## Conquest 1AC

### Contention I: Doctrine of Conquest

#### The war powers are founded in the war against Native peoples.

Yoo, 1996 John C. "The continuation of politics by other means: The original understanding of war powers." California Law Review (1996): 167-305.

This view of the Constitution is also supported by early post-ratification history. Because scholars have viewed the Declare War Clause as granting Congress the sole authority to begin war, the United States' failure to wage a declared war until 1812 might be seen as something of a puzzle. Certainly the answer does not lay in the existence of an era of good international feelings from 1789-1812. These years saw the French Revolution, a general European war, and a resulting series of challenges for American national security policy. n558 For the Republic's first five years, the Washington administration waged a difficult conflict with Indians in the Ohio River Valley, and the Adams administration fought a naval war, known as the Quasi-War, toward the turn of the century. Neither of these wars were small conflicts. The former witnessed the crushing defeat of the nation's first standing army by the Indians in 1791, in response to which the Washington administration created the nation's first permanent military establishment. n559 Even though no declaration of war had issued against the Indians, [\*291] George Washington exclaimed, "But, we are involved in actual war!" n560 The Quasi-War produced not only raids on merchant commerce, but also full-scale battles between American and French ships, and the creation of a huge 10,000-man regular army, with George Washington as its Commander in Chief and Alexander Hamilton as his deputy. n561 In neither 1789 nor 1798 did the President or Congress believe a declaration of war was necessary. In both conflicts, the President managed international relations, and after diplomacy had failed, ultimately decided to use military force. Once he had decided upon combat, the President turned to the Congress for the raising and supply of the necessary troops and sailors. In the context of voting on the President's requests, Congress had ample opportunity - of which it invariably took advantage - to discuss war aims and strategies. Thus, in 1789 President Washington and his Secretary of War decided that the Indians in the Northwest were preventing the peaceful settlement of territory ceded by Great Britain and that a combination of military force and diplomacy was needed. Once the Indian war bogged down, President Washington had to ask Congress for more and more funds: first for a call-out of the militia in 1789 to begin operations; then, for 2,000 regular troops, after the first, inconclusive battle with the Indians in 1790; then, after the stunning defeat of General St. Clair the next year, for a tripling of military expenditures to one million dollars a year and 5,000 more troops. n562 Although Congress agreed to the President's requests, each appropriation was accompanied by a vigorous discussion over the war's merits. n563 For example, Washington's final request for a 5,000-man army, which finally defeated the Indians under General "Mad" Anthony Wayne at the Battle of Fallen Timbers in 1794, provoked a bitter debate in Congress over whether peace efforts would be more effective than force, whether white settlers had provoked the war, whether the state militias should be used rather than army regulars, and whether it would make for better strategy to seek one winning blow rather than "dribbling away" money every year. n564 Congress' approval of the appropriation by a vote of 29-19 in the House and 15-12 in the Senate constituted an explicit authorization of the President's war plans. Congress never considered a declaration of war necessary. n565 [\*292] The Quasi-War further supports the conclusion that a declaration of war was not understood as necessary for authorizing combat. The Quasi-War arose out of revolutionary France's efforts to shatter Britain's peace with the United States established by the Jay Treaty of 1794. n566 After a series of French raids on American commerce and the declaration of France's Directory that American ships would be seized if they carried British goods, President Adams sent three diplomatic emissaries to Paris to negotiate a settlement. When this encounter exploded into the "XYZ Affair," Adams sent the country on a course for war by publicly releasing the dispatches of the envoys, by requesting new ships for the navy, and by seeking the buildup of coastal defenses and a new army of up to 50,000 men. In response, Congress approved Adams' designs to wage a naval war against France by supplying the funds for the bulked up military. n567 "We are," Federalists declared, "now in a state of war." n568 Yet Congress never brought to a vote a motion to declare war, even though Federalists controlled both houses and the presidency. Even those High Federalists who wanted a declaration viewed its benefits in a purely domestic light. A declaration, they thought, would "rouse the spirit of the people, facilitate the collection of taxes, quicken the military preparations, and cut off the correspondence of Republicans with France by making such correspondence a crime punishable by law." n569 But in terms of an authorization of combat, there was no need for a declaration because Congress had already played a significant role in raising and funding the military and in setting rules for the capture of French ships. Congress' failure to declare war against France also demonstrates the limited nature of the conflict. Not seeking a declaration was a deliberate decision of President John Adams, who believed that a full-scale war against France would not be in the national interest. His decision fulfilled the hopes of those Framers who wanted the President to play a more significant role than that of a mere super-magistrate. As we have seen, the Framers left the crucial decisions in war to the President because they viewed him as the nation's protector and representative. Today, we may see less need for a national presidency that could counter Congress' regionalist interests. But the late eighteenth and early nineteenth centuries were a time when the Framers rightfully could fear that a majority in Congress might support a war for sectional, rather than national, advantage. Thus, the Framers looked to the President to lead [\*293] America into war when the national interest required, or to discourage war when self-interested factions gained control of Congress. The Framers' design was realized during both the Quasi-War and the 1789 Indian War. In the Indian War, President Washington pursued a limited war that rejected the hopes of both New England Federalists, who opposed the war because of its costs, and Southern Republicans, who sought an aggressive war to secure territorial gain. n570 During the Quasi-War, Adams resisted the demands of his own pro-English party leaders, who wanted a total war against France. n571 Believing that peace was possible without risking the costs of a full-scale war, Adams opted for a limited naval conflict that permitted diplomatic contacts and, eventually, a negotiated reconciliation. n572 In both cases, the President pursued the national interest, while different factions in Congress quarreled over aims and strategies in order to achieve their regional or party objectives. The Quasi-War also supports this study's argument that the Framers did not intend the judiciary to play a role in the decisions on war. Unlike the Indian War, the Quasi-War generated disputes that reached the Supreme Court in a trilogy of cases:Bas v. Tingy, n573 Talbot v. Seeman, n574 and Little v. Barreme. n575 Commentators have placed great store in these opinions, particularly Little, as contemporaneous evidence showing that courts can exercise jurisdiction over war power cases. n576 However, none of these cases called upon the Supreme Court to decide that the President was waging war in violation of the Constitution, or that Congress had failed to declare that a state of war existed, or that courts could step in to adjudicate inter-branch disputes over war. In fact, the precedent set by the trilogy remains quite modest. All three revolved around the question of how much of the value of a ship and its cargo, seized by an American commander during the naval operations against France, flowed to the commander instead of to the ship's owner. Such issues did not involve the power of going to war, but rather the domestic and legal effects of war once it had begun. Further, these cases clearly fell within Congress' power to "make Rules concerning Captures on...Water" n577 and Article III's grant of the jurisdiction over "all [\*294] Cases of admiralty and maritime Jurisdiction," n578 which from its earliest days, the Supreme Court has read to authorize federal common lawmaking power. n579 Rather than making grand pronouncements on the separation of powers, cases such as Bas, Talbot, and Little underscored Congress' role in deciding on the legal state of relations with a hostile nation. In Bas and Talbot, for example, owners of ships that had been captured by the French, and then recaptured by American warships, challenged the prize rules that would give the American commanders a substantial portion of the ship's proceeds. They argued that the prize rules did not operate because Congress had failed to declare war formally, and that as a result the Court should hold inapplicable any statutes concerning recaptures until a declaration of war had been issued. n580 In both cases the Court held that Congress had the sole power to decide on the legal nature of hostilities: whether they would be "general" or "partial," "public" or "private," "solemn" and "imperfect" or "limited" and "imperfect." According to Justice Chase, "Congress is empowered to declare a general war, or Congress may wage a limited war; limited in its place, in objects, and in time." n581 Chase then emphasized a declaration of war as important primarily in international law:"If a general war is declared, its extent and operations are only restricted and regulated by the jus belli, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws." n582 In adjudicating cases stemming from a limited war, the courts must defer to Congress' judgment on which laws of war would apply to the conflict, and which would not. Chief Justice Marshall expressed this principle in Talbot:"Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed." n583 In all three cases, the Court rebuffed arguments that it should determine whether a state of war existed, or whether Congress and the President had acted constitutionally in beginning the conflict with France. n584 Neither Bas, Talbot, nor Little (nor all three added together) constituted the Marbury of foreign relations law. [\*295] Conclusions This study has shown that the Framers intended Congress to participate in war-making by controlling appropriations. Although the Constitution gives the President the initiative in war by virtue of his powers over foreign relations and the military, it also forces the President to seek money and support from Congress at every turn. In making decisions whether to raise and support the requested forces, Congress can judge the benefits of a particular war as well as influence its means and ends. Such was the practice under the British Constitution and under the early American governments, elements of which provided models for the drafters of the new federal Constitution. Such was the explanation given by the supporters of the Constitution to its opponents. Contrary to the arguments by today's scholars, the Declare War Clause does not add to Congress' store of war powers at the expense of the President. Rather, the Clause gives Congress a judicial role in declaring that a state of war exists between the United States and another nation, which bears significant legal ramifications concerning the rights and duties of American citizens. Congress' power to declare war also has the additional effect of ousting the courts from war powers disputes, because it deprives the courts of the ability to second-guess Congress' determination of whether a formal state of war exists. [\*296] The Framers also may have believed judicial participation unwarranted because of the structure established in the war powers area. The potentially conflicting powers of the President and Congress establishes a system that demanded no constitutionally correct method of waging war, but instead permits flexible decision-making based on each branch's exercise of its powers. Aside perhaps from policing against the most extreme violations of those grants by another branch - such as if Congress attempted to "fire" the President as Commander in Chief - the courts have no constitutional standards to apply to a process the Framers left intentionally undefined. Instead, the Framers understood that the legislature and the executive would use their powers to defend the prerogatives of their departments, as well as to pursue their policy preferences against a recalcitrant coordinate branch. The Framers expected the branches to cooperate to wage a successful war, but also anticipated conflict should the two disagree. They also provided the means for the government to continue to function in war, so long as the legislature acquiesced in the actions of the executive.

#### War powers are the foundation of federal domination of Natives.

Prygoski, 1997 Professor of Law, Thomas M. Cooley Law School. J.D., L.L.M. University of Michigan Law School. "War as the Prevailing Metaphor in Federal Indian Law Jurisprudence: An Exercise in Judicial Activism." TM Cooley L. Rev. 14 (1997): 491.

While the Indian Commerce Clause and the Treaty Power comprised the basis of much federal legislation dealing with Indian tribes, the War Powers of Congress served as the technical and theoretical underpinning of much federal regulation of the tribes. 42 As Felix S. Cohen put it: "Although comparatively little has been written about the [W]ar [P]owers of Congress and the Indian, these powers underlay much of the federal power exercised over Indian land and Indians during the early history of the Republic. In international law conquest brings legal power to govern. ' The prevalence of the War Powers as the main basis for Indian regulation is illustrated by the fact that both the Congress of the Confederation and the first Congress of the United States placed Indian affairs under the auspices of the War Department.44 Thus, from 1786 until jurisdiction over Indian affairs was transferred to the Department of the Interior in 1849,41 control over relations with Indian tribes was vested in the War Department, a clear indicator of the true nature of the relationship between the federal government and the tribes. Further evidence of the military mindset in dealing with Indian tribes is the interplay between Congress's exercise of the Treaty Power and its War Power.46 "The early dominance of the Treaty Clause as a source of federal authority illustrates that-at least during the first century of America's national existence-Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law."4' 7 Early reliance on the War Powers as the theoretical basis for regulating Indian tribes has left its mark on subsequent policies and laws affecting Indians." Part of this "heritage of decades of military control"49 is the methodology of the Supreme Court in reviewing Indian law cases.

#### Further, War powers authority undergirds the Supreme Court’s decision in Johnson v M’Intosh – which legalized genocide.

Williams, 1992 Robert A.. E. Thomas Sullivan Professor of Law and American Indian Studies Harvard Law School, J.D. American Indian in Western Legal Thought : The Discourses of Conquest. Cary, NC, USA: Oxford University Press, USA, 1992. p 330.

The Doctrine of Discovery's denial of "an absolute and complete title in the Indian" was recognized not only by Virginia but also by all the United States, according to Marshall. Regardless of the Supreme Court's views of the Indians' natural rights based on "abstract principles of justice," 129 the Doctrine of Discovery was the law of the country: "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." 130 Marshall's judicial abdication to the title acquired by white civilization's "conquest" of the Indians was actually an acknowledgment of the series of legal fictions supporting the Doctrine of Discovery. The rights acquired by European discovery of infidel-held lands under the doctrine were inchoate and anticipatory in nature. The Doctrine of Discovery assumed that the European discoverer would eventually establish its feudal prerogative rights of conquest over the infidel-held lands, either by wars of expulsion or by treaties of cession contracting the limits of the tribes. Thus in acknowledging "conquest" as the basis of the United States' superior title to the lands of America, Marshall specifically incorporated into United States land law the Norman-derived feudal fiction that discovery was the basis of the English Crown's original assertion of prerogative rights of conquest in America. The British government, Marshall stressed, "whose rights have passed to the United States," asserted its title and rights of conquest acquired by first discovery to all the lands occupied by Indians within the chartered limits of the British colonies. These rights, as Marshall recognized, were only claims to prerogative authority and had to be "maintained and established ... by the sword." 131 Great Britain, 316 The Norman Yoke in fact, did eventually succeed in perfecting these inchoate rights of discovery "as far west as the River Mississippi." As the title to a vast portion of the land now held by the United States originates in these initial Norman-derived claims of rights of conquest acquired by discovery, [h]owever extravagant the pretension of converting the discovery of an inhabited country into conquest may appear [here Marshall is referring to the Crown's feudal right of conquest]; 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. 132 As for the allied principle of the Doctrine of Discovery asserting the Indians' incapacity to transfer "absolute title" to the lands they claimed by right of occupancy: 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 adopted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice. 133 Marshall's discourse of conquest in Johnson settled the law on the rights and status of American Indians in the lands of the United States. Acknowledging the outcome of a political compromise that had been concluded forty years earlier, Johnson's acceptance of the Doctrine of Discovery sought to absolve the Supreme Court of any injustices arising from the Founders' denial of natural rights to the American Indians. It is not surprising, therefore, that Marshall made only passing reference to the medievally derived premises supporting the Doctrine of Discovery in Johnson v. McIntosh—"the character and religion of.. . [America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy." 134 But Marshall and the other justices were well aware of the historical paternity of this bastardized principle sired by Europe's Law of Nations and legitimated by the United States Supreme Court. As was clearly recognized by Marshall's close friend and fellow Supreme Court justice, Joseph Story, the assumptions supporting the Doctrine of Discovery permitted European nations to claim an absolute dominion over the whole territories afterwards occupied by them, not in virtue of any conquest of, or cession by, the Indian natives, but as a right acquired by discovery. Some of them, indeed, obtained a sort of confirmatory grant from the papal authority. But as between themselves they treated the dominion and title of territory as resulting from the priority of discovery. . . . The title of the Indians was not treated as a right of property and dominion, but as a mere right of occupancy. As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations. The territory over which they wandered, and which they used for this temporary and fugitive purposes, was, in respect to Christians, deemed as if it were inhabited only by brute animals. 135 The acceptance of the Doctrine of Discovery into United States law held profound implications for future relations between the federal government and the Indians. The Doctrine of Discovery's discourse of conquest was now available to legitimate, energize, and constrain as needed white society's will to empire over the North American continent. The doctrine confirmed the superior rights of a European-derived nation to the lands occupied by "infidels, heathens, and savages," encouraged further efforts by white society to acquire the Indians' "waste" lands, and vested authority in a centralized sovereign to regulate the Indians' dispossession according to national interest, security, and sometimes even honor. Perhaps most important, Johnson's, acceptance of the Doctrine of Discovery into United States law preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples. White society's exercise of power over Indian tribes received the sanction of the Rule of Law in Johnson v. McIntosh. The Doctrine of Discovery's underlying medievally derived ideology— that normatively divergent "savage" peoples could be denied rights and status equal to those accorded to the civilized nations of Europe— had become an integral part of the fabric of United States federal Indian law. The architects of an idealized European vision of life in the Indians' New World had successfully transplanted an Old World form of legal discourse denying all respect to the Indians' fundamental human rights. While the tasks of conquest and colonization had not yet been fully actualized on the entire American continent, the originary legal rules and principles of federal Indian law set down by Marshall in Johnson v. McIntosh and its discourse of conquest ensured that future acts of genocide would proceed on a rationalized, legal basis.

#### Johnson v. M’Intosh is still good law – this creates paternalistic racist practices justified by notions of white superiority

EagleWoman, 2011 Angelique Townsend. ‎Associate Professor of Law at University of Idaho College of Law "Bringing Balance to Mid-North America: Restructuring the Sovereign Relationships between Tribal Nations and the United States." U. Balt. L. Rev. 41 (2011): 671.

Eventually, Tribal Nations must leave the shadowland they have been relegated to by U.S. federal Indian law and policy.171 This will require tribal leadership to assert that tribal sovereignty has a tribal definition that is not externally defined.172 For far too long, the various branches of the U.S. government have dictated to Tribal Nations on matters of political governance, resource management, and even the relationship between tribal citizens and tribal governments.173 Since the U.S. Supreme Court handed down its Johnson v. M’Intosh174 opinion in 1823, European superiority has been the primary justification for the mistreatment of Tribal Nations.175 Almost two hundred years later, this justification still undergirds the relationships between the United States and Tribal Nations through the imposed trustee status over tribal governments and peoples.176 Tribal Nations have indigenous homelands that are not part of the federal or state territories. Through the U.S. trust land management system, the title of the majority of the tribal homelands is held in trust status with the federal government and is expressly exempt from state governance as tribal aboriginal lands under federal governance.177 Yet the Supreme Court continues its onslaught to redefine the aboriginal land rights and homelands of Tribal Nations through the rhetorical myth of the incorporation of the tribal lands into the U.S. territory.178 In decisions regarding the land rights of Tribal Nations, the Court has resorted to retroactive reinterpretation of allotment statutes from the late 1800s to destroy territorial boundaries and to bar on-going land-rights claims by Tribes.179 In the last fifty years, extinguishment of tribal title seems to be the primary theme in the U.S. Supreme Court jurisprudence.180 In this manner, the colonial enterprise of appropriating the lands of the indigenous peoples is still being carried out through the U.S. judiciary.181 Tribal Nations have been coerced to reform tribal governments when U.S. Indian policy has changed.182 A majority of Tribal Nations have adopted constitutions drafted by the U.S. Bureau of Indian Affairs throughout the 1930s and 1940s.183 Under the U.S. trust system, federally-recognized Tribes have been characterized as “domestic dependent nations” and thus,184 to have ceded a portion of their inherent sovereignty under the U.S. Supreme Court’s view that the U.S. Congress has “plenary” authority over Tribes.185 Since the formation of the U.S., the Tribal Nations have been excluded from meaningful interaction with the United States confederacy and been subjected to paternalistic racist practices justified by notions of white superiority.186 The current status of the relationships between Tribal Nations and the United States can be described as one of colonization by the United States. At this point in time, colonization has been denounced throughout the globe, yet it continues to exist for the indigenous peoples of mid-North America under the U.S. imposed trust relationship.

#### Pretending that these cases are “in the past” is deadly - locking tribes into the past and limits the legal rights of Native Peoples.

Fort, 2013 Kathryn. \* Staff Attorney, Michigan State University Indigenous Law and Policy Center; Adjunct Professor, Michigan State University College of Law. J.D., Michigan State University College of Law "The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court." St. Louis University Law Journal 57.297 (2013): 11-06.

When it comes to Indian tribes, the Court is no longer expressly stating the extinction of tribes is preferred, but the undercurrent of assimilation and disappearance still holds. Justice Rehnquist’s Leo Sheep history does this cultural work for the Court. Tribes may hold the place of an ethnic or social organizing framework, but tribes as sovereign nations with a separate law framework vis a vis the federal government appears untenable for the Court. For example, Justice Thomas’s concurrence in United States v. Lara 245 illustrates part of this problem. From his perspective, he can argue tribes lost all utility in 1871 with the end of treaty-making.246 Justice Thomas cannot find basis in the Constitution for Congress’s plenary power over Indian tribes.247 This plain finding would probably have support from many Indian law scholars. The problem arises from where Justice Thomas would take the idea. Instead of arguing for resumption of strong exercise of tribal sovereignty, it appears Justice Thomas would be happier for tribes to be subsumed into the United States, to assimilate and to be incorporated. As he writes, “[T]he States (unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments . . . . The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it.”248 Tribes, not considered long for this world by the drafters of the Constitution, also cannot exist today, at least to those with a certain originalist understanding. Justice Thomas’s concurrence in Lara provides a chilling look into his understanding of tribes as non-sovereign groups specially treated in the law for no particular reason. His focus on the 1871 statute ending treaty-making makes the link that the end of treaty-making meant the end of tribal sovereignty. Though it does not always fit neatly into the same rubric, the Supreme Court’s jurisprudence in federal Indian law has some things in common with “post-racial” jurisprudence. The Court removes context from the history it presents. The Court treats the cases as fundamentally ahistorical, stubbornly keeping context at bay,249 ignoring the implications of using historical stereotypes to come to decisions without context. This is a paradox in both “post-racial” jurisprudence and in federal Indian law—history is both extremely important and at the same time atemporal and unanchored. Chief Justice Rehnquist’s concern with the plain meaning of the text without any context is an example of this strange ahistoricism. In his dissent from Minnesota v. Mille Lacs,250 he complained about “scattered historical evidence,” that President Taylor’s reservation establishment order was a removal order was not as important as the text of the order.251 Considering the context of the removal policy would be “second-guess[ing] a century and a half later.”252 When a tribe tries to make that argument outright—that subsequent Congressional policies and laws negate laws from an earlier policy period253—the Court still does not agree.254 As the Court wrote, “If the Yakima Nation believes that the objectives of the Indian Reorganization Act are too much obstructed by the clearly retained remnant of an earlier policy, it must make that argument to Congress.”255 Another angle of post-racial jurisprudence, identified as the whitening of discrimination,256 is also relevant in land claims cases—specifically the “reframing [of] antidiscrimination law’s presumptions and burdens to focus on disparate treatment of whites as the paradigmatic and ultimately preferred claim.”257 In fact, this is the one way to frame all of Indian law, where the burden of tribes on non-Indians is the preferred claim, and the burden of non- Indians on tribes is not.258 For example, a case discussed at length, the Sherrill case, looked at the “history” of the tribe’s sovereignty for the past two hundred years, ignored all context, and put all the burden of the on the tribe. Like the Parents Involved case, there was no explanation for the tribes “inaction” in bringing in a land claim case. Detailed elsewhere, the tribe’s inability to bring a land claims case was based on the actions of the federal and state government preventing the tribe from coming to court, and preventing the tribe from hiring objective counsel.259 This ahistoricism within federal Indian law cases is deadly, locking tribes into a forgotten past and preventing them from existing in current caselaw. Eliminating tribes from the federal legal landscape leaves tribal citizens as one minority group among many, and subject to a jurisprudence obsessed with a time when they only existed to become civilized. To quote an award-winning historian, the point of this Article is not just a banal moral point that stereotypes are bad. It is a judgment about the effect that the reliance on stereotypes has on the finished product of historians. Stereotypes are a problem for the writing of history because they allow for the use of shortcuts. Whenever shortcuts are taken, essential and important parts of the story can be missed, and historians may end up not considering all possible paths to whatever can be called the truth.260 This warning to historians applies in its way to the Court. Using stereotypical shortcuts to write history obscures possible other truths, and quite simply, limits the legal rights of tribes and tribal peoples.

**The constitution’s grant of war powers locks in the idea of the “savage” as an enemy justifying expansive federal military power survives**

Ablavsky, 2013 (Gregory, Sharswood Fellow in Law and History, University of Pennsylvania Law School; Doctoral Candidate in History, University of Pennsylvania, The Savage Constitution, Duke Law Journal, http://ssrn.com/abstract=2229957)

Soon after ratification, word of the new Constitution spread throughout Indian country. “Our Union, which was a child, is grown up to manhood,” federal commissioners told the Creeks.462 Now that “[o]ne great council is established, with full powers to promote the public good,” the United States would ensure “justice” for the Native nations within its borders.463 The Indians took them at their word. “We rejoice much to hear that the great Congress have got new powers, and have become strong,” the Cherokees wrote the new federal government.464 “We now hope that whatever is done hereafter by the great council will no more be destroyed and made small by any State.”465 The Six Nations expressed similar sentiments in a letter to George Washington466; when New York emissaries demanded yet another land cession, Iroquois leaders waved copies of the federal statute barring state purchases of Indian lands in front of them.467 The sale happened anyway, a recurring pattern that quickly dashed Native hopes for the new government.468 Federal officials spoke the Madisonian language of paternalism, but their efforts at restraint were halfhearted and ineffectual.469 Georgia’s defiance of federal authority was especially brazen, but not unique: many states claimed and exercised a constitutional right to govern Indians until well after the Civil War.470 By contrast, the Hamiltonian Constitution functioned as the Federalists had promised. Indians turned out to be the substantial threat they invoked: the first military expeditions against the western Indian confederacy, in 1790 and 1791, suffered the worst defeat “Indians ever inflicted on the U.S. Army in its entire history.”471 But, after tripling the size of its army and spending $5 million—five-sixths of all federal expenditures from 1790 to 1796 472— the United States ultimately prevailed, seizing most of present-day Ohio.473 War between the United States and Native nations remained a near constant for the next century, but the outcome was never again so close.474 The fiscal-military state the Constitution created proved its most enduring legacy in Indian country, and made Natives among the biggest losers of ratification.475 This is not to suggest that Native dispossession was the simple result of federal military conquest. Just as significant as federal financial and military support for expansion was the entrenchment of a militaristic paradigm that cast Anglo-American settlers as victims and force against “savages” as both justified and necessary. Although Madisonians had hoped the new government would keep “both [whites and Natives] in awe by a strong hand, and compel them to be moderate and just,” in practice the constitutional structures of popular sovereignty and federalism ensured that the federal government’s “legal coercive power” ran largely one way.476 The specter of the “sword of the Republic” undergirded all laws and treaties regulating Native interactions with the United States, often obviating actual bloodshed.477 Through this alchemy, “lawless” violence was refined into the purer stuff of constitutional liberty and order.478 This postratification history of Indian affairs was neither inevitable nor accidental; it was, in a certain sense, the deliberate choice of the Constitution’s proponents. Though the Madisonians should not be anachronistically valorized as racial egalitarians—their paternalism reflected their own imperialist aims and disdain for Natives 479—they were sincerely committed to using the new government to secure Indians what they repeatedly termed justice. But the Federalists, though they likely shared Madison’s humanitarian impulses, nonetheless prioritized the heightened power of the United States to control the borderlands and defeat Native nations when selling the Constitution’s virtues. Their implicit bargain helped ensure that, instead of checking expansionist states and settlers, the federal government proved their valuable ally, engendering a perverse form of cooperative federalism at Natives’ expense.480 As French observer Alexis de Tocqueville perceptively noted in the era of Indian removal, The Union treats the Indians with less cupidity and violence than the several States, but the two governments are alike deficient in good faith. . . . [T]he tyranny of the States obliges the savages to retire; the Union, by its promises and resources, facilitates their retreat; and these measures tend to precisely the same end.481 The history presented here revises some of our understandings of the Constitution. For certain constitutional provisions, the context of Indian affairs is critical. As this Article has demonstrated, relations with Indians were a central site for early debates over federalism. Moreover, works that purport to expound the original understanding of the treaty or war power—without acknowledging that in its first decade the federal government entered six “foreign” and eleven Indian treaties,482 or that the U.S. Army fought two “foreign” and at least ten Indian wars before the Civil War483—present a partial perspective.484 As one example, some scholars have argued that the drafters of the Constitution anticipated that “treaties that sought to have a domestic, legislative effect” would require subsequent legislative enactment.485 But this conclusion is difficult to reconcile with the reality that Indian treaties—perhaps the paradigmatic instance of treaties having domestic legislative effects, as resistance under the Articles underscores—were considered self-executing.486 Yet even scholars who have used constitutional history extensively to critique this position and advance a nationalist interpretation of the treaty power have similarly ignored Indian treaties, even though the history recounted here powerfully supports their arguments, and even when the sources they cite specifically mention Indians.487 More fundamentally, focusing on Indian affairs challenges traditional conceptions of what the Constitution was. Legal scholars understandably privilege a view of the “Founding” as a legal and intellectual event: a serene gathering of statesmen, well-versed in European political philosophy and English legal thought, who translated these abstractions into the foundation of a new government intended to curb past abuses through a new American “science of politics.”488 This vision stresses the document’s restraining function through the mechanistic “checks and balances”489 that have become shibboleths of our constitutional culture: limited government, federalism, enumerated powers, and separation of powers.490 This perspective, though valid, is partial. Integrating Indians into our constitutional histories helps reveal how the Constitution was also made outside Independence Hall—in the violent, pluralist borderlands, where the United States contested with Native nations, European empires, and states and squatters to assert sovereignty over vast spaces of the continent. In 1783, the United States’s triumph in this “Long War for the West” was, in words of one scholar, “the most unlikely scenario of all,” a reality underscored by the disasters of the Articles.491 Yet less than seventy years later, the federal government— having expanded its jurisdiction to the Pacific, incorporated seventeen new states, and forcibly removed most Indian nations from east of the Mississippi River—was the contest’s undisputed victor.492 This improbable success owed much to the conscious designs of the Constitution’s drafters. All inhabited a world marked by a seemingly perpetual crisis of authority on the frontier, and they crafted a national government with formidable powers to address this challenge: to create the extended republic envisioned by Madison by expanding the nation and governing the West.493 From this perspective, the Constitution was not a document of restraint, but the foundation of what historians have increasingly recognized as a powerful early national state, whose authority was strongest on its peripheries.494 “[T]he American spirit, assisted by the ropes and chains of consolidation, is about to convert this country into a powerful and mighty empire,” warned Patrick Henry at the Virginia ratification convention.495 Henry’s prescience foretold much Native suffering. Natives were among the first subjects of this empire, but they were not the last. In the creation of the Constitution, as in much of early American history, Indian affairs were a central site of American state formation, prefiguring later imperial projects.496 The Federalists’ strategic deployment of the rhetoric of savagery anticipated future debates, as Indians became the stock template for America’s subsequent cross-cultural encounters, their supposed primitiveness evolving into a free-floating discourse to justify rule over other purportedly inferior peoples.497 At the same time, the legal and constitutional structures created to dispossess Natives and control the West—the national fiscal-military state, federal territorial plenary power, the exclusion of subject peoples from the privileges of representation and citizenship—became the bases of America’s later global empire.498 Unwittingly and unwillingly, Natives were the handmaidens of the United States’s imperial Constitution. As this narrative suggests, including Indians in constitutional histories also raises questions about the Constitution’s complicity in historical injustice. Most scholarship on this issue, unsurprisingly, has addressed the Constitution’s paradigmatic moral failure: its entrenchment of chattel slavery.499 There are important similarities, for the issues of Natives and slavery were closely intertwined. Southern states’ land hunger stemmed from the plantation complex’s imperative for ceaseless expansion, as Georgia and other states rapidly populated formerly Creek and Cherokee land with enslaved Africans.500 Moreover, like its entanglement with slavery, the Constitution’s commitment to the expropriation of Native lands enshrined a practice many at the time considered morally abhorrent to secure the more immediate goal of union.501 The delegates themselves made a connection: at the Convention, Charles Pinckney of South Carolina deflected a heated attack on the Three-Fifths Compromise with the contention that “the Western frontier [is] more burdensome to the U.S. than the slaves.”502 But the constitutional history of Indian affairs also presents different challenges for the contemporary Constitution than slavery.503 Unlike the document’s frequent (albeit oblique) references to slavery, nothing in the constitutional text explicitly mandates an imperialist Indian policy. For a textualist, this may absolve the document from its unpleasant historical associations. Yet in practice this absence has made the effects of this history all the more insidious. Although slavery’s legacy persists in profound ways, its appearance in the Constitution forced the nation to confront African-Americans’ status as a constitutional issue; the struggle to repudiate that history yielded powerful tools to further an antiracist constitutional agenda. The Constitution remains silent, however, on Native struggles to overcome our nation’s historical injustices. Even as views on Indians have shifted dramatically,504 Native nations remain legally a quasiconquered people, subject to the plenary power of a sovereign created in part to dispossess them.505 The idea of the “savage” as an enemy justifying expansive federal military power survives, too: the U.S. Justice Department has claimed that precedent from nineteenthcentury Indian wars legitimizes current practices in the War on Terror and the U.S. military codenamed Osama bin Laden “Geronimo,” after the nineteenth-century Apache chief.506 The problem is not that federal Indian policy has not changed; prompted by Native activism, the federal government has made significant, if incomplete, strides toward respecting Native nations as separate, self-governing sovereigns.507 But considering the history of Indian conquest and dispossession as incidental to the Constitution has allowed doctrines crafted to justify this process to endure, as if they could be abstracted from their imperial origins.508 These doctrines’ persistence underscores that, for Natives, the history traced here has not yet ended.

### Plan here

#### The United States Supreme Court should overrule Johnson v. M’Intosh on the grounds that the war powers authority does not justify federal control of Native lands.

### Contention II: Solvency

#### Expunging conquest as a justification is necessary to solve.

Echo-Hawk, 2010 Walter. Walter Echo-Hawk is a Native American attorney, tribal judge, author, activist, and law professor, As a Native American rights attorney since 1973, Walter worked at the epicenter of a great social movement alongside visionary tribal leaders, visited tribes in indigenous habitats throughout North America, and was instrumental in the passage of landmark laws—such as, the Native American Graves Protection and Repatriation Act (1990) and the American Indian Religious Freedom Act Amendments (1994). In the Courts of the Conqueror : The 10 Worst Indian Law Cases Ever Decided. Denver, CO, USA: Speaker's Corner, 2010. p 132.

This anomalous situation prompts a string of questions. What is this notion of conquest all about? What is the factual and legal basis for the doctrine of conquest in federal Indian law? Were Indian nations really conquered, and if so, when and how? Is it legally or politically necessary (or desirable) for the United States to rely on bare conquest to govern Indian tribes, rule Indian people, and exercise dominion over their property? Finally, if Native America was never really conquered, what were the Indian wars all about? We will explore these questions briefly to provide a backdrop for considering the law pertaining to the Indian wars. As you will see, the notion of conquest is embedded in federal Indian law, but it rests on flaky legal grounds— a legal fiction articulated in Johnson v. M’Intosh (1823) and then rejected by the same court in Worcester v. Georgia (1832)—and on shaky factual grounds, if we apply the commonplace definition of conquest to the facts at hand. Furthermore, there is no apparent need for the United States to rely upon conquest in its relations with the tribal governments that exist within its territory, to control Native Americans or exercise power over their property. Ample power over Indian affairs is provided by a far more legitimate source: the US Constitution. As such, the doctrine of conquest is superfluous and should be expunged from federal Indian law as an outmoded and injurious vestige of our colonial past. Talk of conquest started early. It began in the courts with Johnson v. M’Intosh (1823), when John Marshall crafted the rules for acquiring Indian land under the doctrine of discovery. According to Johnson, the multipurpose doctrine did several things. It operated to vest legal title to Indian lands in the United States; it granted the United States limited sovereignty over Indian nations; and it empowered the government to obtain Indian land by purchase or conquest. 9 Purchase is a straightforward concept. Indeed, nearly every aboriginal acre acquired by the United States was purchased through treaties made during times of peace— sometimes fair and square, often by hook or crook. 10 But conquest is an ugly word. It conveys a darker, more menacing connotation that requires greater explication. After all, conquest is aggression in its worst form. Marshall wrote in Johnson that “title by conquest is acquired and maintained by force” and the “conqueror prescribes its limits.” 11 This rule flew in the face of international law of the era, since bare conquest has never been considered sufficient to convey good title under international law. The law of nations has always forbade the use of force simply to acquire territory. Thus, Marshall was forced to devise a creative exception to the rule that conquerors must respect property rights in the lands they invade (i.e., we do not own Iraq merely because we invaded that nation). He said that the normal rules of international law governing the relations between the conqueror and conquered are “incapable of application” in the United States. Why? Because the settler state was confronted by Indian nations composed of “fierce savages, whose occupation was war.” He therefore considered it impossible to mingle with Indians, to incorporate them into a colonial social structure, or to govern an Indian nation as a distinct people, because the Indian nations “were ready to repel by arms every attempt on their independence.” Thus, “frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued.” According to Marshall, these factors forced the settler state to “resort to some new and different rule, better adapted to the actual state of things.” The new rule fashioned in Johnson was an outlandish legal fiction that converted “discovery of an inhabited country into conquest.” 12 Even if it looked good on paper, Marshall’s new rule meant nothing to Indian nations. It was a paper conquest by the Supreme Court in name only. The United States’ extravagant legal claims to land and sovereignty over any unwilling Indian nations remained to be won the hard way—“by the sword.” 13 Following Johnson’s discourse on conquest, Indian law opinions quickly began to fill with metaphors of war. 14 The early opinions were written during wartime with an unmistakable military mind-set, sometimes by judges who were themselves veterans of military conflicts with Indian tribes. In Cherokee Nation v. Georgia (1831), Justice Thomas Johnson reiterated that discovery grants rights of dominion over the country discovered, and that conquest provides such rights in case of war. He described Georgia’s assertion of legal rights against the Cherokee Nation as “war in disguise.” 15 The southern judiciary wrote jingoistic opinions in the extension cases discussed in chapter five that drip with hostility against Indians. 16 By 1955, the myth of conquest was so prevalent in the law that the Supreme Court assumed every American Indian and Alaska Native tribe had been conquered, even though few actually lost their land or independence by force of American arms. Justice Stanley Reed stated in Tee-Hit-Ton Indians v. United States (1955): Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale but the conqueror’s will that deprived them of their land. 17 The legal and factual basis for the doctrine of conquest rests on dubious ground. One can argue that the Indian tribes were conquered and are subject to the law of conquest, because (1) Johnson says discovery by Europeans means all Indian tribes are automatically conquered; (2) Indian nations lost their independence and sovereignty by force of arms or they became domestic dependent nations through treaties; and (3) the territories of Indian nations were appropriated by the United States in war. An examination of each argument shows that none hold water, except in rare instances. First of all, conquest cannot be equated with discovery. A legal fiction is an assumption of fact made by a court as the basis for deciding a legal question. The legal fiction used in Johnson bore no relation to reality in 1492 or 1823, when the case was decided— it was simply not true. Importantly, that legal fiction was at issue and rejected in Worcester v. Georgia (1832), when the Supreme Court discarded the absurd ideas about conquest and dominion found in the doctrine of discovery: This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, occupy the lands from sea to sea, did not enter the mind of any man. 18 Unjust legal fictions in the law that are wrong and injurious should be rejected, not perpetuated by modern courts. Just like the legal fictions used in Plessy v. Ferguson (1896) that blacks are racially inferior and segregation is not harmful or denigrating were finally rejected in Brown v. Board of Education (1954), it is time to retire the foolish legal fiction that European discovery of an inhabited continent can be equated with the conquest of that continent. 19 Whether conquest occurred is best determined on a case-by-case basis, rather than by a sweeping assumption. Second, the domestic dependant nation status of Indian tribes is not considered conquest when it is established through treaty agreements. When Worcester put flesh on that political classification, the court explained that treaty agreements placing Indian nations under US protection do not conquer or deprive them of their sovereignty, because “[p]rotection does not imply destruction of the protected.” 20 The protectorate relationship is frequently found in international relations. It is simply one “nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.” 21 Worcester emphasized that “the settled doctrine of the law of nations is, that a weaker power does not surrender its independence— its right to self government, by associating with a stronger, and taking its protection.” 22 Furthermore, the Indian protectorate relationship described in Worcester creates “no claim to [Indian] lands, no dominion over their persons” at all— it merely binds Indian tribes to a stronger nation “as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.” 23 Justice John McLean astutely observed: Every state is more or less dependent on those which surround it; but unless this dependence shall extend so far as to merge the political existence of the protected people into that of their protectors, they may still constitute a state. 24 Thus, Worcester held that the Cherokee Nation, which placed itself under the protection of the United States in treaties, retained its self-government and had never been conquered. Rather, the Cherokee Nation continued to exist as a separate and distinct people “being vested with rights which constitute them a state, or separate community— not a foreign community, but a domestic community— not as belonging to the confederacy, but as existing within it, and of necessity, bearing to it a peculiar relation.” 25 In short, domestic dependent Indian nations are not conquered nations under federal Indian law or international law; they continue to exist as separate self-governing communities within our domestic political system. This leaves us with the factual contention that Indian tribes lost their land or sovereignty by conquest. To assess this argument we must first define the term conquest. Strictly speaking, conquer means “to acquire by force of arms” according to Webster’s and conquest refers to “something conquered,” especially “territory appropriated in war.” 26 Applying this narrow definition, few American Indian tribes and no Alaska Native tribes were conquered. First, in virtually every instance, Indian land was purchased through treaties or statutes, not appropriated in war. 27 The motive and goal of many Indian wars was to remove noncompliant bands and tribes to reservations established by the treaties as their homelands, and tribes fought to remain in ceded areas. But the fact remains that those acres were acquired by purchase, and force was not employed until later and then only to enforce the sale agreements. The Indians’ territory in those instances was not appropriated in war. At most, armed force was a tool used to enforce treaty cessations; that is, in those circumstances it was a questionable police action to be sure, but not conquest as that term is normally understood. Second, it is difficult to find many tribes who lost their sovereignty by force of American arms since, as discussed above, most tribes agreed to come under the protection of the United States and assumed their domestic dependant nation status through treaties. In that sense, the treaties are analogous to the social or political contracts by which other political subdivisions joined the union because they are the instruments by which the signatory tribes came under the protection of the United States and exist within the political system as separate communities with the right of self-government. Indian wars did occur, but few were outright wars of conquest, fought to appropriate Indian territory or reduce tribal sovereignty, since this was accomplished primarily through treaties of peace, trade, and friendship. To be sure, some Indian nations were defeated militarily, but whether they actually lost any of their land or sovereignty as a result of those particular conflicts requires a careful case-by-case examination yet to be conducted on any comprehensive basis. Until then, we cannot simply assume those tribes were conquered as that term is used in Webster’s dictionary or commonly. Furthermore, the notion of a wholesale military conquest of every Indian nation by force, as is sometimes implied in federal Indian law, is plainly wrong. For example, no shots were exchanged in Alaska. No wars were waged against many tribal nations, such as the Pawnee and others. And many who were in fact defeated militarily did not lose a single acre or suffer reduced sovereignty as a result of the conflict. It would be a misleading fantasy to think conquest occurred in these situations. The law should not arbitrarily sanction the government of those tribes by conquest when it never happened as a mater of fact or law. This wrongly suggests that the United States’ power to govern Indian tribes is derived solely from an extraconstitutional source— military conquest. The United States need not rely on that raw principle to rule Indian tribes, since the Constitution provides a far more legitimate source of federal power to regulate Indian affairs. Though some land was no doubt appropriated in war, no wholesale conquest occurred unless we define conquest far more broadly than Webster’s to include the subjugation and dominion of Indian nations by means other than armed force. Indeed, there were arguably vehicles of conquest other than military force as Manifest Destiny engulfed the Indian nations during the nineteenth century: the use of law, germs that spread disease, culture conflict, destruction of game, habitat, and natural resources, theft and avarice, and so on. But these agents are not comparable to invading, seizing, and ruling another country by raw force of arms, nor are any of these destructive agents, standing alone, capable of conquering a continent inhabited by indigenous nations. Admittedly, all Indian tribes are subject to rule by armed force, but no more so than any other segment of society— we are all subject to military force if the legitimate need arises. If mistaken and misplaced ideas about conquest are allowed to linger in the law, they can be dredged up at any time by politicians and jurists to exercise unwarranted control over Native people, property, and political institutions, or, worse yet, by other nations who look to federal Indian law to justify warfare against indigenous peoples free from the restraints, protections, and obligations imposed by international law. It is better to be factually clear: relatively little appropriation of Indian territory in war occurred as a matter of fact. For the most part, tribes entered into a protectorate relationship with the United States by treaty agreements, not as a result of military conflict, and the law does not treat the resulting domestic dependent nationhood status as conquest any more than a state that has joined the union through other constitutional means. The misleading and sweeping pronouncements by jurists like the late Justice Reed should be set aside, along with mistaken notions of conquest in the law. We are no longer in a state of war with Indian nations and the judicial mind-set of conquest derived from wartime jurisprudence no longer serves any apparent purpose— judicial saber rattling is highly inappropriate and outmoded in contemporary times. After all, the Indian wars ended in 1890. The last vestiges of those conflicts expired in 1913, when the Chiricahua Apache POWs were released from Fort Sill, Oklahoma, after twenty-seven years of imprisonment. For the above reasons, the idea of conquest is dubious. The continued use of the law of conquest by federal courts to decide Indian legal questions today is highly questionable— unless the courts still believe they are courts of the conqueror. As seen, the notion of conquest is as complex in federal Indian law as it is in other arenas. Nations may lose wars and not be conquered. And there is a troubling reciprocity. No conquest is permanent, since occupation by the victors is often short and even the most powerful empires fade over time. Today’s conquerors can become the conquered tomorrow. This reconnaissance-level discussion is not intended to provide definitive answers, but to highlight an area of inquiry. Given this minefield, jurists should tread lightly before applying sweeping notions of conquest to decide legal questions.

#### The precedent must be removed. Scalia - Bat signal ….

Echo-Hawk, 2010 Walter. Walter Echo-Hawk is a Native American attorney, tribal judge, author, activist, and law professor, As a Native American rights attorney since 1973, Walter worked at the epicenter of a great social movement alongside visionary tribal leaders, visited tribes in indigenous habitats throughout North America, and was instrumental in the passage of landmark laws—such as, the Native American Graves Protection and Repatriation Act (1990) and the American Indian Religious Freedom Act Amendments (1994). In the Courts of the Conqueror : The 10 Worst Indian Law Cases Ever Decided. Denver, CO, USA: Speaker's Corner, 2010. p 132.

2. Overturn Johnson v. M’Intosh. The doctrines of discovery and conquest in Johnson v. M’Intosh (1823) should be overturned by the Supreme Court. The Supreme Court still relies upon them. 34 For example, in Nevada v. Hicks (2001), eighteen states sought to expand the doctrine of discovery. Their brief sent up the bat signal to the Dark Knight in the marble chambers. They claimed that the doctrine of discovery is the source of all federal Indian law and argued that it should vest plenary power in the states to intrude into Indian reservations. 35 Like Batman, Justice Scalia donned his black robe and answered the call. Even though his dark opinion in Hicks did not cite Johnson, he accepted their plea and sanctioned state intrusion into reservation homes. Hence, Johnson continues to undermine Indian tribes today, just like its doctrines “conquered” Alaskan tribes in 1955. There are four reasons why Johnson can and should be overturned. First, the Johnson proceeding was crooked as a barrel of snakes, as made plain in Professor Lindsay C. Robertson’s Conquest By Law (2005). 36 No attorney or judge should cite Johnson without first consulting this new research. The Johnson proceeding was infected by intolerable conflicts of interest among the attorneys. There was no “case or controversy” because the dispute was entirely feigned by the land speculators. The real parties in interest— the Indian tribes— were not present before the court as necessary parties. And, John Marshall should have been recused for a judicial conflict of interest. He decided the case and wrote the decision, even though he speculated in hundreds of thousands of acres near the case area with enormous interests at stake: his family fortune depended upon the outcome. In these disreputable circumstances, it is hardly any wonder that the Supreme Court burped out a gross miscarriage of justice. The decision is too heavily tainted to serve as legitimate legal precedent. Courts need not draw from the bottom of the barrel, especially in a nation that aspires in its organic documents to much higher values. Law professors should strip the unseemly case from property law and Indian law textbooks altogether for ethical reasons alone. At most, Johnson has instructive footnote value in the unpopular ethics courses. It illustrates how unchecked bad legal ethics and judicial conflicts of interest can impress bad law and miscarriages of justice into our legal system. In marked contrast to the crooked Johnson proceeding, the UNDRIP requires states to recognize and protect indigenous lands through “a fair, independent, impartial, open and transparent process.” Second, in Worcester Chief Justice Marshall rejected the discovery and conquest doctrines of Johnson as absurd legal fictions and circumscribed their reach. Unfortunately, his effort to erase them was short-lived. Soon after his death, the Supreme Court put together by President Andrew Jackson rushed to reinstate the doctrines. 37 Nonetheless, Chief Justice Marshall got it right: they are unjust legal fictions. The discovery of American Indian land by Europeans did not operate to transfer tribal title or sovereignty to anyone, nor can discovery of North America be equated with conquest of the continent. The outcome of no case should turn on these legal fictions

#### Only by pointing to the contradictions – like justice Thomas can we solve the biopolitical erasure of native peoples.

Rifkin, 2009, Mark. Professor – UNC Greensboro Ph.D. University of Pennsylvania-2003 "Indigenizing Agamben: Rethinking Sovereignty in Light of the" Peculiar" Status of Native Peoples." Cultural Critique 73.1 (2009): 88-124.

As Agamben suggests in Means Without End, sovereignty "is the guardian who prevents the undecidable threshold between violence and right … from coming to light" (113). Emphasizing the normative crisis over which the topos of sovereignty is stretched does not so much make room for Indigenous principles within Euramerican terminologies and institutions as refuse en toto the right claimed by the state to assess and adjudicate Native governance, drawing attention to the state's inability to ground Indian policy in anything but the forced incorporation of Native persons and lands into the nation. Might this deconstructive approach not be open to the same pragmatic critique Turner makes of Alfred, that it fails to appreciate the exigencies faced by Native communities and the consequent need to find a more "effective way" of engaging with settler-state policy? Reacting to a similar question with respect to his discussion of the need to challenge the racist stereotypes embedded in the precedents cited by the U.S. Supreme Court, Robert Williams observes, "the legal history of racism in America teaches us that the most successful minority rights advocates of the twentieth century recognized that the real waste of [End Page 112] time was trying to get a nineteenth-century racist legal doctrine to do a better job of protecting minority rights" (xxxii). While his emphasis on the "metaprinciple of Indian racial inferiority" cannot fully address the geopolitics of settler-state jurisdiction, as discussed earlier, his caution here seems quite relevant in considering the value of directly challenging the process by which the United States legitimizes its management of Indigenous peoples. In the three cases on which I have focused, the assertion of Native autonomy threatens to disrupt the U.S. territorial/jurisdictional imaginary and that potential rupture is contained by the citation of "sovereignty"—a concept whose substance keeps shifting and out of which emerge statuses and classificatory schemes that determine the institutional intelligibility of Native identities and claims. That process of exceptionalization has no check—the "plenary power" or "overriding sovereignty" of the United States is taken to license complete control over Native collectivities, including in what ways and to what extent, if any, they in fact will be recognized as collectivities (never mind as self-determining polities). To leave uncontested the topology of settler-state sovereignty, then, is to allow for Native peoples to remain abandoned to, in Agamben's terms, a "zone of indistinction between … outside and inside, violence and law" (64). Moreover, that "zone" is less a function of a self-confident exercise of power than a sign of the normative tenuousness of U.S. authority. As Clarence Thomas's comments suggest, the creation of a concept like "inherent sovereignty" works to cover while not unsettling the "overriding" and potentially limitless authority exerted by the U.S. government, specifically Congress, in Indian affairs, providing the impression of a legal logic that can guide or legitimize U.S. actions. I am suggesting, however, that it might be possible to occupy the contradiction embedded in a formulation like "inherent sovereignty" in ways that neither endorse the category as (continually re)formulated within U.S. Indian policy, disown it as the imposition of an alien norm, nor translate Indigenous traditions into its terms. Instead, the status can be used as a discursive entry point through which to highlight the groundlessness of U.S. claims to Native land and the impossibility of reconciling Indian policy with the principles of constitutionalism, drawing attention to the difficulty of validating the incorporation of Native peoples into the mapping of the jurisdictional geography of the state [End Page 113] except through recourse to violence. Such a strategy emphasizes the coercive imposition of domesticity on Native peoples who neither sought nor desired it, foregrounding the ways the narration of Indigenous polities as subjects of domestic law depends on a process of exceptionalization in which they axiomatically are consigned to a "peculiar," and thus regulatable, internality that forcibly disavows their autonomy and self-representations.32 If such a deconstructive argument were successful, in Turner’s terms ‘opening up the physical and intellectual space for Aboriginal voice’ (Turner aoo6: 30—I), what might the resulting relationship look like? The disjunction between the supposed fact of Indians’ domesticity and their existence as independent political collectivities prior to the formation of the US appears perhaps most visibly in the negotiation of treaties, and that tension supposedly is allayed by the assent of Native peoples to these documents. Although certainly less unilateral than the declaration of authority over Native populations contained in Kagama and Oliphant, treaties were not free from US efforts to regulate what would constitute viable forms of political subjectivity, represent ing Native governance and land tenure in ways that facilitated the project of settler expansion. That being said, as the process within US constiturionalism most suited to the recognition of extraconstitutional entities, treaty making seems the most viable vehicle for a ‘sovereignty-free’ politics. Rather than trying to contain the geo political difficulties that indigenous occupancy generates for the imaginary of the settler-state, treaties can serve as sites of negotia tion, not simply over particular concrete issues hut over the terms of engagement themselves.30 When no longer subordinated to the assertion of an overriding, underlying, pre-emptive or plenary authority, such dialogue could perform the kind of translation Turner describes between different traditions or frameworks of governance, displacing sovereignty in favour of politics. In Means Without End, Agamben suggests, ‘Politics is the exhibition of a mediality: it is the act of making a means visible as such, Politics is the sphere neither of an end in itself nor of a means subordinated to an end’ (Agamben 1000: 116—17, original emphasis), and ¡n this vein, treaties freed from the end of securing the obviousness of national territoriality become a mediality’ of negotiation. The forms of recognition emerging from that process would not func tion as part of a mode of regulation and would not be predicated on casting Native peoples as an exception within the sphere of US politics and law. What I have sought to do, then, is to use Agamben's analysis of the violence of sovereignty in its reliance on the production of a state of exception to suggest the absence of a normative framework for U.S. Indian policy and more broadly for the geopolitics of the settler-state. The coding of Native peoples as "peculiar" within U.S. governance depends on the assertion of a territorially based jurisdiction over them that further licenses the regulation of their entry into the shifting field of national politics, generating various (kinds of) categories that they are called on to occupy. While offering rigorous critique of such statuses, including their racializing premises and inability to engage with traditional philosophies and practices, Indigenous political theory largely has not contested the broader ways violence is transposed into legitimacy through the circulation of the enveloping yet empty sign of "sovereignty." Exposing that transposition, potentially through the countercitation of Native sovereignty (giving deconstructive force to what largely operates as a placeholder within settler-state governance), can work to disrupt the attendant metapolitical matrix through which Native identities are produced and managed. As Justice Thomas suggests, "The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty" (225). Emphasizing that failure and thus the location of Native peoples at the threshold between law and violence, between "ordinary domestic legislation" and imperialism, opens the state of exception to the possibility of self-determination, in which Indigenous polities cease to be axiomatically enfolded within the ideological and institutional structures of the settler-state. [End Page 115]

#### Our method of history is particularly important in the context of settler colonialism.

Brenna Bhandar, 2007 “ ‘Spatialising History’ and Opening Time: Resisting the Reproduction of the Proper Subject,” in Law and the Politics of Reconciliation, ed. Scott Veitch (Aldershot, Hampshire: Ashgate, 2007

How ‘we’ do hisory’ is a political act and a decision about politics. It is through doing history that ‘we’ constitute ourselves as subjects and as communities. For the purposes of the present discussion of how ‘history’ is related to the formation of the ‘subject’ and how this relationship is manifest in the particular context of processes of reconciliation, I employ the concept of ‘history’ with an understanding of it as a modality — with spatial and temporal dimensions — through which we constitute ourselves as subjects. The spatial and temporal dimensions of history both determine and reflect our self-understanding as subjects and communities of subjects. For instance, a linear, teleological spatial and temporal conception of history lends itself to, or supports, the idea of the subject as a work in progress that develops over time, eventually reaching its fully developed state as a civilized being. Thus, the political act involved in how we ‘do history’ is a decision about how we understand the relationship between what has happened in the past — and more specifically, the very shape that our understanding of the ‘past’ takes - and contemporary social and political realities. In other words, the decisions about how we come to make sense of things, or give meaning to events, is the means through which we accomplish an understanding of how we come to be who ‘we’ are, as individuals and as communities. history can thus be understood as one of the primary means through which the ‘we’ — of political community, or of nation — is produced. In a colonial settler context, such as Canada, the attempt to deal with the denial of rights and entitlements of the indigenous population in the transition to a post-colonial, constitutional democracy requires the production of an understanding of the past of colonial settlement that will facilitate such a transition. Through the production of an understanding of the process of colonial settlement, the nation and its constituent parts enable themselves to construct and configure an image of a legitimately founded, multicultural, constitutional democracy. What is at stake is not only creating a settled version of the past, but also creating a ‘background’ that will support an image of the future that the nation aspires to. I argue that in the colonial context, the transition from colonial settler society to post-colonial democracy that is performed through processes of ‘reconciliation’ requires a bounded history that is teleological and linear. While the content of this narrative may shift with time, the essential form remains the same. This has implications for the subject that is recognized through legal and political processes that aim towards a reconciliation of the violence of colonial settlement with the nation as a postcolonial entity. In this chapter, 1 will argue that a linear, teleological conception of history produces a subject that is (always already) the ‘proper’ subject. The much vaunted social and political objective of reconciliation, prevalent in colonial settler societies which attempt to grapple with the injustices that accrued during the course of violent settlement, demands a settled, unified notion of what transpired. which in turn compresses history into a seamless, progressive narrative of nation formation. The result is that the objective to recognize previously marginalized and oppressed ‘others’ in the post-colonial landscape is resolved through the recognition of a ‘difference’ that is always and only proper to the status quo of social, material and political inequality. By elucidating the temporal and spatial dimensions of the historical narratives that have been employed by the courts in their efforts to effect the constitutionally driven objective of reconciliation, I hope to point in the direction of alternative conceptions of history that might hold open the political potential for a different outcome in the ongoing struggle for legal and political recognition by aboriginal communities in the Canadian context. The question that remains is whether the idea of reconciliation is compatible with this alternative political and ethical vision.

#### 1AC – Our history key discursive entry point to solve sovereign violence.

Rifkin, 2009, Mark. Professor – UNC Greensboro Ph.D. University of Pennsylvania-2003 "Indigenizing Agamben: Rethinking Sovereignty in Light of the" Peculiar" Status of Native Peoples." Cultural Critique 73.1 (2009): 88-124.

Simply to present U.S. superintendence as a function of brute force would undercut the very legitimizing aim of the arguments in which sovereignty is employed, thwarting their effort to cover the inability of U.S. law philosophically to ground itself in the ground of the nation. The citation of sovereignty, therefore, is less a confident and self-assured indication of untroubled control than a restless performance in which the failure to find a normative foundation on which [End Page 106] to rest the legitimacy of national jurisdiction remains a nagging source of anxiety. Justice Clarence Thomas addresses this dynamic in his concurrence to the decision in U.S. v. Lara (2004).26 Thomas observes that there is a contradiction at the heart of U.S. Indian policy. "In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously" (215), and he later adds, "The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty'" (225).27 Despite the fact that the majority opinion describes tribes' "inherent sovereignty" as the source of their, still circumscribed, criminal jurisdiction, it also indicates that such "sovereignty" can be abridged, restored, and reconfigured at will by Congress, suggesting that the powers reaffirmed by the court under the rubric of tribal sovereignty actually are not predicated on the existence of Native peoples as autochthonous ("separate") entities but instead on the authority arrogated by the U.S. government to redefine the status of Native collectivities according to any principle it wishes. Still substantively conditioned by congressional sanction, the legalism of "inherent sovereignty," not unlike "domestic dependent nation," draws attention away from the untenability of the United States' overriding claim to sovereignty itself, or rather the absence of a legitimate legal claim (or basis for making one) that is registered by the citation of the figure of sovereignty. That process of invention signals an effort to cloak U.S. imperial modes of exception as something other than, in Agamben's terms, "sovereign violence," to cover the degree to which Native peoples are left "exposed and threatened on the threshold" of national territoriality (Homo Sacer, 64, 28). The attempt to locate legitimacy for U.S. jurisdiction in something other than its own imposed, circular obviousness can be found even in the most strident declarations of sovereignty. In Oliphant, for example, the majority opinion suggests that "Indian tribes do retain elements of 'quasisovereign' authority after ceding their lands to the United States" and that they "give up their power to try non-Indian citizens" after "submitting to the overriding sovereignty of the United States" (208, 210). Such moments suggest a point at which Native peoples voluntarily surrender certain forms of political authority. While quite doubtful as a way of characterizing the actual [End Page 107] workings of the treaty system or the ways it was understood by Native signatories (assuming that sale or lease of particular plots of land is tantamount to a wholesale acceptance of unconstrained regulation by the United States over every aspect of Native life), this description does predicate federal power on consent ("ceding," "submitting"), seeking to cast U.S. sovereignty as encompassing yet fundamentally noncoercive. This effort to find a way to ameliorate the force of settler-state jurisdiction suggests that part of the metapolitical generation of categories, concepts, and statuses is the attempted simulation of legitimacy as well. If the notion of "inherent sovereignty" as employed in U.S. Indian policy is somewhat of a placeholder given its continued subjection to potential congressional reworking (the supposed "overriding sovereignty" of the federal government), it still provides a discursive entry point that can be occupied by Native peoples in ways that expose the domination at play in the deployment of the topos of sovereignty by the settler-state. In other words, exploiting the kind of logical incoherence and underlying normative crisis toward which Thomas points, the discourse of sovereignty can be mobilized to deconstruct U.S. rule by illustrating how the settler-state exerts a monopoly on the production of legitimacy—the ways statuses are imposed on Native peoples in the context of their axiomatic yet constitutionally indefensible subjection to U.S. authority. The countercitation of sovereignty can reveal and contest the operation of such a monopoly by drawing attention to the organizing indistinction between force and law in Indian policy—the operation of a geopolitical state of exception.

#### 2AC - War power key – no commerce based justification.

Skibine, 2004 Alex Tallchief. Professor of law at Utah J.D. from Northwestern University School of Law. served as Deputy Counsel for Indian Affairs for the U.S. House of Representatives Committee on Interior and Insular Affairs. "United States v. Lara, Indian Tribes, and the Dialectic of Incorporation." Tulsa L. Rev. 40 (2004): 47.

Justice Breyer's Lara majority opinion put a heavy emphasis on the existence of congressional plenary power, proving that contrary to what some may want to imagine, 60 while the power of Congress may no longer be plenary when it comes to trampling on the constitutional rights of individual Indians,61 it is still very much plenary when it comes to controlling the internal affairs of the tribes.62 One has to question whether such an emphasis on plenary power was necessary to the decision. Certainly, this emphasis provoked a reaction from Justice Thomas, who in his concurring opinion argued that he could not agree with the Court "that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.' 63 Justice Thomas seems to think that the political branches of the government did have "plenary" authority over Indian tribes, but that was only due to the war power and the treaty power. Since neither power is being used today, there is no sound basis for regulating "sovereign" Indian tribes except through the Commerce power, but his analysis convincingly demonstrates why the Commerce Clause does not vest plenary power over Indian tribes to Congress. 64 Thomas cannot reconcile himself with the idea that if Indian tribes retained any form of inherent sovereignty, Congress can still have "plenary authority to legislate for the Indian tribes in all matters, including their form of government., 65 That is because, according to Thomas, "[i]t is quite arguably the essence of sovereignty not to exist merely at the whim of an external government."6 6 This is why Thomas believes that the Court has to choose between inherent tribal 67 sovereignty and congressional plenary power. In reality, I wonder whether Thomas was not playing devil's advocate. Chiding the majority for finding both that Indian tribes are still sovereign and that Congress has plenary power over them, he seems to be daring the Court to choose one or the other. Thus, he warned that a thorough "analysis of the sovereignty issues posed by this case" 6 8 might push the Court to "find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. 69

#### Why care about Indian wars now?

Echo-Hawk, 2010 Walter. Walter Echo-Hawk is a Native American attorney, tribal judge, author, activist, and law professor, As a Native American rights attorney since 1973, Walter worked at the epicenter of a great social movement alongside visionary tribal leaders, visited tribes in indigenous habitats throughout North America, and was instrumental in the passage of landmark laws—such as, the Native American Graves Protection and Repatriation Act (1990) and the American Indian Religious Freedom Act Amendments (1994). In the Courts of the Conqueror : The 10 Worst Indian Law Cases Ever Decided. Denver, CO, USA: Speaker's Corner, 2010. p 132.

In the winter of 1973, Native American Rights Fund (NARF) attorneys John Echohawk and Roy S. Haber were called into Wounded Knee, South Dakota, shortly after the occupation of that village by the American Indian Movement (AIM) and traditional tribal leaders began. Wounded Knee was an impoverished and oppressed community on the neglected Pine Ridge Indian Reservation so desperate for social change that it gave rise to hostage taking and an armed stand-off. When the attorneys arrived, it was a war zone. A few hundred Indians in the isolated village were surrounded by a large force of US marshals, FBI agents, and BIA police armed with shotguns and automatic weapons and supported by a dozen armored personnel carriers. The task of the NARF attorneys, who were the first outsiders allowed into the besieged area, was to open lines of communication for negotiations between the parties so no one would be killed. After a series of meetings with AIM leaders in the village church, a tipi was erected on neutral ground in the demilitarized zone between the lines, and negotiations began. It was to be the last armed confrontation between Indians and Big Knives in the twentieth century. Recalling the historical significance of the seventy-day Wounded Knee occupation, Echohawk observed, "it focused national attention on neglected Native American issues for the first time in many decades, and the nation began to constructively address long-overdue grievances."129 Today, most modern-day Indian wars are fought in courtrooms and legislative hallways by several thousand Native American lawyers. They are foot soldiers in the remarkable Native American sovereignty movement, which has done so much to restore pride, sovereignty, and well-being in Indian Country. Today these attributes of freedom are sometimes taken for granted. However, indigenous rights are never voluntarily given by the conqueror. They must be demanded, wrested away, and earned in the first instance by the Native people themselves with support from people of goodwill. Native American rights were won in hard-fought legal battles and legislative campaigns during the modern era of federal Indian law. Myths about the law of war and conquest must no longer be tolerated. When Chief Justice Marshall alluded to the right of conquest in his trilogy of decisions, he did not imply that it is an unfettered right free of legal restraints. Many carelessly assume that "might makes right" when considering indigenous affairs, as reflected in the infamous remarks of Justice Reed in Tee-Hit-Ton !ndians.130 Though invasion, war, and conquest are brutal acts, they are still governed by the law. The Indian wars were not free from legal restraint. No loophole or exception to the rules of war existed for warfare against indigenous people then, or now, even though a double standard may have been applied by the United States to judge its own conduct during those conflicts. Furthermore, if we define conquest as "the appropriation of land by force of arms," there was no wholesale military conquest of Native America as Justice Reed seemed to believe. Were the Indian wars legal? Certainly not, at least in the case study described in Connors, nor at Sand Creek. Further research on other conflicts may demonstrate that some of the Indian wars were perfectly legal, while in others the violence committed against Native Americans was unlawful indeed, murder that went unpunished. In the latter instances, much of the death and destruction could have been averted, or at least mitigated, had America observed the law of war. But why should we care at this late date? The Cheyenne care. So do other indigenous peoples who have been harmed by war or live under its threat today. Much violence was committed against Native peoples in the nineteenth and twentieth centuries- amounting to world war against them in some years. Their concerns about violence are reflected in the United Nations Declaration on the Rights of Indigenous Peoples (2007), which protects indigenous peoples from acts of genocide and the use of violence by states, including the forcible removal of their children, forced assimilation or cultural destruction, and forcible removal from their lands.131 The legality of the Indian wars matters in the same way that the legitimacy of American wars in Korea, Vietnam, Afghanistan, and Iraq matter to many people, especially the veterans of those conflicts and their families. I believe it also mattered to Judge Nott, when the former prisoner of war examined the facts in Connors and asked whether the violence committed against the Cheyenne was lawful. Though Connors did not decide the issue, the case serves much the same stark educational purpose as Cherokee Nation v. Georgia, by leaving in the records of the courts of the conqueror, for future generations to read, ample testimony of the conduct of the United States toward its Native peoples. It memorializes the use of violence as part of the federal Indian policies of the nineteenth century.