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### A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights

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# U.C.L.A. Law Review

## A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights

Justin Desautels-Stein

### ABSTRACT

There is no critical race approach to international law. There are Third World approaches, feminist approaches, economic approaches, and constitutional approaches, but notably absent in the catalogue is a distinct view of international law that takes its point of departure from the vantage of Critical Race Theory (CRT), or anything like it. Through a study of racial ideology in the history of international legal thought, this Article offers the beginnings of an explanation for how this lack of attention to race and racism came to be, and why it matters today.

### AUTHOR

Justin Desautels-Stein, Director, Center for Critical Thought, University of Colorado. This Article is a piece of a much larger project, and the recipient of much helpful feedback from a number of directions. For comments on versions of the argument presented here, many thanks to E. Tendayi Achiume, Jim Anaya, Tony Anghie, Arnulf Becker Lorca, Devon Carbado, Kim Crenshaw, James Gathii, Chris Gevers, Michael Fakhri, Cheryl Harris, Fred Megret, Sam Moyn, Aziz Rana, Mohammad Shahabuddin, Anna Spain Bradley, Brian Tamanaha, Natsu Taylor Saito, Chantal Thomas, and Ntina Tzouvala. All errors are mine.



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## INTRODUCTION

International law is a strange business, and perhaps it has always been so. As a field of governance meant to restrict the wills of emperors, kings, and presidents, what was once called *jus gentium* surely boasts an unusual job description. Of course, it is this very quality that likely accounts for both the field's eternal popularity, as well as its perennial opprobrium. But here in the first decades of the twenty-first century, we might inquire about what is so especially strange about international law in the present moment. After all, since the postwar inauguration of the United Nations (UN), the functions of international law are now routine, if still questionably effective. What is strange about our current international legal order lies not in its fundamental purpose, or in its (in)ability to realize its aims. The issue is this: There is a hole in the fabric of international law, and very few have noticed.

To get a sense for this absence, consider Andrea Bianchi's *International Law Theories: An Inquiry into Different Ways of Thinking*. The book provides a recent survey of what is and is not going on in the intensely eclectic world of international legal thought.<sup>1</sup> In his tour of what it means to think like an international lawyer today, the scene includes no less than thirteen distinctive modes, including Law and Economics, Marxism, Feminism, and Third World Approaches to International Law (TWAAIL).<sup>2</sup> As the study attests, there is a lot going on in the contemporary analysis of international law. What is not going on in international legal thought, however, is the study of race. This silence was flagged twenty years ago in a symposium organized by the *Villanova Law Review*, titled "Critical Race Theory and International Law: Convergence and Divergence."<sup>3</sup> In the introduction to the symposium, Ruth Gordon wrote,

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1. ANDREA BIANCHI, *INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING* (2016).
  2. *See generally id.*
  3. Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 *VILL. L. REV.* 827 (2000). A sample of representative writings that have emerged in the last two decades since the symposium include ADOM GETACHEW, *WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION* (2019); JOHN REYNOLDS, *EMPIRE, EMERGENCY AND INTERNATIONAL LAW* (2017); HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* (2008); MOHAMMAD SHAHABUDDIN, *ETHNICITY AND INTERNATIONAL LAW: HISTORIES, POLITICS, AND PRACTICES* (2016); E. Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, 45 *GEO. J. INT'L L.* 323 (2014); Robert Knox, *Valuing Race? Stretched Marxism and the Logic of Imperialism*, 4 *LONDON REV. INT'L L.* 81 (2016); Celina Romany & Joon-Beom Chu, *Affirmative Action in International Human Rights Law: A Critical Perspective of its Normative Assumptions*, 36 *CONN. L. REV.* 831 (2004); Kim Benita Vera, *From Papal Bull to Racial Rule: Indians of the*

“Traditional international discourse is framed in terms of formal equality, and race appears to be an almost nonexistent factor. *International legal theory rarely mentions race, much less employs it as a basis of analysis.*”<sup>4</sup>

Gordon’s assessment is unfortunately as relevant today as it was then. Especially when we consider the flowering of international legal scholarship that has taken place in the last two decades along with the rising popularity of international law as a profession, the absence of race on Bianchi’s and many others’ lists is all the more puzzling. This silence is odd, not only because of the glaring mismatch between a form of social dislocation that is only getting worse and a global legal regime the interests of which remain elsewhere. The situation is strange because the failure to grapple with racism and xenophobia is not accidental. This hole in the global legal order is no oversight, it is not because of a lack of resources, it is not because of a lack of enforcement power, and it is not because of a lack of will. Or, at least, it is not only because of these things. Our obliviousness about international law’s silence is a result of an ideology of inclusion. And if that is right, a strange game is afoot.

But before getting to that, we should ask, is it correct to claim that international law rarely mentions race?<sup>5</sup> After all, the vulgar racism of the nineteenth century was eventually displaced in the move to international institutions that began with the League of Nations and the minority treaty system, and which then developed into the United Nations and international human rights law. With figures like Julian Huxley heading the newly formed United Nations Educational, Scientific, and Cultural Organization (UNESCO) and Ashley Montagu leading UNESCO’s “statements on race” project, along with the UN General Assembly’s adoption of the International Convention on the Elimination of All Forms of Racial Discrimination, the middle decades of the twentieth century gave international law an explicit and intentional rejoinder to

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*Americas, Race, and the Foundations of International Law*, 42 CAL. W. INT’L L.J. 453 (2012); and Adrienne Katherine Wing, *Global Critical Race Feminism: A Perspective on Gender, War, and Peace in the Age of the War on Terror*, 15 MICH. ST. J. INT’L L. 1 (2007).

4. Gordon, *supra* note 3, at 829–30 (emphasis added).
5. In this Article I do not have the space to take up the fascinating question of whether the Third World Approaches to International Law (TWAAIL) movement does, in fact, provide a racial approach to international law, and I simply take it as a given here that TWAAIL and a critical race approach to international law are meaningfully different things. At the level of international institutions, the Office of the High Commissioner for Human Rights has shouldered the task since the middle of the twentieth century. Today, the most prominent agencies within that Office tasked with combating racism in international law are the Committee on the Elimination of Racial Discrimination (CERD), and the Special Rapporteur on Contemporary Forms of Racism.

nineteenth century racism.<sup>6</sup> After the U.S. civil rights movement went mainstream and South African apartheid finally collapsed, the global response to racism seemed triumphant. To be sure, even on the mainstream view there was work still to be done. In 1993, the United Nations Human Rights Council established a Special Rapporteur on Contemporary Forms of Racism, in 2001 a world conference against racism was held in South Africa, and the international machinery of administration and conferences continue to churn today.

My claim in this Article is that while it is certainly true that for more than a century international lawyers have wrestled with the problem of racial prejudice and the ability to craft international laws and institutions that might respond to and regulate that racism, what has been very rarely addressed is the way in which international legal thought is itself constituted by a structure of racial ideology.<sup>7</sup> On this view, race and racism are not merely objects of legal regulation. Rather, these concepts perform as modes of justification essential to the liberal construction of the entire system.<sup>8</sup> My claim therefore depends upon a distinction between racism as a form of individual prejudice and anomalous behavior on the one side, and racism as a structure of racial ideology on the other.

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6. See, e.g., MICHAEL BANTON, *THE INTERNATIONAL POLITICS OF RACE* (2002); PATRICK THORNBERRY, *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* (2016).
  7. This Article anticipates a much more extensive analysis in my forthcoming book, *THE RULE OF RACIAL IDEOLOGY: A GLOBAL CRITIQUE OF LAW, BORDERS, AND THE RIGHT TO EXCLUDE* (forthcoming with Oxford University Press). For a discussion of ideology and law, see Justin Desautels-Stein & Akbar Rasulov, *Deep Cuts: Four Critiques of Legal Ideology*, 31 *YALE J.L. & HUM.* 435 (2021).
  8. For a sample of the literature on critical race theory, see DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 *IOWA L. REV.* 1497 (2009); Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 *STAN. L. REV.* 985 (2007); and Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329 (2006). I do not want to be misunderstood for suggesting that racism necessarily trumps other forms of discrimination in international law. Rather, the claim is that racism garners far less attention than sexism or economic development in international law. With respect to the reality of an intersectional pattern of worldwide discrimination, see, for example, PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2d ed. 2000); ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* (1983); AUDRE LORDE, *Age, Race, Sex and Class: Women Redefining Difference*, in *SISTER OUTSIDER* 114 (rev. ed. 2007); Sumi Cho et al., *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 *SIGNS* 785 (2013); Kelly Coogan-Gehr, *The Politics of Race in U.S. Feminist Scholarship: An Archaeology*, 37 *SIGNS* 83 (2011); and Rebecca L. Clark Mane, *Transmuting Grammars of Whiteness in Third-Wave Feminism: Interrogating Posttrace Histories, Postmodern Abstraction, and the Proliferation of Difference in Third-Wave Texts*, 38 *SIGNS* 71 (2012).

With respect to the study of racial ideology in international law, since the middle decades of the nineteenth century and in the context of liberal political theory, there have been three primary structures of racial ideology: classic, modern, and postracial. The classic structure of racial ideology was singularly focused on the production of raciality and the justification of exclusion. One might presume that international lawyers in the nineteenth century had little difficulty in excluding certain peoples from the realm of sovereignty. Exclusion, after all, was hardly a new idea.<sup>9</sup> For millennia, it was typical to separate the barbarians from the *zoon politikon*. For even longer there have been characteristic efforts to distinguish various peoples from one another on the basis of religion, and before that, surely, there was “us” and “them.” After the introduction of liberal theory, however, these old maneuvers for excluding outsiders from insiders were, simply put, illiberal. Religion proved too blunt of a tool for distinguishing analytically between the “civilized” and “uncivilized.” To be sure, a prominent and recurring proxy for what counted as “civilized” was whether a sovereign was Christian. As a mode of legal argument, however, references to religious authority inevitably came into conflict with the liberal view of the rights-bearing individual on which the new understanding of the sovereign was based.

It was precisely at the same time that international lawyers were seeking legal justifications to exclude large portions of the world from the rights of sovereignty that the science of racial classifications was exploding throughout the Western world. First invented in the late seventeenth century and slowly evolved over the course of the eighteenth, it was in the nineteenth century that raciality emerged as a reliable piece of empirical science. Of course, this science of race was racist.<sup>10</sup> Configured like a set of concentric circles, at the center of the target belonged the most developed human beings, those peoples descended from the Caucasus region between the Black and Caspian seas. One step out were those Aryan relatives of the proto-Indo-European peoples that had migrated out to Spain, India, and Persia. Next were the American Indians and “Mongoloid” peoples, and finally were those descendants from the African continent. Each circle designated

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9. See, e.g., WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* (2010); MICHAEL BURLEIGH, *EARTHLY POWERS: THE CLASH OF RELIGION AND POLITICS IN EUROPE FROM THE FRENCH REVOLUTION TO THE GREAT WAR* (2005); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–960* (2001); JENNIFER PITTS, *A TURN TO EMPIRE: THE RISE OF IMPERIAL LIBERALISM IN BRITAIN AND FRANCE* (2006).

10. See BRUCE BAUM, *THE RISE AND FALL OF THE CAUCASIAN RACE: A POLITICAL HISTORY OF RACIAL IDENTITY* 95–118 (2006); IVAN HANNAFORD, *RACE: THE HISTORY OF AN IDEA IN THE WEST* (1996). For the legal context of these concepts, see Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1 (2012).

a degree of intellectual, cultural, and spiritual achievement, starting with the greatest achievements at the center and moving out accordingly.<sup>11</sup>

This hierarchy of racial classification became the model for what international lawyers coined “the Family of Nations.”<sup>12</sup> With respect to its ideological structure—if not the reality of practice—at the center of the system were the Great Powers. Next came those middle and small European powers, all of whom enjoyed sovereign rights. Eventually the United States and the “liberated” colonies of South America would join as well. The Persians, the Ottomans, the Chinese, and Japanese existed in a semi-peripheral, quasi-civilized outer circle beyond the borders of the Family of Nations.<sup>13</sup> Africa existed further out still. The ability to provide legal justifications for excluding much of the non-European world was of great importance to the Great Powers: If a people could claim sovereignty, they claimed the equal rights of civilization, of liberalism, including rights of nonintervention and self-determination. What’s more, these legal justifications needed to be liberal in and of themselves. After all, the hierarchy of racial classification was no piece of ancient foolishness. It was new and grounded in natural science. As a legal justification for the exclusion of peoples from the Family of Nations, the science of racial classification was perfect.

In contrast, the modern structure of racial ideology emerged in the course of the twentieth century with the following characteristics. First, there was a weakening of the argument that theories of racial development could justify the sovereign’s right to exclude other peoples from the Family of Nations, that international community of rights-bearing peoples. Whereas in classic racial ideology, race proved an international legal justification for exclusion, in the modern form a more functional view of international society suggested the need to be more inclusive. And in many important ways, the new international institutions of the twentieth century did become, very slowly, more inclusive. Second, modern racial ideology’s more catholic approach to international society was underwritten by a shifting of the racialized right to exclude to the borders between national communities. Whereas there had earlier been a far more *laissez-faire* approach to border controls, by the early decades of the twentieth century sovereigns were relying on a new form of race science to justify the exclusion of undesirable people at the border. This was a moment in which international law

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11. See NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* (2010); NANCY STEPAN, *THE IDEA OF RACE IN SCIENCE: GREAT BRITAIN 1800–1960* (1982).

12. For an overview of the “Family of Nations,” see 1 L. OPPENHEIM, *INTERNATIONAL LAW* 10–12, 31–35 (2d ed. 1912).

13. See ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842–1933* (2014).



might have moved the question of migration to the foreground of its disciplinary machinery, but instead, the problem of constituting boundaries was deposited in the background space of the right to exclude. Reinforcing this view of international law's limited appetite for antiracist regulation, the effort to promote racial equality as an international ideal eventually diminished into an individualized mode of antidiscrimination law. By the 1970s, the international responsibility for racial equality was becoming the sole province of human rights.

Between World War II and the 1970s, international law's association with the antidiscrimination principle was not as markedly individualist as we think of it today. For even while the antidiscrimination principle was being developed in the early iterations of the UN's International Convention on the Elimination of Racial Discrimination (ICERD) and on the administrative machinery of its Committee on the Elimination of Racial Discrimination (CERD), it was also pressed into the service of the decolonization movement. But after decolonization peaked in efforts like the project for a New International Economic Order, the antidiscrimination principle shifted entirely into the familiar space of international human rights law. Once understood as also a fixture of decolonization's social justice program, the antidiscrimination principle soon reemerged in the individual rights regime. The problem of raciality generative of peoples, and of racial discrimination waged against peoples, was morphing into a problem of individual prejudice. Consequently, and for the most part, the concept of antidiscrimination detached itself from the anticolonial mission and enrolled in the newly energized international human rights movement.

This intellectual alliance between the generalized prohibition on racial discrimination and international human rights law is a crucial feature of the contemporary morph from modern to postracial ideology. It is here that we come to see the hallmark of international law's current race problem: by the time the use of racial classifications merged with the "neutrality" of the antidiscrimination principle, and work on the physical anthropology of race became increasingly nebulous, cultural disagreement emerged as a primary focus of international legal scholarship and practice. Racism and xenophobia dropped out of the conversation, and now running riot at the border, lie in a blind spot, secluded from international law's field of vision. It is in this double foregrounding of multiculturalism and its discontents on the one side, and the hegemony of the antidiscrimination principle on the other, that the challenges of racism and xenophobia slide into international law's background. It is because of this double maneuver that we often fail to see how the shift from the Family of Nations to the United Nations did not delete the racially exclusionary practices of the nineteenth century as much as it cut and pasted them at a different kind of borderland. It was

here that a new ideology of inclusion busily worked its way up above, distracting from a new ideology of exclusion, digging in below.

Why does this view of racial ideology in international law remain so obscured? The answer is implicated in the development of a third and contemporary phase of racial ideology, a postracial ideology which mystifies the contemporary manifestation of the sovereign's right to exclude. On the other side, there is ideological justification for a contemporary vision of the right to exclude. Postracial ideology shoulders both tasks: mystification and justification.

The purpose of this Article is to help explain the ideological preconditions for postracial ideology in international law, but not the postracial structure itself. That is, this Article lays out a prologue to the story of racial ideology in our own era of international human rights law. In doing so, the Article begins with some comments on methods of analysis. As I have said, the target in this inquiry is racial ideology, and as I explain in Part I, I understand racial ideology as a *legal* ideology—that is, as a mode of naturalizing juridical science. My aim is not to tell an intellectual or social history of international law. I do not mean to suggest that the concept of race or racial ideology is somehow the key variable that can explain everything. My aim is more technical, which is to understand the racialized structure of an ideological form of legal justification. Part I both clarifies the purpose of this methodological approach, and hopefully avoids some misunderstandings about what it is not. Part II turns to the classic mode of racial ideology in international law. It looks to the international lawyer and U.S. statesman Elihu Root as exemplary of its operation. The defining feature of the classic mode is its use as a mediating device: As international lawyers and politicians assumed the classic liberal view of sovereigns as free, equal, and independent, the question was how to justify the frontiers of the community of rights-bearing sovereigns. Racial ideology shouldered that task. Part III explores the mistaken premises of this conventional narrative and explains why today's lack of a racial approach to international law is no accident. As the twentieth century began, nineteenth century fascinations with phrenology and bloodline were slowly giving way to new advances in anthropology, and the old science of racial classification was weakening. As a result, many international lawyers argued for a retreat from the old Family of Nations model, and a move forward toward an international law of racial equality. In international legal thought, what emerged by the 1920s is what I call a modern structure of racial ideology. On the one hand, racial discrimination was becoming slowly disfavored at the level of international society. Rather than exclude nonwhite peoples from the new international institutions, international law was taking baby steps in its new embrace of an ideology of inclusion. All peoples were believed to enjoy the right of international participation, *eventually*. On the other

hand, this ideology of inclusion at the level of international institutions drew attention away from a new ideology of exclusion digging in at the level of territorial borders. While nineteenth century international law had largely abided by a laissez-faire approach to migration, the League of Nations formed a new international law of territorial exclusion that was entrenched by the U.S. Supreme Court and Congress. This right to exclude individual people at the territorial border, memorialized in the U.S. Immigration Act of 1924, became the gold standard for sovereigns around the globe. Under the influence of a burgeoning eugenics movement, this right to exclude individual people from domestic society was decisively racial—and was the twentieth century update to the nineteenth century's right to exclude peoples from international society.

This is the great bait and switch: While a racial ideology of exclusion was slowly giving way at the level of international institutions, it was reimagined at the level of territorial borders and a regime of racialized migration governance. The consequences of the displacement of a racialized right to exclude from the Family of Nations to the sovereign border have been dramatic. Despite the fact that support for the so-called plenary power to exclude migrants was drawn from international law, and that the sovereign's contemporary right to exclude is an international rule, the very idea of racism in international law has gone right out of sight. The reasons are many, but chief among them is the mainstream view that racism does not exist as a structure of racial ideology, but instead exists as acts of individual discrimination. And if racial discrimination is the problem, human rights law is the answer. But this view of discrimination neither understands the scope of today's right to exclude, nor the racial ideology that continues to sustain it.

Until we can better understand what became of international law's classic mode of racial ideology, and how it morphed into a modern structure, we will continue to see international law's race problem as entirely marginal—a problem that does not really infect the discipline as much as it does individual agents. The twenty-first-century transition into a postracial ideology is bad news: more disastrous than the moderns, and more deceptive than the classics. At the same time, the sovereign right to exclude seems more powerful than ever. In the first decades of the twenty-first century, a generalized fear of foreigners—and foreignness—is spinning out of control. At the least, here in the wake of a Trump Administration run amok and a Biden Administration struggling at the border, the sovereign right to exclude foreigners that was born in the crucible of modern racial ideology appears revitalized. What's more, the right of certain peoples to exclude other peoples from the community of rights-bearing sovereigns looks to be on the rise. To be sure, there is nothing yet that suggests the coming arrival of a

new Congress of Vienna, with its explicit forms of legal hierarchy. And yet, this is precisely what certain thinkers in the United States have recently been advocating for in the context of the so-called War on Terror: While so-called great powers like the United States ought to enjoy the full rights of sovereignty, peoples either “unable” or “unwilling” to conduct themselves “rationally” on the world stage should not.<sup>14</sup> Startlingly, the sovereign’s right to exclude—both at the level of territorial border control and at the level of sovereign-sovereign relations—is more active than it has ever been in international legal history. If international human rights law is the answer, so be it. But let it be reimagined.

### I. ON METHOD

While largely understudied, race has substantially influenced international legal thought. Of course, this influence has been intensely diverse, and might be analyzed in any number of arenas.<sup>15</sup> In this Article, my focus is on the use of race as a structure of argumentative practice, with race serving a powerfully harmonizing purpose in the context of liberal legal thought.<sup>16</sup> In brief, liberal legalism begins in a contest with its Aristotelian predecessor, articulating a baseline thesis of individual right against the Aristotelian theory of intelligible essences.<sup>17</sup> But this thesis of individual right cannot stand alone. It requires political management, thus triggering a second liberal commitment to political order. The problem in securing this form of order, however, is the persistent question of equality. In the effort to tame the thesis of individual right, no one group could naturally profit at the expense of another. The solution to this problem is a third thesis in the language of liberal legal thought: the rule of law—or naturalizing juridical science.<sup>18</sup>

In the classic *From Apology to Utopia*, Martti Koskenniemi outlined this precise problem at the level of international legal thought, in which the demands

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14. See, e.g., JOHN YOO, POINT OF ATTACK: PREVENTIVE WAR, INTERNATIONAL LAW, AND GLOBAL WELFARE (2014).

15. For recent works, see, for example, EMPIRE, RACE, AND GLOBAL JUSTICE (Duncan Bell ed., 2019), and CAROLA LINGAAS, THE CONCEPT OF RACE IN INTERNATIONAL CRIMINAL LAW (2020).

16. My use of “structure of argumentative practice” draws heavily upon JUSTIN DESAUTELS-STEIN, THE JURISPRUDENCE OF STYLE: A STRUCTURALIST HISTORY OF AMERICAN PRAGMATISM AND LIBERAL LEGAL THOUGHT (2018), and Justin Desautels-Stein, *International Legal Structuralism: A Primer*, 8 INT’L THEORY 201 (2016).

17. See ROBERTO MANGABEIRA UNGER, KNOWLEDGE & POLITICS (1975).

18. DESAUTELS-STEIN, *supra* note 16, at 10 (“In the context of liberal legal thought, naturalizing juridical science holds that legislation is political and discretionary, that adjudication is impersonal and constraining, and that in order to maintain this distinction, the work of adjudication must prove a natural harmony between the imperatives of the first two theses.”).

of freedom, order, and the rule of law recur.<sup>19</sup> In this illustration of international critical legal studies, Koskenniemi suggested that the legal concept of sovereignty is stuck in a paradox if one only considers the conflicting demands of freedom and order. To move past it, international lawyers harmonize the dissonance by way of a process of intellectual mediation, namely a state's tacit consent to the rule of law. For instance, State A will argue against State B that it deserves the freedom to act in furtherance of its self-preservation and that it is beholden to no rules to which it has not given its consent. State B will argue against State A that if there is to be any kind of meaningful international order, certain rules must constrain all sovereigns in the choices that they make. These two claims about freedom and order—what Koskenniemi calls ascending and descending patterns of argument—are mutually exclusive so long as the whole structure is founded on an underlying premise of sovereign equality: thus, the contradiction. The way to harmonize this apparent tension between the demands of freedom and order is to suggest State A's tacit consent to the rule of law. Strictly speaking, and wholly in the abstract, this is a nonracialized form of naturalizing juridical science.

I mention Koskenniemi's important work in *From Apology to Utopia* in order to distinguish a structure of argumentative practice in which equality predominates from a structure of argumentative practice in which it does not. Under Koskenniemi's framework, the drive toward a mediating device like tacit consent is motivated by the indispensable requirement that sovereigns consent to the rules by which they are governed. Modifying consent so that it speaks at once to the contrasting theses of freedom and order gives the appearance of harmony. And this modification is the trick explored throughout *From Apology to Utopia*. But the present question is not about how to harmonize the conflict between the theses of freedom and order. It is rather about how to harmonize conflicts over the scope or frontiers of that structure. Which groups participate in the liberal structure of argument, and which are left out?<sup>20</sup> As we will see momentarily—unlike the approach taken by Koskenniemi—this is a racialized form of naturalizing juridical science, or what I call racial ideology.

Of course, the question of who's in and who's out of the global order has been among the central questions of postcolonial studies.<sup>21</sup> For instance, in his

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19. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006). A classic statement of this view of sovereignty is reflected in EMER DE Vattel, *THE LAW OF NATIONS* (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., 2008).

20. Notice that the question of participation here is not a question about the empirical realities of the international legal order. It is rather a question of legal argument, and who is considered deserving of engaging in this structure of legal argument.

21. See, e.g., KWAME NKRUMAH, *NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM* (1965).

illuminating *Imperialism, Sovereignty and the Making of International Law*, Antony Anghie agreed that the traditional starting point in international legal thought has been about how to justify the existence of rules that could bind sovereign states.<sup>22</sup> But Anghie argued that the quest to justify the limitation of that question to only certain populations served as a guarantee for the rest of the system, and that the relation between this limitation and the system's making had yet to be understood.<sup>23</sup> For while it may have been true that the premise of sovereign equality made it difficult to justify a legal order, Anghie pointed out that the concept of sovereign equality came into being in a prefigured context of domination and subordination. That is, the cultural character of sovereignty was itself defined by the way international legal thought answered the question of scope.<sup>24</sup> This is Anghie's well known theory of the dynamic of difference, in which the sovereign form was defined by way of its cultural other.<sup>25</sup>

What is generally missing in the international law literatures of critical and postcolonial studies, however, is an analysis of racial ideology and its legal structures.<sup>26</sup> To analyze the legal structure of racial ideology, and yet still remain within the confines of *From Apology to Utopia's* understanding of liberal legalism, I retain the ideological focus on structures of mediation and harmonization. But the mediating function is different in the context of exclusion than in the context of equality. After all, if the claim from State A is that they are a people with governing power over a specified territory, and that this people understands itself as subject to no higher forms of legal or political authority, it does not make much sense for State B to argue that State A has impliedly consented to the rule that State A ought to be excluded from the family of sovereign states. That is exactly the opposite of what they are saying. The device of tacit consent is consequently too narrow to justify excluding certain peoples from the structure itself.

Furthermore, while I follow Anghie's lead in interrogating the cultural constitution of sovereignty, I set aside Anghie's dynamic of difference as it is too

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22. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2004).

23. *Id.* at 3–8.

24. There are many examples of the use of race as a means of exclusion throughout U.S. law, as well as in international law. On the domestic side, critical race theory has done the most in pursuit of the point. See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (rev. ed. 2006); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 *STAN. L. REV.* 1 (1991). For helpful discussion of the point at a broader level, see THOMAS MCCARTHY, *RACE, EMPIRE, AND THE IDEA OF HUMAN DEVELOPMENT* (2009).

25. ANGHIE, *supra* note 22, at 3–4.

26. Much of the current attention views race as peripheral to international legal thought. See, e.g., Martti Koskenniemi, *Race, Hierarchy, and Legal Science: Lorimer's Legal Science,* 27 *EUR. J. INT'L L.* 415 (2016).

broad as an explanatory device. The dynamic of difference attends us-them relations going back into antiquity, well before the invention of racial ideology. For liberals working in the nineteenth century, something more than “positivism” was required that might serve as a foundation for separating out an us from a them, and it is here that race becomes a form of naturalizing juridical science in the liberal hunt for harmonious justification for the gap between equality and exclusion. We end up with a racial ideology the function of which is to justify: (1) a particular a structure of rules; and (2) a structure of argumentative practice.

In a “classic” mode of liberal legal thought, sovereignty is premised on key themes duplicated in the context of private property.<sup>27</sup> Sovereignty is at its core about autonomy and self-determination, distilled in the rule that all sovereigns have the right to exclude other sovereigns from the places and communities they call their own. This right to exclude, however, is necessarily indeterminate. Who exactly gets to exclude who from where and from what? The answers quickly multiply: There is the sovereign right to exclude other sovereigns from discrete territories. There is the sovereign right to exclude other “sovereigns” from the community of sovereigns. There is the sovereign right to exclude nonstate actors from each of these separate domains. In the classic liberal style, these statements about exclusion and sovereignty intertwine in the following rule: Only racially superior populations of human beings are naturally able to achieve the legal status of sovereignty, and it is only the sovereign state that may rightfully exclude other sovereigns from its territory and community.<sup>28</sup>

As was argued repeatedly by nineteenth century jurists defending this exclusionary effort, only racially superior sovereigns were bound by the laws of territorial integrity and nonintervention.<sup>29</sup> If a racially superior state sought to use force on a territory belonging to a racially inferior people, the rules governing the ensuing violence were purely “moral.”<sup>30</sup> Thus, in the classic style of liberal legal thought, the general argument began with the three theses of liberal legalism: (1) freedom of right (for whom?); (2) ordered liberty (for whom?); and (3) a harmonizing rule of law. Taken together, these three theses provide the basic

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27. See, e.g., ANDREW FITZMAURICE, *SOVEREIGNTY, PROPERTY AND EMPIRE, 1500–2000* (2014); Justin Desautels-Stein, *The Realist and the Visionary: On the Problem of Social Change in the History of International Legal Thought*, in *CONTINGENCY IN THE COURSE OF INTERNATIONAL LAW: HOW INTERNATIONAL LAW COULD HAVE BEEN* (Kevin Jon Heller & Ingo Venzke eds., forthcoming 2021).

28. For discussion of racial superiority and political status, see BAUM, *supra* note 10; HANNAFORD, *supra* note 10.

29. See, e.g., PAINTER, *supra* note 11; STEPAN, *supra* note 11.

30. See, e.g., THEODORE D. WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* 231–33 (1860).

contours for the liberal concept of sovereignty. Next, restrict the presumption of sovereign equality to a certain few: those peoples ranking as fully human. Finally, these restrictions must be justifiable from within the borders of liberal theory, and the empiricism of race science fit the bill perfectly.<sup>31</sup> But this construction of the racial sovereign is necessarily in the background, constituting the very idea of what counts as a full participant in the international legal order.<sup>32</sup>

As a structure of argument, nineteenth century jurists deployed a racial ideology for excluding those sovereigns enjoying the full arsenal of international legal rights from those that did not. This strategy included the use of new legal concepts like “the Great Powers” and “the Family of Nations.” And just as the science of race emerged as a means for producing a hierarchy of value in human classification,<sup>33</sup> so too did it function to discriminate between those racially superior states enjoying full international legal personality, and those that did not.<sup>34</sup> Importantly, this exclusionary effort did not simply mean that nonwhite nations enjoyed fewer rights than the so-called white nations. It meant that when nations attacking under cover of whiteness would invade those racially inferior nations, the laws of war simply did not apply. Even more importantly, this form of exclusion was indigenous to liberal theory, predicated on empirical epistemology rather than religion or culture. Racial exclusion was justifiable because it was knowable as natural science. And if it was knowable as natural science it was knowable as legal science. The result is a working definition of a racial ideology: a form of naturalizing juridical science in which patterns of argumentative practice at once give structure to indeterminate legal concepts and justify relations of domination through the use of seemingly neutral racial classifications.<sup>35</sup>

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31. On the early relation between empiricism and liberalism, see generally JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Peter H. Nidditch ed., Oxford Univ. Press rev. ed. 1979) (1689), and DAVID HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* (Stephen Buckle ed., Cambridge Univ. Press 2007) (1748).

32. Sumi Cho & Gil Gott, *The Racial Sovereign*, in *SOVEREIGNTY, EMERGENCY, LEGALITY* 182 (Austin Sarat ed., 2010).

33. An obvious analogue here is the problem of slavery in the United States. See, e.g., WILLIAM HARPER ET AL., *THE PRO-SLAVERY ARGUMENT: AS MAINTAINED BY THE MOST DISTINGUISHED WRITERS OF THE SOUTHERN STATES: CONTAINING THE SEVERAL ESSAYS ON THE SUBJECT, OF CHANCELLOR HARPER, GOVERNOR HAMMOND, DR. SIMMS, AND PROFESSOR DEW* (Walker, Richards & Co., 1853); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812* (1968).

34. See TRAVERS TWISS, *THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES: ON THE RIGHT AND DUTIES OF NATIONS IN TIME OF PEACE* 120 (1861). See also the earlier discussion of “modified natural law” in DIETRICH HEINRICH LUDWIG VON OMPTEA, *LITERATURE ON THE ENTIRETY OF INTERNATIONAL LAW, BOTH NATURAL AND POSITIVE* (1785).

35. For more on ideology in the legal context, see Desautels-Stein and Rasulov, *supra* note 7. See also DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1998).



This emphasis on the ideological function of justification, and the role that the science of racial categories has played in the process of circumscribing liberalism, has much in common with Roland Barthes's well-known analysis of myth.<sup>36</sup> As Barthes explained, a mythical ideology "has the task of giving a historical intention a natural justification, and making contingency appear eternal."<sup>37</sup> The principal figures in this process, Barthes continued, were inoculation, tautology, and the privation of history.<sup>38</sup> As discussed above, the story of race science and the invention of whiteness deploy these figures systematically. Indeed, *racial ideology* takes historical reality and gives the new concept of race a natural orientation, covering up contingency with necessity.<sup>39</sup> Racial ideology, in this sense, depoliticizes in the service of rendering a history of slavery, discrimination, exploitation, and destruction, as natural, neutral, and necessary, "a harmonious display of [human] essences."<sup>40</sup> Barthes explained that the exnomination of belief—the resistance to naming—is itself an indication of ideological naturalization.

Diagnosing the mythology of the bourgeoisie, Barthes pointed to the various registers in which that set of beliefs operates. At the economic level, there is little in the way of denial. The economic system of the bourgeoisie was capitalism, plain and simple. At the political level, things get murkier. There has never been a "Bourgeois Party," so named. But at the level of ideology, Barthes suggested, bourgeois beliefs disappear completely. "The bourgeoisie has obliterated its name... it makes its status undergo a real exnominating operation: the bourgeoisie is defined as the social class which does not want to be named."<sup>41</sup> Ideological success, said Barthes, becomes knowable by way of a "locus of an unceasing hemorrhage: meaning flows out of [the bourgeois] until [its] very name becomes unnecessary."<sup>42</sup> This bleeding of the concept out and into every crevice of the culture, just as the concept of race has done today, signals a naturalization of the concept so powerful we could call it hegemonic. As Barthes continues:

[I]n a bourgeois culture, there is neither proletarian culture nor proletarian morality, there is no proletarian art; ideologically, all that is not bourgeois is obliged to borrow from the bourgeoisie. Bourgeois ideology can therefore spread over everything and in doing so lose its name without risk: no one here will throw this name of *bourgeois* back

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36. ROLAND BARTHES, *MYTHOLOGIES* 34 (Richard Howard & Annette Lavers trans., 2d ed. 2013).

37. *Id.* at 254.

38. *Id.* at 267.

39. *Id.* at 254.

40. *Id.* at 255.

41. *Id.* at 250.

42. *Id.*

at it. It can without resistance subsume bourgeois theater, art, and humanity under their eternal analogues; in a word, it can exnominate itself without restraint when there is only one single human nature left: the defection from the name *bourgeois* is here complete.<sup>43</sup>

Whereas mystification involves a hiding of ideology through a series of argumentative techniques, legitimation involves the different work of consolidating the ideology as not only a natural feature of social life (the way it is), but a legitimate feature of social life (the way it ought to be). If ideology successfully sheds its name in the way the snake sheds its skin, legitimation follows a similar route. And so, Barthes notes:

[J]ust as bourgeois ideology is defined by the abandonment of the name *bourgeois*, so myth is constituted by the loss of the historical quality of things: in it, things lose the memory that they once were made. The world enters languages as a dialectical relation between activities, between human actions; *it comes out of myth as a harmonious display of essences*. A conjuring trick has taken place; it has turned reality inside out, it has emptied it of history and has filled it with nature, it has removed from things their human meaning so as to make them signify a human insignificance.<sup>44</sup>

What Barthes said of bourgeois ideology, we can now say of racial ideology.<sup>45</sup> Of course, racial ideology offers different justifications in different places and different times, a point one would be mistaken to treat carelessly. Indeed, not only the justifications of racial ideology, but racism itself, are historically dependent, varied in context.<sup>46</sup> Nevertheless, I claim that racial ideology played a special role

43. *Id.* at 251.

44. *Id.* at 255 (emphasis added).

45. Influential works on my thinking about racial ideology include NAHUM DIMITRI CHANDLER, X: THE PROBLEM OF THE NEGRO AS A PROBLEM FOR THOUGHT (2013); DENISE FERREIRA DA SILVA, TOWARD A GLOBAL IDEA OF RACE (2007); SAIDIYA HARTMAN, SCENES OF SUBJECTION (1997); FRANTZ FANON, BLACK SKIN, WHITE MASKS (Richard Philcox trans., Grove Press 2008); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1976); EUGENE D. GENOVESE, IN RED AND BLACK: MARXIAN EXPLORATIONS IN SOUTHERN AND AFRO-AMERICAN HISTORY (1971) [hereinafter GENOVESE, IN RED AND BLACK]; C. L. R. JAMES, THE BLACK JACOBS: TOUSSAINT L'OVERTURE AND THE SAN DOMINGO REVOLUTION (Vintage Books ed. 1989) (1963); CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (Univ. N.C. Press 2000) (1983); FRED MOTEN, IN THE BREAK: THE AESTHETICS OF THE BLACK RADICAL TRADITION (2003); GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (1998); and JOHN B. THOMPSON, STUDIES IN THE THEORY OF IDEOLOGY 5–6 (1984).

46. For arguments on the disaggregated state of racial identity, see KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE (1992); PAUL GILROY, BETWEEN CAMPS: NATIONS, CULTURES AND THE ALLURE OF RACE (2000) [hereinafter GILROY, BETWEEN CAMPS]; PAUL GILROY, "THERE AIN'T NO BLACK IN THE UNION JACK": THE CULTURAL POLITICS OF RACE

within the global context of liberal legal thought: to both produce and defend the delimitation of liberalism to the circle of whiteness.<sup>47</sup> Or to put this in Charles Mills's language, it is the function of racial ideology to rationalize and justify liberalism in the register of the racial contract. Or as Anthony Farley has suggested, the original moment of departure from the natural world was also a moment in which the members of the new society who would be ruled were distinguished from those who would rule it.<sup>48</sup> If the racial contract required liberal justification, or in other words, if the human mind desired a rationale for just why it was that all human beings were not "full persons" after all, then the mark of science was the answer.<sup>49</sup> Or as Barbara Fields argued, "Racial ideology supplied the means of explaining slavery to people whose terrain was a republic founded on radical doctrines of liberty and natural rights . . . . Race explained why some people could rightly be denied what others took for granted: namely, liberty, supposedly a self-

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AND NATION (1987); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); and Kenneth W. Warren, *Appeals for (Mis)recognition: Theorizing the Diaspora*, in CULTURES OF UNITED STATES IMPERIALISM 392 (Amy Kaplan & Donald E. Pease eds., 1993). On the contextualization of race and racism, see, for example, Olindo De Napoli, *Race and Empire: The Legitimation of Italian Colonialism in Juridical Thought*, 85 J. MOD. HIST. 801 (2013); George M. Fredrickson, *Diverse Republics: French & American Responses to Racial Pluralism*, 134 DAEDALUS 88 (2005); David A. Hollinger, *The One Drop Rule & The One Hate Rule*, 134 DAEDALUS 18 (2005); Christopher J. Lee, *Jus Soli and Jus Sanguinis in the Colonies: The Interwar Politics of Race, Culture, and Multiracial Legal Status in British Africa*, 29 L. & HIST. REV. 497 (2011); Shu-Mei Shih, *Comparative Racialization: An Introduction*, 123 PMLA 1347 (2008); and Hulme T. Siwundhla, *White Ideologies and Non-European Participation in the Anglo-Boer War, 1899–1902*, 15 J. BLACK STUD. 223 (1984).

47. SILVA, *supra* note 45, at 29. A complication concerns the very distinction between black and white, and the framing power of that distinction. For discussion, see, for example, LINDA MARTÍN ALCOFF, *THE FUTURE OF WHITENESS* (2015); MANNING MARABLE, *BEYOND BLACK & WHITE: TRANSFORMING AFRICAN-AMERICAN POLITICS* (1995); Kathryn T. Gines, *Critical Philosophy of Race Beyond the Black/White Binary*, 1 CRITICAL PHIL. RACE 28 (2013); and Theresa H. Pfeifer, *Deconstructing Cartesian Dualisms of Western Racialized Systems: A Study in the Colors Black and White*, 39 J. BLACK STUD. 528 (2009).
48. See Anthony Paul Farley, *The Colorline as Capitalist Accumulation*, 56 BUFF. L. REV. 953 (2008).
49. SILVA, *supra* note 45, at 105; GILROY, *BETWEEN CAMPS*, *supra* note 46, at 31 ("Though it would be foolish to suggest that evil, brutality, and terror commence with the arrival of scientific racism toward the end of the eighteenth century, it would also be wrong to overlook the significance of that moment as a break point in the development of modern thinking about humanity and its nature."); see also GEORGE M. FREDRICKSON, *RACISM: A SHORT HISTORY* 56 (2002) ("The scientific thought of the Enlightenment was a precondition for the growth of a modern racism based on physical typology."); ROBERT MILES & MALCOLM BROWN, *RACISM* 39–44 (2003); Jenny Reardon & Kim TallBear, "Your DNA is Our History": *Genomics, Anthropology, and the Construction of Whiteness as Property*, 53 CURRENT ANTHROPOLOGY S233 (2012); Peter Wade et al., *Nation and the Absent Presence of Race in Latin American Genomics*, 55 CURRENT ANTHROPOLOGY 497 (2014).

evident gift of nature's God."<sup>50</sup> Those who were marked could not be parties to the social contract, members of the new society. "The masters come together as one through the mark," Farley continued, "After the mark, we are white-over-Black."<sup>51</sup>

Curiously, while the story of this connection between racial ideology and international law is not unknown in the international literatures of critical legal studies and TWAIL, it is certainly underplayed. This absence may be the result of a number of factors, but when taken together are rather complementary in masking the contemporary presence of a racial ideology.

There are two general kinds of criticism here. First, there are those critics disposed toward thinking of the international in terms of identity and domination but see a singular focus on race as misguided in one way or another. For example, some might see a focus on racial exclusion in the nineteenth century as something of a nonstarter, since international law has since found its way out of that particular mess: to substitute exclusion with inclusion. Our contemporary problems, according to this view, are much broader and more complicated than the vulgar racism of the past. Similarly, when it comes to the identity markers in question, TWAIL scholarship in particular, and postcolonial theory in general, are often more preoccupied with cultural prejudices rather than racial ones. Or, these scholars would at least argue that some intersectional combination of vectors—as opposed to a special focus on race—is the better bet.

Second, there are those critics for whom a focus on the structure of ideology remains out of touch with reality. The more "concrete" preference is to seek out the proper social, political, or economic contexts of international law. These contexts might be rather narrow and particular, or very broad and general. In any case, the mistake is to confuse the abstractions of international legal thought with the grounded complexities of real power.<sup>52</sup> I will briefly elaborate on each of these criticisms—(i) the mistaken focus on race, and (ii) the mistaken focus on ideological structure—and offer a synopsis of response.

Within the first family of criticisms, one reason provided for failing to account for the history of racial ideology in international law is the sense that it is an old problem with an obvious solution. In *Boundaries of the International*, Jennifer Pitts provides a study of international legal thought very much in keeping

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50. Barbara Fields, *Slavery, Race and Ideology in the United States of America*, 181 *NEW LEFT REV.* 95, 114 (1990). Though Fields understood that the scientific construction of race was entirely wrong, as elaborated *infra*, she maintained that through "the ritual repetition of the appropriate social behaviour," racial ideology was entirely "real." *Id.* at 113.

51. Farley, *supra* note 48, at 953.

52. SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY* 62 (2000).

with the spirit of this Article.<sup>53</sup> As she explains, “the law of nations is Europe’s distinctively successful solution to universal problems of order . . . especially pernicious as a source of justifications for and obfuscations of European imperial domination.”<sup>54</sup> Shortly thereafter, Pitts explains that European imperialism is sometimes characterized as a problem of exclusion, wherein a model of sovereignty was first developed in Europe and then jealously kept there. On this view, the solution was to expand the European system into an international system, extending the benefits of sovereignty to the newly independent states.<sup>55</sup>

What is problematic about this framing—as Pitts rightly points out—is that if the imperialism of international law is characterized as an initial form of exclusion, and inclusion is then proffered as the remedy, we do not actually get very far in dealing with the problem of domination and subordination in our contemporary world.<sup>56</sup> For one thing, non-Europeans were often “included” in the arrangements of nineteenth century international law that were supposedly exclusionary, as in the case of the much-discussed capitulation treaties.<sup>57</sup> For another, a more meaningful form of inclusion was the inspiration of much twentieth century international legal thought, and even if we still have some ways to go, the road to reform was laid long ago: If exclusion was the problem, the League of Nations, and then considerably better, the United Nations, made great strides beyond the Family of Nations. In this way, it would seem the problems of racism and exclusionary practice go together, and so when the international legal order became more inclusive in the second half of the twentieth century, it became less racist as well. The contemporary architecture of the UN system, with its Special Rapporteurs and the ICERD, seems to attest to this very point: Exclusion and racism are hardly what they once were. As a result, the problem with focusing on exclusion is two-sided: Either you miss the fact that outsiders were increasingly included,<sup>58</sup> or you miss the fact that this form of inclusion simply reproduced other forms of domination and subordination.<sup>59</sup>

A second and related issue within the first family of criticisms concerns the contemporary relationship between race and competing identity markers, such as culture, ethnicity, nationality, and gender. If racism should not be a cause for concern either because (a) it is no longer an international problem, or (b) it

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53. JENNIFER PITTS, *BOUNDARIES OF THE INTERNATIONAL: LAW AND EMPIRE* (2018).

54. *Id.* at 6.

55. *Id.* at 13–14.

56. *Id.* at 9–10.

57. *Id.* at 37. Or consider the uber-example of the Japanese defeat of Russia in 1905.

58. *See generally*, JOHN RAWLS, *THE LAW OF PEOPLES* (Harv. Univ. Press 2001) (1999).

59. AGAMBEN, *supra* note 45, at 107.

remains an international problem but no longer the problem it once was, scholars argue that the same cannot be said about these other markers.<sup>60</sup>

As Mohammad Shahabuddin has ably explained, international legal thought in the nineteenth century contested the role of ethnicity and culture, rather than race. This contest is best characterized as between two traditions: the Enlightenment and Romanticism.<sup>61</sup> In each case, international lawyers reflected contrasting visions of how to construct the nation state. In the Enlightenment tradition, a European culture of rights and reason was expected to gradually assimilate the rest of the non-European world, introducing the uncivilized into the Family of Nations.<sup>62</sup> In the Romantic tradition, culture was more hardwired into the ethnic core of nations, thus serving as a more concrete barrier of religious, linguistic, and racial constituencies.<sup>63</sup> Sometimes, Shahabuddin explains, the Enlightenment and Romantic traditions influenced vying views of the international legal order, while at others the two views came together in a single treaty.<sup>64</sup> In any case, and what is of most relevance here, Shahabuddin emphasizes that this conflict between traditions was a story about ethnicity and culture—race was important in the broader scheme of prejudices, to be sure, but it never served as a source of ideological justification, as ethnocultures did. Race was, in this view, a more passive acted-upon object, while ethnoculture was doing all the heavy lifting. And while race today seems far less problematic, the “clash of civilizations” and the parade of “ethnic conflict” seems to see no end.

If historians like Pitts and Shahabuddin suggest a focus away from race in their admirable examinations of international law’s empire, a different reason for rejecting the history of racial ideology concerns the historian’s conventional way of defining “context.”<sup>65</sup> In their recent *Rage for Order*, Lauren Benton and Lisa

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60. While it would certainly be helpful to have much more in these areas, we have several discernable approaches to international law in the feminist, postcolonial traditions. See, e.g., HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000); INTERNATIONAL LAW: MODERN FEMINIST APPROACHES (Doris Buss & Ambreena Manji eds., 2005); BANDUNG, *GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* (Luis Eslava et al. eds., 2017); ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842–1933* (2014); Makua wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT’L L. 1113 (1995); Catherine O’Rourke, *Feminist Strategy in International Law: Understanding Its Legal, Normative and Political Dimensions*, 28 EUR. J. INT’L L. 1019 (2017).

61. MOHAMMAD SHAHABUDDIN, *ETHNICITY AND INTERNATIONAL LAW: HISTORIES, POLITICS AND PRACTICES* 22–38 (2016).

62. See *id.*

63. See *id.*

64. *Id.*

65. See generally Peter E. Gordon, *Contextualism and Criticism in the History of Ideas*, in *RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY* 32 (Darrin M. McMahon & Samuel

Ford offer a criticism of this kind, arguing for histories of international law that differ significantly from the approach of ideological structure.<sup>66</sup> For Benton and Ford, studying “Vattelian visions of sovereignty,” or the “articulation of a standard of civilization from which certain colonial peripheries were tidily excluded,” is largely just bad history.<sup>67</sup> In fact, to better understand international law’s role in the history of empire, historians should “look away from international law and international lawyers”<sup>68</sup> and toward a legal vernacular unlike anything found in the works of a Johann Bluntschli or an Elihu Root. Rather than study the language of international legal thought, Benton and Ford suggest that it would be better to locate more concrete, on-the-ground contexts in which law actually formed and made a difference.<sup>69</sup> This orientation ought to lead the historian to hunt “men in the middle,” “participants in a vernacular imperial constitutionalism with regional variants and potentially global reach.”<sup>70</sup> Unavailable in the “tomes of jurists” or “the usual fixtures of the field,”<sup>71</sup> this more realistic history of an imperial international law is hardly “international law” at all: It is instead the fluid vernacular of an imperial constitution, adopted and enforced in the professional crannies of the British Empire. As Benton and Ford attest:

Outside the empire, Foreign Office officials, naval officers, and roving bureaucrats collaborated to cast a thin skein of jurisdiction over oceans by stretching municipal (domestic) law to its limit . . . . It was the medium of multiple, parallel projects of imperial change . . . . [A]n endemic and eclectic genre, and it was often a tedious one—the stuff of long dispatches and arcane complaints, occasionally leavened by juicy scandal. The traces of this story hide within the pages of untidy commission reports, obscure manuals of colonial administration, and hagiographies of law-minded governors.<sup>72</sup>

If this second reason for refuting the relevance of a “totalizing” structure of racial ideology is about the more pressing need to canvass the complexities of the vulgate, a related sort of complaint concerns a demand for a different sort of contextualism. For whereas Benton and Ford study vernacular contexts, others seek to understand international law in more macro-contexts, such as the

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Moyn eds., 2014); Justin Desautels-Stein, *A Context for Legal History, or, This is Not Your Father’s Contextualism*, 56 AM. J. LEGAL HIST. 29 (2016).

66. LAUREN BENTON & LISA FORD, *RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800–1850* (2016).

67. *Id.* at 21.

68. *Id.*

69. *Id.* at 24–27.

70. *Id.* at 2.

71. *Id.* at 3.

72. *Id.* at 2–3.

politicoeconomic “reality” of the international system. For instance, in *International Law and World Order*, B.S. Chimni argues for an “integrated” approach to international law, one that incorporates Marxism, feminism, and TWAIL.<sup>73</sup> In the process of building this account, Chimni criticized earlier versions of the structuralist approach offered in this Article, suggesting that the reality of European power cannot be understood “by merely looking at the internal structure of international law.”<sup>74</sup> What is necessary instead is a treatment of the historical and political contexts in which the structures of international law get their meaning, in which the forces of capitalism bend law to its needs.<sup>75</sup> Referencing the twin poles of freedom and order, Chimni continued, “[t]he reality and ideology of universalizing capital configures and circumscribes the ideas of autonomy and community in different ways in different eras.”<sup>76</sup> Without appreciating these extralegal contexts, thinkers in the structuralist tradition remain in jeopardy of being “unwittingly incarcerated in a Eurocentric discourse of international law.”<sup>77</sup>

A focus on the “reality” of the international system naturally leads to some strange bedfellows, as the leftwing Chimni here finds an ally in the retroclassical scholar John Yoo. Like Chimni, Yoo desires an international law more in tune with the demands of power. The difference is that while they both see these demands as the decisive variables, their prescriptions move in opposite directions. Chimni desires a Third World/feminist/Marxist approach to international law’s power dynamics. But in *Point of Attack*, Yoo’s argument for making international law more responsive to the system’s power structure is not any of these things. Instead, it is a fascinating piece of advocacy for a global increase in government-sponsored killing.<sup>78</sup> Yoo argues that as we move toward a contemporary international law that encourages states he calls the “great powers” to use more violence in foreign territories, international society will enjoy a total increase in “global welfare.”<sup>79</sup> It is not merely that international law would transform in the effort to better legitimize the killing of the weak by the strong. Yoo suggests that certain types of irrational states should be excluded from the same rights of

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73. B. S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* (2d ed. 2017).

74. *Id.* at 263.

75. *Id.* at 263–65.

76. *Id.* at 264.

77. *Id.* at 267; see also CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* 48–60 (2005).

78. YOO, *supra* note 14, at 113–19.

79. *Id.* at 5.



violence enjoyed by the Great Powers.<sup>80</sup> For example, while the United States will be legally justified in the killing of suspected terrorists in Egypt, Egypt would be legally barred from targeting individuals in U.S. territory, assuming Egypt had determined that the United States was unable or unwilling to take action against what Egypt understood to pose a substantial threat. As Kenneth Anderson colorfully puts the idea:

States are not all the same . . . . No rational US leader is going to take the solemn international law admonition of the “sovereign equality of states” too seriously in these matters—and the United States has never regarded a refusal to do so as contrary to international law but instead as something built into international law as a qualification on the reach of the “sovereign equality” of states. There will not be “Predators over Paris, France,” any more than there will be “Predators over Paris, Texas,” but Pakistan, Yemen, Somalia, and points beyond are a different story.<sup>81</sup>

Thinkers like Yoo and Anderson suggest that the UN Charter’s theory of self-defense and general approach to state-sponsored use of force is hopelessly outdated in today’s world. In order to better increase global welfare, we need a new international law that better incentivizes the use of force. This is in obvious contrast to a system whose purpose is to keep the use of force to a minimum, if not to abolish it completely. This type of argument suggests that if international law better incentivized states to use force, terrorists would have fewer safe harbors in the world and the lives of a majority of the world’s people would be better on the whole. Yoo proposes that—rather than looking to the UN Charter and its rules of self-defense—we are better served looking deeper into the past, to the Great Powers system that emerged after the Congress of Vienna in 1815.<sup>82</sup> That system, Yoo believes, will replace the United Nations’s equality standard with an exclusionary standard in which the Great Powers serve as global police, hunting down and killing criminals. Those states not rational enough to warrant

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80. *Id.* at 128. Yoo believes that the categories of “rogue” and “failed” state present different calculations, but for all intents and purposes he treats them as “targeted states” in opposition with the Great Powers. *See id.* Ultimately, such states become targets for war because they simply cannot muster an effective government (that is, “unable”), or have an effective government but one that is crazy or evil or both (that is, “unwilling”). Yoo introduces the concepts together in his welfare calculus. *Id.* at 112–17. *See also* ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* (1990); RAWLS, *supra* note 58.

81. Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War,’* in *FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW* 1, 10 (Peter Berkowitz ed., 2011).

82. *See* YOO, *supra* note 14, at 131–55.

membership in the Great Powers enjoy far fewer rights and are not presumed to be legal equals. Yoo argues that the Great Powers system makes much more sense in part because the UN system was established on the basis of an historical anomaly. For Yoo, the architects of the League of Nations and UN were motivated by attachments to medieval just war theory, which simply made no sense in the context of twentieth century power politics.<sup>83</sup> In other words, the move to institutions that began in the early twentieth century was a mistake from the start, building out of intellectual foundations that were simply anachronistic. The Great Powers system of the nineteenth century, in conclusion, is the more realistic choice for today.

Thus, the structural approach to racial ideology produces two general kinds of anxiety. First is the view that either the problems once posed by racialized exclusion have been solved, or if they have not, a focus on race alone is an insufficient solution. Related to this first view is also the point that while race was once an explicit feature of international law, the real problems for contemporary international lawyers are better situated in the language of culture, if not a more general intersectionality. Second, there is the view that a focus on ideological structure misses the crucial contexts in which these ideologies gain their traction and meaning. These contexts might take us away from international legal thought altogether and toward the legal vernacular, or they might take us into the more general territory of power politics and the global economy. In any case, the problem here is that absent sufficient emphasis on the right context, a structural analysis will not adequately reflect the international system's historical reality.

These are all important concerns, and in the space of this Article I cannot hope to give them the attention they demand. But I can offer some brief and provocative—though hopefully not too provocative—responses. With respect to the first family of complaints about the contemporary relevance of racial exclusion, Pitts is right to echo the postcolonial insight that if one frames international law's empire as a problem of exclusion, the natural next step seems to be a turn to inclusion, and that this "next step" is seriously ill-equipped.<sup>84</sup> To think as much is to misunderstand how the powerful dominate the powerless, even after the powerless are included. I agree wholeheartedly, and this is why I treat racial exclusion as a morphing ideology in liberal legal thought. If the treatment were to end with a statement on the logics by which the peoples of the world have been excluded from the full ambit of international rights, the shifting patterns of argument found among the moderns might very well come off as the progressive

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83. See *id.* at 65–80.

84. See *supra* notes 53–57 and accompanying text.

denouement of an ugly period in international legal history. But that is not the story. As I argue below, it is precisely in the context of a more inclusive structure of racial ideology that international law transformed in the middle decades of the twentieth century. As I will suggest in the context of modern liberalism, racial ideology morphed into a different structure of naturalizing juridical science. At the level of the law of sovereigns, race receded as a means for excluding other peoples from the realm of international legal personality. But while the demise of a racialized logic of exclusion actively foregrounded the prohibitive work of the antidiscrimination principle, race simultaneously fortified a twinned right of exclusion for sovereigns seeking to control their borders. As I argue elsewhere, racial ideology later morphed at this juncture, entering into an alliance with a postmodern pragmatism and yielding a contemporary form of postracial ideology in international legal thought.<sup>85</sup> All of this is to say that I am fully sympathetic with the concern about the study of racial exclusion as leading to a dead end. My response to this is simply that rather than seeing exclusion as masking the reality of domination, one ought to see the right to exclude—a result of this morphed form of racial ideology—as both producing the very idea of the racial subject, as well as sustaining racial hierarchy right up to the present.

With respect to the related concern about raising racial analysis over the study of culture, I have been heavily influenced here by the literature on neoracism.<sup>86</sup> In a word, while I wholeheartedly endorse the TWAIL emphasis on cultural subordination as a crucially important variable, I also see the elevation of cultural studies as a moment in which a new and subversive form of raciality has come to thrive behind the scenes. What's more, while I am in complete agreement with the theory of intersectionality as key for understanding the breadth of the international legal order, I also see the emphasis on that breadth as coming at a cost. That cost is what we sometimes lose in terms of understanding the very peculiar function of race in constituting our patterns of justification.

With respect to the second family of complaints, I am certainly attentive to the necessity of "context." Indeed, the study of "ideology" in international legal

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85. DESAUTELS-STEIN, *RULE OF RACIAL IDEOLOGY*, *supra* note 7.

86. Chief influences on my approach include WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* (2006); W.J.T. MITCHELL, *SEEING THROUGH RACE* (2012); RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008); ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* (1991); MARTIN BARKER, *THE NEW RACISM: CONSERVATIVES AND THE IDEOLOGY OF THE TRIBE* (1981); PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* (2000); DAVID THEO GOLDBERG, *THE THREAT OF RACE: REFLECTIONS ON RACIAL NEOLIBERALISM* (2009); and DAVID THEO GOLDBERG, *ARE WE ALL POSTRACIAL YET?* (2015).

thought might seem to be just the sort of old intellectual history that is now well behind the times.<sup>87</sup> It was twenty years ago that Susan Marks was positioning her own work on ideology as outdated, pointing to the “end of ideology” theorists on the one side and the postmoderns on the other, all of whom were arguing for the lack of use in the study of “ideology.”<sup>88</sup> For the end of ideology camp, ideology reflected a kind of worldview that had simply gone out of style, while for the postmoderns, ideology reflected a kind of totality that never was. It is certainly fair to say that in the decades since Marks’s publication, the study of “ideology” has remained—at best—a peripheral exercise.

Nevertheless, I remain wholly persuaded that Marks was on the right track and that a structural approach to racial ideology is sorely missing in today’s international law debates. I believe this is so for the reasons just mentioned regarding the salience of race and neoracism. Further, the study of ideology can also serve as a mode of contextualist historiography. Consider the critiques of Benton, Ford, Chimni, and Yoo at the level of historical method. While the particular contexts in which they study international law differ greatly, and while their proposals differ even more, they all share the view that whatever language there is in international legal thought, it must be understood in some context outside of or external to that language. That is, it would be a mistake to study the language without a context in which to place it, whether that be the correspondences of English imperialists in the nineteenth century, the nature of capitalism in the twentieth, or the prospects of bioterrorism in the twenty-first.

These contexts have their place, and in various respects they all are edifying. But understanding international law in the context of racial ideology is just as contextualist as any of these methods. It is a mistake to believe that because the context of racial ideology is somehow internal to international law, it is therefore illegible as a proper context in which to understand international law’s history. What’s more, the whole business of characterizing certain contexts as external to law and therefore more edifying seems largely unhelpful.<sup>89</sup> The dismissal of ideology-critique as irrelevant to the “real” contexts of international law must rest on something more substantial than a flimsy internal-external distinction. If we are to blind ourselves to the contexts of racial ideology in international legal thought, it must be because there is really nothing to see. And I submit that

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87. What is more, while works like *From Apology to Utopia* are often remarked upon, they are very rarely utilized in contemporary international legal histories. Indeed, scholars like B. S. Chimni have questioned the very purpose of the structural approach, asking instead for treatments that better track the “reality” of the international legal order. See CHIMNI, *supra* note 73.

88. MARKS, *supra* note 52, at 15.

89. Desautels-Stein, *supra* note 16, at 230.

if you believe there is nothing to see in the structure of racial ideology, you need to keep reading.

In sum, my claim about the context of racial ideology in international legal thought is as follows: In international law a classic mode of racial ideology generated a legal conception of sovereignty through a process of racial subjection, as universal and always already delimited by the lights of a naturalizing science of racial classification. A modern mode of racial ideology, in contrast, interprets the legal concept of sovereignty as universal, and justifies its expanding application to nonwhite peoples by the lights of a social science understanding of racial classification. At the same time, in smuggling classic racial ideology away from the formal apparatus of international society, modern racial ideology instantiates the classic form of racial subjection at a different borderland, one between members of a national community and the “other.” Modern racial ideology, as a result, is two-sided. It slowly develops a sense of racial equality and inclusion at the level of sovereign-sovereign relations, but also naturalizes a racialized right of individual sovereigns to exclude outsiders from the national community.

In what follows I offer a short synopsis of each of these racial ideologies. The story of postracial ideology in the era of international human rights is yet to come.

## II. CLASSIC RACIAL IDEOLOGY: EXCLUDING PEOPLES FROM INTERNATIONAL SOCIETY

Throughout the nineteenth century, racial ideology fueled the sovereign’s right to exclude. In the language of international law, this exclusionary ideology was an engine for legal justification that operated at the level of sovereign states. Empowered by this type of justification, the concept of the Family of Nations rested on the right of sovereigns to exclude peoples from the community of sovereigns.<sup>90</sup> The relevant polis was global, and the task of what I am calling classic racial ideology was to justify and naturalize the rights of so-called racially superior peoples to exclude so-called racially inferior peoples from the circle of so-called rights-bearing sovereigns. This sovereign right of exclusion was not characterized as a right to exclude individuals from a particular territory: Between recognized sovereigns—such as within the Family of Nations—migration was easy and open.<sup>91</sup> It was not until the twentieth century that the border controls of today were justified by a sovereign right to exclude. Before this, sovereign rights of exclusion

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90. On the “Family of Nations,” see OPPENHEIM, *supra* note 12.

91. See VINCENT CHETAIL, *INTERNATIONAL MIGRATION LAW* 38–46 (2019).

were focused on keeping entire peoples out of the Family of Nations, and not on keeping individual migrants out of a territory.

To appreciate the transformations that occurred in international legal thought at the turn of the twentieth century, let us quickly recall that in 1823, then U.S. President James Monroe proclaimed the right of independence enjoyed by Spain's former colonies in the Americas.<sup>92</sup> What precisely was this right of independence to mean? Was it an affirmation of sovereign equality, rights of legal personality and full participation in the Family of Nations? In the 1820s the United States was still a peripheral sovereign in the international legal order, and it remained unclear what right the United States had to participate in the Family of Nations, much less what rights were due to the racially diverse and openly rebellious peoples occupying the rest of North and South America.<sup>93</sup>

What was very clear, however, was the U.S. interest in preventing European conquest in the Western Hemisphere. By 1845, the United States annexed Texas from Mexican control, and a few years later the Mexican-American War was in full bloom. By the end of the conflict, Mexico had lost half of its territory to the United States. And by the turn of the twentieth century, the United States was in a curious position with respect to the legacy of the Monroe Doctrine. With its imperialist adventures in Panama, Cuba, and the Philippines, could the United States offer respect for an international rule of sovereign equality, with anything resembling a straight face? From the perspective of many international lawyers and politicians in South America, the results of the Spanish-American War were racially motivated. The United States was no defender of sovereign equality. It was a bully and a bigot.

As the Argentine international lawyer Alejandro Alvarez would later explain, what needed clarifying was the separation between the Monroe Doctrine, as it had crystallized into a rule of customary international law, and the hegemonic and imperialist policies of the United States. What the Monroe Doctrine was “really” about, according to Alvarez, was the recognition of “acquired rights to independence, to non-intervention, and to non-colonization on the American

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92. This Article offers one very U.S.-centric view of the transition from a classic to a modern structure of international racial ideology, and it takes the work of American lawyer, Elihu Root, as exemplary of the ideological transformations critical to this story. For a more comprehensive and global account, see DESAUTELS-STEIN, *THE RIGHT TO EXCLUDE*, *supra* note 7.

93. A discussion of the concepts of race and racism at work in the wars of Spanish American independence is beyond the scope of this Article, but it is worth flagging just how dominant the racial ideology of the independence movements was throughout. For discussion, see JEREMY ADELMAN, *SOVEREIGNTY AND REVOLUTION IN THE IBERIAN ATLANTIC* (2006); PAUL D. NAISH, *SLAVERY AND SILENCE: LATIN AMERICA AND THE U.S. SLAVE DEBATE* (2017); and IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM IV: CENTRIST LIBERALISM TRIUMPHANT, 1789–1914* (2011).

continent.”<sup>94</sup> In contrast were U.S. policies which contradicted this commitment to sovereign equality:

During the nineteenth century the United States built up alongside of this Doctrine a personal policy, which does not represent the interest of the continent, but quite the reverse; wherefore it inspires fear rather than sympathy in the states of Latin America. This so-called policy of hegemony or supremacy consists in intervention by the United States, on behalf of its own interests, in the domestic affairs of certain states in Latin America . . . .<sup>95</sup>

Nevertheless, Alvarez further suggested that the sovereign right of nonintervention could go only so far; if “civilization” demands a sovereign to abide by certain changes occurring in the international order, the fundamental right of the state to independence should give way.<sup>96</sup> Alvarez explained:

[A] State may not, on the ground that it is absolutely independent, isolate itself entirely from the other States or refuse to enter into relations with them. The great Powers have compelled certain Asiatic States to open their doors to European commerce, *and this action has been approved by the whole civilized world.*<sup>97</sup>

In the encounter with Latin American jurists like Alvarez, a legal task before the United States in the wake of new imperial control over the Philippines, Cuba, and Puerto Rico, was one of justification.<sup>98</sup> If Alvarez was right, and the Monroe Doctrine stood above all else for a standard of sovereign equality, what legal justifications might warrant U.S. action everywhere from Panama to Hawaii? Indeed, this was precisely the concern motivating President William McKinley in his decision to appoint the New York lawyer Elihu Root as his Secretary of War.<sup>99</sup> Later to become a President of the American Society of International Law, Theodore Roosevelt’s Secretary of State and Secretary of War, as well as a Chair of several of Andrew Carnegie’s corporate entities, McKinley’s charge to the man that would become his international law czar was to justify the U.S. record abroad.

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94. Alejandro Alvarez, *The New Monroe Doctrine and American Public Law*, 2 MINN. L. REV. 357, 358 (1918).

95. *Id.* at 359.

96. See Alejandro Alvarez, *The State’s Right of Self-Preservation*, 3 ST. LOUIS L. REV. 113 (1919).

97. *Id.* at 124 (emphasis added).

98. For discussion of the U.S. view of international law as relevant to the Americas, see BENJAMIN ALLEN COATES, *LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY* (2016), and CHRISTOPHER R. ROSSI, *WHIGGISH INTERNATIONAL LAW: ELIHU ROOT, THE MONROE DOCTRINE, AND INTERNATIONAL LAW IN THE AMERICAS* (2019).

99. 1 PHILIP C. JESSUP, *ELIHU ROOT: 1845–1909*, at 215–21 (1938).

In the years before World War I, Root gave an array of public lectures both in the United States and throughout Latin America. Root repeatedly agreed with Alvarez that the principle underlying the Monroe Doctrine was “the right of every sovereign state to protect itself,” where “each state must judge for itself when a threatened act will create such a situation.”<sup>100</sup> Root continued:

The fundamental principle of international law is the principle of independent sovereignty. Upon that all other rules of international law rest. That is the chief and necessary protection of the weak against the power of the strong. Observance of that is the necessary condition to the peace and order of the civilized world. By the declaration of that principle the common judgment of civilization awards to the smallest and weakest state the liberty to control its own affairs without interference from any other Power, however great.<sup>101</sup>

Two years later, Root addressed the American Society of International Law regarding a recently adopted declaration on the equality of nations.<sup>102</sup> That declaration espoused that “[e]very nation is in law and before law the equal of every other nation . . .,” and Root forcefully set this principle against the example of the warring states of Europe.<sup>103</sup> At the same time, however, Root cautioned that this move toward a more fulsome sense of legal equality had to be realistic if it was to be effective.<sup>104</sup> Commenting approvingly of Root’s “masterful” view of sovereign equality, Alvarez explained that what Root was talking about could not be the

absolute equality of states, subjecting the more powerful to various kinds of restraint. The equality that must be established . . . is legal equality, by virtue of which no state may, merely because of its superiority, have any claim or pretention to rights which are not recognized as belonging to weaker states. All states must be equal before the law.<sup>105</sup>

The point that needs to be emphasized here as we search for the coming transition into a modern form of racial ideology, is that while Root and Alvarez agreed on the need to consider Latin American sovereigns as equal members of the Family of Nations, they also agreed that this commitment to sovereign equality for states meant very little for the equality of the human races. Not every people, in other words, deserved a sovereign state and a legal position in the Family of

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100. Elihu Root, *The Real Monroe Doctrine*, 8 AM. J. INT’L L. 427, 432 (1914).

101. *Id.* at 434.

102. Elihu Root, *Declaration of the Rights and Duties of Nations Adopted by the American Institute of International Law*, 10 AM. J. INT’L L. 211 (1916).

103. *Id.* at 213.

104. *Id.* at 216.

105. Alvarez, *supra* note 94, at 117.



Nations. In Alvarez's "Latin America and International Law," for example, he argued for the importance of understanding the racial composition of the Latin American population.<sup>106</sup> Unlike the "single race" of "whites" in Europe, Alvarez pointed in South America to the "conquering race" from Spain, the "negroes imported from Africa," and the creoles, those children born in Latin America from European-born parents.<sup>107</sup> Among these groups, the only "thinking" part of the population was the creole: The Spanish whites and the Africans either thought of Latin America as just another piece of Europe, or didn't think at all.<sup>108</sup> Indeed, in the course of Spanish-American independence and the various congresses and conventions that emerged in the first third of the nineteenth century, the political construction of the new sovereigns was highly racialized.<sup>109</sup> The bottom line: While the new Latin American sovereigns would come to take a marginal place within the Family of Nations, this was participation only for racially recognizable sovereigns.

In the context of Root's work in the effort to elect Theodore Roosevelt, Root argued for a racial approach to equality from a different direction. Anticipating Alvarez's criticism of U.S. imperialism in the Western hemisphere, the Democratic Party's political platform at the turn of the century regarded the paramount issue in the presidential election to be that of "imperialism."<sup>110</sup> To be sure, Root abided by a classic racial ideology by arguing in favor of sovereign equality for small and great states alike. But was it imperialist for the United States to deny sovereign prerogatives to the Filipino people if they did not have the capacity for self-governance? As Spain conceded control of the Philippines to the United States in 1899, ought the United States to have recognized the Filipino people as an independent sovereign, naturally endowed with rights of nonintervention and independence? Or, as Root framed the question, ought the United States to have regarded as sovereign equals a "tribe" under the leadership of a "Chinese half-breed"?<sup>111</sup> "Is there anything in the circumstances of the assistance which we have received from these men which entitles them to the reward of the sovereignty of the Philippines?"<sup>112</sup> Root's reply: "Nothing can be more preposterous than the proposition that these men were entitled to receive

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106. Alejandro Alvarez, *Latin America and International Law*, 3 AM. J. INT'L L. 269, 271 (1909).

107. *Id.*; see also Liliana Obregón, *Between Civilization and Barbarism: Creole Interventions in International Law*, 27 THIRD WORLD Q. 815 (2006).

108. Alvarez, *supra* note 106, at 272-73.

109. See generally WALTER D. MIGNOLO, *THE IDEA OF LATIN AMERICA* (2005).

110. Elihu Root, U.S. Sec'y of War, Speech at Canton, Ohio 8 (Oct. 24, 1900) (transcript available at the Library of Congress).

111. *Id.* at 9.

112. *Id.* at 11.

from us sovereignty over the entire country which we were invading.”<sup>113</sup> Only “Oriental treachery” might convince one otherwise.<sup>114</sup>

Root’s suggestion was that like the American Indians, presumably not only those indigenous peoples living in the United States but those all throughout the Americas, the Filipino people ought to have realized that they enjoyed no entitlements over territory as against the United States.<sup>115</sup> It is true, Root conceded, that democracies enjoy legitimacy from the consent of the people. But “[n]othing can be more misleading,” Root cautioned, “than a principle misapplied.”<sup>116</sup> If government arises among a people capable of making “free, intelligent and efficacious decisions,” then surely the government must be by and for that people.<sup>117</sup> But Root asserted that the people of the Philippines were not of this stock, and simply “incapable of self-government.”<sup>118</sup> To put this another way, did the United States have a right to exclude the Filipino people from sovereign status in the international legal order? Armed with a clear-cut racial ideology of hierarchy, Root’s answer was not merely that the United States was justified in excluding the Filipino people from the community of sovereigns. Rather, the United States was under an international legal obligation to do so, given the lack of racial competence rampant in the Philippines.

Of course, the point here is not to single out Root for a racist perspective on the U.S. war in the Philippines.<sup>119</sup> Rather, the purpose is to illuminate a classic form of racial ideology in international legal thought, which was hardly restricted to a few elite lawyers. As Will Smiley has explained, “the war had been accompanied by fierce racist sentiments among Americans.”<sup>120</sup> And these were not only the

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113. *Id.* at 12.

114. *Id.*

115. *Id.*

116. *Id.* at 15.

117. *Id.*

118. *Id.* at 16.

119. Indeed, there was plenty of racism to go around. See, e.g., Theodore S. Woolsey, *The Legal Aspects of Aguinaldo’s Capture*, 67 *OUTLOOK* 855, 855 (1901). For discussion, see PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, & THE PHILIPPINES* (2006).

120. Will Smiley, *Lawless Wars of Empire? The International Law of War in the Philippines, 1898–1903*, 36 *LAW & HIST. REV.* 511, 511 (2018). I should note that Smiley’s thesis here is that it is a mistake to believe that the United States denied the applicability of *jus in bello* to the Philippines on racial grounds. Rather, Smiley suggests, “United States officers reinterpreted the law so that it could simultaneously demonstrate their moral and cultural superiority, while also authorizing widespread summary violence.” *Id.* at 514. To be clear, my claim is not that international lawyers like Root were suggesting that the Philippines was *terra nullius*, and that international law did not apply. It is rather that, insofar as the Filipino people might have had a right to participate in the Family of Nations with the full rights of international legal personality, racial ideology played a critical role in justifying the U.S. effort to exclude the Philippines from that status of free and equal participation. The extent to which international

sentiments of the American public; military officers engaged in questions about the applicability of the laws of war consistently relied on a racial ideology of inferiority to justify unusually violent allowances for the United States in its suppression of a “backward” race.<sup>121</sup>

### III. MODERN RACIAL IDEOLOGY: EXCLUDING PEOPLE FROM NATIONAL COMMUNITIES

In his attempt to justify a particular understanding of sovereign equality in international law, we can see how Root structured an essentially indeterminate sovereignty concept by at once opening its application universally and restricting its application to racially superior peoples. This is a classic mode of racial ideology, naturalizing what is a historically contingent argument about sovereignty by way of an appeal to the science of racial classification. What I turn to now, however, is Root’s deployment of a modern mode of racial ideology, in contrast with the classic mode explored above. As I explain in the remaining pages, modern racial ideology in international legal thought arose in the midst of a tremendously effective bait and switch.<sup>122</sup>

To best understand this transition, we should start with what were at the time two separate views of racial equality. The first kind was the weakening of the right to exclude peoples from international society, and which slowly gained ground as the Family of Nations model gave way to the new League of Nations. This weakening led to the rise of a formal equality of sovereigns to participate in international society, and in particular, in the new international institutions. And then there was a second kind of racial equality, distinct from the equality due to sovereigns operating in international society. This was a view of racial equality regarding prohibitions on the rights of states to exclude individuals from entry into a national political community, and the enjoyment of certain freedoms once

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law might morph in its racially coded application is precisely what Smiley describes—a process similar to that described by Teemu Ruskola regarding Caleb Cushing’s work toward the Treaty of Wanghia. See Teemu Ruskola, *Canton Is Not Boston: The Invention of American Imperial Sovereignty*, 57 AM. Q. 859, 860–61 (2005). But I want to clarify that interpretation and justification are not only in play when it comes to the application of international rules, for as this Article argues, exclusion of peoples from international society also requires interpretation and justification. If it did not, exclusion would merely and only be political.

121. Smiley, *supra* note 120, at 537–38, 542.

122. The language of “bait and switch” is not meant to suggest a conscious or intentional effort to deceive on the part of any particular actor. More accurately, I refer to the tactics of mystification and naturalization endemic to ideological production at the level of social and legal structure. See generally KENNEDY, *supra* note 35; GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* (Rodney Livingstone trans., Merlin Press Ltd. 1971) (1968); FREDERIC JAMESON, *ALLEGORY AND IDEOLOGY* (2019).

inside. In a word, this view of racial equality would have called for the emergence of an international migration law capable of regulating the rights of sovereigns to control their borders. But while classic racial ideology justified the rights of sovereigns to exclude other sovereigns from their territories and from international society, modern racial ideology justified the rights of sovereigns to exclude individual people from their territories and from the national community. The bait and switch in international legal thought concerns a simultaneous fading of the classic mode, and emergence of the modern mode: While an ideology of *inclusion* was taking center stage at the level of international institutions, an ideology of *exclusion* was animating the emerging international law of migration.<sup>123</sup>

As the architecture of the League of Nations came together, international lawyers agreed about how ineffective the new international institutions would be if they remained caught up in the old racial hierarchies of the nineteenth century.<sup>124</sup> These lawyers believed that whatever their racial inferiorities, all sovereigns should join the League, either as full members or as “members in training.”<sup>125</sup> The question was whether this weakening of classic racial ideology suggested an open attitude toward migration, to the inclusion of racially diverse residents in national communities. Or was that weakening only relevant to the inclusion of racially diverse peoples in the international community? In response to a query for his feedback on the issue, Root told the American delegates in Versailles to oppose any language that pushed the idea of racial equality beyond the level of sovereign-sovereign relations. To do otherwise, Root counseled, would suggest a “plan for unlimited yellow immigration.”<sup>126</sup> As Root had written earlier, “[w]ith the great

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123. See generally MARILYN LAKE & HENRY REYNOLDS, *DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY* (2008); ADAM M. MCKEOWN, *MELANCHOLY ORDER: ASIAN MIGRATION AND THE GLOBALIZATION OF BORDERS* (2008); PETER SAHLINS, *BOUNDARIES: THE MAKING OF FRANCE AND SPAIN IN THE PYRENEES* (1989); PETER SAHLINS, *UNNATURALLY FRENCH: FOREIGN CITIZENS IN THE OLD REGIME AND AFTER* (2004); JOHN C. TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE* (2d ed. 2018); RACIAL PROFILING AND BORDERS: INTERNATIONAL, INTERDISCIPLINARY PERSPECTIVES (Jeff Shantz ed., 2010).]

124. See, e.g., EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* (1920); Alpheus Henry Snow, *International Law and Political Science*, 7 AM. J. INT'L L. 315 (1913).

125. The phrase “member in training” conceals far more than it explains. As has been ably discussed, the mandate system was best understood as merely a new name for an older system of domination and subordination. As Mark Mazower has detailed, the mandate system was in large part the brainchild of Jan Smuts. MARK MAZOWER, *NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS* 48 (2009); see also ANGHE, *supra* note 22.

126. LAKE & REYNOLDS, *supra* note 123, at 292–93. See also Elihu Root, *The Proposed Convention for a League of Nations: Letter to the Chair of the Republican National Committee, March 29, 1919*, 5 INT'L CONCILIATION 694 (1919).

varieties of race and custom and conceptions of social morality in the human family the right of each nation to conduct its own internal affairs according to its own ideas is the essence of liberty.”<sup>127</sup> Racism should not bar a sovereign state from being left alone to organize its own affairs—this was a version of the principle of self-determination Wilson was promoting. At the same time, notions of racial equality could not tell sovereigns how to do the organizing.

Indeed—and certainly in the United States—migration was increasingly seen as an issue best regulated by a sovereign’s right to exclude, rather than by treaty.<sup>128</sup> Root elaborated on what he saw as the appropriate balance in a passage that would seem alien to the perspectives of today’s conservative politicians, explaining that it was essential for all sovereigns to abide by the procedures and decisions of international arbitrations and adjudications. Importantly, this included the United States; every nation, regardless of its economic, military, or cultural achievements, ought to submit their claims to international law and its attendant mechanisms for conflict resolution. This was a key for avoiding future wars, and Root thought that the League covenant did not go far enough in making the rules for international dispute resolution more effective.<sup>129</sup> In this sense, all sovereign peoples were equals in the eyes of international law.

But while the United States shared an interest with all other sovereigns in promoting a more effective and functional international law, it shared no interests at all in promoting the racial equality of individual human beings. Choices about how to constitute and police the membership and boundaries of the new international community was a question for the new League; in contrast, questions about the membership of a sovereign’s own political and national community were “purely American affairs” and to be determined solely by domestic policy.<sup>130</sup> As Root explained, “The nations of Europe in general are nations from which emigrants go. The United States is a nation to which immigrants come . . . Europe and America are bound to look at questions of emigration and immigration from

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127. Root, *supra* note 92, at 216; see also Erik A. Moore, *Imperial International Law: Elihu Root and the Legalist Approach to American Empire*, ESSAYS IN HIST. (2013), [http://www.essaysinhistory.com/imperial-international-law-elihu-root-and-the-legalist-approach-to-american-empire/#\\_ftn13](http://www.essaysinhistory.com/imperial-international-law-elihu-root-and-the-legalist-approach-to-american-empire/#_ftn13) [https://perma.cc/87DY-7LXD].

128. MCKEOWN, *supra* note 123, at 318 (taking a view regularly promulgated by the Immigration Restriction League, of which Root was a member); see also *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); Frederic Megret, *A Road Not Taken: Open Borders, The Human Right to Immigrate and the History of International Law*, in CONTINGENCY IN INTERNATIONAL LAW (Ingo Venzke ed.) (forthcoming 2021); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13 (2003).

129. Root, *supra* note 126, at 706–07.

130. *Id.* at 709.

different points of view . . .”<sup>131</sup> There was simply no connection—as Root understood it—between accepting on the one hand that the United States would subject itself to international regulation by new institutions in the service of fostering world peace and the end of war, and accepting on the other hand that the League would be able to intervene in questions related to the right of the United States to exclude certain kinds of people from its borders.<sup>132</sup> From Root’s outlook, international migration law simply could not exist. As a result, Root suggested that the United States qualify its entrance into the League with an amendment reading in part, “the representatives of the United States of America sign this convention with the understanding that nothing therein contained shall be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions . . . (including therein the admission of immigrants), to the decision or recommendation of other powers.”<sup>133</sup>

So what exactly was going on here? Why were the framers of the League Covenant so anxious about an affirmation of racial equality as relevant to migration questions, and yet potentially open to questions about legal personality in the international community? As so many international lawyers in the United States and Europe recognized, international law’s race problem was shifting away from sovereign-sovereign relations and toward the question of whether a new field of international migration law might come to regulate a sovereign’s decisions about border control.

At the time, the idea that sovereigns enjoyed a right to exclude individual migrants was new to the international legal order. As international lawyers had explained for centuries, a sign of fluency with the Law of Nations was an open border between states.<sup>134</sup> Nominally, and certainly by the nineteenth century, the status of sovereignty in the Family of Nations signaled an appreciation of open migration as commercial intercourse. In this respect migration was often understood as merely a facet of the *laissez-faire* world of civilized legal relations. That said, the legal establishment of racial borders was not unknown. Likely the most vivid example in opposition to the “free movement” regime of the Family of Nations was the situation for free African Americans in the antebellum United States. As Kunal Parker has explained, for whatever the reality of other international pressures that might have pushed against a sovereign’s choice to

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131. *Id.* at 710.

132. *Id.*

133. *Id.* at 716.

134. The idea is present as early as in the writings of Francisco Vitoria, one of the so-called founding fathers of international law. See Francisco De Vitoria, *On the American Indians*, in *POLITICAL WRITINGS* 277 (Anthony Pagden & Jeremy Lawrance eds., Cambridge Univ. Press 1991).

adopt national immigration control, at least in the United States the arrival of a national immigration law was held in abeyance for as long as individual states feared a loss in the rights to exclude African Americans from their territories. It was only after the Civil War and the adoption of the Fourteenth Amendment that slavery's block on a national immigration law finally caved in. But rather than the inclusionary ethos of radical reconstruction, it was precisely the slave states' racialized right to exclude that rose to prominence in the now-national context of migrant exclusion. Thus, while the Fourteenth Amendment of 1868 had cleared domestic obstacles for a national immigration law, it was only fourteen years later that Congress adopted the Chinese Exclusion Act of 1882.<sup>135</sup>

After World War I, the movement toward a national immigration regime and its attendant hostility toward Asians and new immigrant groups from Europe came into contact with the universalizing push for the new League of Nations. Immigration was increasingly viewed as a social problem demanding application of the best available, cutting-edge social science. How should the United States approach the tremendous influx of persons moving into its territory? Thinking about migration as free commercial intercourse did not make sense; it had not really ever made sense, at least in the United States, considering the situation first for freed slaves and then Chinese immigrants. But now, with such an increase in migration from southeastern Europe, how could a new migration law best meet the country's social need? The answer was eugenics.<sup>136</sup>

Through the Johnson-Reed Act of 1924 (the Act),<sup>137</sup> and inspired by a congressionally sponsored commission tasked with studying the science of race and migration, the United States established a domestic form of border control that bore all the marks of classic racial ideology. It was hierarchical, exclusionary, and rooted in a science of race. As Mae Ngai has written, "In a sense, demographic data was to twentieth century racists what craniometric data had been to race scientists during the nineteenth. Like the phrenologists who preceded them, the eugenicists worked backward from classifications they defined a priori and declared a causal relationship between the data and race."<sup>138</sup> The Act quickly went global, inspiring sovereigns around the world to implement the newly forged and internationally ensconced right to exclude. As Adam McKeown has argued, "Institutions that had their origins in exceptional methods necessary to preserve

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135. Pub. L. No. 47-126, 22 Stat. 58 (1882).

136. See DESMOND KING, *MAKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF DIVERSE DEMOCRACY* (2000).

137. Pub. L. No. 68-139, 43 Stat. 153 (1924).

138. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 31-32 (rev. ed. 2014) (2004).

the ideals of self-government from the threats of an uncivilized world had now become indispensable technologies of population management. Their adoption became a prerequisite for recognition as a self-determining state in the international system.<sup>139</sup> The Act became the international gold standard for migration regulation.<sup>140</sup> “It was the potent mix of race and self-rule that built a world of border control.”<sup>141</sup>

These developments were entirely foreseen in Root’s assault on the racial equality clause that never made it into the League Covenant. The racial ideology of inclusion that was rising in the context of sovereign participation in the international legal order was, at least in part, actively assisted by a racial ideology of exclusion at the level of the sovereign right to exclude migrants. That is, just as classic racial ideology appeared to weaken at the formal level of sovereign relations, it was reemerging in another disciplinary field. No longer the guardian of the border between the international community and racially inferior peoples, classic racial ideology moved forward as the justification for a right of sovereigns to police their territorial borders, guarding the border between the national community and racially inferior people. But this bait and switch not only helped lay the ideological conditions for the Act. It also helped to ensure that the field of international migration law would arrive stillborn. Rather than launch a field of regulation governing the entry of individuals at sovereign borders, the bait and switch relegated the vast majority of the legal terrain to the sovereign right to exclude. The remnants, now regarded as exceptions to the general rule of sovereign prerogative, were eventually given over to the new and exceptional field of refugee law.

What I hope is coming into focus here is the interplay between two separate international law narratives that have yet to be properly understood together. On one side is the “triumph” over a classic racial ideology, whereby the colonized world very slowly entered the field of newly independent states. This is a story of the decline of a racialized right to exclude “inferior” peoples from the community of sovereign states. On the other side is the transition from a moment in international law when migration between members of the Family of Nations was relaxed and relatively fluid, and ripe for the emergence of a new regime of international migration law, to a later moment in which the sovereign right to exclude manifests in the xenophobic context of a plenary power over border control. This is the story of the ascendance of a racialized right to exclude “inferior” individuals from a sovereign’s national political community. These two

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139. MCKEOWN, *supra* note 123, at 319–20.

140. *See id.* at 334.

141. *Id.* at 213.



narratives are deeply intertwined, in the sense that what we see here is the morphing of racial ideology in international law—what we have typically come to see as the eclipse of classic racial ideology—actually shifting into another disciplinary terrain. This is the transformation from classic racial ideology into the modern: an entrenchment of a racialized right to exclude at the territorial border made possible by an emerging ideology of inclusion at the level of international society. This dynamic would come to be governed by the antidiscrimination principle of human rights law: What once was called “racism” would become repackaged as “cultural diversity.”

### CONCLUSION

The international law of the nineteenth century was in a pickle. On one side, a traditional view of sovereignty had developed, as analogized to that famous resident of the “state of nature”: the rights-bearing individual of liberal political theory. Just as that individual was born free and equal, naturally endowed with certain rights, so too were sovereign states free to determine their national destinies. The very idea of sovereignty entailed rights of equal autonomy and nonintervention for all. On the other side, however, and after the end of the Napoleonic wars and the reconstitution of international society at the Congress of Vienna, the rights and powers of international legal personality were increasingly seen as belonging to certain, special peoples. Given the traditional understanding of sovereignty, however, the question was about how to justifiably draw the line between those true sovereigns and the rest. Indeed, by the second half of the nineteenth century, international lawyers increasingly needed legal justifications that warranted the exclusion of large portions of the world from the rights of sovereignty. The problem was that within the confines of classic liberal theory, it was unclear how to make these kinds of distinctions.<sup>142</sup>

This hierarchy of racial classification became the template for what international lawyers coined “the Family of Nations,” that community of states that were ostensibly free and equal in the exercise of the rights of international legal personality. This use of racial classification as a legal justification for outlining the scope of the Family of Nations was integral to what I have called in this Article international law’s “classic racial ideology.” In the American context of the Monroe Doctrine, I looked to the examples of Elihu Root and Alejandro Alvarez as

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142. See, e.g., GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* (2004).

demonstrative of a racialized practice of argument in which certain human populations were considered ill-deserving of membership in the Family of Nations.

Nevertheless, even as lawyers like Alvarez and Root comfortably deployed classic forms of racialized justification, what eventually seemed common ground was a view of global society as having matured beyond the problem of racism as any longer a fundamental feature of the international legal order. International law's race problem—congratulations all around—was largely solved. The remaining fight would be engaged on the terrain of human rights law, and the elimination of individual acts of prejudice and discrimination.<sup>143</sup>

This is the moment of a great feint, a moment of powerful misdirection that continues to cast a shadow on our own contemporary global order. As classic racial ideology began to fade, the problem of racial exclusion looked to loosen as a problem for international law. Soon, peoples once banished to the domain of colonies, mandates, and trusts would find their way as equals in the United Nations's new world, where at least in the General Assembly, every people would enjoy a sovereign voice. With the international community's attention held by the gradual shift away from the Family of Nations and imperialism and toward the United Nations and decolonization, this focus on inclusion distracted away from an ideology of exclusion unfolding elsewhere. The racial ideology of exclusion was still hard at work with a gatekeeping function, but no longer gatekeeping who could be a sovereign. Distracted by the apparent sense in which a racialized right to exclude was feigning retreat at the level of a more inclusive United Nations, that very same ideology was manifesting a regime of highly exclusionary border controls. That is, while at the level of the sovereign community racial ideology morphed into an ideology of *inclusion*, at the level of border control a new racial ideology was busily valorizing an ideology of *exclusion*.

To restate the point: Racial ideology's gatekeeping function in international law did not disappear in the transition from the Family of Nations to the United Nations, and in some ways, it even strengthened. It was now working hard at the territorial border between states in a way that was entirely novel, even as the conceptual borderland between the Family of Nations and the uncivilized world was becoming more and more a story of economic development.<sup>144</sup> The international legal presumption that a sovereign enjoyed a plenary right to exclude foreign individuals from its territory, in much the same way that an individual property owner could exclude the world, was coming into view for the first time.

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143. For discussion, see E. Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, 45 GEO. L.J. 323 (2014).

144. For discussion, see SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH, AND THE POLITICS OF UNIVERSALITY* (2011).

And it came with a vengeance. As has been thoroughly documented in the study of citizenship and immigration at the turn of the twentieth century, international law was increasingly relied on as a means for justifying the sovereign's right to control the boundaries of its demos, as well as to determine the identity of its citizens. The results, at least in the United States, were as racially marked as they were severe. What's more, this is also the moment of a racialized xenophobia rearing its head at the border.<sup>145</sup> To be sure, xenophobia hardly comes into existence at the end of the nineteenth century. Rather, the point is that as racial ideology morphed from its exclusionary work at the level of sovereigns and came to play a constitutive role in new thinking about border controls, "fear of the foreigner" took on a new and different significance, as well as justification, in international law.

The aim of this Article has been to explore this shift from the classic to the modern mode of racial ideology in international law. My claim is that until we can better understand what became of international law's classic mode of racial ideology, and how it morphed into a modern structure, we will continue to see international law's race problem as entirely marginal: a problem that does not really infect the discipline as much as it does individual agents. Without this, we are at a disadvantage when it comes to studying the ideological legacy of the modern structure, and the status of international law's race problem today.

The discussion above intended to suggest how antiracist strategy in international law might have taken a route through the field of migration and border control. Instead, a racialized right to exclude that had been raised to defend the frontiers of international society, has now been duplicated at the borders of national societies. It was here that modern racial ideology *justified* a new form of racialized exclusion. At the same time, modern racial ideology manifested a distinctly inclusive approach to global race relations. But an important aspect of this architecture of inclusion was something beyond a mere willingness to open up international institutions to more participation.<sup>146</sup> It was also the advent of human rights law, and in particular, the antidiscrimination principle. This advent was bittersweet. For just as "inclusion" was a desirable turn for international society with its own sorts of challenges, so too did the human rights approach both signal welcome developments and at the same time a closing down of alternative

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145. See, e.g., REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981); KUNAL M. PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000* (2015); BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* (2010).

146. For discussion, see, for example, STEPHEN C. NEFF, *JUSTICE AMONG NATIONS* (2014); SIMPSON, *supra* note 142.

approaches to racial justice. And it is this closing down that marks the arrival of a third structure—our contemporary structure of postracial ideology—the structure of raciality in which we find ourselves today.