Articles

Against the Intentional Fallacy: Legocentrism and Continuity in the Rhetoric of Indian Dispossession

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Ye shall know them by their fruits.
—Matthew 7:16

The road of US Indian law and policy, like its companion to hell, is paved with good intentions. Critics of its generally diabolic outcomes have had little difficulty demonstrating the moral chasm between the appealing rhetoric in which a policy or judgment was framed and the oppressive consequences to which it practically conduced. Yet it is not clear that the tactic of holding Indian law and policy to account by the standard of their own apologetic rhetoric has had positive effects. From the beginning, the reduction of Indian peoples from the status of independence and territorial sovereignty to that of the most deprived group within US society has been accompanied by the complaint that events on the ground were failing to reflect the elevated idiom in which Indian-affairs discourse was characteristically couched.[1] Given the historical regularity of the pattern, those continuing to express this complaint would seem to be possessed of a robust capacity for surprise. One might have thought that a passing acquaintance with the history of US-Indian relations would suggest that a tactic that had so consistently failed in the past was

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unlikely to prove beneficial in the present. The issue is not simply one of naivety, however. Rather, this article will argue that the critique of discontinuity between rhetoric and outcome in Indian affairs participates in the very process that it indicts. This is because, for all its ineffectiveness as an enhancer of Indian rights, the critique in question has proved only too effective as an ideological alibi for the negative outcomes of Indian administration, which emerge from it as policy failures or unintended consequences rather than as systemic regularities. This ideological effect is premised on a liberal-individualist style of utopianism that privileges expressions of intention, no matter how contrary to historical experience, over collective outcomes, no matter how emphatic their historical regularity. Methodologically, this approach privileges the manifest, divining the intentions of judges and policy makers from utterances designed for public consumption—which is to say, from utterances designed to impart an unimpeachability of intent. At the very least, this circular procedure mistakes prescription for description. More consequentially, it represents the inequitable outcomes of Indian-affairs discourse as running counter to the principled workings of a fair society, a representation that effaces that society's continuing abjection of Indian people.

With a nod to twentieth-century literary criticism, I call this style of utopianism the *intentional fallacy*. As originally coined, this term signaled the rejection of authorial intention as a controller of textual meaning. My otherwise inconstant appropriation retains this core premise.[2] As I use the concept here, the intentional fallacy refers to an obliviousness to long-run empirical continuities that results from history being viewed as an indeterminate space in which discrete actors form spontaneous subjective intentions. With regard to Indian-affairs discourse, the perspective's principal ideological outcome is its effacement of US settler colonialism, the long-run empirical continuity that primarily determines US-Indian relations. In particular, the intentional fallacy suppresses the persistence through the postfrontier era of the settler-colonial characteristic that I term the *logic of elimination*, manifest in the repertoire of strategies whereby settler polities seek to rid themselves of the refractory Native alternative as it survives in their midst. Settler-colonial invasion is a structure not an event: a set of ongoing techniques (including, *inter alia*, geographical removal, physical sequestration, allotment in severalty, assimilation, and tribal termination) whereby settler authorities continue to seek the elimination of Native societies once the dust has settled on the initial violence of the frontier.[3] This long-run, supraindividual settler-colonial continuity is effaced in scholarly histories that narrate US Indian-affairs discourse solipsistically, as reducible to the intentions of Euro-American officials.[4]

Confined to the manifest, the intentional fallacy takes it for granted that the object of Indian-affairs rhetoric is Indian people. Yet Indian policy has

underwritten the US government's credentials as a fair dealer between the plethora of competing ethnicities that a dynamically expanding settler society has striven to accommodate. Consider, for instance, Ulysses S. Grant's State of the Union explanation for his Peace (or "Quaker") Policy, which institutionalized Indian reservations: "a system which looks to the extinction of a race is too horrible for a nation to adopt without entailing upon itself the wrath of all Christendom and engendering in the citizens a disregard for human life and the rights of others, dangerous to society."[5] Amplifying this theme, Frederick Hoxie has observed that the ideological advantages of the Dawes-era campaign of Indian assimilation extended beyond Indian affairs to US society as a whole: "Assimilated natives would be proof positive that America was an open society, where obedience and accommodation to the wishes of the majority would be rewarded with social equality."[6] In the fraught context of continuing high levels of immigration, this major ideological return could be achieved at the relatively low cost of admitting a demographically insignificant minority.[7] Hoxie's observation obliges us to consider Indian-affairs rhetoric's address, which, in this case at least, was extrinsic. Its principal object was not Indians but Euro-Americans, its ideological utility lying in the internal maintenance of Anglo-Protestant hegemony.[8] Viewed as a message for mainstream consumption, Indian-affairs rhetoric emerges as a rationalization rather than a motive. On this basis, the resilience of the gap between rhetoric and outcome might better be judged a public-relations success than a policy failure.

The observation that Indian-affairs rhetoric reaches beyond the Native constituency to promote interethnic harmonies that undergird the nation as a whole has a positive, even optimistic implication for the present. Through furnishing a warrant for the level playing field, the Indian "minority" acquires resources that far exceed its numerical status, in particular the potential alliances that flow from Indians' usefulness as maintainers of wider social solidarities.[9] Yet such alliances are crucially dependent on the dissemination of information about Indians across the wider society beyond the reservation.[10] In this connection, scholarly writing about Indian affairs cannot be detached from its object. Rather, for better or for worse, scholarly writing is part of Indian affairs.

In what follows, I present a historical critique of the intentional fallacy. Examples are widespread, not least in the writings of eminent historians.[11] To reduce a pervasive phenomenon to manageability, however, this article will focus on a core historiography, moving from the three canonical Indian judgments that Chief Justice John Marshall delivered during the 1820s and 1830s—especially *Worcester v. Georgia* (1832), which many scholars have held to mark a high point in the assertion of Indian rights—through the Indian-policy nadir of congressional plenary power, which commentators have

generally associated with the *Kagama* (1886) and *Lone Wolf v. Hitchcock* (1903) judgments that were delivered at the height of the Dawes-era reforms. Historically, the movement from *Worcester* to *Lone Wolf* also maps out the space between the early nineteenth-century transition from monarchical to republican jurisprudence and the late-nineteenth-century closing-off of the frontier. Over the course of this period, the status of Indian affairs was transformed, the original arena of US foreign policy becoming a relatively minor department of domestic administration. I shall argue that, throughout this process and beyond, the intentional fallacy has not only served as a legitimating device for judges and policy makers. With significant exceptions, it has also structured the narration of Indian law and policy in historical and legal-studies scholarship. Accordingly, this scholarship will emerge as participating in Indian deprivation, a process that has continued throughout postfrontier history.

The discussion will, therefore, revisit some well-trodden ground. The aim is not to discover new data but to reorganize and reinterpret established data. To this end, the article can be read as situating academic writing within the settler-colonial continuum that law historian Robert A. Williams Jr. has aptly termed the "discourses of conquest."[12] Williams's critique of a centuries-deep tradition of scholarship has not, so far as I am aware, been taken as applying to scholarly writing in the present, as if some intervening rupture had brought absolution to the contemporary liberal academy. Yet no one has identified a moment or set of moments through which the contemporary academy has freed itself from the millennial complicity in colonial discourse that Williams has discerned. Accordingly, this article assumes no such moment. Rather, it seeks to characterize a rhetorical practice whereby, despite protestations to the contrary, liberal scholarship about Indians has brought a sanitized discourse of conquest into the present.

The first of the following sections, "Wardship and Dependency," begins to address Indian sovereignty as that concept has been constructed in US juridical discourse, starting from the Marshall court's enunciation of domestic dependent nationhood and raising the question of legitimatory rhetoric in US Indian law and policy: why is it that judges and policy makers have insisted on clothing the violence of dispossession in the language of legal formality? This question takes the discussion back, in the second section, to the concept of discovery, a monarchical principle that the Marshall court adapted for republican use. Having characterized the basic features of discovery, the third section, "Marshall and the Nation," situates the Marshall trilogy of Indian judgments in the context of US nation building. In this context, the three cases are shown to have a political consistency that an apologetic legal historiography has sought to deny. This denial has relied on an optimistic reading of Marshall's 1832 *Worcester v. Georgia* judgment. Accordingly, the fourth section focuses on the

historical context in which the *Worcester* judgment was delivered, contending that it was addressed to political requirements flowing from a time of crisis for the Union, and showing how the judgment's timing ensured that its ostensibly benign rhetoric on Indians would be rendered inoperable. On this basis, the section "After Marshall" shows that the repressive late-nineteenth-century judgments that Marshall's defenders have depicted as frustrating his intentions actually faithfully continued his legacy, even reproducing the Marshall court's characteristically benevolent rhetoric. In the final three sections, this misleading rhetoric is traced from judicial pronouncements into the wider culture of US Indian-affairs discourse and thence into liberal historiography on US Indian law and policy. This scholarship is criticized for its legocentrism, by which I mean the channeling of political contestation into the domain of law. The article concludes that this scholarly privileging of legal processes has maintained the ideological misrepresentation of Indian dispossession into the present, a situation that calls for a more critical scholarship.

The analysis begins with *Cherokee v. Georgia*, the 1831 judgment in which Marshall enunciated the bedrock concept of domestic dependent nations, on which all treaties and other exchanges between the US government and Indian tribes or nations have subsequently been based. Most of the forced removals perpetrated against Indian peoples took place during the half-century following *Cherokee v. Georgia*.[13] Moreover, from 1831 until treaty making was formally discontinued in 1871, of the hundreds of Indian peoples who were removed from their ancestral homelands, hardly any were obliged to depart before some of their number had first signed a treaty.[14] The pattern is too consistent for us to view the abuses as belying or frustrating the intention behind the treaties. Rather US authorities clearly viewed treaty making, which presupposed Indian sovereignty, as integral to the process of removing, expropriating, and replacing Indian nations. Thus we should ask whether Indian sovereignty's negative practical outcomes have occurred in conformity with, rather than in spite of, the concept's codification in US law. We begin with the concept of domestic dependent nationhood.

Wardship and Dependency

In *Cherokee v. Georgia*, the juridical question at issue—whether the Cherokee could bring a case before the US Supreme Court—had to be resolved before their complaint could be heard. Strictly, therefore, Marshall's comments on the relationship between the US government and the Cherokee were mere dicta. Yet they could hardly have been more consequential: "It may well be doubted whether those tribes which reside within the acknowledged boundaries of the

United States, can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[15]

Thus was laid a foundation stone of US Indian law. This is not to say that Marshall invented Indian wardship in 1831. He had anticipated the concept eight years earlier, in a context in which the racial implications of subordination had been less softened by the rhetoric of paternalism. In *Johnson v. McIntosh*, Indians had not been "*citizens* in the ordinary sense of that term, since they are destitute of the most essential rights which belong to that character. They are of that class who are said by jurists not to be citizens, but perpetual inhabitants with diminutive rights. The statutes of Virginia, and of all the other colonies, and of the United States, treat them as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government."[16]

The notion of wardship was inherently ambivalent. On the one hand, wards, like children, were entitled to care and protection. Thus the later Marshall would proceed from his analogy between Indians' relationship to the United States and the ward/guardian relationship to observe that "they look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father."[17] On the other hand, the condition of childhood was demeaning and inferior (enslaved adult males, after all, were routinely called "boy"). Guardianship was double-edged, involving responsibility and subordination. In stressing the former at the expense of the latter, Marshall's rhetoric downplayed the coercive effects of superior force in favor of the restraining obligations of natural law. In 1831, when he coined the "domestic dependent nations" formula, gold-hungry whites were overrunning Cherokee lands, while the state of Georgia was legislating to negate treaties that the Cherokee had entered into with the federal government.[18] Yet we cannot simply conclude that Indian-affairs rhetoric served to disguise the irregular means whereby Indian entitlement was being suppressed because there had been no lack of high-flown sentiment in situations in which Indians continued to present the United States with a genuine military threat: "The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."[19]

This celebrated passage comes from the Northwest Ordinance of 1787. Significantly, at the time, the Indian nations to the northwest of the new republic remained undefeated and in close contact with the British. Thus the altitudinous declarations so favored in Indian-affairs discourse should not be seen as reflecting either the continuance or the suppression of Indian militancy because they applied in either case. If it is easy enough to appreciate why diplomatic hyperbole should have been deemed appropriate where Indians remained capable of forcibly defending their territories, it is harder to see why conquered Natives, who no longer presented an obstacle to territorial acquisition, should have been treated to the same rhetorical largesse. In view of the US government's growing military superiority over Indian nations—and especially after the War of 1812, when Indians finally lost their last European ally—the question arises as to why the federal government should have been so scrupulous in going to the trouble and expense of extending diplomatic niceties to defeated Indians. Why—when, as Thomas Jefferson put it, "we have only to shut our hand to crush them"—were the elaborate formalities of international relations maintained?[20] To begin to explore this question, we turn to the context in which the Marshall judgments were delivered.

Discovery

The Marshall judgments did not arise out of nowhere. As is well known, they were selectively constructed from a set of propositions informing the law of nations, later known as international law, that had received impetus from European conquests in the Americas and is somewhat misleadingly referred to, in the singular, as the doctrine of discovery.[21] After the French and Indian War, certain key precepts from this theoretical arena had been incorporated into the Royal Proclamation of 1763. In addition to constituting the territories that the French had surrendered, this proclamation had, for the first time, established a boundary (roughly, the crest of the Appalachians) between Indian country and the British mainland colonies.[22] This boundary was principally intended to contain expansionist ambitions on the part of the colonists. On its British, eastern side, though the crown claimed radical or ultimate title, the Indians retained a right of occupancy that, so long as it was not extinguished by the crown, was good so far as third parties were concerned. These two features of the Royal Proclamation—the assertion of colonial claims *vis-à-vis* other European powers and the allocation to Natives of the right of occupancy—exemplify what, for our purposes, are the two principal characteristics of discovery: the doctrine concerned relations between Europeans rather than between Europeans and Natives, and it rendered Native entitlement inferior to

its European counterpart. These linked principles were formally incorporated into republican jurisprudence by way of the Marshall judgments.

In keeping with the doctrine of discovery, the Marshall judgments presuppose, and can only consistently be read as presupposing, a fundamental asymmetry between Indians' right of occupancy and the property rights that white settlers could obtain once Native title had been extinguished. Under certain conditions, Natives' immemorial occupation of their land entitled them to a right of soil or usufruct, which was understood as hunting and gathering rather than as agriculture. This right was inalienable. It could not be sold to a private individual or corporation but, under the principle of preemption, could only be surrendered to the crown.[23] Once Native title had been surrendered to the crown and extinguished, however, the crown could transfer to settlers an entitlement (fee simple) that was greater than the right of occupancy that the Natives had surrendered. Thus the process yielded more than land for settlers. It also yielded sovereign subjecthood: they became the sort of people who could own rather than merely occupy. The asymmetry between occupancy and title reflected a thoroughgoing discrepancy whereby Indian and white were categories of a different order. The same words meant different things when applied to either.

An appreciation of the foundational asymmetry between the rights and capacities respectively accorded to Europeans and to Natives helps us to understand how concepts such as national sovereignty came to attach to Indigenous peoples under the Marshall court's version of discovery. For it was a lesser form of sovereignty than that which inhered in European nations, a form of sovereignty that Marshall termed "diminished," which meant that terms such as ownership and possession were correspondingly diminished insofar as they applied to Native rights. This asymmetry was presupposed in such seemingly unequivocal pronouncements as Marshall's assertion that, prior to discovery, Indian land was "held, occupied, and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil; and who neither acknowledged nor owed any allegiance or obedience to any European sovereign or state whatever."[24] However unqualified such rhetoric may seem when lifted out of its context, other passages from the same judgment clarify the presuppositions involved: "So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject *only* to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title."[25] Statements such as these were not seen as inconsistent because they presupposed discovery, which, on an instant, diminished the fulsomely expressed Native sovereignty of the first extract. Native sovereignty existed out of (or at least, prior to) colonial

time, which is to say, it did not exist at all—or rather, it only existed in order to be diminished. Paradoxically, therefore, Native sovereignty was a creation of discovery. Propositionally, it was an imperative generated by Marshall's commitment to diminution, which required an undiminished prior state that could be diminished *from*. In the end, there was only diminution. As Mark Rifkin has observed, this diminutive sovereignty seems to function "less as a way of designating a specific set of powers than as a negative presence, as what Native peoples categorically lack."[26] Thus words or concepts connoted less when applied to Indians than when applied to Europeans. This was especially the case when it came to Indian nationhood. In contradistinction to the sovereign autonomy accorded foreign states, the sovereignty of Indian nations was categorically qualified as "domestic" and "dependent."[27]

The disparity between the rights and status respectively assigned to Europeans and to Natives is compatible with our other core feature of the doctrine of discovery. A commonplace of all accounts of discovery, regardless of their political orientation, is that the doctrine primarily concerned relations between Europeans rather than relations between Europeans and Natives.[28] This arrogantly optical discourse—to see was to conquer—sought to regulate the affairs of European sovereigns, who were only too prone to waste their energies in colonial war making.[29] Being recognized by other European powers as the discoverer of a stretch of land occupied by non-Christian savages gave a European sovereign dominion over the land and the exclusive right to purchase the Natives' right of occupancy should they choose to sell it (this was the right of preemption).[30] Thus the Natives were prevented from selling their right of occupancy to anyone other than their discoverers. Within a given colonial formation, the same principle also operated to centralize relations between Europeans (or their creole successors) and Natives because it provided for transactions between the two to be mediated by the metropolitan sovereign.[31]

After the war of independence, once the aggressively state-centered policies of the Articles of Confederation period had threatened to degenerate into chaos, the new republic adopted a policy framework that recalled the reviled King George III's Royal Proclamation.[32] The so-called treaty clause of the Constitution gave the president "power, by and with the advice of the Senate, to make treaties, provided two-thirds of the Senators present concur."[33] An equally consequential five words were the "and with the Indian tribes" that the Constitutional Convention added onto the end of the commerce clause of the Constitution, the earlier draft of which had merely given Congress the power to regulate commerce "with foreign nations, and among the several States."[34] On the basis of the Indian reference in the commerce clause, the first Congress—whose initial act had been to set up the Department of War with special responsibility for hostilities with Indians—passed a series of trade and

intercourse acts intended to regulate relations between Indians and whites. No less than four of these acts were passed in Congress' first decade (1790, 1793, 1796, and 1799).[35] Together, they were intended to ensure that Indian affairs became a federal preserve, principally through federal control of land acquisitions, as under the doctrine of preemption, but also through federal controls on Indian trade and Indian-related criminal proceedings.

Though these acts provided for federal primacy in Indian affairs, they did not clarify the status of the tribes or nations with whom the federal government could enter into its exclusive arrangements. Constitutionally, this remained an open question because, in order to maintain the republic's Indian alliances in relation to the British, French, and Spanish, the Constitution had ratified treaties that had previously been agreed upon by Indian nations and the British.[36] This ratification amounted to the acknowledgment of an Indian sovereignty dating from the British period—which is to say, a sovereignty that was prior to and independent of the US Constitution. Understandably, the Constitution did not dwell on the matter of this heteronomous sovereignty, so the issue was left unresolved. During the late eighteenth century, the military threat that some Indians presented precluded the downgrading of relations with them. Peter Silver has convincingly documented his contention that what he calls the "anti-Indian sublime," an "enraptured discourse of fear" of Indians that colonists refined, played a formative role in the emergence of "a new group, more and more often invoked in the middle colonies after mid-[eighteenth] century: 'The white people.'"[37] It is crucial to remember that Indian affairs constituted the fledgling republic's first foreign policy. The threat that Indians presented was of such magnitude that, despite the profound misgivings of a number of the framers of the Constitution, it led to the creation of a standing army, with all the freshly remembered potential for tyranny that this entailed.[38] Initially, therefore, the new republic maintained the British policy of treating with Indian nations as effective counterparts. As the military balance tilted the United States' way, however, control over how white people dealt with Indians (a matter internal to US society) inexorably expanded out into control over Indians themselves. After nearly half a century, the Marshall court finally confronted the wild card of Indian sovereignty, domesticating it to the republican constitutional environment. Though synthetic, in that it combined elements from the established discourse of discovery, the Marshall court's version of Indian sovereignty was an invention contrived to accommodate the novel circumstance of settler-colonial nationhood. As such, the concept inaugurated "post"colonial jurisprudence, adapting a horizontal vocabulary to a vertical mode of domination.[39] The key to understanding this inventive synthesis is the principle that discovery concerned relations between European powers rather than relations between Europeans and Natives.

Marshall and the Nation

Some commentators have depicted the first and third of the Marshall trilogy, *Johnson v. McIntosh* (1823) and *Worcester v. Georgia* (1832), as antithetical.[40] On this basis, *Cherokee v. Georgia* (1831) figures as somewhat awkwardly bridging the two. Yet the three judgments unanimously preserve the principle that discovery mediates between Europeans (or Euro-Americans) rather than between Europeans and Natives. Moreover, the second core axiom of discovery, that Native rights were inferior to European ones, is inseparable from this principle. In holding that Indian nations were endowed with a form of sovereignty, albeit diminished, Marshall was not dispensing a new or enhanced acknowledgment of Indian rights under international law. He was asserting the monarchical doctrine of discovery's continuation into the republican era. Despite the endorsement of Indian sovereignty, the status of domestic dependent nationhood was so disabling that, in one sense, it is misleading to speak of *Cherokee v. Georgia* as a case at all. The substance of the Cherokee's plea never made it to trial. Being a domestic dependent nation, as opposed to a foreign one, they were barred from applying to the Supreme Court to have the treaties that they had signed upheld. Bereft of either US-citizen or foreign-nation status, the Cherokee had no juridical personality. As Marshall's brother judge, Henry Baldwin, put it, almost too perfectly exemplifying the concept of *corpus nullius*, "there is no plaintiff in this case."[41]

The rhetorical shift between *Johnson v. McIntosh* and the two 1830s judgments did not sustain a corresponding shift in practical outcome. Marshall was aware that, though separated by nearly a decade in his professional life, his judgments would stand coevally in black letters to be juxtaposed and cross-referenced by generations of lawyers. He did not hold out his judgment in either the *Cherokee* or the *Worcester* case as modifying *Johnson v. McIntosh*. Thus we should identify the grounds on which these three decisions cohere. Such grounds are provided by two closely related constitutional dimensions of a novel form of polity that was still at a formative stage of its self-determination: the diachronic dimension of the republic's accession to rights that had previously attached to the British crown and the synchronic dimension of federalism. From early in his career as a state politician in Virginia, and unwaveringly from his appointment as federal chief justice in 1801, Marshall had championed the twin ideals of nationalism and federalism.[42] Put barely, the former ideal was at issue in *Johnson v. McIntosh*, and the latter was at issue in the two Georgia cases.[43]

In *Johnson v. McIntosh*, Marshall found that the US government had succeeded to the title acquired by the British crown under the doctrine of discovery. The issue here was not the rights of Indians but the successive rights

of the crown and the US government in relation to Indians. Now, so far as the later two judgments are concerned, the same principle applies—the rights of Indians were incidental. This time, however, the primary concern was not the successive rights of the US government vis-à-vis the British crown but the coexistent rights of the US government vis-à-vis the states of the Union. In this connection, and altogether consistently, the federalist-nationalist Marshall came down in favor of the federal government.

Cherokee v. Georgia and *Worcester v. Georgia* both involved pleas in which the Supreme Court was asked to intervene in order to restrain the state of Georgia from violating treaties that had been entered into by the federal government. As we have seen, Marshall sidestepped the issue when he could do so at the expense of the Cherokee by means of his finding that domestic dependent nations could not bring cases before the Supreme Court. The following year, however, the Cherokee were back at the Supreme Court. This time they did not appear on their own account but through the person of a white US citizen from Vermont, Samuel Worcester. Worcester was one of two missionaries whom the Georgia court had sentenced to four years of hard labor for being on Cherokee land without the approval of the state government, an action that infringed a statute that Georgia had recently passed as part of a program of negating the Cherokee sovereignty that treaties with the federal government had recognized. The missionaries had appealed to the Supreme Court, who had issued a writ of error to the Superior Court of Georgia. Governor Wilson Lumpkin had reacted to this writ with a defiant message to the Georgia legislature, which responded, in what Charles Warren termed "rebellious resolutions," by directing the governor that "any attempt to reverse the decision of the Superior Court . . . by the Supreme Court of the United States, will be held by this State as an unconstitutional and arbitrary interference in the administration of her criminal laws and will be treated as such."[44] It was in this abrasive context that the Supreme Court came to consider the missionaries' appeals. The question was the same as in the previous year's case: could a state suborn the federal government's agreements with Indian nations? This time, however, the plaintiffs were not domestic dependent nations but US citizens, citizens and foreign nations having undisputed access to the Supreme Court. Thus the federal/state issue became unavoidable. As this issue obtained between Europeans, however, resolving it in favor of the federal government would not affect the diminution of Indian sovereignty.

Against this background, it is not surprising that such sovereignty as Indians have been accorded has often turned out to be hollow when put to the test. The final two Marshall judgments coincided with the systematic campaign of Indian Removal that received legislative expression, during the presidency of Andrew Jackson, in the Indian Removal Act of 1830. Throughout the

following decade or so, the majority of Indians from the South and East (including the Northeast) were relocated west of the Mississippi by force, fraud, or, more often, both—a process through which, apart from loss of life, Indians lost millions of acres of land. Throughout the half-century following the Marshall decisions, Indian treaties put the United States in possession of much of its national territory, as the westward expansion of the republic was sanctioned by these treaties together with warfare with (and purchase from) Mexico, which yielded rights that had originally accrued from agreements between Indian polities and the Spanish.[45] Thus Indian sovereignty, which the treaties presupposed, enabled Indian territories to be converted into so many parts of the United States—their sovereignty encouraged, rather than restrained, Indians' dispossession. As observed, this seeming paradox reflects the fact that it was an inherently inferior form of sovereignty, presupposed in the infantilization of Indians that wardship inscribed. As wards or minors, Indians were incapable of holding rights that inhered in Europeans (adults, personified in the "great father"). Moreover, unlike European wards (unless these were female), Indians could not attain their majority. In keeping with their capacities, their rights were congenitally diminished. This protoevolutionist formula was more damaging to Indian rights than the claim that they had forfeited their sovereignty through defeat in a just war because it operated retrospectively—they had never had a sovereignty to compare with the European one in the first place.[46] Thus a differential nature enabled the nationalist Marshall simultaneously to retain and to devalue the constitutional concession to Indian sovereignty, reducing it to the mere right of occupancy from which European-style sovereignty was axiomatically distinguished. Hence *Johnson v. McIntosh*'s "Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others." They could not transfer absolute title to others because they were incapable of holding it in the first place.[47]

Having arrived at this formula for negating Indian sovereignty, why did the later Marshall seem to back away from it? By the 1830s, in the two Cherokee cases, the requisite diminution of Indian sovereignty came to be expressed as resulting more from the European takeover than from qualities that inhered in Indians. Here again, though, Marshall's consistency was flawless. In the context of his *federalist* agenda, for Marshall to maintain his earlier denial of Indians' precontact incapacity to exercise full national sovereignty would have been to lose the ground that he needed to rule that the relevant jurisdiction lay with the federal government rather than with the state of Georgia. As a state of the Union, Georgia was precluded from engagement in international relations. That was the prerogative of the federal government alone. For relations

with the Cherokee to be international, the Cherokee first had to be a sovereign nation. Hence *Worcester*'s "strong" version of Indian sovereignty, qualified though it was by wardship. Thus Marshall's pro-Indian pronouncements were a rhetorical device to the ironic end of promoting the primacy of the US government. Wardship—or more generally, diminution—enabled Marshall to maintain federal control over Indian affairs by assimilating them to the treaty function while simultaneously attenuating the sovereign status that this entailed for Indian nations.[48] Wardship and federalism were inseparable: wardship defused the anomaly of Indian sovereignty that lingered on as the price of federal control over Indian affairs. In sealing off the lacuna created by the Constitution's silence on Indian sovereignty, wardship completed the ideological process whereby the monarchical doctrine of discovery was refurbished for republican use. In this light, as I have previously observed,

> We see how the flood of broken treaties that followed in the wake of Marshall's judgments preserved the spirit of those judgments. Consider the key phrase "domestic dependent nation" itself. Indian nations were not "domestic" in the conventional sense of having a proper (even familial) place within the social order—on the contrary, their domestic status excluded them from a juridical domain that even foreign nations could enter. Rather than Indians themselves, it was their inconvenient sovereignty that was being domesticated. "Dependent" is similarly double-edged, since, as Marshall himself made clear, dependency, like wardship, connotes both a condition that warrants protection and a state of subordination. In the event, the former provided rhetorical cover for the latter. Finally, "nation," for all its flattering of White-appointed treaty signatories, was a necessary condition of their signing away their peoples' homelands.[49]

In short, rather than conflicting with the Marshall version of sovereignty, Indian dispossession was of its essence.

Worcester v. Georgia and History

Though incongruous with the rhetoric of *Worcester*, this melancholy consequence is consistent with the case's outcome. The circumstances of the judgment's delivery make clear that it was timed to save the Union, not Indians. It has been widely suggested that *Worcester*'s statement of Indian sovereignty was a benign construction whose intentions were frustrated in the hard-nosed realm of practical politics. This suggestion has derived historical sustenance from a remark attributed to President Jackson. The fame of this remark has not suffered from the likelihood of its being apocryphal. According to Horace Greeley, when Jackson was told of the *Worcester* decision, he retorted: "Well: John Marshall has made his decision: *now let him enforce it!*"[50] With the notable

exception of Warren, subsequent historians generally seized on this alleged remark.[51] The aura of mystery surrounding the story is suggestive of an article of faith—a collective submission to the notion that the Supreme Court was prevented from bringing justice to the Cherokee by Jacksonian realpolitik.[52] In Jessie Green and Susan Work's assessment, for instance, "Whatever cruelties may be chargeable to other governmental branches in this [early nineteenth-century] period, the courts always maintained the obligations of good faith due the Indians from the federal government."[53] But this is to take the judgment at face value. The effect of Greeley's story—and accordingly, the character of the *Worcester* decision—is qualified in the light of some apparent realpolitik on Marshall's own part, whose timing of the delivery of his judgment ensured that it would be practically unenforceable regardless of anything that Jackson may have said or done.

As a number of more recent historians have recounted, largely prompted by the research of Joseph Burke (who followed Warren), the *Worcester* judgment was delivered in a fraught and complex juridico-political environment.[54] The federal tensions that would eventually lead to civil war were already in evidence. The previous year, when he delivered the *Cherokee v. Georgia* judgment, Marshall had been acutely aware of a states'-rightist move in Congress to repeal section 25 of the 1789 Judiciary Act, under which the Supreme Court had the power to rescind decisions made by state courts.[55] A decision in favor of the Cherokee would have fueled the fire of those seeking to limit the Supreme Court's power in this way. The following year, when Marshall delivered the *Worcester* decision, federalism was again under threat—not only from the Georgia legislature's attitude to federal treaties with the Cherokee but also from the threat by the South Carolina government of Jackson's erstwhile Vice President John C. Calhoun to refuse to collect or pay the "tariff of abominations" that the Jackson administration was continuing to impose. In preparing to nullify the federal tariff, South Carolina seems to have taken heart from the Georgia legislature's defiance of federal authority in relation to the *Worcester* case. As it was, the issue already had a strong North-South dimension. Because tariffs were seen to encourage retaliatory measures on the part of foreign countries that constituted the primary export market for the plantation economy, they were seen to favor the industrial North at the expense of the South, a division that reinforced the differences regarding slavery.[56] In this connection, Indian Removal provided an issue that was capable of reconciling northerners such as Jackson's second-term Vice President Martin Van Buren and the southern slaveholding interest. When it came to defending the tariff system that protected their industries, many northern republicans were prepared to abandon the missionaries as the price of seeing South Carolina's revolt suppressed.[57] It has even been argued that Indian Removal furnished

a basis for unifying the fledgling Democratic Party.[58] Moreover, Jackson's reluctance to risk alienating Georgia (along with Mississippi and Alabama, which were also clamoring for Removal) for fear that it would be driven to find common cause with South Carolina gave him an incentive for appeasing Georgia. Correspondingly, the Georgians had no desire to face the militant stance that Jackson was adopting against South Carolina. Thus it makes sense that Georgia should fail to support South Carolina's attempt to nullify the tariff while Jackson should overlook Georgia's comparable defiance of the federal judicial process. The point is, however, that this did not need to put Jackson at odds with the Supreme Court. Rather, because nullification had the unlikely-seeming effect of bringing out the federalist in Jackson, Marshall had no cause to disagree with him over the issue. The story of Jackson's remark nicely encapsulates the converging pressures that made it unthinkable that the old Indian fighter would put Cherokee interests before his need to isolate South Carolina. But it does much less justice to Marshall's concurrence with Jackson regarding the threat to federalism that the nullification issue posed.

Significantly, the *Worcester* decision did not order the federal marshal to free Worcester and his fellow prisoner, Elizur Butler, as would have been the normal procedure.[59] Rather it merely referred the ruling back to the Georgia Superior Court, requiring it to reverse its earlier decision and free the missionaries. Under the controversial section 25 of the Judiciary Act of 1789, the Supreme Court could only issue an order of compliance against a state court when that court had already failed to respond to a decision that had been remanded to it at least once. Moreover, the state court had to refuse the Supreme Court's order in writing.[60] Once the *Worcester* judgment had been handed down, however, the Supreme Court went into recess—as the justices had known it would—until January 1833.[61] This did not leave enough time for the Georgia court to refuse the order and a messenger to bring the relevant notification back to Washington before the Supreme Court's 1832 term came to an end (as it happened, the Georgia court did not oblige with a written refusal anyway). If the Supreme Court had wanted to execute its decision, the timing of its judgment ensured that it would not have been able to do so until the following year. Even then, however, the situation would have been far from straightforward because (or so the missionaries' attorney, William Wirt, advised) the Georgia court's defiance would have required the missionaries to petition the state governor for relief, failing which they would have had to petition the president to implement the judgment, failing which they would have had to ask Congress to impeach the recently reelected president, despite his popularity.[62] Thus nothing could happen, and the president would certainly have been under no obligation to act until January 1833 at the earliest.

Even when the Georgia court ignored the Supreme Court's ruling, as everyone presumed it would, the president would not be required to act. Rather (come January 1833) the Supreme Court could issue a writ of *habeas corpus* on behalf of the prisoners, it could indict Georgia state officials for contempt of court, or it could mandate the US marshal to form a *posse comitatus* to carry out its ruling. The president could not be called on to act unless one or more of these actions had failed. When it came to it, the Georgia court did refuse to grant the missionaries *habeas corpus*, though this was not recorded in the court minutes, there being no provision for Supreme Court action where a state court had failed to record its proceedings. In any event, the *habeas corpus* provision was far from conclusive, as the law at the time only applied to prisoners being held in federal custody.[63]

Thus the circumstances of the *Worcester* decision make Jackson's alleged remark redundant. This is not necessarily to deny that he uttered it. It is, however, to say that the remark's considerable notoriety, to which historians have contributed, misrepresents the *Worcester* judgment's predictable consequences, of which the justices were well aware.[64] In the wake of Jackson's reelection in November 1832, with the January 1833 deadline approaching, the nullification issue reached boiling point. The gathering constitutional crisis converged on the two missionaries as they performed their hard labor (as cabinet makers) in Georgia's Milledgeville Penitentiary. Vice President Van Buren, whose presidential ambitions depended crucially on the North-South alliance that he was carefully constructing, devised a strategy to divide Georgia from South Carolina. Georgia's releasing the missionaries without losing face was central to this strategy. As Hezekiah Niles explained in his *Weekly Register*, the hope was "that Georgia, being allowed time to get cool, and content with executing her laws over the Indians and their lands, will quietly release Messrs. Worcester and Butler, and so remove the present cause of action—and cast future controversies on their own precarious issue."[65] This is very much what happened. Though the missionaries were instructing their attorneys to pursue the matter in the Supreme Court as late as November 26, 1832, they were warned, directly and by way of their wives, that their continuing with their action might lead to a federal-state showdown that would push Georgia, Mississippi, and Alabama to side with South Carolina, a situation that could ultimately lead to secession and civil war. The missionaries wavered and consulted the American Board of Commissioners for Foreign Missions; the board instructed the missionaries to request a pardon under protest (which would avoid their seeming to renege on the justice of their cause). For his part, Governor Lumpkin wanted to pardon the missionaries and bring the matter to a close before the looming storm of South Carolina's nullification broke. After a false start, the missionaries were pardoned and released, leaving their

cases mooted and the Cherokee once again without legal recourse.[66] Two days later, on January 16, 1833, Jackson sent a message to Congress asking it to authorize the use of force against South Carolina. As the Columbia, South Carolina, *Telescope* ruefully noted, Jackson "had wit enough to take no step like 'the military force bill' till he had got the Georgia case out of his way."[67] These dramatic developments had been enabled the previous March by the *Worcester* decision, whose timing had ensured that the Supreme Court and the federal government would not have to confront each other for the better part of a year.

All in all, then, the *Worcester* judgment makes little sense as a defense of Indian rights and a great deal of sense as a defense of federalism. The overriding concern of the Marshall court was to assert federal power over the states, not to side with the Cherokee against Georgia. The circumstances of the judgment ensured that the requisite federal power could be asserted without needing to be tested in the Indians' cause. Pragmatically, therefore, the court's priorities were similar to those of Jackson, who was prepared to take a stand against South Carolina when federal revenue was at stake but not against Georgia when Indian rights were the issue. It is significant that an account of the events that followed the decision hardly requires mention of the Cherokee. For all its grandiloquent rhetoric, the *Worcester* decision did nothing to alter the Cherokee's status as a domestic dependent nation that lacked access to the Supreme Court. Their fate depended on factors that were beyond their own control. In perfect conformity with the doctrine of discovery, their fate was determined not by transactions between the Cherokee and Euro-Americans but by a process confined to Euro-Americans: the missionaries' acceptance of the Georgia governor's pardons. When that took place, the Cherokee lost their last legal resort, with Georgia, as *Niles' Weekly Register* had hoped, being left "content with executing her laws over the Indians and their lands."[68]

After Marshall

Given the manifest discrepancy between the rhetoric and the practical outcome of the *Worcester* judgment, it is appropriate to question the proposition that the late-nineteenth-century judgments associated with the doctrine of inherent plenary power (in particular *Kagama*) constituted unwarranted extensions of Marshall's "analogy" of wardship.[69] In so far as the concept of wardship originated in dicta rather than as a judicial holding, the proposition is sound. But this does not mean that there was a conceptual break between Marshall's formulation of sovereignty and the absolutist doctrine of plenary power that would be enunciated later in the century. As we have seen, Marshall's concept of wardship expressed obligation and subordination, with the latter prevailing.

In recouping tribal sovereignty from state control, *Worcester* did not return it to Indian societies. It subordinated it to federal jurisdiction. Plenary power—whereby the courts accorded complete and unreviewable power over Indians to the federal government, thus rendering Indians' treaty-based rights dependent on election results—was not a departure from this. The *Kagama* court even mimicked Marshall's rhetorical style with remarkable fidelity, clothing the hard message of plenary power (which it did not name) in the sententious justification that Indians were so weak that federal domination was "necessary for their protection, as well as to the safety of those among whom they dwell." "From their very weakness and helplessness," the court averred, "there arises the duty of protection, and with it the power."[70] Not only was the rhetoric pure Marshall, but the court traced plenary power back to the premise that "these Indian tribes are wards of the nation. They are communities *dependent* on the United States."[71]

This is not to question the significance of the *Kagama* and *Lone Wolf v. Hitchcock* judgments. I am arguing that there was no rupture between Marshall and plenary power, not that there was no history. Falling as they did around the turn of the twentieth century (in 1886 and 1903, respectively), these two repressive judgments cluster straightforwardly with the other symptoms of containment (notably the end of treaty making and the Dawes legislation) that marked the end of the frontier. In the aftermath of the frontier, which had relied on treaties for its expansion, the doctrine of plenary power sought to remove the remaining juridical obstacles that Indian sovereignty presented to the dual process of dismantling tribal governments and breaking tribal territory down into private allotments that could be sold to white people. So unfettered was the apparatus of plenary power that, in 1913, the *Sandoval* court felt obliged to insulate the rest of the population from the possibility that Congress could deprive any group of its rights by the simple expedient of "arbitrarily calling them an Indian tribe."[72]

The practice of treaty making with Indian tribes had been officially discontinued in March 1871.[73] Despite the humdrum procedural status of this ostensibly minor rider to a congressional appropriation bill, its significance as a marker of the final containment of Indian societies can hardly be overstated. In separating Indian affairs from treaty discourse, the 1871 act consolidated *Cherokee v. Georgia*'s withholding of the protection of international law from Indian nations.[74] The outcome was a thoroughgoing domestication whereby, through being internalized, the Indian problem was rendered administrative rather than political. In the aftermath of the frontier, when the Indian problem had become internal, the *Kagama* and *Lone Wolf v. Hitchcock* judgments formally dispensed with the international dimensions of the Marshall

version of Indian sovereignty, leaving the practical realities of diminution and federal control to stand unadorned.

The extreme of political domination that plenary power represents is generally derived not only from the doctrine of wardship but also, in association with it, from a juridical term whose connection to wardship may not be immediately apparent: a concept known as the "political question." In establishing the connection between wardship and the political question, we can further appreciate the logic of US-style Indian sovereignty and the strategic unity of the Marshall judgments.

Though plenary power is conventionally tied to the *Kagama* judgment, its anticipation in *Cherokee v. Georgia* even extended to the word *plenary*. In his concurring judgment, Justice Baldwin asserted that "the power given in this [constitutional] clause is of the most plenary kind." Lest the full implications of this formula be misunderstood, Baldwin went on to explain that the clause in question consisted in "rules and regulations respecting the territory of the United States; they necessarily include *complete jurisdiction*."[75] In common with many who would follow him, Baldwin traced the US government's power over Indians to the commerce clause's reference to Indian tribes: "not foreign nations nor states of the union, but Indian tribes."[76]

The qualified third term in the domestic dependent nation formula—nationhood—had an elasticity that enabled Indian groups to slip in and out of foreign-nation status in tune with judicial exigency. As we saw, the Marshall court had found in *Worcester v. Georgia* that the domestic dependent nation of the previous year had, in the meantime, become more like a foreign nation. In this case, though, the Cherokee nation had needed to partake of foreignness for Marshall to assert federal primacy over the state of Georgia. Four decades later, a year before treaty making was discontinued, the court in the *Cherokee Tobacco* case would show comparable consistency in proceeding from the Cherokee's quasi-foreignness to enunciate one of the pillars of plenary power. Foreign affairs were for Congress to deal with, not the judiciary. They were a political question. In *Cherokee Tobacco*, because treaties with foreign nations could be superseded by acts of Congress, it was, for once, in an Indian people's interest to be something different from a foreign nation. Under these circumstances, the Cherokee petitioners, like their predecessors in *Worcester*, found themselves assimilated to foreigner status after all, the double bind being dispensed with the customary sententiousness: "Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory [than treaties with foreign nations]."[77] Hence the doctrine of the political question, whereby "the consequences in all such cases [treaties with Indian nations] give rise to questions which must be met

by the political department of the government. They are beyond the sphere of judicial cognizance. . . . If a wrong has been done the power of redress is with Congress, not with the judiciary."[78] This was the basis on which, thirty-three years later, the *Lone Wolf v. Hitchcock* court would place congressional treaty abrogation beyond judicial scrutiny.[79] Thus we finally come full circle: far from being a departure from Marshall, plenary power, which deprived Indians of judicial redress against any abuse that Congress might contrive, required and presupposed the ostensibly benign formulation of Indian sovereignty that Marshall had dispensed in *Worcester v. Georgia*. To be beyond judicial scrutiny, plenary power required the concept of the political question, and this, in turn, required that Indian affairs be aligned with international relations in conformity with *Worcester*'s "strong" version of Indian sovereignty.[80] Thus not only had that version of Indian sovereignty enabled Indian nations to enter into the treaties whereby their respective territories were converted into so many parts of the United States. Once this process reached its limit, in the postfrontier era, the same sovereignty enabled those treaties to be put aside so that Indians' remaining estate could also be transferred. At this point, wardship and the political question become inseparable. A more comprehensive jeopardy could not be devised: either Indian rights were comparable to those held by foreign nations (*Worcester v. Georgia*) or they were not so comparable (*Johnson v. McIntosh* and *Cherokee v. Georgia*). Either way, Indians were without rights.

Where wardship had expressed obligation and subordination, with the subordination aspect prevailing, plenary power expressed protection from the states and subjugation to the federal government, with the subjugation aspect prevailing. As we have seen, Indian sovereignty was preconstitutional, so the Bill of Rights did not apply. Moreover, because Indians were not citizens, treaties, for all their shortcomings, were the only source of rights that they had. In the absence of treaties, Indians became unrelievedly subject to the power of Congress. This unqualified subjection is the essential feature of plenary power. Indians who lacked either treaties or citizenship fell between two stools after 1871. In a two-way loss reminiscent of *Cherokee v. Georgia*, whereby the Cherokee were neither citizens nor a foreign nation, Indians without treaties became subject to the whim of Congress without receiving the positive compensations of subjecthood. Bereft of a social contract, they became subject to but not subjects of a sentence. As the nineteenth century drew to a close, the campaign to generalize this condition to all Indians informed a range of official strategies that maintained the settler-colonial logic of elimination into the postfrontier era.

The cornerstone of the postfrontier regime, the 1887 General Allotment (or Dawes) Act, generalized a strategy—breaking down tribal territory into allotments for allocation to individuals as their private property—that had

been appearing in individual treaties for most of the nineteenth century.[81] Moreover, where treaties did provide for it, allotment typically featured merely as an individual option. Hence it is consistent that Senator Dawes should have advocated the discontinuance of treaty making earlier on the grounds that this would conduce to general allotment.[82] Allotment was not just a device for breaking up tribal landholdings. In addition, the discipline and responsibility accruing from private-property ownership were held out as a total cultural experience that would redeem Indians from collective inertia and convert them into enterprising white individuals. Moreover, breaking down reservations into individually owned lots would remove the impediment to statehood that reservations presented for unadmitted territories.[83] Yet refraining from making new treaties was selective, applying only to those who had not already entered into them. Generalizing its effects would require the abrogation of treaties that had already been signed. This objective, which would remove the legal protection, however insubstantial, that treaties formally provided, was central to the post-1871 policy framework that John Wunder has termed "the New Colonialism," a reservation- and boarding school–based discursive formation, designed to augment the cultural transformation that allotment would achieve, that "attacked every aspect of Native American life—religion, speech, political freedoms, economic liberty, and cultural diversity."[84]

In 1886, the *Kagama* court cited the need to protect Indians as justification for its reassertion of federal primacy over the states: "They [Indians] owe no allegiance to the States, and receive from them no protection."[85] In what Lawrence Baca has plausibly termed "perhaps the single most powerful expression of the authority of the federal government over Indian tribes,"[86] *Kagama* relied on Marshall's concept of wardship to hold that, by ending treaty making, the 1871 amendment had provided that Indians should be governed by acts of Congress: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre [*sic*] of its existence is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."[87] The year after *Kagama*, the Dawes Act was passed. A few years later, at the dawn of the twentieth century, the totalitarian edifice of plenary power was completed when, in *Lone Wolf v. Hitchcock*, the Supreme Court determined that "the power exists to abrogate the provisions of an Indian treaty."[88] In the same judgment, the Court unilaterally surrendered its power to review congressional activity in the special realm of Indian affairs, declaring that Indian affairs were a political question and, as such, the preserve of the legislature. In completing the depoliticization of Indian affairs through

the ironic device of the political question, therefore, the Court took *Cherokee v. Georgia*'s removal of judicial protection to its logical conclusion.

In the wake of the frontier, reservations—the concrete territorial embodiment of that portion of Indians' original sovereignty that they had reserved, or not surrendered, in treaties—were all that Indians had remaining to them. The greatest threat to this residual patrimony was not the US cavalry but allotment, indefatigably championed by the Friends of the Indian, an organization whose name epitomized its rhetorical predilections.[89] During the years between the *Cherokee Tobacco* case in 1870 and *Lone Wolf* in 1903, Congress formally discontinued treaty making, sought to subvert tribal law on reservations, and passed legislation intended to generalize allotment. In territorial terms, the outcome of this collusion of the powers was that, within the same three decades, "cessions in trust" deprived Indians of half their land (from more than 155 million acres in 1881 to less than 80 million in 1900).[90] Thus reduced, Indians were increasingly seen as becoming eligible for the generalized citizenship that would cap their assimilation, the final erasure of Indianness. In individual cases, citizenship had already been made available to Indians who allotted and distanced themselves from the tribal organization, though the 1884 case of John Elk—an assimilated town-dweller who, as an Indian, was nonetheless barred from voting—illustrated the limitations of this concession.[91] In 1919, Indians who had contributed to the war effort were rewarded with citizenship, a measure that was finally generalized in 1924. In light of the persistence, however beleaguered, of tribal organization, it might seem that this measure was somewhat premature. A crucial feature of Indian citizenship was, however, that it was not formally equivalent to that enjoyed by other citizens. Rather, in 1924, Indians as a whole acquired a uniquely qualified form of US citizenship that somehow accommodated the continuing disability of the Marshall court's concept of wardship.[92]

A Rhetoric of Dispossession

The dismal chronicle of Removal, allotment, and assimilation brings us back to the question of rhetoric. How are we to reconcile the fact that the people whom the US government singled out for this treatment were people whose national sovereignties it had insisted on recognizing? At its simplest, the rhetoric operated as a denial, converting dispossession into opportunity. This is not to say that officials seriously believed that expropriated Indians would be convinced. As observed, Indians were not their primary address. Rather, the rhetoric recruited Indians to relay encouragement to the common man. Throughout the history of their dispossession, Indians have been called on to stand in for the

enterprising individual who displaced them. At one of his talks, for instance, Thomas Jefferson impressed on the gathered chiefs his vision for what, without a trace of embarrassment, he called "the lands now given you." To save Indians from losing land to the overbearing tribe, he entreated them to behave like the yeoman farmers of his American idyll, "to give every man a farm; let him enclose it, cultivate it, build a warm house on it, and when he dies, let it belong to his wife and children after him."[93] Jackson would subsequently perfect the rhetorical art of defending innocent tribespeople from the machinations of their venal leaders—in particular, the "half-breeds and renegade white men" who were turning real Indians against giving up tribal territory and removing to their true home in the forest.[94] Such sentiments not only validated the politics of Indian dispossession. In addition, where a populist president's internal constituency was concerned, championing the plain-thinking underdog against manipulation by the clever was bound to resonate with those who feared and mistrusted speculators. By the end of the century, as Hoxie pointed out, it was not Indian Removal but Indian assimilation that had come to furnish a model of fairness with which to reconcile ethnic imbalances.[95] From allotment through the post–World War II policy of tribal termination, Indians who grasped the opportunity that dispossession offered them became ideological role models for the melting pot. In 1957, for example, Senator Arthur Watkins of Utah, indefatigable champion of tribal termination, would dub the policy the "Freedom Program." Though termination involved the final abrogation of treaty obligations, the freed party was not the US government but Indians, who could now share the freedoms enjoyed by mainstream society: "Following in the footsteps of the Emancipation Proclamation of ninety-four years ago, I see the following words emblazoned in letters of fire above the heads of the Indians—*THESE PEOPLE SHALL BE FREE!*"[96]

The patent chasm between rhetoric and outcome in Indian policy is a significant contradiction, judicial notice of which has produced important reprieves for Indians. One thinks, for example, of cases such as *Crow Dog*, *Williams v. Lee*, or the more recent decisions that prompted Vine Deloria and David Wilkins to reaffirm their contention that "the treaty process is viable and remains the most appropriate, most fair, and certainly the clearest manner in which to identify and demarcate the rights of tribal nations."[97] Even in these cases, however, the advantages have by no means been unqualified. Sydney Harring convincingly documented his assertion that the Bureau of Indian Affairs sought the strong pro-sovereignty stance of the court in *Crow Dog* so as to stimulate a public outcry that would facilitate the passing of legislation to reduce tribal authority on reservations.[98] This came to pass two years after the decision, with the enactment of the Seven Major Crimes (or Offenses) Act of March 1885.[99] A year later, the *Kagama* court would seem to have

taken the lesson to heart. Three-quarters of a century after *Kagama*, *Williams v. Lee*'s unambiguous endorsement of tribal-court jurisdiction came at the price of a significant inroad into tribal independence from state control.[100] These are only the cases that it is customary to cite, along with *Worcester* and *Mitchel*, as hopeful.[101] Overall, Indian-affairs rhetoric has been conducive rather than antithetical to the sorry policy outcome. To claim otherwise is to assert the untenable proposition that, for more than two centuries, US presidents, Congress, and the courts have been content to allow the most solemn principles of national policy to be violated publicly with impunity. Rather than viewing the rhetoric, whether naively or disingenuously, as a motive, we should recognize it as a rationale. The fact that it is descriptively misleading is not the point. What matters is that it is a performative rhetoric.[102] It has helped Indian deprivation to occur. Moreover, as indicated at the outset, this ideological function has not been the exclusive preserve of politicians, administrators, and judges. A substantial body of scholarly writing has lent its warrant to the official version of events. Nowhere is this more apparent than in accounts of the Marshall judgments, in particular *Worcester v. Georgia*. Thus we turn to the scholarship.[103]

Scholarship and Innocence

Michael Blumm emphasizes the disjuncture between Marshall's rhetoric and substantive findings with a view to sustaining conclusions that are very different from those that I argue here. Blumm acknowledges the "pernicious" consequences that have flown from the Marshall judgments, in particular their failure to recognize Indian occupancy as equivalent to fee simple, but argues that these were not what the Court intended. Rather, they resulted from subsequent courts' misinterpretations of Marshall's decisions.[104] Yet these subsequent decisions were backed up with quotations from Marshall. Blumm dismisses these inconvenient quotations as "rhetoric," a term that seems to function as a code word for the passages he would rather Marshall had not uttered. Palpably, however, Marshall did utter them, so where did they come from? Blumm argues that they resulted from an alleged ignorance of property law on Marshall's part, which led him to "mislabel" aboriginal title. This mislabeling then "allowed later courts to fundamentally misconstrue the nature of the proprietary rights retained by the natives." Even apart from the vague doctrine of discovery-provenance that he assigns to the rightful law he would have had Marshall dispense, nothing that Blumm claims can alter the fact that these awkward dicta were made available for future use. Hence his distinctly lame acknowledgment that the miscreant later judges "were encouraged . . . by

the rhetoric of Chief Justice Marshall, who mislabeled the property interests of the tribes and the government."[105]

Depicting Marshall as caught between the hard fact of Euro-American invasion and a desire to recoup as much for Indians as he pragmatically could, Joshua Seifert has focused on the intertextual poetics of the *Johnson v. McIntosh* decision, arguing that "the power of the opinion comes from its story as much as its outcome."[106] By "outcome," Seifert means the judicial holding, well short of the social impact that I am emphasizing. This is not to say that he is unaware of alternatives. On the contrary, Seifert is staunchly hermeneuticist in his championing of the priority of the text. I imagine that he would regard the argument I am putting here as an instance of his eponymous myth of *Johnson*: "The view of many of *Johnson*'s modern critics, the view that constitutes the myth of *Johnson*, is that the opinion is essentially an act of conquest itself, bringing into American law all of the Eurocentric prejudices that plagued much of colonial American thought. These criticisms are best aimed not at *Johnson*, but rather at subsequent opinions that failed to reckon Marshall's sarcasm, and the cultural pragmatics that drive *Johnson*."[107] For all its literary allusions (held out as traversing the contents of Marshall's library and, thereby, of his thought), Seifert's account ultimately brings us back to Blumm: Marshall is not to blame. His successor judges misread him. Not only this, but to have read him correctly, later judges are expected to have divined a redeeming sarcasm secreted in Marshall's text—they are expected to have read the text as saying something different from its own wording. As an indication of just how much Seifert requires of these judges, he even endorses the extravagant suggestion that, in order to capture Marshall's meaning properly, you have to read his words out loud.[108] In the event, Seifert's text epitomizes the insouciance concerning retributive justice for Indians that undergirds the intentional fallacy, prioritizing one white man's internal condition over the historical oppression of hundreds of Native societies. In the face of the challenge of doing justice to the past, Seifert offers the niceties of the text: "the literary aspect of *Johnson* makes the opinion vital. The moral depth is lost on many of Marshall's critics who see the story, but mistake the man. *Johnson* is not just [!] a social model for American-Indian legal interactions; it is also a literary-social model with subtleties in tone and purpose that question and encourage further questioning of the ability to do justice to the past."[109]

In a manner comparable to Blumm's, though with much more historical substance (it is based on a veritable archival coup), Lindsay Robertson's *Conquest by Law* also depicts the consequences of the Marshall judgments as unintended.[110] Though anyone reading the *Johnson* judgment would be hard-pressed to believe that its author could possibly have believed it could fail to impact negatively on Indians, Robertson insists that Marshall had

different intentions, believing that the judgment would help his Virginia Militia comrades to acquire land bounties promised them for Revolutionary War service. Here intention seems to partake of exclusivity, as if it is only possible to entertain one at a time. According to Robertson, Marshall was not as hostile to Indians as the judgment's outcomes, which included the Indian Removal Act, would suggest. Rather, he was dismayed by these outcomes and intended the *Worcester v. Georgia* judgment to rectify the defects in *Johnson v. McIntosh*. In a further frustration of intention, however, the revision came too late. In Robertson's account, the European invasion of America becomes a kind of intentional concertina as the aberrant outcomes pile up: "This is a story of unintended consequences, of the way a spurious claim gave rise to a doctrine intended to be of limited application, which itself gave rise to a massive displacement of persons and the creation of an entire legal regime." The idealism informing this summary is echoed in the book's title, which, apart from suggesting that Indians were conquered by law in isolation from force of arms, asserts that the agency that dispossessed Indians was "discovery"—in which, it immediately becomes clear, Robertson does not seek to include the physical process that the cover illustration suggests, involving navigators and explorers along with their diseases and weapons, but merely the conceptual verbiage of discovery. This textual conquest is internal to the invaders' legal system, of which Robertson wishes his book to prompt reconsideration.[111] This perspective not only exonerates Marshall. In so internalizing Indian affairs, it also recapitulates the domestication that Marshall enunciated in *Cherokee v. Georgia*.[112]

In common with Robertson's book, Stuart Banner's *How the Indians Lost Their Land* seeks to divert attention away from outright violence in favor of an emphasis on the potency of the white man's legal system: "In the end, the acquisition of land in North America is a story of power, of the displacement of the weak by the strong; but it was a more subtle and complex kind of power than would have been necessary to seize land by force."[113] As such, Banner's book is premised on a straw man, as few if any authors have been simplistic enough to posit exclusivity between law and the state violence that sanctions it.[114] The alternative that Banner presents to the putative hegemony of this violence-only thesis consists in a set of alternations between historical periods and social factions. When governments were denying Indian ownership, settlers could be entering into contracts and treaties with Indians on the frontier, and vice versa.[115] This scenario leads Banner to posit an ongoing nineteenth-century tussle between landgrabbers on the western frontier and a set of eastern legislators who were generally well intentioned. This tussle followed *Johnson v. McIntosh*, which was the turning point that finally declared that Indian land belonged ultimately to the federal government—whereupon,

consistent with Banner's alternations, the federal government acted as if Indians owned the land. In Banner's case, therefore, the reversal represented by *Worcester v. Georgia* was not strictly necessary because the policy realm already provided scope for the exercise of good intentions.[116]

On the face of it, there is no real mystery as to why the federal government should insist on cloaking its dealings with Indians in a semblance of propriety. Yet Banner resists skeptical explanations, as well he might. After all, if eastern legislators had not meant what they said, he would lose the productive tension between center and frontier that drives his whole scheme. Thus the easterners' statements have to be taken at face value, rendering these reformers honestly mistaken rather than in denial about the pragmatic business of conquest. "What kind of conqueror," Banner asks at the beginning of his book, repeating the question verbatim four pages later, "takes such care to keep up the appearance that no conquest is taking place?" — "A conqueror," he answers his own question, "that genuinely does not think of itself as one."[117] One cannot help wondering why such a seemingly naive assertion should be so important to Banner's argument that he is prepared to risk repeating it.[118] It is worth noting that, without the transparency whereby easterners' motives were reflected in their mistaken utterances, there would be no substantial difference between these gentlemen and their less disingenuous frontier counterparts.[119] There was certainly no difference of outcome. Rather, on the level of outcomes, the consistency was not merely spatial, harmonizing East and West. It even reconciled the republican and monarchical eras. Thus Indian Removal was nothing new. As Banner states, "if one focuses on the methods by which land was transferred and on the consequences to the Indians of ceding their land . . . the features of US government policy that are conventionally thought to make up Indian removal were nothing new. If the 1830s were an era of removal, so too were the previous two centuries."[120]

What, then, was new? What was the substance of the various alternations that Banner identifies if there was no difference of outcome, if they were merely different means to a common end? A problem for Banner is that taking public statements at their face value is the only evidence that he has for asserting that some whites (early colonists and eastern reformers) believed that Indians owned their land while others (Articles of Confederation–era legislators and frontier landgrabbers) either did not believe it or did not care. The easterners did not get what they said they wanted because their high-blown declarations on behalf of Indians were frustrated by the countervailing machinations of the westerners. Banner is less clear on how the westerners' ambitions were frustrated. Perhaps the rhetoric emanating from the East had a delaying effect. In any event, the outcome was a compromise between East and West, the result being that because nobody got what they wanted, nobody,

not even the westerners, can be credited with having intended the outcome. Innocence prevailed, and the Indians lost their land: "We might interpret the outcome [of federal Indian policy] as an extraordinarily clever and successful method of acquiring land, accomplished at great cost to the Indians but at least cost to the United States. It would be too much, however, to conceive of that result as having been intended by anyone. Federal Indian land policy came about not by plan but by compromise."[121]

Banner observes of the reformers who persisted with allotment long after the evidence of its effects "ought to have given them second thoughts": "Rarely have so many well-intentioned people been so wrong."[122] Yet his book is a history of well-intentioned people making just this kind of mistake, so it cannot have been as rare as all that. Moreover, he downplays countervailing evidence that these misguided policy makers had to ignore or suppress in order to persist in their innocence. Two years before the passing of the General Allotment Act, for instance, former Indian Commissioner George Manypenny—whom Banner quotes in utterances more convenient to his argument—had publicly repudiated his own mistaken intentions.[123] Vainly counseling against the impending Dawes legislation, a repentant Manypenny harked back to the 1850s, when he had himself implemented measures designed to dissolve tribal governments and encourage allotments, "thus making the road clear for the rapacity of the white man." He had, he said, acted in good faith: "Had I known then, as I know now, what would result from those treaties . . . I would be compelled to admit that I had committed a high crime."[124]

Indian-affairs rhetoric can also be promoted over outcomes in smaller ways, which do not necessarily contribute to an explicit defense. As observed, various scholars have depicted Marshall's judgments as dividing into two contrary tendencies, the benevolent sentiments expressed in *Worcester v. Georgia* being contrasted to the relatively harsh language of *Johnson v. McIntosh*. But this misses the consistency of outcome between the cases. Lisa Ford, for instance, asserts that the *Worcester v. Georgia* court "rejected its own reasoning in Johnson v. McIntosh."[125] In the light of the earlier judgments, Ronald Berutti concluded that it was a "mystery" that the court should have found in Worcester's favor.[126] Even Burke depicted *Worcester* as Marshall's moment of redemption ("he wrote in 1832 [*Worcester*] the opinion that he could not write in 1831 [*Cherokee v. Georgia*]"), while Wunder attributed the differences between the judgments to the unlikely circumstance that Marshall had "confused the basic concepts of sovereignty."[127] According to Timothy Garrison, the fact that "Marshall was willing to admit his own fallibility and was capable of changing positions so drastically reflected considerable courage on his part," while William Swindler saw *Worcester* as "essentially a retraction of much that had been central to the *Cherokee Nation* opinion."[128] In a somewhat different vein, Philip Frickey found

Worcester to be "an interpretation far afield from the normative and institutional assumptions of *Johnson*."[129] For all its metahistorical subtlety, however, Frickey's account does not depart from the others in leaving open the question of how it comes to be that, in spite of *Worcester*, *Johnson* remains good law.[130] More systematically than other commentators, Charles Wilkinson influentially distinguished between two competing traditions in Indian jurisprudence (though without pursuing the revealing consideration that the same judges could subscribe to both).[131] The first tradition, a benign one, "began with the Marshall Trilogy . . . and, especially, *Worcester v. Georgia*" and continued through the late nineteenth-century *Crow Dog* and *Talton v. Mayes* cases. It was counterposed to the correspondingly repressive *Kagama-McBratney-Lone Wolf* line, which "implicitly conceptualized tribes as lost societies without power, as minions of the federal government." Without explaining quite how this latter characterization might differ from wardship, Wilkinson resorted to irony to account for the ability of the *Kagama-McBratney-Lone Wolf* line of judges to cite Marshall in support of their draconian findings: "The *Worcester-Crow Dog-Talton* line set out doctrine justifying extensive tribal power with considerable clarity, but such clarity has had the ironic effect of complicating modern adjudication."[132] Echoing the theme, Garrison also dismissed as ironic the fact that so many of "the same justices, judges, and lawyers who succeeded Marshall, and who helped establish the chief justice as the demigod of American law, [should pay] so little attention to one of his most forthright and logical decisions [*Worcester*]."[133] The whole judicial army cannot be out of step. Unlike many law historians (along with Williams, Edward White is a notable exception), most judges have not allowed rhetorical dicta to distract them from the substantive continuity informing the Marshall decisions.[134] In the final analysis, as Robert Coulter and Steven Tullberg witheringly commented, "the denial of Indian rights is not less damaging because it occurs under the rubric of paternalism rather than greed."[135]

Legocentrism and the Political Question

The tendency to take Marshall rhetoric at face value participates in a wider surprise at the gap between the exalted language of Indian policy and the oppressive consistency of its outcomes. William Quinn, for instance, found Indian sovereignty "curiously coexisting with the antithetical policy of conquest and genocide."[136] Indians, by contrast, tend to duck for cover when white people offer them equal rights. As Sandra Cadwalader wryly noted, "For Indians, unlike any other group in this country, equality does not appear as a state of grace, but rather as a threat to their remaining tribal heritage—their

land, culture, religion, sovereignty."[137] In the forked tongue of assimilationist rhetoric, the denial of separate status is expressed as equality, just as, in Senator Watkins's lexicon, the termination of tribal trust obligations was expressed as freedom. The issue here is not the sincerity, or even the lack of it, behind Indian-affairs rhetoric. An account of the public outcomes of Indian policy does not require an account of private intentions. Conversely—and more importantly—*private intentions do not account for the outcomes of Indian policy*. Surprise requires a lack of knowledge, an ignorance or an amnesia whereby something veridical is nonetheless unexpected. A psychologistic focus on individual intentions sustains this amnesia because it reproduces historical actors' failure to register observable external regularities—in this case, regularities that add up to the ongoing settler colonization of Native America. In the historiographical outcome, generation upon generation of well-intentioned experts can keep making the same mistake in a repetitive Indian-affairs soliloquy that is miraculously detached from its consequences. For ideological purposes, an unintended consequence presents the same alibi as nature. Both mystify (hence the surprise); both place the issue in question beyond the reach of political intervention.

Thus we end on the wider question of legocentrism. Eric Foner has characterized the idealist tendency in US legal historiography that I have been discussing as "history focused on law and ideas divorced from their social, political, and military context."[138] As Alexis de Tocqueville had earlier observed, with characteristic insight, "There is almost no political question in the United States that is not resolved sooner or later into a judicial question."[139] De Tocqueville's American tour took place in 1830, the year of the Indian Removal Act. Nonetheless, he still managed to omit Indians from his list of those who could not vote ("slaves, domestics, and indigents nourished by the townships"). Yet his remarks on the status of legal discourse in the United States remain germane to the political options available to Indians. Noting that "the inhabitant of the United States" submits to the law as to "a contract to which he would have been a party," de Tocqueville made the crucial observation that "those who want to attack the laws are therefore reduced to doing openly one of these two things: they must either change the opinion of the nation or ride roughshod over its will."[140] Beyond changing the opinion of the nation, this leaves few viable options for disempowered communities who find themselves oppressed by the law. The fiduciary element of wardship was a concession to this predicament—as we saw, though Indians were in the invidious position of "occupy[ing] a territory to which we assert a title independent of their will," they could still "look to our government for protection; rely upon its kindness and its power."[141] Whether this fiduciary scenario was merely an analogy, we are still left with the legal substance that it conveyed.

That substance, it should be remembered, was that, for the purposes of treaty enforcement by the US Supreme Court, the Cherokee did not exist.

The hegemony of the law in Indian affairs is a compelling reason for seeking to maximize the possibilities available through the law rather than discrediting its more hopeful avenues. I am not for a moment suggesting that Indians should give up trying to mount successful court cases.[142] But this does not alter the fact that Marshall's rhetoric is treacherous sand on which to base Indian rights. As Vine Deloria and Clifford Lytle acknowledged, the federal government and Indian claimants have both sought to exploit the contradictions in Marshall to suit their convenience: "Predicting the outcome of litigation, the legislative process, or discretionary administrative actions is therefore perilous since it cannot be predicted which set of interpretive tools will be chosen."[143] By the same token, the most motley of judgments—*Mitchel v. United States*, *US v. Rogers*, *Crow Dog*, *Kagama*, *Talton v. Mayes*, *Lone Wolf v. Hitchcock*, and *Williams v. Lee*—all found accommodation within the semantic range of Marshall's pronouncements, which have not predetermined judicial outcomes so much as provided an arena for political contestation.

In the end, then, Native rights are a political question after all. Moreover, scholarly representations have a crucial role to play in the historical resolution of this question. As observed at the outset, Indian-affairs rhetoric has an ideological role that extends beyond the reservation, a situation that provides Indians with a range of potential alliances that belies their demographic marginality. As also observed, however, the realization of these potential alliances is particularly dependent on the dissemination of information. This is because a further outcome of Indian sovereignty has been the relatively high degree of Indian invisibility that reservations provide. The positive aspect of this invisibility is a qualified respite from surveillance. A related consequence is, however, that potential allies (de Tocqueville's "opinion of the nation") are particularly reliant on hearsay information. Under these circumstances, scholarly endorsements of misleading official rhetoric are not merely declarative. In lending the academy's authoritative warrant to the mystification of Native deprivation, such endorsements are constitutive—they help that deprivation to persist. In this lies the promise, and with it the responsibility, of a critical scholarship.

Notes

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1. This complaint was commonplace from the earliest days of the republic. Consider, e.g., Secretary at War Henry Knox's July 18, 1788 report to the Continental Congress: "It appears . . . that the white inhabitants on the frontiers of North Carolina in the vicinity of Chota on the Tenessee [*sic*] river, have frequently committed the most unprovoked and direct outrages against the Cherokee indians . . . in order to vindicate the sovereignty of the Union from reproach, your secretary is of opinion, that, the sentiments, and decision, of Congress should be fully expressed to the said white inhabitants, who have so flagitiously stained the American name." *Journals of the Continental Congress*, vol. 34 (Charleston, SC: Nabu Press, 2010), 342–43.

2. Inconstant primarily because, as will become clear, I do not subscribe to the New Critics' advocacy of confining one's gaze to the text. Rather, this is precisely where I fault many of the authors discussed here. For literary-theoretical exegesis and critique of the New Criticism, see, e.g., David Newton-De Molina, ed., *On Literary Intention* (Edinburgh, Scotland: Edinburgh University Press, 1976), esp. the chapters by M. K. Wimsatt and Monroe C. Beardsley ("The Intentional Fallacy," 1–13) and Quentin Skinner ("Motives, Intentions and Interpretations of Texts," 210–21).

3. "In contrast to the kind of colonial formation that Cabral or Fanon confronted, settler colonies were not primarily established to extract surplus value from indigenous labour. Rather, they are premised on displacing indigenes from (or *re*placing them on) the land. . . . Settler colonies were (are) premised on the elimination of native societies. . . . The colonizers come to stay—invasion is a structure not an event." Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999), 1–2; Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8 (2006): 387–409, see esp. p. 388.

4. I leave for another time the task of tracing through the history of intentionalism in Western political thought. Suffice it to say here that contemporary Western historiography seems to have taken the theme back to the subjectivist individualism expressed in courtly love lyrics, in Gratian's *Decretum*, and in philosophers associated with Peter Abelard (who contended, in Brian Tierney's formulation, that "the moral value of an act was determined entirely by individual intention"). For a lucid, entertaining, and provocative introduction, see Tierney, "Origins of Natural Rights Language: Texts and Contexts, 1150–1250," *History of Political Thought* 10 (1989): 615–46, esp. pp. 626–38, where natural-rights discourse is adumbrated through to the doctrine of discovery. Mysteriously, however (and he is by no means alone in this), Tierney's retrospective trail seems to peter out during the twelfth century, only to reemerge more than a millennium earlier in Cicero and, before him, in the Stoics. My suspicion is that the missing continuity may feed back through Islamic Neoplatonism, the twelfth century marking the high point in the Andalusian translation movement whereby Latin Western Christendom initially (re)acquired its Hellenistic legacy from Arabic sources, only thence turning to Byzantium for the Greek originals. An Islamic background has, after all, been assigned to the individualistic troubadors (Mariá Rosa Menocal, "Close Encounters in Medieval Provence: Spain's Role in the Birth of Troubadour Poetry," *Hispanic Review* 49 [1981]: 43–64). From the voluminous literature on the Andalusian translations, see, e.g., M-T. D'Alverny, "Translations and Translators," in *Renaissance and Renewal in the Twelfth Century*, ed. R. L. Benson and G. Constable (Cambridge, MA: Harvard University Press, 1982), 421–62; Charles H. Haskins, *The Renaissance of the Twelfth Century*

(Cambridge, MA: Harvard University Press, 1927), 278–302; R. Lemay, "Dans l'Espagne du XIIe siècle: les traductions de l'arabe au latin," *Annales* 18 (1963): 639–65.

5. Fred L. Israel, ed., *The State of the Union Messages of the Presidents, 1790–1966*, 3 vols. (New York: Chelsea House, 1966), 1199.

6. Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880–1920* (Cambridge: Cambridge University Press, 1989), 33–34. I have cited Hoxie's remark before, though without appreciating the fuller implications that it suggests, which Hoxie did not explore. See Patrick Wolfe, "*Corpus Nullius*: The Exception of Indians and Other Aliens in US Constitutional Discourse," *Postcolonial Studies* 10 (2007): 138. The present article seeks to develop these implications.

7. Hoxie, *A Final Promise*, 34.

8. In a related context (the Zionist settler colonization of Palestine), George E. Bisharat has noted of the ideological address of colonial lawmaking that "the use of law by colonizers to execute and rationalize oppressive policies, notably the acquisition of native lands for European settlement, is poorly explained as an effort to gain the consent of thoroughly dominated indigenous populations. Rather, it is argued here, the use of law under such circumstances reflects the needs of dominant colonial groups to maintain internal cohesion and morale, and, to a lesser extent, to gain international approval for their policies." Bisharat, "Land, Law, and Legitimacy in Israel and the Occupied Territories," *The American University Law Review* 43 (1994): 467–561, see esp. pp. 469–71.

9. I address the question of why liberal-democratic discourse should select mathematics as its preferred idiom for talking about political exclusion in my entry: "Minorities: Overview" in Peter N. Stearns, ed., *Oxford Encyclopedia of the Modern World*, vol. 5 (New York: Oxford University Press, 2008), 218–21.

10. The point concerns the need for information to be disseminated among those who are not already informed about Indian affairs. For all their virtues, therefore, Native-produced publications such as *Indian Country Today*, *Wičazo Ša Review*, or the earlier *Akwesasne Notes* perform a somewhat different role.

11. Prominent examples of this widespread tendency include Father Francis Paul Prucha, who consistently privileges expressions of intention. In his apologia for Andrew Jackson's policy of Indian Removal, which allegedly reflected Jackson's "vision" for Indians, e.g., Prucha asserted that "Jackson was genuinely concerned for the well-being of the Indians and for their civilization. Although his critics would scoff at the idea of placing him on the roll of the humanitarians, his *assertions* [author emphasis]—public and private—add up to a consistent belief that the Indians were capable of accepting white civilization, the hope that they would eventually do so, and repeated efforts to take measures that would make the change possible and even speed it along. . . . The removal policy, begun long before Jackson's presidency but wholeheartedly adopted by him, was the culmination of these views." Francis P. Prucha, "Andrew Jackson's Indian Policy: A Reassessment," *Journal of American History* 56 (1969): 527–39, see esp. pp. 533–34. Donald B. Cole has pointed to the partiality of Prucha's defense of Jackson: "Prucha . . . documents Jackson's supposed generosity toward the Indians by quoting from the president's [Jackson's] letter to John Coffee about the Chickasaw removal in which he referred to the 'liberality' and 'justice' of his policies. Prucha neglects, however, to include the part in which Jackson congratulated Coffee for getting the Indians to move at their own expense—not a good example of generosity." Cole, *The Presidency of Andrew Jackson* (Lawrence: University Press of Kansas, 1993), 118. Prucha's sentiments are echoed in formulations such as Robert V. Remini's claim that "Jackson felt he had no choice but to insist on [Indian] removal as the only means of preventing conflict and Indian annihilation." Remini, *Andrew Jackson and His Indian Wars* (New York: Viking, 2001), 228. For a sustained critique of Remini's partisanship regarding Jackson, see Laurence M. Hauptman, *Tribes and Tribulations: Misconceptions about American Indians and Their Histories* (Albuquerque: New Mexico University Press, 1995), 40–48.

12. Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990). The general approach can be traced back to Edward W. Said's *Orientalism* (London: Routledge, 1978) and, ultimately, to Karl Marx's writings on ideology.

13. The classic accounts from a well-established continuing literature include Annie H. Abel, "The History of Events Resulting in Indian Consolidation West of the Mississippi River," *American Historical Association Annual Report for 1906*, 2 vols. (Washington, DC: Government Printing Office, 1908), ii, 233–450; Angie Debo, *A History of the Indians of the United States* (Norman: Oklahoma University Press, 1970), 117–283; Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes of Indians*, 2nd ed. (Norman: Oklahoma University Press, 1953); Helen Hunt Jackson, *A Century of Dishonor: A Sketch of the United States Government's Dealings with Some of the Indian Tribes* (New York: Harper and Brothers, 1885).

14. See, e.g., Russell Thornton, *American Indian Holocaust and Survival: A Population History since 1492* (Norman: Oklahoma University Press, 1987), 91–133.

15. *The Cherokee Nation v. the State of Georgia*, 30 U.S. 1, 5 Pet. 1 (1831) at 21.

16. *Johnson and Graham's Lessee v. William M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) at 569. Earlier still, in the 1795 Treaty of Greenville between the US government and the twelve tribes to the west of the Pennsylvania frontier, a link had been established between the general concept of wardship and the principle of preemption. "Treaty with the Wyandot, etc. (August 3, 1795), art. V.," in *Indian Affairs: Laws and Treaties*, vol. 2, *Indian Treaties, 1778–1883*, ed. Charles J. Kappler (Washington, DC: Government Printing Office, 1904), 42.

17. *Cherokee v. Georgia*, 30 U.S. 1 at 21.

18. David Williams, *The Georgia Gold Rush: Twenty-Niners, Cherokees, and Gold Fever* (Columbia: South Carolina University Press, 1993); Mary E. Young, "Racism in Red and Black: Indians and Other Free People of Color in Georgia Law, Politics, and Removal Policy," *Georgia Historical Quarterly* 73 (1989): 492–518.

19. Excerpted from the Northwest Ordinance of 1787, ratified by Congress in August 1789 (1 Stat. 50).

20. Letter to Governor William Henry Harrison, February 27, 1803, in Thomas Jefferson, *The Writings of Thomas Jefferson*, 20 vols., ed. Richard H. Johnston, Andrew Adgate Lipscomb, and Albert Ellery Bergh (Washington, DC: Thomas Jefferson Memorial Association, 1903–4), x, 369–71.

21. For varying analyses and discussions of the principal formulations of the doctrine of discovery, see, e.g., Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard International Law Journal* 40 (1999): 1–80; Larissa Behrendt, T. Lindberg, R. J. Miller, and J. Ruru, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Melbourne, Australia: Oxford University Press, 2010); Andrew Fitzmaurice, *Humanism and America: An Intellectual History of English Colonisation, 1500–1625* (Cambridge: Cambridge University Press, 2003); Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), esp. 148–66; David Kennedy, "Primitive Legal Scholarship," *Harvard International Law Journal* 27 (1986): 1–98; Mark F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longman, Green and Co., 1926); Williams, *American Indian in Western Legal Thought*, 233–86.

22. At the level of the individual colony, Daniel M. Friedenberg has traced the division back to the 1758 Treaty of Easton. Friedenberg, *Life, Liberty, and the Pursuit of Land: The Plunder of Early America* (Buffalo, NY: Prometheus, 1992), 105.

23. Eric Kades has contended that *Johnson v. McIntosh* enabled preemption to serve "as a means of expropriating Indian land at minimal cost. Just as sellers can charge more when they are monopolists without competitors, so too buyers can pay less when they are monopsonists without competing

bidders." Kades, "History and Interpretation of the Great Case of *Johnson v. M'Intosh*," *Law and History Review* 19 (2001): 67–115, see esp. p. 69.

24. *Johnson v. McIntosh*, 21 U.S. at 545.

25. Id. at 596; author emphasis.

26. Mark Rifkin, "Indigenizing Agamben: Rethinking Sovereignty in Light of the 'Peculiar' Status of Native Peoples," *Cultural Critique* 73 (2009): 89. As may be apparent from my approach here, I do not believe that Rifkin needed to detour by way of Agamben's theoretical apparatus to arrive at the acute perspective he develops in this article.

27. *Cherokee v. Georgia*, 30 U.S. 1 at 15, 19.

28. Cf., e.g., Anghie, "Finding the Peripheries," 69; L. C. Green, "Claims to Territory in Colonial America," *The Law of Nations and the New World*, ed. L. C. Green and Olive P. Dickason (Edmonton: Alberta University Press, 1989), 76–127, see esp. pp. 125–26.

29. My thanks to Audra Simpson for making me see the optical dimension.

30. For the specifically religious (Christian) dimension of discovery, see Steven T. Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Golden, CO: Fulcrum, 2008). On the shift from providential to secular rationales for Europeans' right to dispossess, see Gary Nash, "The Concept of Inevitability in the History of European-Indian Relations," in *Inequality in Early America*, ed. Carla Gardina Pestana and Sharon Vineberg Salinger (Hanover, NH: Dartmouth College/New England University Press, 1999), 267–91. Roy Harvey Pearce's retitled 1953 classic, *Savagism and Civilization: A Study of the Indian and the American Mind*, rev. ed. (Berkeley: California University Press, 1988), also remains instructive.

31. Where British North America was concerned, this principle was enshrined by the Privy Council in the *Mohegan Indians v. Connecticut* case, which, though it dragged on for most of the eighteenth century, eventually made it clear that Indian policy was a matter for the Crown in London rather than its local colonial representatives. Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), 422–42. The Royal Proclamation, which was issued while that case was still proceeding, assigned the key components of Indian relations (land, trade, and diplomacy) to the central government in London ("Proclamation of 1763," reproduced in Robert N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs," *Boston University Law Review* 69 [1989]: 329–85, see esp. pp. 382–85).

32. Articles of Confederation, art. 9, cl. 4 (U.S. 1781). See also, Gene Bergman, "Defying Precedent: Can Abenaki Native Title Be Extinguished by the 'Weight of History'?" *American Indian Law Review* 18 (1993): 447–85, see 455n46; Walter H. Mohr, *Federal Indian Relations 1774–1788* (Philadelphia, PA: Philadelphia University Press, 1933), 173–99.

33. Articles of Confederation, art. II, § 2, para. 2.

34. Ibid., art. I, § 8, para. 3. The consequential phrase "and with the Indian tribes" was deliberate, the Constitutional Convention having amended the Committee of Detail's recommendation that the clause in question read "and with the Indians, within the Limits of any State, not subject to the laws thereof." Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1911), ii, 367.

35. 1 Stat. 137; 1 Stat. 329; 1 Stat. 469; 1 Stat. 743.

36. Articles of Confederation, art. VI, para. 2.

37. Peter Silver, *Our Savage Neighbors: How Indian War Transformed Early America* (New York: Norton, 2008), xix–xx.

38. Alexander Hamilton, "Publius," in *The Federalist*, no. 24, ed. Jacob E. Cooke (1787; repr., Middletown, CT: Wesleyan University Press, 1961), 152–57. Marshall would recognize the centrality of this concern over the management of Indian affairs in his *Worcester* judgment: "early journals of

Congress exhibit the most anxious desire to conciliate the Indian nations. . . . The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend, and everything which might excite [Indian] hostility was avoided." *Samuel A. Worcester, Plaintiff in Error, v. The State of Georgia*, 31 U.S. 6, Pet. 515 (1832) at 515–96; see pp. 515, 549.

39. Wolfe, "*Corpus Nullius*," 136.

40. See, e.g., Milner S. Ball, "Constitution, Court, Indian Tribes," *American Bar Foundation Research Journal* 1 (1987): 1–139, see esp. pp. 31–33. Other examples follow. In her account of plenary power, which deals with the concept's application to nonwhite immigrants and aliens as well as to Indians, Sarah Cleveland locates the break between *Cherokee v. Georgia* and *Worcester* (which "significantly modified the view that [Marshall had] set forth in *M'Intosh* and *Cherokee Nation* [and] . . . offered a resounding affirmation of Indian sovereignty." Cleveland, "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs," *Texas Law Review* 81 (2002): 1–284, see esp. p. 39.

41. *Cherokee v. Georgia*, 30 U.S. 1 at 30.

42. David S. Robarge, *A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court* (Westport, CT: Greenwood, 2000), 97–98, 298–301; Lindsay G. Robertson, "John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine," *Journal of Law and Politics* 13 (1997): 759–77; Thomas C. Shevory, *John Marshall's Law: Interpretation, Ideology, and Interest* (Westport, CT: Greenwood, 1994), 80–95.

43. Thus I endorse Joyotpaul Chaudhuri's assertion, which he did not develop, that "the *McIntosh* decision is consistent with Marshall's nationalism and his imperial conceptions of the unitary state. The *Worcester* decision conforms to his Federalist and antistate politics." Chaudhuri, "American Indian Policy: An Overview," in *American Indian Policy in the Twentieth Century*, ed. Vine Deloria Jr. (Norman: Oklahoma University Press, 1985), 15–33, see esp. p. 25.

44. Quoted in Charles Warren, *The Supreme Court in United States History, 1821–1855*, vol. 2 (Boston: Little, Brown and Co., 1922), 214.

45. Felix S. Cohen, "The Spanish Origin of Indian Rights in the Law of the United States," *The Georgetown Law Journal* 31 (1942): 1–21.

46. See, e.g., *Journals of the Continental Congress* 25 (1783): 681–93; 27 (1784): 453–65.

47. Blake Watson has argued, on the basis of numerous mainly seventeenth-century examples of individual English colonists making land purchases directly from Indians, that this perspective of Marshall's was "by no means universally accepted" prior to the *Johnson v. McIntosh* judgment, concluding that Marshall's view that Indian land rights were diminished should not be accepted today. See Watson, "John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of 'Universal Recognition' of the Doctrine of Discovery," *Seton Hall Law Review* 36 (2006): 481, see esp. p. 549. Watson concedes, however, that the crown attempted to regulate these purchases (535–37).

48. The import of the commerce clause remained unresolved, and the comprehensive Trade and Intercourse Act of 1834 was yet to be passed.

49. Wolfe, "*Corpus Nullius*," 140. Jill Norgren analyzed the formula as follows: "For his purposes, Marshall represented Indian nations as being *domestic* in the sense that their territories were located within the exterior boundaries of the United States, *dependent* because of the limitations placed on them with respect to war and foreign negotiations, and *national* because they were distinctly separate peoples outside the American polity." Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw-Hill, 1996), 103.

50. In view of the historiographic purchase that this version of events was to achieve, it is worth noting that, in order to corroborate it, Horace Greeley cited someone who was not necessarily a witness and whose testimony could no longer be checked: "I am indebted for this fact [!] to the late Governor George N. Briggs, of Massachusetts, who was in Washington as a member of Congress

when the decision was rendered." Greeley, *The American Conflict*, 2 vols. (Hartford, CT: O. D. Case, 1864), i, 106n27.

51. Warren, *Supreme Court in US History*, 217–22.

52. "This mighty opinion [*Worcester*,] written in the deep heat of one of history's most charged situations, is by any standard one of the great constitutional, moral, and political statements ever produced by our jurisprudence. Historians still argue over whether President Jackson actually said the words attributed to him in response to the *Worcester* decision, but surely he thought them; and surely it can be said, even today, that the words 'John Marshall has made his law, now let him enforce it' continue to epitomize the fragile, multifaceted relationship between the Supreme Court and the presidency." Charles F. Wilkinson, "Indian Tribes and the American Constitution," in *Indians in American History*, ed. Frederick E. Hoxie (Arlington Heights, IL: Harlan Davidson, 1988), 123.

53. Green and Work were citing (actually closely paraphrasing) Austin Abbott, "Indians and the Law," *Harvard Law Review* 2 (1888): 171. Cf. Jessie Green and Susan Work, "Comment: Inherent Indian Sovereignty," *American Indian Law Review* 4 (1976): 321.

54. Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review* 21 (1969): 500–31, see esp. pp. 524–31. In addition to the specific citations, the account in this and the following three paragraphs relies generally on Warren's and Burke's correctives, together with Cole, *The Presidency of Andrew Jackson*, 114–17; Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (New York: Oxford University Press, 1987); Timothy A. Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (Athens: Georgia University Press, 2002), 147, 193–97; William McLoughlin, *Cherokees and Missionaries, 1789–1839* (New Haven, CT: Yale University Press, 1984), 245–99; Edwin Miles, "After John Marshall's Decision: *Worcester v. Georgia* and the Nullification Crisis," *Journal of Southern History* 39 (1973): 519–44; Robert V. Remini, *The Legacy of Andrew Jackson: Essays on Democracy, Indian Removal, and Slavery* (Baton Rouge: Louisiana State University Press, 1988), 68–79. In a more diffuse sense, my analysis is indebted to the early work of Nell Newton, in particular to her "Federal Power over Indians: Its Sources, Scope, and Limitations," *University of Pennsylvania Law Review* 132 (1984): 195–288.

55. Cole, *The Presidency of Andrew Jackson*, 113.

56. Louis P. Masur, *1831: Year of Eclipse* (New York: Hill and Wang, 2001), 153–56.

57. Miles, "After John Marshall's Decision," 534.

58. Richard B. Latner, *The Presidency of Andrew Jackson: White House Politics 1829–1837* (Athens: Georgia University Press, 1979), 97–98.

59. William F. Swindler, "Politics as Law: The Cherokee Cases," *American Indian Law Review* 3 (1975): 7–20, see esp. p. 16.

60. As Joseph Burke pointed out, *Niles' Weekly Register* of March 31, 1832 and the *National Intelligencer* of April 5, 1832, "clearly explained what would have to be done before Jackson could be called on to execute its [the Supreme Court's *Worcester*] decree. And even a layman's glance at the Judiciary Act of 1789 would have made this clear." Burke, "Cherokee Cases," 525n144.

61. That the court was attuned to the benefits of postponement was demonstrated in the concurrent case of *New Jersey v. New York*. The argument presented by New York Attorney-General Bronson having begun to involve the court in crucial states'-rights considerations concerning its own jurisdiction, "on the morning of the next day, the Chief Justice, I believe it was, said that as the case had assumed a more important aspect than had been contemplated, the Court had agreed to postpone any further proceedings till next session." *New York Courier*, March 21,1832, quoted in Warren, *Supreme Court in US History*, 232.

62. Burke, "Cherokee Cases," 526; Garrison, *Legal Ideology of Removal*, 193–94.

63. Warren, *Supreme Court in US History*, 224.

64. Prior to Warren, even Ulrich Phillips had been content with a close paraphrase of Greeley. Phillips, *Georgia and State Rights* (1901; repr., New York: Aldine Press, 1968), 82. After Warren, various historians have still reproduced Greeley's account with little or no qualification. See, e.g., Alfred H. Kelly and Winifred A. Harbison, *The American Constitution: Its Origin and Development* (New York: Norton, 1948), 303. Accounts by better-known and more recent scholars seem more surprising, however. To substantiate her assertion that "the President [Jackson] refused to enforce this decision [*Worcester*]," for instance, Mary Young simply cited Peters's report of the judgment. Young, "Indian Removal and Land Allotment: The Civilized Tribes and Jacksonian Justice," *American Historical Review* 64 (1958): 31–45, see 36n13. Yet this flaw in Young's account hardly compares with Jill Norgren and Petra Shattuck's citation of Charles Warren to substantiate their claim that "President Jackson is said to have responded to the Court's decision in favor of the Cherokee [*sic*—not the missionaries]: 'John Marshall has made his decision, now let him enforce it.'" Norgren and Shattuck, "Limits of Legal Action: The Cherokee Cases," *American Indian Culture and Research Journal* 2, no. 2 (1978): 14–25; see esp. p. 24n9; see also their text, p. 20. Even Vine Deloria and Clifford Lytle managed to have the Cherokee, rather than the missionaries, as litigants: "The Cherokees won the *Worcester* case but Marshall's fears were realized. On hearing of the decision, President Jackson is reported to have remarked, 'John Marshall has made his decision: now let him enforce it.'" Deloria and Lytle, *American Indians, American Justice* (Austin: Texas University Press, 1983), 33.

65. *Niles' Weekly Register*, quoted in Warren, *Supreme Court in US History*, 227.

66. For a detailed account of the circumstances surrounding Butler and Worcester's release, Joseph Tracy, *History of the American Board of Commissioners for Foreign Missions*, 2nd ed. (New York: M. W. Dodd, 1842), 280–82, remains well worth consulting.

67. Quoted in Miles, "After John Marshall's Decision," 541.

68. *Niles' Weekly Register*, quoted in Warren, *Supreme Court in US History*, 227.

69. Deloria and Lytle, *American Indians, American Justice*, 41; David Wilkins, *American Indian Sovereignty and the US Supreme Court: The Masking of Justice* (Austin: Texas University Press, 1997), 352–53.

70. *United States v. Kagama and Another, Indians*, 118 U.S. 375 (1886) at 384.

71. *Kagama* 118 U.S. 375 at 383–84; emphasis in original.

72. *United States, Plaintiff in Error, v. Felipe Sandoval*, 231 U.S. 28 (1913) at 46.

73. 16 Stat., 566 (Act of March 3rd, 1871, c. 120, § 1). So far as the United States was concerned, a major difference between the executive agreements and treaties was that, whereas under the Constitution (art. II, § 2), treaties involved the executive and legislative branches (presidential representatives and a two-thirds Senate majority), the agreements merely required simple majorities in Congress and the Senate. See Vine Deloria Jr. and Raymond J. De Mallie, eds., *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979* (Norman: Oklahoma University Press, 1999), i, 249.

74. Patrick Wolfe, "After the Frontier: Separation and Absorption in US Indian Policy," *settler colonial studies* 1 (2011): 13–50, see esp. pp. 32–33. Available at http://ojs.lib.swin.edu.au/index.php/settlercolonialstudies/article/view/240/224 (accessed September 10, 2011).

75. *Cherokee v. Georgia*, 30 U.S. 1 at 44; author's emphasis. The constitutional clause in question was art. 4, s. 3, § 2. David Wilkins has traced the concept back to *Gibbons v. Ogden* in 1824. Wilkins, *American Indian Sovereignty and the US Supreme Court*, 25.

76. *Cherokee v. Georgia*, 30 U.S. 1 at 42.

77. *Two Hundred and Seven Half Pound Papers of Smoking Tobacco, Elias C., Boudinot et al. (Claimants) v. United States*, 78 U.S., Wall. 11. 616 (1870) at 621 (hereinafter referred to as *Cherokee Tobacco*).

78. *Cherokee Tobacco*, 78 U.S. at 621. The doctrine is conventionally traced back to Taney's judgment in *United States v. Rogers*, 45 U.S., 4 How. 567–574 (1846) at 572. Even in *Cherokee v. Georgia*, however, the principle had been at least suggested: "The bill [plaint] . . . savours [*sic*] too much of the exercise of political power to be within the proper province of the judicial department. . . . If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted." *Cherokee v. Georgia*, 30 U.S. 1 at 19–20.

79. Since the 1970s, the Supreme Court has departed from this view on Fifth Amendment grounds. In 1980, Justice Blackmun's decision in the Sioux Nation case (*US v. Sioux Nation of Indians*, 448 U.S. 371 [1980]) "finally buried the infamous 'political question' doctrine." Wilkins, *American Indian Sovereignty and the US Supreme Court*, 229.

80. "By relying on federal foreign relations power to free tribal sovereignty from state control, *Worcester* subjugated that sovereignty to the will of Congress and set the stage for a tradition of deference to Congress in Indian affairs analogous to that deference accorded Congress (or the President) in foreign affairs." Newton, "Federal Power over Indians," 202.

81. The best general account of allotment is still D. S. Otis, *The Dawes Act and the Allotment of Indian Lands*, ed. F. P. Prucha (1934; repr., Norman: Oklahoma University Press, 1973). For an excellent account of the allotment program's consequences for some of its primary targets, see Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893–1914* (Orem, UT: Ancestry, 1999).

82. Wilcomb Washburn, *The Assault on Indian Tribalism: The General Allotment Law (Dawes Act) of 1887* (Philadelphia, PA: J. B. Lippincott, 1975), 25. For an alternative account of the allotment program in the context of assimilation and blood quanta, see Wolfe, "After the Frontier," 23–39.

83. "It was inconceivable to the federal officials that a state could be admitted to the Union that did not provide for free commerce with other states, and the communal holding of land struck directly at the personal land tenure system already entrenched in the other states. If an Indian could not sell a tract of land within a state, how could the other states have equal status with the newly admitted Indian state and how could commerce proceed when the best that white citizens might ever achieve within the new Indian state might be the leasing of lands?" Vine Deloria Jr. and Clifford M. Lytle, *The Nations Within: The Past and the Future of American Indian Sovereignty* (Austin: Texas University Press, 1984), 24–25.

84. John R. Wunder, "*Retained by the People*": *A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994), 39, 17.

85. *Kagama*, 118 U.S. 375 at 383–84.

86. Lawrence Baca, "The Legal Status of American Indians," in *History of Indian-White Relations*, vol. 4 of *Handbook of North American Indians*, ed. Wilcomb E. Washburn (Washington, DC: Smithsonian Institution, 1988), 237.

87. *Kagama*, 118 U.S. 375 at 384–85.

88. During the special circumstances of the Civil War, Congress had previously empowered the president to abrogate treaties entered into with Indian nations that had sided with the Confederacy (Appropriations Act of July 5, 1862, ch. 135, § 1, 12 Stat., 512, 521).

89. Francis P. Prucha, *Americanizing the American Indians: Writings by the "Friends of the Indian"* (Cambridge, MA: Harvard University Press, 1973).

90. US Bureau of the Census, Department of Commerce, *Statistical Abstract of the United States* (Washington, DC: Government Printing Office, 1955), 180.

91. *Elk v. Wilkins*, 112 U.S. 94 (1884).

92. "Nor did the fact of citizenship create any constitutional protection for Indians against the actions of their tribal governments." Baca, "Legal Status of American Indians," 233. *Elk v. Wilkins* notwithstanding, T. H. Haas drew attention to the provisions for Indians who took up allotments or elected to reside apart from their tribes to be made citizens. Haas, "The Legal Aspects of Indian

Affairs from 1887 to 1957," *Annals of the American Academy of Political and Social Science* 311 (1957): 12–22, see esp. p. 13.

93. Letter to Captain Hendrick, the Delawares, Mohicans, and Munries, December 21, 1808, in Jefferson, *The Writings of Thomas Jefferson*, xvi, 452. See also Jefferson's May 4, 1808 talk to the Chiefs of the Upper Cherokees (*The Writings of Thomas Jefferson*, xvi, 432–35).

94. Theda Perdue, *"Mixed Blood" Indians: Racial Construction in the Early South* (Athens: Georgia University Press, 2003), 70, 95–96.

95. See n. 6 above and associated text.

96. Arthur V. Watkins, "Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person," *Annals of the American Academy of Political and Social Science* 311 (1957): 55.

97. Vine Deloria Jr. and David Wilkins, *Tribes, Treaties, and Constitutional Tribulations* (Austin: Texas University Press, 1999), 162.

98. Sydney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994). For the sake of continuity, I refer to the Bureau (rather than to the Office) of Indian Affairs throughout.

99. 23 Stat., 385.

100. *Williams v. Lee*, 358 U.S. 217 (1959) at 220.

101. In *Mitchel v. United States*, which was Marshall's last case, Justice Baldwin took US Indian affairs rhetoric to the limit. Speaking for a unanimous Supreme Court that included Marshall, Baldwin averred that Indians' title to their land was "as sacred as the fee simple of the whites" (34 U.S., 9 Pet. 711 [1835 at] 746). Three years later, the Cherokee embarked on the Trail of Tears.

102. Performative utterances act on the world rather than merely describing it. Their force is illocutionary rather than (or as well as) propositional, constitutive rather than declaratory. The classic formulations of speech act theory are those of the English philosophers J. L. Austin (*How To Do Things with Words* [Cambridge: Cambridge University Press, 1975)] and John R. Searle (*Expression and Meaning: Studies in the Theory of Speech Acts* [Cambridge: Cambridge University Press, 1979]).

103. It should be clear that I am not simply problematizing the "particular rhetorics used to justify the state's plenary power," an approach whose shortcomings Rifkin rightly critiques in Williams and others (Rifkin, "Indigenizing Agamben," 90). Rather I am concerned with the positivity whereby scholarly rhetoric actually produces—and thereby becomes—state power.

104. Michael C. Blumm, "Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country," *Vermont Law Review* 28 (2004): 713–77, see esp. pp. 716–17, 773.

105. Ibid., 717.

106. Joshua Seifert, "The Myth of *Johnson v. McIntosh*," *UCLA Law Review* 52 (2004): 291.

107. Ibid., 326.

108. Ibid., 310–11.

109. Ibid., 328.

110. Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005). I would like to record that, when I e-mailed Lindsay Robertson on hearing of his book being in press, he graciously entrusted a manuscript copy to me, a complete stranger, his only condition being the unenforceable one that I should not comment on it prior to publication.

111. Ibid., 4.

112. In addition to rendering the conquest of Indians a literary event, Robertson's book recapitulates the doctrine of discovery by confining it to Europeans. Presumably sensitive to the charge that he has overlooked Indian agency, Robertson acknowledges this confinement: "Despite the fact that the

legacy of the *Johnson v. McIntosh* litigation is felt most acutely by indigenous peoples, the history of the litigation was dictated almost entirely by European Americans. Indigenous peoples seldom appear in the following narrative. I hope their absence will underscore the extent of their effective disenfranchisement in the judicial conquest of Native America." Ibid., xiii.

113. Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA: Harvard University Press, 2005), 82.

114. It is hard to know who would disagree with Banner—certainly not Robert A. Williams Jr., whom Banner cites (ibid., 11) in disregard of a title, accurately reflecting the book's contents, that refers to "discourses"—rather than to, e.g., firearms or blunt instruments—of conquest (Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest*). Otherwise, Banner's critique consists in decontextualized stray quotes (10–11).

115. In this respect, Banner's analysis is comparable to Lisa Ford's emphasis on local transactions between settlers and Natives on the frontier: "Settlers and indigenous people developed their historically distinct affinities with reciprocity and retaliation into a body of syncretic, uneven, and at times mutually misunderstood practices. The resulting syncretic normativity of reciprocity and retaliation tended to push indigenous-settler theft and violence outside the purview of federal and state courts." Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge, MA: Harvard University Press, 2010), 36.

116. Though Banner nonetheless subscribes to the reversal: "In *Worcester v. Georgia*, John Marshall led the Supreme Court in a ringing declaration of Indian sovereignty. The crux of *Worcester* contradicted some of what Marshall had said in his earlier opinions." *How the Indians Lost*, 221.

117. Ibid., 2, 6.

118. The question is so important that Banner cannot finish his book without returning to it once again: "But it is hard to see why justices bent on conquest would have perceived a need to cover it up" (ibid., 246). The answer lies, of course, in the "bent on."

119. The Dawes reformers did not constitute a congressional majority that was independently able to carry the day. On the contrary, as Hoxie's absorbing tables of voting patterns show, they invariably required support from other factions, whose intentions were often very different from their own (Hoxie, *A Final Promise*, 35, 110–11). For an account of the cross-factional congressional support that allotment variously motivated, see also William T. Hagan, "Private Property: The Indian's Door to Civilization," *Ethnohistory* 3 (1956): 126–37.

120. Banner, *How the Indians Lost*, 192.

121. Ibid., 148–49.

122. Ibid., 287, 278.

123. Ibid., 231–32.

124. G. W. Manypenny, "Shall We Persist in a Policy That Has Failed?" *The Council Fire* 8, no. 11 (November 1885): 156. Manypenny was here disavowing the very policies that Banner quoted him as advocating in the passages just cited (see n. 123).

125. Ford, *Settler Sovereignty*, 192. Ford maintains the tradition of scholarly confusion that attends this topic. Despite asserting, in close to ringing terms, that the *Worcester* court "acted to end their role in the oppression of indigenous people . . . by vindicating both federal and indigenous sovereignty at the expense of Georgia's jurisdiction," and by "bolster[ing] indigenous rights to land in Georgia" (192), she goes on to describe *Worcester*'s defense of Indian sovereignty as "pallid" (195).

126. Ronald A. Berutti, "The Cherokee Cases: The Fight to Save the Supreme Court and the Cherokee Indians," *American Indian Law Review* 17 (1992): 291–308, see esp. p. 305.

127. Burke, "Cherokee Cases," 522. John R. Wunder, "No More Treaties: The Resolution of 1871 and the Alteration of Indian Rights to Their Homelands," in *Native Americans and the Law:*

Contemporary and Historical Perspectives on American Indian Rights, Freedoms, and Sovereignty, ed. John R. Wunder (New York: Garland, 1966), 42.

128. Garrison, *Legal Ideology of Removal*, 10; Swindler, "Politics as Law," 15.

129. Philip P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law," *Harvard Law Review* 107 (1993): 402.

130. Robertson's response to this objection (*Conquest by Law*, 144) is that, when courts cite *Johnson*, "what they invoke is the repudiated product of multiple contingencies." Whatever it might mean (it presumably refers to *Worcester*), this repudiation is repudiated by the citations. *Johnson* remains good law.

131. Sydney Harring, e.g., simply accepted Wilkinson's construction as given. Harring, *Crow Dog's Case*, 9n17.

132. Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, CT: Yale University Press, 1985), 24–25.

133. Garrison, *Legal Ideology of Removal*, 240.

134. "Yet when the opinion [*Worcester v. Georgia*] was said and done, the rights of Indian tribes occupied precisely the same jurisprudential state that they had occupied in *Johnson v. McIntosh*." G. Edward White (with Gerald Gunther), *The Marshall Court and Cultural Change, 1815–1835* (New York: Oxford University Press, 1988), 732. See also Williams, *American Indian in Western Legal Thought*, 231.

135. Robert T. Coulter and Steven M. Tullberg, "Indian Land Rights," in *The Aggressions of Civilization: Federal Indian Policy since the 1880s*, ed. Sandra L. Cadwalader and Vine Deloria Jr. (Philadelphia, PA: Temple University Press, 1984), 189.

136. William W. Quinn Jr., "Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 *C.F.R.* § 83," *American Indian Law Review* 17 (1992): 38.

137. Cadwalader, introduction to Cadwalader and Deloria, *Aggressions of Civilization*, x.

138. Foner's referent was Banner's book, the shortcomings of which he criticized in terms comparable to mine: "Ultimately, *How the Indians Lost Their Land* illustrates the weaknesses of a history focused on laws and ideas divorced from their social, political and military context. To be sure, Banner is fully aware that 'formal law and actual practice could diverge.' But this radical understatement is typical of an account that seems oddly antiseptic given the violence that always infused Indian-white relations. Banner unnecessarily plays down the role of outright military subjugation in land acquisition." Eric Foner, "Purchase and/or Conquest," review of *How the Indians Lost Their Land*, by Stuart Banner, *London Review of Books* (February 9, 2006): 17–18. I am grateful to Gerald Torres for bringing this review to my attention.

139. Alexis de Tocqueville, *Democracy in America*, trans. and ed. Harvey C. Mansfield and Delba Winthrop (Chicago: Chicago University Press, 2000), 257.

140. Ibid., 230.

141. *Cherokee v. Georgia*, 30 U.S. 1 at 21.

142. To put this another way, the two strategies for furthering Native rights that James Anaya has cogently distinguished as the "historical sovereignty" approach (which seeks the redrawing of state boundaries along historical lines) and the less formally legalistic "human rights" approach are not mutually exclusive. See James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims," *Iowa Law Review* 75 (1990): 837.

143. Deloria and Lytle, *American Indians, American Justice*, 33.