

Introduction

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This special issue of the journal was not originally planned as such. Rather, several articles coalesced in suggestive ways around issues of interpretation, misinterpretation, and reinterpretation of laws, treaties, and other legal decisions structuring the American Indian–US government relationship. “The law” in the United States instantiates power—associated as it is with the policing and military power of the government—but also connotes protection, associated with a correlative discourse of reasoned, principled argument, which promises a forum in which truth is produced and citizens are treated equitably. Such claims are regularly and rightfully contested. This introduction will consider some of the narratological, political, and philosophical premises upon which critiques of law, particularly with respect to Indian affairs, are based.

Peter Brooks has argued that the law’s unacknowledged reliance on persuasive storytelling to convince a jury, panel, or judge to rule in a desired way undermines its claim to proceed “by reason alone.”ⁱ Because matters of “fact” are determined in large part by the choice of a narrative to describe what happened or larger assumptions about how the world works, legal outcomes are influenced by storytelling. Brooks puns on the word *conviction* to underscore the performative function of legal discourse: “‘Conviction’—in the legal sense—results from the conviction created in those who judge the story.”ⁱⁱ From the perspective of narratological analysis, the law’s reliance on verisimilitude and rhetoric undermines its claim to truth or authority, but as the case studies in this issue demonstrate, the performative aspects of legal discourse have devastating consequences on Indian lives.

The rhetorical analysis of legal decisions can be extended to identify the “will to empire” of nation-states as the primary imperative to use and misuse the law to displace indigenous peoples from their lands. Robert Williams Jr. reached this conclusion after examining American Indian treaties written between 1600 and 1800 in order to present the American Indian perspective on law and peace.ⁱⁱⁱ In an earlier study of Western legal thought, Williams examines the “discourses of conquest” in legal writings that bear on American Indians, from their origins in the medieval discourse of crusade, through the colonizing discourse of Renaissance Spain, wars in Britain and the American colonies, and to the American Revolution. Of the divergent discourses he identifies as bearing on Indian legal status—the British Crown’s “royal-prerogative” right to dispose of Indian lands, the landed colonies’ assertion of their Crown and Saxon charters to control Western lands, and frontier speculators’ claim that natural law and natural right gave Indian peoples the right to sell their

lands—all three engaged in the rationalization of the land-acquisition process during the American Revolutionary period.^{iv}

Aziz Rana has provoked a rethinking of latter-day discursive transformations of that Revolution's ideals, arguing that a substantive ideal of freedom has been displaced by the discourse of security, that empire "has become the master rather than the servant of freedom."^v Invoking Patrick Wolfe's conceptualization of settler colonialism as a systemic structure rather than an event,^{vi} Rana asserts that subjugation and conquest were constituent elements of republicanism and early settler notions of American liberty. He traces the historical evolution of the conceptual relations between the settler experience and notions of liberty from the early settler period to the present day, examining how the development of republican ideals in the American "settler empire" required the conquest of lands to secure the free labor of the settler. His key insight—that early settlers could not imagine "liberty without suppression and a free citizenship without the control of subject communities"—inserts the co-optation of labor into the settler-colonial stew of displacement strategies.^{vii} As the case studies in this issue demonstrate, the subjugation of labor, the will to empire, and legal fictions are fundamental methods by which that displacement was effected in the United States.

Overall, this special issue can be thought of as falling into two parts, with Patrick Wolfe's introductory article offering a salient method of rereading the intentions claimed by defenders of treaties that impacted the tribes under study in this issue, and the remaining articles offering case studies of indigenous groups that have resisted the deliberate and/or unintentional misinterpretation of treaties and indigenous rights. All of the articles take as a basic premise that competing analyses/(mis)interpretations of legal documents and discourse have resulted in dispossession and loss of rights granted to indigenous peoples, including those who signed written treaties with the fledgling US government.

Wolfe's "Against the Intentional Fallacy" analyzes the rhetoric of several US Supreme Court decisions, arguing that key Marshall court decisions were not, as many historians and legal scholars claimed, later misinterpreted by errant officials. Rather, he asserts that Marshall's decisions were in fact consistent with the settler-colonial "logic of elimination": that their function was to deprive American Indians not only of a sustainable land base and of rights to that land, but to displace the indigenous peoples altogether.^{viii} He makes the case that legal decisions rendered by the Marshall court—which many critics maintain *unintentionally* led to poor outcomes for Native peoples—were actually in accord with the settler-colonialist drive to acquire more territory at the expense of tribal groups. Wolfe further contends that scholars have been

complicit in insisting on Marshall's benign intentions (hence the clever reversal of the literary concept of the "intentional fallacy"), suggesting that this fallacy is perpetuated by what he calls a "liberal-individualist style of utopianism that privileges expressions of intention, no matter how contrary to historical experience."^{ix}

The remaining articles address the ways in which tribes fought to reassert their sovereign rights either by reinterpreting the legal language of treaties and maps or by asserting control over labor agreements. Larry Nesper shows how the reestablishment of Ojibwe treaty rights, which state law had sought to supersede, resulted in the restoration of the original intent held by the treaty signers. He argues that the successful treaty-rights movement among the Ojibwe in the Upper Great Lakes region (encompassing Wisconsin, Michigan, and Michigan) led to a cultural renaissance and transformation, particularly among the eleven Ojibwe bands that make up the Great Lakes Indian Fish and Wildlife Commission. Prior to a series of federal decisions that reaffirmed rights outlined in treaties, state law regulated hunting and fishing rights on ceded tribal lands, even though those rights had been preserved in treaties. Tribal members who fished or hunted off-reservation did so surreptitiously, as their actions were considered illegal according to state law. With the passage of the *Voigt* decision in 1983, tribal members were empowered to manage their own resources, which, Nesper argues, resulted in a "transformation of consciousness and practice that goes beyond self-determination to the realm of realizing the sovereignty that was first envisioned and enacted by the signatories of those treaties."^x

Andrew Fisher similarly addresses the ways in which the Yakama preserved the intentions of the original treaty signers in their oral histories. His article examines their quest to redraw the boundaries of their reservation to include Mt. Adams (Pátu), a sacred peak that had been wrongly excluded from the Yakama Reservation by a series of erroneous boundary surveys, what he deems a "cartographic comedy of errors."^{xi} In 1855, the Yakama signed a treaty that set aside lands for their exclusive use, which they believed to include Pátu. However, controversy erupted over Article II which did not include the peak, and the Yakama fought for more than eighty years to restore it as an official part of their territory. The article demonstrates how oral tradition—the memory of the spoken agreements made when the treaty was signed—was passed down from generation to generation, empowering the struggle to reclaim the peak. Even after a "lost" 1855 map resurfaced, which supported the Yakamas' claim, it took several more years of struggle before the peak was partially returned to the reservation by executive order in 1972. Fisher's article traces how the five major periods in Indian policy between 1855 and 1972 shaped the government's shifting responses to the Yakamas' claim. He concludes that the history of the Yakama struggle is in part a familiar tale

of the federal government's disregard of its trust responsibility to Indian tribes, but also of the power of "memories that were produced and preserved through the spoken word, sustaining an interpretation of the treaty that challenged the maps and manuscripts of the dominant society."^{xii} After 1972, the peak served as a symbol of Yakama identity and nationhood due to its association with the tribe's treaty and successful resolution of the disputed reservation boundary.^{xiii}

In his consideration of the economics of dam building and global-scale development in the Nez Perce watersheds of the Snake and the Columbia rivers, Daniel Columbi examines the ways in which the "growth ideology" of the settler class clashed with Nez Perce ideals of communal landownership and more equitable distribution of social power.^{xiv} He traces the ways in which Nez Perce land—beginning with the treaty of 1855, through the formation of Idaho as a state, through hostilities with the government, through the Dawes act—was reduced by millions of acres. Allotment, which enabled large numbers of non-Indians to purchase Nez Perce land, led to the move toward an agricultural economy, but an economy from which the Nez Perce were excluded because of their desire to hold title communally rather than individually. In addition to land acquisitiveness, Columbi further illustrates how the exigencies of World War II and the purported need for national defense underlay the effort to convert land tracts to large-scale agribusiness, which in turn led to the building of dams. He compares the rhetoric of dam building, touted as "'public works projects for a public good,'" to the destruction that dams inflict on Nez Perce lands and way of life, particularly in their destruction of salmon habitat, and outlines the Nez Perce attempts to preserve their communal holdings and equitable system of social power.

Kevin Whalen's study of the outing system at Sherman Institute, an off-reservation federal Indian boarding school located in Riverside, California, seeks to add Native voices to the well-documented studies of boarding schools, many of which were based on archives containing only the school administrators' side of the story. "Existing scholarship tends to characterize life within the Indian School Service as a sort of second-rate existence for Native American employees."^{xv} His study takes as its premise that because living conditions on the reservation were dire, many Native students who were sent to work as laborers used that work as a source of empowerment. Whalen argues that reluctant workers engaged in various modes of resistance, while others chose to work to earn money and gain skills that could be parlayed into higher pay to help their home communities. He claims that, although the outing system presented student-laborers with harsh working conditions and sought to prepare them for lives of menial labor, in many cases, indigenous students and their communities utilized the system for their own benefit.

The varying interpretations of legal decisions that effected the displacement of indigenous peoples in the United States inform each of the cases and treaties discussed in the five essays that constitute this special issue, from Ojibwe treaty rights in the Great Lakes regions, to boundary disputes on the Yakama Reservation, to dam-building on Nez Perce lands, to the Sherman Institute's "outing" system. Each case points to the transformative effect that winning those legal battles had in buttressing the tribes' exercise of their sovereign rights. In effect, the tribes' struggles to return to an original intent of oral and written agreements exposes the gap between the surface meaning of treaties and other legal documents—what is actually stated—and the practical outcomes that emerge from the interpretation of those documents. The cases discussed in this issue provide an account of how the surface meaning can be recuperated by using the legal system itself to force a reinterpretation of the actual language stipulated in the treaties, and how laborers can exploit their very subjected status to exercise agency.

ⁱ Peter Brooks, "Narrativity of the Law," *Law and Literature* 14:1 (Spring 2002): 2-4.

ⁱⁱ *Ibid.*, see especially p. 2.

ⁱⁱⁱ Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (New York: Oxford University Press, 1997), 124.

^{iv} Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), 287.

^v Aziz Rana, *The Two Faces of American Freedom* (Cambridge, MA: Harvard University Press, 2010), 3.

^{vi} Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999), 2.

^{vii} Rana, *Two Faces*, 4.

^{viii} Wolfe, *Settler Colonialism*, 1–2.

^{ix} Wolfe, "Against the Intentional Fallacy: Legocentrism and Continuity in the Rhetoric of Indian Dispossession," *American Indian Culture and Research Journal* 36:1 (2012): 4.

^x Larry Nesper, "Twenty-five Years of Ojibwe Treaty Right in Wisconsin, Michigan, and Minnesota," *American Indian Culture and Research Journal* 36:1 (2012): 72.

^{xi} Andrew Fisher, "The Mislplaced Mountain: Maps, Memory, and the Yakama Reservation Boundary Dispute," *American Indian Culture and Research Journal* 36:1 (2012): 81.

^{xii} *Ibid.*, 82.

^{xiii} *Ibid.*, 81–2.

^{xiv} Benedict J. Columbi, "The Economics of Dam Building: Nez Perce Tribe and Global-Scale Development," *American Indian Culture and Research Journal* 36:1 (2012): 139.

^{xv} Kevin Whalen, "Labored Learning: The Outing System at Sherman Institute, 1902–1930," *American Indian Culture and Research Journal* 36:1 (2012): 170.