"THE CENTER CANNOT HOLD": NATION AND NARRATION IN AMERICAN INDIAN LAW

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> *Then she began without bothering with onceuponatime, and whether it was all true or false he could see the fierce energy that was going into the telling, . . . this memory jumbled rag-bag of material was in fact the very heart of her, her self-portrait . . . . So that it was not possible to distinguish memories from wishes, guilty reconstructions from confessional truths, because even on her deathbed [she] did not know how to look her history in the eye.*
>
> – Salman Rushdie, quoted by Homi Bhabha[1]

I. Introduction[2]

Indigenous nations figure in America's constitutional blind spot. This blindness is a willful one. The so-called "Indian problem" has vexed America's mythology since the country's inception,[3] dampening the narrative of democracy's "big bang."[4] The Constitution is conspicuously

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First place winner, 2021-2022 *American Indian Law Review* National Writing Competition.

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1. Homi K. Bhabha, *DissemiNation: Time, Narrative, and the Origins of the Modern Nation*, *in* NATION AND NARRATION 291, 318 (Homi K. Bhabha ed., 1990) (quoting SALMAN RUSHDIE, THE SATANIC VERSES 145 (1988)).

2. A note on terminology: This article uses the term "American Indian law" to refer to the body of United States laws that define and exemplify the unique political status of Indigenous peoples in the contiguous United States. The author acknowledges that in jurisdictions such as Canada, the word "Indian" is widely regarded as an outdated colonial term in ordinary usage. Accordingly, this article favors the term "Indigenous" where it is not necessary to employ specific legal terminology. *See* GREGORY YOUNGING, ELEMENTS OF INDIGENOUS STYLE 51–52, 56–57, 64 (2018).

3. *See, e.g.*, Nelson A. Miles, *The Indian Problem*, 128 N. AM. REV. 304, 304 (1879) ("Strange as it may appear, it is nevertheless a fact that, after nearly four hundred years of conflict between the European and American race for supremacy on this continent, . . . we have still presented the question, What shall be done with the Indians?").

4. Joe Amarante, *Yale Expert Likens Constitution to the Big Bang*, NEW HAVEN REG. (May 5, 2013), https://www.nhregister.com/connecticut/article/Yale-expert-likens-Constitution-to-the-big-bang-11417038.php.

silent on Indigenous nations' relationship to "We the People," leaving this problem unspoken and unsolved. Through omission, America's constitution charts a course for writing Indigenous peoples out of the country's history.

But erasure, it turns out, is not a simple enterprise. Despite Indigenous peoples' faint constitutional footprint—or, perhaps, because of it—their subsistence has long demanded the judiciary's attention. Courts have become sites of narrative contest and conquest, as judges struggle to negotiate the uneasy relationship between states, the federal government, and Indigenous nations. Across decisions, Indigenous peoples are chimeric: their characterizations range from "fierce savages"[5] to wards of the federal government;[6] from "domestic dependent nations"[7] to "distinct political societ[ies]."[8] The judicial gaze is unable to settle centrally on the Indigenous subject, who flits in and out of focus between and within decisions.

Like the Indigenous subject, America's "intricate web of judicially made Indian law" is fraught with contradictions.[9] It has been described by judges and scholars as "anomalous,"[10] "complex,"[11] "confus[ing],"[12] "manipulative,"[13] "murky,"[14] "at odds with itself,"[15] and "schizophrenic."[16] But the challenging nature of American Indian law is no license to dismiss it as incoherent. Explaining federal Indian law away as sui generis relegates the doctrine into a "tiny backwater" that, like its people, abides at the margins of America's constitutional consciousness.[17]

American Indian law should be brought to the foreground. As Maggie Blackhawk urges, American Indian law can teach us broader public law

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5. .Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823).
6. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 13 (1831).
7. *Id.* at 17.
8. *Id.* at 12.
9. *See, e.g.,* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).
10. United States v. Kagama, 118 U.S. 375, 381 (1886).
11. *Id.*
12. United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).
13. Richard B. Lillich, *Sovereignty and Humanity: Can They Converge?*, *in* THE SPIRIT OF UPPSALA 406, 413 (Atle Grahl-Madsen & Jiri Toman eds., 2019).
14. Philip P. Frickey, *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973, 1973 (1996) (reviewing FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE (1995)).
15. *Lara*, 541 U.S. at 225 (Thomas, J., concurring).
16. *Id.* at 219.
17. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law,* 107 HARV. L. REV 381, 383 (1993) [hereinafter Frickey, *Marshalling Past and Present*]; *see also* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1794 (2019).

"lessons about how to distribute and limit government power."[18] This Article develops another lesson for inclusion in Blackhawk's public law curriculum: a unit on literature. American Indian law is a powerful illustration of the potency of narrative and rhetoric in judicial decision-making. A judge's turn of phrase dictates outcomes: from elevating a treaty to a "promise," to recasting sovereignty as delegated authority. Rhetoric can reduce Indigenous peoples to a racist caricature in the mythology of America's founding; it can also restore their status as sovereign entities that command respect. These rhetorical choices, in turn, map onto a broader cultural project: plotting the narrative of America as a nation.

This Article embarks on a reading of American Indian law as literature. This Article intends to show how the doctrine's unsteady, extra-constitutional foundations rest on constructivist narratives complete with plot, trope, and character. Within these stories, Indigenous peoples serve as the object—but rarely the subject—of judicial decision. This case study in literary analysis reveals broader truths about our public law system: namely, the power of rhetoric in dictating outcomes; the instrumentality of narratives in both legitimating and dismantling colonialism; and the central role of stories in constituting and re-constituting the identity of "We the People."

This Article proceeds in four parts. Part one canvasses some influential theories in the law and literature field. Part two charts the narratives of domination and resistance that play out in the "Marshall Trilogy," the three founding cases of American Indian law doctrine. Part three examines the instability of judicial rhetoric in *United States v. Lara* (2004).[19] Part four considers narratives of redemption in *McGirt v. Oklahoma* (2020).[20]

If America has been nursing a blind spot, these pages offer both a diagnosis and prescription. American Indian law represents a pathology of the legal imagination. This doctrine is not comprised of statutes, but stories. Through devices of character and rhetoric, judges have deployed narratives to justify the dispossession of Indigenous lands and to shore up the identity of the American people. But these stories, which rely upon a misremembering of history, have left the law unstable. Across cases and time, the pliant narratives that comprise American Indian law have been handily bent and broken. The original sin of Indigenous erasure continues to destabilize this doctrine today. This is an attempt to look America's history in the eye.

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18. Blackhawk, *supra* note 17, at 1793.
19. *Lara*, 541 U.S. 193.
20. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

II. Law as Literature: Narrative, Rhetoric, and the Legal Imagination

Before settling into a comfortable armchair with a copy of the Marshall Trilogy, it is important to cover some theoretical concepts. What does it mean to read American Indian law as literature? The "law as literature" movement employs theories of literary criticism and interpretation to examine the writing, thought, and social practice that constitute legal systems.[21] James Boyd White's landmark text *The Legal Imagination*[22] is widely credited with catalyzing this field of interdisciplinary study.[23] White sought to "develop a way of thinking about the activities of mind and imagination that lie at the heart of law."[24] He urges an understanding of the law as a literary, rhetorical, and ethical enterprise. Viewed in this way, the language of law holds immense power. As White asks, "Might it not be suggested that the central act of the legal mind . . . is [the] conversion of the raw material of life . . . into a story that will claim to tell the truth in legal terms?"[25]

White sees law as a rhetorical activity of cultural construction. The study of "constitutive rhetoric . . . is the study of the ways we constitute ourselves as individuals, as communities, and as cultures, whenever we speak."[26] It is "a way of telling a story about what happened in the world and claiming a meaning for it by writing an ending to it."[27] Competing stories are perpetually reaffirmed or rejected in a social process of signification.[28]

American Indian law is a case-study in the legal imagination. The doctrine was created out of whole cloth, spun from the fiber of constitutive rhetoric. Uninhibited by precedent or principle, the inaugural cases read as a form of narrative address. This Article examines the literary elements of American Indian law—such as plot, character, and point of view—to reveal the doctrine's insubstantiality. The founding decisions are a jurisprudential

21. GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 3 (2000).

22. JAMES BOYD WHITE, THE LEGAL IMAGINATION (1973) [hereinafter WHITE, LEGAL IMAGINATION].

23. Elizabeth S. Anker & Bernadette Meyler, *Introduction to* NEW DIRECTIONS IN LAW AND LITERATURE 1, 6, 24, 30 (Elizabeth S. Anker & Bernadette Meyler eds., 2017).

24. James Boyd White, *The Cultural Background of* The Legal Imagination, *in* TEACHING LAW AND LITERATURE 29, 36 (Austin Sarat, Cathrine O. Frank & Matthew Anderson eds., 2011).

25. WHITE, LEGAL IMAGINATION, *supra* note 22, at 859.

26. JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 35 (1985) [hereinafter WHITE, HERACLES' BOW].

27. *Id.* at 36.

28. *Id.* at 36–37.

vehicle for cultural construction; these narrative recollections of the national past are revised and retold across cases and time.

But to what end? If we accept that law is a rhetorical enterprise, Robert Cover deepens our understanding of the legal imagination by providing an account of the motives that drive it. Cover explains that "[w]e inhabit a *nomos*—a normative universe."[29] Cover conceives of the law as a link between the "world that is" and the "world that might be."[30] Cover writes, "Law may be viewed as . . . a bridge linking a concept of reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative."[31] Like writers, lawyers and judges use narratives to create new worlds.

Despite this creative power, Cover forcefully argues that judges are fundamentally different from poets. Judges do a violence through their interpretations that poets do not share: "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[32] In creating legal meaning, judges affirm some normative worlds at the rejection of others. And unlike the poet, a judge's interpretive act is accompanied by state-sanctioned force. Judges, in short, do not only create worlds; they destroy them.[33]

Not all narratives are extinguished upon judicial rejection, however. Some divergent understandings of the law are so deeply held as to withstand the power of the state. These texts of resistance are a form of "redemptive constitutionalism" —a sharply different vision of the social order that must often endure violence for survival.[34] As Cover notes, "One great strength and one great dilemma of the American constitutional order is the multiplicity of the legal meanings created out of the exiled narratives and the divergent social bases for their use."[35] The project of interpreting legal meaning is ongoing; texts of resistance test judicial commitments and sometimes compel the constitution of new claimed realities.

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29. Robert M. Cover, *The Supreme Court, 1982 Term –Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4 (1983) [hereinafter Cover, Nomos *and Narrative*].

30. *Id.* at 10.

31. *Id.* at 9.

32. Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) [hereinafter Cover, *Violence and the Word*].

33. *See id.* at 1602.

34. Cover, Nomos *and Narrative*, *supra* note 29, at 34.

35. *Id.* at 19.

Philosophical work on the imagination offers a framework for categorizing these legal worlds. A recent article by Emilia Mickiewicz draws upon philosophers Kant and Ricoeur to present a theory of pathologies of the legal imagination.[36] Kant drew a distinction between the "productive" and "reproductive" imagination: "Whereas the reproductive imagination promotes continuity in the existing law, the productive imagination empowers judges to reshape it in creative ways."[37] Referencing the work of Ricoeur, Mickiewicz argues that the imagination can operate in "pathological" ways that are "characterized by escapist tendencies."[38] Pathologies of imagination often manifest themselves as "a blind commitment to a non-existent reality," which cannot be fully realized within the horizon of actuality.[39] These pathologies of the legal imagination spawn crises of judicial legitimacy by stretching the letter of the law beyond its factual basis.[40] Where a court-ordained interpretation diverges too sharply from observed reality, the court risks forfeiting public belief in the court's claim to truth.

Taken together, the works of White, Cover, Kant, and Ricoeur provide a framework to approach the literary analysis of legal text. White reveals how the legal imagination finds cultural expression through constitutive rhetoric. Cover charts the motives that drive this rhetorical enterprise, describing law as a "bridge" between reality and an "imagined alternative."[41] By accepting certain narrative imaginings at the rejection of others, the court occupies a privileged position in the interpretation (and creation) of new worlds. This act of interpretation becomes pathological where a judge's adopted legal world is incongruous with reality.

The legal imagination has important implications for judicial legitimacy. Judges occupy the gap between the actual and the imaginary. Judges constantly affirm or disturb the imagined realities of others by authoring their own imagined state of affairs. Judges can help smooth over legal incongruities and preserve existing social practices through narrative.[42] However, when the gulf between the actual and the imaginary becomes too

36. Emilia Mickiewicz, *Pathologies of Imagination and Legitimacy of Judicial Decision-Making*, *in* LAW AND IMAGINATION IN TROUBLED TIMES 75 (Richard Mullender et al. eds., 2020).

37. *Id.* at 75.

38. *Id.* at 76.

39. *Id.* at 76, 81.

40. *Id.* at 82.

41. Cover, Nomos *and Narrative*, *supra* note 29, at 19.

42. *See* Mickiewicz, *supra* note 36, at 78.

great, these narratives are stretched to the point of transparency. Powerful appeals to national identity become paper-thin narratives too flimsy to sustain public confidence in an imagined worldview. In these cases, the court's inability to sustain public belief can call the court's competence into question.[43] Just as narratives have an immense power to shore up judicial legitimacy, narratives also pose legitimacy's gravest threat.

American Indian law brings these theories to life. The Marshall Trilogy is a manifestation of the pathological legal imagination. In his attempt to define America as a nation, Chief Justice Marshall spins an irresistible narrative of conquest and dependency. This narrative, which aims to justify the colonial dispossession of Indigenous lands, is incongruent with the continent's history. Situated at the end-range of the court's narrative reach, this unsteady legal foundation haunts the doctrine to this day.

III. Reading the Marshall Trilogy as Literature

Ronald Dworkin once likened the act of judicial decision-making to writing a "chain novel."[44] He envisioned judges as a group of authors, each of whom is responsible for a chapter of a collective book. The writers, he imagined, would draw lots: "The lowest number writes the opening chapter . . . which he or she then sends to the next number who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one."[45]

If American Indian law is a chain-novel, it is natural to start with the first chapter (or, more accurately, the first three). The Marshall Trilogy is a set of U.S. Supreme Court decisions of the early nineteenth century that lays the foundations of the doctrine of federal Indian law. The trilogy consists of three cases: *Johnson v. M'Intosh*,[46] *Cherokee Nation v. Georgia*,[47] and *Worcester v. Georgia*.[48] Each decision is penned by our chain-novel's first author: Chief Justice Marshall.

Or so it would appear. Like many aspects of American Indian law, the phrase "Marshall Trilogy" glosses over complexities with a reductive label

43. *Id.* at 75 (citing MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 130 (A.M. Henderson & Talcott Parsons trans., 1964) (1947) (defining a legitimate decision as one that narrows the gap between the claim advanced by the court and the public's belief in that claim)).

44. Ronald Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179, 195 (1982).

45. *Id.* at 192.

46. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

47. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

48. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

that, over time, tends to overtake the original subject. Contrary to the simplified account in most textbooks, the trilogy was not solely authored by Chief Justice Marshall. The dissent of a separate judge, later picked up by the Chief Justice, thickened the Court's conception of sovereignty and played an influential role in developing a theory of Indigenous self-governance. This productive interplay within the trilogy foreshadows narrative contests for meaning that have played out across centuries and into the present.

A. Johnson v. M'Intosh *(1823)*

Johnson v. M'Intosh is a remarkable narrative moment in American history. After centuries of contact between Indigenous peoples and Europeans; after a host of treaties recognizing and reserving Indigenous lands; after a revolutionary war and the founding of America's Constitution; the U.S. Supreme Court, in 1823, gave its first authoritative legal articulation of Indigenous peoples' property interest in their territory.[49] Chief Justice Marshall, writing for a unanimous court, relied heavily on narrative; his judgment reads as a story of colonial discovery, inheritance, and manifest destiny.[50] With the stroke of a pen, he relegates Indigenous property interests to a right of occupancy only, and formally adopts the doctrines of discovery and conquest to rationalize the United States' superior claim to title. A product of the legal imagination that is both vibrant and devastating, Chief Justice Marshall's decision is well-suited for literary analysis of character, audience, and point of view. These artistic choices reveal insights about authorial intent, and the motives that drove the establishment of American Indian legal doctrine.

The cast of characters in *Johnson v. M'Intosh* might strike readers as peculiar. Although *Johnson v. M'Intosh* is regarded as the inaugural decision in American Indian law doctrine, there are hardly any Indigenous peoples to be found within it.[51] The case itself involved a title dispute between two non-Indigenous parties: the plaintiffs had purchased land from the Illinois and Piankeshaw peoples, whereas the defendant purchased the same land from Congress decades later, leading to a dispute over title.[52] The Court held that Indigenous peoples did not have the authority to alienate land to any entity other than the U.S. government, thereby invalidating the plaintiff's title

49. *Johnson*, 21 U.S. at 585.

50. *See generally id.* at 572–74.

51. Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada and New Zealand*, 34 SEATTLE U. L. REV. 507 (2011). *See generally Johnson*, 21 U.S. at 572–74.

52. *Johnson*, 21 U.S. at 555, 571–72.

claim.[53] The Court reached this momentous conclusion without any argument from the Illinois or Piankeshaw peoples, or for that matter, any Indigenous community at all.[54]

The absence of Indigenous voices during argument is mirrored in the text of the decision itself. Chief Justice Marshall's decision is written through the perspective of the colonizer. His analysis reads as a story of white discovery and domination. It begins:

> 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.[55]

Employing a limited omniscient point of view, Justice Marshall confines his perspective to the colonizer. The "Indian" does not exist in the text until he is "discovered" by Europeans. The very use of the word "discovery" evinces Indigenous erasure: "discovery" is "the action of . . . becoming aware of something for the first time; the action of being the first to find (a place)."[56] Justice Marshall's use of this term denies Indigenous peoples' standing as beholders of the land on which they live. The doctrine of discovery, introduced as a necessary principle that gives the discoverer title against all other Europeans, silently slides from a European rule in one paragraph to a principle of "universal recognition" in the next.[57] In the wake of this terminological expansion, the perspectives of Indigenous peoples are entirely disregarded.

This disregard is far from a thoughtless omission; it is the product of an impassioned ignorance. From the opinion's opening lines, Justice Marshall papers over history with rhetoric. Indigenous peoples are not the first nations of a vast continent; they are merely "inhabitants," incidental fixtures on land

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53. *Id.* at 604–05.

54. Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C.L. REV. 637, 645 (1999).

55. *Johnson*, 21 U.S. at 572–73.

56. *Discovery*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/54015?redirectedFrom=discovery#eid (last visited Feb. 15, 2023).

57. *Johnson*, 21 U.S. at 574.

offering "ample field to the ambition and enterprise of all."[58] That Indigenous inhabitants are excluded from this munificent "all" is axiomatic. Unlike the "great nations of Europe," who propel the narrative with their commanding force, Indigenous peoples are textually inert.[59] Indigenous peoples are introduced obliquely, through reference to their lowly character and religion.[60] This crafted inferiority empowers the court to assert the settler's superior claim to "discovered" land. The same theme of inferiority also underpins the more capacious doctrine of conquest, which places Indigenous peoples squarely under the jurisdiction of the conqueror.[61] In these opening lines, Indigenous peoples' narrative debut is not merely a stylistic curiosity; it prefigures their doctrinal fate.

Justice Marshall's narrative strategy transforms Indigenous peoples from the subject (discoverer) to object (the discovered). He draws "no distinction . . . between vacant lands and lands occupied by the Indians."[62] Indigenous peoples are not portrayed as agents, but as passive inferiors whose rights are necessarily diminished by the superior entitlements of the colonizer. Justice Marshall writes:

> In the establishment of [the doctrine of discovery], the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. . . . [T]heir 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 original fundamental principle, that discovery gave exclusive title to those who made it.[63]

In this passage, Indigenous peoples are described indirectly through reference to their rights. These rights are "necessarily" altered by the colonizer's dominion. Through strategies of syntax, Indigenous peoples are always acted *upon,* figuring as objects, rather than subjects, in Marshall's rendition of history.

As these passages show, Justice Marshall's decision relies not upon reason, but rhetoric. He offers a suite of conclusory statements that are declared, rather than justified. The doctrine of discovery exists because

58. *Id.* at 573–74.
59. *Id.* at 572.
60. *Id.* at 573.
61. *See, e.g.*, *id.* at 589–90.
62. *Id.* at 596.
63. *Id.* at 574.

Europeans have always said it is so; Indigenous rights are diminished because it is necessary.[64] To prop up these bald assertions, Justice Marshall describes his conclusion as irresistible, universal, and beyond reproach.[65] The doctrine of discovery "cannot be drawn into question," has "always been maintained," and "has never been doubted."[66] This "original fundamental principle" has been "universal[ly] recogni[zed];"[67] consequently, the rights of Indigenous peoples are "necessarily diminished" and "necessarily . . . impaired."[68] Rhetoric serves to present the Court's holding as inevitable as a matter of fact and unimpeachable as a matter of law.

The inexorable force of law creates a curious sense of narrative passivity. On *Johnson's* account, the Illinois and Piankeshaw peoples were not dispossessed of their ancestral lands by European settlers, politicians, or judges—but instead the "original fundamental principle" of the doctrine of discovery.[69] It is not man but "the Law" that denies Indigenous peoples a claim to the land upon which they live. There is a pathos in this construction; a suggestion that the court itself would be lawless to ignore the "great and broad rule" of discovery and conquest.[70] Through use of passive voice, the judicial minds behind the *Johnson* decision vanish—it is not man, but the Law, that commands its result.

Justice Marshall's narrative strategy can be understood as an example of "retrospective prophecy." As described by law and literature scholar Peter Brooks, retrospective prophecy is a form of narration that frames the present as an inevitable outcome of the past:

> [T]he notion of "retrospective prophecy" perfectly characterizes the constitutional narratives written by the Supreme Court, and perhaps indeed most legal narrative in general. It is a prophetic narrative cast in the backward mode, implicitly arguing that the

64. *See id.* at 572–74 ("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. . . . 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 . . . . [B]ut 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 original fundamental principle, that discovery gave exclusive title to those who made it.").

65. *See id.* at 572, 574, 585.

66. *See id.* at 572, 585.

67. *Id.* at 574.

68. *Id.*

69. *Id.*

70. *See id.* at 587.

> ruling in the case at hand is the fulfillment of what was called for at the beginning—somewhat in the manner that medieval Christian theologians argued that the Gospels offered a fulfillment of the prophetic narratives of the Hebrew Bible, as figure and fulfillment. . . . Past history is seen as realized, as fulfilled, in the present. It is as if the past were pregnant with the present, waiting to be delivered of the wisdom which the Court majestically presents in its ruling.[71]

In other words, retrospective prophecy is where the present is portrayed as realizing the past's latent meaning. Although the author appears to start at the beginning, they are, in reality, working backwards from their ends. In an act of narrative construction, the present "rewrites the past" to justify the current state of affairs.

This theory of retrospective prophecy reveals Justice Marshall's narrative motivations. In his own words, Indigenous peoples' limited right of occupancy was necessary to explain "the actual state of things."[72] Despite its fabricated quality, Justice Marshall avers, the doctrines of discovery and conquest are firmly rooted in America's history:

> 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 . . . .[73]

This passage reads as a form of confession and avoidance. The court acknowledges the "extravagant . . . pretension" of the doctrine of discovery and conquest, all the while redoubling the doctrine's status as law of the land.[74] Never does the Court interrogate the origins of such pretense. The Court's role is limited to discovering latent principles embedded in America's history, which are portrayed as incontrovertible truths to justify present circumstances. In the words of Brooks, this retrospective prophecy

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71. Peter Brooks, *"Inevitable Discovery"—Law, Narrative, Retrospectivity*, 15 YALE J.L. & HUMAN. 71, 99 (2003).

72. *Johnson*, 21 U.S. at 591.

73. *Id.* (emphasis added).

74. *Id.* at 591.

acts as "an arche-teleological discourse, one that constantly stresses origins in order to achieve ends."[75]

As the first judicial word on America's origin story, Justice Marshall's retrospective prophecy takes on a mythological quality. As Brooks notes, "The structure of prophecy and fulfillment is probably requisite in any claim to a master narrative that governs societies."[76] The Supreme Court's rendition of America's historical beginnings is not only a vehicle to justify the current social order; it is also an example of constitutive rhetoric. As White notes, "Every time one speaks as a lawyer, one establishes for the moment a character—an ethical identity . . . —for oneself, for one's audience, and for those one talks about, and proposes a relationship among them."[77] Through the act of narrative, Justice Marshall embarks on a remaking of America's identity.

Both the Court and community sensed these high stakes. The case "attracted attention from the watchers of D.C. politics," drawing spectators "though the day . . . was cold."[78] In his written reasons, Justice Marshall notes that he "bestow[ed] on this subject a degree of attention which was more required by the magnitude of the interest in litigation . . . than by its intrinsic difficulty."[79] It is evident that the decision was written with a particular audience in mind: European nations and the American public. Justice Marshall weaves together a historical account of European settlement practices, referring in an unbroken chain to Spain, France, Holland, Britain, New England, New York, Pennsylvania, Maryland, and Virginia.[80] This discussion of the United States' legal inheritance reads as a careful attempt to elevate the colonies on the same plane as their European antecedents, securing America's place as the youngest member in the family of nations.

But this narrative project came at the cost of historical accuracy. In the course of elevating the United States' stature on the international stage, Justice Marshall sketches a perverse caricature of Indigenous peoples. In one of the few passages where Indigenous peoples are not simply mentioned as objects in passing, they are described as

> fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of

75. Brooks, *supra* note 71, at 100.

76. *Id.*

77. WHITE, HERACLES' BOW, *supra* note 26, at 34.

78. Matthew L. M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 630 (2006).

79. *Johnson*, 21 U.S. at 604.

80. *Id.* at 574–86.

> 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.[81]

This characterization is both racist and historically inaccurate. From the point of first contact, Indigenous peoples were largely respected as sovereign nations with formidable military force, who partnered in trade and capably entered into treaties with other countries.[82] But this did not comport with Justice Marshall's theme of American superiority. The purpose of Indigenous peoples was to serve as a character foil—a literary device that employs contrast to highlight the distinctive temperament of the protagonist. The low, uncivilized nature of the Indian placed the United States' superior, refined character into sharp relief.

The distorted image of Marshall's Indian provided a lens through which Americans could regard and reaffirm their racial superiority. Drawing from statutory language, Chief Justice Marshall casts Indigenous peoples as an "inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government."[83] As Elizabeth Bird puts it, "Indians are the quintessential Other, whose role . . . is to be the object of the White, colonialist gaze."[84] The "White man's Indian" functions as a "general category against those beliefs values, or institutions [that White Americans] most cherished in themselves."[85] Justice Marshall's depiction of Indigenous peoples' racial inferiority was a way to reaffirm American's civilized, European qualities.

These narrative techniques—such as foil, caricature, and focalization—constitute an act of "writing the nation." In Homi Bhabha's book, *Nation and Narration*, he describes narratives as a "patriotic speech-act" that is both "pedagogical" and "performative."[86] In a collapse of the present with the past, the nation speaks of itself in a revisionist historical mode: "The people emerge in an uncanny simulacral moment of their 'present' history, as 'a

81. *Id.* at 590.

82. *See* WILCOMB E. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW 41–42 (2d ed. 1971); *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546 (1832).

83. *Johnson*, 21 U.S. at 569.

84. S. Elizabeth Bird, *Introduction: Constructing the Indian, 1830s–1990s*, *in* DRESSING IN FEATHERS: THE CONSTRUCTION OF THE INDIAN IN AMERICAN POPULAR CULTURE 1, 4 (S. Elizabeth Bird ed., 1996).

85. ROBERT F. BERKHOFER, JR., THE WHITE MAN'S INDIAN 27 (1978).

86. Bhabha, *supra* note 1, at 309.

ghostly intimation of simultaneity across homogenous empty time.'"[87] This project, according to Bhabha, necessitates "a strange forgetting of the history of the nation's past: the violence involved in establishing the nation's writ. It is this forgetting, a minus at the origin, that constitutes the *beginning* of the nation's narrative."[88]

Indigenous peoples are part of America's "minus at the origin." In weaving the United States' origin story of racial and cultural superiority, Justice Marshall had to misremember the history and character of Indigenous peoples. They were vibrant communities and sovereign nations with powerful armies and treaty-making authority. These facts are conveniently omitted in Marshall's account of American and Indigenous relations. This erasure is an act of narrative violence, a kind of "death-in-life" to prop up the "'imagined community' of the nation."[89]

But this narrative is not without cracks. Between Justice Marshall's rhetoric of "necessity" and "inevitability," self-conscious flashes of recognition pierce through his reductive mythology. Before summarizing the crux of his holding, he acknowledges the "extravagant . . . pretension of converting the discovery of an inhabited country into conquest."[90] And despite Justice Marshall's affirmations of European sameness, he also tries to distance the United States from its inherited colonialist doctrine. With apologetic undertones, he notes that "we do not mean to engage in the defence of those principles" by which Europeans (not Americans) have "wrested" Indian title from its peoples.[91] He goes on to suggest that Europeans (again, not Americans) "may, we think, find some excuse, if not justification, in the [Indian's] character and habits."[92] This half-hearted attempt at justification, accompanied by meager efforts to hide behind the actions of European antecedents, reveals Justice Marshall's discomfort with his account. These fluctuations in rhetoric foreshadow the return of Bhabha's "minus in the origin," which "antagonizes the implicit power to generalize, to produce the sociological solidity."[93]

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87. *Id.* at 309 (quoting BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 132 (1983)).

88. *Id.* at 310.

89. *Id.* at 315.

90. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591 (1823).

91. *Id.* at 589.

92. *Id*.

93. Bhabha, *supra* note 1, at 306.

B. Cherokee Nation v. Georgia *(1831)*

The first chapter of the Marshall Trilogy employs rhetoric and retrospective prophecy to justify the United States' entitlement to Indigenous lands, while hints of a subaltern narrative play at the decision's edges. If *Johnson v. M'Intosh* is the opening chapter of our chain-novel, *Cherokee Nation* can be considered a variation on a theme. The concepts set out in the previous chapter are amplified, as Justice Marshall expands his caricature through metaphor, and counter-narrative takes a sustained shape in the voice of a dissenting judge.

The case of *Cherokee Nation* arose from a jurisdictional dispute. Georgia claimed it had the authority to enact laws within Cherokee territory.[94] The case was the upshot of two of the federal government's irreconcilable commitments: the United States had promised by treaty to protect the Cherokee's territory; however, the federal government had also pledged to Georgia that it would extinguish Indian title to lands within the state's borders "as soon as it could be done 'peaceably, and on reasonable terms.'"[95] Georgia, taking matters into its own hands, enacted laws which "declar[ed] Cherokee lands to be part of Georgia's territory" and annulled Cherokee Nation's laws.[96] The Cherokee Nation applied to the U.S. Supreme Court for an injunction to restrain Georgia from enforcing its laws within Cherokee territory.[97]

The case of *Cherokee Nation* differs from the first installment of the trilogy in several respects. First, unlike *Johnson*, *Cherokee Nation* is a case involving Indigenous litigants.[98] In fact, contrary to *Johnson*, Indigenous litigants were the *only* participants at the hearing; "Georgia did not appear . . . on the [basis] that as . . . sovereign it could not be sued without its consent."[99] For the first time in the trilogy, the Court received an Indigenous perspective on the matter under dispute.

Second, the *Cherokee Nation* decision differs from its predecessor in the form of the Court's opinion. Unlike *Johnson*, which was a unanimous decision, the Court in *Cherokee Nation* fractured. Chief Justice Marshall,

94. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

95. Blackhawk, *supra* note 18, at 1820 (quoting ROBERT ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 50 (3d ed. 2015)).

96. *Id.*

97. *Cherokee Nation*, 30 U.S. at 1, 15.

98. Jonas Bens, *When the Cherokee Became Indigenous:* Cherokee Nation v. Georgia *and Its Paradoxical Legacies,* 65 ETHNOHISTORY 247, 249 (2018).

99. Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 949 (2010).

wrote the majority opinion;[100] two justices wrote separate concurrences that were hostile to the Cherokee Nation's interests;[101] and Justice Thompson, joined with Justice Story, dissented.[102] The authoritative history of conquest set forth in *Johnson* was not recited in unison, with four opinions sketching different accounts of the Cherokee Nation's statehood and dependence.

This case turned on the preliminary question of jurisdiction. At issue was whether the Cherokee delegation qualified as a "foreign state" under Article III, Section 2 of the Constitution.[103] Despite the technicality of this jurisdictional issue, each justice's analysis was curiously notional. The meaning of "foreignness" was largely untethered to substantive legal principles, turning instead on depictions of the Cherokee's character.[104] Unlike the *Johnson* decision, which cast Indigenous peoples as supporting actors in the United States' origin story, this case centered the Cherokee Nation as the focal object of inquiry. In a move away from oblique references to Indigenous peoples, *Cherokee Nation* demanded an accounting of the "minus at the origin"—the people that the *Johnson* case conspicuously forgot.[105]

1. Justice Marshall's Majority Opinion

Justice Marshall's opinion in *Cherokee Nation* marks the doctrinal origins of paternalism, a fraught legal strategy to diminish Indigenous sovereignty and further their colonization.[106] His opening lines, however, hint at a more complex picture of Indigenous self-determination than the *Johnson* decision was willing to acknowledge. Justice Marshall's portrait of the Indigenous subject begins with an underpainting of sovereignty, depicting the Cherokee as "[a] people once numerous, powerful, and truly independent."[107] He acknowledges the Cherokee as a "state," in that it constitutes "a distinct political society, separated from others, capable of managing its own affairs

100. *Cherokee Nation,* 30 U.S. at 15–31.
101. *Id.* at 31–50.
102. *Id.* at 50–80.
103. *Id.* at 15–16.
104. *See, e.g.*, *id.* at 17.
105. Bhabha, *supra* note 1, at 310.
106. *See* GEORGE D. PAPPAS, THE LITERARY AND LEGAL GENEALOGY OF NATIVE AMERICAN DISPOSSESSION: THE MARSHALL TRILOGY CASES 61–62 (2017).
107. *Cherokee Nation,* 30 U.S. at 15.

and governing itself."[108] These opening lines sketch the beginnings of an independent sovereign power.[109]

These promising opening lines, however, are swiftly painted over with strong streaks of paternalism. Although he finds that the Cherokee Nation is a "state," Justice Marshall holds that it does not constitute a "foreign state" within the meaning of the Constitution.[110] Through narrative strategy, Justice Marshall confines the Cherokee's "once" powerful status firmly to the past.[111] He weaves a story of the Cherokee Nation's decline, subdued by a superior white power:

> A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.[112]

Justice Marshall's recognition of the Cherokee's "once" powerful standing is undercut by his assertion of European superiority and the Cherokee's concomitant decline.[113] The phrase "uncontrolled possession" is constructed in a manner that solicits colonial control. Turning to the treaties, Justice Marshall preserves the colonial project by qualifying the treaties' territorial guarantee to Cherokee lands to those that are "deemed necessary."[114] As the decision progresses, it becomes clear that the colonizers will be the ones doing the "deeming."

Justice Marshall's decision is a study in paternalism. When considering the Cherokee's treaty relationship, he latches onto the treaty's use of the word "protection" to spin a narrative of Indigenous dependency. Because the

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108. *Id.* at 16.

109. This recognition of Indigenous peoples' historic independence is in some ways prefigured in *Johnson*. As Justice Marshall writes,

> To leave [the Indians] 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 high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823).

110. *Cherokee Nation*, 30 U.S. 20.

111. *Id.* at 15.

112. *Id.*

113. *Id*.

114. *Id.*

Cherokee "acknowledge themselves in their treaties to be under the protection of the United States," Justice Marshall concludes that "they admit their dependence."[115] On his view, this admission reduced the Cherokee to hapless wards of the federal government:

> [The Cherokee] 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.[116]

This narrative of dependency lacks textual substance. Justice Marshall's account relies on neither law nor evidence, but instead the pathological imagination. Fashioning a feeble hook out of the word "protection," he spins a yarn of Indigenous wardship that sits uncomfortably with his acknowledgement of the Cherokee Nation's capacity for self-governance.

Despite these incongruities, Justice Marshall's metaphor of wardship serves as an instrument of colonial control. First, wardship brings any assertions of sovereignty within the oversight of the federal government. It is up to the United States to determine if a particular tribe has sovereignty, and if so, how much. Second, this metaphor confers upon the federal government a wide latitude in interpreting its legal obligations towards Indigenous nations. Liberated from the strict construction of nation-to-nation treaties, the government's interpretations can be colored by assessments of "deemed necess[ity]" and Indigenous peoples' best interests.[117] This project of paternalism is easily adapted to justify any number of federal Indian policies, from self-determination to assimilation.

Third, this metaphor feeds the prevailing narrative of federal superiority and benevolence. Once again, Indigenous peoples serve as a character foil to cast the American people in a positive light. As Justice Marshall writes, "[The Cherokee] 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."[118] In another self-constitutive act, themes of Cherokee inferiority and deference are used to underscore the federal government's standing as a generous and formidable power.

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115. *Id.* at 17.
116. *Id*.
117. *Id.* at 15.
118. *Id.* at 17.

Finally, the metaphor of dependency serves a broader colonial project of appropriation and assimilation. The concept of "ward" implies a political relationship of a feudal character. Under feudal law, a lord has guardianship and custody over the person and lands of a minor, with all profits accruing during the person's minority.[119] Justice Marshall's analogy implies an entitlement to Indian lands during Indigenous acculturation; it also implies an eventual maturation, or "aging out" of care. Through the United States' benevolent conferral of rations, agriculture, religion, and education, Indigenous peoples were expected to adopt America's "superior policy, [its] arts and [its] arms" and eventually join the citizenry.[120] In an act of the feudal imagination, Justice Marshall's analogy of "wardship" envisions a future where Indigenous peoples—and, more importantly, their lands—become one with the American people.

Justice Marshall's decision is a curious mix of fact and fiction. The overt fictive element is his narrative of dependency, which is not based in law, but unsubstantiated metaphor. To return to Cover, this metaphor represents a bridge linking 1831 America to an "imagined alternative" of assimilation and territorial expansion.[121] Justice Marshall's unfaithful representation of the Cherokee Nation charts a course to efface their lands, their cultural identity, and their difference.

But for the first time, we also begin to see representations of fact beneath these narrative overtones. In his opening lines, Chief Justice Marshall hints at Indigenous sovereignty at the point of first contact with the Europeans. And unlike the flat caricatures of the concurring justices, who reduce Indigenous peoples to "wandering hordes, held together only by ties of blood and habit, having neither laws or government,"[122] Chief Justice Marshall recognizes the contemporary Cherokee Nation as a "distinct political society . . . capable of . . . governing itself."[123] This acknowledgement brings with it a slew of challenges. How does self-government square with notions of pupilage and assimilation? Are "distinct political societ[ies]" the same as "domestic dependent nations"?[124] Can a domestic, dependent association lay claim to nationhood? Justice Marshall's new legal category inches beyond

119. *See* John Seymour, *"*Parens Patriae *and Wardship Powers: Their Nature and Origins,"* 14 OXFORD J. LEG. STUD. 159, 162–63 (1994).

120. *Cherokee Nation*, 30 U.S. at 15.

121. Cover, *Violence and the Word*, *supra* note 32, at 30.

122. *Cherokee Nation*, 30 U.S. at 27–28 (Johnson, J.).

123. *Id.* at 16.

124. *Id.* at 16–17.

Johnson's flat caricature of the Indian, rousing an inchoate recognition of Indigenous liminality.

2. Justice Thompson's Dissent

Though his wardship metaphor is specious, Justice Marshall does not extinguish the historical sovereign that lies in the Indigenous ward's shadow. In dissent, Justice Thompson exploits this penumbra by shedding light on the Cherokee's half-forgotten history.[125] In an instance of counter-narrative, the dissent provides the first competing account of Indigenous sovereignty. An example of Cover's "texts of resistance,"[126] this subaltern story forms a thread that continues to run through American Indian law doctrine.

Like the Chief Justice's reasons, the dissenting opinion is a study in rhetoric. Justice Thompson begins by rousing the reader's sympathies towards the Cherokee through the device of apophasis:

> It would very ill become the judicial station which I hold, to indulge in any remarks upon the hardship of the case, or the great justice that would seem to have been done to the [Cherokee Nation] . . . . If they are entitled to other than judicial relief, it cannot be admitted that in a government like ours, redress is not to be had in some of its departments; and the responsibility for its denial must rest upon those who have the power to grant it. But believing as I do, that relief to some extent falls properly under judicial cognizance, I shall proceed to the examination of the case . . . .[127]

Justice Thompson's use of rhetoric invokes a sense of injustice and calls upon the federal government to vindicate the Cherokee's rights—without *technically* saying anything at all.

After these preliminary remarks, Justice Thompson begins to unravel Justice Marshall's narrative of dependency. He nimbly detaches Justice Marshall's yarn from its singular textual hook—the treaty term "protection." Weaving a competing theory of sovereignty, Justice Thompson argues that protection is not tantamount to subjection: "[A] weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does

125. *Id.* at 54.
126. Cover, Nomos *and Narrative*, *supra* note 29, at 49.
127. *Cherokee Nation*, 30 U.S. at 51 (Thompson, J., dissenting).

not cease on this account to be placed among the sovereigns who acknowledge no other power."[128]

On Justice Thompson's view, sovereignty is not a question of relative power, but a nation's capability to "govern itself by its own authority and laws."[129] Unequal alliances between stronger and weaker states do not annul the sovereignty of the latter.

This observation elegantly cuts through Justice Marshall's metaphor of wardship. A guarantee of protection does not reduce the Cherokee to a state of pupilage; they remain "a people governed solely and exclusively by their own laws, . . . exercising exclusive dominion over [their territory]," and "claiming absolute sovereignty and self-government over [their territory]."[130] By rejecting a theory of sovereignty that relies on formalistic equality of power, Justice Thompson's opinion examines the Cherokee's political position in its complexity. This faithful representation of the Cherokee Nation's predicament exposes Justice Marshall's metaphor for what it is: an act narrative construction built on shoddy textual foundations.

By thickening the concept of sovereignty, Justice Thompson presents a counter-narrative to the fiction of conquest set forth in *Johnson*. Far from hapless subjects, the Cherokee were recognized by the United States as a treaty-making authority and "a sovereign state . . . [under] the law of nations."[131] The Cherokee retained "their separate national existence" and never became "subject to the laws of the conqueror."[132]

This disavowal of the doctrine of conquest presents a new way to theorize the Cherokee's rights. Justice Thompson elevates the treaties from a license of guardianship to a solemn promise between nation states. This promise carries with it obligations, as Justice Thompson notes: "[I]f [the Cherokee], as a nation, are competent to make a treaty or contract, it would seem to me to be a strange inconsistency to deny them the right and the power to enforce [it]."[133] Far from endorsing paternalism, the treaty term of "protection" is a federal guarantee to protect the Cherokee's "subsisting" rights.[134]

This new understanding of the term "protection" is a form of Cover's redemptive constitutionalism. Unlike Justice Marshall's metaphor of wardship, which fosters unbridled federal paternalism, Justice Thompson's

128. *Id.* at 53.
129. *Id.*
130. *Id.*
131. *Id.* at 54
132. *Id.*
133. *Id.* at 59.
134. *Id.* at 73.

opinion prescribes limitations and, indeed, positive obligations on the federal government. This approach, based on a relationship between nations, restores the constitutional dimension of treaty obligations, and the role of the courts in enforcing the Cherokee Nation's sovereignty.

Beneath Justice Marshall's unmoored narratives of conquest and wardship, a different account of Indigenous sovereignty lurks in the undertow. In an oft-forgotten decision, Justice Thompson charts a course for the vindication of Indigenous rights. Curiously, historical materials suggest that the Chief Justice himself sought to foster this tidal turn. According to Francis Stites, Justice Marshall was "not happy with the result" of *Cherokee Nation*, and "encouraged [Justices] Story and Thompson to write opinions explaining their dissent after the Court had risen."[135] In a potentially deliberate act of literary construction, Justice Thompson offers a competing story of Indigenous self-governance that breaches the surface in *Worcester.*

C. Worcester v. Georgia *(1832)*

Worcester represents the high-water mark of Indigenous sovereignty in American Indian law. Buoyed by Justice Thompson's dissent in *Cherokee*, the Chief Justice casts away his previous themes of conquest, discovery, and wardship in favor of a constitutional expression of Indigenous sovereignty.

Like *Cherokee Nation*, the legal issue in *Worcester* was whether Georgia had jurisdiction to extend its legislative reach into Cherokee territory.[136] Georgia had prosecuted a white man for the offence of residing in Cherokee territory without a license, contrary to Georgia's laws.[137] Unlike *Cherokee Nation*, which was dismissed for want of jurisdiction, the Court in *Worcester* adjudicated the merits of the dispute.[138] In a 5-1 decision led by Chief Justice Marshall, the Court annulled the Georgian law as repugnant to the Constitution and the treaties made under it.[139]

From his opening lines, Justice Marshall's opinion signals a different narrative approach from previous installments. He begins: "This cause, *in every point of view* in which it can be placed, is of the deepest interest."[140] Unlike his opinion in *Johnson*, which was restricted to the viewpoint of the colonizer, his decision in *Worcester* embraces the perspective of the

135. FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 162 (Oscar Handlin ed., 1981).

136. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 536–39 (1832)

137. *Id.* at 537.

138. *Id.* at 541.

139. *Id.* at 536, 596.

140. *Id.* at 536 (emphasis added).

Cherokee Nation. From this new vantage point, Justice Marshall presents a fresh historical account of Indigenous-European relations. And unlike *Johnson*, this rendition does not begin with the European protagonist at the brink of discovery, but Indigenous occupation from "time immemorial."[141] Justice Marshall writes, "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[142] Drawing from the dissenting undertones in *Cherokee Nation,* Justice Marshall presents a new depiction of Indigenous peoples. No longer savages, but sovereigns; Indigenous peoples were not features of undiscovered land, but rather organized nations that exerted control over their territory.

This reframing of the continent's history curtails the doctrines of conquest and discovery. Picking up on *Johnson's* discomfort with the "extravagant . . . pretension of converting the discovery of an inhabited country into conquest,"[143] Justice Marshall observes,

> It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied, or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.[144]

Marking a shift in rhetoric, this passage treats Indigenous peoples as *equals* to their European contemporaries. Just as the Cherokee Nation could not claim dominion over Britain, the British could not claim dominion over the Cherokee. This strategic framing transforms an "extravagant pretension" into a preposterous one.

In an about-face from *Johnson*, Indigenous peoples are described as powerful as compared their "feeble" European counterparts.[145] Accordingly, Europeans never imagined they had a right to govern or occupy Indigenous territory: "The extravagant and absurd idea that the feeble [European] settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the

141. *Id.* at 559.
142. *Id.* at 542–43.
143. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591 (1823).
144. *Worcester*, 31 U.S. at 543.
145. *Id.* at 544–45.

lands from sea to sea did not enter the mind of any man."[146] In *Worcester*, Justice Marshall discards the legal fiction of conquest to describe Indigenous-European relations. In fact, his revisionist account denies the legal fiction ever existed: "The crown could not be understood to grant what the crown did not affect to claim; *nor was it so understood*."[147] Likewise, the doctrine of discovery, a principle of "universal recognition" in *Johnson*,[148] was silently demoted in *Worcester* to an organizing principle among European nations only.[149] Rather than address his previous decision, Justice Marshall conceals it with a fresh coat of paint.

Unencumbered by his previous rulings, Justice Marshall articulates a new version of the "actual state of things."[150] Drawing from Justice Thompson's dissent in *Cherokee Nation*, the Chief Justice recharacterizes the Cherokee Nation as a powerful, independent state.[151] Without a single reference to wardship, Justice Marshall adopts Justice Thompson's reading of the treaty term "protection," which "does not imply the destruction of the protected."[152] Instead, "protection" merely constitutes an alliance with "a powerful friend and neighbour . . . without involving a surrender of [the Cherokee's] national character."[153] The treaties are reframed as agreements negotiated on "equal" footing between two sovereigns.[154]

By silently abandoning the themes of conquest, discovery, and guardianship, Justice Marshall spins a new story of Indigenous sovereignty. The Cherokee's capacity for self-governance, as recognized by treaty, creates a territorial zone of state non-interference. According to Justice Marshall, "history furnishes no example, from the first settlement of our country, of any attempt on the part of the Crown to interfere with the internal affairs of the Indians."[155] As a distinct political community, the Cherokee Nation has exclusive authority within its territorial boundaries and a right to all lands

146. *Id.*
147. *Id.* at 545 (emphasis added).
148. *Johnson*, 21 U.S. at 574.
149. *Worcester*, 31 U.S. at 543–44.
150. *Id.* at 543, 546, 560; *Johnson*, 21 U.S. at 591.
151. *Worcester*, 31 U.S. at 546 ("Fierce and warlike in their character, [the Cherokee] might be formidable enemies, or effective friends.").
152. *Id.* at 552.
153. *Id.* at 518.
154. *See id.* at 554–56.
155. *Id.* at 547.

within those boundaries.[156] This right is "not only acknowledged, but *guarantied* by the United States."[157]

By shifting from a narrative of wardship to sovereignty, Justice Marshall imbues Indigenous treaty rights with constitutional protection. According to Article VI, which declares treaties to be the supreme law of the land, the Constitution "has adopted and sanctioned the previous treaties with the Indian nations."[158] These treaties recognize the nation's pre-existing power to govern itself, guarantee the land within the Cherokee Nation's borders, and solemnly pledge to restrain United States citizens from trespassing upon it.[159] These rights, according to Justice Marshall, subsist "until that right should be extinguished by the United States *with [the Cherokee Nation's] consent*."[160] Georgia's laws, which are in "direct hostility with [these] treaties," were repugnant to the constitution and therefore annulled.[161]

This remarkable legal outcome is borne from shifts in rhetoric. From the decision's opening lines, the Chief Justice signals a departure from *Johnson's* mythology of European superiority and *Cherokee Nation's* theory of Indigenous dependence. By centering the Cherokee as the subject—rather than object—of his decision, Justice Marshall moves beyond flat caricatures of savages and weak metaphors of wardship towards a thickened conception of Indigenous sovereignty. Building on Justice Thompson's dissent, Justice Marshall brings the Indigenous-U.S. relationship within the purview of the Constitution and, by extension, judicial oversight.

This decision ultimately represents a powerful affirmation of the Cherokee Nation's right to self-government, the solemnity of treaties, and the enduring guarantee of unceded Indigenous lands. As Phillip Frickey notes:

> [B]y conceptualizing the relationship of tribes with the federal government as a sovereign-to-sovereign one, by envisioning an Indian treaty as the constitutive document of that sovereignty and structure, and by protecting treaty-recognized sovereignty and structure from erosion by all but crystal-clear treaty text, Chief Justice Marshall built a complex, institutionally sensitive interpretive scheme.[162]

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156. *Id.* at 557.
157. *Id.* (emphasis added).
158. *Id.* at 559.
159. *Id.* at 561–62.
160. *Id.* at 560 (emphasis added).
161. *Id.* at 561–62.
162. Frickey, *Marshalling Past and Present*, *supra* note 17, at 417.

In the words of Matthew Fletcher, "There had not been a stronger statement of respect for the legal authority of Indian tribes—and there has not yet been one like it since."[163]

D. The Marshall Trilogy: Conclusion

The Marshall trilogy is a lesson in literature—hardly any law is to be found within it. The trilogy is comprised of three stories. The first is a tale of European discovery and conquest; the second is the birth of the Indian ward; and the third is the perseverance of the independent Cherokee Nation. Each story provides a different account of Indigenous sovereignty: in the first, sovereignty never existed; in the second, sovereignty disappeared; and in the third, sovereignty was never surrendered. The first three chapters of American Indian law doctrine are fraught with discontinuities and contradictions. It is difficult to see how these stories all hang together.

The central challenge with the trilogy is its insubstantiality. The founding cases of American Indian Law are built not on legal text, but an uninhibited exercise of the legal imagination. In *Johnson*, Justice Marshall was faced not with law, but a vast blank canvas and a thin-tipped brush. With words, he began to paint a portrait of America's history as a nation. Through the tools of caricature and retrospective prophecy, he offered a myth of discovery and conquest that relies upon a misremembering of the continent's history. This "minus at the origin" prods Justice Marshall's narrative weak spots, compelling his recognition of the "extravagant . . . pretension" of colonial conquest and discovery.[164]

This instability only grows as the trilogy progresses. In *Cherokee Nation*, Justice Marshall's metaphor of wardship is antagonized by a counter-narrative of subsisting sovereignty. In *Worcester*, this text of resistance overtakes the prevailing narrative, but without acknowledging its departure from the decisions that came before. The Court's interpretations read as delible moments of narrative experimentation, rather than principled and congruent statements of law.

The Marshall Trilogy exhibits pathologies of the legal imagination. Both *Johnson* and *Cherokee Nation* represent a "blind commitment to a non-existent reality" of wardship, discovery, and conquest.[165] Although *Worcester* constitutes a more faithful representation of Indigenous histories, Justice Marshall fails to "meaningfully situate [this narrative] product in the

163. Fletcher, *supra* note 78, at 647.
164. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591 (1823).
165. Mickiewicz, *supra* note 36, at 81.

wider [jurisprudential] context."[166] By neglecting to tackle *Johnson* and *Cherokee Nation* head-on, the Chief Justice creates an unsettling degree of doctrinal latitude. Did *Worcester* retire the phrase "domestic dependent nations"[167] in favor of "distinct political communities"?[168] Where does *Worcester*'s new articulation of sovereignty leave the metaphor of wardship? It is unclear whether *Worcester* overtook *Cherokee Nation,* or whether the two cases are meant to simply sit in uncomfortable co-existence.

This pathology of the legal imagination spurred an unprecedented crisis of the Court's legitimacy. In repudiation of the Court's decision in *Worcester*, "President Jackson refused to enforce the ruling."[169] Georgia courts followed suit, "refusing to release Worcester on the Supreme Court's mandate."[170] Georgia proceeded to award Cherokee lands to white settlers, who swiftly began to encroach on Cherokee territory.[171] Soldiers eventually drove the Cherokee people down the Trail of Tears towards Oklahoma in blatant disregard of the Cherokee's territorial and constitutional rights.

As Fletcher notes, "The executive's rejection of the *Worcester* principle haunts Indian tribes today."[172] *Worcester* began to fall out of favor, and the doctrines of conquest and dependence were read and re-read as the prevailing legacy of the *Marshall* trilogy. As these concepts were reiterated through subsequent cases, the fictions began to harden. As Jan Camden and Katherine Fort note, "Literature forever reinvents itself. The law, however, relies heavily on the notion of precedent. Justice Marshall's legal fictions [in *Johnson* and *Cherokee Nation*] are therefore much more difficult to rewrite or reject."[173] Slowly, the *Worcester* decision—and its commitment to treaty rights and territorial sovereignty—fell into a relative obsolescence. As Justice Scalia observed in the 2001 decision *Nevada v. Hicks*: "Though tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'the Court departed from Chief Justice Marshall's view that "the laws of [a state] can

166. *Id.* at 76.

167. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542, 557, 559, 561 (1832). The phrase "domestic dependent nations" is not mentioned once in *Worcester*. By contrast, the phrase "distinct political communities" (or a variant) is mentioned five times. *Id.*

168. *Id.* at 557.

169. Blackhawk, *supra* note 17, at 1823.

170. *Id.*

171. *Id.*

172. Fletcher, *supra* note 78, at 647.

173. Jen Camden & Kathryn Fort, *"Channeling Thought": The Legacy of Legal Fictions from 1823*, 33 AM. INDIAN L. REV. 77, 101 (2008-2009).

have no force" within reservation boundaries.'"[174] Over time, the subaltern narrative of *Worcester* sank beneath the waves of America's constitutional consciousness.

IV. After the Trilogy: Navigating Plot Holes

Though submerged, the legacy of *Worcester* did not disappear. To borrow a trope from the American Indian law canon, the narrative in *Worcester* lay "dormant."[175] In the wake of *Worcester*'s political crisis, the constitutional protection of Indigenous sovereignty began to recede. Within twelve years, the Court conjured the "plenary power doctrine"—an extraconstitutional federal power that was immune from judicial review.[176] This judicial creation expanded legislative authority over Indigenous peoples, but lacked corresponding constitutional safeguards to protect their rights. Beginning in the mid-1800s, Congress started to exercise this new "original power" by restricting Indigenous territory to reservations. By the end of the century, these lands were broken up into allotments, with excess lands offered for white settlement.[177] This unchecked federal authority marked the emergence of common-law colonialism, the diminishment of Indian territory, and the subordination of Indigenous sovereignty.

To rationalize these federal policies, courts relied upon a growing workbook of judicial rhetoric. Treaty commitments lost their constitutional standing, relegated instead to a "backdrop for the intricate web of judicially made Indian law."[178] Pliant phrases were used to explain legal outcomes without regard for concrete legal principles or interpretive methodology. Holdings increasingly turned on subjective assessments of the "Indian character" of a reservation,[179] a tribe's "dependent status,"[180] or a statute's "magic language" of diminishment.[181] In the words of Justice Story, such

174. Nevada v. Hicks, 533 U.S. 353, 361 (2001) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832)).

175. Worcester, 31 U.S. at 544; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197 (1978).

176. Blackhawk, *supra* note 17, at 1829–30.

177. *Id.* at 1830–32.

178. *Oliphant*, 435 U.S. at 206.

179. *See* Solem v. Bartlett, 465 U.S. 463, 471 (1984).

180. *See* United States v. Wheeler, 435 U.S. 313, 326 (1978).

181. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 18 (1999).

rhetoric was "most flexible and convenient,"[182] easily manipulable to achieve judicial ends.

As the pages of the chain novel began to swell, *Johnson*'s myth of European conquest became entrenched as America's constitutive narrative. The 1955 decision *Tee-Hit-Ton Indians v. United States* captures the extent of its cultural ubiquity:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when 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.[183]

The pervasiveness of *Johnson*'s mythology was matched by *Cherokee Nation*, which became a wellspring for judicial articulations of wardship and dependence.[184] These legal interpretations did a great violence to Indigenous nations. As these dominant narratives were recited across time, they began to acquire the "patina of fact"[185] by constraining Indigenous self-government and swallowing their lands.

But mere repetition cannot cure structural deficiencies. The first two installments of the Marshall Trilogy continued to rest on a faulty premise that misrepresents this continent's history. Layers of paint cannot fix a problem that lies within a building's foundations. In *United States v. Lara* (2004), the Court's reasons begin to buckle under the weight of unsupported judicial rhetoric.

United States v. Lara offers a rare judicial recognition of literary constructivism. In *Lara*, the Court was called upon to once again consider the character of Indigenous sovereignty. The case concerned a congressional statute that "recognized and affirmed" the "inherent authority of tribal governments" to bring certain prosecutions against "nonmember Indians".[186] Lara, who had already been convicted of an offence by Spirit Lake Tribe, was subsequently pursued for federal prosecution over the same conduct.[187]

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182. Camden & Fort, *supra* note 173, at 90.

183. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289–90 (1955).

184. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 383–84 (1886) ("These Indian tribes *are* the wards of the nation" who are "*dependent* on the United States . . . for their daily food . . . and for their political rights.").

185. Camden & Fort, *supra* note 173, at 79.

186. United States v. Lara, 541 U.S. 193, 222 (2004) (citing 25 U.S.C. § 1301(2)).

187. *Id.* at 193. *See generally* SPIRIT LAKE TRIBE, http://www.spiritlakenation.com/ (last visited May 11, 2023) (showing that the Tribe currently refers to itself as the "Spirit Lake Tribe" and the "Spirit Lake Nation" interchangeably).

The issue was whether Lara was protected by the double jeopardy clause, which only permitted successive prosecutions brought by "separate sovereigns."[188] At its core, the case was about theorizing the *source* of the Spirit Lake Tribe's criminal jurisdiction: was it "inherent tribal sovereignty" or "delegated federal authority"?[189] The Court was called upon once again to revisit the "minus at the origin," grappling this time with the basis of Congress's plenary authority.[190]

Writing for the majority, Justice Breyer was not up to the task. His reasons sidestep a rigorous constitutional analysis through techniques of linguistic construction. Instead of considering the source of Congress's authority to "recognize and affirm" Indigenous sovereignty, he focuses on characterizing the statute's effect. According to Justice Breyer, the statute was merely "*relax[ing] the restrictions* imposed by the political branches on the tribes' inherent prosecutorial authority."[191] Without interrogating the source of Congress's plenary power, Justice Breyer simply asserts that Congress is authorized "to enact legislation that both restricts, and in turn, relaxes those restrictions on tribal sovereign authority."[192] Through carefully crafted sentences, Justice Breyer focuses not on the source of this legal power, but the position of his linguistic frame.

This use of rhetoric attracted criticism from others on the Court. In concurrence, Justice Kennedy called out Justice Breyer for using "euphemism" to evade a proper constitutional analysis:

> The Court resolves, or perhaps avoids, the basic question of the power of the Government to yield authority inside the domestic borders over citizens to a third sovereign by using the euphemistic formulation that in amending [the statute] Congress merely relaxed restrictions on the tribes. There is no language in the statute, or in the legislative history, that justifies this unusual phrase . . . .[193]

Uneasy with judicial use of "fiction[s],"[194] Justice Kennedy disavows the majority's attempt "to evade the important structural question by relying on

188. *Id.* at 197–99.
189. *Id.* at 199.
190. Bhabha, *supra* note 1, at 310.
191. *Id.* at 205 (emphasis added).
192. *Id.* at 202.
193. *Id.* at 213 (citation omitted).
194. *Id.* at 214.

the verbal formula of relaxation."[195] This concurrence represents a rare moment of judicial insight into the unsubstantiated rhetoric that forms the doctrine of federal Indian law.

The deepest insight, however, comes from the concurrence of Justice Thomas. Cutting through decades of narrative, caricature, and metaphor, he cogently articulates the paradox at the heart of American Indian law:

> It seems to me that much of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members.[196]

In this passage, Justice Thomas faces the greatest challenge of American Indian law head-on: theorizing Indigenous sovereignty.

In perhaps the first candid judicial consideration of the subject, Justice Thomas turns to consider the "essence" of sovereignty. He writes, "In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously."[197] Grappling with the inherent tensions in the term "domestic dependent nations," he questions whether Congress's ability to "relax" restrictions on sovereignty is repugnant to the concept of sovereignty itself: "The sovereign is, by definition, the entity 'in which independent and supreme authority is vested.' . . . It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government."[198] Justice Thomas criticizes both the majority and dissent for failing to critically analyze the Court's tribal sovereignty cases. The majority eschews any structural analysis, "utterly fail[ing] to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty."[199] The dissent's analysis is equally superficial. Cobbling together the term "dependent sovereignty," the dissent seems to believe that merely invoking the word "dependence" locates tribal jurisdiction within the sphere of delegated federal authority.[200] Justice

195. *Id.* at 213.
196. *Id.* at 214–15 (citation omitted).
197. *Id.* at 215.
198. *Id.* at 218 (citation omitted) (quoting *Sovereign*, BLACK'S LAW DICTIONARY (6th ed. 1990))
199. *Id.* at 224.
200. *Id.* at 228–29.

Thomas rejects both rhetorical strategies and calls for an interrogation of the constitutional structure that enumerates Congress's powers.

While Justice Thomas's concurrence grasps the intricate knots of federal Indian law, he makes little headway in untangling them. He provides no final answer on the propriety of Congress's plenary power, nor the origins of Indigenous sovereignty. His wisdom is limited to capturing the challenge of Indigenous self-governance in its complexity. Indigenous peoples occupy a liminal space; neither entirely foreign nor dependent, they abide in the shadow of America's constitutional order. Their legal status relies not on enumerated powers, but fictions and rhetoric. *Lara's* recognition of this fact was enough to destabilize a tottering doctrine; on the dissent's own admission, "our conceptualizations of sovereignty . . . are largely rhetorical."[201] If Justice Thomas had his way, the Court would clear away this overgrown thicket of straggling narratives and swollen metaphors and begin afresh.

V. Reclaiming the Narrative and Rewriting the Nation

Despite Justice Thomas's proselytizing, the "intricate web of judicially made Indian law" persists.[202] Courts remain a site of narrative contest in the continual act of writing the nation. As Frickey observes:

> [T]he Supreme Court has become the site of an ongoing mini-constitutional convention for evaluating the essentially insolvable conundrums of the place of tribes in the American constitutional system. Cases come to the Court with their own complicated facts and background, . . . yet they become the battleground for the application of [the] American values of liberty, egalitarianism, individualism, populism, and laissez-faire.[203]

Despite the constitutional dimension of these ongoing debates, traditional theories of constitutional interpretation are not typically brought to bear on questions of American Indian law. This should be rectified. As Blackhawk argues, federal Indian law can offer untapped "lessons about our constitutional framework."[204] The challenging questions at the heart of

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201. *Id.* at 230.

202. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

203. Philip Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 484–85 (2005).

204. Blackhawk, *supra* note 17, at 1789.

American Indian law are a powerful case study of those issues that animate constitutional theory.

To draw from the work of Philip Bobbitt, American Indian law should be understood as a fertile site for ethical arguments. These arguments are a mode of constitutional interpretation grounded in ethos.[205] As Bobbitt explains, if a reader were to color-code a judicial decision to identify traditional modes of legal interpretation, one will find that sometimes "there is nevertheless a patch of uncolored text."[206] This text is of a special significance:

> [Y]ou may find that this patch contains expressions of considerable passion and conviction—not simply the idling of the judicial machinery that one finds in dictum. It is with those patches that I am now concerned. There is a class of arguments that I will call *ethical* arguments . . . . By "ethical" argument, I mean constitutional argument that relies for its force on a characterization of American institutions and the role within them of the American people. It is the character, or *ethos*, of the American polity that is advanced in ethical argument as the source from which a particular decision derives.[207]

The narratives at play in American Indian law should be understood as competing expressions of constitutional ethos, which "shape [the] people's vision of their Constitution and of themselves."[208] Although time has favored the mythologies of *Johnson* and *Cherokee Nation*, the counter-narrative of *Worcester* subsists; and this text of resistance continues to inform the ongoing project of constitutional meaning. In the recent decision of *McGirt v. Oklahoma,* the theme of Indigenous sovereignty in *Worcester* returns to interrogate the Court's vision of the United States, and which values that the American people stand for.

Like many decisions that came before, *McGirt v. Oklahoma* is a contest in narrative. This competition is apparent from the majority's opening sentence. The issue in *McGirt* was whether the Muscogee (Creek) Nation Reservation qualified as an "Indian reservation" for the purposes of federal criminal law.[209] In framing the case, Justice Gorsuch begins by centering the perspective of the Creek Nation in the execution of a solemn treaty:

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205. Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 727 (1980).

206. *Id.*

207. *Id.*

208. *Id.* at 766 (quoting Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 238 (1972)).

209. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

> On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding "all their land, East of the Mississippi river," the U.S. government agreed by treaty that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians." Both parties settled on boundary lines for a new and "permanent home to the whole Creek nation," located in what is now Oklahoma.[210]

By situating the reader on the Trail of Tears, Justice Gorsuch gestures toward a historic injustice. By casting the treaty as an enduring "promise," he evokes in the reader a desire to do right by the Creek Nation.

The dissent's opening lines bear no resemblance to this theme of treaty solemnity. Like the majority, the dissent seeks to inspire a sense of injustice in the reader—but on entirely different terms. The opening paragraph of Chief Justice Roberts' decision begins not in 1832, but in 1997. It reads:

> In 1997, the State of Oklahoma convicted petitioner Jimcy McGirt of molesting, raping, and forcibly sodomizing a four-year-old girl, his wife's granddaughter. McGirt was sentenced to 1,000 years plus life in prison. Today, the Court holds that Oklahoma lacked jurisdiction to prosecute McGirt—on the improbable ground that, unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation.[211]

These two opening passages are breathtaking in their difference. The majority begins with a solemn promise made in the nineteenth-century; the dissent opens with a grotesque crime in the 1990s against a little girl. Because the law of disestablishment is based on a doctrine of endless flexibility, these narratives are not merely stylistic choices, but indispensable fixtures of argument. Both decisions offer competing theories of injustice: one is a broken promise; the other is a criminal who escaped justice. In a narrative contest, it is hard to tell from these opening lines which opinion will prevail.

But the majority draws from something the dissent does not: *ethos*. Justice Gorsuch's opening passage is not merely an attention-grabbing hook to rouse the reader's sympathies. He is crafting a story rooted in ethical argument. After setting out the history of the treaty with the Creek, Justice Gorsuch

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210. *Id.* at 2459 (citations omitted) (quoting Treaty with the Creeks, arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368, and Treaty with the Creeks, pmbl., Feb. 14, 1833, 7 Stat. 418, 418).

211. *Id.* at 2482.

turns the Court's task at hand: "Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word."[212]

This phrase captures the ethos behind Justice Gorsuch's decision. His narrative is grounded upon a particular vision of the United States: as a nation that upholds its promises.

At first glance, this vision of the United States might seem out-of-touch. After all, the United States' track record on treaty promises is extremely poor.[213] But Justice Gorsuch gains credibility through narrative. He candidly acknowledges these failings in his rendition of the Creek Nation's history, noting that the United States has "broken more than a few of its promises to the Tribe."[214] Though Congress "breached its promises to tribes . . . that they would be free to govern themselves," Justice Gorsuch maintains that these "particular incursion[s]" have "limits."[215] In his view, past injustices do not license the Court to disregard a treaty's solemn commitments in the light of today.

This represents a striking disavowal of the Marshall Trilogy's foundational legal fiction. In *Johnson*, we saw the Chief Justice bend the law to justify the "actual state of things."[216] Despite the admitted "extravagan[ce]" of justificatory fictions, Justice Marshall held that "if the principle had 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*."[217] Justice Gorsuch categorically rejects this approach as repugnant to the rule of law. In an explicit appeal to the imagination,[218] he illustrates what it would mean to indulge that path:

> A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few

212. *Id.* at 2459.
213. *See* Blackhawk, *supra* note 17, at 1829.
214. *McGirt*, 140 S. Ct. at 2462.
215. *Id.* at 2459.
216. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591 (1823).
217. *Id.* (emphasis added).
218. *McGirt*, 140 S. Ct. at 2474.

> predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. . . . That would be a rule of the strong, not the rule of law.[219]

In this passage, Justice Gorsuch paints a picture of what the United States is *not*. In doing so, he seeks to redeem the United States from its legacy of colonial and doctrinal violence. Putting aside injustices of the past, the rule of law demands today that the Court holds the government to its word.

This ethos overpowers the dissent's narrative of pragmatism. Justice Roberts' opinion is a tired refrain of the inevitability of Indigenous disenfranchisement. Treaty promises of "forever" were "not to last" as a "'determination to thrust the nation westward' gripped the country."[220] In an appeal to *Johnson*, Justice Roberts relies on the "actual state of things" to justify the current social order, asserting: "What has gone unquestioned for a century remains true today: A huge portion of Oklahoma is not a Creek Indian reservation."[221] But Justice Roberts lacks a higher vision. While the dissent relies on alarmist rhetoric,[222] the majority is guided by ethos—and this puts the dissent on its heels. Indeed, at the dissent's close, Justice Roberts acknowledges the weight of the majority's argument: "[T]he Court responds to [our arguments] with the truism that significant consequences are no 'license for us to disregard the law.' Of course not."[223] The dissent's appeal to custom, however, is not a compelling answer. Without a competing ethical argument to back the dissent's narrative, it falls easily to the vision of the majority.

Justice Gorsuch's opinion should be recognized as an act of redemptive constitutionalism. Citing to *Worcester*, he breathes life into its subaltern narrative and ethos.[224] By re-centering the Indigenous perspective, Justice Gorsuch restores treaties as the "supreme law of the land,"[225] and once again

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219. *Id.*

220. *Id.* at 2484 (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 71 (Nell Jessup Newton et al. eds. 2012)).

221. *Id.* at 2482.

222. *Id.* ("Not only does the Court discover a Creek reservation that spans three million acres and includes most of the city of Tulsa, but the Court's reasoning portends that there are four more such reservations in Oklahoma . . . . Across this vast area, the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the court has profoundly destabilized governance of eastern Oklahoma . . . .")

223. *Id.* at 2502.

224. *Id.* at 2477.

225. *Id.* at 2462 (citing U.S. CONST. art. VI, cl. 2).

elevates the "Creek Tribe" to a sovereign treaty-making nation.[226] In doing so, he breaks from almost two centuries of case law that sought to justify the previous social order. Rather than doing what is easy, Justice Gorsuch obliges the United States to do right, by the law and the Creek Nation. As the majority's conclusion goes:

> [M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.[227]

In this parting apophatic image, Justice Gorsuch once again defines the nation by that which it is not. Regardless of its past failings, the United States of today is a nation built on the rule of law. The Court holds the people to their word.

VI. Conclusion

American Indian law is a puzzle that we will never solve. But this is no license to admit defeat. Its challenging nature does not stem from its sui generis character, but from its remarkable ordinariness; it is yet another illustration of the nihilistic threat that lurks at the heart of constitutional interpretation.

The indeterminacy of constitutional law has been likened to a swamp in which we are destined to stay "for tomorrow and tomorrow."[228] If we indeed *are* in a swamp, American Indian law surely lies at the deepest part of it, but the wisdom of White, Cover, Bhabha, and Bobbitt "stand as signposts on the way out of the swamp to those who might have consigned their tomorrows to an existence there."[229] As one writer puts it:

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226. *Id.* at 2468.

227. *Id.* at 2482.

228. *Editor's Introduction* to Bobbitt, *supra* note 205, at 698 (quoting *Editors' Introduction* to Grant Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1027 (1975)).

229. *Id.*

> They point the way to firm ground, not by promising yet another "escape from [the] inconclusiveness" of constitutional law—whose promise has sent so many, not out of the swamp, but merely into another part of it—but by showing us that the study of constitutional law is the study of ourselves.[230]

American Indian law, like constitutional law more broadly, is an institutional exercise in perpetual self-construction. These doctrines represent "traditions of writing that have attempted to construct narratives of the imaginary nation-people."[231] This is an imperfect project; as Bhabha observes, the author's positionality means that their narratives can never be objective.[232] For too long, Indigenous peoples have been denied not only the status of protagonist, but also the role of author in writing this continent's history. But the project of creating constitutional meaning is an ongoing one. Narratives allow us to shed straitjackets of the past for "imagined alternative[s]."[233] They allow us to ask, "What are we to-day"?[234]

For all that has happened since the Marshall Trilogy—for all the times that the character of the nation has been made and remade—those three stories serve as a remarkable prediction of this ongoing contest for meaning. Though these cases cannot be reconciled in the traditional sense, they continue to be renegotiated over time. Law is nothing more than narratives and counter-narratives, which "continually evoke and erase [the] totalizing boundaries" of the nation.[235] Our rhetoric constitutes our identity, and, as *Lara* warns us, this rhetoric is unstable. American Indian law is a national discourse located in "the space of liminality, in the 'unbearable ordeal of the collapse of certainty.'"[236] In the words of W.B. Yeats, "the centre cannot hold."[237]

But perhaps this is cause for hope, rather than fear. Decisions such as *McGirt* may signal a new path forward. By rooting his rhetoric in ethos, Justice Gorsuch crafts a narrative that confronts pathologies of the legal imagination and envisions a new national identity. This ethos grounds the

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230. *Id.* (alteration in original) (quoting Bobbitt, *supra* note 205, at 706).

231. Bhabha, *supra* note 1, at 303.

232. *Id.* at 298.

233. Cover, Nomos *and Narrative*, *supra* note 29, at 9.

234. Bhabha, *supra* note 1, at 301 (citing TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT (Luther H. Martin et al. eds., 1988)).

235. *Id.* at 300.

236. *Id.* (quoting CLAUDE LEFORT, THE POLITICAL FORMS OF MODERN SOCIETY 214 (1986)).

237. W.B. Yeats, *The Second Coming*, *in* THE COLLECTED POEMS OF W.B. YEATS 158–59 (Wordsworth Poetry Libr., 1994).

narrative in a way that empty metaphors cannot. As Bobbitt notes, "[I]t is the ability to *overrule* precedent that enables the Court to achieve this expression of values."[238] Bobbitt likens ethical arguments to a novel, which "can inform and lead into new places the flow of our sympathetic consciousness, and can lead our sympathy away in recoil from things that are dead."[239] As *McGirt* shows us, narrative gives ethos its form.

At its heart, American Indian law is a doctrine of stories. The only way to make sense of these narratives is to continue to tell them. Each of us participates in the discursive process of interpreting the collective memory of the nation. As Margret Atwood once wrote, you don't look back along these stories, "but down through [them], like water. Sometimes this comes to the surface, sometimes that . . . . Nothing goes away."[240]

238. Bobbitt, *supra* note 205, at 756.

239. *Id.* (quoting JOHN UPDIKE, PICKED UP PIECES 29 (1966) (quoting in turn D.H. Lawrence)).

240. MARGARET ATWOOD, CAT'S EYE 3 (1988).