

**THE PRE-HISTORY OF SELF-DETERMINATION: UNION AND
DISUNION OF STATES IN EARLY MODERN INTERNATIONAL LAW**

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ABSTRACT

National self-determination serves as a chief justification for disunion, as well as union, of states in contemporary international law and politics. While theoretical debates over the meaning of national self-determination go on, the historiography about it seems to reach a consensus: historical writings about national self-determination usually begin with the two modern revolutions in the late 18th century. Against this conventional narrative, this article provides an overview of a pre-history of national self-determination—that is, a genealogy of early modern territorial sovereignty and secession before the rise of national self-determination. While nationalism was absent in early modern international law, territory was largely treated as the property of the sovereign king. With various legal means including conquest, dynastic inheritance, discovery, and occupation, kings aggregated land and augmented their territories in Europe and America. Secessions were rare during that time; they were just a flip side of the logic of the composite kingly states. Ironically, in contradistinction to the modern era, unifying and separatist territorial change went easily and legally in the era of dynasticism.

Keywords. National Self-Determination, Secession, Territorial Sovereignty, International Law, Dynastic States, Conquest, Nation-State, Nationalism, Popular Sovereignty

“The state” began its conceptual career as the estate of an anointed king...

—Margret
Canovan¹

I. INTRODUCTION

Union and disunion of states has become a hot-button topic in the news. The European Union faces the threat of Brexit.² Member states are coping with secessionist movements from within: Scotland sought independence from Britain, and following a referendum, the Catalan independence movement culminated in a

¹ Margret Canovan, *The People*, in THE OXFORD HANDBOOK OF POLITICAL THEORY 349 (John S. Dryzek et al. eds., 2006).

² Steven Erlanger, *British Stun World with Vote to leave E.U.*, N.Y. TIMES, June 24, 2016, <https://www.nytimes.com/2016/06/25/world/europe/britain-brexiteuropean-union-referendum.html>.

unilateral declaration of independence from Spain in 2017.³ Outside of the European Union, Crimea seceded from Ukraine and joined Russia.⁴

In virtually all of these events, the concept of national self-determination is invoked to justify various political claims over disputed territories.⁵ Although quite often associated with unilateral secession, recent literature has revealed that national self-determination, serving chiefly as a justification for territorial changes in a contested political situation, can in fact support both unifying and separating claims.⁶ Recent practice also confirmed the theoretical point: both Crimea's secession from Ukraine and its accession to Russia were conducted in the name of self-determination.⁷ Because of this conceptual, as well as practical, ambiguity, national self-determination has been a troubling issue for both international politics and law,⁸ triggering fierce political and legal debates for years.⁹ International

³ Thomas Y. Patrick, *the Zeitgeist of Secession Amidst the March Towards Unification: Future of the European Union*, 39 B. C. INT'L COMP. L. REV. 195, 195 (2016); see generally Asier Garrido-Munoz, *Prime Minister v. Parliament of Catalonia*, 112 AM. J. INT'L L. 80 (2018) (documenting the 2017 Catalan referendum and the subsequent constitutional dispute over it).

⁴ See generally Thomas D. Grant, *Annexation of Crimea*, 109 AM. J. INT'L L. 68 (2015).

⁵ See, e.g., Alisa Gdalina, *Crimea and the Right to Self-Determination: Questioning the Legality of Crimea's Secession from Ukraine*, 24 CARDOZO J. INT'L & COMP. L. 531 (2016).

⁶ See, e.g., Han Liu, *Two Faces of Self-determination in Political Divorce*, 10 VIENNA J. INT'L CONST. L. 355, 381 (2016) (arguing that the principle of national self-determination can be employed to justify both nation-building projects and separatist movements). For earlier sentiments, see Charles Tilly, *National Self-Determination as a Problem for All of Us*, 122 DAEDALUS 29, 30 (1993) ("[F]or almost two centuries, this set of principles [of national self-determination] has had extraordinary force as a justification for political action by ostensible leaders of peoples who lack states, by rulers of states who speak in a nation's name, and by third parties... who intervene in the political struggles of particular states.").

⁷ See Gdalina, *supra* note 5, at 533; see, e.g., Matteo Vaccaro-Gincisa, *Crimea's Secession from Ukraine and Accession to the Russian Federation as an Instance of North (-West) v. South (-East) Divide in the Understanding of International Law*, 15 ST. CL. J. INT'L L. 126, 142–43 (2017).

⁸ SECESSION AS AN INTERNATIONAL PHENOMENON: FROM AMERICA'S CIVIL WAR TO CONTEMPORARY SEPARATIST MOVEMENTS 1 (Don Doyle ed., 2010) ("Secession has left a bloody trail that runs through nearly every part of the globe. The very word 'secession' is fraught with contested meaning."); Ralph Premdas, *Secessionist Movements in Comparative Perspective*, in SECESSIONIST MOVEMENTS IN COMPARATIVE PERSPECTIVE 12–13 (Ralph Premdas et al. eds., 1990) ("Bloodshed, chaos and suffering tend to accompany the birth of the secessionist child.").

⁹ See, e.g., Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 177–78 (1991) ("One the one hand, the principle of self-determination of peoples suggests that every 'people' has a right to its own state. . . . Unfortunately, it seems directly contrary to another, equally venerable, principle of international law, which upholds the territorial integrity of exiting states."). For a glimpse of

lawyers and scholars have debated the definition of “the self” (national or ethnic groups) and the scope of “determination” (internal autonomy or unilateral secession).¹⁰

While theoretical debates over the meaning of national self-determination go on, the historical writing about national self-determination seems to have achieved a broad consensus.¹¹ The commonplace narrative goes roughly as follows: the principle arose in national politics around the time of the French and American Revolutions in the late 18th century and developed internationally in the 19th century with the rise of nationalism; it came into international order as a political principle after World War I, justifying the breakups of empires; in the post-World War II era, it was codified in international legal documents and transitioned into a legal right in international law.¹² In a word, the development of national self-determination underwent a progressive course.

The conventional account, of course, is not without problems.¹³ In a larger context, since the new century, international law began to take critical attitudes towards its history.¹⁴ Following this trend, recent literature has challenged the linear, Whiggish narrative¹⁵ of national self-determination, highlighting the

the debate over the right to secession, see ALEXSANDAR PAVKOVIĆ & PETER RADAN, CREATING NEW STATES: THEORY AND PRACTICE OF SECESSION 199–220 (2007).

¹⁰ See Liu, *supra* note 6, at 378–83.

¹¹ See, e.g., Arnulf Becker Lorca, *Petitioning the International: A “Pre-History” of Self-Determination*, 25 EUR. J. INT’L L. 497, 498 (2014) (“While defining the nature and scope of this right is difficult, identifying the historical origins of self-determination seems much less controversial.”).

¹² See, e.g., Ian Brownlie, *An Essay in the History of the Principle of Self-Determination*, in STUDIES IN THE HISTORY OF THE LAW OF NATIONS 90–99 (C. H. Alexandrowicz ed., 1970); Robert A. Friedlander, *Self Determination: A Legal-Political Inquiry*, in SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS 309 (Yonah Alexander & Robert A. Friedlander eds., 1980); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177, 179–82 (1991); see generally Joha Salo, *Self-Determination: An Overview of History and Present State with Emphasis on the CSCE Process*, 2 FINNISH Y. B. INT’L L. 268 (1991); see Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT’L L. 1, 2–31 (1993); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 11–13 (1995); Kalana Senaratne, *Beyond the Internal/External Dichotomy of the Principle of Self-Determination*, 43 HONG KONG L. J. 463, 464–69 (2013).

¹³ Sam K. N. Blay, *Self-Determination: An Historical and Analytical Inquiry into Its Origins and Evolution, 1400-1495*, 2 AUSTR. J. LEGAL HIST. 117, 117 (1996) (“Ironically, the historical origins of the principle and relationship between its evolution and development in the social, political and ... economic institutions associated with its historical origins hardly receive any serious attention in international law.”).

¹⁴ See generally George Rodrigo Bandeira Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 EUR. J. INT’L L. 539 (2005).

¹⁵ *Contra* HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 23 (1931) (noting that Whiggish narrative refers to a historiography that interprets human history as a process of progress).

tortuous development of national self-determination before World War I.¹⁶ However, among these literature, few cover the *ancien regime* before the rise of national self-determination.¹⁷ This has hindered a comprehensive understanding of the deep, structural transformation of international law the rise of national self-determination brought about. After all, one cannot understand how modern states break apart without knowing how they were put together. To provide a holistic historical account, the pre-history of national self-determination must be taken down, when union and disunion of states operated without the discourse of nationalism and the principle of self-determination.

This article attempts to fill the gap by providing a genealogy of territorial sovereignty and secession before the rise of national self-determination, hoping to contribute to the critical study on national self-determination. The genealogical account presents a picture of various justifications for territorial change (union and disunion of states) contrasting national self-determination. Unlike its early-modern predecessor, the contemporary conception of territorial sovereignty, affected by the notion of national self-determination, is tied up to national identity,¹⁸ functioning as an integral component of nationhood.¹⁹ All the theoretical debates share a common assumption: the modern nation(al) state derives legitimacy from representing the nation; and every nation, in theory, has a moral right to have its own state.²⁰ Contests of national self-determination, therefore, usually involve violent conflicts among nation states, or in Lansing's words, "dynamites."²¹ To trace the prehistory is to know what the dynamites bombed and dismantled. It has not always been so in modern international law and politics.

¹⁶ See, e.g., Lorca, *supra* note 11, at 497–523; see generally Deborah Whitehall, *A Rival History of Self-Determination*, 27 EUR. J. INT'L L. 719 (2016).

¹⁷ But see Blay, *supra* note 13, at 120–26 (tracing the feudal origins of the modern state before the rise of national self-determination); Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1288 (1991) (arguing that national self-determination originated in the 16th century with the rise of nation-states).

¹⁸ Territorial sovereignty now bears many meanings: it serves as the material basis for the nation that has its state; its geographical extent signifies the scale of power of the nation; more importantly, it takes on meanings of national identity. Duncan Ivison, *Property, Territory and Sovereignty: Justifying Political Boundaries*, in NATURAL LAW AND CIVIL SOVEREIGNTY 221 (Ian Hunter & David Saunders eds., 2002) ("If ethnicity or religious belief no longer provided the key properties for common identification, states still needed to link their territory with some unifying conception of identity.").

¹⁹ FREDERICK HERTZ, NATIONALITY IN HISTORY AND POLITICS: A PSYCHOLOGY AND SOCIOLOGY OF NATIONAL SENTIMENT AND NATIONALISM 150–51 (1944) ("Every nation regards its country as an inalienable sacred heritage, and its independence, integrity, and homogeneity appear bound up with national security, independence, and honour."); MALCOM ANDERSON, FRONTIERS: TERRITORY AND STATE FORMATION IN THE MODERN WORLD 19 (1996) [hereinafter MALCOM ANDERSON, FRONTIERS].

²⁰ See PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 260 (2005).

²¹ ROBERT LANSING, THE PEACE NEGOTIATIONS, A PERSONAL NARRATIVE 97 (1921).

This article argues that, ironically, absent national self-determination, unifying and separatist territorial change went easily and legally. In the age of national self-determination, on the contrary, territorial change becomes difficult and extra-legal.²² Before national self-determination, territoriality took on proprietary or patrimonial colors.²³ Dynastic states employed legal means to acquire territories and affirm sovereignty over them.²⁴ Unions and disunions followed dynastic laws.²⁵ For several centuries, even after 1648 when the modern state began its life, the locus of the sacred was the king's body, not territory;²⁶ as the king's property, territory could be easily transferred following dynastic rules of patrimony and marriage.²⁷ Losing a tract of territory was not yet a national humiliation. As a territorial project,²⁸ the rise of the modern state was characterized by land aggregation and the formation of territoriality,²⁹ which I call "territorial accession."³⁰

Tracing out the prehistory of national self-determination can uncover the deep, structural transformation of the modern state and the pathology of the national state.³¹ To do so, this article attempts to demonstrate three points. First, the pre-national self-determination state was the composite monarchy, rather than the unitary nation-state. As the sovereign, the king's body linked multiple tracts of territories, putting them together into a *unified*, but not *unitary*, state. Second, with this conception of territory, the sovereign could acquire and consolidate territories through various, flexible legal means, including dynastic marriage, inheritance, and

²² In each moments of large-scale application, national self-determination was used politically, rather than legally. See Liu, *supra* note 6, at 364.

²³ See *infra* Part III, Section B.

²⁴ See *infra* Part III, Section C.

²⁵ See, e.g., Paul S. Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 455–56 (2002); PETER SAHLINS, *BOUNDARIES: THE MAKING OF FRANCE AND SPAIN IN THE PYRENEES* 93–94 (1989).

²⁶ See generally ERNST KANTOROWICZ, *THE KING'S TWO BODIES* (1957); JOHN BREULLY, *NATIONALISM AND THE STATE* 45 (1982) (quoting Louis XIV's declaration: "In France the nation is not a separate body, it dwells entirely within the person of the King.").

²⁷ LASSA OPPENHEIM, *INTERNATIONAL LAW*, VOL. I 265 (1905) ("When Grotius created that science of [international law], State territory used to be still, as in the Middle Ages, more or less identified with the private property of the monarch of the State. Grotius and his followers applied, therefore, the rules of Roman Law concerning the acquisition of private property to the acquisition of territory by States.").

²⁸ See SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS* 25–73 (2006).

²⁹ CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 126–38 (G. L. Ulmen trans., 2003) (describing the rise of the modern state in the 16th and 17th centuries as a process of the European appropriation of the New World as well as the creation of territorial borders within Europe).

³⁰ It was what modern secessions, from the American Revolution to decolonization, were directed against. See generally DAVID ARMITAGE, *DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* (2007).

³¹ See generally LINDA BISHAL, *FORGETTING OURSELVES: SECESSION AND THE (IM)POSSIBILITY OF TERRITORIAL IDENTITY* (2004).

conquest, since territory was treated as the property and/or patrimony of the king; territory was not directly and strongly linked to political identity, and the peoples were objects, rather than subjects, in both domestic and international laws.³² Third, secessions during that period were comparatively rare and took on different meanings from subsequent, modern ones. There were only two examples of secession: the Dutch Revolt and the Independence of Portugal, both against Spain.³³ Without a nationalist imprint, secession was just the flip side of the prevailing project of dynastic, territorial aggregation.

This article falls in seven parts. Part II begins with some preliminary definitions. It makes a distinction between the state and the nation-state: the state has existed from 1648 until now; the nation-state was a recent political invention after the rise of nationalism. I call the early modern state the “composite kingly state.” Part III shows how the dynastic sovereigns appropriated lands with the help of legal institutions such as conquest and inheritance within Europe, and how the conception of territoriality emerged. Part IV extends this analysis to land appropriation in America. Part V is a general description of the territorial structure and particularly the juridical status of the acquired territories within the realm of composite kingly states, mainly England, France, and Spain. Part VI will analyze the two cases of secession, the Netherlands and Portugal, both from Spain. Both show the flip side of the territorial accession in early modern composite kingly states. A conclusion follows.

II. THE STATE AND THE NATION STATE

It is commonplace to say that the modern nation-state began with the Treaty of Westphalia in 1648.³⁴ That is not altogether wrong, but it is imprecise. According to conventional wisdom, the state is identified with the nation-state. But if we define the nation-state in its literal sense, as a unitary, national, and even mono-national political community with sovereignty, then we will find that 1648 was not its year of birth. The state at that time was not the nation-state as we understand it today.

In *The Shield of Achilles*, constitutional lawyer and historian, Philip Bobbitt, rejects the monolithic notion of the state.³⁵ His historical exploration finds

³² Domestic law, because the ruled did not become subject until the triumph of democracy; international law, because the peoples did not become subject until the rise of self-determination. The later French Revolution exalted both democracy and self-determination.

³³ See *infra* Part VI.

³⁴ See, e.g., Jason Farr, *Point: The Westphalia Legacy and the Modern Nation-State*, 80 INT’L SOC. SCI. REV. 156, 156 (2005).

³⁵ See generally PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002).

that the state evolved along with the historical changes of law and strategy.³⁶ It had five variations in modern history: the princely state, the kingly state, the territorial state, the state-nation, and the nation-state.³⁷ The “nation,” according to his categorization, did not ascend until the American and the French Revolutions; the nation-state, which identifies the state with the nation, did not appear until the end of World War I.³⁸ The nation-state in the nationalist sense, therefore, is a product of a 19th century or even early 20th century political imagination—a very recent type of the state.³⁹

We may make a neat distinction between the nation-state and the pre-national state. The pre-national state, including the princely state, the kingly state, and the territorial state, had little bearing on nationalist aspirations and incorporated multiple political communities and tracts of territories bound by the king’s body politic.⁴⁰ In this work, I call it “the composite kingly state.”⁴¹ If we call political history after the American Revolution the age of secession, history before, then, can be dubbed the age of aggregation. This is so in two senses: first, within the European–Christian community, the absolutist states assimilated the decentralized feudal units into unified polities; second, outside Europe, the Great Powers appropriated the non-European lands (the Americas) as their territory.⁴² Together, this two-fold project of territorial accession brought forth the political-geographical order of traditional European international politics and international law.

By highlighting the early modern composite kingly state, I do not suggest that the nation-state was the teleological or eschatological destiny of the evolution of the modern state.⁴³ The turn to history is intended to liberate our thought to imagine alternatives and possibilities, rather than narrow our minds. We should reject a “Whiggish” narrative that reduces modern political history to the simple

³⁶ See generally BOBBIT, *supra* note 35.

³⁷ See generally *id.*

³⁸ See generally *id.*

³⁹ See MARK GREENGRASS, CONQUEST AND COALESCENCE: THE SHAPING OF THE STATE IN EARLY MODERN EUROPE vii (1991) (“Although we choose to imagine Europe’s political structure in the form of a small number of unitary and integrated nation states, it has been so only in the relatively recent past.”).

⁴⁰ See John H. Elliott, *A Europe of Composite Monarchies*, 137 PAST & PRESENT 48, 50 (1992).

⁴¹ Of course, I’m speaking of the Weberian ideal type. Not all the states in Europe at that time were composite kingly states. But the composite kingly state was both a powerful political imaginary and a dominant form of state in the early modern period.

⁴² See *infra* Part IV.

⁴³ See Elliott, *supra* note 40, at 51 (“It is easy enough to assume that the composite state of the early modern period was no more than a necessary but rather unsatisfactory way-station on the road that led to unitary statehood; but it should not automatically be taken for granted that at the turn of the fifteenth and sixteenth centuries this was already the destined end of the road.”).

story of creating and developing the unitary nation-state.⁴⁴

III. TERRITORIAL ACCESSION IN EARLY MODERN EUROPE

The advent of the early modern state was a two-fold process: the rise of the kingly sovereignty and the rise of territoriality.⁴⁵ First, there was a wave of enhancing the political status of the kings.⁴⁶ In the medieval period, the supreme political authority—sovereignty—lay in the church and the empire; their dominion was over the whole world as the Christian commonwealth.⁴⁷ National kings began to establish their political independence from these universal political authorities; kings became sovereigns.⁴⁸ Second, there was also a parallel project of political-geographical centralization and the formation of new territorial units.⁴⁹ In contrast to feudalism, the formation of the state was a process of aggregating scattered lands.⁵⁰ Modern states centralized the political and military power from the feudal lords, bishoprics, abbeys, and other small entities.⁵¹ “In the year 1500,” observes Philip Bobbitt, “Europe comprised some 500 or so princely domains, independent cities, and contested territories.”⁵² But by 1900, as Charles Tilly points out, there were only twenty-five states in Europe.⁵³

A. The King and the Sovereign

In modern legal and political theories, sovereignty is the supreme political

⁴⁴ See HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 68–78 (1973) (critiquing the Whiggish historiography).

⁴⁵ See *infra* Part III, Section B, Subsection 1, 3.

⁴⁶ See *infra* Part III, Section A.

⁴⁷ See *infra* Part III, Section A.

⁴⁸ See JOSEPH STRAYER, *ON THE MEDIEVAL ORIGINS OF THE MODERN STATE* 57 (1973) (“By 1300, it was evident that the dominant political form in Western Europe was going to be the sovereign state. The universal Empire had never been anything but a dream; the universal Church had to admit that the defense of the individual state took precedence over the liberties of the Church or the claims of the Christian commonwealth.”).

⁴⁹ See *infra* Part III, Section B.

⁵⁰ See *infra* Part III, Section B.

⁵¹ See BOBBITT, *supra* note 35, at 123 (“Louis abolished or ignored all rival authorities and councils. The local authorities, the nobility, the Church, and town government were all placed directly in relationship to the Crown, and all were made responsible to his will.”).

⁵² BOBBITT, *supra* note 35, at 123.

⁵³ See *Reflections on the History of European State-Making*, in *THE FORMATION OF NATION STATES IN WESTERN EUROPE* 15 (Charles Tilly ed., 1975).

authority within a given territory.⁵⁴ Sovereignty, thus, encompasses two components: supreme political authority and a defined territory. Sovereignty is a right to command, to coerce, and to be obeyed;⁵⁵ it is power with legitimacy. Yet it is only supreme—and legitimate—within a given spatial domain.⁵⁶ The modern conception of sovereignty, therefore, always presupposes land division and territoriality.

Sovereignty as the supreme political authority was not always territorial in the modern sense.⁵⁷ Carl Schmitt famously points out that: “All significant concepts of the modern theory of the state are secularized theological conceptions. . . .”⁵⁸ The idea of sovereignty as supreme authority, too, has theological origins in the medieval, Christian political imagination.⁵⁹ The idea of earthly supreme political authority began with the theological conception of God’s sovereignty.⁶⁰ Whether the locus of sovereignty in the political world was the Pope, the Emperor, or the rising national kings (or even later the people⁶¹), they all pointed to the sovereignty of God.

Throughout the later Middle Ages, the locus of political sovereignty was vigorously contested. Both the Pope and the Emperor claimed to be the universal sovereign of Europe, which caused conflict.⁶² James Bryce illustrated this contestation by assigning two “legal sovereigns”: “From the eleventh century onwards it was admitted in Western Christendom . . . that there were two Legal Sovereigns, and according to the view more generally held, each was *de iure*

⁵⁴ See Daniel Philpott, *Sovereignty: An Introduction and Brief History*, 48 J. INT’L AFF. 353, 357 (1995).

⁵⁵ See Robert P. Wolff, *Conflict between Authority and Autonomy*, in AUTHORITY 20 (Joseph Raz ed., 1990).

⁵⁶ See Philpott, *supra* note 54 (“Supreme authority within a territory implies both the undisputed supremacy over the land’s inhabitants and independence from unwanted intervention and outside authority . . .”).

⁵⁷ See, e.g., HENRY MAINE, INTERNATIONAL LAW 56 (1890) [hereinafter MAINE, INTERNATIONAL LAW] (“Sovereignty was not always territorial; it was not always associated with a definite portion of the earth’s surface.”).

⁵⁸ CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 36 (George Schwab trans., 2005).

⁵⁹ See JEAN B. ELSHTAIN, SOVEREIGNTY: GOD, STATE, AND SELF 30 (2008) (“As we reach the later Middle Ages, theological understandings of God’s fullness of reason and goodness and his relational complexity are featured less prominently; instead, God, as the site of sovereign will, moves to the forefront of controversy and implication.”).

⁶⁰ *Id.* (“Claims to earthly power or *potestas* as dominion, and *auctoritas*, or right authority, migrated over to politics from arguments about God’s power and authority, in a word, God’s sovereignty.”).

⁶¹ See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 65 (Arthur Goldhammer trans., 2004) (“The people reign over the American political world as God reigns over the universe. They are the cause and end of all things; everything proceeds from them, and to them everything returns.”).

⁶² See SASSEN, *supra* note 28, at 39–40.

absolute, the Pope in spiritual, the Emperor in temporal matters.”⁶³ The contest over sovereignty between the Papacy and the Emperor, therefore, was settled, although temporarily, by the division between church and state, spiritual and secular, rather than by a territorial delimitation.⁶⁴

However, over time, the Pope wanted more. From the beginning of the 13th century on, the Papacy claimed to be sovereign in matters both temporal and spiritual,⁶⁵ as shown in the Bull of 1302, *Unam Sanctam*, in which Pope Boniface VIII proclaimed that it “is absolutely necessary for salvation that every human creature be subject to the Roman pontiff.”⁶⁶ The Papacy’s propagandists—the papalists—declared that there could be no separation between church and state.⁶⁷ Rather, the Pope reigns over all things in the world.⁶⁸ The papalist Giles of Rome, for example, held in the beginning of the 14th century that “[t]he plenitude of the spiritual and material powers belongs to the pope.”⁶⁹ The Church, for the papalists, was not only a religious group but also a political community.⁷⁰ In this sense, the legal historian Harold Berman calls the Church “the first modern state.”⁷¹

⁶³ JAMES BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 529 (1901).

⁶⁴ *See id.*

⁶⁵ *See* ELSHTAIN, *supra* note 59, at 23 (“Boniface insisted that the pope enjoys a plenitude of power unavailable to, and unattainable by, any other power or authority in Christendom. The pope, perforce, could make and unmake kings, being the final word in all things.”).

⁶⁶ Boniface VIII, *Unam Sanctam* (1302), <http://www.fordham.edu/halsall/source/B8-unam.asp>.

⁶⁷ *See* MICHAEL WILKS, *THE PROBLEM OF SOVEREIGNTY IN THE LATER MIDDLE AGES* 29 (1963) (“There is no divorce of temporal from spiritual, of Church from State, since all such distinctions are lost in the unity of the universal society. Each inferior community is no more than an administrative unit. The kingdom is at the same time a church; the king is subject to his primate as emperor is to the universal bishop; and each bishop and chapter are strictly analogous to the pope and his college of cardinals. Kings and bishops are integral parts of one and the same body politic, which is itself an integral part of the universal principate.”).

⁶⁸ *See id.* at 31 (“The pope becomes a *minor mundus*, the actualised image of the single and universal administration of all things. The head is a microcosm, in which is reflected the total ordering of the world. Thus the ruler can be described as both head and whole of the community in the same way that Christ is not only the *capute Ecclesiae* but also forms the *corpus Ecclesiae* itself.”).

⁶⁹ ERIC VOEGELIN, *HISTORY OF POLITICAL IDEAS: THE LATER MIDDLE AGES* 51 (Paul Caringella et al. eds., 1998).

⁷⁰ *See* WILKS, *supra* note 67, at 18 (“To the papalist the medieval Church had been expanded into a comprehensive whole which included not only religious but equally all political and social institutions. It came near to being a practical realization of the ideal of Plato’s Republic, that is, of the rule of the wise over a unified society built up organically in ranks, and of the ideal of the Stoics whose universal commonwealth was to contain the whole of mankind without distinction in one universal right-minded and right-living community.”).

⁷¹ *See* HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 411–12 (1983).

The sovereignty, especially the temporal political authority of the Pope, had a Roman justification as well. The Pope claimed to be the inheritor of the Roman Emperor who purported to be the ruler of the world, and that was purportedly evidenced by the Donation of Constantine (later proved to be forged in the 15th century), according to which, the Roman Emperor donated the *imperium* over the Empire to the Papacy in the 4th century.⁷² Pope Boniface VII's famous saying at the beginning of the fourteenth century epitomizes this idea: "It is I who am Caesar, it is I who am emperor."⁷³ All these ideas led to the conception of "papal monarchy."⁷⁴ The Pope, accordingly, was the monarch of the kingdom of Christians.

The imperialists challenged the idea of papal sovereignty. The imperialists held that "not the Pope but the Emperor is truly sovereign, and, that he is so by God's direct appointment."⁷⁵ The Holy Roman Empire, for the imperialists, is both *Roman* and *holy*. It is Roman, because it is the inheritor of the Roman Empire: "The Holy Roman Empire was but the continuation of the Empire of the Caesars, the Flavii, and of Justinian."⁷⁶ It is holy, because the Roman Empire was ordained by God.⁷⁷ Hence, theorists like Marsilius of Padua held that the Holy Roman Empire was independent of Papal control.⁷⁸ Even Bartolus (1313–1357), the jurist who would try to justify the autonomy of the Italian city-states, once said that anyone who denied the Roman Emperor's rulership over the whole world "would be a heretic" because Christ himself recognized the Roman Emperor as lord.⁷⁹

Both the idea of papal and of imperial sovereignty turned out to be pipe dreams. From the 14th century on, both the Pope's and the Emperor's sovereignty were but names.⁸⁰ "The Pope was gravely wounded by a revolt which ended by withdrawing half Europe from his sway."⁸¹ After a huge conflict with Philip IV, the

⁷² See FRANCIS OAKLEY, *KINGSHIP: THE POLITICS OF ENCHANTMENT* 112 (2006) ("The Donation depicts the pope as occupying a position equal in status with that of the emperor . . . As a result, the document was later to lend itself to extensive use by the defenders of a papal sovereignty in matters temporal.").

⁷³ *Id.* at 116.

⁷⁴ See generally COLIN MORRIS, *THE PAPAL MONARCHY: THE WESTERN CHURCH FROM 1050 TO 1250* (1991).

⁷⁵ JOHN N. FIGGIS, *THE DIVINE RIGHTS OF KINGS* 15 (1935).

⁷⁶ *Id.* at 43.

⁷⁷ Dante, for example, argued that God directly authorized the Roman Emperor's temporal power and authority without the mediation of the Pope. DANTE: *MONARCHY* 1312–13 (Prue Shaw ed., 1996).

⁷⁸ See generally MARSILIUS OF PADUA: *THE DEFENDER OF PEACE* (Annabel Brett ed. and trans., 2005) [hereinafter MARSILIUS OF PADUA].

⁷⁹ Constantine Fasolt, *Sovereignty and Heresy, in INDEFINITE BOUNDARIES: ORDER, DISORDER, AND REORDER IN EARLY MODERN GERMAN CULTURE* 386 (M. Reinhart ed., 1998).

⁸⁰ See VOEGELIN, *supra* note 69, at 163 ("[T]he emperor had been practically eliminated, in his function as the temporal lord of Christianity . . . The papacy approached in the fourteenth and fifteenth centuries the same fate. . .").

⁸¹ BRYCE, *supra* note 63, at 531.

King of France, the Pope was imprisoned in Avignon.⁸² This ultimately led to the Great Schism of the Church from late 14th century to early 15th century.⁸³ The Church was divided; the universal sovereignty of the Church within Christendom was but a vision. However, so was that of the Emperor.⁸⁴ The conflict between Emperor Henry VII and King Robert of Naples in 1312, in which the Emperor unsuccessfully attempted to bring the King to his knees, marked “the last imperial effort to assert in practice the universal overlordship of the emperor over kings and princes.”⁸⁵

Out of the contest and competition between the Pope and the Emperor emerged the rising national kings, especially those of France and England.⁸⁶ From the 13th century on, national kings aspired to get out of both the papal and imperial dominations.⁸⁷ For kings and princes, “[i]ndependence *de facto* was ultimately translated into a sovereignty *de jure*.”⁸⁸ The Papacy even helped enhance the political status of the kings. The Pope, to weaken the power of the Emperor, began to reduce the emperor to a status equal with that of national kings.⁸⁹ Both the kings and the Emperor were equal political underlings under the sovereign Papacy.⁹⁰ Monarchs now assumed the sovereign rights of the Emperor.⁹¹ France was the

⁸² FRANCIS OAKLEY, *THE CONCILIARIST TRADITION: CONSTITUTIONALISM IN THE CATHOLIC CHURCH 1300-1870* 27 (2003).

⁸³ See generally WALTER ULLMANN, *THE ORIGINS OF THE GREAT SCHISM* (1948).

⁸⁴ BRYCE, *supra* note 63, at 531 (“The Emperor died out as universal Sovereign, and became thenceforth little more than a German monarch, with a titular precedence over other princes.”).

⁸⁵ Walter Ullman, *The Development of the Medieval Idea of Sovereignty*, 64 *ENG. HIST. REV.* 1, 1 (1949).

⁸⁶ See MALCOM ANDERSON, *FRONTIERS*, *supra* note 19, at 18 (1996) (“[T]he uneasy, sometimes conflicting, relationship between Pope and Holy Roman Emperor allowed the development of polities independent of both—the modern European states”).

⁸⁷ See John H. Herz, *Rise and Demise of Territorial State*, 9 *WORLD POL.* 473, 475 (1957) (“Modern sovereignty arose out of the triangular struggle among emperors and popes, popes and kings, and kings and emperors.”).

⁸⁸ CHARLES MCILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* 268 (1932).

⁸⁹ FIGGIS, *supra* note 75, at 44 (“To establish their own claims to supremacy, the Popes were driven to minimize the prerogatives of the Emperor, and to recognise in him less instead of more authority, than they did in the case of other kings. Thus all monarchies were free to appropriate such rags and trappings of his ancient majesty, as still belonged to the ‘ever august increaser of the Empire’ in the shape of theories of power that was never exercised and claims of sovereignty that was never effective.”).

⁹⁰ See FRANCIS H. HINSLEY, *SOVEREIGNTY* 88–89 (1986) (“[F]rom the thirteenth century the formula *rex imperator in regno suo* (the king is Emperor within his own kingdom) became a characteristic device for defending the leading monarchies against the imperialists’ claims.”).

⁹¹ See JOHN JEWEL, *THE APOLOGY FOR THE CHURCH OF ENGLAND* 224 (1846) (What was the Emperor’s right “is now a common right to all princes, for so much as kings are now possessed in the several parts of the whole Empire.”).

forerunner in this trend.⁹²

National kings employed both the Papacy's and the Emperor's justifications for their own sovereignty.⁹³ The doctrine of papal monarchy or papal sovereignty provided some precedents to the modern theory of sovereignty.⁹⁴ From the later Middle Ages to early modern era, some legists presented "a mirror image of papal *plenitudo potestatis*"⁹⁵ for the rising national kings.⁹⁶ The national kings appropriated the theory of imperial sovereignty to justify their sovereignty as well. The 14th century notion of Divine Rights of the Emperors, which evolved in the contest with the Pope, was translated into the Divine Rights of Kings in the next two centuries.⁹⁷ The king now claimed himself to be the sovereign directly authorized by God.⁹⁸

The rise of the conception of kingly sovereignty was therefore a process of sacralization of the king.⁹⁹ The king became a thaumaturgic and sacred figure.¹⁰⁰

⁹² See VOEGELIN, *supra* note 69, at 55 ("The first indication that a French claim of power independent of the imperial existed is contained in the decretal *Per Venerabilem* of Innocent III (1202), which declares that the king of France does not recognize a superior in temporal matters."); HINSLEY, *supra* note 90, at 80 (1986) ("When Innocent III announced in 1202 that the King of France recognized no superior in temporal affairs, or when a cannon lawyer agreed that the regional king was *de facto* independent of the Empire, the object was to advance the argument that Emperor and king were equally subject to the theocratic Pope and the law of the universal Church. . . . When as early . . . as the twelfth century the King of Spain or France or England announced that he was an emperor, . . . [h]e was giving expression to his ambitions in the imperial terms that came naturally to a primitive state which hardly knew, as yet, that the Emperor existed.")

⁹³ See PERRY ANDERSON, *LINEAGES OF THE ABSOLUTIST STATE* 28 (1979) ("The Pope's assertion of a *plenitudo potestatis* within the Church set the precedent for the later pretensions of secular princes, often realized precisely against its religious exorbitance.")

⁹⁴ See ANTHONY J. BLACK, *MONARCHY AND COMMUNITY: POLITICAL IDEAS IN THE LATER CONCILIAR CONTROVERSY* 80–81 (2005); ELSHTAIN, *supra* note 59, at 24 ("It was legists in the pay of the centralizing French monarchy who first began to use the word *sovereignty* in the thirteenth century as a characterization of political rule, analogous to God's sovereignty.")

⁹⁵ See ELSHTAIN, *supra* note 59, at 24.

⁹⁶ See *id.* at 44, 61 ("The articulation of a plenitude of power advanced by medieval canonists was appropriated by legists in the service of ambitious earthly monarchs and turned against the papacy." And "[d]ecisive conflicts in the thirteenth and fourteenth centuries are illustrative, showing the appropriation of a theory of sovereign power from papacy and applying it to centralizing monarchy.")

⁹⁷ See FIGGIS, *supra* note 75, at 44–45 (The divinity of earthly political rule "took shape in the fourteenth century as the Divine Right of the Emperors . . . [I]t was to reform itself in the sixteenth and seventeenth centuries as the Divine Right of Kings.")

⁹⁸ See VOEGELIN, *supra* note 69, at 55 ("the claim was expressed by Louis IX in the formula that the king holds power from God only and from himself, the formula that, in slight variation, is still the symbol of French princely sovereignty in the theory of Bodin.")

⁹⁹ Paul W. Kahn, *The Question of Sovereignty*, 40 *STAN. J. INT'L L.* 259, 268–69 (2004).

¹⁰⁰ See VOEGELIN, *supra* note 69, at 59.

For example, he could lay on hands to heal diseases and thus to manifest his divinity.¹⁰¹ Another example was the theory of “king’s two bodies”: the body natural subject to birth and death, and the Christ-like body politic that never dies.¹⁰² By the early modern periods, “the Divine Right of Kings” sat at the center of the Christian political imagination.¹⁰³

The rise of the conception of kingly sovereignty implied the disunion of Christendom and of Europe as well. Europe was no longer a universal *republica Christiana*, but a plurality of sovereign kings. Each sovereign had his own geographical realm. Thus, kingly sovereignty brought about a conception of territoriality: the king is the *only* sovereign within *only* his territory. Conceptually, kingly sovereignty and territoriality are complementary, but distinct; historically, they went hand in hand in the rise of the modern state.¹⁰⁴

B. Land and Territory

Territoriality is a political imagination that organizes politics according to geographical division. Modern territoriality contains several elements. First, there are multiple states on the earth’s surface and each sovereign enjoys supreme political authority within his territory.¹⁰⁵

Second, political rule is linked to a tract of land.¹⁰⁶ Political rule was not always associated with land; only modern territorial sovereignty attaches political authority closely to the occupation and domination of a tract of land.¹⁰⁷ The pre-modern, medieval conception of political power was either tribal or universal: for the former, political power was linked to kinship, which was over people rather than land;¹⁰⁸ for the latter, political power was to be over the whole world, rather than a

¹⁰¹ See generally MARC BLOCH, *THE ROYAL TOUCH: MONARCHY AND MIRACLES IN FRANCE AND ENGLAND* (J.E. Anderson trans., 1961).

¹⁰² ERNST KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* 4 (1957).

¹⁰³ See PAUL MONOD, *THE POWER OF KINGS: MONARCHY AND RELIGION IN EUROPE 1589-1715* 3 (1999) (In early modern era, “monarchy was not just a system of worldly dominance; it was a reflection of God, and an ideal mirror of human identity. It was a link between the sacred and the self. In turn, the mediation of the royal person had become essential to Christian conceptions of political authority.”).

¹⁰⁴ See *infra* Part III, Section B.

¹⁰⁵ See, e.g., ADAM WATSON, *THE EVOLUTION OF INTERNATIONAL SOCIETY* 182 (2009) (“The Westphalia settlement was the charter of Europe permanently organized on an anti-hegemonic principle.”).

¹⁰⁶ John Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 *INT’L ORG.* 139, 148–49 (1993).

¹⁰⁷ *Id.*

¹⁰⁸ See HENRY MAINE, *ANCIENT LAW* 98–101 (1861) [hereinafter MAINE, *ANCIENT LAW*] (pointing out that before the rise of territorial state, “the notion of sovereignty that prevailed seems to have been twofold”: “tribe-sovereignty” and “universal dominion”).

particular, geographical realm.¹⁰⁹

Third, modern law distinguishes between public-law rights (territory or jurisdiction) and private-law rights (property), and between imperium and dominium.¹¹⁰ Internally, the state has merely territorial rights over the whole land.¹¹¹ The state may have a proprietary right over part of the land (such as public roads, rivers, state-owned land, etc.), but this proprietary right is differentiated from its territorial right.¹¹² The state's right of expropriation, known as eminent domain, is part of territorial sovereignty, not that of proprietary right.¹¹³ Internationally, under the modern system of territorial states, transference of territory is emphatically transference of governing competence, not of landed property.¹¹⁴

Fourth, the form of modern state territory is characteristically a contiguous geographical block delineated by clear boundaries.¹¹⁵ The modern conception of territoriality relied greatly on the development in cartography that helped draft modern maps.¹¹⁶ The map, taking the place of the body politic of the king, became the embodiment of and the visible symbol of the modern territorial state.¹¹⁷

The early modern state attained the first two elements of modern territoriality: the element of the division of realms, and the linkage between sovereignty to land dominion.¹¹⁸ But its territoriality was not a public-law conception premised on the public/private distinction: the territory of the state was

¹⁰⁹ See MAINE, *ANCIENT LAW*, *supra* note 108, at 100–01 (noting that medieval monarchs searching for an alternative to tribal sovereignty often “came forward as aspirants to universal empire” like the Roman Empire).

¹¹⁰ See MALCOM ANDERSON, *FRONTIERS* *supra* note 19, at 13 (“[T]he modern international frontier and the related concept of sovereignty owe much to Roman ideas of territoriality, of *dominium* and *imperium*, transmitted through the Catholic Church, rediscovered by political theorists of the Renaissance and regarded as useful tools by jurists serving the interests of princes in the early modern period of European history.”).

¹¹¹ See JOHN WESTLAKE, *INTERNATIONAL LAW* 86–87 (1910).

¹¹² *Id.* at 86.

¹¹³ *Id.* at 87 (“Eminent domain . . . is not a part of the property but a right of interfering with property, which it limits.”).

¹¹⁴ See H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE, VOLUME III* 12 (1970) (“What is transferred in the case of cession of State territory is no longer a ‘real’ right (*jus in re*) of a proprietary or patrimonial nature... The object of the transfer is rather the aggregate of public competencies respecting the territory and its inhabitants, which the ceding State used, or was entitled under international law, to exercise until the cession. What is in reality transferred is the total of State competencies inherent in the concept of territorial sovereignty.”).

¹¹⁵ GORDON EAST, *GEOGRAPHY BEHIND HISTORY* 98–99 (1938).

¹¹⁶ See Michael Biggs, *Putting the State on the Map: Cartography, Territory, and European State Formation*, 41 *COMP. STUDIES IN SOC’Y & HIST.* 374, 374 (1999).

¹¹⁷ PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 60 (2000) (“[T]he map has replaced the king’s body. For us, the territory of the state is represented by a map—a deliberately constructed, artificial representation.”).

¹¹⁸ See *infra* Part III, Section B, Subsections 1–2.

the property of the king.¹¹⁹ The strict public-law definition of territory was not yet known. Besides, the form of early modern territory was not yet a contiguous tract of land delimited and demarcated by strict, fixed, and linear boundaries.¹²⁰ Explanations of these points follow.

1. Division of Realms

The rise of kingly sovereignty implied that Europe became politically plural; the king's sovereignty had a particularity in terms of spatial range.¹²¹ In this sense, Westphalia was first and foremost a symbol of division of the European, universal, political order.¹²²

Yet the political imagination of universality never totally disappeared.¹²³ The Pope continued to claim universal power over the world, at least over the civilized part of it.¹²⁴ Even after the French Revolution, Joseph de Maistre still argued for the universal political authority of the Pope in Europe.¹²⁵ After the French Revolution, political universalism began to take secular forms; the political conception of universal human rights began to develop.¹²⁶ The French Revolution sowed the seed of secular universalism all over the world.¹²⁷ Both communism and liberal internationalism are embodiments of Christian universalism.¹²⁸ Contemporary claims of cosmopolitanism and human rights are but renewals of

¹¹⁹ See *infra* Part III, Section B, Subsection 3.

¹²⁰ See *infra* Part III, Section B, Subsection 4.

¹²¹ See MICHEL FOUCAULT, TERRITORY, SECURITY, POPULATION 297–98 (Michel Senellart ed., Graham Burchell trans., 2009) (“[E]very sovereign is emperor in his own domain, . . . and there is no indication that a single sovereign of a particular state has a superiority that would make Europe a kind of single whole. Europe is fundamentally plural . . . it is a geographical division, a multiplicity of states without unity . . .”).

¹²² See, e.g., WATSON, *supra* note 105 (“The Westphalia settlement was the charter of Europe permanently organized on an anti-hegemonial principle.”).

¹²³ See MALCOM ANDERSON, FRONTIERS *supra* note 19, at 17 (“Absolute control of territory by rulers recognizing no superior authority was for a long time challenged by various forms of universalism. The core belief of universalism was that some high authority out to hold sway over the whole of mankind or at least the civilized part of it.”).

¹²⁴ MALCOM ANDERSON, FRONTIERS *supra* note 19, at 18.

¹²⁵ See generally JOSEPH DE MAISTRE, THE POPE (1880).

¹²⁶ See, e.g., *The Declaration of Rights of Man and of the Citizen, 1789*, NAT’L ASSEMBLY OF FR., https://www.americanbar.org/content/dam/aba/migrated/2011_build/human_rights/french_dec_rightsofman.authcheckdam.pdf (last visited Oct. 15, 2018).

¹²⁷ BRAIN J. REILLY, THE COLUMBIA HISTORY OF TWENTIETH-CENTURY FRENCH THOUGHT 345 (Lawrence D. Kritzman, ed., 2006).

¹²⁸ PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 235–36 (2005) (“Liberalism . . . reaches unity across borders.”).

Christian universalism.¹²⁹ They are, for that reason, distinctly European projects.

If universality remains in the background, a plurality of political realms, it must have a political-theoretical or even political-theological justification from its start. It must answer the question why the division of political realms (*divisio regnorum*) is desirable and legitimate. John of Paris (c.1255–1306), the theoretical defender of the King of France, offered one early justification of plural realms: “the secular power showed far greater complexities and diversities in its structure than its spiritual counterpart. Thus, it would not be advisable to have the same idea of universality as there was in spiritual affairs.”¹³⁰ Marsilius of Padua (1275–c.1342) expressed similar ideas. For him, as Voegelin put it,

[t]here should be a plurality of states corresponding to the regional linguistic, and cultural diversification of mankind, for it seems to be the intention of nature that the propagation of men should be moderated by wars and epidemics so that limited space would be sufficient for the process of eternal generation.¹³¹

The canonist Alanus (1428–1475), forwarded the general principle that every king has in his realm the same rights as the emperor in the empire; he refers to the origin of the rule in the international law of the time insofar as the division of the realms (*divisio regnorum*), introduced by *ius gentium*, is approved by the pope.¹³²

Leibniz (1646–1716) also clarified the nature of territoriality among divided realms, by pointing to political practice: sovereignty lies in the actual control within the territory of the ruler and is thus not universal.¹³³ With these theoretical efforts, appealing to God, nature, and practice, the division of realms was explained and justified. With the Treaty of Westphalia, the division of political realms was confirmed in international society as the norm.¹³⁴

2. Land and Sovereignty

During the early medieval period, political authority rested on the right to

¹²⁹ See, e.g., Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 48–75 (1992).

¹³⁰ See JOHN OF PARIS: ON ROYAL AND PAPAL POWER 14 (Arthur P. Monahan, trans., Colum. Univ. Press 1974) (quoted in Ullmann, *supra* note 85, at 16).

¹³¹ VOEGELIN, *supra* note 69, at 96.

¹³² *Id.* at 55.

¹³³ See Herz, *supra* note 87, at 478–80.

¹³⁴ See SCHMITT, *supra* note 29, at 144–45.

govern a people or on the divine right of universal domination.¹³⁵ Territorial rulership was not considered as a title of dignity in the political realm.¹³⁶ Even the division of the empire of Charlemagne was not territorial, for the three grandsons of Charlemagne still claimed to be Emperors of Rome.¹³⁷

The rise of feudalism in the High Middle Ages began to link the basis of political authority to dominion of land. The political relationship between lords and vassals was built upon their respective economic and military rights and duties over a tract of land as fief.¹³⁸ As Henry Maine pointed out, “[t]erritorial sovereignty—the view which connects sovereignty with the possession of a limited portion of the earth’s surface—was distinctly an offshoot, though a tardy one, of *feudalism*. . . . It was feudalism which for the first time linked personal duties, and by consequence personal rights, to the ownership of land.”¹³⁹ Maine expressed the same meaning in his discussion of international law: “The fact is that the feudali[z]ation of Europe had to be completed before it was possible that Sovereignty could be associated with a definite portion of soil.”¹⁴⁰ In a word, feudalism is the historical prerequisite of territorial sovereignty.

Although feudalism linked the political authority of feudal kings to their ownership of land, their power was quite weak, parceled, and shared.¹⁴¹ The king was neither internally supreme nor externally independent. Internally, the feudal relations made the lord and the vassal share political authority; sometimes the vassal even disobeyed the lord.¹⁴² Externally, a king was but one of the players in the feudal economic/political relationships; he could be subject to other kings as landlord.¹⁴³

¹³⁵ MAINE, ANCIENT LAW, *supra* note 108, at 100.

¹³⁶ MAINE, ANCIENT LAW, *supra* note 108, at 101.

¹³⁷ *Id.* at 102 (“Just as the Caesars of the Eastern and Western Empires has each been *de jure* emperor of the whole world, with *de facto* control over half of it, so the three Carolingians appear to have considered their power as limited, but their title as unqualified.”).

¹³⁸ See SUSAN REYNOLDS, *FEIFS AND VASSALS: THE MEDIEVAL EVIDENCE REINTERPRETED* 18–19 (1994).

¹³⁹ MAINE, ANCIENT LAW, *supra* note 108, at 56–57.

¹⁴⁰ MAINE, INTERNATIONAL LAW, *supra* note 57, at 56–57.

¹⁴¹ See ANDERSON, *supra* note 93, at 37–38 (“Mediaeval Europe had never been composed of a clearly demarcated set of homogeneous political units—an international State system. Its political map was an inextricably superimposed and tangled one, in which different juridical instances were geographically interwoven and stratified, and plural allegiances, asymmetrical suzerainties, and anomalous enclaves abounded.”).

¹⁴² See MARC BLOCH, *FEUDAL SOCIETY: THE GROWTH OF TIES OF DEPENDENCE* 402 (L.A. Manyon trans., 2014) (noting that in European feudal society, “scant respect . . . was often paid to the royal authority. The examples of kings whose vassals disobeyed them, fought against or flouted them, and even held them prisoner, are indeed numberless.”).

¹⁴³ See ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 22 (1954) (“The King of England was for a time a vassal of the King of France with respect to the

The primary legal reason for this situation was that the king's legal title over land was conditional, rather than allodial, proprietorship.¹⁴⁴ The king had only indirect and remote control over his land; political authority in feudalism was fragmented.¹⁴⁵ There was not yet a distinction between sovereignty and property over land. As Anderson has written, there was a "fusion of property and sovereignty, lordship and landlordship."¹⁴⁶ Political ties, apart from the familial relations, were constructed and construed within a reciprocity of military obligations and landholding. Because the king did not enjoy comprehensive proprietary rights over his land, he did not have absolute political power over his territory.¹⁴⁷

3. Dynastic-Patrimonial Territoriality

The rise of the modern, composite kingly state as embodied in Westphalia is commonly supposed to be a sharp break with the medieval order.¹⁴⁸ In fact, the absolutist, kingly state inherited a lot from feudalism.¹⁴⁹ For example, Rowan noted

Duchy of Normandy; and the Count of Champagne, a French peer and a vassal to the King of France, held fiefs from the Emperor and the Duke of Burgundy.”)

¹⁴⁴ See John Ruggie, *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, 35 *WORLD POL.* 261, 274–75; ANDERSON, *supra* note 93, at 25, 410 (“Conditional property instituted the subordination of the vassal within a social hierarchy of lordship: parcellized sovereignty, on the other hand, vested the feoffee with autonomous jurisdiction over those below him For the feudal mode of production . . . was precisely defined by juridical principles of ‘scalar’ or conditional property, the complement of its parcellized sovereignty.”).

¹⁴⁵ See FRANCOIS GANSHOF, *FEUDALISM* 157 (1964); JOSEPH STRAYER, *MEDIEVAL STATECRAFT AND THE PERSPECTIVES OF HISTORY* 63 (1971) (“Feudalism was a type of government in which political power was treated as a private possession and was divided among a large numbers of lords.”); see JOSEPH STRAYER, *FEUDALISM* 36–42 (1963); F.L. GANSHOF, *FEUDALISM* xv (1964) (“A dispersal of political authority amongst a hierarchy of persons who exercise in their own interest power normally attributed to the state and which are often, in fact, derived from its break-up.”).

¹⁴⁶ ANDERSON, *supra* note 93, at 196.

¹⁴⁷ WILHELM G. GREWE, *EPOCHS OF INTERNATIONAL LAW* 67 (Michael Byers trans., 2000) (“All these territorial legal relationships were extremely complicated and obscure, because the extent of the sovereign’s rights differed depending on the historical development of the territory, and because there were, alongside the sovereign, other manorial lords who were also able to exercise ban rights and grant fiefs.”).

¹⁴⁸ See ANDERSON, *supra* note 93, at 15 (“In the course of the 16th century, the Absolutist State emerged in the West. The centralized monarchies of France, England and Spain represented a decisive rupture with the pyramidal, parcellized sovereignty of the mediaeval social formations, with their estates and liege-systems.”).

¹⁴⁹ *Id.* at 51 (The absolute, kingly states did not yet “achieve any complete administrative centralization or juridical unification; corporative particularisms and regional heterogeneities inherited from the mediaeval epoch marked the *Ancien Regime* down to their ultimate overthrow. Absolute monarchy in the West was thus, in fact, always doubly limited:

a merger of economic and political power feudalism passed on: “Feudalism involved specifically the merger of economic and political powers; the rise of the sovereign territorial state did not destroy this merger in the case of the dynastic monarchies but confined it increasingly to the monarch.”¹⁵⁰

With the revival of the Roman-law conception of absolute ownership, the sovereign king became increasingly an owner, no longer bound by others’ interests in the land of the state.¹⁵¹ Absolute sovereignty developed hand in hand with the absolute conception of property rights.¹⁵² Scholars found that Roman legal theories understand property rights as the ownership which “*must be singular and indivisible: there is one.*” They continued, “[t]ransferred to theories of earthly rule, the king is said to be a proprietor as ‘some writers . . . make the king the sole proprietor of his whole kingdom.’”¹⁵³ The rise of the modern state owed greatly to the “rediscovery of the concept of absolute and exclusive private property from Roman law.”¹⁵⁴ Rules regulating acquisition of territory in early modern international law, according to Sir Henry Maine, were “merely transcribed from the part of the Roman law which treats of the modes of acquiring property *jure gentium*.”¹⁵⁵ According to Maine, “sovereigns are related to each other like a group of Roman proprietors.”¹⁵⁶ With his absolute and exclusive proprietary right over his land, the king became internally supreme and externally independent.

In the composite kingly state, territory was regarded and treated as the patrimonial property of the king.¹⁵⁷ The Westphalian sovereignty embodied this

by the persistence of traditional political bodies below it and the presence of an overarching moral law above it.”)

¹⁵⁰ Herbert H. Rowen, “*L’Etat C’est Moi*”: *Louis XIV and the State*, 2 FRENCH HIST. STUD. 83, 88 (1961).

¹⁵¹ ANDERSON, *supra* note 93, at 20 (“[W]ith the reorganization of the feudal polity as a whole, and the dilution of the original fief system, landownership tended to become progressively less ‘conditional’ as sovereignty became correspondingly more ‘absolute.’”).

¹⁵² *Id.* at 429 (“The increase in the political sway of the royal state was accompanied, not by a decrease in the economic security of noble landownership, but by a corresponding increase in the general rights of private property. The age in which ‘Absolutist’ public authority was imposed was also simultaneously the age in which ‘absolute’ private property was progressively consolidated.”).

¹⁵³ ELSHTAIN, *supra* note 59, at 24; see MCILWAIN, *supra* note 88, at 98.

¹⁵⁴ , *supra* note 106, at 157; see Friedrich Kratochwil, *Sovereignty as Dominium: Is There a Right of Humanitarian Intervention?*, in BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 41 (G. Lyons & M. Mastanduno eds., 1995); see generally NICHOLAS ONUF, THE REPUBLICAN LEGACY IN INTERNATIONAL THOUGHT 113–38 (1998).

¹⁵⁵ MAINE, ANCIENT LAW, *supra* note 108, at 97.

¹⁵⁶ *Id.* at 98.

¹⁵⁷ ANDERSON, *supra* note 93, at 39 (“The State was conceived as the patrimony of the monarch, and therefore the title-deeds to it could be gained by a union of persons. The supreme device of diplomacy was therefore marriage - peaceful mirror of war . . .”).

conception of territoriality: territory was largely treated as property.¹⁵⁸ As noted by Teschke, “[i]n dynastic states, sovereignty was personali[z]ed in the monarch who regarded and treated the state as the private patrimonial property of the reigning dynasty.”¹⁵⁹

The dynastic-patrimonial conception of territory, codified by Westphalia, became the norm of Europe. In France, for example, Louis XIV’s famous saying *L’Etat c’est moi* actually had a territorial dimension: The king was the proprietor of the state’s territory.¹⁶⁰ All the kings and ministers in the *ancien regime* assumed that the king was both the ultimate political authority of the nation and the proprietor or owner of the state.¹⁶¹ Jurists at the time defended “the doctrine that the king held his crown and his territory as entailed property which came down to him from his ancestors.”¹⁶² Things were quite similar in Spain: “The proprietary character of the Spanish crown was openly accepted; . . . the official title of the ruler was ‘king proprietor of the realm.’”¹⁶³

4. Shape of Early Modern Territory

With its dynastic-patrimonial nature, the shape of early modern territory was different from that of the modern era. Two mutually affecting characteristics of early modern territory are prominent. First, the territory of a state was not necessarily contiguous.¹⁶⁴ Even alongside the frontiers between two states, many

¹⁵⁸ *Id.* at 32. (“[T]erritories formed a continuum with private estates, and their classical mean of acquisition was force, invariably decked out in claims of religious or genealogical legitimacy.”).

¹⁵⁹ Benno Teschke, *The Metamorphoses of European Territoriality: A Historical Reconstruction*, in STATE TERRITORIALITY AND EU INTEGRATION 52 (Michael Burgess & Hans Volland eds., 2006).

¹⁶⁰ LAURENCE PACKARD, AGE OF LOUIS XIV 10 (Richard A. Newhall et al. eds., 1929) (The King “had owned and controlled their original fiefs as personal property, and now that these had expanded into kingdoms, they regarded both lands and subjects as belonging to the royal dynasty, subject as absolutely to royal authority as a private estate and slave are subject to an owner.”).

¹⁶¹ Rowen, *supra* note 150, at 91.

¹⁶² *Id.* at 94.

¹⁶³ *Id.* at 96. It should be pointed out that the territory of a king is an entailed estate, rather than a free-disposed property. As a patrimony of the crown, the territory cannot be transferred by the king at will to others. See HUGO GROTIUS, DE JURE BELLI AC PACIS [THE RIGHTS OF WAR AND PEACE] 289 (Francis W. Kelsley trans., 1962) (1625).

¹⁶⁴ BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM, 19 (1983) (“In the modern conception, state sovereignty is fully, flatly, and evenly operative over each square centimetre of a legally demarcated territory. But in the older imagining, where states were defined by centres, borders were porous and indistinct, and sovereignties faded imperceptibly into one another.”).

enclaves and exclaves were extant.¹⁶⁵ For example, enclaves between the Spanish and Dutch survived the Peace of Westphalia for many years.

Second, borders between kingdoms were zonal rather than linear.¹⁶⁶ To borrow the nomenclature of political geography, territorial boundaries at that time took the form of “frontiers” rather than “boundaries”; the former denotes zonal qualities of territorial limits while the later means precise, linear divisions.¹⁶⁷ In other words, borderland, rather than borderline, lay between two adjacent states.

The fixed, linear territorial boundaries developed quite recently in the 18th century.¹⁶⁸ In part, that development reflects the development of modern technology of geodetic surveying and cartography.¹⁶⁹ However, it also reflects the clearance of the feudal remnants of intricate, overlapping legal rights over land.¹⁷⁰ Borderlines were rarely delimited and demarcated before the mid-18th century.¹⁷¹ Consider the boundary between Spain and France established by the Treaty of the Pyrenees in 1659: although commonly held as the first clearly defined border in Europe, it still established a frontier in the form of specific villages, while the clear delimitation did not happen until late in the 19th century.¹⁷² The first national survey of territorial borders occurred in 1789 as the French Revolution endowed territory with nationalist colors.¹⁷³ Territorial boundaries thereafter became more

¹⁶⁵ See generally Brendan R. Whyte, *En Territoire Belge et à Quarante Centrimètres de la Frontière: the Belgian and Dutch enclaves of Baarle-Hertog and Baarle-Nassau* 13 (Univ. of Melb., Working Paper No. 19, 2004), <https://minerva-access.unimelb.edu.au/handle/11343/28979>.

¹⁶⁶ See EAST, *supra* note 115, at 116.

¹⁶⁷ See Lucien P. V. Febvere, *Frontiere: The Word and the Concept, in A NEW KIND OF HISTORY* 208–18 (Peter Burk ed., 1973).

¹⁶⁸ See GREWE, *supra* note 147, at 321 (From the 18th century on, the state began to “straighten out the layers of feudal relations that, particularly in frontier areas, resulted in a complex territorial mix between neighboring states. Thus, enclaves and exclaves were progressively dispensed with and clear borderlines were drawn within these areas.”).

¹⁶⁹ See generally Michael Biggs, *Putting the State on the Map: Cartography, Territory, and European State Formation*, 41 *COMP. STUD. IN SOC’Y & HIST.* 374 (1999).

¹⁷⁰ See EAST, *supra* note 115, at 98 (“In 1718 a boundary was actually surveyed precisely and fixed cartographically between France and the Austrian Netherlands, but even towards the end of the eighteenth century frontiers were the realities in Europe, and few boundaries were accurately known.”).

¹⁷¹ See, e.g., PETER SAHLINS, *BOUNDARIES: THE MAKING OF FRANCE AND SPAIN IN THE PYRENEES* 93–94 (1989).

¹⁷² *Id.* at 2 (“The delimitation and demarcation of the Pyrenean border occurred more than two centuries later, when between 1854 and 1868 the Spanish and French governments agreed in the Treaties of Bayonne to mark an imaginary border line by posing officially sanctioned border stones. . . . [I]n 1659 it was a boundary defined by the jurisdictional limits of specific villages. Much would happen before it became a delimited boundary defining national territorial sovereignty.”).

¹⁷³ See Richard Ford, *Law’s Territory: A History of Jurisdiction*, 97 *MICH. L. REV.* 4, 875 (1999).

and more fixed, rigid, and sacrosanct.¹⁷⁴ Indeed, the transition from early-modern territorial sovereignty to the modern all-embracing territorial sovereignty “was still taking place even as late as the first part of the nineteenth century.”¹⁷⁵

C. Aggregating Land: Conquest and Inheritance

The collapse of the medieval order led to many possibilities regarding the size and form of the state: for example, the city-league, the city-state (princely state), and the territorial sovereign state (composite kingly state).¹⁷⁶ The road toward the composite kingly state began with the aggregation of multiple tracts of land into contiguous, large-scale territorial projects.¹⁷⁷ Two *legal* institutions combined and greatly helped advance the project: conquest and inheritance.

It seems startling to say that conquest was a *legal* means of acquiring territory. Yet only the 20th century anti-war sentiments make people feel this way.¹⁷⁸ We tend to intensify the antinomy between war and law; we think law a peaceful thing. However, in traditional international law and jurisprudence, war, like lawsuit, was a legal means to achieve justice.¹⁷⁹ In medieval conceptions, war is part of law; war is a judicial means to address injustice under God.¹⁸⁰ As the world entered the early modern period, the right of war became the prerogative of the state. War now meant interstate war, rather than the medieval “civil war” inside Christendom.¹⁸¹ But war itself was still part of law, and particularly, international law.¹⁸²

¹⁷⁴ Ruggie, *supra* note 106, 151.

¹⁷⁵ VERZIJL, *supra* note 114, at 7.

¹⁷⁶ HENDRIK SPRUYT, *THE SOVEREIGN STATE AND ITS COMPETITORS* 6 (1996).

¹⁷⁷ Ruggie, *supra* note 106, at 151.

¹⁷⁸ *See generally* OONA HATHAWAY & SCOTT SHAPIRO, *INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

¹⁷⁹ *Id.* at 10.

¹⁸⁰ *See, e.g.*, FOUCAULT, *supra* note 121, at 300–01 (“What . . . was war in medieval conceptions? . . . war was basically a juridical behavior; . . . One waged war when there was injustice, when there was a violation of right, or anyway when someone claimed a right that was challenged by someone else. In the medieval world there was no discontinuity between the world of right and the world of war. There was not even any discontinuity between the universe of private law, . . . and the world of confrontations between princes, which was not, and could not be called international and public law. It was public war as private war, or private war that took on a public dimension. It was a war of right, and the war was settled moreover exactly like a juridical procedure, by a victory, which was like a judgment of God.”). *See also* GEORGES DUBY, *THE LEGEND OF BOUVINES: WAR, RELIGION, AND CULTURE IN MIDDLE AGES* 76–109 (1990).

¹⁸¹ SCHMITT, *supra* note 29, at 143–46.

¹⁸² This is the reason why most of the early modern treatises on international law were concerned with the right of war. *See generally* BALTHAZAR AYALA, *DE JURE ET OFFICIIS BELLICIS ET DICCIPLINA MILITARI* (James. B. Scott ed., 1912); *see generally* GROTIUS, *supra*

The right of conquest was an extension of the legality of war.¹⁸³ The right of conquest was the victor's right to assume sovereignty over conquered land and its inhabitant as his spoils.¹⁸⁴ Even in the early 20th century, the right of conquest had long been recognized by international law and state practice.¹⁸⁵ Historical examples of territorial acquisition by conquest abound: the land of the United States was conquered by the European powers, and Ireland was annexed into the territory of Britain by conquest.¹⁸⁶ For lawyers, the most famous example of conquest was the Norman Conquest of England.¹⁸⁷

There was a peaceful way to territorial aggregation as well: dynastic inheritance and marriage.¹⁸⁸ Aggregation of territory through marriage was possible thanks to two institutional reforms in the Late Middle Ages: male primogeniture and female inheritance.¹⁸⁹ Both affected the process of peaceful territorial consolidation that laid the territorial groundwork for the modern European political order.¹⁹⁰ Much later, Alexis de Tocqueville said that laws of inheritance have great "influence on the course of human affairs" and "ought to be placed at the head of all political institutions, for they have an incredible influence on the social state of peoples, of which political laws are only the expression."¹⁹¹ That was especially true in early modern European system of dynastic states.

The rise of primogeniture stabilized dynastic states.¹⁹² In the feudal era,

note 163; ALBERICO GENTILI, *DE JURE BELLI* (John. C. Rolfe trans., 1931) (citing 1612 edition).

¹⁸³ See MONTESQIEU, *THE SPIRIT OF LAWS* 139 (Anne M. Cohler et al. eds., 1989) (citing 1748 edition) ("From the right of war derives that of conquest, which is its consequence; therefore, it should follow the spirit of the former."); THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* 153–54 (Michael Oakshott ed., 1962) (on despotic dominion as a result of conquest).

¹⁸⁴ LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 288 (1st ed., 1905).

¹⁸⁵ See SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 7–18 (1996).

¹⁸⁶ See generally MICHEAL O'SIOCHRU, *GOD'S EXECUTIONER: OLIVER CROMWELL AND THE CONQUEST OF IRELAND* (2008).

¹⁸⁷ See generally JANICE HAMILTON, *THE NORMAN CONQUEST OF ENGLAND* (2007).

¹⁸⁸ See Vivek Sharma, *Politics as Property: The Undemocratic Peace and the Origins of Modern Europe* 8 (Sept. 2–5, 2004), https://convention2.allacademic.com/one/apsa/apsa04/index.php?click_key=2#search_top (presented at the annual meeting of the American Political Science Association).

¹⁸⁹ *Id.* at 2.

¹⁹⁰ *Id.* at 12.

¹⁹¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 47 (Harvey Mansfield & Delba Winthrop trans., 2000).

¹⁹² See HINSLEY, *supra* note 90, at 104 ("After the thirteenth century, as a result of the elaboration at last of laws of hereditary succession in place of the older kin-right of all members of a royal family to compete for rule, the elective principle, which had hitherto remained as prominent as consecration at the succession of king, was further, if only very slightly, curtailed.").

since men believed in the hereditary vocation, not of an individual but of a dynasty, all the sons of a dead king had the right to inherit the realm.¹⁹³ These practices continued even though “they seemed injurious to the public welfare,” because they violated the principle of the indivisibility of the monarchy.¹⁹⁴ Against this backdrop, “[p]rimogeniture halted the fragmentation of estates and principalities by transmitting patrimonial lands to the eldest son while disinheriting younger sons. . . .”¹⁹⁵ This maintained the geographic dominion of the state.

If male primogeniture tended to preserve the territory, female inheritance made possible augmentation. From the 12th century on, absent the near male heir, rights over land were passed to daughters.¹⁹⁶ Land could even be conferred upon a daughter while a younger distant male relative existed.¹⁹⁷ Dynastic unions through intermarriages plus the institution of female inheritance expanded the dynastic state’s territorial extent.¹⁹⁸ As the French theologian François Fénelon nicely put, “a princess carried a monarchy in her wedding portion.”¹⁹⁹

History is replete with examples of territorial accession through dynastic marriages. The union between England and Scotland was through the marriage between James IV, king of Scotland, and Margaret Tudor, the daughter of Henry VII; in Spain, the marriage between Isabella of Castile and Ferdinand of Aragon played the same role; in France, the marriage between Charles VIII and Anne, heiress of Brittany, helped the King of France annex Brittany.²⁰⁰ Apart from historical cases, we may add a fictional one. In Shakespeare’s *King Lear*, both the King of France and the Duke of Burgundy want to acquire part of the land of Britain through marriages with Cordelia, the youngest daughter of Lear, the King of Britain.²⁰¹ The centralizing trend through intermarriage and inheritance decisively defined the political map of West Europe.²⁰² With this trend, European politics

¹⁹³ HINSLEY, *supra* note 90, at 6.

¹⁹⁴ MARC BLOCH, *supra* note 101, at 107.

¹⁹⁵ Sharma, *supra* note 188, at 7.

¹⁹⁶ *Id.* at 8.

¹⁹⁷ See generally Eileen Spring, *The Heiress-at-Law: English Real Property Law from a New Point of View*, 8 L. & HIST. REV. 273 (1989).

¹⁹⁸ See Sharma, *supra* note 188, at 8 (“Dynastic unions were polities comprised of two or more separate political entities united in the person of a common ruler who had inherited them through legitimate succession. In other words, they were conglomerations of territories united as a consequence of the laws of succession.”).

¹⁹⁹ JOHN EMERICH EDWARD DALBERG-ACTON, *THE HISTORY OF FREEDOM AND OTHER ESSAYS* 273 (John Figgis & Reginald Laurence eds., 1907).

²⁰⁰ See Sharma, *supra* note 188, at 12–13.

²⁰¹ See HARRY JAFFA, *The Limits of Politics: King Lear, Act I, Scene i, in SHAKESPEARE’S POLITICS* 113–45 (Allan Bloom & Harry Jaffa eds., 1981); PAUL W. KAHN, *LAW AND LOVE: THE TRIALS OF KING LEAR* 12–21 (2000).

²⁰² See Verzijl, *supra* note 114, at 298 (“Many States owe their present territorial shape and extent in part to marriages contracted in former centuries between rulers of smaller political units or between such a ruler and the heiress or heir of another political entity.”).

became less and less in number, and more and more centralized.²⁰³

In practice, inheritance and conquest were linked in dynastic territorial aggregation. Disputes over titles of inheritance were resolved by war—the trial before the court of God to determine who enjoyed the title to a dynastic patrimony among competing claimants to the throne.²⁰⁴ Take the Second War of Portuguese Succession (1580–1583) for example. In the Portuguese succession crisis, Antonio, Prior of Crato, and Philip II of Spain, being the two strongest claimants to the throne, engaged in a war, and Philip eventually won to be crowned as the King of Portugal.²⁰⁵

Contemporary secession theorists call secession “political divorce” in the metaphorical sense.²⁰⁶ We may call the early modern territorial accession “political marriage” in the real sense.²⁰⁷ Peacefully or violently, the composite kingly state employed legal means to achieve territorial accession in the Old World.

IV. OUTSIDE EUROPE: LAND APPROPRIATION AND COLONIAL EXPANSION

Territorial accession also defined the beginning of global history: the discovery and conquest of the New World.²⁰⁸ Territorial accession inside Europe created a territorial, inter-state order that contrasted with previous celestial and feudal orders.²⁰⁹ This new order did not achieve historical self-consciousness until it confronted its “others,” just as previous orders in the West gained their subjectivity against their “others.”²¹⁰ Territorial accession outside Europe, therefore, was an indispensable factor contributing to the formation of European

²⁰³ See Sharma, *supra* note 188, at 12 (“The number of dynasties ruling the sixteen kingdoms of Latin Europe shrank from twelve in 1300 to five in 1610.”).

²⁰⁴ JONATHAN SUMPTION, *THE HUNDRED YEARS WAR: TRIAL BY BATTLE* 348–49 (1999).

²⁰⁵ See JAMES ANDERSON, *THE HISTORY OF PORTUGAL* 100–01 (2000).

²⁰⁶ See ALLEN BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC* 7 (1991).

²⁰⁷ ANDERSON, *supra* note 93, at 39 (“The ultimate instance of legitimacy was dynasty, not the territory. The state was conceived as the patrimony of the monarch, and therefore the title-deeds to it could be gained by a union of persons: *felix Austria*. The supreme device of diplomacy was therefore marriage-peaceful mirror of war, which so often provoked it. For, less costly as an avenue of territorial expansion than armed aggression, matrimonial manoeuvring afforded less immediate results and was thereby subject to unpredictable hazards of mortality in the interval before the consummation of a nuptial pact and its political fruition.”).

²⁰⁸ SCHMITT, *supra* note 29, at 86.

²⁰⁹ See *id.*

²¹⁰ The Western political order of Greek city-states had its others in Persia and Egypt. The Roman Empire had Persia, India, and so forth. The medieval order was accompanied by the Crusade against the Islamic civilizations.

political consciousness, as expressed in international law and the inter-state political order. Subsequent waves of secession, such as the American Revolution and the South American Revolutions, were directed against this Eurocentric project. It is, therefore, necessary to inquire into land appropriation in the New World by the European powers. How did the European powers justify their land appropriation in the New World? What was the juridical status of the newly conquered lands in the state's domestic order?

A distinction can be made between two kinds of legal titles of land appropriation in the New World. One was the common European legal title for territorial acquisition *vis-à-vis* the Indians, which sought to answer the question why Europeans have the legitimate authority to appropriate the land of America.²¹¹ The other contained legal titles of individual European powers *vis-à-vis* their European colonial rivals, which concerned the question of why a tract of land belonged to one state, rather than the other.²¹²

The answer to the first question was clear. The common European legal title for land appropriation in the New World was discovery.²¹³ Discovery in the "Age of Discovery" was not only a geographical or cartographical term, but also a legal title to territorial acquisition.²¹⁴ Behind the title of discovery, then, lay the lasting legal tradition of the Christian/non-Christian or civilized/barbarian distinction: the uncivilized have no legal titles to the land where they lived in.²¹⁵

Debates over the validity of discovery as a title for territorial acquisition in modern international law may blind us to the role of this common legal title for European powers in the early modern era. These later debates revolve around the discovery as the title for territorial acquisition among European powers, that is, the issue now concerns disputes among civilized victors.²¹⁶ Some international lawyers and scholars held that discovery was a sufficient title; others thought it only an "inchoate title," which had to be complemented with effective occupation to become a full title.²¹⁷ This debate is illustrated by the case of *the Island of Palmas*, which involved a territorial dispute between the United States and Holland over an island that had been ceded by Spain to the United States in 1898.²¹⁸ The United States spoke of the "unquestioned validity of title based on discovery as late as the

²¹¹ See SCHMITT, *supra* note 29, at 101.

²¹² See *id.* at 132.

²¹³ *Id.* at 131 ("In reality, the only justification for the great land-appropriations of non-European territory by European powers was discovery.")

²¹⁴ *Id.*

²¹⁵ See ROBERT A. WILLIAMS, JR., AMERICAN INDIANS IN WESTERN LEGAL THOUGHTS: THE DISCOURSES OF CONQUEST 99 (1990) ("Columbus's discoveries . . . were based on the presumption, . . . that Christian European discovery of territory held by infidel or pagan nonbelievers vested title in the discovering European nation.")

²¹⁶ See SCHMITT, *supra* note 29, at 132.

²¹⁷ *Id.* at 106.

²¹⁸ See generally U.N. Secretary-General, *Reports of International Arbitral Awards: Island of Palmas Case* (Apr. 4, 1928).

early part of sixteenth century,” and thereby justified the sovereignty of Spain.²¹⁹ Holland held that discovery alone was not a sufficient title for territorial right.²²⁰ Similar cases in the 19th century include the case of *Delagoa Bay* (Britain vs. Portugal), in which Portugal employed the doctrine of discovery, and the case of *Carolinas* (Spain vs. Germany), in which Spain used discovery as a title.²²¹ All these cases were disputes between European parties.

An American jurist laid out discovery as a common European legal title for land appropriation. In *Johnson v. McIntosh*,²²² Chief Justice John Marshall asserted that the “Doctrine of Discovery” was recognized as the law of nations by every European colonial power, citing the examples of Spain, Portugal, England, Holland, and France.²²³ He held that discovery gave the discovering state “an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.”²²⁴ The Indians had no sovereignty over the land of the United States; the land of the United States was free land in terms of the law of nations.²²⁵ Marshall’s reference to “purchase” or conquest is exemplified by England and Spain, respectively.²²⁶ To simplify the discussion, I will focus on these two colonial powers.

A. Just War as Civilizing Process: Vitoria’s Catholic Argument

Francisco de Vitoria was the first theorist to consider the problem of legitimizing Spanish colonial territorial acquisition America from the perspective of the law of nations.²²⁷ To Vitoria, the question was “whether discovery constitutes a legal title for acquisition of discovered land” and, if not, is there an alternative ground for legal title.²²⁸

Vitoria denied that discovery was a legitimate title because, as a humanist, he did not think that the Christians had a right to annex land in the United States based on the civilization/barbarian distinction.²²⁹ The Indians, for Vitoria, were not

²¹⁹ GREWE, *supra* note 147, at 252.

²²⁰ *See id.* at 251–52.

²²¹ *Id.* at 252.

²²² *See generally* 21 U.S. 543 (1823).

²²³ *Id.* at 573–75.

²²⁴ *Johnson*, 21 U.S. at 587.

²²⁵ *Id.* at 573–74 (The Indians’ “rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, . . . were denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”).

²²⁶ *See infra* Part IV, Sections A, B.

²²⁷ *See* SCHMITT, *supra* note 29, at 106.

²²⁸ *Id.* at 106.

²²⁹ This distinction applied not only in America. *See* SCHMITT, *supra* note 29, at 112 (East Europe was once a non-Christian land. “The pope could issue mandates for either missions or crusades to the lands of non-Christian princes and peoples, which established

animals, but rational beings; the New World was not new. The Indians, even as infidels, could have rights of property and lordship over the American land under the law of nature.²³⁰ They were “true owners alike in public and in private law before the advent of the Spaniards among them.”²³¹ Vitoria held that, “unbelief does not destroy either natural law or human law; but ownership and dominion are based either on natural law or on human law; therefore they are not destroyed by want of faith. . . .”²³² “The barbarians,” for Vitoria, “were true owners, both from the public and from the private standpoint.”²³³

This does not mean that Vitoria argued against the Spanish conquistadors. Rather, Vitoria justified the Spanish colonial enterprise with other arguments. Vitoria recognized the Indians’ rights of sovereignty and property before the coming of the Spaniards.²³⁴ After the advent of the Spaniards, Vitoria argued, according to international law, “a just war provided the legal title for occupation and annexation of American territory and subjugation of the indigenous peoples.”²³⁵ War, therefore, was the legitimate manner by which Spaniards legally annexed the land of the Indians; land could be acquired as spoils of a just war.²³⁶

Vitoria’s justification of territorial annexation predicated on just-war theory appealed to the principle of free commerce. The Indians, according to the law of nations, had duties to receive strangers and foreigners.²³⁷ They had to respect the Spanish right of commerce.²³⁸ If the Indians refused to recognize these rights, Spain “may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones.”²³⁹ Thus, although barbarians own the land, they violated the principle of free

both the justice of war in international law and the legitimacy of territorial acquisition. Thus, as early as the 10th century, in the Ottonian era, German emperors received missionary mandates to convert the heathen Slavic peoples and to expand their territory in the East. The pope’s proclamation of a crusade against the infidels became a title of great political significance in international law, because it constituted the basis for the acquisition of the territory of the Islamic Empire.”).

²³⁰ Actually, there was an internal debate within the Catholic Church in medieval times. While in the 13th century Pope Innocent IV held that both Christians and pagans have the right to own property and rule themselves, the canonist Hostiensis, or Henry of Segurcio, contended that pagans have no such rights. See Timothy Christian, *THE LAW OF NATIONS AND THE NEW WORLD* x (Leslie C. Green & Olive P. Dickason eds., 1989).

²³¹ See FRANCISCO DE VITORIA, *DE INDIS ET DE IVRE BELLI REFLECTIONES* 115 (Ernest Nys ed., 1917).

²³² DE VITORIA, *supra* note 231, at 123.

²³³ *Id.* at 138–39.

²³⁴ *Id.* at 138.

²³⁵ *Id.* at 109.

²³⁶ See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 23 (2007).

²³⁷ VITORIA, *supra* note 231, at 151.

²³⁸ *Id.* at 152–53.

²³⁹ *Id.* at 155.

commerce when they enjoyed their property.²⁴⁰ Hence Spain had the right of “humanitarian intervention” as a just cause to wage war against the Indians.²⁴¹

Vitoria’s “objective” deductions in the law of nations and the law of nature revealed his Christian faith and, with that faith, the hierarchical distinction between the Spaniards and the Indians:

If after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, then they can make war on the Indians And may enforce against them all the rights of war. . . .²⁴²

The legal rights to travel or commerce rested on religious background; they were part of the mission of spreading Christian messages to the world.²⁴³ Vitoria said, “ambassadors are by the law of nations inviolable and the Spaniards are the ambassadors of the Christian peoples. Therefore, the native Indians are bound to give them, at least, a friendly hearing and not to repel them.”²⁴⁴

Vitoria’s justification significantly influenced the Spanish colonial ideology and policy. The Spanish Crown’s royal proclamation of 1573, which denominated all further extensions of empire in the New World as ‘pacifications’ rather than ‘conquest’ and mandated peaceful conversion of the Indians, fittingly illustrates the rationalized nature of the discursive trajectory launched by the Victorian irruption in Western legal thought respecting normatively divergent tribal peoples.²⁴⁵

Accordingly, conquest was part of the civilizing mission. Title went to the civilized.

B. Conquest or Settlement: Locke, Vattel, and the Protestant Argument

²⁴⁰ SCHMITT, *supra* note 29, at 109 (“If barbarians opposed the right of free passage and free missions, of *liberum commercium* [free commerce] and free propaganda, then they would be violating the existing rights of the Spanish according to *jus gentium*; if the peaceful entreaties of the Spanish were of no avail, then they had grounds for a just war.”).

²⁴¹ *Id.* (“Such grounds gave Spaniards right of occupation and intervention if they were interceding on the part of people [Christianized] in their own country being suppressed unjustly by barbarians.”).

²⁴² VITORIA, *supra* note 231, at 155.

²⁴³ See WILLIAMS, Jr., *supra* note 215, at 105 (“Spain . . . could conquer and colonize the Indians of the Americas for refusing to hear the truth of the Christian religion.”).

²⁴⁴ VITORIA, *supra* note 231, at 156.

²⁴⁵ ROBERT A. WILLIAMS JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 106 (1990).

At the beginning of its colonial project in North America, the English had no prominent and famous theoretician like Vitoria. Nevertheless, we can find their justification for territorial sovereignty in the American colonies in the actions and speeches of kings and jurists. For the English kings and their agents, that justification was the doctrine of conquest.²⁴⁶ The American colonies were but one among many territories England acquired by conquest—Ireland (1175–1603), the Isle of Man (1406), Wales (1536), and so forth.²⁴⁷ The royal charters that constituted the legal foundation of the colonies, in the eye of jurists like Sir Edward Coke, signified that it was the right of conquest that legalized the English occupation of the lands of America.²⁴⁸

Still, the conquest of America was significantly different legally from English conquests in Europe. Coke distinguished between the conquest of Christians and of infidels: the former fell into the sphere of civil law or the common law while the latter could only turn to the laws of nature and God.²⁴⁹ Upon conquest, the laws of infidels are “automatically void as being contrary to Christianity and to the law of nature.”²⁵⁰ By contrast, the laws of the conquered Christian kingdoms, like Ireland, shall remain effective until the conqueror changes them.²⁵¹ Unlike Vitoria, who still recognized an initial right of sovereignty and possession of the Indians in the law of nature and the law of nations, Coke held that the infidels had no political authority and property rights because of their lack of the Grace of God.²⁵²

Coke’s position soon lost its appeal. As the colonies developed, settlers in

²⁴⁶ See Anthony Pagden, *Law Colonization, Legitimation, and the European Background*, in *THE CAMBRIDGE HISTORY OF AMERICAN LAW: EARLY AMERICA (1580–1815)* 6 (Michael Grossberg & Christopher Tomlins eds., 2008) (“[D]uring the first phase of the colonization of America, from the moment of Raleigh’s short-lived settlement at Roanoke, the English Crown and its agents maintained consistently that the American colonies were ‘lands of conquest,’ no matter what the realities of their actual occupation. Virginia, New York, and Jamaica, for instance, were consistently referred to as conquests.”).

²⁴⁷ *Id.*

²⁴⁸ See SIR EDWARD COKE, *THE FIRST PART OF INSTITUTE OF THE LAWS OF ENGLAND*, II 249b (1684) (Occupation “signifie[s] a putting out of a man’s free hold in time of [war]...*occupare* is sometimes take to conquer.”).

²⁴⁹ See SIR EDWARD COKE, *THE REPORTS OF SIR EDWARD COKE* 601–02 (1658) (“If a Christian king should conquer a kingdom of an infidel, and bring them under his subjection, there [sic] ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and nature contained in the Decalogue.”).

²⁵⁰ See Gavin Loughton, *Calvin’s Case and the Origins of the Rule Governing ‘Conquest’ in English Law*, 8 *AUSTL. J. LEGAL HIST.* 143, 175 (2004).

²⁵¹ See Daniel Hulebosch, *Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 *L. & HIST. REV.* 439, 462 (2003).

²⁵² ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500-C. 1800* 8 (1998).

America began to claim their rights under the common law of England.²⁵³ They thought the rights of Englishmen traveled with Englishmen in the New World and claimed, “New England lies within England.”²⁵⁴ The doctrine of conquest disappointed them. For if the American lands were acquired by the title of conquest, these lands were categorized as the royal demesne governed at the King’s will, rather than the King’s realm ruled by law and the Parliament.²⁵⁵ Therefore, “as the colonies matured, many Britons began to view colonization as the peaceful displacement of those who failed to cultivate the land rather than as conquest,”²⁵⁶ although the King and some jurists still adhered to the doctrine of conquest.²⁵⁷

From the late 17th century on, the English began to base their land appropriation in the New World on the new ground: land was gained legitimately by cultivation, plantation, and settlement. The theoretical ground of this shift was best presented by John Locke. Locke’s theory of natural law, property, and territory in *The Two Treatises* is, at first glance, not a direct treatment of the question of colonial land appropriation. However, careful reading shows that Locke provided a powerful justification for England’s colonial enterprise in America.²⁵⁸

Distrusting the doctrine of conquest,²⁵⁹ Locke’s central argument was that the Indians did not really own the land because they did not permanently cultivate it.²⁶⁰ Locke invented another version of the civilized/uncivilized distinction: now the distinction between cultivation and nomadism. “In the beginning,” wrote Locke, “all the world was America,” which was “wild woods and uncultivated wast[e] . . . without any improvement, tillage or husbandry.”²⁶¹ The Indians, who still live in the state of nature, do not own the land because they do not add value to the land

²⁵³ See PAGDEN, *supra* note 252, at 93–94.

²⁵⁴ *Id.* at 133.

²⁵⁵ Pagden, *supra* note 246, at 8.

²⁵⁶ Hulsebosch, *supra* note 251, at 470.

²⁵⁷ See, e.g., WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND BOOK I 107–08 (3rd ed., 1768) (“Our American plantations are principally of this latter sort [conquered or ceded countries], being obtained in the last century either by the right of conquest and driving out of the natives, or by treaties”).

²⁵⁸ See BARBARA ARNEIL, JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM 2 (1996) (“By taking seriously Locke’s repeated references to America in the Second Treatise, it can be shown that the *Two Treatises* were written as a defence [sic] of England’s colonial policy in the new world against the sceptics in England and the counter-claims of both the aboriginal nations and other European powers in America.”).

²⁵⁹ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 385 (Peter Laslett ed., 1988) (“That the *Aggressor*, who puts himself into the state of War with another, and *unjustly invades* another Man’s right, can, by such an unjust War, *never* come to *have a right over the Conquered*, will be easily agreed by all Men, who will not think, that Robbers and Pyrates have a Right of Empire over whomsoever they have Force enough to master; . . .”) (emphasis original).

²⁶⁰ See Thomas Flanagan, *The Agricultural Argument and Original Appropriation: Indians Land and Political Philosophy*, 22 CAN. J. POL. SCI. 589, 594 (1989).

²⁶¹ LOCKE, *supra* note 259, at 294.

through their agrarian labor.²⁶² Locke's theory of property divested the Indians of the right to acquire landownership.²⁶³ The colonists could take the land as their possession by effective occupation, i.e. cultivation and plantation.²⁶⁴

For Locke, a territorial right is derived from property right: those who own the lands in the state of nature bring their private property into the political society formed by a social contract.²⁶⁵ This process excluded the Indians from territorial rights because the Indians did not, and could not, establish a political society that protects property rights and transforms multiple tracts of land into state territory.

Locke's political theory found an echo in the Swiss diplomat and international lawyer Emerich de Vattel's international legal theory. Vattel's well-known treatise, *The Law of Nations*, was well read and accepted in the protestant Anglo-American world.²⁶⁶ For Vattel, there are two kinds of rights over land: sovereignty (which he calls "empire") and property ("domain").²⁶⁷ For a state or nation, which are identical words for Vattel, "[t]he whole space over which a nation extends its government, becomes the seat of its jurisdiction, and is called its *territory*."²⁶⁸ There are two ways to acquire territory. The first is "the original occupation," that is, to occupy an unoccupied land.²⁶⁹ The second is "aggregation," that is, "a number of free families . . . come to unite for the purpose of forming a nation or state, they all together acquire the sovereignty over the whole country they inhabit; for they were previously in possession of the domain. . . ."²⁷⁰ In other words, the aggregation of the lands owned by scattered families forms the territory of the state. Here, Vattel, like Locke, blurred the strict distinction between property and sovereignty: territorial sovereignty follows the logic of property.

Vattel opined that discovery legitimated colonial territorial acquisition by European states, yet he added that effective occupation must follow discovery to establish territorial rights.²⁷¹ Vattel's theory in fact proceeded on two fronts. The

²⁶² Flanagan, *supra* note 260.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See George Gale, *John Locke on Territoriality: An Unnoticed Aspect of the Second Treatise*, 1 POL. THEORY 472, 474 (1973).

²⁶⁶ See BOBBITT, *supra* note 35, at 532; see Stephane Beaulac, *Vattel's Doctrine on Territorial Transfer in International Law and the Cession of Louisiana to the United States of America*, 63 LA. L. REV 1327, 1329 (2003).

²⁶⁷ See EMER DE VATTEL, *THE LAW OF NATIONS* Vol. I 257–58 (Bela Kapossy & Richard Whatmore eds., 2008).

²⁶⁸ *Id.* at 214.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* ("When therefore a nation finds a country uninhabited and without an owner, it may lawfully take possession of it; and after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation. Thus navigators going on voyages of discovery, furnished with a commission from the sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nation: and

first was against the Indians: based on the principle that the state should cultivate the land, Vattel argued that the Indian tribes occupied, but did not own the land of America.²⁷² On the second front, Vattel argued against previous claims of other European powers: the discovering nation's occupation must be a real possession to gain full territorial sovereignty. "The law of nations," according to Vattel, will not "acknowledge the property and sovereignty" of the Kings of Spain and Portugal who merely settled "empty ceremony," but didn't take "actual possession."²⁷³

Although Vattel did not employ the traditional civilization/barbarian distinction as a ground for conquest, he did not recognize the Indians' right over the American land. He put forward the idea of "cultivation" as the basis for land ownership, which was akin to Locke's idea of labor.²⁷⁴ Thomas Pownall, the Governor of Massachusetts from 1757 until 1760, expressed explicitly the idea set out by Locke and expounded by Vattel: the Indians were "not landowners, but hunters, not settlers but wanderers, with no idea of property in land, of that property which arises from a man's mixing his [labor] with it."²⁷⁵ This represents the typical Protestant justification for the land appropriation in the North American continent.

V. THE JURIDICAL STATUS OF KINGDOMS AND COLONIES

With the lands acquired in both Europe and America, the Europe of composite kingly states took shape.²⁷⁶ How did the European states treat the acquired territories in their own political and legal orders?

For France, the territorial structure was quite centralized. Among its provinces, only Brittany, which was incorporated through dynastic union, retained regional autonomy until the French Revolution.²⁷⁷ France treated its overseas colonies as ordinary administrative regions.²⁷⁸ Compared with its European

this title has been usually respected, provided it was soon after followed by a real possession.").

²⁷² DE VATEL, *supra* note 267, at 216 ("[T]hose nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe ... were lawfully entitled to take possession of it, and settle it with colonies.").

²⁷³ *See id.* at 215.

²⁷⁴ It is interesting to observe that Vattel praised the settlers of New England to purchase the land from the Indians. It involves a tricky question that whether purchase registered the settlers recognized the property rights of the Indians. *See generally* STUART BANNER, *HOW THE INDIANS LOST THEIR LANDS: LAW AND POWER ON THE FRONTIER* (2005).

²⁷⁵ THOMAS POWNALL, *THE ADMINISTRATION OF THE COLONIES* 157 (1765).

²⁷⁶ *See supra*, Parts III & IV.

²⁷⁷ *See* JOHN KOCH, *CELTIC CULTURE: A HISTORICAL ENCYCLOPEDIA* 10 (2006).

²⁷⁸ Pagden, *supra* note 246, at 2, 4 (In Canada, "the French settlers were governed according to a body of local administrative law called the Coutume de Paris. . . . Under a law of 1664, all native inhabitants of New France who had converted to Christianity were held to

competitors, France was more uniform and centralized.²⁷⁹ This tradition lasted until quite recently. Algeria, although in Africa, was treated by the French Government as a province, rather than a colony.²⁸⁰

Spain was a bit more complicated. It gave much legal and political autonomy to the kingdoms that were annexed by dynastic unions, respecting their own laws.²⁸¹ The situation was different in the conquered lands. American colonies were integrated into the Crown of Castile.²⁸² They were primarily the dependencies of Castile and had no legal relationship with other kingdoms of Spain.²⁸³ Generally speaking, subjects of Spain's other internal kingdoms could not set foot in these dependencies.²⁸⁴ Spain, therefore, registered a composite character. The nexus of unity was the king.²⁸⁵

Britain was even more complicated. In the metropolis, it was a composite monarchy.²⁸⁶ The troubling problem lay in the legal relationship between metropolis and the American colonies. The legal status of the American colonies

be denizens and French natives, and as such entitled for all rights of succession, good laws and other dispositions. . . .”).

²⁷⁹ Pagden, *supra* note 246, at 2, 4.

²⁸⁰ See, e.g., Jennifer Pitts, *Empire and Democracy: Tocqueville and the Algeria Question*, 8 J. POL. PHIL. 295 (2000).

²⁸¹ See JOHN H. ELLIOTT, *THE REVOLT OF CATALANS* 8 (1984) [hereinafter ELLIOTT, *THE REVOLT OF CATALANS*] (“Almost an absolute monarch in Castile,” the King of Spain “was a ruler with very limited powers in Valencia or the Netherlands. What he could do in an official capacity in Mexico, governed by the laws of Castile, he could not possibly do in Aragon or Sicily.”).

²⁸² See Pagden, *supra* note 246, at 1–2 (“The overseas possessions of the Spanish, despite early incorporation into the Crown of Castile, were legally identified as separate kingdoms—the *reinos de Indias*—governed by a separate body of legislation (codified in 1680) and administered by a royal council whose functions were similar to those of the councils that administered the European regions of the empire: Italy, Flanders, and Castile itself. The Spanish possessions were thus a separate but legally incorporated part of a single imperium, embodied in the person of the monarch – what has often be referred to as a ‘composite monarchy.’”).

²⁸³ See JOHN H. ELLIOTT, *EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492-1830* 119–21 (2006) [hereinafter ELLIOTT, *EMPIRES OF THE ATLANTIC WORLD*].

²⁸⁴ ELLIOTT, *THE REVOLT OF CATALANS*, *supra* note 281, at 8 (“Since the New World was the conquest, and therefore the property, of the Crown of Castile, the king’s Aragonese subjects would take no significant part in its colonization and development.”).

²⁸⁵ *Id.* (“[T]he kingdoms must be ruled and governed as if the king who holds them all together were king only of each one of them.”).

²⁸⁶ ELLIOTT, *EMPIRES OF THE ATLANTIC WORLD*, *supra* note 283, at 117 (“Like Habsburg Spain, Great Britain, as united under the rule of James VI and I, was a composite monarchy. In common with its continental counterparts the British composite monarchy of the early Stuarts . . . consisted of different realms and territories with their own distinctive traditions and forms of government, although subject to one and the same monarch.”).

was quite vague in English law.²⁸⁷ The historian J.G.A. Pocock asked the following question and answered with uncertainty:

What then was the legal status of a ‘colony’, and had that status been clarified in law? Here we may find ambiguity; a colony’s charter, if it had one, might authorize it to act and exist as something in the nature of a trading company, or a civil corporation akin to a borough, or a body political, ecclesiastical as well as civil, subject to a crown whose authority ruled it as the same authority ruled the realm of England according to the Act in Restraint of Appeals. . . . Even under royal governors, the colonies were not vice-royalties, subject kingdoms, realms or dominions, as were the components of the Spanish Monarchy. . . .²⁸⁸

To sum up, the territories outside the original kingdom of the composite kingly state, enjoyed different juridical status according to the way they had been acquired. Vattel was right when he wrote that both contiguous kingdoms and overseas colonies were the territories of the state. But when he said that they were “part of the state, equally with its ancient possessions” and “[w]henever therefore the political laws, or treaties, make no distinction between them, everything said of the territory of a nation, must also extend to its colonies,”²⁸⁹ he was describing not the early modern composite state, but rather what was to emerge as the modern, impersonal, unitary, territorial state.²⁹⁰

VI. SECESSIONS IN THE AGE OF TERRITORIAL ACCESSION: THE NETHERLANDS AND PORTUGAL

In the society of composite kingly states, the king usually employed military conquest and dynastic interconnections to augment the territorial size of the state, rather than to abate it.²⁹¹ But secession did happen in the era of territorial

²⁸⁷ ELLIOTT, EMPIRES OF THE ATLANTIC WORLD, *supra* note 283, at 117–18.

²⁸⁸ See J. G. A. POCKOCK, THE DISCOVERY OF ISLANDS: ESSAYS IN BRITISH HISTORY 149 (2005).

²⁸⁹ DE VATTEL, *supra* note 267, at 217.

²⁹⁰ See ELLIOTT, EMPIRES OF THE ATLANTIC WORLD *supra* note 283, at 118–19 (“The more general term ‘British Empire,’ used to designate a unitary political body of England, Ireland, Scotland and the colonies, does not seem to have made an appearance before the second quarter of the eighteenth century, following belatedly in the wake of the Anglo-Scottish union of 1707.”).

²⁹¹ See BOBBITT, *supra* note 35, at 127 (“[T]he kingly states, represented by Louis, [kept] intact those dynastic inheritances that might, in the fullness of time, augment the kingly state.”).

accession. There were two cases of secession during that era: the Netherlands seceded from Spain in 1581 and Portugal in 1640 from Spain.²⁹² Although they seceded from a composite kingly state, each exemplifies the flip side of territorial accession as dynastic unions. Both union and disunion followed the rules of the dynastic, kingly territoriality, which combined titles of inheritance and conquest.

A. The Dutch Revolt

The Netherlands was incorporated into Spain through dynastic inheritance.²⁹³ In the 16th century, Charles V, the Duke of Burgundy who owned the Netherlands as his fiefdom, became the King of Spain by inheritance.²⁹⁴ Charles V generally granted self-government of the Netherlands by creating the Collateral Councils in 1531 to check the power of his Governor-General and channel the will and interest of the Dutch.²⁹⁵ This way of governance, especially the Collateral Councils, fit well with the conciliary tradition of government in the Netherlands that had developed from the 15th century.²⁹⁶

Charles V's successor, Philip II, adopted several policies that made the Dutch think Spain was violating their autonomy.²⁹⁷ The first policy was about money. To alleviate the financial situation in Spain, Philip began to change the taxation system in the Netherlands, introducing general taxes on movables and immovables instead of a lump sum.²⁹⁸ The second was about religion. After the Reformation, religious division threatened the union between the Protestant Netherlands and Catholic Spain. Philip II, following the papal bull *Super Universas* (1559), set out to reorganize the diocesan structure of the Netherlands.²⁹⁹ He appointed new bishops and persecuted heretics (mostly protestants),³⁰⁰ for "he thought that maintaining religious unity within the empire a pre-condition for maintaining the empire itself."³⁰¹ Both policies were met with serious oppositions from the Dutch.³⁰²

These oppositions finally led to secession. In 1568, the Dutch Revolt broke out and started the Eighty Years' War between the Netherlands and Spain. In 1579, the northern Dutch provinces proclaimed their political autonomy and religious freedom against Spain. In 1581, they enacted the Act of Abjuration to

²⁹² See *infra* Part VI, Sections A, B.

²⁹³ MARTIN VAN GELDEREN, *THE POLITICAL THOUGHT OF THE DUTCH REVOLT 1555-1590* 17 (1992).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 20.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 19.

²⁹⁸ See VAN GELDEREN, *supra* note 293, at 32–33.

²⁹⁹ *Id.* at 33.

³⁰⁰ *Id.* at 33–34.

³⁰¹ *Id.* at 32.

³⁰² *Id.* at 32–34.

declare independence. The preamble of the Act reads:

As 'tis apparent to all that a prince is constituted by God to be ruler of a people, to defend them from oppression and violence as the shepherd his sheep; and whereas God did not create the people slaves to their prince, to obey his commands, whether right or wrong, but rather the prince for the sake of the subjects. . . . [When a prince] does not behave thus, but, on the contrary, oppressed them, seeking opportunities to infringe their ancient customs and privileges, exacting from them slavish compliance, then he is no longer a prince, but a tyrant, and the subjects...may not only disallow his authority, but legally proceed to the choice of another prince for the defense of liberty, which we ought to transmit to posterity, even at the hazard of our lives.³⁰³

At first glance, it sounded like the United States Declaration of Independence of 1776. It is, therefore, unsurprising that Jefferson was inspired by it when he penned the Declaration of Independence.³⁰⁴ Yet putting their speeches and actions together, this Act was not as radical as the US Declaration of Independence in 1776. The political ideology in this text was more akin to the Protestant, monarchomachic political thoughts than to the republican, revolutionary ideology of the American Revolution.³⁰⁵ The monarchomachic thought took a good regime to be “formally monarchical, its basis as democratic, and its government as aristocratic.”³⁰⁶ The king, accordingly, derives his authority from God but should be controlled by the people represented by the magistrates. This thought did not endeavor to overthrow monarchy outright; it still adhered to the principle that the king’s power and authority came from God.³⁰⁷ It added the elements of democracy and aristocracy, consent and abjuration to the monarchical regime.³⁰⁸ The governed, accordingly, have the right to abjure their loyalty to a tyrannical king and pledge it to another.³⁰⁹ The metaphors of “sheep” and “shepherd” vividly illustrate this point. Unlike the American Revolution, the king was abjured not because of the origin of right, but because of his abuse of that right.

The initial aim of the Dutch secession was not independence, but to change the sovereign ruling them. After declaring abjuration, the Dutch offered sovereignty

³⁰³ AMY CHUA, *DAY OF EMPIRE* 145–46 (2009).

³⁰⁴ See, e.g., Stephen Lucas, *The Rhetorical Ancestry of the Declaration of Independence*, 1 *RHETORIC & PUB. AFF.* 143, 143 (1998).

³⁰⁵ QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHTS VOLUME II: THE AGE OF REFORMATION* 338 (1978); VAN GELDEREN, *supra* note 293, at 269–76.

³⁰⁶ Jan Rohls, *Reformed Theology and Modern Culture*, in *REFORMED THEOLOGY FOR THE THIRD CHRISTIAN MILLENIUM* 52 (Brian Gerrish ed., 2003).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *See id.*

over the Netherlands consecutively to the King of France and Queen Elizabeth of England.³¹⁰ Indeed, the Act of Abjuration itself was a preparation for the union with France.³¹¹ Yet both sovereigns of England and France eventually declined the offer.³¹² With no dynastic sovereign to accept them, the Dutch were forced to establish an independent, republican state, which was an anomaly to the international order at the time.³¹³

The Act of Abjuration escalated the war between Spain and the Netherlands.³¹⁴ Immediately after the Act, Spain sought to recapture the United Provinces and reconquered the southern part of the Netherlands.³¹⁵ The northern part of the Netherlands remained *de facto* independent. Over the following years, the Northern Netherlands continued to be at war with Spain, interposed by an armistice known as the Twelve Years' Truce (1609–1621).³¹⁶ Finally, Spain failed to reconquer the Northern Netherlands and the Eighty Years' War ended.³¹⁷

In 1648, the Peace of Westphalia finally recognized the Netherlands as an independent state. Importantly, Spain as the host state recognized the independence of the Dutch in the Treaty of Münster. As Grewe writes,

During the preliminary negotiations preceding the peace congress in Westphalia it remained controversial, whether the Dutch delegates were entitled to the title of 'Excellency', as this would have been considered an expression of the sovereign status of their country. Not only the Spanish, but also the French at first denied them the use of this title. This hesitation was exacerbated by the question of whether States with a republican form of government were permitted to use the title of 'Excellency' for their delegates. In a decision of the Emperor in 1646, permission for the Dutch delegates to use this title was made conditional upon the agreement of Spain. This was often regarded as a confirmation of the view, that only the former sovereign was able to grant independence of the seceding territory. Such a grant was accomplished by the Hispano-Dutch peace treaty of 1648, and the question was thereby resolved.³¹⁸

To be sure, the secession of the Netherlands did not go with a title of

³¹⁰ See CHUA, *supra* note 303, at 146.

³¹¹ *Id.*

³¹² *Id.*

³¹³ See Elliott, *supra* note 40, at 70 (“As the provinces of the northern Netherlands found during the early years of their struggle against Spain, secessionist movements culminating in some form of republic were looked at askance in the monarchical world of early modern Europe.”).

³¹⁴ CHUA, *supra* note 303, at 146.

³¹⁵ *Id.*

³¹⁶ *Id.* at 156.

³¹⁷ *Id.*

³¹⁸ See GREWE, *supra* note 147, at 185.

dynastic inheritance. But the new, republican country followed the rules of conquest used by dynastic monarchies.

B. The Independence of Portugal

The second secession that occurred in the era of territorial accession was the independence of Portugal. After the union between Spain and Portugal in 1580, there was a debate over the legal nature of Portugal's annexation: was it an inheritance or a conquest? On the one hand, some emphasized that it was a conquest, employing this as the foundation of a claim to integrate Portugal into the kingdom of Castile, and make the Iberian Union a more centralized, unitary, and cohesive state.³¹⁹ Some even suggested making Lisbon as Philip's capital to "rule the Hispanic world from the shores of Atlantic."³²⁰ On the other hand, Philip himself presented it to other European powers as a dynastic succession.³²¹ Accordingly, he did not abolish the local laws and impose his own laws. Rather, he declared that he would "abide by a series of articles" that protected the autonomy of the kingdom of Portugal.³²² Notably, Philip respected Portugal's autonomy in the Iberian Union and in colonial affairs too.³²³

Later on, Spain began to adopt more absolutist policies.³²⁴ Like in the Netherlands, Spain increased taxes in Portugal, which weakened the economy and stirred the people.³²⁵ The Portuguese people began to express their discontent. Popular opinion soon transformed to violent actions: a local riot in 1637 was the first step; then it spread all over Portugal.³²⁶ All these finally pointed to a movement of secession.

The Portuguese nobility, however, was at first reluctant to lead a secessionist movement. For example, John, the Duke of Braganza, who, according to Cardinal Richelieu of France, was the suitable choice for the legitimate King of Portugal, at first rejected such a proposal and remained loyal to Spain. In 1640, rebellion in Catalonia broke out.³²⁷ Spain tried to employ Portuguese soldiers to

³¹⁹ See J.H. Elliott, *The Spanish Monarchy and the Kingdom of Portugal, 1580-1640*, in CONQUEST AND COALESCENCE 50–51 (Mark Greengrass ed., 1991)

³²⁰ RICHARD BONNEY, *THE EUROPEAN DYNASTIC STATES, 1494-1660* 139 (1992).

³²¹ *Id.* ("Philip viewed his inheritance chiefly in dynastic terms. He accepted the Portuguese crown as part of his confederation of territories, the union being comparable in his mind to that of 1479 between Castile and Aragon.")

³²² See Elliott, *supra* note 319, at 51 ("The laws of Castile were not to be introduced into Portugal.")

³²³ ANDERSON, *supra* note 205, at 103 (2000) ("The overseas empires of both nations remained separate.")

³²⁴ A. R. DISNEY, *A HISTORY OF PORTUGAL AND THE PORTUGUESE EMPIRE* 1213 (2009).

³²⁵ DISNEY, *supra* note 324, at 214–15.

³²⁶ *Id.* at 217–18.

³²⁷ *Id.* at 219–20.

repress the Catalans at the cost of Portugal.³²⁸ Popular resentment of these moves provided another opportunity for independence. John “recogni[z]ed that should the plot fail he had more lands to lose than any other Portuguese duke. Eventually, however, he agreed to lead the insurrection and to lend the name of his house to an insurgent dynasty.”³²⁹ After a series of battles, Portugal won the Restoration War and expelled the representative of the Spanish Habsburgs. It seceded from Spain.³³⁰

During the independence movement of Portugal, there was a wave of popular nationalism known as “Sebastianism”: the people longed for the coming of the ancient King Sebastian to emancipate them from their captivity.³³¹ But on the road toward independence, popular nationalism was largely suppressed for two reasons. First, the leaders of secession were nobles who feared that the peasants would take advantage of the secession to incorporate a populist ethos into Portugal and change the social structure.³³² Second, the Catholic Church, which the Portuguese nobilities followed, disfavored nationalism, which they believed to be grounded in Protestant religious doctrines.³³³

Hence, the independence of Portugal was not a popular revolution based on cultural nationalism.³³⁴ Instead, it was an expression of dynastic independence. Both the union and disunion between Portugal and Spain were examples of dynastic politics: Spain annexed Portugal through Philip’s claim to the throne of Portugal; Portugal’s secession from the Iberian Union was through the House of Braganza’s dynastic claim to the sovereignty of Portugal. The divorce between Spain and Portugal was just the flip side of territorial aggregation as dynastic union. Secession

³²⁸ *Id.* at 220.

³²⁹ DAVID BIRMINGHAM, A CONCISE HISTORY OF PORTUGAL 35 (3d ed., 2018).

³³⁰ See ANDERSON, *supra* note 205, at 108–09; BIRMINGHAM, *supra* note 329, at 35.

³³¹ See generally José I. Suárez, *Portugal’s “Saudosismo” Movement: An Esthetics of Sebastianism*, 28 LUSO-BRAZILIAN REV. 129 (Summer, 1991); ANDERSON, *supra* note 205, at 108 (The Portuguese peasants “cherished a messianic hope known as Sebastianism, which surmised that the young king was not really dead and would return to lead Portugal back into prosperity and greatness . . . The willingness of the people to believe almost any story that involved the reappearance of the deceased king indicates the strong desire to cast off Spanish authority and return to a sovereign Portuguese state.”).

³³² See BIRMINGHAM, *supra* note 329, at 36 (“Court culture was truly transnational up to the time of the revolution.”).

³³³ *Id.* at 41 (“nationalism was not much favored by the seventeenth-century Vatican. The popes associated political independence with the Protestant religious autonomy which had swept northern Europe.”).

³³⁴ *Id.* at 36 (“The Braganza insurrection was not, by inception, a popular revolution. Three years earlier, in 1637, a genuinely grass-roots rebellion had been attempted in Portugal. . . . Their cause, however, had not been supported by the landowners who had feared that any popular rebellion might jeopardiz[e] their own status and privilege. Indeed it has been argued that the subsequent revolt of the barons in 1640 might have been a pre-emptive strike to prevent another popular uprising when the burden of Spanish unity was becoming even heavier. The Braganza supporters were keenly anxious to avoid turning the world upside down, as was being threatened in England . . . It was not any sentiment of cultural nationalism in high society which led Portugal towards the revolt of the nobility.”).

was to create a new dynastic state, or to put it more precisely, a new king. Nationalism, the overarching political principle in the modern nation-state after 1789, did appear in the Portuguese secession, but it played no important role. Perhaps the most important “reason for the success of the Portuguese revolt was that, in the Duke of Braganza, Portugal had a potentially legitimate king in waiting.”³³⁵

The secession of Portugal represented the flip side of conquest too. Claims to dynastic inheritance were usually accompanied by the threat or possibility of conquest. Disputes over territorial claims were resolved by war. Spain and Portugal came together when Philip won the War of Portuguese Succession in the later 16th century. They came apart when John won the Restoration War six decades later.

VII. CONCLUSION

Although challenged by the American and French Revolutions at the end of the 18th century, the old international order of dynastic states continued to dominate the 19th century.³³⁶ The United States was merely peripherally involved in international politics in those years. The international impact of the French Revolution was halted at Waterloo in 1815 and the *ancien regime* was restored at the Congress of Vienna.³³⁷ The old European order of composite kingly states did not receive a fatal blow until the end of World War I, at which point the triumph of national self-determination delegitimized the dynastic principles.³³⁸

The identity of “state-nation-territory” was a product of modern popular revolutions and modern nationalism. Originating from the two modern revolutions, the dual meanings of self-determination—against both foreign rule and domestic tyranny—developed in the late nineteenth and early 20th centuries and triumphed in decolonization in the 1960s. Democracy and nationalism went hand in hand: searching for the embodiment of the people, we turn to “the nation.” State politics is nationalized and the national discourse is politicized.³³⁹ When the invisible popular sovereign replaced the king’s visible body, the land became the visible

³³⁵ Elliot, *supra* note 40, at 69.

³³⁶ Liu, *supra* note 6, at 360.

³³⁷ BOBBIT, *supra* note 35, at 542.

³³⁸ Matti Koskenniemi, *National Self-Determination Today*, 43 INT’L & COMP. L. Q. 241, 254 (1994). Even today, the character of the composite kingly state is still detectable in multinational states. The United Kingdom is still a composite state, from which Scotland may seek independence. As for Spain, Catalonia, and Basque are quasi-independent nations within a multiple kingdom. Outside Europe, China, which contains Tibet, Xinjiang, Hong Kong, and Macau, is hardly a unitary nation-state, but inherited its imperial tradition of composite constitution.

³³⁹ See generally Bernard Yack, *Popular Sovereignty and Nationalism*, 29 POL. THEORY 517 (2001).

symbol of the state.³⁴⁰ No longer the patrimony of the sovereign king, land becomes both material and spiritual foundations of the state.³⁴¹ To cede even a small parcel of territory is a huge national humiliation; many states would engage in destructive wars to fight for a tract of useless land.³⁴²

Secession became a problem alongside the development of the modern state. When the state was the patrimony of a sacral king, territorial aggregation and disaggregation followed rules of inheritance and property, governed by the law of nations. The problem of secession appeared with popular sovereign states that had their origin in modern revolutions. As the dynastic principles were rejected, the territorial unity of the state became the core of the political entity. The problem of secession was intensified by the rise of nationalism and the marriage of notions of popular sovereignty and nationality, all characteristics of the modern nation-state. The theoretical ambiguity and practical perils of national self-determination are both the cause and product of these modern political transformations. When the people were transformed from objects to subjects of politics, the unity among members of a political community became problematic. In the composite kingly state, the sovereign king was the nexus of unity between multiple political communities and territories. When the American and French Revolutions overthrew the king in both political theory and political practice, the nexus of unity changed. The new type of state invented the image of the popular sovereign to serve as the bond of unity.³⁴³ That project was not easy. The territorial unity of the state becomes politicized and problematic. The 20th-century problem of secession arises out of this pathology of the nation-state as it is tied to territoriality. Both the parent state and the seceding group adhere to the imagination of territorial identity—one nation, one state, one territory. Union and disunion of states becomes difficult, controversial, and usually violent.

³⁴⁰ PETER SAHLINS, *BOUNDARIES: THE MAKING OF FRANCE AND SPAIN IN THE PYRENEES* 3 (1989) (“In the late nineteenth and twentieth centuries, territories and boundaries became political symbols over which nations went to war and for which citizens fought and died.”).

³⁴¹ MALCOM ANDERSON, *FRONTIERS*, *supra* note 19, at 3 (1996) (“Emotions aroused by state frontiers became more widely shared and obsessive with the sacralization of homelands by nineteenth-century nationalism. Frontiers became associated with powerful images, symbols and (sometimes invented) traditions.”).

³⁴² For example, Chile and Argentina once fought a war, known as “the Beagle Dispute,” over several useless islands in the 1970s. *See* DAVID STRUTHERS, *THE BEAGLE CHANNEL DISPUTE BETWEEN ARGENTINA AND CHILE: AN HISTORICAL ANALYSIS* 63 (1985).

³⁴³ *See generally* EDMUND MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1989).

