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Essay

JEFFERSON, THE NORMAN YOKE, AND AMERICAN INDIAN LANDS

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INTRODUCTION

During the 60 year period between King George III's Proclamation of 1763 closing off the trans-Appalachian American frontier to white settlement, and Chief Justice John Marshall's 1823 opinion in *Johnson v. McIntosh*[1] holding that the United States exercised a superior sovereignty over the territory occupied by American Indian Nations, the status and rights of Indians in their lands represented one of the most intensely contested issues in the life of the early Republic.[2] In this Essay, I examine the principal competing modes of legal discourse involved in this important debate that contemporary American legal scholarship has largely ignored.[3] A deeper

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1. 21 U.S. (8 Wheat.) 543 (1823).

2. *See generally* M. JENSEN: THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1778, 107-238 (1940); *see also* T. ABERNATHY, WESTERN LANDS AND THE AMERICAN REVOLUTION (1959).

3. For instance, the Revolutionary-era legal debate concerning the status and rights of frontier Indian Nations in their lands is not even touched upon in the only treatise for the field, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982). Historians writing from a primarily non-legal perspective, however, have provided extended treatment of the topic as part of their general narrative of the major events and forces of the era. *See* sources cited *supra* note 2. *See also* J. SOSIN, WHITEHALL AND THE WILDERNESS: THE MIDDLE WEST IN BRITISH COLONIAL POLICY 1760-1775

appreciation of the radically divergent character of these discursive practices respecting Indian lands, the material conditions that informed and were informed by them, and their ultimate cloture within a systematized body of legal thought called "Federal Indian Law" will demonstrate that our present legal conceptions of Indian status and rights are grounded in a highly contingent set of historical circumstances and suppressed discourses.

Justice Marshall's 1823 opinion in *Johnson v. McIntosh*,[4] the proration of this great debate in American history, stands as a foundational source in modern legal discourse respecting Indian status and rights.[5] Yet Marshall's famous opinion declaiming a superior status and right in European Nations "discovering" lands held by American Indian Nations[6] had little to do with what the Western European-derived legal tradition might call "the Rule of Law." Rather, Indian land rights and status were determined by an intense political conflict that sacrificed principles and the "Rule of Law" to interest and expediency. Thus, in describing those principles that were sacrificed and the interests that prevailed in the contest over the nature of American Indian land rights, I will also be making the related argument that our contemporary Indian law is not a reflection of either rationality or the "Rule of Law," but rather of politics.

The normative implications of my arguments will become clearer in analyzing the widely-proclaimed dissatisfactory state of our contemporary "Indian law"[7] as the inevitable byproduct of a jurisprudence built upon anachronistic assumptions and political choices. Once it is recognized that

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(1961); C. ALVORD, THE MISSISSIPPI VALLEY IN BRITISH POLITICS (1959). These historical sources, while immensely valuable, do not provide an extended analysis of the competing legal discourses of the era. This Essay will attempt to bring into sharper focus the legal discursive traditions, material conditions, and problematics of these competing discourses on Indian rights and status and their mediation during the Revolutionary Era.

4. 21 U.S. (8 Wheat.) 543 (1823).

5. *See* Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947); Henderson, *Unravelling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75, 87-105 (1977). *See also* R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980); Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 253-258; Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFFALO L. REV. 637 (1978); Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980).

6. Marshall's opinion in Johnson described the origins of the Discovery Doctrine as follows:

> 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 ascendancy . . . But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

21 U.S. (8 Wheat.) 543, 572-573 (1823).

7. *See, e.g.*, Clinton, *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L. REV. (1981); Pelcyger, *Justices and Indians: Back to Basics*, 62 OR. L. REV., 29 (1983); Barsh, *Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term*, 59 WASH. L. REV. 863 (1984); Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979); Note, *Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of* Oliphant, 7 AM. INDIAN L. REV. 291 (1979).

such outmoded assumptions and choices hold little relevance to the legal issues raised by tribalism's challenge to the core values and traditional norms assertedly embodied in American legal thought today, it might then be possible to engage in the construction of a new "Federal Indian Law." Rather than a brute reflection of the interests of a conquering nation groping for its own unique colonizing syntax and grammar, such a reconstructed "Federal Indian Law" ought to embody the vision of a nation great enough to dare to actualize its asserted values and norms, even in its treatment of those peoples it once sought to exterminate.

THE DOCTRINE OF DISCOVERY

The medieval ancestors of the Anglo-Saxon invaders of America discoursed in Old English. Their word for "law" was "lagu." The Anglo-Saxon word "lagu" derives from the Old Norse word "lag," meaning things *laid down* or *settled*.[8] If by "law," the English conquerors of North America meant all the rules of conduct established and *laid down* by the authority or custom of a community or state, then there was no "law" as the English understood the term in their dealings with American Indians in the eighteenth century.[9]

On the receding boundary of the frontier, where American Indians confronted, resisted, or accommodated European Americans, nothing was *settled* or *laid down*. All was either war, or politics—the art of war carried on by other means.[10] The expedient pursuit of interest, by military arms or diplomatic art, defined the Englishman's relation to the Indian. No "law," as the Englishman defined it, could be *laid down* for that unsettled, potential situation that was the American Wilderness.

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8. This etymology can be found in any standard dictionary. *See* WEBSTER'S NEW WORLD DICTIONARY, SECOND COLLEGE EDITION (1982).

9. Robert Rogers popular play of 1756, *Pontiach: Or the Savages of America, A Tragedy*, dramatized the ethical code of a fictional frontier trader, M'Dole. In the first act of the play M'Dole offers advice to the novice Murphey concerning the tricks of the Indian trade. Contemporary real life accounts, from colonial officials in the field and from non-official observers of frontier behavior, support the verisimilitude of Rogers *mise en scene* of English frontier attitudes.

> M'DOLE. That is the curst of Misfortune of our Traders; a thousand Fools attempt to live This Way, who might as well turn Ministers of State. But, as you are a Friend, I will inform you of all the secret Arts by which we thrive, Which if all practis'd, we might all grow rich, Nor circumvent each other in our Gains. What have you got to part with to the Indians?
>
> MURPHEY. I've Rum and Blankets, Wampum, Powder, Bells, and such like Trifles as they're Wont to prize.
>
> M'DOLE. 'Tis very well: your Articles are Good: But now the Thing's to make a Profit from Them, worth all your Toil and Pains of coming Hither. Our fundamental Maxim then is this. That it's no Crime to cheat and gull an Indian.
>
> MURPHY. How! Not a Sin to cheat an Indian, Say you? Are they not Men? Hav'nt they a Right to Justice as well as we, though savage in their Manners?
>
> M'DOLE. Ah! If you boggle here, I say no More; This is the very Quintessence of Trade, And ev'ry Hope of Gain depends upon it; None who neglect it ever did grow rich, Or ever will, or can by Indian Commerce. By this old Ogden built his stately House, Purchased Estates, and grew a little King. He, like an honest Man, bought all by weight, And made the ign'rant Savages believe That his Right Foot exactly weighed a Pound. By this for many years he bought their Furs, And died in Quiet like an honest Dealer.

Reprinted in W. JACOBS, DISPOSSESSING THE AMERICAN INDIAN 38-39 (1972).

10. *See* M. FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 at 90 (1980).

This fact proved embarrassing to the nineteenth century descendants of these eighteenth century British Americans, who, by virtue of a Revolution, inherited the troubling task of laying down a law for a new nation in dealing with Indian Americans. We recognize John Marshall, Chief Justice of the United States Supreme Court during the critical first third of the nineteenth century, as the individual most responsible for laying down the legal rules and principles regulating the relations of power in the federal system after the Revolutionary War. Marshall was also responsible for laying down the rules and principles regulating the relations of power between the Indian Nations of North America and the United States.[11]

In 1823, Marshall wrote the opinion for a unanimous Court in the famous case of *Johnson v. McIntosh*.[12] In that case, the Supreme Court held that the Indian tribes of America did not hold full and clear fee simple title to the lands that they historically occupied and claimed. Rather, under Europe's Law of Nations, upon discovery by a European sovereign, legal title to Indian lands in America vested in the discovering European nation. Under this "Doctrine of Discovery" as described by Marshall, the indigenous tribal nations inhabiting America were treated as dependent, diminished sovereigns whose rights and status in their lands were determined solely by the invading European colonizers.[13]

Since Marshall's 1823 opinion, the Discovery Doctrine's diminishment of tribal status and rights has been extended and interpreted by courts to vest an unquestioned plenary power in Congress, acting in a guardian-ward, or trust relationship with respect to American Indian Nations.[14] Principles and rules derived from the Doctrine and its related notions of Congressional plenary power in Indian affairs have legitimated numerous injustices and violations of Indian human rights.[15] Uncompensated Congressional abrogations of Indian treaty rights, leading to takings of Indian lands and resources,[16] involuntary sterilization of Indian women,[17] violent suppression

11. On Marshall's jurisprudential background, *see generally* Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978). On Marshall's impact on the development of Federal Indian Law jurisprudence, see sources cited *supra* note 5. *See also* Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 486-490 (1982 ed).

12. 21 U.S. (8 Wheat) 543 (1823).

13. *See id.* at 572-74. Discovery, according to Marshall, "gave title to the [European] government by whose subjects . . . it was made." *Id.* at 573. Discovery vested in that European government "the sole right of acquiring the soil from the natives . . . with which no Europeans could interfere." As for the American Indian tribes "discovered" along with the soil, Marshall's Doctrine held they had no theoretical, independent right to sovereignty that a European discoverer might be required to recognize under Europe's Law of Nations:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired . . . 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. Those relations which were to exist between the discover and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

Id. at 573-74.

14. *See generally* F. COHEN, *supra* note 3, at 489-493, and sources cited *supra* at note 5.

15. *See* Williams, *supra* note 5, at 252-265.

16. *See, e.g.*, Lonewolf v. Hitchcock, 187 U.S. 553 (1903) (treaties with American Indian Na-

of traditional religions and governing structures,[18] and all the other usual forms of genocide perpetrated upon Indian people by European-derived "civilization" represent the historical detritus of this legal doctrine.[19]

In short, Indian people regard the "Doctrine of Discovery," the foundation of our "modern" Indian law, as the "separate but equal" and *Korematsu* of United States race-oriented jurisprudence respecting their status and rights.[20] Worse, however, is the fact that United States courts continue to this day to rely on the Doctrine and its derivative forms of legal discourse to determine Indian status and rights.[21] The ability of Congress to unilaterally determine the self-governing powers that tribal governments shall or shall not exercise, an ability clearly sustained and legitimated by the Discovery Doctrine, acts efficiently and effectively in chilling any exercises of tribal sovereign powers that might be perceived as too radical or normatively divergent from the majority society's wishes or whims.[22] And as for the Doctrine's effect on Indian lands, the current intractable situation at Big Mountain, Arizona between the peoples of the Navajo and Hopi Nations indicates the folly as well as tragedy that can accompany Congress' unilateral power derived from the Doctrine to manage and dispose of the Indian estate.[23]

The amazing thing about this most amazing legal doctrine cited by Justice Marshall as support for the decision in *Johnson v. McIntosh*[24] is that it was, in essence, a fiction, admitted as such and turned to by the Court to legitimate the outcome of an intense political struggle.[25] The roots of this

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tions can be unilaterally abrogated by acts of Congress presumed "consistent with perfect good faith toward the Indians"). In United States v. Sioux Nation, 448 U.S. 371 (1980), the Supreme Court, while not abandoning the concept of plenary power permitting unilateral abrogation of Indian treaty rights, essentially rejected the *Lone Wolf* doctrine's conclusive presumption of congressional good faith in Indian legislation. *See* Comment, *Federal Plenary Power in Indian Affairs after Weeks and Sioux Nation*, 131 U. PA. L. REV. 235 (1982); Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984).

17. *See, e.g., Killing Our Future: Sterilization and Experiments*, 9 Akwesasne Notes, No 1 at 4.

18. *See, e.g.*, AMERICAN INDIAN POLICY REVIEW COMMISSION, 1 Final Report at 67-68, 95th Cong. 1st Sess. (1977); FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, Pub. L. 95-341 (1979).

19. *See, e.g.*, Coulter, *The Denial of Legal Remedies to Indian Nations Under U.S. Law*, 3 AM. INDIAN J. No. 9, at 5 (1977); Harvey, *Constitutional Law: Congressional Plenary Power Over Indians Affairs—A Doctrine Rooted in Prejudice*, 10 AM. INDIAN L. REV. 117 (1982).

20. Plessy v. Ferguson, 163 U.S. 537 (1986). *But see* Brown v. Board of Education, 347 U.S. 438 (1954) (Brown I), overruling Plessy v. Ferguson's "separate but equal" doctrine. Korematsu v. United States, 323 U.S. 214 (1944) (holding that the United States could lawfully inter Japanese-Americans in concentration camps during World War II).

21. *See* Williams, *supra* note 5, at 265-289.

22. *Id.*

23. *See generally* Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians Under P.L. 93-531 and P.L. 96-305*, 27 ARIZ. L. REV. 371 (1985).

24. 21 U.S. (8 Wheat) 543 (1823).

25. However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been

struggle trace back to long-forgotten conflicts and claims, originating in this Nation's Revolutionary era. Numerous historical instances could be recounted to demonstrate that the origins of modern Indian jurisprudence had little to do with rationality and "the Rules of Law," but instead were the outcome of a distant political conflict no longer immediately relevant to the legal issues confronting tribalism today.[26]

This Essay will focus on the particular story of *Jefferson, the Norman Yoke, and American Indian Lands.* This narrative has been selected because of the central role played by its starring character, Thomas Jefferson, durring the Revolutionary era, and also because the story is a fascinating one which sheds light not only on the political conflict over Indian lands that engulfed the early Republic, but also on the underlying legal and political discourses animating the vision contained in our own Constitution.[27] There is an integral, though suppressed, relation between the Revolutionary-era political conflict respecting the status and rights of Indians in their lands, and the vision animating the Constitution. As will be demonstrated, the principles inherent in that vision were sacrificed in the interests of espediency in the resolution of this conflict. This point should argue strongly for rethinking doctrine in modern Federal Indian Law in order to bring it closer in line with the Founding Fathers' own vision of the still-pertinent animating principles of the Constitution. Such a call for rethinking our Indian law jurisprudence seems entirely appropriate on the eve of the bicentennial of that vaunted document.

THE FRENCH AND INDIAN WAR AND THE PROCLAMATION OF 1763[28]

Historians, for good reason, mark the year 1763 as the beginning of the

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settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

Id. at 591-592.

26. *See generally* the historical sources cited *supra* note 3.

27. On the legal and political discourses of the Revolutionary and Constitutional eras, see generally B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969).

28. This section of the Essay represents a synthesis of numerous primary and secondary source materials. The major documentary and primary sources relied on for this section include: EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 (Alden T. Vaughan, gen. ed. 1983); JOURNALS OF THE COMMISSIONERS FOR TRADE AND PLANTATIONS PRESERVED IN THE PUBLIC RECORD OFFICE, 1704-1775 (1920-1938); ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, 1670-1776 (L. Labaree, ed. 1935); DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK (E.B. O'Callaghan, et. al., eds. 1856-1887). S. WHARTON, PLAIN FACTS: BEING AN EXAMINATION INTO THE RIGHTS OF THE INDIAN NATIONS OF AMERICA, TO THEIR RESPECTIVE COUNTRIES: AND A VINDICATION OF THE GRANT, FROM THE SIX NATIONS OF INDIANS, TO THE PROPRIETORS OF INDIANA, AGAINST THE DECISION OF THE LEGISLATURE OF VIRGINIA, TOGETHER WITH AUTHENTIC DOCUMENTS PROVING THAT THE TERRITORY WESTWARD OF THE ALLEGHENY MOUNTAINS, NEVER BELONGED TO VIRGINIA, ETC. (1781); S. WHARTON, AN ACCOUNT OF THE PROCEEDINGS OF THE ILLINOIS AND WABASH LAND COMPANIES, IN PURSUANCE OF THEIR PURCHASE MADE OF THE INDEPENDENT NATIVES, JULY 5TH, 1773, AND 18TH OCTOBER, 1775 (1786); MEMORIAL OF THE UNITED ILLINOIS AND WABASH LAND COMPANIES, TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES (1816); COLLECTIONS: THE CRITICAL PERIOD, 1763-1767 (C. Alford & C. Carter, eds. 1915); THE NEW REGIME, 1765-1767 (C. Alford & C. Carter, eds. 1921); TRADE AND POLITICS, 1767-1769 (C. Alford & C. Carter, eds. 1921).

Major secondary sources relied on for this section include: T. ABERNATHY, THREE VIRGINIA FRONTIERS (1940); T. ABERNATHY, WESTERN LANDS AND THE AMERICAN REVOLUTION (1937);

Revolutionary era in American history.[29] Great Britain had just fought and won a rather expensive war, the French and Indian War, to protect its American empire from rival French ambitions. By the Treaty of Paris, signed in 1763, Great Britain gained for itself control of the rights previously asserted by France to deal with the Indian tribes of the eastern half of the Mississippi Valley.

By far the most valuable prize won in the war was the jewel of France's Indian-based trading empire, the Old Northwest territory—the region bounded by the Great Lakes on the North, the Mississippi River on the West, the Ohio River on the South, and the Appalachian Mountains on the East. Having driven the French out of the Northwest, however, Great Britain now had to maintain a military presence in the region. This was required for two reasons. First, forts had to be manned to serve as trading posts for the valuable Indian trade in furs that the tribal hunters would exchange for British manufactured goods such as spun cloth, metal utensils, and muskets. Second, the forts had to be garrisoned by an army capable of stopping encroachments upon Indian territory by English colonists hungry for the cheaper lands lying beyond the Appalachians. An Indian on the war path against encroaching whites was one less Indian trapping furs for European markets and accepting payments for those furs in high mark-up British manufactured goods. Suppressing Indian hostilities with British troops only added to the empire's ultimate losses from failing to keep the peace on the frontier.

These two goals—facilitating the profitable Indian trade and protecting Indian lands to prevent hostilities—were viewed as complimentary halves of a self-serving colonial policy advocated by the mercantilist interests in the British ministry at Whitehall. These interest, which viewed protection and promotion of home industries as paramount in fashioning colonial policy,[30] consequently viewed inland expansion by British Americans away from the Atlantic seaboard with considerable consternation. Transportation costs for British manufactured goods rose to prohibitive proportions the further inland in America such goods had to be moved. The mercantilists in Whitehall feared that expansion of the colonial frontier beyond the reach of the

C. ALVORD, *supra* note 3; R. BERKHOFER, THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT (1978); L. GIPSON, THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION (1958-1970); W. JACOBS, DIPLOMACY AND INDIAN GIFTS: ANGLO-FRENCH RIVALRY ALONG THE OHIO AND NORTHWEST FRONTIERS, 1748-1763 (1950); F. JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALSM, AND THE CANT OF CONQUEST (1975); M. JENSEN, THE FOUNDING OF A NATION: A HISTORY OF THE AMERICAN REVOLUTION 1763-1776 (1968); C. ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES, BUREAU OF AMERICAN ETHNOLOGY, EIGHTEENTH ANNUAL REPORT, 1896-1897, part 2 (1899) (see especially "Introduction," by Cyrus Thomas, pp. 527-644); H. SHAW, BRITISH ADMINISTRATION OF THE SOUTHERN INDIANS, 1756-1783 (1931); J. SOSIN, *supra* note 3; J. SOSIN, THE REVOLUTIONARY FRONTIER 1763-1783 (1967); A. VOLWILER, GEORGE CROGHAN: WILDERNESS DIPLOMAT (1959). *See also* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS (1970); B. BAILYN, *supra* note 27; C. HILL, SOCIETY AND PURITANISM IN PRE-REVOLUTIONARY ENGLAND (1967); C. HILL, PURITANISM AND REVOLUTION (1958); C. HILL, INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION (1965).

29. *See* M. JENSEN, THE FOUNDING OF A NATION, at 3-69 (1968).

30. C. ALVORD, THE MISSISSIPPI VALLEY IN BRITISH POLITICS, VOL. I, 45-75 (1959), provides a concise summation of prevailing mercantilist eighteenth centry thought in Great Britain and its specific application to the Old Northwest.

Atlantic ports would ultimately lead to the creation of competing inland manufactures, lessening dependence throughout the colonies on British goods, and ultimately on the Mother Country itself. This mercantilist thesis conveniently complimented the anti-expansionist views of other influential ministers in the cabinet who were most concerned with the requisites of fiscal retrenchment throughout the empire brought about by the French and Indian War. Thus, by a volatile process of consensus which characterized British ministerial policymaking, particularly for America, during this period, Whitehall, with only occasional deviations and wavering, committed itself to maintaining the upper Ohio Valley as an exclusive Indian preserve from 1763 onward.

Thus in 1763 the ministry, under King George III's signature, promulgated the Proclamation Act.[31] The Proclamation of 1763 drew a boundary line along the crest of the Appalachians, to the west of which no English subject was permitted to acquire or settle on Indian lands without London's approval. In essence, the Proclamation of 1763 represented the institution of a conscious policy of racial apartheid. Economics, however, not racism, was behind it. Keeping English settlers off American Indian lands was the most expedient device to avoid costly wars and protect English economic interests in both the Indian inland and British American seaboard trade.

A. *Implementing the Stamp Tax*

While sound in theory, the policy's implementation presented several practical problems, not the least of which involved its economics. Treasury's requests for funds to maintain British armed forces in America after the war approached nearly half-a-million pounds annually. The empire could not afford to finance on its own this supposedly economizing policy initiative in the newly acquired Northwest territory, given that the national debt of Great Britain had risen from a pre-war total of 73 million pounds to 137 million pounds after the war. The annual carrying charge on that debt alone equaled five million pounds, compared to an annual national budget which averaged only eight million pounds during this period.[32]

Thus, when the ministry in 1764 considered the practical problems of paying for the policy behind the Proclamation, it was only natural that the ministry looked to the colonies in providing the answer. Relatively speaking, they were in far better financial shape. Parliament had reimbursed them for over three-fifths of their meager two and a half million pound debt incurred during the war. The total annual expense of all the colonial governments in America was a paltry 75,000 pounds.[33] The solution to the empire's fiscal problems in North America appeared simple to Whitehall. In the words of Lord Grenville, First Lord of the Treasury, who had originally proposed the idea of taxing the Americans to pay for the policy behind the Proclamation: "It was but reasonable the colonies should contribute at least

31. Printed in 1 DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA, 1759-1791, at 163-68 (A. Shortt & A. Doughty eds., 2d & Rev. ed. 1918).

32. These figures are provided in J. SOSIN; WHITEHALL AND THE WILDERNESS: THE MIDDLE WEST IN BRITISH COLONIAL POLICY 1760-1775, 79-83 (1961).

33. *Id.*

to take that part of the burden from the Mother Country which concerned the protection and defense of themselves."[34]

The colonists, of course, did not see Grenville's 1765 Stamp Act tax imposing minor duties on various legal documents such as wills and pleadings as "reasonable." Earlier forms of trade restrictions and duties on the British Americans had always been resented and resisted. The Stamp Act, however, representing to many of the colonists a doubly odious attack on their perceived rights and liberties, radicalized opposition to British colonial policy as no previous legislation had ever done.

First, the Act was pilloried in all the colonies as another overt attempt at direct taxation without representation and thus as a violation of the colonists' rights and liberties as English freemen. Acording to the colonists' constitutional paradigm, only their colonial assemblies could levy direct taxes upon them. Second, the Stamp Tax presented a new anomoly to the paradigm of colonial constitutionalism that American radicals sought to articulate during this turbulent period. Specifically, the Act was designed to finance and enforce a policy that closed the western frontier to the colonists' own speculative expectations and ambitions. No freedom-loving colonist could relish the idea of a levy imposed on Americans to pay for a standing British army on American soil. Furthermore, for the several "landed" colonies that claimed territory in the Ohio Valley under their royal charters,[35] the British plan to seal off the frontier appeared as a particularly ominous move. The policy behind the Proclamation of closing the frontier struck at the very meaning of America in the colonial mind as a New World of plentiful and cheap lands free of the feudal burdens that made land dear and unavailable in England.

B. *The Camden-Yorke Opinion*

To these "landed" colonies, the Proclamation asserted the dubious proposition that the King by his prerogative, not the colonists under their charters, controlled the preemption rights in the lands of America beyond the Appalachians. This was an important, though subtle, point of contention in American Revolutionary-era radical thought. The formal defeudalization of American property law following the Revolution has obscured this crucial contention to contemporary legal consciousness. Though opinions on both sides of the Atlantic diverged on the ancillary legal implications beyond the root feudal principle, Lord Coke in *Calvin's Case*[36] established clearly in the early seventeenth century that the King held both the title and rights to government over lands acquired by conquest.

This basic foundational premise of the entire royal Norman-derived feudal structure lost much of its significance as a source of Crown prerogatives

34. Quoted in M. JENSEN, THE FOUNDING OF A NATION 63 (1968).

35. The colonies that claimed land under their charters included Virginia, Georgia, North Carolina, South Carolina, New York, Connecticut, and Massachusetts. Some of these claims were extensive. Virginia, for example, under its 1609 charter, claimed virtually all the lands in America lying west of the Appalachian Mountains to the South Seas.

36. 77 Eng. Rep. 377 (1608). For a discussion of this case and its relation to English colonial legal theory, see Williams, *supra* note 5, at 239-246.

following the radical realignments in British politics after the Glorious Revolution of 1688-89. Instead, as the advocates of Parliamentary sovereignty formalized their ascendancy over the English government in the seventeenth and eighteenth centuries, the principle was more often cited as a source of limitations on the Crown. Particularly in the administration of colonial affairs, when so many members of the Privy Council, their placemen, and Parliament invariably held secret interests or outright shares in the great overseas trading ventures, delimiting the Crown's rights to interfere with the new forms of property and wealth being created throughout the empire appeared as a self-evident self-preserving necessity.

The English lawyers who elaborated and formalized the legal discourse of diminishment of royal prerogatives worked in subtle and circumspect fashion in installing the new regime of limitations on their monarchs. In a carefully-drawn commentary prepared for the Privy Council in 1757 by Attorney General Charles Pratt (later Lord Camden) and Solicitor General Charles Yorke, the property rights of the East India Company in lands it acquired by purchase in India were carefully insulated from any rival Crown prerogative property claims as follows:

> . . . relative to the [Company's] holding or retaining fortresses or districts already acquired or to be acquired by Treaty, Grant or Conquest, we beg leave to point out some distinctions upon it. In respect to such places as have been or shall be acquired by treaty or grant from the Mogul or any of the Indian Princes or Governments[,] your Majesty's Letters Patent are not necessary, the property of the soil vesting in the Company by the Indian Grants subject only to your Majesty's Right of sovereignty over the settlements and over the inhabitants as English subjects who carry with them your Majesty's Laws wherever they form colonies and receive your Majesty's protection by virtue of your Royal Charters. In respect to such places as have lately been acquired or shall hereafter be acquired by Conquest the property as well as the Dominion vests in your Majesty by virtue of your known prerogative and consequently the Company can only derive a right to them through your Majesty's Grant.[37]

By the time of this *Camden-Yorke* opinion (as it came to be called), the root feudal principle that the King controlled the property as well as the dominion (right of government) in lands acquired by conquest functioned as a formal principle of limitation in British constitutional theory respecting colonial acquisition of land. Real property acquired by a colonial venture outside the feudal paradigm of conquest was held free of the King's prerogative property claims. Yet, by virtue of the royal charter authorizing the colonial enterprise, these lands were at the same time entitled to "receive your Majesty's protection." The King had no direct right of property in the Company's lands acquired by peaceful means; he did, however, have a responsibility to defend and protect such lands according to the *Camden-Yorke* opinion.

37. Reprinted in J. SOSIN, *supra* note 31, at 230.

C. *Land Speculation in the Pre-Revolutionary Era*

To the radicals of the American Revolutionary Age, the Proclamation's implied assertion of unchallengeable authority over the frontier served as an ominous reminder of the Crown's continuous assault on these asserted constitutional principles of limitation. To them, the entire course of American relations with the British empire was marked by a long series of direct attacks upon their rights as English freemen. These radicals particularly detested the gradual century-long process beginning with the Stuart Kings by which the Crown brought formerly independent chartered colonies under its direct royal control. By 1775 in fact, only Connecticut and Rhode Island remained as self-governing corporations, and only Pennsylvania, Delaware and Maryland still retained their original status as proprietary colonies.[38]

In practice, the Crown tempered the theoretical oppposition to its asserted usurpation of American colonial charter rights by permitting the traditional institutions of colonial self-government—the assembly, governor, and council—to continue functioning in roughly the same semi-autonomous fashion that was customary prior to charter revocation. With respect to the vast western frontier, parts of which were claimed by all the colonies except for Pennsylvania, Maryland, New Jersey, Delaware, and Rhode Island, these traditions of colonial self-government tended to harden into claims of absolute right on the part of the colonial aristocratic hierarchies to determine the pace and direction of their colonies' western land sales.

Thus, the Proclamation's closing of the frontier formerly vested by charter in the "landed" colonies was viewed not only as a reminder of the tyrannous usurpation of colonial charter rights, but also as an attack on customary self-government. Such factors in and of themselves would have provided enough justification for challenging the legitimacy of the King's asserted prerogative rights in the western lands, for the radicals of the American Age of Revolution believed firmly that the nature of tyranny was such that claims against it were never time-barred or estopped.

There was much more, however, to the colonists' opposition to the Proclamation than a desire to correct history and assert their own particular constitutional vision which ought to structure political and legal relations with the British empire. Great sums of wealth were involved in the controversy, for the sale of frontier lands by the landed colonies had proven a great money-making machine for their ruling elites. Prior to the Proclamation, the governments of the landed colonies had freely parceled out unsettled frontier lands under their asserted charter rights. Even if the Crown under its prerogative claimed the ultimate rights to such lands, there were numerous opportunities presented by the colonial land acquisition process for profit, both licit and illicit, to be taken by the Americans.

A Governor's royal order might often entitle them to a percentage of the sale on a fee patent as part of the consideration for accepting a post in the colonies. The larger and more favorable wilderness tracts would go to favorites and men of influence. These speculators gladly paid unreported

38. *See* M. JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION 10-16 (1964).

premiums to facilitating colonial officials who had set the purchase price at artificially low levels. For the not so favored individual colonist who merely desired to obtain a decent-sized tract on the unsettled frontier, acquiring land could be a long and expensive process. After receiving the required license from colonial officials, usually puchased at valuable consideration along with the normal bribes, the individual colonist would then approach the Indian tribes that claimed the desired lands. After bargaining and acceptance of a satisfactory offer by the head chief or chiefs of the tribe, the colonist returned with the signed Indian deed of release and presented it to colonial officials. After another round of bribes and fees, the colonist would finally receive confirmation of his purchase and a patent.

There were, of course, variations in this procedure throughout the colonies for patenting Indian claimed lands. Sometimes a speculator first acquired an Indian deed and then sought confirmation and a patent from colonial officials who expected and received compensation for such favors. Or, tribes would release their land claims directly to the colonial government, which would then simply distribute patents to individual buyers. Many of the colonies passed prohibitory statutes voiding or outlawing any purchase of Indian lands not made in the presence of a colonial official. These injunctions were often times more honored in the breach than in the observance, and simply provided an excuse for initiating another round of bribes and graft. In short, an individual could acquire lands on the frontier in America in numerous ways, but all these methods ultimately referred back to the legitimating constitutional paradigm that the colonies themselves held the rights to control preemption and therefore the rights to receive the profits and petty graft involved at every stage of the colonial land acquisition process. From an early period in American colonial history, the granting of and profiting from lands on the unsettled colonial frontier had been regarded as an important aspect of colonial self-government, interest, and prosperity. To a race of men whose legal discourse easily sublimated customs and traditions into the force of a common law, any interference with their settled expectations arising from their histories was bound to be seriously regarded and resisted.

Thus, the Proclamation struck at the heart of the colonists' expectations that the lands of the Northwest claimed by their charters would be the bank that would finance their future prosperity. The issues implicated by the Proclamation, conceived of as another tyrannous usurpation of property rights achieved through the King's despised prerogative, and the related attempt by Parliament to tax the Americans in violation of the English Constitution, were therefore viewed as being of the utmost consequence to the colonists. For an Englishman of the eighteenth century, whether he resided in Yorkshire or New York, property and self-determination were synonymous. The future co-author of the Federalist Papers, John Jay, was not being facetious when he stated the maxim that every one of our Founding Fathers would have agreed with: "The people who own the country ought to govern it."[39] Resistance to the Proclamation's boundary line, like resistance

39. Quoted in M. JENSEN, *supra* note 2, at 4.

to the Stamp Act, was thus part of a larger conflict over who was going to own, and therefore govern America. The Revolutionary generation sensed grand conspiracies against their liberties accompanied by ultimate corruption in virtully every proposal emanating from Whitehall during this period. Defiance of such sinister schemes became the *sine qua non* of Revolutionary radical practice.

Thus, the radicals of the Revolutionary era never viewed their resistance to British imperial control in purely economic terms. Rather, they viewed the question of property ownership as being closely tied up with the more fundamental issue of the right to govern themselves and be represented in government. Their resistance was grounded and legitimated by their conception of their self-governing rights under the British Constitution.

It was the crisis brought about by England's challenge to their constitutional vision after 1763 that led American radicals to reexamine and reaffirm the roots of the relationship between property and self-government assertedly protected by the British Constitution. What they found in their search for roots was the discourse of natural law that provided a firm legitimating foundation for the Constitution, and, therefore, for their resistance as well.

Samuel Adams, for example, drafted the following resolutions for the House of Representatives of Massachusetts protesting the Stamp Act:

1. *Resolved*, that there are certain essential rights of the British Constitution of government, which are founded in the law of God and nature, and are the common rights of mankind; therefore
2. *Resolved*, that the inhabitants of this Province are unalienably entitled to those essential rights in common with all men; and that no law of society can, consistent with the law of God and nature, divest them of those rights.[40]

In this bicentennial year of our own Constitution, it is useful to recall that the intellectual origins of that particular document derive from the Revolutionary generation's antecedent conceptions of the English Constitution. Though never fully reduced to writing, the English Constitution was as real and meaningful a text to the Revolutionary generation of Adams, Henry, and Jefferson as is our own Bill of Rights for our generation, perhaps even more so.

For American radicals, the animating spirit of the English Constitution was natural reason, actualized and contained in the English common law, the realization in history of man's natural reason perfected. And for the radicals, the central historical experience that served as testament and culminating proof of the divinely inspired origins of the English Constitution was the British Revolution. For all Englishmen of the eighteenth century, the meanings of the Glorious Revolution of 1688-89 against the Stuart dynasty of kings were contained in a specific vision of history. That vision was best captured by the image of the Norman Yoke.

40. Quoted in B. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT 72 (1931).

DIVERGENT DISCOURSES[41]

A. *The Norman Yoke*

For Englishmen, the image of the Norman Yoke spoke to the idea of a natural law established by God of eternal truth, equity, and justice, which their Saxon ancestors had virtually realized prior to their invasion by the Norman conqueror in 1066. The idea of a purer Saxon-derived constitution crushed by an invading foreign sovereign served as a rallying point for the Glorious Revolution in the seventeenth century. It is no surprise that the Norman Yoke discourse experienced a revival by late eighteenth century radicals in England as well as in America who protested a corrupt ministry and a foreign-born Hanoverian King in league against the sacred rights and liberties of Englishmen everywhere.

For the Americans, in particular, the series of attacks against their fundamental rights were claimed as merely the continuation of the Norman Yoke that had reversed the Saxon model of government founded on natural law and the common rights of mankind.[42]

Thus, the liberties which Americans demanded were seen as a part of their ancient Saxon birthright. A John Adams could thus sense "Providence" at work in the settlement of America, where a purer, Saxon-derived constitution based on natural law would be properly revived.[43] Adams, like so many of the colonial radical theorists, saw the settlement of America as the continuation of the great struggle for liberty embedded in the Saxon spirit of which the English Revolution was a part. For the Americans, England was irredeemably corrupted. America was the promised land where the purer English Constitution and its guarantees of rights and liberties would be preserved. The Norman Yoke became part of the radical's discourse of insurrection that argued for ultimate independence for America.

The Norman Yoke discourse also perfectly complimented the arguments of those colonies that claimed that the Proclamation had usurped their charter rights in western lands. It took little in the way of an historical leap of the imagination to see in the King's usurpation of rights in the western lands an abuse of his prerogative constituting but another instance of the tyranny of the Norman Yoke, this time applied in America. Lands which

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41. *See* sources cited *supra* note 28 for the bibliographical references utilized in this section of the article.

42. James Otis, one of the most widely-read of the radical pampheteers of the early Revolutionary era, drew on the Norman Yoke imagery to underscore the priority of his natural rights discourse in opposition to positive law as follows:

> Here indeed opens to view a large field; but I must study brevity—Few people have extended their enquiries after the foundation of any of their rights, beyond a charter from the crown. There are others who think when they have got back to old Magna Charta, that they are at the beginning of all things. They imagine themselves on the borders of Chaos (and so indeed in some respects they are) and see creation rising out of the unformed mass, or from nothing. Hence, say they, spring all the rights of men and of citizens.—But liberty was better understood, and more fully enjoyed by our ancestors, before the coming in of the first Norman Tyrants than ever after, 'till it was found necessary, for the salvation of the kingdom, to combat the arbitrary and wicked proceedings of the Stuarts.

J. OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1764), *reprinted in* TRACTS OF THE AMERICAN REVOLUTION 1763-1776 (M. Jensen ed.) 20-21 (1967).

43. *See* B. BAILYN, *supra* note 27, at 8.

ought to have remained free for appropriation by the labor of Americans had been usurped by a tyrannous monarch as part of his feudal demesne.

1. *A Summary View*

We can develop a truer appreciation of the radical nature of this particular strain of insurrectionist discourse by examining its most radical elaboration during the Revolutionary period. If by "radical" we mean to convey the idea of going to the foundation or source of a thing, then certainly Thomas Jefferson's *A Summary View of the Rights of British America*,[44] written in 1774, represents the most radical extension of the Norman Yoke theory, as well as the most radical elaboration of colonial insurrectionist thought prior to the Revolution.

Jefferson's *A Summary View* was one of the most influential and popular pamphlets published prior to the Revolution. In many ways, it can be seen as a trial run for ideas that Jefferson would later elaborate in the Declaration of Independence.[45] To set the stage, it is necessary to explain the historical events leading up to the pamphlet.

The British ministry, itself torn by internal feuding and factionalism, repealed the Stamp Act shortly after promulgation in the face of American rioting and opposition. At the same time, ruling factions in the ministry continued to adhere to the policy of the Proclamation of 1763 prohibiting white settlement beyond the Appalachians.

Without the Stamp Act, however, the ministry lacked a source of revenues to enforce the boundary line with any degree of vigor. It was hoped that by merely declaring the western frontier off-limits, and garrisoning a few forts at strategic placements, the colonists would simply cease in their efforts to acquire Indian lands. That was simply not to be. Virginians, in particular, continued to act upon the assumption that the right to grant western lands reserved to the Indians by the King's Proclamation belonged to Virgina by charter and that the boundary line was only, in the words of George Washington, himself an avid speculator in Indian lands, a "temporary expedient."[46] In contrast, speculators from colonies such as Pennsylvania, Maryland and New Jersey, the so-called "landless" colonies whose boundaries were limited by their charters and thus could claim no western lands, saw the Proclamation as the window of opportunity to acquire interests in the territories claimed by the large landed colonies. Their hope was that the ministry in London might be persuaded (or bribed) to ratify grants obtained from Indian tribes on the frontier under the King's asserted right of preemption.

The ultimate and wholly unintended result of the Proclamation therefore was to accelerate the process of speculation in western lands by Virginians and non-Virginians alike in the decade preceding the Revolutionary War

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44. The pamphlet is reprinted in TRACTS OF THE AMERICAN REVOLUTION 1763-1776, *supra* note 42 at 256-276.

45. *See* M. JENSEN, *supra* note 28, at 399, 485.

46. Quoted in THIS COUNTRY WAS OURS: A DOCUMENTARY HISTORY OF THE AMERICAN INDIAN 57 (V. Vogel, ed. 1972).

as the fragile consensus on both sides of the Atlantic respecting the locus of administrative power to confirm titles acquired by Indian grants completely broke down. Virginians and non-Virginians swarmed the frontier surveying lands and purchasing any and all claims and interests from willing Indian tribes who suddenly discovered the meaning of the term "sellers' market." In a time of discursive crisis, the wise are counseled to cover all bets.

One of the most significant, and from the Virginian speculators' point of view, worrisome, speculative ventures in western Indian lands was that of the Vandalia Company. Benjamin Franklin, Pennsylvania's agent in London in the 1760's and early '70's, was a central cog in this scheme involving influential colonists from the "landless" colonies of Pennsylvania, Maryland, and New Jersey, as well as influential London politicians and financiers who had been bribed with free shares in a scheme to petition the ministry at Whitehall for confirmation of a 20 million acre grant south of the Ohio River in a region claimed under Virginia's charter. This grant would be used to establish a colony named, appropriately enough, Vandalia.

Virginia responded quickly to this attempt to annex lands claimed under its charter. In 1773, the Governor of Virginia, Lord Dunmore, himself heavily invested in speculative ventures that relied on his colony's control over Indian land sales in the west, disobeyed direct orders from London and granted lands conflicting with the Vandalia claims. Then, in 1774, Dunmore moved to thwart the speculative designs of other colonies on the west by marching Virginia's militia upon Fort Pitt, the strategic key to migration into the region. The fort was seized, renamed Fort Dunmore, and a county government under Virginia's jurisdiction was proclaimed, overlapping the boundaries of the Vandalia colony, and preempting prior claims of Pennsylvania to the region. Any Indians who resisted the encroachment on their hunting grounds were massacred in what became known as Dunmore's War.

Dunmore's War was but final proof that the Americans would never abide by the Proclamation line. The British Ministry had been besieged by petitions from speculators and colonial officials seeking the right to settle lands beyond the Proclamation boundary. Oftentimes, such requests were only to confirm an already blatantly and illegally established fact. British officials in the field reported regularly on the impossibility of keeping the Americans out of the western territory.

Resigned to the impossibility of enforcing the policy of the Proclamation without a supporting tax from the colonies, the ministry began in 1773 preparing legislation that would turn over control of the Northwest to the colony of Quebec. The former French province captured in the war was still predominantly Catholic. The French Canadians had been permitted by a reluctant Whitehall to continue operating roughly according to their alien civil law customs. Whitehall knew that no Englishman would desire to ever come under the Catholic and alien-inspired government of a Canadian controlled Northwest. The Quebec Act became law in the summer of 1774.

It was in response to the crisis represented by this intense set of circumstances arising in the early 1770s: the Vandalia fiasco; Dunmore's War; the looming Quebec Act; and the seeming approaching inevitability of open rebellion with the Mother Country; that Thomas Jefferson drew upon the Nor-

man Yoke to argue for effective independence from England in his pamphlet *A Summary View*.

The pamphlet attacked, among other things, the usurpation by the Crown of Virginia's charter rights to the Northwestern territory. Jefferson framed his insurrectionist discourse using the radical thematics of the Norman Yoke, setting out his view of the colonist's rights "from the origin and first settlement of these countries" as follows:

> . . . our ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right which nature had given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote the public happiness that their Saxon ancestors had.[47]

The freedom-loving Saxons, according to Jefferson's mythology, emigrated from northern Europe and set up in England "that system of laws which has so long been the glory and protection" of Great Britain.[48] The Americans, descendents of the noble Saxons, were now setting up their own laws in the forests of the New World. "No circumstance," argued Jefferson in *A Summary View*, "has occurred to distinguish materially the American from the Saxon emigration."[49] America was conquered, and her settlements made, and firmly established, at the expense of individuals, and not of the British public;" for themselves they conquered, and for themselves alone they have a right to hold,"[50] according to the later author of the Declaration of Independence.

Jefferson thus drew upon the radicals' natural law ideology of government by compact based upon the consent of the governed to legitimate an American claim for independence from British sovereignty. His discursive strategy was to utilize the mythology of the freedom loving Saxons for purposes of dramatizing the continuity of the Saxon struggle for natural rights now being played out on the American stage. The Americans, inheritors of the Saxon mantle of liberty, saw their natural law claims to freedom illustrated by the continuous usurpations of the British Crown, which had wrongfully asserted its sovereignty over the colonies. This history of usurpation by the Crown, Jefferson argued, should therefore be recognized for what it was; a wrongful continuation of the perversion of Saxon principles of right and justice, traceable to the imposition of the Norman Yoke.

Jefferson went on in his pamphlet to make an intriguing revisionist-style argument of the history of English land tenure, post-Norman Yoke. "Our Saxon ancestors held their lands . . . in absolute dominion," unencumbered by any superior. William the Conqueror imposed feudal burdens upon the entire realm, under the fiction that all of the lands in England were held from the Crown, although many of the free tenures held by the Saxons were never formally surrendered to the Normans. Thus, "feudal holdings," ar-

47. TRACTS OF THE AMERICAN REVOLUTION, *supra* note 42, at 258.
48. *Id.* at 259.
49. *Id.*
50. *Id.*

gued Jefferson, are to be seen as an anomoly to the Saxon laws of possession, and as "America was not conquered by William the Norman," the exceptions of feudal tenures do not apply in the New World. All property in America is held free of the Norman Yoke of the imperial feudally-derived prerogative.[51] This was a powerful argument, for it implied that the King's asserted right of preemption in western lands was but another despised Norman-imposed anomaly upon the purer Saxon pattern of holding lands that ought to prevail in America. The usurpation of Virginia's charter rights to its western lands was boldly presented to the reader of Jefferson's *A Summary View* as a perversion of the pure Saxon constitution established in America.

> It is time, therefore, for us to lay this matter before his Majesty, and to declare that he has no right to grant lands of himself. From the nature and purpose of civil institutions, all the lands within the limits which any particular society has circumscribed around itself are assumed by that society and subject to their allotment only.[52]

The colony's ample charter defined the limits that the particular society of Virginians had circumscribed around itself. As Jefferson was well aware, however, the western lands claimed under Virginia's charter were not vacant and ready for allotment by Virginia, the Crown, or anyone else. They were occupied and fiercely defended by the Indian tribes of the region who had proven time and time again that they would only surrender their claims for valuable consideration, or by costly wars of conquest. But that was not the point, for the real issue in the mind of Jefferson and all the colonists was who would control the exclusive right of acquiring the Indian's "waste" lands for resale to emigrating colonists; the Crown from London, or Virginia.

Jefferson's argument in essence was that Englishmen who had emigrated to America had freed themselves from Norman feudal tyranny and established a purer Saxon constitution of non-feudal tenures. It should be emphasized that Jefferson's argument in *A Summary View* was widely praised and trumpeted by American radicals. The fact that the post-Revolutionary state governments usually moved quickly in abolishing many of the remaining feudal incidents of tenure[53] attests to the responsive chord Jefferson struck in *A Summary View*. But taken to its logical limits, Jefferson's argument would seem to imply that neither the King, nor Virginia, (for Virginia, it could be argued, derived any rights it had from the King's 1609 charter) ought to have the feudally-derived right to control the disposition of Indian lands. If American land was unencumbered by Norman-derived feudal incidents, then why could not Americans purchase directly from the Indians?

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51. *Id.* at 258-260, 272-273.

52. *Id.* at 273. *See also* Jefferson, NOTES ON THE STATE OF VIRGINIA 110-122 (1954), in which he makes essentially the same point.

53. *See, e.g.*, J. KENT, COMMENTARIES ON AMERICAN LAW, Vol. 3, Part VI: OF THE LAW CONCERNING REAL PROPERTY, Lecture LIII: OF THE HISTORY OF THE LAW OF TENURE 501-510 (5th ed. 1844).

2. *Indian Land Grants*

Thus in theory according to this anti-positivistic legal discourse, Americans exercised their natural rights as free men when they purchased lands held by the Indians. Concomitantly, the Indians, as free, unconquered nations (for the Indian tribes of the Northwest were fiercely independent at this time) exercised their natural rights by freely alienating that which they occupied and held as their own to whomsoever they pleased.

This self-serving inclusion of the Indian within the speculators' natural law discourse at the least legitimated, and perhaps even energized, the laissez-faire attitude adopted by so many of the land jobbing colonists on the frontier in the years immediately prior to the Revolution. Suddenly, one could find the most hardened land market capitalist assuming the mantle of zealous advocate of the Indian's natural rights. Samuel Wharton, one of the principal organizers and backers of the Vandalia venture (and also future member of the Continental Congress), argued to potential collaborators in London that the Indians already released their interest in the lands of the proposed colony to the Vandalia company's agents, and that a grant from an Indian Chief was sufficient to pass title under the laws of natural justice.[54]

The speculators in Indian land grants of course never primarily regarded themselves as crusaders for a racially-neutral form of American egalitarianism. Like the empire and the Virginians, they sought to use legal discourse as a tool to further their own perceived self-interests. An earlier legal paradigm in the colonies had simply vested the right of confirming and patenting grants to Indian lands in colonial officials. The status and rights of the Indians in those lands seemed irrelevant, since what Englishmen sought was security of title against other Englishmen. The asserted right of preemption in the colony simply rationalized the land acquisition process for colonists, who up to this time never had cause to test the legal assumptions behind the preemption doctrine of an exclusive right in the colonies to patent Indian lands. The Virginians, whose charter bestowed upon their colony claims to Indian lands to the South Seas, benefited and expected to benefit even further under the assumptions behind the preemption doctrine that the government could control the Indian right of alienation in its sole favor. The non-Virginians who formed these speculating syndicates and ventures, buoyed on by the King's Proclamation, found it in their interest to question and test such assumptions, and to invest in alternatives.

The fact that so many groups of speculators invested large sums of money purchasing lands directly from the frontier tribes on the basis of the entirely novel theory that Indians had the natural right to alienate their territory indicates the proportions of the crisis in colonial legal thought brought about by the Proclamation and subsequent imperial measures. England's attack on British American rights had opened up a new field of discourse—a field in which men sought desperately to protect and promote their own interests on the frontier. The most widely-divergent theories and discourses on the rights of Englishmen and Indians thereby proliferated and flourished;

54. See J. SOSIN, *supra* note 3, at 195-198.

in the state of nature that was the American frontier, there was no law laid down or settled.

In such a state of nature, Indian rights became a fungible commodity, regulated only by the laws of supply and demand. Indian rights were valued highly by those who stood to gain the most by a recognition of the savage's ability to alienate his estate. Those who stood to lose the most by acceptance of the proposition that natural law applied to all men, even savages, in turn placed little value on land titles acquired directly from Indians. Rarely has the dynamic relationship of American racism and the dominant caste's economic interest been so clearly revealed within the normative fineries of national legal discourse as in the Revolutionary era debate on the status and rights of Indians in their lands. White interests and expediency, not the rule of law, ultimately informed and determined Revolutionary era legal discourse on the natural law rights and status of the Indian.

B. *Plain Facts*

The speculators, of course, sought legal precedents in addition to their natural law arguments that Indian tribes were sovereign over the lands they occupied, and could alienate to anyone they so chose without the confirmation of either the Crown or Virginia. One of the important legal precedents they found and frequently discussed was the previously cited opinion prepared for the Privy Council in 1757 by then Attorney General Charles Pratt, Lord Camden, and Solicitor General Charles Yorke.[55] The *Camden-Yorke* opinion had been prepared to address an issue on the rights of the East Indian Company in India. The opinion declared that lands acquired by treaty or grant from an Indian Mogul or Prince did not require confirmatory letters patent from the Crown. The property of the soil, according to the opinion, vested in the grantee "by the Indian Grants."[56] While supposedly restricted in its application to India and the East India Company, numerous land speculators in America quickly seized upon the *Camden-Yorke* opinion (George Washington copied the opinion into his personal diary).[57] They cited the opinion for the proposition that a purchase from the natives was, in Patrick Henry's words, "as full and ample a title as could be obtained."[58]

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55. *See supra* text accompanying notes 36-38.

56. *See supra* text accompanying note 37.

57. An impressive list of American radicals cited the *Camden-Yorke* opinion and had a copy of it in their possession. Patrick Henry, Lord Dunmore, Governor of Virginia, Judge Richard Henderson of North Carolina, Samuel Wharton, member of the Continental Congress, all knew of and cited the opinion in support of speculative activities. George Washington had a copy of the opinion in his diary for 1773. *See* J. SOSIN *supra* note 3, at 259-267. The copy of the opinion which was widely circulated in America had been conveniently edited so as to support the argument that its terms were not limited to India, "Indian Moguls" and the East India Company. Compare the following American version with the official version which appears *supra* in the text accompanying note 37:

> In respect to such places as have been or shall be acquired by Treaty or Grant from any of the Indian Princes or Governments; your Majesty's Letters Patents are not necessary, the property of the soil vesting in the grantees by the Indian Grants; subject only to your Majesty's Right of Sovereignty over the settlements and over the inhabitants as English subjects who carry with them your Majesty's Laws wherever they form colonies and receive your Majesty's protection by virtue of your Royal Charters.

Quoted in J. SOSIN, *supra* note 3, at 231.

58. *Id.* at 229.

Just one example of the *Camden-Yorke* opinion's use will suffice to demonstrate the widespread currency on the frontier of its basic proposition that American Indian tribes could alienate their own lands. In 1773, a trader named William Murray organized a syndicate of influential Pennsylvanians and Marylanders that eventually assumed the name of the Illinois-Wabash Company. Murray set out for the Ohio country to purchase several large tracts of land directly from the Indians. These tracts would eventually form the basis of the suit in *Johnson v. McIntosh*,[59] the 1823 case in which Chief Justice John Marshall ruled that the United States held a superior sovereignty in the soil claimed by Indian tribes. When the English commander at Fort Gage in the interior attempted to stop Murray from purchasing lands directly from the Indians as an act in violation of the Proclamation of 1763, Murray presented a copy of the *Camden-Yorke* opinion, and explained that His Majesty's subjects were at liberty to purchase whatever quantity of lands they chose from Indians. Murray was reluctantly allowed to make his purchases.

There are numerous other examples demonstrating that on the eve of the Revolution, at least three competing discourses on the legal status and rights of Indians in their lands existed.[60] All contended for legitimacy. All were acted upon by men who invested fortunes on the chance that their preferred theory of Indian land rights would win out, and they would profit handsomely from their perspicacity. The Crown asserted its rights to control the preemption and disposition of Indian land under its royal prerogative. Virginia and the other landed colonies asserted preemption rights under their charters and a purer version of the Saxon natural law-based constitution. And a large group of speculators who cared neither for the Crown's nor the landed colonies' pretensions, claimed that under natural law the Indians themselves as sovereigns of the soil could sell to whomsover they wish.

These divergent discourses on Indian legal status and rights were of course all derivative of the larger and more direct question (in the minds of the colonists), involving rationalization of the land acquisition process on the American frontier. As far as American colonizing legal theory during this period was concerned, that was virtually the only arena in which the Indian's legal status was seriously debated. His rights were of only indirect concern, for he was but a supplement to the larger, manifest goals pursued by whites on the frontier of their destiny. Only when it became apparent to Indian tribes that their own survival required a less accommodating stance towards the white man's offers of purchase would American colonizing legal theory be directly confronted by the issue of Indian rights and status in their lands. And that would not occur with any notable inconveniencing frequency until after the Revolution, and the adoption of a policy by the federal government of simply removing the tribes by military force from their lands to make way for white settlement. Only then would American legal theory

59. 21 U.S. (8 Wheat) 543 (1823). See *supra* text accompanying notes 11-13.

60. *See generally* T. ABERNATHY, WESTERN LANDS AND THE AMERICAN REVOLUTION (1959). *See also* J. SOSIN, THE REVOLUTIONARY FRONTIER 33-38 (1967).

directly confront the question of whether Indians had natural rights in the lands which they refused to sell to desiring whites, and the answer, of course, was that they did not.[61]

During the Revolutionary era, however, the only real issue presented by the Indian to the development of American colonizing theory was his ability or disability to pass a vested title without the positive sanction of a European-derived sovereign entity. The strident anti-positivistic thematics of American radical thought during the period explains why some colonists saw no problem in unquestioningly extending their natural law discourse to Indians as an inherent correlative postulate of their own radical discursive practice. The most widely circulated and popular pamphlet of the era which urged the Revolutionary Continental Congress to recognize the natural law-based validity of Indian grants was titled, non-controversially enough, *Plain Facts: Being An Examination Into the Rights of the Indian Nations of America, to their respective Countries. . . .*[62] It was written by Samuel Wharton, the previously-mentioned land speculator and member of the Continental Congress.

C. *Public Good*

As anyone familiar with American history knows, the self-evident truths of this discourse of the Indians' natural rights to their lands was an-

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61. *See generally* F. MOHR, FEDERAL INDIAN RELATIONS 1774-1788 (1937). Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969), provides an excellent case study of the confrontation in American legal theory between the natural rights discourse applied to Indians wishing to keep their lands, and that same discourse utilized by whites to justify taking Indian lands. John Adams, in his famous 1802 speech at the anniversary of the Sons of the Pilgrims clearly indicated the nature of the consensus on Indian natural rights adopted by Americans in the early decades of the nineteenth century:

> There are moralists who have questioned the right of Europeans to intrude upon the possessions of the aborigines in any case and under any limitations whatsoever. But have they maturely considered the whole subject? The Indian right of possession itself stands, with regard to the greatest part of the country, upon a questionable foundation. Their cultivated fields, their constructed habitations, a space of ample sufficiency for their subsistence, and whatever they had annexed to themselves by personal labor, was undoubtedly by the laws of nature theirs. But what is the right of a huntsman to the forest of a thousand miles over which he has accidentally ranged in quest of prey? Shall the liberal bounties of Providence to the race of man be monopolized by one of ten thousand for whom they were created? Shall the exuberant bosom of the common mother, amply adequate to the nourishment of millions, be claimed exclusively by a few hundreds of her offspring? Shall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world? Shall he forbid the wildnerness to blossom like the rose? Shall he forbid the oaks of the forest to fall before the ax of industry and rise again transformed into the habitations of ease and elegance? Shall he doom an immense region of the globe to perpetual desolation, and to hear the howlings of the tiger and the wolf silence forever the voice of human gladness? Shall the fields and the valleys which a beneficient God has framed to teem with the life of innumerable multitudes be condemned to everlasting barrenness? Shall the mighty rivers, poured out by the hands of nature as channels of communication between numerous nations, roll their waters in sullen silence and eternal solitude to the deep? Have hundreds of commodious harbors, a thousand leagues of coast, and a boundless ocean been spread in the front of this land, and shall every purpose of utility to which they could apply be prohibited by the tenant of the woods? No, generous philanthropists! Heaven has not been thus inconsistent in the works of its hands. Heaven has not thus placed at irreconcilable strife its moral laws with its physical creation.

Reprinted in C. ROYCE, *supra* note 28, at 536-537.

62. *See* PLAIN FACTS, *supra* note 28.

swered ultimately with a silence. The plain facts of expediency and interest in the life of the early Republic dictated a cloture of the debate on the nature of Indian title. The circumstances that led to the silent rejection of the theory that Indian tribes held legal title to their lands in American law, however, are worth recounting, and hold profound implications for contemporary Indian law jurisprudence.

1. *Just Gaming: Delay in the Ratification of the Articles of the Confederation*

During the course of the war, Virginia continued to insist upon its rights in the west. A large number of delegates to the Continental Congress, particularly members of the Maryland, Pennsylvania, and New Jersey delegations, however, had previously acquired large financial interests in various land speculating ventures on the frontier. In particular, the many members of the Congress who held shares in the Vandalia colony and the Illinois-Wabash Company, both of which had acquired grants directly from tribes prior to the war, sought to assure that the new Congress would assume control of the western frontier territories and recognize the validity of their Indian grants. Each colony in the confederation held a veto power, however, and Virginia succeeded in blocking any consideration on the issue by the Continental Congress. Virginia's own Constitution, adopted in 1776, contained an amendment drafted by none other than Thomas Jefferson that the boundaries of the state to the west were to remain as defined in the Charter of 1609; that is, as extending to the South Seas and encompassing the Old Northwest territory and lands south of the Ohio River. Delegates from Maryland and Pennsylvania threatened not to ratify any version of the Articles of Confederation unless Virginia dropped its extravagant claims. They argued that small states would be endangered by the growth of large states. Jefferson replied with the maxim: "A man's right does not cease to be a right, because it is large."[63]

Jefferson and the radicals from Virginia and other states felt endangered by a large central government. They firmly believed that power should be dispersed, not concentrated in a centralized sovereign. They succeeded in assuring that the Articles of Confederation presented for final ratification to the states assured a weak central government, with little power to interfere in the domestic affairs of the new states, and no real power to affect the land claims of Virginia and other states with charter rights to the west. Maryland, whose governor and several other prominent citizens such as Charles Carrol held controlling shares in the Illinois-Wabash Company, followed up on its earlier threat and refused to ratify the Articles.

Events reached a climax in late 1778 when the depreciation of Virginia's currency convinced the government that funds from western land sales would restore the state's credit. Virginia's legislature, under the leadership of Jefferson and George Mason, declared void all unauthorized purchases of lands from Indians within its chartered limits. The natural rights of the Indians in their lands was not a point of debate. The Virginians relied only

63. Quoted in M. JENSEN, *supra* note 2, at 155.

on their charter's asserted grant of preemption authority to extinguish whatever claims the Indians might make.

Maryland held firm in its vow that it would never ratify the Articles of Confederation until Congress had been given full power to fix the boundaries of the United States. The argument of the speculators in the Maryland delegation was two-fold. First, they argued that the lands had been seized from the British Crown by the united efforts of all the colonies and should benefit them all. Second, they made the legal argument that by the conquest of the lands, the right of the Crown's prerogative devolved upon the United States. In essence, then, the speculators abandoned the effort to base the legitimacy of the western claims solely on the natural law rights of the Indians to sell their lands. Instead they appealed to the pretensions of sovereignty which the advocates of a strong central federal government sought so desperately to legitimate in the face of the fearfully perceived spirit of "democracy" supposedly raging in the individual colonies.

Jefferson and other radicals who preferred to think of the Declaration of Independence as a clean break with England were appalled at this "devolution of sovereignty" argument that flew directly in the face of the theory that the king's prerogative was nothing more than another Norman-inspired usurpation of natural Saxon-derived liberties. Acceptance of the "devolution of sovereignty" argument, which was gaining wide acceptance among those who favored a stronger federal government, meant to the likes of Jefferson that a revolution had been fought against one aggrandizing tyrant, only to see another centralized monolith arise like a dreaded phoenix from its ashes.

British advances in the south in the winter of 1780 made both Virginia and Maryland reconsider. Maryland, pressured by the new nation's ally, France, finally capitulated and ratified the Articles in 1781. This, however, was only after Virginia and other states with unresolved border issues began negotiations with the Congress over the terms of their ultimate cessions of their western land claims. Virginia's stipulations of cession were devised by George Mason; the newly adopted concessionairy attitude was influenced by the fact that British troops were moving northwards to the Chesapeake Bay region. Virginia would cede to Congress the Old Northwest, but only in exchange for confirmation of the land titles already granted by Virginia in the region. In addition, Virginia demanded as part of the national price for the Old Northwest that its charter claims to the territory south of the Ohio River be recognized, and that all claims of the non-Virginian land speculating companies relying on Indian grants be disallowed.

2. *Common Sense Prevails*

It was at this point that the speculators holding tribal grants mounted a massive publicity campaign to convince the Congress to hold firm in its decision not to deny the validity of Indian titles. They directed their discursive energies toward persuading Virginia to relent on this one demand holding up the cession of the Northwest and the unity of the new nation.

Among those called upon to join this publicity campaign was Thomas

Paine, whose earlier 1776 pamphlet *Common Sense*,[64] had galvanized revolutionary thought. For the apparent price of 300 shares in one of the speculative ventures,[65] Paine produced a pamphlet entitled *Public Good: Being an Examination Into the Claim of Virginia to the Vacant Western Territory, and the Right of the United States to the Same.*[66]

Paine sought to demolish the basis of Virginia's claims to the western territory by pointing out that the charter under which it claimed lands to the "South Seas" had been granted by the Crown to the London Company, and that by subsequent actions revoking the charter, the Crown had superseded the Company's interest. Thus, argued Paine, the Crown had voided the creature of its creation, the London Company, and any rights belonging to this creature that it created. Therefore, any vacant lands under this charter belonged to the Crown, and had now devolved to the sovereignty of the United States.[67]

Paines's *Public Good* must have read like positivistic feudal nonsense to the Virginians, who felt that the Crown's supersession of the colony's charter was illegitimate to begin with under natural law. Any national claims to Virginia's western lands that supposedly devolved from this illegitimate act therefore similarly violated Saxon understood natural law principles. The Virginians refused to remove their stipulation to cession forbidding Congress to recognize the rival Indian-derived claims of the land companies.

For Paine and the advocates of a strong central government, however, common sense dictated that the United States Congress should decide how to dispose of the western lands for the benefit of all the colonies, and to determine if Indian grants should be recognized. The idea that the Indians had natural rights to their lands which the Congress ought to recognize did not figure into Paine's discourse of union. There was a more immediate and direct question confronting the colonies of assuring the survival and future prosperity of a European-derived nation on the American continent. Paine's discourse, therefore, was one of interest and expediency, projected from a non-Indian perspective. It only intended to demonstrate that the question of western lands ultimately involved issues of politics and the form the positive dictates of law fashioned by political concerns ought to assume. By Paine's common sense political calculations, the "Public Good" of the nation depended on Virginia ceding unconditionally its western land claims to the Congress.

The impasse over the western lands question continued until 1783, when a political compromise was finally brokered. Congress would accept Virginia's cessions of its claims north of the Ohio, but it would not specifically invalidate all private land purchases from the natives in the territories as demanded by Virginia. Congress agreed, however, not to investigate the

64. *Common Sense*, in T. PAINE, THE WRITINGS OF THOMAS PAINE I: 69-120 (M. Conway ed., 1894).

65. T. VOLWILER, GEORGE CROGHAN AND THE WESTWARD MOVEMENT 1741-1782, 317 (1926).

66. The pamphlet is reprinted in T. PAINE, THE WRITINGS OF THOMAS PAINE 2: 33-66 (M. Conway ed., 1894).

67. *Id.* at 46.

question of conflicting claims. Given the promise by Congress that the lands should be used for the common benefit of the states, the Virginians felt satisfied that their cession did not require a provision against private purchases from Indians. Congress had essentially acquiesced to Virginia's demands.

Congress in 1784 formally accepted the old Northwest cession from Virginia, thus effectively closing the door on the land speculating companies, and opening a new door for Congress itself, as it sought under the Land Ordinance of 1785 and then the Northwest Ordinance of 1787 to utilize the western lands to pay off its enormous war debt. The Constitution of 1787 ratified the bargain struck in 1784. It vested exclusive authority in Congress to regulate trade and commerce and make treaties with Indian tribes. Its text thus positively affirmed the principle sought to be implied by Virginia's cession; that the British Crown's right of preemption to Indian lands in the Northwest had *devolved* to the sovereignty of the United States.

Of the three competing legal discourses on Indian rights and status that had been in circulation at the time of the Revolution, only one retained any currency a short decade later. The Crown's Norman-derived fiction of a right of conquest granting it a superior sovereignty in the lands of America had "devolved" upon the United States, although the lands of the Indians had never been formally surrendered. The Norman Yoke had not been completely thrown off by the Revolution; its feudal vestiges had been preserved in the definition of the legal status and rights of Indian tribes in their lands. The United States held superior title to Indian lands, which neither the Indians nor the individual citizens of the former colonies could deny.[68]

Only the United States could control the disposition of Indian lands on the frontier. The Indians' rights, natural or otherwise, of sovereignty in their own soil, were thereby denied by a compromise made for the public good as the Founding Fathers came to understand that term. And their understanding did not include Indians.[69]

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68. The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.
We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.
21 U.S. (8 Wheat.) 543, 588-589 (1823).

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

3. *Johnson v. McIntosh*

Thus in 1823, when the successors in interest to the Illinois-Wabash claim, based on William Murray's 1774 frontier purchase from the Indians,[70] finally had their chance to argue for the validity of their Indian-derived deeds before the Supreme Court,[71] Chief Justice John Marshall found himself conveniently confronted by a *fait accompli.* A political compromise had already determined the United States' superior interest in the lands for nearly half a century. All that remained was for the Supreme Court in the case of *Johnson v. McIntosh*[72] to legitimate the outcome of this conflict in legal terms, and preside over the final interment of any competing legal discourse that recognized natural rights in Indian nations to the territories they occupied. For Marshall, the Doctrine of Discovery presented itself as a convenient fiction, one which masked the Revolutionary era political struggle by which Indian Nations were denied rights and status in their lands. As Marshall himself stated in a fitting feudally-inspired *coda* to his opinion, "Conquest gives a title which the courts of the Conqueror cannot deny."[73] In this case, those who had conquered were the advocates of a strong central government with unilateral control over Indian land disposition. As Marshall himself admitted:

> [W]ith respect to the principle that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others, [h]owever this restriction may be opposed to natural right, and the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled . . . it may perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice.[74]

THE REASON OF THE STRONGEST IS ALWAYS BEST[75]

Today, under Chief Justice Marshall's opinion in *Johnson v. McIntosh*,[76] Indian Nations find themselves operating within a legal system that denies them ultimate sovereignty and the right of self-determination in their lands. Under the Doctrine of Discovery, Congress retains ultimate sovereignty over Indian Nations, and can unilaterally strike down the exercise by tribes of even the most pedestrian forms of self-government.[77] No other citizens under our Constitution have such restrictions placed upon their rights on their land. No other citizens find themselves still subjugated by the feudal vestiges of the Norman Yoke.

It is evident today that the convenient paradigm represented by the

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Id. at 590.

70. *See supra* text accompanying notes 58-60.

71. Daniel Webster argued the case for the land speculators. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 562-568 (1823).

72. 21 U.S. (8 Wheat) 543 (1823).

73. 21 U.S. (8 Wheat) 543, 588 (1823).

74. *Id.* at 591.

75. *See* Williams, *supra* note 5, at 287-289.

76. 21 U.S. (8 Wheat) 543 (1823).

77. *See* Williams, *supra* note 5, at 265-289.

Doctrine that permits the United States to deny Indian Nations full rights of self-determination in their treaty-reserved territories is itself undergoing crisis.[78] During the past two decades, American Indian Nations have challenged the conception of their inherent diminished status under the Doctrine by attempting to engage in governmental exercises of sovereignty which call into question the basic assumptions of "Federal Indian Law."

Indian tribes during our era have sought to realize their own vision of a purer, indigenous form of self-determination, unencumbered by the tyranny of their Norman-derived status as conquered peoples. Tribes have sought to exercise criminal jurisdiction over non-Indians on their reservations, as well as civil and taxing regulatory authority. They have demanded autonomy in managing their water and other natural resources, and also in defining what economic development means from an Indian perspective. In all of these efforts, they have met legal challenges from non-Indians who argue that such self-determining initiatives are inconsistent with Indian status as conquered nations under the Doctrine of Discovery.[79]

"Federal Indian Law" has responded to this breakdown of consensus by attempting to reconcile the Doctrine's outmoded theories of Indian inferiority and white superiority with the reality and practice in Indian Country of a people demanding the freedom and liberty necessary for self-determination. The widely recognized breakdown of doctrinal coherence in the field[80] is indicated by Indians themselves articulating their radically divergent forms of legal discourse respecting their status and rights in world and international forums. They seek to call international attention to the human rights abuses perpetuated in European-derived colonial regimes, including the United States, under the Doctrine's convenient premise of an inferior legal status for Indian Nations.[81]

This crisis confronting "Federal Indian Law" today is the direct by-product of a legal discourse which has little to do with the "Rule of Law," but is instead grounded in the peculiar but today irrelevant political history of the early Republic. The dominant paradigm of Federal Indian Law that subordinates Indian rights of self-determination to the expedient interests of non-Indians adequately responded to the legitimating and rationalizing needs of a colonizing Norman usurper. Like the ancient tribal Saxons, however, Indians today find themselves resisting a feudal yoke imposed by an alien conqueror. Their appeals are grounded in a higher law which even the conqueror's courts have found increasingly difficult to resist.[82]

The Doctrine of Discovery's notion of diminished tribal sovereignty may be cited today only as a backdrop of analysis by the conqueror's courts in Federal Indian Law, but it has been found by modern courts nonetheless to vest *inherent* rights in the absence of a positive statement of the Con-

78. *See, e.g.*, sources cited *supra* note 7.

79. *See* Williams, *supra* note 5, at 265-289.

80. *See* sources cited *supra* note 7.

81. *See* Barsh, *Indigenous North American and Contemporary International Law* 62 OR. L. REV. 73 (1983).

82. *See, e.g.*, United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II); United States v. Sioux Nation, 100 S. Ct. 2716 (1980).

queror's will.[83] Thus, the great tradition in the English common law of viewing the fictive doctrine of conquest as a source of limitation on the superior sovereign rights[84] has been preserved in American Federal Indian Law by the doctrine of still inherent though diminished tribal sovereignty. Felix Cohen, the great legal realist who formulated the inherent tribal sovereignty doctrine in the 1940's as a corrective correlate of the Discovery Doctrine,[85]

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83. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n 411 U.S. 164 (1973).

> [T]he trend has been away from the idea of inherent tribal sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.

Id. at 172.

84. *See supra* text accompanying notes 37-38.

85. *See* C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: HISTORICAL RIGHTS AT THE BAR OF THE SUPREME COURT 57-61 (1986).

> [T]he scholarship of Felix Cohen during the 1940's played a cardinal role in preserving the doctrine of tribal sovereignty for modern courts. Looking to the Marshall Trilogy, Cohen expostulated upon tribal sovereignty, calling it "perhaps the most basic principle of all Indian law." The old cases, although they applied the term sovereignty to tribes just once, were firmly in support of Cohen's thesis. But the more recent opinions were not. Cohen refused to acknowledge that the law could change so dramatically, even in light of the demonstrably dramatic change in the social and legal structure governing Indians, and set out his (and John Marshall's) essential paradigm: tribes initially possessed complete sovereignty, they lost some of those powers to a more powerful nation, and they retain all powers not lost. Cohen, whose pen was at once scalpel and sledgehammer, said,
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> > Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.
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> > The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of governments.
>
> Cohen's view—the Marshall-Cohen formulation—effectively stemmed the tide of opinions that threatened to bury the doctrine of tribal sovereignty in the name of changed circumstances. Cohen's position, set out in 1942, was cited repeatedly by the courts and attained something of the weight of a Supreme Court opinion. Cohen's forceful writing style and his reputation help account for the significance his views attained. Further, his prodigious scholarship—including dozens of articles and respected books such as The Legal Conscience and Ethical Systems and Legal Ideas—went far beyond Indian law, encompassing an array of subjects within the fields of jurisprudence, ethics, and international law. He was a leader in the legal realism movement. But Cohen's thinking was also available to the modern Court for use as precedent simply because his work was the only comprehensive scholarship available, a factor that must have counted for much as courts

simply revised the natural law principles inherent in *Camden-Yorke* that recognized the preserving necessity of placing limitations on an unbridled sovereignty. Cohen's was a radical retrieval of the animating spirit of the Revolutionary Founding Fathers.

There are other parallels which could be drawn in demonstrating that not all the history of the early Republic should be regarded as an anachronism, devoid of lessons for the present and future. The treaties that Indian Nations negotiated with the United States are not unlike the great documents, such as *Magna Charta*, of the British Constitutional tradition, by which a tribal people sought to preserve their ancient liberties and self-determining rights against a tyrant. The treaties are the charters by which Indian peoples sought the right to rule themselves in their reserved territories. The history of Indian people *post pax Americana*, however, has been one of constant attacks upon those charter-guaranteed liberties. Thus it also becomes useful to recall Jefferson's vision of a purer Saxon constitution, and his own rejection of the Norman feudal yoke as a legitimate part of the legal discourse of America. The notion that control of property also implies control over destiny in a society such as ours was a principal guiding theme for the Revolutionary generation of Jefferson. It was to make the relation between property and self-determination more explicit and secure that our Founding Fathers in fact declared their independence from the Norman Yoke, and established their own, more pure form of a Constitution.

As we approach the bicentennial of that celebrated document, is it not the proper time to recognize the historical parallels between today's divergent, seemingly radical discourses calling for broader recognition of basic Indian human rights of self-determination and control of treaty-guaranteed property, and the once-radically regarded discourses of the Founding Fathers, who by force of circumstances unfortunately lacked the will to free all Americans from the Norman Yoke? Is it not the time to ask that the final vestiges of feudal tyranny corrupting their purer vision be abandoned, and that America's Indian tribes be permitted to exercise in their lands the liberties and rights guaranteed to all peoples by a vision of law uncorrupted by politics and interest, and the usurpations of the Norman Yoke.

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researched a complex field that most judges viewed as being of tangential importance at most. And surely—although Cohen in fact was a committed advocate for Indians—a mantle of objectivity was cast on his work because it was published under the name of the Department of the Interior. Surely this government-commissioned work must be definitive; surely it would not overstate the powers of nonfederal entities as against the United States. It was on the back of such disparate and miscellaneous circumstances that the Marshall-Cohen view of tribal sovereignty was available, in a serious way, for affirmation by the modern Court, in spite of a pronounced dearth of support in the judicial opinions during the first sixty years of this century.

Id. at 57-59.