that decision within his overall picture of failed Federal Policy and unjust laws. Though many legal commentators hailed the McGirt ruling as justice long overdue, *Arguments Over Genocide* provides a much more critical and arguably correct view. McGirt actually provides a smoke screen to hide the perpetuation of the worst of the policies, allowing politicians and lobbyists eager to sway them a cover behind which they can smugly feel vindicated."

Thomas "Lee" Hester, Jr., a founding editor of *Ayaangwaamizin: International Journal of Indigenous Philosophy,* and former faculty in the History of Law and Policy concerning Indigenous People at universities in Canada and the United States.

"I am surprised as I write this: the most compelling new work of theology I have read in years is embedded in a historian's exploration of 19th century legal debates. Worthy of its alarming title, *Arguments Over Genocide* is an urgent book that every clergyperson and seminarian should read. In it, Schwartzberg grabs hold of Christian arguments for genocide and drawing from 19th century counter arguments, beautifully refutes them, on Christian terms. In so doing, he indicts every American Christian, pulls Christian thought out of its pious cul-de-sac, suggests a new way to write history, and places the Christian origins of the genocide of Native Americans under the withering light of truth. The remarkable thing is that his argument is on fire with hope. Such hope does not come cheaply. Centuries of violence against Native Americans can be traced directly to Christian convictions. Schwartzberg shows that Christian legal arguments for genocide have never lost the ascendancy they gained in the 1830s, and continue to kill today. Are there 'sufficient intellectual and moral resources within the Christian tradition to do successful battle with its capacity to believe that one is being benevolent while committing genocide?' The story Schwartzberg has unearthed throws this question down with force. It cannot be ignored. The integrity of American Christianity rides on the answer. More importantly, so do human lives."

Matt Fitzgerald, Senior Pastor, St. Pauls, United Church of Christ, Chicago.

"On December 1, 1790, the new United States summarily informed the Ohio Iroquois that it had them in their hand, by the 'closing' of which,

they 'could crush' them to 'nothing.' To prevent the crushing, the invader 'demanded … a great County,' Ohio, as 'the price of that peace' thus offered. It was as if, said the Seneca chiefs Gaiänt'wakê, Gahgeote, and Kiandochgowa, 'our want of strength had destroyed our rights.' That was precisely the invader's presumption, articulated at the birth of U.S. Indian Affairs and continuing into the present. It is what Steven Schwartzberg examines legally in *Arguments over Genocide: The War of Words in the Congress and the Supreme Court over Cherokee Removal*. Neither was the weakness of the proposition unrecognized at the time by a loud minority in Congress, even as the State of Georgia obviated the new Constitution by unilaterally evicting the Cherokee from their homeland. As critics lay supine, the Supreme Court under John Marshall crafted the 'Marshall Trilogy'—*Johnson v. McIntosh* (1823); *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832)—gutting James Wilson's carefully crafted, legal premises of 1787. Despite Marshall's legalized genocide in embracing the antique, papal doctrine of discovery and its corollaries of conquest, the Trilogy to this day forms the basis of 'Indian law,' with its 'dependent domestic' definition of Indigenous nations as 'wards' of the U.S. Examining Marshall's premises, Schwartzberg demolishes them, one by one, demonstrating their honeyed lethality and urging a principled revision of American jurisprudence."

Barbara Alice Mann, Professor of History, University of Toledo,
and author of *Iroquoian Women: The Gantowisas* (2006)

"We all, indigenous people and settler descendants, have become trapped in the tangled web of the Doctrine of Discovery and a legal system that practices denial of justice and historical facts. Too often these themes deliver a message of despair and hopelessness. However, Steven Schwartzberg's *Arguments Over Genocide* transcends the darker themes of indigenous history by shedding a light of reason and moral clarity onto our nations' colonial history. When I refer to "our nations' history" I refer to my own Potawatomi ancestry and also our family's French Canadian voyageur origins that became entangled as two nations and civilizations encountered one another in the 18th century. I think it is no coincidence that Steven lives on, writes from, and in many ways writes about the history of my tribal homeland in and around Chicago. This place is obviously

speaking to him, and he listens. Throughout his book, and particularly in his magnificent climactic Epilogue, Steven writes in a voice that expresses respect for the aspirations both of indigenous people and of our other than human kin in a manner that is rare amongst those with no Native American ancestry. This book is more than a mere scholarly exploration. It is a gift. Hopefully, it is part of a roadmap forward."

Randy Kritkausky is an enrolled tribal member of
the Citizen Potawatomi Nation.

"The unique contribution of *Arguments Over Genocide* is its interweaving of spiritual and constitutional discourses to help us see the deep dynamic of the debate over 'Indian Removal'. Removal was about land, no doubt; but it was also about a claimed 'right of domination' of Christians over 'heathens and pagans'. On one side, it was a brutal brew of racism and religion in service of economic 'development' (read, imperial expansion). On the other side, it was a blend of pity and religion in aid of a campaign for co-existence of peoples. Schwartzberg demonstrates that these competing perspectives fought within the frameworks of the US Constitution and the Christian religion. For their most virulent enemies, the goal was 'removal' of Indigenous peoples from the 'path of civilization,' whether accomplished by extermination or wagons. For their most sympathetic friends, the goal was 'civilization' of Indigenous peoples, accomplished *in situ* with the aid of missionaries. Both sides of the debate claimed Christian right; both claimed Constitutional authority."

Peter d'Errico, Professor Emeritus of Legal Studies,
University of Massachusetts at Amherst, from the Afterword.

"This is a bracing, learned, and eloquent study of words and actions that mattered -- that still matter -- and the relationship between them. I learned much. Steven Schwartzberg has taken the trouble to be scholastically, morally, and politically rigorous, and he has produced a book that will have lasting value."

David Waldstreicher, Professor of History, The Graduate Center,
City University of New York

Arguments over Genocide

The War of Words in the Congress and the Supreme Court over Cherokee Removal

By Steven J. Schwartzberg

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I dedicate this book to all whose righteous demand for LandBack must be accepted for the beloved community to emerge and to all I have hurt or neglected through a patriarchal masculinity

"All Christendom seems to have imagined that, by offering that immortal life, promised by the Prince of Peace to fallen man, to the aborigines of this country, the right was fairly acquired of disposing of their persons and their property at pleasure."

Senator John Forsyth of Georgia, 15 April 1830

"Is the Indian right less a right because the Indian is a savage? Or does our civilization give us a title to his right? A right which he inherits equally with us, from the gift of nature and of nature's God. The Indian is a man, and has all the rights of man. The same God who made us made him, and endowed him with the same rights; for 'of one blood hath he made all the men who dwell upon the earth.'"

Senator Asher Robbins of Rhode Island, 21 April 1830

"I do not think any subject ever discussed in Congress has drawn forth a more splendid display of talent in each house of the national legislature than this, or is more worthy of the deliberate consideration of the government and of the nation."

Supreme Court Chief Justice John Marshall, 5 June 1830

"For verily there is no savage nation under the Cope of Heaven, that is more absurdly barbarous than the Christian World."

Thomas Traherne, 1636-74
Centuries of Meditations

"We all know how often individuals feeling connected to someone through the process of cathecting insist they love the other person even as they are hurting or neglecting them. Since their feeling is that of cathexis, they insist that what they feel is love."

bell hooks, 1952-2021
All About Love

"What gives us elbow room, what gives us space to grow and become ourselves, is the love that comes to us from another. Love is the space in which to expand, and it is always a gift."

Herbert McCabe, 1926-2001
God Matters

"When you can't see how that rock on the ground has as much vitality and as much presence as any other entity, tensions will inevitably rise. When you feel like there's nothing to learn from others, including the porous rock, and you have all the answers, and in the process of getting where you want to be, you will kill me to get there, then the soldier of love in me will fight, defend, care, and tend simultaneously with the rock and for the rock. This tension lives throughout Formless Formation and that's why we move from artists mobilizing the aesthetic to how the militarization of the police mobilize it. There's this ongoing interplay throughout the book: a constant call and response, a move forward and a move back, tango, a careful hustle. I am always trying to understand how I am in them, and how everything that I see as two is also one, and how the most important thing I'll ever be able to hear and say is thank you—to them, to myself, to the rock, to the frog, to you. But I don't know that I'm there, because too much brutality, not thoughtfulness, is our everyday. It's a cycle created and perpetuated by racial misogynist colonial capitalist logics and I want to get someplace else."

Sandra Ruiz, October 2021

https://www.e-flux.com/journal/121/423318/resonances-a-conversation-on-formless-formation/

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Preface and Acknowledgements

With love and hope for what Martin Luther King, Jr. called the beloved community—and with trust in the grace any effort to help realize that community requires—we will reimagine and radically revise our relations to the land and to each other including to all of the peoples on whose land we abide. "We have no right over the Indians, whether within or without the real or pretended limits of any Colony," the Pennsylvania jurist James Wilson told the Continental Congress in July 1776: "Grants made three thousand miles to the eastward, have no validity with the Indians."[i] This book tells a story that indicates why we must return U.S. law to such a stance and that explores in depth the arguments that we will have to overcome to do so—the arguments *for* genocide that have helped determine the law, policy, and conduct of the United States toward the Native Nations for centuries.

The simple fact is that the arguments advanced by men guilty of horrific evil—the arguments advanced by the advocates of genocide and their appeasers—triumphed in the 1830s and have never since lost the ascendency. These historic arguments for genocide—or for a "right" to commit genocide—support present-day assertions of U.S. domination in the structure of what the American Bar Association calls "federal Indian law." The arguments of the opponents of the genocide of the 1830s, meanwhile, have largely been forgotten, at least among non-Native people. These arguments center on the proposition that the Native Nations are independent foreign states, as the Cherokee Nation told the Supreme Court in 1831, "not owing allegiance to the United States, nor to any state of this union, nor to any other prince, potentate, or state, other than their own."[ii] This is the truth that the advocates of genocide and their appeasers—then and now—have united in denying.

The "extravagant pretension" whereby the Supreme Court sought to lay claim to this continent in *Johnson v. McIntosh* in 1823—the pretension of "discovery" by representatives of a "Christian people" centuries earlier—is not, as is commonly claimed, either a legal fiction or a historical fact.[iii]

Rather, it is a treaty-violating fantasy that is repugnant to the Constitution as well as to the truth of the past. It is a fantasy that ignores the Treaty Supremacy Clause and presents the title to their lands of the Cherokee Nation, Choctaw Nation, Chickasaw Nation, Muscogee Nation (and hundreds of others) as a mere right of occupancy rather than as a treaty-guaranteed and treaty-relationship guaranteed dominion, well established both in constitutional law and in the law of nations as it was understood by the framers of the Constitution.[iv] The doctrine of "discovery" is a fantasy at odds with the intentions of the framers, with the meaning of the text, and with the international moral and legal order under which the American people claim their own rights.

The Supreme Court's consequent denial in *Cherokee Nation v. Georgia* in 1831 of the Cherokee Nation's right to defend their dominion in the courts of the United States—a wrongly decided opinion that paved the way for the Trail of Tears and for subsequent genocides and land thefts—is an even more stark violation of constitutional law. It simultaneously represents the single worst expression of the Supreme Court's long-standing bad faith interpretive stance toward the treaty obligations of the United States to the Native Nations and brought that stance into existence in the first place with its denial of Cherokee treaty rights. According to this anti-democratic and anti-constitutional interpretive stance, treaties and the law of nations (even including the prohibition against genocide) are deemed binding upon "the sovereign" only to the extent that the federal government deigns to so consider them. Because of the nature of precedent in legal structures, this bad faith interpretive stance has warped and twisted *every* decision that has ever been made in the Supreme Court regarding the national rights of a Native Nation, depriving each and all of them of what is rightfully theirs in *American* law to say nothing of what they are entitled to in the laws and usages that prevailed on Turtle Island before the eurochristian invaders arrived.[v]

The Supreme Court derives its denial of the binding character of treaty obligations, and its repudiation of sovereign equality, from the doctrine of "Christian discovery."[vi] This doctrine made possible the Supreme Court's assertion, in *Cherokee Nation v. Georgia*, that the Cherokee Nation "is not a foreign state in the sense of the Constitution, and cannot maintain an action

in the Courts of the United States."[vii] The doctrine of Christian discovery, in turn, rests on the claim that sovereignty resides not in "we the people"—as a right of self-government claimed by the American people under an international moral and legal order mandating respect for the equal rights of all peoples—but rather derives from some Christians setting eyes on the land and so acquiring ownership of it and authority over those living on it. The doctrine involves a claim to "title" to the land—a title that originates in a treaty-violating fantasy—and a claim to an "ultimate dominion" over other peoples that is equally and utterly repugnant to the Constitution.[viii]

As the Supreme Court has built on this doctrine of Christian discovery—this assault on the lands and authority of others conducted behind a fog produced by the allegedly benevolent intentions of a "Christian people"—it has added a "trust doctrine" and an explicit claim to a "plenary power" in the Congress to its arsenal. But the entire "trust relationship" between the United States and the Native Nations is simply a secularized expression of the doctrine of Christian discovery in which the word "trust"—like the words "Christianity" and "civilization" before it—is designed to sound good in many American ears as a source of motivation and effectively disguises reality. In terms of what my friend Steve Newcomb (Shawnee, Lenape) calls "the view from the shore" before the European invaders arrived, these words—as the Supreme Court uses them—are merely code words that sustain what Steve has shown at length—in *Pagans in the Promised Land*—is a system of domination and dehumanization.[ix]

There is reason to think that we are on the cusp of another moment like *Brown v. Board of Education* when a system of institutionalized racism and bigotry—embodied in what the Supreme Court had claimed for decades was the law of the land—was revealed to the general public as at odds with the Constitution, with human rights, and with the global common good.[x] After this book—and especially after my friend Peter d'Errico's recently published volume: *Federal Anti-Indian Law: The Legal Entrapment of Indigenous Peoples*—there should be no remaining doubt as to why "federal Indian law" is another such system of domination and dehumanization; no remaining doubt as to why it is a system that is racist and bigoted to its core.[xi]

In *Vasquez v. Hillery,* in 1986, the Supreme Court suggested, in an opinion by Associate Justice Thurgood Marshall that precedent to be overturned must be shown to be "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." [xii] The precedents on which "federal Indian law" rests *are* outdated, ill-founded, unworkable, and a violation of the intentions of the framers of the Constitution and the meaning of the text. They are also violations of Native law and of Native understandings of the meaning of treaties signed with the United States. They are precedents that allowed the genocide of the 1830s to take place, as well as subsequent genocides and land thefts, and that function as an obstacle to lawful conduct on the part of the United States to this day. This book will make clear how these precedents were adopted in violation of the obligations upon the Supreme Court that are inherent in the Constitution's having made treaties the supreme law of the land, including those obligations deriving from the explicit grant to plaintiffs of the right to compel states to accept the original jurisdiction of the court in all cases arising under treaties in which a state is a party to the case.

The land I am seeking to write in harmony with—the land that all law must ultimately draw upon—i want to acknowledge as sustaining the traditional homelands of the nations of the Council of the Three Fires—the Potawatomi, the Odawa, and the Ojibwe—as well as the nations of the Illinois Confederacy—including the Peoria and the Kaskaskia—and others including the Miami, Menominee, Kickapoo, Ho-Chunk, Sauk and Meskwaki nations, near and including what is currently Chicago. Native Nations throughout Turtle Island—throughout this continent—continue to adopt various approaches to resist the ongoing dispossession, colonization, genocide, and erasure begun by the Spanish, English, French, Dutch, and other European powers, and continued by the United States. [xiii] That genocide is the accurate term is made clear at the beginning of the Introduction to this book. If you are a member of one of the Native Nations, you already know the most important part of what I want to convey far better than I do, although I hope you will find here some new and useful information. Together the Native Nations are—as they always have been and always will be—what the theologian Vine Deloria, Jr. (Standing Rock Sioux) calls the "spiritual owner of the land."[xiv] This is, always has been,

and always will be, Native Land. The United States lacks, as this work will make clear, a valid legal claim to title.

I am profoundly indebted to Steve Newcomb, the co-founder and co-director of the Indigenous Law Institute, to Peter d'Errico, an emeritus law professor at the University of Massachusetts at Amherst, and to JoDe Goudy (Yakama Nation), a former chairman of the tribal council of the Yakama Nation and the guiding light behind the deeply informative website: www.redthought.org. Entering into the conversations they have been having for decades has been a great honor and delight from which I have learned much more than I can put into words, especially about the doctrine of "Christian discovery" and the American form of the domination and dehumanization system that has been built with the tools that doctrine provides. I have also learned more than I can say from Steve Russell (Cherokee) whose book, *Sequoyah Rising*, first convinced me that the injustice of "federal Indian law" required going to the root of the problem and not being satisfied with correcting the numerous low hanging evils that Steve identified that might be addressed by Congressional action. In the copy of his powerful memoirs that he sent to me, before his untimely death from cancer in 2021, he wrote: "For my friend Steve, for whom I will write words we'd both like to see in *U.S. Reports*: 'Wherefore, premises considered, *Cherokee Nation v. Georgia* ought to be, and is hereby, REVERSED.'"[xv]

I would like to single out for special thanks my parents, Hugh and Joanne Schwartzberg, and my sister, Jenny Schwartzberg. My mother, in particular, offered helpful comments on what must have seemed an interminable stream of drafts. My sister proof-read the penultimate version. The work is also better for comments from, and/or conversations over the years with: Margo and John Arbogast, Cindy Ball, Bruce Beavis, Diane Bell, Thalia Bell, Matt Bergman, Joanna Blad, Bill Borden and Allan Heinemann, Carrie Bruggers, Betsy Burnam (Lakota), Ingrid Burnett, Guy and Erika Burton, Willie and Carol Cade, Jeff Carlson, Peter Choi, Liz Clark, Mark Clark, Rick Conason, Taylor Culver, Rick D'Loss, Kurk Dorsey, Bill Eilfort, Joe Fendt, Matt and Kelli Fitzgerald, Joan Flanagan, David Frisk, Joel Gawlik, Alan Gilbert, Walter and Celia Gilbert, David Hacker, Kurt Hansen, Brian Hastings, Scott Hibbard and Tara Magner, Konan Houphoue, Akira Iriye, Michael Koenigsknecht, Gil Klapper, Carolyn

Schmidt and Randy Kritkausky (Potawatomi), Frank Labaty and Kevin Malone, Gerry Lang (Chowanoke Nation), Frank Lackner, Barb Lloyd, Fred Logevall, Julie Fudala Loprieno, Karen Lyons, Dean Martin, Deirdre McCloskey, Liz McPike, Paul Metzger, Heather Miller (Wyandotte Nation), Brendan Minard and Erika Burton-Minard, Greg Mooney, Christoph Mueller, Shawna Bluestar Newcomb (Shawnee-Lenape-Azteca), Andrew and Shannon Page, Rick Peterson, Steve and Betsy Peterson, Sam Peterson, Anthony Redmond, Joan and Toby Roberts, Marilynne Robinson, Patrick Levine Rose, Paul Saenger, Galen Schwartzberg, Pattie and Tom Sokol, Gaddis Smith, Katie Spero, Mary Stainton, Charles Stewart and Sena Leikvold, Steve Tamayo (Sicangu Lakota), Tink Tinker (wazhazhe/Osage), John Tuohy, Anthony Vaccaro, Helen Valkavich, Irene Voros, Clark Wagner, Jeff Wagner, Mark and Kathy Watson, Jon Welsh, Jack Womack, and Cheryl Woodson.

Three churches have been spiritual homes to me while writing this book: St. Pauls, a UCC church in the Lincoln Park neighborhood in which I live in Chicago, the Lighthouse Church of Chicago, another UCC church that meets in the same building as St. Pauls, and Church of Our Saviour, an Episcopal church in Lincoln Park. I would also like to mention the monthly meditations and Dharma talks by the Rev. angel Kyodo williams that I have been blessed to attend. I am indebted as well to the Chicago Literary Club, whose members graciously received and commented upon several of my papers, and to my students at DePaul University. And I am grateful also to the many people I met and talked with about these issues while campaigning for Congress in the Illinois 5th District in 2018.[xvi]

The conduct of the United States has consistently fallen short of American democratic ideals. We are far from ever having had a government of all of the people, by all of the people, and for all of the people. Not only has the United States fallen short, but at times some of its ideals—most obviously "assimilation" or even "integration"—have been genocidal in their implications. It is in the nature of systems of domination that they can take any word or ideal and twist it to genocidal purposes. There is a sense, moreover, in which all states—by their nature—constitute systems of domination. The claim of "democracy" is that despotic power—sovereign power—resides in the people within a legal context that respects the

political rights and civil liberties of the citizenry and that this makes democratic states distinctive among states. This book shows some of the limits of such a perspective, especially when it comes to the United States.

Here it is necessary to make a comment not about the invader state, but about the people who see themselves as loyal to that state or as loyal to the United States Constitution, and who still acquiesce in that state's conduct toward the Native Nations. This is a comment about who the American people has been in its conduct—not in its aspirations, but in its history. What needs to be said is that this is a people whose state has committed both genocide and attempted genocide; a people whose state has consistently broken the people's word. This is a people, in other words, that over the centuries has not only been murderous—in the conduct toward the Native Nations that it has tolerated—but a people that appears incapable of maintaining trustworthy, reciprocal, and consensual relationships with the Native Nations to this day.

I am not trying to talk about all of the reasons why this has been the case: the desire for domination, the greed, the religious bigotry, the racism, the belief in "superiority" however defined—(especially among those who think of themselves as benevolent)—but just the part of the story that concerns the collective amnesia of this people when it comes to the arguments of those Americans who were opposed to the genocide of the 1830s. I do not claim that if everybody in America knew these arguments the American people would suddenly wake up and become a trustworthy people seeking consensus and reciprocity in their relationships with the Native Nations and adhering to all of the requirements of their treaties with these nations. I do not imagine that they would immediately and effectively oppose their government's spurious claims of jurisdiction and plenary power over the Native Nations. But I think knowledge of these arguments against genocide—although they are rooted in Eurochristian culture—may be helpful in the struggle for justice. And by justice, I mean the right of the Native Nations to their original free and independent existence.

Here are two of these Eurochristian arguments against genocide. I would ask readers to keep them in mind as they read through the text. The first is from Senator Asher Robbins of Rhode Island in the debate in the United

States Senate in 1830 over the Removal Bill: "The Indian is a man, and has all the rights of man. The same God who made us made him, and endowed him with the same rights; for 'of one blood hath he made all the men who dwell upon the earth.'"[xvii] The second is from the lawyer, publicist, and Congregationalist Jeremiah Evarts whose "William Penn" essays were read by perhaps half a million people in 1829-1830 in a country with a total population of less than thirteen million: "The people of the United States are bound to regard the Cherokees and other Indians, as *men*; as human beings, entitled to receive the same treatment as Englishmen, Frenchmen, or ourselves, would be entitled to receive in the same circumstances."[xviii]

This book begins with the central premise of these arguments against genocide—the truth that the Native Nations are entitled to be treated just the same as all nations—and builds from that foundation. The Introduction presents the most refined arguments in support of the genocide of the 1830s—those of the House Committee on Indian Affairs—the first chapter then develops the larger structure of this book's argument, the second chapter reviews the debate in the Senate, the third chapter reviews the debate in the House of Representatives, the fourth and fifth chapters explore and critique the Supreme Court's decision in *Cherokee Nation v. Georgia* in the context of what I refer to as "Marshall's War" against the rights of the Native Nations in his entire "trilogy," the sixth chapter provides a brief account of the immediate aftermath of that decision for the Cherokee Nation, the seventh chapter provides an examination of the jurisprudence of the constitutional framer James Wilson, the eighth chapter emphasizes the rupture with the rhetoric and some of the practices of the founding generation, and then there is an Epilogue that looks to the future.

Native voices speak in this work primarily through quotations—especially from the Cherokee Nation's bill before the Supreme Court, in 1831, that I present in chapter four—rather than through paraphrases. The argument that the Cherokee Nation made was valid then and remains valid now. This is the argument that the Cherokee Nation's treaty-rights as an independent and sovereign state should be respected as a matter of *American* constitutional law. That argument is at one with the argument made by the Yakama Nation in 2018, in an *amicus* brief, in the case of *Washington State Department of Licensing v. Cougar Den, Inc,* calling on the Supreme Court to

"repudiate the doctrine of Christian discovery and its racist foundations as the basis for federal Indian law."[xix] Noting that the true foundation of the United States' relations with the Yakama Nation is a treaty, the Yakama Nation charged the courts of the United States with systematically attempting to undermine the Yakama Nation's treaty rights by imposing an imaginary prior relationship sourced in the doctrine of "Christian discovery." [xx] The Supreme Court, the Yakama Nation argued, has "judicially manufactured an extra-constitutional congressional plenary authority to abrogate treaties and regulate Native Nations. This manufactured authority rests on the false assertion that our sovereignty and free and independent existence were 'necessarily diminished' upon Christian European arrival on the North American continent."[xxi]

The bad faith interpretive stance that the Supreme Court ultimately derives from the doctrine of Christian discovery is repugnant to who any people wants to be and repugnant to the Constitution. It is foulness generating worse foulness. It would be repugnant even if it had not led directly to genocide. And yet it remains the interpretive stance that the Supreme Court uses to this day with two modifications. The Court adds two significant additional lies to its foundational dishonesty about treaties not being binding on "the sovereign": first, it proclaims that the United States is in some sort of "trust relationship" with the Native Nations and, second, it proclaims that it is interpreting treaties as they would have been understood by these nations when they were signed. In fact, the trust in any *treaty relationship* is the trust that the treaty will be adhered to and this is precisely what the "trust relationship" as the Supreme Court defines it denies whenever "the sovereign" wishes to deny it. The original Native understanding of any treaty was that it was to be adhered to on both sides in good faith. There was no understanding that the American side thought that it could lie its way out of any of its commitments by appealing to the doctrine of Christian discovery and the "ultimate dominion"—the sovereignty or "plenary power"—it supposedly conveys.

At times, over the course of the book, we will circle back to examine points previously made in a new light. A handful of vital quotes—of particularly powerful evidence—will probably become familiar to attentive readers by the end of the work. There is also a larger circling back in the structure of

the book as we return, after the discussion of the debates in the Congress and the Supreme Court, to an examination of James Wilson's revolutionary jurisprudence as a contrast to John Marshall's reactionary jurisprudence and then to another exploration of how and why the United States came to break with the positions of the founders of the United States and the framers of the Constitution in the genocide of the 1830s. This exploration emphasizes the importance of the initial resistance—followed by appeasement—with which President John Quincy Adams met Georgian aggression and suggests that "removal" would have been attempted even if Adams had been reelected and Andrew Jackson had never won the presidency.

I pay little attention to James Wilson's and John Marshall's role as large land speculators whose personal economic interests had a direct bearing on the positions they advocated.[xxii] Wilson wanted to establish that private individuals could purchase land directly from the Native Nations, as land companies that he was involved with had sought to do, especially with regard to vast territories in what would come to be called Illinois, and Marshall wanted to establish that the United States had some sort of "title" to lands still in the possession of the Native peoples, particularly in what would come to be called Kentucky, where he and his family had acquired substantial claims that had originally been articulated without first even beginning to approach the Native owners. It is Wilson's and Marshall's conflicting ideas, rather than their conflicting economic interests, that will provide a focus of our attention. These ideas had (and have) a life of their own and won support among those less directly engaged in their economic consequences. It remains true that every American was affected by the choice between Wilson's jurisprudence and Marshall's; a choice which acted as a switch between radically different trajectories of history and economic organization for the American people and for all of the peoples of Turtle Island. From the perspective of those on the shore when the invaders from Europe arrived, all American land speculators were encroaching on lands that did not belong to them and appeared motivated, to a greater or lesser extent, by genocidal visions of a future territory in which the Native Nations would have no part.[xxiii]

* * *

When faced with the history of American genocidal conduct—to foreshadow the Epilogue—I urge rejecting any efforts to make excuses for the past, or for failing to do the right thing going forward, such as "sometimes real justice is impossible." Rather we should hold that real justice is always deemed impossible under the terms of this world and recognize that the call of justice can lead to a rejection of these terms as a pernicious illusion of scarcity and can lead instead to the embrace of the truth that we are each unique expressions of everything else in the universe and are created to communicate abundant love as embodied ideas born of the love with which God extends God's Self in creating the space and time in which all creation either reciprocates God's love with spaciousness and grace toward *all* or else sustains the terms of this world. In the arguments over genocide that are still ongoing we either oppose genocide or we acquiesce in and even support it. It is a subject on which there can be no middle ground.

Introduction

That the United States deliberated so publicly over "ethnic cleansing" before embarking upon it surely makes the genocide of the 1830s distinctive among the world's genocides. That the genocide of the 1830s was a genocide, or rather a series of genocides, is made clear in the next few pages. The administration of President Andrew Jackson knew full well—in advance—that the Trail of Tears would be utterly horrific for the Native Nations with great sufferings to be encountered and many people expected to perish along the way. In September 1831, Jackson was expressly, if ineffectually, warned by his Secretary of War, Lewis Cass, that without adequate preparations: "great sufferings must be encountered upon the journey, and many will doubtless perish."[24] Beyond the callous indifference to human life that the Jackson administration demonstrated by failing to make "adequate preparations"—a callous indifference itself suggestive of genocidal intent—it is clear that *every* argument and action that was taken in support of removal occurred in the context of Georgia's express intention to see the Cherokee Nation destroyed. Georgia's Senator John Forsyth was explicit in publicly claiming that his state had a right to destroy the Cherokee Nation without any interference on the part of the United States: "If their separate existence as a tribe is destroyed by State legislative enactments, the control of the Government of the United States, even over the commerce with them is at an end."[25]

Whatever the self-deluded self-righteousness of many of those who supported removal—whatever their pathetic fantasies that they were acting in the "best interests" or even simply in "the interests" of the Native Nations—the fact remains that *all* of the advocates of removal were effectively assisting Georgia in its pursuit of its admittedly genocidal intentions; in its efforts to completely eradicate any Indian political presence from what it claimed (falsely) was its territory by seeing the Cherokee Nation "destroyed" as a prelude to getting rid of some or all of its nationals.[26] The laws by which Georgia expressly sought to destroy the Cherokee Nation's "separate existence as a tribe" were emulated by the states of Alabama and Mississippi as they also "extended" the jurisdiction

of their states over territories that were guaranteed to Native Nations—including the Cherokee, Creek (Muscogee), Choctaw, and Chickasaw Nations—by treaty.[27] All this was common knowledge. There was thus no way to pursue "ethnic cleansing" that did not also pursue genocide. No way to seek removal that did not also aid Georgia, Mississippi, and Alabama in their efforts to destroy Native Nations in violation of the treaty commitments of the United States to these nations.

Even if vast numbers had not died on the Trail of Tears, the genocide of the 1830s would have been both "ethnic cleansing" and genocide. The express Georgian intention—and this is the key point—was to destroy, in whole or in part, the Cherokee Nation. The Congress is guilty of genocide for choosing to support Georgia in violation of the law. And the whole country, as Congressman Henry Storrs of New York noted at the time, "must bear the crime and the shame."[28] The Congress' action was also, as Congressman George Evans of Maine noted before it was taken, proposed initially as a straightforward violation of the good faith of treaties: "We are called to pass a law exchanging land with private individuals, when we have guaranteed the possession of that land to the Cherokee nation, as common property; so that we are not only to stand by, and see Georgia violate our faith, but to pass a bill—which very bill expressly violates it."[29] The bill, Congressman Edward Everett of Massachusetts observed, "provides the means for co-operating with the States of Georgia, Alabama, and Mississippi, in removing the Indians within their limits…. It is a joint policy. We are to do part, and the States to do part. We are to furnish money, and a portion of the machinery. The great principle of motion proceeds from the States. They are to move the Indians. We are to pay the expense of the operation."[30] As Supreme Court Chief Justice John Marshall wrote in a letter to Everett—thanking him for his speech—"You have shown, what is certainly true, that they are parts of the same system, and that Congress completes the coercive measures begun by the states."[31] But, rather than denounce the unconstitutionality of this crime, Marshall would lead the Supreme Court to join this genocidal "system" and help complete "the coercive measures begun by the states" with his opinion in *Cherokee Nation v. Georgia* before disguising what the Supreme Court had done with his opinion in *Worcester v. Georgia* the following year.

Georgia's intentions were genocidal in the strictest sense of the term for both the United Nations' convention on the subject of 9 December 1948, and Article 6 of the Rome Statute of the International Criminal Court of 16 January 2002, define genocide in terms of "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[32] This genocidal intention was effectively embraced, unavoidably, by every advocate of removal. Those who claimed to be "saving" the Cherokee Nation by supporting removal were doing something that made no sense and that remained genocidal: helping destroy the Cherokee Nation (at least in part) in order to "save" it: severing the nation from its roots in its territory and depriving it of the exercise of self-determination through almost all of its established institutions; annihilating or greatly disrupting all of the rights, privileges, powers, and relations which the Cherokee Nation had previously enjoyed as a distinct and independent community.[33] The deaths brought about by driving the Cherokee Nation and its neighboring nations onto the Trail of Tears also constitute an effort to destroy (at least in part) the nations involved but given the self-deception of so many Americans—then and now—the genocidal intentions may seem less clear to some; may appear as merely a callous acceptance of "collateral damage" rather than direct genocidal intent.

It was Georgia's intentions that drove the course of events in the late 1820s and the early 1830s, that qualify beyond the shadow of a doubt as genocidal, and that unquestionably identify this episode as a genocide in the history of international law. Georgia passed an Act on 19 December 1829 that promised to extend its jurisdiction over the territory of the Cherokee Nation—an Act that sought to destroy the existence of the Cherokee people as a distinct people. "And be it further enacted," the seventh article read, "That after the first day of June next, all laws, ordinances, orders and regulations of any kind whatever, made, passed, or enacted by the Cherokee Indians, either in general council or in any way whatever, or by any authority whatever of said tribe, be, and the same are hereby declared to be null and void and of no effect, as if the same had never existed."[34]

To coercively deny a peaceful people, or a group of peaceful peoples, their dominion by "legally" destroying their governments, invading their

homelands, and depopulating them is sufficient to justify the term genocide and would be even if the deaths of large percentages of these peoples' populations were not involved. That some of the Native Nations "agreed"—under extreme duress—to "remove" across the Mississippi should not obscure the reality of the genocide of the 1830s.

The law professor Gary Clayton Anderson in his book, *Ethnic Cleansing and the Indian*, has claimed that genocide is "difficult to prove" and maintained that "the conflicts with Indians hardly resemble the mass killings of millions that occurred in Europe."[35] This ignores both the more revealing comments of what the perpetrators of the genocide of the 1830s said were their intentions and the lived experience of numerous Native Nations for whom losses of twenty percent or more of their nationals were common. The contrast between the ruthless workings of the bureaucratic and financial machinery of expulsion—well illuminated in a book titled *Unworthy Republic* by the historian Claudio Saunt—and the rosy picture of removal painted by some of its advocates in 1829-1830 could not be more striking. The loss of life and the sums involved in what soon became a coercive federal effort to extirpate 80,000 people from their homelands are staggering. In 1836, removal consumed more than 40 percent of the federal budget and would again in 1838.[36] According to Saunt: "The federal government expended about $75 million to expel Native peoples from their homelands, equivalent today to a trillion dollars, or about $12.5 million for each deportee."[37] Put in relative proportional population terms, the "removal" of 80,000 people from a territory containing a total U.S. population of less than 13 million in the 1830s, would be the equivalent of "removing" more than two million people today out of a territory containing a total population of around 328 million—and seeing something like 400,000 of them die.[38] Had it been the American people, today, who suffered the kinds of losses that the Native Nations experienced on the Trail of Tears, the numbers of the dead would have exceeded sixty million.[39]

The genocide of the 1830s stretched on for years after the horror was widespread knowledge as nation after nation to the east of the Mississippi was driven west. Before the issue returned to the Supreme Court, in *Worcester v. Georgia*, in 1832, the term a Trail of Tears had already begun to reverberate in the northern press.[40] This was a result of the Choctaw

Nation's horrific experience in accepting the United States' "offer" and a comment from a Choctaw chief to an *Arkansas Gazette* reporter about the journey as far as Little Rock. It had been, he said, "a trail of tears and death."[41] As the historian A. J. Langguth notes, rough calculations show that one in five Choctaw nationals, perhaps more, did not survive.[42] Alexis de Tocqueville, who personally witnessed some of the Choctaw Nation crossing the Mississippi in late 1831, wrote in *Democracy in America*: "I was the witness of sufferings which I have not the power to portray."[43]

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The language of the late eighteenth and early nineteenth centuries can be difficult to follow. Nevertheless, and for a variety of reasons, I have chosen to let the historical actors speak in their own voices rather than in paraphrased summaries to a great extent. The vile brutality of an advocate for removal such as Senator John Forsyth of Georgia cannot really be appreciated in summary. Nor can the eloquent decency of an opponent of removal such as Congressman Henry Storrs of New York. The comments in the debate are generally presented in chronological order so that it is possible, at least to some extent, to perceive the flow of criticisms and responses on both sides. Although the debate proper began in the Senate on 9 April 1830, the report of the House Committee on Indian Affairs of 24 February 1830 is an essential part of the background and will be examined first.

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Presenting the report titled, "Removal of Indians," to the House of Representatives, on 24 February 1830, Congressman John Bell of Tennessee began by pointing out that beyond the great interests involved, "many entertain the opinion that the honor and character of the country are, also, in an eminent manner placed in the keeping of Congress, at this juncture."[44] The report observed the division of opinion and explicitly noted that whether those who were opposed to removal "can claim to have been the most judicious friends of the Indians, remains to be tested by time."[45] With the advantages of hindsight, it is clear not only that the claims of the opponents of removal have been vindicated but also that the claims of the

advocates of removal to be advancing the interests of the Indians have proved hollow and part of a grotesque and morally bankrupt genocidal policy. Given this retrospective clarity, the question naturally arises as to how such a horribly evil policy triumphed, and what would have been required to defeat it. Here it is essential to stress the self-deception of the advocates of removal and to note the power of the sense of self-righteousness and seeming sophistication with which they made their claims. The committee's report addressed the moral criticisms leveled by the opponents of removal head-on:

> Principles of natural law, and abstract justice, are appealed to by some, to show that the Indian tribes within the territorial limits of the States, ought still to be regarded as the owners of the absolute property in the soil they occupy, and that they are to be regarded as independent communities, having all the attributes of sovereignty, except such as they have voluntarily surrendered. All civilized nations acknowledge the validity of the principles appealed to, according to their understanding of what they are, and profess to be governed by them in their intercourse with the rest of mankind. That the interpretation of these principles, as developed in the practice of nations, should vary with the progress of general science, is natural, and agreeable to the truth of history. What, at one period, was held to be just and reasonable, in a succeeding age is condemned as cruel and oppressive. The errors of society, committed in the early stages of it, generally admit of correction, when detected by more enlarged and just views; but it is not always so. It often happens, that they become so closely connected with the very foundations of society itself, that any attempt to eradicate them would involve a dissolution of its bonds, and the destruction of all order—an extremity, forbidden by the very principles, the recognition of which pointed to the original mischief.[46]

The only remedy to the original mischief, the report suggested, was "to have abandoned the continent to the undisturbed possession of the Indian."[47] The authors of the report explicitly recognized the existence of a moral order that "all civilized nations" professed to be "governed by," and then proceeded to argue that its apparent obligations could not be realized

in this case without undermining "the very foundations of society itself." This rhetorical maneuver depended for its persuasiveness on an understanding of "society itself" that derived from an extremist conception of states' rights in which there could be no challenge to the sovereignty of a state from within its chartered limits—no autonomous Native Nations with full rights of sovereignty and ownership of the soil within those limits or, better said, on their own territories which were, in fact, outside the actual limits of any state and of the United States. Framed somewhat differently, states' rights—as a legal claim and as a legal concept—is really code for stealing lands and authority from the Native Nations on the basis of an "inheritance" from some Christians gazing at the land and lacks a coherent account of its origins without reference to the doctrine of Christian discovery. This "inheritance" was, to be sure, a claim on untrammeled authority allegedly acquired from "the Crown" by revolution, but the Crown (which certainly did not possess such untrammeled authority under the British constitution) allegedly derived what untrammeled authority it had in the Americas from discovery.

From the perspective of the authors of the report, what were important were not any "abstract" moral principles, but rather their own interpretations of the "actual practices" and maxims of those "civilized nations" that settled the Americas. They were, in short, although they did not use either term, "positivists" and "realists." Rather than look to the natural law principles of the Declaration of Independence, or those that informed the revolutionary jurisprudence underlying the Constitution, they looked instead to the history of communities founded on a Christian supremacist nationalism:

> The foundations of the States which constituted this Confederacy were laid by Christian and civilized nations, who were instructed or misled, as to the nature of their duties, by the precepts and examples contained in the volume which they acknowledged as the basis of their religious rites and creed. To go forth, to subdue and replenish the earth, were received as divine commands, or relied on as plausible pretexts to cover mercenary enterprises, by the governments which gave the authority, and the adventurers who first discovered and took possession of the new world. Whether they

> were right or wrong in their construction of the sacred text, or whether their conduct can, in every respect, be reconciled with their professed objects or not, it is certain that possession, actual or constructive, of the entire habitable portion of this continent, was taken by the nations of Europe, divided out, and held originally by the right of discovery as between themselves, and by the rights of discovery and conquest as against the aboriginal inhabitants. In the Spanish provinces, the Indians became the property of the grantee of the district of country which they inhabited; and this oppression was continued for a considerable period. Although the practice of the Crown of England was not marked by an equal disregard of the rights of personal liberty in the Indians, yet their pretensions to be the owners of any portion of the soil were wholly disregarded.[48]

This dishonest vision of the past—the vision of "Christian discovery"—had, somehow, to account for several hundred years of treaties in which land was purchased from the Indians. The rhetorical mechanism whereby this history was made an irrelevancy was the claim that such purchases were a matter of expediency not law—in other words that the treaties signed were signed on the part of the colonists in bad faith. There was, the report's authors asserted, a religious feeling that forbade thrusting the Indians out of the land with violence and, besides, trade with them was profitable. This soon brought the colonists to perceive the advantages of cultivating peaceable relations:

> This interest, however, was found, in the progress of the new societies, to be opposed to another great interest; which was, that their resources should be increased, and the demands of the cultivator supplied, by appropriating the wild land within their limits as speedily as possible. The difficulty that was felt in reconciling these two interests, lies at the foundation of the policy which was adopted in relation to the Indians; and the expedients which were resorted to, in order to effect an object so important, constitute the evidence of what the policy of the country was, from that time up to the formation of the Constitution. One of those expedients was, to appear to do nothing, which concerned the Indians, either in the appropriation of their hunting grounds, or in