‘A Jus gentium for America’.  
The Rules of War and the Rule of Law in the Revolutionary United States

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In juridical histories, justifications of war, conquest and dispossession are often treated as corruptions of European law and justice brought about by its imperialist and colonialist uses. This article inverts that view. Taking Vattel’s Law of Nations (1758) as its key text and revolutionary America as its key context, it argues that war, conquest and dispossession were constitutive features of European political jurisprudence – the “law of nature and nations” – whose core premise was that justice does not exist between nations. Rather than being symptomatic of the corrupting backwash of law’s imperialist and colonialist deployment, war and conquest are in fact indicative of the political-jurisprudential continuity that the law of nations established between European state-formation and colonialist empire-building.

To be sure, reason remains immutable, but when reason argues in behalf of both sides so that it is doubtful where the preponderating weight lies, we must appeal to custom for a decision.¹

Introduction

One of the striking features of a good deal of recent historiography dealing with the imposition of European law in colonial contexts is the manner in which it posits an initial period of juridical reciprocity or pluralism, in which shared norms had the potential to establish just relations between colonizers and colonized. The moment of a just foundation proves fleeting, however, as the plural or cosmopolitan justice of first contact is quickly corrupted, by racial supremacism, bad anthropology, European land-hunger, and imperial rivalries. It is replaced by a legal order whose defining characteristic is to impose a univocal jurisdiction on indigenous inhabitants in the interests of subjecting them to the alien rule of a European territorial sovereign state.

For some historians of colonial America and Australia the initial period of juridical openness is grounded in humanitarianism and scientific curiosity, while its corruption through racism and anthropological ignorance is expressed in the doctrine of *terra nullius*: the legal means of political expropriation and subjection. Others have located an initially reciprocal legal and moral culture in early modern natural law, which had the capacity to recognize indigenous land rights and sovereignty until a corrupting mix of European racism, land hunger and imperialist politics allowed it to be replaced by a positivist law doing the bidding of the imperial sovereign, with

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1) Research for this article was made possible by the award of an Australian Professorial Fellowship. The arguments were presented at the symposium “Between Indigenous and Settler Governance”, University of Western Sydney, August 2011, where Anna Yeatman provided incisive commentary. A short version of the arguments will be appearing in the conference proceedings, to be edited by Lisa Ford and Timothy Rowse. Evolving drafts have benefited from comments by Mark Finnane, Mark Hickford, Martti Koskenniemi, Paul McHugh, Shaun McVeigh, David Saunders, Andrew Sharp, Benjamin Straumann, Ryan Walter and Damen Ward.

2) Stuart Banner, “Why *Terra Nullius*? Anthropology and Property Law in Early Australia”, *Law and History Review* 23 (2005): 95–131. Banner’s account manifests the tendency to cite a wide variety of source utterances – from explorers, botanists, sailors, missionaries, lawyers, convicts and officials – as exemplifying the opposed moral qualities of humanitarian openness and racist ignorance, but without attempting to clarify in what capacities these utterances were made, for what purposes, and with what effect. For a persuasive criticism of the foundational significance attributed to the *terra nullius* doctrine, see Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in North America”, in J. McLaren, A.R. Buck, and N.E. Wright (eds.), *Despotic Dominion: Property Rights in British Settler Society* (Vancouver: UBC Prss, 2005), 50–78.