The Political Uncommons

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Introduction

> A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably. (Wittgenstein 1965: 115)

The commons is increasingly proposed as an economic and legal solution to global and regional problems. Commons are often thought of as collectively managed, shared resources. From the reduction of greenhouse gas emissions into our common atmosphere to the management of watersheds that straddle territorial boundaries, resources that extend beyond the jurisdictions of nation-states and outside the entrenched frameworks of the international order, the commons offers a new (and ancient) way of managing things we share. Certainly the Nobel Prize Committee understood this when they awarded the 2009 prize in economics to Elinor Ostrom for her lifelong work on the commons. Coming after the global economic collapse of 2008, the committee seemed to suggest that the intricate regulatory system of our global financial markets was not unlike the complex regulatory system of our climate: too fundamental to be left deregulated or mismanaged for the benefit of an elite few.[1]

As the global commons rises to adjudicate problems of a technologically and economically globalized earth, it is prudent to consider the history of its formation in international law. How has Western law managed common property at a global scale? What kind of social relations are implied in a commons? Will a new cosmopolitan class of citizens identify with the new global commons? Will the cosmopolitan class be a just vehicle for the concerns of non-Western peoples, for the voices of the global South? How have Indigenous commons persisted into the legal structures of modernity and what lessons do they hold for the global commons? Just as we have come to understand that the modern nation-state is supported not only by its legal and social institutions but by the news stories, novels, and artistic works that create the nation as an imaginary and exclusive community, so too the supports of the modern global commons go beyond the concepts of sovereignty and common property that we find in the legal documents. International law of the global commons is undergirded by a spatial imaginary whose outlines help explain why the global commons has so often failed to do what it says it does: manage things we all share for the benefit of all humankind. From the Roman concept of *res communis* to the early modern law of the seas,

1 The Tobin Tax, a tax on financial transactions, was proposed and supported by the Group of 77 and the European Union as a mechanism to fund the implementation of the 2009 Copenhagen agreement. The justification of a global tax on financial transactions that can be distributed to those in global need with regard to climate change is well on the way to understanding the financial system itself as a global commons.

the law of outer space, the radio frequency spectrum, and more recently the laws that govern the biodiversity of genetic material, the cultural history of the global commons foregrounds deeply rooted contradictions that can help explain the failures of international law to achieve its stated goal of managing what is shared by humankind for the common benefit of all.

In this book, I focus on a particular cultural aspect of the global commons: its spatial imaginary. More specifically, I focus on empty space and its role as an epistemic imaginary in the international law of the global commons. Cultural studies often provide an epistemological corrective to the forms of knowledge that underpin legal and social structures of the state (Sarat and Simon 2003). In this book, I argue that the metaphors and rhetoric of empty space carry into international law a very modern and powerful epistemological ground, evident in the colonial sovereignty that maintains the current configuration of modern nation-states, but obscured in more recent attempts to go beyond the international order of the state to create legal institutions of the global commons. Empty space is a key spatial imaginary of modernity. How does it persist in and respond to the challenges of post-colonial and post-modern forms of legal and social organization such as we see in attempts to govern domains of the earth as global commons? That is the question I explore in this book.

Indigenous Claims and the Global Commons

In December 2004 the front page of the *New York Times* reported that the Inuit, about 155,000 seal-hunting peoples scattered around the Arctic in both Canada and Alaska, will seek a ruling from the Inter-American Commission on Human Rights that the United States is threatening their existence by contributing substantially to global warming (Revkin 2004). Specifically, the charge points to the actions of the US Bush Administration which repudiated the Kyoto Protocol and refused to cut US carbon dioxide emissions, which make up 25 percent of the world's total and are a leading cause of the rising temperatures and sea levels whose drastic consequences are most dramatically seen by those communities living on the Arctic fringe.[2] The Inuit's legal move is unprecedented for the potential clout it has to shift the global warming issue from an environmental problem to an assault on

2 While the so-called developing world is more vulnerable to climate change (its people are more directly dependent on the natural resource base, more exposed to extreme weather events as we saw in the 2004 tsunami, and are less able economically and technologically to make needed adaptations), it is the industrial countries of the well-to-do North that contribute far more to the build up of greenhouse gases—the US is responsible for 30 percent—and who reap the greatest economic benefits in the process. The United States with its population over 250 million now emits the same amount of greenhouse gases as 2.6 billion people living in 151 developing nations (Speth 2004: 61). Most immediately, rising sea levels due to global warming are drastically changing the environments of the Arctic coast and tropical atolls. High mountain communities suffer in this category as well.

a people's basic human rights. While the Commission hearing the Inuit's claim has no enforcement powers, its declaration that the US has violated the Inuit's rights presented a new legal framework to pursue action against global climate change. Calling on a liability rule rather than a property rule, the Inuit claim sparked hopeful legal thinking. The *New York Times* suggested that the Inuit case "could create the foundation for an eventual lawsuit, either against the United States in an international court or against American companies in federal court." Citing legal experts, some from the very industries producing the noxious emissions, the *Times* reported, "if the Inuit effort succeeds, it could lead to an eventual stream of litigation, somewhat akin to lawsuits against tobacco companies." The application of the liability rule in the US brought forth litigation and popular campaigns addressing the culture of smoking which lead to the most successful national change in citizens' behavior in recent history: cigarette smoking is no longer allowed to contaminate the air in public places. The legal analogy comparing the successful protection of US public air space from tobacco smoking with the desired protection of the global atmosphere from fossil fuel burning was a hopeful one. It reminded citizens of how law can work to create effective social change.

In 2004, the moment seemed propitious for the Inuit's petition since industrial countries, including the United States, had concluded in recent reports and studies that global warming linked to heat-trapping smokestack and tailpipe emissions is contributing to large-scale environmental changes in the Arctic. Just one month previous to their claim, an assessment of Arctic climate change by 300 scientists for the eight countries with Arctic territory, including the United States, concluded that "human influences" are now the dominant factor in the alarming rate at which the Arctic is warming, a rate that is projected to continue by as much as 18 degrees Fahrenheit by 2100.[3] As the warming melts northern ice it causes a dramatic increase in freshwater released into the North Atlantic. According to scientists at the Woods Hole Oceanographic Institute, it is the largest and most dramatic oceanic change ever measured in the era of modern instruments (Gagosian 2003). The impact on Arctic ecosystems, including sea ice, permafrost, forests, and tundra is enormous.[4]

How can we explain the spark of hope raised in 2004 around the Inuit claim?[5] How do we account for the striking possibility that Indigenous peoples, nonstatist

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In the not so distant future this will increasingly include coastal areas of the North such as the Netherlands and Florida.

3 See the online report "Impacts of a Warming Arctic: Arctic Climate Impact Assessment (Overview)" (Arctic Climate Impact Assessment 2004).

4 The mechanism is complex, but scientists basically explain that dumping freshwater into the ocean risks disrupting the Gulf Stream by blocking its release of heat which would in turn disrupt the ocean currents that pull warm waters of the stream northward. Rivers were dumping seven percent more freshwater into the Arctic Ocean in 2002 than in the 1930s with global warming cited as the most likely cause. Bruce Peterson et al., "Increasing River Discharge to the Arctic Ocean," *Science*, December 2002: 2171–2173.

5 As of this writing, the Inter-American Commission on Human Rights had declined to rule on the Inuit complaint. "The agency told the Inuit Circumpolar Conference, which

social actors who, since the European colonization of the globe, have always been excluded from positions of power, may have some cultural and legal leverage missing from the nation-states meeting in Copenhagen in 2009 or Kyoto in 1992 to use legal instruments at national and international levels to fight global warming? Two answers come immediately to mind. First, nation-states may have lost certain powers to effect change at a global level. The political economy of the global market system has changed in the last decades and global elites, corporate entities and other nonstate social actors have new powers to use states for their own interests. Nation-state structures themselves have become more flexible in the new global economy, sometimes going against their own interests to seek greater gain in the global economy.

The second answer lies in the way international law has defined the atmosphere as a domain of the global commons. Perhaps international law itself has set the earth's nonterritorial environments up for ruin. Global commons are vast domains described in international law as regions belonging to no one individual or nation but ostensibly protected by law for just use by all the earth's citizens. From this legal perspective, commons are natural spaces made accessible for general use, exploitation or dispossession by various technological innovations in the modern era: the high seas opened to colonial trade and later the ocean's fisheries and deep seabed minerals opened to industrial exploitation; the earth's atmosphere open to air travel and the orbital pathways of outer space to satellite launches; the radio frequency spectrum inhabitable to cell phone and computer networks; and finally, the biodiversity of the earth viewed as DNA codes containing genetic blueprints of all forms of life.[6] International law describes all these global commons domains as theoretically lying outside the territorial sovereignty of states.

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represents 150,000 people in northern Alaska, Canada, Russia and Greenland, that there was insufficient evidence of harm. Inuit leaders said they would seek a hearing to present more evidence" (Revkin 2006).

6 Legal scholars define the global commons as four jurisdictions where sovereignty is shared globally: the oceans, the atmosphere, outer space and telecommunications, and Antarctica (Vogler 1995, Buck 1998). In this book I include biodiversity as an emergent global commons domain. I will not, however, address the status of Antarctica as global commons for the following reasons. Unlike the legal regimes that govern the high seas, outer space and telecommunications, the atmosphere, and biodiversity, Antarctica is governed by a treaty headed by a consortium of scientists from the twelve nations who conduct research on the subcontinent. The Antarctic Treaty was signed in 1959 by Argentina, Australia, Belgium, Chile, France, Great Britain, Japan, New Zealand, Norway, South Africa, the Soviet Union, and the United States. Since recent discoveries suggest the presence of oil, gas, and mineral supplies on Antarctica's outer continental shelf, relations between the signatories have become strained. Many developing nations have argued that the Antarctic Treaty System should be converted into a United Nations regime. Because of its special governing structure involving scientists restricted to only twelve countries, Antarctica's status is like no other global commons domain. I plan to address Antarctica separately in a future article.

In practice, however, the outside status of the global commons has often been a legal fiction. New technologies have always led to further internalization and privatization of the global commons. The high seas, for example, have increasingly been brought into the territorial jurisdiction of coastal states: the original zone of territorial waters reflected the distance of canon fire but by the last Law of the Seas Convention economic development zones allow states to extend from their shores a claim to 200 and 350 mile economic development zones that enclose the fish, energy, and mineral sources in these areas.[7] Further privatization of the global commons occurs in other domains as well: the gene pool that comprises the global commons of biodiversity is privatized by intellectual property rights; the radio frequency spectrum used for wireless access to the internet and cell phones is moving toward a system of proprietary rather than user rights; and outer space, a domain which the 1967 Outer Space Treaty declared a non-militarized zone, has not ceased being developed by states for military purposes since the former Soviet Union sent Sputnik into orbit in 1957 and flight patterns of Cold War nuclear missiles territorialized the Cold War skies much as satellite systems carrying weapon defense technologies promise to territorialize the geostationary orbits under continuing state initiatives popularly known as Star Wars.

Even when the global commons do remain outside the territorial governance of states and individuals, international law has not succeeded in protecting them from devastating exploitation.[8] The oceans and atmosphere have become garbage dumps of the industrial age and the phenomenon of global warming, only recently validated by scientific regimes, has still to find an effective legal instrument to recognize the seriousness of its threat.[9] Legally described as nonstate space, outside

7 Ninety percent of the world's fisheries are now enclosed in these coastal economic development zones. According to Boris Worm et al., in *Science*, the current mismanagement of ocean fisheries has lead to enormous biodiversity loss on ocean ecosystems. Fish stocks have collapsed in nearly one-third of all ocean fisheries. All commercially valuable world fish stocks could completely collapse by 2048 (2006). (Fisheries are collapsed when yields fall to less than 10 percent of the recorded maximum catch during the period 1950 to 2003.)

8 For recent discussion of the failure of international law to protect the global commons from pollution, resource depletion and privatization, James Speth offers a historical review and critical analysis of post 1970s international law of the following global commons domains: ozone layer depletion; climate change; desertification; deforestation; biodiversity loss; freshwater resources; marine environment deteriorization; toxic waste trade; and acid rain (2004: 75–116). See also Young 1997, Hunter 2000.

9 See the report of the National Academy of Sciences which states: "Recent scientific evidence shows that major and widespread climate changes have occurred with startling speed ... (G)reen house warming and other human alternations of the earth system may increase the possibility of large, abrupt and unwelcome regional or global climatic events." National Research Council (2002). Scientists at the International Geosphere-Biosphere Program have warned: "The evidence is now overwhelming that (rising temperatures) are a consequence of human activities ... (W)e are now pushing the planet beyond anything experienced naturally for many thousands of years. The records of the past show that

territorial sovereignty, global commons are not protected as domains that belong to everyone, *res communis*. Instead international law treats them as domains that belong to no-one, *res nullius*. "The 'state of nature' for the global commons is *res nullius*," laments international relations scholar John Vogler (1995: 17). Given their commons structure in international law, the global commons appear to be corrupted beyond our ability to correct. Why then should Indigenous peoples be so well poised to intervene in the corruption of the global commons?

A Second Grotian Moment

Some international legal scholars suggest that the recent leverage of marginal social actors in the world political system is a sign that the system itself is undergoing fundamental change. Richard Falk, the eminent scholar of international law, once remarked that Hugo Grotius' seventeenth-century work on the law of nations marked a similar moment of profound societal change on a global scale. "A Grotian moment," Falk calls it, "a time in which a fundamental change in circumstances (creates) the need for a different world structure and a different international law" (Falk 1983: 272, Roling 1990: 297–98, Buck 1998). Falk was referring to the passing of feudal society, the rise of the nation-state, and the development of a law among nations for which Grotius had written the foundational documents describing the form of statist sovereignty that would eventually become international law. Is the Inuit claim evidence of a second Grotian moment?

In her book *The Global Commons* legal scholar Susan Buck asks whether the changes we are coming to call globalization signal a second Grotian moment. Her conclusion is ambivalent: Grotius' international law among nations, codified and strengthened over the centuries, still appears to operate for powerful multinational corporations and for the world's developed nation-states. The first Grotian moment is still with us. Indeed, several recent factors give Buck pause: "government policy makers are increasingly forced toward a globalized view of the world environment, triggered by recognition of impending disasters (such as) the depletion of the ozone, global warming, acid deposition and the destruction of the rain forests" (1998: 173). The instant telecommunication systems that make global assessments of environmental conditions immediate, and the role which developing countries like

climate shifts can appear abruptly and be global in extent, while archeological and other data emphasize that such shifts have had devastating consequences for human societies" (Alverson, Bradley, Pedersen et al., 2001: 27). The most likely mechanism for abrupt climate change is the disruption of ocean currents such as the Gulf Stream. Computer models suggest that a shutdown of the Gulf Stream would lead to winters twice as cold as the worst winters on record in the Eastern United States (Gagosian 2003: 8). Scientists have outlined the effects of abrupt climate change: extensive biodiversity loss; extreme weather events such as extraordinary droughts, floods, heat waves, and hurricanes; sudden regional cooling; sea level rise; coral bleaching; public health risks, and major new social stresses within and between countries (Speth 2004: 61).

China are playing as holders of valuable natural resources and potential industrial polluters on a heretofore inconceivable scale are all new factors to consider.[10] The global commons, those domains that international law has always placed outside the sovereignty of nation-states, cannot be managed by the so-called developed nations without the consent of the developing ones. This calls for changes in the law of nations, Buck argues; the creation of a different kind of world government, a second Grotian moment.

Buck's assessment is significant but incomplete. Governance of the global commons does require the consent of developing nations, and international law has not yet been an effective instrument for those countries to make themselves heard.[11] But the Inuit are not a developing nation. The reason that native peoples like the Inuit have a unique voice in international law of the global commons is because they have always had a unique position in the international legal order. As the global commons increasingly became a global sink for the pollution of the industrial world in the last 50 years, Indigenous peoples were becoming more adept at strategically using their unique status within post-World War II structures of intensified nation-building. The spatial and life practices of Indigenous peoples have always challenged the statist legal system that was built during the centuries-long first Grotian moment.

The Inuit, for example, challenge Western categories of legal thinking in international law in at least two ways, both intricately connected to new forms of spatial organization including those of the global commons. First, the Inuit are not organized as a nation-state. Their legal identity for purposes of the 2004 petition against the US is comprised of villages and communities that span the coastline of the Arctic sea regardless of where it crosses the territorial boundaries of Canada and the United States. Secondly, when the Inuit provide videotaped statements for the petition from elders and hunters describing the harmful effects of global warming to their way of life, they do not use legal categories from Western law but rather categories that come from their own traditions and common sense experience (Watt-Cloutier 2004). In this way, descriptive categories of space not embedded in the territorial spatial imaginary of Euro-American states make their way into a Western court and demand recognition.[12] Once recognized in the

10 As predicted, in 2009 China surpassed the US in CO_2 emissions (Wong and Bradsher 2009).

11 Note the frustration of the Group of 77 (developing countries) who were effectively dismissed from negotiating the final agreement at the Copenhagen summit when the US, China, Brazil, India, and South Africa forged a last minute, three page document which "did not meet even the modest expectations that leaders set for this meeting, notably by failing to set a 2010 goal for reaching a binding international treat to seal the provisions of the accord" (Broder 2009: A1).

12 See the discussion by Robert A. Williams, Jr. on how traditional storytelling practices of Indigenous peoples in Western venues of international law have succeeded in introducing native people's complaints in frameworks that demand new legal categories in order to find remedy (1990). See also Torres and Milun's discussion of how US legal

form of a legitimate legal claim, these new spatial descriptions, with their various metaphors, narratives and worldviews, can provide not only the leverage with which to force Western legal categories into negotiations, but also new spatial imaginaries for the tools of international law. For these reasons the Inuit's claims may become an important and effective way to introduce change to the ineffective, dominant forms of spatial thinking on the global commons.

The emergence of a second Grotian moment, then, can be observed when we consider challenges to neo-liberal globalization from the perspective of the global commons, the complex spatial imaginary it deploys, and the common history it shares with the colonization of Indigenous peoples. The recent, contentious inclusion of Indigenous peoples at national and international levels does indeed suggest a second Grotian moment. It also suggests that Western spatial imaginaries are, broadly speaking, changing under pressure from the non-territorial and mixed territorial spaces that are emerging in the era of globalization.

Res Nullius and Empty Space versus the Ecological Perspective: The Outlines of a Political Uncommons

The global commons are often described and treated in international law under the doctrine of *res nullius*, things or space which cannot be governed and therefore belong to no-one. As such, domains of the global commons exist in a category that overlaps with the legal category *terra nullius*, land belonging to nobody, a colonial doctrine of sovereignty used by European states to dispossess Indigenous peoples of their land in the eighteenth and nineteenth centuries. Historical references to both *terra nullius* and *res nullius* domains show that global commons and Indigenous peoples are caught in an epistemic imaginary where metaphors of vacant, empty space support a legal rhetoric that legitimates dispossession. Like the "political unconscious" described by literary critic Fredric Jameson to show how political ideologies operate subliminally in the storytelling devices of a culture, empty space operates as a "political uncommons" in the legal descriptions of the global commons in international law (Jameson 1981). Within the persuasive authority of legal discourse deeply embedded in the cultural traditions of the West, empty space furthers an agenda of dispossession despite a rhetoric of shared sovereignty. In this regard, the international law of the global commons shows that globalized space can work as the kind of primitive accumulation strategy Marx described for the early phase of capitalism: dispossession *tout court*.[13] Working alongside the greed

traditions, in particular the structures of precedent and rules of evidence, do not provide an adequate arena to hear stories from American Indian plaintiffs that bear witness to historical and present acts of injustice (1990).

13 Political geographer David Harvey has argued that the term globalization often disguises what are in fact simply modes of primitive capitalist accumulation. (Talk given at the Globalization Conference at University of California, Santa Barbara in 2003.)

and power of overdeveloped northern states, international law employs empty space as a particular spatial imaginary that lends rhetorical force to legitimate the privatization and exploitation of the global commons.

Cultural geographers tell us how key metaphors are often used to organize spatial thinking into regions.[14] *Res* and *terra nullius*, first steps in the legal organization and dispossession of spaces that do not fit the territorial spatiality of European nation-states, carry the rhetorical force to create regions. In *The Political Uncommons* I argue that empty space is a key regional metaphor for the vastly different, unbounded domains of the global commons. In international law, *res* and *terra nullius* show how empty space functions as a powerful spatial imaginary behind doctrines that overtly describe domains of public space belonging to all the earth's citizens even as they covertly enable these domains to be treated as if they belonged to no-one. If globalization foretells the possibility of a second Grotian moment, a world government that radically departs from the earth's modern history of dispossession and colonial territoriality, *The Political Uncommons* argues that it does so only when international law no longer makes empty space the regional metaphor for the creation of the nonstate space of the global commons. And, if global commons can be disentangled from the web of *res nullius* legalities, then, I argue, Indigenous peoples too, given their common history of nonstatist standing in international law, may likewise gain a new voice in world politics as they are recognized in a legal idiom that has moved beyond the cultural logic of empty space.

The Inuit's current leverage in world politics relies on a spatial form of being-in-the-world whose authority was at once eliminated by the territorial nation-state and allowed to remain as a residual moment in international law. Finding the right term to describe their special politico-spatial identity is difficult. Up until now I have been referring to their special spatial status in an abstract Western way by calling it nonstate space. This is deceptive. To say that Indigenous peoples are nonstate social actors is to overlook their cultural difference. It erroneously places Indigenous peoples in the same legal category as that other nonstate social actor of increasingly powerful nonterritorial global status in the past quarter century: the multinational corporation. Certainly in US Federal law Native American tribes have been encouraged to deal with their nonstate status by incorporating themselves. The modern corporation, however, is a rather recent legal invention. Giving a profit-oriented enterprise the legal rights of a human being is a development that does not surprise us only because we have become accustomed to its face (Buck 1998: 176). Multinational corporations do overshadow national governments in many international spheres. Indeed, as many observers of contemporary neo-liberal global capitalism note, never before in world history have corporate

14 See, for example, Popper and Popper's work on the Buffalo Commons Project in the Great Plains of the US Deborah E. Popper and Frank J. Popper, "The Buffalo Commons as Regional Metaphor and Geographic Method," *The Geographical Review* 89, no. 4 (October 1999): 491–510.

interests unconnected with the interests of a nation-state so regularly determined international structures and policies. The most obvious difference between multinational corporations and Indigenous peoples as nonstate social actors in international law is their economic power. If both groups have leverage (albeit drastically unequal) within nation-state frameworks of sovereignty, multinational corporations have this leverage because, contra many critics of neo-liberal global capitalism, they have not broken out of the old legal mode and continue to operate within the context and benefits of the international law among nations. The 2008 bailout of insolvent multinational insurance agencies and banks by national governments is a case in point. Multinational corporations are enabled by the first Grotian moment whose laws are defined through the spatial categories of the nation-state and colonialism.[15]

Indigenous peoples' leverage, on the other hand, comes from the legal difference they maintain despite the colonial and statist framework of international law. They may be nonstate social actors but that is not what is so important about their contribution to the transformation of the global commons.[16] The Inuit have leverage in international law because they make a human rights claim that cannot be understood apart from their land. They bring a specific spatial dimension to the law. The multinational corporation, on the other hand, claims rights in the nonstate space of the global marketplace. Both involve their own kind of spatial thinking expressed in the metaphors and images they use to make their claims. While corporate claims are not "landed" and thus tend to invoke images and metaphors of unlimited, abstract, empty space, Indigenous peoples' claims are landed and tend to carry very different, ecologically minded spatial metaphors. Indigenous claims are landed, but still in nonstate space. This complex difference is the contribution Indigenous peoples make to our spatial thinking about the global commons. Unlike the nonstate space of multinational corporations and neo-liberal capitalism, Indigenous nonstate spatial thinking is above all unthinkable without the land. Indigenous nonstate space occupies habitats of long-standing cultural value in the land. When critiquing and composing regional metaphors for the global commons, the Inuit and the other two cases of Indigenous land claims I examine later in this book reveal the importance of cultural understandings that persist in nonstatist lands. Landed understanding of nonstate space brings metaphors of limited space into international arenas. The metaphors of empty, unlimited space, on the other hand, metaphors so useful to the abstractions of numbers and money, come to international law from an entirely different, imperialistic historical project.

15 I explore this more fully when I discuss the success of multinational corporations in thwarting the Common Heritage of Mankind principle in international law in Chapter 4.

16 Some progressive social analysts see the legal leverage of Indigenous peoples as stemming from their special ability to incorporate themselves and enter the economic arena from the powerful, legally protected status of the corporation. See *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, ed. Stephan P. Cornell and Joseph Kalt (Los Angeles: American Indian Studies Center, UCLA, 1992).

If Indigenous peoples have contributed the sense of limited, nonstate space in the global commons, it is because they begin from an ecological perspective. From an ecological perspective there is first of all no "outside" to the earth's living systems. There is no ecological way to think of "waste products" and "side-effects" in natural systems because there is no "waste" or "side" in nature, just complex, interactive systems. The global commons, then, from an ecological, Indigenous perspective is not "outside." From the statist perspectives of modern economics and international law, on the other hand, the global commons retains an outside status: the commons are legally outside territorial states and the pollution and other side effects of industrial life (called "externalities" in economic terms) are side-products the costs of which are scarcely if at all factored into our dominant system of capitalist production.

The ecological perspective the Inuit bring to international law includes cultural relations to the land that preceded the colonial mentality of *vacuum Domicilium*, a legal doctrine used by Europeans as they settled the West to justify dispossession of native peoples. Seventeenth-century English political philosopher John Locke, for example, built his theory of natural rights to private property based on arguing that the Americas were undifferentiated expanses, a kind of empty space which Europeans were justified in occupying and eventually possessing as their agricultural labor added a surplus value missing in the cultures of the Indigenous inhabitants. In his well known chapter on property in the 1690 classic, *Two Treatises of Government*, Locke presciently offered a metaphor for what may well characterize the fate of the global commons today: "In the beginning all the world was America" (Locke 1988: II.49.1). The European projection of an undifferentiated, homogenous quality onto the diverse, heterogeneous (and unknown) terrain of the New World is the preamble for the justification of the European natural rights theory of property which dispossessed Native Americans of their land.

Metaphors of empty space pervade colonial thinking and create a cultural logic that applies beyond domains of land. Locke's other famous metaphor, the *tabula rasa* (empty slate), was used to explain why the dominium of European-style thinking should be extended to nonEuropean minds. "Let us suppose," wrote Locke, "the mind to be, as we say, white paper, void of all characters, without any Ideas: how comes it to be furnished?"[17] The *tabula rasa* argument (originally in Aristotle) makes Euclidean space—everywhere the same, static, uniformly subject to the same laws, and abstract in the sense of being empty—the universal foundation of Reason. Thus empty, homogeneous space in Locke is an originary abstract space that can serve as a foundation for the seizure of that space by the state or by individuals.

17 See the entry "*table rase*" (French for *tabula rasa*) in André Lalande, *Vocabulaire technique et Critque de la Philosophie* (Paris: Presses Universitaire de France, 1983: 1099). The editor notes that the expression *table rase* probably came into French philosophical discourse thanks to Leibniz who ridiculed Locke's theory of a foundational empty space.

In addition to the perspectives of *res* and *terra nullius*, the other main way in which international law describes the complex space that lies outside the territory of the law of nations is through the law of the high seas. The early legal description of the high seas comes from Dutch scholar and humanist Hugo Grotius. Modern legal scholars generally focus on the bulk of Grotius' writings that famously describe interstate space: the rules and rights for exchange among emergent nation-states.[18] Indeed, Grotius' early modern description of laws for interstate space has earned Grotius the reputation of "the father of international law" or, as Richard Falk notes, our first "Grotian moment." In *The Political Uncommons* I argue that a second Grotian moment compels us to instead examine the body of law that grew up around the "outside" space of states, the space of the global commons. This means turning our focus to one of Grotius' lesser known works, *Mare Liberum* written in 1609 (1916). *The Free Seas* (or *The Freedom of the Seas*) is a treatise on the laws that apply on the high seas. Rediscovered and translated into English in the late nineteenth century, *Mare Liberum* argues that the seas must be legally protected as nonterritorial space. No one European colonial nation should govern the seas, Grotius wrote; rather they should be open for the free usufruct right of all. As the first description of a global commons in modern international law, Grotius legal and spatial thinking about the high seas is an important document. Since the last century, I argue, its arguments have entered every subsequent legal description of a global commons regime from outer space to biodiversity.

The relation between empty space and maritime space in Grotius and later legal thinking is complex.[19] Unlike Locke's vision of natural domains as empty, extensive, homogeneous space, Grotius' description of the high seas gives a paradoxical account of natural domains as space which is both homogeneous and heterogeneous, at once possessible, unpossessible and possessive. Amenable to, but more complex than, the metaphorics of empty space, the law of the seas has provided extended maritime metaphors of open, nonterritorial, nonstate space to legal thinking on the global commons. Along with Locke, Grotius and his legal description of the oceans, I argue, provides the other key regional metaphor for all the diverse forms of the global commons today. Like the empty space metaphors Locke uses to describe domains over which proprietary rights can be asserted, metaphors of maritime space dominate the description of modern commons domains over which only usufruct rights can be asserted. Both sets of

18 Grotius' most influential work in international law is *De Jure Belli ac Pacis* (1625) translated into English in 1682 as *The Rights of War and Peace*, by Jean Barbeyrac, ed. Richard Tuck, 3 vols (Indianapolis: Liberty Fund, 2005). The work is more than a discourse on the rules of war and the rights of citizens during wartime. It became a source of the modern idea of natural rights, the doctrine that all human beings equally are by nature free to dispose their persons and their possessions as they think fit. Natural rights, in this view, are the foundation of law and government and are not granted by the state.

19 I provide a close reading of *Mare Liberum* in Chapter 3, focusing on the complex kinds of space Grotius envisioned in the first global commons: *res nullius, res communis, res publicae*.