THE USES OF HISTORY: LANGUAGE, IDEOLOGY, AND LAW IN THE UNITED STATES AND SOUTH AFRICA

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This study compares the language in which South African and United States law represents the histories of indigenous peoples. South African political and legal language has linked denial of indigenous peoples' history with denial of rights to property. The language of the law in the United States recognizes prior history and prior possessory claims to land, although in the past this recognition did not stop the decimation of Native Americans. The contrast between the uses of history in the laws of two nations reveals how ideologies, language, and the law are intertwined in the determination of indigenous peoples' property rights.

I. INTRODUCTION

This paper examines the official language in which the governments of South Africa and the United States changed indigenous peoples' rights to land. The process relied on images of history in the language of the law to impose social ideologies on social life.[1] The rhetorical transformation accomplishes more than a se-

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[1] Ever since Geertz's (1973) telling critique, "Ideology as a Cultural System," anthropologists have been wary of the term "ideology." To the extent that "ideology" carries with it the "vulgar" Marxian conception of false consciousness—that people's ideas are mere delusions—I certainly share that wariness. But scholars have spoken of ideology in a more sensitive way, as in Sally Falk Moore's (1978: 51–52) account:

> Ideology may be regarded as a product of what we have called the regularizing processes. Yet its instance-by-instance use permits [a] kind of reinterpretation, redefinition, and manipulation. . . . Sometimes an ideology or part of it can be constructed precisely to cover the complex mess of social reality with an appearance of order. . . . But usually, in action, in particular situations, only pieces of ideology are invoked.

For scholars in both the semiotic/linguistic (see Silverstein, 1976) and Marxian/social theoretic (see Postone, 1986) traditions, ideology can at once distort

mantic change; the language of the law is powerful, and when it appropriates history in a particular way, it also affects and changes social structures and entitlements. Thus an analysis of linguistic mediation can provide important insights into the uses of history in social change.

A. Ideology and History

An ideology of history emerges in the legal and political texts of South Africa and the United States, but it is not a preexisting ideology mechanically expressed through language. Rather, legal language and ideology are intimately intertwined in a creative process that has drawn increasing scholarly attention (Brigham, 1978; Mertz and Weissbourd, 1985; White, n.d.). Thus we capture ideology in the making as we examine the language in which courts and legislators speak of history, land, and people. At the same time, we see the impact of existing social structures and power in the language of the law. My approach to language and social praxis combines recent developments in anthropological linguistics and semiotics (see Silverstein, 1976, 1979; Mertz, 1985) with the concern for cultural content found in the work of Sarat and Felstiner (1986), and a focus on the social grounding of language characteristic of social theorists such as Bourdieu (1977). In its emphasis on the uses of history in legal ideology, my analysis continues some of the earlier concerns of Charles Miller (1969; *re* history and ideology more generally, see Moore, 1978; Sahlins, 1981).

The approach taken here views language as a key mediator in human interaction, and as socially-grounded. In both respects, language is ideological. As work by linguists and semioticians has demonstrated, language filters and channels the stories speakers tell (see Mertz and Parmentier, 1985). Language is also the medium through which much of our social interaction is accomplished. Thus language is socially grounded, structuring and being structured by social context. In studying legal texts, we see the dynamic translation and creation of social relations as they are explained—an explanation that speaks of history, and justifies social change.

B. Comparing South Africa and the United States

In comparing the uses of history in legal and political narratives from South Africa and the United States, we can begin to analyze the impact of differences in social histories, in legal systems, and in the language of the law, upon this complex interaction. Dif-

and capture reality. Thus, a theoretical account of distortion alone is inadequate. Studies of ideology must also explain how an ideological image becomes plausible, the aspects of life to which the image is true, and the way it succeeds for the people who hold it. This study of ideology combines the semiotician's attention to the structure of how things are said with an analysis of semantic themes (see also Sarat and Felstiner, 1986).

ferences are immediately apparent in the kinds of texts with which we must work. South Africa has a system of "legislative supremacy," in which the courts may not overrule legislative enactments. Thus in South Africa we must look to the statutes, and to the legislative debates and governmental justifications behind their enactment, to understand the legal transformation of indigenous people's property rights. For instance, the case law that followed the "native" land statutes did not affect basic entitlements, but merely clarified relatively minor semantic questions.[2] By contrast, the United States Supreme Court has the power to void statutes if it decides they conflict with fundamental constitutional guarantees. The language of United States case law speaks authoritatively of history and social change, from John Marshall's court to the most recent treaty cases. The legal narratives of South Africa and the United States thus have different institutional sources, and fit into different systems of law. They also result in distinctive histories of indigenous peoples and differing assessments of the import of those histories, as the legal texts reflect and forge very different social structures.

At the same time, there remains a striking point of comparison; both South Africa and the United States have consigned their indigenous peoples to limited geographical areas, officially redefining the history and rights to land of people who once occupied entire nations. Through this point of comparison, we can isolate differences to better understand the ideological framing and definition of indigenous peoples' rights to land in the language of the law. The history generated in the American case has sometimes recognized that violence and unequal power led to the reservation system, and liberal canons of interpretation as well as reaffirmation of rights off of reservation land have resulted from this recognition. This is an ideological difference, discernible in legal and political language, that has given radically different meaning to United States and South African laws encouraging separation of indigenous and "white" cultures. In the ideology is a justification for the distribution of land and of power; in the shape of the language used is a structure of social relations (see also Brigham, 1978).

II. SOUTH AFRICAN "HOMELANDS"

The battle over history in South Africa has in many ways been stark and unsubtle. Quite simply, "white" South Africans have rewritten the story of South Africa's past, which they begin with the

[2] For example, the cases involved questions concerning the referent for the phrase "breach of regulations" (*R.* v. *Goora*, 1949 (20 S.A.L.R. 541 (E.D.L.D.)), and the correct application of phrases such as "domestic consumption" (*R.* v. *Duma*, 1949 (3) S.A.L.R. 110 (E.D.L.D.)), "affected property" (*Patel* v. *Group Areas Development Board*, 1966 (1) S.A. 777 (D)), or "hire of land" (*R.* v. *Dekker*, 1950 (4) S.A. 48 (N)).

Europeans' arrival in South Africa. They have emptied the South African past of human occupants before colonial times (Modman, 1976: 1):

> Three and a quarter centuries ago the whites entered South Africa from the south at Table Bay. . . . It was a Dutch-speaking stream which for more than a century made no significant contact with Blacks. Only in about 1770 was it stopped . . . by a Black stream moving southwards.

This quote comes from one of a series of official publications generated by South African government departments or institutes. The goal of these publications is to represent the history of white domination and current policies—as, for example, the homelands policy and apartheid—in benign terms (see Black Homelands in South Africa, 1976; South African Digest, 1980; Homelands: The Role of the Corporation, 1973; The Official Yearbook of the Republic of South Africa, 1976, 1978, 1983; see also textbooks reported in Leonard Thompson, *The Political Mythology of Apartheid* (1985: 200–202)).

The "white" South African ideology of history has varied through time. Early histories, as later ones, denied indigenous South Africans their past achievements—indeed, even their presence—but these texts more often focused on the generally "inferior" character of nonwhite races than on precolonial history. Thompson (1985), in his study of the political mythology of apartheid, has noted a change in modern texts; they stress internal ethnic divisions among African peoples, and spend more time than did the older histories on elaborate chronologies designed to demonstrate that blacks were not prior occupants of the land.

Thompson views this shift as an attempt to justify South Africa's emerging "homelands" policy, in an international scene in which barefaced racist explanations relying on inherent superiority or inferiority were no longer acceptable. He also views the shift as a result of a general change in concerns following South African independence (Ibid., p. 41):

> Race had always been a vital factor in the Afrikaner mythology. However, until the Second World War it took second place to the imperial element. . . . Nearly all white South Africans . . . assumed that any sensible, civilized person knew that Africans were a culturally inferior race . . .—an assumption that corresponded with the global distribution of power.

After the war, Thompson argues, racial issues moved more to the fore, as African workers migrated to urban areas and participated in growing numbers in the nation's burgeoning industrial development (Ibid., p. 43). The change in historical ideology of that time corresponds with the rise of the infamous "homelands" policy that

completed the sad process by which indigenous South Africans were stripped of their rights to most of their land.

In one sense, this seemed to be a different approach, a marked change. Yet in another sense, the post-war ideology and law merely continued earlier efforts to rob Africans of their history and property rights at the same time. We can follow that movement through contemporaneous accounts and through legal developments.

A. History as "Civilization"

The ideology of history in early accounts is recounted in a story about "civilization," one that serves as justification for the disenfranchisement of South Africa's indigenous people (Bryce, 1897: 86, 96):

> The native races seem to have made no progress for centuries . . . the feebleness of savage man intensifies one's sense of the overmastering strength of nature. . . . The people were—and indeed still are—passionately attached to their old customs. . . . Their minds are mostly too childish to recollect and draw the necessary inferences from previous defeats.

This use of an evolutionary scale, the highest, most modern point of which is occupied by whites, is typical of European social thought of the time (see Chase, 1977; Gould, 1981; Stocking, 1968). This scheme distorts the time frame within which indigenous peoples' history is to be told; if they represent an "earlier" stage in evolution, then, although they live in the present, their past cannot be as developed as that of people representing "higher" stages. When used to represent an earlier stage in the development that led to European "civilization," indigenous South Africans are made to embody someone else's past in objectified form. The corollary of this vision of history is that indigenous South Africans lack a past of their own.

And, indeed, early South African historians linked their descriptions of the indigenous African population as "backward" or "primitive" to a denial of developed history; a number of these accounts concluded that such "backward" people could not possibly have produced the elaborate stone monuments discovered in Zimbabwe (Bryce, 1897: 80–81; Theal, 1912: 418). The ahistorical past to which early historians consigned Africans is perhaps best illustrated by the frequent analogy to children; like children, indigenous people represent an earlier ontogenetic stage—and precisely for that reason, lack any history of their own.

These historical narratives provide a backdrop to deliberations at the National Convention of 1908, at which the South Africa Act, "An Act to Constitute the Union of South Africa," was drafted. A key issue at the Convention was the extension of the franchise to "non-whites" living in South Africa. Representatives from the

Cape Colony, which had extended the franchise to members of all races, were committed to defending an open franchise policy (Walton, 1912: 120–132). In the debate that followed, representatives argued the merits of universal suffrage. The evolutionist account of racial superiority that emerges in the debate encapsulates its conception of history in discussions of the notion of "civilization," discussions with direct and dramatic political consequences for indigenous South Africans. In the words of one delegate, Sir Percy Fitzpatrick (as reported in Walton, 1912: 122):

> . . . few would contend that [civilization] consisted only of a surface education and of the signs of improvement such as those they readily welcomed among the Native peoples. Civilization went a great deal further . . . and the white man gave as security the traditions of his race of many centuries of civilization.

In a similar vein, Sir Frederick Moor, another delegate, told the convention (as reported in Walton, 1912: 123):

> the white and black races in South Africa could never be amalgamated. The history of the world proved that the black man was incapable of civilization and the evidences were to be found throughout South Africa today.

Here the claims of history are encompassed in the concept of civilization; to be civilized is to have a past that has left tangible traces, a past that can be tracked through successive stages culminating in civilization. Indigenous South Africans lacked this tangible history; they were "uncivilized." In this collapse of temporal and cultural categories, Africans are robbed of their history and of the franchise, and the scene is set for the Native Lands Act (No. 27 (1913)) that followed four years later, and that revoked their rights to land throughout most of the country.

Interestingly, the language of the South Africa Act gives no rationale for its provision barring "natives" from Parliament or from voting; it merely lists, in a matter-of-fact fashion, "European male adult" as a requirement in provisions dealing with these matters. This declarative style represents a highly debatable position as fact, as not requiring an explanation. And the language of the debates behind the Act show us why this is so; for the faction whose position won out, the only necessary explanation lay in the categories themselves. Once someone is classified as "native" or "civilized" (and, note also, as male or as female), ability and right to self-govern followed naturally. A rhetoric that characterizes people by their "stage" in history won over a rhetoric of rights and justice at the Assembly; the crude, unsupported imposition of categories translated this victory into law. In these early narratives the "white" South Africans deny Africans a developing past, a history, as they deny them legal rights as citizens in their own land. We see that in the "white" ideology, a history, defined in written records, is a key feature of "civilization," and only civilized people

may be citizens, with rights to own land and determine their own political fate. This is a relatively subtle use of history in comparison with later South African debates; here the issue is not whether Africans can lay claim to land because they occupied it first, but rather whether Africans can have any of the rights belonging to citizens of a "civilized" state. A refusal to recognize indigenous history is part of an attempt to classify the people without a history as inherently excludable from political rights and participation. Length of occupation becomes less relevant as long as the prior occupation can be treated as in some sense timeless or ahistorical.

The Cape Colony representatives who sought to guarantee Africans' political rights recognized this; they did not argue prior occupation of land, but rather abstract political ideals. For example, Mr. Sauer, of the Cape Colony (as reported in Walton, 1912: 126–128):

> declared himself in favour of equal rights and he was one of those who believed that a great principle never yet shown to have failed in the history of the world would be a safe principle in South Africa to adopt at this great moment of her life. He could not accept Sir Frederick Moor's plan because he did not believe it would lead to peace, and permanent peace could never be founded upon injustice. . . . We could not govern the natives fairly and justly unless they were represented by their own elected representatives. . . .

These arguments were not persuasive; the "compromise" that emerged from the Convention granted voting rights only to indigenous people who could vote at the time of the Union (the Cape Colony being the only area where Africans had had the franchise), with the proviso that the Legislature could vote to change the arrangement at a later date. The South Africa Act also permitted only Europeans to become elected representatives to the Legislature 35 ((1908) Part IV, s.26(d)).

Formal restrictions on land use emerged in the same year as the Convention, with the Transvaal Gold Law of 1908, which barred "colored persons" from land in mining districts (Act No. 35, s.3 (1908); see Rousseau, 1960: 5). In 1913 the South African Parliament passed the "Natives Land Act," which, in language that is formal and declarative, provided that (Natives Land Act, No. 27 of 1913, 1.(a))

> From and after the commencement of this Act, land outside the scheduled native areas shall . . . be subject to the following provisions, that is to say:—Except with the approval of the Governor-General—
>
> (a) a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such

> land or of any right thereto, interest therein, or servitude thereover. . . .

Europeans were also forbidden to purchase land from "natives" (Natives Land Act, No. 27 of 1913, 1.(a)(b)). The Act also limited alienability of land within "native" areas (Natives Land Act, No. 27 of 1913, 2). The Natives Land Act took an ostensibly protective arrangement, in which "native" areas had been those especially reserved for indigenous peoples, and changed it so that protected areas were now the only areas in which Africans could own land. The arrangements in the Act were modified in subsequent Acts (The Native Lands Release Act, No. 28 of 1925; The Native Lands Further Release and Acquisition Act, No. 34 of 1927; The Native Lands Adjustment Act, No. 36 of 1931; the Native Lands Further Release and Acquisition Act, No. 27 of 1935), most of which provided for the sale or transfer of designated reserves to Europeans or to the government.

The language of all of these property-shifting statutes is formal and declarative, and gives no reason or justification. It was apparently self-evident that this "uncivilized" people, this people without written history or European culture, could lose its land by fiat—through imposition of the written word. The power behind the imposition of law was evident in its summary treatment of indigenous peoples' history and rights—indeed, in its complete exclusion of their voices and stories. Here denial of history "makes sense" of the denial of rights in land.

B. "Protection" and Prior Occupation

By the 1930s there had already been a shift in the language used to describe Africans in South African accounts, and there had been a change in the framing of statutory language as well. In a treatise on South Africa's Department of Native Affairs, an official explains the Department's purpose (Rogers, 1933: 17–18):

> The essential function of the Native Affairs Department is to assist, guide, protect and generally to subserve the interests of a large, undeveloped and, for the most part, inarticulate Native population, which is rapidly emerging from barbarism and is in the process faced with the necessity of accommodating itself to a novel and highly complex environment.

The evolutionist image is still strong here, and Africans are still characterized as primitive and inferior, but there is also an attempt to justify land policies as benefiting blacks. This slight shift away from unabashed supremacist language and declarative statutory structure can also be seen in the Native Trust and Land Act (No. 18 of 1936, Ch. 2 (4)(1) & (2)):

> A corporate body, to be called the South African Native Trust . . . is hereby constituted. . . . The Trust shall, in a manner not inconsistent with the provisions of this Act, be

> administered for the settlement, support, benefit, and material and moral welfare of the natives of the Union.

The Act evinces much more concern for "natives" than did the Native Land Act of 1913, but at the same time it bars unregistered Africans from white rural areas and limits their overall mobility (Native Trust and Land Act, No. 18 of 1936, Ch. 3, s. 10; Ch. 4, s. 26, 27, 32–38; see also Greenberg, 1980: 83). Here the characterization of indigenous peoples as "uncivilized" is not employed to justify outright denial of rights or land on the basis of raw claims to superiority. Instead it serves as an explanation of why European control over "native" lands and prerogatives is in the Africans' own interest; as "uncivilized" people, they need the guidance and protection of European supervision.

From the Act of 1913 through the Act of 1936, then, there was a steady move to segregate Africans in designated areas and to remove their rights to land in "white" areas, which constituted most of the country. Greenberg notes the utility of these measures in maintaining a rural labor force "though it had lost its grazing and cultivation rights and depended primarily upon wage labor" (1980: 86). The laws gave "white" landowners increased power over African land and labor during a critical transition from labor tenancy to wage labor. And, astonishingly, this separation of Africans from their land was accomplished in a rhetoric of increasing altruism.

After World War II, both economic and ideological changes again affected the uses of history in efforts to take rights to land from the African population. Economically, this was the period during which South Africa made the transition to capitalism (Ibid., p. 105). Ideologically, the government rested its new "Homeland" policy on an account of South African history which stressed differences among African groups and a recent date for the migration of Africans into South Africa (Thompson, 1985: 198–200). This crude attempt to rob Africans of their past, and of their common claim to the land, accompanied the rise of the "Apartheid" policy under the Nationalist regime, which (Fredrickson, 1981: 245)

> clearly and explicitly established that the only place where any African could hope to enjoy most of the political and civil rights accorded to white citizens was in a homeland. The fact that many urban Africans had been born outside these areas or had weak or nonexistent ties to them did not exempt them from a kind of resident alien status.

In his volume entitled *White Supremacy*, historian George Fredrickson paints current attempts by the South African government to give these homelands "independent" national status as a natural outgrowth of this "resident alien status" conferred on so many Africans in their own land (see the Native Homelands Citizenship Act, No. 26 of 1970, and the Transkei Constitution Act, No. 48 of 1963). This disenfranchisement not only continues European control of land, political system, and the labor force, but it also divides

the Africans into discrete groups, undermining unity among African workers.

How does the "official story" explain this unjust system? Here is the explanation given in one of numerous government-promoted publications, this one with a preface by M.C. Botha, the Minister of Bantu Administration and Development and of Bantu Education (Homelands, 1973: 15):

> The Government of the RSA (Republic of South Africa) is intensely aware of the special problems which are created by an historical heritage which has placed the White nation in a position of trusteeship over various underdeveloped Bantu peoples. . . . In an artificially integrated unified state, the Bantu would, as a result of their enormous backlog in comparison with the Whites (in terms of economic, technical and political-administrative development), be doomed to become a backward proletariate. . . . However, by creating for each Bantu people the opportunity to grow into an independent nation in a geopolitically acknowledged sphere of influence, i.e., in its own historical homeland, the possibility that the divergent interests of the groups concerned will lead to a continual political struggle for power is obviated.

With an Orwellian brand of double-speak, the government here appropriates an enlightened vocabulary—"proletariate," "multinational"—in an effort to convince the reader that the substance of the program described matches the form of the language used to describe it. The complete political disenfranchisement of Africans since the inception of the Republic of South Africa is glossed over in the phrase "White's political leadership," as if somehow in an open and fair competition "whites" had won out, as if there had ever been any opportunity at all in the existing political framework for Africans to lead politically. The lack of African political power is represented as a failure, as a predictable component of a generally backward state, rather than as a necessary, indeed mandatory, part of the political system originated and maintained in force by "whites." The exile and forcible removal of Africans to unfamiliar areas of the country is portrayed as a benevolent assurance of independence to people in their own "historical homelands"; the accompanying limits on mobility and acquisition of land outside the homelands constitute an "opportunity"; subjugation is empowering; and poverty-stricken, undeveloped areas are "historic homelands."

Here the South African government's approach to text is authoritarian, in the sense that James White employs in his work on law and language.[3] Complex and ambiguous situations are glossed

[3] James White (n.d.) describes the rhetorical effectiveness of opinions when the linguistic structure matches the judge's model of the text to be interpreted. For example, White characterizes the rhetoric of Taft's majority opinion in *Olmstead* v. *United States* (277 U.S. 438 (1928)), as authoritarian and un-

authoritatively in single words; difficult political decisions and situations are expressed as simple and straightforward. Problems are not even acknowledged; instead, declarative and assertive language is used to describe the setting as the government wishes it to be seen. This is very much a monologic voice; multiple voices and perspectives, indeed, questioning of any kind, are not permitted. Language expressing doubts or indexing controversies is not to be found.

A similar match between authoritative, unreasoned narrative and a crude appropriation of African land and rights is found in government treatment of history (Homelands, 1973: 9):

> When one considers that the White [South African] community forms one of the oldest European nations outside Europe, it is indeed naive to regard it as a community of settlers. . . . According to generally accepted historical and demographic criteria, the whites exist as an integral part of the socio-political structure of the African continent. The Whites regard themselves as a permanently established African nation in a geopolitically clearly described fatherland. They link this claim with three historical realities: purposeful and uninterrupted residence and occupation; effective and sustained economic development; and effective political and administrative control within clearly demarcated boundaries.

There is nowhere any comparable story of the history of African groups in this text; it casually mentions that the African groups fell under "the political sphere of influence of the Whites during the 19th century," and that this occurred through a "unique combination" of events (Ibid., p. 5). Other similar texts go further, asserting that indigenous South Africans were not actually indigenous: "For over a century the two races occupied various regions of the country without really coming into contact with one another" (Black Homelands, 1976:1). The land Europeans occupied was simply empty before they arrived. Here again is a rhetoric that deals with controversy, ambiguity, or difficult ethical issues by erasing them, by leaving them out of the text. "According to generally accepted historical and demographic criteria," the writers assure us, whites have strong claim to South African land. The text's authors attempt to represent a normative claim as objectively measurable; a deeply controversial issue has already been determined, the author tells us, by scientifically legitimated criteria. Subjective judgments become objectively determined; open questions are closed; difficult issues are not even acknowledged to be remotely problematic.

This is the deceptive, authoritative language in which indigenous South Africans were robbed of their rights to land and to

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reasoned, an effectual structure for the presentation of his "plain meaning" approach to constitutional interpretation.

political self-determination, at the same time losing their history. And a government that seeks to appease international public opinion through propaganda of this sort continues to paint an optimistic, positive view of the current situation, still failing to perceive that among the crimes of which it stands accused is depriving a people of their history.

III. AMERICAN "RESERVATIONS"

Initially, in the United States, there is somewhat more attention paid to legal rationales and authoritative grounds for European claims to particular territories. The Europeans who settled North America relied on treaties with the indigenous people to a much greater extent than did the South African settlers, on the premise that the "aborigines" had rights to the land they occupied (Cohen, 1947, 1971). An influential legal thinker of the time, Franciscus de Victoria, established this principle (Victoria, 1917: 28, quoted in Getches, Rosenfelt, Wilkinson, 1979: 30):

> . . . the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and . . . neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners.

These treaties are still the subject of litigation, and modern courts take quite seriously the obligation of reading them for the meaning that would have been imputed by the original parties. An early concern about the grounds on which property rights could be claimed was translated into a practice of land transfer that allowed Native Americans some redress for grievances in later times (as, for example, in cases such as *United States* v. *Washington* (384 F. Supp. 312 (W. D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976)). This practice was also characterized by at least some recognition of Native Americans' history, a recognition that continued in later judicial opinions on the subject.

The strongest similarities between the Native American and South African situations can be found in statutory law. It was through statutes such as the Indian Removal Act (4 Stat. 411; 25 U.S.C. § 174 (1830)) that Native Americans were summarily stripped of rights to land and forced to relocate in ever-smaller areas to the west. There were a number of statutes that affected the Native American population, including the Indian Removal Act of 1830, the General Allotment Act of 1887 (ch. 119 § 1, 24 Stat. 288, as amended at 25 U.S.C. § 331 (1970)), the Indian Reorganization Act of 1934 (25 U.S.C. § 461), and the Indian Civil Rights Act of 1968 (25 U.S.C. §§ 132–133 (1970)). These statutes, along with executive orders to remove indigenous Americans from their homes, destroyed Native American communities. They also played a role not only in reshaping patterns of land use and ownership, but also

in the decimation of the people themselves during the process of forced relocation. Despite early confrontations in which numerous indigenous South Africans were killed, the indigenous people of South Africa remained numerically strong; Native Americans, by contrast, were reduced to very small numbers at an early date. Thus, while indigenous Americans were allowed more claim to their history than were South Africans, the danger to a white majority in allowing this claim was considerably less when most of the indigenous people had been eliminated.

In contrast with the South African case, where statutes were decisive in determining land entitlements, in the United States indigenous peoples' entitlements were also shaped by judicial opinions. These opinions are not only based on statutes but also on the Constitution, international law, and treaties between settlers and Native Americans. Here, official interpretation broadened the application of the texts. In the United States system, the interpretive act was vital to determining the statutes' ultimate range and efficacy, so that the interplay of history and land entitlements can clearly be seen in the case law. We turn now to one key string of cases in which Native Americans' modern position in American law was largely determined.

A. The Marshall Decisions

In the early nineteenth century, Chief Justice Marshall wrote a series of opinions clarifying the relationship between native Americans, the states, and the federal government. In one of the first cases, *Johnson* v. *McIntosh*, Marshall held that title to land conveyed by tribal chiefs was valid; to reach this holding, Marshall had to uphold "the power of Indians to give, and of private individuals to receive" such a title (21 U.S. (8 Wheat.) 543 (1823)). The opinion is a fascinating historical account, woven with the aim of establishing a "middle" road between denying Native Americans any claim to the land and granting them absolute ownership (Cohen, 1947: 48). Here Marshall attempts to sort out the relative claims of prior possessors[4] and discoverers (*Johnson* at 543, 573–574):

> This principle [upon which the European explorers agreed] was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. . . .
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> In the establishment [of relations between discoverers and natives], the rights of the original inhabitants were, in no instance, entirely disregarded. . . . They were admitted to be the rightful occupants of the soil, with a legal as well

[4] An emphasis on history as a basis for property rights is a version of the "prior possession" theory in which a person gains right to property by virtue of earlier possession of it (cf. Rose, 1985; Mertz, 1987).

> as just claim to retain possession of it . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will . . . was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Marshall's writing is not devoid of the kind of supremacist language found in the early South African texts; he speaks of the "discoverers'" right as accruing to any "Christian" people, "notwithstanding the occupancy of the natives, who were heathens"—and he describes the indigenous people as "fierce savages," in whose hands the country would remain an undeveloped "wilderness."

At the same time, in contrast with almost any official South African account to date, Marshall speaks with some sympathy of "the painful sense of being separated from their ancient connexions" that faced Native Americans, acknowledging their prior claim to the land, and their deeply-rooted history there. In order to ease that pain, and to ensure that "the conquered shall not be wantonly oppressed," Marshall urges that their rights to property remain "unimpaired." By contrast with the South African narratives, Marshall does not hesitate to admit the dubious character of the European claim, "acquired and maintained by force." While still subscribing to a weak variety of the supremacist argument used in South Africa (Europeans can take over land because they are advanced Christians), Marshall balances this grant of authority with the concession that the original inhabitants retain possessory rights.

There is an isometry here between the historical narrative told in the text and the balancing of legal rights Marshall hopes to achieve: Marshall tells both the story of innocent original inhabitants robbed of their land by force, and the tale of fierce warring savages destined never to rise out of the wilderness. He paints a picture of Christian people come to develop an orderly and peaceful society, and of brutal conquerors who wrest the natives' ancestral home from them. Legally, he tells us of the rights of the conquerors, yet stresses that the conquerors recognized the prior claim of indigenous North American peoples. Thus the history he forges yields the legal balance of rights to land with which the opinion concludes. This balancing carries through to even more minute aspects of the text's linguistic structure.[5] The text is at

[5] Marshall softens his statements asserting the rights of the conquerors with linguistic cues that distance and distinguish his voice from the text's content. At one point in the opinion, he holds that "[c]onquest gives a title which the Courts of the conqueror cannot deny . . ." but continues, ". . . whatever the private and speculative opinions of individuals may be," an apparent attempt to distinguish the harsh path dictated by external circumstances and subjective reactions to that path (21 U.S. (8 Wheat.) 543, 588 (1823)). The institutions (Courts) are opposed to the individual, the objective legal outcome to subjective opinions. This passage is followed by an attempt to give "some excuse, if

every point balanced; Marshall never moves the reader very far in any direction without immediately providing support.

Eight years after the *Johnson* case, Marshall again addressed the problem of indigenous peoples' rights to land. The cases arose under explosive political circumstances in which the relative power of the states and the federal government, of the judiciary and the executive, were at stake. In the first of these, *Cherokee Nation* v. *Georgia*, (30 U.S. (5 Pet.) 1, 15 (1831)), the Cherokees brought an original action in the Supreme Court, asking for injunctive relief against the state of Georgia, which had passed statutes that sought to "annihilate the Cherokees as a political society, and to seize, for [its own use] the lands of the nation."

Marshall's opinion here attempts a balance similar to that in the *Johnson* case; it is a complicated narrative replete with double-voicing, in which the apparent meaning of the text is undercut by a second "voice" or undertone, and by other subtle cues undermining the ostensible message. In *Cherokee Nation* Marshall actually holds against the Cherokee, on the basis that the Court lacks jurisdiction to hear the case. And yet, in classic Marshallian fashion, this holding is undermined by dicta that recognized Cherokee possessory rights and imposed a fiduciary standard on the government.

As in the *Johnson* opinion, Marshall's rhetoric in *Cherokee Nation*, and his appeal to history, mirror the opinion's legal impact, which appears to defer to the state at the same time as it dictates policy. Thus his initial discussion begins, "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined" (p. 15). He proceeds to describe the gradual downfall of Native Americans who had once been "numerous, powerful, and truly independent" (p. 15), but who had gradually lost more and more land "by successive treaties, each of which contains a solemn guarantee of the residue" (p. 15). Marshall follows this emotional passage with a terse paragraph: "Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause?" Here we see Marshall removing himself as an agent as he moves to consider the technical, removed procedural issue on which he hangs his decision. Again he contrasts a subjective and emotional state—indulging in sympathy—to which he as human actor might be drawn, with the objective and removed courts that must operate free of emotion. The distasteful outcome of the case is not Marshall's choice; he is merely addressing the unpleasant but necessary questions that "present themselves." Marshall does not pres-

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not justification" for European behavior by looking at the "character and habits of the people whose rights have been wrested from them," (Ibid., p. 589)—so that again each section of the text is balanced against a previous one, with strong rhetoric in one direction counterbalanced by vivid descriptions to undercut it.

ent himself as an actor in the system shaping results; instead, he highlights the conflict of roles—human person with emotional reactions, legal persona following the dictates of law—as he in effect disowns responsibility for the legal outcome. This disaffiliation heightens the dual message sent by the opinion to Georgia: that he does not fully endorse the outcome he reaches cannot help but weaken the opinion's force.

In *Worcester* v. *Georgia* (31 U.S. (6 Pet.) 515 (1832)), Marshall brings the seed sown in the *Cherokee* dictum to fruition, insisting that under treaties made with the Cherokees the United States had "assum[ed] the duty of protection" (p. 556) hinted at in his use of the guardian-ward metaphor in the earlier case. This time the challenge to the Georgia statutes came from two missionaries arrested, while in Cherokee territory, for violating Georgia law. Marshall proceeds to sift through history, the law of nations, and the Constitution, to reach the conclusion that the statutes were unconstitutional. He uses an historical story to support his holding that tribes are to be viewed as independent entities with special status (*Worcester* at 559):

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power. . . .

As in all of these key decisions, Marshall does not hesitate to give full recognition to Native Americans' prior claim to the land—to their history.

This provides a contrast with the South African case, in which prior possession and legitimate claim to land are denied along with indigenous history. Marshall's is a rueful history that insists on the conquerors' rights while at the same time admitting and giving some legal force to indigenous peoples' history and claims to land. Marshall was unable to stop the removal of the Cherokees from their land, because in the end all he had done was to reserve to the federal government the right to accomplish the decimation attempted by the state of Georgia.[6] But in insisting on some measure of sovereign rights to land for Native Americans, and on a trust relationship between them and the federal government, Marshall set the stage for later Native American court victories.

Nonetheless, it should be stressed again that although there is a more overt recognition of history in later United States legal texts than can be found in the "official" South Africa story even today, there are a number of similarities. For example, early American settlers had their own version of the South African "empty lands" story, as in John Winthrop's contention that "al-

[6] See Brigham, 1984 *re* assertion of federal sovereignty over the states in the early property decisions by the federal judiciary.

most all of the land in North America was *vacuum domicilium* because the Indians had not used it for agriculture" (Fredrickson, 1981: 35). This argument became a key rationale for dispossessing Native Americans of their land, although dispossession of the coastal groups to which Fredrickson refers was accomplished "through legitimate purchase, fraud, treaties in which coercion was often involved, and land settlements resulting from wars" (Ibid. p. 35), rather than through outright statutory seizure. Thus even where there was an attempt to generate a story such as the one that has dominated South African accounts, North American settlers conceded prior presence in the area. This concession, however, did not stop the decimation of the indigenous population in North America, nor the process by which Native Americans were robbed of their land.

B. Removal and the Statutory History

In the United States statutory framework for dealing with Indian lands can be found some interesting parallels with early South African statutes. For example, just as early South African statutes ostensibly aimed at protecting indigenous people, a United States statute passed in 1790 (1 Stat. 137; reenacted in 1793, 1796, 1799, and finally adopted in permanent form in 1802, 1 Stat. 329, 469, 743; 2 Stat. 139; cf., 25 U.S.C.A. § 177) forbade the purchase of Indian land except by government treaty.

In the infamous Indian Removal Act (4 Stat. 411; 25 U.S.C. § 174 (1830)), President Andrew Jackson authorized the removal of many Native Americans from the Southeast, whose trek to the west became known as the "Trail of Tears" (cf. McNickle, 1975). As with the Native Land Act in South Africa, this statute limited indigenous peoples' rights to land they had occupied, specifying instead a limited geographic area within which Native Americans had rights to land. And, as in the South African case, the designated area was to change, growing increasingly limited through time. The laws that authorized these changes were not challenged in court, so that by the time the Supreme Court again dealt with indigenous peoples' property rights, a drastic change had occurred (Chambers, 1975: 1218). The concern with indigenous history and land rights evinced by the courts in early times had little effect on the crucial process by which land was fundamentally reallocated and taken away from Native Americans. As in South Africa, the actual deprivation of land was accomplished through curt, declarative statutory language that paid little heed to these concerns.

However, the broad outlines of statutory development after that time in the United States diverge from those of South African statutes. In the late 1880s Congress passed the General Allotment Act (ch. 119 § 1, 24 Stat. 228, as amended at 25 U.S.C. § 331 (1970)), the goal of which was to encourage assimilation by permitting indi-

vidual Indian ownership of parcels of reservation land that had previously been communally owned by the tribe. A number of tribes expressed objections to the allotment scheme, because it undermined tribal integrity. The assimilationist policy was reversed in the Indian Reorganization Act of 1934 (25 U.S.C. § 461), which returned power to control Indian reservation land to the tribes, and forbade alienation of reservation land. Where a move toward a more separatist homelands policy in South Africa had negative effects on the black majority, here a retreat from assimilationist policies was viewed for the most part as empowering for Native Americans (cf. *Michigan Law Review*, 1972). This is not surprising, given that the white majority in the United States could more easily assimilate the Native American population without a significant loss of political or economic power than could the white minority of South Africa.

The statutory framework, then, grants little importance to indigenous peoples' history or claims to land until the 1930s. The case-law framework developed somewhat differently.

C. *Of Treaties and Rights to Land*

A number of recent cases have dealt with the problem of interpreting treaties to determine rights to land. If history has always played a major role in judicial decisions regarding Native Americans, it is in the treaty decisions that this role becomes most decisive, with the courts committing themselves to a reading that construes treaties "in the sense in which the Indians understood them and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people' " (*Choctaw Nation* v. *United States*, 318 U.S. 423, 432 (1942)). As Charles Miller notes (1969: 24):

> [t]his generous recognition of the full obligation to protect the interests of a dependent nation may sound strange, condescending, or even hypocritical in the face of the military force, political expediency, and social neglect which have bulked large in the history of the white man's relations with the Indians. But it has been white man's law that has provided the chief source of security for the Indians, and beyond an appeal to conscience and legal documents the best evidence in most Indian cases is the testimony of history, especially the use, possession, practices, and expectations concerning the lands.

Native Americans have won a number of encouraging court battles over treaty rights, turning the "white man's" ideology of history to their advantage.

The carefully-crafted language of the Marshall opinions had great significance for later interpretations of treaties in court decisions. Building from the Marshallian notion that the federal government stood in a trust relation with Native Americans, later de-

cisions showed considerable deference in interpreting the language of treaties (Wilkinson and Volkman, 1975: 617):

> The unequal bargaining position of the tribes and the recognition of the trust relationship have led to the development of canons of construction designed to rectify the inequality. . . . Three primary rules have been developed: ambiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians.

In the opinions following these canons, the use of history emerges full-blown, with much of the text of the opinion constituting a story of the history of the tribe and treaty in question. The telling of this story is a charter for the interpretation to be accomplished in the opinion; from the history will flow the result. Although the victories thus won may pale by comparison with the large injustice of the past, they also contrast with current South African attempts to deny history altogether. The contrast is one between a text almost entirely absorbed in analyzing indigenous people's past and one in which that past disappears altogether.

A number of early decisions established the canons described by Wilkinson and Volkman, although it should be noted that treaties have not always been accorded this measure of respect (cf. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Seneca Nation of Indians* v. *Brucker*, 262 F.2d 27 (1959)). However, liberal canons of construction have remained critical through recent decisions, maintaining the approach indicated by Marshall and early treaty-construction cases (cf. Chambers, 1975). In two such early cases, the Supreme Court established the "reserved rights" doctrine, under which all rights not explicitly surrendered by treaties were reserved to the tribes (*United States* v. *Winans*, 198 U.S. 371 (1905); *Winters* v. *United States*, 207 U.S. 564 (1908)). In *Winans* the Court explains why an examination of historical circumstances is to be crucial in construing treaties (*Winans* at 371, 380–381):

> [W]e will construe a treaty . . . as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right without regard to technical rules." How the treaty in question was understood may be gathered from the circumstances.

The opinion proceeds to develop the "reserved rights" doctrine through an analysis of the historical circumstances surrounding the treaty-making. The history was used to establish intent, and the treaty was then construed to give effect to that intent. From Marshall's earlier insistence on a trust relationship comes a doctrine for interpreting the language of treaties, a linguistic canon of

deference to the people to whom protection is due. And deference is to be shown through a consideration of that people's history.

One of the most famous American decisions is *United States* v. *Washington*, decided by Judge Boldt of the Western District of Washington (384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976)). In this case, the judge took as his task the interpretation of treaties whose terms read: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . ." (384 F. Supp. 312, 356). The decision turned on the meaning of the terms "in common with," which under the state's construction would simply indicate that Native American fisherfolk were subject to the same regulations as any other citizens.

Judge Boldt engaged in a painstaking review of the settlement patterns and indigenous culture at the time of the treaties, dealing at length with the significance of salmon in the economic and religious life of the tribes. He also examined carefully the treaty-making process itself, in an effort to achieve an understanding of how the Indians themselves would have understood the agreement achieved. A particularly crucial consideration in this regard was the way in which treaty terms could have been translated into indigenous languages (384 F. Supp. 312, 356):

> Since . . . the vast majority of Indians at the treaty councils did not speak or understand English, the treaty provisions . . . were interpreted . . . to the Indians in the Chinook jargon and then translated into native languages by Indian interpreters. . . . There is no record of the Chinook jargon phrase that was actually used in the treaty negotiations to interpret the provision. . . . A dictionary of the Chinook jargon . . . indicates that the jargon contains no words or expressions that would describe any limiting interpretation on the right of taking fish.

The judge then looked to English language dictionaries of the time for an understanding of the words as the English-speakers would have used them. He concludes (384 F. Supp. 312, 342):

> By dictionary definition and as intended and used in the Indian treaties and in this decision "in common with" means sharing equally the opportunity to take fish at "usual and accustomed grounds and stations"; therefore, nontreaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and . . . treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish.

In the story of an indigenous people's past cultural understanding and language lies the key to current property rights; the semantics of treaty language, viewed through the filter of a linguistic and cultural history, are translated directly into current power. The

linguistic history tells us that "equality" was envisioned; thus fifty percent of the fish belong to descendants of the treaty-makers.

This is obviously no indirect use of history. History has emerged as the template for legal rights, and the telling of the historical tale constitutes in language a legal rationale with direct consequences for power over property. The resulting decision was hailed as an encouraging success by Native Americans (see Cohen, 1986: 177–178). Much the same interpretive process can be seen in other decisions in which contests over land and resources were resolved by careful analysis of treaty terms in historical context (see, e.g., *State* v. *Tinno* 94 Idaho 759, 497 P.2d 1386 (1972)). In constructing linguistic histories, the courts have given treaties expansive readings. And in retelling and confirming indigenous histories, they have restored control over resources and land. Here history, language, and legal rights flow together, at once recognized and reconfirmed in one another.

IV. CONCLUSION

There are certainly similarities between the two cases. Both the United States and South Africa established limited geographical areas for indigenous populations. Both used history to guide their policies regarding those populations. However, there are also differences in their uses of history. The South African government, from earliest settlement, managed indigenous people by denying them their history and rights in land. The United States conducted a policy of removal and genocide as it established the reservation system; however, it also gave some weight to Native Americans' prior occupation and history in legal narratives, an admission that at least in theory gave indigenous people limited legal power to determine the fate of their land in later years.

Scholars have noted that although the United States system has accorded legal protection to indigenous peoples and to Afro-Americans, white Americans have little claim to innate moral superiority over white South Africans; the European population in North America has not since its earliest history faced the demographic odds confronting whites in South Africa (Fredrickson, 1981: 247; see also Deloria, 1983; Rogin, 1975). Thus Fredrickson contrasts the two histories (Fredrickson, 1981: 246–247):

> Assume for a moment that the American Indian population had not been decimated and that the number of European colonists and immigrants had been much less than was actually the case—creating a situation where the Indians, although conquered, remained a substantial majority of the total population of the United States. After the whites had seized the regions with the most fertile land and exploitable resources, the indigenes were consigned to a fraction of their original domain. All one has to envision here are greatly enlarged versions of the current Indian

> reservations. Then suppose further that Indians were denied citizenship rights in the rest of the country but nevertheless constituted the main labor force.

Fredrickson hypothesizes that under these circumstances, measures such as those taken in South Africa would become necessary for the white minority to retain control. In such a situation, the shift away from acculturationist policies toward recognition of tribal autonomy that occurred in the United States during the 1930s might take on much more sinister dimensions.

Although the surviving individual Native Americans arguably have greater political power than indigenous people in South Africa because they can vote, their current socioeconomic position does not even approach equality with that of American whites (see Rosen, 1978: 1–2), and they have become such a small percentage of the population that their aggregate political power is minimal. Their current minority status reflects a history of genocide in the United States that demonstrates anything but respect for indigenous people. Indeed, indigenous people in America may have kept their history—in an attenuated form—precisely because a large number of them were denied their future.

Thus, while differences in ideology have important consequences in both countries, we must note that whether by treaty, statute, or war, indigenous peoples in both lands were dispossessed and relocated, in a relentless process that ended rich cultures with their histories. The government-created history of South African laws and treatises extols the virtues of the homelands policy, creating a fictional past in which people are given roots in homes they have never seen. Although the ideologies differ, history served a similar end in both cases. That the dispossession may have been viewed in other ways, that it decimated one people and left the other enslaved, are differences that hardly eliminate a shared history of oppression.

Ideology, then, is not distinct from economic and social change; "ideas" do not have any priority in shaping social change. Rather, the history in legal discourse forms a social ideology that is an integral part of ongoing economic and social restructuring. In its appropriation of history, legal language is at once a conceptual framework and a powerful social praxis that maps and expresses a social "taking" of the most tangible sort, for in the history lie rights to land. Yet, in granting a people their history, law also limits such "takings."[7] This limit is at once in language and in social practice.

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[7] Marxist debates, for example, have moved beyond a naive equation of court decisions with capitalist class domination to a recognition that in at least some instances the forum provided by courts has permitted some working class victories (cf. Beirne and Quinney, 1982). Thus even the law of the conqueror can serve as a weapon for the conquered, if not consistently or for the purposes of major social restructuring. And, similarly, the language of the law—of prior decisions, constitutions, and statutes—serves as a limit, however

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elastic, on the decision-making process (cf. Llewellyn (1931) on paper rules; also Mnookin and Kornhauser (1979); Mertz (1987)).

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