

2006

Commerce, Conquest, and Wartime Confiscation

James T. Gathii

Loyola University Chicago, School of Law, jgathii@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [International Law Commons](#)

Recommended Citation

James T. Gathii, Commerce, Conquest, and Wartime Confiscation, 31 Brook. J. Int'l L. 709 (2006).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

COMMERCE, CONQUEST, AND WARTIME CONFISCATION

*James Thuo Gathii**

All the Advantage procured by Conquest is to secure what we possess ourselves, or to gain the Possessions of others, that is, the produce of their Country, and the Acquisitions of their Labor and Industry; and if these can be obtained by fair Means, and by their own Consent, sure it must be more eligible than to exhort them by Force.

This is certainly more easily and effectually done by a well regulated Commerce, than by Arms.¹

I. INTRODUCTION

In this short paper, I explore the complex relationship between commerce, conquest, and the confiscation of private property in the context of war. I do this by examining illustrative case law and other materials. In doing so, I make two primary arguments. My first argument is that the relationship between conquest and confiscation, on the one hand, and commerce, on the other, is not fixed or even stable but rather occupies a continuum between at least two extremes: the absolute power of a sovereign belligerent to confiscate enemy private property upon conquest on the one hand, and the policy of allowing commerce safe passage during war on the other hand. Given this relationship, my second argument is that it is inaccurate to portray the eighteenth and nineteenth centuries as periods during which the absolute power of confiscation prevailed and the twentieth century as a period in which a rule prohibiting confiscation of private property during wartime held sway.²

* Professor of Law, Albany Law School. I would like to thank James Leary, Elaine Haonian, Robert Gregor, and Maryam Kougholi for their research assistance.

1. 3 CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS 179 (John Trenchard & Thomas Gordon eds., Da Capo Press 1971) (1755).

2. This narrative of progress from the dark nineteenth century as a time of confiscation to today's more acceptable rules proscribing confiscation during wartime is recently exemplified by the Eritrean Ethiopian Claims Commission. In this dispute between the State of Eritrea and the Federal Democratic Republic of Ethiopia, the Commission noted in part that:

[u]ntil the nineteenth century, no distinction was drawn between the private and public property of the enemy, and both were subject to expropriation by a belligerent. However, attitudes changed; as early as 1794, the Jay Treaty bound the United States and the United Kingdom not to confiscate the other's nationals' property even in wartime. This attitude came to prevail; the 1907 Hague

I proceed by discussing the four manifestations of the relationship between confiscation and commerce. These manifestations include the following: confiscation trumps commerce; commerce trumps confiscation; balancing between commerce and confiscation where neither trumps the other; and finally, the doctrine of exceptional circumstances under which warfare between lawful belligerents and actors thought of as existing outside the law are regarded as beyond legal regulation. In addressing the exceptional circumstances doctrine, I show how the broad ranging measures to confiscate the property of Baathists following the U.S.-led conquest of Iraq in 2003 is related to the exceptional circumstances doctrine that is being used to justify the massive transformation of the Iraqi economy without fully consulting with the Iraqi people. The paper ends with some concluding reflections.

II. THE RELATIONSHIP BETWEEN CONFISCATION AND COMMERCE

A. Confiscation Trumps Commerce

The inherent power of confiscation during wartime is traceable to absolutist notions of sovereignty.³ Proceeding from such views of the power of the State, courts have affirmed confiscations as an exercise of a war power as opposed to a municipal power⁴ suggesting that war powers

Regulations reflect a determination to have war affect private citizens and their property as little as possible.

Eritrean Ethiopia Claims Commission, Partial Claims Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, para. 125 (Dec. 17, 2004), <http://pca-cpa.org/ENGLISH/RPC/BECC/BR%20Partial%20Award%20Dec%202004.pdf>. To be fair, the Commission does acknowledge in a later paragraph that these prohibitions are accompanied by a "competing body of belligerent rights to freeze or otherwise control or restrict the resources of enemy nationals so as to deny them to the enemy State." *Id.* para. 127.

3. Thus in *Ware v. Hylton*, 3 U.S. (2 Dall.) 199, 226 (1796), Justice Chase, quoting *Bynkershoek Q. I.P. de rebus bellicis*, states that "[s]ince it is a condition of war, that enemies, by every right, may be plundered, and seized upon, it is reasonable that whatever effects of the enemy are found with us who are his enemy, should change their master, and be confiscated, or go into the treasury." To further illustrate the absoluteness of the claims of confiscation, the Confederate government passed retaliatory legislation permitting it to confiscate the property of northerners when Congress passed legislation permitting the confiscation of enemy property during the Civil War. See JOHN SYRETT, *THE CIVIL WAR CONFISCATION ACTS—FAILING TO RECONSTRUCT THE SOUTH* 6 (2005).

4. *Miller v. United States*, 78 U.S. (11 Wall.) 268, 304-05 (1870). Here, the court held that the restrictions of the Fifth (prohibiting deprivation of private property without due process of law) or Sixth (presentment or indictment by jury) Amendments did not preclude the confiscations since Congress has the power to declare war which includes "the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted." *Id.*

are more expansive than the more limited municipal powers. Other justifications for the authority to confiscate private property during wartime include the military necessity doctrine,⁵ executive orders claiming expansive authority in the conduct of war,⁶ as well as the kind of broad powers the International Economic Emergency Powers Act⁷ confers on the Office of Foreign Assets Control.⁸

Several American Civil War cases demonstrate the far-reaching claims of the absoluteness of the rights of belligerents to confiscate private property. In *American Insurance Co. v. 356 Bales of Cotton*, the Court reaffirmed the absolute power granted to the government to confiscate property without compensation.⁹ In some Civil War cases, Congress' power to pass legislation authorizing the confiscation of private property, even in cases where it was held by non-combatants, was justified as arising under the power of Congress to "make regulations [sic] concerning captures on land and water."¹⁰

Courts generally upheld broad powers of the Union government and army to confiscate cotton owned by southerners even though the Confiscation Acts were vague and unclear.¹¹ One case affirms the legitimacy of wartime confiscation of cotton as being "not for booty of war, but to

5. See Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 75-79 (2005) (discussing military necessity as a justification for property seizure and destruction).

6. In *Paradissiotis v. United States*, 304 F.3d 1271 (Fed. Cir. 2002), the Federal Circuit held that the United States did not affect an unlawful taking of property when it refused to permit a person determined to be an agent of the Libyan government to exercise stock options included among assets that were frozen by executive order.

7. In *Dames & Moore v. Regan*, 453 U.S. 654, 671 (1981) (quoting *Chas. T. Main Int'l v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 806-07 (1st Cir. 1981)), Justice Rehnquist noted that "[t]he language of IEEPA [referring to 50 U.S.C. § 1702(a)(1)(B) in particular] is sweeping and unqualified. It provides broadly that the President may void or nullify the 'exercising [by any person of] any right, power or privilege with respect to . . . any property in which any foreign country has any interest . . .'" (emphasis in original).

8. On the role of the Office of Foreign Assets Control, see Jill M. Troxel, *Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Privilege*, 24 REV. LITIG. 637, 652-54 (2005).

9. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 542 (1828).

10. *Haycraft v. United States*, 89 U.S. (22 Wall.) 11, 94 (1874) (quoting U.S. CONST. art. I, § 8, cl. 11).

11. SYRETT, *supra* note 3, at 155. Some scholars have suggested that civil war confiscation cases had a direct bearing on the emergence of laissez faire constitutionalism and the emergence of a particularly strong right to private property right. Daniel Hamilton, *A New Right to Property: Civil War Confiscation in the Reconstruction Supreme Court*, 29 J. SUP. CT. HISTORY 254, 255 (2004).

cripple the enemy."¹² Thus in *Miller v. United States*, Justice Strong noted:

The whole doctrine of confiscation is built upon the foundation that [property] is an instrument of coercion, which, by depriving an enemy of property within reach of his power . . . impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war.¹³

Although the courts affirmed confiscation in broad terms, the Lincoln administration only grudgingly supported confiscation.¹⁴ Some Union army officers, by contrast, argued that the Confiscation Acts empowered them to confiscate slaves as they continued to be described as property.¹⁵ The Second Confiscation Act¹⁶ referred to slaves as property,¹⁷ consistent with the racist *Dred Scott* view that blacks could never attain citizenship in the United States.¹⁸

The enhanced authority of belligerents in cases like *Miller v. United States* was invoked in the post-Second World War case, *United States v. Caltex* in which the court held that military necessity justified the U.S. army's destruction of terminal facilities after the attack on Pearl Harbor and that such destruction was necessary to prevent the use of the facilities by the enemy.¹⁹ In 2003, the Court of Federal Claims in *El Shifa v. United States* affirmed such broad powers when it held that the President's designation of "war-making property" was judicially unreviewable and as such the mistaken bombing of private property abroad was not subject to compensation under the Fifth Amendment.²⁰

12. *Haycraft*, 89 U.S. (22 Wall.) at 94.

13. *Miller*, 78 U.S. (11 Wall.) at 306 (emphasis added). In *American Manufacturers Mutual Insurance Co.*, the court held that there was no compensation available for property destroyed as part of the fortunes of war. *Am. Mfrs. Ins. Co. v. United States*, 197 Ct. Cl. 99 (1972).

14. SYRETT, *supra* note 3, at 186.

15. *Id.* at 22 ("Slaves remained property in descriptions of confiscation but became people in reference to their rights after the fighting, however.")

16. An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes. 37 Cong. Ch. 195, 12 Stat. 589 (July 17, 1862).

17. SYRETT, *supra* note 3, at 24.

18. PAUL FINKELMAN, *DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS* 4 (1997).

19. *United States v. Caltex*, 344 U.S. 149, 154-55 (1952).

20. *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 771-72 (2003). The Court in *El-Shifa* considered a claim resulting from destruction of Sudanese property by the United States in retaliation for terrorist attacks on the American embassies in Kenya and Tanzania. *Id.* at 753-54. For a further analysis, see Nathaniel Segal, Note, *After El-*

This strong rule of confiscation also manifests itself under contemporary international law. United Nations Security Council Resolution 1373 of 2001, passed only a few days after the terrorist attacks on the United States on September 11, 2001, authorized states to freeze and therefore confiscate private property without due process and outside the UN's international human rights standards.²¹ The Security Council established the Counter-Terrorism Committee to monitor the implementation of this resolution.²² In 2002, the UN agreed to potentially consider appeals of over two hundred individuals whose assets had been frozen and who had been listed by the Counter-Terrorism Committee as having suspected links to terrorism.²³ At the September 2005 UN World Summit, a resolution was adopted expanding the work of the Counter-Terrorism Committee to include incitement to commit acts of terrorism.²⁴ The resolution, however, called upon states to comply with rules of international human rights in complying with their enhanced obligations to combat terrorism.²⁵ The expansive authority the Security Council has assumed in combating terrorism has fundamentally shifted its role from dealing with

Shifa: The Extraterritorial Availability of the Takings Clause, 13 CARDOZO J. INT'L & COMP. L. 293 (2005).

21. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). Paragraph 1(c) of Resolution 1373 obliges States to:

Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.

S.C. Res. 1373, para. 1(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001). *See also* Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874-76 (2003) (discussing the implications of the Counter-Terrorism Committee's ability to impose financial sanctions).

22. The Security Council describes the Counter-Terrorism Committee as follows:

The 15-member Counter-Terrorism Committee (CTC) was established at the same time [as the adoption of resolution 1373] to monitor implementation of the resolution. While the ultimate aim of the Committee is to increase the ability of States to fight terrorism, it is not a sanctions body nor does it maintain a list of terrorist organizations or individuals.

Security Council: Counter-Terrorism Committee, <http://www.un.org/sc/ctc/> (last visited Mar. 1, 2006).

23. *UN Eases Tough Stance Frozen Assets*, MX (Austl.), Aug. 16, 2002, at 15, available at 2002 WLNR 6240311.

24. S.C. Res. 1624, para. 1, U.N. Doc. S/RES/1624 (Sept. 14, 2005).

25. *Id.* para. 4.

crises on a case-by-case basis to legislating entirely new rules of international law.²⁶ Given the unrepresentative nature of the Security Council, where no African, Arab, or Latin American country is represented, these new rules may very well represent the will of a tiny minority of the States in the world today.²⁷

Even more troubling is that the work of the Security Council's 1267 Sanctions Committee, initially established in 1999 to monitor sanctions against the Taliban regime, in 2002 was extended to cover individuals linked to the Al-Qaeda organization.²⁸ The Sanctions Committee is authorized under the Security Council's compulsory authority under Chapter VII of the UN Charter and is therefore susceptible to application against an individual's private property without review or appeal. Unsurprisingly, the United States has used this authority in conjunction with its Office of Foreign Assets Control without regard to due process or transparency.²⁹

Another instance illustrating the absolute policy of confiscation arose following the 2003 U.S.-led war and subsequent occupation in Iraq. The de-Baathification of that country became one of the most important occupation objectives of the U.S.-led occupation.³⁰ It has involved the dissolution of not just the Baath Party, but a whole continuum of entities affiliated with Saddam Hussein, including defense, security, information, and intelligence organs of government and the entire structure of the

26. See Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 902-05 (2002) (discussing Security Council Resolution 1373 and the Security Council's increasing willingness to make demands on states).

27. I pursue this theme much more fully in James Thuo Gathii, *Assessing Claims of a New Doctrine of Pre-emptive War Under the Doctrine of Sources*, 43 OSGOODE HALL L.J. 67 (2005).

28. S.C. Res. 1267, para. 6, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1390, para. 2, U.N. Doc. S/Res/1390 (Jan. 16, 2002). For a description of post-September 11, 2001 international reaction to terrorist financing, see Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315 (2003).

29. See Alvarez, *supra* note 21, at 876-77.

30. The preamble to the first order of the Coalition Provisional Authority on de-Baathification notes in part,

[T]hat the Iraqi people have suffered large scale human rights abuses and dep-
ravations over many years at the hands of the Ba'ath Party,

. . . . [And] the grave concern of Iraqi society regarding the threat posed by the
continuation of Ba'ath Party networks and personnel in the administration of
Iraq, and the intimidation of the people of Iraq by Ba'ath Party officials

Coalition Provisional Authority Order No. 1: Implementation of De-Ba'athification of
Iraqi Society, pmb. (May 16, 2003), available at <http://www.cpa-iraq.org/regulations> (on
file with the *Brooklyn Journal of International Law (BJIL)*).

Iraqi military, including paramilitary units.³¹ All the property and assets of the Baath party were under order directed to be seized and transferred to the U.S. appointed and controlled Coalition Provisional Authority "for the benefit of the people of Iraq."³² Individuals in possession or control of Baath party property were required to turn it in to the Coalition.³³ An Iraqi Property Claims Commission was authorized to return seized private property.³⁴ The Iraqi De-Baathification Council, now renamed Committee, is charged with the location of Baathist officials and the assets of the Party and its officials with a view to eliminating the party and its potential to intimidate the population.³⁵

A striking similarity in each of the instances discussed above, in which the absolute power of confiscation was advanced, is that there was a danger argued to justify confiscation as a means of defeating the enemy with whom the danger was associated. In the context of the U.S. Civil War, courts even justified the power of confiscation where those involved were not belligerents on the premise that there was a mere possibility that if their cotton fell into the hands of the Confederate army, it could be used to support the rebellion against the Union. In addition, the power to confiscate has been claimed in a variety of historical epochs. As noted above, in the contemporary international scene, new institutions, such as the Counter-Terrorism Committee, are facilitating the power of confiscation among States. This continuity undermines claims that a successful belligerent's authority to confiscate enemy private property has receded into historical memory.

Finally, it is important to note that it is not always true that the absolute power to confiscate is always opposed to the ends of commerce. Rather,

31. Coalition Provisional Authority Order No. 2: Dissolution of Entities, Annex (May 23, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*).

32. Coalition Provisional Authority Order No. 4: Management of Property and Assets of the Iraqi Baath Party, § 3(1) (May 25, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*).

33. *Id.* § 3(3).

34. Coalition Provisional Authority Regulation No. 8: Delegation of Authority Regarding an Iraq Property Claims Commission (Jan. 14, 2004), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*). The Property Rights Commission (IPCC) and the Property Rights Reconciliation Facility (IPRF) were both developed, in part, to collect and resolve real property claims. However, the IPCC is a quasi-judicial agency under the direction of the Governing Council, while the IPRF acts more like an executive agency under the direction of the Administrator. Coalition Provisional Authority Regulation No. 4: Establishment of the Iraqi Property Reconciliation Facility (June 25, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*).

35. Coalition Provisional Authority Order No. 5: Establishment of the Iraqi De-Baathification Council, § 3 (May 25, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*).

the question might more appropriately be whose commerce is affected since confiscation may well only divert the gains of commerce from one party to another. For example, in *Young v. United States*, the Supreme Court upheld the confiscation of cotton found within confederate territory as well as the decision of the Union army to sell it and as such to divert the benefit of trade and commerce away from the Confederacy and in favor of the Union.³⁶ This example illustrates that it is possible to simultaneously weaken the enemy by confiscating private property in accordance with the absolutist rule, while simultaneously continuing in commerce and trade. In this scenario, rather than destroying private property, the absolutist rule seeks to divert the gains of trade and commerce from the enemy belligerent to the defeated belligerent.

B. Commerce Trumps Confiscation

A second relationship between commerce and confiscation during wartime is that commerce trumps confiscation. According to Justice Marshall in *United States v. Percheman*, property rights are not abolished with a change in sovereign power. According to Marshall:

The modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the whole civilized world, would be outraged; if private property should generally be confiscated and private rights annulled, on a change in the sovereignty of the country. The people change their allegiance . . . but their relations to each other, and their rights of property remain undisturbed.³⁷

36. *Young v. United States*, 97 U.S. 39, 61 (1877) (noting "the national government acted with double power upon the strength of the enemy: first, by depriving them of the means of supplying the demand for their products; and, second, by lessening the demand.").

37. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 51 (1833). The government's position in the case is captured by the following quote:

What, indeed, can be more clearly entitled to rank among things favorable, than engagements between nations securing the private property of faithful subjects, honestly acquired under a government which is on the eve of relinquishing their allegiance, and confided to the pledged protection of that contry [sic] which is about to receive them as citizens?

Id. at 68.

This view is also reflected in British cases of the same period.³⁸ Perhaps in overstating the significance of commerce during war, Chief Justice Marshall in *Brown v. United States* noted that the "practice of forbearing to seize and confiscate debts and credits [is] universally received"³⁹ and that this "modern rule . . . appears to be totally incompatible with the idea, that war does of itself vest the property in the belligerent government."⁴⁰ Attitudes about the positive role of commerce in society are strongly correlated with the rejection of any claims of restricting commerce such as through the public power of confiscation of private property without compensation.

Thus, French philosopher Montesquieu argued that the influence of commerce and industry "polishes and softens barbaric ways."⁴¹ Alexander Hamilton also observed that some individuals believe that the "natural effect of commerce is to lead to peace."⁴² One of the most important justifications accounting for the preeminence of commerce over a belligerent

38. See *In re Rush*, [1923] 1 Ch. 56, 70 (Eng.) (Younger, L.J., concurring) ("Lord Birkenhead, in *Fried Krupp Aktiengesellschaft v. Orconera Iron Ore Co.*, in 1919 observed: 'It is a familiar principle of English law that the outbreak of war effects no confiscation or forfeiture of enemy property.'" (quoting (1919) 88 L.J.R. (Ch.) 304, 309)). Somewhat analogously, in *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238 (2d Cir. 1994), the Second Circuit held that a default occasioned by war, economic sanctions, and the freezing of its assets making it impossible to obtain foreign currency to repay its debts did not preclude it from finding that Iraq had willfully defaulted. *Id.* at 242-43.

39. *Brown v. United States*, 12 U.S. 110, 123 (1814).

40. *Id.* at 125. In a more forthright statement of the principle, Justice Marshall observed that the "proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt." *Id.* at 127. However, Justice Marshall conceded that war gives a sovereign the "full right to take the persons and confiscate the property of the enemy," but that this "rigid rule" had been moderated by "the humane and wise policy of modern times." *Id.* at 122-23. By contrast, Justice Story dissented, arguing that while mere declaration of war did not ipso facto operate as a confiscation of the property of enemy aliens, such property is liable to confiscation "at the discretion of the sovereign power having the conduct and execution of the war" and that the law of nations "is resorted to merely as a limitation of this discretion, not as conferring the authority to exercise it." *Id.* at 154. Although Justice Marshall appeared to have suggested that the modern rule prohibited confiscation under the law of nations and limited the sovereign power to confiscate enemy property, *id.*, in *United States v. Percheman*, 32 U.S. 51 (7 Pet.) (1833), he affirmed the rule against confiscation under the law of nations unambiguously.

41. See Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LITERATURE 1463, 1464 (1982) (quoting CHARLES MONTESQUIEU, *DE L'ESPRIT DES LOIS* 81 (1961) (1748)).

42. However, Hamilton himself disagreed with this notion. See THE FEDERALIST NO. 6, at 33-36 (Alexander Hamilton) (E. H. Scott ed., 1898).

erent's right to confiscation is the salience of private property rights over competing claims of confiscation made by sovereigns. For example, Alexander Hamilton supported the prohibition against confiscation contained in the Jay Treaty in the strongest terms, stating in part:

No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation.⁴³

The rise of individualism associated with the Enlightenment that had influenced the American and French revolutions,⁴⁴ and the Spanish Constitution of 1812⁴⁵ are closely associated with the importance placed on protecting the inalienable rights to individual property from tyrannical governments.⁴⁶ The Lockean views of property ownership were argued to derive rights from the labor of the individual rather than from a grant from the sovereign.⁴⁷ As such, some of the framers of the U.S. Constitution argued that when individuals were deprived of certain inalienable rights, such as the right to property,⁴⁸ they were entitled to revolt against such deprivations of their inalienable rights.⁴⁹

43. Otto C. Sommerich, *A Brief Against Confiscation*, 11 LAW & CONTEMP. PROBS. 152, 156 (1946) (quoting 4 HAMILTON'S WORKS 343 (Lodge ed., 1885)).

44. See G. Richard Jansen, *The Provenance of Liberty and the Evolution of Political Thinking in the United States* (Feb. 1, 2003) (unpublished manuscript, on file with *BJIL*), available at <http://lamar.colostate.edu/~grjan/provenanceliberty.html?>. The merchant and bourgeoisie classes were strong driving forces behind the French Revolution in 1789. *Id.*

45. The Spanish Constitution of 1812 was based in large part on the Jacobian Constitution of 1793. Karl Marx, *Revolutionary Spain* (1854), in XII WORKS OF MARXISM-LLENINISM: REVOLUTION IN SPAIN 62-63 (1939).

46. Jansen, *supra* note 44. The French National Assembly, in its Declaration of the Rights of Man and the Citizen, written by the Marquis de Lafayette, assisted by Thomas Jefferson, included property as a natural and inalienable right of man. *Id.*

47. John Locke, *Second Treatise on Government*, in TWO TREATISES OF GOVERNMENT 285, 303-20 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

48. Jefferson, during the Revolution, wrote of the right of people to recognize a new government when the existing government fails to protect those rights. See Christian G. Fritz, *Recovering the Lost Worlds of America's Written Constitution*, 68 ALB. L. REV. 261, 264 (2005) ("In the Declaration of Independence, Thomas Jefferson considered the people 'endowed by their Creator with certain unalienable Rights,' including the right to alter or to abolish governments destructive of the legitimate ends of government. These words are often associated with Locke's justification for the right of revolution."). The Fifth Amendment provides that "no person shall be . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. See generally J. FRANKLIN JAMESON, *THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT* 27-46 (Beacon Press

In international humanitarian law, this attitude is reflected in the prohibition of destruction or seizure of enemy property "unless . . . imperatively demanded by the necessities of war" found in Article 23(g) of the 1907 Hague Regulations,⁵⁰ as well as Article 33 of Geneva Convention Relative to the Protection of Civilians in Time of War (IV) which prohibits pillage and reprisals against protected persons' property.⁵¹ With respect to occupied territory, Article 53 of the Geneva Convention Relative to the Protection of Civilians in Time of War (IV) prohibits destruction of private property except where "rendered absolutely necessary by military operations"⁵² while Article 46 of the Hague Regulations prohibits confiscation,⁵³ and Article 47 forbids pillaging by military authorities in occupied territory.⁵⁴ To supplement this broad range of prohibitions of interfering with private property during war is the customary international law rule that territory cannot be lawfully acquired through the use of force.⁵⁵

The strong support of private property rights against belligerent confiscation found similar expression in the post-Second World War period, when a jurist noted that the norm against confiscation of private property was an important precondition for the United Nations to build durable peace.⁵⁶ Perhaps building on this view, Article 8(2)(a)(iv) of the Statute of the International Criminal Court, which entered into force on July 1,

1964) (1926) (discussing how the ownership system of land influenced the American Revolution).

49. David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring With the People*, 81 CORNELL L. REV. 879, 886 (1996). The framers were highly skeptical of a powerful centralized government and favored an inherent right of the citizenry to revolt when deprived of certain inalienable rights. *Id.*

50. Convention Respecting the Laws and Customs of War on Land art. 23, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

51. Geneva Convention Relative to the Protection of Civilians in Time of War art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

52. *Id.* art. 53.

53. Hague Regulations, *supra* note 50, art. 46.

54. *Id.* art. 47. Notably, in the 1970s, the U.S. State Department took the position that Israel's occupation of the Gulf of Suez did not authorize it to violate the concessionary rights granted by Egypt to an American corporation, as these rights were protected under the law of belligerent occupation. Memorandum of Law, Monroe Leigh, United States Department of State, *Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez* (Oct. 1, 1976), reprinted in 16 I.L.M. 733, 750-53 (1977).

55. See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Annex, G.A. Res. 2625, para. 1, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (Oct. 24, 1970).

56. John Dickinson, *Enemy-Owned Property: Restitution or Confiscation?*, 22 FOREIGN AFF. 126, 141 (1943).

2002, makes it a war crime to engage in "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and unwantonly."

In *Congo v. Uganda*, decided by the International Court of Justice (ICJ) in December 2005, the Court found against Uganda for violating rules proscribing the looting, plundering, and exploitation of the natural resources of the Democratic Republic of the Congo.⁵⁷ Similarly, in December 2005, the Eritrea Ethiopia Claims Commission found Ethiopia liable for failing to compensate Eritrean civilians whose trucks and buses it had requisitioned contrary to international law rules requiring full compensation for wartime confiscations.⁵⁸

The reinforcement of the primacy of private property over the rights of belligerents to confiscate it in the foregoing rules and cases is belied by other rules and cases that continue to justify the confiscation of private property without compensation. I outlined a variety of such rules in Part II.A above. Professor Joseph Singer has, for example, shown how, notwithstanding the extremely strong support for private property rights in the United States, courts have simultaneously justified the uncompensated taking of American Indian property.⁵⁹ On the international level, I have demonstrated how the deferential application of the rules prohibiting interference with the private property of Italians and Germans during the post-Second World War Allied occupation stands in sharp contrast with the widespread disregard of these rules in the non-Western societies of Japan after the Second World War and Iraq following the U.S.-led war.⁶⁰ In short, there is a tension between the right to private property and a sovereign's claim to broad ranging power. As Franz Neumann observed regarding the opposition between sovereignty and the rule of law—if we were to imagine the limitation of the sovereign right to con-

57. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 7, 75–79 (Dec. 19). The Court found that Uganda had failed to live up to its obligation of vigilance as an occupying power as required by Article 43 of the Hague Regulations of 1907 by failing to stop the "looting, plundering and exploitation" of the natural resources of the Congolese territory it occupied. *Id.* at 79.

58. *Eritrea-Ethiopia Claims Commission, Partial Award, Loss of Property in Ethiopia Owned by Non-Residents, Eritrea's Claim 24*, paras. 15–26 (Dec. 19, 2005), available at <http://pca-epa.org/ENGLISH/RPC/EECC/FINAL%20ER%20CLAIM%2024.pdf>; see also *Partial Claims Award, Civilians Claims 15, 16, 23, 27–32*, *supra* note 2, paras. 123–52.

59. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 1–5 (1991).

60. James Gathii, *Foreign and Other Economic Rights Upon Conquest and Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491, 542–46 (2004).

fiscate as limited by the rule of law—whenever a reconciliation between the two is sought, “insoluble contradictions” arise.⁶¹

C. *Balancing Between Commerce and Confiscation*

Courts and jurists invented a number of doctrines between the two irreconcilable views of the absolute right of confiscation during wartime, on the one hand, and the freedom of commerce during wartime, on the other. Thus the third manifestation of the relationship between commerce and confiscation during wartime that I address here is a continuum between these two otherwise opposing ideas. In the United States, the balancing between the right to confiscate and to engage in commerce during war found its clearest expression when the United States was less powerful as an economic and military state relative to Britain and France and at a time when countries like the Netherlands had superior naval capabilities in safeguarding their commerce. To illustrate this balancing, I will also examine confiscation cases arising from the American Civil War, particularly those that arose in relation to congressional limitations on the Union government’s power to confiscate the assets of southerners.

The first doctrine I will examine is that of suspension and restoration. One of the best cases illustrating this doctrine is *Hanger v. Abbott*, a Civil War case in which the Court held that debts and executed contracts that existed prior to the Civil War and that played no part in undertaking the war, even though confiscated, remained suspended during the war

61. FRANZ NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* 4 (1986). Justice Marshall recognized this dilemma in *Brown*, 12 U.S. at 122–23, where he noted:

[W]ar gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall chuse [sic] to bring it into operation, the judicial department must give effect to its will.

In this case, Justice Marshall, however, concluded that the modern rule was that in the absence of congressional authorization to confiscate enemy property upon the declaration of war, there was no automatic power of confiscation. *Id.* at 126–27. In *The Nereide*, 13 U.S. 388 (1815), Justice Marshall, speaking of two conflicting rules of neutrality of commerce, one allowing a neutral to carry enemy property without confiscation and another to the contrary, noted: “If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress from the first attempts at their introduction to the present moment.” *Id.* at 420.

and revived with the restoration of peace.⁶² By contrast, under the rule in this case, executory contracts are dissolved on the premise that "all trading, negotiation, communication, and intercourse between the citizens of one of the belligerents with those of the other" ceased with the declaration of war.⁶³ The doctrine of suspension enunciated in *Hanger v. Abbott* is a sharp departure from cases like *Miller v. United States* in which the Supreme Court had held that the mere presence of property within the enemy territory made the property of those present therein subject to capture and confiscation.⁶⁴

Closely related to the doctrine of suspension is the view of the Supreme Court in *Haycraft v. United States*.⁶⁵ In this case an insurgent's cotton had been confiscated and sold by the Union government during the Civil War. The insurgent then sought amnesty and pardon as provided by statute in order to be entitled to recover the proceeds of the sale of his or her property.⁶⁶ Under the statute, pardon and amnesty therefore had the effect of restoring the property rights of the insurgent or enemy whose property had been confiscated. In *Klein v. United States*, the Supreme Court held that under the 1863 Captured and Abandoned Property Act, those who had not given aid or comfort to the rebellion and whose property had nonetheless been seized or confiscated were not divested of their ownership in the captured property.⁶⁷

62. *Hanger v. Abbott*, 73 U.S. 532, 536 (1867). The court also notes that this rule is justified by the fact that a creditor has no ability to sue for the debt during the war since the courts where the debtor is located are closed or inaccessible. Thus, the law of nations results in the suspension of the debt during the pendency of the war. The court also notes that the statute of limitations stops running with declaration of the war and with the return to peace, the statute of limitations starts to run. *Id.* at 539-40.

63. *Id.* at 535. By contrast, executed contracts such as a preexisting debt are not dissolved but suspended. *Id.* at 536.

64. *Miller v. United States*, 78 U.S. (11 Wall.) 268, 306 (1870); see *id.* at 317-18 (Field, J., dissenting).

65. *Haycraft v. United States*, 89 U.S. (22 Wall.) 11 (1874).

66. *Id.* at 95-96. See also *United States v. Klein*, 80 U.S. 128, 128-29 (1871).

67. *Klein*, 80 U.S. at 139 (holding in part: "(1.) That the cotton of the petitioner was, by the general policy of the government, exempt from capture after the National forces took possession of Savannah. (2.) That this policy was *subject to modification* by the government, or by the commanding general, in the exercise of his military discretion. (3.) That the right of possession in private property is not changed, in general, by capture of the place where it happens to be, except upon actual seizure in obedience to the orders of the commanding general.") (emphasis added). Another doctrine demonstrating that the absolute power of confiscation had moderating doctrines is the rule permitting transactions that are the result of necessity between an alien enemy and a citizen. See *Hallet v. Jenks*, 7 U.S. (3 Cranch) 210 (1805).

The United States was even more circumspect in exercising a right to confiscation in its international relations in the late eighteenth and early nineteenth century. Thomas Jefferson reflected this caution in 1793 when he summed up U.S. policy on confiscation of a belligerent's private property by saying that "the making of reprisal on a nation is a very serious thing. Remonstrance [and] refusal of satisfaction ought to precede; [and] when reprisal follows it is considered as an act of war."⁶⁸ Thus while the United States in its initial years as a nation recognized the right of a belligerent to confiscate the goods of its enemy, it wished to remain neutral in the ongoing conflicts between Britain and France, and took no position on either side in an attempt to "cultivate the arts of peace."⁶⁹ In *Findlay v. The William*, a Pennsylvania court therefore observed that it was "difficult for a *neutral nation*, with the best dispositions, so to conduct itself as not to displease one or the other of belligerent parties, heated with the rage of war, and jealous of even common acts of justice or friendship on its part."⁷⁰

The doctrine of neutrality and the caution expressed in establishing the legality of confiscations of foreign states announced in *Findlay* can best be understood against the background of the new government's desire to forge peaceful relations with foreign nations. There was a practical policy rationale for U.S. neutrality. As a relatively new nation, the United States lacked the military resources to wage war with superpowers of the period such as England and France as well as Spain and Holland.⁷¹ Fur-

68. Thomas Jefferson, *Opinion on "The Little Sarah,"* in 7 THE WORKS OF THOMAS JEFFERSON 332, 335 (Paul Leicester Ford ed., 1904).

69. *Findlay v. The William*, 9 F. Cas. 57, 61 (D. Pa. 1793). *Findlay* held, inter alia, that as a neutral nation, the United States does not have the right to affect the confiscation practices of another sovereign, but can forbid the sale of confiscated goods on American soil. *Id.* at 59.

70. *Id.* (emphasis added).

71. BENSON J. LOSSING, THE PICTORIAL FIELD-BOOK OF THE WAR OF 1812, at 154 (1869). Lossing notes that a French decree of December 17, 1807, promulgated in response to British decrees, in turn sparked similar decrees from Spain and Holland. As a result, the commerce of the United States was "swept from the ocean" within a few months, even though it had been conducted "in strict accordance with the acknowledged laws of civilized nations." *Id.* As a result, Lossing notes that the United States was

utterly unable, by any power it then possessed, to resist the robbers upon the great highway of nations [and] the independence of the republic had no actual record. It had been theoretically declared on parchment a quarter of a century before, but the nation and its interests were now as much subservient to British orders in council and French imperial decrees as when George the Third sent governors to the colonies of which it was composed . . .

ther complicating political matters, the general population had a great distrust and contempt for the creation of a standing military, fearing that a permanent military would become little more than a resource for political patronage jobs, among other concerns.⁷² As a result, early lawmakers were both practically and politically estopped from adopting a policy of confiscation. Instead of fighting British and French confiscation of American cargo with force,⁷³ U.S. diplomats attempted to use access to American ports as leverage in their treaties with England.⁷⁴ This infuriated the French, who, feeling betrayed by the nation they had assisted in overthrowing the British, embarked upon a campaign of seizure of American goods on the high seas.⁷⁵

Following the defeat of Thomas Jefferson to John Adams in the 1797 presidential election, France commissioned its war vessels to seize certain U.S. ships.⁷⁶ In January of the following year, France's Executive Directory issued a proclamation whereby any ship containing any item of English manufacture was subject to seizure.⁷⁷ This led to the United States' first quasi-war. In retaliation to French privateering,⁷⁸ Congress authorized the capture of French military vessels,⁷⁹ and the seizure of

72. *Id.* at 167–69. Lossing also notes that “notwithstanding the many deprivations upon American commerce and the increasing menace of the belligerents of Europe, very little had been done to increase the efficiency of the navy of the United States since its reduction at the close of the war with the Barbary States.” *Id.*

73. 3 HISTORY OF NEW YORK STATE 1523–1927, at 1072 (James Sullivan et al. eds., 1927). By 1792, Northeastern merchants were already complaining of British confiscation of American cargo. *Id.*

74. Gregory E. Fehlings, *America's First Limited War*, NAVAL WAR C. REV. (Summer 2000), <http://www.nwc.navy.mil/press/Review/2000/summer/art4-Su0.htm> (last visited Mar. 23, 2006). In 1794, the United States and Britain entered into Jay's Treaty, which authorized British privateers' use of American ports in their conflicts against France. *Id.*

75. *Id.*

76. See Decree of the Executive Directory Concerning the Navigation of Neutral Vessels, Loaded With Merchandise Belonging to Enemies of the Republic, and the Judgments on the Trials Relative to the Validity of Maritime Prizes, 12 Ventose an 5 (Mar. 2, 1797), Duv. & Boc. 358 (1825). In reaction to Adams' defeat of Jefferson, the Directory (France) commissioned its war ships and privateers to seize all U.S. flagged vessels with insufficient cargo inventories or carrying contraband. See ALEXANDER DECONDE, *THE QUASI-WAR* 36–73 (1966).

77. See Law Which Determines the Character of Vessels From Their Cargo, Especially Those Loaded With English Merchandise, 29 Nivose an 6 (Jan. 18, 1798), Duv. & Boc. 214 (1825).

78. See *Talbot v. Seeman*, 5 U.S. 1, 6 (1801).

79. An Act to Authorize the Defence of the Merchant Vessels of the United States Against French Depredations, ch. 60, §§ 1–2, 5th Cong., 2d Sess., in 1 THE PUBLIC

French cargo.⁸⁰ While the congressional acts gave American vessels the right to seize French property, the laws were not unfettered,⁸¹ and contained a number of restrictions regarding the nature of property to be confiscated.⁸² One act provided that aliens of hostile nations could depart the United States with their property intact.⁸³

The United States' legislated seizure of its enemy's private property provided the Supreme Court with an opportunity to define early American judicial attitudes towards the law of nations. In the 1801 opinion in *Talbot v. Seeman*, Chief Justice Marshall, writing for the Court, upheld the constitutionality of the 1798 and 1799 congressional acts designed to safeguard U.S. commerce from armed foreign vessels,⁸⁴ but limited the scope of the acts' application, and provided some criticism of the doctrine of confiscation.⁸⁵ In *The Nereide*, Marshall articulated the principle that war does not confer the right to confiscate the goods of a friend,⁸⁶ and that property belonging to a neutral nation found on a belligerent ship was not belligerent in nature, and thus not subject to confiscation.⁸⁷ According to Marshall, it was "harsh indeed to condemn neutral property, in a case in which it was clearly proved to be neutral."⁸⁸

STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 572-73 (Richard Peters ed., Little & Brown 1845) (1798) [hereinafter PUBLIC STATUTES].

80. An Act to Further Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 2, § 6, 5th Cong., 3d Sess., in PUBLIC STATUTES, *supra* note 79, at 615-16.

81. See Fehlings, *supra* note 74. Congress specifically withheld the right to prey upon unarmed French vessels in fear of an all-out war between the French and the United States. The United States' reluctance to authorize seizure of unarmed French vessels was less a product of enlightened thinking and more the product of America's fear of an all-out war and possible French invasion. *Id.*

82. See An Act to Further Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 2, § 6, 5th Cong., 3d Sess., in PUBLIC STATUTES, *supra* note 79, at 615-16.

83. *Id.* at 615; see 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 132 (O.W. Holmes, Jr. ed., Little, Brown & Co. 12th ed. 1873) (1826).

84. See *Talbot v. Seeman*, 5 U.S. 1, 9, 31 (1801).

85. *Id.* at 41. Marshall wrote that a violation of the law of nations by one belligerent did not justify a subsequent retributive violation by the other belligerent. Marshall added that remonstrance was the appropriate initial course of action for an aggrieved nation, but conceded that once all remonstrative options had been exhausted, use of hostilities was in conformity with the law of nations. *Id.*

86. *The Nereide*, 13 U.S. at 418-19. Marshall attributed recent variations of this principle to nations acting in their own self-interest, deeming a non-belligerent's right to avoid confiscation as a "simple and natural principle of public law." *Id.* at 419.

87. *Id.* at 419-20.

88. *Id.* at 417.

American efforts at retaliation showed little success, and by 1800, French military vessels and privateers had seized over two thousand American vessels.⁸⁹ Throughout the next decade, the French government continued to issue decrees and proclamations authorizing the seizure of American vessels and property.⁹⁰ This provided ample opportunity for Jefferson's political opponents to criticize his policy.⁹¹

A further complication to U.S. policy on confiscation and commerce was the increasing number of English confiscations of American vessels on the high seas.⁹² With congressional acts authorizing the United States to seize belligerent property having little to no effect on French and British privateering, President Jefferson offered a new policy approach whereby the United States would cut economic ties with countries confiscating the private property of its citizens.⁹³ The effects of this policy

89. See Fehlings, *supra* note 74. In 1797, Secretary of State Pickering reported to Congress that during the previous eleven months, the French had captured 316 merchant ships. *Id.*

90. The Berlin Decree of November 21, 1806 declared the British Isles closed to commerce and authorized the seizure of both packages sent to England and letters written in the English language. Nov. 21, 1806, Duv. & Boc. 66 (1826). The Milan Decree, issued by Napoleon on December 17, 1807, authorized seizure of any ship and all cargo traveling from or to an English port. Dec. 17, 1807, Duv. & Boc. 223 (1826). The Bayonne Decree, issued on April 23, 1808, authorized the immediate seizure of all American vessels found in France. LOSSING, *supra* note 71, at 170. The Rambouillet Decree, issued on March 23, 1810, Duv. & Boc. 69 (1826), in response to the Non-Intercourse Act, ch. 24, 2 Stat. 528 (1809), provided that any American ship traveling in French controlled territory or any ship carrying an American or American goods was subject to seizure.

91. LOSSING, *supra* note 71, at 168. Lossing quoted a Jefferson critic who noted that his policy was "wasteful imbecility." *Id.*

92. LOSSING, *supra* note 71, at 158. The attack on the American vessel, *The Chesapeake*, by the British was heavily criticized across the board within the United States. *Id.*

93. See generally L.M. SEARS, *JEFFERSON AND THE EMBARGO* (1927) (exploring Jefferson's perspective on the use of embargo and its role in the law of nations). The first attempt was the Nonimportation Act of 1806, ch. 29, 2 Stat. 379, forbidding the importation of specified British goods in order to force England to relax its rulings on cargoes and sailors. The act was suspended, and replaced by the Embargo Act of 1807, ch. 5, 2 Stat. 451, which forbade all international trade to and from American ports. Britain and France stood firm, and not enough pressure could be brought to bear. In March of 1809, the embargo was superseded by the Non-Intercourse Act, ch. 24, 2 Stat. 528. This allowed resumption of all commercial intercourse except with Britain and France, but failed to bring pressure on the belligerents. In 1810, it was replaced by Macon's Bill No. 2, ch. 39, 2 Stat. 605, which provided for trade with both Britain and France so long as they timely revoked their restrictions on American shipping; the President was empowered to forbid commerce with either Britain or France if they failed to revoke their offensive measures.

shift did little to thwart privateering.⁹⁴ In 1810, America's resumption of trade led France to repeal many of its decrees authorizing confiscation of American goods.⁹⁵ England's refusal to follow suit and the continued plundering of American goods led President Madison to ask Congress for a declaration of war, and the War of 1812 ensued.

Following the 1812 war, U.S. policy regarding a sovereign's confiscatory rights continued to shift from the absolute to the limited. Some scholars have attributed this shift to the expansion of voting rights during the 1820s and 1830s.⁹⁶ The argument in support of this shift is that with a larger populace able to express their preferences through the ballot box, politicians began paying more attention to the right of individual ownership of personal property. More importantly, the courts, and Marshall in particular, established that it was within the judicial power to chastise those sovereigns abusing the right to seize the property of belligerents. While many of the Court's decisions during this time period left the ultimate decision on matters of confiscation in the hands of the legislative branch, the Court was quick to limit acts of confiscation performed outside the realm of war.⁹⁷

In sum, doctrines balancing the right of confiscation and of private property, in part was a reflection that early U.S. leaders lacked the military strength and economic leverage required for the application of the sovereign's absolute power to seize private property during times of conflict. As a result, early American exercise of its confiscatory power was used as a retributive last resort when all other methods of diplomacy had been exhausted. However, even as American military strength grew

94. SEARS, *supra* note 93, at 124–42. Jefferson's acts had little impact on the seizure of American cargo, but irritated northeast merchants who expressed their concern in the ballot box and in the press. However, Sears suggests that ultimately northeast merchants adapted to the embargo as it spurred the development of domestic manufacturing in the north. While southerners tended to support the embargo, it actually harmed them as the embargo did not encourage the development of manufacturing in the south. *See id.* at 125–28, 145–51.

95. In a letter dated August 5, 1810, the Duke of Cadore, speaking on behalf of Napoleon, declared the Berlin and Milan decrees repealed, effective November 1, 1810. LOSSING, *supra* note 71, at 178–79.

96. *See* Jansen, *supra* note 44 (“During the 1820’s and 1830’s suffrage became wider and property and freehold requirements for voting gradually were abandoned. More offices at state and local levels [also] became elective rather than appointive in nature.”).

97. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86–87 (1833). In *Percheman*, private landowners used the United States for enforcement of the 1819 Treaty regarding Spanish cessation of Florida. Specifically, the treaty guaranteed landowners continued possession of all property owned prior to the change in sovereignty. Justice Marshall, writing for the court, held that a change in sovereignty does not affect the right of private individuals to possess and enjoy their property. *Id.*

throughout the early nineteenth century, the Supreme Court, and specifically, Justice Marshall, sought to limit the sovereign's confiscatory power, and consistently held that the decision to confiscate lay in the hands of elected officials rather than with the courts.⁹⁸ The foregoing cases and analysis demonstrate judicial creativity in managing the tension between the absolute powers of confiscation, on the one hand, and giving commerce a definite freedom during wartime, on the other. By inventing a variety of doctrines, courts deemphasized sharp distinctions between power to confiscate and the right to engage in commerce during wartime.

D. The Exceptional Circumstances Doctrine

The exceptional circumstances doctrine is the fourth and final doctrine on the relationship between commerce and conquest during war that I will explore. Unlike any of the foregoing doctrines, it is founded on extremely broad and troublesome claims of authority. For example, while Justice Marshall strongly argued in favor of limiting the power of confiscation without congressional grants of approval, he nevertheless argued that conquest⁹⁹ and discovery¹⁰⁰ give conquerors a legitimate title to the territory of Native Americans. Hence, in exactly the same time period he was urging limitations on the power of confiscation, he was endorsing acquisition of title to territory by conquest and discovery. He also fa-

98. *Id.* at 89-90. In fact, Marshall labelled the practice of confiscation unjust and morally outrageous. *Id.* at 86-87.

99. In *Johnson v. M'Intosh*, 21 U.S. 543, 587 (1823), Marshall held that "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."

100. According to Marshall:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Id. at 591. In affirming this further, Marshall notes:

This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.

Id. at 592. See also *id.* at 595.

vored the incorporation of conquered peoples into American society.¹⁰¹ However, he specially singled out what he referred to as Indian "tribes" for non-incorporation since in his view they were "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."¹⁰² Marshall argued that it was impossible to "govern them as a distinct people" and because of their fierceness, it was necessary to enforce European claims to the land occupied by these Indians "by the sword."¹⁰³ War then, rather than incorporation, was the solution for the subjugation of the Indian peoples. Marshall endorsed this subjugation by arguing that "European policy, numbers, and skill, prevailed" over Indian aggression.¹⁰⁴

As Marshall's holding in *Johnson v. M'Intosh* illustrates, under this exceptional circumstances doctrine, the power of confiscating or assuming title over Indian territory arises not simply out of a belligerent's absolute power, but rather out of the presumed backwardness of those whose territory or property has been seized as well as by virtue of the proclaimed superiority of Europeans over these peoples. Similar to Marshall's unqualified support of the effect of conquest on Indian territory and the arrogance of European conquest, a British court in the early twentieth century upheld the refusal of the British government to compensate a South African company whose gold had been seized. The court, recalling an earlier case, observed that "where the King of England conquers a country . . . by saving the lives of the people conquered [he] gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases."¹⁰⁵

This basis of this doctrine in the common law finds expression in the landmark 1602 *Calvin's Case* where Lord Coke noted:

And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vitæ et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King

101. *Id.* at 589.

102. *Id.* at 590.

103. *Id.* Marshall claimed that the Indians were incapable of legally owning the land and that they merely possessed it and as such could not pass on valid title to the white population. Marshall claimed that the Indians were merely the ancient inhabitants of the land. *Id.* at 591.

104. *Id.* at 590.

105. *W. Rand Cent. Gold Mining Co. v. R.*, [1905] 2 K.B. 391, 406 (U.K.) (emphasis added).

should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue¹⁰⁶

Similarly, Alexander the Great extolled the idea that conquerors dictate the law to the conquered, and the conquered are expected to abide by that law.¹⁰⁷ Even during the Roman Empire, it was "an indubitable right of war, for the conqueror to impose whatever terms he pleased upon the conquered."¹⁰⁸ There is clearly a lineage of Western thought exemplified in *Calvin's Case* designating non-Christian and non-European peoples not only as infidels, but as perpetual enemies with whom their conquerors could have no peace.¹⁰⁹ Some scholars have argued that the prejudice against non-believers in *Calvin's Case* was a throwback to a very medieval time and that this dictum was also quite contrary to the "commercial interests of a country which was beginning to conduct a prosperous trade with infidels."¹¹⁰

It is certainly true that the prejudice against non-believers is medieval.¹¹¹ It is also important to note that this prejudice was sometimes expressed in subtle, though still Eurocentric, ways in the process of justifying European conquest and acquisition of non-European territory and resources.¹¹² For example, in a groundbreaking analysis of the writings of

106. *Calvin v. Smith*, (1608) 7 Coke Rep. 1a, 77 Eng. Rep. 377, 397-98 (K.B.).

107. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 348 (A. C. Campbell trans., M. Walter Dunne Publisher 1901) (1625), available at http://oll.libertyfund.org:81/Texts/Grotius0110/LawOfWarPeace/0138_Bk.pdf.

108. *Id.*

109. *Calvin*, 77 Eng. Rep. at 397; see 8 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 409 (2nd ed., Little, Brown, & Company 1937) (1903).

110. 8 HOLDSWORTH, *supra* note 109, at 409. The writ *de haeretico comburendo*, an English writ dating back to 1401, permitted the execution of a heretic. BLACK'S LAW DICTIONARY 435-36 (7th ed. 1999).

111. Today, international law recognizes freedom of religion. International Covenant on Civil and Political Rights, art. 18, adopted and opened for signature Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171.

112. See, e.g., Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. REV. 219, 244-45 (1986). Williams notes:

Eurocentrically-defined reason's mediating function, represented conceptually in the law of God and nature, was used to determine the status and rights of all individuals according to universal normative criteria. Those who could presumptively comport their conduct according to these universalized norms, such as European Christians at peace with the King, were granted rights consistent with their status. Those who presumptively could not, such as infidels, were not

Vitoria, the sixteenth century international legal jurist credited with being one of the founders of international law, Antony Anghie shows that while Vitoria exhibited a progressive approach to dealing with the Indians by arguing in favor of incorporating them within the universal law of *jus gentium*, their incorporation into this universal law in turn served as the basis for justifying the imposition of Spanish discipline on them.¹¹³ Vitoria argued that since Indians were resisting the right of the Spanish to sojourn on their territory, the Spanish were entitled to use forcible means to enforce this right.¹¹⁴ In addition, Vitoria argued that the ordinary prohibitions of waging war do not apply to Indians. In Vitoria's words:

And so when a war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans is of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and women of the Saracens into captivity and slavery.¹¹⁵

Vitoria's writings here sound eerily similar to Lord Coke's dictum in *Calvin's Case*.¹¹⁶ Like Lord Coke, Vitoria justified as lawful the killing of the Indians in the course of the war noting that this is "especially the case against the unbeliever, from whom it is useless ever to hope for a just peace on any terms."¹¹⁷ Thus, according to Vitoria, war and the destruction of all the Indians who bore arms against the invading Spanish conquerors were the only remedies available to the Spaniards.¹¹⁸

What is remarkable about Justice Marshall, Vitoria, and Lord Coke's dictum in *Calvin's Case* is the genealogical similarity in their racially charged jurisprudence with respect to non-Christian and non-European

even entitled to inclusion within the hierarchy of statuses accorded to individuals in Coke's English common law jurisprudence.

Id.

113. Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321, 327-31 (1996).

114. *Id.* at 328.

115. *Id.* at 330.

116. *Calvin*, 77 Eng. Rep. at 398.

117. Anghie, *supra* note 113, at 330.

118. *Id.* at 328. Under Eurocentric jurisprudence, conquest was thought necessary to "bring the Infidels and Savages' . . . to human Civility, and to a settled and quiet Government." Williams, *supra* note 112, at 246 (quoting S. COMMANGER, DOCUMENTS OF AMERICAN HISTORY 8 (1968)).

peoples. One could surmise that such similar jurisprudential moves arise in the encounter between metropolitan policy and local colonial conflict.¹¹⁹ As Laura Benton has argued, the extraterritorial expansion of metropolitan authority in the periphery produced predictable “routines for incorporating groups with separate legal identities in production and trade and for accommodating (or changing) culturally diverse ways of viewing the regulation and exchange of property.”¹²⁰ Thus widely repeated conflicts between people from vastly different cultural and racial backgrounds reproduce similar solutions and rules for ordering relations between them.¹²¹ The solution under English law for ordering these relations was “Christian subjugation and remediation.”¹²² Ordering these relations then is ultimately a question of power.¹²³

In my view, the ongoing haphazard¹²⁴ and massive transformation of the Iraqi economy by the U.S.-led occupation parallels the expansive and extraordinary powers of subjugating non-European peoples as claimed by Vitoria, Lord Coke, and Justice Marshall.¹²⁵ The 2003 Anglo-American war against Iraq was primarily premised on finding weapons of mass destruction to preempt their use in future terrorist attacks.¹²⁶ However, the goal of finding weapons of mass destruction came to

119. For further discussion, see LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900*, at 4–5 (2002), which has heavily influenced my work.

120. *Id.* at 5.

121. See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005) (arguing that sovereignty doctrine emerged through the encounter with cultural difference).

122. Williams, *supra* note 112, at 247.

123. See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 675 (1989) (arguing that the issues of power and sovereignty “dominate the scholarship of ‘federal courts’ jurisprudence”).

124. For an acknowledgement of the haphazard nature of this transformation by a senior U.S. administrator in Iraq, see L. PAUL BREMER III & MALCOLM McCONNELL, *MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE* (2006). See also GEORGE PACKER, *THE ASSASSINS’ GATE: AMERICA IN IRAQ* (2005).

125. See Ash U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 431, 440–45 (2005) (criticizing the United States’ desire to establish a market economy in post-Saddam Iraq as in conflict with its obligations as an occupying power). See generally Henry H. Perritt, Jr., *Iraq and the Future of United States Foreign Policy: Failures of Legitimacy*, 31 SYRACUSE J. INT’L L. & COM. 149 (2004) (evaluating and critiquing the United States’ political trusteeship of Iraq). See also Gathii, *supra* note 60, at 534–43 (discussing the international rules governing an occupying power).

126. Robert F. Turner, *Operation Iraqi Freedom: Legal and Policy Considerations*, 27 HARV. J.L. & PUB. POL’Y 765, 778 (2004).

naught.¹²⁷ For this reason, other justifications given by the Bush and Blair administrations for going to Iraq need to be taken seriously. According to Colin Powell, then Secretary of State, the U.S.-led coalition was waging war to “liberate the Iraqi people”¹²⁸ from Saddam Hussein’s tyrannical dictatorship, including his torture chambers. Fully aware that the war against Saddam Hussein would be widely regarded as the conquest of a militarily weaker and oil-rich country, President Bush argued that the United States exercises its “power without conquest” and that it sacrifices “for the liberty of strangers.”¹²⁹ Thus, according to President Bush:

America is a nation with a mission, and that mission comes from our most basic beliefs. We have no desire to dominate, no ambitions of empire. Our aim is a democratic peace—a peace founded upon the dignity and rights of every man and woman. America acts in this cause with friends and allies at our side, yet we understand our special calling: This great republic will lead the cause of freedom.¹³⁰

Clearly then, spreading freedom and other humanitarian goals clothe the geopolitical ambitions of conquering states today as did the mission to spread the benefits of civilization during the times of Spanish conquest of the New World as seen by jurists like Vitoria. Similar to the jurisprudence of Justice Marshall with regard to American Indians or of Lord Coke with regard to the Irish in *Calvin’s Case*, the cause of freedom that justified the 2003 war against Iraq is an expression of military power laced with the desire to subjugate so-called “primitive” peoples.¹³¹

The mission of bringing freedom to Iraq and to the Middle East is no less informed by a view that presupposes the superiority and inevitability

127. Robert Cryer & A. P. Simester, *Iraq and the Use of Force: Do the Side-Effects Justify the Means?*, 7 THEORETICAL INQUIRIES IN L. 9, 10 (2006) (“In post-Saddam Iraq, after more than a year of searching, the coalition failed to find any evidence of WMD in Iraq.”).

128. Colin L. Powell, U.S. Secretary of State, Remarks at Briefing on the State Department’s 2002 Country Reports on Human Rights Practices (Mar. 31, 2003), available at <http://www.state.gov/secretary/former/powell/remarks/2003/19218.htm> (last visited Mar. 23, 2006).

129. George W. Bush, State of the Union Address (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-23.html> (last visited Mar. 23, 2006).

130. George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited Mar. 23, 2006).

131. For an excellent exposition of this theme in the context of human rights, see Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201 (2001).

of the values of liberty and freedom as Western norms to be spread around the globe with forcible means if need be.¹³² This then parallels Vitoria's sixteenth century views that the Spanish were free to wage war against the Indians if they resisted the right of the Spanish to sojourn in the New World.¹³³ Like Vitoria recognizing the humanity of the Indians, the Bush administration similarly acknowledges the humanity of the Iraqis and the peoples of the Middle East,¹³⁴ but it nevertheless justifies the use of force to spread the benefits of freedom to them.¹³⁵

Lurking¹³⁶ behind these humanitarian justifications is the fact that the United States and the United Kingdom were unable to procure Security Council consent to use force against Iraq or even to build a broad based coalition in the war effort.¹³⁷ Thus, it is legitimate to ask whether the reasons given for the invasion were pretexts for seeking control of one of the richest oil sources in the world today or whether it was to demonstrate the unparalleled military might of the United States to other rogue states.

The U.S.-led coalition also assumed broad powers in government-occupied Iraq. After the coalition single-handedly appointed Civilian Governor Paul Bremer without any apparent consultation with the then

132. Jacinta O'Hagan, *Conflict, Convergence or Co-existence? The Relevance of Culture in Reframing World Order*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 537, 565 (1999) (describing a "clash of civilizations" analysis where Western universalism "projects Western evolved norms and values" including the use of force as a means to achieve that end).

133. See *supra* notes 117-18.

134. Thus, according to President Bush, "Our desire is to help Iraqi citizens find the blessings of liberty within their own culture and their own traditions." See Press Release, White House, President Signs Iraq Resolution (Oct. 16, 2002), <http://www.whitehouse.gov/news/releases/2002/10/20021016-1.html> (last visited Mar. 23, 2006).

135. According to President Bush, "Part of the war on terror is to promote freedom in the Middle East." See Press Release, White House, President Discusses Energy, Iraq and Middle East (Aug. 19, 2003), <http://www.whitehouse.gov/news/releases/2003/08/20030819.html> (last visited Mar. 23, 2006).

136. The remainder of this section is largely based on and is a further exploration of a section of my previous article, James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 *U. PA. J. INT'L ECON. L.* 491, 536-43 (2004).

137. See *France Warns of "Illegitimate" War*, CNN, Feb. 26, 2003, <http://www.cnn.com/2003/WORLD/meast/02/26/sprj.irq.france.warn/index.html> (last visited Mar. 1, 2006). Countries argued that a U.S.-led force to overthrow Saddam Hussein without UN approval was an illegitimate use of force. They urged the United States to refrain from launching a unilateral invasion against Iraq, believing that international approval in the form of a Security Council Resolution should be obtained before any military attack was made. See *id.*

U.S.-appointed Iraqi Governing Council,¹³⁸ Bremer issued a series of wide-ranging orders authorizing, among other things, foreign investors to own up to one hundred percent interests in Iraqi companies (without profit repatriation conditions) in virtually all sectors of the economy¹³⁹ while leaving the oil industry in the hands of a professional management team who would be independent from political control;¹⁴⁰ the appointment of a former Shell Oil Company CEO to be chair of an advisory committee to oversee the rehabilitation of Iraq's oil industry;¹⁴¹ a flat tax;¹⁴² a U.S.-Middle East free trade area;¹⁴³ the privatization of the police force;¹⁴⁴ formation of a stock market with electronic trading;¹⁴⁵ and the establishment of modern income tax, banking, and commercial law systems under the direction of U.S. contractors.¹⁴⁶

A secret plan dubbed "Moving the Iraqi Economy From Recovery to Sustainable Growth," drafted in part by U.S. Treasury Department officials, is widely regarded as a blueprint for reorganizing the Iraqi econ-

138. See Dmitry Kirsanov, *Paul Bremer Appointed Chief of Civilian Authorities in Iraq*, ITAR-TASS NEWS AGENCY, May 2, 2003.

139. Coalition Provisional Authority Order No. 39: Foreign Investment (Sept. 19, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*). Some commentators have suggested that this order is highly troublesome since it conflicts with the Iraqi Constitution. See Thomas Catan, *Iraq Business Deals May Be Invalid, Law Experts Warn*, FIN. TIMES, Oct. 29, 2003, at 14. An article published by the conservative Heritage Foundation has called for widespread privatization of publicly held Iraqi assets. Ariel Cohen & Gerald P. O'Driscoll, Jr., *The Road to Economic Prosperity for a Post-Saddam Iraq*, HERITAGE FOUND., Mar. 5, 2003, <http://www.heritage.org/Research/MiddleEast/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=37452>.

140. See Chip Cummins, *State-Run Oil Company is Being Weighed for Iraq*, WALL ST. J., Jan. 7, 2004, at A1 (noting the opinion of the occupation advisors that the oil industry should be state-owned).

141. See Neela Banerjee, *A Retired Shell Executive Seen as Likely Head of Production*, N.Y. TIMES, Apr. 2, 2003, at B12 (noting that the former chief executive of Shell Oil is expected to be the leading candidate to oversee Iraqi oil production).

142. Coalition Provisional Authority Order No. 37: Tax Strategy for 2003 (Sept. 19, 2003), available at <http://www.cpa-iraq.org/regulations> (on file with *BJIL*). The flat rate tax is apparently down from 45 percent under Saddam Hussein. Dana Milbank & Walter Pincus, *U.S. Administrator Imposes Flat Tax System on Iraq*, WASH. POST, Nov. 2, 2003, at A09.

143. See Jess Bravin & Chip Cummins, *U.S. Offers Concessions to U.N. in Bid to Lift Sanctions on Iraq*, WALL ST. J., May 9, 2003, at A1.

144. See Andrew Higgins, *As it Wields Power, U.S. Outsources Law and Order Work*, WALL ST. J., Feb. 2, 2004, at A1.

145. See Neil King, Jr., *Bush Officials Draft Broad Plan for Free-Market Economy in Iraq*, WALL ST. J., May 1, 2003, at A1. Private American contractors will be primarily responsible for establishing the proposed Iraqi electronic stock market. *Id.*

146. See *id.* at A8; see also Bob Sherwood, *Legal Reconstruction: Investors Want Reassurance Over Iraq's Framework of Commercial Law*, FIN. TIMES, Nov. 3, 2003, at 14.

omy along a free market model.¹⁴⁷ Two primary premises of the privatization effort underpinning this effort were that Western-based firms are capable of making Iraq's assets and resources more productive and that private ownership at a time when there is no stable government in the country is preferable to public ownership of assets.¹⁴⁸ In addition, these reforms are predicated on the view that a future Iraqi government organized around a model of free market democracy would be unlikely to become dictatorial or inclined to develop weapons of mass destruction as the Saddam Hussein regime.¹⁴⁹ These reforms have been widely criticized for being thinly veiled plans to give multinational corporations access to Iraqi assets.¹⁵⁰

The exercise of these expansive powers to transform Iraq into a free market economy incorporating controversial elements such as a flat tax have been justified as falling within the scope of the Coalition Provisional Authority's (CPA) mandate of promoting "the welfare of the Iraqi people through the effective administration of the territory"¹⁵¹ and assisting in the "economic reconstruction and the conditions for sustainable development . . ."¹⁵² While this Security Council Resolution is at best a controversial source of such expansive authority, it is scarcely arguable that the powers exercised by the CPA in signing privatization contracts lacked legitimacy among a broad range of Iraqis¹⁵³ and potentially may be subject to reversal by a post-occupation Iraqi regime exercising its internationally recognized sovereignty over its natural and other re-

147. King, *supra* note 145, at A1, A8.

148. For similar views justifying a role for the private sector in post-war reconstruction, see Allan Gerson, *Peace Building: The Private Sector's Role*, 95 AM. J. INT'L L. 102 (2001).

149. See generally *id.* (discussing the international community's recognition of the importance of private-sector involvement in unstable areas).

150. E.g., Sara Flounders, *Why Best-Laid Plans Can Go Astray: The Corporate Looting of Iraq*, WORKERS WORLD, July 24, 2003, at 6-7, available at <http://workers.org/pdf/2003/ww072403.pdf>; *The Rape of Iraq*, WORLD SOCIALIST WEB SITE, May 9, 2003, http://www.wsws.org/articles/2003/may2003/iraq-m09_pn.shtml (last visited Feb. 23, 2006).

151. S.C. Res. 1483, para. 4, U.N. Doc. S/RES/1483 (May 22, 2003).

152. *Id.* para. 8(e).

153. See Cummins, *supra* note 140, at A1. See also ANDREW NEWTON & MALAIKA CULVERWELL, ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, SUSTAINABLE DEVELOPMENT PROGRAMME, LEGITIMACY RISKS AND PEACE-BUILDING OPPORTUNITIES: SCOPING THE ISSUES FOR BUSINESSES IN POST-WAR IRAQ 1, available at <http://www.chathamhouse.org.uk/viewdocument.php?documented=3953> (stating that "business must earn legitimacy if it is to approach successfully the opportunities arising from the need to reconstruct Iraq").

omy along a free market model.¹⁴⁷ Two primary premises of the privatization effort underpinning this effort were that Western-based firms are capable of making Iraq's assets and resources more productive and that private ownership at a time when there is no stable government in the country is preferable to public ownership of assets.¹⁴⁸ In addition, these reforms are predicated on the view that a future Iraqi government organized around a model of free market democracy would be unlikely to become dictatorial or inclined to develop weapons of mass destruction as the Saddam Hussein regime.¹⁴⁹ These reforms have been widely criticized for being thinly veiled plans to give multinational corporations access to Iraqi assets.¹⁵⁰

The exercise of these expansive powers to transform Iraq into a free market economy incorporating controversial elements such as a flat tax have been justified as falling within the scope of the Coalition Provisional Authority's (CPA) mandate of promoting "the welfare of the Iraqi people through the effective administration of the territory"¹⁵¹ and assisting in the "economic reconstruction and the conditions for sustainable development . . ."¹⁵² While this Security Council Resolution is at best a controversial source of such expansive authority, it is scarcely arguable that the powers exercised by the CPA in signing privatization contracts lacked legitimacy among a broad range of Iraqis¹⁵³ and potentially may be subject to reversal by a post-occupation Iraqi regime exercising its internationally recognized sovereignty over its natural and other re-

147. King, *supra* note 145, at A1, A8.

148. For similar views justifying a role for the private sector in post-war reconstruction, see Allan Gerson, *Peace Building: The Private Sector's Role*, 95 AM. J. INT'L L. 102 (2001).

149. See generally *id.* (discussing the international community's recognition of the importance of private-sector involvement in unstable areas).

150. E.g., Sara Flounders, *Why Best-Laid Plans Can Go Astray: The Corporate Looting of Iraq*, WORKERS WORLD, July 24, 2003, at 6-7, available at <http://workers.org/pdf/2003/ww072403.pdf>; *The Rape of Iraq*, WORLD SOCIALIST WEB SITE, May 9, 2003, http://www.wsws.org/articles/2003/may2003/iraq-m09_pn.shtml (last visited Feb. 23, 2006).

151. S.C. Res. 1483, para. 4, U.N. Doc. S/RES/1483 (May 22, 2003).

152. *Id.* para. 8(e).

153. See Cummins, *supra* note 140, at A1. See also ANDREW NEWTON & MALAIKA CULVERWELL, ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, SUSTAINABLE DEVELOPMENT PROGRAMME, LEGITIMACY RISKS AND PEACE-BUILDING OPPORTUNITIES: SCOPING THE ISSUES FOR BUSINESSES IN POST-WAR IRAQ I, available at <http://www.chathamhouse.org.uk/viewdocument.php?documented=3953> (stating that "business must earn legitimacy if it is to approach successfully the opportunities arising from the need to reconstruct Iraq").

sources.¹⁵⁴ Further, justifying a broad mandate on the premise that it is consistent with the welfare of the Iraqi people is very reminiscent of the "sacred trust of civilization" under which European countries justified their mission of colonial rule and administration.¹⁵⁵

Thus, in addition to the broad ranging measures confiscating the property of Baathists discussed earlier in this paper and the massive transformation of the Iraqi economy without the consent of the Iraqi people based on the presumed superiority of the free market model of economic governance and constitutional democracy, the occupation forces have exercised extremely broad powers to transform the Iraqi economy into something of an idyllic bastion of the free markets.¹⁵⁶ Even the U.S. economy is not governed by market norms as extensively as U.S. reforms in Iraq suggest. For example, the conservative economic idea of a free tax imposed in Iraq has found little attraction in the United States. Further, it is ironic that the Bush administration, claiming the unassailable superiority of its conception of both human and economic freedom, has itself been responsible for torturing Iraqis¹⁵⁷ as well as massive economic corruption.¹⁵⁸

154. Paragraph 7 of General Assembly Resolution 1803 provides that the "[v]iolation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace." G.A. Res. 1803, para. 7, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (Dec. 14, 1962). Paragraph 1 of General Assembly Resolution 1803 provides that "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned." *Id.* para. 1. The preamble of Security Council Resolution 1483, in addition, provides that Iraqis have the right "freely to determine their own political future and control their own natural resources . . ." S.C. Res. 1483, para. 4, U.N. Doc. S/RES/1483 (May 22, 2003). Note that U.N. Security Council Resolution 1511, adopted on October 16, 2003, underscored "that the sovereignty of Iraq resides in the State of Iraq," and reaffirmed "the right of the Iraqi people freely to determine their own political future and control their own natural resources." S.C. Res. 1511, pmbl., para. 2, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

155. See generally James Thuo Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, 15 LEIDEN J. INT'L L. 581 (2002) (discussing the role of racism in the European colonization of African nations).

156. See Duncan Kennedy, *Shock and Awe Meets Market Shock: The Dangerous Mix of Economic and Military Goals in Iraq*, BOSTON REV., Oct.-Nov. 2003, available at <http://www.bostonreview.net/BR28.5/kennedy.html>.

157. See generally REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (2004), available at <http://download.repubblica.it>

III. CONCLUSIONS

Since the end of the nineteenth century, commerce has often been thought of as an antidote to war and wartime confiscation. In this Article, I have demonstrated that the relationship between war and the confiscation of private property is more complicated. The view that either commerce or wartime confiscation supersede each other has to be seen against a series of legal doctrines such as neutrality and suspension. In addition, the continued vitality of the exceptional circumstances doctrine under which belligerents have claimed inherent authority to override commerce undermines the view that commerce has prevailed over wartime confiscations. The massive transformations of the Iraqi economy and society have been justified on the basis of such exceptional powers. It is therefore plausible to argue that it is not so much that commerce has prevailed over the barbarity of wartime confiscations, but that at various historical moments, powerful countries employ the ascendant ideas of liberty and freedom as a means of prevailing over culturally and politically different but militarily weaker societies.¹⁵⁹ My argument then has been that these projects of liberty and freedom as promoted and supported by the most powerful countries contain and sometimes conceal the

pdf/rapporto_crocerossa.pdf (discussing incidents of torture of Iraqi detainees by U.S. forces in Iraq prior to the revelations of the Abu Ghraib torture scandal). HUMAN RIGHTS WATCH, *THE NEW IRAQ? TORTURE AND ILL TREATMENT OF DETAINEES IN IRAQI CUSTODY 2* (2005), available at <http://www.hrw.org/reports/2005/iraq0105/iraq0105.pdf> (demonstrating that human rights violations continue at the hands of Iraqi police and an inability to confirm that U.S. torture violations are not continuing). It is also noteworthy that the President has resisted congressional legislation to prohibit torture of overseas detainees. See *Bush Urged to Specify U.S. Policy on Torture*, L.A. TIMES, Jan. 20, 2006, at A18; Editorial, *Vice President for Torture*, WASH. POST, Oct. 26, 2005, at A18.

158. Michael Hirsh, *Follow the Money*, NEWSWEEK, Apr. 4, 2005, at 34 (discussing the fraudulent actions of Custer Battles, a military contractor in Iraq contracted by the U.S. government). Custer Battles overcharged occupation authorities and therefore increased its profits by claiming inflated costs. When the fraud was exposed by whistle-blowers who brought an action against the contractor, the Bush administration refused to participate and attempted to retrieve the money that the government was essentially defrauded of. The Justice Department has never responded to requests by the presiding judge of the case to join the lawsuit. In response, the government says that the CPA is not an arm of the U.S. government. *Id.* See also CHRISTIAN AID, BRIEFING PAPER FOR THE MADRID CONFERENCE ON IRAQ, *IRAQ: THE MISSING BILLIONS: TRANSITION AND TRANSPARENCY IN POST-WAR IRAQ 5* (2003), available at <http://www.christianaid.org.uk/indepth/310iraqoil/iraqoil.pdf>; Adam Davidson & Mark Schapiro, *Spoils of War*, NPR Marketplace radio broadcast, Apr. 20–23, 2004, available at <http://marketplace.publicradio.org/features/iraq/index.html> (last visited Mar. 23, 2006).

159. See Obiora Okafor, *Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective*, 43 OSGOOD HALL L.J. 171 (2005).

raw power of wartime confiscation. Wartime confiscation is therefore not an aberration of the contemporary international legal order, but rather a constitutive component of it—albeit one which no country wants to claim adherence.

A major upshot of the analysis in this paper is that conquest ultimately involves the domination of a militarily weaker society by a militarily stronger society. The power of confiscation in early U.S. history in relation to more economically and militarily powerful States of the period was therefore carefully hedged by the Marshall court. By contrast, in the contemporary period of unchallenged military superiority, the federal judiciary has acquiesced to the expansive claims of Executive authority to conduct the war and its military policy abroad with little if any checks. Similarly, the United Nations Security Council has through the Counter-Terrorism Committee expanded its authority to legislate and in particular to empower States to freeze, block, and confiscate assets of individuals or groups with ties to terrorism. However, the expansion of the power to confiscate in the context of conquest has not been unambiguous. There continue to be efforts to check the unbridled exercise of these powers through the human rights guarantees of the United Nations system as well as through limiting the power of belligerents to use force inconsistently with international legal prohibitions. Curbing the excesses of war, not to mention wartime confiscations, as well as the accompanying racial and cultural arrogance of powerful northern states, continues to be an important imperative in the twenty-first century as it was in prior periods.