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Source: *American Indian Quarterly*, Vol. 39, No. 3 (Summer 2015), pp. 243-270

Published by: University of Nebraska Press

Stable URL: <http://www.jstor.org/stable/10.5250/amerindiquar.39.3.0243>

Accessed: 06-09-2016 18:22 UTC

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# The Corporation and the Tribe

JOANNE BARKER

## A PROLOGUE

The system ain't broke. It was built to be this way.

Tom B. K. Goldtooth (Diné/Dakota)

This article examines how the foundational legal definitions of the “corporation” and the “tribe” between 1790 and 1887 worked together to establish and protect imperialist social relations and conditions in the United States between powerful financial interests, both government and corporate, and Indigenous peoples. While the analysis is focused historically, I want to frame it by the current political debates and organizing efforts against government and corporate collusion and fraud represented by Occupy Wall Street (ows) and my engagement with Occupy Oakland. I hope this will help to better understand how the history of the territorial dispossession and collusive fraud enacted by the US government and corporate interests against Indigenous peoples clarifies the kinds of issues of government and corporate collusion and fraud that ows has addressed. To be clear, the 1 percent did not show up in 2008. They have been around all along, targeting Indigenous peoples and their territories over which the US empire was built and continues to operate.

On September 17, 2011, ows began in Zuccotti Park (Liberty Plaza) in Manhattan's financial district with the goal of “fighting back against the corrosive power of major banks and multinational corporations over the democratic process, and the role of Wall Street in creating an economic collapse that has caused the greatest recession in generations.”<sup>1</sup> From

my particular viewpoint in Oakland, California, it seemed that ows had swiftly coalesced the demands of a wide array of grassroots-based organizations and individuals for solidarity against and open debate about the more insidious legal protections of government and corporate collusion. For instance, discussions facilitated by ows exposed the gross misrepresentations of congressional representatives and energy industry CEOs about job creation and public safety in Canada's Keystone XL Pipeline and its proposed extensions through the United States and then linked these lies to the ongoing struggles of Indigenous peoples for environmental justice.<sup>2</sup> When so many Occupy Oakland participants began showing up in solidarity at Indigenous actions in the Bay Area, such as the Chochenyo Ohlone's Annual Emeryville Shellmound Protest on Black Friday, I genuinely believed that the ows movement had succeeded in opening a critical space for much-needed discussions about the structural, ideological, and social links between the foreclosure of many blacks, Asian Americans, and Latina/os from their homes and the US dispossession of Indigenous peoples from their territorial homelands. I was optimistic—unusually so for me—that these discussions would facilitate meaningful solidarity and transformation.

Many things happened that changed my mind and thinking so much that I began the research that informs this article. The first occurred on October 27, 2011, when a group of us failed to convince those present at an Occupy Oakland General Assembly to change the name of Occupy Oakland to Decolonize Oakland in recognition of the fact that Oakland is already on occupied lands. While the assembly did pass a rather non-threatening statement of solidarity with Indigenous peoples, they accused us then and in the Bay Area press of trying to “guilt trip” them into some larger-than-life demand for Indigenous land reparations that went far beyond, they argued, the urgent issues of the foreclosure crisis and the militarized crackdown on ows in Oakland that they cared about. They argued with us more sincerely, and ironically, that changing the name from Occupy to Decolonize would result in them losing “brand recognition” and so affiliation with the broader movement.<sup>3</sup>

We responded by organizing a series of teach-ins to more carefully work people through the historical, legal, and social connections between the foreclosures on black, Asian American, and Latina/o homes and the dispossession of Indigenous peoples in the Bay Area. Along with several other mostly Indigenous women, we hosted the teach-ins

just before the General Assembly from mid-December 2011 through early May 2012 at Oscar Grant Plaza and then at community centers within walking distance of the plaza. Initially the teach-ins gathered a diverse range of individuals. But almost immediately Indigenous peoples—particularly Ohlone—stopped attending. This seemed to be because of the hostile resistance we experienced against the historical links we argued existed between the foreclosure crisis and the dispossession of Ohlone people. The most severe expression of this hostility occurred when a man who identified himself to me as a “member of the black community” accused me of having a “hidden agenda” to move “Indians” into the “family homes of black people” that the banks had foreclosed on.

The intergenerational consequences of foreclosure and the pain and frustration of the rampant evictions of black families from their homes in Oakland were real and vicious. After several such exchanges, I came to believe that those involved in the Occupy movement had not done so well (including myself) at fulfilling the core pedagogical mandate of movements like it to provide the historical and social contexts needed for non-Indigenous communities to understand why Indigenous peoples might perceive the foreclosure crisis as merely (though importantly) the most recent representation of a long history of collusive and fraudulent land issues defining the US economy as an imperialist one.

This article results from my reflection on the pedagogical approaches and content needed within movements like ours to build lasting solidarities across the very community divides—perceptual, structural, and other—on which the US imperial formation depends. These approaches must be characterized by compassion, generosity, reciprocity, and responsibility and must be historical, social, and legal. Working to reform a bad set of laws that protect Wall Street banking interests from taxation or bringing criminal charges against banking executives will not—on their own—adequately address the needs of our diverse communities. Corrections or amendments or enforcement, in other words, do not demand any real structural change. The kind of social transformations needed can only happen from a place of genuine understanding—compassionate, respectful, and informed—about *all* of the historical and social complexities of oppression and exploitation that inform the perceptions and experiences of our communities.

AN INTRODUCTION TO “CORPORATIONS”  
AND “INDIAN TRIBES”

How does the historical and ongoing dispossession of Indigenous peoples clarify the “corrosive power of major banks and multinational corporations over the democratic process” within the United States? How is “the role of Wall Street in creating an economic collapse that has caused the greatest recession in generations” more effectively understood in relation to ongoing Indigenous struggles against jurisdictional and territorial dispossession than within its more popular frame of reference to the Great Depression?

This article, divided into two main sections, considers these questions by examining how the core foundational definitions of the legal status and rights of “corporations” and “Indian tribes” worked in concert to establish and protect imperialist social relations and conditions between powerful financial interests, both government and corporate, and Indigenous peoples. The first part of the article examines the limitations of the status and rights of “Indians tribes” to trade—commercially and in lands and resources—by the US Congress through treaties between 1778 and 1871, the six Acts to Regulate Trade and Intercourse with the Indian Tribes between 1790 and 1834, and the pivotal decision of the Supreme Court of the United States (SCOTUS) in *Johnson’s Lessee v. McIntosh* of 1823. I compare the consequences of these laws to the SCOTUS decisions regarding corporate rights in *Fletcher v. Peck* of 1810 and *Trustees of Dartmouth College v. Woodward* of 1819. Therein, SCOTUS ruled that the US Constitution provided that (1) states were restricted from invalidating contracts that carried out the sale and acquisition of tribally treated lands, irrespective of any fraud or the possession of proper title on which those contracts were based; and (2) corporate charters qualified as contracts between private parties with which states could not interfere.

In the second part of the article, I examine how the legal status and rights of “Indian tribes” were all but decimated by the US Senate’s unilateral suspension of treaty making in 1871 and the terms and administration of the General Allotment Act of 1887. I link the loss of treaty-making powers and territorial dissolution to the SCOTUS decision in *Santa Clara County v. Southern Pacific Railroad Company* of 1886. In that decision, SCOTUS ruled that corporations possessed Fourteenth

Amendment rights analogous to those of “persons,” a stark contrast to the way concurrent law was stripping tribes of any and all legal protections to governance and lands.

Focused historically between 1790 and 1887, this article provides a legal analysis of core US statutes and court decisions in the definition and provision of corporate and tribal status and rights. While focused historically, it anticipates a readership that cares about how this history matters in thinking through the sociolegal importance of the questions raised by OWS and movements like it in relation to Indigenous strategies for political coalition and legal revolution. It assumes that the US dispossession of Indigenous peoples clarifies the “corrosive power of major banks and multinational corporations over the democratic process” as well as “the role of Wall Street in creating an economic collapse that has caused the greatest recession in generations” by bringing into sharp relief the collusive and fraudulent relations between the US Congress, courts, and corporations.<sup>4</sup> In doing so, it does not presume the current system’s catastrophes—marked by the 2008 foreclosure crisis—are aberrations or abnormalities of US democracy. Rather, as Tom B. K. Goldtooth (Diné/Dakota), executive director of the Indigenous Environmental Network, said during a 2012 Toronto symposium entitled “The Occupy Talks: Indigenous Perspectives on the Occupy Movement,” “The system ain’t broke. It was built to be this way.”<sup>5</sup>

#### PART 1: INDIAN TRIBES AND CORPORATE ARTIFICIALITY

##### *The Trade in “Indian Tribes”*

“Indian tribes” appear only once in the US Constitution. Article 1, section 8 enumerates the powers of the US Congress, including jurisdiction over taxation; the national debt and borrowing; naturalization law; bankruptcy and counterfeit law; coinage; post offices and roads; copyright protections; appointment of tribunals; prosecution of crimes on the high seas and offenses against foreign nations; the declaration of war and the commission of armies, naval forces, and militia; and the construction of public buildings. It provides that Congress will “make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer

thereof.” Clause 3 provides specifically that Congress has the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

Congressional power to regulate commerce with Indian tribes was enacted in 371 ratified treaties between 1778 and 1871 and six separate statutes in 1790, 1793, 1796, 1799, 1802, and 1834 titled *An Act to Regulate Trade and Intercourse with the Indian Tribes*. In ratified treaties, Congress established the boundaries of tribal territories and secured tribal rights to governance within them, excepting jurisdiction over US citizens and slaves or Indians who committed crimes against them. The ratified treaties frequently provided for forms of economic self-sufficiency unique to the tribal signatory/ies, such as protecting hunting and fishing rights in “usual and accustomed places.” They often provided for annuities, including payments and goods, in compensation for land cessions. They explicitly guaranteed that no US citizen would be permitted to illegally settle, hunt, or fish within tribal territories. They affirmed congressional authority in tribal trade and protected tribal rights to trade with US citizens.

The *Act to Regulate Trade and Intercourse with the Indian Tribes* of 1790 established a federally regulated licensing system for US citizens wanting to trade with tribes, strict punishments for crimes committed against tribes on tribal lands by US citizens, the prohibition of liquor sales on tribal lands, and restriction against tribal land sales to anyone but Congress by treaty: “That no sale of lands made by any Indians, or any nation or tribe of Indians the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.”<sup>6</sup> In response to rampant treaty violations, the 1793 and 1796 acts provided stricter measures for federal oversight and licensing and for horse sales and an affirmation of treaty provisions respecting tribal boundaries. Anyone attempting to settle on tribal lands was to be expelled, fined up to \$1,000, and imprisoned up to one year.<sup>7</sup> These measures were strengthened in 1799, 1802, and 1834.

Established by the *Indian Trade and Intercourse Acts* (as they were known), trading houses or posts operated under federal oversight from 1796 to 1822 “to supply the Indians with necessary goods at a fair price and offer a fair price for the furs in exchange” (at the time, furs were the most common trade item).<sup>8</sup> The superintendent of Indian trade, a

position established in 1806, and the agents at the posts were appointed through the Office of the President, and their accounts were managed by the secretary of the treasury.<sup>9</sup> The posts were closed in 1822 in large part because fur traders had so effectively circumvented the posts' oversight that they became obsolete.<sup>10</sup> In 1824 the secretary of war created the Bureau of Indian Affairs (BIA) in part to oversee trade with the tribes.<sup>11</sup> The BIA was transferred to the Department of the Interior in 1849.

Even while the US Congress recognized and protected the rights of Indian tribes to commerce and trade over/within their territories by ratified treaties and the Indian Trade and Intercourse Acts, it subjected the terms and exercise of those rights to its own plenary authority. This subjugation coalesced in the SCOTUS decision in *Johnson's Lessee v. McIntosh* of 1823.<sup>12</sup> On the surface, the case involved competing claims to the same eleven thousand acres of land in the state of Illinois. The lands fell within the unique territorial boundaries of the Piankeshaw Nation, whose particular borders had been affirmed by 1773 and 1775 treaties with the Crown. Even SCOTUS argued that the United States inherited the obligations of these treaties from the Crown by the Treaty of Paris in 1783.

The plaintiffs were the legal heirs of Thomas Johnson, who along with several other British citizens claimed to have lawfully purchased the acreage and neighboring areas from the Piankeshaw and Illinois Nations. The defendant was William McIntosh, who claimed to have acquired a deed to the land in 1818 from the US Department of the Interior. The question before the SCOTUS, as Chief Justice John Marshall framed it, was what kind of title the Piankeshaw Nation held in the lands. But before deciding, the Court had to address two facts: (1) the US Congress had acknowledged in its ratified treaties with Indian tribes—as had all European nations before it—that tribes possessed a land title that they could treat upon; and (2) the treaties themselves referred to Indian tribes as sovereign nations with all commensurate jurisdictional rights over and within their territories.

While not missing the import of treaty language, SCOTUS sided with McIntosh on the grounds that Indian tribes had never been recognized as equal “sovereign, independent states.”

The uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent



communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations.

This understanding, SCOTUS maintained, was reflected in the treaties:

All the treaties and negotiations between the civilized powers of Europe and of this continent . . . have uniformly disregarded their supposed right to the territory included within the jurisdictional limits of those powers. Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states.

Effectively, SCOTUS rewrote treaty history to find that treaties with Indigenous nations functioned internationally in a way contrary to the precepts of international law. Instead of recognizing Indigenous sovereignty, nationhood, and territorial rights, the Court argued that the treaties had, all along, “disregarded” Indigenous legal status and rights as sovereign nations. The Court argued that the evidence for this fact of disregard was discovery:

Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives. The sovereignty and eminent domain thus acquired, necessarily precludes the idea of any other sovereignty existing within the same limits. The subjects of the discovering nation must necessarily be bound by the declared sense of their own government, as to the extent of this sovereignty, and the domain acquired with it. Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another, is no longer a sovereign state. The same treaties and negotiations, before referred to, show their dependent condition.

The Court claimed that by virtue of their relationship to the land as Lockean hunter-gatherers, having *always already* passed into a Hegelian subservience to dominant sovereigns owing to their need for the master’s protection, Indigenous peoples had been made “subject to the sovereignty of the United States.” These were well-established facts, the Court contended, of colonial law, which had wisely understood Indige-

nous people “as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government” on the basis that they were not in full possession of the lands over which they “wandered.”

In lieu of full title or property in the lands, SCOTUS offered “aboriginal title” as the kind of title and so rights Indigenous people possessed in the lands. Essentially, aboriginal title was the right to use and occupy lands, “a mere right of usufruct and habitation.” It was not a right of ownership—with the implied “power of alienation.” Consequently, the title could be extinguished if found to be in lack. In other words, tribes not making adequate use or occupation of their lands forfeited all claims to the lands. The *Johnson* decision nullified the rights of Indigenous peoples to own and trade over/within their territories by subjecting the terms and conditions of all commerce in goods and lands to the plenary authority of Congress in evaluating whether or not tribes were properly and adequately using and occupying their lands.

In *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*, Lindsay G. Robertson provides an exceptional analysis of the collusions informing *Johnson’s Lessee v. McIntosh*.<sup>13</sup> Johnson’s and McIntosh’s attorneys were hired by the same land development company operating out of New England and for decades illegally buying up lands from Indigenous nations all over North America. Even the particular plot of land in question was not in dispute; Johnson and McIntosh held title to lands in Illinois that were fifty miles apart. The case, however, served to create the legal fiction Congress and SCOTUS needed about tribal land title amounting to nothing more than a benefit of federal guardianship, the terms of which were left to the discretion of federal authorities in assessing “use and occupancy” in relation to their own and corporate interests in development.<sup>14</sup>

### *The Contract in “Artificial Beings”*

The unilateral suspension of treaty making, the Indian Trade and Commerce Acts, and the *Johnson’s Lessee v. McIntosh* decision are but one cluster of the myriad efforts by US officials to decimate Indigenous territorial rights. Simultaneously, there was a steady centralization and entitlement of corporate rights to buy, lease, develop, and extract from tribal lands and natural resources. In other words, legally contorting Indig-

enous nations into the function and operation of “Indian tribes” in all matters of trade under congressional authority worked to subject Indigenous peoples and their territories to corporate interests altogether indistinguishable from congressional ones by goal and office.

In the early laws of European kingdoms and nation-states, a king, a parliament, or a pope issued charters to establish institutions such as municipalities, universities, guilds, and churches that were considered self-governing, able to hold property, and enter into contracts.<sup>15</sup> Virtually absent from these early charters were business entities; almost always the charters were aimed at civic bodies that would provide some form of public service. They were called corporations, “from the Latin word *corpus*, meaning body, because the law recognized that the group of people who formed the corporation could act as one body or one legal person.”<sup>16</sup>

By the seventeenth century, charters began to be issued to trading companies that operated as finite partnerships that dissolved at the conclusion of a specifically commissioned job, usually entailing naval exploration and a guaranteed monopoly, such as in the spice trade.<sup>17</sup> Different from earlier chartered entities, these companies did not have the “features of perpetual succession, identifiable persona, and asset separation.”<sup>18</sup> Because they proved to be financially risky, they were stabilized by England in 1600 with the charter of the East India Company and by the Netherlands in 1602 with the charter of the Dutch East India Company, both of which were soon granted charters *in perpetuity* to protect their “building, populating, and governing” of the colonies.<sup>19</sup> In other words, by the early 1600s, chartered corporations were entirely enveloped within the colonial projects of empire building, invested by their respective kingdoms and then nation-states with the powers of government and military.<sup>20</sup> In fact, corporate executive officers were often given state titles (governors) and corresponding authority to purchase land, administer trade, and wage war.

The US Constitution provided that state legislatures take over the responsibility of respecting preconstitutional charters and the task of issuing new ones.<sup>21</sup> The legal veracity of state charters was established by article 1, section 10, clause 1 of the US Constitution, known as the contract clause, which provided that “no State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in

Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”

The first US Supreme Court decision, issued under Chief Justice John Marshall, on the legal import of the contract clause was in *Fletcher v. Peck* of 1810.<sup>22</sup> In *Law and Politics in the New Republic: Yazoo: The Case of Fletcher v. Peck*, C. Peter Magrath provides an important examination of the collusions and fraud that informed the landmark decision and so anticipated those involved in *Johnson's Lessee v. McIntosh*.<sup>23</sup>

In 1789 three land companies formed in Georgia with the purpose of buying land in the Yazoo River area, then included within the treated boundaries of the Cherokee Nation. The governor signed a deal to sell nearly sixteen million acres of these lands to the companies for \$200,000 (1 cent per acre). In 1790 President George Washington issued a stern warning to Georgia regarding the treaty rights of the Cherokee Nation to the lands and the potential of the deal to solicit armed conflict with the Cherokees and their allies among the neighboring Chickasaw, Choctaw, and Creek Nations. Undeterred, the state passed a resolution requiring that the payment for the lands be made in gold and silver, which the companies could not do. The deal fell through.<sup>24</sup>

Several years later, four new land companies formed, again with the purpose of buying lands in the Yazoo River area. These companies included speculators from Georgia and Pennsylvania, as well as two senators (one from Georgia and one from Pennsylvania), two members of the House (one from Georgia and one from South Carolina), three judges (including Supreme Court Associate Justice James Wilson), and the Tennessee territorial governor. Between 1794 and 1795, several Georgia legislators received large grants of land in the eastern part of Georgia. In 1795 they passed the Yazoo Land Act. By the act, Georgia claimed fee title to thirty-five million acres of land and sold them to the four companies for \$500,000 (1.4 cents per acre). The act likewise directed a resolution to the US president requesting that the necessary treaty be made with the Cherokee Nation securing the extinguishment of the Cherokees' land title and so allowing the sale to proceed.<sup>25</sup>

By this time, the Cherokee Nation had entered into treaties with the United States in 1785 and 1791 that delineated the nation's boundaries in lands within and bordering Georgia. The 1791 boundaries were reaffirmed by treaty in 1794. The boundaries were not redrawn until the treaty of 1798 and then again in treaties of 1804, 1805, 1806, 1816, 1817, and 1819. By

each treaty Georgia sought further and further land cessions from the Cherokees. Georgia would achieve its goal for the complete cession of Cherokee land title with the Cherokee removal treaty of 1835.<sup>26</sup>

Meanwhile, the Yazoo Land Act of 1795 was exposed in state politics as a collusion and taken up in debates between Georgian Federalists and Republicans as the 1796 state election approached. The result was felt when Georgia's voters, enraged by the state's creation of large land monopolies, rejected most of the incumbents. The newly elected officials worked quickly to pass a law that repealed the 1795 act and so the titles issued under its provisions. However, the land companies had already begun selling Yazoo lands throughout the country, in some cases making nearly 650 percent profit on their original investments. One of the most important of these sales was of eleven million acres to the New England Mississippi Land Company, which included wealthy merchants, former elected officials and judges, and land speculators in the New England region. When Georgia legislators repealed the Yazoo Land Act in 1796, the company mobilized its network to challenge the state's repeal law and secure its land claims. Failing to secure passage of a congressional law that would have compensated it for alleged financial losses incurred as a result of the repeal act, the company took its complaints to federal court.<sup>27</sup>

The complaint was orchestrated by the New England Mississippi Land Company in 1803 between land speculator Robert Fletcher (of New Hampshire) and the company's director, John Peck (of Massachusetts). Fletcher alleged that he had bought fifteen thousand acres from Peck and that Peck breached the contract of sale by not having legal title.<sup>28</sup> Peck contended that Georgia's repeal act was invalid. In 1810 the US Supreme Court agreed with Peck.<sup>29</sup>

SCOTUS conceded that there had been fraud underlying the original sale of the Yazoo River lands but rejected Fletcher's argument that Georgia had the power to repeal the 1795 act on the grounds of the fraud. It argued instead that Peck had entered into two valid contracts—one when purchasing and one when selling the land—and that those contracts operated outside the original fraud: "When a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights." Fletcher's claim was dismissed, and Georgia's law repealing land titles was nullified.<sup>30</sup>

While the ruling made frequent passing remarks about "Indian title,"

it failed in all regards to address the substantive questions of the state's claim to fee title in the lands, the state's rights to sell the lands, the fact that tribal title had not been extinguished by treaty when the claim and sale were enacted by state law, and the fact that the US Congress was not a party to the sale in violation of the Constitution. Instead, SCOTUS sashayed over "Indian title" as if it posed no legal challenge whatsoever to the question of whether or not a state could breach a contract between individuals without violating the Constitution. This fundamentally shifted the significance of the contract clause away from its implication of tribal treaty rights—"No State shall enter into any Treaty . . . or Law impairing the Obligation of Contracts"—and toward service to corporate interests. It allowed, if not outright encouraged, collusive investment practices in land speculation that could be easily legalized by the exchange of money and contractual signatures between those parties committing the fraud.<sup>31</sup>

The second US Supreme Court decision on the legal import of the US Constitution's contract clause was in *Trustees of Dartmouth College v. Woodward* of 1819.<sup>32</sup> The New Hampshire legislature amended Dartmouth's charter to change it from a private to a public institution with trustees to be appointed by the governor. The trustees challenged whether or not the state could unilaterally amend the terms of the school's charter.

The suit raised the question about whether or not charters—the mechanism by which corporations were created—fell under constitutional protections. SCOTUS ruled that they did. However, it explained that the entities created by charters—corporations—were created under state authority:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

These "properties" included the right of the individuals making up corporations to "act together as a single person for purposes of holding property, entering into contracts, and suing and being sued in court." The court ruled that charters

enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented, and are in use.<sup>33</sup>

The artificiality of chartered entities pretended that corporations were overdetermined by constitutional law and state jurisdiction. It so invested and protected corporate property rights *in perpetuity*, figuratively clothing male executives in liberties and freedoms from having their corporate-held property and individual investments (and so profits) divided, taxed, or otherwise burdened by regulation.<sup>34</sup> Protected as a constitutional right, corporate property rights trumped tribal territorial claims, even when secured by a treaty, and even when corporations acquired the lands by fraud. *Fletcher* and *Dartmouth* thereby represented the rearticulation of “Indian tribes” into a legal and economic structure predicated on imperialist capitalism without any corporate accountability.

## PART 2: INDIAN TRIBES AND PERSONS

The legal status and rights of “Indian tribes” were all but decimated in the Reconstruction period by Congress’s unilateral suspension of treaty making in 1871 and the consequences of the General Allotment Act of 1887, which brought about both the privatization of tribal lands and an expansive yet inefficient system of federal administration over remaining tribal lands, natural resources, and financial assets. This virtual obliteration of tribal rights contrasts sharply with the juridical expansion of corporate rights by the SCOTUS decision in *Santa Clara County v. Southern Pacific Railroad Company* of 1886. SCOTUS ruled that corporations possessed Fourteenth Amendment rights analogous to those of “persons,” including due process and equal protection. This emboldened, entitled position—and the surrounding rhetoric of the overburdened regulation and taxation borne by corporations—evaded public and federal accountability for the role of railroad and related companies in the dispossession and genocide of Indigenous peoples.

## *Reconstruction*

During and after the Civil War, Congress enacted a series of laws meant to suspend the secession of the Confederacy, emancipate African slaves, prohibit racial discrimination, and stimulate a free labor economy. The Thirteenth Amendment of 1865 and the Fourteenth Amendment of 1868 required that southern states, and the tribes that had aligned with them in part or in whole during the war, modify their constitutions and by-laws to abolish slavery and prohibit racial discrimination. For southern states, these requirements were satisfied technically but met with grossly uneven implementation and conflict marked by fiercely contested elections, such as within Georgia over its constitutional revisions in 1865 (when it repealed secession and abolished slavery), 1868 (when it extended suffrage to all male citizens), and 1877 (when previous provisions were strengthened). Conflict was also marked more popularly by the formation of the Ku Klux Klan in 1865, initially in Tennessee, and state-sanctioned practices condoning and facilitating all manner of racial segregation, including those within education and voting.

For tribes, particularly those who had been removed from the South and into Indian Territory, the requirements of Reconstruction were imposed through treaties, such as those ratified in 1866 with the Cherokee, Choctaw and Chickasaw, Creek, and Seminole Nations.<sup>35</sup> The treaties provided that the tribes abolish slavery, enfranchise African freedmen, reintegrate those factions that had fought for the South, and restore property confiscated from those factions during the war. The treaties also provided that tribal territories were to be subjected to the “right of way” of railroads but for the first time required that federally issued licenses to individual and corporate traders be approved by tribal governments (up to then, the BIA issued licenses, often without consulting with tribes). The provisions of abolition and enfranchisement of blacks were deeply contested in intra- and intertribal politics, including those that denied the existence of black-Native lineage, property, and voting rights.<sup>36</sup> These provisions also engendered multiple forms of opposition to allotment and statehood, including armed militia and subversive acts of defiance.<sup>37</sup>

The complexities of postwar national politics included many social movements against racial discrimination and segregation and for the enfranchisement of women, as well as intertribal military and unarmed alliances against US treaty violations. At the same time, there was an



explosive growth of business-minded corporations: from 7 in 1780, to 335 in 1800, to several thousand in 1850, to over half a million in 1900.<sup>38</sup> Many of these corporations were aimed at the development of tribal territories (railroad tracks, postal routes, townsites, cattle grazing) and the extraction of tribal resources (timber, oil, coal, gold) and directly or implicitly involved in violence and fraud against non-Indigenous people and Indian tribes that resisted.<sup>39</sup> In an effort to protect their often illegal investment/development schemes against opposition, corporate boards and their attorneys worked to claim constitutional protections, particularly through the Fourteenth Amendment of 1868.

The Fourteenth Amendment modified article 1, section 2, clause 3, which enumerated the powers of the House of Representatives and determined the apportionment of representatives and taxes. It is the only appearance of “Indians” in the Constitution: “Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.” It provided that

all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In 1870 the Fifteenth Amendment provided that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”<sup>40</sup> Together, the amendments attempted to address the social politics of abolition and enfranchisement, as well as protecting the rights of all citizens to be represented fairly in Congress and protected against unlawful government actions or deprivations of “life, liberty, or property, without due process of law.”

As the amendments were being debated and passed, so too was Congress assessing its financial obligations to tribes by treaty, no doubt in immediate concern over the nation’s economy following the war but also in looking forward to the expansion of its territories into the Pacific and Caribbean. In 1871 the House of Representatives took the ini-

tiative in adding a rider to the annual Indian Appropriations Bill before it moved to the Senate:

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.<sup>41</sup>

The US Senate agreed. “Indian tribes” were no longer to be recognized as independent authorities with whom the United States would “contract by treaty” and so incur any further debt, though existing treaties and financial obligations were to be fulfilled.

The suspension of tribal treaty making invited corporate collusion with federal efforts to subject remaining tribal territorial rights to the goals of capitalist development, coalescing in the perfect sociolegal storm of the privatization of tribal lands and the vast extension of federal administration over remaining lands by the General Allotment Act of 1887 and its amendments by the Curtis Act of 1898, the Burke Act of 1906, and the Omnibus Act of 1910.<sup>42</sup> The acts provided for reservations to be broken up in severalty and issued to members as parcels, which ranged from forty to six hundred acres each based on the value of the lands and the members’ marital and dependent status.<sup>43</sup> The issuance of title was supposed to be based likewise on assessments of individual “competency.” Those deemed incompetent were given trust titles, their property held in trust by the BIA for a period not supposed to exceed twenty-five years, during which time they were to get educated in proper land use. Despite the suspension of trust titles by the Burke Act of 1906, there are 10.6 million acres of individually owned lands that are held in trust even now.<sup>44</sup> The gross mismanagement of these lands was addressed by the largest class-action suit in US history, *Cobell v. Salazar* of 1996, which was concluded by the Claims Resolution Act of 2010.<sup>45</sup> Meanwhile, those who were deemed competent were issued fee titles, awarding them with US citizenship and so subjecting them to property taxes. Almost 60 percent of lands issued in fee were lost within a decade, the majority of them to state property tax foreclosure.<sup>46</sup>

Surplus lands, or lands unassigned to tribal members, were sold to nonmembers. Allotted and surplus lands were divided by the practice of

checkerboarding and fractionated heirship. Checkerboarding scattered tribal allotments in between nontribal lands to disrupt tribal governance and collective forms of economic self-sufficiency. It rendered shared-use practices such as collectively operated agriculture and forest conservation impossible. Fractionated heirship divided allotments among heirs who share an undivided interest in the land. Over time, this has meant that an allotment can have thousands of owners. In most cases, heirs are absentee leaseholders, with leases that render them without the ability to use the lands for their own economic self-sufficiency, little financial benefit, and no collateral for developing credit.<sup>47</sup>

While total tribal and individual landholdings were reduced by about two-thirds through allotment (from 148 to 48 million acres), many of these lands were configured in such a way by checkerboarding and heirship that nonmembers came to dominate the use if not the control of tribal lands. This was furthered by the fact that even before but especially after allotment of a given reservation, corporations had secured thousands of leases for grazing and licenses for resource extraction from both reservations and allottees whose titles were held in trust.<sup>48</sup> Allotment's "Indian tribe" was no match for *Santa Clara County's* corporate "person." The tribe had suspended rights to treaty making and was left only with an option to agree or not with federal mandates, sometimes but not always negotiated through finite contracts, but both of which were overshadowed by corporate interests in expansive development and figured entirely through an "Indian tribe" that was all but stripped of legal status.

### *The Equal Protection of "Persons"*

In what are known as the *Slaughterhouse Cases* of 1872, the US Supreme Court issued its first opinion on the legal merits of the Fourteenth Amendment.<sup>49</sup> The cases emerged from three suits in New Orleans, Louisiana, where residents had suffered eleven cholera outbreaks and related ill health as a result of animal matter from slaughterhouses polluting the city's drinking water. In 1869 the state legislature passed a law that allowed New Orleans to charter a single corporation (the Crescent City Livestock Landing and Slaughterhouse Company) with the promise that it would centralize all slaughterhouse operations in the city, confine butchers to areas that kept them away from the city's water supplies, and facilitate

better regulatory oversight. Represented by former Supreme Court justice John A. Campbell (whose Confederate loyalties had forced him to resign from the Court), over four hundred members of the Butchers' Benevolent Association sued to stop the city's takeover of the slaughterhouse industry on the basis of the Fourteenth Amendment's protections for due process, equal protection, and the privileges and immunities clause (section 1, clause 2: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all *privileges and immunities* of citizens in the several states" [emphasis added]). Issued by Justice Samuel Freeman Miller, the SCOTUS held to a narrow interpretation of the amendment, arguing that due process applied only to procedure, that equal protection applied only to former slaves ("Freedmen"), and that the privileges and immunities clause applied only to national and not state citizenship rights.

The *Slaughterhouse* decision was overturned in *Santa Clara County v. Southern Pacific Railroad Company* in 1886.<sup>50</sup> In 1879 the California legislature ratified a new state constitution that among other things outlined strict rules for the assessment of railroad property values and taxes. In 1882 Santa Clara and Fresno Counties assessed the "franchises, road-ways, road-beds, rails, and rolling stock" of the Southern Pacific Railroad Company and the Central Pacific Railroad Company to recover taxes for the previous fiscal year, 1881–82, under the new rules. The court found that "the state board of equalization, in making the supposed assessment of said roadway of defendant, did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said roadway and the land of coterminous proprietors. Said fences were valued at \$300 per mile." The railroad companies appealed, claiming that they were protected from such taxes under a federal statute of 1866, affirmed by an 1870 state law, that established "a right of way over the public domain" with liberal access to "public lands" in order to construct and maintain a continuous railroad line from Missouri to the Pacific "subject to the use of the United States for postal, military, naval, and all other government service, and to such regulations as congress might impose for restricting the charges for government transportation."

SCOTUS found that in neither federal nor state law were fences to be assessed differently from the railroads and adjacent lands and that therefore the state board did not have the power to include the fences

in its assessment of the railroads' property values. The Court concluded that "upon such an issue, the law, we think, is for the defendant. An assessment of that kind is invalid, and will not support an action for the recovery of the entire tax so levied."

In framing its conclusion, the Court claimed that corporations were protected against such actions under the Fourteenth Amendment: "One of the points made and discussed at length in the brief of counsel for defendants in error was that 'corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States.' Before argument, Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does." SCOTUS thereby overturned the strict interpretation of *Slaughterhouse* on the questions of procedural due process and equal protection for "former slaves" not by extending those protections to substantive due process and other racialized groups but by assuming that the protections applied to corporations. This almost dismissive caveat—"We are all of the opinion that it does"—would be the first time SCOTUS ruled that corporations possessed Fourteenth Amendment rights analogous to those of "persons."

Irrespective of the Court's intent, which has been much debated in legal scholarship, the opinion served as precedence for the application of Fourteenth Amendment protections to corporations. So consequential was the decision that it created what has since been referred to as "corporate personhood."<sup>51</sup> The rationale was that the US Constitution upheld the rights of individuals, so their individual guarantees of due process, et cetera, should extend naturally to corporations as mere amalgams of those individuals.<sup>52</sup>

Nowhere within *Santa Clara County* is there any reckoning—even to an imaginary of conquest as a fait accompli—for Indigenous territorial rights, either within the counties suing the railroad for back taxes, more broadly within the state of California, or within the US imperial formation plummeting the nation forward into global capitalism marked by the illegal annexation of Hawai'i and the war with Spain over Pacific colonies in 1898. This lack of reckoning underscores the way "Indian tribes" were perceived to be so thoroughly situated under a federal plenary authority serving corporate interest as to be locally irrelevant.

What changes in our understanding of “corporate personhood” if we insist on an account of Indigenous territorial rights within it?

When Spain began its imperial efforts in the region where California was to become a state, it is estimated conservatively that the tribal population was around three hundred thousand. Forced into slavery and starvation by the Spanish military and Catholic Church working in concert to bring about Spanish-Catholic power, about one hundred thousand people died between the first mission of 1769 and Spain’s cession of the territory to Mexico in 1821. At the close of the US-Mexican War and the acquisition of California as part of the Treaty of Guadalupe Hidalgo of 1848, another fifty thousand died as slavery, starvation, and armed conflict characterized tribal-Mexican relations as they had tribal-Spanish. After the gold rush of 1848, US miners, agriculturalists, and railroaders settlers quickly outnumbered everyone else. Tribes were aggressively removed from their territories in violation of the 1848 treaty, which had provided that the United States would protect tribal land grants. Undeterred, US citizens displaced and outright murdered tribal peoples to gain hold of their lands and coerce survivors into servitude.<sup>53</sup>

California was admitted to the United States as a free state in 1850. In 1851 the legislature passed the Act for the Government and Protection of the Indians, which allowed any “white” to force into work any “Indian” found to be “vagrant.” Since Mexicans were then classified as “whites” in state law, this facilitated the enslavement of tribal peoples by all property owners in the state. Since “Indians” could not testify against “whites” in court, tribal people had no recourse to challenge either their forced removal or enslavement or the physical and sexual violence that often came with it. For despite its status as a free state, California permitted the open sale and indenture of tribal people for labor and sex trade purposes.<sup>54</sup>

In 1851, in his inaugural address to the legislature, Governor Peter H. Burnett promised that “a war of extermination will continue to be waged between the two races until the Indian race becomes extinct.”<sup>55</sup> In 1853 the legislature ordered the “extermination” of all Indians. Reimbursed by the federal government, state bounties were paid per Indian scalp or severed head, and all expenses related to the efforts were reimbursed, including the cost of ammunition, guns, and horses. Within two years, California paid out about \$1 million to individuals who submitted claims. It was inhumane. Whole tribes, bands, and families were massacred.

Describing this campaign in *Native Americans of California and Nevada*, Jack D. Forbes emphasizes that it was not merely military or state officials who participated in it: “The sequence of events is all the more distressing since it serves to indict not a group of cruel leaders, or a few squads of rough soldiers, but, in effect, an entire people; for the conquest of the Indigenous Californian was above all else a popular, mass enterprise.”<sup>56</sup> By 1860 no more than twenty thousand of the tribal population had survived. Those who did were almost entirely dispossessed of their territories and living in conditions of gross poverty and ill health. Many had begun to identify as Mexican to secure paid work as farmhands, passing into an other, analogously complicated status in hopes of survival.

In 1851 the US Congress sent a commission to California to negotiate treaties with tribes for land cession. By 1852 eighteen treaties had been negotiated with more than one hundred tribes. The treaties would have provided the tribes with approximately 8.5 million acres divided into eighteen reservations. However, California’s governor and senate actively opposed the treaties, seeing them as excessively generous and cumbersome to the state’s goals. They, along with several private citizens (mostly ranchers and miners), lobbied hard to stop the ratification process. As a result, the US Senate put an “injunction of secrecy” on the treaties, which held until 1905. But the tribes were never notified that the treaties had not been ratified. Federal and state agents and militia moved many onto smaller reservations (often from several different tribes) under the auspices of carrying out treaty provisions while they purchased the “deserted” lands for themselves.<sup>57</sup>

In his definitive historical study of imperialism, *Violence over the Land: Indians and Empires in the Early American West*, Ned Blackhawk demonstrates how each invading power directly created the economic and social conditions in which the next prospered and all at Indigenous peoples’ expense.<sup>58</sup> Spain and Mexico and then the immigrants who would form California and join the Union in 1850 flourished as a direct result of the genocide and dispossession that they enacted on Indigenous peoples, producing the very conditions through which miners, agriculturalists, and the railroad could lay claim to unfettered access and development of tribal territories and natural resources.

In other words, the “corporate persons” of *Santa Clara County* were able to claim tribal lands, resources, and bodies in California as a result

of their involvement in the genocide and dispossession of tribal peoples. *Santa Clara County* legitimated this history and then protected the “persons” involved as corporations with full constitutional rights. *Santa Clara County* was thereby consistent with the historical work of corporations in imperialism and its colonial projects as the entities through which the “building, populating, and governing” of the empire were enabled.<sup>59</sup>

#### A CONCLUSION

Got land? Thank an Indian.

Jeff Manard (Pine Creek First Nation)

The legal precedent set by the congressional statutes and court rulings read above deeply informed the re-formation of Indigenous governments into corporations of a particular kind. The Hawaiian Homes Commission Act of 1920, the Indian Reorganization Act of 1934, and the Alaska Native Claims Settlement Act of 1971 configured “Native Hawaiian organizations,” “American Indian tribes,” and “Alaska Native villages” as bodies possessing analogous rights between them to enter contracts. But by the time these statutes were passed into law, tribes had long since been stripped by SCOTUS of the ability to own and alienate the lands they used and occupied or to enter into contractually binding agreements with each other or other political and economic entities without federal oversight and approval. These serious limitations underscore the core capitalist ideologies and practices that undergird the United States as an imperialist power and social formation. In a state whose capitalism is *always already* reaching out globally, of course Indigenous peoples cannot have equal or commensurate claims to any lands and resources that might compete with corporate-as-the-government’s interests to expand, extract, and profit some more. Of course.

The problematic erasures of the historical contextualization of Indigenous territorial rights within the pedagogical mandates of ows is not about a forgetting of an imperial-colonial past that can be fixed with a liberalist project of recovery or memorandum of solidarity.<sup>60</sup> As if we just included the facts about the historic wrongs of corporate-federal collusion and fraud in the dispossession and genocide of Indigenous peoples, all would be righted in radical social justice efforts against “the



corrosive power of major banks and multinational corporations over the democratic process.”

The erasures of Indigenous territorial rights and historical experiences of corporate-government collusion and fraud are, rather, a politic of epistemology—an ideology and practice of knowledge making—that takes the imperial-colonial narrative for granted in its understanding of US imperialism and in its thinking through strategies of opposition against its injustices. That narrative believes in its own success story—that Indigenous peoples are conquered, disappeared, lost, gone. Tragically but nonetheless as an objective truth: the Indigenous has been eliminated from the lands and resources of the empire and so from relevance to current political debate.

The question for ows and related movements is why any effort against the US empire needs a scandal of corporate-federal collusion and fraud like that of the Wall Street foreclosure and securities crisis around which to organize. Why ows so early figured that scandal as a battle of the 1 percent against the 99 percent. Why ows’s resolutions have often been about arrest and redistribution and not a radical transformation of the system. Why Wall Street’s current behavior is exceptionalized. As if the US “democratic process” has been merely corrupted and would otherwise not be but for the selfish greed of a few.

It seems Jean Baudrillard’s *Simulacra and Simulation* is important again for understanding that the public performance of scandal is really an act of concealing that there is no scandal at all—that the social relations and conditions registered by the scandal-performed are the norm.<sup>61</sup> This is especially difficult to confront from any political perspective predicated on contrasting the altruism of US democracy with the collusive fraud of Congress and Wall Street. But what if US democracy has only ever been a façade, a mask, a costume? A performance that conceals? That the formative values at work in the US Constitution were not liberty, freedom, and equality as celebrated but were aimed at establishing and protecting government and corporate power of a government invested? What if it is “US democracy” that is “the truth which conceals that there is none”?

This would certainly seem to be the case in the story of the multiple kinds of racialized and gendered inequalities between “artificial entities” and “Indian title,” “persons” and dis-treated “Indian tribes” that have been articulated historically through corporate, court, and congressio-

nal racketeering in Indigenous territorial rights. An epistemological practice that begins with the presumption of the centrality of Indigenous territorial-based claims to sovereignty and self-determination in the constitution of the US political-economic system might more directly expose not only that the “man behind the curtain” has *always-already* been there but that all along there has been a meaningful role of the audience in maintaining the theater of democracy’s performance. Leaving behind the goal of trying to fix or correct that which is broken or corrupted, of trying to revenue share our way into social justice, we might be able to think more productively together about the necessity for meaningful and substantive social reformation if we insisted on the empire’s accountability to the territorial rights of Indigenous peoples.

#### NOTES

1. See <http://occupywallst.org/about>.
2. Naomi Klein, Michael Moore, William Greider, Rinku Sen, and Patrick Bruner, panel discussion, “Occupy Everywhere: On the New Politics and Possibilities of the Movement against Corporate Power,” November 10, 2011, the New School, New York, <http://www.thenation.com/video/164494/watch-michael-moore-naomi-klein-and-others-owss-possibilities>.
3. For a record of the resolution, see Occupy Oakland General Assembly Resolutions, <https://occupyoakland.org/2011/11/general-assembly-resolutions>.
4. Occupy Oakland General Assembly Resolutions.
5. Tom B. K. Goldtooth, “The Occupy Talks: Indigenous Perspectives on the Occupy Movement,” January 3, 2013, Toronto, Canada, <http://www.ienearth.org/occupy-talks-indigenous-perspectives-on-the-occupy-movement-media-wrench-toronto>.
6. An Act to Regulate Trade and Intercourse with the Indian Tribes, 1 Stat. 137 (July 22, 1790).
7. Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1994), 100–102.
8. Felix S. Cohen, *Handbook of Federal Indian Law* (Washington, DC: Government Printing Office, 1942), 10.
9. Cohen, *Handbook of Federal Indian Law*, 10.
10. Prucha, *American Indian Treaties*, 102.
11. Cohen, *Handbook of Federal Indian Law*, 10.
12. Johnson’s Lessee v. McIntosh, 21 U.S. 543, 5 L. Ed. 681, 1823 U.S. LEXIS 293 (1823).
13. Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford: Oxford University Press, 2005).
14. The “Marshall Trilogy,” as it has been referred to historically, also included the

SCOTUS decisions in *The Cherokee Nation v. The State of Georgia* (30 U.S. 1, 8 L. Ed. 25, 8 L. Ed. 2d 25, 1831) and *Worcester v. Georgia* (31 US 515, 8 L. Ed. 483, 8 L. Ed. 2d 483, 1832). Together, these decisions defined “Indian tribes” as having passed under the juridical dominion and so protection of the United States as dependent “wards.”

15. Margaret M. Blair, “Corporate Personhood and the Corporate Persona,” *University of Illinois Law Review* 3 (2013): 785–820, see esp. 788.

16. Blair, “Corporate Personhood,” 788–89.

17. Blair, “Corporate Personhood,” 790.

18. Blair, “Corporate Personhood,” 791.

19. Blair, “Corporate Personhood,” 791.

20. See Vine Deloria Jr., “Self-Determination and the Concept of Sovereignty,” in *Economic Development in American Indian Reservations*, ed. Roxanne Dunbar Ortiz (Albuquerque: University of New Mexico Indigenous American Studies, 1979), 22–28; S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004).

21. Blair, “Corporate Personhood,” 793.

22. *Fletcher v. Peck*, 10 U.S. 87, 3 L. Ed. 162, 3 L. Ed. 2d 162 (1810).

23. C. Peter Magrath, *Law and Politics in the New Republic: Yazoo: The Case of Fletcher v. Peck* (Cambridge, MA: Brown University Press, 1966). See also Robertson, *Conquest by Law*.

24. Magrath, *Law and Politics*, 4–5.

25. Magrath, *Law and Politics*, 6–9.

26. Treaty with the Cherokee, 7 Stat. 39 (July 2, 1791).

27. Magrath, *Law and Politics*, 15, 34, 38.

28. Magrath, *Law and Politics*, 54–55, 64–65.

29. See Robertson, *Conquest by Law*, 29–44.

30. It would not be until 1934 that the US Supreme Court would rule that a state could alter the terms of a contract so long as the alteration was rationally tied to protecting the public’s welfare (*Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413).

31. See Robertson, “Harper,” in *Conquest by Law*, 29–44.

32. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 250, 4 L. Ed. 629 (1819).

33. See Beth Stephens, “Are Corporations People? Corporate Personhood under the Constitution and International Law,” *Rutgers Law Journal* 44, no. 1 (2013): 1–38; Carl J. Mayer, “Personalizing the Impersonal: Corporations and the Bill of Rights,” *Hastings Law Journal* 41 (1990): 577–667; Lyman Johnson, “Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood,” *Seattle University Law Review* 35 (2012): 1135–64.

34. For analysis of the impact of gendered ideologies and property rights on Indigenous women, see Bethany Ruth Berger, “After Pocahontas: Indian Women and the Law, 1830 to 1934,” *American Indian Law Review* (1997): 1–62; Theda Perdue,

*Cherokee Women: Gender and Culture Change, 1700–1835* (Lincoln: University of Nebraska Press, 1999).

35. Treaty with the Cherokee, 14 Stat. 799 (July 19, 1866); Treaty with the Choctaw and Chickasaw, 14 Stat. 769 (April 28, 1866); Treaty with the Creek, 14 Stat. 785 (June 14, 1866); Treaty with the Seminole, 14 Stat. 755 (March 21, 1866).

36. Circe Sturm, *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma* (Berkeley: University of California Press, 2002).

37. Angie Debo, *And Still the Waters Run* (Princeton, NJ: Princeton University Press, 1940); Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (New York: Cambridge University Press, 1994).

38. Johnson, "Law and Legal Theory," 1145.

39. Craig H. Miner, *The Corporation and the Indian: Tribal Sovereignty and Industrial Civilization in Indian Territory, 1865–1907* (Norman: University of Oklahoma Press, 1989).

40. However, it retained this right for men. It would not be until 1920 that the Nineteenth Amendment extended voting rights to women. The Twenty-Sixth Amendment of 1971 would lower the voting age to eighteen.

41. Indian Appropriations Bill, 25 U.S.C., § 71.

42. The collusions were initially conflicted. Some corporations affirmed tribal sovereignty and treaty rights, while some argued for their annulment. The differences depended on whether or not, within their respective relations with tribal governments and individuals, they had found success in gaining unfettered access to tribal lands and resources. See Miner, *The Corporation and the Indian*; and Samuel Thomas Bledsoe, *Indian Land Laws* (Vernon Law Book Company, 1913).

43. Janet Ann McDonnell, *The Dispossession of the American Indian, 1887–1934* (Bloomington: Indiana University Press, 1991).

44. According to the Bureau of Indian Affairs, "FAQS," <http://www.bia.gov/FAQS>.

45. Alyosha Goldstein, "Finance and Foreclosure in the Colonial Present," *Racial History Review* 118 (2014): 42–63.

46. Cohen, *Handbook of Federal Indian Law*, 192–94.

47. Cohen, *Handbook of Federal Indian Law*, 216.

48. Cohen, *Handbook of Federal Indian Law*, 214–15.

49. Slaughterhouse Cases, 83 U.S. 36 (1872).

50. Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886).

51. Blair, "Corporate Personhood," 803.

52. Blair, "Corporate Personhood," 804. See Morton J. Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," *West Virginia Law Review* 88 (1985): 173–224, 176.

53. Robert Fleming Heizer, Alan J. Almquist, and Alan F. Almquist, *The Other Californians: Prejudice and Discrimination under Spain, Mexico, and the United*

*States to 1920* (Berkeley: University of California Press, 1977); Jack D. Forbes, *Native Americans of California and Nevada* (Happy Camp, CA: Naturegraph Publishers, 1993).

54. Pratap Chatterjee, "Gold, Greed, and Genocide" (1998).

55. Clifford E. Trafzer and Joel R. Hyer, eds., *Exterminate Them: Written Accounts of the Murder, Rape, and Enslavement of Native Americans during the California Gold Rush* (East Lansing: Michigan State University Press, 1999).

56. Forbes, *Native Americans*, 69.

57. James J. Rawls, *Indians of California: The Changing Image* (Norman: University of Oklahoma Press, 1986).

58. Ned Blackhawk, *Violence over the Land: Indians and Empires in the Early American West* (Cambridge, MA: Harvard University Press, 2009).

59. Blair, "Corporate Personhood," 791.

60. Kevin Bruyneel, "The Trouble with Amnesia: Collective Memory and Colonial Injustice in the United States" (May 31, 2013), in *Political Creativity: The Mangle of Institutional Order, Agency and Change*, ed. Gerald Berk, Dennis Galvan, and Victoria Hattam (Philadelphia: University of Pennsylvania Press, forthcoming), <http://ssrn.com/abstract=2272816>.

61. Jean Baudrillard, *Simulacra and Simulation* (Ann Arbor: University of Michigan Press, 1994).