quote is on p. 16.

38 The Protective Policy and Warehousing System, A Report Submitted to the House of Representatives, June, 1868 by Mr. Morrell, of Pennsylvania, from the Committee on Manufacturers (Washington D.C.: GPO, 1868): 3.

39 "The classification of warehouses as public and private warehouses is not the new suggestion of a distinction for the purposes of the argument, but is a distinction that has been kept up in all the legislation of congress, in all the instructions of the Treasury department, and in all the practice of the revenue service

from the first establishment of warehousing." United States v. MacDonald, et al. 2 Cliff. 270, 26 Law Rep. 558, Circuit Court, D. Maine, April Term, 1864.

40 26 Fed. Case 1084.

41 Letters January-February, 1868; McCulloch to Keith, June 30, 1868, NARA RG 56 General Records of the Department of the Treasury, Correspondence of the Office of the Treasury, Letters Sent, 1789-1878, Letters Sent Relating to Customs and Internal Revenue Warehouse , (series "GA")1868-70, NARS A-1, entry 24.

42 "No distilled spirits can be withdrawn or removed from any warehouse for the purpose of transportation, redistillation, rectification, change of package, exportation, or for any other purpose whatever, until the full tax on such spirits shall have been duly paid to the collector of the proper district." Orlando F. Bump, ed., Internal Revenue Statutes Now in Force with Notes Referring to all Decisions of the Courts and Departmental Rulings, Circulars, and Instructions Reported to October 1, 1870 (New York: Baker, Voorhis & Co., Publishers, 1870), 174. In 1894, the Treasury Department determined that "some of these warehouses have proved to be of convenience to the taxpayer without an undue amount of expense to the United States. Others have been found to be detrimental to the interests of the Government."

43 J. K. M., Jr., "The Oleomargarine Controversy," Virginia Law Review 33, no. 5 (September 1947): 631.

44 Eugene O. Porter, "Oleomargarine—Pattern for State Trade Barriers," The Southwestern Social Science Quarterly 29, no. 1 (1948): 39.

45 Schollenberger v. Pennsylvania, 171 U.S. 1 (1898).

46 "'Bogus Butter,' A Speech of Hon. Albert J. Hopkins," May 24, 1886, Special Collections, University of Virginia Library.

47 "Oleomargarine: Remarks of William W. Grout, of Vermont, in the House of Representatives, May 25, 1886, on the Bill to Tax Oleomargarine," (Washington D.C.: 1886).

48 In November 12, 1886; 24 U.S. Stat. 209 (1886); and Abstracts Taken from the Report of Joseph S. Miller, Commissioner of Internal Revenue of U.S.A., Referring to the United States Oleomargarine Tax Law for the Year 1886-7 (Boston: Samuel Hobbs & Co., 1888).

49 U.S. Statutes at Large XXIV, 209; Lewis Heyl, United States Duties in Imports, 1891, 33rd ed. (Philadelphia: Sherman & Co., Printers, 1891), 147-148. Yet interestingly, imported oleomargarine did not have to be labeled with all of the same caution notices that the domestic product featured, though coloration was always noted. The extremely detailed rules dealing with the production, sale, import, and export of oleomargarine dating from 1886 and revised thereafter is United States Internal Revenue Service Regulations No. 9, Revised Regulations Concerning Oelomargarine, also Adulterated Butter and Process or Renovated Butter Under Internal Revenue Laws (Washington D.C.,: GPO, 1907).

50 "The taxes were declared constitutional even though they ran the risk of totally destroying the subject being taxed. There is such a distinction between natural butter artificially colored and oleomargarine artificially colored so as to cause it to look like butter that the taxing of the latter and not the former cannot be avoided as an arbitrary exertion of the taxing power of Congress without any basis of classification, taxing one article and excluding another of the same class." McCray v. United States, 195 U.S. 27 (1904). Also see "A New Instance of the Power of Congress to Destroy by Taxation," Michigan Law Review 3 no. 3 (January 1905): 220-223.

51 House Committee on Ways and Means, Overview and Compilation of U.S Trade Statutes, Part I, 111th Cong., 2d sess., 2010 (Washington D.C.: GPO, 2010).

52 The global comparative history of the FTZ is my broader book project. Incredibly, this has not been undertaken since Richard S. Thoman's short and quite dated Free Ports and Foreign-Trade Zones (Cambridge, MD: Cornell Maritime Press, 1956). There was a recent, stimulating article with a limited focus on Staten Island Foreign Trade Zone No. 1, Dara Orenstein, "Foreign-Trade Zones and the Cultural Logic of Frictionless Production," Radical History Review 109 (Winter 2011): 36-61.

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Free Trade Zones in Okinawa, Japan

Koji Furukawa (Chukyo University)[1]

In Japan, Free Trade Zones (FTZs) exist only in the Okinawa Prefecture, the southernmost prefecture near Taiwan. These FTZs, coupled with Bonded Areas scattered around all of Japan, including Okinawa, make up Japan's Custom Bonded System (CBS). Okinawa has two FTZs and they are not as effective as one may think; they remain less competitive than similar systems in Hong Kong, Taiwan, and Singapore. This is partly because of Okinawa's geographical location far from Tokyo. But more importantly, Okinawa faces an uphill battle against its own national government in Tokyo when it wants to strengthen the international competitiveness of its FTZs. On the one hand, the administrative structure of CBS at the national-government level is so fragmented. On the other hand, the national government, especially the Ministry of Finance, has an upper-hand over prefectural governments in the area of taxation. These institutional conditions work against Okinawa's efforts to enhance the two FTZs' position in the global market place. This article is organized in two sections. It starts with a brief history of the CBS and the advent of the two FTZs in Okinawa. The article then examines the features of the FTZs.

A Brief History

In the old policy regime since the Meiji period (1868-1912), the Customs Bureau of the Ministry of Finance was the sole government agency in charge of Japan's CBS. The Bureau lost its authority in 1943 due to the war. After World War II ended in 1945, the United States occupied Japan until 1952. The Supreme Command for Allied Powers (SCAP) led by General Douglas MacArthur pursued numerous reforms in Japan. The foreign trade policy regime was no exception. SCAP ordered the Japanese government to restore an effective Customs Bureau immediately.[2]

But the old Customs Bureau was never reestablished. Instead, its jurisdictions were divided up by several agencies: the Animal and Plant Quarantine Service went to the Ministry of Agriculture and Forestry; the Quarantine Station was picked up by the Ministry of Welfare; the Ministry of Transportation acquired the Maritime Safety Board; and the Bureau of International Trade and Industry moved to the Ministry of International Trade and Industry.[3]

The upshot of all this was that customs administration became more complicated and policy coordination became more difficult among the agencies involved. For example, it became a constant feature of Japan's CBS to see turf wars, such as the one between the Ministry of Agriculture and Forestry on the one hand, and the Ministry of International Trade and Industry on the other.

SCAP's reform attempts also touched on the relationship between the national and prefectural governments in an effort to enhance the democratization of Japan. As a result, the Local Autonomy Law of Japan became enacted in April 1947. This was meant to be "an Act of Devolution" that established the local government structures, including prefectures and municipalities, in Japan. On the surface of it, the law encouraged formal democratization; however, as far as the authority of taxation was concerned, democratization was not achieved as it remained in the firm grip of the Ministry of Finance in Tokyo.

Japan regained its independence after the U.S. occupation ended in 1952. But the U.S. occupation continued in Okinawa until 1972. In October 1959, the first FTZ was established at Miegusuku in Naha Port, Okinawa.[4] When Okinawa was returned to Japan in May 1972, the legal status of the Okinawa FTZ system was secured with the enactment of the Act on Special Measures for the Promotion and Development of Okinawa. In December 1987, the head of the Okinawa Development Agency in Japan's national government officially designated the Naha FTZ as a Free Trade Zone, which was formally opened for business in July 1988. After that, it was expanded and reinforced through the measures to reduce taxes and tariffs. In March 1999, another FTZ was established in Okinawa: the Special Free Trade Zone in the Nakagusuku Bay District (SFTZ). The new Act on Special Measures for the Promotion of Okinawa replaced the old Act on Special Measures for the Promotion and Development of Okinawa in April 2002.[5]

The Present Situation of FTZs in Okinawa

At present, the two FTZs in Okinawa promote business and trade 1) by providing tax/financial incentives to businesses located within the zones, which are provided by the Okinawa Development Finance Corporation; and 2) by operating as bonded areas, that is, containing bonded warehouses and bonded factories, as specified under customs law and prescribed by the aforementioned Act on Special Measures for the Promotion of Okinawa.[6]

Furthermore, the SFTZ has the following functions: (a) It can be utilized as a center to process and assemble imported raw materials, semi-processed intermediate goods, and parts for domestic (mainly mainland Japan) and foreign exports; (b) it is a bounded area, so that it can be utilized as an international trading center, i.e., as an entrepôt and stock point; (c) it can be utilized as a testing and inspection ground for imported goods before those are delivered to consumers; and (d) it can be utilized as a world fair site which can provide facilities for the exhibition of products and actual transactions. Thus, the SFTZ presents various incentives for prospective investors.

In addition, the SFTZ provides tax exemptions.[7] That is to say, within the SFTZ, a corporate income tax of 35 percent—compared with the standard 40.9 percent—will be deducted from taxable income for ten years for manufacturing, packaging, and warehouse activities, provided the investor employs at least twenty locals. Furthermore, the SFTZ tax rate for small- and medium-sized enterprises will be only 19 percent compared to 34 percent in the non-SFTZ enterprises. The other incentives are investment tax credit, special depreciation allowance for machinery and equipment, and wage subsidy for those investors who employ young regular workers through the Public Employment Office.[8]

Despite these incentives, however, the FTZs in Okinawa are not as effective as one may imagine in boosting the economy of Japan's southernmost prefecture. Both per capita income and

the rate of unemployment in Okinawa remain the worst in Japan. The FTZ has attracted only a small number of firms because their tax exemptions system is actually less favorable than those of Taiwan, Hong Kong, Mainland China, and Singapore. Furthermore, many firms—even Japanese firms—are hesitant to invest in the Okinawa FTZs because of high transportation costs. Okinawa is just too far away; the distance between Tokyo and Okinawa is about 1,500 km.

Why can't the Japanese national government help Okinawa to increase its FTZs' competitiveness against other Asian nations and alleviate the problem of Okinawa's geography? The national government, as it turns out, is another source of problems for Okinawa.

As was noted earlier, Japan's CBS is rather fragmented within the national government. This requires a time-consuming and sometimes rocky process of inter-agency policy coordination. Coupled with this, the national government is superior to the prefectural governments in the area of taxation. In other words, the Ministry of Finance has strong control over the tax policy of the prefectural governments. Because of these administrative structures, the Okinawa prefecture faces an uphill battle against the national government in Tokyo when it comes to the question of the FTZs.

For example, in the late 1990s, the Okinawa Prefectural Government proposed a plan named "Grand Design of Okinawa 21st Century." This policy initiative was meant to make the existing FTZs larger. But it eventually collapsed after the negotiation with many ministries of the national government was deadlocked.[9] Among these ministries, it was particularly the Ministry of Finance that put a major stumbling block against "the Grand Design of Okinawa 21st Century" because this plan proposed no tax zones throughout the Okinawa prefectures.

Conclusion

Okinawa is unique in Japan. It has Japan's only FTZs. But they are less competitive than other Asian countries' FTZs due to the administrative structures surrounding them. Logically then, what is required is strong political leadership for administrative reform at the national-government level of Japan. When and how will such political leadership come by and help Okinawa's FTZs? Only future historians can tell.

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2 SCAP Instruction Note（SCAPIN）941-A, April 8, 1946; for more information, see Japan Ministry of Finance, ed., *The History of Finance during the Showa Period: From the End of War to the Peace Treaty* (Tokyo: Toyo Keizai Inc., 1984), 6:495-96. (The Ministry of Finance publication is in Japanese.)

3 Ministry of Finance, 528-35.

4 Nobuyuki Yamada, "Okinawa in a Perspective of 'FTZ' Problem — Interplay between 'Coreness' and 'Peripherality'," *Teikyo Journal of Sociology* 14 (2001): 139-141. (This journal is published in Japanese.)

5 Okinawa Prefectural Industrial Site Promotion Division,"Naha Free Trade Zone," http://www.pref.okinawa.jp/zone/zone/english/004/index.html (accessed March 21, 2013).

6 Visit http://www.pref.okinawa.jp/zone/zone/english/001/img/doro_l.gif to see a map of the area.

7 Hiroshi Kakazu, *Okinawa in the Asia Pacific* (Okinawa: The Okinawa Times, 2012), 57. A comparison of effective corporate tax rates inside and outside the Free Trade Zone can be found at http://www.pref.okinawa.jp/zone/download/pdf/English-20101031.pdf, 16. "Effective tax rate (ETR)" means actual tax burden of a corporation. ETR is lower than the nominal tax rate, which is a simple average of various taxes imposed on a corporate firm.

8 Kakazu, 58.

9 Akihiro Sado, "A Pitfall between Grand Design of Okinawa toward Twenty-First Century and Modern Sovereign State System," in *The View in Asia-Pacific*, ed. Jin Kikkawa (Seibundo Inc., 2007), 150-54; Yamada, 145-147. (Both publications are in Japanese.)

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Raw Materials, Race, and Legal Regimes: The Development of the Principle of Permanent Sovereignty over Natural Resources in the Americas

Mats Ingulstad (Norwegian University of Science and Technology)[*] and
Lucas Lixinski (University of New South Wales)[**]

Do states exert sovereignty over the natural resources that can be found in their own soil? How? Since when? The answers to these questions are less clear-cut than they seem. We easily assume that sovereignty entails territoriality, and that the state has control over a fixed space, which, in principle, is distinct from the external environment, and all the people and the resources within the borders of this territory.[4] That was not always the case. International law, as defined in the capitals of Western Europe, for centuries allowed the imperialist states to legitimate their control over natural resources all over the globe through conquest and dispossession. It was by no means a foregone conclusion that the right to these resources would revert to the native populations (perceived by their former colonizers as "uncivilized" and "primitive") during the decolonization process, as the industrialized countries insisted on the obligations of the successor states to respect existing agreements.[5] A decade of wrangling between the industrialized and the developing countries climaxed with the promulgation of the principle of permanent sovereignty over natural resources (PSNR) in the United Nations in 1962. International law obviously plays a key role in determining who owns what.

What follows is by and large an exploratory piece, part of a larger project. We wish to discuss how the rise of Pan-Americanism in Latin America owes much to a pro-sovereignty move embodied precisely in the principle of PSNR, which challenged the overweening imperial influence of the United States as well as assumptions about Latin Americans' "primitiveness" and their consequent inability to govern themselves and their own resources. We therefore argue that, despite general assumptions to the contrary, sovereignty is not necessarily the enemy of international relations, and that, at least in this instance, sovereignty has served as the means to galvanize support for the creation of the Organization of American States (OAS), one of the most important regional organizations in existence.

State Sovereignty in a World History Perspective

It may seem paradoxical that the history of the struggle for sovereignty over natural resources may provide a useful lens for the study of world history, which, after all, takes interconnectedness as a starting point. But it is intrinsically connected to the issues of war, trade, and international institutions, all of which are shaping the patterns of interactions between societies, and consequently fodder for world historians.[6] The transnational turn in the historiography of international relations has taught us how the state´s boundaries are porous, allowing us to track global flows of people, culture, capital and commodities across borders. The contest for control over raw materials provides an important perspective on the issue of sovereignty since political boundaries seldom conform to geological boundaries; geopolitical calculations or purely economic requirements of the different states compel the internationalization of resource issues. A particularly salient example is the reliance of the industrial complexes in Northern America and Western Europe on the raw materials that are found in developing countries in the Global South. Another key element in the recent efforts to transnationalize history has been the influence of race in shaping the perspectives and actions of policymakers, as well as their reception in the global arena.[7] Thinking on race powerfully shapes the political discourse on resources in a myriad of ways, whether in terms of regulating the right of ownership or turning the native people themselves into a labor resource that can be utilized for tapping other natural resources.[8]

Trade and resource extraction are cross-border activities that fall under the purview of international law, as well as world history. Thinking on race also informs the formulation of legal regimes, and especially raises the question of who is fit to exercise sovereignty over natural resources. Third World Approaches to International Law (TWAIL) is a strand of critical international law scholarship that argues that, fundamentally, international law exists for the creation and perpetuation of empire and imperial structures. It shows that attitudes of developed countries towards developing ones are informed by deep-seated racism and a belief that colonization is (and must be) justified by international legal structures.[9] TWAIL is thus an appealing lens through which to examine the way international law has developed in the Americas, in light of the relationship between the United States and countries to its south.

From Bolivar to Monroe and Back: The Evolution of Pan-American Ideals

The ideals of Pan-Americanism go back to the eighteenth century, when the process of decolonization in the Americas was in full swing. Naively defined from the South, and in Simon Bolivar's view, Pan-Americanism meant the unity of American nations, not only against the common European enemy, but, most importantly, out of a sense of shared identity (ironically, largely derived from the European ancestry of elites across the continent, that is, provided by the same enemy they were uniting against). Pan-Americanism became a flag of liberation and progress for the Americas, a utopian dream that was never really to see the light of day.[10]

In his State of the Union address in 1823 President James Monroe announced that any further expansion of European power in Latin America, including any attempt to re-impose colonialism on the many newly-independent republics, would be regarded as an unfriendly move against the United States. This doctrine in a sense embodied the ideals of solidarity of Pan-Americanism, while in fact it appropriated and colonized them, simply replacing European colonial aspirations with North American ones, disguised as solidarity between the strong northern power and their impoverished southern neighbors. However, Washington's claim to leadership in the cause of the common hemispheric interest was fraught with contradictions,

not least since the very notion of hemispheric unity conflicted with the Anglo-Saxon belief in their own racial superiority.[11] That way the U.S. justified its own expansion in the continent as a process of liberation from European colonialism. Moreover, securing the independence of Latin-American states also diminished the European threat close to home, in addition to creating new prospective allies (and markets) for the United States. The imperialist underpinnings of the doctrine became crystal clear with the development of the Roosevelt Corollary to the Monroe doctrine (1904), which turned the doctrine into an assertion of the right of the U.S. to intervene militarily in other American republics.[12]

Over the course of the nineteenth century the Monroe doctrine became a hallowed precept of American foreign policy to the extent that it was considered in Washington to be tantamount to international law. In Richard Olney´s famous interpretation from the 1897 Venezuelan border dispute: "Today the United States is practically sovereign on this continent and its fiat is law upon the subjects to which it confines its interposition."[13] This expansive interpretation was shot down by a stinging rebuke from Lord Salisbury, with the result that the doctrine was not incorporated into positive international law until after the First World War. The Covenant of the League of Nations affirmed that "[n]othing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace."[14] Despite this affirmation, Frank Ninkovich suggests that from the mid-1920s onwards, the Roosevelt Corollary was quietly shelved. In its stead the Republican administrations laid the groundwork for a non-interventionist policy in Latin America based on respect for international law, an approach the next President Roosevelt would eventually appropriate and label the Good Neighbor policy.[15] Whether this newfound respect for the sovereignty of the Latin American nations would also extend to their ownership over natural resources would remain an open question.

Despite Woodrow Wilson's insistence on self-determination after the close of the First World War, the Monroe Doctrine gained a new lease on life in the interwar years. The explorer, politician and academic who 'discovered' Machu Picchu, Hiram Bingham, argued that too much could be made of the principle of "racial self-determination." Rather, Bingham insisted that "we owe it to the progress of the world and to the world´s need for its natural resources to see to it that the republics of Tropical America behave like citizens of the world rather than like pirates or members of savage head-hunting tribes."[16] He was not alone among U.S. elites in linking race, sovereignty and the ability to provide raw materials for U.S. industry. Racism was rife among the U.S. internationalist elites in the interwar years, drawing on a long prehistory of viewing Latin Americans as a deplorable bunch of half-breeds.[17] As an observer at the Council of Foreign Relations noted, if the inhabitants did not have the necessary abilities or capabilities to develop these resources, somebody else would have to, "regardless of the ethics."[18] The implications of this worldview were clear: if the population of an area could not utilize their local resources, whether due to lack of capital or some racially determined inability to cope with mine management, it was tantamount to a forfeiture of their right to rule themselves, and the U.S. would gracefully step in as the benevolent caretaker who would exploit resources for the good of the hemisphere. The imposition of imperial control was thus justified in terms of the need to secure continued resource extraction.

Race was an amorphous biological and cultural concept and conformance with the values espoused north of the Rio Grande implied the possibility of improvement. The Americans described Latin Americans as "childlike" and "docile", the "dregs of a once powerful and progressive race" that only could be saved by an influx of American capital, organizational techniques, and vocational training.[19] Improvement would take time however, as Thomas Lamont at JP Morgan wrote to Secretary of State Charles Evans Hughes during negotiations over Mexican debt payments in 1922: "These Mexican people ought not to (be) proud and peculiar, but they are, and we can't change them overnight into Anglo-Saxons."[20] There were limits to how much could be done by improving culture, however. Inherited racial characteristics were seen as a significant factor shaping the suitability of the Latin American host societies to American investment. Chile, for instance, was singled out by the Council of Foreign Relations in 1930 as a prime location for investment in copper and other natural resources, primarily due to the large influx of civilized Europeans, but also due to the "soundness of the racial stock," referring to the native Araucanian Indians who were considered to be fiercely independent and energetic.[21] The Monroe Doctrine itself was imbued with such racist assumptions about how the lesser peoples of Latin America would benefit from American tutelage in return for their markets and resources. It thereby became a vessel for a potent mix of contradictory ideas and policies, enabling American elites in the interwar years to combine their time-honored tradition of political isolation with hemispheric domination, their self-perceptions as purveyors of civilization with economic exploitation.[22]

The Monroe Doctrine remained in place as a guide for American policy in the interwar years, and both the doctrine itself and the underlying conceptions of race shaped the responses to any political developments that could threaten American ownership over natural resources. The feud over the Mexican attempt to nationalize its subsoil mineral reserves after the Revolution of 1917 proved a case in point. Not only was the nationalization incompatible with Anglo-Saxon legal tradition, but it drew instead on the Spanish tradition of vesting mineral ownership in the crown and Indian notions of communal ownership.[23] It caused many out-and-out racists in the State Department and in the oil industry to call for embargo, or even war, in order to protect the interest of American oil companies. After all, the Mexicans were "weak and bumbling, incapable of resisting American fighting men, and in great need of being bossed around by the Anglo race."[24] Bossing the Latin Americans around was not a policy option limited to Republican administrations. President Roosevelt withheld recognition and sent warships to Havana in late 1933, effectively paving the way for the ouster of president Ramón Grau San Martin after he raised the banner of nationalization. Roosevelt also kept the screws tight on Bolivia for years after the confiscation of Standard Oil's

properties in 1937. The White House defended the investments of U.S. companies in Latin America and the principle of compensation with such alacrity that the decision not to intervene after the Mexicans finally nationalized their subsoil minerals in 1938 has been considered the very apogee of the Good Neighbor policy.[25] By that time, however, developments in Europe ensured that the U.S. had to recalibrate its policy towards the rest of its own hemisphere, and the question was to what extent the pre-war ideas, prejudices, and political structures would survive the Second World War.

From Monroeism to Multilateralism

In 1947, the Norwegian explorer Thor Heyerdahl won worldwide fame by crossing the Pacific on a raft of balsa wood, while attempting to prove his theory that Polynesia had been populated by Peruvians under the leadership of a race of light-skinned rulers.[26] The main problem for Heyerdahl as he set out to prove that the oceans were pathways rather than barriers to migration was that almost all available balsa timber had been felled and sold to the U.S. during the Second World War, along with numerous other raw materials.[27] The endless U.S. demand for Latin American raw materials during the war, such as rubber, copper, tin, and manganese, placed a heavy strain on the Good Neighbor policy. At the inter-American meeting in Rio de Janeiro in 1942, the issue of an equitable distribution of raw materials was of prime importance, and Undersecretary of State Sumner Welles offered economic assistance in return for the exclusion of the Axis nations from trade within the hemisphere. As Max Paul Friedman has pointed out, Washington turned to strong-arm tactics to keep the Axis away from the resources of Latin America to an extent that clearly marked the return to a Monrovian policy.[28]

Good fences make good neighbors, and presumably clearly demarcated lines of sovereignty do as well. During the Second World War, U.S. soldiers, government planners, and purchasing agents swarmed across the Southern Cone countries to protect, develop, and exploit the various sources of raw materials. The pressure for access to raw materials generated strong antipathies towards the *norteamericanos* across Latin America. This carried substantial risks both from the perspective of Washington and the entrenched Latin American regimes, since the rising resentment at foreign ownership of natural resources strongly correlated with a growth in revolutionary sentiment directed at the domestic political order.[29] "Yankeephobia" thus breathed new life into Pan-Americanism; it suggested to Latin American elites that the creation of a Pan-American organization where they could come together to become at last a counterweight to the U.S. was not only possible, but necessary for the economic viability of their states and their own political survival. The series of treaties designed to exclude the Axis from trading within the hemisphere had further important ramifications in this regard, as they became the institutional-legal germ for the creation of the Organization of American States.[30] However, because the nascent OAS relied on the structures of the pre-existing bilateral arrangements, the pro-U.S. hegemony bias ended up replicated in the newly-created organization as well.

The OAS Charter, approved in 1948 during a diplomatic conference in Bogotá, is quick to proclaim the OAS as "… the international organization that they [American states] have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence."[31] Article 3 of the Charter announces the principles of the Organization, among which are "… respect for the personality, sovereignty, and independence of States…", and that "[e]very State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State."[32] Relatedly, Article 19 is a strong provision on non-intervention, according to which "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements."[33]

The provisions of the OAS Charter highlight its intent to protect the sovereignty of all American nations. From the U.S. side, it meant the consecration of the idea of "America to the Americans," while for Latin Americans it represented the creation of safeguards not only against external powers from outside the hemisphere, but also safeguards against the northern hegemon.[34] Perhaps unsurprisingly, given the U.S.'s commitment to bilateralism in this area, and its decision to rely on the Open Door policy instead of negotiating explicit provisions on access to strategic raw materials in the founding documents of the Organization, the OAS Charter does not mention natural resources explicitly in its text, despite the importance that the trade in materials played in strengthening inter-American cooperation and building up momentum for the creation of the OAS. But the Charter does contain a small provision on economic self-determination (and PSNR is widely understood to be an essential part of economic self-determination). More specifically, Article 17 states that "[e]ach State has the right to develop its cultural, political, and economic life freely and naturally…."[35] This provision, coupled with Article 19's mandate of non-intervention, might be considered as the legal basis for the assertion of a principle such as PSNR, but that was not to be, precisely because of the net of bilateral treaties that predated the OAS Charter and specified commitments in this area.

An assertion of sovereignty from Latin American states was the catalyst for cosmopolitanism (understood in the Kantian sense of peaceful and friendly relations between nations towards the installation of a universal order) in the American hemisphere. At the same time, though, it was not sufficiently strong to entirely curb U.S. imperialism in the region, perhaps precisely because Latin American states tried to strike a balance between asserting their sovereignty and opening up to regional cooperation (which also meant much-needed U.S. dollars through development programs). At the end of the day, sovereignty can in fact be a pro-cosmopolitan move, at least to the extent it can bring states together against a common imperial enemy. Empire has too long disguised itself as cosmopolitanism, and PSNR is one of the ways through which the mask can be pulled off the

ugly face of domination and conquest. Current disputes over resources should be informed by these ideas, as a means to aid in the clearer pursuance of anti- and post-colonial agendas, instead of catering to the demands of a perennially hungry and unequal "free" market.[36]

International law as embodied in the OAS Charter thus became the language through which U.S. domination is expressed.[37] And, even though the OAS is quick to proclaim its allegiance to liberal ideals of human rights, equality, and non-discrimination, the rhetoric carries the undertone of American superiority. A TWAIL analysis would suggest that the text of the OAS Charter carried all along a colonial undertone, even as it nominally served to level the playing field between the U.S. and the Latin American states. And, because U.S. quasi-colonial practices towards Latin America are rooted on racial superiority, racism is at the foundation of the OAS.[38] Additionally, bilateral treaties cast a net which informs the uses of the OAS Charter, undermining its potential for promoting greater autonomy for Latin American states. Most importantly, the idea of developing "freely" becomes coupled with the idea of regional cooperation and assistance, which, even if it opens the door for the U.S. money Latin American states needed, through the very same door comes the possibility that the U.S. will have some input in domestic affairs, particularly those related to the exploitation of natural resources. After all, it is not only the U.S. that committed to cooperating with Latin American countries; Latin American countries also agree to cooperate with the U.S. for the pursuance of hemispheric peace and security. This quid pro quo logic ends up killing the dream of Latin American emancipation through the OAS.

Latin American attempts to push for sovereignty over their natural resources were rather unsuccessful. Realizing how damaging the reliance on raw materials was for their economic development, they sought to diversify and industrialize. They met with little more than derision in Washington, where the Latin American governments were likened with children playing with intricate things they could not understand, a comparison tinged with more than a little latent racism.[39] Washington preferred that the Latin Americans remain exporters of raw materials rather than diversifying and building up a trade in manufactures.[40] Eventually it became clear that there was little hope for economic assistance from the United States, and the Latin Americans, spearheaded by the National Revolution in Bolivia, intensified their efforts to reassert control over their natural resources.[41] This caused considerable dismay within Washington, and the State Department noted how Latin American nationalistic feeling was on the rise, and declarations in favor of nationalization of minerals again had become fashionable.[42] The Latin American states had much to fight for. As Peter Drucker observed in 1959: "The twenty largest underdeveloped countries produce more than one half of the Free World´s industrial raw materials. But they themselves consume less than 5 per cent of what they produce. All of them except Brazil are ´colored!´"[43] While this statement attests not only to the problematic concept of color or the enduring inclination to view the gap between the industrialized countries in the North and the developing countries in the South through that darkly tinted lens, it also shows how the quest for control over these raw materials would remain an uphill struggle with very high stakes.

Given the difficulties of working in the OAS context, assistance was sought elsewhere. And the United Nations was the chosen forum, where Latin American states made the initial push for the recognition of the principle, ultimately approved with the votes of newly-independent North African countries.[44] But, regardless of the fact that PSNR failed to be promulgated first by the OAS, the fact remains that it is the PSNR impetus (even if not the terminology) that is responsible by and large for the creation of the Organization of American States. Perhaps the failure to ultimately promulgate PSNR in this forum is telling of how quickly its aspiration to become a U.S. counterweight in the hemisphere was frustrated.

Conclusion

Travelling around Latin America in 1950, the influential American diplomat George Kennan reflected on the importance of Latin America for the United States. American success in the Cold War would depend on turning the Latin American states into allies and establishing solid economic links. It could never be a partnership of equals though, as he mused that the interbreeding of Spaniards, Indians, and Negroes had produced a most infelicitous outcome. Fortunately, Kennan thought, they would not need the Latin Americans as soldiers, but as miners of raw materials for the United States. The creation of the OAS had changed little about the way Washington thought about its entitlement to the raw materials found south of the Rio Grande.

The history of Permanent Sovereignty over Natural Resources in the Americas is a tale of how sovereignty can, in fact, serve international law and international relations. It is also a tale of how international law is still mired in the mud of empire. That the OAS is largely founded on a desire to promote PSNR as a means to overcome racist domination, and yet the Latin American states that were the absolute majority in the organization failed to formally proclaim the principle and had to move the discussion to the UN, is telling of the intricacies of international politics and how certain biases can be built into institutions both in and despite of the language of its constitutional instruments.

History shows how sovereignty works for and against cosmopolitanism, and tells us much about the law that most lawyers (and, in fact, many historians) tend to overlook: law is not a static, autonomous set of ideals; it is rather a moving process of sedimented categories of knowledge and power. What is more, the geography of power also matters, particularly in international law. In other words, Kennan unwittingly got it half right when he suggested that in Latin America, the impediments to progress were "written in blood and geography."[45]

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U.S. Overseas Territories and the Legacy of Empire

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In 2008, amid a heated legal and political struggle over the detention of enemy combatants at Guantánamo Bay, Cuba, the U.S. Supreme Court reaffirmed the power of the United States to exercise a raw form of sovereignty in overseas territories. Justice Anthony Kennedy wrote an opinion that granted habeas corpus rights to five Algerian men, including Lakhdar Boumediene, who had been arrested in Eastern Europe and confined at the Guantánamo Bay naval base.[1] This case was unusual – and remarkable – not because the men challenged their incarceration and sought access to U.S. civilian courts (instead of the military courts available to them) but because the decision revived the law of American empire.

The Court's decision tied the modern War on Terror to a century-old judicial legacy that Americans had invented in order to give constitutional justification to imperial expansion. This judicial legacy emerged after the U.S. victory in the 1898 Spanish-American War. And it revolved around questions concerning the addition of non-contiguous territories and the fate of non-white island peoples within American constitutional governance. American jurists at the time – especially, Supreme Court Justices – devised solutions to these problems that allowed for the expansion of U.S. sovereignty to strategically important islands in the Caribbean and Pacific. At the same time, these solutions suspended certain constitutional protections and withheld U.S. citizenship from island peoples.

The U.S. Supreme Court played a crucial role in empire-building by providing a constitutional rationale for U.S. sovereignty to move overseas but leave behind the full force of the Constitution. Through an unusual interpretation of this foundational document, the Court said that republican institutions did not move along with U.S. governing control to the islands. But the Court did find a constitutional justification for extending an imperial form of sovereignty over the new possessions. The Court further built on this logic by dividing Americans themselves into separate and distinct categories. These distinctions, the Court recently revealed, applied not only to people born in U.S. territory but to anyone who comes under U.S. sovereignty.

While many Americans celebrated the nation's quick victory over the Spanish in 1898, few American were fully aware of the legal struggles that ensued. The transfer of Spanish territories to the United States posed considerable problems concerning how new territories might join the American Republic. Lawmakers, legal scholars, and others agreed that the new insular territories were different from previous acquisitions, which included the Mexican Cession and the Louisiana Territory. Those regions had joined the United States as places destined for statehood. Congress granted people residing in these continental territories U.S. citizenship and the right to organize states that would join the union as equal members. Statehood and equality were not part of the plan for Puerto Rico, Guam, or the Philippines, and this was the crux of the problem that lawmakers and jurists confronted.[2] How could the United States incorporate island territories without making them states and without making their residents citizens?

The task of puzzling through these questions belonged to Congress, but Congress failed to act. Lawmakers were preoccupied with other matters, including building a canal in Central America, setting up a colonial government for Puerto Rico, and fighting a war with Filipinos for control of their islands. Debates in Congress also indicate that lawmakers were reluctant to address the matter of incorporating the islands because the topic would raise the related issue of incorporating eight million island residents, whom most Americans considered not white and somehow incompatible with U.S. society and government. Even though Congress remained inactive on this particular matter, American businessmen quickly set to work in the islands. They wanted to tap in to the resources of tropical America. Their undertakings forced the Supreme Court to confront the matter of the status of Puerto Rico within the expanding United States.

Entrepreneur Samuel Downes was one of those Americans who sought to benefit from the U.S. assumption of sovereignty over Puerto Rico. Downes imported produce from the island to the mainland U.S., and he protested when the collector of customs at the port of New York assessed a fee of $659.13 on a shipment of oranges. Puerto Rico, Downes claimed, was a part of the United States and federal law prohibited states from collecting duties on goods when they were shipped within the U.S. The tax treated Puerto Rico – and its resources – as foreign. In 1901, Downes challenged the duty before the Supreme Court, but he failed to convince its Justices that Puerto Rico was as much a part of the United States as the, then, territories of Oklahoma or Arizona.[3]

The Justices explained that the tax was constitutional because Puerto Rico was an American territory that could be treated as foreign territory in certain matters, including domestic trade and commerce. The reason Puerto Rico was so exceptional – and different from other regions that had joined the U.S. during the 19th century – was because Congress had not passed legislation specifically incorporating the islands into the United States. The Senate had merely ratified the treaty ending the Spanish-American War, something that established American authority in the international arena, but did not express an intent to make the island a part of the United States. Until Congress acted, none of the islands would be fully incorporated, and so none enjoyed the promise of eventual statehood.

The designation of the islands as "unincorporated" territories meant that Puerto Rico as well as Guam and the Philippines were colonies of the United States. The distinction that the Supreme Court drew between "unincorporated" islands and "incorporated" regions represented a great disparity between island colonies, on the one hand, and states and territories, on the other. Previous territories (and their peoples) had become a part of the United States, formed republican institutions, and, significantly, exercised popular sovereignty in state formation.[4] The new island territories were excluded from these processes. As Downes discovered, not all the Constitution's protections applied to unincorporated American territories, and the Constitution never would apply in full so long as the islands remained under U.S. sovereignty but not a part of the United States. The sovereign power that the United States exercised over the colonies was similar to an older variety that had existed in the international arena before the Constitution. Westphalia sovereignty was an early modern invention that allowed Europe's warring societies to establish clear borders, designate one ruler who set law, and offer mutual recognition to these sovereigns. This kind of sovereignty more adequately defines the power the United States exerted over the colonies and explains how they fit into the new imperial Republic. Domestically, in terms of popular sovereignty, the colonies were foreign; in the international community, the colonies were American.

This distinction is present in the way the Supreme Court used the Constitution to define Puerto Rico, Guam, and the Philippines as both unincorporated but under Congress's authority. Referring to the Constitution's territorial clause, the Court explained that Congress could "make all needful rules and regulations respecting [U.S.] territory."[5] This authority meant Congress could pass any legislation it thought necessary for the colonies. This was the only clause in the Constitution that applied to colonial governance; the Articles on representation did not. So, lawmakers could act without regard for the desires of island residents. Congress proceeded to pass legislation that created internal civil governments or military administrations for Puerto Rico, the Philippines, and Guam. Civil government gradually extended local control to residents, but Congress retained ultimate legislative authority over the islands.[6] Congress defined the sovereign power that extended to the colonies.

The legal dispute that began with the importation of oranges came to have significance well beyond tariffs and territorial incorporation because the Court showed how the Constitution was divisible when U.S. sovereignty moved beyond its traditional borders. Not only provisions related to commerce were inoperative in the island colonies, but a host of rights and liberties that the Constitution guaranteed to U.S. citizens were unavailable in unincorporated American territory. In this respect, the decision in the *Downes* case reveals how the emerging law of American imperialism might have a devastating impact on the people living in the islands.

Supreme Court Justices, like so many Americans at the time, did not want seemingly non-white foreigners to become U.S. citizens. They shared the belief that a person's outward appearances of race were indicators of internal and inherent characteristics, moral fiber, or mental capacity. They also believed in a myth of racial hierarchy that placed men like Supreme Court Justices at a prestigious pinnacle of humanity and all others at various lesser points. U.S. Senator Albert Beveridge gave voice to these commonplace, racist viewpoints when he spoke before the Senate on the matter of whether or not the U.S. should keep the Philippines and thus govern Filipinos. "They are a barbarous race," Beveridge said, "modified by three centuries of contact with a decadent [Spanish] race." For this reason, Beveridge argued, white America needed to take control of the islands. White Americans needed to govern Filipinos because Filipinos, Beveridge claimed, "are not capable of self-government."[7]

Beveridge's impassioned arguments in support of U.S. control of the Philippine Islands were calculated to respond to opponents of expansion. White Americans had long held that their vast republic worked because it remained racially homogenous. In response to Beveridge, former Secretary of the

Interior Carl Schurz spoke before a large gathering of the Anti-Imperialist League of New York. He said the U.S. had always expanded in the past with the "intention and well-founded expectation that the acquired soil would be occupied by a population of our own, or at least homogenous with our own" so that it could join the Republic.[8] Indeed, these very assumptions about racial affinity had forestalled expansion to places populated by seeming non-white races, including the Dominican Republic and, up to 1898, Hawaii.[9] Beveridge – and other supporters of expansion – struggled against this tradition by drawing attention to both trade opportunities and the supposed needs of non-whites. The Philippines, he surmised, was "richer in its own resources than any equal body of land on the entire globe, and peopled by a race which civilization demands shall be improved."[10]

The arguments that imperialists made succeeded in convincing Congress that Americans should fight to bring the islands under U.S. control. And the *Downes* decision protected the U.S. from the uncertain consequences of expansion by preventing the incorporation of seemingly heterogeneous peoples. Yet this Court decision did not settle questions concerning the status of island peoples. If they weren't citizens, what were they? As before, Congress offered no direction. Instead, conclusions about their civil standing fell to Cabinet officers and to the Supreme Court. In 1901, and in response to inquiries from foreign consuls, U.S. Attorney General John Griggs spelled out the civil standing of island residents. He said that Puerto Ricans and Filipinos should be treated as Americans in the international arena. Whenever they traveled beyond the sovereignty of the United States, they should be afforded the protections extended to any U.S. citizen. But, Griggs carefully clarified, "from the standpoint of our Government they are not citizens of the United States in any sense. They are," he continued, "persons who are… subjects of the United States, or, to use the term that has been suggested, 'nationals.'"[11]

The U.S. Supreme Court invoked precisely this category – that of subjecthood or noncitizen "national" – when, in 1904, the Court added its affirmation to the Attorney General's opinion. This particular court challenge emerged when Isabel Gonzales sought admission to the mainland United States through the port of New York. The Commissioner of Immigration there denied admission to Gonzales, who hailed from Puerto Rico, because he believed she was an alien likely to become a public charge. U.S. immigration law empowered the Commissioner to deny admission to alien immigrants in this manner. The Supreme Court said the Commissioner had exceeded his authority when he denied admission to Gonzales. The Court clarified that Gonzales was not an alien; she was an American. The Justices used the same reasoning concerning American sovereignty and subjecthood that was offered by Attorney General Griggs. Even though Gonzales might be denied certain rights as a noncitizen and as a person who originated from unincorporated American territory, the right to migrate within U.S. dominion could not be refused.[12]

At the same time that the Court affirmed the subjecthood of insular residents, it also began to address the rights that noncitizen Americans would enjoy within the U.S. empire. The *Gonzales* case was only the first of two decisions, which the Supreme Court rendered that year that began to elaborate on what being a noncitizen American meant. In the other decision, the Court went into greater detail on what rights were guaranteed to residents of American colonies. This challenge originated with the conviction of newspaperman Frederick Dorr. Dorr edited a newspaper in Manila, the Philippine Islands, and an American judge had convicted him of libel after he published allegedly malicious stories about one member of the U.S. governing body for the Islands. Dorr objected to his conviction without the benefit of a trial by jury. Seeking to overturn his conviction, Dorr claimed a constitutional right to trial by jury. But the U.S. Supreme Court sustained his mode of trial – by a judge, not a jury – and, thus, his conviction.[13]

This decision underscored how civil society and civic life in the islands was different from other parts of the United States that were under the full force of the Constitution. The Court explained that only certain, fundamental aspects of American constitutionalism moved throughout the world along with the spread of U.S. imperial sovereignty. In this way the Justices explicitly divided constitutional rights into two categories: fundamental rights, which were protected in American colonies, and remedial rights, which were not. Fundamental rights, the Court explained, consisted of natural rights and were "indispensable to a free government." They included First Amendment rights, due process, and the guarantees of private property. Remedial rights embraced those matters that seemed exceptional to the functioning of *American* republican government, including voting laws, taxes, modes of trial, and access to citizenship. In the Justices' opinion, trials before a jury were peculiar to Anglo-American legal customs and, therefore, were not among the rights guaranteed in unincorporated territory.[14]

This division between fundamental and remedial rights had an unfortunate outcome for Frederick Dorr, but it also had very serious consequences for residents of American colonies because the division of constitutional protections sustained U.S. imperial sovereignty. The so-called remedial rights that did not accompany the expansion of U.S. sovereignty promoted empire by ensuring that definitions of citizenship and suffrage would be determined not by the Constitution, but by members of Congress. This division also ensured that American judges – not Filipino or Puerto Rican juries – would enforce U.S. law through the court system. In this particular case, Frederick Dorr had originally tried to prove the truth behind his unflattering story of one administrator. He maintained a jury would find the story accurate and uphold his free speech where a U.S. judge had not. The Court denied Dorr the opportunity to test the truth of his news report before a jury because he allegedly committed a crime in a new American colony. This careful division of constitutional protections allowed lawmakers and law-enforcers to preserve certain aspects of U.S. constitutionalism in the colonies while it withheld key protections, matters that facilitated colonial administration and control. Noncitizen Americans thus owed their privileges and immunities not to constitutional rule, but to the imperial sovereignty wielded by Congress.

One significant detail in the challenge Dorr put before the Supreme Court was that Frederick Dorr was a U.S. citizen.

Like so many other citizens, he had migrated to the Philippines seeking new opportunities, in his case, as a newspaper publisher. Dorr's own civil standing did not guarantee him the so-called remedial rights that all U.S. citizens enjoyed at home. Rather, the status of the territory – the unincorporated Philippine Islands – carried the greatest weight in determining which rights a U.S. citizen would enjoy in this particular corner of the greater United States.

The unincorporated status of U.S. territory continues to be significant in determining rights that residents enjoy. Throughout the twentieth century the Supreme Court has maintained that the islands are "foreign" in terms of the domestic constitutional power of the United States. The persistence of this intermediary status explains why Puerto Ricans still do not vote in U.S. presidential elections, despite the fact that an Act of Congress naturalized Puerto Ricans in 1917, nearly a century ago.[15] As an unincorporated U.S. territory, Puerto Rico sends a "Delegate" to Congress. Delegates sit in the House and participate in debates, but they cannot vote on legislation. Because they are not regular members of Congress, and cannot vote, the territory they represent receives no votes in the Electoral College.

This conditional disfranchisement of U.S. citizens highlights another continuity in U.S. imperial sovereignty during the twentieth century. Congress has not acted to alter or abolish the unusual territorial classification, which was largely invented by the Supreme Court. With the exception of the Philippines, which gained independence in 1946, the territorial status of Puerto Rico and Guam has remained unaltered. Indeed, the geographic scope of unincorporated territory expanded in the years after 1898 to include American Samoa; the Panama Canal Zone; the Virgin Islands; the Mariana, Micronesian, and Marshall Islands; and, most recently, Guantánamo Bay. The Supreme Court conferred the status of unincorporated territory on Guantánamo Bay only in 2008 when it grappled with questions about the fundamental rights of foreign detainees held at the base.

The *Boumediene* decision extended the "unincorporated" territorial status to Guantánamo, and it also represented a culmination in legal wrangling over how President George W. Bush pursued the War on Terror. Soon after Congress granted the President the authority to use military force in response to the attacks of September 11, 2001, American forces began to interrogate and arrest alleged enemy combatants throughout the world, even in places far from the battlefields in Afghanistan. Several hundred, including Lakhdar Boumediene, were transferred to and detained at Guantánamo because it was a seeming "legal black hole" – under U.S. authority but beyond the reach of constitutional guarantees concerning presentation of evidence, due process, and habeas corpus.[16] Federal courts and the U.S. Supreme Court frustrated this plan; they pierced the darkness by voiding Department of Defense procedures and overturning Acts of Congress intended to empower Guantánamo's military commissions and restrict the habeas corpus rights of foreigners held there.[17]

The *Boumediene* decision, in 2008, brought many of these controversies to a close. It provided some basic constitutional protections to accused war criminals while it also expanded the territory of the U.S. empire. When assessing the appeal that Boumediene and other detainees made before federal courts, Supreme Court Justices did not focus exclusively on the status of the men, that of foreign nationals and accused terrorists. Rather, the Court said that "the place of their confinement and trial" overrode other considerations – including congressional legislation – and, thus, imparted fundamental rights to the detainees.[18] Guantánamo, then, was not a "legal black hole." It was part of the U.S. empire, and, thus, guaranteed all residents – including foreign detainees – fundamental rights. Those fundamental rights, the Court said, included not just habeas corpus protections but also procedural protections including the ability of detainees to introduce their own, exculpatory evidence and the right to have decisions made by military commission reviewed.

Boumediene shows us how the concept of fundamental constitutional rights has changed and expanded since the 1904 *Dorr* decision. At the same time, the Court did not challenge the artificial division between fundamental and remedial rights that emerged from an effort to divide white American citizens from non-white American nationals and anchor that division in territorial status. The Court found that Guantánamo's military commissions did not fulfill the fundamental procedural expectations necessary to determine if a detainee was indeed a war criminal. At the same time, the Court did not question the power of Congress to create a distinct trial system for Guantánamo detainees. Mode of trial is, according to the *Dorr* decision, peculiar to Anglo-American legal culture. For this reason, the authority to define trial procedure remains under Congress's sovereign power to govern unincorporated American territories.

In the end, the Court conferred fundamental rights on foreign prisoners held on U.S. soil while also reviving distinctions in rights and territory that, a century ago, had allowed Americans to build and maintain an empire. The Court affirmed that U.S. imperial sovereignty continues to operate beyond the reaches of popular, constitutional sovereignty and that empire has an important role to play in the twenty-first-century United States. Guantánamo and other unincorporated territories in the Caribbean and Pacific provide Congress and the Executive with access to places that are clearly under U.S. control and outside of international interference, but that are also beyond the reach of full Constitutional protections and guarantees. The *Boumediene* decision reveals the ways in which American imperial sovereignty continues to operate beyond the nation's traditional borders.

1 Lakhdar Boumediene v. George W. Bush, 553 U.S. 723 (2008); Lakhdar Boumediene, "My Guantánamo Nightmare," *New York Times*, January 7, 2012.
2 Lawrence A. Lowell, "The Status of Our New Possessions – A Third View," *Harvard Law Review* 13, no. 3 (1899): 155-176.
3 Samuel Downes v. George Bidwell, 182 U.S. 144 (1901).

4 For more on U.S. expansion and how these court decisions changed precedent see Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton: Princeton University Press, 1996); Christina Duffy Burnett and Burke Marshall, eds., *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Durham: Duke University Press, 2001).

5 U.S. Const., art. IV, § 3, para. 2. *Downes v. Bidwell*, 250.

6 Jones Act (for the Philippines), 39 Stat. 545 (1916); Jones Act (for Puerto Rico), 39 Stat. 951 (1917). Guam remained under the authority of the U.S. Navy from 1898 to 1950 when Congress established civil government; see 48 U.S.C. §1421 (1952).

7 Albert Beveridge quoted in "Policy Regarding the Philippines," *Cong. Rec.,* 56th Congress, 1st sess., 33 (Washington, D.C.: Government Printing Office, 1900), 705, 708.

8 "Carl Schurz Speaks to Anti-Imperialists," *New York Times*, September 29, 1900.

9 Eric Love offers an insightful analysis of the role that race played in preventing U.S. expansion during the late nineteenth century; see *Race over Empire: Racism and U.S. Imperialism, 1865-1900* (Chapel Hill: University of North Carolina Press, 2004).

10 Beveridge, "Policy," 707.

11 U.S. Attorney General John Griggs, "American Seamen – Filipinos – Cubans – Porto Ricans," *Opinions of the U.S. Attorney General*, 23 Op. Att'y Gen. (1901), 400, 402.

12 Isabel Gonzales v. William Williams, 192 U.S. 1 (1904). For more details on Gonzales and her case see Sam Erman, "Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzales, and the Supreme Court, 1898 to 1905," *Journal of American Ethnic History* 27, no 4. (Summer 2008): 5-33; Christina Duffy Burnett, "'They Say I Am Not an American...': The Noncitizen National and the Law of American Empire," *Virginia Journal of International Law* 48, no. 4 (2008): 659-718.

13 Frederick Dorr v. U.S., 195 U.S. 138 (1904).

14 Downes v. Bidwell, 282-3; Dorr v. U.S., 144-148.

15 Congress extended compulsory naturalization to Puerto Ricans through the Jones Act of 1917.

16 Gerald L. Neuman, "Closing the Guantanamo Loophole," *Loyola Law Review* 50, no. 1 (Spring 2004): 1-66.

17 In November 2001, President Bush authorized military commissions to try non-citizens accused of war crimes. The Supreme Court's 2004 decision *Rasul v. Bush* upheld the right of Guantánamo detainees to petition for habeas corpus in federal courts. The Department of Defense responded with the creation of Combatant Status Review Tribunals, which determine, using government evidence, if detainees were enemy combatants. In 2006, the Supreme Court overturned the use of tribunals when it found, in *Hamdan v. Rumsfeld*, that the tribunals violated due process guarantees including the use of exculpatory evidence. At the same time, Congress worked to authorize military review of detainees' status. It passed the Detainee Treatment Act in 2005, allowing military commissions to review evidence of detainees' status as combatants. In 2006, and in the wake of the *Hamdan* decision, Congress also passed the Military Commissions Act, which empowered Guantánamo commissions (not federal courts) to review cases and deprived detainees of habeas corpus. See *Boumediene v. Bush*. For more contextualization of this legal history see H. Robert Baker, "The Supreme Court Confronts History, or *habeas corpus redivivus*," *Common-Place* 8, no. 4 (July 2008), http://www.common-place.org/vol-08/no-04/talk/ (accessed April 2, 2013). See also Marjorie Cohn, "Why Boumediene Was Wrongly Decided," *Jurist*, February 27, 2007, http://jurist.org/forumy/2007/02/why-boumediene-was-wrongly-decided.php (accessed April 2, 2013); Linda Greenhouse, "Justices, 5-4, Back Detainee Appeals for Guantánamo," *New York Times*, June 13, 2008; Boumediene, "My Guantánamo Nightmare."

18 Boumediene v. Bush, 760.

World History Association

Special Section: Sovereignty and World History

The Specter of Sovereignty: Reflections on Teaching about Empires and Political Imagination

Lauren Benton (New York University)

As denizens of a world in which the word "sovereignty" seems to pop up everywhere, we think we know sovereignty when we see it. People invoke the term in expressing opinions about international entanglements, as when war is justified by pointing to violations of sovereignty, and they sometimes wear the term out in engaging in domestic political controversies, for example in insisting that diminished (or overreaching) sovereign powers can affect the viability of favored cultural perspectives or "values." Such uses of the term are rarely accompanied by analysis of the properties of sovereignty. In fact, the assumption is that we all know more or less what the word means.

Even gazing just below the surface, we find that the picture gets murkier. If we follow attempts to pin down the qualities that compose sovereignty, at first sight the term seems fairly easy to define. Political scientists tell us that "sovereignty" refers to a suite of claims: (1) control of activities and persons within a bordered territory by a state; (2) control by that state over what and who crosses the borders; and (3) authority by the state to negotiate arrangements with other sovereign entities over activities external to the sovereign territory that can be reasonably asserted to have an effect on the interests of members of the political community. The definition itself reveals plenty of room for ambiguity. The way to determine legitimacy of states is left vague. And the degree of actual control exercised over internal and external spheres is clearly contingent. It is obvious that claims to sovereignty might be extended without being supported by evidence of a meaningful capacity to exercise it.

Given the ambiguities built into contemporary understandings of sovereignty, it is rather surprising that the term is applied at all by world historians in analyzing political change in periods before the late nineteenth century. The problem of how to use the term in writing history parallels the question of when to label political entities as "states." In both cases, historians have cautioned against anachronistic approaches. Early modern states, we are told, are best thought of as bundles of practices rather than singular authorities. Sovereignty, we read, should not be regarded as a historically occurring, coordinated set of claims in which domestic and external spheres are easily distinguished. Even European powers in a post-Westphalian world relied on a flexible language of law and a varied set of practices of settlement and jurisdiction in asserting claims over territory and populations. These practices, we know, were even more layered and complex in settings where multiple polities and societies were in play and where local political communities fought to retain and legitimize their own uneven and contingent spheres of authority.

As someone who has written about the complex legal conflicts that compose this historical process, I cannot say that we have arrived at a perfect vocabulary for describing it. But we have certainly come a long way from older political narratives outlining transitions from empires to nations. In *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press, 2010), I critique the notion that a widely accepted understanding of territorial sovereignty operated in European imperial ventures, and I offer some rubrics for understanding the uneven territorial patterns that resulted from the thrust of some kinds of imperial authority. Empires, their subjects, and people who came into contact and conflict with them tended to imagine control over narrow bands of territory, or corridors, and discrete settlements or trading posts, or enclaves. Certain legal practices were employed to extend jurisdiction into such areas, while subjects aided the process by pursuing self-interested claims of their attachment to sovereign sponsors. I join other historians in arguing that such practices were paralleled by an important strand of thinking about political and legal authority emphasizing the layered qualities of rule. This tendency carried into the late nineteenth- and twentieth-century world, in which politicians and international lawyers nevertheless referred more confidently to sovereign states as foundational units in international order. The perspective helps us to understand why examples of part-sovereignty (think of Gaza) and anomalous zones (consider Guantánamo) continue to dot the global landscape.

And yet sovereignty remains a troubled historical term. Like the term "state," use of the word "sovereignty" by world historians encourages associations both with more recent iterations of the phenomenon and with an ideal type developed at or after the end of the nineteenth century. I have observed this confusion in graduate courses with very smart students who have had difficulty shedding their expectations about the nature of political authority when reading world histories. I offer some reflection on my experiences with an eye to illuminating questions about how to teach about historical contingencies and the nature of legal claims in history.

Consider this scenario. I assign to a dozen or so very able graduate students a series of historical studies that emphasize the complexity and multi-layered nature of claims made by European powers in the early modern Atlantic and Indian Ocean worlds. The works include John Elliot's classic article about "composite monarchies" in Europe, various articles (including one of my own) that highlight the creative ways legal discourse was employed in the construction of imperial claims, and selections from several recent books analyzing European strategies in the Atlantic and Indian Ocean worlds. I have made the self-conscious decision to assign works that focus on European empires; that choice will turn out to be, as I will show, part of the problem. But I have also carefully chosen works that problematize older representation of Europeans engaging in "expansion" and operating with fixed understandings of objectives of conquest and territorial command or of the proofs required to substantiate such claims. I have also chosen works—to give just one example, a piece by David Northrup that traces patterns of European-African interactions that fall well outside the usual boundaries of political engagements—that are partly about Europeans without being Eurocentric in their perspectives.

The students arrive in class and seem to be excited about what they have read. They then embark almost immediately on a conversation about the thrust of European "sovereignty" into the extra-European world. They use the word as if they know precisely what it means, and they discuss the assigned readings—none of which uses the term, except to critique it—as if they are obviously *about* sovereignty. As I listen, I think back to a conversation with my editor when selecting the title for *A*

Search for Sovereignty. I had wanted to call the book "Anomalies of Empire," and the editor said, "You can't use that title. No one knows what an anomaly is. Everyone knows what sovereignty is." I had thought at the time that the comment was telling, but I also hoped that by using "search" in the title, I might make it clear that I was describing a phenomenon without a settled reality and also conveying that the political objectives were open-ended. Listening to my students, I began to see that it was possible to read the title differently and to assume that Europeans, and everyone else, had a very clear grasp of sovereignty and were merely searching for its instantiation.

Back to the classroom. Growing concerned, I attempt to intervene in the conversation lightly by posing questions that focus attention on the arguments of the authors; after all, I keep thinking, I have Elliot on my side, and that article alone makes clear the limits and complexities of European state claims and power. But the conversation continues in a register of certainty about political claims, and the word "sovereignty" rings like an insistent bell. Increasingly frustrated, I abandon all recommended pedagogical restraint (never a good idea), and pose the question more directly: "To what extent does it make sense to use the term 'sovereignty' in these contexts, and in this period?" This more pointed probe prompts half the class to stop talking, and the other half to offer more elaborate explanations of how the approaches of the authors we had read could be reconciled with a clear and compelling definition of sovereignty. After all, one student finally ventures to observe, even I had used the term in the title of my book.

I am often humbled by experiences in the classroom. So I was not surprised to come away from this class forced to consider what had gone wrong, and how I could do better in future. I reflected, by way of contrast, on classroom discussions in the graduate class that I have taught every other year with my colleagues Jane Burbank and Fred Cooper on the comparative history of empires. Some discussions in this course followed the same pattern of students' reluctance to allow certain familiar terms to be detached from settled meanings. But I also remembered that some historical examples are simply too striking for students to overlook. In our class on empires, the most eye-opening case for students was the history of the Mongols. Most graduate students come to the subject with little background, and they are surprised to find that political power could be influenced in ways so different from the patterns associated with ideal typical empires and states. Similarly, colleagues who have taught Pekka Hämäläinen's *The Comanche Empire* tell me that the book also jars students out of complacent acceptance of familiar categories for describing political rule. Whether one agrees or not that the label "empire" fits the case, the book insists that power can move effectively and fluidly through a variety of social and political configurations.

There is real pedagogical value, I concluded, in a world historical and comparative perspective. Yet, I was plagued by the doubt that destabilizing Eurocentric perspectives would be sufficient. One of the students in my class had, after all, taken the course on empires in world history, where he was exposed not only to readings on the Mongols but also to other historical works – including Burbank and Cooper's own writing about empires – that made a persuasive case for open-ended ways of thinking about political power and the imagination of rule. Why was he now confidently informing other students that all that was necessary to understand sovereignty in the Atlantic world was to grasp supposedly stable pan-European definitions of *imperium* and *dominium?*

Something further must be needed to get the message about the contingencies of imperial rule and the doubtful utility of the term "sovereignty." My next thought was to consider whether a more thorough grounding in legal history would have helped. I have found that students who read James Muldoon's *Popes, Lawyers, and Infidels: The Church and the Non-Christian World, 1250-1550,* a work published well before the students in my class were born, tend to become alert to the jurisdictional complexities underlining imperial projects. Yet, again, Muldoon or another similar work would not work like magic. My students had been assigned an article of mine that cites Muldoon extensively and argues that the Treaty of Tordesillas was not intended to award Spain and Portugal sovereignty but to delineate spheres of influence in which they could act to establish claims. The article lays out the Roman law behind this thinking and insists that proofs of possession were recognized as matters of interpretation rather than as clear-cut requirements of the law. The students had read the article and had taken away something about the influence of Roman law but had read past any implications for considering whether Europeans had something other than garden-variety sovereignty in mind in the early modern Atlantic world.

In the end, I began to think, the problem was larger than my own classroom. That is, students' exposure to "sovereignty" as a term with an apparently settled meaning in the contemporary world was a powerful influence. The pedagogical tasks required to untangle the associations with the term might be no different from those required for other pedagogical objectives: students must be invited to build the analysis themselves, and they must be exposed to a great deal more material written from unfamiliar perspectives. Most graduate programs, including the one I teach in, have of course understood that to become good historians, students need to be thrown into research early in their graduate careers, and so the first recommendation is hardly surprising. But whereas secondary and undergraduate pedagogy have worked hard to develop ways of involving students in hands-on projects, the graduate classroom seeks to nurture the ability to survey secondary literature and quickly extract key issues and problems. I would have chafed as a graduate student at being assigned an artificial exercise such as analyzing an isolated primary source, or even a set of sources bundled like those on Advanced Placement exams. If students were puzzled by secondary works they were reading, it was my task to help them to read more deeply. As for getting students simply to read more, this laudable and necessary goal would also not cure all. Graduate programs do require a deep and extensive reading of books and articles in the relevant field. But it seems naïve to hope that repetition on its own will produce knowledge. And because historiography sings with more than one voice, the possibility is real that students might be persuaded by facile arguments to identify themselves with fashionable perspectives.

What to do? I pledge, of course, to continue to raise questions rather than provide answers in the classroom. I will forge ahead with plans to deliver more of the right kinds of works

to students to get them to appreciate the richness of contests over political control and the multiple meanings of references to sovereign power. And I will renew my efforts to encourage students to deal directly with the evidence and to grapple with analytical categories. In addition, I will direct students of Atlantic and European history to read about the Mongols, the Chinese, and Pacific Islanders as they consider problems of political organization in the Atlantic world. I will continue to suggest that the study of law is an important part of world history, even if it has tended to be developed inside national historical frameworks until recently. And, finally, I will suggest to my publisher that if *A Search for Sovereignty* appears in a second edition the cover should list "search" in bold letters and "sovereignty" in tiny font.

I do know that a combination of all but the last of these approaches can work because I have seen the results in the innovative research of advanced graduate students at NYU and at other universities. The last decade has seen an explosion of provocative studies in the study of the legal history of empires with rich world historical dimensions: Lisa Ford's elegant study of "settler sovereignty" (there's that term!) in New South Wales and Georgia (*Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836);* Paul Halliday's rewarding *Habeas Corpus: From England to Empire;* Pär Cassel's intriguing *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan;* Daniel Hulsebosch's insightful *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830;* Rande Kostal's oddly overlooked but very rich *A Jurisprudence of Power: Victorian Empire and the Rule of Law;* Brian Owensby's valuable *Empire of Law and Indian Justice in Colonial Mexico*; and many others. Other works principally identified as contributions to world history have helped broadcast destabilizing messages about assumptions regarding sovereignty; Adam McKeown's extraordinary *Melancholy Order* deserves special mention. The theoretical underpinnings of political power and law are being tackled, too, in such works as Annabel Brett's *Changes of State: Nature and the Limits of the City in Early Modern Natural Law,* Alison Lacroix's *The Ideological Origins of American Federalism,* Janet McLean's *Searching for the State in British Legal Thought*, and Antony Anghie's *Imperialism, Sovereignty, and the Making of International Law* (perhaps his editor insisted that the S-word appear in the title, too). Historians have turned to the history of the political imagination of imperial rule with a vengeance, and the results have been undeniably far-reaching.

There is no cause for alarm, then. My clumsy teaching may not matter. Still, I consider myself put on notice not to take for granted this turn to problematize the concept of sovereignty. Equipped with a new resolve to be skeptical about advice from editors, I will continue to guide students to give up their assumptions about political authority, territoriality, and inter-polity legalities when they investigate the past. Not only do we not know sovereignty when we see it, we often see it when it is not there.

Why Europe?

The Rise of the West in World History 1500-1800

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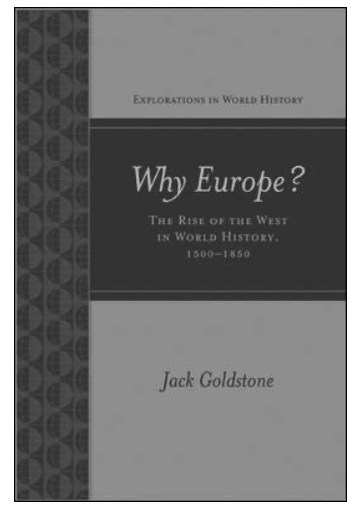

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Jack A. Goldstone is the Virginia E. and John T. Hazel, Jr. Professor of Public Policy at George Mason University, winner of the Arnaldo Momigliano Award of the Historical Society, and the Barrington Moore and Distinguished Scholarly Achievement awards of the American Sociological Association.

The WHA thrives on its committed volunteer leadership and is deeply grateful to all who work so hard for its common good. For all of our volunteers in every area of this organization, you are sincerely thanked for your dedication and service. Three such people who have served on the WHA Executive Council have finished their three-year terms, and we want to give a big shout out of thanks to each of them:

Rick Warner is an associate professor of Latin American and World History at Wabash College. At Wabash, his activities and positions have included being Faculty Coordinator of International Programs, Teacher Education liaison for History Department, and teaching Latin American and World History. Rick is also a Lifetime Member of the World History Association and has been active on the WHA Fundraising Committee, and has presented conference papers at many WHA conferences, among many other areas of involvement with the WHA. One of Rick's goals during his time on the EC was to encourage Latin Americanists to become more deeply involved in the WHA, a goal we hope will become increasingly realized with his enthusiastic support for WHA's July 2014 Conference in San Jose, Costa Rica. Thank you Rick!

Connie Hudgeons teaches Advanced Placement courses at Albuquerque High School in Albuquerque, New Mexico and is a College Board Consultant for both AP Human Geography and AP World History. Connie's 25 plus years of experience includes teaching special education (LD) and gifted social studies, ESL to Vietnamese and Laotian refugee students, teaching in residential treatment centers, and teaching at the college level. Connie was selected by the National Geographic Education Program and CPB/Annenberg as a master teacher for instructional video content demonstration of classroom techniques in *Teaching the Geographical Perspective* professional development video series--one of many accolades Connie has received over her career. Connie was also host at WHA' s first conference at a high school for the Albuquerque 2012 Conference. Many thanks to Connie for a most welcoming conference and for her term of service on the EC.

Candice Goucher is a professor of history and director of undergraduate studies at Washington State University, Vancouver, Candice has long been a supporter of the WHA and knows the value of its membership in advancing the research, teaching, and practice of world history. One of Candice's goals on the EC was to help increase the diversity of our professional community and to further the development of networks that seek a global reach, bringing more than 20 years of experience teaching world history at the college level and encompassing a collaborative spirit to that effort. With the new WHA symposia series around the world, WHA is accomplishing much in developing its global reach. Candice has authored textbooks, has served as editor for the series *Issues and Controversies in World History*, was co-lead scholar on the Annenberg Project, *Bridging World History*, and is part of the advisory board for the *Cambridge History of the World*, among many other professional accomplishments. Candice truly embodies and appreciates the need for collaborative practice among secondary and higher education specialists, and has brought passionate commitment for positive change to the WHA. Thank you Candice for your service now and in the future.

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Global Environmental History
Fall 2013

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