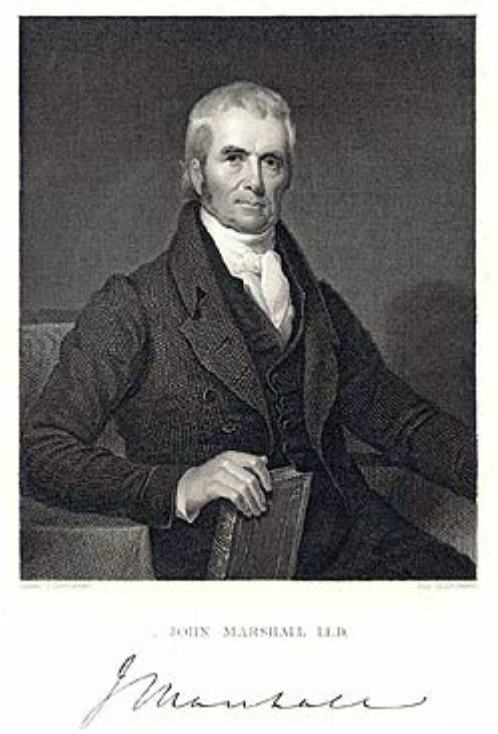
Doctrines of Discovery



I. Introduction

In a speech given on September 8, 2000, at a ceremony on the 175th anniversary of the Bureau of Indian Affairs (BIA), Kevin Gover, a Commanche tribal member and outgoing head of the Bureau, issued “a formal apology to Indian people for the historical conduct of this agency,” an agency whose first mission was the forced removal of the southeastern tribes from their homelands, along the notorious Trail of Tears. “Today I stand before you,” Gover continued, “as the leader of an institution that in the past has committed acts so terrible that they infect, diminish, and destroy the lives of Indian peoples decades later, generations later.”

The Bureau of Indian Affairs was established by President James Madison in 1824, as part of the Department of War. In 1832, Congress authorized the president to appoint a Commissioner of Indian Affairs, and, in 1834, enacted a bill to organize a Department of Indian Affairs. In 1849, the BIA was transferred to the newly created Interior Department. By the 1850s, overseeing Indian reservations had become its principal arena of activity.

In this context, the term *colonialism* has a precise meaning: the control by the federal government over what federal law terms “Indian country” (Title 18, U.S. Code, section 1151), which, in broadest terms, includes all federal reservation land; all “Indian allotments”; and all “dependent Indian communities,” whether they are residing within a reservation or not. In Indian country, reservation land is land used by federally recognized tribes, but titled to the federal

government, which thus has legal ownership of it, keeping the lands “in trust” for the tribes, of which there are 330 today in the lower forty-eight states.

The “trust” relationship between the tribes and the federal government is at best a double-edged sword. Ostensibly guaranteeing federal protection of Indian assets, it also casts Indians in the role of perpetual minors, a barely veiled version of the classic European stereotype of the childlike “savage.” Indians, by definition legally incompetent to manage their own resources, find these resources placed in the hands of a federal bureaucracy, overseen by Congress, which has historically grossly mismanaged them. The BIA currently finds itself embroiled in an almost five-year-old class-action lawsuit filed by the Native American Rights Fund against the Bureau and the Department of the Interior for the mismanagement of an estimated ten billion dollars in Indian trust funds since the end of the nineteenth century. In February 1999, as reported in the *Washington Post* of August 17, 2000, Gover himself was held in contempt of court for not turning over records in this case, records he claimed “no longer existed.”

As it functions, the trust relationship contradicts what for the last thirty years has been the stated federal policy of increased “self-determination” for Indian tribes. Yet the tribes, rightfully, resist any congressional attempts to dissolve this relationship (and only Congress has the constitutional power to do so) because all such attempts have only offered the dismemberment of the tribes as an alternative.

As distinct from reservation lands, allotted lands are lands, on or off reservation, which the federal government has granted to individual Indians. In this case, the government may retain title to the individual lands, which is most often the case, or the individual may hold title. Approximately eighty percent of the Indians lands to which the federal government holds title (approximately fifty-five million acres) are reservation lands.

It is clear enough under the law that any tribe occupying reservation land is considered a “dependent Indian community” in relation to the federal government. There are also tribes, like the Oklahoma Cherokees, numerically the largest tribe in the United States, that, while not occupying a reservation *per se*, still come under federal superintendence with title to their tribal lands held by the federal government, and are thus considered a “dependent Indian community.” Ambiguities arise, however, in the case of Alaskan Native communities, which except in one case, do not occupy reservations or other kinds of “trust” lands but hold title to their lands as corporate entities under the Alaska Native Claims Settlement Act of 1971 (43 U.S.C.A, sec 1601-28), while still receiving federal benefits of various kinds because of their standing as Native Americans.

In 1998 in *Alaska v. Native Village of Venetie Tribal Government,* 118 S.Ct. 948, the Supreme Court tied the notion of “dependence” to the fact of lands held “in trust” by the federal government for Native Americans and thus ruled

that the Alaskan village in question and by extension all such corporate entities were not in “Indian Country,” while at the same time recognizing Congress’s constitutional authority to modify the legal definition of “Indian country.” At present, Indian country does not extend to include Native Hawaiians either, though they are a people historically colonized by the United States and are engaged in an ongoing struggle for their land rights.

In carrying out U.S. Indian policy today, the BIA has long counted on the collaboration of elected tribal councils, Western-styled governments first put into place under the auspices of the Indian Reorganization Act (IRA) of 1934. The decision whether or not to adopt IRA-sponsored constitutions was left up to the tribes. At the time, 181 tribes voted to adopt them and seventy-seven tribes voted to reject. Nevertheless, all the tribes needed a governmental mechanism (tribal council) in order to deal with the BIA for the resources it controlled under congressional mandate, which included, principally, tribal lands. Thus, whether or not a tribe drafted a constitution as the BIA requested, it had to comply in one way or another to BIA pressure to form representative governments. As they do today, these councils faced various forms of resistance from the grassroots of their communities. Thus, one often finds in Indian country a democratically elected tribal government that is at the same time opposed by or alienated from the grassroots population precisely because it is perceived as an arm of U.S. colonial power. But, it is important to emphasize, a tribal council may also oppose U.S. power in certain instances and so claim the support of its constituency on certain issues, particularly those dealing with land and sovereignty. These kinds of divisions within the tribes have a long history, which is a direct result of European colonial policies in the Americas.

Because of reforms instituted by the IRA, the BIA is now administered from top to bottom largely by Indians. But, in spite of Kevin Gover’s optimism, the BIA continues to contribute to the general impoverishment of Indian people. Today the 1,698,483 tribally enrolled U.S. Indians (out of an approximate Native population of two million) are the poorest of the poor. The 1990 census reports a per capita income in Indian country of $4,478, compared to a national average of $14,420. According to BIA statistics, in 1999 unemployment among the labor force of the 556 federally recognized tribes (226 in Alaska) was forty-three percent, a one percent increase from 1997. Only nine percent of Native Americans twenty-five years and older have college degrees in comparison to thirteen percent of Latinos, fourteen percent of African Americans, and twenty-four percent of the total population.

In his September 2000 apology, Gover distinguished between the BIA “in the past” and the BIA now, “in this era of self-determination, when the Bureau of Indian Affairs is at long last serving as an advocate for Indian people in an atmosphere of mutual respect.” But this all too clean separation overlooks, for example, the mismanagement of trust funds previously mentioned. Meanwhile, his neat distinction between the old and the new BIA also ignores the ongoing Navajo-Hopi Land Dispute in which, beginning in 1977, the Bureau has overseen

the displacement of twelve to fourteen thousand Navajos from their homelands. Despite Grover's claims for "an atmosphere of mutual respect," the colonial structure of federal Indian law, which the BIA administers, dooms the Bureau to be a certain kind of classic colonial bureaucracy.

II. Land and Property

United States federal Indian law is grounded in the history of Western imperialism in the Americas, and in what were and remain the central issues in the conflict between Indian communities and European powers: land and sovereignty. It is not only that the Euro-Americas are built on stolen Indian land but also that the traditional Native relationship to land was radically opposed to early modern Europe's increasingly capitalist relationship to it.

> [T]reaties were always written in Western languages employing Western legal vocabularies, grounded in the term property.

Traditionally, land was and is the absolute resource of the Native community. In Native America land mediates all relationships on a plane where the distinction between the sacred and the secular made by the West does not exist. Native land is not what the West understands as property, a decidedly secular institution.As a traditional value, land is the antithesis of property. Land, in this view, is the inalienable ground of the communal, defined exclusively in terms of extended kinship relations. I use *traditional* in this context not to denote unchanging cultural practices, the notion of which is in any case a fiction, but rather to signify an ongoing and adaptive force marshaled from the historical moment of the Columbian invasion of the Americas (1492) against the European exploitation of Native land. Such resistance is exemplified in the present by the continued refusal of the Sioux Nation to accept a monetary settlement, now with accumulated interest worth an estimated 350 million dollars, granted them in 1974 by the Indian Claims Commission for a wrongful taking in 1877 of the Black Hills, land central to their identity as a people. For the Sioux, the Black Hills are not fungible.

Whether in such different cultures as the Pueblos in what would become the southwestern U.S. (or the pueblos in Mexico), the Iroquois Confederacy in the territory that is now the northeastern U.S. and Canada, the Creek or Cherokee towns in what became the southeastern U.S., or the *tiospaye* of the Oceti Sakowin (Sioux) on the great plains of North America, the traditional Native community can be described as an extended family or system of interlocking extended families working in concert for mutual sustenance. But we should be careful not to conflate the Western nuclear family paradigm with the Native paradigm of family, or, as I prefer, kinship. The relational terms of the Western family (*father, mother, brother, sister, aunt, uncle, cousin,* etc.) do not translate into the terms of Native kinship. In comparison to the class and

gender hierarchies of Western nation-states, Native communities were marked by egalitarian social and political structures, where group action was based on group consensus, precisely because (if one wants to take an economic perspective) the labor of all, female and male, was equally valuable for the sustenance of the group. Native kinship terms extend as well into that part of the world that the West has increasingly alienated, subordinated, and exploited as "nature." Such extended kinship by folding nature into the Native community sets conservative limits to the use of natural resources.

In theory and practice, the indigenous conception of community does not exclude conflict either within or between communities, as indigenous oral traditions clearly attest. However, in societies where there were no class divisions, where every person's contribution was valuable to the sustenance of the group, and where there were no systems of incarceration, solutions to intragroup conflict were conceived primarily in terms of restoring *balance* to social relations rather than, as in Western societies, isolating transgressors from these relations. So, for example, the killing of the member of one group (family or clan) by the member of another might be balanced by a single counter-killing or, alternatively, a payment of some kind, either of which, it was agreed by the aggrieved party, would close the circuit of violence. Interclan conflicts within the Hopi villages have been resolved historically by the formation of new villages, which nevertheless remain within the Hopi fold through clan ties that link village to village on the three mesas in northeastern Arizona. The last resort in maintaining balance in indigenous social systems was exile, for psychic and social survival outside the kinship community was precarious at best. As for intercommunity conflict, what the West terms *war*, it is enough to say here that whatever its function (ritual, territorial, raiding) it cannot be understood in terms of modern Western warfare, which is based in an imperial/colonial paradigm: the clash of nation-states over issues of property. Once capitalist economies disrupted Native economies, of course, Native kinship relations to land were disrupted by property relations, and were forced to come to *terms* with property relations, but have also managed to mount a continuing, if often divided, resistance to these relations. That is, the Western imperial invasions of Native America have brought with them the kinds of collaboration that such invasions bring, the kind, for example, instanced by the BIA at the present moment.

In Native kinship economies, land was not fungible, that is, marketable, or alienable by an individual, or group acting as an individual within the community. Thus, the treaty, signed by "chiefs" or other designated leaders, in which, centrally, the Indian "tribe" or "nation" alienated a portion of its land in exchange for payment of various kinds, is always, quite literally, the sign of the imposition of Western terms on indigenous communities: treaties were always written in Western languages employing Western legal vocabularies, grounded in the term *property*.

Property is the foundation of Western capitalist democracies; and land is in the history of these democracies the fundamental form of property. These

democracies both as nations (ideas, or ideals, or ideologies) and states (political systems that mediate, or express, the nation) are particular articulations of property, which is not simply a material relation but implies in the very history of the word *property* a moral and social one (what is *proper*) and a metaphysical one as well: the particular *properties* that define what the West has come to understand as an *individual.* When the United States was founded, for example, only *property-holding* white males by and large had the franchise, were, that is, considered *individuals* in the political realm. Even today, not to hold some form of property in the West is to have one's individuality bracketed, to find one's recognition as a person seriously compromised. It has been the overriding thrust of U.S. federal Indian law from its constitutional inception to the present to translate Indian land into *property*, not for the purpose of entitling Indians to their land but for the purpose of *legally* entitling the federal government to it and thereby compromising the sovereignty of Indian communities.

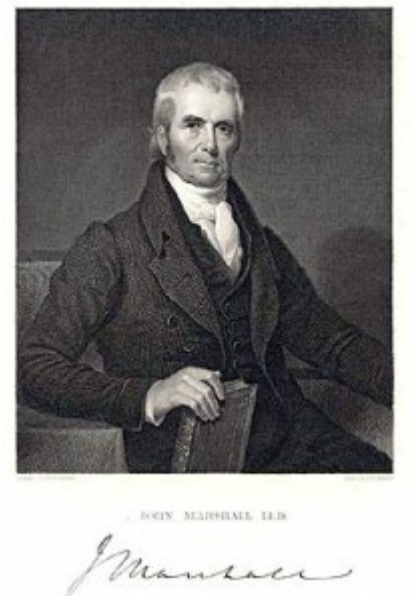
III. Legal Fictions

The laws that govern the colonial space of Indian country today are for the most part codified in the twenty-fifth title of the U.S. code. This makes Indians the only group of people in the United States who are governed by a distinct body of law. This body of law, which defines the colonial status of Indians, derives its ultimate authority from the Commerce Clause of the Constitution (Article I, Section VIII, Paragraph III), giving Congress the power: "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Using the Commerce Clause as a basis, Congress enacted a series of trade and intercourse laws between 1790 and 1834 that extended the definition of "regulating commerce" to include control over the buying and selling of Indian land, as had the British Royal Proclamation of 1763, which was the model for U.S. Indian policy in this regard. These laws became the constitutional rationale for the three major legal cases that to this day form the foundation of federal Indian law. These cases, known as the "Marshall Trilogy," after John Marshall, the chief justice of the Supreme Court who wrote the defining opinion in each case, are, in the order of their enactment, *Johnson v. McIntosh,* 21 U.S. 543 (1823), *Cherokee Nation v. the State of Georgia,* 30 U.S. 1 (1831), and *Worcester v. Georgia,* 31 U.S. 515 (1832).

> Perhaps the principal irony in Johnson is that in a case that has determined the status of Indian land and sovereignty from 1823 to the present, there were no Indian parties to the suit . . .

Like all bodies of knowledge that claim objectivity, the subjectivity of the law—its social, cultural, political, and economic biases—can be located in the narratives that underlie it but that are rarely brought into play in

contemporary legal practice. The U S. law upholding the constitutionality of the death penalty is exemplary in this respect. It seems at this point clearly driven by the social and economic biases of race and class (a radically disproportionate number of prisoners on death row are poor and black); it provides, that is, an historical narrative of race and class discrimination not only in the workings of the criminal justice system but in the nation as a whole, which in this case Congress and the Supreme Court have agreed to ignore so that the death sentence can continue to be administered (in the majority of states) as if it were being administered fairly. Federal Indian law works in precisely the same way; that is, it is grounded in a narrative of cultural and political bias, which the government ignores so that it can continue to administer this body of law as if the narrative of the imperial domination of culturally inferior peoples that drives it were a thing of the past. When Kevin Gover apologized to Indian people for the genocidal past of the BIA, he implicitly acknowledged this narrative. But when he uncoupled the present BIA from the past BIA, he repressed the persistence of this narrative in the present.



Chief Justice John Marshall. Courtesy AAS.

In *Johnson v. M'Intosh,* however, this narrative remains quite explicit and so it is only by the continuing noninspection of this foundation of federal Indian law by the majority (in Congress and hence of the voters in the U.S.) that the edifice of federal Indian law remains uncondemned. Public and official ignorance and indifference, as well as bureaucratic inertia, are the principal props for the colonial structure of Indian country.

Perhaps the principal irony in *Johnson* is that in a case that has determined

the status of Indian land and sovereignty from 1823 to the present, there were no Indian parties to the suit, which was brought by the Anglo-American heirs of one of the parties to a land sale consummated in 1775 between the Piankeshaw Indians and a group of British investors in what would become after the Revolutionary War the state of Illinois (21 U.S. 543, 555). As the facts of the case reveal, this land was taken militarily from the British by the state of Virginia in 1778 and incorporated as "the county of Illinois," which in 1783 at the conclusion of the Revolution Virginia ceded to the United States (558-59). Then in 1818, the U.S sold 11,560 acres of this land in what was by then the state of Illinois to William M'Intosh, a citizen of the state (560). This sale provoked the suit by the lessee of Joshua Johnson and Thomas J. Graham, heirs of Thomas Johnson, one of the original purchasers of the Piankeshaw lands, and citizens of Maryland (561). The suit came to the Supreme Court on a writ of error from the District Court of Illinois brought by the plaintiff. The Supreme Court confirmed the verdict of the lower court in favor of the defendant, M'Intosh.

At stake in the suit was the status of Indian title to Indian lands, whether, that is, Indian title to the lands Indians inhabited superceded U.S. title to those same lands; and therefore, whether a sale of those lands by an Indian tribe to private individuals was legal. The Court found that such a sale was not legal, precisely because, in the opinion of the Court, the U.S. held absolute title to Indian lands. The principal problem in interpreting this case from Marshall's opinion to the present has been that all of its commentators have assumed the naturalness or universality of the terms of Western property law, the terms of *title,* under which the case was argued and decided in favor of the federal government's right to the title of Indian lands. This assumption is explicit in the stated facts of the case, including:

That from time immemorial, and always up to the present time, all the Indian tribes, or nations of North America . . . held their respective lands and territories each in common . . . there being among them ["the individuals of each tribe"] no separate property in the soil; and that their sole method of selling, granting, and conveying their lands, whether to governments or individuals, always has been, from time immemorial, and now is, for certain chiefs of the tribe selling, to represent the whole tribe in every part of the transaction; to make the contract, and execute the deed, on behalf of the whole tribe; to receive for it the consideration, whether in money or commodities, or both; and finally, to divide such consideration among the individuals of the tribe . . . (549-50)

The fact here stated is a fiction. This legal fiction at once recognizes Indian communities "from time immemorial" as communal landholders but then constructs these communal holdings on the model of a Western corporation or joint-stock company whose "individuals" own equal shares in a common "property," which upon the vote of the stockholders, as communicated to a "chief" (a CEO of sorts), is fungible in terms of "money or commodities, or both."

No one from Marshall to the present has commented on the fiction of this "fact," though nine years later in *Worcester*, arguing for both the sovereignty of Indian tribes and the federal government over and against the states in Indian matters, Marshall would in passing allude to the imposition of Western legal terminology on Indian communities when he noted: "The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense" (31 U.S. at 559-60). In retrospect, this comment, which seems disingenuous in light of the usurpation of Native sovereignty accomplished by the Court in *Johnson* and *Cherokee Nation*, serves to highlight the fact that in order for *Johnson* to be argued in the first place, Indian communal conceptions of land were implicitly translated into the terms of *property* so that the issue of *title* could be raised.

Before *Johnson* ever came to court and in the absence of any indigenous input, Indian lands were translated into property and the Indians given title to those lands, not to recognize Indian sovereignty but, quite the contrary, so that the Court could alienate that title *legally* to the federal government thereby placing Indian sovereignty under U.S. control. Part of the summary of the argument for the defendants in *Johnson* captures succinctly the extent of that control: "Such, then, being the nature of the Indian title to lands, the extent of their right of alienation must depend upon the laws of the dominion under which they live. They are subject to the sovereignty of the United States . . . The statutes of Virginia, and of all the other colonies, and of the United States, treat them as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government" (21 U.S. at 568-69).

The language of "protection and pupilage" used by the defense in *Johnson* to argue against Indian title points to the language that Marshall would employ eight years later in *Cherokee Nation* to compromise Indian sovereignty by defining Indian "nations," or "tribes," as "domestic dependent nations." Following the logic of his opinion in *Johnson,* Marshall, in *Cherokee Nation,*reasoned of Indian tribes: "They occupy a territory to which we assert a title independent of their will . . . Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian" (30 U.S. at 17). Marshall's oxymoronic phrase "domestic dependent nations" (for by definition a *nation* is at once both foreign and independent) allowed the Court both to recognize that the Cherokees were "a distinct political society, separated from others, capable of managing its own affairs and governing itself" (16) and deny that fact at the same time. Further, we recognize in Marshall's metaphor of the Indian/government relation as one of "a ward to his guardian" the basis for the "trust" relationship discussed earlier. While all Indians were granted citizenship by an act of Congress in 1924, Indians living on reservations as well as all tribally enrolled Indians continued to be dominated by the colonial relationship of "trust."

Among other issues, *Johnson* points to the culturally relative status of the term *legal.* Nowhere is this clearer than in the narrative Marshall constructs to validate his opinion in favor of U.S. title to Indian lands. This narrative is the European narrative of the conquest of the Americas from which Marshall derives the legal "doctrine of discovery":

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency [*sic*]. 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 (21 U.S. at 572-73).

Perhaps Marshall inflects this expansive and expansionist narrative with a bit of irony in noting what he appears to recognize as the ethnocentric perspective of the imperial powers of the Old World who "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." The implicit stereotype here is the one that Columbus records early in his journals, before he begins to be met with indigenous resistance: innocent savages willingly exchanging all their wealth for the blessings of Christian Europe. But if Marshall is to a certain extent being ironic in order to suggest his historical sophistication vis-à-vis 1492, he nevertheless ultimately justifies the taking of Indian land with the same stereotypical opposition between the savage and the civilized, hunters and cultivators, that mapped the ideological terrain for Columbus: "[T]ribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence 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).

The characterization ends with praise that damns, and it is also in bad faith because Marshall had available to him an abundance of published ethnographic material that contradicted the stereotype of savage Indian hunters (not to mention its implied counterpart: the stereotype of Europeans as peaceful farmers who did not hunt). Indeed, in the "history of America, from its

discovery to the present day" (574), a history focused from the Anglo-American perspective that Marshall constructs as the context and rationale for his opinion in *Johnson*, he references the first two permanent British colonies in North America, those at Jamestown (1607) and Plymouth (1620), though in keeping with his savaging of the Indians he doesn't mention what was paramount in the historical narratives written by the first colonists: these colonies couldn't have survived without Indian agriculture, principally corn. Marshall's narrative of Anglo-American conquest of North America necessarily mentions the French and Indian, or Seven Years', War (1756-63), which effectively established British control of the continent and thus set the stage for the American Revolution. This narrative mentions as well the alliance of the British with the Iroquois Confederacy but it does not mention the crucial part this alliance played in assuring British victory. More importantly, in terms of propping up his figure of the Indian as an ungovernable savage, Marshall does not reflect in his narrative on the way the very act of *alliance* contradicts the stereotype, just as indigenous economies from the agricultural Pueblos in the Southwest to the mixed agricultural/hunting/fishing societies of the Northeast contradicted his stereotype of an Indian "wilderness."

IV. Sovereignty

Ironically, within eight years of *Johnson,* Marshall would have the example of the Cherokee Nation before him in court, which would appear in the person of its attorneys, William Wirt (the former attorney general) and Thomas Sergeant (a renown legal scholar), to petition the Court to recognize it, based on its treaty relationship with the United States, as a fully sovereign foreign nation, so that as a foreign nation it could bring suit against the state of Georgia in the Court for violating its treaties with the United States. The Cherokees, who had in 1821 incorporated a written language developed in a syllabary by the Cherokee Sequoyah, adopted a written constitution in 1827 modeled on that of the U.S., and established in 1828 the first Indian newspaper in the U.S. (the *Cherokee Phoenix* circulated in a bilingual Cherokee and English edition), contradicted in the most obvious ways Marshall's stereotype of Indians as unregenerate savages, as did the other four of the so-called "Five Civilized Tribes," (Creeks, Choctaws, Chickasaws, Seminoles) who were effectively dispossessed of their lands in the southeast by the Indian Removal Act of 1830 and forced between 1831 and 1838 out to "Indian territory" (present-day Oklahoma) on the Trail of Tears, for which we find Kevin Gover apologizing one hundred and seventy years later.

> Given the history of U.S. Indian relations, the presumption of congressional good faith and the coincidence of Indian and federal interests in these matters is, to say the least, ironic.

It is within Marshall's imperial narrative in *Johnson*, a narrative loaded with

the ideological charge of racial stereotyping, that Indian lands were silently translated into property, and that "the rights of the original inhabitants . . . were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the fundamental principle, that discovery gave exclusive title to those who made it" (574).

The language here may be deceiving because it only seems to restrict Indian "power to dispose of the soil at their own will." But, as I have emphasized, Indian tribes had no interest in selling their land outside of a context of conquest, that is, of forced sales called *treaties.* And within this context of conquest, for which "discovery" is a euphemism, the forced translation of Indian land into property, accompanied by the forced transfer of "exclusive title" to the conquerors, gave to the conquerors ultimate control over that land in all respects, as the history of federal Indian law demonstrates. The legal scholar Robert A. Williams Jr. catches the force of *Johnson* at the time it was enacted, when he notes: "While the tasks of conquest and colonization had not yet been fully actualized on the entire American continent, the original legal rules and principles of federal Indian law set down by Marshall in *Johnson v. McIntosh* and its discourse of conquest ensured that future acts of genocide would proceed on a rationalized, legal basis." The fundamental decision in *Johnson* (the transfer of title of all Indian land to the federal government), which is the cornerstone of the colonial edifice of federal Indian law, remains intact, and thus so does the "legal" ground of this decision: the imperial "doctrine of discovery." The United States continues to celebrate this doctrine every Columbus Day, a day of mourning and a continued call to resistance in Native American communities.

Marshall's rulings in *Johnson* and *Cherokee Nation* helped solidify the geopolitical integrity of the expanding and expansionist United States as a nation during the age of Manifest Destiny. His ruling in *Cherokee Nation*—that the Cherokees were not a foreign nation thus barring them from suing Georgia for their treaty rights before the Court—avoided as well a potential constitutional crisis: a confrontation between the Court and both the president and the state of Georgia. Andrew Jackson had refused the Cherokees' request for U.S. troops to enforce their treaty rights (as a foreign nation) against Georgia, which was invading their lands and usurping their laws. And Georgia itself refused to appear before the Court in this case, as it would in *Worcester*, asserting that it was solely a state matter. But the Court's expedient politics in *Cherokee Nation* were paid for by the Cherokees and ultimately all Indian communities. For the Marshall decision rationalized the breaking of Native treaty rights and thus paved the way for "removal," or what Gover refers to rightly as "ethnic cleansing," as the centerpiece of federal Indian policy. This policy of ethnic cleansing did not begin nor end with the infamous Trail of Tears, on which approximately four thousand Cherokees died

from both murder and murderous exposure in 1838.

In the same month (March 1831) the Court's decision in *Cherokee Nation* was being handed down, the state of Georgia, in violation of Cherokee sovereignty guaranteed by treaty, arrested two missionaries, Samuel Worcester and Elizur Butler, who were living and working with the Cherokees on Cherokee lands at Cherokee behest. The two had broken a Georgia law interdicting "white persons" from "residing within the limits of the Cherokee nation without a license" (31 U.S. at 528). That law itself, the two stated in their representation by Wirt and Sergeant, violated both the Cherokees' sovereignty over their internal affairs and U.S. sovereignty over the Cherokees. Reading *Worcester v. Georgia,* the final case in the "Marshall Trilogy,"which was decided only a year after *Cherokee Nation* and is based in the same set of legal issues regarding Indian sovereignty, is to experience the schizophrenia, the constant double takes, induced by an analysis of federal Indian law. For in it, Marshall echoes the arguments presented in the dissenting opinion of Justice Thompson in *Cherokee Nation* (arguments reasoning that the Cherokees are a fully sovereign, foreign nation) in order to reach the following conclusion: "The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress [*sic*]. The whole intercourse between the United States and this nation, is, by our constitution [*sic*] and laws, vested in the government of the United States" (561).

Marshall's reasoning in *Worcester*, if not his opinion,contradicts both his reasoning in *Johnson*, based on "the doctrine of discovery," which in *Worcester* he is at pains to qualify in the most instrumental of political terms, and in *Cherokee Nation.* But as in the Freudian model of the psyche, such contradictions remain permanently in the unconscious so that consciousness, in this case the law, can appear coherent. While the language of Marshall's opinion in *Worcester* seems inconsistent with the infantilizing language in *Cherokee Nation* that describes the Cherokees (and by extension all Indian communities) as the "ward" or "pupil" of the federal government, this language is nevertheless careful not to limit the federal government's powers in Indian affairs but only to assert the limits of the power of the states in relation to both tribal autonomy and the authority of the federal government. *Worcester* makes clear that federal authority is preeminent in Indian affairs and that it is vested constitutionally in the first instance in Congress. Far from rocking the foundation of the colonial edifice of federal Indian law, *Worcester* puts the capstone on it by making clear what this law will come to define as the "plenary power" of Congress in governing Indian country, a power if not absolute then virtually absolute in its force, though, it must be emphasized, a power that Indian communities have historically resisted and continue to resist both in and outside the courts.

This "plenary power" allowed Congress in 1871 to pass a law prohibiting any

further treaty making with Indian tribes, though treaties signed before this time retain the force of law and typically form the basis for ongoing tribal land claims. And in *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903), the Supreme Court ruled that the plenary power of Congress in Indian affairs allowed it "to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indian themselves, that it should do so" (566).

Given the history of U.S. Indian relations, the presumption of congressional good faith and the coincidence of Indian and federal interests in these matters is, to say the least, ironic. While subsequent Supreme Court decisions have qualified to some extent the congressional power to abrogate treaties—Congress must compensate tribes monetarily for land taken that was reserved by treaty, see *United States v. Shoshone Tribe of Indians,* 304 U.S. 111 (1938) and *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980)—"the holding [in *Lone Wolf*] remains a valid precedent," according to Getches, Wilkinson, and Williams in *Cases and Materials on Federal Indian Law* (4th ed., St. Paul, Minn., 2000), one of the definitive textbooks in federal Indian law today.

Former BIA head Kevin Gover might wish that "in this era of self-determination, . . . the Bureau of Indian Affairs is at long last serving as an advocate for Indian people in an atmosphere of mutual respect," but the continuing colonialism of federal Indian law subverts such advocacy at its source.

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