

Against the Intentional Fallacy: Legocentrism and Continuity in the Rhetoric of Indian Dispossession [Abstract]

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It has often been observed that, though the outcomes of US Indian law and policy have been consistently negative for Indian peoples, this consistency is belied in the rhetoric of judges and Indian-affairs officials. This article makes the further argument that this legitimacy rhetoric has received endorsement from a liberal-individualist style of historical and legal-studies scholarship that privileges judges' and policymakers' intentions, as inferred from their official utterances (the "intentional fallacy" of the article's title). This scholarship prioritizes expressions of individual intention over regularities of collective outcome, a perspective that effaces the USA's continuing settler-colonization of Indian peoples.

Taking the Marshall judgments as its central example, the article reanalyzes nineteenth-century Indian law and policy, demonstrating a strategic continuity both within the Marshall judgments and between those judgments and the late-nineteenth century doctrine of plenary congressional power from which they are conventionally distinguished. On this basis, the article critiques a range of recent and established Indian-affairs scholarship, contending that, in writing about Indian dispossession, this scholarship contributes to Indian dispossession.

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