



## BIROn - Birkbeck Institutional Research Online

Fitzpatrick, Peter (2000) 'Enacted in the destiny of sedentary peoples': racism, discovery and the grounds of law. *Balayi: Culture, Law and Colonialism* 1 (1), pp. 11-29. ISSN 1444-2094.

Downloaded from: <https://eprints.bbk.ac.uk/id/eprint/490/>

*Usage Guidelines:*

Please refer to usage guidelines at <https://eprints.bbk.ac.uk/policies.html>  
contact [lib-eprints@bbk.ac.uk](mailto:lib-eprints@bbk.ac.uk).

or alternatively

**Birkbeck ePrints: an open access repository of the  
research output of Birkbeck College**

<http://eprints.bbk.ac.uk>

---

Fitzpatrick, Peter (2000). 'Enacted in the destiny of sedentary peoples': racism, discovery and the grounds of law. *Balay: Culture, Law and Colonialism* 1 (1) 11-29.

---

This is an author-produced version of a paper published in *Balay: Culture, Law and Colonialism* (ISSN 1444-2094). This version has been peer-reviewed but does not include the final publisher proof corrections, published layout or pagination.

All articles available through Birkbeck ePrints are protected by intellectual property law, including copyright law. Any use made of the contents should comply with the relevant law. This article was first published in *Balay: Culture, Law and Colonialism* and is reproduced with permission of the publishers - Jumbunna Indigenous House of Learning at the University of Technology, Sydney.

Citation for this version:

Fitzpatrick, Peter (2000). 'Enacted in the destiny of sedentary peoples': racism, discovery and the grounds of law. *London: Birkbeck ePrints*. Available at: <http://eprints.bbk.ac.uk/archive/00000490>

Citation for the publisher's version:

Fitzpatrick, Peter (2000). 'Enacted in the destiny of sedentary peoples': racism, discovery and the grounds of law. *Balay: Culture, Law and Colonialism* 1 (1) 11-29.

---

**‘Enacted in the destiny of sedentary peoples’: Racism, Discovery and the  
Grounds of Law.**

Peter Fitzpatrick  
Queen Mary and Westfield College  
University of London

Whilst the racial, and racist, basis of the doctrine of discovery is a modern innovation, the doctrine owes much to its pre-modern forms and ethos. The finding and settlement of putatively unknown lands has long been attended with mythic and religious justification and with rituals of appropriation all of which strikingly resemble modern practice. Similarity in this case, however, serves to dramatize difference. What marks modern discovery of the occidental variety is the displacement of the mythic and religious by a combination of racism and legalism. The story of that displacement is told here along with an analysis of the poverty, not to say vacuity, of the doctrine of discovery as a justification for imperial appropriation. Since the story is told in broadly historical terms, its conception of the modern relies on the temporal ‘depth’ which historians usually attribute to this term, the discoveries of Columbus here providing something of a benchmark. But this account of the doctrine of discovery is not an antiquarian exercise, not a tale told in a now entirely discovered world, the unfolding of which may have had its reasons for regret but is now decidedly done with. Rather, this account is modern also in the sense of having current significance, of discovery’s still being an impelling force in the treatment of peoples supposedly once discovered and in the self-identity of those who would claim to have once discovered them, an identity which extends to the grounding of the discoverer’s law. Following the preponderant legal authority on discovery, my ‘case’ study here will come from the history of the United States. The parallels with the Australian situation are, it would seem, close.

Perhaps the most compendious point to be made about discovery in this present setting is that it involves something specifically more than the word's ordinary meaning. What the word normally imports is the uncovering or the disclosure of what is already there. In this sense, the word is contrasted to invention, to the creation or inauguration of what was not already there. However, the prefix 'dis-' does have a privative force with its connotations of actively denying or undoing a previous condition. What this intimates for discovery is that the thing discovered is now different for having been discovered. It is now denied its 'cover' and put in a new scene, one pertaining to the discoverer. If this discoverer claims to be the repository of universal truth, a claim which modern discoverers invariably do make, then discovery in this extended sense can join with its primal meaning and the discovered be now revealed as what they should, in truth, be.

This stretching of the semantic is given a more explicate force by the mythic renditions of discovery. With these, the act of discovery is equated with the deific creation, with a 'transformation' of what is discovered by endowing it with 'forms and norms' (Eliade 1965: 9-11). This mythic charge was encapsulated and made effective in possessory rituals. So, the almost paradigm planting of the Christian cross 'was equivalent to a justification and to the consecration of the new country, to a "new birth," thus repeating baptism (act of Creation)' (Eliade 1965: 11). What is more, the prior 'undiscovered' condition was comprehensively subordinated to this new dimension, a dimension in which the condition had now 'become real' (Eliade 1965: 11). The seeming secular equivalent is captured in Diderot's aptly fanciful account of Bougainville's discovery of Tahiti (Diderot 1972). Here the French envelop a Tahiti that is but 'a remote recess of our globe'. For Tahiti to be brought into the ambit of the Occident, for it to be quite overwhelmed by this 'contact' with

the French, it is enough for Bougainville to have touched the island and to have enacted there a ritual of appropriation - the erection of a plaque asserting 'this land is ours', described by Diderot's ever-perspicacious Tahitian sage as the title 'of our future slavery'. The encompassing, transforming effect of imperial discovery was then reassuringly confirmed by the ease with which savage cultures were supposedly subverted by it. Thus Bougainville's visit brings about 'the eclipse' of a Tahitian society left in heavy expectation of what is to come (Diderot 1972: 147-8, 175, 178). This putative effect, along with the quasi-redemption of 'contact', echoed a prior religious doctrine conferring title to lands populated by infidels or pagans on their first Christian discoverer (Williams 1990: Part I).

The transformation of discovery from a religious doctrine brought together hugely significant forces in the making of the modern Occident. Intriguing similarities with religious forms and justifications remained, but the search for a legitimating basis of discovery shifted from the papal and universal to the monarchical and national. A pointed significance attached to the technique of enquiry adopted by the Church for its government and taken over, as it were, by monarchical government through law: such enquiry extended to 'a technique of travelling - a political enterprise of exercising power and an enterprise of curiosity and acquisition of knowledge - that ultimately led to the discovery of the Americas' (Foucault 1996: 340). Thus Columbus relied on papal authority, religious rituals of appropriation, and redemptive invocation, but his claims to the land in the name of the Spanish Crown were taken to be valid only when legally authorized by that sovereign power. Furthermore, Columbus usually insisted on some legalistic recording of discovery by a notary. The rituals of appropriation themselves came to adopt a legal aspect. Thus, a contemporary royal instruction of Spanish origin directed that 'acts of possession' be

made 'before a notary public and the greatest possible number of witnesses'; also, 'you shall make a gallows there, and have somebody bring a complaint before you, and as our captain and judge you shall pronounce upon and determine it' (see Greenblatt 1991: 56). There was yet another momentous force at work, one intimated in the notorious distinction which Columbus drew between the peoples discovered, between those who were co-operative and thence virtuous and those who were resistant and utterly degraded, these being negatively rendered in the Spanish repertoire of 'blood' and race. For the considerable refinement of this division and its implanting in the modern doctrine of discovery, however, we have to move on just a few years to the contribution of Francisco de Vitoria.

The ambivalence of Vitoria could hardly be more pronounced. He is almost invariably received as the benign humanist who erected a basic defence of Indian sovereignty and title to their lands and fathered international law. Yet in doing both these things he provided a consummate legitimation for one of the more spectacularly rapacious of imperial acquisitions. In his meditation *On The Indians Recently Discovered*, delivered as lectures in 1539, Vitoria went so far in elevating the Indian interest as to deny the validity of the title which Columbus claimed (Vitoria 1934 - published 1557). He reached this result by finding that natural law, in the form of a universalized 'law of nations', would only support title acquired by discovery where the lands discovered were deserted. This was not the case with any of the Spanish claims to the Americas. Indeed, for Vitoria the Indians already had that *dominium* - a combination of sovereign and proprietary title - which in natural law attached to all 'men'. They were even similar to the Spanish in having families, hierarchical government, legal institutions, and something like religion. In all, the Indians had the accoutrements of natural law and were participating subjects in that law.

Vitoria also managed, however, to arrive at a contrary conclusion by relying on that same natural law. This infinitely amenable law also provided that the rights of the Indian peoples had to adjust to the expansive rights of all other people, including the Spanish, to travel, trade, 'sojourn' and, in the cause of Christianity, to proselytize. There was also something of a right to enforce natural law. These rights could not be aggressively asserted unless they were resisted by the Indians. When so resisted, however, they could be asserted to the full extent of conquest and dispossession. And so they were. This process was greatly facilitated by Vitoria's deeming the Indians to be inherently recalcitrant. Although included initially within its universal embrace, Vitoria also found the Indian to be outside the range of natural law. The details of their utter deviance was even then quite standard, ranging from the instantly egregious, such as cannibalism and sexual perversion, to more picayune affronts to European taboos of diet and dress - nudity, consuming food raw, eating reptiles, and so on.

This conflicting constitution of non-European peoples persisted in international law and eventually negated Vitoria's ascribing *dominium* to them. What happened, in broad outline, was that international law became a matter of relations between sovereign states, and such sovereignty was intrinsically contrasted to certain uncivilized others excluded from participation in international law. From at least the late eighteenth century, the doctrine of discovery, now a tenet of international law, provided that full title was conferred on the sovereign state on whose behalf the discovery was made, and this was so even where the lands discovered were manifestly inhabited. The old doctrine that discovery conferred title only on deserted lands now segued with the new through the latter's equating the chronic inadequacy of non-European occupation with the virtually deserted (Green 1989: 75). Reference

to the *doctrine* of discovery now became one of an indulgent exactitude. Apart from the hardly veiled racial ascription, the doctrine now lacked any palpable criterion of application. The civilized occidental discoverer assumed title on discovery of land occupied by the uncivilized, by those whose ‘uncertain occupancy’ cannot be ‘a real and lawful taking of possession’, as one leading authority put it with unabashed clarity (Vattel 1971: 44). The discovery still had to be marked and evidenced but the marking and the evidence were of discovery, not of adequate occupation. Although the discoverers’ justifications often advanced the superiority of their agriculture over nomadism or over inadequate cultivation, the quality of superiority attached to them and not to a more effective working of the lands discovered. But having discovered lands of allegedly ‘uncertain occupancy’, it was then ‘entirely lawful’ to occupy them (Vattel 1971: 44-5).

In this blank apotheosis, the doctrine of discovery acquired its definitive version in the judgement of Chief Justice Marshall delivering the decision of the Supreme Court of the United States in the case of *Johnson v. M’Intosh* (1823), one of a distinct collection of so-called Indian cases which in the first half of the nineteenth century set the legal subordination of Indian peoples. As well as legally settling the doctrine and its effects for the United States, Marshall’s judgement became, as Williams puts it, ‘accepted as the settled law on indigenous peoples’ rights and status in all the European-derived settler-colonialist states of the West’ (Williams 1990: 289), something confirmed with its effect in *Mabo v. The State of Queensland (No 2)* (1992).. Despite the range of its influence, the issues in this case, as Williams goes on to indicate, were quite specific to the settlement of the United States (Williams, 1990, p.289). But the case did basically pose a poignant issue which imported not only the whole modern history of the doctrine of discovery but also the insistent contradiction

at the core of occidental imperialism. The terms of the dispute, then, require some particular attention.

On one side of this contest over title to certain frontier lands were settlers who, doubtless more out of convenience than conviction, asserted the rights of the Indians from whom they had derived the titles which they claimed. The Indians, just like those championed by Vitoria, were said to have had full transferable title to the lands acquired from them. Such a line of argument evoked, with excusable confidence, the credo of natural rights which inspired the revolution in the United States, and it placed some understandable emphasis on the right to property. The Declaration of Independence, to take a conspicuous instance, after invoking the cause of a specific 'people', takes its impetus from certain self-evident truths and these are headed by one which has it 'that all men are created equal'. And as Corwin has shown, the constitution of the United States is nothing less than a fusion of the sovereignty of a particular people with universal, natural rights enshrined in a transcendent legality (Corwin 1928).

The other side in the case argued, in a distinctly counter-revolutionary mode, that the fullest possible title to the lands had, on the contrary, vested in the government of the United States as the successor to the British Crown, and the Crown in turn had acquired this title on discovery. It would follow from this that the Indians would not have had a transferable title. To sustain that line of argument a seeming denial of revolutionary universal assertion was invoked, a denial coeval with the assertion itself. The demiurge here is Locke who, so Corwin finds, 'having transmuted the law of nature into the rights of men, ... next coverts them into the rights of ownership' (Corwin 1928: 391). Being natural rights they should of course inhere in all 'men'. Necessary distinctions had to be drawn, however. Such rights could for Locke only be

fully enjoyed by those who enter into political society, the ‘Civiliz’d part of Mankind’ (Locke 1965: 331, 367 - paras. 30, 87). It is the entry into political society which secures ownership - secures the land: ‘The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property’ (Locke 1965: 395 - para. 124 - his emphasis). This blessed state was constitutively contrasted with the condition of those in the state of Nature who had an inadequately engaged relation to land:

For I aske whether in the wild woods and uncultivated waste of America left to nature, without any improvement, tillage or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated?

(Locke 1965: 336 - para. 37)

Those who lacked as cultivators were, for Locke, lacking in reason also, and since reason was a necessary attribute of being ‘men’, the sufficiency of the Indian on that score had also to be doubted (Hulme 1990: 30). The existential hold which property had on the European by the late eighteenth century can hardly be exaggerated (see Fitzpartick 1992: 50, 82-4; and generally Davies 1998). Despite the breaking of the feudal ties to land, it was land which remained the paradigm of property (cf. Foucault 1970: 199). At that time also, as well as into the nineteenth century, it was land which became the basis of new national territories, and this was territory now distinctively tied to law - to the law of the land. All of which civilized solidity was in the United States constitutively pitted against wildness and lack of attachment to land, seminally against ‘the merciless Indian savages’ conjured in the Declaration of Independence,

and thence used to found the appropriation of lands long settled by Indian peoples. Mere evidence of intensive agriculture on the part of Indian peoples, or indeed evidence of the great variety of their relations to land, was never allowed to disturb the attribution to them of a feckless nomadism. Nor could a landed relation changing in time ever dislodge an unchanging and 'curious timelessness in defining the Indian proper' (Berkhofer 1979: 28).

In an extended declamation, one of obscene eloquence, Marshall accepted that type of argument, but not without a constantly ambivalent regard for the argument on the other side. With characteristic insight, Carr hones the dilemma in this way: 'These new Americans have defined their nation in terms of opposition to injustice, and of belief in inalienable natural rights; but they found that only by injustice and the alienation of rights could they bring their nation into being' (Carr 1996: 9). As we will now see, the lines of this founding fracture and its putative resolution are delineated within the figure of 'the Indian'.<sup>1</sup>

The resonant confidence of Marshall's judgement was more a compensation for the intractability of the issues in dispute than a reflection of felt certitude. From a sweeping survey of the practices of imperial states, from 'the history of America, from its discovery to the present day', from the remarkable consistency of the claims of its various colonizers, and from that immensely convenient international law based on the 'usage' of the imperial powers themselves, Marshall precipitately derived the view that discovery by the British had conferred on them an 'absolute' and 'exclusive' title, one which not only 'gave to the nation making the discovery the sole right of acquiring the soil from natives and establishing settlements upon it', but one which also conferred on that nation the 'right' of consequent conquest (pp. 573, 586, 590-1, 595). Without wishing to impugn the Court's delicate impartiality in the

matter, it could be added that to have held otherwise may well have proved disastrous for the fledgling union of the United States, and it could also be added that the Court's position in that scheme of things was itself far from secure (see Williams 1990: 231, 306-8). There was, however, the inconvenience, not to say embarrassment, that such a decision ran counter to the impelling ideology of the 'American' revolution and its trumpeting of natural rights, pre-eminently the right to property. Appropriately, then, Marshall did recognize that Indian people had 'natural rights' in their land, and that this would include the right to transfer ownership (p. 563).

Marshall sought to negate this right, and to resolve the conflict, by defaming the Indian people who held it. Thus Marshall found that they were 'fierce savages ... whose subsistence was drawn chiefly from the forest' and to 'leave them in possession of their country, was to leave the country a wilderness' (p. 590). In the so-called Indian cases generally, the grievous inability of Indian people to cover the land with furrow and fence was continually used judicially to find that their rights to land were less than resolved and hence inferior to the rights of the settler governments. Indian people were repeatedly and, for what it may be worth, inaccurately described as mere hunters who left the land 'a wilderness', and who would inevitably have to give way before agriculture and industriousness.<sup>2</sup> In terms of the ancestor figures of international law, Vattel was much relied on judicially to support a necessary refinement. For Vattel, a nation may occupy territory not only when it is uninhabited but also when it is inadequately habited. 'Merely ... hunting, fishing and gathering wild fruits' was a profligate use of land and 'savages' indulging in such means of subsistence can justly be restricted 'within narrower bounds' (see Green 1989: 74). Although some justices were prepared to go as far as adopting a full-blown version of the doctrine of *terra nullius* and treat Indian land 'as if it had been vacant and

unoccupied',<sup>3</sup> Vattel's contribution made this unnecessary. Crucially, it allowed some rights to the Indian peoples, indefinite as they may be, and those rights supported transfers and cessions of land which were made by them to settler governments.

The usual judicial strategy, for neutralizing fixed natural rights involved a counter recourse to natural progress. Indian people were typically seen to be in the inadequate 'hunter state' (hunting for many of them was more a consequence of being expelled from their agricultural land) and thus would have to give way before the 'advance' of more adequate others to the agricultural state; that 'would have a tendency to impair' their natural right 'and ultimately to destroy it altogether'. This outcome was, without more, inadequate because the Indian could still respond to the call of a universal humanity and advance, acquiring full(er) rights to their land and thus undermine the national settlement. Justice Johnson came close to completing the truth of it when he remarked that the Indians were 'a race of hunters' and 'it is not easy to see how their advancement beyond that state of society could ever have been promoted, or, perhaps, permitted, consistently with the unquestioned rights of the States or United States, over the territory within their limits'. Wise and benign attempts to advance the Indians beyond the hunter state had been 'altogether baffled' by 'their inveterate habits and deep seated enmity'.<sup>4</sup> The judgements thence, are replete with the persistent and comprehensive inadequacy of the Indians, their wildness, lawlessness, cruelty, stupidity and so, considerably, on - the usual catalogue.

The utility and 'force' of these designations can be brought more into view by looking a little more closely at the relative transparency of Marshall's version. He sets it somewhat tentatively by saying that the 'principles which Europeans have applied to Indian title' may be indefensible but 'they may, we think, find some excuse, if not

justification, in the character and habits of the people whose rights have been wrested from them' (p.588). There follows the unexceptional catalogue. The 'actual condition' of the Indian people was savage, degraded and recalcitrant, 'the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct entity' (p.590). In that stunning synopsis, it was, then, the Indians' own irresolute condition that led to the truncation and eventual elimination of the rights to their land. They could not be 'mixed' with, could not become the same and have the same rights as everyone else, but neither could they remain distinct and different, retaining their own natural and integral rights to the land.

Marshall's more refined deprecations did revealingly inhibit his resorting to another ground of appropriation in international law as readily as his more robust brethren. That was the ground of conquest. Their attenuated regard for historical accuracy enabled most justices to designate the British as 'conquerors' who thereby assumed a full 'sovereignty' to which the United States succeeded. Marshall, on the contrary, found that there had been no conquest by the European nations to whose rights the United States succeeded.<sup>6</sup> For Marshall's scheme of things, the distinction between discovery and conquest had to be maintained since, with conquest, the outcome is that 'the conquered inhabitants can be blended with the conquerors or safely governed as a distinct people' and, as we have just seen, they could be neither (pp. 589-90).

All of which left Marshall with a double ambivalence. What was originally his 'excuse' resolving one ambivalence and denying the Indian peoples their natural right to transfer property became a 'principle' sustaining the following 'justification':

However this restriction may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under

which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice (pp. 591-2).

The overall effect, he recognized, was one of conquest - a conquest which neither had taken place nor, in his scheme, could be recognized as having taken place. Marshall resolved that further ambivalence in these terms:

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 (p. 591).

In all, when allied to this pair of unprincipled 'principles', discovery initiates and maintains the asserted factuality of a primal acquisition of territory and its proprietorial holding. These then provide the unquestionable 'ground' of law, of 'the law of the land'. On closer inspection, however, this seeming solidity is specifically lacking.

Along with Marshall, it may be granted readily enough that law adapts to 'the actual state of things' but, when that adaptation does take place, its terms and the constitution of the actual state of things are matters of legal determination. What is involved here is a modernist legality delineated in the so-called Indian cases, most explicitly by Marshall. In setting his approach in *Johnson v M'Intosh*, Marshall saw that it would be necessary to examine not only 'those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations ... but those principles also which our government had adopted in the particular case, and

given us as the rule for our decision' (p. 572). The deific invocation was but a tribute absence pays to presence. This was, in terms of the Declaration of Independence, 'nature's God'. The rights of nature doubtless extended to all humanity, and doubtless the commitment of the United States to natural rights was especially intense since natural rights were taken to have impelled the revolutionary struggle and to have been incorporated within the constitution, but Marshall elevated a law which, in its solitary sufficiency, could stand against and override such rights. In the end it became for Marshall solely the 'government' which has 'given us... the rule for our decision' (p.572).

The dominance of law over nature and natural rights extended also to the whole new-created world of fact. Much as the justices of the Supreme Court would render the seizing and holding of the land as the ground of law, they had to resort 'originally' to law in order to do so. The fact of discovery unadorned and the fact of settlement are cognitive perceptions and 'ground' nothing. To ground, and to found, there is in the so-called Indian cases a constant use of terms primally saturated in legality. So, discovery confers a 'title', one which is 'absolute', 'exclusive' and 'ultimate' (pp. 574, 587-8, 592). No amount of plain discovery and settling can make the leap to the legal, - to entitlement, exclusivity, ultimacy, and such. Law has even to make good the lack of crucial factualities to which it must then dutifully adapt. For example, Marshall's relatively scrupulous regard required him to recognize, as we saw that conquest had not taken place, that in his scheme of things it could not be accepted as having taken place, and that discovery was decidedly not conquest; yet discovery had to be converted to conquest no matter how 'extravagant the pretension' (p. 591).

Even when attempting to exempt the law and themselves from the 'savagery' of a founding violence, the justices succeed in nothing so much as intractably implicating

themselves and the law in it. One of the ‘Indian cases’ can also illustrate the point with a dismal clarity. There is as well something integral to that violence which the case can illustrate, and that is the law’s most significant invention of fact in these cases - the ‘fiction’ of the Indian. In *Cherokee Nation v. Georgia* (1831), the Cherokee sought redress against a depredatory State of Georgia. To gain access to the national legal system they sought to rely on the constitutional provision whereby the original jurisdiction of the Federal Courts extended ‘to controversies ... between a State, or the citizens thereof, and foreign states, citizens or subjects’.<sup>8</sup> Indian tribes were held not to be ‘foreign states’ within that clause and the Cherokee were thus denied relief on a jurisdictional basis. I will return to that exact finding and its designation of Indian peoples shortly, after dealing first with the ground of law. In dealing with this ground, some reliance will be placed also on other so-called Indian cases, especially Marshall’s engagement with discovery in *Johnson v M’Intosh*.

The judicial movement here is one from law’s ensuing from overwhelming fact to that fact’s being overwhelmed by law. It was certainly not an understatement for Marshall to say of the plight of the Indian people revealed in *Cherokee Nation v. Georgia* that ‘if the courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined’. A people ‘sinking beneath our superior policy, our arts and our arms’ are left with but a ‘remnant’ of their land. That remnant was now to be taken from them through a massive violence and fraudulently enacted law of the State of Georgia. But to do anything about all this, according to Marshall, ‘savours too much of the exercise of political power to be within the proper province of the judicial department’; ‘this is not the tribunal which can redress the past or prevent the future’.<sup>9</sup> Justice Johnson found the situation apt only for an ‘appeal... to the sword and to Almighty justice, and not to courts of law or equity’.<sup>10</sup>

The law of the land, to borrow his phrase, could not for Marshall question the ‘momentous’ national settlement which gave it being; that outcome ‘is not now to be disturbed’.<sup>11</sup> This self-denying ordinance, on closer inspection, proves to be something more than a simple giving way to overpowering fact which thence sets insuperable bounds to law. So, for Marshall, ‘it is not for the courts of the country to question the validity of this title’ derived from ‘the sword’, and the ‘rights’ given by ‘power, war, conquest... can never be controverted by those on whom they descend’.<sup>12</sup> Likewise for Johnson, ‘it cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights...’.<sup>13</sup> That which most immediately must not be questioned or controverted is law’s self-constituting origin - an origin replete with legal matter, with the question of validity, with rights and right. Nor will law rest restrained and content on the consequential side of the origin but will, rather, shape and make the facts supposedly impelling its own ordinary matter. We have already instanced Marshall’s ‘extravagant pretension’ of conquest. Another example would be his attributing the ‘right... to prescribe those rules by which property may be acquired and preserved’ to ‘society’ conceived of as ‘the nation’; this right too ‘cannot be drawn into question’ (p. 572). (Sovereign right in all these cases and invariably put in national terms.) Yet Marshall derived the social and national origin of right and law by going beyond the national society and placing its determinant effect within international law in such terms as discovery and effective occupation.<sup>14</sup>

The *über* fiction through which law created and sustained both its factual ground and its self-entitling was the figure of the Indian. A stark instance of the making and use of this fiction can be isolated by continuing the story of discovery in *Johnson v*

*M'Intosh*. After doing that, I will return to *Cherokee Nation v Georgia* and its inglorious contribution to the constitution of the Indian.

Summary can serve to emphasise the overweening quality of the claims made in the name of discovery. Not only did the discoverers acquire 'absolute' and 'exclusive' title to the land, not only did discovery thence give them 'the exclusive right... to appropriate the lands occupied by the Indians', they also 'asserted the ultimate dominion to be in themselves' (p. 574). Bluntly, the discoverers were the kind of people who had sovereignty and title, and the discovered were the kind of people who had neither. Unlike Vitoria's involving natural law which recognized something like sovereignty vested in them, the Indians were now utterly subordinate to a sovereign power and were 'excluded... from intercourse with any European potentate than the first discoverer' (p. 573). Indian people had no operative participation in the doctrine as a mode of legal determination nor any part in the constitution of the truth discovered. The active purpose Marshall attributes to it is 'to avoid conflicting settlements, and consequent war' between 'European potentates' (p. 573). Such a purpose produced a telling hiatus in the doctrine of discovery itself. This is intimated in a disparity barely hidden within Marshall's statement of the 'principle' of discovery in this setting of inter-imperial rivalry:

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 (p.573).

But this title, as we have just seen, was one of an ultimate and absolute kind and hardly required 'consummation'. Sovereignty and proprietary title, and the very ground of law, are thus revealed as existent and integral only in their contrary relation

to the discovered Indian. When, however, there are competing claims to discovered territory between the exemplars of transcendent sovereignty and property, such elevated attributes degenerate to a drab 'effectiveness', the test of effectiveness having been promoted in international law to decide between such competing claims, among other things (Shearer, 1994, pp.145-8). Effectiveness here is equivalent to Marshall's 'possession' and connotes the ability to 'hold down' territory, to deal with disruption from within or from without. In a feat of legal legerdemain, this requirement came in the nineteenth century to be reconciled *sotto voce* with instant and full title as against the discovered by the invention of 'inchoate title'. As against other civilized 'European' sovereign powers, however, the initial title had to be, in Marshall's term, 'consummated' by effective occupation.<sup>15</sup>

Returning to *Cherokee Nation v Georgia*, we find that this case served to put in enduring terms the attributes of the Indian which Marshall advanced in *Johnson* to deny Indian people sovereignty and any secure title to their lands. The straitened discoverers in *Johnson* had to acquire title and sovereignty because of 'the condition of a people' who could neither be a 'distinct' nation, nor 'mix' with the settlers on the basis of parity (p.590). As a distinct nation they would retain title to their lands and as mixed they would retain their natural rights of property. In *Cherokee*, Marshall found that the tribe had some distinctness, it was 'capable of managing its own affairs and governing itself', but not enough, because the Cherokee also were a 'domestic dependent nation' which 'looked to our government for protection' in 'its kindness and its power' as would a 'ward' or someone in a 'state of pupillage':

They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United states, that any attempt to acquire their lands, or to form a

political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

That ‘the Indian Territory is admitted to compose part of the United States’ cannot be gainsaid because, as Marshall observed, ‘in all our maps, geographical treaties, histories and laws, it is so considered’.<sup>16</sup> With such a threadbare positivism, we see law not so much simply inventing the factuality of its ground as aptly choosing one ‘fact’ rather than another. Here, the pervasive truth of ‘our maps, geographical treaties’ and so on or, in *Johnson*, Marshall’s acceptantly accommodating the vast, rapacious range of European imperial history can enter as grounding matter, whereas a scrupulous legal formalism prevented any response to the murderous savagery of the State of Georgia. That the choice could have been otherwise is indicated by the remarkable and painstaking dissent of Justice Thompson in the *Cherokee* case. He found ‘that the Cherokees compose a foreign State within the sense and meaning of the Constitution, and constitute a competent party to maintain a suit against the State of Georgia’. His main reason for so holding was that ‘civilization and the establishment of a regular government’ had ‘been accomplished’ by the Cherokee people. Indeed, constitutionally and legally, the Cherokee people had successfully adopted a model close to that of the United States itself. The offending laws of the State of Georgia were explicitly directed against that ‘accomplishment’: ‘the laws of Georgia set out in the bill, if carried fully into operation, go the length of abrogating all of the laws of the Cherokees, abolishing their government, and entirely subverting their national character’.<sup>17</sup>

In another way, however, that choice was not an available one. The national settlement, as Marshall uneasily recognized, was founded on the Indian’s having that

contradictory duality of attributes, on being dependent yet independent and on being included yet excluded, which Thompson's singular and liberating finding would deny. What was especially dangerous about Justice Thompson was that he considered Indian people to be human, most significantly in their capacity to change. The national settlement, and along with it the ground of law, depended not just on the Indian's having once had the contradictory attributes but also on the Indian's forever having them, something which Justice Johnson recognized in *Cherokee* when he opined that 'it is not easy to see how their advancement beyond that [hunting] state of society could *ever* have been promoted, or, perhaps, *permitted*, consistently with the unquestioned rights of the States or United States, over the territory within their limits'.<sup>18</sup> These 'unquestioned' rights are also unquestionable. They cannot, as we have seen, be 'questioned', they can 'never be controverted', and they are 'not now to be disturbed'.<sup>19</sup> So much is obvious for what preceded the national settlement or, more exactly, for that massively retrojected factuality or fantasy which would necessitate the Indian's then being uniformly nomadic, hunting, conquered, incapable of independence yet unable to mix with the settler, and so on. What is less obvious, but still has disturbing force, is the prospect following on the national settlement of change in its constituent conditions. What if the Indian soon after proves conspicuously capable of independence, and not only that, but assumes independence in the same 'civilized' terms as those espoused by the settler, all of which Justice Thompson readily perceived in *Cherokee Nation v Georgia*? What if the Indian follows another 'civilized' route and proves capable of mixing with the settler? 'Permitting' such things, to use Justice Johnson's term, would be at least to disturb the settlement based on their absence.

Marshall's notion of wardship could be taken as both a symptom of this problem and a telling failure to resolve it. As with many colonial situations, the land or territory of the indigenous people is said to be held in trust for them pending their advance. That advance somehow never comes. Like the ravages of those other colonial powers, trusteeship was in the United States used to justify what would otherwise have resembled fraud and theft less equivocally. Amongst the types of controls the United States found necessary to protect its charges, the disposition of land was of some importance. The federal government as trustee - a trustee not held by the courts to the exacting standards of its private law counterparts - could and did readily dispose of Indian land as the act of the Indian people themselves (Shattuck and Norgren 1991: 115-21). There was little restraining the trustees in the relationship since the courts assumed a sufficient protection in that 'the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race'.<sup>20</sup> This corresponded to an influential view in international law at the time that any rights of the colonized are best left to the benign dispensation of the colonist (Westlake 1971: 50-1). The terms of advance and the determination of their achievement are always reserved to the settler (Carillo 1995; Torres and Milun 1995).

That prerogative is made effective in a power of comprehensive regulation over Indian peoples liberally bestowed on Congress by a Supreme Court with scant constitutional justification, a power indistinguishable in its terms and exercise from that used by more forthright contemporary colonial rulers.<sup>21</sup> Such a power of comprehensive regulation was obviously requisite if the Indian had to be contradictorily included and excluded, and so could have no settled expectation, no enduring basis for an informed and voluntary adherence. As far as Indian people are

concerned, we are dealing here not so much with a constitutional settlement as with ‘constitutional unsettlement’ (cf. Foley 1989: chapter 5). This active ambivalence has since been sustained, ranging from the alternation in the later nineteenth century between ‘reform’ aimed at ‘assimilation’ and ‘treatment’ as different, to the current divide between ‘self-government’ and ‘termination policy’, a sensitively titled variant of assimilation.

The enduring ambivalence of the Indian, the impossibility ‘of coming to terms’ with the settler, can be confirmed in the constant lamentations about the incoherence and inconsistency of ‘Indian law’ or, more immediately, in the long lines of cases which successively defy resolution yet repeatedly insist on it. (Wunder 1994: 3-4; Frickey 1994: 418; Harring 1994: 4). Ruling perceptions of that same Indian law perversely indicate its significance. So, in line with the occidental strategy of marginalizing the foundational, we have Wunder’s remarking that the ‘dominant society’ often classifies ‘Indian disputes as obscure and inconsequential’ (Wunder 1994: 3-4). In the same vein, Frickey has assembled a catalogue of epithets directed at ‘federal Indian law cases by [Supreme Court] Justices themselves’, these august authorities describing such cases as ‘crud’ and ‘peewee’ cases, and worse (Frickey 1993: 383). Another indication of perilous marginality: Friedman’s greatly influential *A History of American Law* devotes but a few words to Indian peoples (Friedman 1973: 443-4). All of which attests to the potency of the insignificant. The Indian cases were, and are, the legal equivalent of Durham’s judgement that:

Nothing could be more central to American reality than the relationships between Americans and American Indians, yet those relationships are of course the most invisible and the most lied about. The lies are not simply

a denial; they constitute a new world, the world in which American culture is located.

(Durham 1993: 138)

In sum, what is 'enacted in the destiny of sedentary peoples' and made operative through their discoveries is a universal becoming which allows of no truth 'besides' itself, and which can only subordinate those who prove to be outside of its inevitable instantiation.<sup>22</sup> Although for Australia the claims of the discoverers and settlers to surpassing truth and entitlement may be less grandiloquent than those made for the United States, they are nonetheless of the same kind, and just as effectively sustained (cf. Motha 1999). Doubtless there were and remain significant differences, not the least of which must be the even more draconic impact of this truth and entitlement on indigenous peoples in Australia.

#### ACKNOWLEDGEMENTS

This paper has benefited greatly from the discussion following its initial exposure at a seminar arranged by Ian Duncanson and Arena Publications in Melbourne in July 1988 and from extensive debates since with Stewart Motha and Colin Perrin.

#### ENDNOTES

1. The irresolution thus transferred to the Indian can be aptly extracted from the Declaration's main author, Thomas Jefferson, who equivocated between positioning the Indian as utterly different to the European and as the same, at least potentially (e.g. Carr 1996: 33; Wills 1980: 304).

2. E.g. *Cherokee Nation v Georgia* at 23 and *United States v Forty-Three Gallons of Whiskey* at 196.

3. Chief Justice Taney in *United States v Rogers* at 572.

4. The quotations in this paragraph come from *Cherokee Nation v Georgia* at 23-4; cf. however Marshall in *Johnson v M'Intosh* at 588.

5. E.g. Justice Johnson in *Cherokee Nation v Georgia* at 23-6.

6. *Worcester v Georgia* at 544-5.

7. For such 'savagery' and its intrinsic relation to law, see Derrida (1992: 40).

8. Art III, s. 2, ch. 1. That jurisdiction is now broader.

9. *Cherokee Nation v Georgia* at 15.

10. *Ibid.* at 52.

11. Marshall in *Fletcher v Peck* at 142.

12. *Johnson v M'Intosh* at 572 and *Worcester v Georgia* at 543.

13. *Cherokee Nation v Georgia* at 22.

14. Occupation and effectiveness are considered shortly when coming to the issue of inchoate title. See also Marshall in *Worcester v Georgia* at 543.

15. The definitive authority is now taken to be *Re Island of Palmas Arbitration* (1928).

16. *Cherokee Nation v Georgia* at 16-18.

17. *Ibid.* at 72, 75, 80.

18. *Ibid.* at 23 (emphasis added).

19. *Johnson v M'Intosh* at 588-9, *Worcester v Georgia* at 543 and *Fletcher v Peck* at 142.

20. *Beecher v Wetherby* at 525-6.

21. *United States v Forty-Three Gallons of Whiskey* at 194.

22. The quotation and its linking to universal becoming are taken from Levinas (1979: 46).

#### REFERENCES

- Berkhofer, Robert, F. (1979). *The White Man's Indian: Images of the American Indian from Columbus to the Present*, New York: Random House.
- Carillo, J. (1995). 'Identity as Idiom: *Mashpee* Reconsidered', *Indiana Law Review*, 28(3):511-545.
- Carr, H. (1996) *Inventing the American Primitive: Politics, Gender and the Representation of Native American Literary Traditions 1789 - 1936*, New York: New York University Press.
- Corwin, E.S. (1928). 'The "Higher Law" Background of American Constitutional Law', *Harvard Law Review*, 42: 149-185; 365-409.
- Davies, M. (1998). 'The Proper: Discourses of Purity', *Law and Critique*, IX (2): 147-73.
- Derrida, J. (1992). 'Force of Law: The "Mystical Foundations of Authority"', trans. Mary Quaintance, in Cornell, D. *et al.* (eds). *Deconstruction and the Possibility of Justice*, New York: Routledge.
- Diderot, D. (1972). *Supplément au Voyage de Bougainville, Pensées Philosophiques, Lettre sur les Aveugles*, Paris: Garnier Flammarion.
- Durham, J. (1993). *A Certain Lack of Coherence: Writings on Art and Cultural Politics*, London: Kala Press.
- Eliade, M. (1965). *The Myth of the Eternal Return or, Cosmos and History*, Princeton: Princeton University Press.
- Fitzpatrick, P. (1992). *The Mythology of Modern Law*, London: Routledge.
- Foley, M. (1989). *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government*, London: Routledge.
- Foucault, M. (1970). *The Order of Things: An Archaeology of the Human Sciences*, London: Tavistock.
- Foucault, M. (1996). 'Truth and Juridical Forms', *Social Identities*, 2:327-41.
- Frickey, P.P. (1994). 'Marshaling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law', *Harvard Law Review*, 107 (2): 381-440.
- Friedman, L.M. (1973). *A History of American Law*, New York: Simon & Schuster.

- Green, L.C. (1989). 'Claims to Territory in Colonial America', in Green L.C. and Dickason, O.P. *The Law of Nations and the New World*, Alberta: The University of Alberta Press.
- Greenblatt, S. (1991). *Marvelous Possessions: The Wonder of the New World*, Oxford: Clarendon Press.
- Harring, S.L. (1994). *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*, New York: Cambridge University Press.
- Hulme, P. (1990). 'The Spontaneous Hand of Nature: Savagery, Colonialism and the Enlightenment', in P. Hulme and L. Jordanova (eds.), *The Enlightenment and its Shadows*, London: Routledge.
- Levinas, E. (1979). *Totality and Infinity: An Essay on Exteriority*, trans. Alphonso Lingis, The Hague: Martinus Nijhoff.
- Locke, J. (1965). 'The Second Treatise of Government', in *Two Treatises of Government*, New York, New American Library.
- Motha, S. (1999). 'Mabo: Encountering the Epistemic Limit of the Recognition of "Difference"', *Griffith Law Review*, 7, 79-96.
- Shattuck, P.T. and Norgren, J. (1991). *Partial Justice: Federal Indian Law in a Liberal Constitutional System*, Providence, Oxford: Berg.
- Shearer, I.A. (1994). *Starke's International Law*, 11<sup>th</sup> edition, London: Butterworths.
- Torres, Gerald and Milun, Kathryn (1995). 'Stories and Standing: The Legal Meaning of Identity', in Dan Danielson and Karen Engle (eds), *After Identity: A Reader in Law and Culture*, New York: Routledge.
- Vattel, E. de (1971). 'Emer de Vattel on the Occupation of Territory', in P.D. Curtin, *Imperialism*, London: Macmillan.
- Vitoria, F. de (1934). 'De Indis', in J.B. Scott (1934), *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations*, Oxford: Clarendon Press.
- Westlake, J. (1971). 'John Westlake on the Title to Sovereignty', in P. D. Curtin (ed.), *Imperialism*, London and Basingstoke: Macmillan.
- Williams, R. (1990). *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York: Oxford University Press.
- Wills, Garry (1980). *Inventing America: Jefferson's Declaration of Independence*, London: The Athlone Press.

Wunder, J.R. (1994). *'Retained by the People': A History of American Indians and the Bill of Rights*, Oxford and New York: Oxford University Press.

## CASES

*Beecher v Wetherby* (1877) 95 U.S. 517.

*Cherokee Nation v Georgia* (1831) 30 U.S. (Pet.) 1.

*Fletcher v Peck* (1810) 10 U.S. (6 Cranch) 87.

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

*Mabo v The State of Queensland (No2)* (1992) 175 C.L.R. 1.

*Re Island of Palmas Arbitration* (1928) 22 *American Journal of International Law* 875.

*United States v Forty-Three Gallons of Whiskey* (1876) 93 U.S. 188.

*United States v Rogers* (1846) 45 U.S. (4 How.) 567.

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