Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement

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EXCLUDING RACE STRATEGIES FROM INTERNATIONAL LEGAL HISTORY: THE SELF-EXECUTING TREATY DOCTRINE AND THE SOUTHERN AFRICA TRIPARTITE AGREEMENT*

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I. INTRODUCTION

PROFESSOR Ruth E. Gordon has thoughtfully suggested that our mission in this Symposium is to “explore what viewing the world through the prism of race consciousness portends for future efforts to remake the international system by giving a voice to the voiceless.” This Article asks how this mission relates to the writing of international legal history, both in the issues regarding race raised by the way the legal historian will write it, and in those raised by the convergence of that history into the present. Little doubt exists that international legal history is part of the African-American present, and part of the present of all African-heritage peoples wherever they are located. Participation and inclusion in this history are essential not only to provide part of the vocabulary for African Americans’ international voice, but also, in an interdependent, simultaneously connected world, as one element of African-American self-identity as a culture and a defined group. Thus, inclusion or exclusion of our narratives from international legal history also helps define our unrolling Future as individual and group participants in both American national law and international law.

Historical inclusion is especially important for African Americans and other peoples of color for several reasons. First, African-American history is the story of our achievements, problems and prosperity in Africa before, and the story of our survival into, through, during, out of, in terms of Harding’s apt historiographical approach of “celebratory history,” and beyond European New World slavery. As the noted historian Vincent Harding reminds us, it is a story of survival and passage down the River

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towards Liberation to be both accurately and affirmatively celebrated.\textsuperscript{1} Second, this story as absorbed by individual African Americans is and has been for a long time—since the early slave stories,\textsuperscript{2} and then the first such composite written history in 1883 by George Washington Williams\textsuperscript{3}—a major source of our collective inspiration and philosophical, jurisprudential, cultural and political strength as the incarnation of the African Diaspora in the United States.\textsuperscript{4} This story is the well to which we go for that special water of remembrance and example when times are particularly tough—when the irreplaceable Mahalia Jackson reminds us in the old gospel anthem to remember: “How we got over.”\textsuperscript{5} We will need a coherent story of our own origins, progress and setbacks as a people into the Future, certainly as long as racism exists in any form which, as Derrick Bell reminds us, may be a very long time.\textsuperscript{6}

Third, whoever controls the writing and interpretation of the history of African Americans or any other people has considerable power over both the welfare of those people in the larger communities where they must live and accommodate, and over the internal, collective self-image of that people as they interact with other peoples and groups, and among themselves. As the historian William Katz relates:

> “If you know I have a history, you will respect me,” a Black Indian student told a conference of New York teachers two decades ago. Her words still ring true. Those who assume that a people have no history worth mentioning are likely to believe they have no humanity worth defending. An historical legacy strengthens a country and its people. Denying a people’s heritage questions their legitimacy.\textsuperscript{7}

Thus, it is no wonder that the history of African Americans, the history of Africans and African-heritage peoples, and the history of the relationship between African Americans and Native Americans continue to be, in one

\begin{itemize}
  \item 2. See, e.g., \emph{Slave Testimony: Two Centuries of Letters, Speeches, Interviews, and Autobiographies} (John W. Blassingame ed., 1977) (documenting early slave stories).
  \item 3. See generally George Washington Williams, \emph{History of the Negro Race from 1619 to 1880: Negroes as Slaves, Soldiers and as Citizens} (1883) (providing first composite written history).
  \item 5. See generally Alan Young, \emph{Woke Me Up This morning} (1997) (recounting life of gospel singer Mahalia Jackson).
  \item 6. See, e.g., Derrick A. Bell, \emph{And We Are Not Saved: The Elusive Quest for Racial Justice} (1987) (discussing African Americans’ continuing, and probably perpetual, struggle against racism).
\end{itemize}
way or another, racial battlegrounds in their writing, acceptance of methods, publication and interpretation. The battleground extends throughout American communities and into other nations, and is by no means confined to the Academy.

I suggest that the same premises hold for the writing of international legal history, particularly for including or excluding the history of the international interests, the stake and the rights and duties of any collective people of color, including African Americans. They hold equally in assessing the importance and authority of those interests regarding the development of international law and evaluating the intersections between international law and local laws of the countries where peoples of color live. The great Howard Law School Dean Charles Hamilton Houston often observed that nobody needs to explain to African Americans the difference between law in the books and law in action. In international law the racial battle lines are not yet quite as clear as in American law, but the discrimination and marginalization of peoples of color are no less real.


9. See, e.g., Robert William Fogel & Stanley L. Engeman, Time on the Cross (2d ed. 1984) (controversial econometric analysis of slavery). Examples of some of the current battles are the battles around the multi-culturalization of high school history books and curricula, around Afrocentrism as a school of history, and recent battles around benign interpretations of slavery, such as the econometric analysis of slave and plantation efficiency in Time on the Cross. See id. (describing these battles). Others might include the furor a decade ago surrounding the publication of William Styron’s depiction of the slave revolt leader Nat Turner, the question facing Black historians fifty or so years ago of how to depict the facts of the American Revolution regarding the large support which Blacks gave the British, and, of course the racist campaign beginning in the first years of the twentieth century carried on by some white historians to depict Blacks only as corrupt and incompetent during the Reconstruction period and afterwards. See id. (discussing American Revolution).


11. See generally Michael Ross Fowler, Thinking About Human Rights: Contending Approaches to Human Rights in U.S. Foreign Policy (1987) (comparing and contrasting views of prominent individuals on fundamental issues raised by American human rights players). Work on the interests of African Americans and Africans (in the Congo) in international law arguably began with the 1899 publication of George Washington Williams’ Open Letter to President William Henry Harrison [and his identical] Open Letter to King Baudoin of the Belgians, arguing that the African people of the Belgian Congo had rights to decent treatment under international law even as it legalized colonialism; these rights were being grossly violated by the Belgians, in large part by holding the Congo as the King’s personal property rather than as a sovereign state colony. See John Hope Franklin, George Washington Williams, A Biography 202, app. at 243 (1985) (noting Williams’ involvement in international law advocacy). W.E.B. Du Bois’ pan-Africanist work at the Versailles Peace Conference in 1919 where he petitioned to
II. THE SCRUBBING OF THE HISTORY OF RACIST STRATEGIES AND BLACK INTERESTS OUT OF LEGAL HISTORY

Legal history by many Anglo-European scholars and authors tends to be scrubbed clean—in terms of prominent documentation—of all but the most inescapable stories and facts of racial oppression.\(^\text{12}\) Excluded are the stories of the trivialization of the rights, interests and welfare on the international stage of peoples of color compared with those of European and other militarily and economically prominent sovereigns and peoples.\(^\text{13}\) First, this exclusion may be done by historians giving prominence to the evolution of "neutral principles" of law, and characterizing decisions, apply the international right of self determination of peoples beyond Southern Europe to peoples of color under colonial rule throughout the world, represents further pioneering work, along with his testimony to the United States Senate in 1946, supporting a strong interpretation of the human rights provisions of the United Nations Charter as binding in American law. The latter was the beginning of many attempts of African Americans to frame their rights under international law in petitions to the United Nations. See, e.g., PAUL ROBESON, CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE (William L. Patterson ed., International Publishers 1970) (1951) (chronicling 1948 Petition to United Nations charging United States with genocide under international law towards Blacks). The work of Y.N. Kly has developed this line of inquiry. See, e.g., Y.N. KLY, SOCIETAL DEVELOPMENT & MINORITY RIGHTS (1997) (addressing coexistence of dominant and non-dominant ethnic groups within same multinational states); see also, e.g., Henry J. Richardson III, The Gulf Crisis and African-American Interests Under International Law, 87 Am. J. Int’l L. 42 (1993) [hereinafter Richardson, The Gulf Crisis] (addressing stake of African Americans in international law). The ranking histories of international law do not include discussions of the interests of any but competing sovereigns in the development of that law or competing interpretations by European jurisprudential scholars, which includes little about, for example, the rights of slaves (as does Grotius), nothing about slaves' interests under international law, and nothing about their interests in the different doctrines and interpretations that competed for authority as the basis of international law moved from natural law, to territorial sovereignty, to more legal realist perspectives. See, e.g., ARTHUR NUSBAUM, A CONCISE HISTORY OF INTERNATIONAL LAW (1947). Only with the appearance of the decolonization movement beginning in the late 1950s do we start to find a legal literature on the interests of peoples of color in the world community in the evolution of international law. See, e.g., MOHAMMED BEDJAoui, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979) (noting evolution of international law regarding people of color). This silencing can be attributed to combinations of racism and a profound disinclination on the part of dominators and their scholars to tell the stories of legal claims by those groups and peoples whom they believed did not prevail in terms of power and wealth, and should not prevail, plus other factors such as the lack of literacy—some of which was deliberate as part of ongoing policies of subjugation of many of these same peoples. Thus their stories must often be implied; however this is well within the capacity of scholars who are to rescue such peoples from their silence. See, e.g., MAROON SOCIETIES (Richard Price ed., 3d ed. 1996) (studying communities formed by escaped slaves in Caribbean, Central and Latin America and United States).


opinions and patterns of authority as racially benign early in their analyses of the history of a particular legal doctrine or institution. Second, this exclusion occurs because legal history tends to be a history of allegedly successful outcomes: a history of those individuals and groups whose efforts, might and resources prevailed in fostering the community and territorial authority of one or another legal principles or institutions, or of a legal culture.

On both of these points, Professor Antony Anghie has shown how positivism as the dominant approach to international law in the nineteenth century incorporated a variety of strategies to support European colonialism and the enslavement of African heritage peoples. In doing so, those strategies marginalized and rendered incidental and invisible the international interests of those and other peoples of color. He further shows that these strategies did not pass out of existence with the substitution of positivism for more legal realist approaches as the basis of international law in the twentieth century, but indeed continue to be used in various ways in the present day. In that respect, I regard this Article as a continuation of Professor Anghie’s valuable inquiry.

One consequence of these exclusionary approaches is that peoples of color, to the extent they are forced to rely on such histories due to lack of access to more complete narratives, are denied accurate knowledge of their own past in connection with the appearance of current law. Yet, simultaneously, we are forced to defend the valid existence of our own past—i.e., to assert that we do indeed have a history, including a legal history, of these same events that is intellectually valid and worthy of attention—in the face of “authoritative” texts which by their omission, and then their subsequent citations and re-citations as “knowledge” in the community, deny that validity. This recognized history is a necessary resource


15. See, e.g., Friedman, supra note 12, at 666 (noting prosperity of 1950s causing underclasses in America to conveniently forget their underclass status).


17. See id. at 80 (noting “the civilizing mission is inherent in one form or another in the principal concepts and categories that govern our existence”).

18. For a long time, many historians denied that Black Africa had a “history” because of the African oral tradition and the comparative lack of written documentation. Thus, Africans in their continuing confrontation with colonialism and Europeans had to wage an intellectually vicious struggle on the question of their own historical existence and validity compared with that of Europeans and white Americans. Obviously, under these arguments, sources derived from the African oral tradition, and the long and authoritative development of customary law, lack the “proper” requisites of historical documentation. African Americans faced a
for the survival and advancement of a people. However, racism operating in the analysis of historical knowledge has undercut yet another one of that people's sustaining supports. This type of racism against African Americans and Native Americans has operated since the earliest years of the United States. Thus, in 1774, one of the Founding Fathers, James Madison, in writing about a slave revolt, said: "It is prudent such attempts should be concealed as well as suppressed."19

Similar distortions occurred with African political and legal history as interpreted through much of the European and American academy until the middle of the twentieth century, and remnants of such attitudes are evident today.20 For African Americans, the tide of academic racism barring our way was not a denial that we had a role in American history, because the massiveness of the slave system since before the beginning of

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20. *See, e.g., Proceedings of the Conference on African-Americans and the Right to Self-determination, 17 Hamline L. Rev. 1, 4 (1993) (discussing historical events that had effect of arresting African-American socio-political and intellectual development). For Africa, there has been much debate among European-American scholars as to whether, to take one example, pre-colonial African societies were governed by "law," since African custom was unwritten, and whether "law" only appeared when custom was reduced to writing. This debate both reflected and helped sustain the marginalization of African societies under Euro-American perspectives. *See, e.g., A. Arthur Schiller, Introduction to Africa and Law* (Thomas W. Hutchinson et al. eds., 1968); Julius Lewin, *The Sources of Native Law, in Studies in African Law 1, 1-12* (1947); *Introduction to African Law: Adaptation and Development*, especially at 16-18 (Kuper & Kuper eds., 1965).
the Republic and its documentation made that impossible. Rather it was the deliberate use of pseudo-historical analysis to attempt to show our lack of talent and public competence, our lack of praiseworthy personal attributes and our propensities to take "uncivilized" actions unless monitored (by whites) and restrained. These deliberate distortions of the history of the Reconstruction era following the Civil War were especially damaging in reinforcing a modern public culture of American racism until the works of W.E.B. Du Bois, Carter Woodson, Benjamin Quarles, George Washington Williams, John Hope Franklin, C. Vann Woodward and others began the still-incomplete process of correction to show the competent and beneficial roles played by Blacks against a context of lynchings and systemic oppression.

As my colleague Sharon Harzenski recently noted in our decades-long dialogue, this particular set of strategies by white historians to degrade Blacks by corrupting the history of the Reconstruction era itself comprises white identity history. It is the image in the mirror of white conservative accusations today that Afrocentrists and other Black historians are creating inaccurate Black "identity history."

However, the approach regarding the conventional legal histories of the United States, by Lawrence Friedman, features the general omission of the legal history of African Americans. Indeed, discussions of American law exist regarding its creation and how it was enforced on African Americans to enslave them, limit them and later to grant them limited rights. But nothing reflects African-American views of how American or international law should be prescribed and what rights they believed they should have from their own perspectives. That is, there is no reflection of an

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21. See id. at 48 (suggesting that African Americans became slaves of state rather than slaves of private actors in post-Reconstruction period).


23. See Sharon Susser Harzenski & Sandra Weaver Weckesser, The Case for Strictly Scrutinizing Gender-Based Separate But Equal Classification Schemes, 52 TEMP. L.Q. 439, 445 (1979) (noting that "[f]ace based, equal treatment statutes provided the nest for much of the racism that infested this nation's post-Civil War history").

24. Cf. GERTRUDE HIMMELFARB, On Looking Into the Abyss 154 (1994) (suggesting that white males have marginalized "all other species"); E.J. Hobsbawm, From Social History to the History of Society, in HISTORICAL STUDIES TODAY 1, 4 (Gilbert & Graubard eds., 1972) (noting that "struggles for political and economic emancipation . . . ha[ve] hitherto been outside, or at best on the margins of, academic orthodoxy in the social sciences, and have been increasingly neglected by historians").


African-American jurisprudence; there are only reflections of majority juriprudential approaches.27

Such strategies in the Academy and the intersecting national and international communities cannot pass unchallenged, because all peoples need a dependable past based on the best of scholarship. Although we could invent a past—as we are these days frequently accused of doing—it is far better to accurately know our own histories, including our legal histories, warts and all. Whatever history we have is part of our Present, and it must be, on an evolving basis, the best history possible. Liberation from national and international racism unfortunately demands the employment of all of the best resources we have, across the full spectrum of values and goals. Thus, the key question does not go to the dangers of people of color creating a false "identity history," as is argued today by even some progressive historians,28 but to creating a more comprehensively accurate history that is as inclusive as the evolving evidence and insightful interpretation allow.29 Unfortunately, even this question has long sparked a process of methodological wars about race, which masquerade as differences about epistemology, evidence and jurisprudence; the fighting of these

27. See generally Angchie, supra note 16 (noting that continuation to present day of authority of such nineteenth century doctrines as Von Martens' "natural rights of states," is illustrative, where Von Martens turned natural law on its head and anthropomorphized the state as a legal concept to give it the inherent rights of natural persons, and thus made its sovereign acts even more unreviewable); Nussbaum, supra note 11, at 183 n.11 (noting historical authority). This and similar notions shielded the state and the actions of its government even more effectively from international scrutiny, including—especially in the nineteenth century, but also for similar issues in the twentieth century scrutiny—about its laws and treatment of slaves, indigenous peoples and other abused groups within its borders. Such shielding only strengthened companion positivist notions that the state "represented" all people within its borders regarding their international rights, absent open and successful revolution, and these notions thus silenced and/or punished all international claims that were antithetical to Anglo-European interests by peoples and groups of color below that rare threshold. This silencing, which included comprehensive and punitive efforts by most slave holders to deny literacy to "their" slaves, encompassed the attitudes about the absurdity of the research, recognition or publication of, inter alia, African American views about their just and desirable interpretations of international law reflecting their interests—particularly their interests in freedom. As the nineteenth century moved towards the American Civil War, their interests and interpretations were occasionally reflected in abolitionist-backed court cases, such as some of the slave ship cases that reached the United States Supreme Court, for example, The Amistad, 15 U.S. (1 Pet.) 518 (1827). But otherwise, the United States government and slaveholder interests pushed a strong dualistic position to protect national slavery against strong arguments under international law to prohibit the international slave trade, as reflected in United States Supreme Court cases such as The Antelope, 12 U.S. (1 Wheat.) 1877 (1827).

28. See Hobsbawm, supra note 24, at 186-91 (discussing history).

wars, when confined to the conventional language of the reigning juris-
prudence, often continue the masquerade that race is not a factor.  

Let me discuss two examples of the trivialization in legal history of 
African heritage interests: one relative to an internationally referenced 
document under the United States Constitution and one relative to interna-
tional law.

III. THE SELF-EXECUTING TREATY DOCTRINE AND AMERICAN 
RACIAL DOMINATION

A. Introduction

The self-executing treaty doctrine ("Doctrine") has been, since 1829, 
a gatekeeper doctrine for the reception of international law from treaties 
into American law through its courts. The gate for human rights law has 
been a narrow one, and the keeper has been stingy. During the modern 
era of human rights, beginning with the United Nations (U.N.) Charter, 
this Doctrine has generally served as a barrier to the direct incorporation 
from treaties of international rights into American law. It has generally 
prevented African Americans and other peoples of color in the United 
States from directly invoking their international human rights in local and 
federal courts.

This barrier violated, for example, the explicit hopes of African Amer-
icans in the mid-1940s that the human rights provisions of the United Na-
tions Charter would make such rights available to them domestically 
through the Charter as a treaty. With the southern United States then 
solidly locked down in phalanxes of legal segregation and legal lynchings, 
and the North subjecting Blacks to less direct but pervasive forms of rac-
cism, their access to those international rights was sorely needed. The 
1952 California case of Sei Fujii v. State, when we understand its violent

30. See Cheryl I. Harris, Whiteness As Property, 106 Harv. L. Rev. 1709, 1716-22 

31. See, e.g., Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 
defines a self-executing treaty as "a treaty that may be enforced in the courts with-
out prior legislation by Congress, and a non-self-executing treaty, conversely, as a 
treaty that may not be enforced in the courts without prior legislative implementa-
tion." Id. at 695.

32. See U.N. Charter art. 1, para. 3 (stating one purpose of U.N. is "to achieve 
international cooperation in . . . promoting and encouraging respect for human 
rights"); see also U.N. Charter arts. 55 & 56 (noting stability and well being for 
peaceful and friendly relations among nations based on respect of equal rights and 
self-determination of peoples).

33. See Vazquez, supra note 31, at 696-97 (outlining instances where legislative 
action is necessary for courts to enforce treaties).

34. See Richardson, The Gulf Crisis, supra note 11, at 73 (noting that rights and 
obligations created by international treaty as civil rights strategy has met with little 
success).

35. 242 P.2d 617 (Cal. 1952).
rejection of international human rights law as a protection against state
crime, and W.E.B. Du Bois’ testimony before the United States Senate
in the U.N. Charter ratification hearings about the hopes Black America
had for the Charter’s human rights provisions, were starkly emblematic
of the gate being slammed shut by willing judges conveniently invoking
the Doctrine. People of color were seen to be too threatening if their
rights were even partly grounded in international law; the recognition of
such rights, if it came, must be confined to the law of the United States
Constitution.

This legal outcome did not occur serendipitously, but must be under-
stood by historical reference to the Doctrine’s seminal Supreme Court
cases of Foster v. Neilson and United States v. Percheman, handed down in
1829 and 1833, respectively. The Doctrine basically holds that the courts
will decide whether the treaty provision claimed upon by a petitioner was
intended to grant individual rights, and if not, such rights may only be
claimed upon through implementing federal legislation. The U.N.
Charter example, and the other denials of expanded rights it symbolizes,
reflect the long hand of racism pushing the Doctrine away from any bene-
fits that stare decisis and even separation of powers concerns may justify for

B. Past Interpretations of the Doctrine

No historical examination of the origins of the Doctrine seems to be
available. The conventional understanding of its origins has been rele-
gated to the particular use of History by the Law under the stare decisis
principle. But stare decisis is inadequate because it does not explain how
the Doctrine emerged as it did from the early nineteenth century crucible

36. See id. at 620 (noting that treaty “does not automatically supersede local
ing in overruled, but remarkable, lower court opinion that U.N. Charter “guaran-
tees equal rights to all”).
37. See Richardson, The Gulf Crisis, supra note 11, at 74 (recounting W.E.B. Du
Bois’ testimony before Senate during U.N. Charter ratification).
38. See id. at 75 (noting that United States government “has expended more
effort to block the definition and invocation of African-American interests through
international organizations than to assist in their realization”); see also Sei Fujii, 242
P.2d at 738 (holding that petitioner’s rights could be protected under
Constitution).
Percheman, 32 U.S. (7 Pet.) 51, 89 (1833).
40. 32 U.S. (7 Pet.) 51 (1833).
41. See Percheman, 32 U.S. (7 Pet.) at 89 (noting that words “shall be ratified
and confirmed” may give force to treaty as self-executing); Foster, 27 U.S. (2 Pet.) at
314 (holding that treaty is equivalent to act of legislature whenever it operates
itself without aid of legislative provision).
42. See Vazquez, supra note 31, at 695 (suggesting that distinction between
self-executing and non-self-executing treaties “has become entrenched in United
States law”).
of American racial domination. Stare decisis has failed to give subsequent American courts the obligation to preserve and act upon in their decisions to the present, in light of evolving interpretations of constitutional rights, the facts of racial conquest and domination of African Americans, Black Indians and Native Americans, which inescapably explain and frame the Foster and Percheman cases. Stare decisis is also inadequate because it furthering interpretations that authorize the judiciary to impose an inappropriate burden on American holders of international human rights.

The Doctrine, through stare decisis, has distinguished between the "sovereign" concerns (such as defining permissible, domestically invoked rights language in a treaty provision) demanding further government action that justify a court's interpreting a treaty as non-self-executing, and non-sovereign concerns that allow the treaty to be self-executing. This structural distinction has been inherently discriminatory to the rights of peoples of color, by supporting the policy that the international rights of American citizens—not least peoples of color—are confined in a wide definition of "sovereignty" of the American state, and thus, must be subject to the national execution of treaties, which, under the United States Constitution, need not be faithful to the original treaty text. Stare decisis has revealed a trend that basically shows that the courts will decide whether the treaty provision was intended to grant individual rights, and, presumptively, if not, such provision may only be claimed upon through implementing federal legislation, notwithstanding the clearly implied warning by Joseph Story in his interpretation of the Doctrine that the definition of sovereign interests in United States treaties was clearly limited. In actuality, "non-sovereign" facts around locally accessible rights tend to weigh most heavily on the lives of African Americans and other citizens of color.

The story of the Doctrine as that of the denial of direct access to human rights has also been told through presidential designations of re-

43. For a further discussion of the emergence of the self-executing treaty doctrine, see infra notes 105-11 and accompanying text.
44. See generally Edwin Wilhte Patterson, Jurisprudence: Men and Ideas of Law 304-14 (1953) (explaining racial conquest); Katz, supra note 7, at 49-58 (discussing Foster). For a further discussion of caselaw after the Foster decision, see infra note 104 and accompanying text.
45. This burden comprises the additional burdens of proof required of petitioners to meet in making out claims of rights through the Doctrine, when such burdens of proof arguably exist because of the Court's original incorrect decision in Foster, as justified through stare decisis under separation of powers rationales in subsequent cases.
cent human rights treaties ratified by the United States as non-self-executing, such as the International Covenant on Civil and Political Rights.\(^\text{49}\) Thus the Doctrine has become an executive sword applied to treaties that the courts are commanded to follow.\(^\text{50}\) This must be compared with analogous designations by the President of some commercial treaties as self-executing, even if they have broad domestic legal effects, such as the U.N. Convention on Contracts for the International Sale of Goods.\(^\text{51}\)

Why then did Chief Justice Marshall and the Supreme Court, in \textit{Foster} in 1829, and the subsequent important case of \textit{Percheman} in 1833, feel it necessary to insert a wide area of judicial discretion into the Supremacy Clause as a provision of clear constitutional text and to \textit{prescribe} treaties into domestic law, where the Framers had deliberately already so prescribed directly through the Constitution, and thus gave the judiciary the competence to \textit{apply} all treaty provisions in United States law as they would federal statutes?\(^\text{52}\) This question is inextricable from the historical finding that the Doctrine was \textit{forged} in the crucible of American racial military conquest and systemic domination of African Americans and Native Americans in the first half of the nineteenth century. As discussed below, the United States government conspired, beginning before the War of 1812, to wrest Florida and the Florida Territory westward to the Mississippi River away from Spain, to drive all Native Americans, including the Seminole Indians, on that territory westward, to destroy the Florida sanctuaries for escaped African American slaves, to enslave the escapees, and to administer all of this conquered territory in ways that would facilitate the extension of plantation slavery westward.\(^\text{53}\)

C. The Crucible of American Racial Domination

The central question in \textit{Foster v. Neilson} was whether Neilson, a squatter, as of about 1811, on 3000 acres of a larger plot of land lying just west of the Mississippi River in what may have been either Mississippi Territory or Louisiana Territory, could be ejected on the grounds of sufficiency of title by the original larger plot owners.\(^\text{54}\) The larger plot owners derived their title from a series of owners from a Spanish land grant of 1804, the


\(^{51}\) Cf. JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 54-56 (1991) (discussing international sale of goods).


\(^{53}\) See ZINN, supra note 29, at 125-46 (describing attempts to extend plantation slavery westward).

\(^{54}\) See Foster, 27 U.S. (2 Pet.) at 256 (discussing issue of whether Neilson could be ejected from land because of lack of sufficient title).
validity of which rested largely on a treaty in 1800, whereby Spain ceded Louisiana to France.\(^55\) This cession occurred three years before the United States purchased Louisiana from the French.\(^56\) The issue was whether the Spanish grant to the original owners was subsequently confirmed by an 1819 Treaty between the United States and Spain.\(^57\)

As far as is known, the defendant squatter Neilson was part of the late eighteenth century/early nineteenth century westward colonization of lands from Florida to the Mississippi River by white Americans who were asserting rights to push Native Americans off those lands, and to rapidly extend the cotton kingdom and sugar plantations, thereby enlarging the slave system and creating new demands for slave labor. By the time Thomas Jefferson became President in 1800, there were 700,000 white settlers west of the Blue Ridge Mountains, and by 1820 there may have been as many Blacks in Alabama and Mississippi.\(^58\)

The American purchase of Louisiana was closely connected with both the Haitian Revolution of 1793 and American slavery.\(^59\) Louisiana had already become a center of sugarcane cultivation, whether it was in the hands of the French or Spanish, or the just-arriving American settlers.\(^60\) Both of the European groups lived in New Orleans and had spread up the riverbanks to cultivate the Mississippi Delta.\(^61\) Black slaves were introduced into those areas by Creole planters, and by the late 1700s some were being brought into Louisiana from the Caribbean.\(^62\)

The acquisition of Louisiana by France worried the United States government because of the fear that secure navigation rights for Western farmers on the Mississippi River, negotiated with the Spanish, would be threatened. Negotiations with the French over this issue produced the unexpected offer by Napoleon to sell Louisiana, an offer directly connected with the success of Blacks in Haiti led by Toussaint L’Ouverture in their overthrow of French control, thus wrecking the French Emperor’s

\(^{55}\) See id. at 256-57 (noting exchanges of title between Spain and France occurring in early 1800s resulting in large landowner’s claim).

\(^{56}\) See id. (discussing treaty between United States and France of Apr. 30, 1803, resulting in United States’ acquisition of Louisiana).

\(^{57}\) See id. at 253-55 (describing issue presented as correct interpretation and effect of treaties).

\(^{58}\) See FRANKLIN & MOSS, supra note 4, at 126 (noting number of Blacks in Alabama-Mississippi region).

\(^{59}\) See id. at 103 (explaining connection between Louisiana Purchase and slavery). For a discussion of the Louisiana Purchase, see CHARLES L. DUFOUR, TEN FLAGS IN THE WIND 122-35 (1967).

\(^{60}\) See FRANKLIN & MOSS, supra note 4, at 103 (discussing success of sugarcane industry).

\(^{61}\) See id. at 61 (explaining spread in sugarcane cultivation).

dreams for a Western empire. That revolution was simultaneously a source of great inspiration to American slaves and great fear among slaveholders of the danger of their slaves being “contaminated” by this example of Black sovereign freedom. Thus, Blacks taking their freedom in Haiti substantially made it possible for America to acquire Louisiana, which in turn extended the cotton and sugar culture in the region and helped extend American slavery westward.

In 1811, the year that Neilson squatted on the plaintiffs’ land, federal and state troops subdued more than 400 rebellious slaves in Louisiana; at least seventy-five slaves died in the battle and the ensuing court trials. In 1812, Louisiana became a state, and another slave uprising took place in New Orleans. If, as is probable, Neilson wished to purchase slaves during this period, the price in Louisiana of a prime slave field hand was about $500.

These trends must be viewed in a wider context. As early as 1804 the United States government was laying plans to conquer the Florida Territory away from England, who had divided the Territory into East and West Florida; the former encompassed generally the present state of Florida, the latter extended west to the Mississippi River. East Florida was deemed a threat to the security of the United States because the plantation holders of Georgia and the Carolinas were threatened by that territory’s existence as a refuge for African American and African slaves. That territory was also perceived as a national threat because it represented perhaps the major failure of whites in America, in both the Northern and Southern states, in attempts that stretched back to the early seventeenth century, to prevent African slaves and Native Americans (and to a certain extent at the beginning, poor indentured whites) from uniting in a common cause against slavery’s oppression, much less intermarrying and thus forming a growing group of Black Indians, which would, in turn, further strengthen African- and Native American cooperation and ties. This latter group was exemplified by the Black Seminoles in Florida and

68. See Franklin & Moss, supra note 4, at 101-04 (describing impact of Black revolt in Haiti on Louisiana Purchase); see also Thomas O. Ott, The Haitian Revolution 47-60 (1973) (describing Black revolt in Haiti).
64. See Franklin & Moss, supra note 4, at 102-03 (explaining impact of Haiti revolution on Americans); see also Ott, supra note 63, at 53-54 (noting Southern slaveholders’ fears fueled by Haitian Revolution).
65. See Franklin & Moss, supra note 4, at 103-04 (discussing results of Haitian Revolution).
66. See Alton Hornsby, Jr., The Black Almanac 11 (1972) (noting that troops quashed slave rebellion); see also Franklin & Moss, supra note 4, at 163 (describing slave revolts).
67. See Franklin & Moss, supra note 4, at 163-64 (describing slave revolts).
68. See id. at 13 (discussing price of slaves in early 1800s).
69. See Joseph Burkholder Smith, The Plot to Steal Florida 38 (1983) (explaining United States’ plans to conquer Florida Territory).
their general cooperation and co-existence with Red Stick Seminoles and increasing numbers of African slaves. Blacks escaped American slavery by fleeing to Florida and finding new lives, alliances and shelter, but also, some modified slavery with Black and Red Seminole Indians, and often freedom with their own villages and farms. In the words of historian Joseph Opala, "From the beginning of Seminole colonization in Florida, the Indians may have depended upon African farmers for their survival." After the American Revolution, this was rapidly seen by white plantation holders, especially in South Carolina and Georgia, as an intolerable situation; the land of East Florida, the return of the ex-slaves, and the breaking of Seminole-African slave unity were all coveted. American raids into Florida began in the context of rising hostility with England. One historian has noted that the War of 1812 was not just a war against England for survival, but also a war for the expansion of the United States into Florida, Canada and Indian territory.

In 1812, the year after Neilson squatted on the land in Foster, and three years before Percheman, an ex-Spanish regional military commander claimed two thousand acres of land in this same northern part of East Florida under a grant from the Spanish Governor of Florida. The American government supplied a group of Georgia volunteers, known as the Patriots, with arms and sent them into Florida. The Patriots gathered on the banks of the St. Mary's River and organized an independent "Republic of Florida." When the Patriots took over in March 1812, the area from Fernandina to St. Augustine was, according to one historian, in a state of high prosperity. White planters grew all their own staples and food for their livestock, profited from the sale of cash crops such as cotton and timber, and families of Spanish, English and American descent lived and worked side by side in peace. Indian and African-American towns flourished as well. No trouble arose among the races, except for slaveholder attempts to re-capture Africans. When the Patriots withdrew a year later in May 1813, however, Indians and Blacks had been set against whites, tensions had emerged among themselves and many villages were destroyed.

During the War of 1812, British forces attempted to recruit Red Sticks and Seminole Indians and Blacks in Florida to fight against the Amer-
In an area located by the Apalachicola River, along the northern boundary of Florida, the British built a fort, known as Prospect Bluff, to conduct negotiations with the Indians and Blacks. When the war ended, the British evacuated Florida and left Prospect Bluff to the African-Americans and the Indians; the latter soon moved eastward and left the fort to the Blacks where it became known as “Fort Negro,” including the fields and grazing land surrounding it. As many as one thousand runaway Blacks and Seminoles lived in the fort, with four pieces of heavy artillery, small arms and ammunition, under the leadership of the very capable Commander Garcia.

As one historian noted, “As long as the Negro fort stood on Prospect Bluff, surrounded by prosperous free Black farmers, it was a beacon to restless slaves for miles around; it was a serious threat to slave holders in the United States.” White plantation owners discussed destroying the fort. For Blacks, the fort was an emblem of freedom and prosperity, and they would fight to the death to keep it. The United States government put out propaganda that the Blacks of Prospect Bluff were a threat to American citizens in Georgia. This was a strange argument because the fort was sixty miles from the Georgia border, and the last thing an ex-slave would want to do was set foot on American soil where he or she could be re-captured. Because it is difficult to imagine that Blacks at the fort would march several days to attack Georgia citizens in a territory where they

80. See Hubert Fuller, The Purchase of Florida 207 (1964) (noting British recruitment of Indians).
81. See Tebeau, supra note 79, at 110 (describing meeting between Indians and Blacks at Prospect Bluff).
82. See id. (noting development of “Fort Negro” nickname).
83. See id. (noting that fort served as housing to runaway slaves); see also Katz, supra note 7, at 54 (describing Fort Negro).

[T]he Site of Fort Blount, 15 m., was where in 1814 the British helped runaway Negroes and Indians to build a fort, mount guns, and store ammunition. The post was known as Negro Fort, and around it the Negroes developed many plantations. The fields, one historian wrote, extended for more than 50 miles along the river. On July 24, 1816, Federal forces under Colonel Clinch and Captain Loomis attacked the fort by land and water. General Andrew Jackson’s instructions were: “Blow it up! Return the Negroes to their rightful owners.” The attack continued for four days, ending when a red hot cannon ball dropped into the powder magazine. All but 60 of the 334 occupants of the fort were instantly killed, including many women and children; only three escaped injury; two of the three, an Indian and a Negro, were executed at Jackson’s orders.

Id.

85. See Gannon, supra note 84, at 167-81 (discussing details of battle for Fort Negro as beginning of First Seminole War).
86. See id.
87. See id.
would automatically be considered slaves, it is more plausible that the slaveholders in the American government saw the fort as a threat to an entire slaveholding way of life for planters near the Florida border. Accordingly, United States military forces under the general command of Andrew Jackson, aided by United States Navy ships, were sent to conquer Prospect Bluff, resulting in a battle between Blacks and Seminoles on one side, and United States troops with five hundred Creek Indian mercenaries on the other. The fort was destroyed and captured when a red-hot Navy cannonball blew up the fort's powder magazine on a hot day in late July, 1816; two hundred and seventy Blacks and Seminoles were killed; sixty-four were wounded, and three were uninjured. Commander Garcia, found alive, was executed, and the surviving men, women and children were marched back to slavery in Georgia. The American public heard nothing about this massacre until 1837. This was the beginning of decades of Red and Black Seminole resistance in the three Seminole Wars.88

Prospect Bluff was part of an American pattern of military conquest to acquire Florida, remove it as a refuge for slaves, remove the Seminole Indians from its territory westward by conducting two brutal wars against them and breaking many treaties, open its lands for white American and some remaining Spanish plantation owners, extend the cotton kingdom and expand the system of slavery.89 From 1814 to 1824 Andrew Jackson was prominent in leading this campaign, after which he became Governor of Florida Territory and then President in 1829, the year the Supreme Court decided Foster.90

Spain had renewed its claim to Florida after the British withdrew, but this was in the context of substantial on-the-ground American conquest and of a pattern of federal legislation establishing American land claims systems in newly conquered territories from Florida westward. Thus, by ceding its interests to the United States, including those interests in West Florida that may or may not have overlapped French sovereignty over Louisiana, which was purchased by the United States in 1803, the Treaty of 1819 between the United States and Spain represented the Spanish accepting American realities of conquest regarding both East and West Florida.91 This ambiguity lay central to Foster regarding Neilson's title to the land on which he squatted. The same treaty, by which the Spanish aimed, inter alia, to ensure the continuing validity to private recipients of its previous land grants in both Louisiana and East Florida, would, in 1833, be

88. See Katz, supra note 7, at 54-55 (explaining insurgency of war).
89. See Gannon, supra note 84, at 167-81 (explaining significance of Prospect Bluff).
invoked by Percheman to quiet title to his Florida land grant under similar circumstances.

In this context of power, wealth and conquest, Chief Justice Marshall and the Supreme Court decided in *Foster* the issue, as the Court framed it, whether certain language in Article 8 of the Treaty of 1819 quieted the relevant titles directly through the treaty, or only placed an obligation on the United States to subsequently do so through its own legislation.92

Marshall’s reliance on congressional intent and the Court’s deference to the will of Congress and the Executive regarding interpreting whether the pertinent land was derived from a French or a Spanish grant, and whether Congress had interpreted that question by establishing a land claims and settlement system from Florida to Louisiana, silenced any access by Blacks and Indians to claiming their fundamental rights, by ignoring the following facts shaping the case:

1) The enabling basis of the congressional land claim system was a wave of United States military conquest aiming to seize Florida from English and Spanish rule and open all the land to white ownership from Florida to Louisiana;

2) Much of the motivation for this conquest was the removal of Florida as a historic slave refuge and source of Native American and African American unity, and the removal of Cherokees, Seminoles, Creeks and other Native Americans across the South to make their lands available to whites; and

3) These strategies exhibited naked military-applied racism against Blacks and Native Americans, with the aim of enforcing their subjugation and extending the cotton kingdom and extending slavery as a system.93

The Court found in favor of Neilson, holding that under its interpretation of the “plain text” of Article 8, the Treaty of 1819 did not itself quiet title to the plaintiffs’ grant, that Spain did not possess the land when it executed that grant but that France did, and that the Treaty only imposed a “contract” on the United States to take further action.94 Thus, an impediment was removed to land ownership of westward-moving white American settlers of means, such as Neilson, who were likely to establish plantations using Black slaves, of whom considerable numbers were being driven west during this period for both use and sale.95 The Doctrine was

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92. See id. at 314 (interpreting treaty to determine whether treaty quieted title or requires legislative act).

93. See id. 314-17 (discussing interpretation of treaties with France and Spain with regard to congressional and executive intent). Part of the pertinent context is that Congress had decided in 1787 that slavery would be barred from the Northwest Territory, lying to the north. See FRANKLIN & MOSS, supra note 4, at 168 (noting abolition of slavery in Northwest Territory in 1787).


95. See FRANKLIN & MOSS, supra note 4, at 128-29 (explaining that domestic slave trade was “one of the most important single factors augmenting the movement”).
born out of judicial deference to the fruits of military conquest, as redefined through congressional statutory arrangements for white occupation and land ownership, where judicial deference took the form of treaty interpretation with a shift of a heavy burden to the proponent to justify the treaty's domestic authority under the already clear Supremacy Clause. As will be seen in the following discussion, the Doctrine's birth rested on silencing and suppressing the rights of black slaves and Native Americans, including their entitlement to an accurate record of what was done to them in destroying their fundamental rights in these years of American history on this territory.

D. United States v. Percheman

Beginning in 1815, Percheman was seeking to sell his two thousand acres in North Florida, apparently for settlement in that particular area, which was rapidly on its way to becoming prosperous for white farmers and plantation owners, and to being defined by the felt-necessity of a slaveholding culture. The issue was whether, under the same treaty language as in Foster, Percheman's title was quieted directly by the Treaty or whether further action by the United States was needed. The American regulatory context was similar in that competing claims were raised by the United States based on the jurisdiction of American land commissioners. But now Chief Justice Marshall had available the original Spanish text of the Treaty and felt obliged to consult it. He found that his original interpretation of Article 8 in Foster had been in error, and that no "contract" was imputed on the United States, but that the Treaty provision itself quieted Percheman's title.

Thus, the process of land transfer following the American conquest of Florida was able to proceed in the context of American colonizing through building a local slaveholding culture, which had been recently made possible by severe military repression against African Americans and Native Americans. In Percheman, however, Marshall modified Foster by imposing a duty on the judiciary in interpreting any treaty language to consult in linguistic detail all authoritative versions of the treaty as a condition of deciding the self-executing issue.

96. See Foster, 27 U.S. (2 Pet.) at 311 (permitting white settler to recover land in Louisiana Territory).
97. See id. at 314 (noting fair construction of treaties as supreme laws of land).
99. See id. at 68 (interpreting treaty language in light of Foster).
100. See id. at 79 (discussing jurisdiction of American land commissioners).
101. See id. at 68-69 (analyzing original text of Spanish treaty).
102. See id. at 88-89 (noting that construction of Article 8 in Foster would be different under current interpretation of treaty).
103. See id. (analyzing original texts of treaties).
Finally, some might protest that in *Percheman* Marshall showed judicial independence and laid the basis for preserving some rights-protective potential in the Doctrine, in opposing the arguments of the United States. If that was the Court's intent, this potential has not come to pass beyond certain interpretations favoring property rights in case law down to the present. The forces of History, however, are larger than even Marshall's formidable prestige and abilities, where both of his rulings originating the doctrine consolidating land titles to whites in land taken from Blacks and Native Americans along a frontier marked by the expansion of slavery and racial conquest.

E. Evaluation

It seems neither new nor historically surprising that 150 years later the Doctrine should bar the access to claims of right to peoples of color by reversing the presumption of any rights pursuant to a treaty's authority under the Supremacy Clause, especially where the claimed rights are usually other than property rights to landed property.

The interpretation of the Doctrine in federal case law tends to be confined to the historically incomplete citations permitted by *stare decisis* from *Foster*, as discussed immediately. The holding of *Percheman* to consult all authoritative versions of the treaty before the court and adopt the most

104. See United States v. Arredondo, 31 U.S. (6 Pet.) 691, 710-12, 734-35 (1832) (applying self-executing treaty doctrine as outlined in *Foster v. Neilson*). Here, the Supreme Court held that the United States had no title to plaintiff's land because it was situated in Louisiana and that land was not ceded until 1819, unlike land at issue in *Foster*, which was situated in Louisiana and ceded in 1803. See id. at 734 (interpreting 1803 Treaty between United States and Spain as giving United States only lands then belonging to Spain, not any lands held by individuals under grants from Spain). In so holding, the Court stated that deciding for the plaintiff in *Foster* would have adopted the Spanish construction of the Louisiana Treaty, which was a political question. See id. at 711 (noting impact of *Foster* decision). Later, in *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), the Supreme Court divided the issues in *Foster* by focusing first on the boundaries of the 1803 treaty and next on the proper construction of Article 8. See *Rhode Island*, 37 U.S. (12 Pet.) at 746. The Court further delineated its role in construing treaties that present political questions by separating treaties into two general categories, executory and executed treaties. See id. at 746-47. According to the Court, it may not rule on an executory treaty because it is a "mere contract between nations, to be carried into execution by the sovereign power of the respective parties . . . ." Id. at 746. An executed treaty, however, "effect[s] of itself the object to be accomplished . . . when either of the parties stipulate to perform a particular act; the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract, before it can become a rule for the Court." Id. at 746-47; accord United States v. Lynde, 78 U.S. (11 Wall.) 632, 638 (1870) (affirming principles of *Foster*, namely "that the judicial department is bound by the construction adopted by its own government"); Lessee of Pollard's Heirs v. Kibbe, 39 U.S. (14 Pet.) 353, 365-66 (1840) (holding defendants responsible for establishing validity of land grants in accordance with a special act of Congress for that purpose); Garcia v. Lee, 37 U.S. (12 Pet.) 511, 521-22 (1838) (holding that grant of land by Spanish government was not valid because Spain did not have title to land in Louisiana after 1800).
EXCLUDING RACIAL STRATEGIES

rights-favorable interpretation seems to have been ignored over the years. Even if it had not been ignored, the issue would most likely still remain as to whether such an interpretation was only available to the petitioner for rights to landed property. Thanks to a combination of judicial and executive actions, human rights treaty provisions have rarely, in any case, been available down to the present to be directly invoked by local litigants.

Immediately after Percheman, the Supreme Court began the process of scrubbing the racial history out of the Doctrine by folding its Foster holding under the stare decisis principle. This enabled and even required subsequent courts to confine their references back to Foster, in invoking its permission, only to its constructed doctrinal content—shorn of its factual narrative—now applied to all treaties, giving courts the authority to presumptively (in view of the burdens on the claimant asserting a treaty right) redirect the existence and source of the right from the treaty provision to federal implementing legislation, if any. This result by the Doctrine was justified by the “neutral principles” of “political question,” separation of powers, and by folding treaty questions under the President’s foreign policy power.

The operation of stare decisis involves, to some degree, subsequent courts in the stream of case law choosing and stating the “best rule” from prior cases. For courts following Foster and Percheman, this involved their decisions to exclude all references to the origin and context of the rights at issue— which perforce would have featured racial conquest narratives—in their definitions of the “best rule,” and to confine the “best rule” to issues of landed property rights and those concerning separation of powers in the federal government. This means that, beginning with Foster, they excluded issues of the proper relationship of each branch of government to the rights of all but one class of American inhabitants, whites, who had some connection to the same land. Such a trend of decision has obtained notwithstanding the option in some interpretations of stare decisis for possibly retrieving the racial narratives underlying Foster. Early in the twentieth century, Professor Oliphant confronted the question of whether a decision could be a precedent for any proposition that the Court did not have in mind when it made the decision. The most racially charitable interpretation of the Marshall Court in Foster might fit under this question.

105. There is no case of which the author is aware, including cases construing provisions of human rights’ treaties, where a United States court, in its opinions, searched for and compared the different authoritative versions of the treaty for any purpose, much less to adopt the most rights favorable interpretation.

106. For a discussion of the subsequent treatment of the Doctrine by the Supreme Court, see supra note 104.

107. See, e.g., United States v. Texas, 143 U.S. 621, 638 (1892) (discussing Foster in regard to determining boundaries of nations).

108. See id. (classifying boundary determinations as political questions); see also Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) at 747 (citing with approval cases designating some treaty questions as beyond judicial power).
Oliphant argued that "one should determine case law from 'the battered experiences of judges among brutal facts' [and] that 'the predictable element' in judicial precedents is to be found in 'what courts have done in response to the stimuli of all the facts in the record in concrete cases before them,' rather than in the study of 'vague and shifting rationalizations.'"\textsuperscript{109} A little later on, Justice Douglas wrote that in constitutional law "stare decisis must give way before the dynamic component of history."\textsuperscript{110}

These common law resources were not brought forward in the evolution of the Self-Executing Treaty Doctrine. The \textit{Foster} Court chose to decide that the American national policy of racial conquest raised no constitutional issue beyond congressional implementation of that policy on the same lands. The \textit{stare decisis} principle has always raised the question of what priority is to be given to protecting the stability of legal expectations, as against the need for the courts to make new law. Moreover, landed property rights have generally attracted \textit{stare decisis} reasoning to ensure such stability.

In \textit{Foster} and similar cases, the question becomes which classes of people—relative to money, status, posture in the community—were in position to compete for property whose title was defined by a treaty. It was whites who had the resources to claim such rights under the Spanish treaty, to both physically occupy the disputed land and to defend their occupation in court, and were potentially eligible to own the land if they won the legal rights competition. It follows that, in the cases invoking the Doctrine after \textit{Foster}, the best rule continued to be framed as one protecting the stability of deciding \textit{any} landed property rights in the new case facts, because the treaty issue in \textit{Foster} revolved around a competition for landed property rights. Since the Marshall Court shielded this competition from all other potential rights claims (e.g., the rights of Native Americans to the same land in the face of illegal conquest, the rights of African slaves to be free if brought into additionally acquired territory beyond the original thirteen colonies/states, or to be free upon having escaped to territory held by the Spanish), the property issues, by attracting \textit{stare decisis} attention, induced later courts to focus no further than the competition for property rights arising in their particular cases. Given the historic discriminatory role of property rights as a gatekeeper for other constitutional rights, \textit{Foster}'s property focus, and its exclusion of the racial stories about that property, result in the Court giving all of those whites, who were shielded in competing for these rights to land away from all persons of color, nothing less than a property right in their own whiteness.\textsuperscript{111}

\textsuperscript{109} \textit{Patterson}, supra note 44, at 310 (reporting that Professor Oliphant advocated the approach to precedent in which courts closely examine facts of each prior case before applying rule to case at hand).

\textsuperscript{110} \textit{Id.} at 305 n.22.

\textsuperscript{111} \textit{See Bell}, supra note 6, at 1716 (stating that "only white possession and occupation of land was validated" because whites treated blacks as property, and Native Americans as having no interest in their homeland); \textit{Harris}, supra note 30.
This "scrubbing" has continued by federal courts down to the present.\textsuperscript{112} It is now part of the African-American Present because it prevents African Americans from claiming directly to treaty provisions as a known source of wider human rights than those currently available under the United States Constitution.\textsuperscript{113} It would be quite helpful, given the inadequacies of current American law, in combating racism on the local level, if such rights could be defined and brought into United States courts.\textsuperscript{114} The same African-American Present, however, has long included white American opposition, unease and anger over the very attempts by African Americans to define their human rights under international law as a separate or even as an additional basis of relief from local and national racism.\textsuperscript{115} The combined historical results of these factors are

\textsuperscript{112} In the twentieth century, federal courts have continued to maintain the distinction between treaties that are self-executing and those requiring further acts of Congress. However, this distinction has been expanded to include cases involving issues other than land disputes. See, e.g., Bowarter S.S. \textit{v.} Patterson, 305 F.2d 369, 377-78 (2d Cir. 1962) (Lumbard, J., dissenting) (arguing for application of distinction to treaty regarding right of ships to freely travel between United States and Great Britain); United States \textit{v.} Fort, 921 F. Supp. 523, 525 (N.D. Ill. 1996) (applying distinction to Geneva Convention's provisions protecting health and safety of political prisoners). In addition, at least one federal court, has expanded the Doctrine to state explicitly that:

[Als] a general proposition, individuals do not have standing to assert private rights in domestic courts on the basis of international treaties. For at least 167 years, the law of this country has been that a treaty does not create private enforceable rights unless it expressly or impliedly creates a private claim for relief. Fort, 921 F. Supp. at 526; cf. Bowarter S.S., 305 F.2d at 377-78 (Lumbard, J., dissenting) (seeking to apply principle that treaty is supreme law of land regarding intervention in labor dispute).


\textsuperscript{115} African American attempts to define American police brutality as a violation of their international human rights before the U.N. Sub-Commission on the Prevention of Discrimination against Minorities and before the U.N. Human Rights Commission have consistently been blocked by United States' government pressure, though there is some recent progress here. Moreover, there is considerable suspicion that the comprehensiveness of the United States' reservations, et al, to the International Covenant on Civil and Political Rights was partially racial in origin, including the provisions thereof based on constitutional federalism. Also, there is the venemous response of President Lyndon Johnson to Martin Luther King, in 1967, who asserted the right as Nobel Peace Laureate to call the Vietnam War illegal, with Johnson demanding that King stick to civil rights (and stay out of international affairs). Furthermore, the Free South Africa Movement of 1984-86 was an intense racial battleground, although many progressive whites joined Blacks in defining a new set of international legal interpretations and interests as not only binding on the United States against apartheid, but applicable in domestic American law. \textit{See} Richardson, \textit{The Gulf Crisis}, supra note 11, at 59 (discussing protest against United States foreign policy and birth of Free South Africa movement).
F. Why Did Marshall Deem the Doctrine to Be Necessary?

We can now explore the question of why Chief Justice Marshall deemed it necessary in Foster to insert a self-executing treaty doctrine into the Supremacy Clause.

As we have seen, Congress acted through statute and other means to establish a system of land commissioners in East and West Florida, as those lands were secured by United States conquest; this was done before formal treaty arrangements ceding those lands had been concluded with Spain. When the operative Treaty of 1819 was concluded in this regard, Marshall found its key language on quieting title relative to American settlers and other transferees in these same conquered lands to be ambiguous on its face pertaining to the obligations on the United States under international law (whether it was or was not bound to quiet the prior Spanish grants of title as referenced). This issue, under the Supremacy Clause, was equally ambiguous under federal law based on the Treaty.

Faced with ambiguous treaty language and a clear pattern of congressional intent to run a system sorting out land claims to facilitate white settler expansion, Indian removal and the extension of African-American slavery into these same conquered lands, Marshall saw Congress as having preempted the question of the United States' obligation to quiet titles directly through the Treaty, by interpreting the Treaty through Congress' actions in the prior enactment of federal law to implement, on the same lands, the process of quieting title through a land commissioner system.

Marshall apparently felt it proper for the Court to agree with Congress in its prior interpretation of the Treaty, because Marshall was a white political leader of his times, and who, notwithstanding occasional sympathetic dicta towards slaves and Indians, believed that Congress' authority to support and consolidate conquest, to extend slavery and to steer the country in that direction, should raise no constitutional opposition from the Court.

117. See id. at 306-07 (discussing introduction of ambiguity to treaty).
118. See id. at 314 (discussing treaties as supreme law of land).
119. See id. at 282 (discussing multitude of certificates issued by land commissioners conferring title).
121. See id. at 47-50 (noting Marshall's belief in power of state to maintain slavery).
The Court, however, was given an obligation by the Framers under the Supremacy Clause to rule on ambiguous treaty provisions in the same way it would rule on ambiguous federal statutory provisions. Doing so on Foster's facts would risk conflict with Congress in two ways: (1) the Court would be asserting authority to re-interpret ambiguous language that Congress had already interpreted by domestic implementation, which would place future courts on collision paths with Congress whenever the latter's intent clashed with the correct interpretation of future treaty provisions; and (2) other Justices on this Court in this case might have read the ambiguous language as not ambiguous at all, and voted to rule against a stated congressional policy.

In order to escape this risk of judicial/congressional conflict around this ambiguous treaty language, Marshall persuaded the Court to rule that United States treaty provisions were subject to a prescriptive condition before they could be domestically applied. This condition must be administered by the judiciary under a sufficiently wide test to give the Court enough leeway to harmonize the treaty language with any previous actions or interpretations that Congress had enacted regarding the same.

In doing so, the Court married the Supremacy Clause for treaties to a broad notion of congressional intent about how they should be implemented. But in later citations, stare decisis operated to convert the issue of the judiciary asking Congress "how" treaties should be implemented (executed), to that of telling Congress whether they should be executed.

This makes Percheman more interesting, because apparently nothing had changed in congressional intent relative to the facts of this case under the same Treaty language as in Foster. What did change was that Marshall now, four years later, found that that language, formerly opaque in English text on quieting title directly through the Treaty, was now clear under the Spanish authoritative version, and indeed mandated the direct authority of the Treaty without further execution. The United States argued in favor of the authority of the United States land commissioners under federal statute. Here, Marshall stopped short of exploring the

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122. See U.S. Const. art. III, § 2, cl. 1 ("The judicial power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . ").


124. See id. (pointing to conflict between treaty language and prior congressional edict).

125. For a discussion of subsequent Supreme Court decisions construing treaties, see supra note 104.


127. See id. at 57.
full intent of the parties and confined himself to their linguistic intent.\textsuperscript{128} The Court wished to hear very little of the story of the Treaty.

Marshall held that with clear treaty language relative to the intent of the parties under international law (where the Court held itself now obliged to consult the most accurate textual version of the parties’ intentions), the intent of the parties prevails, particularly if it is harmonious with related international legal rules.\textsuperscript{129} The intent of the treaty prevails over the same prior congressional interpretation, as in Foster, if the Court finds the language clear.\textsuperscript{130}

The Court in Percheman did not insert a prescriptive condition to rule whether the Treaty should be executed; it directly ruled on legal rights under a treaty provision.\textsuperscript{131} This decision of course, put the Court back in conflict with Congress’ intent. But, Marshall might have reasoned that the Treaty was signed subsequent to Congress’ placement of the land commissioners system.\textsuperscript{132} This would have allowed the principle of “last-in-time” to support judicial authority. Furthermore, the intent of the Treaty parties, once clarified, is also the intent of the United States President with Senate approval.\textsuperscript{133} Thus the Court can be said not to be directly in conflict with Congress, and not at all with the executive branch, because the Court here applies the treaty language rather than inserting a prescriptive condition to its application.

In other words, in Percheman, Marshall returned, but in a sense, accidentally, to the Framers’ intention under the Supremacy Clause that the Judiciary apply a treaty like it would a statute.\textsuperscript{134} “Accidently” because there is no authority under the Supremacy Clause for the Court to prescriptively intervene with a decision on whether rights in treaty text are or are not to be available to the claimants. They are available, and the Court may identify, interpret and apply them, but not decide that it would be inappropriate if they were available. In Percheman, Marshall still asserted the Court’s authority to decide whether it was appropriate for the right to be available to the land claimants, and unlike in Foster, he decided that it was. This produced a technically correct outcome under the Supremacy Clause through a constitutionally flawed interpretation, and thus “accidently.” Congressional intent may help shape the way a treaty or statute is to be applied, but not whether the Court will apply it. If a prescriptive condi-

\textsuperscript{128} See id. at 86-90 (demonstrating Marshall’s emphasis on litigant’s stated intent).
\textsuperscript{129} See id. at 88-89 ( remarking that party intent is to be given effect, especially when treaty language is clear).
\textsuperscript{130} See id. at 89 (distinguishing Foster v. Neilson).
\textsuperscript{131} See id. at 88 (discussing 1819 treaty with Spain and what legal rights were established and maintained under that treaty).
\textsuperscript{132} See id. at 89 (stating that board of commissioners was established by Act of Congress in 1822, and treaty was signed in 1819).
\textsuperscript{133} See id. at 88 (clarifying intent of parties to treaty, stating that intent was to guarantee security of private property rights).
\textsuperscript{134} See id. at 86-90 (construing treaty language).
tion governing *application* is to be inserted, it must be in the treaty or statute itself, or the international parties or Congress must make a new treaty or statute.\textsuperscript{135}

Thus *Foster* resolves itself into a *sui generis* anomaly, where the Court ruling on especially troublesome facts and, with a great respect or outright agreement for those particular congressional aims, reached out for a solution by rule that was horribly overbroad. Marshall’s corrective in *Percheman* has been generally ignored by the clanking machinery of *stare decisis*. Nonetheless, the Court in both *Foster* and *Percheman* did not want to know the full story or intent or consequences of either Congress or the Treaty parties relative to the land titles on which it was ruling to quiet one way or the other. That story defined the crucible of racial domination and the destructive policies and intent of the United States government from which emerged the Doctrine.

G. *Policy Recommendation*

Serious thought should be given to overruling the Doctrine. First, the Doctrine can be said to be unconstitutional per the intent of the Framers under the Supremacy Clause, which mandates prescription of treaty authority within domestic law. Second, it violates federal due process in its effects against people of color by denying their access to international rights as part of United States law. Third, the Doctrine can be argued as violating the separation of powers principle because of the Judiciary’s deference to Executive (and congressional) labeling of the treaty as self-executing or, especially, non-self-executing during the ratification process, a deference that detrimentally affects legal rights and duties under the treaty within the United States without constitutionally mandated law-making procedures being followed. Fourth, it promotes bad public policy by encouraging and consolidating the excesses of the President’s and Congress’ limiting and disclaiming strategies to curtail the domestic implementation of American international treaty obligations, especially regarding human rights.

The historical symmetry between the Doctrine having been born to uphold a government policy of racial conquest, and the Doctrine’s present status of being consistently used by the judiciary and political branches to bar people of color, in a context of continuing American racism, from invoking the full width of human rights to which they are entitled for protection, confirms the correctness of giving great weight and authority to the facts and decisions about the birth of the Doctrine in assessing its present constitutionality. Fundamental rights of African Americans, Black Indians and Native Americans were violated then, and are violated now; and race is the invidious historical, territorial, constitutional and international link through time.

\textsuperscript{135} See id. at 95-98 (examining treaty and Act of Congress to determine which should be applied based on language in each).
IV. The Southern Africa Tripartite Agreement Under International Law

There are considerable indications that as South Africa approached negotiations between the outgoing apartheid regime and the African National Congress ("ANC") in the late 1980s to set up a new constitution and elections for a black majority government, United States-Soviet-apartheid South Africa geopolitical agreements about southern Africa near the end of the Cold War severely disadvantaged the ANC in reducing the leverage it could exert in those negotiations. This may well have been an element in key outcomes of these negotiations about the future of South Africa, such as measures that an ANC-led government could be empowered to take to eradicate, beyond political apartheid, economic apartheid. The question of international influences on racial leverage in the South African constitutional negotiations is being scrubbed from the international legal history of these events.

The reference here is to the Tripartite Agreement sponsored by the United States in December 1988, with apartheid South Africa, Angola, the Soviet Union and Cuba playing important collateral roles. Under the Agreement, South Africa’s withdrawal from Namibia and that territory’s subsequent independence were traded off, in part, for the Soviets and their allies cutting off support to seven ANC military training camps in their territory and forcing Angola to agree to close them. Shortly thereafter the Soviet Union changed its policy of support for the ANC by terminating its support of other ANC camps in southern Africa that supported the ANC liberation struggle in South Africa itself. This forced most of the camps to soon close, and the Soviet Union urged the ANC to cease its armed struggle and immediately open negotiations with the apartheid regime. This directly compromised the ANC’s capacity to wage its war of


137. See Allister S. Sparks, Tommorrow is Another Country: The Inside Story of South Africa’s Road to Change 235 (1995) (stating that despite tremendous opportunity granted by South African free elections, there are still severe economic issues to be overcome).


139. See id. at 958 (“All military forces of the People’s Republic of South Africa shall depart Namibia.”).

liberation against the apartheid government, helped ensure that whites would not be defeated in South Africa, and pushed the ANC towards negotiations about a new South Africa on a timetable that was very likely premature for its maximum advantage and leverage against Pretoria.\textsuperscript{141}

The Tripartite Agreement was justified at the time under United States-favorable, southern Africa-related geopolitical rationales relative to decreasing Soviet influence in Africa, removing Cuban troops from Angola, and ending South Africa’s illegal occupation of Namibia.\textsuperscript{142} Its consequences were directly racial; they were aimed against ANC capacity to effectively continue its guerrilla war against the white minority apartheid Pretoria regime.\textsuperscript{143} It therefore gave the white South African minority increased leverage at a crucial point relating to determining the future of South Africa as shaped by the anti-apartheid struggle. Washington’s geopolitical justifications included characterizing this trade-off as the best way to end South Africa’s illegal occupation of Namibia, which indeed subsequently occurred in 1990.\textsuperscript{144}

However, the specific long-time objectives of Pretoria to strike whatever blow to weaken the ANC in the region were adopted by all the participants to the Agreement. The interests of the ANC, which represented the majority of the South African people, were trivialized, rendered incidental and suppressed as being worthy of sacrifice to the Agreement’s other objectives and thus to Pretoria’s welfare. Neither the ANC nor the South African people consented to this; their consent, under the conventional state-centric and positivist perspectives of international diplomacy, was considered unnecessary to obtain and, indeed, inappropriate, because the ANC and the South African people were non-sovereign, non-state entities that were classically seen as lacking both standing and authority in such negotiations.\textsuperscript{145} Although the closure of the ANC camps, the South African demands in this regard, the change in Soviet policy and the harm to ANC interests were reported in the journalism of the time, the relatively scant mention of the implications for the ANC, plus the public interna-


\textsuperscript{142} See \textbf{CROCKER}, supra note 136, at 68-69 (discussing United States policy goal of removing Cuban forces from Angola and South African forces from Namibia).

\textsuperscript{143} See id. at 485-86 (noting that after Tripartite Agreement, there was no longer any threat of “armed struggle” from ANC forces).

\textsuperscript{144} See Agreement, supra note 138, at 957 (stating that South African occupation of Namibia was to end).

\textsuperscript{145} See \textbf{CROCKER}, supra note 136, at 490-92 (noting lack of ANC importance subsequent to negotiations).
tional selling of the validity of all of the Agreement's other geopolitical justifications, comprised an essential element of the loss of black South African leverage as a result of racially directed objectives and decisions being "scrubbed" out of the subsequent international legal history of these arrangements.  

Part of the scrubbing dynamic was both the public highlighting of this strategy as a necessary condition for Namibian independence and the highlighting of its success in securing the withdrawal of the Soviet Union as the communist superpower from southern Africa. Therefore, these actions could be implied through a meta-language in American and Western public discourse as both an anti-communist and an African racial equity triumph for American diplomacy. These actions probably accelerated the advent of Namibian independence, which indeed has considerable historic importance in the liberation of the Namibian people.

However, the consequential use of this strategy in public implication and justification—as a triumph of white Western (conservative) governments to bring a halt to the regional expansion of South African apartheid while fostering the independence of an African people (with the help of a considerable United Nations peacekeeping force in 1990)—is consciously or unconsciously racially co-optive, on several levels, in the process of interaction between African-heritage peoples, Americans and Europeans in the international community. It blocked from public view and analytical importance (and continues to do so) the impact on Black South Africans of the regional trade off of priorities in Africa made totally by Western and Soviet government officials, with no meaningful participation in these essential geopolitical decisions by representatives of the African peoples involved. Those African peoples were used both to legitimize this trade-off as a confirmation of the alleged sincerity—regarding audiences of other African peoples in the international community and for African Americans in the United States—of white Western government officials and leaders in facilitating Namibian independence, and to pay for

146. See Burns, supra note 140, at Al (noting Soviet shift in policy towards South Africa); Wren, Guerrillas, supra note 140, at 16 (noting closure of ANC base camps).

147. Compare Wren, Guerrillas, supra note 140, at 16 (discussing ANC base closures), with Burns, supra note 140, at Al (discussing Soviet withdrawal of support from ANC), and Wren, Pretoria Walkout, supra note 140, at A8 (discussing Namibian independence).


149. See Ottaway, supra note 148, at Al (citing President Bush's dedication that "American diplomacy will continue to encourage African ... governments to provide maximum support to a process of negotiation").

150. See Crocker, supra note 136, at 386-91 (discussing Soviet and American dealings on South Africa).
this trade off in the giving away of ANC regional military support capabilities to the Pretoria regime.\textsuperscript{151}

The regional trade-offs were racially co-optive in yet more ways. First, the arrangement by outside Western diplomatic priorities of this negotiating structure barred meaningful discussion of a solution that both preserved ANC military support leverage into South Africa for the liberation struggle and also removed South African military forces from Namibia. It did so, in large part, through a stream of Western governmental decisions to forego putting even greater economic pressure on Pretoria than the United States executive had been reluctantly forced to do under the Comprehensive Anti-Apartheid Act of 1986.\textsuperscript{152} That Act had been produced by a historic mass movement, the Free South Africa Movement from 1984-86. That movement had considerable African American leadership that pressured Congress to pass such an Act and make it veto-proof against President Reagan’s fervent desire to continue American economic cooperation with the apartheid regime.\textsuperscript{153} For years the anti-apartheid movement and the ANC had been demanding direct economic sanctions against South Africa by the European Community, the United States and the United Nations.

Second, the subsequent interpretation in publicity and first assessments of these Western/Soviet moves as being the only available “realistic” option, played off the rights of the Namibian people as an African people against the rights of Black South Africans as another African people, as if protecting the rights of both peoples in the same transaction was an inconceivable objective in such geopolitical negotiations.\textsuperscript{154} Such assessments were aided by conventional interpretations of international law referring to the greater eligibility for the realization of the right to self-determination by the Namibian people who inhabited an International Territory administered by the United Nations, as compared to Black South Africans whose right to self determination was constantly challenged by arguments from Pretoria that their fate was an internal matter of domestic jurisdiction within the borders of a sovereign state, an argument that found continuous threads of empathy among conservative lawyers and policy makers.

\textsuperscript{151} See Wren, \textit{Guerrillas}, supra note 140, at 16 (noting that ANC bases in neighboring countries were to be closed); Wren, \textit{Pretoria Walkout}, supra note 140, at A1 (discussing United States sincerity towards facilitating independence).

\textsuperscript{152} See Comprehensive Apartheid Act of 1986, 22 U.S.C. § 5501 (1986) ("prohibit[ing] loans to other investments in, and certain other activities with respect to, South Africa").

\textsuperscript{153} See Richardson, \textit{The Gulf Crisis}, supra note 11, at 59 (discussing Free South Africa Movement and pressures exerted by that Movement leading to congressional sanctions).

\textsuperscript{154} See CROCKER, supra note 136, at 397 (demonstrating importance to America of Namibian independence, but making no mention of Black South Africans).
in America and Western Europe.\textsuperscript{155} Compounding the injustice was the added recognition as a legitimate and lawful government, worthy of international protection against outside forces that would undermine it, received through the Tripartite Agreement by the Pretoria apartheid regime as part of the trade-off in the United States/Soviet geopolitical strategy. This recognition persisted as the Soviet Union sold out the ANC in its struggle against that regime by suddenly calling for it to lay down its arms and negotiate, and in doing so give up considerable negotiating leverage with little or nothing at that time promised in return.\textsuperscript{156}

This added dollop of recognition to Pretoria was extended notwithstanding the legal fact that the illegality of apartheid as a state system had long been established in international law, including that apartheid had been defined under the same law as a crime against humanity.\textsuperscript{157} The Western/Soviet uses of recognition strategies to protect the Pretoria regime attempted to transfer to Pretoria the leverage that the same geopolitical scheme had removed from the ANC by demanding and getting the closure of its regional military support bases just prior to the upcoming South African negotiations about that country's constitutional future.\textsuperscript{158}

This was no less than a windfall of leverage and breathing room for a beleaguered apartheid regime; it confirmed the continuing importance of white minority South Africa and its control structure to Western economic and political interests.\textsuperscript{159}

Namibia represented a joinder of Western foreign policy priorities to racial co-option strategies. Further, it showed the use of the latter in the former, by employing Namibia as a cloak and an affirmative defense in attempting to shape the elements of the South African power equation in favor of the apartheid regime to the disadvantage of the ANC. This resulted in the scrubbing of these racial decisions from international legal history by the general omission or denial that they should be analytically included in any rights discussion of Black South Africa regarding its constit-


\textsuperscript{156} See Agreement, supra note 138, at 958 (recognizing Namibian independence); Burns, supra note 140, at A1 (noting Soviet withdrawal of support for ANC); Wren, \textit{Guerrillas}, supra note 140, at 16 (noting ANC's loss of military means).


\textsuperscript{158} See Wren, \textit{Guerrillas}, supra note 140, at 16 (noting ANC base closure).

\textsuperscript{159} See CROCKER, supra note 156, at 433 (discussing South African insistence, and Cuban-Angolan agreement, that ANC bases be closed in order to continue bargaining process).
tutive negotiations with the apartheid regime. This scrubbing thus constructs the historical "fact' that the objectives and decisions of the ANC in this particular context were highly counterproductive or marginal regarding "reasonable" Western geopolitical decisions. This "reasonable-ness" encompasses their great power imposition and racially co-optive objectives regarding the immediate future of both Namibia and South Africa, and the degree of comparative leverage and authority that Black versus white South Africa would have in Western official discourse about South Africa’s new constitutional order. The independence of Namibia in 1990 did to some extent raise further expectations of an upcoming abolition of political apartheid in South Africa. But the erasure from historical consideration of the boost in legitimacy given to Pretoria in 1988 to 1989 through the Tripartite Agreement distorts the history of the march in South Africa through very difficult negotiations to the 1994 elections by concealing this element of white-dominated governments’ international support for the apartheid regime, and thus their support for the latter’s wide spectrum of self-protective demands about whites’—especially direct apartheid participants’—future in the new South Africa.

A. Two Suggestions About Historical Consequences

A complete discussion of the consequences and historical causality of this marginalization of ANC/Black South African interests in the contemporaneous and historical depiction of the negotiation, conclusion and implementation of the Tripartite Agreement is beyond the scope of this article. I make two suggestions in this regard, however, as proposals for further inquiry.

First, I suggest that one consequence of this dollop of recognition given to the apartheid Pretoria regime was to strengthen international expectations that not only the minority rights but the minority privileges of Afrikaners and other white South Africans must be protected under the new South African constitution instituting Black majority rule. It was a question of enhancing such expectations and not creating them relative to the ANC and white Nationalist Party negotiating process. Those expectations in vague form began to appear as early as the first secret contacts in the mid-1980s between the ANC and South African apartheid government officials. The latter included communications and contacts between Prime Minister Vorster and Nelson Mandela while still imprisoned, and

160. See id. (demonstrating lack of participation in negotiations by ANC, and perceived unimportance of ANC political agenda). This perceived unimportance of ANC interests led to a scrubbing of their role in the process. See id. at 441-45 (discussing Tripartite Agreement, but omitting discussion of ANC).

161. See id. at 433 (demonstrating unimportance of ANC objectives as compared to Western initiatives).

162. See id. at 441 (demonstrating unimportance of ANC interests).
otherwise with leaders of that government.\textsuperscript{163} Led by Mandela from his prison cell and Oliver Tambo from outside of South Africa, the ANC demanded and obtained the principle of majority rule. Through Mandela, the organization struck a conciliatory tone in assuring Afrikaners that the aim of South African Blacks was not to drive them into the sea, and that the New South Africa held an important place for them.\textsuperscript{164}

The added dollop of international recognition from the Tripartite Agreement for the apartheid Pretoria regime in December 1988-at a point when there were clear signs that there would probably soon be a change in the South African regime, and even that Mandela might soon be released from prison-arguably provided Pretoria, which was now being buffeted severely by events inside South Africa and internationally by the anti-apartheid movement, while negotiating behind the scenes with the ANC, with at least new points of diplomatic strength. The recognition mirrored a demand, from both inside and outside of South Africa, that some legitimacy must continue to be accorded to that regime, notwithstanding that it had long been discredited in law and decency.\textsuperscript{165} It mirrored a demand that excessive credit quickly be accorded to its leaders for the halting changes they were finally beginning to be willing to make, and even that there be some policy empathy for the "dilemma" they found themselves in regarding their own racially fearful perceptions of their own future under a Black majority regime.\textsuperscript{166} It may have played a role in the objectionable decision of the Nobel Prize Committee shortly afterwards to award jointly the Nobel Peace Prize to Mandela and DeKlerk, thus placing DeKlerk on the same moral plane regarding South Africa and anti-apartheid as Mandela.\textsuperscript{167} Many saw this as a travesty.

International legal doctrine regarding the recognition of states and governments played a helpful role in providing legal and normative barricades behind which Pretoria could continue to find shelter as long as that regime formally existed. This would seem to be the case regarding policy in the United States, even though there was a strong issue in law and fact as to whether the United States was obligated to withdraw its recognition of Pretoria.\textsuperscript{168} Under international law, there has long existed a spectrum

\hspace{1cm}\textsuperscript{163} See SPARKS, supra note 137, at 36-45 (discussing Mandela’s frequent removals from prison in order to meet with government officials).

\hspace{1cm}\textsuperscript{164} See id. at 56 (noting perceived long-term success of Mandela’s meetings conducted while in prison).

\hspace{1cm}\textsuperscript{165} See CROCKER, supra note 136, at 445 (demonstrating renewed South African legitimacy after signing of Tripartite Agreement).

\hspace{1cm}\textsuperscript{166} See id. at 446 (noting political credit that began being granted to South African leadership).

\hspace{1cm}\textsuperscript{167} See Bill Keller, Mandela Shares Nobel Accolade with De Klerk, N.Y. TIMES, Oct. 16, 1993, at A1 (noting subdued public reaction to shared Nobel award, and complex nature of situation).

of legal claims regarding the discretionary right of sovereign states to recognize a new government or state, the legal criteria on which this has been done and even should be done, and the legal consequences of adopting particular legal interpretations at various points along the spectrum. One end of the spectrum is defined by the constitutive theory of recognition: that the act of recognition confers international personality on an entity purporting to be a state or legitimate authority as a new government of a state.\textsuperscript{169} The other end is defined by the declaratory theory; that the existence of a state depends upon the facts on the ground, and thus, the act of recognition is declaratory of the independent existence of a state.\textsuperscript{170} Many authorities give the nod to the declaratory theory, though there is still some dispute.\textsuperscript{171}

During the Carter Administration, the United States announced its adherence to the declaratory theory. The temptation of the world's most powerful nation to use recognition under international law as a public strategy of its own foreign policy, however, is probably overwhelming. This is especially so because recognition decisions by the executive branch can signal strong approval or disapproval, and therefore American assistance or opposition for a new regime. Recognition decisions may also have domestic legal consequences for areas such as foreign assets within the United States.\textsuperscript{172} Arguably, the Reagan Administration quietly modified American policy more towards the constitutive school.\textsuperscript{173}

On the other hand, the legal doctrine of recognition played a prominent role in the anti-apartheid struggle in southern Africa, so much so that the constitutive theory of recognition has arguably penetrated the expectations of American, European and other populations, while penetrating even more deeply the expectations of African-heritage peoples. There are two prominent examples in this regard of applying the legal doctrine of recognition, spearheaded in the United States by international lawyers


\textsuperscript{170} See id. at 124 n.8 (describing constitutive and declaratory or objective school of recognition).

\textsuperscript{171} See Henkin \textit{et al.}, \textit{supra} note 14, at 231 (noting controversy between constitutive and declaratory schools leans towards acceptance of declaratory theory).

\textsuperscript{172} See Bank of China \textit{v.} Wells Fargo Bank & Union Trust Co., 92 F. Supp. 920, 923 (1950) (stating that "the action of the political department of the government in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to draw for themselves its legal consequences in litigations pending before them" (citing \textit{Guaranty Trust Co. v. United States}, 304 U.S. 126, 138 (1938))).

\textsuperscript{173} See Richardson, \textit{Obligation to Withdraw}, \textit{supra} note 168, at 157-58 (noting domestic pressure of public opinion within United States to withdraw recognition).
such as Professor Goler Butcher and Gay McDougall. The first is the refusal of the international community to recognize the breakaway apartheid government of Southern Rhodesia as the lawful government of that territory, in the context of United Nations economic sanctions against that regime from 1965 to 1977.\(^\text{174}\) While the United States formally refused to recognize the Ian Smith regime, constant and significant right-wing pressure was exerted, coupled with a “mineral resources essential to the United States” argument, to both recognize and break sanctions.\(^\text{175}\) Both the international community’s refusal to recognize the regime, and the projected consequences of the United States breaking that ban, if it had, were powerful mobilizers of international expectations about the legitimacy of that regime.\(^\text{176}\) Clearly the constitutive theory of recognition was in force.

The second prominent example consisted of the international community’s rejection of a recognition strategy concocted by the South African apartheid government in the mid-1970s to divide international opposition against it on international legal grounds.\(^\text{177}\) Ten “homelands” were created in remote and desolate regions of South Africa as a first strategy to forcibly export several million Black South Africans out of South Africa proper by legally redefining the country to maximize white minority advantage. Beginning in the late 1970s, South Africa declared four of these “homelands” to be “independent” governmental structures and territories, declared them to be no longer part of South African territory and their inhabitants no longer citizens (though still able to enter for work in the apartheid economy), “recognized” them as “sovereign” states and began a campaign for the international community to similarly recognize

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these entities. Due to intense international effort by the members of the anti-apartheid movement, for whom this was a major issue, the apartheid government’s strategy failed and these entities remained unrecognized beyond Pretoria. Again, the constitutive theory of recognition was in play here, where part of the definition of a state was deemed to include minimal international legitimacy. Again, there was significant right-wing pressure within American political discourse to recognize these “homelands.”

Though I could mention important questions concerning the international community’s refusal to recognize the legitimacy of apartheid South African authority over the territory of Namibia prior to its independence, I now turn to Pretoria itself. In 1910, following the Boer War, the Pretoria government was internationally recognized as the government of a sovereign South Africa, notwithstanding deadly patterns of racism already in place against the majority indigenous South Africans. To shorten a longer legal history, from that day until almost up to the epic election in 1994 for majority rule, a succession of apartheid governments have overtly relied on the recognition of South Africa as a sovereign state, in numerous legal fora where apartheid has been challenged under international law, as the basis of their drumbeat arguments that the way they treated its Black and “Colored” citizens was an internal matter “essentially under the domestic jurisdiction” of a sovereign state, and was therefore, barred from international scrutiny.

Thus, in 1955, when a United Nations subcommittee decided it had the competence to hear petitions against apartheid from South African citizens, a major step in international human rights law was taken toward the legal conclusion that apartheid is per se illegal. Throughout the anti-apartheid struggle, South Africa’s previous recognition as a sovereign state was used as a bulwark against effective international legal scrutiny,

179. See Richardson, Self-Determination, supra note 155, at 214-17 (noting failure of apartheid government to garner support for recognition of independent “homelands”).
180. See J. Clay Smith, Jr., United States Foreign Policy and Color Teal Butcher, 37 How. L.J. 139, 181 (1994) (discussing 1984 proposal by ABA’s legislative committee of young lawyers to support United States’ recognition of South African “homelands” policy). The American anti-apartheid community mobilized against this resolution, which resulted in its revocation approximately two years later by the plenary assembly of the American Bar Association. See id. at 181 (noting proposal never passed due to rallying of Black bar groups and others to oppose recognition).
182. See, e.g., Richardson, Obligation to Withdraw, supra note 168, at 159 n.29, 161 n.35 (noting subsequent apartheid government’s reliance on Pretoria’s arguments).
183. See Richardson, Self-Determination, supra note 155, at 190-93 (discussing United Nation’s first major step in its renunciation of apartheid).
and as a quasi-moral claim appealing to nationalist sentiments in the world community, until international law changed under the facts of the massive injustice of the apartheid regime.\textsuperscript{184} It is in this context that the dollop of recognition granted to a Pretoria regime by major outside states through the Tripartite Agreement, as that regime was wobbling in its final years, must be evaluated.

The Tripartite Agreement was fostered by the Reagan Administration, which, throughout the 1980s, proclaimed an official United States policy of "constructive engagement" towards apartheid Pretoria. This policy was one of refusal by the United States to agree to economic sanctions against that regime. The refusal was coupled with an approach of gentle negotiations and anodyne protests regarding its brutalities under apartheid, rationalized by arguments that only this approach could induce the end of apartheid. But this United States policy was essentially undercut by the Free South African Movement, which forced Congress to pass the International South African Anti-Apartheid Sanctions Act in 1986, levying a number of economic sanctions on that regime and rendering the Act veto-proof against the strong and even desperate opposition of the Reagan administration.\textsuperscript{185} This sequence of events revealed that the Reagan policy towards the white minority South African regime was not in the last instance strategic, but racial, with unstated aims that whites' "kith and kin" would be protected by the United States.\textsuperscript{186} The dollop of recognition thus given to Pretoria was an outgrowth of "constructive engagement" as a tattered policy. It supported what remained of the "domestic jurisdiction" claims of that regime and, against the demands of massive Black demonstrations at that time throughout South Africa for justice and majority rule, supported Pretoria's demand that it was still the lawful government of that country, and therefore was owed, in law and international policy, a measure of "internal" latitude—in what was by then a thoroughly internationalized situation—to make decisions about governing the country notwithstanding its illegitimacy.\textsuperscript{187} Under this rationalization, the ANC was marginalized to a protest organization over which the "government" had final authority, including that to demand that the ANC give up its claim to lawfully use armed force against apartheid. As the historian George Fredrickson has well demonstrated, there is a racial symbiosis in the histories of


South Africa and the United States, and this dollop of recognition is well reflective of long patterns of white-to-white cooperation. The anti-apartheid movement does in turn reflect, in part but not totally, a pattern of international African heritage solidarity. And thus we see strategies of racial co-option and marginalization against African and African-heritage peoples pushed into the international community as the official policies of these two states.

Finally, I offer a second suggestion as a basis for further inquiry regarding the historical consequences of the Tripartite Agreement. I suggest that the undermining of ANC leverage against the Pretoria regime, as spelled out above, may have helped to make the ANC more vulnerable than it otherwise would have been. This vulnerability encompassed a range of issues, not least of which was the ANC renunciation of its commitment to lawful armed force against apartheid, in its independence negotiations with Pretoria between 1990 and 1994. This rolling negotiating process generally pitted the Pretoria regime and the international supporters of a continuing, cohesive and economically powerful white South Africa against the Nelson Mandela-led ANC, the overwhelming majority of Black South Africans, some white South Africans and the ANC’s international supporters who demanded constitutional arrangements that would produce both political and economic liberation for Black South Africa. The ANC was bedeviled by the double roles played by most Western governments and multinational corporations who publicly favored the end of “political apartheid” in announcing their support of the ANC relative to building “a new South Africa,” but who supported the DeKlerk-led Nationalist Party in the process by opposing any proposed constitutional arrangements that would diminish the continuing leverage of white South Africa and its major corporate combines and their allies over the South African economy.

I suggest that integral to this down-stream exploitation of ANC/Black South African vulnerability were the concerted American-European de-


190. See Crocker, supra note 136, at 485-86 (noting Tripartite Agreement resulted in end to armed resistance to apartheid).

191. See Richardson, The Gulf Crisis, supra note 11, at 80 (discussing contrary interests of international support).

mands, from both governments and the high corridors of international capitalism, that the ANC publicly and constitutionally renounce important plans long-foreseen in its Freedom Charter. The Charter included plans to address the massive and racist distortions of the apartheid economy, to address the poverty of most Black South Africans and to begin the process of equitably redistributing the national wealth by constructing a constitution and government having the authority to nationalize—or take similar steps regarding—the heights of that economy, including the ten or so dominating economic combines. These combines were internationally quite well connected and were led by the massive Anglo-American Corporation. During the years of the negotiations, there was an increasing media campaign in the United States and Europe against the ANC having such authority, which only added to the Nationalist Party’s leverage in pushing for the constitutionally protected continuation of white South Africa’s economic privileges after 1994.

There were public implications from American and other Northern Tier sources, which threatened denials of needed economic assistance to a new South Africa whose national economy was not organized strictly on free market/free trade principles, whose government was empowered to nationalize parts of the economy and who did not proclaim its welcome of overseas foreign investment as the major outside source of its development capital. For whatever reasons, the ANC acquiesced to these con-


194. See Makau wa Mutua, Hope and Despair for a New South Africa: The Limits of Rights Discourse, 10 Harv. Hum. Rts. J. 69, 90 n.155 (1997) (“The Freedom Charter advocated the restoration of the country’s wealth to all South Africans and the transfer of mineral wealth, banks, and other industrial monopolies to ownership by the people.”).


196. See Richardson, The Gulf Crisis, supra note 11, at 80 (arguing European and American campaign against nationalization of economy).

197. See Paul Taylor, Nations Weigh Aid to World Bank, IMF “Itching” to Make Loans, Wash. Post, July 6, 1993, at A8 (noting World Bank’s readiness to loan up to billion dollars per year “once a new, democratically elected government is in place”). Presumably, this means a democratically elected government that subscribed to the principles outlined by Secretary of State Warren Christopher in his May 1993 speech, which emphasized assistance going to African nations with free market economies. See Jeffrey Herbst, The ANC, Pretoria Return to Table, But Without a Significant Other South Africa, L.A. Times, Oct. 4, 1992, at M2 (stating: As the ANC becomes less and less a guerrilla army and more and more the government-in-waiting, it has been forced to soften its rhetoric on the economic reforms it vows to implement once in power. During the last two years, the ANC has begun, reluctantly, to come to terms with the realities of the complex South African economy and what can and cannot be done, in the short-term, to redistribute income (emphasis added); see also Scott Kraft, ANC Crash Course in Capitalism After Years of Marxist Rhetoric, L.A. Times, July 23, 1993, at A1 (describing economic “reorienta-
economic conditions and this national economic system was initially put into place. Economic apartheid continues to persist. 198

In this connection, I suggest finally, as the basis for a more complete future inquiry, that ANC/Black South African interests regarding the interference of international capital, and its sponsoring government, in the epic constitutional negotiations have been marginalized in the unfolding international legal history of these events. I suggest that further research and analysis may well demonstrate that a number of factors, including the Tripartite Agreement and its dollop of recognition to Pretoria, combined to reduce, or attempt to reduce, ANC leverage to protect the interests of international capital, as those interests have racial outcomes and objectives related to the South African economy and the welfare of the mass majority of Black South Africans, subsequent to the promulgation of a new majority-rule constitution.

And I suggest that, beyond the recognition questions above, interpretations of international law were invoked and mobilized at crucial points by Western governments and others sharing the same interests, but that the subsequent international legal history will not, unless monitored and corrected, assess and evaluate these racial objectives and outcomes. Rather, the history will tend to subsume them under implicit judgments about the "reasonableness" of Western policies and legal interpretations: for example, the "reasonableness" of policies protecting foreign investment and free trade, as compared with the demands of the Black South African majority about the requirements of their own economic needs.

198. See Henry J. Richardson, John Dugard's International Law: A South African Perspective, 89 Am. J. Int'l L. 656, 658 (1995) (book review) (noting persistence of economic apartheid). By economic apartheid, I refer to the continuing situation in South Africa, quite similar to that under political and legal apartheid, of the distribution of wealth and access to economic resources explicitly, but inversely, mirroring the racial demography of the country, and whites continuing to be privileged in this regard in a degree quite similar to the apartheid period. To the extent that economicist and business-based perspectives are currently dominant in political, legal and international power analyses, it is misleading to distinguish between economic and other "kinds" of apartheid, since the former is seen—not only by academics, but through intense divisions among South African blacks—as defining the latter. This does not diminish the importance of the advent of the 1994 elections, constitution and Mandela government, but it puts them in perspective regarding the magnitude of the governmental challenges and the degree of underlying change towards liberation, which has or has not occurred from 1994 to the present day. Free market/free trade approaches strongly tend to consign national economic disparities to the gentle care of the free market, and as has been often remarked, the free market nationally and internationally is hard on poor people and peoples, and academic and public policy thinking in this regard may be even harder in connecting the acquisition of wealth to individual and group moral rectitude. See Mike Muendane, South Africa: Dream of a Better Life, SOWETAN, Apr. 20, 1999, available in 1999 WL 10803670 (noting powerful Western pressures, forced adoption of economic and political paradigms, resultant economic impoverishment, and calling for a change in paradigm).
V. Conclusion

There would appear to be processes of regular invocation, prescription and application of legal interpretations that scrub the history of economic and political strategies and techniques upholding racism and domination against peoples of color out of much writing of international legal history, as well as out of the history of internationally related domestic legal doctrine. This scrubbing distorts the history of the evolution of international law by leaving it incomplete, particularly regarding the allocation of overall costs under particular doctrines and interpretations between African-heritage peoples and European-heritage peoples. It tends to create structural disadvantages under international law for peoples of color, in ways similar to those so well assessed regarding women in the international community by Professor Hilary Charlesworth and her colleagues.199

Such strategies further tend to undercut the gathering of evidence used to identify past wrongs against African-heritage peoples and others, and used to assess them under international legal principles and declare their eligibility now for reparations and similar remedies. They undercut the jurisprudential competence of courts, executives and even reluctantly willing legislatures to prescribe the necessary legal obligation, so that the evidence can demonstrate its violation, the present consequences of that violation, and the obligation of a legal remedy to peoples of color. In doing so, this scrubbing removes vital knowledge from peoples of color about themselves and puts them on the defensive throughout the community about the validity of their own histories and perspectives about law.

Developing methodological and legal interpretive principles to eliminate the scrubbing of information from international legal history about past racial oppression, oppression done by identifiable decisions and actors to the voiceless, is essential to “giving a voice to the voiceless”200 under international law. But, in an affirmative sense, the stake of the voiceless in the international legal process, growing out of their own group histories, must be identified and made part of both the jurisprudence and the interpretation of international law, and thus part of its history, because of the impact that this law has had on them, and because this impact makes them part of the story of its authority.

Part of the new synthesis that Critical Race Theory gives to international law must be the creation of ever-expanding space in the international community and in national communities, including the United States, for the ongoing refinements of the vertical history of each people of color, and of all such peoples together. This space must include the


valuing in the community of those refinements, and the valuing of substantive and procedural refinements in the applicable community law to use those refinements of history as legal evidence regarding not only liability for new findings of pre- or post-reparations wrongdoing, but also regarding more daily legal decision making, free from racial or cultural co-optation.

These refinements of the vertical histories of each people of color must include the legal histories of such peoples: the histories of their demands, aspirations, and actions about "law" as they desire to be governed. Each people of color has its own jurisprudence, which has been trampled under the supervening law of a conquering or dominating group, or which is otherwise ignored, undiscovered or unwritten. This includes their expectations about international or "outside" law as they would consent or understand for it to impact fairly on them and what it would mean in their lives. These legal histories must be incorporated into the accepted sources of international law, simply because these peoples were generally prevented—and absolutely so before the decolonization movement in the 1960s—from helping to create conventionally defined international law governing the international community, but were often oppressed by its interpretations made by others.

African Americans have their own jurisprudence, including in international law, irrespective of its non-recognition in conventional legal history, whose origins arose prior to the birth of the United States, and whose development is coterminous with, but not identical to, American law. It includes, relative to the present discussion, the principle that in American law the courts, when facing the issues encompassed in the self-executing treaty doctrine, should act to encourage, and not discourage, the introduction of wider sources of rights from international law. Similar arguments, mutatis mutandis, can be made for the jurisprudence of Black South Africans and other South Africans of color, including some principle demanding that the application of law and legal responsibility for the allocation of costs to various groups under the 1994 constitution should be informed by comprehensive narratives of international/national decisions and process leading to that constitution, which convey the true costs these peoples paid for the South African nation to have it.201

Both African Americans and Black South Africans have been disadvantaged by the scrubbing of evidence of racial manipulation out of the writing of international and national legal history. It amounts to a long process of international and domestic silencing of their voices. This article has tried to show at least some of the ways in which this has been done. Legal history as it serves the entire American and human community can

201. Cf. Scott Kraft, ANC Makes Key Concessions on S. Africa Power, L.A. TIMES, Nov. 26, 1992, at A1 (discussing major concession by ANC to share power with white government after new multi-racial elections, because of perceived need for "urgent breakthrough").
only benefit if the silence is now replaced with the full tapestry of historical actions and expression.