

WHOSE AMERICA?

CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS. By Lindsay G. Robertson.¹ Oxford University Press. Pp. 272. \$29.95.

HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER. By Stuart Banner.² Belknap Press of Harvard University Press. Pp. 352. \$29.95.

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*"We can only grope to understand."*⁴

The 3.6 million square miles of land that we now call America once belonged to Indian tribes. Now Indian lands comprise only a tiny fraction of the whole, about 4%.⁵ This great land transfer has been and continues to be a source of tension between tribes on the one hand and federal, state, local governments and non-Indians on the other. It has also been and continues to be a fertile field for articles and books attempting to explain it.⁶ Two more books on the subject have now been pub-

1. Sam K. Viersen, Jr. Presidential Professor of Law, University of Oklahoma College of Law.

2. Professor of Law, UCLA School of Law.

3. Joseph E. Wargo Anoka County Bar Association Professor of Family Law, University of Minnesota Law School. Younger teaches first-year property classes, including *Johnson v. M'Intosh*. See *infra* note 6. She thanks her research assistant Brandon L. Raatikka for his cheerful help and support.

4. BERNARD BAILYN, *THE PEOPLING OF BRITISH NORTH AMERICA: AN INTRODUCTION* 131 (1986).

5. *IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS* 4 (Imre Sutton ed., 1985).

6. *Johnson v. M'Intosh*, the seminal Supreme Court case discussed *infra*, which defined Indian land rights vis-à-vis the American sovereign, commands the enduring attention of legal scholars. A non-exhaustive Westlaw KeyCite search, conducted on October 20, 2005, yielded citations to *Johnson v. M'Intosh* in over 900 sources of secondary legal literature from the past two decades. See, e.g., Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 *LAW & HIST. REV.* 67 (2001) (describing the case as a feigned controversy because the plaintiff and defendant had no overlapping land claims); David E. Wilkins, *Johnson v. M'Intosh Revisited: Through the Eyes of*

lished: *Conquest by Law: How the Discovery of America Disposessed Indigenous Peoples of Their Lands* by Lindsay G. Robertson, and *How The Indians Lost Their Land: Law and Power on the Frontier* by Stuart Banner. Both authors are law professors; both books are well-written, but their views of the phenomenon they seek to explain are startlingly different. Professor Robertson blames the law for dispossessing the Indians of their lands, while Professor Banner blames government officials for failing to enforce the law.

The story begins in 1496 when Henry VII, then King of England, commissioned John and Sebastian Cabot, father and son, to discover countries which had “been unknown to all Christians” and to take possession of them in the King’s name.⁷ The Cabots made two voyages of discovery in 1497 and 1498. John Cabot, along with four of his five ships, was lost on the second voyage. In the course of the first, however, he touched down on the coast of North America—we don’t know precisely where. He thus became the man who “gave England her American title.”⁸ The exact nature of that title and, incidentally, the title of the Indians who were already in possession when the Cabots made landfall was not clearly articulated until more than 300 years later. The vehicle was the United States Supreme Court’s 1823 decision in the “great case”⁹ of *Johnson v. M’Intosh*.¹⁰ By then, of course, England had been succeeded as sovereign, first by the original colonies, and then by the United States. All three sovereigns adopted the same policy with respect to Indian lands: private individuals were prohibited from buying them without government consent. In a world where land speculation was the

Mitchel v. United States, 19 AM. INDIAN L. REV. 159 (1994) (characterizing *Johnson v. M’Intosh* as “historically and legally unsound,” and arguing that it should be abandoned in favor of the Supreme Court’s later decision in *Mitchel*); Dana G. Jim, *Great Property Cases: Johnson v. M’Intosh and the South Dakota Fossil Cases*, 46 ST. LOUIS U. L.J. 791 (2002) (discussing, inter alia, the pedagogical value of teaching *Johnson* in first-year property classes). There are a plethora of books on the general question of Indian land loss as well. See, e.g., IRREDEEMABLE AMERICA, *supra* note 5 (investigating various Indian tribes’ efforts to obtain relief for past transfers); GEORGE C. SHATTUCK, THE ONEIDA LAND CLAIMS: A LEGAL HISTORY (1991) (tracing the general history of the Oneida land claim litigation); WILLIAM THOMAS HAGAN, TAKING INDIAN LANDS: THE CHEROKEE (JEROME) COMMISSION, 1889-1893 (2003) (describing the negotiations which took place during the late 1800s between the Cherokee Commission and Indian tribes in which the federal government purchased vast amounts of land from the tribes).

7. SAMUEL ELIOT MORISON, THE EUROPEAN DISCOVERY OF AMERICA: THE NORTHERN VOYAGES 159 (1971).

8. *Id.* at 157.

9. So it was called by the Court in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1954).

10. 21 U.S. (8 Wheat.) 543 (1823).

norm and everyone was a land speculator,¹¹ the prohibitions did not succeed in preventing unauthorized purchases from Indian tribes.

Among such purchases were those at issue in *Johnson v. M'Intosh*. The plaintiffs claimed through an organized group of land speculators ("the Companies") who, in 1773 and 1775, bought two large tracts from the Piankeshaws and the Illinois tribes without governmental consent. The Indians later sold the same land to the United States. The United States, in turn, sold it to the defendant, another speculator. From 1775 to 1810, the Companies unavailingly sought to get the approval of the appropriate sovereigns for their purchases. They turned to the federal courts as a last resort. The case came to the District Court of Illinois on the basis of diversity jurisdiction and on an agreed statement of facts. The District Court decided for defendant and the Supreme Court affirmed. In doing so, it took the opportunity to lay out the governing principle that discovery and conquest gave England and its successors in sovereignty an exclusive right to extinguish Indian titles to land. Until this right was exercised, the Indians could continue to occupy the land they possessed.

Lindsay Robertson's book, *Conquest by Law*, is all about *Johnson v. M'Intosh*. The author made the serendipitous discovery of a trunk containing "the Companies' complete corporate records, compiled over more than fifty years—hundreds of documents . . . never cited by scholars" (p. ix). The author uses this treasure trove to give us what he calls "the first complete account of the history of *Johnson v. M'Intosh*" (p. ix). Standing alone and allowed to speak for itself, this would have been a fine contribution to existing scholarship. Unfortunately, Robertson does not allow the facts to make the story. It is the import he ascribes to them that mars the book.

Professor Robertson attempts to convince the reader that the discovery doctrine enunciated by Chief Justice John Marshall in *M'Intosh* was responsible for the Indians' loss of their land. Marshall, he says, deliberately inserted the doctrine to settle the claims of Virginia revolutionary war veterans who had been awarded warrants for land which had not yet been purchased from the Indians. Marshall, according to Robertson, "had

11. See BAILY, *supra* note 4, at 67 ("Every farmer with an extra acre of land became a land speculator—every town proprietor, every scrambling tradesman who could scrape together a modest sum for investment. . . . There was never a time in American history when land speculation had not been a major preoccupation of ambitious people.").

a lot on his plate” at the time—including “circuit riding obligations” and “a social life to enjoy” (p. xi)—and didn’t fully grasp the implications of the doctrine. Later, says Robertson, when Marshall realized the danger, he tried to retract the doctrine in *Worcester v. Georgia*.¹² It was then too late. Asserting that the discovery doctrine “led to political catastrophe for Native Americans” (p. x), and casting it as the culprit in Indian land loss, Robertson ignores the enormous non-legal pressures that were being exerted to make the Indians give up their land. Among these were the espousal by President Jackson (who had been elected in 1829) of the removal movement, which had already well begun;¹³ the insatiable land hunger of non-Indians; and the prevailing general attitudes that Indians were insignificant and inferior to Europeans.¹⁴ These non-legal factors would have resulted in the same outcome, even if the discovery doctrine had never been articulated, and even if the Supreme Court had characterized Indian title differently.¹⁵ Whatever the Supreme Court called such title—“fee title” or “the right to occupancy”—the Indians would have been divested of it by some means.

Robertson’s conjectures about what was in Marshall’s mind when he put the discovery doctrine into the opinion in *Johnson v. M’Intosh*, what he foresaw and failed to foresee, have to be discounted. Others have engaged in similar speculation about the late, great Chief Justice’s thought process and reached different conclusions.¹⁶ What Marshall was really thinking is unknowable; there are only the facts of the case and the language Marshall used to decide it. The case was framed as an action for

12. 31 U.S. 515 (1832).

13. SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 445 (1965). In fact, even Thomas Jefferson “looked forward to removing all Indians across the Mississippi.” *Id.* at 380.

14. See, e.g., ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 231 (1990) (“[A] discourse of conquest, emerging out of a Revolutionary-era vision of the public good that did not include the American Indian, had settled the law of America concerning Indian rights and status.”).

15. See MORISON, *supra* note 13, at 445 (discussing the “old-world process of one race or people pushing a weaker one out of an area that it wanted,” which found justification in the Old Testament).

16. See, e.g., Kades, *supra* note 6, at 103 (asserting that Marshall enunciated a “broader rule” in *Johnson* than necessary because the Chief Justice thought that “[a] more limited ruling would leave loopholes for future litigation”); Wilkins, *supra* note 6, at 167–68 (suggesting that the holding of *Johnson v. M’Intosh* reflected Marshall’s desire for a “political/legal compromise”).

ejection.¹⁷ The plaintiffs' land claims rested on the Companies' purchases from Indians in 1773 and 1775. These were clearly illegal and the Companies knew it. The defendant purchased from the United States, the duly constituted sovereign at the time. Thus Marshall's statement of the reason that the plaintiffs had to lose: "the Court is decidedly of the opinion, that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States."¹⁸ It is, after all, the sovereign who decides what the recognized objects of property are and the protected relations in them. In tracing the defendant's title back to England's discovery of North America through its authorized agents, the Cabots, he laid out the chain of title for all to see. The Indians' preexisting rights were not destroyed,¹⁹ but only re-described as "occupancy." Ironically, occupancy became quite valuable in the "Courts of the conqueror"²⁰ many years later.²¹

Similarly unfounded is Robertson's claim that when Justice Marshall recognized the damage he'd done with the discovery doctrine he tried to retract it in *Worcester v. Georgia*. That case was about the validity of a Georgia law making it a crime for non-Indians to live on Cherokee land within the territorial boundaries of the state without a license. Worcester and six other missionaries violated the prohibition and were sentenced to four years in state prison. The Supreme Court voided the Georgia statute on federalism principles. The case did not affect Indian property rights but dealt with states' rights, Indian sovereignty, and the convicted missionaries' "personal liberty."²²

17. This kind of suit originated as a tenant's action to recover possession of land, but came to be the usual method of trying title to land (pp. 53–54).

18. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 604–05 (1823).

19. In other words, Marshall did not characterize Indian land as *terra nullius*—unowned land. For more information on *terra nullius* as it applied to British colonization of Australia, see Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 LAW & HIST. REV. 95 (2005).

20. *M'Intosh*, 21 U.S. (8 Wheat.) at 588.

21. See, e.g., *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (Oneida I) (recognizing a federal cause of action for wrongful possession premised on Indian right of occupancy); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (Oneida II) (holding that the Oneidas' land claim was not barred by statute of limitations, political question doctrine, or equitable doctrines of laches, acquiescence, or estoppel); *Cayuga Indian Nation v. Pataki*, 165 F.Supp.2d 266 (N.D.N.Y. 2001), *rev'd*, 413 F.3d 266 (2d Cir. 2005) (awarding Cayuga Indian tribe over \$247 million in damages in land claim action before the Court of Appeals reversed), *petition for cert. filed*, 74 U.S.L.W. 3452 (Feb. 3, 2006) (No. 05-978).

22. *Worcester v. Georgia*, 31 U.S. 515, 562 (1832); see also G. EDWARD WHITE, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 735 (1988) (“[T]he Georgia court’s judgment against Worcester affected ‘personal liberty,’

When “the opinion was said and done, the rights of Indian tribes occupied precisely the same jurisprudential state they had occupied in *Johnson v. McIntosh*.”²³

Robertson states one of his aims in writing *Conquest by Law* is “to expose the process of judicial lawmaking in the early republic” (p. x). “The history of the Johnson litigation,” he says, is an example of “collusion, fabrication, and manipulation of pleading rules . . . as the plaintiffs’ attorneys aggressively sought to turn deficiencies in the system to their clients’ advantage” (p. x). In this statement are two basic charges: first, that *Johnson v. M’Intosh* was collusive, or a feigned case, and second, that the plaintiffs’ attorneys acted improperly in carrying it forward. The first charge has been suggested before.²⁴ Robertson reconstructs the factual circumstances of the case in attempting to substantiate both charges (pp. 45–76). The plaintiffs’ lawyers needed a defendant who was a citizen of some state other than Maryland to make out diversity jurisdiction. They found William M’Intosh, an Illinois resident, who had claims to 11,560 acres situated within the Companies’ purchases (p. 51).²⁵ Robertson writes that more than land claims made M’Intosh a willing participant in the litigation; among other motivations, he had a desire to embarrass one-time friend William Henry Harrison, who had negotiated the Indian treaties which might be undermined by a judgment *for the plaintiffs* (pp. 51–53). Robertson conjectures that the plaintiffs “almost certainly also offered [M’Intosh] a share in the Companies as well” (p. 53), although he provides no support for that assertion.

The case was brought in the newly created District of Illinois²⁶; there is no evidence that the district judge was biased or otherwise interested in the outcome of the case.²⁷ At this stage, M’Intosh was apparently content to let plaintiffs’ attorneys manage the litigation. Robertson insinuates that there was something

not ‘property.’”).

23. WHITE, *supra* note 22, at 732.

24. See, e.g., Kades, *supra* note 6, at 99–101 (asserting that the plaintiffs and defendant did not have overlapping land claims).

25. In a footnote, Robertson traces the metes and bounds of the parties’ respective land claims to show they are in fact competing (pp. 195–96). Eric Kades had asserted that there was never any overlapping claim between M’Intosh and the Companies. Kades, *supra* note 6, at 67.

26. The plaintiffs’ plans to bring it in Indiana failed because the district judge there had at one time been a paid agent for the Companies, and therefore had scruples about presiding (pp. 47–49).

27. Of him, Robertson says only that his brother had married the niece of plaintiff Thomas Johnson (p. 51).

corrupt about the submission of the matter on agreed facts, the pro forma opinion of the district judge and his decision for defendant, but offers scant evidence for the proposition. He suggests that defendant M'Intosh's failure to seek an appeal bond is further evidence of his collusion. However, besides his competing land claims, some other facts demonstrate the possibility that M'Intosh might have wanted a different result than the plaintiffs. M'Intosh chose his own legal counsel for the appeal—the prominent lawyers William Henry Winder of Baltimore and Henry Maynadier Murray of Annapolis—although the Companies paid them. Additionally, the defendant's counsel represented him vigorously at the Supreme Court; so vigorously, in fact, that they argued upon a legal issue that the plaintiffs' counsel intended to moot via the stipulated facts (pp. 66–67). And, of course, the parties did not procure the result they are alleged to have commonly desired.

If the facts do indeed make *Johnson v. M'Intosh* a collusive case—as Robertson notes was the contemporaneous assessment of some Washington observers (p. 74)—it takes its place among others which have been characterized in the same way, like *Marbury v. Madison*²⁸ and *Dred Scott v. Sanford*.²⁹ Indeed, “some of the most famous constitutional decisions have come in what now seem to have been collusive cases.”³⁰ As to the conduct of the plaintiffs' lawyers, which Robertson characterizes as aggressive manipulation of the legal system and exploitation of its defects, that is often what lawyers do and what they are paid for. Attorneys commonly look for adversaries, pick their courts, carefully frame their pleadings and arguments, and take advantage of procedural peculiarities of the legal system to further their clients' causes. Of course, they are not to violate ethical rules in the course of their zealous representation on behalf of clients. But the applicable ethical rules are those of their day, not

28. See, e.g., Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1308–09 (2003) (discussing the probability that *Marbury* was a “made case,” and implicating Chief Justice Marshall in getting the case before the Supreme Court).

29. PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 83 (1949) (“No graver issue was ever decided by the Supreme Court than that in the *Dred Scott* case; and it was presented in circumstances which suggested that the Court had no business dealing with it at all.”). But see DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 251 (1978) (“There is no evidence of underlying political purposes, or of an intent to contrive a test case.”).

30. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 65 (6th ed. 2002).

ours. Ethical standards and norms have changed significantly since the early 1800s.³¹

Professor Banner's book is a more balanced treatment of the Indian land transfer than Professor Robertson's. It devotes only twelve pages to *Johnson v. M'Intosh* (pp. 178–90), and claims that the Indian right of occupancy was already widely accepted doctrine long before that case arose (pp. 188–89). Like Robertson, Banner speculates as to Justice Marshall's thoughts when he incorporated the discovery doctrine into the *Johnson* opinion, suggesting that the Chief Justice wanted to establish the validity of state grants of preemption rights to land Indians presently occupied (pp. 180–81). The book's main thesis, however, does not limit its explanation of the great land transfer to a mere matter of the state of the law, but describes the transfer as a function of the law's enforcement or nonenforcement. The key to understanding the phenomenon, according to Banner, is an analysis of the balance of power between Indians and non-Indians during the relevant time periods. *Johnson v. M'Intosh* remains the law today as it was in 1823. Nevertheless, some Indian efforts of the last sixty years to "get land back, or be compensated for land wrongfully taken" have "been remarkably successful" (p. 291). After citing successes like the Alaska Native Claims Settlement Act of 1971 (which resulted in over forty million acres and nearly \$1 billion for Alaskan Natives), Banner notes that "[o]utcomes like these would have been almost unimaginable in 1900, and utterly inconceivable in 1800" (p. 291). It was "not a change in the law" (p. 291) which led to these achievements. Rather:

It was a change in the relative political power of Indians and whites. From the early seventeenth century to the early twentieth, the divergence between formal law and actual practice had been growing, as whites grew stronger relative to Indians. In the twentieth century, when the balance began to tip back a bit toward the Indians, they gained the power to force practice to move closer to the formal law. Lawyers and judges began taking their claims more seriously. Legislators and execu-

31. See, e.g., 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 287 (1965) ("Prior to 1850, and for some time thereafter, the lawyer. . . [was] concerned almost exclusively with 'the law' at the expense of 'the facts.'"); Lindsay G. Robertson, "A Mere Feigned Case": *Rethinking the Fletcher v. Peck Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249 (discussing the prevalence and acceptance of feigned issues and similar procedural devices in eighteenth and early nineteenth century American legal culture); but see *id.* at 263 ("[It] seems to be that by 1810, the tide was turning against the use of feigned issues.").

tive branch officials began fearing the consequences. The law did not change, nor did the nature of the Indians' claims. Rather, those claims were now heard, and the law was now implemented, within a new political framework in which Indians could no longer be ignored (p. 292).

How the Indians Lost Their Land guides the reader from the early seventeenth century through to the present, exploring differences in Indian and non-Indian opinion, divisions in Indian and non-Indian opinion *inter se*, and shifts in federal land policy—from removal to reservations and allotment. At each turn, Banner shows dramatically how little the governing principle of *Johnson v. M'Intosh* had to do with what actually occurred. The author makes two other points that are worthy of note. First, he observes that the transfer of Indian lands have, for the most part, been consensual in form, if not in fact. Here he raises the knotty question of the meaning of "voluntary" (p. 50) and links it to the key concept of power. The Indians' early consents to land sales were more voluntary than their later consents to removal treaties and even later consents to private allotments of formerly communal lands. The variable was the shift in power from them to non-Indians. Second, Banner makes the point that Indian successes have been accompanied by a showing that the transactions complained of were illegal when they occurred. These transactions did not have to be involuntary to be illegal. The argument, thought up by some ingenious lawyer, goes something like this: *we sold our land; the law³² prohibited us from selling it without federal consent; we didn't have federal consent; the sale was therefore void; the land is still ours!*³³

Professor Banner's discussion of the balance of power between Indians and non-Indians contains no mention of Indian gaming. In 2004, casinos on Indian reservations took in about \$18.5 billion in gross revenues.³⁴ This seems so significant an amount that it is hard to see how it could not affect the calculus of political power. Unfortunately, the Indian victory noted by Professor Banner in the Cayuga land claim case (p. 291) has since been overturned by the Second Circuit Court of Appeals.³⁵

32. Nonintercourse Act, 1 Stat. 137, 138 (1790) (current version at 25 U.S.C. § 177 (2005)).

33. This is essentially the argument of the Oneidas in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

34. NATIONAL INDIAN GAMING ASSOCIATION, AN ANALYSIS OF THE ECONOMIC IMPACT OF INDIAN GAMING IN 2004, 2 (2005).

35. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3452 (Feb. 3, 2006) (No. 05-978).

The basis for the reversal was the U.S. Supreme Court decision in *City of Sherrill v. Oneida Indian Nation*,³⁶ a case which, in turn, limited an earlier Supreme Court victory for the Indians. So, the sad story continues. It is certainly overwritten and perhaps there is not much new to add. Indians are still attempting to regain their land and non-Indians are still groping to understand.

36. 544 U.S. 197 (2005).