

presented with the question of whether Indians had land rights. In order to respond, Marshall looked to international legal theory. The sources to which Marshall looked all agreed that the first discoverer by any means acquired the right to title. According to Marshall, under the law of nations, once Indians were discovered, they dropped out of the law of nations. Their treatment by their "discoverer" became a matter solely of domestic law concern.

Johnson v. M'Intosh imposed the doctrine of discovery on Indians for the next 150 years, making international theory suspect to indigenous peoples. The exclusion of Indians from the law of nations became apparent to Professor Williams when he became involved with treaty negotiations between Indian tribes and the Canadian government. The Canadian government's position, in theory and in practice, was that there is no right to self-determination for Indians under international law. Seeking redress at the Organization of American States, it became evident that international legal theory for indigenous peoples has progressed only minimally in recent decades.

Legal processes, however, are more than just theories. Seeking redress before the Organization of American States or in Geneva, indigenous people presented cases in which they were getting slaughtered and demanding redress. Thus, the issue that courts and scholars must address is finding a theory to protect indigenous peoples and redress the wrongs done to them by international legal theory in the past. Such a theory is radical but clear. Despite the doctrine of discovery, indigenous property systems and property rights still exist, never having been displaced by doctrine of discovery. Therefore, indigenous laws of land have just as much legitimacy as white property law.

Today we confront a situation where indigenous people have gone before international legal institutions and rejected traditional international law theory. ICHR opinions are grappling with the idea of an overlaying system of indigenous rights that survived the onslaught of the traditional theory of the doctrine of discovery.

REMARKS BY BENEDICT KINGSBURY*

Professor Kingsbury, who was instrumental in organizing the panel, delivered the final comments from the panel. Professor Kingsbury noted that his comments were being delivered not only during the centenary meeting of the Society, but also on the two-hundredth anniversary of the publication of James Madison's legal treatise, *An Examination of the British Doctrine, Which Subjects to Capture a Neutral Trade, Not Open in Time of Peace*. The little-known work, published while Madison was Secretary of State, is an important illustration of the interaction between U.S. domestic and international legal theory.

Madison's work was written in the context of the British policy of seizing neutral vessels. Written in 1806, Madison was among the Americans seeking to avoid war with Britain and wrote about international law as a means of convincing others.

The *Examination* demonstrates the close integration of international and domestic law in the early Republic. The *Examination* provides a description of Madison's view of the relations between law and politics. Madison held an interest-based theory of politics and recognized the need to design institutions to cope with these interests. The brutal self-interest underlying politics could be tempered by deontological arguments; essentially, Madison sought to temper the politics of national interest by an appeal to reason. It is this belief that underlies the *Examination*.

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Madison was obsessed with trying to control passions in politics. As a result, he believed that international law should be made in times of peace, when passions were at their lowest and the appeal to reason was at its strongest. In the context of his *Examination* of the law of prize, Madison believed that customary international law was the wrong method of determining the rights of neutral ships. Custom was shaped by self-serving unilateral practices and on the biased actions of strong nations. The right way to address the rights of neutral ships and the law of prize was through treaty law.

Unlike customary law, treaties require public justification, requiring reasoned arguments in support of the final compromise. Moreover, even if the bargains struck in treaties are one-sided, treaties give something to each side. Most importantly, treaties are made in times of peace. They are forward-looking and made in times not ruled by passion, and therefore the best manner of addressing international law in general as well as the law of prize that was the subject of the *Examination*.

Central to Madison's argument for treaties is a positive account of the importance of public justification in law-making. In Madison's view, public entities require openness, and this openness is a requirement of both national and international law. For Madison, publicly justifying domestic or international law required an appeal to reason, thereby introducing reason into the law-making process.

Beyond examining the interplay between international law and reason as a force for peace, Madison explored the relationship between law and institutions. The reasoning of the *Examination* focuses on prize courts and their application of the international law of prize. While Madison believed that judicial independence and the separation of powers were central to properly functioning prize courts, he could always see national bias in the prize decisions he studied. Throughout Madison's treatise, there is, therefore, a question mark of suspicion regarding international institutions. Thus, Madison's international law theory was based on the belief that international rules were laudable, but institutions were more difficult.

Given his subject matter, Madison could not have escaped an examination of the relationship between law and power. Madison's work was written in the context of British seizure of neutral (i.e., American) ships, and as the global superpower of the time, the British certainly had the power to do so. According to Madison, power determines what is possible in law, but the British would not always be dominant. For that reason, Madison reasoned, even the British needed to establish fair precedent while they were still powerful. Madison's reasoned argument in favor of an international law protecting neutrals was that there would be situations where the British would need the support of neutral nations. There would be other situations where British power would not be deployable. In such situations, the British, or other strong powers, would need the support of small nations who care about legal justification. Thus, Madison's argument reasoned, it was in the interest of great powers to establish equitable legal rules.

Madison's examination of the relationship between law and power is not only evidently relevant to the events of today, but it also frames the questions that have concerned United States international law theory since Madison's time.

Even after reading Madison, questions about his international law theory remain. His international law theory does not address "soft power," nor does it address the way in which power can be messy. Madison's work does present an example of how international law theory struggles to contain a subtle theory of power, but does not address all questions that have been debated in later U.S. international law theory. For example: Does his theory really

reach beyond an early exposition of game theory? Does it need a theory of collective action? How does collective action relate to power?

Madison's international law theory, as expressed in the *Examination* addresses the central questions that have provided continuing uncertainty in subsequent U.S. international legal theory: is there any law other than the justification of coercion? What are the other functions of law and how do these related to coercion?

To the extent that Madison provides an answer to any of these questions, he finds the answer in a continuing struggle between consensus and reasoned contestation. Madison's international law theory is based on consent, but rejects majoritarianism. However, this commitment to consensus is molded by pluralism and contestation by reasoned arguments. Within his Enlightenment view of law, Madison's international law theory suggests that the law of nations itself might be an essentially contested idea. For Madison, if everyone agreed on the law of nations, the concept itself would be lost.

CONCLUDING REMARKS BY MICHAEL REISMAN

Professor Reisman closed the panel with concluding remarks summarizing the panel's theme, "United States International Law Theory: Possibilities and Problems." Much of the panel's comments were expressions of a push for change in the law by representatives of disenfranchised groups. As such, U.S. international law theory today represents a broadening of international law. While the world is imperfect and full of social inequalities, law is effective to empower the disenfranchised.