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# *Corpus nullius*: the exception of Indians and other aliens in US constitutional discourse<sup>1</sup>

PATRICK WOLFE

The coexistence of the rhetoric of human freedom that has characterised the US Government's 'war on terror' and the denial of due process to those who have been dubbed 'enemy combatants' is by no means unprecedented in US policy. The moral hiatus between the universal human rights that signatories to the Declaration of Independence enunciated and the lack of rights that these gentlemen assigned to the enslaved human beings whom they continued to own and trade is perhaps the best-known historical analogue.<sup>2</sup>

The less well-known arena of Indian affairs is, however, a closer precedent. After all, US foreign policy originated in Indian affairs. Moreover, the anomalous status of 'domestic dependent nations' that US jurisprudence assigned to Indian societies cut across the received categories of international law in a manner that anticipated the extranational status that has recently been assigned to so-called enemy combatants. These examples raise the question of whether it is merely coincidental that such exclusions should coexist with US-style human-rights discourse. This article will argue that the exception of particular groups is an axiomatic feature of the US Constitution. To exemplify this contention, the article will consider the constitutional basis on which Indians were excepted from the humanity that was the bearer of universal rights.

As humans excepted from the ostensibly universal category of the human, Indians were not simply 'Other' in the monolithic, undifferentiated sense that has passed muster in oppositional critique over the past few decades. Indians' anomalous status differed significantly from that of, say, White women, the Irish or voluntary-immigrant non-citizens in general. For all the disabilities that these groups suffered, they were not excluded from fundamental rights such as *habeas corpus*. With a view to introducing some discrimination into discussions of alterity, this article will use the term '*corpus nullius*' to express the outer limit of othering that is reached when, as in the case of nineteenth-century US Indian policy, particular humans are excepted from the general requirements that govern the treatment of humanity as a whole.

US foreign policy began with treaties between the US Government and Indian nations. A core feature of these treaties is the disparity between the ideals that they proclaimed and the inequities that they produced. Treaties

placed Indian nationhood under erasure, employing a vocabulary of sovereignty to enact the practical subordination of Indian parties to them.<sup>3</sup> In the event, despite the separateness inherent in the treaty concept, post-treaty Indian societies have not figured as external, foreign or independent but as the most deprived of internal minorities in US society. Treaties, premised on exteriority, were the official mechanism whereby Indian societies were contained.

On the basis of such considerations, Sarah Cleveland has contended, in an extensive and justly well-received article, that the unrestrained powers claimed and exercised by the Bush administration over detainees at Guantánamo Bay continue an extra-constitutional tradition of inherent power that has previously been applied to Indians, alien immigrants and US overseas territories.<sup>4</sup> Cleveland argues that, though the Constitution provided for limited, enumerated governmental powers, over time these constraints came to ‘stop at the water’s edge’, giving way, in the realm of international affairs, to a doctrine of inherent powers whose distinctive features are threefold: ‘an extra-constitutional source of authority deriving from international law, relative lack of constitutional constraint, and limited judicial review’.<sup>5</sup> Cleveland goes on to note that

[i]t is precisely the convergence of these doctrines that provides the legal basis for the George W. Bush Administration’s current detention of alleged enemy aliens at the Guantánamo Naval Base in Cuba. The doctrines supporting the United States’ plenary power over aliens and territories beyond its borders [...] render Guantánamo a ‘Constitution-free zone’ in the eyes of the Administration.<sup>6</sup>

For Cleveland, US power is Janus-faced, the domestic realm of constitutional propriety being counterposed to a lack of constitutional restraint in the realm of international relations. The idea that the exercise of unrestrained power over aliens is inimical to the Constitution is by no means limited to Cleveland, being at least implicit in such well-known descriptions of Guantánamo Bay as a ‘legal black hole’.<sup>7</sup> But to view Guantánamo Bay as a constitutional anomaly in this way is to take the Constitution—or, at least, its surface text—for granted. An alternative view was suggested in Uday Mehta’s influential ‘Liberal Strategies of Exclusion’. In that article, Mehta contended that exclusion was a core feature of liberal principles, to which it was not an accidental concomitant (‘an aspect of its [liberalism’s] theoretical underpinnings and not merely an episodic compromise with the practical constraints of implementation’).<sup>8</sup> He noted how liberalism’s inclusive universal categories were premised on an anthropological commonality, a collective human potential that could be frustrated in the realm of culture. For Locke, for instance, although the capacity to reason—and, accordingly, access to natural law—was ostensibly a universal human endowment, its achievement required an altogether particular cultural experience: ‘a highly conventionalistic regime of instruction and social manipulation. Such a conventionalistic molding vitiates the naturalistic and universalistic moral limits that natural law is meant to designate.’<sup>9</sup> Within liberal theory itself, in other words—as opposed to the easier target of liberal political practice,

which was manifestly exclusive—culture restored the particularity that nature had theoretically levelled.

Mehta's insight provides a starting-point for this article, which contends that the recalcitrant gap between the universal rights and freedoms that US constitutional discourse proclaims and the social inequity that has invariably accompanied the enunciation of these rights and freedoms cannot be explained, circumstantially, as a failure of implementation. Rather, we should approach US constitutional discourse, in conformity with Mehta's larger liberal category, as inherently—rather than merely accidentally—exclusionary. To put this another way, and to revise Cleveland's formula, we might view Guantánamo Bay as a Constitution-charged zone. The analysis will start with US Indian policy and trace the key procedures whereby Indian subjecthood came to be nullified in US constitutional discourse. The intention is not to draw a determinate line from nineteenth-century US Indian policy to Guantánamo Bay, or, for that matter, to the nullification of groups such as enslaved Africans, late nineteenth-century Chinese immigrants or World War II Japanese-American internees. The argument is not that Indian policy produced the civic nullification of these other groups. The argument is rather that, in common with the treatment of these others, Indian policy instantiates a nullificatory component of US constitutional discourse. I term this component 'exceptionism'. Indian policy is a rather special instance of exceptionism since, as observed, it constituted the fledgling republic's original foreign policy. Indeed, Indian policy formed the ideological basis on which the settler-colonial state burst the bounds of the original thirteen colonies and expanded to its current continental extent.

On the basis of its analysis of nineteenth-century US Indian policy, the article distinguishes exceptionism from the complementary discourse of US exceptionalism. Exceptionism is not so much a form of exceptionalism as its other side. *Exceptionalism* refers to the belief (and the practices associated with that belief) that the United States has, and should pursue, its own particular and independent destiny.<sup>10</sup> As such, American exceptionalism inscribes a positivist repudiation of international accountability. Correspondingly, *exceptionism* maintains a universalism that, as we shall see, derives from natural-law thinking. This universalism is above all structured by particularity—'We the people of the United States' is both a particular group and a source of higher law. As a particular group, this people necessarily excludes people. (Indians, for instance, were excluded from the antidiscriminatory provisions of the Fourteenth and Fifteenth Amendments).<sup>11</sup> This exclusion is not accidental. It is a necessary consequence of the set 'we the people of the United States' being a subset of the universal set 'we people'. The term exceptionism refers to the necessity of this exclusion. More concretely, exceptionism refers to the practical nullification of certain human groups that finds expression in the US Constitution's arrogation of universality. This practical exception, the *corpus nullius* of my title, is the ideological continuity that links the effacement of Indian subjecthood to the juridical nullification of Guantánamo Bay detainees.

In one significant regard, the analysis departs from—or, perhaps, adds to—that of Mehta. Mehta critiques liberal theory internally, as immanently productive of exclusion. This feature of his analysis has the major advantage of retrieving social inequity from the inexplicable realm of happenstance. Yet a corresponding disadvantage of his approach, one that I do not think Mehta fully addresses, is that it can cast exclusion as an undifferentiated reflex of liberal theory rather than as a set of historically specific practices and discursive formations, each of which has to be reconstructed in its own right. In particular, Mehta’s account does not distinguish between different types and intensities of exclusion.<sup>12</sup> I use the term ‘exceptionism’ to distinguish the discourse of *corpus nullius* from the secondary or less intense otherings and marginalisations that were experienced by migrant groups (such as the Irish, Jews or Poles) who were at least tacitly scheduled for eventual inclusion. Indeed, by the early twentieth century, Indians themselves increasingly came to be so scheduled, while exceptionist discourse moved on to different social targets. In focusing on the constitutional exclusion of Indians in the United States, therefore, this article seeks to characterise a versatile feature of US constitutional discourse rather than a long-run characteristic of Indian policy. To this end, we will start with Indian treaties.

The problem does not lie in the nature of treaties themselves, since the US Government was relatively scrupulous in regard to treaties entered into with European nations.<sup>13</sup> It can, however, be argued that the nature of treaties changed over time. C H Alexandrowicz distinguished influentially between two eras of European treaty-making with non-European societies. From the fifteenth to the eighteenth century, such treaties were premised on an equality between the parties that contrasts with the imposed, unequal style of treaty-making that would come to characterise nineteenth-century European colonialism.<sup>14</sup> Legal scholars such as Antony Anghie have associated this shift with a conceptual transition from naturalism to positivism that allegedly took place among theorists of international law in the second half of the nineteenth century.<sup>15</sup> Naturalist theory had subordinated local sovereignty to a universal set of principles that was manifest in the order of creation and legible to all. Sovereigns had been bound by this set of principles, which their own laws had been required to reflect and implement.<sup>16</sup> Positivism, on the other hand, privileged source over content, rendering sovereigns supreme within their own realm and subject to no higher law. Laws emanated from the will of the sovereign alone, the only external constraint being agreements into which the sovereign had entered (Bodin’s *pacta sunt servanda*).<sup>17</sup>

Regardless of its merits (which I shall be questioning below), this bifurcation has a counterpart in American Indian historiography, where it has been asserted that the nature of treaty-making with Indian tribes underwent a change between the British and the republican periods. In place of the natural-law style ‘accommodation treaties’ premised on a diplomatic balance between the parties that had characterised the British period, US-style treaties instantiated a form of colonial domination that a strong power was imposing on weaker ones.<sup>18</sup> This shift, which is generally dated from the

1790s, anticipates the one that Alexandrowicz and Anghie have discerned. It raises a number of questions. First, of course, is it accurate to assert that, in their dealings with natives, the British—or, more generally, European powers as a whole—felt themselves bound by a set of rules that applied equally to both sides? I shall argue below that, from the outset, discovery was a fundamentally unequal discourse that assigned rights to natives that, although ostensibly natural, were inferior to the rights assigned to Europeans. Moreover, naturalism and positivism had been available as alternatives within that discourse since at least as far back as the seventeenth century. The second question, which has particular reference to settler nationalism, is whether the Alexandrowicz/Anghie thesis suffers from an unduly narrow, ‘blue-water’ view of colonialism that requires a geographical space between metropole and periphery, thus excluding the territorial adjacencies of US expansionism from its purview.<sup>19</sup> In so far as it does, their thesis recapitulates the settler-colonial strategy of assimilating the natives. To address these and derived questions, we will start with the doctrine of discovery, initially formulated in response to the conquest of the Americas, which encompassed the apologetic repertoire whereby European sovereignty was asserted over the lands and inhabitants of the non-European world.

In that it suggests singularity, the term ‘doctrine’ of discovery is misleading, since it glosses a range of positions within the disputatious arena that would come to be known as the law of nations or, later, international law. Nonetheless, certain themes are constant, in particular the unequivocal distinction between dominion, which inhered in European sovereigns alone, and natives’ right of occupancy (also expressed in terms of possession or usufruct). The right of occupancy entitled natives to pragmatic use of a territory that Europeans had discovered, even though ultimate title, or dominion, vested in the European sovereign.<sup>20</sup>

In the Lockean form that was to underpin the conquest and settlement of British North America, the principles that animated the doctrine of discovery were central to the liberal ideology that was being counterposed to the dominance of a landed aristocracy by an emergent bourgeoisie. On the basis of a labour theory of value, property rights were seen to accrue from a rational application of labour whereby land was rendered more efficient (which is to say, capable of supporting a larger population than it could have done if left in its natural state). As a discourse on the efficient utilisation of land, as opposed to a wasteful system of hereditary estates, this doctrine represented an altogether domestic symptom of entrepreneurial will. Although arguably continuing older justifications for taking the land of subjugated peoples (notably the Roman *vacuum domicilium* and the medieval Norman Yoke), the distinctive configuration of notions of efficiency, utility, rationality and individual enterprise that suffused liberal-bourgeois discourse hallmarked an altogether new concept of property that was to have transformative implications at home as well as abroad.

It is important to recognise these deep cultural moorings if we are to avoid the idealist mistake of attributing global potency to legal theorists. The

doctrine of discovery did not derive its power from the writings of philosophers such as Pufendorf, Locke or Vattel (or, for that matter, from wider epistemologies such as naturalism or positivism). Rather, these ideas acquired currency through their congeniality to the global expansion of European capital. Impervious to legislative amendment, discovery expressed an indurated proclivity that the law-historian Robert Williams has aptly termed the discourses of conquest.<sup>21</sup>

In particular situations, native entitlement was negotiated in the practical interchange between colonising agenda and local exigency. Whether or not the natives engaged in practices such as settled agriculture or juridical centralism, the entitlement that they received reflected their capacity to defend their borders, a calculus that varied across time. (In early US treaties, for instance, the eternality of the ties that bound Native Americans to their homelands tended to reflect the presence or absence of the English or the Spanish.)<sup>22</sup> Through all the variety, however, one feature remained constant: ultimate sovereignty—and, with it, title to land—was of European (or, later, Euroamerican) provenance. An observation that unites almost all commentators, whatever their political inclination, is that the doctrine of discovery was concerned with relations between colonial powers.<sup>23</sup> If addressed at all, relations between Europeans and natives were secondary or incidental. To understand the full presumption of, say, the English claim to New York, it is not enough to see it as a denial of Iroquois sovereignty, since the competing sovereignties that the English were principally concerned to deny were not Iroquois but Dutch, French and Swedish. Discovery was not a passive encounter, the un-covering of an independently pre-existent realm, but the positive filling-in of unappropriated space.

The eurocentrism at the core of discovery found sovereign expression in the principle of preemption. According to this principle, discovery by a given European power meant that the natives were prevented from disposing of their land to any other European power. On the face of it, this would seem to pose little threat to people who did not wish to dispose of their land to anyone. Indeed, this semblance of native voluntarism has provided scope for judicial magnanimity in regard to Indian sovereignty. In practice, however, the corollary did not apply. Preemption sanctioned European priority but not indigenous freedom of choice. As Harvey Rosenthal observed of the concept's extension into the US constitutional environment, 'The American right to buy always superseded the Indian right not to sell.'<sup>24</sup> Underlying this disparity was the simple but crucial assumption that the terms 'European' and 'native' were of a different order. The same logic did not apply to both.

Designed to restrain the endless round of colonial war-making between rival European sovereigns, the principle of preemption sought to provide a formula whereby conflict and overlap in European claims to New World territorial possessions could be avoided. Through being the first European to visit and properly claim a given territory, a discoverer acquired the preemptive right, on behalf of his sovereign and *vis-à-vis* other Europeans who came after him, to negotiate land transactions with the natives. The sovereignty qualification is critical. The proviso that natives could only enter

into territorial transactions with representatives of a European sovereign was often represented as a benign measure, whereby innocent Indians were protected from losing their lands through dealings with unscrupulous individuals. Whether or not this was the case (no doubt it sometimes was), the proviso had other major consequences. In particular, through its centralisation of dealings with natives, preemption not only regulated relations between European powers. Within a given colonial society, it also vouchsafed the primacy of the sovereign.<sup>25</sup> In early colonial Massachusetts, for example, the assembly determined that Indians were entitled to their land under natural law. This entitlement was, however, subordinate to the dominion that had been vested in the assembly by the English Crown. On this basis, the legislators prohibited land transactions between individual colonists and Indians, asserting their own exclusive right to acquire land from the natives.<sup>26</sup> In this manner, as Tim Garrison put it, the colony established 'a distinction between property rights, which the Indians retained under law, and sovereignty or dominion, which the Massachusetts Bay Company claimed under its royal charter'.<sup>27</sup>

In a colonial context, preemption enlists native title to the service of the monarch as against his or her diasporan subjects. The native right of occupancy is good against everyone except the monarch. Pending the extinguishment of native title, therefore, no one else can preempt the monarch's prior entitlement. Thus preemption had a dual consequence. As between the crown and natives, it spanned the interlude between the theoretical conquest inherent in discovery and the reality of actual conquest (manifest in extinguishment), while, as between the crown and its diasporan subjects, the same principle recruited natives to fill the spaces left by the empirical patchiness of colonial settlement. These implications were not, however, symmetrical. Ultimately, the rights that preemption sanctimoniously assigned to Indians were meaningless. They existed pending extinguishment. In the wake of extinguishment, however, sovereign transfers of title in fee produced homogeneity between settler subjects and the crown. This homogeneity, an outcome of conquest, existed *vis-à-vis* the natives, uniting Europeans in a refusal to share space with them. At this point, sovereignty becomes coterminous with race.

Understood as an assertion of indigenous entitlement, the distinction between dominion and occupancy dissolves into incoherence. Understood processually, however, as a stage in the formation of the settler-colonial state (specifically, the stage linking the theory and the realisation of territorial conquest), the distinction is only too consistent. Preemption provided that Indians could transfer their right of occupancy to the sovereign and to no one else. They could not transfer dominion because it was not theirs to transfer; that inhered in the crown and had done so from the moment of discovery. Dominion without settlement constitutes the theoretical (or inchoate) stage of territorial sovereignty.<sup>28</sup> In US Chief Justice John Marshall's words, it remained to be 'consummated by possession'.<sup>29</sup> Upon this consummation, the completion of conquest, the sovereign gathered together the totality of rights attaching to the territory concerned. From this consolidated set of

rights, the sovereign transferred to settlers an entitlement, fee simple, that was greater than the right which the natives had previously surrendered. Collectively, in other words, the process yielded more than land for settlers. It also yielded sovereign subjecthood: settlers became the sort of people who could own rather than merely occupy. What, then, was the supplement that the sovereign added to natives' right of occupancy to produce the expanded confection that was passed on to the settler? It was, of course, the element of dominion, asserted by the sovereign at the moment of discovery, which had not been the natives' to transfer. Again, therefore, sovereignty converges with race: only Indian occupancy was detachable from title. Fee simple in the United States, as in other settler colonies, remains traceable to a sovereign grant. Property starts where Indianness stops.

Once the theoretical expropriation asserted at discovery had been realised in practice, the distinction between occupancy and dominion lost its primary function, persisting as a contradiction with which natives might embarrass the moral pretensions of the settler state. The right of occupancy has produced a number of utterances in statutes, treaties and court decisions that would enable sympathetic judges to find in favour of Indian claimants.<sup>30</sup> In the context of the whole, however, these concessions seem a small price to pay.

A key feature of discovery is that it was instantaneous. From the moment of assertion, it covered the whole of a discovered territory, shielding it from the ambitions of other European powers. The military metaphor is advised, since the scheme was ultimately grounded in violence. The assertion of sovereignty *vis-à-vis* other European powers did not require that the land mass in question had been settled and regulated by the discovering power. That would have taken time. Rather, it was an assertion that the discoverer was capable of warding off other Europeans. Should another European power prevail in a war for the territory, then sovereignty would pass to that power.<sup>31</sup> All this took place in the realm of dominion, so the natives were not involved. Their right of occupancy obtained in a separate realm, where the process of acquisition was anything but instantaneous. Nation by nation, tribe by tribe, band by band, the ceaseless movement of the frontier was inherently uneven. In combination, the instantaneous assertion of sovereignty and the piecemeal extinguishment of native occupancy produced the international and the domestic faces of the emergent settler nation-state. As Jill Norgren has observed, succession to the British Crown's assertion of discovery enabled the United States to claim dominion over all Indian lands in one fell swoop. Indian affairs and foreign policy coincided as the crown's original preemption *vis-à-vis* other European powers was applied to the new republic's hemispheric neighbours: 'Discovery thus supported the assertion of American hegemony over the continent, a diplomatic stance reiterated during Marshall's time in the 1823 Monroe Doctrine.'<sup>32</sup> President Monroe announced his bedrock foreign-policy doctrine in the same year as Chief Justice Marshall's *Johnson v. McIntosh* decision formally incorporated the monarchical distinction between occupancy and dominion into republican jurisprudence.

On the basis of the distinction between occupancy and dominion, the Marshall court reworked a long-held conception of native rights that

rendered them inferior to those enjoyed by Euroamericans. On the cusp of modernity, Francisco de Vitoria had reformulated this ancient discrepancy a few years after Columbus had precipitated a religious crisis in the shape of humans whose relationship to Adam was at best unclear. Although the inhabitants of the Indies lacked access to the gospel, it was necessary for them to be normatively intelligible to Europeans. In particular, for Vitoria to integrate them into his scheme, they had to be subject to the *jus gentium*. His solution (perhaps the only one in the circumstances) was a universal rationality whereby all people created by God could discern the order in His creation. This universal competence subtended both a shared set of human rights under God and a shared responsibility to adhere to the *jus gentium*, a responsibility which the allegedly incestuous, human-sacrificing and bestial cannibals of the New World were conspicuously failing to discharge. On the one hand, therefore, the inhabitants of the Indies were possessed of reason, and thus equivalent to everyone else—which is to say, equivalent to the Spanish—while, on the other hand, their sociocultural demeanour was at variance with the *jus gentium* (which was also, of course, equivalent to the Spanish). Thus they required Spanish intervention, an occurrence that was rendered likely by the fact that Vitoria held the Spanish entitled to enforce their right to travel, trade and proselytise in the Indians' country.<sup>33</sup>

Although natural law was there for all to divine, in other words, some could divine it better than others (culture, as it were, trumped anthropology). In terms of outcome, it is hard to see how this hierarchical privileging of the European perspective is more egalitarian than positivism. Thus it is significant to note, in relation to Anghie's otherwise illuminating discussion, that positivism did not have to wait for the nineteenth century. In terms of propositional substance, if not of nomenclature, the basic outlook had been there in the unilateral rationalism of Aquinas and in Hobbes' refusal of any legal bond between nations.<sup>34</sup> Vitoria himself distinguished between natural law and the will of nations as bases for the law of nations, asserting that the law of nations derived either from natural law, to which it was subordinate, or from international consensus.<sup>35</sup> Commenting on this passage, Antonio Truyol Serra even characterised Vitoria as '[c]riticizing juridical positivism *avant la lettre*'.<sup>36</sup> Claims to natural status should always raise our ideological suspicions. Rather than viewing naturalism and positivism as separate tendencies with distinct time periods, it makes more sense to view natural law as an alibi for positivist practice.

In comparison to Vitoria's residual scholasticism, the Lockean version of discovery that Marshall favoured was relatively secular and ecological. Nonetheless, it still constructed Indians as both equal and inferior. Rather than defects in their personality, Locke had ascribed Indians' inferiority to their defective use of land. The American whom civilised man ('all the world') had once resembled was above all distinguished by his alleged failure to cultivate.<sup>37</sup> Again, therefore, while Indians' humanity was equivalent to that of Europeans, the equivalence ran parallel to a deficit that cancelled it out. Marshall combined the internal and external dimensions of this formula.

Where Vitoria had located Indians' inadequacy in their personalities and Locke had located it in their use of land, Marshall attributed Indians' incompetent land-use to their inadequate personalities. The European invasion, Marshall asserted in *Johnson v. McIntosh*, found 'some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them'.<sup>38</sup>

The discrepancy between Indians' rights and capacities and those of Europeans was presupposed in the Marshall court's acknowledgement of Indian sovereignty. It underlay such otherwise startling judicial pronouncements as Marshall's statement that, prior to discovery, Indian land

was held, occupied, and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil; and who neither acknowledged nor owed any allegiance or obedience to any European sovereign or state whatever.<sup>39</sup>

Stirring though such rhetoric may seem when lifted out of its presuppositional context, other passages in the same judgment bring us back to earth:

So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title.<sup>40</sup>

Statements such as these were not seen to conflict with one another because, in uttering them, Marshall was shifting registers between occupancy and dominion. In the outcome, the same word or concept came to connote less when applied to Indians than it did when applied to Europeans. In particular, although Indian tribes were recognised as 'nations', they did not constitute foreign nations for the purpose of the US Constitution—which, needless to say, is the purpose that counted. Rather, they became domestic dependent nations, an anomalous construct whose sovereignty was inoperable.<sup>41</sup>

Although synthetic, in that it drew from the established imperialist lexicon, the domestic dependent nation was an invention contrived to accommodate the novel circumstance of settler-colonial nationhood. As such, the concept inaugurated 'post'colonial jurisprudence, adapting a horizontal vocabulary to a vertical mode of domination. It is important to stress that I am not arguing that Indian sovereignty was inadequately recognised in the Marshall judgments, as if sovereignty were a universal or neutral good and just needed to be more equitably distributed. I am rather arguing that, from its axioms up, the concept contained, encoded and reproduced Indian subordination. Indian sovereignty was not recognised but imposed. Domination was of its essence. No amount of enhanced acknowledgement can address, let alone redress, the comprehensive inequity that it ordained.

A crucial feature of Indians' right of occupancy is that it did not sustain a right of adverse possession. If a White man occupied another White man's land without being disturbed or challenged for long enough, it became his. By contrast, no amount of occupation, not even from time immemorial, could

vest equivalent rights in Indian occupiers. Indian sovereignty maintained this difference, enshrining an alterity that excluded Indians from constitutional rights and safeguards.

The Marshall court's formulation of Indian sovereignty consolidated a delicate transition from the monarchically-framed discourse of discovery by which the British had negotiated treaties with Indian nations to a republican version that reflected the collectively-dispersed sovereignty of a group of settler citizens. In the wake of the war of independence, the victorious ex-colonists had hardly been disposed to defer to an edict that had been issued by the reviled George III. Nonetheless, following the abrasive Articles of Confederation period, Congress passed a succession of Trade and Intercourse Acts which regulated dealings between Whites and Indians in terms that echoed the Royal Proclamation of 1763.<sup>42</sup> These statutes attest to a strategic dilemma. The US Constitution had tacitly acknowledged Indian sovereignty through its ratification of treaties that had been negotiated between Indian tribes and the British Crown. For it not to have done so would have jeopardised the tissue of alliances whereby the British—who, along with the French and Spanish, were still around—had been defeated.<sup>43</sup> Having acknowledged a sovereignty that had been in place in the British period, the Constitution could not also annul that sovereignty or reduce it to its own specifications. Rather, the acknowledgement itself necessarily included recognition that Indian sovereignty was prior to and independent of the US Constitution. Accordingly, the Constitution was silent on the matter.

Once the Constitution had been adopted, various attempts were made to get around this problem. In particular, it was asserted that tribes who had sided with the British had been conquered in a just war, thereby forfeiting their sovereignty.<sup>44</sup> But this by no means accounted for all the Indian nations with land in the territory coveted by the United States, particularly nations to the south and west into whose lands the new republic was destined to expand. An ostensibly more benign (although, as it has turned out, more damaging) alternative was enunciated in 1795 in the Treaty of Greenville, whose language anticipated the fiduciary rhetoric of wards and guardianship that would later characterise Marshall's *Cherokee v. Georgia* judgment.<sup>45</sup> In a manner reminiscent of the harmony between African-American slavery and the Jeffersonian rhetoric of freedom, the language of wardship invested Indian dispossession with humanitarian appeal.

The US treaty system developed in response to expansionist pressures, which it both furthered and regulated. Treaty genres reflected the tactical challenges that different Indian societies presented. In the 1830s, for instance, when the passion for removing Indians from the South was reaching its fateful zenith, the Senate was ratifying treaties with powerful Plains nations to the north-west in terms reminiscent of British-era compacts between autonomous foreign powers.<sup>46</sup> Fifteen years earlier, in the north-east, Iroquois sachems had asked President Madison to remove them to Ohio. They were told that, while they were welcome to leave New York, they could not remove to Ohio because 'the Government was even then contemplating a consolidation of settlements this side of Michigan as a safeguard should

another war break out with Great Britain'.<sup>47</sup> Such tactical considerations take us behind the uniformly sententious rhetoric in which treaties were framed to the strategic constants that the various approaches sustained. The same applies where the policy differential between British and US treaty-making is concerned. The US Government and the British Crown had different strategic agendas. In particular, the British had been relatively anti-expansionist, since they feared (only too rightly, as it turned out) that expansion would render the colonists unmanageable.<sup>48</sup> On this basis, it was prudent not to attempt to destroy the power of indigenous neighbours who, in addition to providing assistance against the French, Dutch and Spanish, might contribute useful support should the crown's own diasporan subjects prove troublesome. The US Government was not so constrained, especially after the War of 1812, when the British no longer presented a credible military threat. In this light, the key question concerning treaties between Indian nations and the United States is not simply the gap between rhetoric and outcome. Rather, given the US Government's growing military superiority over Indian nations (in Thomas Jefferson's words, 'we have only to shut our hand to crush them'),<sup>49</sup> the question is why the pretence of treaty-making was maintained at all. How should we read the scrupulosity with which, no matter how humbled and broken the condition to which a people had been reduced, the US Government insisted on acknowledging their sovereign rights prior to removing, reserving or otherwise dispossessing them?<sup>50</sup> The rhetoric cannot have persisted so tenaciously without serving a purpose. What, then, were the motivations for US treaty-making?

Treaty-making was a pragmatic procedure that was more a reflection of the relative strength of the parties involved than it was of legal theory, which was by no means monolithic. In the United States, the balance of power between Whites and Indians shifted fundamentally over the three decades following the revolutionary war, which had brought the competing native and settler-colonial sovereignties into geographical conjuncture. In the wake of the 1803 Louisiana Purchase and the War of 1812, the new republic had consolidated and grown in confidence, the inevitability of its westward expansion into Indian country being consensually viewed as manifest. To a nation so susceptible to the appeal of righteous principles, the violent expropriations that this expansion involved sat awkwardly with the Constitution's tacit acknowledgement of Indian sovereignty. In keeping with the doctrine of discovery's application to relations between Europeans, Marshall's Indian judgments were addressed to this awkwardness. In other words, Indian sovereignty's address was extrinsic. Its principal object was not Indians but Euroamericans, the concept's ideological utility lying in the internal maintenance of Anglo-Protestant hegemony. This implication of Indian policy would prove durable—as Frederick Hoxie has observed of the post-treaty era, for instance, 'Assimilated natives would be proof positive that America was an open society, where obedience and accommodation to the wishes of the majority would be rewarded with social equality.'<sup>51</sup>

A key principle that the Marshall judgments enunciated was the idea, previously expressed in the Treaty of Greenville, that Indians were wards of

the United States. The infantilisation of Indians that the notion of wardship entailed was more deleterious than the defeat-in-war formula because it compromised the acknowledgement of a prior sovereignty. As wards or minors, Indians were not competent to be vested with the full rights that were exercised by Europeans (adults, personified in the 'great father'). In other words, though Indians' prior sovereignty could not be undone, it could be diminished. The fatal impact of the *Johnson v. McIntosh* judgment lies in its making this diminution already in place at the moment of discovery—it was, as it were, diminishedness rather than diminution. Diminishedness was not a new development, the result of military defeat, but a pre-existent feature of Indians' defective characteristics, a corollary to their degraded state in relation to Europeans ('the actual condition of the two people'). By means of this proto-evolutionist formula, Marshall reinscribed the discrepancy between occupancy and title as infantilism, discounting Indian rights in the very act of their acknowledgement. Thus 'Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others'.<sup>52</sup> They were incapable of transferring absolute title to others because—whether as mere occupiers or as wards-cum-minors—they were incapable of holding it in the first place. In this determination, the asymmetry between native rights and European ones was not quantitative, a consequence of the relative size or strength of the two parties, but qualitative, a consequence of the developmental disparity in their human capacities. As Frank Shockey has pointedly observed, although Europe contained both large and small nations, none of them 'seriously contended that the citizens of another European nation held their lands under a different, and less secure title than its own subjects'.<sup>53</sup> This racial diminution is the presupposition that lent consistency to the amplified rhetoric of Indian sovereignty that would characterise Marshall's judgment in the subsequent (1832) case of *Worcester v. Georgia*.

In the wake of the Marshall decisions, the US expanded westwards and southwards, either by engaging in treaties with Indians held representative of wider tribal groupings, or by warfare with (and incremental purchase from) Mexico, through which the US acquired rights that had often been negotiated with indigenous groups by the Spanish. Since treaties require and presuppose national sovereignty on the part of signatories, it was Indian nations' sovereignty that enabled their respective territories to be converted into so many parts of the United States. These treaties were the means whereby the United States came to occupy the bulk of its contiguous national territory. Rather than conflicting with the Marshall version of sovereignty, therefore, as observed, Indian dispossession was of its essence. Thus it was not simply that there was inconsistency between Marshall's stirring rhetoric of Indian sovereignty and his talk of diminution; not simply that the rhetoric failed to prevent the various homicidal trails of tears that took place under the Indian Removal Act of 1830.<sup>54</sup> Rather, sovereignty was the *de jure* formula whereby the United States caught up with the practical activities of its citizens through sales of land that Indians, engulfed by landgrabbers, had surrendered

in treaties. Indian sovereignty enabled dominion to be converted into possession.

Marshall coined the ‘domestic dependent nations’ formula in his 1831 *Cherokee v. Georgia* judgment, continuing from it to acknowledge that Indians had ‘an unquestionable, and, heretofore, unquestioned right to the lands they occupy, and that right shall be extinguished [i.e. shall only be extinguished] by a voluntary cession to our government’.<sup>55</sup> At first sight, this statement might seem to constitute an unqualified affirmation of native rights. We should, however, be alert to the tell-tale word ‘occupy’, repeated from the earlier *Johnson v. McIntosh* judgment,<sup>56</sup> which signalled the axiomatic discrepancy between native rights and those that were available to Europeans. Thus Marshall’s stout statement of Indian sovereignty is quickly followed, without any perceptible sense of discomfort, by the assertion that Indians were

in a state of pupillage; their relation to the United States resembl[ing] that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.<sup>57</sup>

The subjection informing this patronising summary reflected the practical outcome of the case. For, despite the affirmation of Indian sovereignty, the status of domestic dependent nation was so disabling that, in one sense, it is misleading to talk about *Cherokee v. Georgia* as a case at all. This is because the wrong of which the Cherokee complained (which included lands that had been guaranteed to them by treaty being distributed among the White citizens of Georgia by lottery) was never actually adjudicated. As a domestic—rather than foreign—nation, they were barred from applying for the treaties that they had signed to be upheld by the US Supreme Court, which heard cases that had been brought by either foreign nations or US citizens. As Marshall’s brother judge put it, ‘there is no plaintiff in this case’.<sup>58</sup> He could have been referring to a Guantánamo Bay detainee. It is hard to imagine a more thoroughgoing effacement.

In this light, we see how the flood of broken treaties that followed in the wake of Marshall’s judgments preserved the spirit of those judgments. Consider the key phrase ‘domestic dependent nation’ itself. Indian nations were not ‘domestic’ in the conventional sense of having a proper (even familial) place within the social order—on the contrary, their domestic status excluded them from a juridical domain that even foreign nations could enter. Rather than Indians themselves, it was their inconvenient sovereignty that was being domesticated. ‘Dependent’ is similarly double-edged, since, as Marshall himself made clear, dependency, like wardship, connotes both a condition that warrants protection and a state of subordination. In the event, the former provided rhetorical cover for the latter. Finally, ‘nation’, for all its flattering of White-appointed treaty signatories, was a necessary condition of their signing away their peoples’ homelands. This degree of compatibility between dispossession and Indian sovereignty as formulated in the Marshall decisions obliges us to view that formulation of sovereignty as a

conduit—rather than an impediment—to dispossession. In this connection, it is crucial to note the simple but generally overlooked fact that Marshall spoke in the plural. It was not just that the Cherokee nation, entirely surrounded by encroaching Whites, had thereby become domesticated and dependent. Rather, as a category, Indian societies were always already domestic dependent nations. Indians west of the Mississippi, Plains nations with whom the federal government was still agreeing treaties whose wording was reminiscent of British-era compacts between equals—all Indian societies, whether or not they had had any meaningful contact with the White republic, were already domesticated and dependent. The phrase was not so much a description as a statement of intent, not so much a theory of conquest as its manifesto.

This inclusiveness of scope underscores a further feature of Indian sovereignty: its tactical versatility. In the 1830s, with the prairie teeming with buffalo, the westward expansion of the United States was inhibited by a daunting military obstacle. This problem existed to a much lesser extent to the east of the Mississippi delta (though Seminole Florida remained defiant).<sup>59</sup> It hardly existed at all in the north-east. In this uneven setting, the utility of Indian sovereignty lay in its situational flexibility. It encompassed the various stages of settler-colonialism's historical development simultaneously, from the unpacified cross-frontier realm of international relations (where grandiloquent concessions to Indian nationhood were in order) to the internal extreme of assimilation (where the domestic and dependent aspects eclipsed the national ones). For juridical purposes, therefore, Marshall's formula filled the space of Manifest Destiny, the genocidal interlude between dominion and conquest. As observed, dominion without settlement constitutes the theoretical or inchoate stage in the formation of the settler-colonial state. At the cost of a minimal residue (literally, 'residual sovereignty'),<sup>60</sup> Marshall's formula brought legitimacy to the nation-founding violence of expropriation. In so far as the Alexandrowicz/Anghie thesis limits the unequal, positivistic mode of treaty-making to later nineteenth-century European colonialism, therefore, it subscribes to a blue-water concept of colonialism that excludes settler-colonial invasion from its purview. In consequence, it retrospectively renders all Indian affairs internal to the United States regardless of when a given Indian society was actually overtaken by the frontier. Thus the thesis recapitulates the narrative structure of dominion, which instantaneously encompassed all Indian territory.

Indian sovereignty's tactical versatility came to the fore in the wake of the frontier. By the final quarter of the nineteenth century, practically all the territory within the contiguous United States that was not in some form of US possession (including public domain) was the territory held by or reserved to Indians under treaties. Thus treaties could no longer serve the purpose of converting Indian homelands into so many parts of the United States. Rather, they had come to constitute islands of incompleteness in the settler-colonial project. The practice of treating with Indians was officially discontinued, more with a whimper than a bang, through a congressional rider that an individual member had inserted into the 1871 congressional appropriation

act.<sup>61</sup> Although removals would continue, with peoples such as the Iowa, Kickapoo, Nez Percés, Pawnee, Ponca and Ute being removed (or re-removed) in the 1870s, and although such notable military encounters as the battle of Little Big Horn and the massacre at Wounded Knee were yet to come, the 1871 legislation represents the first formal expression on the national level of the extended historical transformation whereby Indians' relationship with settler society had shifted from one of exteriority to one of interiority. Through becoming internal, the Indian problem was rendered administrative rather than political.

In separating Indian affairs from treaty discourse, the 1871 act completed *Cherokee v. Georgia's* exclusion of Indian nations from the protection of international law. The resulting civic limbo—whereby Indians were neither citizens nor foreigners and, in consequence, had no qualities to which rights might attach—constitutes a juridical forerunner to Guantánamo Bay, only on a much larger scale. Treaties, for all their shortcomings, had at least required a semblance of bipartisanship—although perhaps drunk, bribed and/or coopted, there still had to be Indian signatories, and the government still had to go out West and talk to them. After 1871—in theory at least, and increasingly in practice—congressmen merely had to talk to each other to change the ways in which Indians were controlled. In the absence of either treaties or citizenship, Indians had no social contract. Shorn of its international dimension, wardship remained as a totalitarian residue informing a concerted campaign of domestication. The final two decades of the nineteenth century were marked by an avalanche of legislation that sought to break up tribal authority by assimilating Indians into White society and converting tribal territory into private allotments that individual Indians could sell to Whites.<sup>62</sup> John Wunder has termed this policy framework 'the New Colonialism', a discursive formation based on reservations and boarding schools that 'attacked every aspect of Native American life— religion, speech, political freedoms, economic liberty, and cultural diversity'.<sup>63</sup>

The link that Wunder makes between the break-up of the treaty system and the imposition of a bureaucratic regime of institutional conditioning is crucial. The depoliticisation of Indian affairs required that the whole domain be detached from the realm of international relations. Once detached, the internalised Indian problem took on the characteristics of a Foucauldian discourse, becoming a technical issue which, like crime or insanity, was to be shaped and managed by a bureaucratically credentialled coterie of specialists whose disciplinary mission was the reconstitution of Indian subjecthood. This depoliticisation was enabled by race, a natural—as opposed to political—condition that warranted the requisite specialisation (anthropology, a discipline whose inscription of Indian difference became increasingly cultural as the pressure to assimilate intensified). Through incorporating Indians into the realm of private property, the New Colonialism sought to complete the settler state's realisation of its territorial possession. Over the half-century or so following the 1871 act, two-thirds of all reservation lands—around a hundred million acres—were transferred into White hands.<sup>64</sup> At the same time, Indian nations' capacity to resist the imposition

of these provisions was hampered by the doctrine of plenary power, under which Congress's power over Indian affairs, including the power to abrogate existing treaties, was rendered impervious to judicial scrutiny.<sup>65</sup> For internalised Indian wards of the US Government, the constitutional no-man's land of the post-frontier condition held a refusal of rights that was without limit or constraint. Although it may seem tempting to equate this anomalous predicament with the oppression that Black people in the United States were enduring at the same time, there is a basic difference. In the post-Civil War, post-Fourteenth and -Fifteenth Amendments era, Southern legislatures had to bend the rules to countenance the racist terror of Jim Crow. By contrast, the thoroughgoing effacement of Indian subjectivity that characterised the post-frontier era *was* the rule. The rules being the issue, we are led back to the Constitution.

The Indian question's significance for the framers of the Constitution is not to be found in the meagre portion of the text that they devoted to it. Moreover, as we have seen, the Constitution acknowledged Indian sovereignty by default. In considering the Constitution's significance for the effacement of Indian rights, therefore, we need to look beyond the surface of the text. I wish to argue that the Constitution is fundamental to Indians' civic non-existence and that the ultimate source of this anomalous condition is not to be found in the text, nor even in a gap in the text, but in the pretextual conditions of the Constitution's own possibility. The seven words with which the Constitution opens, 'We the people of the United States', are not globally familiar without reason. They instantiate an entirely novel concept of popular sovereignty. The US Constitution exists because the people of the United States will it into existence. In doing so, they also will themselves into existence.<sup>66</sup> This revolutionary formula cuts across the traditional distinction between naturalism and positivism that we have already noted.

As we have seen, natural law was conceived as a global framework of higher law, divined rather than willed, to which even sovereigns were bound. By contrast, positivism's fragmentary perspective relieved sovereigns of the constraints of a higher potency. Sovereigns were only bound by the agreements into which they had entered. In this sense, positivist theory reinscribed the liberal individual within society as the sovereign nation within the expanded context of the society of nations. On their own, neither positivist nor natural law theory can encompass the unmediated popular sovereignty that was both presupposed and created in the novel formula 'We the people of the United States'. For, although the idea of a determination emanating from the will of a given group is clearly positive, it is above all conceived as being a higher law (there being no higher source of human will than 'the people') and, accordingly, as partaking in naturalism's global scope. In its original formulation, US positivism was not so much the challenge to international obligation that would eventually find expression in American exceptionalism as a rejection of the monarchism that inhered in the conceptualisation of natural law. With sovereignty located in the will of the people as a whole, there can be no sovereign institution such as a monarch or

a parliament, for the simple reason that an institution cannot be both sovereign and subordinate to another body. In assimilating the universal status of human will to the particular form of the will of the people of the United States, the US Constitution laid claim to the sanction of nature at the same time as it repudiated the constraint of a normative ceiling in a straightforwardly positivist manner. The ideological consequence of this cyclopean universalism was a naturalising of *homo Americanus*. As Patrick Henry had declared in his electrifying speech to the first Continental Congress: ‘Government is dissolved [...] Where are your landmarks, your boundaries of Colonies? We are in a state of nature, sir [...] The distinctions between Virginians, Pennsylvanians, New Yorkers, and New Englanders are no more. I am not a Virginian, but an American.’ Along with their land base, ‘we the people of the United States’ were also appropriating Indians’ status as natural man. Thus we should reverse Edward Corwin’s deft observation, made in this connection, that ‘[n]atural rights were already on the way to become national rights’.<sup>67</sup> The nation was not so much assimilating itself to nature as incorporating nature. Nature was being made American—*jus naturale* being made *jus civile*—not the other way round.

An ideological achievement of this magnitude was not, of course, effected seamlessly. The Constitution bears the marks of a residual naturalism in its reference to rights that citizens bear even though it has failed to specify them (consider, for instance, the Ninth Amendment: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people’). In the wake of the revolutionary war, these features of the Constitution sustained proponents of antislavery and associated liberal causes. As Edward White showed, however, over the course of the nineteenth century, the Supreme Court’s tolerance of the glaring discrepancy between natural rights theory and the practice of racial oppression resulted in the elimination of extratextual sources of rights from US legal discourse:

The Court’s reduction of the natural law argument to a moral exhortation, and its consequent abandonment of that argument as an independent source of law in cases involving racial minorities, played a part in the eventual undermining of unwritten natural law as a commonly held source of nineteenth-century American jurisprudence.<sup>68</sup>

Acute as it is, however, White’s observation is not the whole story. Naturalism was only partly abandoned. In sloughing off naturalism’s subscription to the supranational normative framework that found expression in extratextual sources, US jurisprudence did not also dispense with the universality of the people’s will. The fusion of this universalism, derived from natural-law thinking, and positivism’s repudiation of an international order is a distinctive feature, perhaps the distinctive feature, of US constitutional discourse. It sustains the discursive practice that I term exceptionism.

Exceptionism is, clearly, of a piece with the paradox that Carl Schmitt and, following him, Giorgio Agamben, have termed the exception, whereby, for sovereignty to exist, the sovereign has to stand outside its own law. Law

becomes regular by virtue of the sovereign's employing irregular means to establish it. For Schmitt, the exception not only proves the rule: the rule 'derives only from the exception'<sup>69</sup>—or, as he put it in the terse language of his secularised political theology, '[t]he exception in jurisprudence is analogous to the miracle in theology'.<sup>70</sup> Schmitt's analysis was general. The exception inhered in the nature of sovereignty and applied to legal systems as a whole. Exceptionism might, therefore, be seen as a particular form of this general phenomenon, one that reflects the distinctive jinder of naturalism and positivism that the US Constitution achieved. 'We the people of the United States' is an entity made up of individuals united by their sovereign consent. As such, they are abstract individuals, defined by this consent rather than by concrete contingencies such as their place of birth.<sup>71</sup> Hence they can revoke their consent and expatriate. More significantly, others can be incorporated. As various scholars have shown, this augmentability on the part of 'we the people' made for a malleable populace that could be rendered more or less inclusive as nineteenth-century immigration radically impacted on a demographic balance that had originally been dominated by Anglo-Protestants.<sup>72</sup> In time, even Irish might apply. The fact that the sovereign people could be added to—that few groups were ultimately incapable of becoming American—was clearly congenial to the needs of an expanding frontier society that depended on continuing immigration. US-style popular sovereignty emerged, in other words, as a settler-colonial discourse, to which the exception of natives was as fundamental as the exception of the enslaved. Since settler colonialism renders outsiders convertible into insiders, it is future-oriented. It constructs the world as potential: in the end, all the world is potentially American. In this sense too, 'we the people of the United States' is a claim to universality. Whoever else might come to qualify, however—not only the Irish but Jews, Poles, even 'Hindus'—intractable anomaly continued to attach to the two groups whom President James Madison once referred to as 'the black race within our bosom [...] and the red on our borders'.<sup>73</sup> These two groups embodied the structure of the exception. They stood outside we the people so that we the people might exist. Their exception was a condition of the others' incorporation.

Exceptionism differs from Schmitt's concept in that it refers to particular groups of people rather than to particular historical eras (states of emergency). As is suggested by an analogy that Schmitt favours, however—that of a borderline—the concept transfers straightforwardly enough to demography, providing for the structural exclusion of particular groups from the operation of human rights, as opposed to the temporary suspension of human rights across society as a whole. The difference is important since, as opposed to the transient crisis presented by a state of emergency, structurally excepted groups confound the rule of law on a continuing basis. In places, Schmitt seems to recognise this possibility: 'the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege'.<sup>74</sup> This foundational status on the part of the exception as borderline concept is my reason for finding Schmitt's theory valuable.<sup>75</sup> The

Red race on our borders and the Black race in our bosom were not simply marginalised. Their exception was *in* rather than *to* the rule. The denial of rights to them was so thoroughgoing that it extended to the proprietorship of their own bodies.<sup>76</sup> Frontier homicides were unregulated. Killing a slave was an offence against the property rights of that person's owner. As Marshall's successor, Chief Justice Roger Taney, put it in the 1857 *Dred Scott* case, Blacks had 'no rights that the white man was bound to respect'.<sup>77</sup> Eleven years earlier, in *US v. Rogers*, Taney had averred that 'native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied'.<sup>78</sup> Given that Indians were not citizens, this appreciably more candid formulation than Marshall's afforded no basis from which rights might flow. The degree of civic effacement that was shared by dispossessed Indians and enslaved Africans was of an order quite different from the marginalisation of migrant groups, who could emancipate themselves under appropriate circumstances and who accordingly shared the possibility of joining the mainstream. Indeed, so unfettered was the apparatus of federal power over Indians that, in 1913, the Supreme Court in the *Sandoval* case felt obliged to insulate others from the possibility that Congress could deprive any group of its rights by the simple expedient of 'arbitrarily calling them an Indian tribe'—to which, we might more recently add, arbitrarily calling them terrorists.<sup>79</sup> To repeat, therefore, we should not confuse the fundamental denial of rights that applies to the exception with the lower-order treatment that accompanies marginalisation or routine forms of othering. The status of exception is not, however, defined in relation to given communities. Emancipation formally ameliorated Black people's status, however precariously in practice, while the end of the frontier eventually led to a form of citizenship being extended to all Indians, albeit one compromised by continuing wardship. Thus exceptionism should not be seen as a historical regularity in the treatment of certain groups but as a versatile property of US constitutionalism that is available to be applied to different groups at different times.

The United States is not, of course, the only society that has dehumanised particular groups of people. Nor is it the only society to have been founded on the combination of settler colonialism and slavery (Brazil springs to mind). As a settler society, however, the United States evinced a diasporan novelty that, as Marx noted, was relatively uncluttered by feudal vestiges.<sup>80</sup> (In this regard, it contrasts with Brazil.) The novel combination of naturalism and positivism that informed the US Constitution provided for an imperviousness to competing sovereignties that obtained as much in the international as in the national arena. The first international expression of this imperviousness was not the Monroe Doctrine but Indian affairs, the fledgling republic's founding foreign policy, whose interdiction of countervailing alliances was hemispherically extended under the Monroe Doctrine. The twin exceptions to American popular sovereignty were originally internal and external (Black and Red, slaves and natives respectively). Subsequent exceptions have been

internal (Japanese-Americans interned during World War II) as well as external (Guantánamo Bay). Although inseparable from settler colonialism, therefore, US exceptionism is by no means limited to settler-colonial discourse. If it had been, my title could have been the more familiar *terra nullius*. Although predicated on land rather than on human bodies, settler colonialism is premised on a cultural logic of elimination that insistently seeks the removal of indigenous humans from the land in question.<sup>81</sup> Thus *corpus nullius* is a component of *terra nullius*. The reverse, however, is not the case. Africans were not enslaved for their land but for their labour, which was to be mixed with Indians' land. As chattel slaves, Africans were not proprietors of their own bodies. Indeed, as property themselves, they could not be proprietors of anything. Thus *corpus nullius* is not specific to given social relationships such as settler colonialism or slavery. Since it springs from the particularity with which the general category of the human is defined at any given time, the scope of *corpus nullius* is not limited to Indians, slaves or any other human group *per se*. Rather, it provides a contextually variable limit on the types of people that the category of the human is framed to encompass. Thus the question of sovereignty and the question of human rights converge: human rights accrue from membership of collectivities that, for the time being, are recognised as sovereign.

In conclusion, since a key feature of the positivism that was to prevail over the course of the nineteenth century was the United States' repudiation of an overarching international order—a repudiation which, as we have seen, originated in Indian treaties—we might also consider the extent to which we should view Indian affairs as prototypical of contemporary US foreign policy. What implications does the historical career of Indian sovereignty hold for the status and value of national sovereignties other than that of the United States in the contemporary international order? If not answered, this question can at least be rejoined by a further question. The Indian experience prompts us to ask whether US foreign policy is best understood as a projection outwards of US policies, interests and values, or as the continuing containment and domestication of the world outside its borders, an endlessly expanding frontier. As we have seen, the full effacement of Indian subjectivity occurred in a context in which the boundary between external and internal affairs was being blurred. Over the course of the nineteenth century, the status of Indian affairs shifted from that of the US's original foreign policy to a relatively minor, and depoliticised, arena of domestic administration. In the process, Indians came to be without rights. Thus the thoroughgoing denial of human rights to Guantánamo Bay detainees suggests that the blurring may not have stopped—that ultimately the United States may not actually acknowledge any boundaries or any separately grounded sovereignties. To the extent that this is the case, the triumph of positivism has not been limited to the nineteenth century.

## Notes

- <sup>1</sup> This article is dedicated to my fellow Australian David Hicks. At the time of writing, and with the shameful connivance of the Australian government, the United States has been holding this Australian citizen in Guantánamo Bay for over five years, without due process, in inhuman conditions, and in defiance of international law. US citizens are specifically excepted from this treatment. For their comments, I am grateful to Connie Atkinson, Julie Evans, Ann Genovese, Lorenzo Veracini and David Yarrow. An earlier version of this article was presented to Monash University's 2005 'Dialogues Across Cultures' conference, convened by Lynette Russell.
- <sup>2</sup> See, e.g., Edwin S Morgan, *American Slavery American Freedom: The Ordeal of Colonial Virginia*, New York; Davis, 1975; David Brion, *The Problem of Slavery in the Age of Revolution 1770–1823*, Ithaca, NY, 1975.
- <sup>3</sup> The reference is to Jacques Derrida's practice of placing concepts *sous rature*—which is to say, inheriting while negating them—which Gayatri Spivak translated as 'under erasure' and lucidly explained in her 'Translator's Preface' to Derrida's *Of Grammatology*, Baltimore, 1976, pp ix–lxxxvii, pp xii–xv.
- <sup>4</sup> Sarah H Cleveland, 'Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs', *Texas Law Review* 81, 2002, pp 1–284.
- <sup>5</sup> Cleveland, 'Powers Inherent in Sovereignty', p 5.
- <sup>6</sup> Cleveland, 'Powers Inherent in Sovereignty', p 2.
- <sup>7</sup> Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules*, London, 2005, p 144; Tony Judt, 'The New World Order', *New York Review of Books* 52(12), 14 July 2005, pp 14–18, p 17.
- <sup>8</sup> Uday S Mehta, 'Liberal Strategies of Exclusion', *Politics and Society* 18, 1990, pp 427–454, p 429.
- <sup>9</sup> Mehta, 'Liberal Strategies of Exclusion', p 433.
- <sup>10</sup> The classic explication of this is, of course, Alexis de Tocqueville's *Democracy in America*. For more recent accounts see, e.g., Seymour Martin Lipset, *American Exceptionalism. A Double-Edged Sword*, New York, 1996.
- <sup>11</sup> The Fourteenth Amendment excludes 'Indians not taxed' from its provisions, while the Fifteenth limits its application to citizens. See, e.g., James D Richardson, *A Compilation of the Messages and Papers of the Presidents 1789–1897*, Washington, DC, 1900, i, pp 37–38.
- <sup>12</sup> Thus the 'boundary between the politically included and the politically excluded' is in the singular for Mehta, 'Liberal Strategies of Exclusion', p 435.
- <sup>13</sup> Ralston Hayden, *The Senate and Treaties 1789–1817. The Development of the Treaty-Making Functions of the United States during their Formative Period*, New York, 1920.
- <sup>14</sup> See, e.g., Alexandrowicz, 'Doctrinal Aspects of the Universality of the Law of Nations', *British Year Book of International Law* 37, 1961, pp 506–515.
- <sup>15</sup> Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', *Harvard International Law Journal* 40, 1999, pp 1–80.
- <sup>16</sup> Otto Friedrich von Gierke, *Natural Law and the Theory of Society 1500–1800*, Ernst Barker (trans), Cambridge, 1934; Arthur Nussbaum, *A Concise History of the Law of Nations*, New York, 1954, pp 35–85.
- <sup>17</sup> Alexandrowicz, 'Doctrinal Aspects', p 506, termed this 'the conception of a positive European law of nations based on treaties and custom'.
- <sup>18</sup> Robert N Clinton, 'The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs', *Boston University Law Review* 69, 1989, pp 329–385, p 381; Dorothy V Jones, *License for Empire: Colonialism by Treaty in Early America*, Chicago, 1982.
- <sup>19</sup> For the Blue Water Thesis, whereby the United Nations accepted a definition of colony as geographically separate from its administering nation, see Ward Churchill, *Perversions of Justice. Indigenous Peoples and Angloamerican Law*, San Francisco, 2004, p 51.
- <sup>20</sup> See especially Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York, 1990. See also Peter Fitzpatrick, *Modernism and the Grounds of Law*, Cambridge, 2001, esp. pp 148–166.
- <sup>21</sup> Williams, *American Indian in Western Legal Thought*.
- <sup>22</sup> Alexander ('Publius') Hamilton, 'The Federalist No. 24' [19 December 1787], in Jacob E Cooke (ed.), *The Federalist*, Middletown, CT, 1961, pp 152–157; Vine Deloria, Jr and David E Wilkins, *Tribes, Treaties, and Constitutional Tribulations*, Austin, TX, 1999, p 19; Jones, *License for Empire*, pp 164–169.

- <sup>23</sup> Anghie, 'Finding the Peripheries', p 69; cf. L C Green, 'Claims to Territory in Colonial America', in L C Green and Olive P Dickason (eds), *The Law of Nations and the New World*, Alberta, 1989, pp 76–127, pp 125–126.
- <sup>24</sup> Harvey D Rosenthal, 'Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission', in Imre Sutton (ed.), *Irredeemable America: The Indians' Estate and Land Claims*, Albuquerque, NM, 1985, pp 35–70, p 36.
- <sup>25</sup> See, e.g., Clinton, 'Proclamation of 1763', p 335; p 349; p 357.
- <sup>26</sup> E.g., '[A]ll lands in this government are holden of the King of Great Britain as the lord of the fee [...] no title to any lands in the Colony can accrue by any purchase made of Indians on pretence of their being native proprietors thereof.' Nathaniel B Shurtleff (ed.), *Records of the Governor and Company of Massachusetts Bay in New England, Vols 1–3*, Boston, 1853, i, p 112. See also John Bulkley, 'An Inquiry into the Right of the Aboriginal Natives to the Lands in America [...]', *Massachusetts Historical Society Collections*, 1st series, 1795, vol IV, pp 172–173.
- <sup>27</sup> Timothy Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations*, Athens, GA, 2002, p 68. For exemplification and further references, see William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England*, New York, 1983, pp 68–70.
- <sup>28</sup> Williams, *American Indian in Western Legal Thought*, p 269.
- <sup>29</sup> *Johnson and Graham's Lessee v. William McIntosh* (*Johnson v. McIntosh*) (Wheaton's *US Supreme Court Cases*, vol 8, February Term, 1823, 543–605), 573.
- <sup>30</sup> The year Marshall died, for instance, three years before the Cherokee Trail of Tears, the court in *Mitchel v. United States* (34 *US* [9 Peters] 711, 1835, 746) considered Indians' right of occupancy to be 'as sacred as the fee simple of the whites'.
- <sup>31</sup> Green, 'Claims to Territory in Colonial America', p 125.
- <sup>32</sup> Jill Norgren, *The Cherokee Cases. The Confrontation of Law and Politics*, New York, 1996, p 90.
- <sup>33</sup> Ernest Nys (ed.), *De Indis et De Iure Belli Relectiones being parts of Relectiones Theologicae XII by Franciscus de Victoria*, John P Bate (trans.), Washington, DC, 1917, S. 3, proposition 4, p 157. See also Antonio Truyol Serra (ed.), *The Principles of Political and International Law in the Work of Francisco de Vitoria*, Madrid, 1946; Williams, *American Indian in Western Legal Thought*, pp 96–118.
- <sup>34</sup> 'While [Hobbes'] cool and indiscriminate alignment of aggression and defense flies in the face of scholastic teachings, his argument, taken as a whole, is an almost classical expression of the ever recurrent feeling that international law is no more than an inane phrase.' Nussbaum, *Concise History of the Law of Nations*, p 146. See also Serra, *Work of Francisco de Vitoria*, p 55; David Kennedy, 'Primitive Legal Scholarship', *Harvard International Law Journal* 27, 1986, pp 1–98; John H Parry, *The Spanish Theory of Empire in the Sixteenth Century*, Cambridge, 1961.
- <sup>35</sup> Anghie, 'Finding the Peripheries', p 11 acknowledges that positivism was an 'extended elaboration' of Vitoria's category of human law without pursuing the implications of this acknowledgement for his connecting of positivism to the late nineteenth century.
- <sup>36</sup> Serra, *Work of Francisco de Vitoria*, p 55.
- <sup>37</sup> Though the immediate referent was the use of money ('For no such thing as *Money* was any where known'—i.e. when all the world was America). John Locke, *Two Treatises of Government* [...] 2 Vols, London, 1690, vol. 2, ch. 5, para. 49.
- <sup>38</sup> *Johnson v. McIntosh*, 589.
- <sup>39</sup> *Johnson v. McIntosh*, 545.
- <sup>40</sup> *Johnson v. McIntosh*, 596.
- <sup>41</sup> *The Cherokee Nation v. The State of Georgia* (Peters' *US Supreme Court Cases* (vol. 5, January Term, 1831), 2–79), 15; 19.
- <sup>42</sup> Clinton, 'Proclamation of 1763', p 371; Walter H Mohr, *Federal Indian Relations 1774–1788*, Philadelphia, PA, 1933, p 199; Nell Jessup Newton, 'Federal Power Over Indians: Its Sources, Scope, and Limitations', *University of Pennsylvania Law Review* 132, 1984, pp 195–288, p 200.
- <sup>43</sup> As Marshall observed in his *Worcester v. Georgia* judgment (Peters' *US Supreme Court Cases* (vol. 6, January Term, 1832, 515–596), 515; 549), the early journals of Congress had exhibited 'the most anxious desire to conciliate the Indian nations [...] The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend; and everything which might excite hostility was avoided.'
- <sup>44</sup> *Journals of the Continental Congress* 25, pp 681–693; 27, pp 453–465; Reginald Horsman, 'United States Indian Policies, 1776–1815', in Wilbur E Washburn (ed.), *Handbook of North American Indians, Vol 4, History of Indian–White Relations*, Washington, DC, 1988, pp 29–39, p 29; Francis P Prucha,

- American Indian Policy in the Formative Years. The Indian Trade and Intercourse Acts 1790–1834*, Cambridge, MA, 1962, pp 32–33.
- <sup>45</sup> ‘And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.’ *Treaty with the Wyandot, etc.* (1795, Art. v), reprinted in Charles J Kappler (ed.), *Indian Treaties 1778–1883*, New York, 1972, pp 39–45, p 42.
- <sup>46</sup> John R Wunder, ‘No More Treaties: The Resolution of 1871 and the Alteration of Indian Rights to Their Homelands,’ in John R Wunder (ed.), *Native Americans and the Law: Contemporary and Historical Perspectives on American Indian Rights, Freedoms, and Sovereignty*. New York, 1966, pp 39–56, p 42.
- <sup>47</sup> Annie Heloise Abel, ‘The History of Events Resulting in Indian Consolidation West of the Mississippi River’, *American Historical Association Annual Report for 1906*, Washington, DC, 1906, i, pp 233–450, p 307.
- <sup>48</sup> Garrison, *Ideology of Removal*, p 47; Wilbur R Jacobs, ‘British Indian Policies to 1783’, in Washburn, *Handbook of North American Indians*, pp 5–12, p 9; Jones, *License for Empire*, p 99; Prucha, *Indian Policy in the Formative Years*, p 16.
- <sup>49</sup> Letter to Governor William Henry Harrison, February 1803, in Andrew A Lipscomb (ed.), *The Writings of Thomas Jefferson*, 22 vols, Washington, DC, 1904, vol. X, pp 369–371.
- <sup>50</sup> California was an exception. See the documents collected in Robert E Heizer, *The Destruction of California Indians*, Lincoln, NB, 1974, and Felix S Cohen, ‘Original Indian Title’, *Minnesota Law Review* 32, 1947, pp 28–59, p 37, n 20.
- <sup>51</sup> Frederick E Hoxie, *A Final Promise. The Campaign to Assimilate the Indians, 1880–1920*, Cambridge, 1989, pp 33–34. The basic contention, ‘the message sent by Indian policy finds its significance in audiences other than the Indians themselves’, has been argued from a Gramscian perspective by George P Castile, ‘Indian Sign: Hegemony and Symbolism in Federal Indian Policy’, in George P Castile and Robert L Bee (eds), *State and Reservation. New Perspectives on Federal Indian Policy*, Tucson, AZ, 1992, pp 165–186, pp 176–183. The point also shares ground with Felix Cohen’s famous comparison between the Indian and the miner’s canary: ‘Like the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere, and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.’ See Felix S Cohen, ‘The Erosion of Indian Rights’, *Yale Law Journal* 62, 1953, pp 348–391, p 390.
- <sup>52</sup> *Johnson v. McIntosh*, 591.
- <sup>53</sup> Frank Shockey, ‘“Invidious” American Indian Tribal Sovereignty: *Morton v. Mancari* contra *Adarand Constructors, Inc. v. Pena*, *Rice v. Cayetano*, and other recent cases’, *American Indian Law Review* 25, 2001, pp 275–313, p 279.
- <sup>54</sup> See, e.g., Abel, ‘Indian Consolidation West of the Mississippi’; Grant Foreman, *Indian Removal. The Emigration of the Five Civilized Tribes of Indians*, 2nd edn, Norman, OK, 1953; Sean Michael O’Brien, *In Bitterness and in Tears: Andrew Jackson’s Destruction of the Creeks and Seminoles*, Westport, CT, 2003.
- <sup>55</sup> *Cherokee v. Georgia*, 17.
- <sup>56</sup> Where it was in turn repeated from Marshall’s 1810 *Fletcher v. Peck* judgment (10 US [6 Cranch] 87).
- <sup>57</sup> *Cherokee v. Georgia*, 17.
- <sup>58</sup> Mr Justice Baldwin, *Cherokee v. Georgia*, 30.
- <sup>59</sup> Kenneth W Porter, ‘Relations Between Negroes and Indians within the Present Limits of the United States’, *Journal of Negro History* 17, pp 287–367; Porter, *The Negro on the American Frontier*, New York, 1971; Laurence Foster, *Negro–Indian Relationships in the Southeast*, Philadelphia, 1935.
- <sup>60</sup> Residual (or inherent) sovereignty refers to the residuum left over (or reserved, hence the term ‘reservation’) from treaties through which Indian tribes surrendered or modified aspects of their primordial sovereignty. See Felix S Cohen, *Handbook of Indian Law*, Washington, DC, 1941, p 122; Robert W Oliver, ‘The Legal Status of American Indian Tribes’, *Oregon Law Review* 38, 1959, pp 193–245.
- <sup>61</sup> 16 Stat., 566 (Act of March 3rd, 1871, c. 120, s. 1).
- <sup>62</sup> D Otis, *The Dawes Act and the Allotment of Indian Lands* (1934), reprinted F P Prucha (ed.), Norman, OK, 1973; Hoxie, *Final Promise*; Francis P Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865–1900*, Norman, OK, 1976.
- <sup>63</sup> John R Wunder, ‘Retained By The People’: *A History of American Indians and the Bill of Rights*, New York, 1994, p 39; p 17. For the genocidal procedures that were institutionalised at boarding schools for Indians, see Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools*, San Francisco, 2004.

- <sup>64</sup> In the half-century from 1881, the total acreage held by Indians in the United States fell by two-thirds, from just over 155 million acres to just over 52 million. *Statistical Abstract of the United States*, US Bureau of the Census, Department of Commerce, 1955, p 180.
- <sup>65</sup> The power to abrogate treaties was stated explicitly under the doctrine of plenary power in the 1903 *Lone Wolf v. Hitchcock* decision (187 US 553), plenary power conventionally being traced back through the 1886 *Kagama* case (118 US 375) and the 1871 *Cherokee Tobacco* case (78 US 616) to Taney's 1846 judgment in *United States v. Rogers* (45 US 568).
- <sup>66</sup> Thus it is significant that, although coming from France, de Tocqueville could declare that, '[i]f there is a single country in the world where one can hope to appreciate the dogma of the sovereignty of the people at its just value [...] that country is surely America [...] The people reign over the American political world as does God over the universe. They are the cause and the end of all things; everything comes out of them and everything is absorbed into them.' Alexis de Tocqueville, *Democracy in America*, Harvey C Mansfield and Winthrop Delba (eds) and (trans), Chicago, 2000, pp 53–55.
- <sup>67</sup> Edward S Corwin, 'The "Higher Law" Background of American Constitutional Law', *Harvard Law Review* 42, 1928, pp 147–185; pp 365–409, p 401.
- <sup>68</sup> G Edward White with Gerald Gunther, *The Marshall Court and Cultural Change, 1815–35*, New York, 1988: *History of the Supreme Court of the United States*, vols 3–4, p 740.
- <sup>69</sup> Schmitt, 'Definition of Sovereignty', in his *Four Chapters on the Concept of Sovereignty*, G Schwab (trans), Cambridge, MA, 1985, pp 5–15, p 15.
- <sup>70</sup> Schmitt, 'Political Theology', in his *Four Chapters*, pp 36–52, p 36.
- <sup>71</sup> At least, other than candidates for the presidency.
- <sup>72</sup> See especially Matthew F Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race*, Cambridge, MA, 1998; David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class*, London, 1991. See also, e.g., Noel Ignatiev, *How the Irish Became White*, New York, 1995; and Ignatiev's irrepressible *Race Traitor* journal.
- <sup>73</sup> Madison, *Writings, Vol III*, p 515, quoted in Abel, 'Indian Consolidation West of the Mississippi', p 255, n.
- <sup>74</sup> Schmitt, 'Definition of Sovereignty', p 5.
- <sup>75</sup> Otherwise, I would prefer not to endorse an idea coined by a man who would later become a theoretician of Nazism. As it is, I see my use of him (even the Weimar Schmitt whom I am citing) as setting a thief to catch a thief.
- <sup>76</sup> Giorgio Agamben's use of *homo sacer* comes to mind at this point, especially since I have cited Schmitt, on whom Agamben relies, but I do not find in Agamben's book an adequate explanation for why *homo sacer* cannot be sacrificed. Since this is one of the two defining properties of *homo sacer* (the other being that he can be killed with impunity), this strikes me as a serious weakness. See Agamben, *Homo Sacer: Sovereign Power and Bare Life*, D Heller-Roazen (trans), Stanford, CA, 1998.
- <sup>77</sup> *Dred Scott v. Sanford* (60 US [19 How.] 393), 407. Earlier in the same judgment, the court had also stated, in dicta (pp. 403–404), that Indians were not citizens.
- <sup>78</sup> *United States v. Rogers* (45 US 568).
- <sup>79</sup> *United States v. Sandoval* (231, US, 1913, 28), 46.
- <sup>80</sup> Marx observed that the USA was a country 'where bourgeois society did not develop on the foundation of the feudal system, but developed rather from itself; where this society appears not as the surviving result of a centuries old movement, but rather as the starting point of a new movement'. Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy*, New York, 1973, p 884.
- <sup>81</sup> Patrick Wolfe, 'Land, Labor, and Difference: Elementary Structures of Race', *The American Historical Review* 106, 2001, pp 865–905.