"RESPECTING THE ORIGINAL JUSTICE OF THE CLAIM":

REALITY AND LEGALITY IN JOHN MARSHALL'S

MYTH OF INDIAN DIVESTITURE, *JOHNSON V. M'INTOSH*

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This thesis examines Chief Justice of the United States Supreme Court John Marshall's opinion for *Johnson and Graham's Lessee v. William M'Intosh* (1823) in light of the fictional history he employed in justifying the decision of the Court. I work from Hannah Arendt's conceptions of myth and legend as corrective of history, and conclude in line with Milner S. Ball that the legal transcription of custom into statute finds a natural corollary in the poetic license exercised by forging precedence from *obiter dicta*. In my examination, I treat law as literature insofar as it allows one to elucidate the elements of *Johnson v. M'Intosh* that are amorally imperial in nature, and on which America is founded. While legend and law can be formally quite similar, I argue that racist, ethnocentric decisions like *Johnson v. M'Intosh* demonstrate that if we desire for our laws to endure as the paramount social embodiment of justice, it is essential that the forms of law and legend remain disparate. As I conclude, the violence done Indian tribes by the statutory institution of Marshall's mythical opinion as authoritative, "true" history is unforgivable and irreparable.

Cette thèse examine l'opinion du président de la Cour suprême des Etats-Unis, John Marshall, sur l'arrêt *Johnson and Graham's Lessee v. William M'Intosh* (1823), au regard de l'histoire fictionnelle qu'il employait pour justifier la décision de la Cour. Cette thèse étudie la conception d'Hannah Arendt du mythe et de la légende comme correctif de l'Histoire, et conclut, en accord avec Milner S. Ball, que la transcription légale de la coutume en loi trouve un corollaire naturel dans la licence poétique exercée dans la construction de la préséance de l'*obiter dicta*. Puisque épopée et loi peuvent être formellement similaires, je soutiens que des décisions racistes et ethnocentriques telles que *Johnson v. M'Intosh* démontrent que si nous désirons que nos lois restent l'incarnation sociale prédominante de justice, il est essentiel que les textes de lois et l'épopée restent distincts. Comme je conclus, la violence faite aux tribues indiennes par l'institution, par Marshall, de l'épopée comme faisant autorité car officielle, "vraie" Histoire, est impardonnable et irréparable.

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I. Introduction: Myth and Legality

In the third decade of the last century before Christ, Virgil sat down to narrativize his ancestors' attainment of what, over the preceding millennium, had become the glory of Imperial Rome. The implications of Virgil's act, which resulted in *The Aeneid*, were great, and reverberated through the Western literary tradition for some two more millennia and counting. In many senses the human impact of his narrative of conquest, which Milner S. Ball describes as a tale of "original violence" that was "justified by the subsequent stability embodied in law," was unprecedented. Likewise, in 1823, when Chief Justice John Marshall sat atop the bar of the fledgling United States Supreme Court to pen the decision for *Johnson and Graham's Lessee v. William M'Intosh*, the lives and livelihoods of a great many hung in the balance. According to one scholar at the Smithsonian Institution in the late 1950s, on Marshall's decision for *Johnson v. M'Intosh*

> hinged the title to the real estate of the nation, the independence of numerous Indian nations, the sanctity of treaty rights, and even the very existence of law and order. Marshall had to consider not only law but conscience and expediency as well. The "natural" rights of the Indians had to be seen in terms of the "speculative" rights of the earlier European monarchs, the "juridical" rights of their successor American states, and the "practical" economic demands of the millions who now populated the continent.
>
> Marshall did not hesitate, and…declared that the Indians of the United States did not possess an unqualified sovereignty despite the centuries of relations conducted with them in terms of treaties and diplomatic agreements. (Washburn 26)

In reality, Marshall did not *have* "to consider" anything beyond the issue at bar, which was a series of private purchases from the Illinois and Piankashaw Indians, along the Illinois and Wabash rivers, transacted in the few years leading up to the Revolution. But what resulted instead was a great deal more than just the resolution of the matter at hand: Marshall used *Johnson v. M'Intosh* to mythologize his European forebears' conquest of native North

America; and in doing so, to secure the rights of white, civilized Europeans to land then held by "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest." With the intonation of surprise, Chief Justice Marshall excused his new mythology by the practical necessity of the matter: "To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence" – as if this, like Aeneas' final confrontation with Turnus, were an unnatural and unreasonable reaction (*Johnson v. M'Intosh* 590).

The European venture in the New World, as a trope, has often been compared to various epics – particularly to Virgil's *Aeneid*, with its narrative of transplantation and settler-state conquest.[1] In this thesis, I liken the mythical justification provided by *The Aeneid* to the descendants of Italy's conquerors to Marshall's alteration of history to structure favorable New-World terms for the descendants of Europeans in his opinion for *Johnson v. M'Intosh*.

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[1] Milner Ball's "Constitution, Court, Indian Tribes" is among the finest and most intrepid studies to make the comparison, which he attributes foremost to Hannah Arendt (Ball 7n.18). Ball, however, finds that the "secular Western tales of origin are ultimately inapposite, and attempted adaptations of them founder on contrary American realities" (10). Most of all, perhaps, Ball is concerned that *The Aeneid* could be used to justify a similar American myth, the "founding events" of which "were not concocted; the history is accessible" (10). I rely heavily on Ball's insights, especially insofar as they offer a critique of the mythic revision of American history.

Other works that make the American comparison to *Aeneid* and its hero include John C. Shields' *The American Aeneas: Classical Origins of the American Self*, an odd work that aims to find in the literary tradition of the Adamic myth an answer to the question, "What precisely did Vergil's hero, Aeneas, and his poem, the *Aeneid*, suggest to migrating and settling Early Americans and to Americans of the Revolutionary era?" (xxix); and Joshua L. Seifert's "The Myth of *Johnson v. M'Intosh*," where he argues that Marshall had an analog in Virgil, who "was torn about the foundation of the Roman state" because it was "steeped in moral guilt, but nothing could be done" (308). While I employ Seifert's paper selectively, I do not make use of Shields' monograph.

Bearing the epic literary trope in mind, I pay far more attention to the Marshall's opinion itself, especially its disregard of justice, than to the theoretical intersections of literature and law. While possessed of a significantly greater capacity than *The Aeneid* to wreak real, human violence, Marshall's legal artifact is nonetheless characterized by all the machinations of the classical epic. After briefly laying out the terms of these literary machinations in my introduction, I examine them in the context both of the history of real conquest in North America, and of the history Marshall gives to justify his rhetorical conquest. My analogical reading of *Johnson v. M'Intosh* and the mythic tradition of *The Aeneid* functions on two levels: first, Marshall acts as just another mythologist in the Virgilian line, as author of his own, and his own culture's, foundational myth; second, Marshall not only inherits Virgil's mythmaking tradition – in the form of law-making-by-mythmaking – but he inherits, as a descendant of Western Europeans, the "aboriginal violence" mythologized in *The Aeneid* itself.

That is to say, Marshall gets both the whole tradition – all the myths and the formal tradition they comprise – and one myth in that lineage in particular as an indicative example of the fundamentally violent course Western culture's mythic metadiscourse has taken since its inception. Marshall gets Aeneas' exiled people and their exilic search for a new homeland; *and* he gets the "pitiless heart" that drives it (Virgil X.782). Virgil may have had some qualms about offering a justification of the conquest of Italy by Aeneas and the Trojans, and offers an account that is resultantly morally conflicted. Marshall, despite myriad attempts at exculpating himself, ultimately stifled any qualms he may have had and used his invented, mythical backstory to advance the interests of the proto-American state in their appropriation of Indian lands. Marshall used his privileged access to the legal narrative

to offer an edition that provided a new American national-origin myth.[2] That myth, however, served not just as inspiration for the young American national project, but also as a cog in the pragmatically efficient machine that, step by step, disposed America's native populations of their homelands, and maintains their subjugation to this day.

Working from the basic entry in which M. H. Abrams defines *Epic* in his *Glossary of Literary Terms*, I catalogue the pitfalls of writing *law* with the license of *epic*. Abrams considers five key features of epic, shared by "no more than a half-dozen poems of indubitable greatness." I abridge his five points as follows. First, the narrative features a hero "of great national or even cosmic importance." Second, the setting of the narrative "is ample in scale, and may be worldwide, or even larger." Third, the narrative's "action involves superhuman deeds in battle…or a long, arduous, and dangerous journey intrepidly accomplished." Fourth, in these actions "the gods or other supernatural beings take an interest or an active part." Finally, the poem itself, composing such a narrative, "is a ceremonial performance, and is narrated in a ceremonial style which is deliberately distanced from ordinary speech and proportioned to the grandeur of the heroic subject and architecture" ("Epic," Abrams 77).[3] For each respective point, we have *Johnson v. M'Intosh* structured as epic as follows. First, Chief Justice John Marshall forges himself, as a descendant of the discovering European "potentates of the old world" (*Johnson v. M'Intosh* 590), into the

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[2] Seifert finds similarly that

> Marshall's desire to create a national narrative finds its legal expression in *Johnson v. M'Intosh*. By settling once and for all that private parties and states could not purchase complete title from the Indian tribes, Marshall put the power to obtain title to Indian lands exclusively in the hands of the federal government. In so doing, "Marshall's opinion helped the United States continue to present a united political, military, and economic front." *Johnson* told the story of the United States from discovery to Revolution, creating a myth of establishment that became part of our legal and cultural landscape. (293, citing Kades "Great Case" 113)

[3] Henceforth I refer to Abrams only in my text, and do not cite page numbers; Abrams' entire entry for *epic* occupies only pages 76-78.

requisite figure of "great national or even cosmic importance." He outlines his own, very significant cultural stake in the European New-World project, and must defend it to the last. Second, the *Johnson v. M'Intosh* decision spans the Atlantic world, if not all settler states, and pits half the world – European Christians – against its natural opposite – barbarous heathens – on the stage of savage wilderness. Marshall claimed as much a right to the unknown and undiscovered as to the already discovered and claimed, with the result that his project became not so much a journey indiscriminately "into *the* wilderness" as one "into *our* wilderness." Third, Marshall's "superhuman deed in battle" is the very abrogation of battle itself. This he achieves by his rhetorical conversion of discovery into conquest, which in turn is accompanied by the "superhuman" triumph of amoral legality, written by the victors, over justice itself, the plight of the vanquished. Fourth, much, if not all, of the Europeans' New-World project is justified by their own self-perpetuating invocation that they were on an errand from God to "Be fruitful, and multiply, and fill the earth and subdue it." Fifth and finally, law by its very nature is a "ceremonial performance," and "is deliberately distanced from ordinary speech and proportioned to the grandeur" of the power and authority that accompany it.[4]

Reading Marshall's legal "narrative" through the lens of Abrams' definition of epic, I conclude that it is possible for the mythical epic and the legal forms to be quite similar,

[4] In addition to these five characteristics of the narrative and its delivery, Abrams also lists three conventions that pertain with more specificity to the form of the epic poem itself: first, the narrator begins with the emphasis of "his argument, or epic theme, invokes a muse or guiding spirit to inspire him in his great undertaking, then addresses to the muse the epic question, the answer to which inaugurates the narrative proper"; second, the narrative famously "starts in medias res, at a critical point in the action"; and third, throughout the work appear "catalogues of some of the principal characters, introduced in formal detail… These characters are often given set speeches that reveal their diverse temperaments and moral attitudes" ("Epic," Abrams 78). Marshall, in *Johnson v. M'Intosh*, offers varyingly precise corrollaries of these three subcategories.

indeed identical, such that they can coexist in the same textual artifact of *legality* – rather than only in examples of fictional narrativity accepted as *literature*. "Texts have consequences," Christopher Tomlins argues: "they deliver violence, reveal violence, conceal violence, are violence, sometimes all at the same time" (456-57). But *Johnson v. M'Intosh* demonstrates that unless the forms of poetic epic and statutory law remain quite disparate, law *as* epic comes to represent even more the operation of an ideology that Robert Cover describes as "much more significant in justifying an order to those who principally benefit from it and who must defend it than it is in hiding the nature of the order from those who are its victims" ("Violence and the Word" 1608). Myth in the place of legal precedence becomes a veil drawn over victimhood, but the erasure of memory can never be complete. Indeed, an epic like *The Aeneid* could just as easily serve to remind its readers of the violence of their origins, with the purpose of preventing like violence in the future, as justify violent means by their ends in the *Pax Romana*. But Marshall's rhetorical conquest, with its goal of rewriting history to supplant proper legal precedence, cannot continue to offer the contrast of multiple possible origins. The anthropologist James Clifford proposes that, "while a court is a theater of dramatic gestures, it is also a machine for producing a permanent document," and that our "adversary system is designed not to produce a judgment that will satisfy everyone or that may be renegotiated next year if the situation changes. It determines winners and losers, a decision on the permanent truth of the case. In this sense law reflects a logic of literacy, of the historical archive rather than of changing collective memory. To be successful the trial's result must endure the way a written text endures" (328-29). Law, as such, must endure *like* epic – as epic endures – but it need hardly endure *as* epic – in the form of the mythical national backstory. Cover goes further regarding the real impact of a similar "logic of literacy," declaring that judges

> deal in pain and death.

> That is not all that they do. Perhaps that is not what they usually do. But they *do* deal death, and pain. From John Winthrop through Warren Burger they have sat atop a pyramid of violence, dealing…
>
> In this they are different from poets, from critics, from artists. It will not do to insist on the violence of strong poetry, and strong poets. Even the violence of weak judges is utterly real – a naïve but immediate reality, in need of no interpretation, no critic to reveal it. ("Violence and the Word" 1608-9, emphasis and ellipsis original)

The risk is when a judge with a power like Marshall's reads a text like *The Aeneid* monologically enough to justify appropriating a similar form, without any of its morally questioning undertones, for the alteration of a continuous, statutory national legal narrative. Cover contends, "Legal interpretation is (1) a practical activity, (2) designed to generate credible threats and actual deeds of violence, (3) in an effective way" (1610). But that efficacy, when propounded legendarily as myth or epic as it is in *Johnson v. M'Intosh*, shifts from the disinterested positivism, from which most law derives its authority, to an amoral evil, from which emerge the hallmarks of unjustness.

The disregard of "abstract principles" of "original justice," a "controversy" on which Marshall expressly refuses to dwell (*Johnson v. M'Intosh* 588), makes the very *evasion* of questions of justness into a powerful servant of *justice* itself. The process rewrites history – as legend – for the victors – or the conquerors – as it proceeds. "Legends," writes Hannah Arendt, "have always played a powerful role in the making of history." She reads myth and legend as consciously, simultaneously proactively and reactively, corrective of history:

> Man, who has not been granted the gift of undoing, who is always an un-consulted heir of other men's deeds, and who is always burdened with a responsibility that appears to be the consequence of an unending chain of events rather than conscious acts, demands an explanation and interpretation of the past in which the mysterious key to his future destiny seems to be concealed. Legends were the spiritual foundations of every ancient city, empire, people, promising safe guidance through

> the limitless spaces of the future. Without ever relating facts reliably, yet always expressing their true significance, they offered a truth beyond realities, a remembrance beyond memories.
>
> Legendary explanations of history always served as belated corrections of facts and real events, which were needed precisely because history itself would hold man responsible for the deeds he had not done and for consequences he had never foreseen. The truth of the ancient legends – what gives them their fascinating actuality many centuries after the cities and empires and peoples they served have crumbled to dust – was nothing but the form in which past events were made to fit the human condition in general and political aspirations in particular. Only in the frankly invented tale about events did man consent to assume his responsibility for them, and to consider past events *his* past. ("The Imperialist Character" 167-68, emphasis original)

If Marshall would come to "assume his responsibility" for his "frankly invented tale about events," it was only by admitting himself to have secured for future generations the limitless potentiality of the American land grab. Virgil, possessed of a contemporary Roman agenda, worked retroactively, *ex post facto*; he penned his mythical corrective in the pursuit of his desired product, which was a present that, at least as he saw it, needed explaining. The present can be most easily explained as the product of a causal past, and in terms of causation. "Seen from the outside," Robert Fitzgerald asks in his postscript to his translation of *The Aeneid*, "are events as unalterably fixed beforehand as they are in retrospect? If so, or nearly so, by what power, and to what end?" Virgil's purpose, Fitzgerald tells us, was "to enfold in the mythical action of *The Aeneid* foreshadowings and direct foretellings of Roman history, more than a thousand years of it between Aeneas and his own time" (qtd. in Virgil 404-5). The implications are profound: Virgil could tell a story, a *history*, the hard facts of which were unimportant because its adoption as a Roman origin myth would constitute it as real, never mind the proper, verifiably-historical reality of it. Marshall's task was similar. Given a present constrained by its accidental past, any past he described or invented was

simply bound by the constraints of fitting that present. He had to create new law to solve, and to prevent the recurrence of, a new problem. Marshall was, as Arendt writes of the British in India, "confronted with the accomplished fact" and assigned the task of finding "an interpretation that could change the accident into a kind of willed act. Such historical changes of fact have been carried through by legends since ancient times" ("Imperialist Character" 167).

"Whatever we may find out about the factual truth of such legends," Arendt posits, "their historical significance lies in how the human mind attempted to solve the problem of the beginning, of an unconnected, new event breaking into the continuous sequence of historical time" (*On Revolution* 197). By this pretense, Marshall's and Virgil's acts are structurally identical. They are acts of interpretation of the historicities that constitute beginnings, attempts at solving quandaries of origination: but were they envisioned from their outset as lending themselves, or subjecting themselves, to *re*interpretation? Therein lies their varying import as eternal documents: while Virgil's poem might have had mythic authority, it did not have a real, temporal power correlative to the place reserved in American culture for statutory law. Moreover, Marshall's text continues to this day to wield its violent power as deftly as it does its justificatory authority: whereas Virgil transcribed "what had been known only to speculative thought and in legendary tales," for Marshall, the legendary "seemed [to have] appeared for the first time as an actual reality" (Arendt, *On Revolution* 198). Arendt writes that while

> power, rooted in a people that had bound itself by mutual promises and lived in bodies constituted by compact, was enough "to go through a revolution" (without unleashing the boundless violence of the multitudes), it was by no means enough to establish a "perpetual union," that is, to found a new authority. Neither compact nor promise upon which compacts rest are sufficient to assure perpetuity, that is, to bestow upon the affairs of men that measure of stability without which they would be

> unable to build a world for their posterity, destined and designed to outlast their own mortal lives. For the men of the Revolution, who prided themselves on founding republics, that is, governments "of law and not of men," the problem of authority arose in the guise of the so-called "higher law" which would give sanction to positive, posited laws. (*On Revolution*, 174)

Chief Justice Marshall's text is one that we treat as authoritative, and thereby elevate it. The American Revolution "distinguished clearly and unequivocally between the origin of power, which springs from below, the 'grass roots' of the people, and the source of law, whose seat is 'above,' in some higher and transcendent region" (Arendt, *On Revolution* 174).

Marshall's text is "positive, posited law," a textually authoritative incarnation of power sufficient to establish and maintain a "perpetual union" while simultaneously keeping at bay the "boundless violence of the multitudes." "When we treat a text as authoritative," James Boyd White reminds us, "we treat it differently from the way we do when we read it merely for a general attitude or disposition. We hold it up for the closest scrutiny, searching for its meaning in detail…we argue carefully about exactly what this phrase or that sentence should be taken to mean, standing alone or as part of the whole, and the opinion as we know it is written to invite that treatment" ("What's a Decision for?" 1366). Which is not to say that we do not do something similar to, say, poetry like Virgil's. Rather, it is merely to argue that engaging in such an activity with Marshall's judicial opinion stands to yield a consequentially more serious, real human impact than would a similar reading of *The Aeneid*. The act of reading such texts can be explained in terms of risks and consequences: the *risk* of misreading *The Aeneid* pales in comparison to the *consequences* of misreading *Johnson v. M'Intosh*. "It will not do," after all, "to insist on the violence of strong poetry, and strong poets." While Marshall might have derived a sense of his cultural authority from Virgil, *Johnson v. M'Intosh* was more directly capable of real violence than was *The Aeneid*. After all, if *The Aeneid* is the inspiration for *Johnson v. M'Intosh*, the epic nonetheless required

Marshall to function as its mediator in the transcription of positive law. Marshall promotes what Michel de Certeau calls "a selection between what can be *understood* and what must be *forgotten* in order to obtain the representation of a present intelligibility" (4, emphasis original). For the Chief Justice, the Court must simply *forget* all that might prevent it from ushering in the "present intelligibility" it is required to achieve, even if it must do so by a sacrifice of history to legal fiction admitted as genuine truth – by the admission of myth and legend as statutory law, rendering an amoral triumph for positive legality triumphant over "abstract justice." De Certeau continues:

> But whatever this new understanding of the past holds to be irrelevant – shards created by the selection of materials, remainders left aside by an explication – comes back, despite everything, on the edges of discourse or in its rifts and crannies: "resistance," "survivals," or delays discreetly perturb the pretty order of a line of "progress" or a system of interpretation. These are lapses in the syntax constructed by the law of a place. Therein they symbolize a return of the repressed, that is, a return of what, at a given moment, has *become* unthinkable in order for a new identity to *become* thinkable. (4, emphasis original)

Johnson v. M'Intosh is just such a perturbing interruption in "the pretty order of a line of 'progress'" in our system of legal interpretation. That "line of 'progress,'" however, in this instance is in fact the trajectory of *justice*. That interrupting perturbation is the westward, wayward march of the European frontier in America, pushing forth with regard for neither the continent's aboriginal inhabitants nor for what Secretary of War Henry Knox called "that distributive justice which is the glory of a nation" (qtd. in *American State Papers: Indian Affairs* I.13). The new, "thinkable" identity – supposed justice – is characterized chiefly by its authors' efforts to overwrite, to repress the "unthinkable." The result is a new, eminently thinkable definition, *Marshall's definition*, of justice that represses the unthinkable idea that the Indians were once the proprietors of this continent, such that the European land grab against them never conflicted with "that distributive justice which is the glory of a nation."

II. Mr. Murray Goes to Vincennes

The story of *Johnson v. M'Intosh* begins in earnest in 1763. On the one hand, the underlying case was a fairly straightforward land dispute involving what, in the Supreme Court of the early nineteenth century, had become a regular cast of players composed variously of early land speculators, their later, post-Revolutionary inheritors, and an elite cadre of professional litigators. The argument was essentially between two purchasers of the same tracts of land in the Indiana territories along the Illinois and Wabash rivers. The two purchasers were a private citizen of England, William Murray, from whom the plaintiff Thomas Johnson's claim descended, and the federal government, to whom the defendant William M'Intosh traced his claim. The question before the Court, at its root, was whether private citizens could purchase land individually, independently of the federal government, from the Indian tribes. To answer the question, Marshall concocted the discovery principle,

> a theory that seems to limit tribal power but that actually poses little or no restriction on the tribes. It has the look and feel of property law esoterica and has the function of settling a certain class of non-Indian title conflicts… The theory sets out two different relationships: one among European claimants to the New World, the other between each of the European claimants and the Indian inhabitants. As among the Europeans, the doctrine of discovery obtained. As between European and Indian nations, each relationship was to be separately regulated. (Ball 24, citation omitted)

To solve the problem of conflicting claims that traced to both private and state purchases from Indians, Marshall simply declared that the official descendants of the European power who had discovered the land in question had the first and only exercisable option of purchase. Regardless of Marshall's eventual invocation of an additional, complicating theory like the discovery principle, the dispute itself was fairly straight forward: if a given private claim like Johnson's conflicted with one like M'Intosh's, from the federal government, could something like eminent domain always prevail? Marshall, of course, decided that indeed it could.

Despite the simplicity of the issue, the history of how *Johnson v. M'Intosh* came to the bar is a tangled web of insider dealing, collusion, and legislating-from-the-bench that exemplifies the old boys' club of the Early Republic. This confusion is ultimately only further exacerbated by Marshall's far-reaching discovery principle. The bulk of this paper explores both in tandem – that is, both the history of the case and the elaboration of the discovery principle in the decision itself – as they coincide with Marshall's legendary re-inscription of history as a new, foundational American origin myth.

In a country rife with land speculators – keen and mostly unscrupulous to the last, men who perhaps would have been wildcatters in the early days of American oil – William Murray hardly stood out. What little biography we have of Murray was last researched and compiled by Anna Edith Marks for her bachelor of the arts in History from the University of Illinois in 1919.[5] She writes of "three angles" from which the continental English viewed westward expansion in the colonies: first, some "heartily favored it as a means of producing markets for English goods"; second, some preferred a reasoned and considered, "gradual process"; lastly, "there were those who, deeming its primeval condition more conducive to fur trading, absolutely disapproved of any settlements west of the Appalachian Mountains" (188). Almost all were interested in striking some balance between relentless and profitable emigration westward and drawing a hard-and-fast line on the other side of which, as settlers saw it, otherwise fruitful land would go unused by savage Indians, who were not possessed of faculties that would permit them to avail themselves of their lands' limitless potentiality.

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[5] Eric Kades cites also a 1987 biography of Murray, one review of which notes, "Dubious premises, unsubstantiated assertions, and a lack of hard facts plagued the authors [in their] shabby and misguided effort to make a Revolutionary hero of a failed intriguer"; others offered "similar appraisals" (qtd. in Kades, "The Great Case of *Johnson v. M'Intosh*" 81n.21). I did not consult this monograph.

Both sides desired peace with the Indians, to be sure, but, as evidenced by philosophies like that espoused by Frederick Jackson Turner in 1893 in "The Significance of the Frontier in American History," many more individuals coveted, and were willing to settle by whatever means necessary, lands extending deep into Indian country. Thus arose the idea of drawing a western line delimiting the extent to which the colonies could grow westward, an idea that, in the 1760s, had already been circulating for a decade. The line, as proposed by the colonial Board of Trade, would be porous to the mutual exchange of goods, "but not to Grants and Settlements" (qtd. in Banner 91). On top of the Board's first proposal, the Privy Council added that the declaration should "prohibit the private purchasing of Indian land, even east of the line" (Banner 92). "It is just and reasonable," stated the resulting Proclamation of 1763, as it came to be called, and "essential to Our Interest in the Security of Our Colonies [that the Indians] should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them" (qtd. in Banner 92). The decree would quickly prove the bane of speculators like Murray, and the courts in which such private frontiersmen would come to argue their claims publicly.

On how little is known of Murray, the elusive subject of Marks' thesis, she declares, "The question of his identity is moot." Probably because of his "Scotch blood" he "seized the opportunity to side in with the Colonies against England" during the Revolutionary War, and indeed lived long enough to see *Johnson v. M'Intosh* tried and lost (Marks 204-5). A decade before the War, Marks writes of "a Capt. William Murray of the forty-second regiment of Royal Highlanders" who was stationed at Fort Pitt in 1764, and who was recorded still to be there "late in the year of 1766"; Captain Murray "may have sailed" with the Fort when they "left America in 1767. At present, the question has not been definitely decided." Marks does not conclude that this Captain Murray and the speculator William

Murray were "one and the same man"; instead she infers his identity from the absence of any other William Murrays in the Pennsylvania Archives. Whether this was *the* Murray or not, Marks offers a compelling account of the typical western speculator:

> In this frontier post, he learned first hand the frontier practices – the squatters, and the ensuing Indian resentment, and at one time was ordered to remove some homesteaders at Red Stone Creek[, Pennsylvania?]. Being in frequent communication with Major Farmar and his successors at Fort de Chartres[,] Murray was no stranger to the conditions existing in Illinois. Moreover, the Western traders and merchants, waiting to embark on new ventures and returning from previous ones, gathered at Fort Pitt where they talked over their anticipations and disappointments, sold their peltry, purchased new merchandise, and gossiped about conditions in general. Captain Murray himself, purchased merchandise...with which to alleviate the almost continuous complaints of the Indians. (Marks 190-91)

After the French and Indian War, armed with the knowledge he gleaned as a professional frontiersman, Murray became "desirous of establishing a business in Illinois." He was not the first, of course. Dreading the arrival of competition like Murray, the Fort de Chartres region's biggest speculation company at the time, Baynton, Wharton, and Morgan, sought at every turn to make an example of him, and to dash his chances of succeeding at even the petty sales of "silver work which was greatly coveted by the Indians" (Marks 194-97).

The Wharton of Baynton, Wharton, and Morgan is the same Samuel Wharton who authored *Plain Facts, Being and Examination into the Rights of the Indians Nations of America....* Published in 1781, *Plain Facts* is Wharton's response to the Virginia legislature's early decision not to honor private grants from the Six Nations Iroquois to individuals in the Indiana Territory. Wharton seems, on first reading, to be the quintessential student of the Enlightenment, and stands in stark contrast to the greedy litigators who would argue *Johnson v. M'Intosh* four decades later. "The produce of the earth is necessary to subsist its inhabitants," he reasons,

> and if the Creator of mankind had made it justifiable for Christians to deprive unbelieving nations of their native countries, we must, from his acknowledged attributes presume, that he would have so formed the latter, as to enable them *to subsist without food*. But as he has made no difference between the natural wants and faculties of Christians and those of Infidels, we may safely affirm, that whatever spiritual advantages are allotted to the former, our common Parent has made no distinctions between the temporal rights of his creatures; and indeed all *distinctions* of this nature have been either overlooked or rejected by every approved writer on the *laws* of *nature* or of *nations*. (8, emphasis original)

Though it bears out much benevolence toward the Indians, Wharton's treatise reads like a rather prescient push for less regulation on private speculation (which it was) and for a retroactive disregard, by the now-*United* States, for Britain's Proclamation of 1763 (which it also was). Wharton goes on to argue "that the validity of the title of the proprietors of *Indiana*," by which he means the Indian tribes, "ought not to have been decided by modern ideas, but such as prevailed at the time of its creation; and as it was *good* under the crown of *England*, it ought certainly to have had the same effect under the republic of *Virginia*" (112, emphasis original). Before the writing of *Plain Facts*, Wharton's efforts to secure the rights of individuals to purchase directly from Indian tribes, and of tribes to sell in a free market, took him personally back to London to lobby for the Indiana Grant. In London, in 1769, he "received a private opinion from Lord Camden and Lord Chancellor Yorke…to the effect that titles to land purchased directly from the Indian tribes by individuals or groups of individuals would be upheld in British courts. In spite of Wharton's attempts to keep this opinion secret, it leaked out about 1772." Marks suggests that the leaked document inspired at least one company "to discontinue their trading operations and take advantage of this opinion by entering into land speculations of their own" (197-98).

Wharton's leaked Camden-Yorke opinion, which would later figure in one of the more obscure passages of Marshall's decision (599-600), provided all the motivation Murray

needed to abandon his small-scale peddling and take up resolutely the speculation that would result in the Illinois and Wabash Companies. No one can conclusively say how, but "sometime prior to the spring of 1773 Murray obtained an altered copy" of the Camden-Yorke opinion (Robertson 7).[6] Originally, as Wharton admits in *Plain Facts*, the Camden-Yorke opinion pertained to "the Mogul or any of the Indian princes or governments" (Robertson 7). It was designed to allay some of the difficulties that complicated land acquisition by British East India Company representatives on the Indian subcontinent, and the slow review and approval of those grants by the Crown in England. Murray's altered copy omitted all talk of "moguls," but the Supreme Court took strong issue with what would eventually trickle down to the *Johnson v. M'Intosh* litigation: Marshall, driving a final nail into the coffin of Robert Goodloe Harper, chief counsel for the plaintiffs, writes at the end of his decision that the document was, "of course, entirely inapplicable to purchases made in America... The words 'princes or governments,' are usually applied to the East Indians, but not to those of North America. We speak of their sachems, their warriors, their chiefmen, their nations or tribes, not of their 'princes or governments'" (600). As Lindsay G. Robertson writes, "The opinion that had fired the Illinois-Wabash purchases thus now escorted the Companies into oblivion" (116).

Murray could not have foreseen the abject failure of his rigged document, and went on anyway to amass a good number of shareholding investors, all of them Pennsylvanians, in short order. By May of 1773 he had formulated "fairly definite plans for the Illinois company" and gone west to the Kaskaskia land offices (Marks 200). He informed the British officers there of his Camden-Yorke opinion and of his intention to purchase lands in the region, by the opinion's authority, directly from the resident Indians. Captain Hugh Lord,

[6] Lindsay G. Robertson's research unearthed the Companies' original copy of this letter, "attested as genuine by shareholder William Smith," of which he includes a facsimile (9).

commanding officer at Kaskaskia, was skeptical of Murray's supposedly authoritative document. Captain Lord told the speculator that while he would permit purchase from the Indians under the Kaskaskia office's jurisdiction, he would not permit the settlement of any of them (Robertson 8). Marks writes that Murray convened, with representatives from the Kaskaskia and Illinois tribes, "an open meeting" which, "together with his orders against giving the Indians liquor, he thought, would show he had no intentions of trickery. He allowed nearly a month for their transactions, in order that the chiefs and sachems would have plenty of time for deliberation and consultation with the tribes which they represented." She offers us a description of the proceedings so quaint that it could just as easily derive a century later from a photograph by her contemporary, Edward Curtis:

> The bronzed Indians with their blankets wound about them – some standing in majestic dignity, others lounging about smoking their long pipes; the red coated soldiers; the buckskin clad Frenchman – all gazing upon the purchase price consisting of piles of bright red blankets, shirts, stockings, shining brass kettles, steel knives, sacks of flour; and even cattle and horses – must have formed a peculiarly striking and impressive setting for the signing of the agreement perfected on July 5 [1773] at Kaskaskia... But even more impressive was the ceremony itself – the translation and explanation into French of the complicated and formal deed by [French and] Indian interpreters, who in turn repeated the lengthy explanation, in the most ceremonial manner, to the Indians[, who] before the entire assemblage assented to this transference and, one by one, set their characteristic seals, in the form of bear's heads, fish, or a cross, if baptized, upon the parchment. (Marks 200-201)

Murray had worked through interpreters "duly sword before" Captain Lord, but did not, by July of 1773, get approved by the British Council to make such a purchase. Instead, Murray "worked on the assumption that the Indian tribes were sovereign nations" who were free to sell to whomever they chose, and that, "although the British Crown was the possessor of this territory, it did not personally own the soils since it had never purchased or leased the land itself" (Marks 201). The Crown, however, had formally outlawed such exchanges with the

Proclamation of 1763. England demonstrated not just its – perhaps benevolent – desire to control its own citizens in their hunger for Indian lands, but also asserted its presumptuous capacity to control America's Indians as subjects. The situation was precarious, and legally and socially unprecedented: in order for the Crown to control English citizens on land that it admitted was not its own, but which it was not willing to admit belonged demonstrably to another, England had to circumscribe some new variety of eminent domain, and admit that the aboriginal inhabitants would be thereby subsumed.

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For Murray, achieving and preserving the apparent validity of his purchases from the outset of speculation was crucial. While western speculators in 1773 might not have foreseen the Revolution of three years hence, most would have had a keen sense of the aggravated and deteriorating political climate. For their speculations to vest, they would have to prove the validity of title to one court or, more likely, another – whether the continental and colonial superiors of Captain Lord, or the unknown quantities that might replace them should an American revolution indeed precipitate. And for the speculators or primary shareholders (or their successors, should recognition of their claims prove immediately elusive) to find additional investors after their initial purchase, they would have to generate confidence in the validity of their deed. In the 1810 Memorial to Congress by which Robert Goodloe Harper would begin his efforts to prove the validity of the Illinois and Wabash Companies' titles, he stresses that at "these conferences, which lasted nearly a month, the civil and military officers of the British Government, and all the inhabitants of the place, were invited to be present. Many persons of both descriptions did attend, and the Indians were carefully prevented from obtaining any spiritous liquors during the whole continuance of the negotiation" (qtd. in

American State Papers: Public Lands II.88). That Murray and Harper went to such lengths to preserve the sobriety of the Indians with whom they were negotiating suggests that coercion, by inebriation or other means, was a common tactic used by whites in their pursuit of the most favorable terms, or of terms at all. "It is true," wrote Thomas Jefferson, who later made a case for complete removal of all the eastern tribes to lands west of the Mississippi, "that these purchases were sometimes made with the price in one hand and the sword in the other" (qtd. in Banner 50). Indeed, in such liberal, enlightened times as ours, when historians or scholars of Indian law posit that essentially *all* lands in the present day United States were *bought* from the Indians – not stolen, or conquered, or claimed by other guile – such sales are what usually spring to mind. "The difference between voluntariness and involuntariness," Stuart Banner reminds us, "is one of degree, not kind." We must ask "not whether to call conveyances of Indian land 'voluntary' or 'involuntary,' but rather how close any given transaction was to one or the other extreme" (50).[7]

Initially the Indians had every incentive to sell to the whites: they had vast amounts of land, and generally had few permanent attachments to any of it because of their inclusive view of *all* of it, and most or all Indians who had had regular contact with Europeans had

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[7] On the myriad tactics, often prescribed *de jure*, employed by federal speculators after the Revolution, see Kades (1120-24). "The United States," he writes, "repeatedly exploited fissures among and within tribes to obtain land cheaply, usually without resorting to force… The United States preyed mainly on two sources of disunity among Indians. First, [they] fanned the flames of longstanding animosities between various groups… Second, [they] manipulated the conflicting and unclear tribal claims in order to buy land cheaply" (1120-22). Worse still, young America, though avowedly principled to the point of Revolution, was not above bribery, and "did not seem to show any aversion to taking advantage of this breach of duty. For example, President Jefferson advised [William Henry] Harrison to bribe chiefs in purchasing Illinois and Indiana Lands, and Harrison did so effectively. The United States resorted to bribing virtually all the tribes from which it bought lands" such that this became the rule rather than the exception (Kades 1124).

grown accustomed to the latecomers' trade goods, including metal wares and textiles (and alcohol, to be sure). "It would have been remarkable," Banner writes, "if the Indians *hadn't* traded land for other things" (51, emphasis original). Banner goes to great lengths to dispel the typical, romantic conception of the Indian tribes' having lived free from want in a land of plenty before the arrival of Europeans.[8] Processes of land sale and exchange before the Revolution were wholly voluntary: Banner notes that Indians' "complaint was *not* that they had been compelled to sell land by the threat of force." Rather,

> Indians had two reasons to sell land. First, and most obviously, land could be exchanged for all the useful things the English brought… The Indians had lots of land. The English, meanwhile, were well stocked with clothing, axes, hoes, knives, fish hooks, kettles, guns, and the like, goods the Indians could put to immediate use in procuring food… Indians' second reason to sell land was to cement political alliances between Indian and English communities. Tribes were sporadically at war with one another all through the seventeenth and eighteenth centuries. (51-52, emphasis original)

Differing concepts of ownership between whites and Indians were sometimes a problem, with colonists' deep-seated, normative-cultural practices of ownership *in fee simple* often barring their understanding or accommodation of tribes' more fluid, less polemical notions of regional or territorial rights of use.[9] Many sales, for instance, especially early

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[8] On the various straits of the indigenous populations, as close to firsthand, and as close to pre-contact, as we can have it, see Álvar Núñez Cabeza de Vaca's *relación*, and, in particular, Rolena Adorno and Patrick Charles Pautz's unparalleled supporting documents and analyses. The *relación* is a record of the failed Narváez expedition to *La Florida* in 1527, from the wreckage of which four men undertook an almost decade-long odyssey through the American south and southwest, from Florida to the Gulf of California, emerging in 1536 from the desert, in the mountainous center of what is now Mexico, "naked and barefoot."

[9] Further blurring apparent maintenance or exploitation of property, use of a given tract also changed seasonally. On concepts of ownership and their role in negotiations and transferences between whites and Indians, see Banner (10-48). See also Katherine A. Hermes, who writes,

sales, left the Indians assuming they still held hunting rights to the land they relinquished. Land-starved European colonists, however, were accustomed to a system where hunting anywhere was the legally-exclusive right of the upper classes, under whom most colonists were subjects at best; they endured passage to and establishment in the New World with the hope and promise of something more.[10] Locke's *Two Treatises on Government* greatly contributed to such confusion over the nature of Indian ownership, but it did so chiefly among statesmen and philosophers on the continent. In one of myriad tacit juxtapositions of reality and legality – or, in this case, legal philosophy – conditions on the ground were very different from those in the ivory tower in which Locke worked and reasoned. According to Banner, "Locke had to have known that the Indians were farmers and that the colonists were purchasing land from the Indians." That is, Locke either subconsciously underestimated, or consciously devalued tribal concepts of ownership of the land they hunted and worked. Locke, Banner continues,

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> Territorial boundaries were well known among the tribes, nations, and confederacies and sometimes were contested. There was no unfettered movement between lands, and chiefs had some sense of control over territory… Yet, there was no property ownership, as Europeans understood it, among most Native American peoples of North America. Typically, before colonization and in the period immediately following it, most Indians followed a law of usufruct that enabled them to use land for various purposes, such as farming, hunting, and maintaining a dwelling. (43)

Hermes' chapter in the *Cambridge History of Law in America* is a pointed refutation of the idea that America's aboriginal populations lived in a lawless, anarchic state of nature.

Black's defines *fee-simple ownership* as "one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon death intestate. Such estate is unlimited as to duration, disposition, and descendibility" ("Fee-simple ownership"). Banner's first chapter, "Native Proprietors" (10-48), explores differing concepts of such absolute estate, but over the course of *How the Indians Lost Their Land*, he explores how the Indians moved from owning their land *in fee simple* – in European eyes as well as, surely, in their own collectivist sense – to having been legally, preemptively divested of it all.

[10] See, e.g., Banner (56-62).

> did not make use of this knowledge in the *Two Treatises*... Whatever the reason for Locke's error, there is no evidence that the *Two Treatises* caused anyone in colonial North American to cease respecting Indian property rights or to stop purchasing land from the Indians. It would be a further error to take Locke's writings as being representative of English thought about land and Indians in the late seventeenth century, or as having influenced colonial land policy in the eighteenth century. (Banner 47-48)[11]

The voluntariness of Murray's purchase from the various Illinois Indians was never the primary issue regarding the validity of his acquisitions for the Companies. The risk to stake-holding private individuals, a half century later, in *Johnson v. M'Intosh*, was distributed amongst whites. Despite its notoriety and their unremitting absence from the case's proceedings, no Piankashaw or Illinois Indian, or any white statesman on their behalf, ever debated the fairness of the exchange. Eric Kades has argued, intriguingly, that the indisputability of Murray's deed might not be such a sound contention. Kades writes that instead of negotiating the later Wabash Companies' purchases himself in 1775, Murray hired a local Frenchman, Louis Viviat, to "[treat] with Piankashaw tribal leaders at Vincennes." In doing so, "Viviat apparently did not make efforts to include all the tribes with colorable claims to the lands purchased... In addition, there is evidence that the Piankashaw negotiators did not have the support of their own tribe in making the grant. These facts are at odds with the case stated in *M'Intosh*, which represented both purchases as being made from united, consenting tribes with exclusive Indian title" (Kades 1082).[12] On this last point, Kades

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[11] Banner does admit, "The principle of Indian landownership was never recognized with unanimity. There were always some English colonists, and sometimes even some colonial governments, willing to take land from the Indians without paying for it... But if one is interested in overall English colonial land policy...the answer is that they treated the Indians as owners of their land" (12).

[12] Eric Kades published two articles, "History and Interpretation of the Great Case of *Johnson v. M'Intosh*" and "The Dark Side of Efficiency," almost simultaneously. The latter is much more persuasive, and indeed includes, to slightly different ends, almost all of the research that features in

remarks, "This illustrates the dangers of relying on facts, especially stipulated facts, in cases that appear to be feigned or collusive" (1083n.63). Later he argues, "The trial court, and then the Supreme Court, decided a case that minimal investigation would have revealed was feigned… Although Congress could have legislatively reversed the decision, *M'Intosh* fostered collusion in the purchasing of Indian lands" (1113).

Buying out whole tribes by means of a few, generally remarked on as corrupt, or at least corrupt*ed*, Indians was a common tactic in the removal of the eastern tribes who

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the former; indeed, in light of "The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Indian Lands," "Great Case" feels almost incomplete. Though I refer occasionally to the lesser article, I cite "The Dark Side of Efficiency" where possible, and only note specifically in my citation when I refer to "Great Case." In the longer article, Kades describes the two poles of Indian-law scholarship: one that insists upon "the American practices of buying lands even where, strictly speaking, the law did not require it"; and the other, "that European laws and practices amounted to a patently immoral land-grab" ("Dark Side," 1068-69). (One could argue, though Kades does not, that these are the typical bastions of professors of Indian law and of Native American studies, respectively, and that each is accorded proportionate degrees of respect by academe in general.) Kades contends in "The Dark Side of Efficiency" that

> neither view is consistent with even the most basic facts in the legal and historical record. Massacres, and even battles, were quite rare in the process of expropriating Indian lands – a fact difficult to harmonize with the theory of intentional genocide. On the other hand, it is hard to reconcile a benevolent view of the expropriation process with the end result – the knowing and intentional expropriation of a continent accompanied by the destruction of tribe after tribe... Simply put, customs and legal rules promulgated by colonial and later American courts and legislatures promoted not simply expropriation (right or wrong), but *efficient* expropriation... [C]olonists established rules to minimize the costs associated with dispossessing the natives. If it had been cheaper to be more brutal, then Europeans would have been more brutal. Such brutality, however, was not cheap at all.
>
> Likewise, if it had been cheaper to show more humanity, the Europeans would have exhibited more, such as extending Indians full rights to sell (or keep) their land. Such a legal rule, however, would have been far from cheap. (1071)

Kades' argument in favor of an *amorality* of efficiency, as I take it to be, rather than the morality or immorality that flank it, is groundbreaking, albeit cynically and quietly so: the thesis put forward in "The Dark Side of Efficiency" seems to have gone almost unnoticed by scholarship, but could just as easily have been eclipsed by books such as Robertson's or, more so, Banner's. It remains as persuasive and original as it is unsettling and unfortunate.

remained to face down Andrew Jackson.[13] This nonetheless is an unspoken, inferred confirmation of whites' acknowledgment of Indian ownership: if one member of a tribe could come forward to represent the sale of his tribe's land, was this not an acknowledgment by the white purchasers that the Indian sellers owned the property they were selling and the whites were purchasing? Apparently, however, the European purchasers did not consider there to be even traces of a tacit acknowledgment, in such exchanges, that the Indians owned the land they were selling:

> There has also been found evidence of a frequent practice on the part of European discoverers of making agreements with the more barbarous native peoples in the form of purchase, of treaties of peace or commerce, or of protectorates. In general, such agreements, with few exceptions ["noted" to be "in India or Ceylon, the Arab Kingdoms, or China"] implied in no way a recognition of the sovereignty of the native chiefs, but were merely useful devices whereby the European discoverers secured the undisturbed enjoyment of lands which they believed they had already acquired by the practice of taking possession. (Keller, et al., 150-51)

Milner Ball, however, argues to the contrary: "the fact that the United States would enter treaties with Indian tribes is itself a way of acknowledging tribal sovereignty and power. In this way, treaties will always be an affirmation of the tribes' political integrity at the same time that they may be a vehicle by which tribes surrender certain powers" (21). The crux for Marshall and the litigants of *Johnson v. M'Intosh* was not whether the Companies had bartered fair and square for the property they were disputing. Rather, it was far more abstract: could the Illinois and Wabash Companies, as composed of private, shareholding individuals, ever buy land from *any* Indian, regardless of whether the sale was backed by adequately representative delegations from all the tribes who might have a vested interest? And if they could, what kind of title, exactly, could they *buy*? The Court in *Johnson v.*

[13] See, e.g., Banner's chapter on "Removal" (191-227).

M'Intosh should have been concerned only with whether individuals could purchase land directly from Indians at all. The issue became instead whether Indians, in general, could sell their land to individuals; and if they could not, then to whom they *could* sell it; and if they *could not* sell it *at all*, then how they were to be most efficiently divested of it by the whites. Marshall ultimately does not care who *bought* the land, as it were, but who *discovered* the land. Only by the act of discovery could the discovering purchaser gain from the seller he discovered the foundation by which he could establish the solidity of his claim of purchase. As Ball succinctly explains regarding this symbolic act of discovery, "The theory sets out two different relationships: one among European claimants to the New World, the other between each of the European claimants and the Indian inhabitants. As among Europeans, the doctrine of discovery obtained. As between Europeans and Indian nations, each relationship was to be separately regulated" (24).

The defendant M'Intosh's claims were as tenuous as the plaintiff Johnson's, which descended from Murray. And in the end, when Marshall's gavel fell on the side of America's young government and rights granted it by its European forebears, M'Intosh won. The issue was whether Murray ever had the right simply to buy the land from the Indians. Thus, far more consequentially, Marshall coevally made the issue whether the Indians had any right to sell it, that is, whether they ever owned it outright at all. In the early-nineteenth-century business of land "reclamation," the business of proving pre-Revolutionary claims to an increasingly skeptical Congress, Murray would prove an insignificant factor. Tragically, the Illinois and Piankashaw Indians, from whom both Murray and the federal government had bought the same tracts along the Illinois and Wabash Rivers, were equally insignificant. When all was said and done the tribes had not just "won" a Supreme Court case in which they were not even implicated as litigants, by nature of the fact that they got to keep the double payment from the separate sales that yielded the initial, conflicting claims. But also,

the Illinois and Piankashaws could add to the same token "win" the insurmountable loss that, along with every other of the continent's aboriginal inhabitants, the imperialist American government had revoked all semblance of rights to the land all tribes had always owned and inhabited.

III. Scoundrels and Charlatans

The history of the *Johnson v. M'Intosh* decision has generally borne out its having been collusive, if less so than its predecessor *Fletcher v. Peck* (1810). But the full extent of that collusion was not known until Robertson discovered the papers of the Illinois and Wabash Companies, and published his research in *Conquest by Law* (2005). *Fletcher v. Peck*, also a land-rights case, involved many of the same players as *Johnson v. M'Intosh*, with Marshall sitting as Chief Justice and writing the opinion; Robert Goodloe Harper as chief counsel, this time for the defendant; and the Federalist judiciary pitted against the Republican states and Congress. *Fletcher v. Peck* featured several land-speculation companies, the most significant being the Georgia Mississippi Company and the New England Mississippi Land Company. The former, after buying from the Georgia legislature an eleven-million-acre tract in the Yazoo River region in December of 1794, sold it to the latter. Only one of the legislators who had voted for the bill of sale had not been bribed, and none were reelected two years after the transaction, at which point the act was unanimously repealed (Robertson 30). *Fletcher v. Peck* contested the legality of Georgia's repeal and public resumption of the Yazoo lands. The argument before the Court was that Georgia's title to the land was never legitimate, and thus the recipient New England Mississippi Land Company's title was invalid and void. Georgia transferred these western lands to Congress in 1802, as Virginia had done with its immense western claims in 1784, and with Georgia's transfer went the contested

Yazoo lands. Robert Goodloe Harper, retained ostensibly by John Peck, doctored the whole thing: he arranged for his fellow shareholder in the New England Mississippi Land Company, Robert Fletcher, to stand as plaintiff, fabricated a deed detailing the sale of some fifteen thousand acres in the Yazoo region, and argued its legitimacy all the way from the Massachusetts Circuit to the Supreme Court. Peck won a "decision affirming the validity of all the covenants – a total victory for the Yazoo speculators" (Robertson 35). Justice William Johnson, dissenting only in part, wrote in a conjoined opinion that he had

> been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court. (*Fletcher v. Peck* 147-48)

In 1809, during preparations for the *Fletcher* proceedings, the Illinois and Wabash Companies invited Harper to become, in practice if not in name, their chief council. In many ways, the judges and litigants, and the litigations they share in cases like *Fletcher v. Peck* and *Johnson v. M'Intosh* (the hearings alone span nearly a decade and a half and yet share many of the same actors and political parties and motivations) demonstrate the incestuousness of early America. The uniformity of the relationships among the ruling, early-republican elite truly lays the conceptual foundation for a sustained class of "rich white men." Harper, for example, married Catherine Carroll in 1801; she was the daughter of then-richest American Charles Carroll, himself a principal shareholder in the Illinois and Wabash Companies; and Harper hoped eventually to receive from him some relief from the debt he had incurred by his own, largely failed speculations. Robertson writes: "As well as being a leading Supreme Court Advocate, Harper was one of America's most experienced, if not most successful, land

speculators," and notes that he had a personal stake in the South Carolina Yazoo Company, another recipient of disputed Yazoo lands at issue in *Fletcher v. Peck* (30-32).

Such a dizzying array of interconnections was characteristic of the early republic, be it in Congress or the judiciary. *Fletcher v. Peck* and *Johnson v. M'Intosh* are two of the more extreme examples, but pertaining only to *Fletcher* and *Johnson*, examples abound of relationships that were more than coincidental. Joseph Story, who would sit on the Court with Marshall for the whole of the "Indian trilogy,"[14] assisted Harper as counsel for Peck in the 1810 decision. Benjamin Parke, selected as the first district judge for the newly created Circuit Court of Indiana, where the Companies would first try their case in 1817, was also their former local counsel. Sometimes this incestuousness was merely serendipitous, which, as they all seemed accidentally to fall in line with each other, makes the "old boys' club" all the more glaring. Robertson writes of Parke's appointment that while "there is no evidence that the Companies or their agents had anything to do with his selection, the shareholders can hardly have been displeased with the choice" (43). Robert Goodloe Harper whiled away eleven months in 1816 as a U.S. Senator for Maryland; he sat there "alongside fellow Maryland [Illinois and Wabash Companies] shareholder Robert Goldsborough" (Robertson 41). And Nathaniel Pope, whose brother was married to the *Johnson v. M'Intosh*-plaintiff Thomas Johnson's niece[15], was chosen for the same job atop the new Illinois Circuit, from where the Companies would finally gain their appeal to the Supreme Court (Robertson 51).[16]

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[14] These were *Johnson v. M'Intosh*, *Cherokee Nation v. the State of Georgia* (1831), and *Samuel A. Worcester v. the State of Georgia* (1832). See note 66 and accompanying text, and bibliography.

[15] Robertson makes a bit too much of this relationship, declaring that the Companies assumed that, "like Parke, Pope was a known commodity" (51). See Judith Younger's erudite review of Robertson's and Banner's contemporaneous works, "Whose America?"

[16] Sometimes, though, unfortunate coincidence gives disparate people the same name: when the Lower Creeks were ousted from their ancestral lands by the Georgia legislature in November of 1824,

Harper may have had a dry run for *Johnson v. M'Intosh* with *Fletcher v. Peck*, and won to boot.[17] But as Robertson writes, "The instruction to Harper," after the *Fletcher* decision, "was crystal clear: *Do not try this again*" (Robertson 36, emphasis original). The ultimate result was at least a tacit understanding by Harper that the Supreme Court would not hear a feigned breach-of-contract suit brought by the Illinois and Wabash Companies in defense of Murray's original claims. By this time, the claims that would result in *Johnson v. M'Intosh* had been variously disputed at the state level and in Congress since Murray

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their leader was William McIntosh. McIntosh, not to be confused with the defendant in *Johnson v. M'Intosh*, was cousin to George Troup, the meddling and corrupt Georgia governor who oversaw the ousting (Robertson 122).

[17] *Fletcher v. Peck* would also serve as a dry run for the "Indian question," already lingering for Marshall, of how the United States would come statutorily to secure preemption rights. Marshall, in conclusion to his *Fletcher* opinion, frames "The question" twofold: first, federally, "whether the vacant lands within the United States became a joint property, or belong to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed." Second, extrinsic to the federalist-republican conversation,

> Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a state can be seised in fee of lands, subject to the Indian title, and whether a decision that they were seised in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.
>
> The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state. (*Fletcher v. Peck* 142-43)

Perhaps Marshall was especially vague because the debate, for the Court, over the nature of Indian title was in its very infancy; perhaps he was merely tentative in his early discursive efforts at Indian divestiture, at rhetorical conquest. Banner clarifies the sentence with which Marshall concludes the opinion: "In plainer language, Georgia and the Indians both had rights in the land: Georgia was the fee simple owner, while the Indians had something called 'Indian title,' a right to occupy the land, but not ownership. The newer view of Indian property rights, not yet even two decades old, had been officially adopted by the Supreme Court" (174). For an in-depth analysis of the invocation of the "Indian question" in *Fletcher v. Peck*, especially insofar as regards the decision's contribution to the still-nascent legal philosophies (the "newer view of Indian property rights") that would come to a head in *Johnson v. M'Intosh*, see Banner 168-78.

procured the original deed some thirty years prior. Harper must have known early on that he would require a very different tack than he did for *Fletcher v. Peck*. This implicit "instruction to Harper," in conjunction with the failure in 1810 of a bill that would have allowed appeals to the Supreme Court directly from territorial courts, meant counsel and client would have to wait another decade to file a viable claim in Washington. Nonetheless, Harper submitted to Congress the Companies' 1810 Memorial, derived from several previous documents and polished by the adept counsel, in which he outlined three chief objections to Congress' sustained denial of their claims' validity. The 1810 Memorial's invocation of half a century's worth of speculative, philosophical "principles" would eventually serve as the foundation for Marshall's findings against the Companies and in favor of universal Indian divestiture.

Synchronously with Harper's first efforts to push his case on Congress, war erupted at Tippecanoe, a fledgling settlement at the center of the northernmost Wabash Company tract. The War of 1812 would have little direct impact on the Companies or their plight, but the internal strife that resulted from the Federalist party's opposition to the war itself would lead to the threat of secession by the New England states, and to the subsequent breakup of the party. The fire of the Federalist dispute, which would mushroom in due time to yield the Civil War, had fuel thrown on it by Marshall's court, as he repeatedly subordinated states' powers to those of the federal judiciary. Problems with individual states, Georgia and Virginia in particular, would rear their heads implicitly in Marshall's "Indian trilogy," which began in 1823 with *Johnson v. M'Intosh*, and was rounded out in 1831 and 1832 with *The Cherokee Nation v. The State of Georgia* and *Samuel A. Worcester v. The State of Georgia*. In 1812, much of the Republican, anti-Federalist, pro-states'-rights South was still reeling from *Marbury v. Madison* (1801), which established the power of the federal judiciary to review the constitutionality of acts of Congress. Virginia was later stymied by *Cohens v.*

Virginia in 1821, and again by *Johnson v. M'Intosh* in 1823. And in Georgia, which very nearly took up arms after the spurning by *Fletcher v. Peck* in 1810, *Cherokee Nation* and *Worcester* twenty years later only further exacerbated the situation.[18]

From the very beginning, the question for the Illinois and Wabash Companies of how to push their claim was a legal one colored boldly by politics: the jurist who heard their case in the higher courts would potentially have to juggle not just legality and politics, but also the moral and ethical questions attending Indian divestiture. The most prominent Illinois-Wabash shareholders were Federalists, if only because the connections, power, and wealth necessary to procure valuable stakes in such a venture in the last years of the eighteenth century were to be found chiefly among the governing Federalists. But between 1800 and 1802, in what was "termed a 'revolution,'" Thomas Jefferson and his Republicans took the Presidency and House of Representatives, followed by the Senate. "They have retired into the judiciary as a stronghold," the new President wrote of the stalwart "remains of Federalism." There they "are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased" (qtd. in Robertson 23). The remark was quite prescient: if the three-decade-long tenure of the fourth Chief Justice of the

[18] See bibliography for full citations. On the deterioration of federalism, briefly, as it pertains the Illinois and Wabash Companies, see Robertson's chapter in *Conquest by Law* on "Early Republican Federalism" (77-94), especially 78-81 on *Cohens v. Virginia* (1821) and *Green v. Biddle* (1821); and more generally on federalism and the Marshall Court, see Robertson's excellent article "'A Mere Feigned Case': Rethinking the *Fletcher v. Peck* and Early Republican Legal Culture." My citations refer only to the monograph.

Justice Joseph Story greatly feared the backlash from states against two decades' succession of federally-leaning decisions; in the aftermath of *McCulloch v. Maryland* he lamented that if "the Judiciary is to be destroyed, I should be glad to have the decisive blow now struck, while I am young, and can return to the profession and earn an honest livelihood" (qtd. in Robertson 80).

Supreme Court, John Marshall, could be characterized in brief, it would be as a showdown between Congress and the judiciary.

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Johnson v. M'Intosh arrived on Marshall's docket in the Supreme Court, in February of 1823, by a circuitous route through numerous failed petitions to Congress and declinations of varying degrees by lower courts. Much of this was a product of confusion during and after the Revolution, and in the early judiciary of what subdivision, exactly, had jurisdiction. Robertson comments that *Johnson v. M'Intosh* could have been resolved concretely immediately after Murray's original purchase, but "among the earliest casualties of dissolution [of colonial ties] was clarity of jurisdiction" (10). After the Revolution, the Companies had no choice but to work through Congress rather than the courts. The validity of Murray's purchase had to be sustained to the highest level: "the Republican-dominated Congress would likely have laughed at the notion of rewarding a group of Federalist land speculators with millions of acres of strategically sited land simply because a territorial judge west of the mountains told them to" (Robertson 24). No courts in the territories had an appeal route to the Supreme Court; litigants had to have claims with valid ties to states that did have routes through appellate courts, or they had to put up with the (final) decisions of the highest judges in the individual western territories. Without an appeals route, and without valid ties of at least one side of the litigation to a state in the Union, the only path to a decision at the highest level of government was by petition to Congress.

The Companies perceived – and hoped – that the federal government at the time did not care *whom* they purchased title *from*, merely that they had purchased some semblance of a title from someone. They made their case to both Senate and House, to committees

arranged specifically to review their plea, in December and January of 1791-92. Shareholding members who included a justice of the new Supreme Court, a U.S. Senator from Pennsylvania, and General John Shee, represented them in Congress. Politics consumed the hearings. Virginia's delegation recalled their state's agreement with the Union that western cessions by the various states would be held in trust for Revolutionary War veterans and "to retire the national debt" (Robertson 19). They contended that Congress' assumption of the Companies' lands would not be subject to similar strictures.[19] With neither Congress nor the Companies accepting nor rejecting the other's terms of compromise, both sides let the issue fall in the second session of 1792. It remained at rest for five years, while the Companies waited for circumstances to change such that buying from them would be cheaper and more attractive for Congress than acquiring the same deed directly from the Piankashaws or other Illinois tribe.

One such circumstance that might alter their chances for the better, the Companies perceived, was renewed war. Indian incursions east across a shrinking frontier northwest of the Ohio River were all too common. These were localized responses to the greater problem of white encroachment. The new, European Americans on the frontier were usually not even provisionally "authorized" to be there anyway, and their residency in such hostile territory was typically a product of desperation; diverse facets did not engender hospitality between the two groups. The frontiersmen could not grasp the connection between the Indians hostility and the colonists' relentless, generally merciless push westward. Likewise, they could not see local acts of retributive violence as but a small part of a problem so large that it uniformly spanned the haphazard frontier project. General Josiah Harmar, for instance, attempted, in response to "reports of Indian incursions and atrocities pour[ing] in from the

[19] This inconsistency with the "common fund" condition of Virginia's cession would inform Virginia's thorny position in later debates on federalism, too. See Robertson (77-94).

west...to 'extirpate, utterly, if possible,'" the Miami Indians in the Illinois and Indiana Territories. However, "his expedition...was routed by the Indians.... The next to try to chastise the Indians was Governor St. Clair," who received additional troops from Congress for his purpose, and whose "chances of success in a punitive war against the Indians" were altogether "greater than those of the hapless Harmar." Nonetheless, St. Clair and the nation were soon embarrassed by the scale of his defeat, which Francis Paul Prucha calls "a national disaster" (Prucha, *The Great Father* 64). Such triumphs were greatly empowering for Indians who were still at the negotiating table with the federal government. They sent the message that conquest or unilateral declaration of title to lands perceived by the whites to be *terra nullius* – that is, unoccupied – was out of the question. Fierce and still capable warriors, despite the ravages of European germs, allied tribes would respond in kind to attitudes and methods like Harmar's and St. Clair's with direct violence possessed of a lasting and far-reaching sting.

General St. Clair's routing by Little Turtle of the Miamis was a watershed moment for the Companies. They saw in this military and political setback a prime opportunity to convince Congress to buy the Illinois and Piankashaw lands directly from them, as opposed to negotiating with embittered and resultantly hostile tribes on the near-frontier (Robertson 21). As Kades indicates, this was not the solution to a moral or ethical quandary. Rather, it was simply economically viable, indeed pragmatically shrewd:

> Consciously paying for Indian lands to avoid costly warfare undermines benevolent interpretations of American policy, yet scholars continue to defend the morality of the nation's land purchases… Simply put, exterminating the Indians with direct violence would have been quite costly, and yet would have yielded few if any benefits beyond those obtained from the policy of expropriating Indian lands as cheaply as possible… When Marshall declined to authorize offensive wars of conquest in *M'Intosh*, he simply made the law congruent with the practicalities of dealing with the tribes.

> Simply put, outright conquest and annihilation were not efficient ways of expropriating Indian lands. (1138)

Congress could recognize the Companies' title and buy the land from them, or it could go to war with the Illinois Tribes at a much greater cost and increased risk to human life. Moreover, many saw that the young government's political reputation both abroad and among Americans depended on its finding a peaceable solution. In 1789, Henry Knox, then Secretary of War under George Washington, writing a report to the President "Relative to the Northwestern Indians," stated:

> In examining the question how the disturbances on the frontiers are to be quieted, two modes present themselves, by which the object might perhaps be effected; the first of which is by raising an army, and extirpating the refractory tribes entirely, or 2dly by forming treaties of peace with them, in which their rights and limits should be explicitly defined, and the treaties observed on the part of the United States with the most rigid justice, by punishing whites, who should violate the same.
>
> In considering the first mode, an inquiry would arise, whether, under the existing circumstances of affairs, the United States have a clear right, consistently with the principles of justice and the laws of nature, to proceed to the destruction or expulsion of the savages, on the Wabash, supposing the force for that object easily attainable.
>
> It is presumable, that a nation solicitous of establishing its character on the *broad basis of justice*, would not only hesitate at, but reject every proposition to benefit itself, by the injury of any neighboring community, however contemptible and weak it might be, either with respect to its manners or power...
>
> The Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature, and of that *distributive justice* which is the glory of a nation. (qtd. in *American State Papers: Indian Affairs* I.13, emphasis mine)

Secretary Knox recognized early on that the question could be answered by direct violence and legal pluralism – that is, by conquest and the paternalist establishment of multiple

legalities, one for whites and one for Indians, formed under the auspices of a dubious sense of cultural superiority and self-righteousness.

But Knox also saw that such a solution ran against the establishment of "character on the broad basis of justice"; it was synonymous with the abrogation of "distributive justice." Robert Nozick writes of an "entitlement theory of justice in distribution," which is "*historical*; whether a distribution is just depends upon how it came about." This he contrasts with "*current time-slice principles* of justice," which, at only one select instant,

> hold that the justice of a distribution is determined by how things are distributed (who has what) as judged by some *structural* principle(s) of just distribution. A utilitarian who judges between any two distributions by seeing which has the greater sum of utility and, if the sums tie, applies some fixed equality criterion to choose the more equal distribution, would hold a current time-slice principle of justice. (153-54, emphasis original)

Thus Kades' proposition that Indian divesture adhered, at the hands of the federal government, to amoral but efficient principles, holds a "current time-slice principle of justice." *Johnson v. M'Intosh* is easy for one to consider as merely a cog in an efficient machine. But because that machine maintains no regard for the justice of how the resultant distribution was made in its existing proportions, the distribution is not just; there is no just solution because justice was no factor in the equation. This is not to say that Kades argues for the *justice* of such an efficiency; he does not. Rather, it is simply to emphasize that Knox's "distributive justice which is the glory of a nation" was not a variable considered by the United States when it fashioned a plainly efficient calculus of dispossession to yield, for its white citizens, the most economically productive distribution. Again, justice was never a factor for the economists who wrote the equation. Secretary Knox recognized this need for an efficiency of dispossession, and tempered his argument accordingly: "It is highly probable," he wrote in the same report quoted above,

> that, by a conciliatory system, the expense of managing the said Indians, and attaching them to the United States for the next ensuing period of fifty years, may, on an average, cost 15,000 dollars annually.
>
> A system of coercion and oppression, pursued from time to time, for the same period, as the convenience of the United States might dictate, would probably amount to a much greater sum of money; but the blood and injustice which would stain the character of the nation, would be beyond all pecuniary calculation. (13)

Note that neither option is even remotely, *justly* ideal: even in Knox's first, "conciliatory system," Indians are still viewed as subjects who require "managing" by and "attaching" to a parochial overseer. But by degrees of benevolence, this is more auspicious than outright extirpation by a "system of coercion and oppression." Unfortunately, however, Knox's calculus would simply not have resulted, for the United States, in a machine of *paramount* efficiency, and so was forsaken in favor of one that would. The "blood and injustice" that would "stain the character of the nation" was not a factor of risk sufficient to dissuade the nation from the promises of paramount efficiency. While the tribes were not, in the end, extirpated, they were gravely and humiliatingly "*mis*managed" by their paternalist "attachment" to the United States.

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For Harper and his slipping chances to validate the Companies' claims, the stars all seemed to align for a brief period in late 1816 and early 1817. Harper by this point had lost the hope of succeeding in full, perhaps even in part, and resigned himself to a Senate seat granted him by the Maryland legislature in January of 1816. However, Harper had accepted his new post too soon, and in any case, apparently took it to be second-rate: he would leave it in December of that year, having decided that, according to his nineteenth-century

biographer, "a conscientious discharge of public duties would rob him wholly of time for his private concerns" (C. W. Sommerville qtd. in Robertson 43). Those "private concerns" were, chiefly, his duties for the Companies, whose day in court was very nearly upon them. Harper had withdrawn the Companies' 1810 Memorial to Congress several years earlier, at the onset of the War of 1812 and the Federalists' subsequent demise. But on being sworn into the Senate in February of 1816, he reprinted it (albeit with his name omitted, to preclude any overt conflicts of interest). In an act of desperation, Harper evidently resubmitted the Companies' petition only in the hope that it might acquire some credibility spontaneously, which it did not.

Instead, Harper's new motives in his efforts on behalf of the Companies were simply the products of circumstance. Serendipitously, Congress not only finally issued a bill specifying an appeals route from the Territories to the Supreme Court, but the Indiana Territory, which subsumed more than half the land Murray had procured from the Piankashaws four decades earlier, was granted statehood by Madison's outgoing administration, before he ceded leadership to Monroe in 1817. And in a further stroke of serendipity that confirms the exclusivity of the early republic, Monroe's appointee to Indiana's highest judgeship was none other than Benjamin Parke, the Companies' former local legal counsel at the land office in Vincennes (Robertson 41-43). Parke, however, proved to be anything but a known quantity on which Harper could reliably depend. His scruples – perhaps the only such characteristics to feature prominently, or indeed at all, among any of this story's players – eventually led him to delay hearing the case until 1818. Edward Ingersoll, an Illinois and Wabash Companies' shareholder and Philadelphia Committee Secretary, intimated that, regarding Parke's conflict of interest, "nothing is left for us but to go on as if he had no scruples and insist on his trying the cause; I do not see how

he can refuse without a dereliction of duty and if he dares refuse he must be impeached, I suppose, but probably when it comes to the point he will not" (qtd. in Robertson 50).

It never came to the point. Illinois was admitted to the Union at the end of 1818, and President Monroe authorized the creation of a new circuit court there, complete with its own new judgeship. Harper took up his cause in the newly minted state of Illinois, where there lay other, similarly large tracts of the Illinois and Wabash Companies' land. Were Harper ultimately to garner a favorable decision in the Supreme Court, it would not matter in which state he initiated the case. All that mattered was that he had garnered, in one circuit court or another, a decision to appeal all the way to the top. A new court in Illinois, however, meant new claimants. The plaintiff Johnson's claim in Indiana, luckily, flanked both sides of the Wabash River; he remained eligible. Harper's local counsel easily located a competing tract in Illinois owned by one William M'Intosh, a colorful, often controversial character of some local notoriety. William Henry Harrison, when Governor the Indiana Territory, which originally included M'Intosh's immense parcel, described M'Intosh as "an arrant knave, a profligate villain, a dastardly cheat, a perfidious rascal, an impertinent puppy, an absolute liar and a mean cowardly person" (qtd. in Robertson 52).[20] Robertson surmises that part of the reason M'Intosh agreed so readily to partake in the new suit Harper was then preparing was "his desire to embarrass William Henry Harrison and to get back at the wealthier citizens of Vincennes" (51). The only evidence to support this suggestion is the public relationship of the two men, who began their association as partners in speculation but diverged politically in the early nineteenth century's process of federation. Indeed, there is much evidence in favor of both M'Intosh and Harrison simply being inveterate speculators competing in the same, rapidly shrinking region around the Grand Rapids of the Wabash.

[20] Robertson writes that "M'Intosh respond[ed] in kind," but does not cite his response (52).

In the early years of the nineteenth century, Harrison, sanctioned by Congress and ignoring the increasingly weak claims of the Illinois and Wabash Companies to their sizeable tracts in the region, purchased nearly ten million acres from the same Illinois tribes with whom Murray had dealt several decades earlier. Harrison did so on the pretext that, as stipulated in the terms of the cession he obtained, the aboriginal population had become "reduced to a very small number...unable to occupy the extensive tract of country which of right belongs to them" (qtd. in Kades, "Great Case" 94). The Kaskaskia, Kickapoo, and Piankashaw Indians generally fall under the Illinois tribes umbrella. Like many other tribes with whom Harrison transacted in "the most notorious" of his "dealings with tribes having only tenuous claims to lands [they] ceded," the Illinois had by this point been decimated by disease and increasing white encroachment on their ever-dwindling hunting grounds.[21] "It took a negotiator willing to cut a few corners to buy Indian lands," and Harrison was most certainly that sort of negotiator. Following Secretary of War Henry Dearborn's suggestion, in 1809 Harrison convinced the Piankashaws to cede their lands to the United States by the same terms of their earlier sale to the Wabash Company, and proceeded to pay the tribes a second time, as per the earlier, thirty-year-old terms (Kades, "Great Case" 94-5). Harrison would have known of the Illinois and Wabash Companies' previous petitions to Congress, none of which were taken particularly seriously by anyone without a vested stake. But it is

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[21] Regarding the legality of Harrison's practices, Kades contends that his "method of exploiting intra-tribal division by striking deals with any member who would sign, while valid as a matter of contract law, may have violated principles of agency law: there appears no plausible basis for imputing to unempowered chiefs (agents) the authority to bind their tribes (principles)" (1123).

On native depopulation by disease, see very generally, parts one and two of Alan Taylor's *American Colonies* (3-272); more specifically, Neal Salisbury's excellent and durable article, "The Indians' Old World: Native Americans and the Coming of Europeans"; and in a more theoretical context, J. H. Elliott's *Empires of the Atlantic World*, especially 64-66.

extremely unlikely that he could have foreseen the contest over their claims ever making it as far as *Johnson v. M'Intosh*.

The United States moved in to survey Harrison's acquisitions in the northwestern territories before the ink was dry, opening official land posts at Kaskaskia, Illinois, and Vincennes, Indiana in 1804. The War of 1812 put a slight hold on things, but in its aftermath Congress passed a particularly Lockean "preemption" act that granted settlers the right to purchase at rock-bottom rates the land they had improved while squatting on it illegally.[22] At first, grants were limited to 160 acres per settler. Congress issued private "preemption" deeds to about 110,000 acres in the Illinois Territory between 1814 and 1815, and President Madison opened the region to public sales of such "preempted" land in May of 1816 (Kades, "Great Case" 97). "This chronology," for Kades, "raises questions about" how M'Intosh came to own the vast, "fifty-three tracts amounting to nearly 12,000 acres" *before* the first public sales:

> There are two possibilities, both consistent with what little is known of William McIntosh.
>
> First, McIntosh may have engaged in a massive fraud, claiming preemptive or colonial rights to acreage one hundred times the per person limit... Given the size of McIntosh's claims, however, it seems probable that officials in Washington would have noticed any irregularity, and so outright fraud seems unlikely.
>
> It is more likely, and consonant with a large body of evidence, that McIntosh obtained these lands from preemptioners and colonial claimants in return for legal services rendered to help establish their claims... It is strange, however, that

[22] As Kades writes, "The need for settlers was obvious…the United States had claims to virtually limitless acres. Yet frontier land, unlike a prime address in Manhattan today or gold since recorded history, had no established market; it was valuable only to the extent that the nation could attract buyers… In addition to enhancing the value of land in their immediate neighborhood, new settlers made land on the previous frontier less dangerous and hence more valuable" (1153-54).

> McIntosh chose to file all these claims, accumulated over ten years or more, on a single day. (Kades, "Great Case" 97-98)

Robertson suggests simply that M'Intosh had merely amassed a fortune from his legal work for settlers in the region. He quotes "a later detractor," William Wesley Woolen, a nineteenth-century historian of Indiana, as having said: "By magnifying the difficulty of obtaining confirmations, and other vile deceptions upon those illiterate and credulous people, he succeeded frequently in obtaining two hundred out of four hundred acres for barely presenting the claim" (qtd. in Robertson 51).[23]

That Kades remains unsure of the actual means by which M'Intosh came to own the lands he claimed, and Robertson makes no argument one way or another, only increases the tragedy of *Johnson v. M'Intosh*'s eventual outcome: for personal gain or just to shake a spiteful fist at Harrison, pragmatically for himself or in the spirit of European "discovery," William M'Intosh *won* the later legal battle. No emphasis may ever be quite sufficient: these are the terms – however murky, shaky, and ambivalent they may be – on which Marshall decided in favor of the "pompous claims" asserted in the first place by "the potentates of the old world" (*Johnson v. M'Intosh* 590, 573). As Kades claims,

> judges often adopt customary practices as law without realizing their efficiency. At some level, however, the courts did realize the importance of *M'Intosh*. The trial court, and then the Supreme Court, decided a case that minimal investigation would have revealed was feigned… The opinion's focus on *incentives* going forward, rather than on the fairness of events that had already transpired, is further evidence that the courts grasped the efficiency motivation for the custom against private purchases of Indian lands. Ironically, despite the detrimental effect of the case on Indian welfare, the real winners of *M'Intosh* were the Illinois and Piankashaw Indians. The losing plaintiffs found the claims they inherited worthless. The victorious defendant, William McIntosh, presumably paid the United States a fair value for the lands and

[23] Kades also cites this nineteenth-century source ("Great Case" 98).

> derived little further benefit from the case. The tribes, however, sold the lands twice: first in 1773 and in 1775 to the Illinois and Wabash companies, then from 1803 to 1809 to the United States [albeit for the same price each time]. The United Companies repeatedly beseeched Congress to avoid double payment to these double grantors, but the legislature, and then the Supreme Court, found this equitably sound argument unconvincing. (1113)

And the reason the Court and legislature found "this equitably sound argument unconvincing" was because double payment for a few stands on the banks of the Illinois and Wabash rivers was a small price to pay for statutorily unmitigated access to the whole of the rest of the continent.

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Ultimately William M'Intosh retreated "to settle in relative isolation," in 1815, "after repeated indignities at the hands of the citizens of Vincennes" (Robertson 200-203n.83). This fact gives some impression of the size of his landholding and the unprecedented scope of the social project on the American frontier: "relative isolation" meant simply moving further back onto his nearly twelve thousand acres. Five years earlier M'Intosh had taken his former slave, Lydia, to be his common-law wife. A recent émigré to the region, drawn to the utopian community at New Harmony, wrote on meeting M'Intosh a year after the Court issued its decision, that "in consequence of [his] connection with this black female, his character is lost among the Americans, and he lives quite retired from all society." The unlikely "winner" of *Johnson v. M'Intosh* was himself thus unfit for assimilation in the country he so staunchly defended. The same émigré-visitor to M'Intosh's homestead in 1810 was "introduced to a black woman as his housekeeper but who seems to answer to all the purposes of a wife, as he has three black children by her. Two of them are fine children"; he

writes nothing of the third (qtd. in Robertson 200-203n.83). M'Intosh died sometime before March of 1834, but not before imparting to his (mixed-race) son "a good education in the English and Latin languages and mathematics"; this led him to become a "distinguished minister" in the African Methodist Episcopal Church (Woolen qtd. in Robertson 200-203n.83).

There is some argument in *Johnson v. M'Intosh* scholarship as to whether the claims at issue even actually overlapped. Many, including more than just those hoping to demonstrate for the case an extreme degree of collusion, have endeavored to demonstrate that they were in fact distinct. The implication of such accusations of collusion is that Marshall greatly overstepped the bounds of his authority, and that he did so for a case which should never have been heard by the Court in the first place. "McIntosh was a natural adversary, but he does not appear to have been a real one," writes Kades. "Mapping the United Companies' claims alongside McIntosh's purchases shows that the litigants' claims did not overlap" (1092). Kades does not push this claim too firmly, save to note that M'Intosh seemed not to want to draw attention to his status as a defendant, and indeed "did not contest a single fact alleged in the complaint, jurisdictional or otherwise" ("Dark Side" 1093).[24] Robertson,

[24] Such "evidence" seems as speculative as Robertson's sympathetic and jovial claim that Marshall inadvertently authorized the discovery doctrine in part because he "had a lot on his plate: in addition to authoring Supreme Court opinions, he had circuit riding obligations, a family to support, and a social life to enjoy" (xiii). James Boyd White reminds us that there is a very distinct point at which we must receive *only* the text, especially as concerns the law and, in the case of Marshall's opinion for *Johnson v. M'Intosh*, the act of writing the law:

> Since the meaning of what one says is never wholly restatable in other terms, especially when the text is written to be read in contexts beyond the immediate, statements of intention are always second-order statements, reductive and interpretative. They involve selection and highlighting, a reordering of the meaning of the language as originally uttered. Any purported statement of a writer's intention can be met with the question: If that is what he meant, why didn't he say it? What the writer actually meant to say was what he in fact did say through the language in the contract or the statute or the poem. ("Law as Language" 439)

referring to Kades' "Great Case of *Johnson v. M'Intosh*," admits that "M'Intosh was a bit casual in his claim." However, tracing the claims' boundaries in an exhaustive footnote, Robertson convincingly lays to rest the possibility that both the litigants' claims were distinct. "When the end points are connected," he writes, "it is clear that many of M'Intosh's tracts do lie with the purchase area" (Robertson 195-96n.15). Kades contends that his map shows that "none of McIntosh's tracts come within fifty miles of the Wabash Company's claims" ("Great Case," 99). In making his case, Robertson converts the Companies' original deeds' English leagues to miles, but notes that "Louis Viviat, who negotiated the treaty, was of course French, and it is possible that he intended that the distances be measured in French leagues, or *lieues*... In this case, the lines would run not ninety but seventy-two miles west from the White and the Ohio [Rivers] – a closer call, but still it appears that M'Intosh had lands within the area sufficient for the federal court to have jurisdiction to hear the case" (Robertson 195-96n.15). In any case, we should grant Chief Justice Marshall and his litigants some degree of respect, even as far as their likely collusion is concerned. We should assume that regardless of their intrigue, feigning the mere tenability of their case was probably a scoundrel's means to which none were quite willing to descend even to achieve their charlatans' ends. This assumption does not preclude Kades' conclusion that "Everyone involved, it seems, wanted a decision on the legal question of the validity of private purchases from the Indians" (1093). Unfortunately, the line between arriving at such a decision and preemptively divesting the Indians entirely, and eternally, was far too fine.

In other words, at the time he drafted the *Johnson v. M'Intosh* decision, perhaps Marshall did, indeed, have "a lot on his plate." But admitting that fact as some kind of exonerating evidence (which Robertson does not necessarily do) does not justify or make amends for the divestiture of America's aboriginal populations.

IV. From Custom and Legend…

As recorded, the document comprising the proceedings of *Johnson v. M'Intosh* is fairly simple in structure, though it does not read quite like narrative history. And unlike even the best narrative history, considerable weight hangs on every single declaratory sentence. It opens with a statement of facts, numbering twenty-four paragraphs, agreed upon by plaintiffs Johnson and defendant M'Intosh. Robertson notes that this agreed statement of facts was the idea of Robert Goodloe Harper, attorney for plaintiff Thomas Johnson and general string-puller for the defendant William M'Intosh, too. The statement "would solve [the] problem" that, "owing to the age of the claims, the burden of proof on the factual grounds of objections – proving, for example, that the Piankashaws had owned the land – would be almost impossible to meet" (54-5). Indicating one of many degrees of collusion, Robertson notes that additionally, "an agreed statement could *shape the issues* to be decided at the trial [in the district court] and on appeal" before the Supreme Court (55, emphasis mine). Conforming to Abrams' requirements for the epic form, the agreed statement itself begins, *in medias res*, with a very brief history of British land acquisition in North America. Indeed, structurally the statement begins so very much "in the middle of things" that its opening lines are only barely complete sentences: atop the first page appears the decision's categorization by the Court Recorder Henry Wheaton as "Constitutional Law."[25] This is

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[25] Regarding whether *Johnson v. M'Intosh* should ever have been categorized as a *constitutional* decision, Kades writes:

> Universal, uniform, and longstanding legislation summed to a customary rule greater than its statutory parts. That said, Marshall did not even hint that Congress was powerless to reverse his opinion by statute and to permit private citizens to buy land directly from the Indians. That is, there is no evidence that *M'Intosh* created a *constitutional* rule. A reading of *M'Intosh*, as decided on customary grounds, is consistent with the general ability of parties to *contract around* customary laws. (1100, emphasis original)

Elsewhere Kades writes that *Tee-Hit-Ton v. United States* (1955), which "held that tribes had no Fifth Amendment *constitutional right* to compensation for taking of their title of occupancy," "seems to

followed by the title of the case itself, and then the lines: "A title to lands, under grants to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773, and 1775, cannot be recognized in the Courts of the United States" (543). Not only does the document begin very much "in the middle of things," but the means by which the Court introduces the argument at bar also fits Abrams' requirements for the invocation of an "epic question." The first proper sentence is not, in fact, complete: it reads simply "ERROR to the District Court of Illinois." This initiates a short, formal paragraph that ends, "The case stated set out the following facts" (543), which in turn, befitting Abrams' definition, "inaugurates the narrative proper" (Abrams 78). The effect makes exceptionally clear the fact that the reader has both entered *in medias* of a protracted legal dispute, and that he also must acquaint himself with the matter at hand if he hopes to understand what follows.

True to epic form, the agreed statement continues with extensive catalogue-histories of both Johnson's and M'Intosh's disputed purchases, complete with all the chains of transfer down from William Murray, for the plaintiffs, and from the United States government for the defendants. Also catalogued, for the purposes of identification, are the many and various natural features characterizing the land in question. This is followed by mention of every single individual Illinois and Wabash Companies shareholder, including chains of inheritance for the deceased. These lists more than satisfy Abrams' tandem requirements (1) that epics contain "catalogues of *some* of the principal characters" – *Johnson v. M'Intosh* catalogues them *all* – and (2) that they be "introduced in formal detail" – even Homer's great catalogues of ships and Trojans in book 2 of *The Iliad* could not have anticipated nineteenth-century America's legalistic hyper-formality. These first twenty pages of the agreed statement

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contradict *M'Intosh*, since it permits the extinguishment of Indian title without purchase, just conquest, or abandonment. At bottom, however, it merely shows that *M'Intosh* was not decided on *constitutional* grounds" (1097n.134, emphasis original).

conclude in two parts: first with a paragraph detailing the Companies' repeated petitions of Congress for recognition of their purchases; and second with the note, itself a sort of further invocation, that "Judgment [in the new Illinois Circuit Court] being given for the defendant on the case stated, the plaintiffs brought this writ of error" (562). After this there is a break in the text (the first of two, the second being before Marshall's official issuance), and Supreme Court reporter Henry Wheaton takes up the recitation of the causes as "argued by Mr. *Harper* and Mr. *Webster* for the plaintiffs, and by Mr. *Winder* and Mr. *Murray* for the defendants. But as the arguments are so fully stated in the opinion of the Court," Wheaton emphasizes, "it is deemed unnecessary to give any thing more than the following summary" (562, emphasis original).

After the agreed statement of facts, the document, which culminates dramatically in Marshall's opinion, lays out the case as presented by the plaintiffs. In light of their eventual loss, this portion of the decision looks positively gilded, especially as regards the Indian tribes. Marshall writes at the conclusion of his opinion for *Johnson v. M'Intosh* that he has "bestow[ed] on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty" (604). The question, in other words, was not intrinsically difficult. If the fingerprints of "difficulty" are apparent in the finished product, it is because the "magnitude" of the project before Marshall lay in the "degree of attention" that only *he* could evaluate and to which only *he* could respond satisfactorily. In the several pages preceding this concluding paragraph, Marshall arranges and debunks each of the specific precedents cited by the plaintiffs presented in making their case. The last of these traces back, Marshall writes, to the Antinomian "religious dissentions of Massachusetts," which resulted in the expulsion that, in turn, resulted in the settlement of the colony at Rhode Island (602). "On the restoration of Charles II," Marshall notes, "this small society hastened to acknowledge his

authority" and sought a royal charter as positive approval of their venture (602-3). "This charter" they were granted, and it "certainly sanction[ed] a previous unauthorized purchase from Indians, under the circumstances attending that particular purchase." But in keeping with the Supreme Court's decision for the matter at hand, in 1823, Rhode Island's charter was "far from supporting the general proposition, that a title acquired from the Indians would be valid against a title acquired from the crown, or without the confirmation of the crown" (604).

The history of Rhode Island's royal charter notwithstanding, Marshall's awkward conclusion on such a grave matter illustrates *exactly* what the Court did *not* do. It did not examine the "circumstances attending that particular purchase" at hand, that is, Johnson and M'Intosh's disputed claims, and issue a decision that correlated with the "intrinsic difficulty" of the matter before the bar. All Marshall had to do, as the Crown did two centuries prior in Rhode Island, was disaffirm the "circumstances attending that particular purchase" along the Illinois and Wabash Rivers from the Piankashaw Indians. Marshall, wandering elegiacally and conspiratorially, as he does, from the sixteenth century to the Revolution and beyond, did a very poor job of attending to the circumstances of the issue at bar. The social and statutory histories he cites as precedent are wrong, and wrongly invented, histories. Many scholars, in their quest for historical and legal objectivity, focus on Marshall's invocation of a plainly wrong history of the conquest of American Indians by European colonizers.[26] Such

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[26] For a complete analysis of the "wrong history" Marshall propounds in *Johnson v. M'Intosh*, see Lindsay Robertson's "John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine." Therein, Robertson lays out, point by point, Marshall's reliance on the history he recounted in his first of five volumes of *The Life of George Washington* (1804), and which later in life Marshall, himself, admitted to be poorly founded:

> Despite his seemingly good intentions, Marshall was not up to the task of shedding much light on the colonial era. The problem was that primary source materials for "the complete execution of such a work" were "not to be found in America." Even if they had been, he

conquests never in fact occurred. As far as the soil itself was concerned, the chronology is one of real purchases. Marshall ignores this fact in explaining how the United States came to acquire the territory it had by 1823. As I examine in terms of Nozick's "justice in distribution," citing Marshall's historical and legal scholarship as wrong debases his precedent, which in turn debases the role *Johnson v. M'Intosh* might itself play as precedent. But by paying too much attention to the faulty precedential foundation that *Johnson v. M'Intosh* provides, it becomes too easy to miss the fact that this very foundation, owing to the Chief Justice, is equal parts poor legal scholarship and abject racism. In focusing on these objective and certainly vital facts, many legal scholars tend to miss the subjectivity of Marshall's unabashed ethnocentrism. For the legal trees, they miss the anthropological forest.

When one reads the agreed statement and opposing parties' summaries, by far the most difficult facet to deduce from *Johnson v. M'Intosh* is whether the Court, because it decided for the defendants, summarily invalidated the whole of the case the plaintiffs presented. And if Marshall's opinion does invalidate all the issues raised by the plaintiffs, the reader must wonder whether this means, in turn, that such an invalidation implies a coeval, summary *validation* for the defendants. In other words, the key predicament for the laws and histories built on the mythical foundation of *Johnson v. M'Intosh* is, if the defendants' case holds, does this mean that, strictly as they presented it, their case somehow

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> lamented, "neither the impatience of the public, nor the situation of the author," would allow him to undertake the research needed to find them. Consequently, Marshall's history was a cut-and-paste compilation of such secondary materials as he found it desirable to include… It bears repeating that, as evidenced by his preface to volume one, John Marshall knew that these sources were methodologically deficient at the time he issued the opinion [for *Johnson v. M'Intosh*]. Moreover, alternative histories were available at the time Marshall composed both the *Life of Washington* and *Johnson v. M'Intosh*. Other writers interested in the question of Indian title had attempted to reconstruct British policy by looking to colonial land records and had reached *dramatically different conclusions*. (764-65, citations omitted, emphasis mine)

becomes *true*? One struggles to ascertain whether, because the defendants won, their limitless concept of dispossession-by-discovery became the irrefutable law of the land. That is, does the Court's decision in their favor make their philosophy *right*? The answer is, not quite. Marshall does bound and qualify the idea, limitless as proposed by the defendants, that the act of discovery equals complete, absolute exercisable possessory right. But there is no gray area, no discussion of the only vaguely distinct "domestic dependant nations" that would characterize Marshall's 1831 decision for *Cherokee Nation v. Georgia*.[27] Instead, immediately after the sentence noting that discovery "overlooks all proprietary rights in the natives," the defendants decree, "The sovereignty and eminent domain thus acquired [i.e., by discovery], necessarily precludes the idea of any other sovereignty existing within the same limits" (567-68). Marshall would clarify, or perhaps qualify, this to mean that no other *European* sovereignty could exist in the same limits, that discovery only garners rights of preemption as between European discoverers, but his clarification quickly became irrelevant.

There is a clear and present danger in simplifying, perhaps even conflating, a decision in favor of the defendants to mean also that the defendants' case, as presented in their briefing, means that the facts of Marshall's opinion can be distilled to the defendants' case *as presented in their briefing*. We must not forget that the opposing parties' case-summaries are subjunctive insofar as every clause is preceded by an unwritten "If…" What results is a long string of clauses that reads, in effect, "*If* the Court decides in our favor, *then*…" But if we distill the text of the Court's decision (which may or may not contain conditional caveats that reshape such clauses to read, for instance, "While the Court has decided in your favor, it also

[27] See note 66 and accompanying text.

stipulates…") to the summary presented by the winning party, there results very little reason to defer to the act of judicial decision writing at all.[28]

The first task the plaintiffs' brief undertakes is to affirm[29] that the Piankashaw Indians, and thus, by extrapolation, all American Indians, "at the time of executing the deed…had power to sell." Indians owned their land outright, *in fee simple*, and had every exercisable option in selling it. Indeed, "the United States had purchased the same lands of the same Indians." This proves that regardless of whether the case was decided for the plaintiffs or the defendants, the mere presence of *any* purchaser stipulates that there existed sellers who owned and were entitled to sell the land, in the first place, that they owned (562). The Court could find in favor of the Companies' having bought the land in question from the Piankashaws, or in favor of the United States' having done so. Either way, the Indians maintained and exercised every necessary right in selling their land to the legally triumphant purchaser. Confirming this, the plaintiffs shift briefly into the conditional:

> It would seem, therefore, to be unnecessary, and merely speculative, to discuss the question respecting the sort of title or ownership, which may be thought to belong to savage tribes, in the lands on which they live. Probably, however, their title by occupancy is to be respected, as much as that of an individual, obtained by the same right, in a civilized state. The circumstances, that the members of the society held in common, did not affect the strength of their title by occupancy. (562-63)

Much of Indians' eventual loss can be traced to just this passage, each sentence of which carries significant weight. Bearing in mind that each sentence builds on the conditional

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[28] See in general, James Boyd White's "What's a Decision for?"

[29] I write "affirm" for effect, but one must bear in mind that everything laid out by the plaintiffs and defendants in their respective briefs is conditional, and does not anticipate the ultimate decision for the defendants. Having said that, one could argue that the defendants' brief is somehow "less" conditional because, by deciding in their favor, the Court in doing so affirmed, unconditionally, that what they had merely *conditionally* proposed was the *actual* truth.

clause that opens the first, I will deal with each in turn and at length, but probably none with any degree of completeness.

The plaintiffs propose that a portion of the decision which resulted is "unnecessary, and merely speculative." This is an apt proposition in terms of the holding that it ultimately bore out. But the aptness of this assessment is difficult to reconcile temporally with the case's final holding. This passage, after all, immediately follows one in which Wheaton, the reporter, acknowledges the entirety of the Chief Justice's final opinion, wherein Marshall lays out a history that would regardless have superseded anything Harper could offer in advance. The author of the summaries of the opposing parties' cases seems not only to know the decision's final holding, but also to summarize the case he knows does not hold. That is, Harper tells us the story of the case that *will not* and that *does not* hold: the distinction is that the brief precedes Marshall's decision textually, tangibly, and yet it is written with the foreknowledge that it will be defeated by Marshall's opinion itself. In yet other words, this summary of the plaintiffs' *losing* case, by its mere inclusion, evokes a general sense of its own mortality. And simultaneously, it evokes a more precise sense of the how that mortality will be exercised. As a last-ditch effort, if an effort at all, the plaintiffs' case reconciles itself with its own mortality from its own grave. In this light, we can read the summaries both as separate summaries of the matters at issue, or potentially at issue, and as a unified commentary on Marshall's handling of those matters. This commentary includes, most importantly, a justification of why those which were at first only potentially at issue came finally to be at issue at all. Thus Harper's shift into the conditional, "It would seem…," signals at least a tacit disapproval[30] of the fact that Marshall *really did* end up discussing

[30] By suggesting that Harper, or whoever authored this agreed upon statement of facts as it came to be compiled, "tacitly disapproved," I do not mean to invoke an authorial presence that would make the author, especially a man like Harper, into the Indians' benefactor. I merely mean to underscore that

exactly what he proposed not to: that is, "the question respecting the sort of title or ownership, which may be thought to belong to savage tribes, in the lands on which they live." We can extrapolate from Harper's general lack of legal scruples that he also lacked a benevolence extendable to eventual Indian subjugation, and was trying to do nothing but obtain the Court's favor and a decision for the plaintiffs. So, not necessarily out of any sense of benevolence, the plaintiffs' summary does not just express the hope that they had built a case that could withstand all the blows the Court could deal it. But also, if one reads it as a critical annotation of the decision that follows, the plaintiffs' summary provides a particularly apt commentary on the lengths to which Marshall *did* take supposedly extraneous issues. By tackling such superfluous matters, Marshall's opinion dealt a succession of blows the plaintiffs' case could not, in fact, withstand.

The second sentence in the passage above illustrates that the plaintiffs' case, by a component that was also contrary to the decision's final holding, would have Indians' "title by occupancy" respected just as it would have been were they to have been characterized, since time immemorial, as living "in a civilized state." James Clifford writes of Indian legal discourse, in white courts of law, as being "constrained not simply by the law, with its peculiar rules, but by powerful assumptions and categories underlying the common sense that supported the law. Among the underlying assumptions and categories," Clifford finds, "three stand out: (1) the idea of cultural wholeness and structure, (2) the hierarchical distinction between oral and literate forms of knowledge, and (3) the narrative continuity of history and identity" (337). To this day, as Steven T. Newcomb argues, the conflicting, practical

> relationship between the United States and Indians can be characterized accurately as the relationship between a "Christian nation" (or the legal successor of a "Christian

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the author of the statement disapproves of the scope that Marshall ultimately deemed necessary, but which was in actuality *extrinsic* to the "intrinsic difficulty" of the question at the bar.

> nation") and historically "heathen," non-Christian peoples. Ever since *Johnson*, the federal government has used the Christian religion as a rationale to maintain its dominance over Indian nations – denying them their rights to complete sovereignty and territorial integrity – on the basis of a historic distinction between Christians and non-Christians. Indian nations have been denied their most basic rights to sovereignty and territorial integrity simply because, at the time of Christendom's arrival in the Americas, they did not believe in the God of the Bible, and did not believe that Jesus Christ was the true Messiah. This basis for the denial of Indian rights in federal Indian law remains as true today as it was in 1823. (308-9)

That the plaintiffs distinguish between "savage tribes" and "a civilized state" is key. Despite how a decision for the plaintiffs could have benefitted Indians, this hypothetical benefit can only be considered relative to the actual losses suffered by the results of the decision for the defendants. The hypothesis does not quite deny a degree of historical inevitability. It demonstrates instead that if we disregard Marshall's decision for the defendants and the judicial-activist course in which he took it, an opposite decision for the plaintiffs would have left Indians still amounting, by legal definition, only to heathen, "savage tribes," which only "probably" have a title worth respecting.

The Oxford English Dictionary's first entry for *probably* defines the word as: "In a way that commends itself to one's reason for acceptance or belief; in a way that seems likely to prove true; with likelihood (though not with certainty); plausibly." This definition, the *OED* notes, is now rare, but features a last-cited entry of 1909. The current definition, with cited entries back to the seventeenth century, reads: "As a sentence adverb qualifying a whole statement: almost certainly; as far as one knows or can tell; in all probability; most likely" ("Probably"). The subjunctivity implied by the word, in this decisive legal instance, is important because, like all subjunctive clauses, it invokes both what *is* and what *is not*. Law must always be considered, as Robert Cover contends, in terms of the "imposition of a normative force upon a state of affairs, real or imagined… To live in a legal world requires

that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be'" (10).

Certainly Harper employs *probably* here as an "adverb qualifying a whole statement." But that use does not exclude the suggestion that by beginning with "probably" he might also be commending the matter "to one's reason for acceptance or belief." The plaintiffs argue, in other words, that an appeal to reason will, "plausibly," given the evidence, "in a way that seems likely to prove true," and "with likelihood," deem Indians to hold a "title by occupancy" that should pass unchecked by considerations of their "savagery." Marshall, in his decision, goes on to rule that it is not out of the question for his young country's claims to land in North America to be judged "pompous" (590) or "extravagant" (591). But Marshall's only task, despite how far he ultimately took it, was exactly as the plaintiffs specified and Harper laid out: "the only question in this case must be, whether it be competent to *individuals* to make purchases, or whether that be the exclusive prerogative of government" (563, emphasis original). Marshall, however, specifically *rules out* an appeal to reason. Although he admits that Indians at some point had "a *legal* as well as *just* claim to retain possession of [the soil]," he insists that now all that was at issue was whether they retained a defensible *legal* claim (574, emphasis mine). It would certainly be possible to investigate justness by way of an appeal to reason. But Marshall repeatedly emphasizes that the Court's only task here was the assessment of legality's response, dependent on the amoral bounds of legal positivism, to Indians' claims as "rightful occupants of the soil" (574). Barely a century after the decision, in *The Imperialism of John Marshall: A Study in Expediency*, George Bryan commented coldly and accurately that

> above all, [*Johnson v. M'Intosh*] involved a flat question of right and wrong. It was a decision which seems to have altogether ignored property rights which had solemnly

> vested and by the same methods of purchase, conveyance and recordation under which all the real estate in America is held today…
>
> We are then to inquire whether or not the conscience of the world will today [in 1924] respond affirmatively to the proposition that discovery and conquest alone give a title as against owners and occupants of property which the courts of the conqueror can not [sic] deny – whether, in a word, *that which is morally wrong can be legally and politically right*. (i-ii, emphasis mine)

The third sentence in the brief passage from the plaintiffs' summary is also a nod to savagery and civilization. The plaintiffs anticipate and counter the claim that some vague notion of Indians' communal land ownership precluded the idea that they could, in fact, own that land outright. Marshall never disconfirms this in his opinion for the defendants. Indeed, the first twenty pages of the decision outline how "the case stated set out the following facts," which were agreed upon by both parties, and thus presumably extrinsic to the case, and inadmissible in contention. Harper emphasizes *ad nauseum* in the agreed statement that before the arrival of Europeans the tract chartered in 1609 by James I, at what would become Jamestown,

> 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: and that in making settlements within this territory, and in all the other parts of North America, where settlements were made, under the authority of the English government, or by its subjects, the right of soil was previously obtained by purchase or conquest, from the particular Indian tribe or nation by which the soil was claimed and held; or the consent of such tribe or nation was secured. (543-45)

These first twenty pages, comprising the agreed statement of facts, are written in a legalese unbecoming of Marshall's flowing prose. Harper spares no hyper-legalistic and frequently repeated flourish in driving home the point that Indians did, in every respect, own their land prior to the arrival of Europeans. A few pages after this passage, writing of the Illinois' and

Kaskaskias' lands, counsel refers to the fact "that these Indians remained in the sole and absolute ownership and possession of the country in question." Later on the same page, the agreed statement of facts reads,

> from time immemorial, and always up to the present time, all the Indian tribes, or nations of North America, and especially the Illinois and Piankeshaws, and other tribes holding, possessing, and inhabiting the said countries…held in their respective lands and territories each in common, the individuals of each tribe or nation holding the lands and territories of such tribe in common with each other, and there being among them no separate property in the soil. (549-50)

Not only does neither party dispute that Indians owned their land to the fullest capacity, but neither disputes that they were capable of doing so *communally*, "each in common" with "there being among them no separate property in the soil." Again, this is the mutually *agreed* statement of facts; neither litigant contends that communal ownership was anything less than complete and absolute.

At issue, then, is why the arrival of Europeans changed anything at all for anyone except Europeans. How, in other words, did Marshall arrive at an opinion that contradicted the fact, agreed upon by both litigants, that the Indians owned their land "in full sovereignty…from time immemorial, and always up to the present time"? In the answer to this question lies the discovery principle, the seed of Marshall's mythical revisionism. The Indians, for their part, conspicuously denied that the arrival of the Europeans changed anything. A sixteen-nation alliance deposing to the "Commissioners of the United States" on 31 July, 1793, proclaimed:

> Brothers: You have talked, also, a great deal about preemption, and your exclusive right to purchase Indian lands, as ceded to you by the King, at the treaty of peace.
>
> Brothers: *We never made any agreement with the King, nor with any other nation, that we would give to either the exclusive right of purchasing our lands*; and

> we declare to you, that we consider ourselves free to make any bargain or cession of lands, whenever and to whomsoever we please. If the white people, as you say, made a treaty that none of them but the King should purchase of us, and that he has given that right to the United States, *it is an affair which concerns you and him, and not us: we have never parted with such a power*. (qtd. in *American State Papers: Indian Affairs* I.356, emphasis mine)[31]

It is difficult to ascertain if the Indians lost the capacity for absolute ownership specifically because "the members of the society held in common," or whether they lost it more generally because "the sort of title or ownership…thought to belong to savage tribes" was unintelligible to, and unrecognizable by Europeans regardless of whether it was held by Indians communally, or by Indians individually. The agreed statement seems to preclude arguments deriving from concepts of Indians' ownership as limited insofar as it was communal. As Harper and Webster's summary of the plaintiffs' case suggests, they thought it was unnecessary for the true nature of Indian tribes' "sort of title or ownership" to be elucidated further than simply leaving it at that, and should instead be taken for granted by the Court and the country. Marshall refers in his opinion to seventeenth-century colonial charters as authoritative regarding Indian tribes' rights as owners. But as Banner notes, pointedly differentiating legality from reality,

> the actual colonial land policy looked very different from the charters, which were drafted in England before colonial settlement took place, before local conditions could have any effect on practice. The rules that in fact governed colonial land acquisition were not taken from the charters, and indeed contradicted the charters. Like most other lawyers of his generation, Marshall appears not to have known this.

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[31] Regarding such "protestations," Kades remarks that they "could have no effect as long as the British respected their treaty with the United States (preventing international competition), and the United States in turn effectively refused to recognize Indian deeds obtained by its citizens (preventing intranational competition). All the willingness in the world to sell to the highest bidder is irrelevant if there is only one bidder" (1114).

> It is not that Marshall favored a legal fiction embodied in the charters over the reality of the law as it was implemented in the colonies, but rather that he mistook the fiction for the reality. (184)

As Lon Fuller reminds us, a legal fiction "taken seriously, i.e., 'believed,' becomes dangerous and loses its utility… [T]he danger of the fiction varies inversely with the acuteness of this awareness" of its status as fictional. "A fiction," Fuller continues, "becomes wholly safe only when it is used with a complete consciousness of its falsity" (370). The plaintiffs' brief, preceding Marshall's decision, takes for granted that Indians owned the land they occupied, regardless of whether they held it communally, individually, or by some other system comprehensible only to "savage tribes." The plaintiffs declare that the Court *must not* take up this matter at all: "the only question in this case must be, whether it be competent to *individuals* to make such purchases, or whether that be the exclusive prerogative of government."

This completes the first clause of the plaintiffs' case summary. The second contends that the Proclamation of 1763, which forbade settlement west of the Allegheny Mountains, did not apply to *Johnson v. M'Intosh* because the Indians "were not British subjects, nor in any manner bound by the authority of the British government" (563). Harper mentions the Proclamation of 1763 only as objectionable material in paragraph ten of the agreed upon statement of facts, and leaves it that the "proclamation is referred to, and made part of the case," presumably because it was an unavoidable obstruction for either party (*Johnson v. M'Intosh* 549). Robertson notes that Harper "left the objection unanswered [and] incorporated the proclamation into the record so that the document would be admitted into evidence for the parties to address" (56). Moreover, the plaintiffs argue that the proclamation did not apply "because, even admitting them [the Indians] to be British subjects, absolutely, or *sub modo*, they were still proprietors of the soil, and could not be devested [sic] of their

rights of property, or any of its incidents, by a mere act of the executive government, such as this proclamation" (563-64).

The plaintiffs' summary further confounds the distinction, already quite subtle, of how British law did not apply to Indians in North America – or at least not to the Illinois and Piankashaws in question. It does so by three tacks. First, the reader must take for granted the idea that a rhetorical act falling under the aegis of rule-by-proclamation had little bearing on the Indians, because "their title by occupancy is to be respected" without condition. Second, with that in mind, the plaintiffs note that at the time of sale, the lands at issue "lay within the limits of the colony of Virginia" (564). One must take for granted, too, the odd paradox that a royal proclamation – charters, in this case – was sufficiently rhetorically empowered to establish "the limits of the colony of Virginia" but not to define its own continuance. Royal proclamation could immaculately conceive Virginia by decree, but could not, thereafter, rule Virginia by decree. This speaks to Arendt's declaration that neither "compact nor promise on which compacts rest are sufficient to ensure perpetuity, that is, to bestow upon the affairs of men that measure of stability without which they would be unable to build a world for their posterity, destined and designed to outlast their own mortal lives" (*On Revolution*, 174). The plaintiffs' jurisdictional distinction is the third source of confusion, that while the Crown could establish the colony of Virginia, it could not automatically thereby gain *fee simple* title to all the lands therein. That is, whatever the act of defining "the limits of the colony of Virginia" might entail, the process *did not* entail actually, automatically taking possession of all the lands in its bounds.[32]

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[32] Regarding the necessity of effective occupation of land claimed by act of discovery, until the nineteenth century "no state appeared to regard mere discovery, in the sense of 'physical' discovery or simple 'visual apprehension,' as being in any way sufficient *per se* to establish a right of sovereignty over, or a valid title to, *terra nullius*" (Keller, et al., 148).

In a way, then, this was the first degree of limbo into which the Indians were cast: their land was theirs in all practice, but not absolutely in name, and perhaps not at all in name, either.[33] So, the plaintiffs argue, Virginia could be what it may, but even within the bounds of whatever Virginia may be, Indians still owned their land. The tribes lived on *their* land, and not on British land, and thus, the plaintiffs contend, were not subject to British proclamation. The plaintiffs do admit that the purchasers from the Piankashaws were British subjects, all inhabitants of the Virginia colony, but demand that the Proclamation of 1763 be recognized merely as an exercise of a "power of prerogative government." This unlimited extensibility for rule-by-decree "is confined to countries newly conquered, and remaining in the military possession of the monarch, as supreme chief of the military forces of the nation." Virginia is not an example of these circumstances, since "the establishment of a government establishes a system of laws, and excludes the power of legislating by proclamation" (564). The plaintiffs rule out both (1) that the Indians are not subject to British law and (2) that the Virginians are not subject to legislation by proclamation. The plaintiffs achieve both points by reasoning that they have demonstrated (i) causally, that the Proclamation of 1763 did not preemptively invalidate the Companies' purchase from the Piankashaws, who were entitled to sell, and (ii) coincidentally, that the Piankashaws were entitled to sell because they owned their land outright, regardless of the liminal strictures imposed by coloniality.

The last topic of the plaintiffs' summary returns, as does each before it, to Harper's central thesis regarding the capacity of individuals to purchase land directly from tribes. In May of 1779 Virginia passed, by assembly, an act maintaining "that this Commonwealth hath

[33] There are several layers of meaning to this "not in *name*." A fundamental contributor to the fact that there is an "Indian question" at all is the lack, in the legal vocabulary, of any clear or precise, or historically consistent, terms to accommodate Indian tribes and tribal issues absolutely. Indeed, most Indian legalese seems to be as unclear, lacking in concrete, absolute, and irrefutable meaning, to the legalist as it is to the layman.

the exclusive right of preemption from the Indians, of all the lands within the limits of its own chartered territory… That no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation" (qtd. in *Johnson v. M'Intosh* 565n.). The plaintiffs, however, bring to bar that the act of 1779 "is not contained in the revisal of 1794, and must, therefore, be considered repealed." And in any case, the act could not have functioned *ex post facto* with authority sufficient to invalidate titles obtained before the assembly first issued it: "At the time of the purchases there was no law of Virginia rendering such purchases void. If, therefore, the purchases were not affected by the proclamation of 1763, nor by the act of 1779," plaintiffs summate, returning to the issue they *hoped* would occupy Marshall in full, "the question of their validity comes to the general inquiry, whether individuals, in Virginia, at the time of this purchase, could legally obtain Indian titles." Concluding with what seems to be an appeal to Marshall's disinterested positivism, plaintiffs admit, "It may be true, that in almost all the colonies, individual purchases from the Indians were illegal; but they were rendered so by express provisions of the local law." Regardless of the general customs or even positive statutes of the rest of the American colonies in the early 1770s, Virginia, specifically, did not proscribe purchases like those undertaken by the Illinois and Wabash Companies from the Piankashaws: "at the time the purchases now in question were made, there was no prohibitory law in existence. The old colonial laws on the subject had all been repealed" (566). With this Harper and Webster conclude their summary for the plaintiffs.

V. …to Myth and Statute

The plaintiffs' case stakes out a largely auspicious argument for the nature of Indian ownership. This activist construction by Harper should not, again, be read as anything more

than evidence of his desire to win the case and secure the right of individuals to purchase directly from the tribes. But *had* the Court decided for the plaintiffs, at least Indians would have emerged retaining some semblance of proper ownership of the land they have, per the agreed statement, indisputably inhabited since "time immemorial." Their opponents' case, in contrast, bears all the marks of the racism and ethnocentrism in favor of which Marshall eventually decided. One might postulate that Harper, in collaboration with Webster for the plaintiff Johnson and Winder and Murray for the defendant M'Intosh, construed a philosophy so extreme that he hoped to garner a decision in favor of the plaintiffs by way of the Court's aversion to such blatant disregard for broadly accepted Enlightenment tenets. In other words, perhaps the outlandishness of Harper's case for the defense is evidence of his hope that the Court would be so repulsed as to decide for the plaintiffs. Perhaps Harper was banking on the very extremity in favor of which Marshall and the Court could not imaginably decide, but in favor of which it ultimately did. In retrospect, it was a huge and risky gamble, both for independent speculators like Harper, who lost, and for Indian tribes, who *really* lost. The very first sentence of the plaintiffs' brief

> insist[s] that the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation [i.e., transfer] to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations. (567)

From here it does not relent. The plaintiffs' case concedes that Indians are "savages," but nonetheless maintains that an appeal to reason, by way of their use of "probably," parsed above, would reveal their occupancy "to be respected, as much as that…in a civilized state" (563). The defendants, on the other hand, refute all of the plaintiffs' progression *toward* an *indisputable* title derived from occupancy since time immemorial. The very extremity of the

final decision in their favor makes it hard for the modern reader to bear in mind that *Johnson v. M'Intosh* is the foundation of settler-state property law, by the norms of which we still live. The result is the mythically convenient alteration of history, and the solidification of the epic myth's "original violence" into what Milner Ball calls the "stability embodied in law" (7). Ball hypothesizes,

> Given the necessity for adaptation of the legends…the American story in its basic outline – as provisionally adapted from Chief Justice Marshall – might seem to fit the pattern of such Western stories of founding as the *Aeneid*, where aboriginal crime in the event becomes the fountainhead of civilization confirmed in law.
>
> We might conclude that the aggressive intrusion with which America began was not unique in the Western tradition. If so, it could be viewed as a repetition of the ancient cycle and justified with a received interpretive apparatus.
>
> But there is something wrong here. Custer is no analog to Aeneas. The adapted version of the American story suffers gaps and omissions. (9)

In these terms of "aboriginal crime," that a decision in the plaintiffs' favor would have stopped at mere "savage[ry]" is downright encouraging; indeed it would have obviated many of the American story's "gaps and omissions."

The defendants' brief instead goes to great lengths to cement all the possible reasons why Indians' claims to their native, aboriginal homelands should not override those of late-coming Europeans. Their amateurish historiography glosses over the myriad contrary reasons supporting how and why things did not, in fact, transpire as both they and ultimately Marshall claim they did. Ball continues:

> Although they are surrounded by much myth and propaganda, the American founding events were not concocted; the history is accessible. Real Europeans did come to a real land that was already occupied by real people… The secular Western tales of origin are ultimately inapposite, and attempted adaptations of them founder upon contrary American realities. Not the least of the realities is the role of law which, so

> far from constituting a means for transcending the primordial crime has, in certain respects, become its instrument. (Ball 10)

Fundamental to the defendants' case is the idea that Indians were conquered by Europeans regardless of whether any proper conquest ever took place. In the American story, violent conquest and its spoils are somehow intrinsically implicit. Nozick reminds us: "Justice in holdings is historical; it depends on *what actually has happened*" (152, emphasis mine). Regardless of the fact that no proper conquest ever actually happened, the indigenous populations have become "subjects" and "must necessarily be bound by the declared sense of their own government" – that is, the various governments installed synthetically by Europeans. "Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so" (568). In any case, the defendants hedge, "if it be admitted that they [Indian tribes] are now independent and foreign states, the title of the plaintiffs would still be invalid: as grantees from the *Indians*, they must take according to *their* laws of property, and as Indian subjects" (568, emphasis original).

Marshall later devotes considerable time to the exculpating conjecture that the plaintiffs should look to an Indian court for redress. The plaintiffs, Marshall argues, bought the Indians' title of occupancy, but not absolute title, which was not the Indians' to sell. The United States later bought the absolute title, and in turn sold it to M'Intosh. If the plaintiffs consider themselves to have been deceived by the selling tribes' sleight of hand, they should take it up with the tribes who deceived them. "If he had been concerned with equity," Kades proposes,

> Marshall could have (1) ruled in favor of the plaintiffs, (2) directed the United States to refund McIntosh's money, and (3) *instructed the United States to pursue the Illinois and Piankashaw tribes for a remedy*, perhaps taking some of their western reservation lands. The United States government alone was capable of disgorging the Indians' unjust gains from selling the same lands twice. Instead, the holding of the

> case left the double grantors with double proceeds, apparently a necessary evil in reaffirming a custom that helped reduce the price Americans paid for Indian lands. (1114, emphasis mine)

Marshall, over the course of his decision, seems constantly to be looking for any possible means by which he might lift from his own conscience all semblance of responsibility for the Court's efficient, "necessary-evil" ruling. He seeks to save history from holding "man responsible for the deeds he had not done and for consequences he had never foreseen" (Arendt, "Imperialist Character" 167-68). But Marshall's pursuit besmirches the lily-whites of a "nation solicitous of establishing its character on the broad basis of justice," at the expense of the Court, justice, and of history itself (Knox qtd. In *American State Papers: Indian Affairs* I.13).

For the time being, after this interjection regarding redress from the Indians, the defendants' summary returns to the theme of the Indians' state-of-nature subjecthood. On the grounds that "the law of every dominion affects all persons and property situate within it," the defendants refute the idea that Indians ever "had any idea of individual property in lands. It cannot be said that the lands conveyed were disjoined from their dominion; because the grantees could not take the sovereignty and eminent domain to themselves" (568). Thus, the defendants conclude, the arrival of Europeans did not just stop – correlatively or causally, it does not matter – the Indians from being "an independent people" who owned their land. But in the event, inquiry itself is irrelevant, because Indians never had a concept of ownership sufficient to warrant the respect of a distinction like "title." The defendants contend, that is, that the Indians were not independent even prior to the arrival of Europeans. Rather, the tribes merely had yet fully to realize the contrast that would be provided, relative to their *independence*, by their spontaneously generated *dependence* on their discovering conqueror. As a result, after the arrival of the Indian tribes' European "superiors," they came to live not

on *their* land, but on land governed teleologically by "the laws of the dominion under which they live." Neither the land nor the laws are more than coincidentally theirs, but tribes are now causally bound to adhere to the laws of the "dominion under which they" *now* live, in the territory circumscribed onto land on which they have *always* lived (568).

It is worth noting that the defendants fail, over the course of their brief, actually to elucidate the ease by which they converted the ethereal act of discovery into real conquest.[34] Perhaps their wavering on the subject of conquest can also be read as evidence of collusion, insofar as the idea would have been widely recognized as at least extreme, if not written off as downright false. "Discovery" therefore could have been used to predict and preempt a decision from the Court, which should have been, as Harper and the Companies hoped, averse to such fallacy. The defendants clarify that Indians

> are subject to the sovereignty of the United States. The subjection proceeds from their residence within our territory and jurisdiction. It is unnecessary to show, that they are not *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[35] of the government. (568-69, emphasis original)

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[34] Robertson refers to this idea with the title of *Conquest by Law*; and Ball traces it precedentially across the corpus of federal Indian law in "Constitution, Court, Indian Tribes." The defendants themselves (collusion notwithstanding) would probably have admitted that "discovery" did not entail much more than sighting a piece of land and emitting an utterance of *very* considerable significance. Perhaps, too, there would be a flag planted in the name of one monarch or religious leader or another. On "discovery," see generally, O'Gorman; Keller, et al.; and Todorov.

[35] Marshall, and most Courts after his, would go on to explore this paternalistic theory that tribes were composed of pupils, wards to be looked after and cared for, but not quite to be entrusted with, for instance, real property. See note 66 and the accompanying text regarding Marshall's decision for *The Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832).

Rights, again by means of an intricate teleology, at once are innately obtained and intrinsically maintained, and are also extrinsic allowances made for the citizen by the sovereignty under the authority of which they live.[36] Indians cannot be "*citizens*, in the ordinary sense of that term," because they lack rights that derive, in those to whom "the ordinary sense of that term" applies, from the essence of "that character." Rights are essential, something an individual was born with, and Indians as first a people and now a class were born without them. Because rights are intrinsic to one's *nature*, and because of Indians are "savages" and "not *citizens*," they cannot generate, learn, or otherwise manifest rights through *nurture*. Rights for Indians are simply a non-object, are not attainable – not inherent by birth nor adherent by life. And yet, since they live under a "subjection" that proceeds from their residence within the United States, the implication is that their "diminutive rights," as mere "perpetual inhabitants," and certainly not as *citizens*, are curtailed by the jurisdiction they *now* inhabit perpetually.

This was something altogether new: not abject, hierarchical colonial subjection in itself, which was hardly novel, but such a carefully crafted (and resultantly tenuous) fully-legal subject-status. Banner writes that American Indians'

> right of occupancy was something new and not fully defined. Its precise meaning and the implications of the theory of conquest would be disputed for years to come, and indeed are still disputed today… When Indians were no longer allowed to sell land to buyers of their own choosing, it became possible to think of the Indians' property rights as something short of full ownership. (188-89)

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[36] Perhaps this would have been greatly simplified had Marshall and his litigants employed what Nozick calls "fundamental explanations of a realm," which "are explanations of the realm in other terms; they make no use of any of the notions of the realm. Only via such explanations can we explain and hence understand everything about a realm; the less our explanations use notions constituting what is to be explained, the more (*ceteris paribus*) we understand" (19).

Banner concludes his chapter on the transition "From Ownership to Occupancy" by proposing that what resulted "was not just the right of occupancy, but the erasure of virtually all memory that things had once been different – that under American law the Indians had once been deemed the owners of their land" (190). What is perhaps most disappointing, and simultaneously, most revealing, regarding this "erasure of memory" is that Alexis de Tocqueville wrote almost the same thing just a decade after the issuance of *Johnson v. M'Intosh*:

> The nation has ceased to exist. It scarcely lives in the memory of American antiquarians and is known only by a few scholars in Europe… What to do? Half-convinced, half-compelled, the Indians move out; they go to inhabit new wilderness, where the whites will hardly leave them in peace for ten years. Thus it is that Americans acquire at a cheap price entire provinces that the wealthiest sovereigns of Europe cannot pay for.
>
> I have just recounted great evils, I add that they appear to me to be irremediable. I believe that the Indian race of North America is condemned to perish, and cannot prevent myself from thinking that on the day that the Europeans will have settled on the coast of the Pacific Ocean, it will have ceased to exist. (310-12)

That American Indians' rights, according to the defendants, are "diminutive" suggests that they are both fundamentally divorced from one's nature as "essential" and intrinsic, and are also acted on by forces from without. The *Oxford English Dictionary* provides several current definitions for *diminutive*, including the current "Expressing diminution" as a "more forcible expression for 'small'…minute, tiny." *Black's Law Dictionary* lacks an entry for *diminutive*, but cites *diminutio*, and *diminution* in the civil law, as "a taking away; loss or deprivation" and "a diminishing or abridgment of personality; a loss or curtailment of a man's status or aggregate of legal attributes and qualifications" ("Diminutio," "Capitis diminutio"). The obsolete definitions of the *OED* correlate well with those of *Black's*, especially when one considers legalese, in the lay sense, as tending towards antiquation. The

OED's obsolete definitions provide for "Making less or smaller; tending to diminution" and "Representing or describing something as less than it is; disparaging, depreciative" ("Diminutive"). Both feature citations up until the end of the eighteenth century, with the latter cited in Thomas Paine's *Rights of Man*, where he notes that regarding the current spirit of Europe "the name of a Revolution is diminutive of its character" (122). Paine's thoughts on the contemporary revolutionary spirit notwithstanding, the result is a conscious, transitive act (albeit with a preposition) resulting in the denigration, or diminution, in an intransitive sense, of the subject in question.

Insofar as the Indian tribes are concerned, this was *the* constitution of the subject, and the defendants were not shy to state it explicitly. The territory of the United States was delineated, and the extent of its jurisdiction thereby defined. My passive construction is intentional, and should emphasize the Court's lack of specificity regarding how those abstract and yet pragmatic processes might have transpired. As they did transpire, Indian subjection simply passed into practice as common, newly American custom. To confirm the transition of the Indian from agent to subject occurred *de jure* as well as *de facto*, and to justify their use of "diminutive" with a direct referent in the form of Indians' rights, the defendants remind us that "Virginia, and…all the other colonies, and…the United States" have transcribed this diminution statutorily by committing to law natives' status "as an inferior race of people, without the privileges of citizens." The defendants signal the transition from custom to statutory, positive law. They indicate their sympathies for the general perception of the Indians as "an inferior race of people" with the declaration that Virginia's act of 1779, which statutorily prevented private purchases from tribes, is "to be regarded as a declaratory act, founded upon what had always been regarded as the settled law" (569).[37] According to

[37] On Virginia's Declaratory Act of 1779, see Robertson 16-18 and 60-62.

Black's, a declaratory statute is "enacted for the purpose of removing doubts or putting an end to conflicting decisions in regard to what the law is" relative to the basic premise of that statute ("Declaratory statute"). Further, a declaratory part of a given law "clearly defines rights to be observed and wrongs to be eschewed" ("Declaratory part of a law"). "Settled law" here is simply custom: it is what Marshall describes variously in terms such as "understood by all," "exercised uniformly," and demanding "universal recognition." A declaratory act, then, is the terminus in statutory law that H. L. A. Hart describes as "a deliberate datable act" (44). A declaratory act is the statutory transcription of customary "settled law," and is analogous to the transcription of legend as history in the form of the origin myth. This is a conscious, deliberate, and voluntary process. In this analogy, it also characterizes the three-step transition from legend – Arendt's "belated corrections of facts and real events" – into history – de Certeau's replacement of "the myths of yesterday with a practice of meaning" – and finally into statutory law on the books. The complete transformation literally constitutes the mythical *epic*: legend imbued with historical and precedential legal authority such that it sums to "stability embodied in law."

Virginia's act of 1779, the defendants claim, is abstract in principle and universal in application: it is the exercise of popular and public philosophy on law. The result is the transcription of the *spirit* of the law merely to yield, for the interdependent sakes of clarity and authority, its *letter*. It is law's transcription into statute of what everyone always already knew anyway: custom. In the defendants' brief, the literal clarity of statute gives way, naturally, to more philosophical diction:

> These statutes seem to define sufficiently the nature of the Indian title to lands; a mere right of usufruct and habitation, without power of alienation. By the law of nature, they had not acquired a fixed property capable of being transferred. The measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their capacity of using it to supply them. It

> is a violation of the rights of others to exclude them from the use of what we do not want, and they have an occasion for. (569, citation omitted)

Here the defendants cite Grotius, Pufendorf, Blackstone, and Locke.[38] There is a selfish, plural incongruity in their invocation of these theorists.[39] In their denial of the validity of

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[38] That both plaintiffs and defendants cite very nearly identical passages from these authors should demonstrate the diverse and conflicting interpretations to which each is open. Expounding the contributions to theories of proprietorship made by Grotius, Pufendorf, Vattel, Blackstone, and Locke, among others, is outside the scope of this paper. See Banner 36 and 178-88; and Robertson 68-75. Generally on the philosophical origins of European New World aboriginal policies, see Robert A. Williams, "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought," and even more comprehensively, part one of *The American Indian in Western Legal Thought* (13-118). Joshua L. Seifert, in contrast to much *Johnson v. M'Intosh* scholarship, writes that "Locke's theory called into question any assertion of European property rights in the New World"; Seifert proposes that Marshall's most "difficult task" was forging a sustainable counter-argument to the popular and critical perception that the discovery principle would founder on Locke's work (314).

[39] In any case, Grotius, for one, would not go far enough to support the defendants' argument for Indians' maintenance of only a poorly defined and inalienable conception of ownership that, in European eyes, amounted to *terra nullius*. Grotius writes:

> Possession may be taken in two ways, either of an undivided whole, or by means of individual allotments. The first method is ordinarily employed by a people, or by the ruler of a people; the second, by individuals. Possession by individual allotments, nevertheless, is more often taken in consequence of a grant than by free occupation.
>
> If, however, anything which has been occupied as a whole has not yet been assigned to individual owners, it ought not on that account to be considered as unoccupied property; for it remains subject to the ownership of the first occupant, whether a people or a king. To this class ordinarily rivers, lakes, ponds, forests, and rugged mountains belong. (192; see generally 186-205)

De Vattel would go further:

> in speaking of the obligation of cultivating the earth…these tribes can not [sic] take to themselves more land than they had need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands with the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them. …we are not departing from the intentions of nature when we restrict the savages within narrower bounds. (*Le droit de gens*, III.85; see generally III.138-43)

And Pufendorf still further: "first occupancy of itself, before the existence of pacts, does not confer any right… And it is absurd that in extreme necessity one person cannot use things which a second has acquired by virtue of occupancy" (*Law of Nature and Nations*, 538; see generally 532-68).

ownership descended from the "state of nature," they invoke the "law of nature"[40] as justification. As Robert Williams writes, "Eurocentrically-defined reason's mediating function, represented conceptually in the law of God and nature, was used to determine the status and rights of all individuals according to universal normative criteria" ("Algebra" 244-45).[41] The defendants deny the philosophical conversation regarding justice in the acquisition of absolute sovereignty over a people, and absolute title over their lands, by invoking the vague and highly philosophical act of discovery.

The defendants admit, however, the works of these theorists insofar as their notions of essential justice speak pragmatically to the "rights of others to exclude them from the use of what we do not want." By "others" the defendants can only mean themselves: Indians, after all, are conveniently "destitute of the most essential rights." Here we see these rights to include a measure of "fixed property capable of being transferred…. Upon this principle," they conclude, "North American Indians could have acquired *no proprietary interest* in the

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[40] Nozick contends that Locke "does not provide anything remotely resembling a satisfactory explanation of the status and basis of the law of nature in his *Second Treatise*" (9).

[41] Williams' career-defining argument spans a vast number of articles and books and some three decades. He contends that very little has changed over the centuries from "the hierarchically ordered legal and political consciousness of the Middle Ages" ("Origins" 7) to discovery, or indeed down to the present day: "From the sixteenth century Spanish debates on papal authority over the inhabitants of the 'Indies' to John Locke's utilitarian calculations respecting the 'natural rights' of hunters versus farmers in the vast soil of America, defining the red man's entitlements under the white man's law has always presented liberal theorists questions 'attended with great difficulty'" ("Origins" 2-3, quoting *Johnson v. M'Intosh* 591). Hannah Arendt, in *On Revolution*, despite avoiding any serious philosophical discussion of America's aboriginal inhabitants, validates Williams' overarching sentiments. She writes that

> the price of "isolation," of severance from the people's own roots and origins in the Old World, would not have been too high if the political release had also brought about a liberation from the conceptual, intellectual framework of the Western tradition, a liberation which, of course, should not be mistaken for an oblivion of the past. This obviously was not the case; the novelty of the New World's political development was nowhere near matched by an adequate development of new thought. (187)

vast tracts of territory which they wandered over" (569-70, emphasis mine). That is, because the tribes can lose *any* of it on principle, the same principle will extend such that they lose *all* of it, or at least *all* possible "proprietary interest" in *any* of that "which they wandered over." The right they might acquire by wandering over "the lands on which they hunted" is not "superior to that which is acquired to the sea by fishing in it. The use in the one case, as well as the other, is not exclusive" (570). Perhaps deliberately, perhaps unknowingly, the defendants were laying the groundwork for the dispossession of the entire continent. Marshall's response to all that the defendants proposed would be to trap them in a paradox of their own making by means of a "dual land tenure system [that] explains why the plaintiffs lost the case: they purchased the Indian title of occupancy, which the Indians could and did extinguish under the law of the United States, by reselling it to the United States" (Kades 1096). The Indians exercised the complete extent of their ownership when they sold their title of occupancy to the plaintiffs, who in turn had *their* title of occupancy extinguished by the United States. The federal government was the only party eligible to buy *absolute* title, which, in turn, trumps the Companies' lesser title of mere occupancy.

The Cherokees, like all other aboriginal tribes, were of no import to the actual holding of *Johnson v. M'Intosh*. They saw this paradox, and recounted it in a congressional deposition that Tocqueville would later include in *Democracy in America*:

> Why was not such an article as the following inserted in the treaty [following the Revolutionary War]: "The United States give peace to the Cherokees, but, for the part they took in the late war, declare them to be but tenants at will, to be removed, when the convenience of the States within whose chartered limits they live, shall require it." That was the proper time to assume such a possession. But it was not thought of, nor would our forefathers have agreed to any treaty, whose tendency was to deprive them of their rights and their country. (qtd. in Tocqueville 324)

The defendants' brief operates in distinct contrast to that of the plaintiffs. Indeed both were probably written by the same hand, such that the two documents form a nearly perfect mirror of one another. The plaintiffs build their notion of the individual's capacity to purchase land directly from the Indians on the selling Indians' inalienable right, justified by absolute ownership *in fee simple* since time immemorial, to sell it to whomsoever they chose. The defendants, on the contrary, structured their counter-argument on the notion that once the land the Indians "wandered over" had been "discovered" by Europeans, the natives lost any absolutely exercisable right to it. The defendants were hoping[42] for the quick and easy adoption by the Court of the doctrine James Kent would later espouse in his *Commentaries* as "established by numerous compacts, treaties, laws, and ordinances, and founded on immemorial usage. The country has been colonized and settled, and is now held by that title. It is the law of the land, and no court of justice can permit the right to be disturbed by speculative reasonings on abstract rights" (III.381). After noting that Indians were discovered in and "remain in a state of nature," the opening paragraph of the defendants' case-summary posits: "All the treaties and negotiations between the civilized powers of Europe and of this continent, from the treaty of Utrecht, in 1713, to that of Ghent, in 1814, have uniformly disregarded their supposed right to the territory included with the jurisdictional limits of those powers" (567, citation omitted). They studiously avoid discussing the means by which "the civilized powers of Europe" might have established "on

[42] Again, these "hopes" are evidenced only by the rhetoric of their brief. The *vast* majority of scholarship holds the *Johnson v. M'Intosh* litigation to have been collusive, with Harper as the interstitial, overseeing manager for both parties simultaneously. And Harper was most certainly *hoping* for *his* western shares, obtained by private purchase, and his private stake as counsel for the Illinois and Wabash Companies, to vest in full. With this in mind, while I write, "the defendants were hoping…," I take as read that Harper's collusion indicates that he was in fact *hoping* for his and the defendants' unqualified *loss* at bar.

this continent" those "jurisdictional limits." The treaties authorize themselves reflexively or teleologically, by the very nascence of their issuance, insofar as the documents "before referred to, show their dependant condition" (568).

The convenience of this teleology is that as a result, the philosophy, or even the simple reason underlying the reality on the ground, is not up for discussion. It is enough, the defendants feel, to state that "not only has the practice of all civilized nations been in conformity with this doctrine" of limitless New-World jurisdiction established customarily upon arrival, "but the whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives" (567). The latter of these two sentences is quite difficult to reconcile with the decision's ultimate holding. First, one must ask literally, what sort of "title"? And second, more philosophically, what defines the act of "discovery"?[43] That "discovery" poses a threat, absolutely, to all semblance of Indian title, is a possibility one can glean from the defendants' brief. The latter sentence above offers a twofold illustration of this hazard. First, European discovery, as a national act insofar as a self-entitled individual carries it out on behalf of his European home nation, founds title. And second, the title thereby gained "overlooks all proprietary rights" which were, up until the time of their discovery by Europeans, maintained by whomever those Europeans discovered inhabiting whatever land they discovered.

Discovery, then, meant making the discovered recognizable; it meant rendering the foreignness of the discovered into a vocabulary familiar to the discoverer. By way of his "ontological analysis of America," Edmundo O'Gorman demonstrates that

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[43] For a sort of narrative-catalogue history of Europe's various discoveries in North and South America and the Caribbean, see Samuel Eliot Morison's rollicking, and still unequalled, tandem volumes comprising *The European Discovery of America*.

> America's internal structure is a composite of two fundamental elements, namely, (1) that of being one of the "continents" of the earth, and (2) that of being a "new world." On the one hand America is conceived of as a physical entity, i.e., something endowed with a fixed, unalterable nature; on the other hand it is conceived as a spiritual entity, i.e., something capable of fulfilling the possibilities with which it is endowed and thus of realizing itself within the sphere of historical being… Not only was America invented and not discovered…but it was invented in the image of its inventor. (140)

In the early nineteenth century, the existence of very nearly every aboriginal land[44] had been "discovered" by other (primarily Christian and European)[45] people who were not aboriginal to those lands. Claims to those lands, however, had been established with varying degrees of tenuousness. The real risk posed by the philosophy the defendants espouse with this sentence arises from its capacity to displace those primary and tenuous claims with a secondary, or tertiary, far more concrete variety. Such a concreteness would, thereby, simplify the European dispossession of the aboriginal populations with the aid of a degree of certainty.

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[44] This is not to say every aboriginal *people* – merely the land itself, even insofar as the discoverer may just have deduced or inferred the land's existence.

[45] On the self-justifying superiority Europe derived for itself from Christianity, specifically, see Williams, "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought"; and Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. M'Intosh*, and Plenary Power." More theoretically, O'Gorman writes that the "object of this passionate debate" over Europe's role as

> self-appointed judge and model of human behavior…was to determine to what degree the native inhabitants of America fitted into the ideal embodied in Christian culture; even in the most favorable case for the Indians, it was impossible to give a higher meaning for their civilizations than that of forms of life pertaining to man, no doubt, but to man only as a creature of nature. The historical being exhibited by America was rejected as lacking in spiritual meaning, according to Christian standards of the time. America was no more than a potentiality, which could be realized only by receiving and fulfilling the values and ideals of European culture. America, in fact, could acquire historical significance only by becoming another Europe. Such was the spiritual or historical being that was invented for America… In this process [of metamorphosing toward Europeanness] the American native was left on one side, and although some attempts were made to incorporate him and Christianize him, in general he was abandoned to his own fate and even systematically destroyed, as a man with no hope of redemption, since his indolence and lack of initiative, thrift, and foresight were judged by Puritan standards as a sign that God had justly forgotten him. (139-44)

Before this time, those efforts had been checked, at least philosophically, by the characteristic uncertainty regarding what kind of title, exactly, the act of discovery accorded to the acting discoverer, or to his self-professed descendants.

The defendants are never quite clear on the nature of the title garnered by the act of discovery, at least insofar as how the process of discovery works. For the significance in the aftermath of the act – that is, regarding what is to be done, as among Europeans, with the discovered lands – the defendants outline a three-step process. Marshall retains this in spirit for his conversion of "discovery of an inhabited country into conquest" (591). The process can be summarized by the terms of a gross simplification of the scientific method: propose hypothesis; test proposed hypothesis; when test confirms causal positive, proposed hypothesis becomes definitional and indisputable fact. If they can confirm that there exists so much as a "*current time-slice principle*" of justice, this confirmation is sufficient for Marshall and the defendants to conclude that the principle arose by historically justice-preserving means. Once they have outlined that progression, they can freely write legend as a "belated correction" of the "facts and real events" of history. Each progressive step, as the defendants' brief outlines, springs from the idea that, "according to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity" (570). First, the defendants define the principle: "the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators." In principle, because tribes were not putting their land to agricultural use as understood by Europeans, it was free for the taking to people who *would* put it to use agriculturally.[46] Second, the defendants acknowledge and, in doing so, test the *potential*

[46] Notwithstanding, of course, is the fact, well-known even in the early seventeenth century, that Indians were indeed roundly agricultural. On the widespread philosophical and social acceptance of

validity of the principle: "All the proprietary rights of civilized nations on this continent are founded on this principle." By the subjunctivity of their brief, the defendants allow that the Court might find exceptions which invalidate the principle. But because the defendants presume that no exception can be found, the practice holds true: the actual exercise of the principle – the principle that agriculturalists are free to appropriate land that is not used agriculturally – is deemed sustainable. And so, third, they declare that the "right derived from discovery and conquest, can rest on no other basis; and all existing titles depend on the fundamental title of the crown by discovery" (570). This verifies that there are no exceptions to the current time-slice principle, since "all existing titles depend" on title-by-discovery, and by a logic that Marshall would mimic in his opinion, the defendants inscribe their legendary hypothesis as historical fact.

No one, neither plaintiff nor defendant, nor Marshall, suggests what might entail the ideological act of discovering something that already exists, albeit without the discoverer's prior knowledge of its existence. Nor, of course, does anyone involved come very near to elucidating how that simple, two-step elocution of "Land-ho!" followed by something along the lines of "I claim this land in the name of…" would, in actuality, result in the means by which such discursive acts as the early New-World charters gained their significance. In this context, the term *discovery*, as defined in the introduction to a slim monograph from Columbia University Press in 1938,

> denotes a purposeful act of exploration or navigation accompanied by a visual apprehension, a landing, and some other act marking or recording a visit, but not acts expressive of possession.
>
> By the term *terra nullius* is meant land not under any sovereignty. The presence of a savage population, or aborigines, or of nomadic tribes engaged in

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the fact, even very early on, that America's Indians really were practicing agriculturalists, see Banner's subsection on "Roger Williams and John Locke" (43-48).

> hunting and fishing, was generally disregarded by the Europeans. For [our purposes], therefore, insofar as any status of sovereignty is concerned, the existence of such a population will not exclude these lands from our definition of *terra nullius*. (Keller, et al., 4)

Regarding the necessity of effective occupation of land once it is claimed by act of discovery, until the nineteenth century "no state appeared to regard mere discovery, in the sense of 'physical' discovery or simple 'visual apprehension,' as being in any way sufficient *per se* to establish a right of sovereignty over, or a valid title to, *terra nullius*." Indeed, "the term 'discovery' was often rather loosely applied, and, in some instances, according to the attendant circumstances, may have been intended to include the performance of a formal ceremony of taking possession. It is, of course, obvious that, in such instances, more had occurred than a discovery in the sense of a mere visual apprehension" (Keller, et al., 148). Tzvetan Todorov opens *The Conquest of America* with an apt summary of what the word *discovery* might mean:

> We can discover the other in ourselves, realize we are not a homogeneous substance, radically alien to whatever is not us: as Rimbaud said, *Je est un autre*. But *others* are also "*I*"s: subjects just as I am, whom only my point of view – according to which all of them are *out there* and I alone am *in here* – separates and authentically distinguishes from myself. I can conceive of these others as an abstraction, as an instance of an individual's psychic configuration as the Other – other in relation to myself, to *me*; or else as a specific social group to which *we* do not belong. This group in turn can be interior to society, i.e., another society which will be near or far away, depending on the case: beings whom everything links to me on the cultural, moral, historical plane; or else unknown quantities, outsides whose language and customs I do not understand, so foreign that in extreme instances I am reluctant to admit they belong to the same species as my own. (3, emphasis original)

It is by something nearest this last category that we might safely assume Europeans viewed the aboriginal inhabitants of the New World: reluctant to admit fundamental, identifying similarities, but culturally incapable of admitting the possibility of coexistence.

So how did charters and similar documents, as the foundation on which the Court built decisions like *Johnson v. M'Intosh*, garner such a capacity to enact real, human violence? The answer, at least in part, lies in the fact that Indians, in the eyes of the law, are "not exclude[d]" from lands typically defined as *terra nullius*, that is, *un*inhabited: Indians and tribes are insufficient entities to warrant the admission by Europeans of habitation. This insufficiency, needless to say, was easily extrapolated such that their occupancy was not itself sufficient to admit them, for instance, as parties to a Supreme Court case in which their complete divestiture was at stake. Indeed, how could the nonexistent inhabitants of *terra nullius* make a case even for their mere existence, let alone for their inhabitancy sufficient to entail the accompanying maintenance of title *in fee simple*? Before professing, "No, really, we *live* here," "a savage population" would need first to convince their discoverers, "No, really, we *do* exist!" Regarding the converse suggestion, that Indians could have sailed east, discovered Europeans, and thereby claimed Normandy or Bristol, the very Europeans who philosophically defined the pragmatic act of discovery would have considered the idea too fallacious to admit into regular discourse. Should such an idea have been proposed, the autonomic response would have been, of course, that Europe's far superior military technology would have prevented its conquest by Indians. But the idea would not even have been considered in the slightest, let alone explored to this degree. Discovering, and later, *conquest* by discovery, was simply something Europeans did.[47] This does not undermine the

[47] On this idea in particular, see the following, variously interdependent works: Walter Mignolo's *Darker Side of the Renaissance*, especially his sixth chapter, "Putting the Americas on the Map: Cartography and the Colonization of Space" (259-313); O'Gorman's *Invention of America*, especially part four, "The Structure of America's Being, and the Meaning of American History" (127-45); Anthony Pagden's "Law, Colonization, Legitimation, and the European Background" in *The Cambridge History of Law in America*; and, of course, Todorov's *Conquest of America*, especially the

basis of the quandary, however. Recall that American Indians were only ever subject to rhetorical conquest, of conquest perpetrated by the *legislative* functioning, anomalous in Indians tribes' example, of the *judiciary*. "If *discovery* conferred title," Banner proposes, "it was through a peaceful process that happened automatically, by operation of law, when a given area was discovered. The colonists and Indians might not even know title was passing, because the passage required no human agency. It was the law, not any human beings, that did the work" (186, emphasis original).

Relative to the defendants, Marshall is more lucid regarding the lasting significance of discovery, but still no less circumspect as pertains to the practical nature of the act itself. Marshall, in his opinion, categorically avoids the necessarily philosophical discussion of what constitutes the act of discovery. He does suggest that the precepts of discovery might be "pompous" or "extravagant," but he stops short of saying so in a manner other than subjunctively or conditionally. He adheres to the more pragmatic argument that what is at issue must *not* be the underlying philosophy of how, or reasoning why, Europeans had even the faintest tenable claim to the land in the first place. In line with the defendants, the Chief Justice connects the fruits of discovery to the morally superior Christian character of Europeans as compared to the savagery of their American Indian counterparts.[48] Marshall expands on the idea of English and Christian duty as he writes his origin myth recounting how all "the different nations of Europe…asserted the ultimate dominion to be in

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first chapter, "Discovery" (3-50). See also Keller, et al., for a more parochial take on the diverse symbolic acts by which civilized Europe could justify taking possession of the savage Americas.

[48] This superiority, in the decade after *Johnson v. M'Intosh*, underwrote the process of removal, too. Banner writes that, in the 1830s, many whites were

> of the view that they were justified in pressuring the Indians into voluntarily agreeing to remove. This was partly a matter of assumed racial superiority. If Indians were less intelligent than whites, they might not perceive their own self-interest as clearly as whites did. Just as children could not make important decisions without guidance from adults, the Indians' own preferences about removal might be helped by guidance from whites. (212)

themselves" (574). He writes that Sir Humphrey Gilbert came to North America by the precepts of a charter that "authorize[d] him to discover and take possession of such remote, heathen, and barbarous lands, as were not actually possessed by any Christian prince or people" (577). In one of the decision's most famous passages, the Chief Justice decrees:

> The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, *against all other European governments*, which title might be consummated by possession. (573, emphasis mine)

This passage defines the right of preemption, to which discovery has generally (but not less selectively) been accepted to be limited.[49] Discovery did not *necessarily* divest Indian tribes *automatically*, but it greatly diminished their land tenure, "to the extent that they could only alienate their lands to the 'discovering' European sovereign… European colonizing nations unilaterally imposed a trade monopoly [or monopsony] on Indian land sales. The Indians' ability to engage in multilateral relations with other sovereign powers, an important aspect of tribal political sovereignty," was reduced singularly to whichever European power happened to establish its opportunistic monopsony by dint of discovery (Williams, "Origins" 3n.5). Coming tantalizingly close to defining the act itself, Marshall writes here that discovery was the principle Europeans established to define which of the Old World's "potentates" garnered what rights to which land, simply by sighting it first. He who saw it first was free, in

[49] Ball's article compiles the exceptions, tracing the Doctrine as it was extrapolated across the shifting corpus of federal Indian law.

principle, to claim it first. This principle, shared amongst Europeans, would regulate conflicting claims.[50] How the discoverer then dealt with the aboriginal inhabitants of the land he discovered was up to the discoverer. And thus, to a great extent, when we take issue with the "Doctrine of Discovery," what we really take issue with, it seems, is (1) America's adoption of the Doctrine in the first place and (2) the subsequent, ever-increasingly cack-handed measures by which America has "regulated" its interactions with its "discovered" subjects. Indeed, we should take issue foremost with why and how the "discovered," *aboriginal* inhabitants became *subjects* to their monopsonist discoverer, the United States.

In their brief, the plaintiffs do not mention "discovery" at all, let alone rights thereby gained. The defendants, however, place inestimable value on the notion that discovery founded "title, in European nations, and this overlooks all proprietary rights in the natives" (567). Ball calls such "absolute title" an "abstract tautology." He notes: "It is the right of the discovering sovereign to prevent other foreign sovereigns from having absolute title. If absolute title ever had any meaning, then it was the meaning of a commodity created by the creation of an exclusive market" (25). As Marshall and the litigants of *Johnson v. M'Intosh* employed it, "Indian title of *occupancy* was a fully recognized and fully protected *possessory right*. The absolute title had bearing only upon past – fictional – transactions between discoverers" (Ball 25, emphasis mine). Proceeding on the premise that both litigants colluded, under the singular direction of plaintiffs' counsel Harper, we may not unreasonably

[50] This is as close as Native Americans came to a free market, in contrast to the parochial monopsony with which they ended up: had Indians just been able to choose whom they were discovered by – the French, even Marshall admits, were probably the fairest bet (*Johnson v. M'Intosh* 574-75) – they could, by the same stroke, have chosen the monopsonist with whom they would have to deal exclusively in the future. Central to Kades' thesis concerning America's efficiency of expropriation, he notes that "the primary effect of monopsony" is "reducing the price a buyer pays" by nature of the fact that in a monopsony, there is only one buyer, and thus sales and transfers entail nothing like market-based bidding (1110-11n.190).

suggest, again, that the defendants invoked the idea of discovery solely for its extremeness. Such a proposition is in keeping with the collusion at the case's core. The suggestion that title *in fee simple* could be had by the simple act of discovery was philosophically, historically, and legally outlandish. But perhaps by reason of its very outlandishness, Harper hoped to garner a decision for the defendants. The Court, in response, tried to temper its decision with a "Doctrine of Discovery" centered on and limited to the preemptive right of purchase from the Indians. But these limits are largely lost through Marshall's lack of clarity and the ease with which he "convert[s] the discovery of an inhabited country into conquest" (591). The result maintains the doctrine of discovery, but abolishes the limits Marshall himself hoped the entitled descendants of European discoverers would necessarily self-impose.

No proper conquest occurred in North America perhaps merely because it did not have to. In a rare vote for the inevitability of history, European germs comprised their most well-honed, if inadvertent, weapon.[51] And given the actual outcome, if Europeans had needed to resort to real, large-scale violence to subdue the tribes and take their land as they pleased, it seems highly likely that they would have done just that. That they *did not* because

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[51] Regarding violence done to the tribes inadvertently or otherwise, Ball writes: "To speak in these terms does not require impugning motives. Indeed, the coming of Europeans to the New World was characterized by missionary impulses, and the devastation wrought upon Indians by European diseases was wholly unintentional" (8). Ball notes, "Among other notable missionaries to the Indians, Jonathan Edwards certainly thought he was doing them good and actually did try to protect Indians from some of his predatory countrymen" (8n.20). Katherine A. Hermes, however, contends:

> Many Americans thought only in terms of how Indians should be reformed, without realizing that Native American culture and law was evolving right alongside them. The good intentions of missionaries to the Indians and their advocates in Congress were in themselves an assault on Indian society and sovereignty. The missionaries thought of themselves as genuine friends of the Indians. Nevertheless, their intent was to destroy the Indians' world. Jeffersonian policy was naïve and confused. It wanted what was best for these noble savages, reformers ultimately desired the elimination of tribal order. Like their predecessors, they rarely recognized native legal or religious institutions. If they did acknowledge Indian jurispractices, they often tried to suppress them. (57)

they *did not need to* does not exonerate them. In other words, just because Europeans found self-vindicating legal means by which to achieve their goals does *not* mean they would not have taken up arms as a last – or second-to-last, or perhaps even just second – resort. Indeed, in the defendants' brief, they note that, "in some cases, purchases were made by the colonies from the Indians, but this was merely a measure of policy to prevent hostilities." Had that "measure of policy" failed, the defendants suggest "hostilities" would inevitably have ensued – either as the Indians' only possible resort, or as the colonists' only logical recourse, or both. "In most of the colonies," the defendants continue, "the doctrine was received, that all titles to land must be derived exclusively from the crown, upon the principle that the settlers carried with them, not only the rights, but all the duties of Englishmen; and particularly the laws of property, so far as they are suitable to their new condition" (571). Surely those settlers, pious as they generally were, found some inspiration and justification in Genesis 1:28, where "God blessed them, and God said to them, 'Be fruitful, and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea, and over the birds of the air, and over every living thing that moves upon the earth.'" The defendants propose that their settler-predecessors carried forth – into the wilderness, as it were – pieces of paper possessed of all the requisite authority and capacity for real, legal violence. This violence was justified not just by their "right" to appropriate Indian land freely, but also by their "duties" as Englishmen and Christians, to subdue the earth. And this, naturally, meant exercising their civilized, agriculturalist superiority as their primary response to savage resistance – and it surely meant conquering tribes by force should their "civilizing" mission require it.

VI. Of Impotence and Precedence

For the early nineteenth-century United States, Marshall's decision was economically shrewd. The result was not limited to the fact that the land currently in the employ of civilized agriculturalists remains in their hands, without regard for whether that land was acquired by means of initial principles of justice in distribution. But additionally, the current, evolutionary state of the frontier, which if left unchecked would only produce more predicaments like that at issue in *Johnson v. M'Intosh*, would remain open to further settlement. It would do so at unlimited Indian expense, in the spirit of the white man's cultural and agricultural obligation. Tocqueville, with his usual degree of prescience, posits:

> If the Indian tribes who now inhabit the center of the continent could find enough energy in themselves to undertake to become civilized, they would perhaps succeed at it. Superior, then, to the barbarian nations that would surround them, they would little by little get strength and experience, and when the Europeans finally appeared on their frontiers, they would be in a state, if not to maintain their independence, at least to have their rights to the soil recognized and to incorporate with the vanquishers. But the misfortune of the Indians is to enter into contact with the most civilized and, I shall add, the greediest people on the globe, when they themselves are still half-barbarian; to find masters in their instructors, and to receive oppression and enlightenment at the same time. (317)

There is a certain suggestion of inevitability in the idea that "the Europeans" would, no matter what, continue to appear and reappear again on the dwindling "frontiers" of Indian tribes, to the tribes' definite detriment. Tocqueville embeds some fleeting hopes in the first clauses of this paragraph, but goes on to dash them by two rhetorical means. The first, crippling setback is his observation that Indians' only chance lies in finding in themselves the capacity "to undertake to become civilized." That is, the survival of the tribes, and only those sufficiently distant from the whites so as not to have been poisoned by their proximity, hangs on their becoming as much like the whites as possible, and on doing so as quickly as

possible. The second and fatal rhetorical blow Tocqueville deals arrives with the final sentence, when the reader realizes that the two preceding sentences are subjunctive: the "But…" that begins the third sentence negates the two which precede it. The result is not just that the Indian tribes can save themselves *only* by becoming like the whites, but also that even this transmogrification will not, in fact, save them. Their inescapable fate is to be oppressed by the greed of the Europeans they are fated inescapably to encounter, again and again, until no frontier remains. The result, Tocqueville writes, is the perennial vacillation, unique to the colonized, between savage and civilized: "Misery had driven these unfortunate Indians toward civilization; today oppression pushes them back toward barbarism. Many among them, leaving their half-cleared fields, resume the habits of savage life" (321).

Chief Justice Marshall does not try to preserve self-imposed restraints on land acquisition in colonists' westward push. Instead he permits the inheritors of the European discoverers to replace (1) the obligations attached to discovery as merely preemptive with (2) a cold, self-delimiting, positivist pragmatism:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the 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. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, *perhaps*, be supported by reason, and *certainly* cannot be rejected by Courts of justice. (591-92, emphasis mine)

Marshall professes his innocence by proclaiming his powerlessness. Neither he nor the Court can change an institution that has reflexively entrenched itself by the very means it is

entrusted to protect. As Banner suggests, Marshall "seems to have been motivated primarily by the desire to convey the impression that the Court had been constrained by events," a concept which is distillable to the law's "pre-statutory," customary influence (187).[52] The "extravagan[ce]" of the law's "pretensions" suggests a certain degree of disbelief in the very philosophy Marshall was mired down in espousing. Racked with doubt, he pinned any and all possible fault on his having been "constrained by events." "As a factual matter," Banner continues, "the country had *not* been acquired and held under any such principle. If anyone was guilty of 'converting the discovery of an inhabited country into conquest,' it was John Marshall in *Johnson v. M'Intosh*, not the British colonists or their government" (187).[53] The

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[52] Kades arrives at a similar conclusion:

> Phrases like "understood by all," "exercised uniformly," and "universal recognition" appeal to long-established practice, not to any specific constitutional, statutory, or common law rule…
>
> This theory – that custom evidenced ancient and lost legislative will – dovetails well with Marshall's blithe response to the possibility that the relevant Virginia colonial statute barring private purchases had lapsed. He considered the later reenactment of a similar provision "as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government." Marshall seemed to say that the longstanding customary *legislative* practice of barring private purchases of Indian title was so strong that it overrode the "mere technicality" of a lapsed or repealed statute. (1098-1100, emphasis original, quoting *Johnson v. M'Intosh* at 585)

[53] Hermes writes that throughout the eighteenth century "the resistance and strength of the natives refuted the notion that conquest *could simply be asserted* rather than won. Tribes refused to yield sovereignty and jurisdiction to the United States" (56, emphasis mine). *Johnson v. M'Intosh* would not be the last time the federal government asserted having conquered America's aboriginal inhabitants when no conquest had ever taken place. More than a century after *Johnson v. M'Intosh*, the Supreme Court handed down *Tee-Hit-Ton Indians v. United States* (1954). In doing so it unquestionably affirmed the proposition that *Johnson v. M'Intosh*'s legendarily inscribed, epic history would live on forever as terrible and dangerous precedent. The Court in *Tee-Hit-Ton* famously declared, "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors will that deprived them of their land" (289-90). Ball calls this "fiction of conquest…particularly preposterous." He responds: "No American schoolboy – not even a modern one using mind-expanding drugs – knows the Tlingit

Chief Justice's contrasts are diverse, but all work within a positivist theme: "extravagant pretensions" with "the actual condition" on the ground; the unjust initial assertion "in the first instance" with the need for it to be "afterwards sustained"; Indians whose occupancy is to be respected as possessory with the fact that they are nonetheless incapable of maintaining or transferring "absolute title"; and finally the contrast of "natural right" which "may, *perhaps*, be supported by reason" with the fact that it still "*certainly* cannot be rejected by Courts of justice."[54]

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of Alaska were deprived of their ancestral ranges by force. The peace-loving Tlingit have never been conquered. No one has made the attempt except the Supreme Court" (115). Ball goes on to cite Nell Jessup Newton, who writes, in her aptly titled "At the Whim of the Sovereign":

> The dicta in *Johnson* regarding the extinguishment of Indian title does not support Justice Reed's conclusion [in *Tee-Hit-Ton*] that all Indian land had been conquered… Both at the time of *Johnson* and today, conquest has been a narrow concept with clearly defined effects on the conquered people. For example, conquest generally requires some sort of physical possession by force of arms. Thus, the conclusions that all Indian land has been conquered was as illogical as it was unprecedented… Finally, even if the federal government's actions in the forty-eight contiguous states could have been interpreted as examples of the "conqueror's will," the Alaska natives had never fought a skirmish with either Russia or the United States, but instead welcomed newcomers to Alaska with open arms. To say that the Alaska natives were subjugated by conquest stretches the imagination too far. The only sovereign act that can be said to have conquered the Alaska native was the *Tee-Hit-Ton* opinion itself. (1243-44)

As an interesting if minor point of comparison, Alan Taylor notes that beginning in earnest in 1729 with the voyage of Vitus Bering and Alexeii Chirikov, the picture was hardly as romantic as Newton proposes: "Like the French and the English, leading Russians longed to believe that they could easily establish an American empire by appearing before the Indians as kinder and gentler colonizers [than the Spanish]… This conviction was especially delusional among Russians, who had exploited the Siberian natives at least as ruthlessly as the conquistadores had the Aztecs" (448). See generally, Taylor 445-54, where he recounts not a few "skirmish[es]." That Alaska's native populations, in the early eighteenth century, ceased in fairly short order to welcome "newcomers to Alaska with open arms" does not diminish the overall significance of Newton's argument regarding rhetorical acts of conquest.

[54] On Marshall's ambiguity in his passage on the conversion of discovery into conquest, Banner writes that the Chief Justice

> never specifies *why* courts cannot inquire into the legitimacy of titles obtained by conquest, but he most likely meant that there were certain kinds of disputes resolvable only by war (or

Here Marshall's disavowal of "principles of abstract justice" is at its clearest. The indispensability of the system, already in place, automatically overrules any intra-system challenges to the matter of its fundamental unjustness. "In our day," Tocqueville wrote in 1835, "the dispossession of the Indians often works in a regular and so to speak wholly legal manner" (311). For Tocqueville it is "*so to speak* wholly legal" because to many, himself included, the unmitigated divorce of justice and legality is nonsensical at best, and plainly wrong at worst. Indeed, Marshall "*certainly*" makes no place in his "Courts of justice" for a principle that is undergirded by "natural right" and which "may, *perhaps*, be supported by reason." Marshall admits, beginning with the notion that it all might be an "extravagant pretension," that a singular hypocrisy characterizes the whole construct. But he finds that reality, "the actual condition of the two people," cannot bend to principles of justice that are contrary to pragmatic experience. This remains true even if the practice itself unveils just how contrary is its own nature to the ideals that "Courts of justice" embody by definition. Marshall's myths of necessity establish what Robert Cover calls

> a repertoire of moves – a lexicon of normative action – that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power and privilege and in the critiques that may be leveled at the justificatory enterprises of law. ("*Nomos*" 9)

The plight of justice, almost sacrificial insofar as Marshall pushes it aside to maintain the very functioning of "Courts of justice," is pathetic. As Ball suggests, "if a wrong done tribes is well entrenched, if it is really wrong and systematically unjust, then its very gravity is

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> perhaps by conflict generally, whether military or political), and that courts lack a capacity or authority to decide such disputes. He seems to have been stating an early version of what modern lawyers would call the "political question" doctrine, an amorphous, self-imposed limitation on the jurisdiction of the courts to interfere in political disputes. (185-86)

ground for continuing it" (128). In the annals of Indian law, a long-standing act's very unjustness becomes the means by which it preserves itself.[55] "Courts of justice," as such, do not dispense justice, but only laws and a resultant legality. "Courts of justice" simply cannot refute, let alone defeat, Chief Justice Marshall's "justificatory enterprises" and "apologies for power and privilege." The most grandiose of these "apologies" is that, even after Marshall denies his Court's capacity to tackle "principles of abstract justice," he continues to refer to such legal bastions as "Courts of *justice*." The reader senses Marshall's desire for them to be something other than bastions of statutory positivism, but comes away ultimately unfulfilled. Marshall's rhetorical veil of "justice" dissembles the fact that they are very often "Courts of *in*justice" – or, at the very least, "Courts of disregard."

Confusingly, however, in this light custom overrules positive, statutory law. Marshall claims that the principle "asserted in the first instance" cannot be revised, even if the customary practice has not yet been integrated statutorily as, for instance, a legal fiction: "it becomes the law of the land, and cannot be questioned." Just as the defendants deny the philosophical invocation of justice, so Marshall's response to this denial does, in the end, "exactly what he said was beyond the Court's authority. He offered a theory to justify why discovery or conquest *should* divest the Indians of their land" (Banner 186, emphasis original). As this emphasis of "*should*" indicates, there is a necessarily philosophical invocation of the imperative – *why* something *should* be done according to moral, ethical,

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[55] Aviam Soifer offers a tangential argument, writing that

> it is a serious mistake to believe that nearly two centuries of lessons taught by the Court are consistent. The Court's opinions neither generally nor consistently stand for the expansion of rights of the downtrodden or recognition of the claims of individuals against government. We still lack any clear idea of what we expect a good or great judge to do. In the post-realist world, we may expect little more of a great judge than that she advance ideas to change the law in what turns out to be a promising direction while simultaneously purporting to be a votary of precedent or original intent. Perhaps we judge judges by their skill at covering their tracks… In other words, the successful and creative judge may be the one who is best at maintaining the protective coloration of legal fictions. (909)

customary, or other *principles*. And for what reason, in this one instance, does Marshall break with his otherwise relentless desire for federalist expansion of the judiciary? This makes his – and the tribes' – plight all the more pathetic. He professes his innocence and his incapacity to enact real change from the very pulpit in which he preached while, two decades earlier, Thomas Jefferson remarked that the Federalists "have retired into the judiciary as a stronghold… There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased" (qtd. in Robertson 23). "Stronghold," "battery," and erasure are not generally terms we associate with political impotence; rather, such words suggest action and the issuance of authoritative imperatives.

What happened, over the course of the *Johnson v. M'Intosh* litigation, to the threat of judicial activism Jefferson feared? While "it was convenient to slip from discovery to conquest as the basis for the opinion," Banner writes,

> this explanation is not entirely satisfying. Marshall may have sympathized with the Indians, but he probably sympathized even more with the settlers and speculators who had been granted parcels of unsold Indian land, a group that included himself, his family, and his friends. It is not obvious that Marshall would have wanted to disclaim responsibility for the decision, or that he would have perceived any personal advantage in using the doctrine of conquest as a shield. He would have found it much more attractive to deny responsibility for the opposite kind of decision, a decision with the effect of *un*settling western land titles. (186, emphasis original)

Banner's assessment of Marshall's true sympathies is accurate.[56] But it is insufficient merely

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[56] Robertson, equipped with a cache of papers unavailable to Banner, convincingly argues that the Chief Justice was motivated more than previously thought by

> his institutional concern for the power of the Supreme Court and his personal concern to secure land grants to Revolutionary War soldiers.
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> After twenty years of increasing Supreme Court power, John Marshall faced not only a backlash from the states, but also some very real disputes involving Virginia and Kentucky. Related disputes involving unfulfilled promises to Virginia's Revolutionary War veterans

to contend that had his decision tacked to the opposite course, the Chief Justice would have had greater cause to construct his argument out of his burning desire to exculpate himself and the Court. Marshall's opinion is full of passivity and impotence, which produce the overarching sentiment that he was aware of the possible extent to which his decision could be carried. He wanted to be sure that, were it to be expanded, he would bear none of the blame. Custom was key: Marshall concluded that all he had to do was graft the rhetorical label of customary law, which he would then render statutory, onto practices in place since "time immemorial."

Obviously, it was a moot point for Marshall that the tribes' ownership of their land was *more customary*, as it were, than practices in which the late-coming Europeans had been engaged only since, at the earliest, the sixteenth century. Because of its etymological dependence on *memory*, "time immemorial" became highly fungible. Indians' unwritten "time immemorial" could not, in effect, be *remembered* by the whites, who in turn could simply replace the concept with their own, more memorable "time immemorial." This dated, for the English, to roughly the beginning of the seventeenth century.[57] The result of this fungibility was not so much "the *erasure* of virtually all memory that things had once been different" (Banner 190, emphasis mine). Rather, the result was the *replacement* of memory – the "memorial" portion of "immemorial" – by a people who self-righteously and pragmatically deemed their memories to be of greater prominence and historical significance.

> threatened to victimize a politically significant and personally (to Marshall) important group. In drafting *Johnson*, he attempted to resolve these problems as well as the Illinois and Wabash claims. (77)

It is the dispute over Revolutionary War soldiers' promised bounty lands in Kentucky, Robertson argues, that "provides the key to *Johnson v. M'Intosh*. In the end, John Marshall would help resolve it in favor of Virginia's Revolutionary War veterans by dispossessing Native America of its title claim to a continent" (82-3).

[57] On the commitment to writing of things like memory, see Walter Ong's *Orality and Literacy*.

Thus "if the principle has been asserted in the first instance," the "*instance*" itself, the very unit of time, hangs on the European *re*definition of what came first, of where the temporal trajectory began. For Marshall's inscription of custom, "if a country has been acquired and held under it," it does not matter that it might have been *previously* "acquired and held." And "if the property of the great mass of the community originates in it," if "it becomes the law of the land," it does so for the new-coming European community whose time, whose memories, and whose laws overwrite – indeed take *precedence* over – the community whose habitation "in the first instance" can henceforth no longer be remembered. That memory has been supplanted by one which is more customarily agreeable to the Court's desired statutory outcome: the "legendary explanation of history" crafted to explain the given present, the current time-slice distribution. Marshall's inscription of custom as statute, as far as the law of the *North American* land[58] is concerned, was in fact just the importation of a new normative system, one unconcerned with justice in distribution. The result, Marshall admits, is that the "Indian inhabitants" came to be necessarily considered as merely "concomitant," as accompanying or being naturally associated with the land they once inhabited, but nonetheless "deemed incapable of transferring the absolute title to others" (591). The tribes become a fictive, tertiary element in the American story – a story for which, as Ball reminds us, unlike for Virgil and *The Aeneid*, the antecedent "history is accessible." Examined sufficiently closely, the real history underlying the American story should prove Marshall's legend to be more abject lies than customarily accepted, historical truth.

Custom negates the fact that, as Marshall disclaims, "this restriction may be opposed to natural right, and to the usages of civilized nations" (591). *This* civilized nation has been engaged in the practice since time immemorial, after all, and, according to Marshall, it

[58] Again, this disregards the fact that the "North American land" already had a "law of the land." See Hermes' "Law of Native Americans, to 1815."

remains still civilized. But if an elite, federal-expansionist atop the United States Supreme Court sees himself as incapable of interpreting old, customary law freely enough to make even mildly contrarian new, statutory law, whom *would* he consider capable? Only the tyranny of the majority, apparently.[59] Thus Marshall completes his teleological feedback-loop: only "the great mass of the community" can shape such practices customarily. The majority, of course, is tyrannical because it can have no regard for "abstract principles." These principles, in turn, contribute to a notion of justice that cannot be accounted for and admitted by "Courts of justice," which even at their final terminus cannot reject the customs "asserted in the first instance, and afterward sustained" by the majority. And the majority, unfortunately, tends toward tyranny and is resultantly as incapable of considering justness as are "Courts of justice." There is a collective disregard, by both custom and the courts, of Nozick's concept of "distributive justice." Therein "a distribution is just if everyone is entitled to the holdings they possess under the distribution" because the distribution descends historically from "legitimate first 'moves'… Whatever arises from a just situation by just steps is itself just" (151). The majority, by the collective, customary ignorance that results in the democratic tyranny Tocqueville so feared, disregards the fact that the given situation *cannot* be just because it did not arise by "just steps"; "justice in transfer" cannot be maintained because there was no initial "justice in acquisition." Thus the distribution is wholly, quantifiably unjust.

But this lack of justice in holdings, Marshall finds, does not matter, because everyone, or the majority, is in on the deal – except the oppressed minority, who become subject to the majority's tyranny. Their subjecthood, in this instance, finds some "excuse, if not justification," in their "character," and so becomes a factor in the distribution of justice.

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[59] Tocqueville writes extensively of the "tyranny of the majority" – indeed, as far as democracy was concerned, it was his one fear, and America's chief failing. See especially Tocqueville 239-64.

Marshall and the Court are simply there to narrativize the process, and authorize the resultant narrative with "stability embodied in law." Vine Deloria, however, suggests that

> a hidden conceptual barrier exists that inhibits not only the permanent minorities but members of the majority as well. That barrier is the inadequate development of the philosophical framework that provided the foundation for our American social contract. In the form in which the men who framed the Constitution received it, the philosophy of the social contract was oriented wholly toward a certain restricted class of individuals and could neither include any divergent groups nor provide any significant guidance or protection for the mass of people. Its primary virtue was to encourage a clever, established elite to benefit at the expense of others and perpetuate itself. (919)

The result is a tyrannical system devoted to finding minor "apologies for power and privilege" and suppressing the "critiques that may be leveled at the justificatory enterprises of the law" (Cover 9). Marshall writes, "When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power" (589-90). This "public opinion" and its "restraints" transpose perfectly onto unconstrained democracy and the effects of its governance. Marshall invokes democracy in the context of his powerlessness to change the admittedly unjust system, however, and thereby suggests either that the majority is indeed tyrannical and unjust, or that the benefit of all hangs on the sacrifices of the few. Either way he is powerless to alter the law's trajectory, which is customarily self-sustaining. But the latter possibility – that the few must bear the brunt of great injustice so that the many may maintain a system that, overall, by some median measure of "average" justice, is characterized by unassailable "principles of abstract justice" – is inapposite as concerns the assimilation of a conquered people. The Chief Justice himself insists upon the conqueror's duty to incorporate the conquered, but professes his

powerlessness in the face of the Indian question. Abject subjugation, as a result, is the civilized, nationalist majority's only option for its savage minority, who are simply beyond incorporation.[60]

Marshall's attempts to exculpate himself, exemplified by his pronouncement on "the potentates of the old world," overshadow his efforts to define the significance of discovery as merely preemptive between Europeans. The present state of things, which is all the Chief Justice has committed himself and the Court to deciding, is a result of actions perpetrated – whether for good or ill is beyond the issue – by "the potentates of the old world." Regarding this official powerlessness, Ball finds:

> The history of the majority's relation to Indians is replete with metaphors of impotence: an oncoming modern world system that would not be altered, manifest destiny that could not be denied, an overpowering wave of non-Indian population inundating Indian country, an irresistible march of civilization. These are the metaphors of people who think events, systems, and institutions are beyond their control and therefore beyond their responsibility. (138)

Marshall had inherited the system within which, as the highest judge of its highest court, he was bound to work. But he wanted to secure for the record that he, himself, had no direct, participatory guilt in the violence that attended the civilization, Christianization, and subjugation of the tribes. Too, Marshall implies, the process was tacit: whether the Indians approved of the exchange of Christianity for "unlimited independence," it nonetheless occurred. This approval, were it to have occurred, presumably would have qualified the

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[60] Banner suggests, "When government officials insist that they lack the legal authority to do something, it is virtually always something they would prefer not to do, and that is especially true when it is something previous administrations have always done" (216-17). He also notes that *Worcester v. Georgia*, the final installment of the "Indian trilogy" that began with *Johnson v. M'Intosh*, "provides a parable of the limits on the ability of courts to effect social change, given all the structural constraints the legal system places on them" (222). See note 66 regarding the two Cherokee decisions.

exchange as reciprocal, which in turn would have saved the "potentates of the old world" from having had to *convince* themselves of its ampleness. Had the exchange indeed been reciprocal, there would have been no question of *convincing* themselves. That one party had to convince itself of the reciprocity of the exchange suggests that the other, recipient party did not see the bestowing party as having made, in truth, "ample compensation…by bestowing on them civilization and Christianity"; the recipients, the tribes, did not see the exchange as reciprocally complete. Instead, they saw themselves on the receiving end of what President James Monroe, himself trained as a lawyer, envisioned as a "compulsory process" that seemed to him "to be necessary, to break their habits, & to civilize them, & there is much cause to believe, that it must be resorted to, to preserve them" (qtd. in Banner 204).[61] Whatever we might make of Monroe's "preservationist" benevolence, the "extravagance" of Marshall's "pretension" derives chiefly from the fact that Indians did not *need* to be conquered. That whites were at least *capable* of conquering the tribes – by a combination of physical violence and other, perhaps unintentional factors like disease and alcohol – made it sufficient for the Indians to be conquered by rhetoric alone.[62]

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[61] "Writers in the early federal period," Hermes notes,

> were still affected by ideas of the noble savage on the one hand, and the Indian frontier presence on the other… Many Native Americans had, even before contact with Europeans, practiced forms of government compatible with a democratic republic even if not conceived in that way. The idea that the people should have a voice through learned councilors was typical of many native legal and political systems. Yet, the United States continued to view the Indians as anathema to principles of democracy and republican government. They needed civilizing, according to almost every Anglo-American commentator, if they were to survive. Those who wished them ill believed they could not be civilized and therefore would vanish. Others had hope. The Indians themselves continually expressed confusion that Americans did not understand that they were sovereign and governed themselves on just principles. (56-7)

[62] All that was needed, in other words, was "discovery" reinforced by the tacit threats of real conquest. And such threats were often sorely lacking in mettle: Kades notes that "in 1786 the United States implied it would attack the Shawnees if they refused to [sic] the proffered terms, despite the Secretary of War's later admission that the nation was 'utterly unable to maintain an Indian war with any dignity or prospect of success'" (1119, quoting Henry Knox in Prucha, *American Indian Treaties* 54).

Marshall's acknowledgment that his forebears had to convince themselves of the ampleness of their contribution is an apology of sorts, albeit one checked by Marshall's insistence that there shall be no remittance. Apologia underwrites many such passages as those pertaining to "their pompous claims" (590), the "extravagant pretension" of conflating discovery and conquest (591), and the fact that "the potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new" (573). In other words, Marshall's forebears might just as well not to have bothered to convince themselves of the ampleness of the exchange at all. Rather, they could simply have acted as if it were in the tribes' best interest to take what the federal government had offered – or they could simply have made no offer nor bothered to acknowledge the tribes at all. Instead, at least as Marshall admits in his opinion, his forebears considered the possibility that their actions might later be found contrary to "principles of abstract justice." But they deemed the risk of future condemnation to be worth an immediate reward that could be achieved only if those principles were either unconsidered or ignored, or were considered and found to be insufficient to warrant *further* consideration of frivolous trivialities like justice. This immediate reward, in lieu of justice, was unfettered access to the whole of the discovered continent and the disenfranchisement of Indians such that there would be no sustainable contentions in the future, because future judges could refer back to Marshall's statutory clarification of the customs of past "potentates." Deloria outlines this coeval, opportunistic process of disenfranchisement and mitigation of risk by prevention of future *en*franchisement:

Richard White adds that Americans' "promises of benevolence," presumably in subjunctive contrast to underlying threats of violence, "were their most potent weapons" (qtd. in Kades 1124). Indeed, finally, Williams argues that, "even if Indian tribes never went to war, the Doctrine of Discovery effectively regarded them as conquered anyway" ("Origins" 3n.5).

> The problems of non-political minorities take on added significance when they are placed within the philosophical framework of the social contract. Although racism, sexism, and ethnocentricity are dominant attitudes which seek to oppress and exclude minorities, they cannot be manifested directly in law and are not nearly as inclusive and effective as is the lack of property which makes the individual person completely defenseless and vulnerable…
>
> American Indians were the original proprietors of the continent, the quintessential practitioners of the original social contract. Through a legal fiction called the Doctrine of Discovery, the Supreme Court adopted the argument that European explorers, sailing along the coasts of North America, gained title to the lands they saw, leaving a mere right of temporary occupancy for the Indian owners. Since Indians were not believed to hold legal title to their lands, the national government claimed the power to administer their property. Thereafter the government became concerned about Indian welfare only insofar as it needed to take or use their lands. Although perceived as a minority group, in reality Indians became a function of the property that the government held on their behalf. (924-25).

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Marshall's attempts at exculpation derive from a desire to find an apology for historical wrongs – "belated corrections of facts and real events," as Arendt writes. Marshall sensed that they "were needed precisely because history itself would hold man responsible for the deeds he had not done and for consequences he had never foreseen" (Arendt, "Imperialist Character" 167). He seeks, as a result, to avoid a discussion of "justice" that would undermine his avowed adherence to custom and amoral legality. "This sort of restraint," writes Banner, "was useful to the Chief Justice in *Johnson v. M'Intosh*, because it allowed him to disclaim all personal responsibility for a decision that he seems to have found a little distasteful. It was not his fault," as Marshall saw it, "that colonization gave Britain the title to all the Indians' land" (186). This was the legal tradition Marshall, and the United

States, had inherited from its colonial forebears. Sometimes, perhaps, Marshall's opinion for *Johnson v. M'Intosh* provides examples that suggest he really did consider the Court's unanimous decision for the defendants to run just too contrary to "abstract principles." And perhaps, in doing so, it would exercise the full extent of the violence of which the law is, but perhaps *should not be*, capable. Much more common, however, are examples that suggest the blame for the inevitable is anyone's but his or the Court's. Sometimes, in the case of the former, Marshall demonstrates some concern for Indian tribes. More often, as in the latter, he cares only about the Court's systematic self-preservation. This pragmatic pursuit of self-preserving means is characterized by a disregard for the violence it might automatically perpetrate, as if by default, in the ends. For Marshall to preserve his and his Court's innocence and neutrality, he records that the Indian tribes, in effect, voluntarily refused to accept "civilization and Christianity" (573). As a result they could not be assimilated into the populace of the conqueror and therefore must be removed.[63] He writes that under the best of circumstances, the conqueror cannot neglect assimilation "without injury to his fame, and hazard to his power" (590). Despite this suggestion of democratic empowerment, these are

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[63] Andrew Jackson, of course, would appropriate this principle of removal with unprecedented and, by Marshall, unforeseen, gusto, and to roundly detrimental ends: "Removal, as a concept," writes Banner, "was in part a humanitarian ideal, intended to protect the Indians from being victimized by whites. But removal as an actual process was a humanitarian disaster" (225). On the underlying principles of removal, Banner quotes a Baptist association that "had long taken an active interest in the Indians' welfare":

> "Whether it is expedient for the Indians to remove…is distinct from the question whether they possess a right to retain their lands." What the Indians *should* do, and what they could be *forced* to do, were two separate issues. "A man may think it for the good of the Cherokees themselves that they should follow their countrymen beyond the Mississippi," declared a Baptist correspondent calling himself "Roger Williams," in honor of the early defender of Indian property rights, "and yet feel grief and indignation at a violation of solemn treaties, or an attempt to force the Indians from their homes." Other religious organizations favoring removal emphasized the same distinction: the Indians would either move west of the Mississippi or face imminent destruction, but that was a choice only the Indians could make. (209)

not those best of circumstances:

> the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose sustenance was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence. (590)

Again the Court finds some comfort in the idea that the land would be wasted were it not for the efforts of "the potentates of the old world." Had Marshall's forebears left it to the Indians, America would have remained a sparsely inhabited, inefficiently farmed and hunted "wilderness," which does not accord with God's order that man should go forth, "replenish the earth, and subdue it." On the face of it, "to leave the country a wilderness" was economically foolish and romantically opposed to entrenched European principles and traditions. But at heart, Marshall suggests, it was practically impossible to stem the tide of frontier expansionism, even when staring down warriors "as brave and high spirited as they were fierce."

Marshall's brush with apologia, evidenced by the "pomposity" and "extravagance" of European land claims, is truly remarkable. Ball writes that the stricture dictating Indian transfer only to his European discoverer is "a fictitious limitation with no real impact. Even so, it did not go down easily with Marshall. It is unnatural and uncivilized; it is American law" (29). Ball admits that he knows

> of no comparable confession in the annals of the Supreme Court. This acknowledgement of the injustice of American law has about it the sense of regrettable necessity but also of boundaries: so much but no more had to be done by the new nation and its law. It was fundamentally wrong, but it was done. This is the maximum permissible extent of it. This far and no farther. The injustice can be admitted because it is a fiction with no import in fact and because there is to be no further encroachment upon tribal sovereignty. (29)

Marshall builds on the simple, legally-fictional pretext that Europeans, any way one looked at it, *already had* claimed the land. At the very least, their mythical superiority would see them through. They could re-entrench the myths that accompanied them initially in "founding republics, that is, governments 'of law and not of men'" (Arendt, *On Revolution* 174). The question for the Court, as the defendants establish, is whether the Indians had retained, down to the late eighteenth and early nineteenth centuries, and forever thereafter, the capacity to sell their land extrinsic to the European monopsony, which resulted from Europeans' having *already* discovered and thereby claimed the land. The Chief Justice writes,

> *We will not enter into the controversy*, whether agriculturalists, merchants, and manufacturers, *have a right, on abstract principles*, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the *original justice* of the claim which has been successfully asserted… It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.
>
> Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, *find some excuse, if not justification, in the character and habits of the people* whose rights have been wrested from them. (588-89, emphasis mine)

Taken together, the result is that justice – "abstract principles" – is excused by the savagery – "character and habits" – of the people who must be subdued legally by one of the most egregious examples, in the history of legal positivism, of the triumph of cold, statutory legality over justice.

This, as Tocqueville observed, is the quintessentially American example that "breathes the purest love of forms and legality" (325). Marshall refers to "those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man." But these, he notes, only "are admitted to regulate, in a great degree, *the rights of*

civilized nations, whose perfect independence is acknowledged" (572, emphasis mine). Kades summates the injustice done in the name of civilization:

> In extensive, apologetic dicta, Marshall offered "excuse, if not justification," for refusing to extend intra-European civility, under the guise of natural or international law, to the Indians. While natural and international law usually required a conqueror to integrate members of the defeated population into its own and extend them equal property rights, Marshall claimed that an agricultural and industrial society simply could not incorporate hunters like the Indians. He refused to justify this less favourable treatment on the theory that "agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits," deeming irrelevant such speculative opinions…respecting the original justice of the [Europeans'] claim. (1103, quoting *Johnson v. M'Intosh* 589, 588).

Kades, like most scholars, ignores an obvious paradox presumably because it is simply too unwieldy. The Chief Justice essentially argues that he is willing to take up "abstract principles" to justify "expel[ling] hunters from the territory they possess," but unwilling to examine the proposition's fundamental justness in terms of "those principles of abstract justice."[64] Marshall argues that Indians are none of the things described by Secretary Knox some three decades earlier, and that the Court, spearheading the judiciary of the young

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[64] Ball examines a similarly damning paradox, from a slightly different angle, but still only in a footnote:

> The admission that American law is unnatural and uncivilized warrants close scrutiny. Europeans asserted the claims of discovery of North America. This legal fiction was one unnatural extravagance admitted by Marshall.
>
> There was another. A limitation was thought to be placed on the tribes. There had been no conquest and no incorporation. The rule was that Indians could not transfer absolute title. Marshall laments this rule. But what is the sin he confesses? As I have noted [Ball 25], the restriction placed on tribes was an abstract tautology with no real impact. Absolute title could not be conveyed by Indians, but absolute title only meant something as between past European "discoverers." Even so, the rule constitutes a non-Indian pretension lacking a civilized, natural, or factual basis. Minor though it is, it is illegitimate. (29n.133)

Minor though it is, one must ask, why did such incongruities not long ago undermine, or at least expose, the clearly faulty foundations of federal Indian law?

nation, is *not*, in fact, "solicitous of establishing its character on the broad basis of justice" (qtd. in *American State Papers: Indian Affairs* I.13). In case Marshall's readers had forgotten, he reminds them that *legal* and *just* are only ever synonymous coincidentally or correlatively, but never causally.

Marshall deems it unnecessary for the Court to evaluate the means by which the distribution of justice arose. He consciously ignores "the controversy" regarding whether of not his settler-predecessors, "the potentates of the old world," had "a right, on abstract principles," to undertake the course of action they did, which resulted in the current time-slice distribution he is now examining. Instead, all the Court must do is decide whether the distribution shall be preserved: the means can neither justify nor invalidate the ends, because the means are not admissible as evidence. And even more unfortunate is just how inapposite this means-ends analogy is: the ends are not ends at all. Rather, the ends, validated by the Court, were simply the means by which the process would be repeated interminably, once *Johnson v. M'Intosh* was installed as citable precedent. The decision would become the new American origin myth, a statutory recording of once-false, now-true history in the form of a "belated correction of facts and real events." And thanks to Marshall's decision, the Court would maintain a dubious justness the "abstract principles" of which could never be subject to reevaluation, because they were unquestionable when the Court approved the process in the first place. "Tribes," Ball declares, "offer the majority an important insight. Injustice is not peripheral or aberrational. It is built into the legal system. To recognize the validity of the insight would help to save us from idolatry" (137). Preserving the "unquestionableness" of Marshall's assertions by preventing the re-evaluation of legend, inscribed as historical and legal fact, traps us in an idolatrous stasis. Ball's interpretation of the generally shared thread of American Indian law scholarship, his unsettlingly apocalyptic "last word" on the subject, is that

> if a wrong done tribes is well entrenched, if it is really wrong and systematically unjust, then its very gravity is a ground for continuing it… The Court's use of an argument "from long usage" [in 1974's *Morton v. Mancari*] is reminiscent of Chief Justice Marshall's argument that the doctrine of aboriginal title, albeit pretentious, could not be judicially abrogated on account of its pervasiveness and historical precedence. (128)

In order to transcend a national phobia that Ball deems "associated with a constitutive fear of strangers," the United States needs "something more than the rhetoric of the *Aeneid* or a modern American equivalent. We certainly need something better than the shabby tales composed by the Supreme Court" (139). What, indeed, are we to do if the embedded, operative mode follows a teleology which concludes that the "gravity" of a legal tradition's systematic unjustness is "a ground for continuing it"?

VII. Conclusion: Marshall's Heft of Conscience

Marshall knew that *Johnson v. M'Intosh* would live on, as would any case that tacked all the way to the Supreme Court, as an artifact of the historical and precedential record, and would decide future history by its citation in later decisions. But he knew, as well, that by his inscription of myth as statute he was effectively deciding past history, too. The precedent *Johnson v. M'Intosh* would establish in deciding the issue argued by the litigants would result ultimately in the settlement of not just that issue alone, but also all others that would later invoke it as precedent. As Sir Henry Sumner Maine writes,

> judges are bound to give their decision in conformity with the settled and general principles of English law, and with any express legislation applicable to the matter in hand, and with the authority of their predecessors and their own formal decisions. At the same time they are bound to find a decision for every case, however novel it may be; and that decision will be authority for other like cases in the future; therefore it is part of their duty to lay down new rules if required. (46n.D)

Because of the new law through which Marshall's decision would wend with its mythic reasoning, it will simply *prevent* "like cases" from arising in the future. His "legendary explanations of history" would come to be authoritatively accepted as settled fact, "positive, posited laws" that are "sufficient to assure perpetuity" (Arendt, *On Revolution* 174).[65] "One can have law of a certain kind without the judicial opinion," White suggests, "perhaps of a good kind. But with the opinion, a wholly different dimension of legal life and thought becomes possible – the systematic and reasoned invocation of the past as precedent" ("What's an Opinion for?" 1367). Reason, however, often and easily gives way wholly to system, and system depends even less on a vision of fundamental "principles of abstract justice" than does the underlying or originating reason. The result, with *Johnson v. M'Intosh*, was the opening of the frontier to descendants of discoverers who would no longer be stymied by the legal tenuousness of their predecessors' discovery. The *reason* is amoral, purely economic pragmatism; the *system* becomes dispossession by any means.

Tocqueville, commenting on an 1830 report by the Committee on Indian Affairs, emphasizes the ease with which early America (as would later America, too) brushed aside

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[65] Much of Ball's "Constitution, Court, Indian Tribes" hangs on how *Johnson v. M'Intosh* functioned later, as precedent, especially insofar as the corpus of federal Indian law, built on *Johnson v. M'Intosh*, is highly inconstant:

> Federal Indian policy is completely reversed periodically. Present policy calls for tribal "self-determination" for Indians. It is the recurrence of a type of policy first fashioned in the 18th century and then attempted again in the first half of the 19th. In between, however, there have been more and less radical policies forcing the dissolution of tribes and the assimilation of Indians. The cases reveal and suffer from the accretion of policies, all of which have present effects notwithstanding their mutual contradiction… The tribes are before the Court with increasing frequency [in 1985], and victories are still possible for them, but the Court makes selective use of contradictory policies, definitions, and canons of interpretation that frustrate tribal rights usually related to land… Although the Court prefers to decide cases on the basis of statutory, treaty, or common law, the antiquity of Indian claims and their affective power raise fundamental issues that are essentially constitutional. (16-20)

Regarding "their affective power," I would argue that the tribes' most tremendous hurdle, pertaining to public opinion, is that the public is *affectively* torn to the point of apathy between a sort of Orientalist romance and Marshall's cold, amoral pragmatism.

what *should* have been moral impediments to their shrewd tactics: "one is astonished at the facility and the ease with which, from the first words, the author disposes of arguments founded on natural right and on reason, which he names abstract and theoretical principles. The more I think about it," he finds, "the more I think that the only difference that exists between civilized man and one who is not, in relation to justice, is this: the one disputes the justice of the rights that the other is content to violate" (325n.29). According to Marshall, before *Johnson v. M'Intosh*, Europeans were faced with the predicament

> either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred. (590)

Because of the unique nature of the American frontier, to which Marshall refers with this "perpetual hazard of being massacred," the problem is not quite limited to "abstract principles." Rather, the problem is wholly universal principles of justice that do not allow for the accommodation, by assimilation, of a people who, according to Marshall, cannot be assimilated. The problem, in yet other words, is Marshall's amorally pragmatic fear of adopting principles that cannot be "adapted to the condition of a people with whom it was impossible to mix." The Chief Justice deduces, then: "The resort to some new and different rule, better adapted to the *actual state of things*, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty" (591, emphasis mine). The Court sees a decision for the defendant as the most pragmatically reasonable solution. And as Aeneas saw himself as divinely chosen, Marshall sees himself as democratically picked to draft this "new and different rule." He is undergirded by the reasoning that it will be "better adapted to the actual state of things" than the dictates under which the country had theretofore been operating. Tocqueville came to a similar conclusion, finding that "the

Indians of North America had only two options for salvation: war or civilization; in other words, they had to destroy the Europeans or become their equals" (312-13). But for Tocqueville, the time is past the point of fighting or assimilating: "The small tribes who neighbor the whites are already too weakened to offer an effective resistance; the others, indulging in the childish insouciance of the morrow that characterizes the savage nature, wait for the danger to arrive before occupying themselves with it; the ones cannot act; the others do not want to." Nevertheless, "It is easy to foresee that the Indians will never want to become civilized, or that they will try it too late when they come to want it" (313). Tocqueville's reasoned conclusion, at which he arrived almost two centuries ago, is simply that the tribes are doomed.

Marshall, by proposing that the Indians should be governed "as a distinct people," laid the groundwork for legal pluralism. A government that pays patronizing and interminable lip service to the tribes' autonomy and independence still governs them, on land originally, unquestionably theirs, precisely as a "distinct people." That the Indians are governed by legally plural tenets, and without representation, is true especially insofar as this implies that they are *not* autonomous. The tribes have not been "allowed" their autonomy basically since the first arrival of civilizing Europeans. The distinction is not one the English legal vocabulary, at the time of Marshall's writing and down to this day, is equipped to define. Marshall would later, in seeming desperation, deem Indians to be "domestic dependant nations" (*Cherokee Nation v. Georgia* 17).[66] And still later, their status would be

[66] In that decision, Marshall writes:

> The condition of the Indians, in relationship to the United States, is perhaps unlike that of any other two people [sic] in existence. In general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is with strict propriety applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where [sic] else…
>
> Though the Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a

no clearer: Indians have never been conquered by violence, and to this day maintain nothing more, according to *Black's Law Dictionary*, than a

> claim of Indian tribes of right, because of immemorial occupancy, to occupy certain territory to the exclusion of any other Indians… Permissive right of occupancy granted by federal government to aboriginal possessors of the land; it is *mere possession not specifically recognized as ownership* and may be extinguished by federal government *at any time*. ("Indian title," emphasis mine)

Indian ownership, if it can be called that at all, remains categorically anomalous, completely unto itself. Indian title is unlike any other sort of title to which lay people – the democratic

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> voluntary cession to our government; yet it may well be doubted whether those tribes which reside without 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 relations to the United States resemble that of a ward to his guardian.
>
> 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. (*Cherokee Nation v. Georgia* 16-17)

It is from this passage that Francis Paul Prucha derives the title for his two-volume tome, *The Great Father: The United States Government and American Indians*. In the quarter century since its publication, Prucha's *magnum opus* has been unrivaled, and remains the most comprehensive analysis of the federal government's self-assumed "responsibility" regarding the tribes.

More specifically on the contributions of *Cherokee Nation* (1831) and the following term's *Worcester v. Georgia* (1832) to Marshall's "Indian Trilogy," see Jill Norgren's *The Cherokee Cases: Two Landmark Federal Decisions in the Fight for Sovereignty*. See also Banner 214-27, where he calls Marshall's opinion for *Worcester* "an astonishingly pro-Indian document for the era. The winner in a technical sense was Worcester, whose conviction was reversed, but Chief Justice Marshall's opinion vindicated the Cherokees' position on virtually every point in their long dispute." Perhaps most importantly, Marshall's decision "included none of the ambiguity and vacillation of his earlier pronouncements" (220). Unfortunately, however, the immediate effects of the narrow scope of the opinion did not mandate sweeping social change, and Indian divestiture continued in much the way it had for the preceding decade. *Worcester* "thus provides a parable of the limits on the ability of courts to effect social change, given all the structural constraints the legal system places on them… Few nineteenth-century American lawyers, if any, would have conceived that courts had the power to issue an order to a state government as broad as 'stop harassing the Cherokees'" (Banner 222).

majority – or most members of the legal tradition can truly, lucidly relate. American Indian legal rhetoric provides the clearest example of legal pluralism in the civilized world. It permits no parallels save, internationally, comparisons to other settler-state indigenous peoples who remain dispossessed and disenfranchised by equally obfuscatory means. Chief Justice Marshall writes that because of their savagery, Indians are beyond assimilation: "to govern them as a distinct people was impossible" because they resisted being governed from without. Marshall ignores the issue of how or why the United States should feel obligated, let alone entitled "to govern them" at all. Thus Indian tribes can only be either cordoned off as a group, or taken in as wards or pupils; and should such "attempts on their independence" fail, they must be subdued by the sword. In other words, Marshall's solution to the problem presented by the Indians' apparently unreasonable resistance to being governed from without is simply to force it upon them, "principles of abstract justice" be damned. There is none of the mutual amalgamation with which Aeneas clinches his conquest of the Latins:

> So let it be – and merge their laws and treaties,
> Never command the land's own Latin folk
> To change their old name, to become new Trojans,
> Known as Teucrians; never make them alter
> Dialect or dress. Let Latium be. (Virgil XII.1115-19)

The Aeneid concludes with Aeneas' final act of violence to Turnus, cementing the reality of the Trojan conquest of Latium, an act of what Arendt and Ball call "aboriginal violence" (Ball 7, citing Arendt, *On Revolution* 11). So too does Marshall solidify the timeless *in*justice of American "Courts of justice" in the violence of their rhetoric of conquest. Tocqueville acknowledges this in a final statement of deeply unsettling prescience, concluding his brief chapter on America's Indians:

> The conduct of the Americans of the United States toward the natives… breathes of the purest love of forms and legality. Provided that the Indians stay in the

> savage state, the Americans do not mix at all in their affairs and treat them as independent peoples; they do not permit themselves to occupy their lands without having duly acquired them by means of a contract; and if by chance an Indian nation can no longer live on its territory, they take it like a brother by the hand and lead it to die outside the country of its fathers.
>
> The Spanish, with the help of unexampled monstrous deeds, covering themselves with an indelible shame, could not succeed in exterminating the Indian race, nor even prevent it from sharing their rights; the Americans of the United States have attained their double result with marvelous facility – tranquilly, legally, philanthropically, without spilling blood, without violating a single one of the great principles of morality in the eyes of the world. One cannot destroy men while being more respectful of the laws of humanity. (325)

Indeed, down to this day, the United States is making ever more amoral attempts to do just that – to destroy Native Americans by denying their basic rights while propping up the unjust and unreal origin myths of a pure, formal legality that rationalizes Native oppression.

SOURCES CITED

Primary Documents

The Cherokee Nation v. the State of Georgia. No. 30-001. Supreme Court of the United States, 1831.

Cohens v. Virginia. No. 19-264. Supreme Court of the United States, 1821.

Congress of the United States. *American State Papers: Indian Affairs*. Eds. Walter Lowrie and Matthew St. Clair Clarke. 2 vols. Washington: Gales and Seaton, 1832.

_____. *American State Papers: Public Lands*. Ed. Walter Lowrie. 2 vols. Washington: Duff Green, 1834.

Fletcher v. Peck. No. 10-087. Supreme Court of the United States, 1810.

Green v. Biddle. No. 21-1. Supreme Court of the United States, 1823.

Homer. *The Iliad*. Trans. Robert Fagles. New York: Penguin, 1991.

Johnson and Graham's Lessee v. William M'Intosh. No. 21-543. Supreme Court of the United States, 1823.

Keller, Arthur S., et al. *Creation of Rights of Sovereignty through Symbolic Acts: 1400-1800*. New York: Columbia UP, 1938.

Samuel A. Worcester v. The State of Georgia. No. 31-515. Supreme Court of the United States, 1832.

Tee-Hit-Ton Indians v. United States. No. 348-272. Supreme Court of the United States, 1954.

Turner, Frederick Jackson. *The Frontier in American History*. 1920. New York: Holt, Rinehart and Winston, 1962.

Virgil. *The Aeneid*. Trans. Robert Fitzgerald. New York: Vintage Classics, 1990.

Wharton, Samuel. *Plain Facts: Being an Examination in the Rights of the Indian Nations of America...* Philadelphia: R. Aitken, 1781.

William Marbury v. James Madison, Secretary of States of the United States. No. 05-137. Supreme Court of the United States, 1803.

Dictionary Definitions

"Capitis diminutio." *Black's Law Dictionary*. 5th Ed. Minneapolis: West, 1979.

"Declaratory part of law." *Black's Law Dictionary*. 5th Ed. Minneapolis: West, 1979.

"Declaratory statute." *Black's Law Dictionary*. 5th Ed. Minneapolis: West, 1979.

"Diminutio." *Black's Law Dictionary*. 5th Ed. Minneapolis: West, 1979.

"Diminutive." *The Oxford English Dictionary*.

"Epic." M.H. Abrams. *A Glossary of Literary Terms*. 7th Ed. Forth Worth: Harcourt Brace, 1999.

"Fee-simple ownership." *Black's Law Dictionary*. 5th Ed. Minneapolis: West, 1979.

"Indian title." *Black's Law Dictionary*. 5th Ed. Minneapolis: West, 1979.

"Probably." *The Oxford English Dictionary*.

Secondary and Tertiary Sources

Adorno, Rolena and Patrick Pautz. *Álvar Núñez Cabeza de Vaca: His Account, His Life, and the Expedition of Pánfilo de Nárvaez*. 3 vols. Lincoln: U of Nebraska P, 1999.

Arendt, Hannah. "The Imperialist Character (On Kipling)." *Reflections on Literature and Culture*. Ed. Susannah Young-ah Gottlieb. Stanford: Stanford UP, 2007. 167-71.

_____. *On Revolution*. New York: Penguin, 2006.

Ball, Milner S. "Constitution, Court, Indian Tribes." *The American Bar Foundation Research Journal* 12.1 (1987): 1-140.

Banner, Stuart. *How the Indians Lost Their Land: Law and Power on the Frontier*. Cambridge: Belknap-Harvard UP, 2005.

Bryan, George. *The Imperialism of John Marshall: A Study in Expediency*. Boston: The Stratford Company, 1924.

Certeau, Michel de. *The Writing of History*. Trans. Tom Conley. New York: Columbia UP, 1988.

Cover, Robert. "Foreword to the Supreme Court 1982 Term: *Nomos* and Narrative." *Harvard Law Review* 97.1 (1983): 4-69.

_____. "Violence and the Word." *Yale Law Journal* 95 (1986): 1601-29.

Deloria, Vine. "Minorities and the Social Contract." *Georgia Law Review* 20.4 (1986): 917-38.

Elliott, J. H. *Empires of the Atlantic World: Britain and Spain in America*. New Haven: Yale UP, 2006.

Fuller, L. L. "Legal Fictions." *Illinois Law Review* 35.4 (1931): 363-99; 513-46; 817-910.

Grotius, Hugo. *De Jure Belli Ac Pacis Libri Tres*. Vol. 2. Trans. Francis W. Kelsey. 1925.

Hart, H. L. A. *The Concept of Law*. 2nd Ed. 1961. Oxford: Clarendon (Oxford UP), 1994.

Hermes, Katherine A. "The Law of Native Americans, to 1815." *The Cambridge History of Law in America*. Vol. 1. Ed. Michael Grossberg and Christopher Tomlins. 3 vols. Cambridge: Cambridge UP, 2007. 32-62.

Kades, Eric. "The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands." *University of Pennsylvania Law Review* 148.4 (2000): 1065-1190.

_____. "History and Interpretation of the Great Case of *Johnson v. M'Intosh*." *Law and History Review* 19.1 (2001): 67-116.

Kent, James. *Commentaries on American Law*. 4 vols. Ed. Oliver Wendell Holmes, Jr. Boston: Little, Brown, 1873.

Maine, Sir Henry Sumner. *Ancient Law: Its Connections with the Early History of Society and Relations to Modern Ideas*. London: John Murray, 1920.

Marks, Anna Edith. "William Murray, Trader and Land Speculator in the Illinois Country." *Transactions of the Illinois State Historical Society* 26 (1919): 188-212.

Mignolo, Walter. *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization*. 2nd ed. Ann Arbor: U of Michigan P, 2003.

Morison, Samuel Eliot. *The European Discovery of America: The Northern Voyages, A.D. 500-1600*. New York: Oxford UP, 1971.

_____. *The European Discovery of America: The Southern Voyages, A.D. 1492-1616*. New York: Oxford UP, 1974.

Newcomb, Steven T. "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. M'Intosh*, and Plenary Power." *New York University Review of Law and Social Change* 20 (1993): 303-41.

Newton, Nell Jessup. "At the Whim of the Sovereign: Aboriginal Title Reconsidered." *Hastings Law Journal* 31 (1980): 1215-85.

Norgren, Jill. *The Cherokee Cases: Two Landmark Federal Decisions in the Fight for Sovereignty*. Norman: U of Oklahoma P, 2004.

Nozick, Robert. *Anarchy, State, and Utopia*. Basic Books, 1974.

O'Gorman, Edmundo. *The Invention of America: An Inquiry Into the Historical Nature of the New World and the Meaning of Its History*. Westport, CT: Greenwood P, 1972.

Ong, Walter. *Orality and Literacy: The Technologizing of the Word*. New York: Routledge, 1982.

Pagden, Anthony. "Law, Colonization, Legitimation, and the European Background." *The Cambridge History of Law in America*. Vol. 1. Ed. Michael Grossberg and Christopher Tomlins. 3 vols. Cambridge: Cambridge UP, 2007. 1-31.

Prucha, Francis Paul. *American Indian Treaties: The History of a Political Anomaly*. Berkeley: U of California P, 1994.

_____. *The Great Father: The United States Government and the American Indians*. 2 vols. Lincoln: U of Nebraska P, 1984.

Pufendorf, Samuel. *Elements of Universal Jurisprudence*. 1672. Vol. 2. Trans. William Abbott Oldfather. The Classics of International Law 15. Oxford: Clarendon, 1916. 2 vols.

_____. *Law of Nature and Nations*. 1688. Vol. 2. Trans. C. H. and W. A. Oldfather. The Classics of International Law 17. Oxford: Clarendon, 1934.

Robertson, Lindsay G. *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*. Oxford: Oxford UP, 2005.

_____. "John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine." *Journal of Law and Politics* 13 (1997): 759-77.

_____. "'A Mere Feigned Case': Rethinking the *Fletcher v. Peck* Conspiracy and Early Republican Legal Culture." *Utah Law Review* (2000): 249-67.

Salisbury, Neal. "The Indians' Old World: Native Americans and the Coming of Europeans." *The William and Mary Quarterly* 53.3 (1996): 435-58.

Seifert, Joshua L. "The Myth of *Johnson v. M'Intosh*." *UCLA Law Review* 52 (2004): 289-332.

Sheilds, John C. *The American Aeneas: Classical Origins of the American Self*. Knoxville: U of Tennessee P, 2001.

Soifer, Aviam. "Reviewing Legal Fictions." *Georgia Law Review* 20.4 (1986): 871-915.

Taylor, Alan. *American Colonies: The Settling of North America*. New York: Penguin, 2001.

Tocqueville, Alexis de. *Democracy in America*. Trans. Harvey C. Mansfeld and Delba Winthrop. Chicago: U of Chicago P, 2000.

Todorov, Tzvetan. *The Conquest of America*. Trans. Richard Howard. New York: Harper and Row, 1982.

Vattel, Emmerich de. *Le Droit des Gens... (The Law of Nations or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns)*. 1758.

Vol. 3. Trans. Charles G. Fenwick. The Classics of International Law. Washington: Carnegie Institution, 1916.

Washburn, Wilcomb E. "The Moral and Legal Justifications for Dispossessing the Indians." *Seventeenth-Century America: Essays in Colonial History*. Ed. James Morton Smith. Chapel Hill: U of North Carolina P, 1959.

White, James Boyd. "Law as Language: Reading Law and Reading Literature." *Texas Law Review* 60.3 (1982): 415-45.

_____. "What's an Opinion for?" *The University of Chicago Law Review* 62.4 (1995): 1363-69.

Williams, Robert A., Jr. "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence." *Wisconsin Law Review* (1986): 219-99.

_____. *The American Indian in Western Legal Thought: The Discourses of Conquest*. New York: Oxford UP, 1990.

_____. "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought." *Southern California Law Review* 57 (1983): 1-99.

SOURCES CONSULTED

Primary Documents

Abbott, Austin. "Indians and the Law." *Harvard Law Review* 2.4 (1888): 167-79.

Beveridge, Albert J. *The Life of John Marshall: Standard Library Edition*. Boston: Houghton Mifflin, 1919.

Marshall, John. *The Constitutional Decisions of John Marshall*. Ed. Joseph P. Cotton, Jr. 2 vols. New York: G.P. Putnam, 1905.

_____. *John Marshall: The Complete Constitutional Decisions. Edited with Annotations Historical, Critical and Legal*. Ed. John M. Dillon. Chicago: Callaghan, 1903.

_____. *The Life of George Washington, Commander in Chief of the American Forces...* 5 vols. London: R. Phillips, 1804. Fredericksburg, VA: Citizens Guild of Fredericksburg, 1926.

Prucha, Francis Paul, Ed. *Documents of United States Indian Policy.* 3rd ed. Lincoln: U of Nebraska P, 2000.

Oliphant v. Suquamish Indian Tribe, et al. No. 435-191. Supreme Court of the United States, 1978.

Wheaton, Henry. *Elements of International Law*. 1836. Rpt. of 2nd ed., 1866, Ed. Richard Henry Dana. Ed. George Grafton Wilson. The Classics of International Law 19. Oxford: Clarendon, 1936.

_____. *Law of Nations In Europe and America; From the Earliest Times...* New York: Gould, Banks, 1845.

Secondary, Tertiary, and Theoretical Sources

Bach, Rebecca Ann. *Colonial Transformations: The Cultural Production of the New Atlantic World, 1580-1640*. New York: Palgrave, 2000.

Bailyn, Bernard. *The Peopling of British North America: An Introduction*. *The Curti Lectures, University of Wisconsin*. New York: Alfred A. Knopf, 1986.

Barsh, Russel Lawrence and James Youngblood Henderson. *The Road: Indian Tribes and Political Liberty*. Berkeley: U of California P, 1980.

Bhabha, Homi K. *The Location of Culture*. 2nd ed. New York: Routledge, 2004.

_____. "Signs Taken for Wonders: Questions of Ambivalence and Authority under a Tree Outside Delhi, May 1817." *Critical Inquiry* 12 (1985): 144-65.

Binder, Guyora and Robert Weisberg. *Literary Criticisms of Law*. Princeton: Princeton UP, 2000.

Butler, Judith. *Excitable Speech: A Politics of the Performative*. New York: Routledge, 1997.

_____. *The Psychic Life of Power: Theories in Subjection*. Stanford: Stanford UP, 1997.

Chaplin, Joyce E. *Subject Matter: Technology, the Body, and Science on the Anglo-American Frontier, 1500-1676*. Cambridge: Harvard UP, 2001.

Coughlin, Anne M. "I'm in the Mood for Law." Rev. of *Literary Criticisms of Law*, by Guyora and Weisberg. *Stanford Law Review* 53 (2000): 209-21.

Cover, Robert. "The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role." *Georgia Law Review* 20.4 (1986): 815-33.

_____. *Narrative, Violence, and the Law: the Essays of Robert Cover*. Ed. Martha Minow, et al. Ann Arbor: U of Michigan P, 1992.

Dworkin, Ronald. "Law as Interpretation." *Texas Law Review* 60.3 (1982): 527-550.

Ferguson, Robert A. *Law and Letters in American Culture*. Cambridge: Harvard UP, 1984.

Eisgruber, Christopher L. "John Marshall's Judicial Rhetoric." *[The University of Chicago] Supreme Court Review* 10 (1996): 439-81.

Fish, Stanley. "Working on the Chain Gang: Interpretation in Law and Literature." *Texas Law Review* 60.3 (1982): 551-567.

Frickey, Phillip P. "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law." *Harvard Law Review* 107.2 (1983): 381-440.

Grotius, Hugo. *Commentary on the Law of Prize and Booty*. 1604. Vol. 1. Trans. Gwladys L. Williams and Walter H. Zeydel. The Classics of International Law 22. Oxford: Clarendon, 1950.

Hart, H. L. A. *Law, Liberty, and Morality*. Stanford: Stanford UP, 1963.

Heald, Paul J., Ed. *Literature and Legal Problem Solving: Law and Literature as Ethical Discourse*. Durham: Carolina Academic P, 1998.

Johnson, Herbert A. *The Chief Justiceship of John Marshall, 1801-1835*. Columbia: U of South Carolina P, 1997.

Klarman, Michael J. "How Great Were the 'Great' Marshall Decisions?" *Virginia Law Review* 87.6 (2001): 1111-1184.

Locke, John. *Two Treatises of Government*. London, 1698.

Martens, Georg Friedrich. *Summary of the Law of Nations, Founded on the Treaties and Customs...* 1748. Trans. William Cobbett. Philidelphia: Thomas Bradford, 1795.

Martindale, Charles, ed. *The Cambridge Companion to Virgil*. Cambridge: Cambridge UP, 1997.

Matthews, Jean V. *Toward a New Society: American Thought and Culture, 1800-1830*. Boston: Twayne, 1991.

Merrell, James H. *Into the American Woods: Negotiators on the Pennsylvania Frontier*. New York: Norton, 1999.

Montaigne, Michel de. *Essays*. Trans. Charles Cotton. London: M. Gillyflower, et al., 1700.

Montesquieu, Charles de Secondat, Baron de. *The Spirit of Laws*. 1748. Trans. Thomas Nugent. 1752. Rev. ed. Ed. J. V. Prichard. 2 vols. London: G. Bell, 1914.

Moore, J.B. "John Marshall." *Political Science Quarterly* 16.3 (1901): 393-411.

Morison, Samuel Eliot. *The Oxford History of the American People*. New York: Oxford UP., 1965.

Newton, Nell Jessup. "Federal Power over Indians: Its Sources, Scope, and Limitations." *University of Pennsylvania Law Review* 132.2 (1984): 195-288.

Norgren, Jill. "Lawyers and the Legal Business of the Cherokee Republic in Courts of the United States, 1829-1835." *Law and History Review* 10.2 (1992): 253-314.

Ouden, Amy E. Den. *Beyond Conquest: Native People and the Struggle for History in New England*. Lincoln: U of Nebraska P, 2005.

Posner, Richard A. *Law and Literature: A Misunderstood Relation*. 2nd ed. Cambridge: Harvard UP, 1998.

_____. "What Has Modern Literary Theory to Offer Law?" Rev. of *Literary Criticisms of Law*, by Guyora and Weisberg. *Stanford Law Review* 53 (2000): 195-208.

Rorty, Richard. *Consequences of Pragmatism: Essays: 1972-1980*. Minneapolis: U of Minn. P, 1982.

Savage, Mark. "The Great Secret About Federal Indian Law – Two Hundred Years in Violation of the Constitution – and the Opinion the Supreme Court Should Have Written to Reveal It." *New York University Review of Law and Social Change* 20 (1993): 343-71.

Smith, Adam. *The Wealth of Nations*. 1776. New York: E. P. Dutton, 1977.

Smith, Jean Edward. *John Marshall: Definer of a Nation*. New York: Henry Holt, 1996.

Weisberg, Richard H. *Poethics, and Other Strategies of Law and Literature*. New York: Columbia UP, 1992.

_____. "Text Into Theory: A Literary Approach to the Constitution." *Georgia Law Review* 20.4 (1986): 939-94.

Weisbord, Carol. *The Boundaries of Utopia*. New York: Pantheon, 1980.

White, Hayden. "The Narrativization of Real Events." *On Narrative*. Ed. W. J. T. Mitchell. Chicago: U of Chicago P, 1981. 249-54.

_____. "The Value of Narrativity in the Representation of Reality." *On Narrative*. Ed. W. J. T. Mitchell. Chicago: U of Chicago P, 1981. 1-24.

White, James Boyd. *Acts of Hope: Creating Authority in Literature, Law, and Politics*. Chicago: U of Chicago P, 1994.

_____. *The Edge of Meaning*. Chicago: U of Chicago P, 2001.

_____. *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*. Madison: U of Wisconsin P, 1985.

_____. "Judicial Criticism." *Georgia Law Review* 20.4 (1986): 835-70.

_____. *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*. Boston: Little, Brown, 1973.

_____. *Living Speech: Resisting the Empire of Force*. Princeton: Princeton UP, 2006.

_____. *When Language Meets the Mind: Three Questions*. Nijmegen, The Netherlands: Wolf Legal, 2007.

_____. *When Words Lose Their Meaning: Constitutions and Reconstruction of Language, Character, and Community*. Chicago: U of Chicago P, 1984.

Wilkinson, Charles F. *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*. New Haven: Yale UP, 1987.

Williams, Robert A., Jr. *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*. Minneapolis: U of Minnesota P, 2005.

_____. *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*. New York: Oxford UP, 1997.

Wolff, Jonathan. *Robert Nozick: Property, Justice and the Minimal State*. Stanford: Stanford UP, 1991.