

**Property and Empire:**  
**The Law of Imperialism in *Johnson v. M'Intosh***

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**Abstract:**

Justice Marshall's opinion in *Johnson v. M'Intosh* has long been a puzzle in both its doctrinal structure and in Marshall's manifest ambivalence and long, strange dicta that are both triumphal and elegiac. In this article, I show that the opinion becomes newly intelligible when read in the context of the law and theory of colonialism, concerned, which, like the case itself, was concerned with the expropriation of continents and relations between dominant and subject peoples.

I examine several instances where the seeming incoherence of the opinion instead shows its debt imperial jurisprudence, which rested on a distinction between two bodies of law: one governing relations among "civilized" nations, the other for relations between "civilized" governments and the "imperfect sovereigns" of other nations. I then show how Marshall's long dicta reflect the then-prevalent view of the historical progress of societies: from hunter-gatherer to commercial orders, with each stage corresponding to a particular set of property institutions. This historical theory lent intelligibility to the legal distinctions among "civilized" and "lesser" or "imperfect" sovereigns by claiming that the latter occupied earlier stages of development, and that "civilized" nations were legally permitted to override the property institutions of "primitive" societies in order to induce progress. The dicta, then, provide the frame for the reasoning of the case just as the theory of historical progress framed the jurisprudence of colonialism in general.

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**Table of Contents:**

- I. Two Puzzles and Some Irony
  - A. Two Puzzles
    - 1. *Indian land transfers and Indian land transfers, distinguished*
    - 2. *Customary international law and customary international law, distinguished*
  - B. Some Irony
- II. Two Domains of International Law
- III. Property in the Law of Colonialism
  - A. Property in the Eighteenth-Century Account of Progress and Governance
  - B. Property in East India: The Context of the Yorke-Camden Opinion
- IV. *Johnson v. M'Intosh* Again
- V. Conclusion: A Little More Irony

*Johnson v. M'Intosh*<sup>1</sup> is among the seminal cases in American property law.<sup>2</sup> It is also one of the stranger opinions in American jurisprudence. In the course of ruling that purchasers of land from Native American tribes did not acquire title enforceable in the courts of the United States,<sup>3</sup> Chief Justice Marshall is elegiac, triumphal, and recurrently ambivalent toward his own reasoning. Marshall acknowledged that the principle of his holding “may be opposed to natural right and to the uses of civilized nations”<sup>4</sup> but, in one of those moments of judicial candor that might convince a vulgar Legal Realist to declare (Pyrrhic) victory and go home, declared, “Conquest gives a title which the Courts of the conqueror cannot deny.”<sup>5</sup> He also spun a narrative tapestry of dicta, describing an agentless ethnic cleansing in which Native Americans “necessarily receded,” along with the deer and the unbroken forests, before the axe and plough of the American frontier.<sup>6</sup> By the end of the opinion, the Euro-American expropriation of North America has emerged as (1) lawful and (2) inevitable, even though the basis of its legality was “opposed to natural right” and Marshall stressed that the inevitability of the displacement gave “excuse” but not “justification” to expulsion.<sup>7</sup>

What is the relationship between the relentless march forward of the legal judgment and the ambivalent tone and sometimes paradoxical movements of the discussions of historical necessity and natural right? The key to the strangeness of the

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<sup>1</sup> 21 U.S. 543 (1823).

<sup>2</sup> See JOSEPH WILLIAM SINGER, PROPERTY: RULES, POLICIES, AND PRACTICES 3-15 (3d ed.) (2002) (opening discussion of property law with *Johnson*); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 3-18 (5<sup>th</sup> ed.) (2002) (same); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW & POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 69-75 (1998) (beginning discussion of the legal institutions that frame property practices with *Johnson*).

<sup>3</sup> See *id.* at 572 (“The inquiry ... is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country”), 588 (holding that the unquestioned power of the United States government to convey Indian lands to settlers “must negate the existence of any right which may conflict with, and control it,” to wit, a right in Indians to convey enforceable title).

<sup>4</sup> *Id.* at 591.

<sup>5</sup> *Id.* at 588.

<sup>6</sup> *Id.* at 590-91.

<sup>7</sup> *Id.* at 589.

opinion is that *Johnson v. M'Intosh* is not just a property case: it is also the leading American case in the law of imperialism. By designating *Johnson* in this way, I mean that it concerns the competing claims of representatives of two political societies, one dominant, the other subordinate, within an extended system of such domination.<sup>8</sup> The courts of the dominant society enjoy unchallenged jurisdiction over the issue in consequence of the imperial relationship. Therefore the question of the case is not which political society will prevail, but what concessions the dominant society will make to the subordinate one. This type of relationship between political societies formed the pattern of imperial rule throughout the Euro-American Age of Empire, from the Spanish conquest of the Americas in the fifteenth century to the independence of India and the colonies of Africa after World War Two.<sup>9</sup> It generated its own jurisprudence and its own problems in normative reasoning generally: these deeply shaped, and thus help to explain, Marshall's reasoning and tone in *Johnson*.

Imperial thought has enjoyed a certain vogue in the last five years, after several decades of overwhelming disrepute.<sup>10</sup> That period of disrepute was as polemical as the

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<sup>8</sup> For a concise account of the modes and varieties of imperialism, see ANTHONY PAGDEN, *PEOPLES AND EMPIRES* (2001) (describing the history of imperial institutions and ideas).

<sup>9</sup> The major synthetic work on the normative theory of empire in Europe remains ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN, AND FRANCE C. 1500 – C. 1800* (1995). An important recent study of the jurisprudence of imperialism, with particular attention to concepts of sovereignty that become important later in this essay, is EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM, AND ORDER IN WORLD POLITICS* (2002). On conflicts in English liberalism with regard to the legitimacy of empire, a major advance was UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (1999) (arguing for a relationship between liberal universalism and normative self-confidence about empire). A particularly nuanced recent study, demonstrating the subtle and multifarious variation in liberal attitudes toward empire, is JENNIFER PITTS, *A TURN TO EMPIRE: THE RISE OF LIBERAL IMPERIALISM IN BRITAIN AND FRANCE* (2005).

<sup>10</sup> For the effort to rehabilitate imperialism's normative claims, see DAVID FRUM & RICHERD PERLE, *AN END TO EVIL: HOW TO WIN THE WAR ON TERROR* (2003); NIALL FERGUSON, *EMPIRE: HOW BRITAIN MADE THE MODERN WORLD* (2003); LAWRENCE KAPLAN & WILLIAM KRISTOL, *THE WAR OVER IRAQ: SADDAM'S TYRANNY AND AMERICA'S MISSION* (2003); MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* (2002). I reconstruct and evaluate arguments of this sort in Jedediah Purdy, *Liberal Empire: Assessing the Arguments*, 17 *ETHICS AND INT'L AFFAIRS* 2 (2003).

recent reconsideration has often been.<sup>11</sup> It typically involved condemning centuries of European thought and politics as relentlessly pro-imperialist, and went so far as to suggest that liberal conceptions of rights and theories of progress, and even philosophical and legal ideas of rationality, ineluctably produced imperial rule and rapine.<sup>12</sup>

More interesting than either the all-encompassing attack on empire or the credulous revival of imperial conceits is the recognition among a new generation of historians and political theorists that centuries of empire, which coincided with extraordinary developments in European law, politics, philosophy, economics, and literature, produced complex and multifarious thinking.<sup>13</sup> In particular, the jurisprudential, political, and philosophical developments of the imperial period did not have any simple or straightforward relationship to empire.<sup>14</sup> They neither produced it nor arose to justify it, but they did not straightforwardly condemn or contradict it, either.<sup>15</sup> Instead, ideas about progress, rights, and the rule of law interacted with imperial practice in many different ways. Great liberal reformers, John Stuart Mill and his father, James Mill, were enthusiastic partisans of British “despotism” in India.<sup>16</sup> The moderate and

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<sup>11</sup> See EDWARD W. SAID, *ORIENTALISM* (1979) for the classic account of imperialism as a categorically pernicious episode that deeply shaped the self-understanding of the West as well as its attitude toward the rest of the world. Said continued these themes in EDWARD W. SAID, *CULTURE & IMPERIALISM* (1994). An even more elaborately theorized version of starkly anti-imperial views is GAYATRI CHAKRAVORTY SPIVAK, *THE SPIVAK READER: SELECTED WORKS OF GAYATRI CHAKRAVORTY SPIVAK* (1996). A much more popular version of these themes, updated for the era of September 11 and the Iraq War, is ARUNDHATI ROY, *AN ORDINARY PERSON'S GUIDE TO EMPIRE* (2004).

<sup>12</sup> Jennifer Pitts, for instance, notes and prepares to argue against this reductive attitude in PITTS, *supra* n. 9 at 3-5.

<sup>13</sup> This argument is a particular concern of PITTS, *id.*, and MEHTA, *supra* n. 9 at 77-114. Although the explicit argument about complexity and multifariousness is not the concern of Edward Keene, it emerges in his discussion of imperial jurisprudence. See KEENE, *supra* n. 9 at 97-119.

<sup>14</sup> See materials cited in n. 13, *supra*.

<sup>15</sup> See *id.*

<sup>16</sup> For discussions of the Mills' ideas, see PITTS, *supra* n. 9 at 123-62; MEHTA, *supra* n. 9 at 87-114. The essential primary texts are JAMES MILL, *THE HISTORY OF BRITISH INDIA* (William Thomas, ed., 1975) (1820), which evinces staggering disdain throughout for a Hindu civilization which Mill regards as barbaric and in need of thoroughgoing reconstruction); JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 415-16 (Geraint Williams, ed., 1993) (1861) (“There are [peoples] which ... must be governed by the dominant country, or by persons delegated for that purpose by it. This mode of government is as legitimate as any other if it is the one which in the existing state of civilization of the

humane conservative, Alexis de Tocqueville, strongly supported French rule over Algeria.<sup>17</sup> But Adam Smith, the jurist, economist, and philosopher of commercial society, resisted supporting imperial projects, while the radical legal reformer and founder of utilitarianism (and muse to the Mills), Jeremy Bentham, denounced them.<sup>18</sup> The conservative Edmund Burke was the greatest British enemy of imperial abuses in the second half of the eighteenth century.<sup>19</sup> The arch-liberal *philosophe* Denis Diderot could claim the same honor in contemporary France.<sup>20</sup> This clutch of examples, many of which I will return to, is enough to suggest the complexity of the phenomenon and the various and non-obvious relationships between general ideas and attitudes toward empire.

Yet none of this is to say that the legal and intellectual history of imperialism is merely, in William James's phrase, a blooming, buzzing confusion. There is a consistent logic in the questions or problems that imperial law posed. In deciding the status of the claims of subject peoples within the legal system of the dominant society, jurists and theorists had to develop an account of the relationship between the legal and the broadly normative cultures of the two societies.<sup>21</sup> Were they symmetrical, so that the role of dominant society's courts, or of normative reasoning generally in the dominant society, is

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subject people most facilitates their transition to a higher stage of improvement. There are ... conditions of society in which a vigorous despotism is itself the best mode of government for training the people in what is specifically wanting to render them capable of a higher civilization. .... The ruling country ought to be able to do for its subjects all that could be done by a succession of absolute monarchs[.]").

<sup>17</sup> See PITTS, *supra* n. 9 at 204-39 (on Tocqueville and Algeria).

<sup>18</sup> See *id.* at 25-58 (on Smith's theory of history and attitude toward colonialism), 103-22 (on Bentham).

<sup>19</sup> On Burke's attitudes, particularly his long campaign against British rule in India, see *id.* at 59-100 (arguing that Burke's combination of universalism as essential humanitarian principles and pluralism as to the content of particular cultures lent suppleness and restraint to his cultural and moral judgment); MEHTA, *supra* n. 9 at 153-89 (making a similar argument).

<sup>20</sup> Diderot wrote in favor of the right of colonized people to resist colonial expropriation and decried colonization of the Americas as the event that had restored the place of slavery in the modern economy after its long decline in Western Europe. See DENIS DIDEROT, *POLITICAL WRITINGS* (John Hope Mason & Robert Wokler, trans. & ed.) 175-77 (on the right of resistance), 185-89 (on colonization and slavery) (1992).

<sup>21</sup> Throughout this essay, I am dealing with both specifically legal reasoning, especially concerning relationships among types of sovereigns, and the political, historical, and theoretical self-conceptions that accompanied and often lent sense to these. Consequently, I sometimes use this broad but infelicitous pairing of terms to convey my meaning.

to adjudicate between competing claims and interests in the manner of modern choice-of-law reasoning?<sup>22</sup> Was the subordinate society regarded as inferior, not just in power but in the quality of normative claims it recognizes, so that such claims have no purchase on the reasoning of the dominant society, but are instead to be regarded as symptoms presenting themselves for management and correction?<sup>23</sup> Or was the subordinate society's normative order eligible for legal recognition in some respects, but in others discounted as a symptom of backwardness, so that the interpreter's task was to distinguish between the eligible and the ineligible?

Addressing this legal or normative question necessarily involved representatives of the dominant society in the closely related task of cultural interpretation, about their own society and the subordinate one. Do they envision the subordinate society as a more primitive version of their own, a living specimen of the past awaiting a determinate future?<sup>24</sup> Do they understand it as genuinely different, not just a distinct link on a single chain of historical progress, but nonetheless as inferior according to a single normative metric that applies to both (or all) societies?<sup>25</sup> Or do they treat the two societies as in some real sense incommensurable, embodying irreducibly distinct combinations of familiar values and even, perhaps, values that are themselves

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<sup>22</sup> For a discussion of the conception of sovereignty and culture that supports this sort of view, *see* KEENE, *supra* n. 9 at 135-50 (discussing an egalitarian conception of states and non-hierarchical conception of cultures).

<sup>23</sup> This view, for instance, was a consequence of the Mills' view of civilization and sovereignty. *See* citations at *supra* n. 16.

<sup>24</sup> I discuss the relationship between this conception of civilization and history, on the one hand, and relations among sovereigns, on the other, with particular reference to the historical accounts of Adam Smith and William Blackstone, in III.A, below.

<sup>25</sup> To appreciate this idea, consider the American conception of the Soviet Union during the Cold War: not as a primitive precursor to modern liberty, but also not as a truly distinct civilization with its own code of values, but rather as another modern society, one that failed by the relevant modern values of personal freedom and social prosperity. Such a view of China or the Ottoman Empire, for instance, was widespread in early-modern Europe.

unrecognizably different to outsiders?<sup>26</sup> These divergent attitudes, in turn, presuppose beliefs about the nature of history and about the degree in which human societies are bound by universal commonalities or truly unlike one another.<sup>27</sup> While such cultural interpretation does not have direct and necessary implications for legal and political judgments, history and reflection suggest affinities between the two modes of judgment: versions of the one tend to keep company with versions of the other.<sup>28</sup>

Two tendencies persisted in the cultural interpretations that members of dominant societies made of subordinate ones throughout the age of empire. Broadly speaking, one was *ironic*, attentive to paradox, inconsistency, and disjuncture. The other was *sirenic*, pressing toward coherence and conciliation of divergent cultures into a single view of the world. Ironists tended to see imperial enterprises as revealing the fatuity and dangerousness of any stark opposition between “civilized” Europeans and “savage” or “barbaric” others.<sup>29</sup> On the one hand, the bare fact of cultural encounter for them highlighted the diversity of human existence and experience, unsettling the easy supposition that their own societies were natural or inevitable.<sup>30</sup> On the other hand, European atrocities in winning and governing empires laid low the idea of European moral superiority: if missionaries and colonial governors were looking for savages and

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<sup>26</sup> For a genuinely pluralist discussion of civilizations, see JOHN GRAY, *TWO FACES OF LIBERALISM* (2000) (arguing for a conception of values as genuinely pluralist, articulated in different, incompatible, and mutually irreducible ways in different civilizations).

<sup>27</sup> The relationship is not perfect, of course. As Jennifer Pitts points out, Adam Smith’s broadly universalist theory of history did not lead him to a reductive or patronizing account of non-European societies as primitive little siblings, partly because both his theory of judgment and his account of the history of Europe emphasized flexibility, context, and contingency, rather than consistent and ineluctable principles. See PITTS, *supra* n.9 at 43 -52 (discussing Smith’s thought in this connection).

<sup>28</sup> Pitts’s account of the loose relationship between theoretical method and imperial politics, *id.*, is somewhat more persuasive than Uday Mehta’s suggestion that the very fact of a universal theory of history and progress tends to generate imperial commitments. See MEHTA, *supra* n. 9 at 23-45 (so suggesting, although with subtle caveats and qualifications characteristic of Mehta’s probing thought).

<sup>29</sup> This is roughly Pitt’s characterization of Smith. See PITTS, *supra* n. 18. In some ways its exemplar is Michel de Montaigne. See MICHEL DE MONTAIGNE, *Cannibals*, in *THE COMPLETE ESSAYS OF MONTAIGNE* 150-59 (Donald M. Frame, ed., Stanford 1995) (1588)

<sup>30</sup> See MONTAIGNE, *id.*; DIDEROT, *id.*



barbarians to improve, suggested Montaigne, Diderot, and (sometimes) Jeremy Bentham, they might begin at home.<sup>31</sup>

By contrast, irenists tended to see cultural encounter as confirming the unity of human experience. Across places and times, human beings pursued the same aims and were answerable to the same moral rules.<sup>32</sup> Differences in societies reflected their different positions along a single continuum of development, from savagery to civilization, or their different degrees of distance from the cultural and spiritual grace of European Christians.<sup>33</sup> Irenists thus tended to see imperial missions as expressions, even duties, of superiority within a coherent human order, to the point of portraying empire as philanthropic self-sacrifice.<sup>34</sup>

Irony and irenism ran together in early American attitudes, partly because of ambivalence as to whether Americans were colonizers or a colonized people. On the one hand, Americans formed a settler colony, systematically displacing an indigenous population.<sup>35</sup> Their complaints against Great Britain prominently included the Crown's constraints on their westward expansion.<sup>36</sup> As late as the War of 1812, British victory portended a buffer nation of Native Americans on the new country's northwest flank – in

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<sup>31</sup> See *id.* For a discussion of Bentham's mistrust of the moral arrogance of imperialism, see PITTS, *supra* n. 9 at 103-07.

<sup>32</sup> See *supra* n. 16 and works cited therein (on the thought of the Mills).

<sup>33</sup> See *id.*

<sup>34</sup> Pitts points out that both James and John Stuart Mill were at pains to establish that British rule in India was a net loss for Great Britain, and thus was properly regarded as a charitable, humanitarian project. See PITTS, *supra* n. 9 at 16.

<sup>35</sup> Indeed, the defendants in *Johnson*, arguing against Native American title, marshaled a set of arguments that had been designed precisely to justify colonial expropriation, specifically the accounts of property and sovereignty developed by Grotius, Locke, and Vattel. See 21 U.S. 543 at \*567-71. On the origins and contemporary uses of this line of argument, which rested on the claim that government originated in private property and thus full sovereignty could not exist in nations that lacked private property – meaning that other property by definition could not be legally symmetrical with European-style regimes – see RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 102-08 (on Grotius), 166-96 (tracing development of this theory from Locke through Vattel) (1999); JAMES TULLY, *AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS* 137-76 (on the use of Lockean thought to abridge aboriginal land claims).

<sup>36</sup> See DECLARATION OF INDEPENDENCE (complaining that King George “has endeavored to prevent the population of these States; for that purpose ... raising the conditions of new Appropriations of Lands” and “endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages”).

the same territory where American writ was contested in *Johnson*.<sup>37</sup> Although they insisted on white, Protestant, settler hegemony over the continent, in face of a British willingness to govern a multicultural empire of commerce, the Americans in these respects were imperialists *par excellence*.<sup>38</sup>

On the other hand, the American Revolution was a colonists' revolt against the arrogance of the world's leading imperial power, and there was considerable impulse to regard the United States not as an extension to perfection of British settler enterprises, but as something new in the world. Alexander Hamilton, no fire-breathing radical but very much a nationalist, proposed as much in *Federalist* No. 11, where he aligned America with Europe's once-prone and now resurgent victims. "Unhappily," he wrote, "Europe ... by force and by fraud, has, in different degrees, extended her dominion over them all. Africa, Asia, and America have successively felt her domination." He continued,

The superiority [Europe] has long maintained, has tempted her to plume herself as the Mistress of the World, and to consider the rest of mankind as created for her benefit. Men admired as profound philosophers have, in direct terms, attributed to her inhabitants a physical superiority; and have gravely asserted that all animals, and with them the human species, degenerate in America – that even dogs cease to bark after having breathed a while in our atmosphere. Facts have too long supported these arrogant pretensions of the European. It belongs to us to vindicate the honor of the human race, and to teach that assuming brother moderation.<sup>39</sup>

This remarkable passage aligns the nascent United States with the victims of imperialism and offers the country as a champion of the world's downtrodden humanity. Hamilton also displays some of the ironic sensibility the great critics of empire, such as Diderot and Montaigne, in his wry evocation of the absurdity of imperial self-confidence. An

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<sup>37</sup> See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 153 (on the alliance of interest in the War of 1812 between the British defense of Canada and the Indian checking of American westward expansion), 161 (noting the British plan to hand over Michigan territory to Indian allies upon defeating American forces).

<sup>38</sup> See *id.*

<sup>39</sup> *THE FEDERALIST* NO. 11 (Hamilton).

imperial nation whose arrogance produces such preposterous empirical mistakes as belief in the unbarking American dog is not so formidable a foe as it may imagine itself, nor can it overawe the American who has seen through its pose.<sup>40</sup> Seeing through the moral and theoretical poses of power is the consummate achievement of the ironic posture toward empire.

Chief Justice Marshall's approach to the interlinked problems of cultural and legal interpretation is a hybrid, occupying an uneasy middle ground between Hamilton's disdain for Europe's imperial arrogance and the emerging political reality of a United States that had become the successor to the European imperial powers.<sup>41</sup> As will emerge in the discussion of Marshall's legal reasoning, he interprets the legal position of the United States as continuous with that of the European colonizers.<sup>42</sup> His language, however, frequently indicates an ironic distaste for imperial presumptuousness, a mockery of the moral self-confidence of imperial apologists.<sup>43</sup> Nonetheless, his reasoning in the end presupposes the irenic view of culture and history that underlay the law of imperialism.<sup>44</sup> Marshall is therefore an ironic irenist, heir to a political tradition of anti-imperial sentiments and a legal tradition of pro-imperial apologetics, which brings in train a hierarchical view of culture and history. These paradoxes lend their shape to the fault lines of a decision that is entirely decisive in content, yet strained and self-questioning in tone.

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<sup>40</sup> It was an essential part of Montaigne's irony that understanding the frailty and foolishness of the great and the common, flawed humanity of all was a great check against the conceits of power. In this respect, his irony served to unsettle self-confidence with the aim of diminishing the motives of unreflective action. See MONTAIGNE, *supra* n. 29.

<sup>41</sup> On the importance of the War of 1812 in consolidating an American political culture committed to westward expansion and the interests of settlers, see WILENTZ, *supra* n. 37 at 175-78.

<sup>42</sup> See Part I.A – I.B, *infra*.

<sup>43</sup> See Part I.B, *infra*.

<sup>44</sup> See Part III, *infra*.

In Part I of this essay, I begin my exposition by examining two puzzles in the reasoning of *Johnson*: Marshall's summary rejection of an argument based on colonial property law in India, and his refusal to apply the customary law obliging conquerors to respects the existing property arrangements of conquered peoples. I also address a third puzzle, the ironic and self-questioning tone of the opinion. My interpretation of the case takes its initial strength from its power to elucidate these puzzles. In Part III, I connect this account with recent scholarship on the history of international law, which has pointed out a critical legal distinction between two classes of political societies: *full* and *imperfect* sovereigns: the powers of imperfect sovereigns might be overridden or supplanted by the acts of full sovereigns to the extent the imperfect sovereigns were unwilling or unable to secure and promote certain essential human interests, which were conceived through a theory of progress. In Part IV, I explain the essential role of property regimes in structuring the legal theory of colonialism: the theory depended on an account of how imperial institutions worked to promote and secure progress; property was the lodestone institution in diagnosing the stage of progress a society occupied and the level that enabled the full sovereign to direct the subordinate society toward higher stages. In Part V, I return to *Johnson v. M'Intosh* in light of this analysis. Part VI concludes.

It is worth saying upfront that in the following exposition I present arguments based on alleged hierarchies among cultures and peoples with deliberate credulity. I am interested in reconstructing these arguments as faithfully as possible and understanding how they structured ideas about the legitimacy of colonialism and the role of property regimes in civilizational progress. I have decided not to insert constant signals of my skepticism or hostility toward certain premises and implications of the view I am treating, for fear that such constant disowning can become a rhetorical tic and impediment to clear

writing. I trust readers will not mistake me for an apologist for the ethnocentric, often crudely teleological, and implicitly or explicitly racist dimensions of the body of thought whose shape and significance I am trying to understand.

## I. Two Puzzles and Some Irony

*Johnson v. M'Intosh* has received considerable scholarly scrutiny, none of it entirely satisfactory. On one view, *Johnson* is an acquiescence to power, in which the courts and the law of property serve as instruments of colonial expropriation. From this perspective, the case teaches the general lesson that law serves power, and some specific lessons as the terms on which that service has been provided in the law of property and Native American rights.<sup>45</sup> On a second view, *Johnson* is an uncomfortable – indeed, an untenably fraught – shotgun marriage of law and power, the latter crystallized in colonial expropriation and ethnic cleansing.<sup>46</sup> A third approach to the case treats it very much as

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<sup>45</sup> Thus Joseph Singer treats *Johnson* as evidence that “both property rights and political power in the United States are associated with a system of racial caste” and that “property rights in land cannot, for the most part, be traced to a system of individual merit and reward,” but rather reflect the use of state power on behalf of favored groups. See Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 5 (1991). Singer proceeds to argue that *Johnson* proves, “The historical basis of original acquisition of property in the United States is not individual possession in the state of nature, with government stepping in only to protect property rights justly acquired. Rather, it is redistribution by the government from those who were thought not to need the property or to be misusing it to those who were thought to need it.” *Id.* at 51. See also Liam Seamus O’Melinn, *The Imperial Origins of Federal Indian Law: The Ideology of Colonization in Britain, Ireland, and America*, 31 ARIZ. ST. L.J. 1207, 1270 (terming the “principles” of *Johnson* “the intellectual product of a centuries-old vision [of] a simple native, thought to be in need of imperial instruction, and possessed of valuable commodities to exchange for the blessings of civilization”).

<sup>46</sup> Philip Frickey has argued that “*Johnson* seemed to establish a rigid dichotomy between power and law. Colonialism, *Johnson* seemed to say, raises almost exclusively nonjusticiable, normative questions beyond judicial authority” – the questions Marshall classed with “natural right and the uses of civilized nations.” Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 389 (1993). On Frickey’s reading of the opinion, “[c]olonialism was ... prior to, and the antithesis of, constitutionalism, which involves justiciable, legal questions about judicially enforceable limits on governmental action[.]” *Id.* at 389. Frickey’s view that *Johnson* established “a rigid dichotomy” appears to reflect not only Marshall’s seeming refusal to give legal effect to “natural rights and the uses of civilized nations,” but also Frickey’s supposition that if the law endorses colonialism, it must in that measure be lawless. As he puts it, “In a country that prides itself on following the rule of law, the justifications for colonization uttered by those European explorers and recognized by the Supreme Court itself – to impose Christianity upon the heathen, to make more productive use of natural resources, and so on – do not go down easily the late-twentieth century.” *Id.* at 383. Frickey

law, specifically an application of the customary law of relations between European colonial governments and Native American tribes in the first two-plus centuries of North American colonization.<sup>47</sup>

Appreciating that *Johnson* is a case in imperial jurisprudence recasts the case in a way that partly contradicts each of the competing views. On this interpretation, the portions of Marshall's opinion conventionally regarded as anomalous, embarrassing, or lawless are in fact applications of the logic of essential legal concepts of the time – albeit not principles that Marshall was willing expressly to endorse *as law*. The customary principle that the European sovereign has the exclusive power to alienate native lands and thus extinguish native property claims – the principle on which Marshall and Kades rely – is nested within a higher-order principle of customary international law: a principle distinguishing between (at least) two types of sovereigns – full sovereigns whose rights and powers are commensurate with those of European governments, and imperfect sovereigns whose prerogative sometimes must yield to the decisions and incursions of full sovereigns. The consequence of this principle was to produce two bodies of international law: one governing relations among full sovereigns, the other governing

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proceeds to argue that in later decisions concerning the relationship of Native American tribes to the United States government, Marshall developed the basic terms of a body of federal Indian law that mediated between constitutionalism and colonialism in much more supple and less quiescent ways than he sees *Johnson* as doing.

<sup>47</sup> The exemplar of this approach is Eric Kades, who treats *Johnson* as an exercise in doctrinal reasoning, albeit doctrine for which much of the relevant precedent is the practice of sovereigns. Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 LAW & HIST. REV. 67 (2001). Kades's account, much of which is a subtle and richly informed narrative of the land speculation and legal maneuvering that brought the case to the Supreme Court more than fifty years after the first purported sale of the parcel in dispute, is an apt and precise interpretation of the several pages of the opinion in which Marshall labors to show that no European or settler sovereign has ever acted in North America on any principle other than the one on which he decides the case: the *rule of discovery*, that the colonial sovereign has the exclusive power to dispose of Native lands. This quasi-doctrinal approach, however, may too readily domesticate *Johnson*, an opinion that continues to fascinate in no small part because of its strangeness: Marshall's embrace of a legal conclusion he apparently concedes to be deeply unjust, the half-disowned apologetics of his dicta, and the unclear relationship between the legal conclusion and the historical narrative of the long aside.

relations between full sovereigns and imperfect sovereigns. *Johnson* applies the logic of the second body of law, and many of its otherwise puzzling or ambiguous elements become clear when read in light of that logic.<sup>48</sup>

Having laid the groundwork for the discussion, I now move to an internal perspective. My argument here is that the interpretation of *Johnson* as an exercise in imperial jurisprudence is not simply an imposition on the case of some similar (or even homologous) political thought of the same period. Rather, the interpretation emerges from within the case, helping to sort out two doctrinal puzzles and make sense of a question of judicial voice and intent: Justice Marshall's heavy irony toward the presuppositions of his own reasoning.

#### A. Two Puzzles

##### 1. *Indian land transfers and Indian land transfers, distinguished*

The first puzzle is Justice Marshall's summary rejection of a precedential argument by the party contending for the validity of Indian land transfers. The litigants invoked the 1757 opinion of Great Britain's Attorney General and Solicitor General,

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<sup>48</sup> This reinterpretation has consequences internal to the debate over the meaning of *Johnson*. It also has significance for understanding the relationship between the law of that time and our own. In the interpretation of *Johnson*, it stands in contrast to Frickey's account in treating colonialism not as the antithesis of law, but as itself an integrally legal episode – albeit, as noted, one whose principles had an ambiguous place in American law. The principle distinguishing full sovereigns from imperfect sovereigns is fact *the* keystone of the law of colonialism. By identifying the principles of colonial law operating in Marshall's reasoning, my interpretation adds to Kades's by contending that *Johnson* reflects broader and more diverse sources than Kades identifies.

The significance of my interpretation for Singer's account is somewhat more complicated. The nub of Singer's view is that *Johnson's* grounds contradict today's conventional conception of property law: rather than meritorious acquisition, the case rests property rights on racial caste and aggressive state redistribution. He argues that these facts should reorient our contemporary conceptions of property in favor of both critical debunking of such justificatory claims and an egalitarian embrace of redistribution. My argument is that a distinct body of legal principles, and not just bigotry and power, informed the reasoning Singer condemns; it is not that these principles were much purer than he supposes: they were in fact both racist in certain of their presuppositions and strikingly committed to a purposive and sometimes redistributive conception of property. In this respect, my characterization of the case is akin to Singer's, at least descriptively, but more nearly internal to the legal thought of the time. I discuss at the end the variety of implications that my interpretation might be taken have.

Charles Pratt and Charles Yorke (later Lords Camden and Marsden, respectively) on the validity of private purchases of land from sovereigns in the Indian subcontinent. The opinion, written to guide the Privy Council in responding to a petition for guidance filed by the East India Company,<sup>49</sup> read as follows:

As to the latter part of the prayer of the petition relative to the holding or retaining Fortresses or Districts already acquired or to be acquired by Treaty, Grant, or Conquest, We beg leave to point out some distinctions upon it. In respect to such Places as have been or shall be acquired by treaty or Grant from the Mogul or any of the Indian Princes or Governments Your Majestys Letters Patent are not necessary, the property of the soil vesting in the Company by Indian Grants subject only to your Majestys right of Sovereignty [sic] over the Settlements as English Subjects who carry with them your Majestys Laws wherever they form Colonies and receive your Majestys protection by virtue of your Royal Charters. In respect to such places as have lately been acquired or shall hereafter be acquired by Conquest the property as well as the Dominion vests in your Majesty by virtue of your known Prerogative & consequently the Company can only derive a right to them through your Majestys Grants.<sup>50</sup>

It is known that a redacted version of the opinion was in circulation in North America by 1773, without language making clear its concern with subcontinental India, specifically omitting reference to “Moguls” and “Fortresses or Districts.”<sup>51</sup>

According to Chief Justice Marshall’s opinion, the version of the Yorke-Camden Opinion submitted by the plaintiffs in *Johnson* was contained in a pamphlet entitled *Plain Facts*, which Marshall characterized as “written for the purpose of asserting the Indian title[.]”<sup>52</sup> So far as the version submitted to the Supreme Court is memorialized, it

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<sup>49</sup> See Jack M. Sosin, *The Yorke-Camden Opinion and American Land Speculators*, 85 PENN. MAGAZINE OF HIST. & BIOGRAPHY 38 (1961).

<sup>50</sup> See *id.* at 38-39.

<sup>51</sup> The full text of the redacted version read as follows:

In respect to such places as have been or shall be acquired by Treaty or Grant from any of the Indian Princes or Governments; Your Majesty’s Letters Patents are not necessary, the property of the soil vesting in the Grantees by the Indian Grants; Subject only to your Majesty’s Right of Sovereignty over the Settlements as English Settlements and over the Inhabitants as English Subjects who carry with them your Majesty’s Laws wherever they form Colonys and receive your Majesty’s Protection by Virtue of your Royal Charters.

See *id.* at 39.

<sup>52</sup> 21 U.S. 543 at 599.



appears to be the redacted version traceable to 1773, referring to land “acquired . . . from any of the Indian princes or governments,” and omitting any reference to “the Mogul.”<sup>53</sup>

Marshall’s response to the Yorke-Camden Opinion is to distinguish it based on the specific question to which it was addressed. Observing that *Plain Facts* acknowledges the opinion’s concern with the East Indies, Marshall flatly states, “It is, of course, entirely inapplicable to purchases made in America.”<sup>54</sup> Why, though, should a statement of English law, in part concerned with the universal applicability of that same law (to “Subjects who carry with them your Majesty’s Laws wherever they form Colonies”) be “of course, entirely inapplicable”? In each case, the question is whether purchases by English private parties from non-European sovereigns are valid without a grant from the Crown. Why is it obvious that the answer to this question, posed as to India, can have no bearing on the question when it is posed as to North America?

In bolstering his assertion that the Yorke-Camden Opinion must be irrelevant, Marshall makes two points. First, the terms “‘princes or governments’ are usually applied to the East Indians but not to those of North America. We speak of their sachems, their warriors, their chiefmen, their nations or tribes, not of their ‘princes or governments.’”<sup>55</sup> This is a peculiar point, because the parsing of terms is superfluous as evidence of the geographic scope of the Yorke-Camden Opinion, which, as Marshall has already observed, concededly address East Indian purchases.<sup>56</sup> What the point rather

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<sup>53</sup> Marshall quotes the following language: “In respect to such places as have been, or shall be acquired, by treaty or grant, from any of the Indian princes or governments, your majesty’s letters patent are not necessary.” *Id.* at 599-600.

<sup>54</sup> *Id.* at 599.

<sup>55</sup> *Id.* at 600.

<sup>56</sup> Marshall’s other basis of distinction seems based on a willful misreading of the Yorke-Camden Opinion. He writes, “The question on which the opinion was given . . . and to which it relates, was, whether the king’s subjects carry with them the common law wherever they form settlements. The opinion is given with a view to this point[.]” *Id.* at 600. So far as I can tell, any only fair reading of either version of the Yorke-Camden Opinion must recognize the reference to the geographically unlimited jurisdiction of

does is to call attention to the differences in the forms of sovereignty prevailing respectively in North America and India: “princes and governments” are terms characteristically applied to European sovereigns as well as those of India: the terms Marshall imputes to Native Americans suggest less institutionally sophisticated forms of sovereignty, defined by holy men (“sachems”), military leaders (“warriors”), “chiefs,” and ethnic or language groups (“nations or tribes”).<sup>57</sup>

## 2. Customary international law and customary international law, distinguished

I will suggest that this distinction tracks that between perfect and imperfect sovereigns, gets at the same underlying contrasts, and essentially informs Marshall’s reasoning in *Johnson*. The best way to approach this issue, however, is through the second puzzle in the opinion : Marshall’s reasoning in ruling that the customary international law governing relations between conquering and conquered nations did not apply in North America. As Marshall explains it, “[t]hat law which regulates and ought to regulate in general, the relations between the conqueror and the conquered”<sup>58</sup> is “a

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English law over the King’s subjects as a proviso to its primary conclusion that private parties may make valid purchases from foreign sovereigns without a grant from the King.

<sup>57</sup> “Nation” is clearly the outlier. The Oxford English Dictionary notes that the term applies both to an “aggregate of communities and individuals united by factors such as common descent, language, culture, history, or occupation of the same territory, so as to form a distinct people” and “such a people forming a political state” or simply “a political state.” The OED further notes, “In early examples notions of race and common descent predominate. In later uses notions of territory, political unity, and independence are more prominent.” The examples given refer to “nation” in the sense of *peoples* consistently through 1852 (a citation to Tennyson’s “mourning of a might nation”). By association with Marshall’s other terms, his “nation” is drawn in the direction of “people” or “tribe.” Ironically, just two pages later Marshall refers to “grants from the native princes” in quoting from a letter describing the acquisition of land in Narragansett country, “in New-England.” *Id.* at 602. A piece of contemporary evidence comes from an 1828 opinion of the Missouri Supreme Court dealing with enslavement of Indians:

In America, the word *nation* is not of the same import as in other parts of the globe: here it is applied to small societies or independent tribes or communities, who subsist by hunting over a vast extent of territory; whose ideas of property are limited to the game they catch or kill: amongst whom there is no distinction but what arises from personal qualities, being without government authority, subordination or prescribed duties – whose actions flow from the impulse of their own feelings or passions uncontrolled, unpunished.

Marguerite v. Chouteau, 2 Mo. 71, 1828 WL 2322 at \*12 (emphasis added).

<sup>58</sup> *Johnson*, *supra* n.1 at 591.

general rule” which “[h]umanity ... acting on public opinion, has established.”<sup>59</sup> In broad formulation, this law forbids inhumane or oppressive treatment of conquered peoples.<sup>60</sup> More specifically, it directs “that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.”<sup>61</sup>

The first thing to note about this “law” or “general rule” is that, as a legal principle, it appears to stand on all fours with the rule of discovery that controls the result in *Johnson*: both are principles of customary international law.<sup>62</sup> The rule of discovery, too, was “a principle” which the European powers recognized as “necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish ... which all should acknowledge as the law by which the right of acquisition ... should be regulated as between themselves.”<sup>63</sup> Marshall’s evidence for the status of the rule of discovery is not any express adoption of it by Europe’s sovereigns – it is not treaty law – but rather the fact that the countries of Europe have in practice abided by it.<sup>64</sup>

It is around the refusal to apply this principle to Native America possessory custom – the refusal to recognize local possessory custom as constituting a property right

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<sup>59</sup> *Id.* at 589.

<sup>60</sup> “[T]he conquered shall not be wantonly oppressed, and ... their condition shall remain as eligible as is compatible with the objects of the conquest.” *Id.* What degree of “eligibility” was compatible with the objects of European colonization in North America is a question I shall shortly reach.

<sup>61</sup> *Id.*

<sup>62</sup> Writing in 1826, James Kent designated three sources of international law, custom among them:

The law of nations is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of all individuals in a state of natural equality and to the relations and conduct of nations; *of a collection of usages and customs, the growth of civilization and commerce*; and of a code of conventional or positive law.

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*3 (14<sup>th</sup> ed. 1889) (1826).

<sup>63</sup> *Id.* at 573.

<sup>64</sup> Marshall concludes after a several-page survey of the history of European acquisition and conflict in North America, “Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.” *Id.* at 584.

due respect under the law of conquest – that Marshall seems to express the most pronounced ambivalence about his reasoning and its result. The “restriction” on Native American rights “may be opposed to natural right and to the usages of civilized nations”;<sup>65</sup> it is not derived from “those principles of abstract justice ... which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged.”<sup>66</sup> The restriction instead subordinates the principle that conquerors must respect the property rights of the conquered to the principle of discovery, “that great and broad rule by which its civilized inhabitants now hold this country.”<sup>67</sup> Why does the latter principle carry the day? Is it only a matter of the constraint placed on the courts by the rough facts of expropriation and settlement – the legacy of *machtpolitik*? Or is it more?

#### B. Some Irony

Whether it is these puzzles or something more basic that is bothering him, Justice Marshall does not write in *Johnson* like a man entirely satisfied with the reasoning he is constrained to apply. His rather heavy irony suggests a suspicion that his decision is rendered in the final act of an historic tragedy, one whose protagonists are obtuse in rough proportion to their culpability. His Europeans are the self-satisfied land-grabbers of Diderot’s and Montaigne’s attacks; their land-grabs form the source of governing law for Marshall’s opinion. He hints at a similarly grim view of the United States law that he applies: it is unquestionably the positive law of a sovereign that has followed the European powers in claiming North America. That sovereign, moreover, generates the law under which Marshall is a justice and his reasoning a judgment; to depart too far

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<sup>65</sup> *Id.* at 591.

<sup>66</sup> *Id.* at 572.

<sup>67</sup> *Id.* at 587.

from it would be inconsistent with being a judge of the United States: without his sovereign, a judge is only an opinionated man in a black robe. Nonetheless, Marshall relentlessly implies, the law that inevitably guides his opinion is not just.

Thus, describing the European encounter with North America, Marshall reports, the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.<sup>68</sup>

An “apology” is somewhere between a justification and an excuse: it seeks to vindicate or redeem something that needs it; but the word carries a hint of suspicion, starting with the fact that the redemption is so badly needed. The account of European “potentates[’]” reasoning is deliberately removed, giving an unmistakably arch tone to the description: Marshall tells us not that they reasoned convincingly, not that they discovered true principles, but that, in the notoriously disreputable and opportunistic position of being judges in their own cases, they “found no difficulty in convincing themselves” of the justice of conquest and expropriation. This is the weakest endorsement Marshall could possibly have given, if it is an endorsement at all.<sup>69</sup>

The same tone appears when Marshall describes the European colonizers’ options upon realizing (as he asserts they did) that they could neither assimilate Native Americans nor co-exist with them “as a distinct people,” as otherwise applicable customary law would have required them to do.<sup>70</sup> This pair of impossibilities put the Europeans “under the necessity either of abandoning the country, and relinquishing their

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<sup>68</sup> *Id.* at 573

<sup>69</sup> Moreover, “potentates” is just about the least complimentary term for rulers, short of an insult: it designates power, not legitimacy or authority, and it carries hints of sumptuous despotism.

<sup>70</sup> *Johnson v. M’Intosh*, supra n. 1 at 589

pompous claims to it, or of enforcing those claims by the sword[.]”<sup>71</sup> Marshall has already told us that claims originated in a self-interested attempt to escape the traditional bounds of customary international law: at this juncture his insertion of the modifier “pompous” reminds the reader that although these claims have the form and force of law, their origins are in self-serving opportunism.

Yet no indecent origin can disestablish these principles as the law Marshall must apply in *Johnson*. It is no surprise, then, that even as he applies the law he will endorse only with the weak suggestion that “it ... may, perhaps, be supported by reason” despite “[h]owever [much] it may be opposed to natural right”<sup>72</sup> and “however extravagant the pretension” on which it rests.<sup>73</sup> What gives force to a principle with such dubious origins is its status in the United States legal system and way of life: it may win rational assent “if it be indispensable to that system under which the country has been settled[.]”<sup>74</sup> In discussing the categorical power of basic social and historical facts, Marshall is careful to counterpose it to the demands of conscience: “Conquest gives a title which the Courts of the conqueror cannot deny, *whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.*”<sup>75</sup> I do not think it is overreading to take this passage as a broad hint that the “private and speculative opinions” are Marshall’s, and he does not personally partake of the legally inescapable conclusion that the claims of expropriation are just.

Yet to rule otherwise, according to abstract considerations of justice, would have meant ceasing to be an organ of the American legal system, which rested both the coherence of its property system and its government’s ultimate claim to sovereignty on

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 591

<sup>73</sup> *Id.* at 591-92

<sup>74</sup> *Id.* at 91-92

<sup>75</sup> *Id.* at 588

those same assertions that European expropriation was legally effective. In the very act of denying that expropriation were legally effective, Marshall would have stepped outside the language-game of a federal judge of the United States. His irony was thus an expression of conscience and independent judgment that was as necessarily impotent as the governing law he inherited was necessarily authoritative.

Yet there is irony within the irony, for Marshall is not simply asserting the traditional ironist's prerogative of maintaining independent judgment in a world full of corruption and compromise.<sup>76</sup> Rather, his expressions of ambivalence come along with a capsule history of North America that is not ironic critique, but pragmatic justification of Euro-American policy.<sup>77</sup> Marshall puts this history outside both the "extravagant" principles of conquest and the "speculative" principles of "natural right." Even as he notes that "we do not mean to engage in the defence of those principles which Europeans have applied to Indian title" – only their application – "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."<sup>78</sup> What does *that* mean, and how is it different from the "pompous claims" and cruel logic which Europe's potentates had no difficulty convincing themselves to accept? Marshall proposes here to move into the realm of what I earlier called "cultural interpretation," and to find some partial resolution there of the paradoxes and ironies that dog his reasoning.

In the next three sections, I argue that both the purely doctrinal puzzles of the opinion and its irony-within-irony manner make sense only in light of its ambivalently

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<sup>76</sup> Montaigne, for instance, concludes *Of cannibals*, a wending and often gripping discussion of the way that judging others "barbarians" obscures both their human traits and our own barbarous qualities, with a despairing suggestion that all his efforts will fall on deaf ears. Having made a case for Native Americans' humaneness and sense of morality and decried Spanish abuses of conquered peoples, he ends with, "[W]hat's the use? They [the Indians] don't wear breeches." *Supra* n. 29 at 159.

<sup>77</sup> I discuss this history and its significance to the case in Part IV, below.

<sup>78</sup> *Johnson v. M'Intosh*, *supra* n. 1 at 589

felt but absolutely essential debt to the law and background cultural and historical interpretation of imperial jurisprudence.

## II. Two Domains of International Law

Each of the passages I have discussed as sources of puzzles in *Johnson* makes critical use of the term *civilized*. It is natural, reading today, to pass over the word in embarrassed silence, as an anachronistic gesture of self-congratulation. If it is that, however, I want to suggest that in its context it is also a legally significant term with meaning for interpretation of the case. The effect of Marshall's usage is (1) to distinguish between civilized nations, "whose perfect independence is acknowledged," and others that have achieved neither civilization nor the corresponding status of "perfect independence" in relations among nations; and (2) correspondingly, to distinguish between two spheres of principle: those that govern relations *among civilized nations* and, by implication, those that govern relations *between civilized and uncivilized nations*. Thus, to say that a principle governs "the rights of civilized nations" or "the usages of civilized nations" does not imply that the same principle presumptively governs colonial relations, and thus that deviation from it is deviation into sheer pragmatism (in the pejorative sense of that word) or power politics. Rather, it specifies the domain of relations that the principle governs and, conversely, the domain where it is inapplicable.

This interpretation draws on the recent work in legal history of Edward Keene.<sup>79</sup> Keene puts his thesis lucidly enough that quoting it at length is efficient. Describing the governing concepts of international law in the late eighteenth and early nineteenth centuries, Keene contends as follows.

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<sup>79</sup> KEENE, *supra* n. 9.



Within Europe, the leading purpose of international order was to promote peaceful co-existence in a multicultural world through the *toleration* of other political systems, cultures and ways of life. Its basic principle of respecting dynastic rulers' rights to govern their domestic possessions in their own way, which gradually changed into the principle that each nation had a right to self-determination, was rooted in the beliefs that different cultures were equally valuable and should be given space to flourish; and that the best way to ensure peace in the society of states was to encourage its members to eschew violence for religious, cultural, or ideological reasons. Beyond Europe, however, international order was dedicated to a quite different purpose: the promotion of *civilization*. Simply put, Europeans and Americans believed that they knew how other governments should be organized, and actively worked to restructure societies that they regarded as uncivilized so as to encourage economic progress and stamp out the barbarism, corruption, despotism and incompetence that they believed to be characteristic of most indigenous regimes. Especially in North America, this was also connected with the idea that the whole continent was an uncultivated wilderness, which needed to be civilized through the establishment of properly ordered settlements[.]<sup>80</sup>

This formulation combines two normative domains which, I have been arguing, were essentially intertwined in the law of imperialism. One comprises legal interpretation principles governing relations among sovereigns, the other cultural and historical interpretation of the divergent societies: how they came to be as they are, and what normative significance their variety implies. On Keene's account, the central difference between the two domains of international law was that "civilized" countries counted as fully independent sovereigns (in Marshall's words, their "perfect independence is recognized"), while the governments of uncivilized peoples enjoyed imperfect sovereignty. Their sovereign powers were conditional on principles of civilization, which could be freely enforced by civilized sovereigns. As Keene puts it,

the independence of indigenous 'semi-sovereign' rulers was constrained by imperial and moral considerations. Their sovereignty was acknowledged, but

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<sup>80</sup> *Id.* at 98-99 (emphasis original). Keene later reports that "[a] consistent theme in textbooks on international law from the middle of the nineteenth century on was the distinction between the family of civilized nations, which was seen as roughly synonymous with the society of states who had achieved recognition as fully independent sovereigns, and the uncivilized world beyond, of territories and peoples that had not yet achieved such recognition." *Id.* at 114.

they were placed under an obligation to obey the paramount [civilized] power in matters of strategic and military concern. *They were also vulnerable to interventions by the imperial power in order to check the dangers of mis-government that, in European eyes, arose from placing political authority in the hands of uncivilized rulers.*<sup>81</sup>

The powers of imperfect sovereigns are thus constrained by their *competence* to secure and advance a concept of civilization specified by cultural and historical interpretation. They may lack competence either materially – in the institutional complexity necessary to engage in certain high-level tasks of governance – or as a matter of *character* – individual or, more likely on the older accounts, collective or cultural – the motive or belief necessary to make and maintain appropriate judgments regarding interest and principle.

This view, as Keene expresses it, had scant *explicit* jurisprudential purchase in the United States at the time of *Johnson v. M’Intosh*. Writing three years later, James Kent asserted the absolute equality of nations and the principle of non-interference as the bases of international law.<sup>82</sup> Kent nonetheless recited and defended the discovery doctrine in his account of *Johnson v. M’Intosh*, contending that in “the necessity of the case ... [t]he peculiar character and habits of the Indian nations rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage.”<sup>83</sup> He continued, “There was no other way of dealing with them than that of keeping them separate, subordinate, and dependent, with a guardian care thrown around them for their protection ... Indian title was subordinate to the absolute, ultimate title of the government of the European colonists.”<sup>84</sup> All this, and the characterization of Native Americans as

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<sup>81</sup> *Id.* at 93-94 (emphasis added).

<sup>82</sup> 1 KENT, COMMENTARIES at \*21-22.

<sup>83</sup> 3 KENT, COMMENTARIES ON AMERICAN LAW \*381 82 (13<sup>TH</sup> ed. 1884).

<sup>84</sup> *Id.* at \*381.

“domestic, dependent nations,” relating to the United States as “a ward to his guardian,”<sup>85</sup> was despite Kent’s premise that “as far Indian nations had formed themselves into regular organized governments within reasonable and definite limits necessary for the hunter state, there would seem [to have been] no ground to deny the absolute nature of their territorial and political rights.”<sup>86</sup> In other words, American jurisprudence in this period was much more wary than European thinking was about the authorizing power of “civilization.” It did acknowledge and carry out the logic of the two domains of international relations; it did not give the second, colonial body of law nominally equal status. The effect of this ambivalence – this hostility to the very logic to which American law was simultaneously capitulating – includes the “puzzles” of Marshall’s opinion in *Johnson*, his reservations about the status of his own reasoning. Therefore, in the American setting, I am arguing not that the domain of law governing colonial relations was expressly acknowledged as law, but that its *logi* deeply shaped legal reasoning.

What is that logic? To make sense of the superior authority of the civilized sovereign, the element of cultural interpretation in any theory of divided and hierarchical sovereignty should have at least three elements. First, it requires some account of the interests or rights advanced and secured by “civilization,” in order to identify circumstances in which civilization’s defense may justify overriding or supplanting an imperfect sovereign. For instance, this account may specify certain rights whose violation by an imperfect sovereign is a *per se* justification of intervention to the extent necessary to vindicate those rights. This was the primary strategy of the Dominican jurist Vitoria in his (mostly critical) survey of possible justifications for Spanish claims to the

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<sup>85</sup> *Id.* at \*382.

<sup>86</sup> *Id.* at \*386.

Americas.<sup>87</sup> In his account of the legitimacy of British imperial rule in India, John Stuart Mill took a more consequentialist view, concentrating on the idea that all persons everywhere have interests in the progressive development of voluntary institutions and freedom-loving personalities, which, when some peoples are trapped in culturally stagnant despotisms, may be advanced only by the intervention and reform of imperial government.<sup>88</sup> I shall be concentrating on this second type of argument because it is the one most pertinent to the episode of legal history I am exploring, and especially to making sense of *Johnson v. M'Intosh*.

Second, such an account must give some diagnosis of the failure of the imperfect sovereign to secure or promote the interests or rights at stake. This will, of course, be a more robust account when interests of the sort Mill contends for are at stake than in the case of a simple violation of inviolable rights. In such an argument, there must be some account of *how* the imperfect sovereign has failed to promote or secure the interests of its population. Otherwise identifying the specific dimension of sovereignty in which it has shown itself incompetent and in which it may be overridden is to pursue an obscure and elusive quarry.

Third, an account of the prerogative of civilized sovereigns should describe how they can vindicate authoritative rights or interests by assuming certain powers of imperfect sovereigns. Otherwise, the superior sovereign can only identify failures in the imperfect sovereign; it cannot say – or know how to do – what would vindicate the interests the imperfect sovereign has neglected or betrayed. Such an interpretive scheme,

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<sup>87</sup> See FRANCISCO DE VITORIA, POLITICAL WRITINGS 273-85 (ed. Anthony Pagden and Jeremy Lawrance) (1991). See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 217-234 (Everyman, Geraint Williams, ed., 1993) (1861).

<sup>88</sup> Mill, for instance, characterized India's peoples as "unfitted for representative government by ... extreme passiveness and ready submission to tyranny." JOHN STUART MILL, CONSIDERATIONS at 238.

giving an account of culture and history that founds a legal theory of relations among distinct types of sovereigns, is what eighteenth- and nineteenth century imperial thought produced. Just Marshall's opinion expresses the logic of that theory.

In the next section of this essay, I make a pair of arguments. First, I claim that theories about property regimes and their implications for the character of government and social orders were central to making operational the distinction between civilized and imperfect sovereigns. I pursue this point by two routes: first, through the general view of property as a key to progress in eighteenth and nineteenth century legal thought, notably that of William Blackstone and Adam Smith; and, second, through a discussion of the use to which the British put property reform in their "progressive" governance of India – specifically in the 1793 reforms of property rights in the Indian states of Bengal, Bihar, and Orissa.

### **III. Property in the Law of Colonialism**

#### *A. Property in the Eighteenth-Century Account of Progress and Governance*

The three desiderata I have just outlined amount to a theory of progress: what counts as progress, why progress fails to occur in some settings, and what can be done to spur it. At least one such theory operated in the theory and law of colonialism during the period of *Johnson*. An account of property gave institutional specificity to that theory: it was the key to the interaction of the legal dimension of the theory and its broader, cultural and historical dimensions.

The backdrop of the account was a development in European historiography, occasioned both by increasing systematic study of the past and by the experience of imperialism, which brought the diversity of human societies irresistibly to European

attention. Eighteenth-century historians proposed a homology between the historical diversity of societies across time and the geographic diversity of societies across space – in effect a single grammar uniting two fields of human variety. On this theory, the European historical experience – rendered in a highly stylized way – formed a master template of societal evolution, describing a passage from a hunter-gatherer existence through a nomadic herding economy to settled agriculture, culminating in the complex institutions of commercial society. Other contemporary societies were assumed to fall into the stylized categories of earlier European experience, so that they could be classified by their place on the civilizational timeline that Europe had defined.<sup>89</sup> Thus William Blackstone, in his introductory discussion of the law of property, illustrated the hunter-gatherer stage by reference to “the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times.”<sup>90</sup> He similarly explained that the basic principle of real property for the stage of nomadic herder societies, the right to move one’s stock onto unoccupied land, “is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages.”<sup>91</sup> This practice, “Tacitus informs us continued

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<sup>89</sup> **Some time on the EB on civilization; some materials on this historiographic development from the Cambridge historians.**

<sup>90</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*3.

<sup>91</sup> 2 BLACKSTONE, COMMENTARIES at \*6.

among the Germans till the decline of the Roman Empire.”<sup>92</sup> From this perspective, then, the present lives of non-European societies were way-stations along the history of Europe.

Adam Smith maintained,

[T]he laws of [occupation] ... vary according to the periods of human society. The four states of society are hunting, pasturage, farming, and commerce... The age of commerce generally succeeds that of agriculture. As men could now confine themselves to one species of labour, they would naturally exchange the surplus of their own commodity for that of another of which they stood in need. According to these stages occupation must vary... Among savages property begins and ends with possession, and they scarce seem to have any idea of any thing as their own which is not about their own bodies. Among shepherds the idea of property is further extended... When it first became necessary to cultivate the earth, no person had in property in it, and the little plot which was dressed near their hovels would be common to the whole village, and the fruits would be equally divided among the individuals... Private property in land never begins till a division be made from common agreement, which is generally when cities begin to be built... An Arab or a Tartar will drive his flocks over an immense country without supposing a single grain of sand in it his own.<sup>93</sup>

The law of property formed the institutional keystone of this theory of history. Property rights were the exemplary indicators of a stage of civilization, corresponding in fairly neat ways to the sequential modes of social order and productive activity: in the earliest stage, a right of exclusive use only in one’s personal possessions – those things one had appropriated or made – and a general, non-exclusive right of occupation and use of all other resources; in the herding stage, signally, a strong *collective* right of exclusive use in herding grounds, coupled with a right to expropriate unoccupied land for one’s own herds; for the first time, with the advent of settled agriculture, the classical private ownership of Blackacre; and with commercial society, the liberalization of land markets and the commodification of labor as an alienable resource, accompanied by increasingly voluntary economic relations mediated by contract and bounded by the right of exit.

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<sup>92</sup> *Id.*

<sup>93</sup> ADAM SMITH, LECTURES ON JURISPRUDENCE 459-60 (R.L. Meek et al. ed.) (Oxford University Press ed. 1978) (1762-63).

Property regimes were not, however, only diagnostic in their significance: they also provided an Archimedean lever by which reformers could induce change from one level of civilization to another. By breaking the grip on power of elites wedded to old regimes and re-ordering incentives to induce dynamic efficiency, it was possible to move an entire society forward in history – that is, along the civilizational timeline marked out by Europe’s historical experience.

The significance of this fact for the law of relations between civilized and imperfect sovereigns was to identify at once the anti-progressive features of existing social systems and the shape of the reforms that would overcome those barriers to progress. In doing this, the theory of property picked out areas in which imperfect sovereigns were incompetent to secure the interests of their populations and directed civilized sovereigns in overriding or assuming the sovereign powers of their imperfect counterparts. In its diagnostic role, property theory also made coherent a hierarchy of imperfect sovereigns by identifying key legal features of each stage of civilization. Of course the diagnostic and normative functions were basically linked. The “earlier” the stage, the farther the imperfect sovereign fell from “perfect independence” and the greater was the prerogative of the relevant civilized sovereign.

#### *B. Property in East India: The Context of the Yorke-Camden Opinion*

I earlier raised the “puzzle” of why Chief Justice Marshall so readily set aside the Yorke-Camden opinion: what exactly did it mean to “distinguish” land purchases from East Indian sovereigns from land purchases from Native American peoples? It would have to mean that East Indian governments occupied a different tier in the hierarchy of imperfect sovereigns from that of North American peoples, such that the power of



disposing of property remained substantially in the hands of East India's governments even as it fell out of the hands of North American sovereigns. I believe this distinction has essentially to do with the property regimes of the respective imperfect sovereigns. I develop this argument, first, through an inspection of the Anglo-American attitude toward each regime.

There is a thin but helpful literature on the British view of property law in the Indian colonies. While I trace some of that literature through footnotes, I concentrate on an exemplary discussion of the issue by Lord Cornwallis, Governor-General of India from 1786 until 1793 (and again from 1805 to his death at Ghazipur, near Varanasi (Benares). Cornwallis's papers on Indian property regimes<sup>94</sup> during his first governorship were among the formative contributions to the British policy of Permanent Settlement, by which India's British overseers sought to turn a feudal tax-based regime inherited from the decrepit Moghul empire<sup>95</sup> into the foundations of a modern, fee-simple system of property rights.<sup>96</sup> The regime the British found on arrival was one in which

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<sup>94</sup> See 2 LORD CORNWALLIS, SELECTIONS FROM THE STATE PAPERS OF THE GOVERNORS-GENERAL OF INDIA 72-126 (George Forrest, ed.) (1926).

<sup>95</sup> The Moghuls emerged from Central Asia and began the conquest of much of India in the thirteenth century. By the time British traders arrived on India's northeast coast, Moghul capitals such as Calcutta, in Bengal, had fallen into profound dysfunction. The British began their eventual conquest of India by contractually undertaking to supplant the Moghuls in sovereign activity that those rulers were literally no longer competent to undertake, beginning with tax collection and proceeding rapidly to defense, policing, and the administration of justice. The role, if any, of this experience in giving force the idea of degrees of sovereign competence would merit investigation.

<sup>96</sup> The closest thing to an authoritative study of the Permanent Settlement is RANAJIT GUHA, A RULE OF PROPERTY FOR BENGAL: AN ESSAY ON THE IDEA OF PERMANENT SETTLEMENT (1996). Guha studies the intellectual and political thought that formed the backdrop to the policy, and concentrates on the widely and strongly held belief that property rights would propel Indian economy and society toward commercial modernity. Edward Keene gives a consonant account of the Permanent Settlement in KEENE, BEYOND at 88-94. For a fascinating near-contemporary criticism, not of the idea but of the implementation of the Permanent Settlement, see JAMES MILL, THE HISTORY OF BRITISH INDIA 476-93 (William Thomas ed.) (University of Chicago Press 1975) (1820). Mill contended that the reform failed because it placed ownership in the hands of the aristocratic zemindars, to whom he ascribed a class-based taste for arbitrary power over increased wealth. He held this preference responsible for the zemindars' failure to make economically rational improvements in the agriculture, in favor of maintaining repressive authority over the ryots. This in turn he blamed on the influence of "the aristocratical ideas of modern Europe" on Cornwallis and others. He argued that a more egalitarian allocation of property rights would have achieved the intended effect:

“property” rights amounted in effect to a pyramid of geographically specific tax-collecting powers.<sup>97</sup> The central government annually set an exaction for the *zemindars*, regional and local administrators and landlords, who in turn exacted from farmers (*ryots*) in their jurisdictions enough tribute to satisfy the zemindars’ obligation to the government with as much left over as possible. The economic consequences of this arrangement were widely appreciated among British students of Indian affairs. Uncertainty as to the future tax (or rent – the systems were one and the terms used interchangeably) burden created a strong disincentive to improve the land: there was no guarantee of recouping the gains from improvement rather than seeing them consumed by an increased exaction, imposed either arbitrarily or in response to the improvements themselves.<sup>98</sup> As a result, agricultural practice remained stagnant out of a kind of sullen self-defense by the landlords and farmers, and there was little effort to develop uncleared lands.<sup>99</sup> This total failure of dynamic efficiency meant lesser revenues for the East India Company, which

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It is the man of small possessions who feels most sensibly the benefit of petty accessions; and is stimulated the most powerfully to use the means of procuring them. It is on the immediate cultivator, wherever the benefit of his improvements is allowed to devolve in full upon himself, that the motives to improvement operate with the greatest effect. That benefit, however, cannot devolve upon him in full, unless he is the proprietor as well as the cultivator of his fields[.]  
*Id.* at 493.

<sup>97</sup> See GUHA, A RULE at 91-111.

<sup>98</sup> As Cornwallis wrote in 1789,

In a country where the landlord has a permanent property in the soil it will be worth his while to encourage his tenants who hold his farm in lease to improve the property; at any rate he will make such an agreement with them as will prevent their destroying it. But when the lord of the soil himself, the rightful owner, is only to become the farmer for a lease of ten years [Cornwallis was commenting on a proposal to freeze exaction rates for a ten-year period], and if he is then to be exposed to the demand of a new rent, which may perhaps be dictated by ignorance or rapacity, what hops can there be, I will not say of improvement, but of preventing desolation? Will it not be in his interest, during the early part of that term, to extract from his estate every possible advantage for himself; and if any future hopes of a permanent settlement are then held out, to exhibit his lands at the end of it in a state of ruin?

<sup>2</sup> CORNWALLIS at 74.

<sup>99</sup> Cornwallis wrote,

I may safely assert that one-third of the [East India] Company’s territory in Hindostan [India] is now a jungle inhabited only by wild beasts. Will a ten years’ lease induce any proprietor to clear away that jungle, and encourage the ryots to come and cultivate his lands, when at the end of that lease he must either submit to be taxed *ad libitum* for their newly cultivated land, or lose all hopes of deriving any benefit from his labour, for which perhaps by that time he will hardly be repayed?

<sup>2</sup> CORNWALLIS at 74-75.

had replaced the Moghuls at the top of the tax-farming pyramid. It also became a major humanitarian issue after 1770, when famine devastated Bengal.<sup>100</sup> The famine was widely reported in the British and American press, and it was recognized as a symptom of an unstable and confused system of property rights and consequent inefficient land use.<sup>101</sup>

Lord Cornwallis, like most reformers active in Indian affairs, understood the Permanent Settlement as a way of securing the benefits of a modern property system – chiefly dynamic efficiency in the improvement of land. It seemed very clear to him that the feckless industry of India and the arbitrary and tyrannical exactions that ran down the tax-farming pyramid were consequences of the legal regime, and not of inherent defects in Indians. As he put it, “The habit which the zemindars have fallen into, of subsisting by annual expedients has originated, not in any constitutional imperfections in the people themselves, but in the fluctuating measures of Government.”<sup>102</sup> Developing this theme in a later 1789 response to another reformer who had expressed doubt that the zemindars could catch “a spirit of improvement,” Cornwallis insisted,

Mr. Shore observes that we have experience in what Zemindars are; but the experience of what they are, or have been, under one system, is by no means the proper criterion to determine what they would be under the influence of another, founded upon very different principles. We have no experience of what the Zemindars would be under the system which I recommend to be adopted.<sup>103</sup>

He proceeded to envision a day not far away “[w]hen a spirit of improvement is suffused throughout the country” by the influence of a new property regime.

Reformers envisioned several types of benefits from the Permanent Settlement. The first was in the motivation and activity of Indians, the “spirit of improvement” just mentioned, which Cornwallis expected to “render our subjects the happiest people in

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<sup>100</sup> Emma Rothschild, lecture at Franklin Center, Duke University, March 22, 2005.

<sup>101</sup> *Id.*

<sup>102</sup> 2 CORNWALLIS at 75.

<sup>103</sup> 2 CORNWALLIS at 95.

India.”<sup>104</sup> The second lay in *raison d’etat*, the development of revenue and economic activity to build the power of the sovereign – in this case, a status divided between the East India Company, whose sovereign power was being increasingly absorbed into Parliament, and local governors and institutions. The new “wealth and prosperity” of the Indians, Cornwallis ventured, “will infallibly add to the strength and resources of the State.”<sup>105</sup> Third was in political culture. By binding the interests of property-holders to the state that created and secured a regime favorable to their interests, the Permanent Settlement would create loyalty to the state, rather than the opportunism and shifting allegiances characteristic of those who believe they can get a better deal under another ruler.<sup>106</sup> The fourth lay in the structure of government itself. In Cornwallis’s view, a state that depended on annual or otherwise regularly revised tax exactions tended inevitably toward the arbitrary and shifting demands on its subjects that were the defining features of despotism. The same organs of government that should secure the liberties and facilitate the prosperity of subjects instead, by the logic of incentives and through the temptations of unregulated power, assumed an inconstant and confiscatory attitude toward the population. India’s land regime thus trapped not only landholders, but also its state in a pattern of irregular and ultimately counter-productive behavior that registered upon the European mind as feudal. A modern land regime depended on a modern state;

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<sup>104</sup> 2 CORNWALLIS at 115.

<sup>105</sup> *Id.*

<sup>106</sup> Cornwallis wrote,

In case of a foreign invasion, it is a matter of the last importance, considering the means by which we keep possession of the country, that the proprietors of the land should be attached to us from motives of self-interest. A land-holder who is secured on the quiet enjoyment of a profitable estate can have no motive in wishing for a change. On the contrary, if the rents of his lands are raised in proportion to their improvement; if he is liable to be dispossessed should he refuse to pay the increase required of him; or if threatened with imprisonment or confiscation of his property on account of balance due to Government which his lands were unequal to pay, he will readily listen to any offers which are likely to bring about a change that cannot place him in a worse situation, but which hold to him hopes of a better.

2 CORNWALLIS at 113.

but just as essentially, a state given a modern land regime to administer would be much more capable of assuming the regular and rule-governed activity of modern government.<sup>107</sup>

This last point is particularly important. On one widespread and influential eighteenth- and nineteenth-century view, the political and moral significance of modernity, or, differently put, the promise of Enlightenment, was the steady diminution of arbitrary power, whether of states over their citizens or of private persons over other persons: slavery, tyranny, and despotism were essentially linked terms in this conception, each denoting arbitrary power and corresponding abject vulnerability.<sup>108</sup> Cornwallis's account of the Permanent Settlement is also a theory of modernization, or progress, based in a diagnosis and prescription for India's property system, but linked to an idea of essential human interests and how they may be realized.

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<sup>107</sup> Cornwallis wrote,

Until the assessment on the lands is fixed, the constitution of our internal government in this country [India] will never take that form which alone can lead to the establishment of good laws and ensure a due administration of them. For whilst the assessment is liable to frequent variation, a great portion of the time and attention of the supreme Board, and the unremitting application of the Company's servants of the first abilities and most established integrity will be required to prevent the land-holders being plundered and the revenues of government being diminished at every new settlement; and powers and functions which ought to be lodged in different hands must continue, as at present, vested in the same person; and whilst they remain so united we cannot expect that the laws which may be enacted for the protection of the rights and property of the land-holders and cultivators of the soil will ever be duly enforced.

2 CORNWALLIS at 113. A passage from Blackstone also aptly illustrates this idea:

Necessity beget property; and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitant; states, governments, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that only a part of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

2 BLACKSTONE, COMMENTARIES at \*8. One can hardly imagine a more succinct claim for property's central necessity to civilization.

<sup>108</sup> The most elegant characterization of this view in my acquaintance is Emma Rothschild's:

The most heroic outcome, in this history of the human spirit [Adam Smith's view of Enlightenment], was to be the slow vanquishing of fear. ... The great promise of liberal and commercial society – of the liberal plea of equality, liberty, and justice ... is that the minds of individuals will be less frightened, and their lives less frightening. Commerce will flourish only in a state with regular administration of justice, or in which there is a certain degree of confidence in the justice of government" (internal quotation marks omitted).

EMMA ROTHSCHILD, *ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET, AND THE ENLIGHTENEMENT* 12-14 (2001).

This is a highly purposive conception of property, in which the institution is regarded instrumentally, in relation to fixed human interests in liberty and prosperity. I now turn to two questions about the consequences of this conception of property. First, how does it affect any obligation of the civilized sovereign to respect the existing property arrangements of the imperfect sovereign, as it would have to those of another full sovereign? Second, can it help us to make sense of the treatment of Native American property regimes in *Johnson*?

Let us begin with the first question. In his papers on Indian reform, Cornwallis proposed a middle course between non-interference and usurpation of existing Indian property rights. He stressed that, on his reading of Indian history “the Zemindars have the best right”<sup>109</sup> to the land, and acknowledged that, to the extent the Permanent Settlement denied the Zemindars some of their old powers of extraction from subordinates, they would be due compensation by “a fair equivalent” even though the extractive right could be eliminated because it was “a right that was incompatible with public welfare.”<sup>110</sup> Nonetheless, he asserts that, even if the Zemindars had lacked convincing legal “right” to their lands,

I am also convinced that, failing the claim of right of the Zemindars, it would be necessary for the public good to grant a right of property in the soil to them, *or to persons of their descriptions. I think it unnecessary to enter into any discussion of the grounds upon which their right appears to be founded.*<sup>111</sup>

In other words, the overriding conception of property at work in this analysis is a functional one. The Zemindars are to be understood not as unique or naturally entitled rights-holders, but as participants – even placeholders – in a functional scheme for progressive in the productive use of resources and the advancement of Indian society and

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<sup>109</sup> 2 CORNWALLIS at 74.

<sup>110</sup> *Id.* at 79.

<sup>111</sup> *Id.* at 74.

governance into modernity. The British governors of India are constrained – perhaps by the dimension of rule of law concerned with predictability, perhaps by the claim of extant rights on fairness – from certain dramatic disruptions of existing rights, but the ultimate criterion of British power is “the public good” of India, defined not by any present evidence of Indian opinion on the matter, but by a table of human interests regarded as universal and authoritative.

What features of divided sovereignty in India have emerged from this discussion? First, the indigenous Indian government is an imperfect sovereign, inhibited by structural impediments – notably its property law and the corresponding structure of administration – from carrying its country forward into civilization. Second and in contrast, however, Indian government is in many respects *commensurable with*, although inferior to, a European legal order. The indigenous scheme of property rights is intelligible – at least from the perspective of English reformers – on analogy with the European feudal order, in which recognizable and clear, but nonetheless tangled, despotic, and inefficient property rights contained the flawed seeds of a modern property regime.<sup>112</sup> The civilized sovereign’s role, therefore, is not to erase and rewrite the legal facts of India’s present, but to insert itself into the Indian legal order as a reformer able to spur the unfolding of the regime’s intrinsic potential – a potential anticipated in Europe’s own passage out of feudalism.<sup>113</sup>

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<sup>112</sup> This is of course exactly the characterization James Mill gives in the passage quoted *supra*. Mill understood the error in the Permanent Settlement to be the decision to side with the feudal aristocracy rather than the yeomanry, with the concomitant failure to bring about the increasing prosperity and autonomy of the small proprietor – just the progress Smith envisioned in Europe, whose spirit was captured in the passage from Emma Rothschild, *supra*. I discuss this dimension of Smith’s theory of evolving property rights, particularly in respect to the right to alienate one’s own labor, in Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Revived Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005)

<sup>113</sup> As Guha puts it in a neat summary of the view of Philip Francis, whose plan for Permanent Settlement preceded and largely anticipated Cornwallis’s, “Francis had conceived of the agrarian relationship in

What insight does this analysis give us into Marshall's dismissal of the *Yorke-Camden Opinion*? It helps to show one half of the contrast on which the distinction rested. Indian property rights and Indian sovereigns were not equal to those of Europe – their “perfect independence” was not an axiom of international relations; but they were nonetheless sufficiently cognate that transactions in rights as between those sovereigns and Britons could take place without the intervention of the British crown. To understand the full significance of this characterization, it is necessary to examine the American side of the contrast. That means returning to *Johnson v. M'Intosh* in light of the law of colonialism and the Indian example of divided sovereignty structured by a conception of progress made operational by a theory of property regimes. In the next section I argue that understanding the role of property in filling out and making operational the civilization-based distinction among types of sovereigns illuminates the underlying logic of the opinion. Property theory structures a classification of the respective powers of an imperfect and a civilized sovereign, conducted in terms of their respective property regimes and the implications of those regimes for progress.

#### **IV. *Johnson v. M'Intosh* Again**

Let us examine the precise terms of Marshall's judgment that colonizing powers cannot be bound to respect the existing property regimes of Native Americans. This is the heart of his dicta, and the part of his discussion most troubling from the point of view of today's anti-colonial sensibility and anti-racist principle. Marshall, recall, opined that “those principles which Europeans have applied to Indian title ... may ... find some excuse, if not justification, in the character and habits of the people whose rights have

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Mughal India as primarily feudal: he had wanted to replace it by a model derived from contemporary England.” GUHA, *supra* n. 97 at 208.



been wrested from them.”<sup>114</sup> After explaining the customary international law requiring the conqueror to respect and maintain the property rights of the conquered, Marshall continued,

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.<sup>115</sup>

There are two distinct arguments in this passage. One is that the fierce independence of Native Americans forbade their political integration into an extended multicultural empire in which their form of life would remain unchanged; it is not evident to what sort of imagined proposal Marshall takes himself to be responding here. The second argument, however, fits squarely into the interpretation I have been developing. The fact that Native Americans’ “subsistence was drawn chiefly from the forest” places them in the hunter-gatherer stage of civilization, in which rights of personal property and collective use-rights over those resources that are not in personal hands. In this stage, no incentive exists for the improvement in productivity of real property, so to leave the Native American property regime in place “was to leave the country a wilderness.” As Blackstone had written, without the institution of private property in land, “the world must have continued a forest,” with no incentive in individuals for agricultural improvement. He maintained that only scarcity, following the exhaustion of resources sufficient to maintain a hunter-gather population, had spurred the recourse to property in

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<sup>114</sup> Johnson v. M’Intosh, *supra* n. 1 at 589.

<sup>115</sup> *Id.* at 590.

land and to agriculture; “necessity begat property.”<sup>116</sup> Without the bite of necessity, the hunter-gatherer condition could persist indefinitely, and the world “continue a forest.”

This circumstance presented Europeans with a pair of unappetizing choices. They were, according to Marshall

under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society.<sup>117</sup>

This passage partly continues the logic of the argument based on the fierceness of Native Americans, noting again the alleged impossibility of governing them “as a distinct society.” The characterization of Native Americans as “a people with whom it was

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<sup>116</sup> Blackstone’s elaboration of the basis for this view is one of the most famous passages of his *Commentaries*:

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor? Had not therefore a separate property in lands, as well as movables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas now (so graciously has providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its rational faculties, as well as of exerting its natural. Necessity begat property[.]

2 BLACKSTONE, COMMENTARIES at \* 7-8.

This passage raises a very difficult question in the history and theory of the development of property rights, one familiar from the puzzling sequence of egg and chicken. How does a people lacking property rights in land overcome the collective-action problem of creating a new regime to establish the rights which its members will later enjoy securely? In the context of Blackstone’s imagined history, without security sufficient to support settled agriculture, how does a constituency first arise for rights that will undergird settled agriculture? Obviously, the existence of a state or the intervention of a conqueror or an established foreign sovereign in another capacity can make this problem much simpler. I shall have nothing other to observe about this issue here. On this issue, see CAROL M. ROSE, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 25-46 (1994); Katrina M. Wyman, *From Fish to Fur: Reconsidering the Evolution Toward Private Property*, 80 N.Y.U. L. REV. 117 (2005) (emphasizing the importance of political institutions in taking advantage of opportunities to realize economic gains by instituting property rights).

<sup>117</sup> See Johnson, *supra* n. 1 at 590.

impossible to mix,” however, goes to the character of their property regime and its significance in the hierarchical civilizational timeline of the time’s historiography. Native American possessory customs were straightforwardly incommensurable with English fee-simple property in land, with its individual rights of use, exclusion, and alienation. The two systems could not be maintained concurrently: to follow one was to overrun and negate the other.<sup>118</sup> In consequence, “That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances.”<sup>119</sup> Europeans therefore had to adopt “principles adapted to the condition of a people with whom it was impossible to mix,” that is, principles guiding the interaction of two incommensurable property regimes and correspondingly distinct social orders and systems of government.<sup>120</sup> The principle selected was the rule of discovery, the exclusive right of the sovereign to extinguish

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<sup>118</sup> This assertion is not simply an intuition based on something like an analogy between property regimes and systems of grammar or logic. It has been developed in considerable historical detail by William Cronon, who has explained how European ownership and agriculture necessarily excluded the more transient and non-exclusive land uses characteristic of Eastern Native Americans. See WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* (2003).

<sup>119</sup> 23 U.S. 543 at 591.

<sup>120</sup> As Marshall put it, “The resort to some new and different rule, better adapted to the actual state of things, was unavoidable.” Johnson, *supra* n. 1 at 591.

It is at this point that Marshall offers his peculiar history of the displacement of Native Americans as a kind of ecological process:

As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists 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 original inhabitants, was parceled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately through the crown, or mediately, through its grantees or deputies.

21 U.S. 543 at 590-91.

I think this passage is best understood as elaborating historically on the perception that the two property regimes and their corresponding modes of productive activity cannot co-exist, that as the one expands, the other will inevitably give way – whatever the mechanisms of displacement and replacement. It is, of course, also a conveniently agent-free sketch of history, which one could read with the impression that no European ever actually *did* anything to a Native American to achieve their displacement. These two interpretations, however, are not exactly incompatible. While the more apologetic version makes the passage plainly, even outrageously false as a matter of agency, that interpretation might still be right as a matter of the relationship between the two regimes: simply by existing, the one excludes the other; moreover, precisely because of its dynamic efficiency, the European regime has an expansionist logic: any individual participant has incentive to claim new tracts of land, for his individual benefit, but with the inevitable consequence of bringing that tract under the terms of the regime.

Native American possessory rights and assign fee-simple ownership in the land. While it may be difficult to see the solution as equitable, Marshall noted, “Every rule which can be suggested with be found to be attended with great difficulty.”<sup>121</sup> That much would be hard to deny.

How does Marshall’s reasoning in *M’Intosh* relate to the theory of relations between civilized and imperfect sovereigns and the division of sovereign powers over uncivilized peoples? It follows the same formula as Lord Cornwallis’s and John Stuart Mill’s approach to the problem of British government in India: the indigenous sovereign is autonomous to the degree of its competence to promote and secure progress. So far as it is incapable of serving that role, however, it may be supplanted by another sovereign in order to vindicate the values of civilization. In both the Indian and the American cases, the impediment to progress is in substantial part a property system that keeps the society at a “pre-modern” stage of development: in India, feudalism characterized by personal dependence and arbitrary government; in America, a semi-nomadic hunter-gatherer condition which produces no wealth and from which no institutions of complex government are likely to emerge (that is, according to the then-dominant theory of progress). The difference in the European responses – incorporating the colonial power into the local structure as an agent of reform (as well, of course, as exploitation) versus colonizing the country and displacing the local population – seemed to Marshall a difference in the range of feasible options. Indian property and governance structures seemed to Cornwallis to be sufficiently cognate to their European analogues to be susceptible to incremental reform. Native American property and governance seemed to Marshall to be incommensurable with Europe’s institutions, and so to present the tragic

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<sup>121</sup> Johnson, *supra* n. 1 at 591.

choice he described: expropriate or leave. To leave was to abandon the cause of progress; expropriation, by contrast, made the colonial sovereign the instrument of progress. Marshall's reasoning thus appears to implement the same customary principle that guided the British theory of rule in India in the Permanent Settlement and beyond. The relative authority of perfect and imperfect sovereigns is ordered by the competence of the imperfect sovereign to promote and secure progress. In turn, property regimes both indicate the society's level of progress and are the instrument of further progress: to understand the Native American property regime was to see what it had to be broken and what should replace it.

## V. Conclusion: A Little More Irony

*Johnson v. M'Intosh* is an unsettling case. As I have argued, Justice Marshall's purely legal logic is cryptic and unsatisfactory. Reading it carefully can lead one to doubt the integrity of legal reasoning, or at least the autonomy of legal reasoning. This in itself is no big surprise: it is conventional nowadays to understand property law in terms of the public policy or social ends that it secures.<sup>122</sup> Nor is this anything new: theorists have understood property regimes in this manner as long as they have been thinking about them.<sup>123</sup>

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<sup>122</sup> The influence of economic analysis on legal scholarship has been so powerful in recent decades that an enormous amount of work on the dynamics of property regimes has addressed the economic efficiency secured by the coordinated pursuit of respective self-interest. See, e.g., RICHARD A POSNER, *THE ECONOMIC ANALYSIS OF LAW* 32-34 (6th ed. 2003); Robert C. Ellickson, *Property in Land*, 102 *Yale L.J.* 1315, 1320-21 (1993) (defining the "efficiency thesis" as that "land rules within a close-knit group evolve so as to minimize its members' costs"). Two of the canonical articles expressing this view are Ronald Coase, *The Problem of Social Cost*, 3 *J. L. & ECON.* 1 (1960). Also significant here are the costs of creating and enforcing property rights, which may be greater than the gains the rights make possible. The canonical treatment of this issue in modern legal scholarship is Harold Demsetz, *Toward a Theory of Property Rights*, *AM. ECON. REV.*, May 1967.

<sup>123</sup> See Aristotle, *POLITICS* 44 (Ernest Barker ed., Clarendon Press 1946); John Locke, *Second Treatise Of Government*, in *TWO TREATISES OF GOVERNMENT* 314-16 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690); William Blackstone, *COMMENTARIES* \*4-10.

What obviously distinguishes *Johnson* is the nature of the policy that motivates it: expropriation of an inhabited continent at the cost – even then becoming increasingly clear – of extinguishing a way of life and most of the people who inhabited it.<sup>124</sup> Without intending any insensitivity to the horror of that extermination, however, I would venture to say that this is not much of a surprise, either.<sup>125</sup> The bloodiness and racism of American history are pervasive and, after many decades of neglect, increasingly well documented and widely recognized. Observing that a major case on the legitimacy of European claims to North America is implicated in these shameful facts may be a reminder of our reasons for dismay, but it is not a revelation. Contemporary Americans are accustomed to acknowledging this history, at least nominally, and marking with relief the difference between the colonial settlers’ attitudes and ours.

In examining the reasoning of *Johnson*, I have done my best to hold at bay my own moral attitudes toward the historical period it describes and helped to shape.<sup>126</sup> Instead, I have tried to enter into the views of social order and progress that informed the contemporary jurisprudential view of the two issues that intersect in *Johnson*: the relationship between “civilized” and “uncivilized” peoples and the nature and purposes of property regimes. In the presuppositions of the opinion, as in much of the explicit thought of the period, is a theory of hierarchy among nations and their governments, in which the sovereigns of advanced nations may – even must – supplant the power of backward, “imperfect” sovereigns. Central to the powers of advanced nations was

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<sup>124</sup> This is very much Joseph Singer’s concern in his discussion of the case. See Singer, *supra* n. 46.

<sup>125</sup> For a few instances of the savagery of the American extermination of the continent’s Indian population, see WILENTZ, *supra* n. 37 at 152 (noting the murder of entire villages and the opening and emptying of Indian graves), 168-75 (on mass execution as a tool of warfare under Andrew Jackson). These are the kinds of atrocities against entire populations that we take today as indicia of ethnic cleansing and genocide, and that is just what they were.

<sup>126</sup> Those attitudes are conventional liberal ones. Depending on my state of mind, I sometimes shudder in reading Marshall’s sanguine recounting of the inevitability of the continent’s clearing and the westward movement of white settlers. I assume, though, that my moral attitudes, precisely because they are so conventional, add little of value to this discussion.

remaking the property regimes of subordinate peoples in order to spur economic development and produce the stability necessary to non-arbitrary government. Doing less, it seemed to adherents of this perspective, would mean neglecting the duties of progress: leaving India under despotism and North America an undeveloped “wilderness.”

In presenting this rationale for imperial government generally, and for *Johnson’s* law of expropriation in particular, I have hoped to highlight a quality I find even more unsettling than the hard-to-miss racism and genocidal implications of the opinion: the deep familiarity of its central logic. The theory that Euro-American property regimes spurred economic and political progress, and that progress justified the extension of such property regimes, did not depend on racism, that is, on a belief about the inherent qualities of various human groups. It depended, rather, on a functional account of the incentives to dynamic efficiency that private property provided, and the limits on arbitrary government that it erected. The hierarchy of civilizational stages that Smith and Blackstone expressed and which, I have argued, informed Marshall’s reasoning, is baroque, but aside from its sweeping generalizations, its guiding principles remain the cornerstones of reasoning about property law.<sup>127</sup> If contemporary scholars, lawyers, and legislators did not believe that property regimes should be judged in good part by how

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<sup>127</sup> For discussions of the economic functions of property regimes, see n. 124, *supra*, and works cited therein. See also HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM SUCCEEDS IN THE WEST AND FAILS EVERYWHERE ELSE* 39-67 (2001) (outlining the efficiency effects of legally designating the productive aspects of resources as the objects of fungible and universally transferable right-claims). For contemporary discussions of the capacity of property regimes to promote and secure political freedom, see James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* 26 (Oxford 1998) (describing how “the protection of property ownership was an integral part of the American effort to fashion constitutional limits on governmental authority”). See also Richard Pipes, *Property and Freedom* (Knopf 1999) (arguing that property is a necessary prerequisite for political liberty).

well they promote economic efficiency and secure ordered political liberty, we would be at a loss to talk about them at all.<sup>128</sup>

Yet Marshall's opinion, which depends essentially on these rationales, may strike today's reader – it does strike me – as morally blind to the human costs of its reasoning. And that blindness doesn't depend only, and I think doesn't depend mainly, on attitudes we have repudiated in our subsequent enlightenment. It rests more substantially on values we still embrace, albeit in different programmatic versions, and to which we lack compelling alternatives. It is at least a reason to wonder whether the justifications we give for our own property systems, and for that matter the other parts of our legal systems, might not support forms of moral blindness in us.

I don't mean to draw any grand, speculative conclusion from this point, but only to urge reading Marshall's opinion as revealing something not just about his time and perspective, but about the possible limits and hazards of a perspective we substantially share. If Marshall's sanguine reasoning disappoints and angers us, we might apply some of that emotional energy to our own ways of thinking, not on the assumption that our ideas must be bad and wrong, but in the recognition that legal judgments are complex and sometimes tragic in their results, and that complacency in them always gives encouragement to moral blindness. In that way, we might manage to be more ironic in our view of law than Marshall was: more skeptical, more self-questioning, less inclined to conclude that we have resolved matters to everyone's satisfaction and best interest. That would be an ironic benefit of a subtle, complex, and elusive opinion whose evasions do not quite manage to wipe the blood from its hands.

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<sup>128</sup> I don't write from outside these perspectives: quite the contrary. *See, e.g.*, Purdy, *supra* n. 113 (arguing for a freedom-promoting approach to property regimes that takes into account economic efficiency as a promoted of substantive human freedom).