Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty Through the Lens of Native American Literature

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> "Just one time when I'm telling a story somewhere, why don't you stop and listen?" Thomas asked.
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> "Just once?"
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> "Just once."
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> Victor waved his arms to let Thomas know that the deal was good. It was a fair trade, and that was all Victor had ever wanted from his whole life. So Victor drove his father's pickup toward home while Thomas went into his house, closed the door behind him, and heard a new story come to him in the silence afterwards.
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> —Sherman Alexie, (Spokane/Coeur d'Alene)[1]

INTRODUCTION

The inspiration for this piece comes from my practice of requiring students enrolled in my course, Native Americans and the Law, to read several literary works by contemporary and historical Native American writers. This is in addition to cases and other materials traditionally taught in this course. The inspiration behind the inspiration, so to speak, traces back to an emerging awareness of the central role stories play in my life.

Though stories were a regular part of life for me growing up as a Houma Indian in Dulac, Louisiana, I was only slightly conscious of their impact on my sense of self, community, and place in the world. Our oral tradition encompasses diverse stories, but within them are recurrent themes, chief

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1. SHERMAN ALEXIE, THE LONE RANGER AND TONTO FISTFIGHT IN HEAVEN 75 (1993).

among them the idea of relationships. Stories carry us through time and reveal our relationships to our historical selves, to others around us, and to the natural and supernatural world. The meanings attached to these stories, like the relationships they explore, are dynamic, increasingly complex, and often surprising. The following story illustrates these points.

In the 1940s, a certain Houma Indian woman enrolled her children in the local Baptist mission school, one of the few schools available at the time to Indian children in this part of Louisiana. Like most Houma, this woman and her family were Catholic. On one occasion, she went to the Catholic church to confess her sins. The confessional was the type where the penitent and the priest occupy adjoining chambers and speak through a matted screen or narrow opening in the wall. The woman had just uttered the words, "Bless me, Father, for I have sinned . . . ," when the priest suddenly interrupted her and said, "I know who you are. And I know that your children go to the Baptist mission school. I want you to promise me that you'll put your children in the Catholic mission school and then I'll hear your confession." The woman was stunned at first; then she became enraged. She came out of the confessional, opened the door of the priest's chamber, and asked him to repeat what he had just said. He did. She punched him square in the face and vowed never to step foot inside a Catholic church again.

This event actually occurred. I was quite young when I first heard this story and I have heard it retold many times by different storytellers. It is a story from the "contact zone," to borrow a useful concept from literary scholar Mary Louise Pratt. For Pratt, the contact zone refers to "the space of colonial encounters, the space in which peoples geographically and historically separated come into contact with each other and establish ongoing relations, usually involving conditions of coercion, radical inequality, and intractable conflict."[2] This story reflects the multi-layered patterns of negotiation that typically emerge from interpersonal and intercultural encounters within the contact zone. Importantly, it depicts Indian people as active participants in the unfolding narrative. The woman's accommodative or adaptive posture, reflected in her decision to have her children educated in white, Christian systems, and in her decision to participate in Christian ceremonial life, contrasts vividly with her posture of resistance, shown in her refusal to negotiate the terms of her children's education and in her refusal to acquiesce to the priest's sacramental blackmail scheme. The woman's act of personal violence against the priest follows, and is perhaps justified by, the priest's act of "sacramental violence" in the perversion of sacred ritual and the defilement of sacrosanct space.

The gendered aspects of the story are also compelling and go beyond the normatively assigned "woman's" role as child-protector. Here, a woman dramatically confronts the hegemony of a male-oriented and male-

2. MARY LOUISE PRATT, IMPERIAL EYES: TRANSCULTURATION AND TRAVEL WRITING 6–7 (1992), *quoted in* COLONIAL DISCOURSE/POSTCOLONIAL THEORY 6 (Francis Barker et al. eds., 1994).

dominated religious institution and reverses the normative patterns of religious exclusion with an emphatic and irrevocable rejection of the church itself.

It is critically important that legal discourse, and particularly the legal discourse that concerns relations between Indigenous and non-Indigenous societies, incorporates the emerging and evolving narrative traditions of Indigenous Peoples. The reason for this, and the central thesis of this Article, is that such an incorporative discourse serves to awaken the mind to reconceptualize the place of Native Americans within American society and to ignite the imaginative possibilities of more inclusive, respectful, and peacefully co-existing communities. Pursuing an incorporative discourse within the framework of federal Indian law nudges us in that direction in at least three distinct ways. First, involving ourselves with such stories allows us better to inquire into patterns of intersocietal encounters and to examine more fully the social and political norms by which Indigenous and non-Indigenous people have organized their lives together.[3] The resulting inquiry offers the potential to examine anew the historical meanings ascribed to various legal texts and to forge a more inclusive and complete "political narrative."[4] Second, inclusion of Indigenous narrative traditions in this legal discourse encourages, and indeed often requires, lawmakers and law advocates to cross intercultural boundaries to examine the extent to which emergent legal structures and rules respect cultural differences or reveal jurisprudential myopia. Such methodology may stimulate what legal scholar John Borrows (Anishinabe) describes as an "awakening of understanding"[5] to one's

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3. Jeremy Webber finds historical support for Aboriginal rights precisely in this space of intersocietal relations in *Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples*, 33 OSGOODE HALL L.J. 623 (1995). Webber's article suggests that

> [Aboriginal rights] are the result of the interaction between Aboriginal and non-Aboriginal peoples, and the process of reflection on that experience, rather than the positive law of one people. They constitute a set of norms that are fundamentally intercommunal, created not by the dictation of one society, but by the interaction of various societies through time.

Id. at 626. Robert A. Williams, Jr., examines North American Indigenous patterns of diplomacy as reflected in treaty practices to show that the resulting political arrangements between Indigenous and non-Indigenous peoples reflected dialogic, not monologic, discourse. *See* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800 (1997).

4. David Luban coined this phrase to signify the historical placement of and representations derived from various legal texts:

> Legal argument is a struggle for the privilege of recounting the past. To the victor goes the right to infuse a constitutional clause, or a statute, or a series of prior decisions with the meaning that it will henceforth bear by recounting its circumstances of origin and assigning its place in history. I shall call such a historical placement of legal materials a political narrative.

David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989). Robert Cover also called attention to the important links between law and narrative. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) ("[N]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture.").

5. John Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster*, 22 AM. INDIAN L. REV. 37, 40 (1997).

limited or erroneous viewpoints about such legal structures.[6] Finally, Indigenous narrative traditions and texts inform and sharpen our understanding of present-day Indigenous claims for self-governance. These texts serve as an antidote to the texts of oppression, which dominate the traditional study of Indigenous Peoples' legal and political experience. Native people live within these literary texts and are active participants in the unfolding narratives. Their contestations of and negotiations with externally imposed regimes of political, religious, and social hegemony proceed on terms that often reflect Native American normative values or minimally, reflect back the hypocrisy of the imposed regimes. Native American literary texts help clarify contemporary negotiations on tribal self-determination by revealing that process to be less a function of enlightened, but still paternalistic, federal policy, and more the product of persistent Indigenous-derived demands for political and social co-existence. In other words, Indigenous voices demanding spheres of self-determination were never silenced; the rule-makers finally stopped and listened to them.[7]

This Article argues for the greater pursuit of an incorporative discourse within federal Indian law by means of reading selected Indigenous narratives alongside the "traditional" canon. This mode of inquiry embraces and combines the content of Indigenous knowledge, the experience and values of Indigenous Peoples, and the methodology of Indigenous narrative traditions (including oral forms) to form, along with non-Indigenous voices, a more polyphonic expression of human life.[8] Incorporative discourse calls forth what Kiowa writer N. Scott Momaday describes as an imaginative journey,

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6. *Cf.* Jody Freeman, *Constitutive Rhetoric: Law as a Literary Activity*, 14 HARV. WOMEN'S L.J. 305 (1991). Freeman notes that lawyers often engage in cultural translation, a process that involves "pushing judges past the limits of their experience by immersing them in a new culture or tradition; it can mean challenging stereotypes. At a minimum, translation is marked by a crossing of boundaries." *Id.* at 309. Many law schools have also attempted to "awaken" their students' understanding of cultural and social differences through adaptations in pedagogy and curriculum, as well as through other efforts to change the legal culture. These efforts usually operate against strong, and often overwhelming, currents within the legal community, where the discourse of "rules rationality" and its pretensions to objectivity and neutrality still claim ascendancy. As one commentator notes:

> [T]echnical legal rules, with their appearance of neutrality and objectivity, effectively mask the partiality and the power of law, despite contemporary moves to alter law's masculinist and raced partiality .... Although dominant interests are not temporally fixed, law continues to favour the interests of "benchmark men," that is, those who are white, Anglo-Celtic, heterosexual, able-bodied, and middle class, and who support a mainstream religion and a right-of-centre politics. Benchmark masculinity asserts its normativity by producing and reproducing itself through legal and other discourses as the invariable standard against which "otherness" is measured.

Margaret Thornton, *Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same*, 36 OSGOODE L.J. 369, 370 (1998).

7. For a fascinating critique of literary narratives written by or about African-Americans and operating in parallel to legal discourses, see Brook Thomas, Plessy v. Ferguson *and the Literary Imagination*, 3 LAW, TEXT & CULTURE 33 (1996).

8. *See* Milner Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989). Professor Ball writes that "[p]olyphony in narrative is the representation of human 'languages' or 'voices' that are not reduced into, or suppressed by, a single authoritative voice: a representation of the inescapably dialogical quality of human life at its best." *Id.* at 2290.

"a whole journey, intricate with motion and meaning; and it is made with the whole memory, that experience of the mind which is legendary as well as historical, personal as well as cultural . . . . The imaginative experience and the historical express equally the traditions of man's reality."[9] Before embarking on such a journey, one must recall that Indigenous narrative traditions are located in myriad texts. They are found within a society's oral traditions, within a diverse range of writings by Native people (autobiographical, fictional, polemical, and judicial opinions)[10] and indeed, even within the land itself, which forms a "sacred text."[11] The Indigenous narratives discussed here reflect, to a limited extent only, the diversity of narrative traditions that exist in Indigenous America. That diversity means that the selection of particular Indigenous texts can raise challenging issues about representations of Native (and non-Native) people and the tendency to assign (incorrectly or prematurely) a normative position to cultural values reflected in the texts. The texts selected for inclusion here are those that, in my own judgment, embody the aspirations of an incorporative discourse because of their capacity to awaken our understanding of the legal structure and rules governing Indigenous and non-Indigenous relations and the place of Native peoples in American society. These include contemporary texts like Louise Erdrich's (Turtle Mountain Chippewa) *Love Medicine*, N. Scott Momaday's (Kiowa) *The Way to Rainy Mountain*, and Sherman Alexie's (Spokane/Coeur d'Alene) *The Lone Ranger and Tonto Fistfight in Heaven*, as well as historical texts like William Apess's (Pequot) "An Indian's Looking Glass for the White Man," from his 1833 book *The Experiences of Five Christian Indians of the Pequot Tribe*.[12]

These Indigenous narratives and the accompanying jurisprudential texts that follow are arranged topically to highlight the value of incorporative discourse across various thematic lines and to draw attention to the non-chronological arrangement of legal precedents. In other words, the arrangement of materials itself suggests a certain fluidity to patterns of intersocietal

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9. N. SCOTT MOMADAY, THE WAY TO RAINY MOUNTAIN 4 (1969).

10. The Supreme Court of the Navajo Nation frequently employs tribal narrative traditions in the course of its legal opinions. See, for example, *In re* Certified Question II: Navajo Nation v. MacDonald, 16 Indian L. Rep. 6086 (1989), wherein the court examines the tradition of fiduciary trust imposed on tribal leaders—*naat'aanii*—by reference to the epic figures like the Hero Twins.

11. FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 34–35 (1995) ("As part of the sacred text, the land-like sacred texts in other traditions-is *not* primarily a book of answers but rather a principal symbol of-perhaps *the* principal symbol of and thus a central occasion of recalling and heeding-the fundamental aspirations of the tradition.").

12. *See* WILLIAM APESS, *An Indian's Looking Glass for the White Man*, *in* THE EXPERIENCES OF FIVE CHRISTIAN INDIANS OF THE PEQUOT TRIBE (1833), *reprinted in* ON OUR OWN GROUND: THE COMPLETE WRITINGS OF WILLIAM APESS, A PEQUOT (Barry O'Connell ed., 1992) [hereinafter O'Connell]. There are now texts presenting the writings of other historical Native figures that include superb commentary and analysis. *See, e.g.*, THE WRITINGS OF ELIAS BOUDINOT (Theda Purdue ed., 1983); BERND C. PEYER, THE TUTOR'D MIND: INDIAN MISSIONARY-WRITERS IN ANTEBELLUM AMERICA (1997); CHERYL WALKER, INDIAN NATION: NATIVE AMERICAN LITERATURE AND NINETEENTH-CENTURY NATIONALISMS (1997); EARLY NATIVE AMERICAN WRITING: NEW CRITICAL ESSAYS (Helen Jaskoski ed., 1996).

and intercultural relations that cut across time and space—relations that are constantly being revised, renegotiated, and/or reaffirmed. Part I seeks briefly to locate and contextualize this interrogative process within the broader contours of the "law and literature" movement and the realm of literary criticism, particularly in its examination of so-called postcolonial literatures. Parts II through IV then address the following thematic elements: Power and the Law, Promise-Keeping and the Sacredness of Words, and Violence and the Word. The textual analysis in these latter Sections owes much to the scholarship of Cheryl Walker and the instructive rhetorical paradigms she advances to interrogate Native American texts.[13] Her particular endeavor is to uncover Native American reflections on nationalism based on nineteenth-century writings by Native authors. These texts, like the ones considered here, advance the central thesis of this Article, i.e., to awaken the mind to reconceptualize the place of Native Americans within American society. As Walker notes, these Indigenous texts speak to an "imagined community," a "future-oriented (and thus particularly American) dream of shared experience, [reflecting] the 'struggle to be together in our differences, even the non-negotiable ones.'"[14] The aspiration here is to advance this imagined community through the realization of an incorporative discourse in federal Indian law.[15]

I. THOUGHTS ON LAW AND LITERATURE

The effort toward an incorporative discourse finds support in both the legal and literary scholarly communities. Within the framework of legal commentary, one can find views like the following: "Both 'law' and 'literature' share the activity of generating narratives that illuminate, create, and reflect normative worlds, that bring experiences that might otherwise be invisible and silent into public view."[16] Certainly, there are differences in the methods, purposes, and consequences of legal and literary interpretations. The late Robert M. Cover reminded us of this when he wrote that

> [l]egal interpretation takes place in a field of pain and death . . . . A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life . . . . When [legal] interpreters have finished their work, they fre-

13. *See* WALKER, *supra* note 12.

14. *Id.* at 11.

15. This Article joins an emerging literature produced by legal and literary scholars who find value in interrogating legal texts in light of Indigenous narratives. *See* Borrows, *supra* note 5; Dean B. Suagee, *Turtle's War Party: An Indian Allegory on Environmental Justice*, 9 J. ENVTL. L. & LITIG. 461 (1994); Eric Cheyfitz, *Savage Law: The Plot Against American Indians in* Johnson and Graham's Lessee v. M'Intosh and the Pioneers, *in* CULTURES OF UNITED STATES IMPERIALISM 109 (Amy Kaplan & Donald E. Pease eds., 1993).

16. Carolyn Heilbrun & Judith Resnick, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1914 (1990).

> quently leave behind victims whose lives have been torn apart by these organized, social practices of violence.[17]

But there is some common ground, as well. Even legal commentators who are otherwise dubious or skeptical about the purported links between law and literature acknowledge "the desirability of enriching the resources of human communication."[18] Since no one could seriously oppose that worthy objective, the residual skepticism lies in whether or not immersion in literature actually influences the relative sensitivity, humaneness, or ethical integrity of the law and its practitioners. The "show me *that* it works" debate is not altogether unhelpful since it calls upon proponents and skeptics of the "law and literature" school of inquiry to re-interrogate and refine their analyses, a result that invariably, if not deliberately, sheds new insights into the process of legal interpretation. But that debate deflects attention away from the "show me *how* it works" inquiry, the particular concern of this Article. As one commentator aptly stated,

> Although countless feminist and minority critiques have called on the legal system to be more sensitive to a "multiplicity of voices," we need concrete suggestions of how this might work. We need to move beyond arguments that judges must learn to hear stories more empathetically and pay more attention to context.[19]

An appropriate starting point, then, is simply to acknowledge that both law and literature share a concern with interrogating the imaginative possibilities of relationships between all living beings, not merely between privileged ones.[20] Such inquiries also reveal the "multivocal" nature of not simply literary narratives generally, but particularly of Indigenous narrative traditions, which challenge the law to move beyond its tendency to speak "univocally" (i.e., in terms that exclude many other voices) to a mode of discourse that is truly multivocal and inclusive of other voices.[21]

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17. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

18. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 311 (1988).

19. Freeman, *supra* note 6, at 318.

20. In a 1970 address to the Canadian Bar Association, Northrop Frye noted:

> If the law were to be completely absorbed into the internal discipline of honest men, there would be no more law, and we should all be living in the Garden of Eden. We are not there, but in the meantime law still depends upon the imagination, and the fostering and cherishing of the imagination by the arts is mainly what makes your profession honourable, perhaps even what makes it possible.

Jonathan Morrow, *Soft Times: The "Literary Imagination" as Poetic Injustice*, 10 AUSTRALIAN FEMINIST L.J. 35, 36 n.3 (1998) (quoting Northrop Frye, *Literature and the Law*, 4 L. SOC'Y GAZETTE 70, 77 (1970), *quoted in* C.R.B. Dunlop, *Literature Studies in Law Schools*, 3 CARDOZO STUD. IN L. & LITERATURE 63, 77–78 (1991)).

21. Legal scholars like Philip Meyer characterize this discursive practice as "constitutive rhetoric." *See* Philip N. Meyer, *Will You Please Be Quiet, Please?: Lawyers Listening To The Call of Stories*, 18 VT. L. REV. 567, 570 (1994). Meyer writes:

Within the framework of literary criticism, there is further support for an incorporative discourse in law that embraces Indigenous literary texts. Scholars of so-called postcolonial literatures[22] and of literary theory pay particular attention to patterns of oppression expressed by or achieved through representation of "others," those individuals or characters whom the dominant society perceives as normatively different and hence inferior. As one scholar notes, there is no pretense that "the teaching of post-colonial literatures and literary theory will . . . save the world, reverse historical injustices or stop contemporary atrocities."[23] Instead, the purpose of teaching such literatures is to "influence the ongoing processes of decolonization at their interface with contemporary forms of neo-colonialism, specifically those which are effected and maintained through representation."[24]

This exploration of the interface between present and past interpretations of the same texts is what Gerald Graff calls "teach[ing] the conflicts,"[25] which implies more than the mere presentation of oppositional perspectives or the addition (or substitution) of noncanonical texts. Graff's admonition to academics is relevant to other interpreters of text, for it addresses the process of uncovering the multiple meanings of texts and the creation of an environment in which such discovery is encouraged. The search for hidden meanings or narrative subtexts is commonplace in the domains of both literary and legal interpretation and yet, many of us devote insufficient attention (or no attention at all) to developing these interpretive skills in ourselves, in our students, or in other would-be interpreters of texts. Graff notes:

> Academics are so accustomed to attributing certain kinds of abstract meanings to all phenomena, not just texts, that they easily forget that this activity does not seem natural or self-evidently justifiable to everyone. If the practice of looking for hidden mean-

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> The premise [of constitutive rhetoric] is that we are what we say—or rather, we are who we say. That is, we speak through many voices and have innumerable stories to tell. Our communities are multivocal. The law, however, speaks univocally, and systematically excludes the voices and stories of those who ought to be included in the community of authoritative speech. The study of stories provides models for a legal discourse that can achieve a multivocal community.

Id. at 570–71.

22. One must acknowledge the persistent debate among literary scholars as to the meaning of "postcolonial" and the possibility that this very concept subverts rather than enhances efforts to enlarge the literary discourse to include texts emerging from survivors of colonialism. As Anne McClintock writes, the very word "post" "reduces the cultures of peoples beyond colonialism to *prepositional time.* The term confers on colonialism the prestige of history proper; colonialism is the determining marker of history." Anne McClintock, *The Angel of Progress: Pitfalls of the term 'Postcolonialism,' in* COLONIAL DISCOURSE/POSTCOLONIAL THEORY 255 (Francis Barker et al. eds., 1994).

23. Helen Tiffin, *Teaching Post-Colonial Literary Theory, in* BRIDGING THE GAP: LITERARY THEORY IN THE CLASSROOM 42 (J.M.Q. Davies ed., 1994) [hereinafter BRIDGING THE GAP].

24. *Id.* at 41–42.

25. Gerald Graff, *Other Voices, Other Rooms: Organizing and Teaching the Humanities Conflict, in* BRIDGING THE GAP, *supra* note 23, at 29.

> ing seems strange to you, it will seem no less strange to look for it in *The Color Purple* than in *Hamlet.*[26]

Conflicts as manifested through dramatic forms of representation, as opposed to didactic forms, may advance the interrogative process described here.[27]

The interrogative analysis for both the literary and legal texts that follow will draw upon Cheryl Walker's rhetorical paradigms of *transpositional* and *subjugated* discourse. Walker employs this discursive treatment in interrogating the writings of several Native Americans from the nineteenth century, including William Apess (Pequot), George Copway (Ojibwa), and Sarah Winnemucca (Paiute). Both modes of discourse involve "mirroring" in the sense that Indigenous writers address and challenge the dominant society's pretensions to ideological superiority but do so in different ways. For Walker, "[t]ranspositional discourse suggests mirroring in the sense that each entity (person, group, or political unit) might occupy the space of its opposite. The force of transpositional discourse is ethical, because it calls attention to underlying principles of similarity which provide the context for certain kinds of behavior."[28] Subjugated discourse, on the other hand, "calls attention to differences, especially those of power, prestige, and purpose. Whereas transpositional discourse is fundamentally horizontal, subjugated discourse is inevitably vertical, but the placement of entities on the vertical axis is unstable, sometimes presenting Euro-Americans as the superior group and sometimes presenting Indians as deserving the higher position."[29] Transpositional discourse embraces a utopian conception of the relations between the subject entities, compared to the overtly politicized and transformative arrangements of entities in subjugated discourse.[30] Particular texts may exhibit both modes of discourse, a factor that complicates the interpretive enterprise, but should not be surprising given the "complexity of the cultural situations" in which many writers operate.[31]

The moral force and relevance of Walker's interrogative analysis for legal texts is best illustrated by reference to Supreme Court Indian law cases that clearly employ these modes of discourse. In its 1979 opinion *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,[32] the Supreme Court considered the nature and character of tribal fishing rights deriving from a treaty with the federal government. The Court employed transpositional discourse to describe treaty relations between these two parties:

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26. *Id.* at 21.
27. *See id.* at 29, 30–36.
28. WALKER, *supra* note 12, at 16.
29. *Id.* at 17.
30. *See id.* at 16–17.
31. *Id.* at 23.
32. 443 U.S. 658 (1979).

> A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. When the signatory nations have not been at war, and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length. There is no reason to doubt that this assumption applies to the treaties at issue here.[33]

Just the year before, the Court employed a mix of transpositional and subjugated discourse in *United States v. Wheeler*[34] to describe the nature of tribal sovereignty in relation to that of the federal government. The defendant raised double jeopardy[35] arguments against a federal prosecution in light of his prior tribal conviction for crimes stemming from the same operative facts. The Court found no constitutional violation in these successive prosecutions because the tribal authority to prosecute traced to inherent, not federally delegated, authority over criminal matters involving tribal members. To this extent, the opinion operates in the mode of transpositional discourse by treating the governmental capacities of both tribal and federal governments in relative equipoise. But the Court further observes:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[36]

This is a startling, and perhaps gratuitous, expression of tribal sovereignty that is firmly articulated in the mode of subjugated discourse.

Even the casual reader will note the apparent contrast and disparity in the Court's characterization of tribal sovereignty, including a tribe's sovereign capacity to enter into treaty relations. An interrogative analysis employing the rhetorical paradigms suggested by Walker properly draws our attention to the Court's use of language in situating tribes in relation to the federal government, either in positions of normative equipoise (*Washington*), or in positions of subordination (*Wheeler*). The court institutionalizes tribal sovereignty within the matrix of American democratic structure through language that alternately affirms tribal political existence into perpetuity and consigns such political existence to the whims of a superior power. This suggests that the nature of tribal sovereignty subsists in a field of contingen-

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33. 443 U.S. at 675 (citations omitted).
34. 435 U.S. 313 (1978).
35. *See* U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").
36. 435 U.S. at 323.

cies, where the ultimate determination of the nature or scope of tribal power and rights operates in relation to broader national institutional imperatives. Identifying these institutional imperatives often sheds light on the Court's conceptualization of tribal sovereignty that, in presentational form, is revealed through language that employs transpositional and/or subjugated discourse.

An examination of the institutional imperatives present in *Washington* reveals that federalism, particularly the vindication of national power to enforce federal court decrees respecting tribal treaty fishing rights in light of severe state recalcitrance to honor those treaty promises, was of central concern. Quoting the lower court, the Supreme Court noted that:

> [t]he state's extraordinary machinations in resisting the [1974 federal court] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . . , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.[37]

Attention to these broader institutional concerns indicates that the Court's discursive treatment of tribal sovereignty, which employs transpositional discourse, operates in strategic fashion to normatize the federal-tribal political relationship in ways that the states were constitutionally bound to respect under the Supremacy Clause.[38] That political relationship, according to the Court, also immunized the unique benefits accorded members of the signatory tribes against claims that such "special rights" violated equal protection principles.[39]

The broader national institutional imperative in *United States v. Wheeler* also relates to federal authority, but to federal authority as it operates vis-à-vis Indian tribes. The Court noted the disparities in possible sanctions resulting from tribal and federal prosecutions for crimes stemming from the same set of operative facts and observed that:

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37. 443 U.S. at 696 n.36 (citation omitted).

38. U.S. CONST. art. VI, cl. 2.

39. The Court stated,

> The simplest answer to this argument is that this Court has already held that these treaties confer enforceable special benefits on signatory Indian tribes, and has repeatedly held that the peculiar semi-sovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians.'

443 U.S. at 673 n.20. *See also* FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS (1986).

> the prospect of avoiding more severe federal punishment would surely motivate a member of a tribe charged with the commission of an offense to seek to stand trial first in a tribal court. Were the tribal prosecution held to bar the federal one, important federal interests in the prosecution of major offenses on Indian reservations would be frustrated.[40]

This concern undergirds the Court's ruling, expressed in the mode of transpositional discourse, that Indian tribes possess sufficient inherent power to prosecute their own members.[41] But having recognized such residual tribal authority, the court manages to contain it by reminding tribes of their subordinate role and status within the federal political system: "This problem [of successive prosecutions] would, of course, be solved if Congress, in the exercise of its plenary power over the tribes, chose to deprive them of criminal jurisdiction altogether."[42] The Court does not recommend that Congress actually pursue this route; indeed, it asserts numerous policy reasons for preserving tribal authority in this area. However, the passage here, like the earlier cited passage on "complete defeasance," works in the mode of subjugated discourse to infuse modern Indian law jurisprudence with nineteenth-century doctrine and rhetoric. This thesis essentially "verticalizes" the parties' political relationship and authorizes Congress' exercise of virtually unlimited power from its position at the upper or dominant end of the axis.[43] In short, the *Wheeler* Court's discursive treatment of tribal sovereignty identifies an important, but severely limited, and even defeasible juridical space for the exercise of tribal power in the shadows of a massive federal authority.

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40. 435 U.S. at 330–31.

41.

> In sum, the power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.

435 U.S. at 328.

42. *Id.* at 331.

43. *See, e.g.*, United States v. Kagama, 118 U.S. 375 (1886) (upholding the Major Crimes Act, 18 U.S.C. § 1153 (1994) pursuant to an implied power rooted in guardianship, and not the textually based constitutional authority found in the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3.) In *Kagama*, the Court observed:

> It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights .... From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

118 U.S. at 383–84.

The Court restates this thesis in *Santa Clara Pueblo v. Martinez*,[44] a case decided less than two months after *Wheeler*. In *Martinez*, a tribe member challenged her tribe's membership rules as violative of her rights under the Indian Civil Rights Act (ICRA).[45] In construing the ICRA as requiring such challenges to be directed into tribal forums, the Court underscored the concerns that led Congress to pass the ICRA in the first place—concerns about individual rights and the administration of justice in tribal government.[46]

Taken together, *Wheeler* and *Martinez* create and apply rules that employ modes of both transpositional and subjugated discourse. In *Wheeler*, these modes are used to vindicate tribal interests in self-government, whereas in *Martinez*, they are used to vindicate federal interests in containing the expression of tribalism to comport, to some extent, with the normative discourse of individual rights and freedom operative in the dominant political arena.

With an understanding of the interrogative analysis pursued here, we proceed now to examine both the literary and legal texts considered below. It is important to be alert to the operative discourse(s) within both the Indigenous literary texts and the non-Indigenous jurisprudential narratives that follow. Attention to the discourses at work in the texts to follow enable us to examine the writers' positioning of the affected individuals or entities, to critique the nature of intersocietal relations flowing from such positioning, and to assess the legitimacy of the legal regimes that emerge from and are reinforced by such positioning. By pursuing such an incorporative discourse, the hope is to awaken within our minds a reconceptualized notion of the place of Native people within American society and to help realize an imagined community where all people, Indigenous and non-Indigenous, can live together amidst their differences.

II. INQUIRIES INTO POWER

The Indigenous literary narratives and the non-Indigenous legal texts considered here were selected because of their tendency to advance our conceptions of how power, both religious and secular, was (and is) negotiated across cultural, religious, and social boundaries. The early political discourse between Indigenous and non-Indigenous societies is noteworthy for its embrace of sectarian ideology and values, chiefly Christian, in formulating legal and political arrangements between these groups. This is reflected in the first major United States Supreme Court decision to deal particularly and

44. 436 U.S. 49 (1978). "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Id.* at 56.

45. 25 U.S.C. § 1302(8) (1994).

46. *See Martinez*, 436 U.S. at 71 ("Although Congress explored the extent to which tribes were adhering to constitutional norms in both civil and criminal contexts, its legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice.")

substantively with Indian legal issues, the 1823 decision in *Johnson v. McIntosh*,[47] which is discussed below.

The literary texts selected for discussion here also reflect the formative influence of religion on interpersonal and intersocietal relations between Indigenous and non-Indigenous peoples. The characters in Louise Erdrich's debut novel, *Love Medicine*,[48] are full-bodied, wonderfully complex individuals who speak a language that is at once real and provocative. The story of Marie Lazarre, contained in the chapter "Saint Marie," offers a powerful meditation on the theme of ill-gotten power. I also consider William Apess's "An Indian's Looking-Glass for the White Man."[49] Apess, a nineteenth-century Pequot and Christian convert, was a contemporary of the jurists who decided *Johnson*. Apess wrote several tracts in the 1830s condemning white society for converting Christian teaching into ideological armament deployed in service of dispossessing Indian people of their lands and indeed, their persons and their legal rights.

These Indigenous literary narratives are read in counterpoise with the United States Supreme Court's decision in *Johnson v. McIntosh*, which embraced the "doctrine of discovery" as legal apologia for dispossessing Indian tribes of their lands, save a residual "right of occupancy."

Several issues emerge from close interrogation of these literary and legal texts, but my chief interest in bringing them together is to examine what they say about power, and the achievement and maintenance of systems of power. Our efforts to reconceptualize the place of Native people within American society through the medium of an incorporative discourse appropriately begins with an examination of moral authority and political power as revealed in these narratives.

A. Indigenous Literary Narratives: Meditations on Power

1. Louise Erdrich's "Saint Marie"

The two central characters in "Saint Marie" are Marie, a thirteen-year-old mixed-blood Chippewa girl, and Sister Leopolda, resident nun at the Sacred Heart Convent located on the Indian reservation Marie calls home. In this imaginative landscape, Marie aspires to sainthood as part of her personal and spiritual struggle to gain Leopolda's acceptance in an extraordinary test of wills. Marie fails to attain the desired acceptance, but her quest ultimately leads her to make surprising and profound discoveries about herself.

Marie's saintly aspirations are soaked in ambivalence from the start. She decides to enter the convent under Leopolda's sponsorship though unsure or ignorant about the value or purpose of gaining acceptance from an individual who views Marie's life choices as being irrefutably narrow: "One, you can

47. 21 U.S. (8 Wheat.) 543 (1823).
48. LOUISE ERDRICH, LOVE MEDICINE (1986).
49. *See* O'Connell, *supra* note 12.

marry a no-good Indian, bear his brats, die like a dog. Or two, you can give yourself to God."[50] Marie's response is indignant, bold, and almost threatening: "I'll come up there . . . but not because of what you think."[51] Marie tries to reassure herself that she is a person of considerable self-worth, who could have any man she desired, who "looked good" and even "looked white."[52] But in Leopolda's eyes, she knew she would remain the play thing of the "Dark One," desired by the "beast" as even Leopolda was. As Leopolda tells Marie, "You're like I was . . . . He wants you very much."[53] "He *wants* you," Leopolda asserts; "That's the difference. I give you love."[54] Ironically, Marie is ready to reciprocate the emotion, at least in some respects: "But I wanted Sister Leopolda's heart. And here was the thing: sometimes I wanted her heart in love and admiration. Sometimes. And sometimes I wanted her heart to roast on a black stick."[55]

Leopolda emerges victorious in the initial test of wills. After beating, prodding, and scalding Marie's body with boiling water ("To warm your cold ash heart," she says),[56] Leopolda finally claims Marie as her own. In the midst of her pain and suffering, Marie has a vision:

> I was rippling gold. My breasts were bare and my nipples flashed and winked. Diamonds tipped them. I could walk through panes of glass. I could walk through windows. She was at my feet, swallowing the glass after each step I took. I broke through another and another. The glass she swallowed ground and cut until her starved insides were only a subtle dust. She coughed. She coughed a cloud of dust. And then she was only a black rag that flapped off, snagged in bob wire, hung there for an age, and finally rotted in the breeze.[57]

Desperate and unhinged, Marie lashes out once more at Leopolda: "He was always in you . . . . Even more than in me. He wanted you even more. And now he's got you. Get thee behind me!"[58] Leopolda's restrained reaction suggests to Marie that perhaps she "had gotten through some chink [Leopolda had] left in her darkness."[59] Still, Marie restrains the impulse to bolt, sensing "something was nearing completion. Something was about to happen."[60] When Leopolda turns to remove bread from the oven, Marie kicks

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50. ERDRICH, *supra* note 48, at 57.
51. ERDRICH, *supra* note 48, at 57–58.
52. *Id.* at 58.
53. *Id.* at 62.
54. *Id.* at 57.
55. *Id.* at 58.
56. *Id.* at 62.
57. *Id.* at 64.
58. *Id.* at 66.
59. *Id.* at 67.
60. *Id.*

her headlong into the oven. Leopolda emerges, poker in hand, face blue, but Marie is fearless; "saints are used to miracles."[61]

> If I was going to be lost, let the diamonds cut! Let her eat ground glass!
>
> "Bitch of Jesus Christ!" I shouted. "Kneel and beg! Lick the floor!"
>
> That was when she stabbed me through the hand with the fork, then took the poker up alongside my head, and knocked me out.[62]

On awakening, Marie finds herself being worshipped by all the nuns of the convent. Leopolda manufactured a story that the marks in Marie's hands were actually the miraculous stigmata, the nailmarks of Jesus, and that Marie had "swooned at the holy vision."[63] To Marie, the surreal appeared natural. "I lifted up my hand as in my dream. It was completely limp with sacredness. 'Peace be with you.'"[64] Marie "called" Leopolda forward and asked her to kneel, preparing to expose her to the others. But instead, the following transpires:

> Leopolda was kneeling bolt upright, face blazing and twitching, a barely held fountain of blasting poison.
>
> "Christ has marked me," I agreed.
>
> I smiled the saint's smirk into her face. And then I looked at her. That was my mistake.
>
> For I saw her kneeling there. Leopolda with her soul like a rubber overboot. With her face of a starved rat. With the desperate eyes drowning in the deep wells of her wrongness. There would be no one else after me. And I would leave. I saw Leopolda kneeling within the shambles of her love.
>
> My heart had been about to surge from my chest with the blackness of my joyous heat. Now it dropped. I pitied her. I pitied her. Pity twisted in my stomach like that hook-pole was driven through me. I was caught. It was a feeling more terrible than any amount of boiling water and worse than being forked. Still, still, I could not help what I did. I had already smiled in a saint's mealy forgiveness. I heard myself speaking gently.
>
> "Receive the dispensation of my sacred blood," I whispered.
>
> But there was no heart in it. No joy when she bent to touch the floor. No dark leaping. I fell back into the white pillows. Blank dust was whirling through the light shafts. My skin was dust. Dust my lips. Dust the dirty spoons on the ends of my feet.

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61. *Id.* at 68.
62. *Id.*
63. *Id.* at 70.
64. *Id.* at 69.

> Rise up! I thought. Rise up and walk! There is no limit to this dust![65]

The areas of contestation within Erdrich's narrative involve the complex interplay of personal identity, religious ideology, and institutional hegemony. On the one hand, Marie's desire to enter the convent and align her aspirational goals within the construct of Christian ideology suggests her prior acceptance of that regime's legitimacy, or minimally, of its influence in her life. On the other hand, her desire to subvert ideological structures in service of a personal agenda, including mirroring back missionizing biblical references, reveals her as an outsider in Leopolda's world. Similarly, Leopolda's offer of love to Marie signals faithful adherence to the fundamental teachings of her religion. But her resort to violence and abuse, her inability to overcome her deep-seated hatred of Indians or her own personal demons leads her to pervert religious ideology and mask her wrongfulness behind the veil of an institutionally sanctioned "miracle."

The rhetoric in this chapter reveals traces of both transpositional and subjugated discourse. Marie's aspirations to sainthood, her sense of equal entitlement to participate in the Christian religious community and her going "tit for tat" with an authority figure like Leopolda place her on the "horizontal axis" with her counterpart and thus evokes the relative equipoise that characterizes transpositional discourse. On the other hand, Marie's "visionary triumph" over Leopolda situates her, at least temporarily, in a superior position relative to Leopolda. In her "visionary triumph" over Leopolda, Marie shatters false, corrupt ideologies, the pieces of which are swallowed by the propagators leading to their eventual demise. That vision is juxtaposed against her real knowledge of Indians who swallowed pieces of holy cloth believing it would cure fever, only to contract smallpox from the contaminated material, killed with belief. In the end, however, Marie's "real triumph" over Leopolda and her temporal ascension to power is joyless because she knows that this power, like Leopolda's earlier exercise of power over her, is anchored in deceit, violence, perversion, and self-denial. Far from shattering false, corrupt ideologies, Marie finds herself complicit in them and now relying on them to maintain her position. The dust that envelopes her, like the dust in her vision, reveals the empty, lifeless and spent force of ideology run amok. This represents a return to transpositional discourse, but only in the sense that each character ultimately realizes, or at least must confront, the morally bankrupt nature of her pretensions to power.

2. William Apess's "An Indian's Looking-Glass for the White Man"

William Apess was perhaps the first Native American writer in English to incorporate notions of nationalism as viewed from an Indigenous perspec-

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65. *Id.* at 71–72.

tive.[66] In his short, seven-year public career, he published five books (between 1829 and 1836),[67] sermonized extensively throughout New England on Indian rights, and initiated the Mashpee Revolt, the only recorded political expression of Indian activism among nineteenth-century Indigenous Peoples in New England.[68] Apess frequently appropriated the rhetoric of American nationalism and Christian doctrine to assert an egalitarian vision of post-colonial America.[69] As noted by literary scholar Barry O'Connell, Apess was less interested in converting Indians to Christianity than he was in

> controvert[ing] Euro-Americans' historical exclusion of his people from the making of America. His preaching, at least from 1831 forward, concentrated on the civil and religious rights of the Indians . . . . [H]e deliberately aimed to reach and to shame whites but . . . also saw himself preaching to Indians to encourage them to demand their rights. He meant . . . to locate himself and his people, all people of color, in the present and the future of the United States. His only instrument was language.[70]

In his 1833 text, "An Indian's Looking Glass for the White Man," Apess holds up a metaphorical looking-glass to his white Christian brethren to interrogate, in the Socratic method, the white man's fidelity to basic Christian teachings in dealings with Indian people. The result is a profoundly brutal indictment of white society and the various systems of dominance, including legal regimes, which were erected to retain supremacy over non-white peoples. That these systems of dominance purported to be inscribed with Christian ideology renders them, in Apess's view, all the more insidious.

In the following excerpt, Apess takes his audience into an imaginary landscape, where the nations of the world are assembled and have their "national crimes" written upon their skin:

> Now let me ask you, white man, if it is a disgrace for you to eat, drink, and sleep with the image of God, or sit, or walk and talk with them. Or have you the folly to think that the white man, being one in fifteen or sixteen, are the only beloved images of God? Assemble all nations together in your imagination, and then let the whites be seated among them, and then let us look for the

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66. *See* WALKER, *supra* note 12, at 41.

67. O'Connell, *supra* note 12, at xiv.

68. *Id.* at xv.

69. Apess's 1835 tract *Indian Nullification of the Unconstitutional Laws of Massachusetts Relative to the Mashpee Tribe*, and particularly his use of the word "nullification" was, according to O'Connell, a "clear echo of South Carolina's assertion of states' rights against the federal government only a year earlier, during the Nullification Crisis." *Id.* at xxxviii.

70. *Id.* at lxviii.

> whites, and I doubt not it would be hard finding them; for to the rest of the nations, they are still but a handful. Now suppose these skins were put together, and each skin had its national crimes written upon it—which skin do you think would have the greatest? I will ask one question more. Can you charge the Indians with robbing a nation almost of their whole continent, and murdering their women and children, and then depriving the remainder of their lawful rights, that nature and God require them to have? And to cap the climax, rob another nation to till their grounds and welter out their days under the lash with hunger and fatigue under the scorching rays of a burning sun? I should look at all the skins, and I know that when I cast my eye upon that white skin, and if I saw those crimes written upon it, I should enter my protest against it immediately and cleave to that which is more honorable. And I can tell you that I am satisfied with the manner of my creation, fully—whether others are or not.[71]

In the following passage, Apess directs his assault at Massachusetts's anti-miscegenation law, again in light of Christian teaching:

> You may look now at the disgraceful act in the statute law passed by the legislature of Massachusetts, and behold the fifty-pound fine levied upon any clergyman or justice of the peace that dare to encourage the laws of God and nature by a legitimate union in holy wedlock between the Indians and whites. I would ask how this looks to your lawmakers. I would ask if this corresponds with your sayings—that you think as much of the Indians as you do of the whites. I do not wonder that you blush, many of you, while you read; for many have broken the ill-fated laws made by man to hedge up the laws of God and nature.[72]

Finally, in the following passage, Apess underscores a fundamental tenet of Christian teaching, to love others as you would yourself, and presents a short, but noteworthy list of individuals whose support of Indian causes illustrated this teaching in practice:

> How are you to love your neighbors as yourself? Is it to cheat them? Is it to wrong them in anything? Now, to cheat them out of any of their rights is robbery. And I ask: Can you deny that you are not robbing the Indians daily, and many others? But at last you may think I am what is called a hard and uncharitable man. But not so. I believe there are many who would not hesitate to advocate our cause: and those too who are men of fame and respectability-as well as ladies of honor and virtue. There is a Webster, an Everett,

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71. *Id.* at 157.
72. *Id.* at 159.

> and a Wirt, and many others who are distinguished characters-besides a host of my fellow citizens, who advocate our cause daily. And how I congratulate such noble spirits-how they are to be prized and valued; for they are well calculated to promote the happiness of mankind. They well know that man was made for society, and not for hissing-stocks and outcasts. And when such a principle as this lies within the hearts of men, how much it is like its God-and how it honors its Maker-and how it imitates the feelings of the Good Samaritan, that had his wounds bound up, who had been among thieves and robbers.
>
> Do not get tired, ye noble-hearted-only think how many poor Indians want their wounds done up daily; the Lord will reward you, and pray you stop not till this tree of distinction shall be leveled to the earth, and the mantle of prejudice torn from every American heart—then shall peace pervade the Union.[73]

The significance of William Apess's writings, as illustrated in "An Indian's Looking-Glass for the White Man," is their capacity to enlarge the arguments in favor of Indian rights beyond the normatively narrower limits of traditional legal discourse. In focusing attention on the underlying religion-based ideological roots already prominent in Indian-white discourse, Apess exposes the fallacy of grounding any legal arguments depriving Indian people and tribes of their rights in natural rights theory. There are flashes of transpositional discourse in parts of this brief essay,[74] but the predominant rhetorical paradigm revealed in the piece is subjugated discourse. Apess repeatedly draws attention to white society's oppressive treatment of people of color as patently violative of professed Christian principles. In one turn, Apess depicts whites as occupying the superior pole along the vertical axis, presumably as a consequence of their ability to write and enforce laws that ensure their continued dominance. At another turn, he situates Indians at the superior pole for structuring their intersocietal relations in faithful accord with "true" Christian teaching and with prevailing conceptions of morality. This rhetorical expression offers a fascinating critique of the law's capacity to operate in society despite having few (if any) morally defensible underpinnings. Cheryl Walker notes that Apess's use of subjugated discourse

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73. *Id.* at 160–61. The "distinguished characters" in Apess's short list included lawyers Daniel Webster and William Wirt. In *Johnson v. McIntosh*, Webster urged the court to uphold the validity of privately negotiated transfers of Indian land between tribes and white citizens. William Wirt argued the Cherokee cases before the Supreme Court in the early 1830s urging the court to nullify Georgia laws reaching into Cherokee lands.

74. Apess directs particular attention to Massachusetts's anti-miscegenation law and writes:

> And if I had [no wife], I should not want anyone to take my right from me and choose a wife for me; for I think that I or any of my brethren have a right to choose a wife for themselves as well as the whites-and as the whites have taken the liberty to choose my brethren, the Indians, hundreds and thousands of them, as partners in life, I believe the Indians have as much right to choose their partners among the whites if they wish.

Id. at 160.

also reveals the impossibility of imagining "America as an egalitarian society until major changes are made in economic, social, and spiritual realms."[75]

Apess employs another touch of transpositional discourse to powerful effect in asking: "Is not religion the same now under a colored skin as it ever was?"[76] His response to this rhetorical question, anticipating the arguments and memorable rhetoric employed by civil rights leader Dr. Martin Luther King, Jr., was to draw attention away from outward personal appearances and towards the hearts and spirit of people, as Jesus did: "[W]e find that Jesus Christ and his Apostles never looked at the outward appearances. Jesus in particular looked at the hearts, and his Apostles through him, being discerners of the spirit, looked at their fruit without any regard to the skin, color, or nation."[77]

In holding up a looking glass to white society, Apess hoped to redirect the trajectory of Indian-white legal and social relations and to infuse the existing nationalist discourse with Indigenous-derived notions of justice and morality. He was not content merely to challenge prevailing ideologies of manifest destiny and notions of Indians as a doomed race. As Barry O'Connell notes, Apess advanced

> an idea of American history which, had it been accepted, would have denied to Euro-Americans the conviction of superiority and of divine mission they needed to conduct their conquests. Indians and black people had, in different ways, to be rendered culturally and morally negligible if the white settlement of the West and the full operation of the slave system were to proceed.[78]

B. Non-Indigenous Legal Narrative: The Discovery Doctrine

In this Section, I consider the Supreme Court's decision in *Johnson v. McIntosh*. The textual interrogation involved here focuses on the rhetoric of the Supreme Court's opinions and its relation to the discourse of power illustrated in the literary texts above.

In *Johnson*, the Court relied on the "medievally-originated doctrine of discovery"[79] to validate federally derived land grants, on grounds that the United States, as sovereign successor to European colonizers, held clear title to lands within its claimed territory subject to an Indian right of occupancy. In his opinion for the Court, Chief Justice John Marshall tempered the normative principle of international law, that "discovery gave title to the gov-

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75. WALKER, *supra* note 12, at 53. Walker further notes that Apess's use of language of "greatest and least" evokes biblical references to the Old Testament prophets as well as to the New Testament—"the last shall be first, and the first last." *Id.* (citing Matthew 20:16).

76. O'Connell, *supra* note 12, at 158.

77. *Id.* at 158.

78. *Id.* at lxxvi.

79. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 69 (4th ed. 1998).

ernment by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession,"[80] with the normative practice of colonizing powers that recognized at least some form of proprietary rights among Indigenous Peoples—specifically, rights of occupancy extinguishable by the sovereign only through purchase or conquest. The emergence of a *sui generis* legal principle of Indian title was required, according to the Court, to account for the "actual state of things,"[81] that is, the political and historical reality that Indian nations represented a "people with whom it was impossible to mix, and who could not be governed as a distinct society."[82] That political and historical reality, coupled with apparent humanitarian concerns towards Indian people,[83] provided the framework for the Court to "fit Indian title into [the national] system of land tenure with a minimum amount of disruption to well-established procedures by which title to millions of acres of Indian lands had already been obtained."[84] The Court's embrace of the discovery doctrine, however, required a concomitant acceptance of that doctrine's underlying premise: that Indian societies were normatively divergent from, and hence inferior to, Euro-American society.[85] Marshall's opinion reveals clear traces of moral discomfort with this proposition, but it nonetheless fits these differences into the architecture of American property law by use of language and a narrative construct of tribal societies that has served to legitimate the ongoing colonial enterprise.[86] I turn now to examine some of the Court's language in relation to the rhetorical theme of power noted above.

Marshall's use of language and judicial writing style has been described as "magisterial, but . . . never pompous. Patient, systematic, unadorned, unemotional, unpretentious, it is the calm and confident voice of reason—the quintessential Enlightenment style."[87] Another commentator notes that Marshall's constitutional opinions have "great rhetorical power, invocation of the constitutional text less as the basis of decision than as a peg on which to hang a result evidently reached on other grounds, a marked disdain for reliance on precedent, . . . and an absolute certainty in the correctness of his conclusions."[88]

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80. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

81. *Id.* at 591.

82. *Id.* at 590.

83. "Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest." *Id.* at 589.

84. GETCHES ET AL., *supra* note 79, at 69. *See also* Webber, *supra* note 3, at 652 ("[Marshall] arrived at a result that upheld neither the claims of the colonizers nor the sovereignty of the Aboriginal peoples in their entirety, but recognized instead a new structure, made from the interaction of the two.").

85. *See* GETCHES ET AL., *supra* note 79, at 69.

86. *See generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 316–17 (1990).

87. POSNER, *supra* note 18, at 290.

88. *Id.* at 291–92 (citing DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST

Though many of these stylistic attributes are well illustrated in Marshall's *Johnson* opinion, Marshall's celebrated confidence or certainty in the correctness of his conclusions is curiously absent. The rhetorical flavor of *Johnson*, far from exuding confidence or certainty, reflects ambivalence and doubt about the political, legal, or moral correctness of the conclusions reached and the reasons proffered in support thereof. For example, in delineating the rules governing this particular controversy, Marshall writes:

> [I]t will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.[89]

Marshall's rhetorical use of terms like "admitted" and "acknowledged" implies a consentience among nations that, in the case of Indian tribes, is either presumed or deemed irrelevant. Placing a relatively contemporaneous text like William Apess's besides Marshall's text shows that even if tribes agreed that natural law principles governed the controversy, they might not agree with the interpretations or conclusions derived from that corpus of rules. It is clear, however, that Marshall means to exclude Indians from the constellation of "civilized nations." In the subsequent "history lesson," the Indians' "character" (as uncivilized) and "religion" (as non-Christian) are said to have "afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."[90] Does Marshall reach these conclusions with confidence or certainty? His own words provide the clues. He writes, "Although we do not mean to engage in the defense of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them."[91] The Indians, says Marshall, are "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness."[92] In noting the distinction between "excuse" and "justification," Marshall concedes that there is no morally acceptable basis for the unilateral usurpation of tribal lands. Since excuse-based acts ordinarily attract moral condemnation, they are defensible only as a consequence of the nature or situation of the actors involved. This

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HUNDRED YEARS: 1789-1888, at 74 (1985)).

89. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 572 (1823).

90. *Id.* at 573.

91. *Id.* at 589.

92. *Id.* at 590.

explains Marshall's focus on the savage character of Indian people and their improper or uncivilized use of natural resources.

Marshall displays even greater doubt about *Johnson's* moral integrity when he acknowledges that the discovery doctrine was being applied expansively to accomplish the "imaginative conquest" of Indian people and their lands, a proposition Marshall concedes is "extravagant" and pretentious.[93] Similarly, he expresses reservations about the rule prohibiting Indian tribes from transferring absolute title to others:

> However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.[94]

Marshall's opinion takes on a more confident tone as it moves from the legal and moral spheres to the historical. In Marshall's narrative reconstruction of colonial and American history, Indians no longer exist as the "fierce savages" of old who contested outsiders for military and political supremacy. The "frequent and bloody wars" between Indians and whites are relegated to the safe domain of the past. Euro-American society, through dint of superior "policy, numbers and skill," emerged victorious while Indian societies, the "ancient inhabitants," remained only as mere remnants of their former selves. By 1823, it appeared possible to elegize "the Indians," as Marshall seems to do in this passage:

> As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturalists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil . . . being no longer occupied by its ancient inhabitants, was parceled out accordingly to the will of the sovereign power.[95]

In this respect, Marshall's narrative construction echoes patterns of an emergent nationalist discourse found in American literature from the same era. Novels like James Fenimore Cooper's *The Pioneers*, also published in 1823, similarly advanced the thesis of Indians as "noble and doomed savages"

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93. In particular, Marshall writes:
> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Id. at 591.

94. *Id.* at 591–92.

95. *Id.* at 590–91.

whose passage "legitimated the poignant but inevitable fact of the superiority of Euro-American civilization. These, and other novels, depended upon and shaped an idea of a people fully, or virtually, extinct in the lands of the original thirteen colonies."[96]

It is only in the context of this metaphysical construct of historical relations between Indians and Euro-Americans that Marshall's rhetorical style reveals traces of transpositional discourse. Indians, at least prior to "conquest," are acknowledged as "brave" and "high-spirited . . . . ready to repel by arms every attempt on their independence."[97] In this view, Indians occupy the horizontal plane with colonists who similarly took up arms against an external political power infringing on their liberty. But the predominant rhetorical thrust of the *Johnson* opinion is the mode of subjugated discourse. The verticalized positions of Indians as subordinate entities in relation to superior Euro-American entities ensures that the narrative, and hence, legal discourse, proceeds to its rightful conclusion, where Euro-American political, legal, and economic hegemony over Indians is maintained.

C. Inquiries into Power: A Synthesis

Marshall's moral ambivalence in reaching the conclusions he does becomes manifest when his opinion is read against the literary texts discussed above. *Johnson v. McIntosh*, like the story in "Saint Marie," is a meditation on how power is achieved and maintained. Marshall's language reveals an awareness of the immorality and illegitimacy of the power asserted and inscribed within law. It is a power rooted in violence, perversion and deceit. One imagines Marshall reading the *Johnson* opinion, not in the "courts of the conqueror," but in the assembly of nations conjured up in William Apess's essay, where the "national crimes" are inscribed upon the skins of the people assembled. The reaction may call forth Marie's response when she looked into Leopolda's eyes, a response that awakens from within the soul a sense that this is ideology run amok. On the other hand, such a reading may call forth a reaction that, under the circumstances, this was the best possible arrangement. In this view, humanitarian concerns (or in Apess's view, Christian impulses) could only go so far in redressing a colonial legacy of dispossession and marginalization.

The point of this discursive treatment is not to assign blame or assuage guilt, but instead to reveal the immense complexity of historic intersocietal relations, to examine critically the range of alternatives in the emerging legal discourse, and to explore the possibilities of recapturing in the present day a mode of thought that demonstrates greater respect for the rights of Indian tribes. Placing Indigenous narrative texts—be they historical or con-

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96. O'Connell, *supra* note 12, at lii. See also Eric Cheyfitz, *supra* note 15, at 109, where the author reads the *Johnson* case in conjunction with JAMES FENIMORE COOPER, THE PIONEERS (1823).

97. 21 U.S. (8 Wheat.) at 590.

temporary, polemical or fictional—alongside the prominent legal texts in federal Indian law permits a greater degree of textual interrogation precisely because they recall the dialogic nature of intersocietal relations and help steer us away from simplistic, inaccurate, or incomplete tellings and retellings of this nation's many formative stories. Importantly, accessing Indigenous texts opens the possibility of revising precedential legal narratives, and ultimately facilitates a minimization, if not a reversal, of the cycle of colonial domination of Indigenous Peoples.[98]

III. ON PROMISE-KEEPING AND SACRED WORDS

In the previous Section, the literary and legal narratives offered perspectives on conceptions of power and the complexities involved in negotiating power across cultural, political and social lines. This Section will focus on one particular manifestation of negotiated power—the exchange of promises made in treaties between Indian tribes and the federal government. The Indigenous literary narrative selected, N. Scott Momaday's *The Way to Rainy Mountain*, as well as its complementary non- Indigenous legal narrative, the Supreme Court's decision in *Lone Wolf v. Hitchcock*, provide important commentary on the ethics of promise-keeping and the exchange of solemn, even sacred words.

At the outset, it should be noted that the practice of treaty-making embraced at least three forms of promises. First, treaties contained what may be termed *particularized substantive* promises, the relatively unique set of obligations, responsibilities and entitlements of the parties to the treaty. Obligations to cede lands, cease war, pay reparations, provide material goods and services, and ensure continued access to ceded lands (usually for subsistence purposes) are encompassed within this set of promises.

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98. The consequences of failing to revise our legal narratives are revealed in the 1955 case, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). In that case, the Supreme Court held that federal extinguishment of Indian title does not attract a legal obligation to pay just compensation. *Johnson*'s "extravagant" conversion of the discovery doctrine into conquest enabled the court quite easily to subdue the Tlingit—and all Alaska Natives for that matter—and bring their lands under federal ownership, subject, of course, to the Indian right of occupancy. That no Alaskan Native group was actually subdued by American military force presented no obstacle to application of the rule from the "great case of *Johnson v. M'Intosh*." As Professor Nell Jessup Newton wrote, "The only sovereign act that can be said to have conquered the Alaska native was the *Tee-Hit-Ton* opinion itself." Nell Jessup Newton, *At The Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1244 (1980).

The *Tee-Hit-Ton* majority was also freed of any moral ambiguities regarding the assertion of power over Alaska tribes since *Johnson* had already sanctioned the conqueror's will to empire. Thus, the court could state emphatically, and in the mode of subjugated discourse, that

> [e]very 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 conquerors' will that deprived them of their land.

348 U.S. at 289–90. In *Tee-Hit-Ton*, the passage of time and the institutional value placed on precedents, even morally conflicted ones, worked to clarify any ambivalence the Court may have had about its reification of the discovery doctrine.

Particularized procedural promises were a second form of promise used in treaties. Some of these procedural promises were expressed, whereas others were implied. These promises typically provided the interpretive rules that subsequent rule-makers and tribal advocates used to adhere to, to modify, or to extinguish the particularized substantive promises. For example, treaties often included language providing that no further cessions of land would be valid unless a stated percentage of the adult (usually male) tribal population concurred. Courts also developed "canons of treaty construction" that, generally, were interpretive rules implied from the trust responsibility owed by the federal government to Indian tribes. For example, courts "interpret[ed] Indian treaties to give effect to the terms as the Indians themselves would have understood them."[99]

A third type of promise that treaties tacitly incorporated were *structural promises*, which obligated the federal government to secure and protect the territorial and political integrity of tribal systems of self-government. These promises proceeded from an understanding of treaties as political arrangements between sovereign bodies, each of which agreed to respect and support the negotiated terms. In 1871, Congress ended the practice of pursuing bilateral treaty relations with tribes in favor of a policy of legislating unilaterally in Indian affairs. Extant treaty arrangements were expressly preserved under this new regime.[100] Notwithstanding Congress's preservation of existing treaty arrangements, the end of treaty-making served to diminish the form and substance of these structural promises, transforming tribes into the collective targets of unilateral federal legislation and exacerbating the relative positions of inequality between the parties.[101]

The legacy of treaty-making persists in contemporary legal discourse, where disputes often require rule-makers and advocates alike to consider carefully the nature of the mediated promises, and to examine the effect of the passage of time on the moral force of arrangements negotiated in another era, all in light of sometimes radically changed political, demographic, and cultural shifts within Indian Country. The Indigenous narrative text offered to assist in this inquiry into the use of promises to negotiate relationships between Indian tribes and white society is N. Scott Momaday's *The Way to Rainy Mountain*.[102] The non-Indigenous legal text examined is *Lone Wolf v. Hitchcock*,[103] a Supreme Court decision that considered whether Congress possessed the power to abrogate treaties with Indian tribes. Both texts offer significant opportunities to reflect on the subject of promise-keeping. Moreover, they help illustrate why an incorporative discourse within federal

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99. Minnesota v. Mille Lacs Band of Chippewa Indians, 119 S. Ct. 1187, 1201 (1999). *See generally* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 221–25 (Rennard Strickland et al. eds., 1982).

100. *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566.

101. Professor Charles Wilkinson concurs that the 1871 Act "signaled a downgrading in the political status of tribes." CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 19 (1987).

102. MOMADAY, *supra* note 9.

103. 187 U.S. 553 (1903).

Indian law offers potential to help us revisit historical arrangements between tribes and the federal government and adapt those understandings to modern circumstances in ways that honor the old promises.

A. Indigenous Literary Text: Momaday and the Man Made of Words

The Kiowa writer N. Scott Momaday gained national and international prominence when his first novel, *House Made of Dawn*, won the Pulitzer Prize in 1969. In that same year, he published his ethnobiographical text *The Way to Rainy Mountain*. This text constitutes a beautiful meditation on a particularly Indigenous view of life, a story of Kiowa origins and the "going on" of traditions, relations and the sense of identity. The way to Rainy Mountain is, according to Momaday, "preeminently the history of an idea, man's idea of himself, and it has old and essential being in language."[104]

In the two dozen or so short passages that compose this book, Momaday offers glimpses into Kiowa lifeways and world views utilizing a multi-voiced narrative structure consisting of mythical, historical, and personal forms.[105] The passages selected for interrogation here relate to the ethics of promise-keeping and the sacredness of words.

Expressing the importance of words themselves, Momaday writes: "A word has power in and of itself. It comes from nothing into sound and meaning; it gives origin to all things. By means of words can a man deal with the world on equal terms. And the word is sacred."[106]

In another passage, Momaday offers the narrative of the arrowmaker from the storehouse of Kiowa traditional knowledge to show the importance of words in conferring power to those who speak them:

> If an arrow is well made, it will have tooth marks upon it. That is how you know. The Kiowas made fine arrows and straightened them in their teeth. Then they drew them to the bow to see if they were straight. Once there was a man and his wife. They were alone at night in their tipi. By the light of the fire the man was making arrows. After a while he caught sight of something. There was a small opening in the tipi where two hides were sewn together. Someone was there on the outside, looking in. The man went on with his work, but he said to his wife: 'Someone is standing outside. Do not be afraid. Let us talk easily, as of ordinary things.' He took up an arrow and straightened it in his teeth; then, as it was right for him to do, he drew it to the bow and took aim, first in this direction and then in that. And all the while he was talking, as if to his wife. But this is how he spoke: 'I know that you are there on the outside, for I can feel your eyes upon me. If you are a

104. MOMADAY, *supra* note 9, at 4.

105. *See generally* Hertha D. Wong, *Contemporary Native American Autobiography: N. Scott Momaday's "The Way to Rainy Mountain,"* 12 AM. INDIAN CULTURE & RES. J., No. 3, 1988, at 15–31.

106. MOMADAY, *supra* note 9, at 33.

> Kiowa, you will understand what I am saying, and you will speak your name.' But there was no answer, and the man went on in the same way, pointing the arrow all around. At last his aim fell upon the place where his enemy stood, and he let go of the string. The arrow went straight to the enemy's heart.[107]

In both of these passages, Momaday gives voice to an important aspect of Indigenous traditional culture, the centrality of language. Language, and the oral tradition in particular, carries the imprint of tribal culture, lifeways, and experiences. To demonstrate the importance of words to tribal life and knowledge, Momaday writes of his grandmother, who lived the entirety of her life "in the shadow of Rainy Mountain," but who could nonetheless tell stories of places she had never seen: "[T]he immense landscape of the continental interior lay like memory in her blood. She could tell of the Crows, whom she had never seen, and of the Black Hills, where she had never been."[108]

In the arrowmaker's story, language is the medium through which the man attempts to relate to the external being; it offers the opportunity for survival and provides protection for himself and his wife. In a more recent book, *The Man Made of Words: Essays, Stories, Passages* (1997), Momaday expands on the significance of this story, not just for Kiowa, but for all of humankind. The arrowmaker personifies the "man made of words." As Momaday states:

> [T]here is no difference between the telling and that which is told. The point of the story lies not so much in what the arrowmaker does, but in what he says—and, indeed, *that* he says it. The principal fact is that he speaks, and in so doing, he places his very life in the balance.[109]

This is the aspect of the story Momaday finds most intriguing, because "here we are very close to the origin and object of literature; here our sense of the verbal dimension is very keen, and we are aware of something in the nature of language that is at once perilous and compelling."[110] It is through language that the arrowmaker defines himself, for "language is the repository of his whole knowledge, and it represents the only chance he has for survival. Instinctively and with great care he deals in the most honest and basic way with words."[111]

The enemy outside the arrowmaker's tipi adds another dimension to the use of language in the story. Momaday does not tell us directly who this "en-

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107. *Id.* at 46.
108. *Id.* at 7.
109. N. SCOTT MOMADAY, THE MAN MADE OF WORDS: ESSAYS, STORIES, PASSAGES 10 (1997).
110. *Id.*
111. *Id.* at 11.

emy" is; however, one senses that the "enemy-outsider" is the embodiment of that which threatens culture and identity. Language is the medium through which the arrowmaker seeks meaning about his situation and, as Momaday notes, its expression entails both risks and responsibility: "In a word, it seems to say, everything is a risk. That may well be true, and it may also be that the whole of literature rests upon that truth."[112] Certainly, as literary scholar Hertha Wong notes, arrows did not save the buffalo, or the horses, or even many aspects of Kiowa traditional life,[113] any more than words exchanged through treaty negotiations guaranteed protection of all promises made. But perhaps, as the arrowmaker's story suggests, it is through the very act of venturing forth, of risking, that one is confirmed in one's being, since "[b]oth the tooth-marked arrow and the well-crafted word go 'straight to the enemy's heart.'"[114] The Acoma Pueblo poet Simon J. Ortiz expresses a similar sentiment when he writes, "[B]ecause of the insistence to keep telling and creating stories, Indian life continues, and it is this resistance against loss that has made that life possible."[115]

In another passage from *The Way to Rainy Mountain*, Momaday evokes the formative influence of landscape upon Indigenous notions of self and community. In eloquent language, Momaday gives voice to the notion that land provides a sacred text containing a storehouse of Indigenous narrative traditions, a "central occasion of recalling and heeding—the fundamental aspirations of the tradition."[116] He writes:

> Once in his life a man ought to concentrate his mind upon the remembered earth, I believe. He ought to give himself up to a particular landscape in his experience, to look at it from as many angles as he can, to wonder about it, to dwell upon it. He ought to imagine that he touches it with his hands at every season and listens to the sounds that are made upon it. He ought to imagine the creatures there and all the faintest motions of the wind. He ought to recollect the glare of the noon and all the colors of the dawn and dusk.[117]

These lessons clearly are meant for all of us. In *The Man Made of Words*, Momaday reiterates this theme:

> In Ko-sahn and in her people we have always had the example of a deep, ethical regard for the land. We had better learn from it. Surely that ethic is merely latent in ourselves. It must now be acti-

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112. *Id.*
113. Wong, *supra* note 105, at 21.
114. *Id.*
115. Simon J. Ortiz, *The Historical Matrix Towards a National Indian Literature: Cultural Authenticity in Nationalism*, *in* CRITICAL PERSPECTIVES ON NATIVE AMERICAN FICTION 68 (Richard F. Fleck ed., 1993).
116. POMMERSHEIM, *supra* note 11, at 35.
117. MOMADAY, *supra* note 9, at 83.

> vated, I believe. We Americans must come again to a moral comprehension of the earth and air. We must live according to the principle of a land ethic. The alternative is that we shall not live at all.[118]

Superficially, Momaday's notion of a land ethic recognizes the symbiotic relationship existing between humans and the natural world. More profoundly, Momaday's call for our "moral comprehension" of the natural world is a challenge to our prevailing legal conception of property and its concomitant emphasis on commodification and exploitability, as well as its relation to personal wealth.

B. Non-Indigenous Legal Narrative: The Abrogation of Treaty Promises

With Momaday's text as a backdrop, examination of the legal narrative offered in *Lone Wolf v. Hitchcock*,[119] a decision centrally concerned with the ethics of promise-keeping as embodied in treaty agreements between the federal government and Indian tribes, exposes the subjugated discourse used in the Supreme Court's decision.

In 1867, the Kiowa and Comanche Tribes (and later, the Apache Tribe) and the federal government concluded the Medicine Lodge Treaty, which established a reservation in present-day Oklahoma for members of these tribes. This treaty contained particularized procedural promises that guaranteed that no further land cessions would be valid unless three-fourths of all the adult Indian males concurred in writing. Following passage of the General Allotment or Dawes Act of 1887,[120] federal authorities sought approval from the tribes to relinquish their claims to communally held reservation lands in exchange for individually held parcels of property or allotments. The allotment policy was designed principally to free up communally held tribal lands for homesteading by non-Indians and to facilitate the gradual assimilation of Indian people into American society.[121] In 1892,[122] an agreement was purportedly reached with the tribes that accomplished precisely that objective. Shortly thereafter, various tribal members challenged this putative agreement as being void, having been procured by fraud and falling short of the requisite number of signatories stipulated in the 1867 treaty. Congress essentially ignored the tribes' protests and memorials and, in 1900, enacted legislation to carry out the 1892 "agreement." In June,

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118. MOMADAY, *supra* note 109, at 49.

119. 187 U.S. 553 (1903).

120. Dawes General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–358 (1994)).

121. *See* FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 75–81 (1984).

122. The details that follow are drawn from the Supreme Court's statement of the case prior to its official opinion.

1901, the tribes sought injunctive relief in federal court seeking to stop government enforcement of the allotment and homesteading process.

Pending appeal of the lower court's denial of injunctive relief, President William McKinley issued a proclamation ordering that the surplus lands ceded by the tribes be opened for homesteading beginning on August 6, 1901. Legal historian Blue Clark provides a glimpse of the staggering scene awaiting the tribes at the start of homesteading process:

> Lone Wolf looked on with dismay at the over ten thousand people camped along Cache Creek near Fort Sill for the start of the [homesteading] registration process . . . . Hopeful people made a total of over 165,000 registrations from July 10 to 26 for the 12,500 possible parcels . . . . During a two-month period, 11,638 homestead entries were made at the two land offices. The secretary of the interior carved three new counties out of the reserve, naming them Comanche, Kiowa and Caddo. Anglo-American society surrounded and engulfed the Kiowa and other Indians.[123]

The Supreme Court rejected the tribes' argument that Congress was bound by the provisions of the 1867 treaty. In language both dismissive of the legal weight to be accorded the tribes' treaty-based rights and deferential to Congress's power in Indian affairs, the Court found that the tribes' contention

> ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.[124]

The Supreme Court announced a sweeping, virtually unchecked power of Congress to legislate at will in Indian affairs, notwithstanding extant treaty promises made to Indian nations. The Court stated:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should

123. BLUE CLARK, LONE WOLF V. HITCHCOCK: TREATY RIGHTS & INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 66 (1994).

124. *Lone Wolf*, 187 U.S. at 564.

> do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.[125]

The Court then quotes extensively from its decision in *United States v. Kagama*,[126] which recognized Congress's plenary power over Indian tribes as derivative of federally imposed wardship status over tribes.

Reading Momaday's text alongside the *Lone Wolf* decision shows that the Court's presumption of consentience on the part of the tribes is completely and utterly fallacious. The *Lone Wolf* court's rhetorical use of the phrase "it was never doubted," recalls the same sort of presumed consentience found in Justice Marshall's opinion in *Johnson v. McIntosh*. Considering Momaday's text in conjunction with *Lone Wolf* exposes the implausibility of such an assumption, certainly with regard to Kiowa interpretive traditions of promise-keeping. Moreover, historical evidence of the treaty practices of many other tribes casts severe doubt about the court's construction of tribal assumptions on the matter of promise-keeping. As Robert A. Williams, Jr., writes:

> In North American indigenous diplomacy, treaties were sacred texts that enabled treaty partners to fulfill a divinely mandated plan of multicultural unity. Indians of the Encounter era also had very practical reasons for making treaties with communities at a distance. Treaties established connections that helped assure survival on a multicultural frontier. The customary bonds of unity created by treaty could be relied on, at least as far as the Indians were concerned, in times of need or crisis. Treaty partners, therefore, as a matter of constitutional principle, were bound to protect each other's interests.[127]

The Court's curiously phrased, and rather empty, caveat that Congress's abrogation power should be exercised only when "circumstances" or "contingenc[ies]" exist requires closer inspection. The caveat constitutes empty rhetoric since it is clear from the balance of the decision that the Court will not interfere with Congress's future breaches of treaty promises; the Court effectively inoculated itself from such further involvement with the political question doctrine, which precludes judicial scrutiny of Congress's acts relating to Indian affairs.[128] Furthermore, it is equally clear that the Court

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125. *Id.* at 566 (emphasis omitted).

126. 118 U.S. 375 (1886).

127. WILLIAMS, *supra* note 3, at 103.

128. "In any event, as Congress possesses full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation." *Lone Wolf*, 187 U.S. at 568. The Supreme Court has since jettisoned reliance on the political question doctrine in favor of a minimal-

accedes the prerogative to Congress to determine when circumstances warrant a breach of treaty promise. But the Court tips its hand in showing what types of circumstances or contingencies may warrant Congress breaching its word.

In *Lone Wolf*, the Court states that "as with treaties made with foreign nations (*Chinese Exclusion Case*, 130 U.S. 581 . . .), the legislative power might pass laws in conflict with treaties made with the Indians."[129] The case referenced is *Chae Chan Ping v. United States*,[130] decided in 1888. In that case, the Court upheld Congress's unilateral abrogation of immigration provisions contained in a treaty with China. In *Ping*, the Court devotes considerable space in explaining the circumstances that warranted the treaty breach. It is worth reproducing the Court's words in some detail:

> The differences of race added greatly to the difficulties of the situation. Notwithstanding the favorable provisions of the new articles of the Treaty of 1868, by which all the privileges, immunities, and exemptions were extended to subjects of China in the United States which were accorded to citizens or subjects of the most favored nation, they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seems impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation.[131]

The Court also describes in detail a memorial to Congress presented in 1879 by California residents. This memorial expressed concerns similar to the ones above, though in more dire terms:

> [T]he presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; . . . that they retained the habits and customs of their own country, and in fact

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ist standard of judicial review for congressional acts in Indian affairs. *See, e.g.*, Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), *reh'g denied* 431 U.S. 960 (1977). Congressional acts in Indian affairs will be upheld if the legislation "can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." *Id.* at 85.

129. *Lone Wolf*, 187 U.S. at 566.

130. 130 U.S. 581 (1888).

131. *Id.* at 595.

> constituted a Chinese settlement within the State, without any interest in our country or its institutions.[132]

In interrogating the text of the *Lone Wolf* decision, one does not find such brazen language to describe the changed circumstances or contingency that would warrant Congress abrogating the treaty with the various tribes. But in giving the *Ping* citation the prominence it has, the Court signals that the same concerns underlie both cases. *Lone Wolf* and *Ping* both involve distinctive cultural groups asserting their respective rights to maintain distinctive traditions, cultures, and languages and resisting external efforts to assimilate them into the dominant society. Moreover, both groups expressly invoked and relied upon legal rights inscribed in the transpositional discourse of the treaties with their respective nations. In both cases, however, the Court responded to these efforts in the mode of subjugated discourse. In these opinions, majoritarian intolerance for claims of multiculturalism is manifested and enforced in drastic, prophylactic measures such as the severing of treaty promises. Indeed, the United States Solicitor, in briefs before the Supreme Court in *Ping*, emphasized the racial underpinnings of anti-Chinese immigration policy to justify Congress's exclusion laws and used earlier federal policies of forced removal of Indian tribes as precedent for such action.[133] Under this view, Chinese immigrants, and by analogy, the culturally distinctive enclaves of Indian tribes, did not fit within the prevailing ideological discourse of cultural, racial, and political homogeneity and thus became proper targets for oppressive actions and exceptional legislation.[134] Perhaps not surprisingly, the fields of Indian law and immigration law are the only two spheres wherein the Supreme Court regards Congress's power as "plenary."[135]

The notion that "wherever there is a 'constitutive we,' there is also an excluded 'they,'"[136] is vividly captured in the words of one congressional proponent of the Chinese exclusion laws:

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132. *Id.* at 595–96.

133. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and The Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 18 (1998).

134. Popular writers of the day, including Mark Twain, gave poignant testimony to the disparate treatment of Chinese people in California. In 1869, Twain wrote that "news comes that in broad daylight in San Francisco, some boys have stoned an inoffensive Chinaman to death, and . . . although a large crowd witnessed the shameful deed, no one interfered." *See* JONATHAN D. SPENCE, THE CHAN'S GREAT CONTINENT: CHINA IN WESTERN MINDS 126 (1998) (quoting 2 MARK TWAIN, ROUGHING IT 105–06 (1913)).

135. *See, e.g.*, Chin, *supra* note 133, at 5. ("*Fong Yue Ting* and *Chae Chan Ping* are the foundation for what has come to be known as the plenary power doctrine, the rule that 'the power of Congress over the admission of aliens to this country is absolute.'"). *See also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

136. Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2078 (1989).

> [N]o voice is raised against the immigration from across the Atlantic because we feel ourselves akin to the people who thus come to our shores. They are the offspring of the nations from which the founders of the Republic, its defenders, and heroes sprang. They are not only of our race, but allied in moral and religious sentiments, in the degree of culture attained . . . . By contrast, [t]he Chinaman is neither socially, nor politically fit to assimilate with us.[137]

This language recalls the words of Chief Justice Marshall, who, in his *Johnson* opinion, characterized Indians as "a people with whom it was impossible to mix, and who could not be governed as a distinct society."[138] The rhetoric of nationalism operates in this passage in the mode of subjugative discourse to effectively deny both Indigenous Peoples and Chinese immigrants participation in the American political community and to mark their historical erasure as contributors to America's nation-building enterprise.

Recalling Momaday's text in this context offers the opportunity to reengage Indigenous voices and to interrogate tribal expectations deriving from treaty negotiations. This Indigenous perspective locates within the treaty a transpositional discourse that operates to place tribes and the national government on a horizontal axis, at least in terms of expectations that treaty promises would be faithfully adhered to. Any modifications to those promises would necessitate actual (not presumed) good faith renegotiations of the treaty terms. Ironically, this is what occurred in *Lone Wolf*, except that the efforts to renegotiate new treaty terms, according to the tribes, were plagued by federal acts of fraudulent misrepresentations, concealment, and amendments to the final treaty terms, which were never agreed to by the tribes.[139]

C. On Promise-Keeping and Sacred Words: A Synthesis

The *Lone Wolf* court could have written a legal narrative that accorded greater respect to the solemnity of the word. In other words, it could have engaged in transpositional discourse. This treatment would not inevitably lock Congress into treaty stipulations with other nations or tribes. It would, however, require that negotiations over treaty alterations proceed with greater fidelity to the substance and form of prior understandings. For example, the incorporation of transpositional discourse in the *Lone Wolf* decision might have enabled the Court to avoid straining to attribute to tribes presumed consentience with the notion that Congress possessed authority unilaterally to abrogate treaties. Through transpositional discourse, the

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137. *See* Chin, *supra* note 133, at 30 (quoting 13 CONG. REC. 1584, 2031 (1882) (statement of Rep. Deuster)).

138. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 590 (1823).

139. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903).

Court more likely would have understood the position of the tribes, and might have accordingly demanded that Congress abide by its word and the tribes' expectations to deal fairly, justly, and honorably, rather than wield the political question doctrine as a shield to avoid moral entanglement with Congress's territorial dispossession of Indians. Alternatively, a Court using transpositional discourse in its analysis could have required new negotiations that might have still led to new land cessions but on terms that attracted the tribes' full comprehension and consent.

Of course, this analysis assumes-perhaps naively-that the central dispute in *Lone Wolf* revolved around territory and federal efforts to acquire more of it to satisfy the demands of non-Indian settlers. In such a context, adherence to the argument advanced above in the *Lone Wolf* case would have required only minimal adjustment to the national narratives of American expansionism and manifest destiny, in which the allotment of Indians' lands (like the Removal policies of the 1830s) functioned to open up Indian lands to white settlers while simultaneously providing moral and humanitarian cover for policy-makers convinced that these initiatives were in the Indians' best interests. The minimal adjustment called for is the expectation that the national polity honor its word to the Indigenous Peoples.[140]

If, however, *Lone Wolf* is principally concerned with political power and its exercise, then the prospects for revising the national narrative using transpositional discourse are indeed limited. In this view, debates about territoriality really mask debates about power. As Milner S. Ball writes, "Territoriality is a way of organizing and talking about power. The problem is one of power, not space. There is plenty of the latter. A solution would require that the United States discontinue expanding 'in the name of liberty' its 'empire over Indian territories and peoples.'"[141] Reading Indigenous texts, like Momaday's, serves to highlight these different readings of *Lone Wolf* and to critique the advantages and limits of transpositional discourse. Momaday's text helps call attention to the express and implied assumptions that underlie legal texts like *Lone Wolf*. In recalling Kiowa oral tradition and the transformative, regenerative power of the spoken word, Momaday revives the substance and process of a parallel Indigenous tradition of promise-keeping. This provides a critical interpretive lens through which we can examine anew the legal and moral validity of legal precedents construing inter-societal promises contained in federal-tribal treaties.

There is one final point to raise concerning the *Lone Wolf* court's treatment of tribal property interests in light of Momaday's texts. In obiter dicta, the Court suggests that the tribal claims for compensation for wrongful taking

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140. For a similar view, see Ball, *supra* note 8, at 2303, who states:
> The American story can easily be made to embrace the obligation of the nation to keep its word promised in a treaty .... In this instance, the problem does not lie in the story but in bringing the legal order into conformity with it. That would not be quick or simple, but nothing narratively, doctrinally, or theoretically exceptional is necessary.

141. *Id.* at 2310 (quoting FRANCIS JENNINGS, EMPIRE OF FORTUNE 457 (1988)).

of lands may be precluded if Congress provides some adequate consideration for the lands. In acknowledging Congress's considerable power to manage tribal property, the Court asserts, "In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government."[142] The flaw in this reasoning, made vividly apparent when read in light of Momaday's notion of the "remembered earth," is that it commodifies land and treats it as a fungible asset. The Court implicitly embraces a form of subjugated discourse in characterizing land as a transmutable property interest. Adopting westernized notions of land as an exploitable, interchangeable resource leaves little room for the protection of Indigenous interests in lands that are rooted in historical and often sacralized connections to the land. The suppression of Indigenous views of land may also contribute to the social dysfunction prevalent in many tribal communities.[143] An incorporative discourse, as suggested by the interrogation of texts like Momaday's, would serve to awaken greater understanding on the part of those constructing legal narratives and those advocating for greater respect to be accorded to Indigenous views about the natural world.

IV. VIOLENCE AND THE WORD

The effort toward an incorporative discourse in federal Indian law must acknowledge not only the similarities but also the distinct differences in the methods, purposes and consequences resulting from interrogations of legal and literary texts. The late Robert M. Cover reminded us of this when he wrote that

> [l]egal interpretive acts signal and occasion the imposition of violence upon others. A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur.[144]

This Section will consider texts that provide occasion to meditate on Cover's thesis: that legal interpretive acts may occasion or justify violence

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142. *Lone Wolf*, 187 U.S. at 568.

143. *See, e.g.*, POMMERSHEIM, *supra* note 11, at 31. Pommersheim writes:

> The rupture in the relationship of the people to the land has also had adverse social effects. Ronnie Lupe, former chairman of the White Mountain Apace Tribe in New Mexico, vividly articulates this view. 'Our children are losing the land. It doesn't work on them anymore. They don't know the story about what happened to these places. That's why some get into trouble.'

Id. (quoting Keith Basso, *'Stalking the Stories': Names, Places, and Moral Narratives among the Western Apache*, in ON NATURE 95 (D. Halpern ed., 1987)).

144. Cover, *supra* note 17, at 1601.

upon others. I examine one literary text by an Indigenous author, Sherman Alexie's *The Trial of Thomas Builds-the-Fire*[145] and two legal texts, the United States Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*[146] and the Vermont Supreme Court's decision in *State v. Elliott*.[147]

A. Indigenous Literary Narrative: Tribalism on Trial— The Trial of Thomas Builds-the-Fire

Sherman Alexie, a Spokane/Coeur d'Alene Indian, has garnered wide acclaim for his piercingly honest writings about contemporary Native American society. In his award-winning book *The Lone Ranger and Tonto Fistfight In Heaven*,[148] Alexie provides a vivid portrait of reservation life served up with unflinching candor, surprising humor and a poetic embrace of cultural traditions. The text interpreted here, Alexie's short story entitled *The Trial of Thomas Builds-the-Fire*, is taken from this collection. The central character in this short story, Thomas, is described as a man with a "storytelling fetish accompanied by an extreme need to tell the truth. Dangerous."[149] He faces trial in Washington State before a federal court for undisclosed charges, though one suspects the gravamen of his alleged offense is simply being a tribal Indian. Indeed, Thomas personifies "Spokane tribalism" on trial for its own identity and history—a history that includes giving voice to tribal aspirations after a long period of silence, surviving military efforts to vanquish Indian people, dying at the hands of military forces only to be later resurrected honorifically in the naming of a golf course, and having successfully defended tribal homelands in battle. Thomas's trial testimony, elicited through a series of distinct stories, embraces actual events in Spokane tribal history, including the 1858 wars against the federal militia.[150]

During the course of this metaphorical trial, Thomas slips in and out of stories in which he speaks through the personas of historical tribal figures ("My name was Qualchan and I had been fighting for our people, for our land."[151]) as well as animals ("It all started on September 8, 1858. I was a young pony, strong and quick in every movement."[152]). His stories at once inspire the spectators gathered in the courtroom and enrage the judge who struggles to maintain order. When a sympathetic voice in the audience cries out, "Thomas . . . We're all listening,"[153] the judge becomes "red-faced with

145. This is a chapter from ALEXIE, *supra* note 1.

146. 435 U.S. 191 (1978).

147. 616 A.2d 210 (Vt. 1992), *cert. denied*, 507 U.S. 911 (1993).

148. This book was a citation winner for the PEN/Hemingway Award for Best First Book of Fiction. *See* ALEXIE, *supra* note 1.

149. ALEXIE, *supra* note 1, at 93.

150. *See generally* DAVID C. WYNECOOP, CHILDREN OF THE SUN: A HISTORY OF THE SPOKANE INDIANS (1969); ROBERT H. RUBY & JOHN A. BROWN, THE SPOKANE INDIANS: CHILDREN OF THE SUN (1970).

151. ALEXIE, *supra* note 1, at 98.

152. *Id.* at 96.

153. *Id.* at 99.

anger; he almost looked Indian. He pounded his gavel until it broke. 'Order in the court,' he shouted. 'Order in the fucking court.'"[154] The judge orders the courtroom cleared with the help of a growing number of tribal policemen, many of whom were "Indians that the others had never seen before."[155] The judge pulls a "replacement gavel from beneath his robe" and says, "We can go about the administration of justice." Thomas inquires, "Is that real justice or the idea of justice?"[156] Enraged again, the judge cuts off Thomas's defense testimony and turns him over to the prosecution for cross-examination. The interrogation focuses on an historic battle, the occasion of Thomas's first military experience, in which he acknowledges killing enemy soldiers. Thomas describes the scene:

> You must understand these were days of violence and continual lies from the white man . . . . The soldiers fought well, but there were too many Indians for them on that day. Night fell and we retreated a little as we always do during dark. Somehow the surviving soldiers escaped during the night, and many of us were happy for them. They had fought so well that they deserved to live another day.[157]

After being asked twice by the prosecuting attorney to state whether he "murdered" the soldiers in cold blood and with premeditation, Thomas finally responds, "I did." A "newsclip" appended near the end of the story notes that Thomas was given a life sentence without possibility of parole for committing a "racially motivated murder." The clipping ends, "'The only appeal I have is for justice,' Builds-the-Fire reportedly said as he was transported away from this story and into the next."[158]

Thomas joins six other prisoners, all but one persons of color, on a bus to the penitentiary. One of the prisoners recognizes him as "that storyteller," and urges Thomas to tell them stories.

> Thomas looked at these five men who shared his skin color, at the white man who shared this bus which was going to deliver them into a new kind of reservation, barrio, ghetto, logging-town tin shack. He then looked out the window, through the steel grates on the windows, at the freedom just outside the glass. He saw wheat fields, bodies of water, and bodies of dark-skinned workers pulling fruit from trees and sweat from thin air.
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> Thomas closed his eyes and told this story.[159]

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154. *Id.*
155. *Id.*
156. *Id.* at 100.
157. *Id.* at 100–01.
158. *Id.* at 102–03.
159. *Id.* at 103.

The Trial of Thomas Builds-the-Fire inexorably intertwines violence and language. Thomas's resumption of speech, after nearly twenty years of silence, mirrors the resurgence of tribalism in modern America after decades of dormancy and oppressive federal strictures. That tribal renaissance, however, becomes the touchstone for renewed inquiry into the persistence of tribalism. Thomas's "defense" of tribalism within a hostile juridical forum echoes patterns of contestation apparent in the persistent legal challenges to tribal assertions of their rights.[160] His testimony captures episodes of violent intersocietal confrontations over territory and a way of life. This aspect of the narrative operates largely in the mode of transpositional discourse, where Thomas situates himself and his people in parity with the invading military forces. The tribally asserted objectives, defense of homeland and people, subsist in relative equipoise with the objectives of the opposing forces, at least when these are perceived as the defense of settlers. Within this discursive treatment, it is possible for each side to express admiration and respect for the opposing side, even in battle. In the voice of one of the horses who escaped the slaughter, Thomas says, "It was glorious. Finally, they gave up, quit, and led me to the back of the train. They could not break me. Some may have wanted to kill me for my arrogance, but others respected my anger, my refusal to admit defeat."[161] In the same text, Thomas, as the warrior, expresses admiration for the bravery and skill of the opposing soldiers.[162]

The narrative framing the trial itself, however, operates in the mode of subjugated discourse. Thomas is rendered powerless to resist the trial court's authority over him, recognizing as he does the awesome display of power marshaled against him, including that of fellow Indigenous people who act in tacit complicity with the court.[163] The legal process constrains the nature of his testimony by variously silencing him[164] and then effectively coercing his admission of guilt. There are moments, however, where the vertical positioning of the parties is reversed, a function of subjugated discourse's inherently political force. Thomas questions the morality of the entire enterprise when he challenges the judge to clarify whether "real justice or the idea of justice"[165] is at issue. The nature of the contestation occurring here is both

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160. *See, e.g.*, N. Bruce Duthu, *The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict*, 21 VT. L. REV. 47 (1996) [hereinafter Duthu, *The Thurgood Marshall Papers*].

161. ALEXIE, *supra* note 1, at 98.

162. *See id.* at 101.

163. This evokes Robert M. Cover's discussion of the criminal defendant who experiences a form of violence in the routine administration of legal acts. Cover writes:

> The defendant's world is threatened. But he sits, usually quietly, as if engaged in a civil discourse . . . . It is, of course, grotesque to assume that the civil facade is 'voluntary' except in the sense that it represents the defendant's autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry.

Cover, *supra* note 17, at 1607.

164. ALEXIE, *supra* note 1, at 100 ("Defense testimony is over . . . . Mr. Builds-the-Fire, you will now be cross-examined.").

165. *Id.*

political and ideological; Thomas seeks to tell the story of his people's survival as a People and of their inherent right to maintain their tribal ways. The court's resistance is best explained as opposition to revisions of the national narrative, which eschews efforts to recall America's violent, oppressive history in its relations with Indigenous Peoples, and favors the mythologized view of America as home to benevolent, freedom-loving people. Ultimately, the sentence to life imprisonment fails to silence Thomas, who is transported from this story to the next. He emerges from the theater of violence, the court, still in possession of his own and the tribe's narrative storehouse, ever ready to engage in story.

B. Non-Indigenous Legal Narratives

1. The Fiction of Implicit Divestiture

In *Oliphant v. Suquamish Indian Tribe*, the United States Supreme Court held that Indian tribes lacked inherent sovereign authority to exercise criminal jurisdiction over non-Indians.[166] The Court could point to no unilateral extinguishment of this power by congressional act nor to bilateral surrender of this power via treaty, the modes then commonly understood as marking the exclusive means by which tribal powers were lost.[167] In *Oliphant*, the Court also held that tribes are precluded from exercising powers that are "inconsistent with their status,"[168] that is, powers lost through the operation of "implicit divestiture."[169] This decision, and particularly its mode of judicial reasoning, has been widely criticized by commentators, including this writer, for its misuse of history and erroneous interpretations of treaties, statutes (including unenacted bills), withdrawn opinions from the attorney general, and case precedent.[170] I will not undertake a review of that voluminous literature here. The present interrogation will, of necessity, be brief and relatively narrow, given the object of this Article.

The *Oliphant* court sought primarily to guard against "unwarranted intrusions" on personal liberty.[171] In the context of tribal jurisdiction, the question would focus on whether the particular exercise of jurisdiction consti-

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166. 435 U.S. 191, 195 (1978).

167. In its decision, the lower court "turn[ed] to the relevant treaties and Congressional acts to see whether any has withdrawn from Suquamish the power to punish Oliphant for a violation of the tribal law and order code." Oliphant v. Schlie, 544 F.2d 1007, 1009-10 (9th Cir. 1976). *See also Powers of Indian Tribes*, 55 Interior Dec. 14 (1934).

168. 435 U.S. at 208.

169. United States v. Wheeler, 435 U.S. 313, 326 (1978). The court declared

> [T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.

170. *See, e.g.*, N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994) [hereinafter Duthu, *Implicit Divestiture*].

171. 435 U.S. at 210.

tuted an "unwarranted intrusion" on individual liberty since the Indian Civil Rights Act of 1968 protects all criminal defendants brought before tribal court tribunals.[172] The lower court in *Oliphant* saw the issue precisely this way and stated, "This issue is raised prematurely. Oliphant is entitled to a fair trial; if he should be denied one, appeal from a conviction or a petition for a writ of habeas corpus would then be appropriate. Further discussion of this contention is unnecessary."[173] The lower court's opinion operates largely in the mode of transpositional discourse, where tribal sovereignty to regulate law and order within Indian country is accepted as a legitimate and co-existent form of political authority. The Supreme Court saw the question differently and focused on the *existence*, not the *exercise*, of tribal criminal jurisdiction over non-Indians. This rhetorical shift allowed the court to examine a wider variety of texts, particularly historical ones, to assess whether the scope of tribal sovereign authority embraced the power asserted here.

The *Oliphant* majority relied almost exclusively on nineteenth-century precedents to examine the tribal jurisdictional issue,[174] an analysis that yielded no clear answers to the question. But the Court found that, "even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."[175] According to the Court, "incorporation" into United States' territory implicitly divested Indian tribes of such power: "Upon incorporation into the territory of the United States the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."[176] The Court nowhere defines what "incorporation" means, nor does it explain when or how it supposedly occurred. One commentator has characterized the Court's "incorporation" thesis as a "performative utterance:"

> Like the conquest of tribes in the *Tee-Hit-Ton* opinion, the incorporation of tribes in *Oliphant* happened in and with—only in and with—the Court's announcement of it. The conquest and incorporation of Indians was done by sleight of hand rather than force of arms, by the present Supreme Court rather than armies of the past.[177]

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172. 25 U.S.C. §§ 1301–1303 (1994).

173. Oliphant v. Schlie, 544 F.2d 1007, 1011–12 (9th Cir. 1976).

174. *See* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 273 n.202 ("One would be hard pressed to find a contemporary Supreme Court opinion which relies so exclusively on as many 19th century precedents as *Oliphant* does.").

175. *Oliphant*, 435 U.S. at 208.

176. *Id.* at 209.

177. Ball, *supra* note 8, at 2299–2300.

The Court's reasoning in *Oliphant* operates in the mode of subjugated discourse, which provides an occasion for reinscribing the national narrative of conquest into law. Conquest by incorporation, like *Johnson v. McIntosh*'s notion of conquest by discovery, situates tribes at the subordinate pole of the vertical axis in relation to the overriding sovereign power of the United States. This bloodless conquest of tribes generates another opportunity for the exercise of the victor's sovereign prerogative to prescribe, limit, or eliminate tribal powers. In *Oliphant*, incorporation functions to clear a juridical space within which the Court can deploy the sword of implicit divestiture to slice away particular expressions of tribal sovereign authority. Like the concepts of plenary power, discovery, and assimilation, the concept of incorporation subsists within the lexicon of federal Indian law with potentially lethal consequences for tribal power.[178]

Tribes emerge from *Oliphant*'s juridical theater of violence much like Thomas Builds-the-Fire in the literary narrative above; they are overwhelmed by the legal discourse and process, constrained in their ability to communicate Indigenous notions of self-governance, and ultimately, consigned to spaces within which their activities may be safely monitored and controlled. Ironically, the *Oliphant* majority constructs a narrative of violence to describe the operations of tribal courts, where, in the Court's view, the potential always exists for unwarranted intrusions on individual liberty. The Court accomplishes this, as I have argued elsewhere, through resort to "legal imagism," the creation of a judicial analogue to captivity narratives, an early American literary genre in which white pioneers wrote of their harrowing experiences within, and escapes from, tribal communities:

> The Western genre and notions of frontier justice were revitalized in *Oliphant* to create an image of Indians and whites still battling over precious lands, where Indians' savage nature . . . still awaits the tempering and benevolent influences of an understanding yet firm paternal white figure . . . and where the Indian polity is already firmly dominated, if not completely superseded, by a superior power. References to 'increasingly sophisticated' tribal court systems are insufficient to eradicate the 'dangers' awaiting non-Indians if brought before tribal forums. *Oliphant*'s vision of justice in tribal courts for non-Indians is the judicial analogue to the American literary genre of captivity narratives.[179]

Reading literary texts like Alexie's *The Trial of Thomas Builds-the-Fire* alongside a legal narrative like *Oliphant* draws attention to the law's role in perpetrating ritualized violence against Indigenous Peoples. The work of

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178. *See* POMMERSHEIM, *supra* note 11, at 104 ("Words or phrases from the field of Indian law, such as 'assimilation' and 'plenary power,' have triggered lethal effects, aiding in the expropriation of Indian land and the denial of tribal culture.").

179. *See* Duthu, *Implicit Divestiture*, *supra* note 170, at 376.

decolonizing federal Indian law can only proceed if interpreters of legal texts develop a consciousness about these narrative constructs in order to generate effective strategies to limit, if not totally eliminate, their tendency to suppress the expression of tribalism.

2. The "Weight of History"

In October 1987, several members of the Abenaki Nation of Vermont and non-Indian supporters participated in an upstate Vermont "fish-in" to express tribal rights to fish in aboriginal homelands and waters, free of state regulations. Approximately thirty-six individuals were subsequently arrested and charged with fishing without a state license. The defendants filed motions to dismiss the charges on grounds that the Abenaki Tribe retained aboriginal title to these particular lands that preserved their rights to fish free of state regulation. After a lengthy trial, notable for its extensive examination of the historical record with assistance from both the scholarly and tribal communities, the trial court granted the defendants' motion to dismiss, accepting the tribe's argument that Abenaki aboriginal title, and concomitantly, the associated right to fish, had persisted through the present day. On appeal by the state, the Vermont Supreme Court reversed the lower court's decision and held that aboriginal title had in fact been extinguished through "the cumulative effect of many historical events," or in other words, "by the increasing weight of history."[180]

The *Elliott* decision has been rightly criticized for departing from the legal requirement that aboriginal title may only be extinguished on proof, by "clear and convincing" evidence, that the sovereign intended that result.[181] The decision accords undue weight to the intentions of colonizing forces (governments and settlers alike) to dispossess tribal interests in property, rather than insisting on demonstrative sovereign acts to effectuate such results. For example, the court notes that certain colonial land grants in the disputed area made to white settlers in 1763 were conditioned on settlement and cultivation within five years of the grants. Failure to fulfill these conditions would result in title reverting to the crown. The court then notes that, eighteen years later, in 1781, Vermont delegates acknowledged to a congressional committee convened to consider Vermont's application for statehood that the land grant conditions had yet to be fulfilled. The court was nonetheless satisfied that these historical events demonstrated that "although settlement had not been completed, [the settlers] *intended* to fulfill all the

180. State v. Elliott, 616 A.2d 210, 218 (Vt. 1992), *cert. denied*, 507 U.S. 911 (1993).

181. *See, e.g.*, Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994); John P. Lowndes, *When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title*, 42 BUFF. L. REV. 77 (1994); Gene Bergman, *Defying Precedent: Can Abenaki Aboriginal Title Be Extinguished by the "Weight of History"?*, 18 AM. INDIAN L. REV. 447 (1993).

conditions. Hence, the early Vermonters took steps to confirm their entitlement by *ensuring fulfillment* of the Wentworth conditions."[182]

The court put forth additional historical facts to prove the intent of the state to extinguish Indian title. The rhetoric of folkloric character Ethan Allen was invoked as evidence of "absolute and unyielding defiance" to assertions of property interests claimed by "invaders."[183] Further proof that Vermonters asserted property interests antithetical to any retained tribal interests was drawn from Vermont's act in 1783 to set a "timetable for settlement," which was "previously hindered by the American Revolution."[184] In short, as the court flatly states, "the relevant focus is on what Vermonters intended to do with the land, not what hindsight discloses [the colonial governor] was authorized to do with it."[185]

In its opinion, the Vermont Supreme Court employs the mode of subjugated discourse with an air of moral confidence, which is at once perplexing and deeply disturbing. *Elliott*'s conceptualization of Indigenous claims to property is viewed in exceedingly narrow and ethnocentric terms. The historical narratives are construed in a manner that clearly vindicates the colonizers' presumed superior interest in lands and dilute the normative (though equally destructive) requirement that the sovereign will to extinguish aboriginal title be clearly and plainly evidenced. It is thus not surprising that the court's opinion draws a tight ideological circle around cases like *Johnson v. McIntosh* and *Tee-Hit-Ton Indians v. United States*. *Elliott*'s embrace of a "weight of history" test for extinguishment of aboriginal title evokes and applies with equally destructive force the discourse of violence evidenced in *Oliphant*. In *Elliott*, Abenaki claims to aboriginal title are eviscerated not by any historic sovereign act, but by the words of a modern state court, which chose to privilege the patterns of Euro-American dominance over Indigenous Peoples as revealed in the "conqueror's" historical and mythologized narratives.

A short time after *Elliott* was decided, one of the justices on that court reportedly had a dream in which he was lying supine and looking up at an Abenaki tribal leader standing over him. The tribal leader was laying heavy rocks upon the chest of the justice, one by one, until the justice found it nearly impossible to breathe. Finally, the tribal leader said, "How does it feel to have the weight of history on you?"[186]

As a form of oral history, this short but powerful narrative offers yet another opportunity to reflect on how law accounts for the past. The *Elliott*

182. *Elliott*, 616 A.2d at 217 (emphasis added).
183. *Id.* at 216.
184. *Id.* at 217–18.
185. *Id.* at 220.
186. A former law student who clerked for the Vermont Supreme Court shared this narrative in my class on federal Indian law. I do not intend to cast aspersions on either the justice, the tribal leader, or the student detailing this narrative, and thus, I have chosen not to use names or other personally identifying information.

opinion itself, and the narrative recounted above, suggest that there are real consequences to producing legal narratives that lack a coherent sense of morality, and view the past through perspectives afflicted with varying degrees of myopia and historical amnesia. The consequences for Indigenous Peoples like the Abenaki are the generation and perpetuation of a jurisprudence that suppresses tribal voices—voices that assert and demand nothing less than equal respect for Indigenous-derived visions of justice and political coexistence. The consequences for legal institutions, like the courts, include considerable diminishment of their claims to legitimacy as justice-generating institutions, as well as erosion of the notion that the rule of law, and not of men, pervades in our society.

C. Violence and the Word: A Synthesis

The interpretive acts in both the *Oliphant* and *Elliott* decisions are remarkable for their insistence on creating and defending a national, or regional, narrative that effectively denies, or ignores, patterns of institutionalized oppression and violence against Indigenous people. Under this analysis, denial of rights to Indian tribes occurs not as a consequence of overt legal policies but rather as a result of the inexorable progression of civilizing influences on tribes and their members. *Oliphant*'s "upon incorporation" thesis and *Elliott*'s "weight of history" analysis both situate tribes as entities that are affected by history but apparently do not participate in the making of that history. This interpretive strategy effectively silences Indigenous voices raised in opposition to or in defiance of these monologic representations of history.

Ironically, the lower courts in each case ruled in favor of preserving the tribal rights or powers at issue. This suggests that rule-makers and advocates can find ways to influence the process of decolonization, in large measure by employing discourses that consider the historical record truthfully and fully and are sufficiently skeptical of representations of Indigenous peoples that do not accord them or their institutions of self-government the dignity and respect they deserve. This interpretive strategy reflects the aspirations for an incorporative discourse within federal Indian law, which would encourage such reflective processes as habits of the mind and heart while actively seeking to discourage the normative tendency of law to silence assertions of tribalism.

CONCLUSION

This Article has argued for the greater pursuit of an incorporative discourse within federal Indian law by means of reading and analyzing Indigenous narratives alongside the traditional canon of legal materials. The texts presented above have attempted to show the potential for this discursive treatment to awaken our minds to a reconceptualized view of the place of Indigenous Peoples within American society. There is no pretension that using modes of incorporative discourse will immediately or even

significantly alter the political and legal status of tribes in the United States. It does offer the potential, however, to move us toward imagining communities whose defining attributes are respect, understanding, and acceptance. Part of that process involves coming to terms with entrenched notions of power in American society. As detailed in Part Two above, discourses of power in Indian law have roots deep in the formative relations of Indigenous and non-Indigenous societies, where political and religious ideology combined to subordinate and suppress tribal communities and their systems of social, cultural, political, and religious organization. Overcoming this legacy and altering the normative patterns of distributive sovereignty in the United States will be slow work indeed. As other Sections suggest, that process will necessarily involve restoring faith in the ethics of promise-keeping, particularly by the federal government, and overcoming the government's impulse to empire across Indian Country.

A critical first step in this process is to remind ourselves that narratives have the ability to reveal patterns of interpersonal and intersocietal relations over time. It is within these patterns of relationships that we reveal our values, our systems of beliefs, and our capacities to engage as morally sentient beings. In denying, suppressing, or limiting Indigenous narrative traditions, we fail to account fully for our shared pasts and constrain our present efforts to engage in more respectful relations.

Embracing Indigenous narrative traditions in this legal discourse enables us to identify and hence perpetuate those patterns of intersocietal relations premised on respect, fairness, and honest dealings. The treaty promises discussed in *Lone Wolf v. Hitchcock*, for example, contained the legal and moral framework for accommodating Indigenous and non-Indigenous needs for land and the mechanisms for revising those arrangements at a future date. The *Lone Wolf* court failed to give effect to this framework by employing a discursive treatment, which operated to suppress the tribe's narrative traditions and expectations derived from the exchange of treaty promises. Engaging with Indigenous narrative texts, even at this late date, allows us to revisit those occasions where intersocietal relations proceeded along a different trajectory, when assertions of unilateral power, deceit, and violence typified the intercourse between Indigenous Peoples and Anglo-Americans.

On occasion, courts have demonstrated capacity and willingness to engage in more incorporative analysis without expressly relying on Indigenous narrative texts per se. In these cases, the analysis instead focuses on reading the texts generated by dominant society with greater attention to the views and perspectives of Indigenous societies. This is precisely what the United States Supreme Court did in *United States v. Sioux Nation of Indians*,[187] a case that modified in important respects the rules in *Lone Wolf*. In *Sioux Nation*, the Court repudiated the notion that a presumption of good faith attaches to

187. 448 U.S. 371 (1980).

federal governmental action relating to its management of tribal lands and instead, demanded that courts, "in considering whether a particular congressional action was taken in pursuance of Congress's power to manage and control tribal lands for the Indians' welfare . . . engage in a thoroughgoing and impartial examination of the historical record. A presumption of congressional good faith cannot serve to advance such an inquiry."[188] The Court then demonstrated the nature of this interrogation in *Sioux Nation* by critically examining the historical record, expressly noting the narrative or storytelling function of this textual exegesis,[189] and by sternly rejecting the dissent's suggestions that this interrogation amounted to engaging in revisionist history.[190]

Embracing Indigenous narratives within legal analysis, or minimally, incorporating a discursive treatment that accords greater respect and sensitivity to Indigenous perspectives and worldviews, provides the opportunity to account for the "moral presence of our past," in that it enables us to understand how our past experiences and relations are reflected in present-day arrangements.[191] It can then point us toward that "imagined community" where we make room to live together in our differences.

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188. *Id.* at 415–16.

189. "The primary sources for the story told in this opinion are the factual findings of the Indian Claims Commission and the Court of Claims." *Id.* at 421 n.32. There were clearly differences of opinion among the Justices about how to go about "telling" this story. For example, in a private memorandum to Justice Harry Blackmun, the author of the majority opinion, Justice Byron White expressed reservations about the "atmosphere" created in Justice Blackmun's opinion, which "often casts the conduct of the government in such an unfavorable light." Correspondence from Justice Byron White to Justice Harry Blackmun (June 16, 1980), *quoted in* Duthu, *The Thurgood Marshall Papers*, *supra* note 160, at 105.

190. "A reviewing court generally will not discard such findings because they raise the specter of creeping revisionism, as the dissent would have it, but will do so only when they are clearly erroneous and unsupported by the record." *Sioux Nation*, 448 U.S. at 421 n.32.

191. *See* Jeremy Webber, *The Jurisprudence of Regret: The Search for Standards of Justice in Mabo*, 17 SYDNEY L. REV. 5, 10 (1995) (citing Gerald Postema, *On the Moral Presence of Our Past*, 36 MCGILL L.J. 1153 (1991)).