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Fanon, Colonial Violence, And Racist Language In Federal American Indian Law

Joubin Khazaie*

This Comment will argue that the racist language enshrined in foundational Supreme Court decisions involving Native tribes continuously enacts a form of colonial violence that seeks to preserve a white racial dictatorship. The paper will use Frantz Fanon's scholarship on colonial violence and the dehumanization of Indigenous people as a framework to understand the history of legalized racism against Indigenous people in the United States. Fanon's analysis allows us to understand how language is used to dehumanize Native people in order to establish a system of hierarchy that informs the societal roles of the colonizer and the colonized. The paper will then trace the use of racial stereotypes and brutalizing language against Native Americans in Supreme Court decisions under Justice Marshall. Further, the paper will argue that the racist precedents and language relied upon by the Supreme Court have operated as a form of colonial violence that serve to justify the denial of property, self-governance, and cultural survival of Native Americans.

* My thanks to my beloved partner Bethlehem. For her help, insights, and strength in the formation and articulation of ideas presented in this paper.

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I. FRAMING FANON

Born and raised in the French colony of Martinique, Frantz Fanon describes himself as a postcolonial subject situated both within a deeply racialized French colonial context and a racialized sense of self.¹ Fanon's publications *Black Skin, White Masks* (1952) and *The Wretched of the Earth* (1961) are widely considered two of the most relied upon works to obtaining a fundamental understanding of anti-colonial liberation struggles; and his central ideas continue to speak to our current age.² His scholarship expresses how colonial racism, and the resulting dehumanization, creates complications of identity for the colonial subject. Fanon examines the ways in which the colonial mentality devalues black consciousness and relies on case studies of anti-Black racism in France and the French West Indies to show how the adoption of the French language and cultural norms lead the colonized to participate in one's own oppression and alienation.³ *The Wretched of the Earth* foregrounds the notion that colonialism is not an accidental formation; rather, the colonial world is a "Manichaeic world"⁴ with a binary division between good and evil and is distinctly relevant to modern structures of power.⁵

I interrogate the relationship between Fanonian concepts and the racist language in American Indian case law because Fanon positions race and the hierarchy of race at the center of his analysis on anti-colonial resistance. Fanon writes:

The singularity of the colonial context is that economic reality, inequality, and the immense difference of ways of life never come to mask the human realities. When you examine at close quarters the colonial context, it is evident that what parcels out the world is to begin with the fact of belonging to or not belonging to a given race, a given species. In the colonies the economic substructure is also a superstructure.⁶

As it relates to the colonial oppression, Fanon understands that whiteness operates as both a political ideology and as a point of relation to

¹ See FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Richard Philcox trans., Grove Press 2008) (1952).

² See generally *id.*, FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Richard Philcox trans., Grove Press 2005) (1961) (in his foreword, Homi K. Bhabha discusses the liberating influence of Fanon's scholarship on revolutionaries such as: Bobby Seale, Huey Newton, Steve Biko, Bobby Sands, and Ali Shariati).

³ See FANON, *supra* note 1.

⁴ See e.g., FANON, *supra* note 2, at xiii.

⁵ See generally *id.*

⁶ *Id.* at 5.

private property and capital.⁷ Further, Fanon values an understanding of decolonization outside of academia and the administration of law. He highlights the necessity of the colonized to overcome the alienation produced by colonial oppression outside of the culture and intellectual possessions of the colonizer. Stated differently, Fanon adheres to the principle that decolonization is always a violent event and an agenda for total disorder within the colonial situation.⁸ I rely on Fanon in my analysis because he offers a lens in which violent, indigenous opposition to dispossession and disempowerment brought by colonialism can serve as a means to overturn feelings of alienation. Most importantly, Fanon's vision of a just society is one that demands an end to economic exploitation, imperialism, racism and other systems of oppression that do not embrace the principle that every human is of worth.

II. "THE SAVAGE AS THE WOLF"

"...the gradual extension of our settlements will as certainly cause the savage, as the wolf, to retire; both being beasts of prey, though they differ in shape."⁹ I begin with this quote from George Washington because I understand it to be a perfect illustration of the western colonial imagination on which the United States was founded. To fully understand how justices on the Supreme Court have constitutionally legitimized a white racial dictatorship in the United States, we must first look to the origination of the racist language employed by Washington, the founding fathers, and the other white colonial-settlers responsible for the genocide of Indigenous nations. Racial dictatorship in this context could be understood as:

... a coercive form of racial rule by whites who sought to legally eliminate all nonwhites from the sphere of political and civil society in the United States. The presumed racial inferiority and incompatibility of these nonwhite "others" disqualified them from full and equal participation in the superior form of civilization established for the enjoyment of the white race by the Constitution and laws of the United States.¹⁰

⁷ See generally *infra* note 23.

⁸ See FANON, *supra* note 2, at 2.

⁹ ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 42 (2005).

¹⁰ *Id.* at 31.

The use of “savagery” as an identifier can be traced back to Enlightenment thinkers such as Grotius, Hobbes, and Locke, who hypothesized philosophical frameworks that relied on the American Indian as an example of man in his most unrefined savage state.¹¹ The idea of the American Indian as an incommensurable being formed the foundation of “the struggle between civilization and barbarism in the Western colonial imagination,” freeing Europeans from the restraints of Exodus 21:12.¹² As noted by Williams, this Enlightenment–era European racial consciousness enabled the West to move past its faux religious convictions that value the unity of mankind and precipitated a shift towards ruthless colonization of recently “discovered” lands full of “strange,” people committed to maintaining their identity of “savagery.”¹³

Omi and Winant hypothesize that the conquest of the American Indian was a significant and distinct repositioning of European’s historical understanding of the “Other.”¹⁴ Manifest destiny marked the consolidation of the will to exploit, dominate, and appropriate the “Other” through organized frameworks such as religion, science, and political economy that were not perpetuated toward other non–European peoples.¹⁵ The maintenance of the white racial dictatorship in the United States through the organized weaponization of the “Other” has provided racial dictatorships outside of the U.S. with a blueprint for subjugation that can be followed, validating Omi and Winant’s hypothesis.¹⁶

Williams writes, “The language of Indian savagery could be evocatively manipulated to cast any of these essential savage character traits as noble virtues of primitive simplicity. But savagery itself possessed no ultimate redeeming value for the Indian.”¹⁷ A review of developing American superstructures makes clear that the racial imagination of European colonists as it relates to Native Americans is shaped and molded to affirm racial perceptions that justify discourses of manifest destiny and national identity.¹⁸ From the 17th to the late 18th commentaries on white victimhood and the capture of Euro–Americans settlers by Native tribes

¹¹ *Id.* at 33.

¹² *Id.* at 34.

¹³ *Id.* at 33.

¹⁴ See MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 62 (2d ed. Routledge 1994).

¹⁵ WILLIAMS, *supra* note 9, at 35.

¹⁶ See JAMES Q. WHITMAN, HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW (2017); FAYEZ A. SAYEGH, ZIONIST COLONIALISM IN PALESTINE (1965).

¹⁷ WILLIAMS, *supra* note 9, at 35–36.

¹⁸ See generally RICHARD SLOTKIN, REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600–1800 (1973).

served as the introduction of American Indian “savagery” to American secular literature.¹⁹

In the nineteenth century, the conception of the Indian as a “savage” in American popular media oscillates between two varieties: 1) the “noble savage” whose closeness to the state of nature is overly romanticized and 2) the alienated, unsaved Indian “savage” casted as an anti-hero for the tales of the Wild West.²⁰ By the 20th century, this foundational language of Indian savagery pushed mass-market media culture to make profitable and digestible caricatures of Indians as uncivilized people. This image is juxtaposed with the superiority of the white man or canonized tales of cross-cultural understanding between Native people and European settlers.²¹ It is important to recognize the influence of popular media representation as a superstructure that not only informs the broader society but also the judicial decision making of Supreme Court justices.

These long-established stereotyped roles and their ritualized construction of racialized and commodified ethnic identities are an inescapable and pervasive part of the metastasizing, conglomerating mass media, market culture that just about every child in America, including those who grow up to become Supreme Court justices, get exposed to at a very early age.²²

An awareness of the pervasive and explicit racialization of Native people through colonial superstructures such as religion, politics, literature, and media in the early colonial period of the United States is fundamental in understanding how political power structures such as the Supreme Court, validate and legitimize white racial superiority.

III. RACIST LANGUAGE AND PRECEDENT IN AMERICAN INDIAN LAW

The language of Indian “savagery” and the growth of the Indian “savage” in popular discourse is deeply embedded in the culture of the colonial era and the formation of a national identity in the United States. Foreseeably, the steadfast beliefs in white superiority and Indian savagery became central organizing principles in the decisions made by the Supreme Court when addressing questions related to Indian rights.²³

¹⁹ See JUNE NAMIAS, *WHITE CAPTIVES: GENDER AND ETHNICITY ON THE AMERICAN FRONTIER* 132 (1993).

²⁰ SHARI M. HUHDORF, *GOING NATIVE: INDIANS IN THE AMERICAN CULTURAL IMAGINATION* (2001).

²¹ See WILLIAMS, *supra* note 9, at 35.

²² *Id.* at 36-37.

²³ *Id.* at 48.

Relying upon the same language of white superiority used by Washington, the Supreme Court under Justice Marshall issued three major opinions on Indian rights, *Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*. As Williams writes, these three 19th century cases formed the foundation of the Marshall Model of Indian Rights, which continues to shape the Court's approach to all questions of Indian tribal rights and sovereignty.²⁴

a. *Johnson v. McIntosh*²⁵

The issue in *Johnson v. McIntosh* was that both parties claimed that they had legitimate title to a tract of land. Johnson's title was granted to him by Piankeshaw Indians in exchange for a sum of money and the United States government sold a portion of the same land to McIntosh.²⁶ The Court unanimously held that land title transferred by Indian tribes to private individuals prior to the American Revolution are not recognized. In *Whiteness as Property*, Cheryl Harris notes that "the issue specifically presented was not merely whether Indians had the power to convey title, but to whom the conveyance could be made—to individuals or to the government that 'discovered' the land."²⁷ The Court reasoned that Indian title was subordinate to European "discovery" of Indian tribal land giving 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."²⁸ *Johnson* is regarded as one of the most important Indian rights opinions because of the Court's validation of the doctrine of discovery. Under the doctrine of discovery, the exclusive right to title of Indian territory either by conquest or by purchase, transferred from Great Britain to the United States following the Revolutionary War.²⁹ Although the Piankeshaw tribe were indigenous to the land, Marshall and the Supreme Court unanimously decided that the racial and cultural otherness of Native tribes struck out any basis for asserting a right to the land in dispute.³⁰ Put simply, the doctrine of discovery allowed the Court to deny Indian tribes the same property rights as Europeans because Indians were regarded as an inferior race under the European Law of Nations.

²⁴ *Id.* at 48-49.

²⁵ 21 U.S. 543 (1823).

²⁶ *Id.* at 557-558.

²⁷ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

²⁸ *McIntosh*, 21 U.S. at 573.

²⁹ WILLIAMS, *supra* note 9, at 53.

³⁰ Harris, *supra* note 27, at 273.

Further, *Johnson's* interpretation of the rights of the conqueror established whiteness as a prerequisite to the exercise of enforceable property rights in the United States. In the opinion Marshall discusses the inevitability of European conquest:

. . . the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave a wilderness, to govern them as a distinct people, was impossible³¹

The use of the familiar language of Indian savagery is clear throughout the text of Marshall's opinion.³² To justify his assertions, Marshall points to "the character and habits of the people whose rights have been wrested from them"³³ as a justification for the "principles which Europeans have applied to Indian title . . ." ³⁴ The Chief Justice also characterized the dispossession of Native land and history by European colonization as follows: "Frequent and bloody wars, in which the whites were not always the aggressors, *unavoidably*³⁵ ensued. European policy, numbers, and skill prevailed. As the white population advanced, that of the Indians *necessarily*³⁶ receded."³⁷

The unmasked validation of the necessity of violence and elevation of the European colonial-fantasy of a white racial dictatorship over non-white people in *Johnson* serves as a principle of the U.S. legal system.³⁸ Here, Fanon's analysis of violence is particularly relevant to Marshall's opinion. Fanon's support of violent revolutionary struggle is drawn from his analysis of the central and inescapable role of violence in the maintenance of colonialism. Using a Fanonian lens, Marshall employs violent language as an immutable component in the relationship between the oppressor and the oppressed.³⁹

In colonial regions, however, the proximity and frequent direct intervention by the police and the military ensure

³¹ *McIntosh*, 21 U.S. at 590.

³² *Id.* at 563.

³³ *Id.* at 589.

³⁴ *Id.*

³⁵ *Id.* (*emphasis added*).

³⁶ *Id.* (*emphasis added*).

³⁷ *Id.* at 590.

³⁸ WILLIAMS, *supra* note 9, at 56; *see generally* *Dred Scott v. Sanford*, 60 U.S. 393, 403-405 (1856); *Korematsu v. United States*, 323 U.S. 214 (1944).

³⁹ FANON, *supra* note 2, at 34.

the colonized are kept under close scrutiny and contained by rifle butts and napalm. We have seen how the government's agent uses a language of pure violence. The agent does not alleviate oppression or mask domination. He displays and demonstrates them with the clear conscience of the law enforcer and brings violence into the homes and minds of the colonized subject.⁴⁰

In this case, the Supreme Court exists as the "government's agent"⁴¹ that utilizes a language of pure violence to enforce law and dominate the colonized subject. We can also look to Fanon's theory of the compartmentalized world to understand Marshall's representation of the dichotomy between European and Indigenous frameworks of society.⁴² For Fanon, the Native and European sectors are mutually exclusive and challenging the colonial world cannot be categorized as a rational confrontation of viewpoints.⁴³ Rather, it is a direct confrontation of two separate and opposing realities. His support for this draws from the fact that the colonist not only physically limits the space of the colonized, but the colonist also turns the colonized subject into the "quintessence of evil . . . [a] corrosive element . . . distorting everything which involves aesthetics or morals . . ." ⁴⁴ "The 'native' is declared impervious to ethics, representing not only the absence of values but also the negation of values In other words, absolute evil."⁴⁵

*b. Cherokee Nation v. Georgia*⁴⁶

In 1831, the Cherokee nation under Article III of the Constitution filed suit against the state of Georgia to prevent the state from executing or enforcing the laws of Georgia within Cherokee territory.⁴⁷ The complaint asserted that the state of Georgia had no authority over the Cherokee nation because it is composed of sovereign and independent states with exclusive rights to their territory and self-government.⁴⁸ Various treaties between the United States and the Cherokee nation that support Cherokee sovereignty are referred to in the complaint.⁴⁹ However, the case turned on

⁴⁰ *Id.* at 4.

⁴¹ *Id.*

⁴² *See generally* FANON, *supra* note 2.

⁴³ *Id.* at 6.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 30 U.S. 1 (1831).

⁴⁷ *See id.* at 1, 10.

⁴⁸ *Id.* at 1-2.

⁴⁹ *Id.* at 2 ("That various treaties have been, from time to time, made between the confederate states afterwards; and finally, between the United States under their present

the jurisdictional question of whether the Cherokee and Native tribes more broadly, can be constituted as “foreign states” under Article III of the Constitution. Justice Marshall held that “the Cherokee nation is not a foreign state, in the sense in which the term ‘foreign state’ if used in the constitution of the United States.”⁵⁰ Rather, the Court determined that Native tribes were akin to “domestic dependent nations.”⁵¹ Under *Cherokee*, Native tribes under U.S. law, “occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”⁵² According to Marshall, Indian tribes at the time the constitution was drafted were “tomahawk”⁵³ wielding savages. Thus, the framers of the constitution did not have Indian tribes in view when providing an avenue for “foreign states” to utilize our courts under Article III.⁵⁴

The Court’s ruling that Indian tribes could not be regarded as ‘foreign’ nations under the Constitution meant that the Cherokees, in Marshall’s words, ‘cannot maintain an action in the courts of the United States.’ Though Georgia’s laws, as pleaded by the tribe, sought ‘directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force,’ the Constitution, according to the holding of *Cherokee Nation* and the Marshall Model of Indian Rights, literally left them incapable of defending themselves before the Supreme Court from the state-sponsored acts of what Remnard Strickland has called ‘genocide-at-law’.⁵⁵

Similar to *Johnson*, *Cherokee* is an example of rights-denying jurisprudence that subjected Tribal nations to inferior political status under the Constitution. Further, *Cherokee* extended the Marshall Model of Indian Rights through the trust doctrine and guardian-ward relationship.⁵⁶ The trust doctrine further relegated Indian tribes to the political

constitution, and the Cherokee nation, as well as other nations of Indians: in all of which the Cherokee nation, and other nations have been recognized as sovereign and independent states; possessing both the exclusive right to their territory, and the exclusive right of self-government within that territory.”).

⁵⁰ *Id.* at 11.

⁵¹ *Id.* at 13.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ WILLIAMS, *supra* note 9, at 61.

⁵⁶ Secretarial Order No. 3335. *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Tribes and Individual Indian Beneficiaries*, U.S. Dept. of Interior (Aug. 20, 2014).

sovereignty of the United States by recognizing Tribes as entities that are distinct from states and foreign nations, establishing the federal government as the “protector” of tribal land, assets, resources, and other recognized rights.⁵⁷

Fanon’s discussion on “The So-Called Dependency Complex of the Colonized” in *Black Skin White Masks*⁵⁸ is particularly relevant to the colonial violence perpetuated under *Cherokee*. I understand the outcome of this case to be analogous to the inferiority complex facing many of Fanon’s patients as a result of colonization.

What Monsieur Mannoni has forgotten is that the Malagasy no longer exists: he has forgotten that the Malagasy exists in relation to the European. When the white man arrived in Madagascar, he disrupted the psychological horizon and mechanisms. As everyone has pointed out, alterity for the black man is not the black but the white man.⁵⁹

The establishment of the “guardian-ward” relationship in *Cherokee* embodies Fanon’s assertion that upon colonization, the indigenous person no longer exists.⁶⁰ They only exist in relation to the colonizer.⁶¹ According to Justice Marshall, Tribal nations only exist in relation to a territory in which only the colonial government may assert title. Despite Cherokee nation, “toe[ing] the line of the white world as quickly as possible”⁶² by utilizing a violent colonial institution like the federal courts, *Cherokee’s* outcome further entrenched Native peoples into their status as a colonized subject. Holding that the Cherokee nation could not maintain an action in federal court as a foreign state resulted in the dismantling of Cherokee political society and the seizure of Cherokee lands despite assurances made valid through treaties with the United States.⁶³

*c. Worcester v. Georgia*⁶⁴

In the final case of the Marshall Model, the Supreme Court addressed whether the federal government or an individual state had the “exclusive right to extinguish the Indian title of occupancy, either by purchase or

⁵⁷ *Id.*

⁵⁸ FANON, *supra* note 1, at 64.

⁵⁹ *Id.* at 77.

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² *Id.* at 78.

⁶³ WILLIAMS, *supra* note 9, at 61.

⁶⁴ 31 U.S. 515 (1832).

conquest.”⁶⁵ Williams notes, “*Worcester* would decide, once and for all, which level of colonial government, state or federal . . . “ would have superior authority under the doctrine of discovery established in *Johnson* to impose laws on Indian nations.⁶⁶ *Worcester* held that Georgia state laws have no force in Cherokee nation because the “intercourse between the United States and this nation,”⁶⁷ is constitutionally vested in the federal government.⁶⁸ Writing for the court, Chief Justice Marshall reasoned that the Georgia law requiring individuals living on Cherokee land to obtain a permit and take an oath of allegiance were in direct conflict with treaties between the Cherokee nation and Georgia.⁶⁹ The Georgia state law also interfered with the federal government’s responsibility to “protect” Cherokee nation.⁷⁰ Conveniently, the court openly affirms the validity of treaties that were denied in *Cherokee* a year prior because doing so supported the consolidation of jurisdictional authority under the federal government.

The court also continued to rely on the language of savagery to justify the federal government’s monopoly on “colonial governmentality.”⁷¹ One of the relied upon Crown charters quoted in the opinion states:

“ . . .and whereas our provinces in North America have been frequently ravaged by Indian enemies, more especially that of South Carolina, which, in late war by the neighbouring savages, was laid waste by fire and sword, and great numbers of English inhabitants miserably massacred; and our loving subjects, who now inhabit there, by reason of the smallness of their numbers, will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages.”⁷²

Marshall relies on various pre-revolutionary English Crown charters to show that only the Crown possessed the right of discovery over Indian tribes. Following the Revolutionary War, that power was now vested in the federal government of the United States.⁷³ While *Worcester* has been considered an achievement for Indian rights because it limited states’

⁶⁵ *Johnson v. McIntosh*, 21 U.S. 543, 573 (1823).

⁶⁶ WILLIAMS, *supra* note 9, at 64.

⁶⁷ *Worcester*, 31 U.S. at 561.

⁶⁸ *Id.*

⁶⁹ *Id.* at 562.

⁷⁰ *Id.*

⁷¹ WILLIAMS, *supra* note 9, at 70.

⁷² *Worcester*, 31 U.S. at 546.

⁷³ *Id.* at 558.

abilities to enact violent policies directed towards Tribal nations, it relied on the language of Indian savagery to “protect” Tribal nations from the state while consolidating colonial power with the federal government.

Although one might be tempted to rationalize the racist language used in the Marshall Model cases by opining “that was the reality of the time,” the principles in these cases still hold weight in Federal American Indian law today. In the final portion of this Comment, I will be discussing Williams’ criticisms of how after *Brown*, judicial reliance on racist precedent was rejected by the Supreme Court for other marginalized groups but maintained for Indian tribes.

d. Tee-Hit-Ton & Brown v. Board of Education

*Brown v. Board of Education*⁷⁴ signals a “departure point”⁷⁵ in the struggle for racial equality in the United States.⁷⁶ In *Brown* we see the rejection of racist language used in *Plessy v. Ferguson* to justify the oppression of Black people through the separate but equal doctrine.⁷⁷ However, Williams writes:

Despite the rejection of the nineteenth century’s racist precedents and hostile stereotypes directed against blacks and despite the supposed benevolent racial paradigm shift represented by the twentieth-century Supreme Court’s landmark civil rights decision in *Brown*, nothing had really changed in the way justices talked about Indians and their rights. These two important decisions unembarrassedly and unhesitatingly draw on the same legal precedents and language of racism used by the nineteenth-century Supreme Court to deny Indians their asserted rights under U.S. law.⁷⁸

In *Tee-Hit-Ton v. United States*, members of the Tee-Hit-Ton Indians in Alaska brought a Fifth Amendment claim seeking compensation from the United States government because the U.S. Secretary of Agriculture sold timber from an area belonging to the Tribe.⁷⁹ The area contained over 350,000 acres of land and 150 square miles of water.⁸⁰ If the Tee-Hit-Ton Indians succeeded, the case could have potentially resulted in as much as

⁷⁴ 347 U.S. 483 (1954).

⁷⁵ WILLIAMS, *supra* note 9, at 86.

⁷⁶ *Id.*

⁷⁷ *Brown*, 347 U.S. at 495.

⁷⁸ WILLIAMS, *supra* note 9, at 87.

⁷⁹ 348 U.S. 273 (1955).

⁸⁰ *Id.*

\$9 billion in just compensation claims awarded to Indian tribes who had faced or were presently facing similar acts of dispossession.⁸¹ The Tee-Hit-Ton tribe contended that following the United States purchase of Alaska, Congressional acts “confirmed and recognized [their] right to occupy the land permanently and therefore the sale of the timber off such lands constitutes a taking pro tanto of its asserted rights in the area.”⁸² Relying on the doctrine of discovery in *Johnson*, the Supreme Court held that under the Constitution, the Tee-Hit-Ton tribe had no permanent legal rights in the lands of Alaska “occupied by them by permission of Congress.”⁸³ Justice Reed also quotes a remarkably racist passage in a 1877 Supreme Court case to solidify the holding that the taking of Indian title did not warrant compensation.

The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized this court from the foundation of the government.⁸⁴

The language in *Tee-Hit-Ton* is judicial validation of the racist conception of the Indian as a savage. The justifications provided in the outcome of *Tee-Hit-Ton*, only a year after rejecting racist legal precedent in *Brown*, illuminates the hypocrisy in federal judicial decisions. Fanon writes “Inferiorization is the native correlative to the European’s feeling of superiority. Let us have the courage to say: *It is the racist who creates the inferiorized.*”⁸⁵ The discrepancy between *Brown*’s rejection of racist precedent and *Tee-Hit-Ton*’s reliance on Marshall’s language of savagery informs us that not only is it the racist (i.e., the Supreme Court) who

⁸¹ DONALD CRAIG MITCHELL, *SOLD AMERICA: THE STORY OF ALASKA NATIVES AND THEIR LAND 1867-1959*, 26-28 (2003).

⁸² *Tee-Hit-Ton*, 348 U.S. at 277.

⁸³ *Id.* at 278.

⁸⁴ *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877).

⁸⁵ FANON, *supra* note 1, at 73.

creates the inferiorized, but the racist also determines when and which victims of white racial violence are given their “rights.”

IV. CONCLUSION

I chose to write this Comment because I believe that an understanding of the history of racist American Indian law is a precursor to achieve justice for Tribal nations and eventual abolishment of the Supreme Court as a colonial institution. I do not believe Indigenous liberation, or any other liberation movement will succeed through a “gentleman’s agreement”⁸⁶ with the mechanisms that preserve white racial hierarchy.

Decolonization never goes unnoted, for it focuses on and fundamentally alters being, and transforms the spectator crushed to a nonessential state into a privileged actor, captured in a virtually grandiose fashion by the spotlight of History. It infuses a new rhythm, specific to a new generation of men, with a new language and a new humanity. Decolonization is truly the creation of new men. But such a creation cannot be attributed to a supernatural power: the ‘thing’ colonized becomes a man through the very process of liberation.⁸⁷

Federal courts have “crushed”⁸⁸ Native people to a non-essential state. The process of transforming Tribal nations from a non-essential state into a privileged actor requires retirement of the Marshall Model, consistent rejection of precedent that relies on racist white supremacist ideology, and implementation of alternative methods of resolution that are led by Native people.

⁸⁶ FANON, *supra* note 2, at 2 (“Decolonization which sets of to change the order of the world, is clearly an agenda for total disorder. But it cannot be accomplished by the wave of a magic wand, a natural cataclysm, or a gentleman’s agreement.”).

⁸⁷ *Id.*

⁸⁸ *Id.*