REPARATIONS AND THE INTERNATIONAL LAW ORIGIN STORY

John Linarelli[*]

In *The Misery of International Law,* my co-authors and I argued that "[w]e really cannot understand structural and institutional forms of racism only by looking inside the borders of the Western states because these borders were used in a long history to maintain slavery and exploitation in the New World and 'civilization' in the Old World."[1] We did not pursue this claim further because our focus was on a critique of how the international law on trade, investment, and finance have perpetuated injustice in the economic sphere and how international human rights law has been ineffective in addressing that injustice. I will extend the point further here, if only very summarily in the form of a short essay: we cannot fully understand the reasons why reparations for African Americans or Native Americans are necessary from a moral standpoint, and why legal grounds must be created to put these moral obligations in a collective form for our political community to deal with, unless we historicize and globalize the inquiry. Why? Extending our study in this way tells us about the origins of the United States, the social and historical conditions of its formation, and how those origins and conditions played a role in the very problems that call for reparations. Study of history and law beyond our borders also will inform us that the American experience is not unique and that we may be able to develop our own law and institutions for repair based on a fuller understanding of how the wrongs of the past did not limit themselves to our current borders or are more immediate circumstances. The modern state came into being as an idea, constructed in the social world, on the foundations of colonialism, slavery, exploitation, subjugation, and a violent

[*]Associate Dean for Academic Affairs and Professor of Law, Touro University Jacob D. Fuchsberg Law Center.

[1] JOHN LINARELLI, MARGO SALOMON, AND MUTHUCUMARASWAMY SORNARAJAH, THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY 117 (Oxford University Press 2018).

restructuring of the global economy. Many "new world" states like the United States came to be, at least in some initial conception, in this period of what the historian Sven Beckert calls "war capitalism,"[2] the first big move towards a global economy.

The origins of the United States as a country is in the context of its settler colony origins, in which the settlers replace the indigenous population through domination (and some might argue genocide[3]) to develop a distinctive identity eventually coalescing into a national identity grounded in the sovereignty that international law affords a state.[4] In the United States, and in some other settler colonies, however, the settlers did not only replace the indigenous population with settlers. They also enslaved others from distant lands to do much of the work in what is primarily an agricultural society at the time. I am no historian. My training and published work are in law and philosophy. I will therefore tread lightly here on the historical questions. The consequences of this history for our Constitution and other institutions could be understood to result in a skewed conception of political freedom and equality which we must constantly work to overcome. Settler societies are rooted in notions of self-rule and participation in political processes, but apparently only for the settlers and their descendants and for people permitted to enjoy membership as free citizens.[5] Freedom in these societies appears to rest on a contradiction: freedom for some but subordination for others, with each granting or denying of agency working simultaneously at a given moment in time.

What is the normative force of these historical events on our current social conditions? What should we do? We should think of the question not as injustice brought on by persons that can be identified, but as injustice that we as a people in a political community can repair. Moral blame is not attributable to individuals for past wrongs, but for failure to deal with our shared past today in some form of collectively agreed redress.

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[2] SVEN BECKERT, EMPIRE OF COTTON: A NEW HISTORY OF GLOBAL CAPITALISM (Penguin 2015).

[3] Patrick Wolfe, *Settler Colonialism and the Elimination of the Native,* 8 J. GENOCIDE RESEARCH 387 (2006).

[4] *See* THE ROUTLEDGE HANDBOOK OF THE HISTORY OF SETTLER COLONIALISM (Edward Cavanagh & Lorenzo Veracini eds., Routledge 2020).

[5] Patrick Wolfe, *Settler Colonialism and the Elimination of the Native,* 8 J. GENOCIDE RESEARCH 387 (2006).

I. THE LAW OF NATIONS AS RATIONALIZATION FOR CONQUEST

Let's start with the origin story for international law, in what was once known as the law of nations. This has been a popular move by international legal scholars to search for the origins of injustice in the world order and in the material inequalities between states. As the law that got states started, it is hard to deny that it influenced current law and set the stage for the social outcomes currently in place for modern states. This work is the so-called historical turn in international law. The historical turn led to a debunking of the "romantic" vision of the origin story as the beginning of an international society of states under the rule of law set by international relations theorists such as Hedley Bull[6] and legal scholars such as Hersh Lauterpacht.[7] The post-colonial or critical wing of the historical turn in the study of international law critiques the modernist vision of international law as "progress" towards higher forms of "civilization" or humanitarianism. It has addressed the problems of economic injustice in the international law. This work exposes the foundations of international law in western conquest of newly "discovered" lands.[8]

An influential movement in this world of ideas is known as Third World Approaches to International Law or TWAIL for short.[9] The history of the law of nations has played an important role in TWAIL work. While TWAIL came to be in the aftermath of the Cold War, and with the rise and fall of the movement towards a New International Economic Order (NIEO), the NIEO movement died but TWAIL thrives, even with its anachronistic use of the phrase "third world," a phrase with little currency anymore with the Cold War long gone.

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[6] HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 24, 27 (Columbia University Press 1977).

[7] Hersch Lauterpacht, *The Grotian Tradition in International Law,* 23 BRIT. Y.B. INT; L. 1 (1946).

[8] *See, e.g.,* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (Cambridge University Press 2012); JAMES THUO GATHII, WAR, COMMERCE, AND INTERNATIONAL LAW (Oxford University Press 2009); NATHANIEL BERMAN, PASSION AND AMBIVALENCE. COLONIALISM, NATIONALISM, AND INTERNATIONAL LAW (Martinus Nijhoff 2011).

[9] Makau W. Matua, *What is TWAIL?,* 94 ASIL PROC. 31 (2000). A tour de force on TWAIL and looking beyond "the limited geography of places and ideas that dominate the beltway of our discipline," *see* James Thuo Gathii's Grotius Lecture, *The Promise of International Law: A Third World View,* 36 AM. U. INT'L L. REV. 377 (2021).

Unease persists from some historians about this work, particularly historians in the contextualist school, who contend that historical work must only be read in the context of its time and not to be applied to present circumstances or seen in a causal light as a precursor to the present.[10] But to classify the work of critical theorists and some historically oriented TWAILists as history is a category mistake: they are not doing history, or more precisely, they are not writing either on the history of political thought or on the history of the law of nations or international law. Rather, they are doing legal sociology and exposing the background conditions for norms and structures of rule-governed hierarchies propagating injustice across generations and between communities.

An important critical and TWAIList claim is that international law is unjust and illegitimate because of its historical roots in colonial conquest by Westphalian-inspired western European states of "discovered" peoples and lands. This conquest, so the historical account proceeds, led to the evolution of a system of states and an international law that perpetuates injustice. The result is the perpetuation of a system of law that enforces domination, subjugation, exploitation, and various other ills. While the anachronism counterargument has been deployed against these claims and more traditionally minded international legal scholars find the arguments too sweeping in their condemnation, the rebuttal resides in a powerful counterfactual: we really cannot get off the ground to change the persistent tragic outcomes that keep perpetuating themselves in the world until we detach ourselves from the bias of the status quo and reimagine what international law and state formation might be like today if their beginnings were not rooted in the inhumanity of war capitalism.

What follows is only a very partial summary of the rules as they were understood at the time of "new world" conquest. I divide the law of the time into two components, one on subjugation of the indigenous

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[10] Anne Orford, *International Law and the Limits of History, in* THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI (Woulter Werner, Mariecke de Hoon & Alexis Galán, eds., Cambridge University Press 2018): 297; Martti Koskenniemi, *Histories of International Law; Significance and Problems for a Critical View*, 27 TEMPLE INTL & COMP. L. J. 215 (2013). The methods of the Cambridge contextualist school are found in 1 QUENTIN SKINNER, VISIONS OF POLITICS: REGARDING METHOD 86-87 (Cambridge University Press 2002). For an article that is reasonably friendly to the lawyers, *see* Andrew Fitzmaurice, *Context in the History of International Law,* 20 J. HIST. INTL L. 5 (2018). I am grateful to Natasha Wheatley for directing me to the Fitzmaurice article.

population and the other the legal rationale for enslaving Africans and forcing them to move to new lands to produce a radical transformation that resulted in the origins of the global supply chain economy. Again, to repeat a note of caution: this is a very short essay offering only a summary level of discourse.

These two sets of legal justifications were the product of Renaissance humanism. Some who read this essay may find my sources of law odd. Where are the cases, statutes, and constitutions in the argument? We do not teach our students that law is a historically contingent enterprise. My apologies to the Dworkinian jurisprudes, but there is no way to avoid the claim that legal positivism has at least a strong hold on lawyers today.[11] We look for a source of positive law from some institution such as a court or a legislature. But this has not always been the case, and indeed it has only recently been the case. In the history of human societies, legal positivism is a relatively new theory of law, arising to prominence in the latter nineteenth to early twentieth centuries.[12] Before then, natural law played an important role in legal thought. Before about 1850, American lawyers would have agreed that murder is a distinctive legal wrong even if no nation at all had any statute or case law making it so.[13] According to a lawyer who accepts natural law as form of law, murder is a legal wrong because it was contrary to the law of nature.[14] As legal historian Stuart Banner explains, in about 1850, it would have been entirely normal for a lawyer in court to use the law of nature as well as statutes and case law, but that today "if a lawyer tries to discuss natural law in court, the judge will look puzzled, and opposing counsel will start planning the victory party."[15] That was about 1850. Go back several hundred more years, to the 1500s. In the time of the Renaissance, positive law ranked low as a source of authority for law.[16] At the time, there was some diversity of understanding about the sources of law. Indeed, asking for a source is a question that a legal positivist would emphasize. But let me try to summarize. First in rank was God's law, unknowable to

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[11] *See* GERALD J. POSTEMA, LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD (Springer 2011); JOHN M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY (Oxford University Press 1992).

[12] STUART BANNER, THE DECLINE OF NATURAL LAW (Oxford University Press 2021).

[13] *Id.* at 1.

[14] *Id.*

[15] *Id.*

[16] ANTHONY PAGDEN, THE ENLIGHTENMENT AND WHY IT STILL MATTERS 36-39 (Oxford University Press 2013).

humans.[17] Second in rank came natural law, available to all rational beings with the capacity to reason, universal in its application to every person.[18] After that came the *jus gentium,* also universal in its application to every person, which either included or was understood as a law of nations, though whether it was purely natural law or a mix of natural law with common social understandings of law was subject to some diversity of views.[19] The lowest law in the pecking order was positive law, a law that was not universal and enacted by sovereigns to govern particular human societies.[20] The result of this mix was that jurists, some of whom we classify as philosophers today, could render binding legal opinions for sovereigns on the *jus gentium* or the law of nations and on natural law. Philosophers and lawyers were in indistinct category. Hence, why we proceed by examining the great proclaimers of the law of nations, who offered reasons for monarchs to kill native populations and enslave Africans in the conquest of the new world during the Renaissance.

The Renaissance jurists, who international lawyers have characterized as the "founders" of international law, claimed that the law of nations is the product of reason about universal principles about what is right, with the universal presupposed as European. The law of nations, to these jurists, is a mainly natural law that is or is derived from reason, though their use of *jus gentium* as a concept could sometimes rest on what we might call social practices today. The law of nations in this conceptualization is universal. It mandates rights and duties to all rational beings. To fail to comply with it is irrational and those who fail to comply must be punished by those who do comply. So, the law of nations is a totalizing and universal product of reason that all must accept. Reason and rationality, however, happen to produce just those normative practices that Europeans happen to accept.

Here we see an argument for cosmopolitanism, but it immediately is in contradiction. The universals were European and not universal. The law of nations was a Eurocentrically constructed law of cultural practices, not a natural law founded in the state of nature and common to all. The idea here was that each person, European or native to what became the Americas, possessed natural legal rights as

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[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

free and rational persons, and were obligated to comply with natural legal duties. It was a rational act and a moral duty, then, for European Christian nations to use force to punish violators and compel compliance.

We could focus on all or several Renaissance jurists such as Grotius, Gentili, or Vitoria. I will focus on Vitoria's conception of the law of nations, widely understood, according to legal historian Robert Williams in his seminal text, *The American Indian in Western Legal Thought,* as the jurist who took the "first critical steps towards a totalizing jurisprudence of international order – a law of nations intended to regulate all aspects of the relationships between independent states."[21] Vitoria's work came about seventy years before that of Grotius. They share the same universalizing logic for the authority of a law of nations. One of his lectures, *De Indis et de Jure Belli Relectiones,* given in 1539, was of special relevance to the development of what we now classify as international economic law. Williams classified this work as the first by a major Spanish Renaissance jurist "to embrace the full implications of the Thomistic Humanist idea that a natural-law connections existed between all nations from which arose a system of mutual social rights and duties."[22]

In summary, Vitoria's argument proceeded as follows:[23] Indians are rational persons with the capacity to reason and are bound by natural law. They are therefore bound by *jus gentium,* a form of natural law administered by sovereigns. The law of nations, to Vitoria, was either natural law or derived from natural law.[24] Because the Indians are so bound, they cannot interfere with the right of the Spanish under the *jus gentium* to travel on Indian lands and trade with the Indians. The Indians have the same right to do these things in Spain. It is an act of war to keep the Spaniards out or to limit their activities and Spanish retaliation is permissible in such cases. Moreover, Indian social and cultural practices violate the *jus gentium* and they can remedy these violations by adopting European social and cultural

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[21] ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 96 (Oxford University Press 1990).

[22] *Id.* at 97.

[23] Linarelli, Salomon, & Sornarajah, *supra* note 1 at 111-127; Anghie, *supra* note 8, 13-31; ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY AND EMPIRE, 1500-2000 (Cambridge University Press 2014).

[24] Williams, *supra* note 21, at 98.

practices. Europeans can use force to achieve the transformation.[25] Consent by the Indians is irrelevant, and resistance is an act of war, a violation of the law of nations. The Indians lack sovereignty as a nation because of their violations and only Christians can wage just war against them forcibly to transform their practices. The rules of just war do not apply to the Indians. Europeans can kill or enslave their women and children if they fail to comply.[26] Other founders of international law, Gentili and Grotius, stated the law similarly. Similar themes preoccupied the legal opinions justifying conquest for all colonizing nations, including Britain. The focus here on Vitoria and Grotius is by way of illustration and because they are widely understood to be the most prominent of jurists on the origins of the law of nations.

This law of nations set the stage for the rise of the global capitalism and the multinational corporation. Grotius' *De Indis,* an apology for Dutch aggression in what is now known as southeast Asia, articulates what Locke will later call the 'very strange doctrine' that in the absence of the law of the state as it is found within the state, each person in nature is morally identical to the state and has the power to punish for violations of the law of nations.[27] So, for example, the Dutch East India Company, the Vereenigde Oost-Indische Compagnie or VOC for short, was justified, at least according to Grotius, in enforcing natural rights of trade and occupation through use of force. The VOC, probably the second multinational company after that of the British East India Company (EIC),[28] had the right to conclude treaties with foreign powers, to wage war, and to levy taxes.[29]

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[25] According to Vitoria, the Indian's "social and cultural practices are at variance with the practices required by the universal norms." Anghie, *supra* note 8, at 327. That is, "the particular cultural practices of the Spanish assume the guise of universality as a result of appearing to derive from the sphere of natural law." *Id.* at 326.

[26] According to Anghie, "we see in Vitoria's work the enactment of a formidable series of maneuvers by which European practices are posited as universally applicable norms with which the colonial peoples must conform if they are to avoid sanctions and achieve full membership." *Id.* at 332.

[27] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Hackett 1980) §9, 10; HUGO GROTIUS, DE JURE PRAEDAE COMMENTARIES, ed & with an Introduction by M Julia van Ittersum (Liberty Fund 2006) Ch. 1; HUGO GROTIUS, DE JURE BELLI AC PACIS, ed & with an Introduction by R Tuck *(*Liberty Fund 2005) Ch II.

[28] The British East India Company was the first joint stock company and the VOC the second. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY & POVERTY 247 (Profile 2013).

[29] FEMME S. GAASTRA, THE DUTCH EAST INDIA COMPANY: EXPANSION AND DECLINE (Walburg Pers 2003).

The EIC maintained its own armed forces of about 200,000, more than most European states of the time, and could call on the Royal Navy and Army for support if needed.[30] These chartered companies were the first companies permitted to organise on a limited liability basis. The EIC sold shares on the Royal Exchange.[31]

The second leg of the legal argument for developing the global supply chain economy was in the notion of "natural slavery," though it must be said that a variety of bad legal arguments, and sometimes very little, justified slavery. As Martti Koskenniemmi explains in the context of British conquest, "[a]stonishingly, a racialist system of plantation slavery arose in the Atlantic colonies without a clear basis either in the common law colonial legislation or the *lex mercatoria."*[32] Arguments ranged from the common law does not apply to conquered lands, slaves were war captives who can be taken as slaves, buying slaves differed from enslaving, and Christ lived in Roman times when there were slaves but was silent on the subject.[33] We could go on. These and other arguments were deployed to justify the enslavement of Africans and to remove them to the Americas to serve as forced

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[30] Beckert explains:

[P]rivate capitalists, often organized in chartered companies (such as the British East India Company asserted sovereignty over land and people, and structured connections to local rulers. Heavily armed privateering capitalists became the symbol of this new world of European domination, as their cannon-filled boats and their soldier-traders, armed private militias, and settlers captured land and labour and blew competitors, quite literally, out of the water. Privatized violence was one of their core competencies. While European states had envisioned, encouraged, and enabled the creation of vast colonial empires, they remained weak and thin on the ground, providing private actors the space and leeway to forge new modes of trade and production. Not secure property rights but a wave of expropriation of labor and land characterized this moment, testifying to capitalism's illiberal origins.

Beckert, *supra* note, 2, at 37.

[31] NICK ROBINS, THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL (Pluto Press 2nd ed 2012); HV BOWEN, THE BUSINESS OF EMPIRE: THE EAST INDIA COMPANY (Cambridge University Press 2009); JOHN KEAY, THE HONOURABLE COMPANY: A HISTORY OF THE ENGLISH EAST INDIA COMPANY (Harper Collins 1993); PHILIP LAWSON, THE EAST INDIA COMPANY: A HISTORY, 1600-1857 (Routledge 1993); William Dalrymple, *The East India Company: The Original Corporate Raiders*, THE GUARDIAN, Mar. 4, 2015; William Dalrymple, *The East India Company: The Company That Rules the Waves,* THE ECONOMIST, Dec 17, 2011.

[32] MARTTI KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH 758 (Cambridge University Press 2021), citing ALAN WATSON, SLAVE LAW IN THE AMERICAS 636 (University of Georgia Press 1989). The *lex mercatoria* or law merchant was considered to be the commercial law of this period, based not or not primarily in the law of states, but a transnational law that applied much in the same way as the law of nations, but to merchants. *See* John Linarelli, *Global Legal Pluralism and Commercial Law,* THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 689 (Paul Schiff Berman ed. Oxford University Press 2020).

[33] Koskenniemi, *supra* note 32.

labor in a new global economic structure. Look at cotton for example, long a product of households that planted cotton with food crops. The British used violence and a corporation with its own armed forces to transform cotton production into an industry, removing it from its center in India to production of crops mainly in the southern United States, with manufacturing of cloth and cotton products in northwest England. This was a violent restructuring to form a global supply chain for Europeans to extract maximum rent from the process while impoverishing longstanding producers, middlemen, and traders.[34] Slave made commodities dominated world trade between 1600 and 1800, creating great wealth for Europeans.[35] One of the significant differences between "new world" slavery of this period and slavery in the ancient world and in the Middle East and Africa at other times was its connection to global trade. Slaves in the ancient world were part of household economics. Slaves in the new world supported large-scale production of major commodities such as sugar and cotton, sold on world markets.[36]

What does this tell us about reparations? It tells us about the origins of states, the populations that inhabit them, and the institutions and social practices that resulted from this conquest and which persist to this day or influence current institutions and social practices. In other words, it tells us about structural racism. From this origin story eventually comes the movements and revolutions that brought about the states that we know of today in the "new world." The United States is one of these states. The United States (as a state and in its prior form as separate colonies) was not the only country that imported slaves. The United States (and its predecessor colonies) imported a relatively small percentage of enslaved people in the new world between 1500 and 1870 than Brazil, Spanish America, the French Caribbean, and the British Caribbean.[37]

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[34] Beckert, *supra* note 2.

[35] For a small sampling of research in the vast field of the study of the transatlantic slave trade, *see Atlantic Slavery and the Making of the Modern World,* 61 CURRENT ANTHROPOLOGY No. s22 (Oct. 2020).

[36] There are many sources for these points. *See.e.g.,* ROBIN BLACKBURN, THE MAKING OF NEW WORLD SLAVERY 10 (Verso 2d ed. 2010). Another significant difference between "new world" and "ancient" slavery was that new world slavery was racialized.

[37] Henry Louis Gates Jr., *How Many Slaves Landed in the U.S.?,* https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/how-many-slaves-landed-in-the-us/ (last viewed July 8, 2022); James N. Green, *Brazil, Five Centuries of Change,* https://library.brown.edu/create/fivecenturiesofchange/chapters/chapter-3/slavery-and-aboliton/ (last viewed July 9, 2022).

These states were created in conditions in which certain imperial subjects were free and others were not. The United States is widely understood to have its origins in the status of a setter colony, or a collection of settler colonies established under a common imperial authority. What started as a collection of settler colonies transformed after independence into a settler empire.[38] A settler colony is a colony supported by an imperial authority that eliminates indigenous peoples and cultures in a territory and replaces them with a settler society.[39] Notions of liberty and freedom in the settler colony origins of the United States are republican, as that concept is understood in a long tradition in political philosophy. Whatever the merits of republican political theory, in the United States, republicanism was the support on which one group, the settlers, declared themselves to be free, while others in out-groups, the enslaved and indigenous peoples among them, were unfree and subjugated. The subjugation that was so natural to the law of nations seems to have made its way into the law of states.[40]

II. THE CONTRADICTIONS OF FREEDOM IN SETTLER COLONY STATES

In political philosophy, there are three prevalent ways to understand the concept of liberty. One of the most common understandings to Americans is that of negative liberty. Negative liberty is freedom from interference from others, usually taken to mean freedom from interference by the state. Positive liberty is the freedom to act or possess the ability to act in ways that allow one to take control of one's life and realize one's ends. A third conception of liberty is known at republican liberty: freedom from domination. In the republican conception of liberty as non-domination, freedom does not require that you not be subject to interference by government. The law will necessarily involve some interference in one's liberty. Rather, what liberty requires is that you not be subject to the arbitrary or discretionary will of others. "Others" includes private agents and is not

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[38] AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 12-13 (Harvard University Press 2010).

[39] LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW (Palgrave Macmillan 2010).

[40] *See* MARTTI KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH (Cambridge University Press 2021).

limited to government. In the republican conception of governing, the law protects citizens from domination by others. The law itself must be promulgated and enforced in a way that avoids domination too, in a system of government that is participatory and of your own making, and not alien or controlled by a foreign power or prince. The animating ideas here, in summary, are that freedom from private domination is a requirement of justice while freedom from public domination is a requirement of political legitimacy.[41] Republicanism is opposed to liberalism, which rests on the notion of negative liberty, and which came to be known as classical liberalism in support of a minimalist state, offering no philosophical support for protection from non-domination.

"Republican" or "republicanism" refer to a long tradition in political philosophy tracing back to ancient Rome. Republicanism was a theory about the legitimate ways of governing that at the time of the War of Independence was seen as in contraposition to monarchical rule. It rests on three conceptions: (1) equal freedom for all citizens, with freedom as understood as non-domination; (2) a mixed constitution that imposed a range of constraints on government power, denying control to any one individual or body, and (3) an active citizenry that demonstrates the public and private virtue to monitor and challenge government policy and law-making.[42] These features of republicanism can be found in Roman thought, in the thought of medieval and Renaissance humanists, and later in the short lived English republicanism of the mid-seventeenth century.[43]

While English republicanism failed as an actual form of governing in Britain, republican ideas became hugely influential in the eighteenth century, during the period of the American Revolution. They were a mainstay of eighteenth-century political thought and furnished the foundation for the case for American independence.[44] There is a substantial consensus among historians on the influence of republicanism on colonial America at the time of the American Revolution.

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[41] PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 3 (Cambridge University Press 2012).

[42] *Id.*

[43] Philip Pettit, *A Brief History of Liberty – and its Lessons,* 2015 J. HUMAN DEV. & CAPABILITIES 1 (2015).

[44] Rana, *supra* note 38; GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (Vintage, 1991).

The focus here is not on republicanism as political thought, but in how, when put into action, human psychology overrode its ideals, with the tendency of humans to group and engage in tribal identifications of insiders and outsiders. In his Pulitzer Prize winning book, *The Radicalism of the American Revolution,* historian Gordon Wood identified as radical to the American Revolution the idea that every property-owning[45] man is "equally free and independent." This break from European monarchy, argues Wood, had "radical and momentous implication for Americans."[46] Unlike in countries ruled by monarchies, in America with its republican government, there were to be no "patron-client relationships" or "multiple degrees of dependency" that put men subject to the will of another.[47] This was understood as a position in which man was truly free. But as John Adams said in 1775, "[t]here are but two sorts of men in the world, freemen and slaves."[48] The distinction between free man and slave, between man and his dependents, put slavery into what Wood characterizes as of "conspicuous significance."[49]

From its early origins in the Roman Republic, republicanism in action has had a membership component, which limits who enjoys freedom and who suffers domination. In actual politics, this membership component has overridden any robust conception of liberty to be extended beyond all but a limited number of persons in a society. The Romans had slaves, who were unfree because subject to the will of their masters. The Romans used the Latin *dominatio* to describe the living conditions for their slaves.[50] In the eighteenth century, republican liberty was maintained by imperial authority that undermined the ideal of liberty itself.[51] Eighteenth century liberty, embedded in the American Constitution, rested on a contradiction. The American founders sought to eliminate all hierarchy in their new society, but they went about putting that elimination in action in a way that maintained and institutionalized in their new Constitution a

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[45] Property in eighteenth century colonial America is not about material possession, wealth, or profit, or at least not only those things, but a source of authority, autonomy, and independence and a feature of a man's personality that provided his identity and protected him from external pressure or influence. Wood, *supra* note 44, at 178.

[46] *Id.* at 179.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Pettit, *A Brief History of Liberty, supra* note 43, at 2.

[51] Rana, *supra* note 38, at 3.

significant hierarchy, that between white Protestant property-owning men and everyone else, all of whom had their socio-cultural roles and identities – women, children, property-less men, and slaves. As the relevance of monarchical rule receded what came pronounced in this political framework was the membership problem. The promise of freedom in the United States has linked historically to domination. Today we talk of the moral equality of each human person. This ideal was not at work at the time as we understand it today. As the American project continues, the move has been toward expanding membership, a reconceptualization of the citizen with rights to take part fully in state governance and society.

If I had more time and space, I would explore how legal rationalizations for conquest in the law of nations connect to theories of property rights for settlers and the political frameworks within new states that institutionalized freedom and domination. Much as the law of nations divided old and new worlds as between Westphalian sovereigns and conquered territories, the law of states that emerged from the conquest produced sharp divisions between the free and the unfree. The British took essentially a Lockean view in their conquest of North America, furnishing them with the permission to appropriate property by engaging in European-style cultivation of land.[52] There was no misappropriation or dispossession of the indigenous population in this action in their view, as the natives left land "lying waste in common" and therefore held no rights to it.[53] From these origins came the plantation economy and a grounding of republican freedom in exclusion and domination. These themes pervade the development of constitutional orders in the United States and in other countries with settler colony origins.

III. CONCLUSION

This short essay only scratches the surface of many themes, which I hope gives the reader some exposure, however limited, to the idea that we must understand the current structure of the American state and American society from historical and global points of view. This approach furnishes a richer context of our origin story based in conquest, how that conquest was justified, and how those justifications

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[52] *Id. at* 28-62; Koskenniemi, *supra* note 32, at 699-726.

[53] Koskenniemi, *supra* note 32 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT (6th ed. Millar 1764)).

influence how our society and constitutional order is structured today. An historical and global inquiry might help us fashion better remedies for historic injustice and better explanations for why those remedies are morally obligatory. This inquiry just might help us achieve that "more perfect union."[54]

[54] U.S. CONST. PREAMBLE.