



of these opinions by a modern student of American Indian law is enough to startle. These three decisions, *Johnson v. M'Intosh*,<sup>5</sup> *Cherokee Nation v. Georgia*,<sup>6</sup> and *Worcester v. Georgia*,<sup>7</sup> written in the obtuse legalese of the day,<sup>8</sup> identified the contours of American Indian law as they remain today in the modern era. These opinions are the house in which American Indian advocates, leaders, and policymakers rise each morning—and it is a house filled with an iron cold of the deepest hour.

This essay is an attempt to reexamine the Trilogy for its continuing relevance to students of modern American Indian law. The law does not remain stagnant. The law of the Marshall Court is no longer the only word in federal Indian law.<sup>9</sup> But the pedagogical value of the Marshall Trilogy goes far beyond the mere holdings of the cases. That is not to say the holdings are not significant—they are. But, as Justice Baldwin wrote in *Cherokee Nation*, the “reasons” for the holdings are more significant than the holdings themselves.<sup>10</sup> There are seven opinions in the Trilogy, with the three main opinions authored by Chief Justice Marshall. The arguments, concepts, and notions in these opinions resonate today, about 170 years after the last of the decisions. The argumentation of these Justices incorporates the seeds of the entire catalog of the current doctrine making up American Indian law. The foundations of the current debates over plenary power,<sup>11</sup> state authority in Indian Country,<sup>12</sup> the special canon of

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Marshall did not envision the consequences of incorporating the Doctrine of Discovery into American constitutional law).

5. 21 U.S. 543 (1823).

6. 30 U.S. 1 (1831).

7. 31 U.S. 515 (1832).

8. Compare *Worcester v. Georgia*, 31 U.S. 515, 562 (1832) (“Will these powerful considerations avail the plaintiff in error? We think they will.”), with *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 (2006) (“For these reasons, we deny the Government’s motion to dismiss.”).

9. “Federal Indian law” is defined as “that body of law dealing with the status of the Indian tribes and their special relationship to the federal government, with all the attendant consequences for the tribes and their members, the states and their citizens, and the federal government.” WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 1 (4th ed. 2004). See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 1-3 (Nell Jessup Newton et al. eds., 2005). “Federal Indian law” includes statutes, treaties, regulations, and other codified law, as well as the federal common law interpreting these statutes and the constitutional common law arising out of the Court’s application of the constitution to Indian affairs.

10. *Cherokee Nation*, 30 U.S. at 32 (Baldwin, J., concurring).

11. Compare *United States v. Lara*, 541 U.S. 193, 200 (2004) (holding that Congress has “plenary and exclusive” powers “to legislate in respect to Indian tribes”); *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Clark*, 435 F.3d 1100, 1112-13 (9th Cir. 2006), with *Lara*, 541 U.S. at 224 (Thomas, J., concurring) (“The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty.”); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1 (arguing that Congress does not have plenary power to legislate in the field of Indian affairs). See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 9, at § 5.02; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power*

construction for Indian treaties,<sup>13</sup> implicit divestiture,<sup>14</sup> the trust doctrine,<sup>15</sup> the political status of Indians and Indian tribes,<sup>16</sup> and others are all to be found within the Marshall Trilogy. For a new student of federal Indian law, these three cases are a microcosm of the entire course to come. It is fitting that these three cases often are the first cases confronted in the course,<sup>17</sup> but it is somewhat disturbing to realize how little the debates have changed over the centuries.

This essay reexamines the Marshall Trilogy for the pedagogical value that reading and understanding the Trilogy may have for students of federal

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*over Foreign Affairs*, 81 TEX. L. REV. 1, 80-81 (2002) (describing as “uncertain” whether the Court will continue to validate Congressional plenary power).

12. Compare *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996) (under the Indian Commerce Clause, “the States . . . have been divested of virtually all authority over Indian commerce and Indian tribes.”), and *Rice v. Olson*, 324 US 786, 789 (1945) (“The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history”), with *McClanahan v. State Tax Comm’n*, 411 U.S. 164, 172 & n.8 (1973) (the Court relies less upon “platonic notions of Indian sovereignty” and looks more to relevant treaties and statutes in order to discern the limits of state power over Indian affairs). See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 9, at § 6.01.

13. Compare *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (“[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.”), with *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (“[C]anons are not mandatory rules. They are guides that ‘need not be conclusive.’”) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)); *Hagen v. Utah*, 510 U.S. 399, 422-27 (1994) (Blackmun, J., dissenting) (arguing that the majority ignored the special canon of construction). See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 9, at § 2.02.

14. *E.g.*, *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.”). See generally John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen’s Handbook Cutting Room Floor*, 38 CONN. L. REV. 731 (2006).

15. *E.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

*Id.* See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 9, at § 5.05.

16. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a ‘guardian-ward’ status, to legislate on behalf of federally recognized Indian tribes.”). See generally Gloria Valencia-Weber, *Racial Equality: Old and New Strains of American Indians*, 80 NOTRE DAME L. REV. 333 (2004); Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943 (2002); Carole Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples,”* 39 UCLA L. REV. 169 (1991).

17. See ROBERT N. CLINTON, CAROLE E. GOLDBERG, & REBECCA TSOSIE, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 57-61, 65-69, 76-85 (4th ed. 2005); DAVID H. GETCHES, CHARLES F. WILKINSON, & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 63-68, 104-25 (5th ed. 2005).

Indian law. Part I is an introduction to the Trilogy. Part I also argues that the modern Supreme Court gives little precedential weight to the Trilogy. Part II identifies the major Indian law doctrines that find their origin stories within the holdings and dicta of the Trilogy. The Trilogy introduced the notions of federal plenary power over Indian affairs, canons of Indian treaty construction, the trust relationship between Indians and tribes and the federal government, and much more. Part III reexamines the Trilogy in light of modern ways of reading the law for students of American Indian law and finds that the Trilogy retains its importance, despite its categorization as both canon and anti-canon. Part IV concludes by identifying some of the dangers of reading too much into the Trilogy.

#### I. THE CONTEXT OF THE MARSHALL TRILOGY WITHIN EARLY SUPREME COURT JURISPRUDENCE

The Marshall Trilogy attracted attention from the watchers of D.C. politics when they were argued and decided, much more so than Indian law cases attract today.<sup>18</sup> The *Johnson* argument “attracted spectators,” even though the day—February 15, 1823—was cold.<sup>19</sup> The *Worcester* arguments sent fifty or sixty Members of the House scrambling downstairs to the converted committee room where the Supreme Court sat in 1832.<sup>20</sup> But the interest appeared to be fleeting—Indians and their problems were forgettable. “Injustice to [Indians] became of interest in politics only as it could be used to prejudice a political opponent in the eyes of the voters, and Indians had no votes.”<sup>21</sup> Chief Justice Marshall, sometimes accused of harboring a soft spot for the plight of Indians and Indian tribes,<sup>22</sup> issued his

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18. A recent major Indian law case, *United States v. Lara*, 541 U.S. 193 (2004), did attract some mention in the national news, see Linda Greenhouse, *Court Upholds Tribal Power It Once Denied*, N.Y. TIMES, Apr. 20, 2004, at A12, but is not a “salient case,” defined as a case reported on the front page of the *Times*. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 156 (2006) (citing Lee Epstein & Jeffrey Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000)).

19. ROBERTSON, *supra* note 4, at 68.

20. See DAVID LOTH, CHIEF JUSTICE: JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 363 (1949).

21. *Id.* at 365-66; see also FRANCIS S. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 159 (1981) (“The rhetoric of opposition to [Indian] removal was more anti-Jackson than pro-Indian. . . . Neither states’ rights sentiment nor the democratic process for equality would tolerate Indian nations inside state borders or Indian exemption from state law.”).

22. See *Johnson v. M’Intosh*, 21 U.S. 543, 586 (1823) (noting that the Indians of Kentucky had “maintained their title with as much persevering courage as was ever manifested by any people”); *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831) (“If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.”) (Marshall, C.J.); RICHARD C. BROWN, ILLUSTRIOUS AMERICANS: JOHN MARSHALL 214-15 (1968). A letter, written in 1828, from Chief Justice Marshall to Justice Story provided:

opinions as a matter of political necessity more than his sympathy for Indians.<sup>23</sup> In fact, for one commentator, the Chief Justice's overall jurisprudential views seemed to be driven more by fear of slave insurrections than the military capabilities of the weakened Indian tribes.<sup>24</sup>

A. JOHNSON V. M'INTOSH

*Johnson* held that Indians and Indian tribes did not have the authority to alienate land to any entity other than the American government.<sup>25</sup> Chief Justice Marshall formally adopted the Doctrine of Discovery into federal common law<sup>26</sup>:

This principle 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.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which

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It was not until after the adoption of our present government that respect for our own safety permitted us to give full indulgence to those principles of humanity and justice which ought always to govern our conduct towards the aborigines when this course can be pursued without exposing ourselves to the most afflicting calamities. That time . . . is unquestionably arrived, and every opposition now exercised on a helpless people depending on our magnanimity and justice for the preservation of their existence impressed a deep stain on the American character.

*Id.* See also LEONARD BAKER, JOHN MARSHALL: A LIFE IN THE LAW 732 (1974) (same).

23. See ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 48-49 (1968).

[T]he vacating of Indian claims to land [in *Johnson*] otherwise appropriated by American law could be painfully justified only as 'indispensable' to the American system, especially where 'the property of the great mass of the community originates' in those appropriations . . . . In each case he qualified human liberty for the sake of short-run expediency, while believing in the long-run expediency, as well as justice, of liberty.

*Id.* (quoting *Johnson*, 21 U.S. at 591). See also DAVID ROBARGE, A CHIEF JUSTICE'S PROGRESS: JOHN MARSHALL FROM REVOLUTIONARY VIRGINIA TO THE SUPREME COURT 301-02 (2000) ("For Marshall, the [*Worcester*] decision was a victory on all counts . . . . 'In this decision, perhaps more than in any other,' Charles F. Hobson has rightly concluded, '[t]he jurist went beyond strict legal necessity to make a pronouncement that trenched upon the political sphere.'").

24. See FAULKNER, *supra* note 23, at 58 ("It might well be that the greater generosity displayed to the Indians, compared to the slaves, was owing to Marshall's belief that danger from the Indians was no longer to be expected, while the awful possibilities connected with Negro enslavement yet remained.").

25. 21 U.S. 543 (1823).

26. In the description of the Trilogy that follows, larger block quotations will be used to help in retaining more of the context of the language of the opinions.

all asserted for themselves, and to the assertion of which, by others, all assented.<sup>27</sup>

Chief Justice Marshall explained that Indians retained rights in the lands they occupied, but that those rights had been limited post-Discovery:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>28</sup>

The federal government, according to the Chief Justice, held the preemption right, the right to extinguish Indian title via purchase or conquest, but also *title* to the Indian lands:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.<sup>29</sup>

The Chief Justice justified the holding that Indians, unlike whites, had lesser rights to lands by suggesting that Indians would, over time, assimilate:

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the

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27. *Johnson*, 21 U.S. at 573.

28. *Id.* at 574.

29. *Id.* at 587.

society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.<sup>30</sup>

Even so, he mocked the doctrine itself, stating that it was an “extravagant . . . pretension” for Euro-Americans to follow a rule that they may take significant property rights from indigenous peoples through discovery.<sup>31</sup>

Professor Stuart Banner’s research shows in great detail that Chief Justice Marshall was wrong when he asserted that the Doctrine of Discovery always had been the general rule of acquiring Indian lands.<sup>32</sup> In fact, Banner argues, the English government, as a matter of “overall English colonial land policy [pre-1763] . . . treated the Indians as owners of their land.”<sup>33</sup> There is a certain forceful logic to Banner’s argument:

Land was abundant and it was usually cheap. Whether to buy an asset or simply seize it, in any context, is in large part an economic calculation, involving a comparison of the costs of each method. The less expensive the Indians’ land, the more likely the English were to buy it.<sup>34</sup>

As more and more English speculators bought land from Indians, more and more land purchases began to rely on that chain of title:

Finally, once the English began purchasing land from the Indians, it became very difficult as a political matter to refuse to recognize the Indians as property owners, because much of the English population derived title to their land from the Indians. Many colonists had bought land either from the Indians directly or at the

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30. *Johnson*, 21 U.S. at 589.

31. *Id.* at 591.

32. See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 10-48 (2005).

33. *Id.* at 12.

34. *Id.* at 40; see also *id.* at 10.

By the late seventeenth century, . . . English government officials settled on an answer [as to whether they could take Indian land or whether they had to buy it]. In principle, if not always in practice, the English recognized the Indians as the owners of North America. If the English wanted Indian land, they would have to buy it.

*Id.* at 10.

end of a chain of title that originated with the Indians. To suggest that the Indians were not property owners would have been to upset the settled expectations of a large number of *English* property owners, who would suddenly have found their land titles open to question.<sup>35</sup>

But after *Johnson*, the Doctrine of Discovery became a “well known fact.”<sup>36</sup>

Professor Lindsay Robertson makes a compelling argument that the Doctrine of Discovery portion of the holding in *Johnson* was unnecessary to decide the case and that Chief Justice Marshall had an ulterior motive in extending the opinion to include that holding.<sup>37</sup> Both land claims made by the petitioners in *Johnson* were prohibited by the British Proclamation of 1763, the law of the land at that time of the two transactions (1773 and 1775), and were, as a result, void *ab initio*.<sup>38</sup> Professor Robertson shows that the Chief Justice expanded the question presented to extend the holding to land grants that would not have been covered under the 1763 proclamation.<sup>39</sup> Moreover, the Chief Justice expanded the legal rule of preemption in Indian lands cases to include actual *title*:

Preemption historically had meant no more than the exclusive right to engage in a particular purchase transaction. The preemption right had not carried with it title to the land to which the right was claimed. Marshall’s language—“that discovery gave *title* to the government by whose subjects . . . it was made, . . . which title might be consummated by possession,” thus worked a significant, if subtle, expansion, in the same way that his restatement of the question presented had drawn the discussion forward temporally.<sup>40</sup>

Professor Robertson alleges that Chief Justice Marshall intended to lay the foundation in *Johnson* for a future case preserving the rights of war

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35. BANNER, *supra* note 32, at 41 (emphasis in original).

36. *Id.* at 188 (quotation omitted); see also 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 2, at 4 (1833) (“That title was founded on the right of discovery, a right, which was held among the European nations a just and sufficient foundation, on which to rest their respective claims to the American continent.”).

37. See ROBERTSON, *supra* note 4, at 95-116.

38. See *Johnson v. M’Intosh*, 21 U.S. 543, 597-98 (1823).

Most of the titles were derived from persons professing to act under the authority of the government existing at the time; and the two grants under which the plaintiffs claim, are supposed, by the person under whose inspection the collection was made, to be void, because forbidden by the royal proclamation of 1763.

*Id.*; ROBERTSON, *supra* note 4, at 95.

39. See ROBERTSON, *supra* note 4, at 96 (“The key expansion Marshall worked at the outset was to covert the case from one about pre-Revolutionary War Indian land transactions to one about post-Revolutionary War Indian land transactions.”).

40. See *id.* at 99 (quoting *Johnson*, 21 U.S. at 573) (italics in original).



veterans who received land grants from the State of Virginia in their western lands.<sup>41</sup> As a condition for entering the Union, Virginia had to cede its claim to these western lands to the United States.<sup>42</sup> Virginia, prior to the adoption of the Constitution and even the Articles of Confederation, had made land grants to returning war veterans—but those grants had not been reserved in the cession to the United States.<sup>43</sup> In *Johnson*, the Chief Justice wanted to create law that would protect land interests granted by the states where the federal government subsequently guaranteed the same lands to Indian tribes.<sup>44</sup> In effect, according to Professor Robertson, in order to protect these Virginia claimants, the Chief Justice cheated:

Because [the petitioners' counsel] had designed the case so as to limit material argument to the effect of the Proclamation of 1763, counsel offered no evidence of the history of public resolution of claims to Indian lands granted by states. Had this history been presented, Marshall would have had at least to reckon with it. Expressing his conclusions in obiter dicta obviated this need.<sup>45</sup>

In the opinion, the Chief Justice wrote,

It has never been doubted, that *either the United States, or the several States*, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.<sup>46</sup>

The Virginia claimants received their compensation via an act of Congress in 1830.<sup>47</sup>

The disastrous legacy of the *Johnson* decision in Indian Country and elsewhere has been articulated too many times to count.<sup>48</sup> The impact on

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41. *See id.* at 83-89.

42. *See* Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 438-39 (2003).

43. *See* ROBERTSON, *supra* note 4, at 86-87 (“Virginia had originally intended that enough lands be reserved from the cession of its western lands to Congress to satisfy the claims of Virginia soldiers in state and continental service left unsatisfied by the lands in Kentucky; when the cession was communicated to Congress, however, the militia claimants were erroneously omitted from the reservation. Marshall was openly sympathetic.”).

44. *Id.* at 106 (“Problems arose, however, when states granted Indian lands to individuals and the federal government subsequently guaranteed the same lands to the tribes by treaty.”).

45. *Id.* at 110.

46. *Johnson v. M'Intosh*, 21 U.S. 543, 584-85 (1823) (emphasis added).

47. *See* ROBERTSON, *supra* note 4, at 117.

48. *E.g.*, Cleveland, *supra* note 11, at 34.

the Marshall Court's federalism would arrive when the Georgia Supreme Court cited *Johnson* in affirming the Corn Tassel murder conviction<sup>49</sup>:

In September 1830, the Georgia judicial convention upheld the legality of Georgia's statutory claim of jurisdiction over the Cherokee Nation. The validity of the assertion, the convention found, depended on the relation between Georgia and the Cherokees. This relation depended in turn "upon the principles established by England towards the Indian tribes occupying that part of North America which that power colonized." These principles had been "ably elucidated by the decision of the Supreme Court in the case of *Johnson v. McIntosh*."<sup>50</sup>

In that light, the *Johnson* holding, a property issue, contributed to the circumstances that would become the Cherokee cases, two major states' rights decisions.

*Johnson* had arisen from the ashes of an earlier case, *Fletcher v. Peck*.<sup>51</sup> *Fletcher* adjudicated the rights of land speculators who had acquired their interests in the Yazoo land fraud, in which all but one Georgia legislator had been bribed to enact bills to grant 35 million acres of land to

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*M'Intosh* established that U.S. authority over tribes, or at least the United States' exclusive right to acquire Indian property, originated from two sources: colonial prerogatives deriving from discovery, and the nature of Indians as savages and incomplete sovereigns. Neither of these sources was based on the text of the Constitution. Instead, the U.S. powers resulting from discovery and the Indians' aboriginal status were original, inherent powers, arising from international law. By deriving U.S. authority over the Indians from an extraconstitutional source and suggesting that Congress's exercise of the power was inappropriate for judicial review, *Johnson v. M'Intosh* laid the groundwork for the doctrine of inherent powers to come.

*Id.*

See also John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. PUB. & POL'Y 533, 565 (2001) (referring to the Doctrine of Discovery as "a principle of white colonial supremacy traceable to the rise of Roman Catholic hegemony in medieval and renaissance Europe"); David E. Wilkins, *Johnson v. M'Intosh Revisited: Through the Eyes of Mitchel v. United States*, 19 AM. INDIAN L. REV. 159, 168 (1994).

The end result, of course, was the enshrinement and institutionalization of a theory of tribal "subservience to the federal government." Put more pithily, *M'Intosh*'s "acceptance of the Doctrine of Discovery into United States law preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples. White society's exercise of power over Indian tribes received the sanction of the Rule of Law in *Johnson v. M'Intosh*."

*Id.* (quoting in VINE DELORIA & CLIFFORD LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 26 (1983), and ROBERT WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 317 (1990)).

49. *Georgia v. Tassels*, 1 Dud. 229 (Ga. 1830) (on file with author).

50. See ROBERTSON, *supra* note 4, at 129.

51. 10 U.S. 87 (1810).

these speculators for a couple pennies an acre.<sup>52</sup> Much of the land at issue included lands owned and occupied by Indian tribes, including the Cherokee Nation.<sup>53</sup> “An outraged Georgia electorate . . . repealed the grants, signaling their contempt for their predecessors by ordering all records of the grants excised from the state’s public records and the original act of sale publicly burned.”<sup>54</sup> The *Fletcher* Court, citing the Contracts Clause, invalidated the repeal of the land grant act,<sup>55</sup> but with great reluctance, because the nascent Marshall Court had not yet reached a place where it felt comfortable invalidating acts of state legislatures.<sup>56</sup> After

52. See ROBERTSON, *supra* note 4, at 29-30; Horace H. Hagan, *Fletcher v. Peck*, 16 GEO. L.J. 1, 8 (1927) (“two cents an acre”). According to Hagan:

Georgia was the last of the thirteen original colonies to be settled, and was the least in population. Its white citizenship was scarcely more than five thousand and to this sparseness of population there was added a bankrupt treasury and a people impoverished and unable to sustain any appreciable burden of taxation. Any one of these reasons would be sufficient to start and support a legislative agitation for the sale of its western lands. The combination of all of them was irresistible.

Hagan, *supra*, at 7.

53. See Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 60 (2005). Hagan asserts that the Indian tribes in Georgia “were more than a match for the State of Georgia alone . . .” Hagan, *supra* note 52, at 8.

54. ROBERTSON, *supra* note 4, at 30; see also Hagan, *supra* note 52, at 1-2 (reporting that the physical Act was laid “upon a fire, kindled, according to tradition, by a sun glass, in order that it might be said that no earthly flames, but fire from the heavens themselves had consumed the record of the inglorious transaction.”).

55. See *Fletcher*, 10 U.S. at 137.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised [sic] of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

*Id.*; Hagan, *supra* note 52, at 3 (“*Fletcher v. Peck* had already settled that a legislative grant is a contract and that, as such, it must be held inviolable by succeeding legislators.”). Professor Akhil Amar suggests that *Fletcher*’s reliance upon the Contracts Clause, “leading to unjust enrichment of one contracting party, would seem antithetical to the basic spirit of the clause.” AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 333 n.\* (2005).

56. See *Fletcher*, 10 U.S. at 130.

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an

*Fletcher*, the Yazoo land speculators flocked to D.C. to petition Congress for compensation settlement in exchange for quieting of their interests in the lands.<sup>57</sup> The petitioners in *Johnson* had analogous land claims in the Indiana Territory and sought compensation from Congress as well, but were unsuccessful.<sup>58</sup> They turned to federal court litigation in an effort to improve their chances of receiving compensation for their interests in the same manner as the Yazoo fraud beneficiaries.<sup>59</sup> The outcome of the litigation—rejection of the claim on the basis that the federal government retained the fee simple title in accordance with the Doctrine of Discovery<sup>60</sup>—generated fodder for debate over whether the federal government or the states held the title, even though Chief Justice Marshall made it clear that the federal government alone retained such rights.<sup>61</sup> Moreover, as Professor Robertson argues, we will see that the Chief Justice had to return to *Johnson* in *Worcester* in order to stamp out the ambiguity over whether the federal government retained fee title to Indians lands or a preemption right, a critical question in the politics of Indian removal:

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act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect.

*Id.* But see *Ware v. Hylton*, 3 U.S. 199 (1796) (invalidating a state statute without discussion of the Court's authority to exercise judicial review over state statutes); William Michael Treanor, *Judicial Review before Marbury*, 58 STAN. L. REV. 455, 555 (2005).

Of course, judicial review had not won universal acceptance by 1803, and in the years after *Marbury*, there was certainly some opposition to the doctrine. In particular, assertions of the power to invalidate statutes provoked controversy in the frontier states of Ohio and Kentucky in the early decades of the nineteenth century, and, in the 1825 case of *Eakin v. Raub*, [12 Serq. & Rawle 330 (Pa. 1825)], Chief Justice Gibson in dissent wrote one of the classic critiques of the doctrine. (Gibson, C.J., dissenting).

Treanor, *supra*, at 555 (internal citations omitted).

57. See ROBERTSON, *supra* note 4, at 30-35.

58. See *id.* at 36-44.

59. See *id.* at 43 (“The question of the validity of the Illinois and Wabash land purchases would now finally become a judicial question.”).

60. See *Johnson v. M’Intosh*, 21 U.S. 543, 573 (1823); ROBERTSON, *supra* note 4, at 75-76.

61. See REPORT OF THE SELECT COMMITTEE OF THE HOUSE OF REPRESENTATIVES (Mar. 3, 1827), reprinted in THE S. REV. 541, 552 (1828) (on file with the *North Dakota Law Review*)

These decisions of the Supreme Court accord with what we have stated, excepted that they do not directly determine, whether the right of extinguishing Indian occupancy belongs to the United States or to the State. We are unable to form an idea of a sovereign State, which has not the power of legislating upon all matters within its jurisdiction.

*Id.* Compare *id.*, with *Johnson*, 21 U.S. at 586 (“The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.”) (emphasis added); BANNER, *supra* note 32, at 214 (“John Marshall’s opinions had been less than clear as to whether the federal government could seize Indian land over the Indians’ objection, but the opinions had made it plain that a state could not do so.”) (emphasis in original).

The discovery doctrine had given Georgia and other eastern states a claim to the underlying fee title to the Indian lands within their borders. This claim offered these states a basis for asserting a claim to jurisdiction over these lands. The assertion, or threat of assertion, of a claim to state jurisdiction gave coercive force to the federal removal program. To frustrate the removal program, John Marshall would have to return to the source. In *Worcester*, therefore, he would dismantle the discovery doctrine by overruling that part of the doctrine assigning fee title to the discovering sovereign. *Worcester* was intended to prove *Johnson's* undoing.<sup>62</sup>

## 2. *Cherokee Nation v. Georgia*

The holding in *Cherokee Nation v. Georgia* is simple—Indian tribes are not “foreign State[s]” as envisioned in Article III, section 2, paragraph 1 of the Constitution.<sup>63</sup> Chief Justice Marshall, writing for only one other Justice, wrote the lead opinion.<sup>64</sup> Justices Johnson and Baldwin concurred in the outcome, writing opinions weighed against Indian interests.<sup>65</sup> At the Chief Justice’s informal request,<sup>66</sup> Justice Thompson wrote a dissent in which Justice Story concurred.<sup>67</sup> It was unusual for the Marshall Court to render such a fragmented decision,<sup>68</sup> evidence that the Marshall Court had begun to split apart as the Chief Justice aged and that the question of state authority in Indian Country was a contentious one.

In the lead opinion, Chief Justice Marshall began by holding that Indian tribes were “states” (but not States of the Union) as envisioned by the Constitution,<sup>69</sup> a question contested by the Justices concurring in the result.<sup>70</sup> He wrote:

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62. ROBERTSON, *supra* note 4, at 133.

63. 30 U.S. 1, 20 (1831) (Marshall, C.J.).

64. *See Cherokee Nation*, 30 U.S. at 15 (Marshall, C.J.).

65. *See id.* at 20 (Johnson, J., concurring); *id.* at 31 (Baldwin, J., concurring).

66. *See STITES, supra* note 21, at 162 (“Marshall was not happy with the result [in *Cherokee Nation*] . . . He encouraged Story and Thompson to write opinions explaining their dissent after the Court had risen.”).

67. *See Cherokee Nation*, 30 U.S. at 50 (Thompson, J., dissenting).

68. *See* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888* 195-96 (1985).

69. *See Cherokee Nation*, 30 U.S. at 16 (Marshall, C.J.).

70. *See id.* at 25 (Johnson, J., concurring) (“Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?”); *id.* at 40 (Baldwin, J., concurring).

The Cherokees were then dependants, having given up all their affairs to the regulation and management of congress, and that all the regulations of congress, over Indian affairs were then in force over an immense territory, under a solemn pledge to the inhabitants, that whenever their population and circumstances would admit they

The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.<sup>71</sup>

In oft-quoted words, the Chief Justice then answered in the negative the question whether this Indian tribe could be considered a “foreign State”:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They 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.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political

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should form constitutions and become free, sovereign and independent states on equal footing with the old component members of the confederation . . . .

*Id.* at 40 (Baldwin, J., concurring).

71. *Cherokee Nation*, 30 U.S. at 16 (Marshall, C.J.).

connexion with them, would be considered by all as an invasion of our territory, and an act of hostility. These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states.<sup>72</sup>

The derogation by the State of Georgia of the Cherokee Nation—a community with written laws and a functioning government,<sup>73</sup> a sitting delegation in Congress,<sup>74</sup> a treaty relationship with the United States,<sup>75</sup> and a surplus of food<sup>76</sup>—would continue.

While *Johnson* concerned states' rights in a tangential manner, states' rights were the leading issue in the Cherokee cases. Southern states used the issue with the Cherokee Nation as a reason to confront the federal government and the Supreme Court, as Justice Breyer stated in a recent speech:

But then North Carolina . . . said, "We will not give the United States customs duties that we owe them because we prefer to keep them. Andrew Jackson woke up to the problem and he ended up saying to the governor of Georgia, You must release Worcester." They had a negotiation and Worcester was let out of jail.<sup>77</sup>

Yet, not knowing the immediate future, Chief Justice Marshall wrote that the 1832 Term in which the *Worcester* case was decided would focus more on the decisions of some Southern states to enact "nullification laws" by which the states asserted the authority to nullify federal tariffs and the

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72. *Id.* at 17-18 (Marshall, C.J.).

73. See *Cherokee Nation*, 30 U.S. at 75 (Thompson, J., dissenting) ("The laws of Georgia set out in the bill, if carried fully into operation, go the length of abrogating all the laws of the Cherokees, abolishing their government, and entirely subverting their national character."); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 110-11 (1982) ("The Cherokees were forbidden to act as a government except for the sole purpose of ceding land. White men were forbidden to reside on Indian lands without a license from the state . . . 'With the United States government no longer protecting them,' one historian noted, 'the Cherokees were subjected to harsh treatment. Roving bands of whites looted Indian homes and the Cherokees, unable to testify in court, could do little to defend their property.'") (quoting *Andrew Jackson, State Rightist: The Case of the Georgia Indians*, 2 TENN. HISTORICAL SOCIETY 329, 225 (1952)).

74. See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 505 (1969).

75. See Treaty with the Cherokee, 7 Stat. 18 (1785), reprinted in 2 INDIAN AFFAIRS: LAWS AND TREATIES 8 (Charles J. Kappler ed., 1904); Treaty with the Cherokee, 7 Stat. 39 (1791), reprinted in 2 INDIAN AFFAIRS: LAWS AND TREATIES, *supra*, at 29.

76. See David M. Wishart, *Evidence of Surplus Production in the Cherokee Nation Prior to Removal*, 55 J. ECON. HIST. 120 (1995).

77. Stephen G. Breyer, *Reflections of a Junior Justice*, 54 DRAKE L. REV. 7, 9 (2005).

Congressional debate over whether to reauthorize the Bank of the United States.<sup>78</sup>

The Chief Justice, an old Federalist, walked a fine line in the 1832 Term.<sup>79</sup> As an aging Chief Justice whose Court was coming apart around him,<sup>80</sup> he faced the prospect of losing the Court's legitimacy in cases of judicial review of state court decisions and statutes.<sup>81</sup> He also believed the Court's preservation of the national government for his thirty-odd years of service was in danger of collapse—and the entire Constitution with it, as he famously wrote to Justice Story after the 1832 Term concluded: “I yield slowly and reluctantly to the conviction that our Constitution cannot last.”<sup>82</sup>

### 3. *Worcester v. Georgia*

Instead of the nullification laws or the Bank being the case wherein the Court would make a critical statement about federalism, by accident, the case was *Worcester v. Georgia*.<sup>83</sup> The State of Georgia had enacted a series of laws that purported to assert jurisdiction over Indian lands and wipe out any competing government entity within the exterior boundaries of the State:

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78. See LOTH, *supra* note 20, at 357 (“To Marshall, the tariff issue seemed more dangerous to his principles. For the South . . . was not professing itself willing to obey any protective tariff law.”); *id.* at 356 (quoting letter to his son; “This session of Congress is indeed particularly interesting. The discussion on the tariff and on the Bank, especially, will, I believe call forth an unusual display of talents.”); see also R. Kent Newmyer, *Chief Justice John Marshall's Last Campaign: Georgia, Jackson, and the Cherokee Cases*, 23 J. SUP. CT. HIST. 76, 78 (1999) (“The Indian cases were also Marshall's final confrontation with the forces of states' rights that had dogged his court for thirty years.”); Richard P. Longaker, *Andrew Jackson and the Judiciary*, 71 POL. SCI. Q. 341, 348 (1956) (“While the President saw the Indian problem as a temporary one, the nullification issue presented a basic national crisis.”).

79. Or, in Joseph Burke's phrase, “An air of doom settled over the Supreme Court when the Justices gathered for the 1832 Term.” Burke, *supra* note 74, at 500.

80. See R. KENT NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* 87 (Kenneth M. Stamp ed., Thomas Y. Crowell Co. 1968) (asserting that Marshall's final term (1833) “reinforced his mounting conviction that the Court he knew was gone”; and that the final years of the Marshall Court were “hampered by internal division, vacancies, and sickness”); Newmyer, *Chief Justice Marshall's Last Campaign*, *supra* note 78, at 79 (“The appearance of new Justices . . . , along with the growing independence of old ones . . . , introduced a new spirit of personal divisiveness and doctrinal uncertainty. . . . [Marshall] was, for example, barely able to hold a majority in the important case of *Craig v. Missouri* (1830), although the issue of paper money and the Contract Clause appeared to have been definitely settled.”).

81. *But see* NEWMYER, *supra* note 80, at 87 (“But [*Worcester*] was ignored by the state and left unenforced. The Indians . . . packed up for the brutal trek . . . across the Mississippi. The Court's future seemed almost as bleak.”).

82. LOTH, *supra* note 20, at 366; JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 519 (1996); STITES, *supra* note 21, at 165; Stephen G. Bragaw, *Thomas Jefferson and the American Indian Nations: Native American Sovereignty and the Marshall Court*, 31 J. SUP. CT. HIST. 155, 155-56 (2006).

83. 31 U.S. 515 (1832).



Inspired by the rhetoric of states' rights and encouraged by the clamor for Indian lands on which gold had recently been discovered, Georgia in 1828 and 1829 enacted a series of laws that distributed the Cherokee territory to several counties and declared that . . . Georgia law would be enforced within this territory and all Indian customs and laws would be null and void. These laws also denied Indians the right to testify in cases involving whites and punished any person or groups who tried to prevent Indians from emigrating from the State.<sup>84</sup>

After Georgia put its laws into motion by prosecuting a Cherokee Indian for a murder in Cherokee territory, the Court granted certiorari to hear the case, but the State defied the Court by executing the defendant a few days after receiving the order.<sup>85</sup> Following the execution of George Corn Tassel:

The Georgia legislature resolved that "the interference by the chief justice of the supreme court of the United States, in the administration of the criminal laws of this state, is a flagrant violation of her rights." The governor was directed to "disregard any and every mandate and process . . . purporting to proceed from the chief justice or any associate justice of the Supreme Court of the United States."<sup>86</sup>

But history shows that, in deciding *Worcester* the way he did, the Chief Justice put the president, a political adversary, in a vise, though Marshall

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84. Burke, *supra* note 74, at 503. The common understanding is disputed that the motivation for the enactment of these anti-Indian laws was "lust" for the Indian lands or gold. *E.g.*, Rennard Strickland, *Yellow Bird's Song: The Message of America's First Native American Attorney*, 29 TULSA L.J. 247, 247, 257 (1993); LOTH, *supra* note 20, at 359. Some claim that Georgia policymakers were motivated by the need for large tracts of land to grow cotton. *See* BAKER, *supra* note 22, at 733; BOBBITT, *supra* note 73, at 108. Others claim the Georgia policymakers were motivated by the need to cut through Cherokee territory for a route from the Atlantic to the Tennessee River. *See* Mary Young, *The Exercise of Sovereignty in Cherokee Georgia*, 10 J. EARLY REPUBLIC 43, 44 (1990). Regardless, none of these reasons comes close to justifying the State of Georgia's attempt to use legislation to define an entire nation of people as criminals.

85. *See* LOTH, *supra* note 20, at 360; SMITH, *supra* note 82, at 516; STITES, *supra* note 21, at 161; Burke, *supra* note 74, at 512.

86. SMITH, *supra* note 82, at 516; *see also* Burke, *supra* note 74, at 512-13.

The state court decision, allegedly written by William H. Crawford completely vindicated Georgia's sovereign right to govern the Indians and denounced Northern fanatics for making the Cherokee question a party issue. The Governor and state legislature publicly vowed never to let the *Tassel* case, or any other case, be carried to the Supreme Court. The execution of George Tassel in the face of a writ of error issued by Chief Justice John Marshall showed that Georgia meant business. The Jacksonian press warned the Supreme Court not to interfere, and Congress echoed the warning by debating late in January 1831 a resolution calling for the repeal of section 25 of the Judiciary Act of 1789, which permitted the review of state court decisions by writ of error.

Burke, *supra* note 74, at 512-13.

didn't realize it at the time. In the end, in part as a result of the Cherokee cases, President Jackson became that which he despised—a national authority-protecting, old time Federalist. As the Chief Justice wrote with smug relief:

Imitating the Quaker who said the dog he wished to destroy was mad, they said Andrew Jackson had become a Federalist, even an ultra-Federalist. To have said he was ready to break down and trample on every other department of the government would not have injured him, but to say that he was a Federalist—a convert to the opinions of Washington, was a mortal blow under which he is yet staggering.<sup>87</sup>

President Jackson, as a direct result of Georgia's intransigence inspiring the other southern states to attempt to nullify federal law, had no choice but to seek federal legislation allowing the Executive to use the military to enforce federal law, including Supreme Court mandates.<sup>88</sup> The president then solved the problem of Georgia's refusal to comply with *Worcester* by "pressuring Governor Wilson Lumpkin to release Worcester and Butler, which he did on the very day the Court reconvened. No mandate was therefore required from the Court, and the Georgia crisis eased."<sup>89</sup> And Chief Justice Marshall, in part because of the Trilogy, preserved enough of his federalism jurisprudence to preserve federal authority.<sup>90</sup> Some

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87. See LOTH, *supra* note 20, at 368 (quoting a letter from Chief Justice Marshall to Justice Story).

88. See SMITH, *supra* note 82, at 519 ("When South Carolina passed an ordinance of nullification declaring the federal tariff act unconstitutional and refusing compliance, Old Hickory reinforced the garrisons at Fort Moultrie and Sumpter, order the treasury department's revenue cutters to enforce the tariff, and on December 10, 1832, issued his famous proclamation to the people of South Carolina calling the hand of the nullification forces."); STITES, *supra* note 21, at 165.

In late November [1832] South Carolina passed a Nullification Ordinance invalidating the tariffs of 1828 and 1832, prohibiting any appeal to the Supreme Court, and threatening secession if the national government intervened. Jackson, however, would not tolerate defiance of a national law and said so unequivocally in a proclamation on December 10. Then, in his message to Congress, he requested a force bill giving federal courts and the officials the power to deal with this emergency.

STITES, *supra* note 21, at 165.

89. ROBERTSON, *supra* note 4, at 136.

90. See generally NEWMYER, *supra* note 80, at 88 ("Though the nationalist offensive of the Marshall Court was halted and much of its previous *spirit* and prestige had vanished, the pillars of Marshall's constitutional law remained.") (emphasis in original); ROBARGE, *supra* note 23, at 302 ("[D]uring its last years the Marshall Court showed flexibility in interpreting the Constitution in ways that upheld the basic nationalist principles it had set forth before, while preserving its independence by preempting attacks from a populist administration and Congress that bore a residual antijudiciary sentiment from earlier years.") .

commentators find it ironic<sup>91</sup> that Chief Justice Marshall's final constitutional opinion was *Barron v. Baltimore*, a decision holding that the Bill of Rights does not apply to the states.<sup>92</sup> But consider that *Barron* is also the decision upon which the Court later relied to hold that the Bill of Rights does not apply to Indian tribes.<sup>93</sup>

But in the 1832 Term, the Marshall Court voted 5-1 to declare unconstitutional the laws of Georgia purporting to invalidate the entire Cherokee Nation in *Worcester v. Georgia*.<sup>94</sup> Though Chief Justice Marshall's wife Polly had passed during the previous recess and his health wavered, he delivered an opinion one commentator declared as "one of the most powerful he ever delivered."<sup>95</sup> Justice Story wrote to his wife, "Thanks be to God, . . . the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights."<sup>96</sup> Justice McLean offered a concurring opinion and concurred in the chief justice's opinion as well.<sup>97</sup> Justice Baldwin dissented but offered no opinion except to reiterate what he stated in *Cherokee Nation*.<sup>98</sup>

The core of the majority opinion relied upon the enactment of the First Congress of the trade and intercourse acts<sup>99</sup>:

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91. *E.g.*, STITES, *supra* note 21, at 165 ("Since the early 1820s the chief justice had compromised to preserve the Union and the Court. A final concession came during the 1833 term in *Barron v. Baltimore*, his last constitutional opinion.").

92. 32 U.S. 243, 250-51 (1833).

93. *See* Talton v. Mayes, 163 U.S. 376, 382 (1896) (citation omitted).

94. 31 U.S. 515, 596 (1832).

95. SMITH, *supra* note 82, at 518 ("Marshall was seventy-six years old. He had just recovered from a severe operation and had recently experienced the death of his wife. Yet his twenty-eight-page decision in *Worcester v. Georgia* is one of the most powerful he ever delivered.").

96. STITES, *supra* note 21, at 164.

97. *See Cherokee Nation*, 31 U.S. at 562 (McLean, J., concurring).

98. *See id.* at 561.

99. *See* AMAR, *supra* note 55, at 108 n.8 ("It also bears notice that the First Congress enacted a statute regulating noneconomic interactions and altercations—'intercourse'—with Indians; see An Act to regulate trade and intercourse with the Indian tribes, July 22, 1790, 1 Stat. 137. Section 5 of this act dealt with crimes—whether economic or not—committed by Americans on Indian lands."); Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2004 n.25 (2006).

It also bears note that none of the leading clausebound advocates of a narrow economic reading of 'commerce' has come to grips with the basic inadequacy of their reading as applied to Indian tribes, or has squarely confronted the originalist implications of the Indian Intercourse Act of 1790, in which the First Congress plainly regulated noneconomic intercourse with Indian tribes.

Amar, *supra*, at 2004 n.25 (citation omitted); *see* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1300 (2006).

Congress's satisfaction with presidential administration with respect to Indian tribes may simply have mirrored its judgment concerning executive authority with respect to the War and State Departments. From the political perspective of the late eighteenth century, commerce with the Indian tribes may have seemed less like regulating

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.<sup>100</sup>

The opinion reiterates what the *Cherokee Nation* Court held, that Indian tribes were distinct national entities, with some very powerful language:

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, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term “nation,” so generally applied to them, means “a people distinct from others.”<sup>101</sup>

In a final iteration of the Court’s challenge to the State of Georgia and all the Southern states threatening nullification of federal law, Chief Justice

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interstate commerce than like some combination of the exercise of the war and foreign affairs powers. Essentially standardless regulatory authority may have been given to the President because Congress understood Indian affairs to be an executive—meaning political—function, but was not sure which executive department should take on the task.

Mashaw, *supra*, at 1300; see Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 205 (2000) [hereinafter Riley, *Recovering Collectively*].

The United States Constitution, this country’s primary political treatise, acknowledges Indian Nations’ unique status through the “Indian Commerce Clause.” The Indian Commerce Clause extends a grant of singular authority to Congress to regulate intercourse and trade with Indian tribes, the only minority group explicitly mentioned in the Constitution. Just as the Foreign Nations Clause provides for federal control of commercial relations with foreign nations, the Indian Commerce Clause in effect recognizes the tribes’ unique position as quasi-sovereign nations-within-a-nation, and shields them from state and local interference.

Riley, *Recovering Collectively*, *supra*, at 205 (footnotes omitted).

100. *Worcester v. Georgia*, 31 U.S. 515, 556-57 (1832).

101. *Id.* at 559.

Marshall threw down the gauntlet by making absolutely clear that state law does not apply in Indian Country:

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States.<sup>102</sup>

There had not been a stronger statement of respect for the legal authority of Indian tribes—and there has not yet been one like it since.

### C. THE CURRENT (IN)SIGNIFICANCE OF THE HOLDINGS

The Marshall Trilogy has fallen on hard times. The holdings are either irrelevant to Indian tribes (except for the bad-news-for-Indians portions of the opinions) or ignored by the modern Supreme Court. For example, tribes still cannot sue states without their consent.<sup>103</sup> Tribes don't even have the right to sue under the federal civil rights statutes.<sup>104</sup> And history was not kind to the victors of the *Worcester* decision. Within the decade, the Cherokee Nation endured the Trail of Tears despite the fact that they won the legal war.<sup>105</sup> The executive's rejection of the *Worcester* principle haunts Indian tribes today<sup>106</sup>—*Worcester's* rejection of the *Johnson* rule that preemption granted title to the discovering nation was itself rejected in the 1835 Term in *Mitchel v. United States*.<sup>107</sup> As a result, the legal lineage of state assertion of jurisdiction over Indian Country continues to be the obiter dicta of *Johnson* and not the holding of *Worcester*.

Moreover, the Marshall Trilogy no longer drives the constitutional common law of the Supreme Court since the advent of Chief Justice Rehnquist's tenure when it hears a case regarding Indian tribes and Indian people. On occasion, the Court relies upon *Worcester* for the proposition that the authority to deal with Indian nations is an exclusive federal

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102. *Id.* at 561.

103. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Blatchford v. Native Vill. of Noatak and Circle Vill.*, 501 U.S. 775 (1991).

104. See *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of Bishop Colony*, 538 U.S. 701 (2003).

105. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 9, at § 1.03[4]; BOBBITT, *supra* note 73, at 114.

106. See ROBERTSON, *supra* note 4, at 135.

107. 34 U.S. 711, 746 (1835); ROBERTSON, *supra* note 4, at 138-39.

authority<sup>108</sup> or for a general affirmation that the Court acknowledges tribal sovereignty.<sup>109</sup> But the Court is more likely to remind tribal advocates that *Worcester* acknowledged certain limitations on Indian tribes,<sup>110</sup> or that the decision is old news, as Justice Scalia wrote in *Nevada v. Hicks*: “Though tribes are often referred to as ‘sovereign’ entities, it was ‘long ago’ that ‘the Court departed from Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries.”<sup>111</sup> In general, when an Indian tribe argues that *Worcester* compels a certain result in their favor, the Court rebuffs them.<sup>112</sup> Now, when *Worcester* is cited, it is usually in dissent.<sup>113</sup> Even the federalism repercussions of the *Worcester* opinion are cited in forgotten or disregarded federalism cases.<sup>114</sup>

So, why study the Trilogy?

## II. THE FOUNDATIONS OF THE MODERN DEBATES

Careful readings of the Marshall Trilogy—and even not-so-careful readings—reveal that the issues confronted by the Marshall Court often are the same confronting modern tribal advocates. The origins of the trust relationship and plenary power are born out of the argumentation between members of the Marshall Court over the meaning of the word “protection” in Indian treaties. The discussion of the meaning of the word “protection”

108. *See* *United States v. Lara*, 541 U.S. 193, 202 (2004) (quoting *Worcester*, 31 U.S. at 557).

109. *See* *Okl. Tax Comm’n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) (quoting *Worcester*, 31 U.S. at 557).

110. *E.g.*, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 426 (1989).

111. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980), and *Worcester*, 31 U.S. at 561); *see also* *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 762 n.2 (1998) (Stevens, J., dissenting) (“The general notion drawn from Chief Justice Marshall’s opinion in *Worcester* . . . , that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations.”) (quoting *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962)) (other citations omitted); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 256 (1992) (quoting *Worcester* 31 U.S. at 556-57, but then asserting, “The platonic notions of Indian sovereignty that guided Chief Justice Marshall have, over time, lost their independent sway.”) (quotation marks and citations omitted); *Brendale*, 492 U.S. at 451 nn.1-2 (Blackmun, J., concurring and dissenting); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 527 (1986) (Blackmun, J., dissenting).

112. *E.g.*, *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 530 n.5 (1998).

113. *E.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 149 n.40 (1996) (Souter, J., dissenting); *Hagen v. Utah*, 510 U.S. 399, 423 n.2 (1994) (Blackmun, J., dissenting); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 791, 792, 795 (1991) (Blackmun, J., dissenting); *Duro v. Reina*, 495 U.S. 676, 705 n.3 (1990) (Brennan, J., dissenting).

114. *E.g.*, *Howlett ex. rel. Howlett v. Rose*, 496 U.S. 356, 368 n.15 (1990) (quoting *Worcester*, 31 U.S. at 571 (McLean, J., concurring)); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 296 n.51 (1985) (Brennan, J., dissenting).

led to the creation of the canon of construing Indian treaty language. Tribal immunity from state jurisdiction and authority derived from the underlying states' rights questions resolved by the Marshall Court in the Trilogy, in part, by designating Indian tribes as having a political status unlike states or foreign nations. Along the way, the Trilogy undertook the first and second instances of implicit divestiture of tribal authority. And the Trilogy did more than that. This Part details the origins of these oh-so-modern doctrines in the Trilogy.

A. PLENARY POWER & TRUST DOCTRINE, OR “PROTECTION” VS. “DEPENDENCE”

The most interesting analysis in the Marshall Trilogy—and which may have a great deal of import in modern American Indian law—involved the question of whether Indian tribes are dependent (assimilated) or distinct (independent). Both the doctrines of federal plenary power over Indian tribes (or Indian affairs) and the trust relationship are related to this discussion.

1. *Protection or Dependence?*

The important overlay of this debate involves the boilerplate treaty language of “protection.”<sup>115</sup> The various Justices debated the meaning of “protection” as being either an invitation to dependence or a recognition of political distinctiveness.

Justice Baldwin's *Cherokee Nation* concurrence was the first to focus on the word “protection” in the Northwest Ordinance<sup>116</sup> and the Treaty of Hopewell.<sup>117</sup> The Treaty of Hopewell explained the purpose of the treaty

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115. Besides the Cherokee treaties, other Indian treaties the Marshall Court discussed, including the Delaware treaty, used the term “protection” as well. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 65 (1831) (Thompson, J., dissenting); see also *Worcester v. Georgia*, 31 U.S. 515, 551 (1832) (noting that “[t]his stipulation is found in Indian treaties, generally”).

116. See *Cherokee Nation*, 30 U.S. at 35 (Baldwin, J., concurring).

In this spirit congress passed the celebrated ordinance of July 1787, by which they assumed the government of the north western territory, paying no regard to Indian jurisdiction, sovereignty, or their political rights, except *providing for their protection*; authorizing the adoption of laws “which, for the prevention of crimes and injuries, shall have force in all parts of the district; and for the execution of process civil and criminal, the governor has power to make proper division thereof.” 1 Laws United States, 477.

*Id.* (Baldwin, J., concurring) (emphasis added).

117. See *id.* at 38 (Baldwin, J., concurring).

The word *nation* is not used in the preamble or any part of the treaty, so that we are left to infer the capacity in which the Cherokees contracted, whether as an independent nation or foreign state or a tribe of Indians, from the terms of the treaty, its stipulations and conditions. “The Indians for themselves and their respective tribes and towns *do*

and, by extension, the meaning of “protection”: “For the benefit and comfort of the Indians, and for the prevention of injuries and aggressions on the part of the citizens or Indians . . . .”<sup>118</sup> Despite this explicit language that tends to lead one (perhaps) in the other direction, Justice Baldwin took the meaning of this language to be that Indian tribes had a “dependent character;”<sup>119</sup> that “protection” was “indenture of servitude;”<sup>120</sup> and that the Cherokee Nation, as a result of the treaty, was “dependent on and appendant to the state government.”<sup>121</sup> He concluded that the “protection” language and the context of the Treaty of Hopewell granted Congress the right to decide the “internal affairs” should it wished to at a later date,<sup>122</sup> a precursor to the plenary power Congress would later take up in force.<sup>123</sup>

According to Chief Justice Marshall in the *Johnson* case, Indian tribes included characteristics of both “dependent” or “distinct” nations,<sup>124</sup> a sort of middle ground. But in *Cherokee Nation*, writing for “the Court” (but really only for himself and one other Justice),<sup>125</sup> he famously labeled Indian tribes “domestic dependent nations”<sup>126</sup> as a new legal term of art created

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*acknowledge all the Cherokees to be under the protection of the United States.*  
Article 3d. 1 Laws U. S. 322.

*Id.* (first emphasis in original; second emphasis added).

118. *Id.* at 38 (Baldwin, J., concurring) (quoting Treaty of Hopewell, art. IX) (internal quotations omitted).

119. *Id.* (Baldwin, J., concurring); *see also id.* at 40 (Baldwin, J., concurring) (“dependants”).

120. *Id.* at 39 (Baldwin, J., concurring).

121. *Id.* at 40.

122. *Id.*

That by the existing regulations and treaties, the Indian tenure to their lands was their allotment as hunting grounds without the power of alienation, that the right of occupancy was not individual, that the Indians were forbidden all trade or intercourse with any person not licensed or at a post not designated by regulation, that Indian affairs formed no part of the foreign concerns of the government, and that *though they were permitted to regulate their internal affairs in their own way, it was not by any inherent right acknowledged by congress or reserved by treaty, but because congress did not think proper to exercise the sole and exclusive right*, declared and asserted in all their regulations from 1775 to 1788, in the articles of confederation, in the ordinance of 1787 and the proclamation of 1788; which the plaintiffs solemnly recognized and expressly granted by the treaty of Hopewell in 1785, *as conferred on congress to be exercised as they should think proper.*

*Id.* (emphasis added).

123. *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1078-79 (2004) (discussing the approval of federal statutes extending federal criminal jurisdiction into Indian Country in *United States v. Kagama*, 118 U.S. 375 (1886)); Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 180-81 (2002) (same).

124. *Johnson v. McIntosh*, 21 U.S. 543, 596 (1823) (“The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies. . .”).

125. *Cherokee Nation*, 30 U.S. at 15 (Marshall, C.J.).

126. *Id.* at 17.



from whole cloth in order to avoid classifying Indian tribes as either states or foreign nations. In this case, the Chief Justice denigrates Indian tribes a great deal: “[T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”<sup>127</sup> In this opinion, Indian tribes appear to be dependent in large extent to the United States.<sup>128</sup> Justice Johnson, in his *Cherokee Nation* concurring opinion, avoided the guardian-ward dichotomy and used the term “master and conqueror” in reference to the United States.<sup>129</sup> In Justice Johnson’s view, Indian tribes existed in a state of “feudal dependence” to the United States<sup>130</sup>—in other words, complete and utter dependence on the order of slaves or serfs.

Justice Thompson’s dissent (joined by Justice Story) in *Cherokee Nation* suggested a different reading of the word “protection.” Drawing on the venerable Vattel, Justice Thompson found that weaker states signing treaties of protection do not, as a side-effect, lose their sovereignty.<sup>131</sup> All that is required for a weaker state to retain statehood is a reservation of the right to self-government, a staple in American Indian treaties.<sup>132</sup>

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127. *Id.*

128. *Id.* at 17-18.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

*Id.*

129. *See id.* at 27 (Johnson, J., concurring).

130. *See id.* at 24 (“[N]ot to be able to alienate without permission of the remainder-man or lord, places [Indian tribes] in a state of feudal dependence.”).

131. *See id.* at 53 (Thompson, J., dissenting).

Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations. It is sufficient if it be really sovereign and independent: that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, *provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state.*

*Id.* (citing EMANUEL VATTEL, THE LAW OF NATIONS 16, 17 (1758)) (emphasis added).

132. *See id.* at 54-55 (Thompson, J., dissenting).

“Protection” and nationhood are not mutually exclusive.<sup>133</sup> Presaging modern Indian affairs where all Indian tribes (save one) are located within the boundaries of a state, Justice Thompson argued that “[t]he Cherokee territory being within the chartered limits of Georgia, does not affect the question.”<sup>134</sup> Moreover, state courts had defined “protection” to be consistent with the retention of sovereignty.<sup>135</sup> Justice Thompson would have found that the Cherokee Nation was a “foreign nation” in the meaning of the Constitution.<sup>136</sup> Justice Thompson’s version of “protection” did not mean all-encompassing dependency, but instead, significant political independence.

While Justice Thompson’s definition of “protection” did not win the day in *Cherokee Nation*, the Court in *Worcester*, per Chief Justice Marshall, adopted this meaning. Writing for the Court (with Justice Baldwin the lone dissenter), Chief Justice Marshall drew upon the pre-Revolutionary War relations between Great Britain and the Indian tribes to find that “protection” meant what the Indians would have thought it meant—“It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages

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They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self government, and become subject to the laws of the conqueror. When ever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate national character.

*Id.*

133. *See id.* at 55.

[T]he right of occupancy is still admitted to remain in them, accompanied with the right of self government, according to their own usages and customs; and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety. But the principle is universally admitted, that this occupancy belongs to them as matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent; or unless a just and necessary war should sanction their dispossession.

*Id.*

134. *Id.* Justice Story’s *Commentaries* makes the same argument: “The power, then, given to congress to regulate commerce with the Indian tribes, extends equally to tribes living within or without the boundaries of particular states, and within or without the territorial limits of the United States.” 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1095, at 542 (1833).

135. *See id.* at 67-68 (discussing *Jackson v. Goodell*, 20 Johns. 193 (N.Y. 1822)).

136. *See id.* at 55.

The progress made in civilization by the Cherokee Indians cannot surely be considered as in any measure destroying their national or foreign character, so long as they are permitted to maintain a separate and distinct government; it is their political condition that constitutes their *foreign* character, and in that sense must the term *foreign*, be understood as used in the constitution.

*Id.* (emphasis in original).

of that protection, without involving a surrender of their national character.”<sup>137</sup> So it was with the British crown as it is with the American government, Chief Justice Marshall added.<sup>138</sup> In what appears to be a reversal (or at least a substantial modification) of his earlier position that Indian tribes were “domestic dependent nations”<sup>139</sup> (a position that, one might remember, perhaps garnered only two votes in *Cherokee Nation*), Chief Justice Marshall’s *Worcester* opinion labels Indian tribes “distinct, independent political communities.”<sup>140</sup> Dependency is not present in this holding. As a final point, Chief Justice Marshall’s opinion concludes by adopting Justice Thompson’s analysis of Vattel, that a “weaker power” does not surrender the right to self-government by agreeing to the protection of the more powerful nation.<sup>141</sup> Chief Justice Marshall ends with his famous

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137. See *Worcester v. Georgia*, 31 U.S. 515, 552 (1832).

What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection, only what was beneficial to themselves—an engagement to punish aggressions on them. It involved practically no claim to their lands, no dominion over their persons. *It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character.*

*Id.* (emphasis added).

138. See *id.* at 551 (“The same stipulation entered into with the United States, is undoubtedly to be construed in the same manner. They receive the Cherokee nation into their favour and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected.”).

139. *Cherokee Nation*, 30 U.S. at 17 (Marshall, C.J.).

140. *Worcester*, 31 U.S. 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, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term “nation,” so generally applied to them, means “a people distinct from others.”

*Id.*

141. *Id.* at 560-61.

The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. “Tributary and feudatory states,” says Vattel, “do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority, are left in the administration of the state.” At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

dictum, “The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokee themselves, or in conformity with treaties, and with the acts of congress.”<sup>142</sup>

Despite the fact that *Worcester* rejected the “dependency” theory in favor of the “distinct and independent” theory, the Court later relied more on the false dependency created by the *Cherokee Nation* opinion to create both plenary power and the trust relationship.

## 2. Plenary Power

Professor Charles Burdick noted in his early-twentieth century treatise on constitutional law that the origins of federal authority over Indian affairs remained an open question since there was no clear textual provisions in the Constitution that provided for such authority: “These [constitutional provisions] leave untouched the general field of constitutional power to deal with Indian affairs, and it has been necessary for the Supreme Court to build up here a very considerable body of unwritten constitutional law.”<sup>143</sup> While there is, according to Professor Burdick, a “general field of constitutional power to deal with Indian affairs,” the source of that authority remains uncertain. This is a particular problem for many commentators<sup>144</sup> and a few Justices.<sup>145</sup> Congress claims *plenary power* over Indian affairs in *two* ways: first, Congress claims *exclusive* authority to deal with Indian

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*Id.*

142. *Id.* at 561.

143. CHARLES K. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT* § 107, at 313 (1922) (citing the Indian Commerce Clause and the Indians Not Taxed Clauses). By “unwritten constitutional law,” it appears that Burdick means a common law generated out of the interpretation of the Constitution as it pertains to Indian affairs.

144. *E.g.*, Ball, *supra* note 11, at 59 (“Indian nations have prevented recent congressional deployment of plenary power against them. But the plenary power does not lie idle. Like Ariel, it reappears, transported from Congress to the Supreme Court, where its lack of both limits and legitimacy is matched by a lack of appeal from its results.”); Cleveland, *supra* note 11, at 26 (“The first difficulty posed by the Indian cases was textual: the Constitution does not bestow any general power on the national government to regulate Indian affairs.”); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 112 (1993) [hereinafter Clinton, *Redressing*] (discussing “the myth of plenary federal power in Indian affairs, a doctrine that had little textual support in the provisions of the Constitution and even less in the contemporaneous history surrounding the adoption of that document”).

145. *See* United States v. Lara, 541 U.S. 193, 224 (2004) (Thomas, J., concurring) (“The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty.”).

affairs;<sup>146</sup> and second, Congress claims authority to legislate over the internal affairs and sovereignty of Indian tribes.<sup>147</sup>

During the history of federal Indian law, the Supreme Court (and Congress) has relied upon the Indian Commerce Clause<sup>148</sup> and the Treaty Clause<sup>149</sup> to uphold these assertions of authority by Congress,<sup>150</sup> but neither of these provisions can satisfy everyone given the extraordinary breadth and depth of the authority claimed by Congress. The Indian Commerce Clause is limited to commerce (whatever that means)<sup>151</sup> and, given the Rehnquist Court's limited view of what "commerce" entails,<sup>152</sup> the Court strains to conclude that the power to deal with Indian affairs is sufficient to, say, enact criminal laws for Indian Country.<sup>153</sup> The Treaty Clause is an Article II provision and does not confer authority onto Congress except (arguably)<sup>154</sup> where an executive branch-negotiated treaty ratified by the Senate extends Congressional authority into areas where it might not be otherwise.<sup>155</sup> But this works only insofar as the treaty says so<sup>156</sup>—the Michigan Ottawas could not enter into a treaty with the United States that

146. *E.g.*, Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2000).

147. *E.g.*, Indian Civil Rights Act, 25 U.S.C. § 1301 (2000).

148. U.S. CONST. art I, § 8, cl. 3.

149. U.S. CONST. art II, § 2, cl. 2.

150. Professor Sarah Cleveland asserts that the federal government's plenary power over Indian affairs derives from the Doctrine of Discovery. *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 43 (2006) (citing *United States v. Kagama*, 118 U.S. 375, 380-82 (1886)).

151. *But see* AMAR, *supra* note 55, at 108, n. 8.

152. *See generally* MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 255-78 (2005).

153. *E.g.*, *United States v. Kagama*, 118 U.S. 375, 378-79 (1886).

The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress 'power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

*Id.*

154. *But see* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

155. *See* *Missouri v. Holland*, 252 U.S. 416 (1920).

156. *See* Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543 (1985); *see generally* Prakash, *supra* note 123.

would extend Congressional authority to deal with the affairs of the Cherokee Nation.

The Court's most recent articulation of the solution to finding the source of authority for Congress to legislate in affairs of all the tribes is that the authority may be "preconstitutional."<sup>157</sup> Justice Breyer's majority opinion in *United States v. Lara* identified two areas where the federal government's authority might extend beyond the strictures of the Constitution to powers that are "necessary concomitants of nationality":<sup>158</sup> Congressional authority in dealing with Indian affairs<sup>159</sup> and executive authority to prosecute war profiteers.<sup>160</sup> The earlier power has come under compelling attacks by commentators.<sup>161</sup>

The interesting thing about Justice Breyer's theory of "preconstitutional" authority to deal with Indian affairs is that the issue comes up during his discussion of the Treaty Clause as a source of authority.<sup>162</sup> There appears to be a conscious (or unconscious) merging of these two theories—theories that could be categorized as separate. Either Congress relies upon

157. *United States v. Lara*, 541 U.S. 193, 201 (2004).

158. *Lara*, 541 U.S. at 201 (quoting *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 318 (1936)).

159. *See Lara*, 541 U.S. at 201-02 (citing 2 J. CONTINENTAL CONG. 174-75 (1775) (W. Ford ed. 1905); *Worcester v. Georgia*, 31 U.S. 515, 557 (1832)). *But see generally* Kirsten Matoy Carlson, *Is Hindsight 20-20? Reconsidering the Importance of Pre-Constitutional Documents*, 30 AM. INDIAN L. REV. 1, 4 (2005-2006).

The existence of so many constitutions developing out of written pre-constitutional norms, and the renewed interest in the serious study of constitutional politics, makes this an opportune moment to address the question of the place that pre-constitutional documents should have in modern constitutional orders. Should pre-constitutional documents be largely forgotten and discarded, or do they retain some inherent value that suggests that they deserve the attention that at least some of them have received publicly? Is it enough to acknowledge that these documents exist and use them rhetorically? Do they provide key insights into constitutional law and politics that mandate more critical retrospective analysis? What status should we accord these texts today?

*Id.*

160. *See Lara*, 541 U.S. at 201 (citing *Curtiss-Wright Export Co.*, 299 U.S. at 315-22).

161. *E.g.*, HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990).

Among government attorneys, Justice Sutherland's lavish description of the president's powers [in *Curtiss-Wright Export Co.*] is so often cited that it has come to be known as the "*Curtiss-Wright-so-I'm-right*" cite—a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign-affairs brief.

*Id.*; *see* ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 127 (Sanford Levinson ed., Univ. of Chi. Press 1994) (1960) ("The danger is of course that the other branches of government will fail to assume the constitutional responsibility which the Court has tendered to them, and will interpret the assignment as a license to act arbitrarily."); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

162. *Lara*, 541 U.S. at 201.

the treaties negotiated and ratified in accordance with the Treaty Clause or it relies on a “preconstitutional” authority. This merging of the two theories is interesting because the members of the Marshall Court attempted a similar thing in the Trilogy and the Taney Court succeeded in doing so in *United States v. Kagama*.<sup>163</sup>

This is what happened: First, the Marshall Court in *Cherokee Nation* fudged the meaning of the word “protection” in the Cherokee treaties to mean that they were dependent on the United States for more than military reasons and implied that they were incompetent. What those additional reasons for dependency were the Marshall Court did not articulate. By the time the Taney Court decided *Kagama*, there were new reasons in some parts of Indian Country—food and shelter,<sup>164</sup> protection from state militias,<sup>165</sup> and the standard military preservation of Indian reservation borders that was intended by the treaties. Some, but not all, Indian tribes really were dependent on the federal government,<sup>166</sup> so the Taney Court filled in the blanks left by the Marshall Court and created the doctrine of

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163. 118 U.S. 375 (1886); see also Michael C. Bluum, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 759 (2004) (“Over the years, subsequent courts and Congresses misinterpreted the Marshall Court’s language and undermined the principles it laid down. In particular, the guardian/ward language in the *Cherokee Nation* case was transformed from a concept protective of tribal prerogatives into one that gave Congress virtually unbridled power over Indian affairs.”); Clinton, *Redressing*, *supra* note 144, at 112 (citing *United States v. Kagama*, 118 U.S. 375 (1886); quoting *Worcester v. Georgia*, 31 U.S. 515, 593 (1832) (M’Lean, J., concurring)).

164. *E.g.*, John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40, 50-52 (2001).

As with its military strategy, the defining element of the United States’ political strategy for dispossessing *Paha Sapa* was coercion. The Fort Laramie Treaty guaranteed subsistence rations to the Sioux until 1872, as well as the right to hunt outside the reservation’s boundaries. However, soon after the treaty was signed, the United States restricted and then eliminated the Sioux tribes’ off-reservation hunting rights in response to “the inevitable clashes between off-reservation hunting parties and whites.” Thus, after the expiration of the treaty subsistence rations in 1872, and because of the government’s failure to assimilate the Lakota, Dakota, and Nakota people to yeoman farming culture, the Sioux tribes remained dependent on government rations to avoid mass starvation.

*Id.* (footnotes omitted). *But see, e.g.*, BANNER, *supra* note 32, at 3-4 (“Any given decision on the part of Indians to sell land, like any decision made by anyone about any subject, may be more or less voluntary, along a continuum that lacks any dividing line between categories. There is a large middle ground between conquest and contract.”).

165. See Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT’L & COMP. L. 1017, 1042-43 (2001).

166. See HELEN HUNT JACKSON, *A CENTURY OF DISHONOR: THE EARLY CRUSADE FOR INDIAN REFORM* 177 (Andrew F. Rolle ed., Harper Torch Books 1965) (1881) (describing the actions of the Indian Bureau forcing Sioux bands to move against their will by placing them in “almost a starving condition”).

plenary (absolute) power over Indians. Second, the Marshall Court's generalization of the meaning of the word "protection" allowed the Taney Court to place the weakest, most dependent Indian tribes in the same category as the most distinct, independent Indian tribes. In sum, the law of plenary (absolute) power extended over all Indian tribes, not just the weakest and most dependent—a "least favored nations" clause incorporated by implication into every Indian treaty by the Supreme Court.<sup>167</sup>

Justice Breyer's endorsement, in terms careful to avoid the ethnocentrism of Supreme Court opinions past, of a "preconstitutional" authority to deal with Indian affairs somehow derived from the Treaty Clause and the War Power is an endorsement of the "least favored nations" implied term. This is not to say that plenary power is wrong or unsupported. Learned professors argue that the Indian Commerce Clause and the Treaty Clause can combine into a textual basis for plenary power.<sup>168</sup> That monster of a debate is outside the scope of this essay, but this debate originates in the Marshall Trilogy. As a matter of pedagogical value, then, the Trilogy, if read correctly, is an indispensable tool for understanding the origins of plenary power.

### 3. *Trust Relationship*

Seeds of what would become known as the "trust doctrine" found their way into the Trilogy. In *Johnson*, Chief Justice Marshall wrote in dicta that Indians (i.e., the "conquered") "shall not be wantonly oppressed."<sup>169</sup> The trust relationship exists because the Marshall Court opined that Indians were weak and dependent and needed the assistance of a higher power—the

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167. Justice Breyer also invoked the War Power. See *Lara*, 541 U.S. at 201 (citing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 208 (Rennard Strickland et al. eds., 1982)). At a time when the Court's recent decisions appear to cabin the President's national security authority, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this very broad reading of Congressional war power is interesting.

168. E.g., Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175, 1177 (2003).

When the Court makes reference to the Indian commerce clause, then, we should in many cases take it as referring elliptically to the combined bases for federal plenary power over Indians. . . . [T]aken together, the Indian commerce power and the Treaty Power authorize plenary federal control; the latter argument is the one that confounds Prakash's positive claim about the scope of the Indian commerce clause.

*Id.* (emphasis omitted).

169. *Johnson v. M'Intosh*, 21 U.S. 543, 589 (1823).

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest.

*Id.*



United States—to become civilized to the extent that they could save themselves from extinction.<sup>170</sup> The Trilogy does not include a holding that the federal government should take action to assist Indians as moral imperative, but the origins of that view are there.

There are two (mis)conceptions of the trust relationship. Since the Marshall Court declared that Indians were weak and dependent (even if they could not make such a holding clear in the Cherokee cases), the Court asserted that the United States must treat them well. The Court would help out the policymaking branches by holding them to a higher standard, what the Court referred to a hundred years later as a “fiduciary relationship.”<sup>171</sup> Nongovernmental entities such as the Friends of the Indian pushed this conception as well.<sup>172</sup> As a result, at times, Congress even took action with the best interests of Indians and Indian tribes at heart. Two notions of a trust relationship evolved from Supreme Court decisions and acts of Congress. First, the federal government owes a duty—moral, ethical, or political—to Indians and Indian tribes in all of its actions. This may be a guardian-ward relationship, a trustee-beneficiary relationship, or theoretically (according to Justice Johnson) a master-conqueror relationship. Second, certain statutes create a trust duty toward Indians and Indian tribes similar to that of a common law trustee-beneficiary relationship.

The modern view of the first type of trust relationship is that the duty owed by the federal government is too vague and amorphous to be enforceable.<sup>173</sup> Some tribal advocates assume that since this first kind of trust relationship exists that Congress is precluded from enacting legislation that will harm tribal interests. Nothing could be further from the truth. While Congress does tend to enact legislation purporting to benefit Indian tribes, Congress does enact laws that can be devastating to tribal interests. The Major Crimes Act,<sup>174</sup> the allotment acts,<sup>175</sup> the Indian Civil Rights Act,<sup>176</sup>

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170. See Riley, *Recovering Collectivity*, *supra* note 99, at 206-10; Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L.J. 121, 156 (1997).

171. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

172. Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 65 (2005) [hereinafter Leeds, *By Eminent Domain*] (citing AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880-1900, 83-86 (Francis Paul Prucha ed., 1973)) (“The proponents of the allotment thought it was in the best interest of the tribes to abandon all forms of common ownership in favor of individual property rights.”).

173. *E.g.*, *United States v. Mitchell*, 445 U.S. 535 (1980).

174. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885), as amended 18 U.S.C. § 1153 (2000). See generally Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006).

statutes that abrogate Indian treaties,<sup>177</sup> and the removal acts<sup>178</sup> are all fair game in the so-called trust relationship. Nothing but the rational basis test—and that only in the last few decades<sup>179</sup>—stops Congress from playing dirty pool with Indian tribes.

The modern view of the second type is that Congress must make *extremely* clear that a trust duty exists and that Congress expects and consents to be sued for money damages in the event the trust is breached.<sup>180</sup> Despite trust breaches that boggle the imagination, unless Congress says, “Go ahead and sue us for money,” the Court will not allow it.<sup>181</sup>

The bigger picture of the trust relationship is that it conflicts with the policy of Congress and the executive toward Indians and Indian tribes of encouraging self-determination. In other words, how can the federal government have a paternalistic trust relationship (or guardian-ward or master-conqueror) when it supports tribal self-determination at the same time? How can Indian tribes demand benefits and entitlements from Congress and the executive when these same tribes demand the federal government to leave them alone? One could argue that these two choices are in conflict.<sup>182</sup>

But an examination of the Marshall Trilogy fleshes out the context of the trust relationship—self-determination dichotomy. They are two sides of the same coin. The Cherokee Nation, nestled in the northwest corner of

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175. See generally Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1 (1997).

176. See generally Angela R. Riley, *Sovereignty and Illiberalism*, 95 CAL. L. REV. (forthcoming June 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=910611](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=910611).

177. See generally Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RESOURCES J. 859 (1991); David E. Wilkins, *The Reinvigoration of the Doctrine of ‘Implied Repeals’: A Requiem for Indigenous Treaty Rights*, 43 AM. J. LEGAL HIST. 1 (1999).

178. See generally Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 441-43 (1998); Leeds, *By Eminent Domain*, *supra* note 172, 62-63; Richard White, *How Andrew Jackson Saved the Cherokees*, 5 GREEN BAG 2d 443 (2002) (reviewing ROBERT V. REMINI, ANDREW JACKSON AND HIS INDIAN WARS (2001)).

179. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977).

180. Compare *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), and *United States v. Mitchell*, 463 U.S. 206 (1983), with *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *United States v. Mitchell*, 445 U.S. 535 (1982).

181. See, e.g., Matthew L.M. Fletcher, *Sawnawgezewog: The “Indian Problem” and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 46-47 (2003-2004) (discussing *Navajo Nation*, 537 U.S. 488).

182. But see Rebecca Anita Tsosie, *What Does It Mean to “Build a Nation”? Re-imagining Indigenous Political Identity in an Era of Self-Determination*, 7 ASIAN-PAC. L. & POL’Y J. 38 (2006) (discussing whether Native Hawaiians should want to follow the model of the “domestic dependent nation” as a means of reaching self-determination).

antebellum Georgia prior to the attempts of the state legislature to destroy it, is a perfect example of how these concepts merge. The Cherokee Nation entered into treaties with the United States that preserved millions of acres as a land base, with the United States promising to preserve those borders. The Cherokee Nation settled in for the long haul—engaging in farming and other economic development, developing a written tribal language and a tribal law, and establishing a governmental, economic, and cultural foundation for all time. The United States had a trust responsibility to the Cherokee Nation—preserve the borders, by military force if necessary and preserve the treaty relationship. Meanwhile, the Cherokee Nation engaged in self-determination, much like Indian tribes do today.

This trust relationship—self-determination dichotomy should have worked for the Cherokee Nation, just as it should work for tribes today. But that relationship with the United States became tainted, and corrupted by the betrayal of Andrew Jackson’s Executive Branch and by Congress, just as the relationship between all the other Indian tribes and the United States became tainted and corrupted by betrayal. What should have been a relationship that evolved into something like what the Vatican and Monaco have with their respective European hosts, devolved into weakness, dependence, and exploitation. The modern trust relationship—self determination dichotomy retains the need for preservation of reservation boundaries (such as they are) and the need for self-determination, but it also includes a moral and legal obligation to restore tribes to the status they had when they entered into these treaties, or at least where they were headed before the betrayal of the United States.

#### B. STATE AUTHORITY IN INDIAN COUNTRY

Chief Justice Marshall’s opinion for the Court in *Worcester v. Georgia* stands as one of the strongest statements of tribal sovereignty in the history of American Indian law—“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”<sup>183</sup> As Professor Robertson argued, it appears the Chief Justice’s argument about state and tribal sovereignty was tied to the Doctrine of Discovery and the right of the state and of the tribes to alienate and control land.<sup>184</sup> In language that Professor Robertson argues was intended to reverse *Johnson*

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183. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

184. See generally ROBERTSON, *supra* note 4, at 133.

v. *M'Intosh* and eradicate the Doctrine of Discovery as controlling law, the Chief Justice quoted a speech from the British Superintendent of Indian Affairs from 1763, in which he stated that Indian lands may not be acquired except through "consent of all your people."<sup>185</sup>

Another argument to which the Chief Justice responded was the recurring argument that Indian tribes were mere hunters that could not claim ownership over land, an argument based on the reference in the Treaty of Hopewell to "hunting grounds."<sup>186</sup> Chief Justice Marshall's reply was more than adequate, relying on basic property law that the use of the land is not relevant to whether a person may own it.<sup>187</sup> This was another argument related to the notion that the State of Georgia had control, and therefore jurisdiction, over Indian lands as a result of the Doctrine of Discovery.

The legacy of *Worcester* as a legal hammer has been limited by subsequent Supreme Court determinations, but the general rule that state law does not apply in Indian Country remains the law,<sup>188</sup> subject to certain exceptions.<sup>189</sup> In this portion of the Trilogy, whether state laws apply in Indian Country, a closer (and different than the plenary power—trust relationship dichotomy analysis) inspection of the protection and dependence analysis is necessary. The opinion tackled the argument Indian tribes had entered into the treaties with the general understanding that they were an inferior race giving themselves up to the "protection" of the United States.<sup>190</sup> The Chief Justice concluded that Indian tribes hadn't equated "protection" with "dependence" and, applying what we now know as the

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185. *Worcester*, 31 U.S. at 547.

186. *E.g.*, *Cherokee Nation v. Georgia*, 30 U.S. 1, 22-24, 28 (1831) (Johnson, J., concurring); *id.* at 40 (Baldwin, J., concurring).

187. *Worcester*, 31 U.S. at 553.

So with respect to the words 'hunting grounds.' Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved. To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village, and an occasional corn field, interrupted, and gave some variety to the scene.

*Id.*

188. *E.g.*, *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *California v. Cabazon Band of Missions Indians*, 480 U.S. 202, 221-22 (1987); *Williams v. Lee*, 359 U.S. 217, 220-21 (1959).

189. *E.g.*, 18 U.S.C. § 1162(a) (2000) (state criminal jurisdiction in Indian Country in some states); 28 U.S.C. § 1360(a) (2000) (state civil jurisdiction in Indian Country in some states); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (state taxation of non-Indian owned businesses in Indian Country). For a description of the current state of the law in relation to the extent that tribal sovereignty and federal interests combine to preempt state law in Indian Country, see Kaighn Smith, Jr., *Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule*, 35 N.M. L. REV. 1, 14-16 (2005).

190. *See Worcester*, 31 U.S. at 546-57.

canon of construction of Indian treaty language, held that Indian tribes understood the word to mean that the United States would protect the tribes from intruders as in an international non-aggression treaty.<sup>191</sup> Indian tribes would constitute a “dependent ally” of the United States, just as they had with the European powers previously:

The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character.<sup>192</sup>

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191. *Id.*

Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country, and this was probably the sense in which the term was understood by them.

*Id.*

192. *Worcester*, 31 U.S. at 551-52; *see also id.* at 556.

This treaty, thus explicitly recognizing [sic] the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protection, and, of course, pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force. To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

*Id.* at 556.

In short, the word “protection” has no special meaning beyond that of, say, the Vatican giving in to the protection of Italy. In this decision, the Chief Justice reversed his own position from a year earlier, in which he concluded that the word “protection” appeared in enough Indian treaties to justify labeling them “dependent.”<sup>193</sup>

The *Worcester* opinion, which garnered a 5-1 majority, never refers to Indian tribes as “domestic dependent nations,” but instead refers to them as “independent” nations<sup>194</sup> who are “dependent all[ies]” of the United States.<sup>195</sup> This is a much, much different animal than the “domestic dependent nation” language that Chief Justice Marshall used in his lead opinion in *Cherokee Nation*. But we still consider Indian tribes “domestic

193. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (Marshall, C.J.).

194. *E.g.*, *Worcester*, 31 U.S. at 542-43 (“America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, *independent of each other, and of the rest of the world*, having institutions of their own, and governing themselves by their own laws.”) (emphasis added); *id.* 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. . . .”) (emphasis added).

A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. “Tributary and feudatory states,” says Vattel, “do not thereby cease to be *sovereign and independent states*, so long as self-government and sovereign and independent authority, are left in the administration of the state.” At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.

*Id.* at 561 (emphasis added).

It must be admitted, that the Indians sustain a peculiar relation to the United States. They do not constitute, as was decided at the last term, a foreign state, so as to claim the right to sue in the supreme court of the United States; and yet, having the right of self government, they, in some sense, form a state. In the management of their internal concerns, *they are dependent on no power*.

*Id.* at 581 (McLean, J., concurring) (emphasis added).

195. *Worcester*, 31 U.S. at 552.

The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a *dependent ally*, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character.

*Id.* (emphasis added); *see also id.* at 555.

The Indian nations were, from their situation, necessarily dependent on some foreign potentate, for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country.”); *id.* at 582 (McLean, J., concurring) (“Every state is more or less dependent on those which surround it; but, unless this dependence shall extend so far as to merge the political existence of the protected people into that of their protectors, they may still constitute a state. They may exercise the powers not relinquished, and bind themselves as a distinct and separate community.

*Id.* at 555.

dependent nations” anyway.<sup>196</sup> How did this happen? This line of thought is a good exercise for the beginning student of American Indian law to consider.

### C. IMPLICIT DIVESTITURE

Implicit divestiture is introduced in *Johnson*, Chief Justice Marshall deciding that, as a function of the Doctrine of Discovery, Indian tribes would no longer retain the right to alienate property to any party except the United States.<sup>197</sup> The *Cherokee Nation* holding amounts to an implicit divestiture of the tribal authority to engage in foreign affairs,<sup>198</sup> such as entering into a binding treaty with Spain or France or Great Britain. By definition, no treaty or statute or other form of tribal consent exists to support or authorize an implicit divestiture of tribal authority. What

196. *E.g.*, *United States v. Lara*, 541 U.S. 193, 199 (2004) (quoting H.R. Conf. Rep. No. 102-261, at 3-4 (1991)); *id.* at 204-05 (quoting *Cherokee Nation*, 30 U.S. at 17); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (same); *Duro v. Reina*, 495 U.S. 676, 699 (1990) (Brennan, J., dissenting) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 451 (1989) (Blackmun, J., concurring and dissenting) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 235 (Nell Jessup Newton ed., 2005)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982); *Baker v. Carr*, 369 U.S. 186, 215 (1962) (quoting *Cherokee Nation*, 30 U.S. at 17); *Roff v. Burney*, 168 U.S. 218, 221 (1897) (same); Hope Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443; Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 762, 763 (2004); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004); Heinrich Krieger, *Principles of the Indian Law and the Act of June 18, 1934*, 3 GEO. WASH. L. REV. 279, 282 (1935); Dudley O. McGovney, *American Citizenship*, 11 COLUM. L. REV. 326, 326, 330 (1911); Editorial, *Legal Status of the Indians—Validity of Indian Marriages*, 13 YALE L.J. 250, 251 (1903).

197. *See Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823).

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; *but were necessarily, to a considerable extent, impaired*. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; *but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.*

*Id.* (emphasis added).

198. *See Cherokee Nation*, 30 U.S. at 17.

In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper . . . .

*Id.*

implicit divestiture amounts to is a decision by the Supreme Court that it will not recognize certain exercises of tribal authority.<sup>199</sup> For over 140 years after the Marshall Trilogy, the Supreme Court rarely (if ever) announced another instance of implicit divestiture.<sup>200</sup>

In the reincarnation of the implicit divestiture doctrine during the Burger Court—in cases such as *Oliphant v. Suquamish Indian Tribe*<sup>201</sup> and *Washington v. Confederated Tribes of Colville Indian Reservation*<sup>202</sup>—the Court adopted a rule that the inherent or retained powers of Indian tribes would not be divested by the Court absent the “overriding interests of the National Government.”<sup>203</sup> This is consistent with the holding in *Johnson* and the understanding of the Marshall Court as evidenced in dicta. For example, the Court often refers to the “necessity” of the European powers to follow the Doctrine of Discovery.<sup>204</sup> The national interest may be fear of military violence<sup>205</sup> or protection of national economic interests and tax

199. *E.g.*, *Nevada v. Hicks*, 533 U.S. 353 (2001) (refusing to recognize the tribal court authority to adjudicate a federal civil rights claim against a state officer); *A-1 Contractors v. Strate*, 520 U.S. 438 (1997) (refusing to recognize the tribal court authority to adjudicate a civil case involving nonmembers outside of Indian Country); *Duro v. Reina*, 495 U.S. 676 (1990) (refusing to recognize the tribal authority to prosecute nonmember Indians); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (refusing to recognize the tribal authority to prosecute non-Indians).

200. *See* *United States v. Wheeler*, 435 U.S. 313, 326 (1978). *Wheeler* lists three areas in which the Court recognized implicit divestiture:

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. [*Johnson*.] They cannot enter into direct commercial or governmental relations with foreign nations. [*Worcester*; *Cherokee Nation*.] And, as we have recently held, they cannot try nonmembers in tribal courts. [*Oliphant*.]

*Id.* (other citations omitted).

201. 435 U.S. 191 (1978) (holding that Indian tribes had no authority to prosecute nonmembers). Of interest in reference to the criminal jurisdiction question, Justice Johnson in his *Cherokee Nation* concurrence notes that Indian tribes, such as the Catawba nation, were not only “punishing intruders,” *Cherokee Nation*, 30 U.S. at 24 (Johnson, J., concurring), but perhaps executing them as well. *Id.* at 25.

202. 447 U.S. 134 (1980).

203. *Confederated Tribes*, 447 U.S. at 153.

204. *Johnson v. M’Intosh*, 21 U.S. 543, 590 (1823).

205. *E.g.*, *Johnson*, 21 U.S. at 596-97.

The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown.

*Id.* (emphasis added).



revenue,<sup>206</sup> but it was national interest that spurred the very first implicit divestiture holding.

But the modern Court's implicit divestiture doctrine does not focus on overriding interests of the Nation, but instead on a more standardless rule, whether the tribal authority was lost "by virtue of their dependent status."<sup>207</sup> Instead of relying on a national interest, the modern Court has far more discretion to determine the extent of the tribes' "dependent status." Once again, dependency looms large. Distinctiveness and independence are forgotten.

#### D. CANON OF CONSTRUCTION OF INDIAN TREATIES

The venerable canons of construction of Indian treaties<sup>208</sup> originate in language within the Marshall Trilogy. In *Worcester*, Chief Justice Marshall held that treaty language should be interpreted in accordance to "the sense by which [the language] was understood by [the Indians]."<sup>209</sup> The language in which the United States and the tribes negotiated treaties was English and the Chief Justice recognized that Indian treaty negotiators were "[n]ot well acquainted with the exact meaning of words . . ."<sup>210</sup> nor were they "critical judges of our language . . ."<sup>211</sup> As a result, the *Worcester* Court twice interpreted treaty language to the benefit of the Cherokee Nation.<sup>212</sup>

Some of the greatest victories achieved by Indian tribes have been in reliance on the canon that ambiguities in Indian treaties should be

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206. *E.g., id.* at 586.

The States, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that "*all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation,*" [etc.] "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever."

*Id.* (emphasis added).

207. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

208. The canons of construction of Indian treaties are described in great detail by the Navajo Supreme Court in *Means v. Distr. Court of the Chinle Judicial Distr.*, No. SC-CV-61-98, 1999.NANN.0000013, at ¶¶ 54-59 (May 11, 1999), available at <http://www.tribal-institute.org/opinions/1999.NANN.0000013.htm>.

209. *Worcester v. Georgia*, 31 U.S. 515, 547 (1832).

210. *Worcester*, 31 U.S. at 546-47.

211. *Id.* at 552.

212. *See id.* at 547 ("protection"); *id.* at 553-54 ("manage all their affairs").

interpreted to the benefit of the tribal interest. Fishing rights,<sup>213</sup> water rights,<sup>214</sup> hunting rights,<sup>215</sup> and tribal sovereign rights<sup>216</sup> have all been vindicated under this theory for many tribes. But the Supreme Court's recent hostility toward tribal interests has exposed a weakness in the argument. The canons apply only if the Court finds the treaty language ambiguous.<sup>217</sup> Since whether treaty language is ambiguous is a question of law, the Court has free reign to decide that treaty language is not ambiguous and interpret it against the tribal interest. In fact, that is how the concurring Justices would have held in *Cherokee Nation*,<sup>218</sup> interpreting the treaty language as they saw it, with no reference to the history of Indian-white relations and the context of a particular negotiation.

#### E. POLITICAL STATUS

Chief Justice Marshall's opinion in *Johnson* presaged this differential treatment and its potential impacts (impressive, given that the Equal Protection Clause of the Fourteenth Amendment was decades away) when he wrote, again, as always in dicta, "When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, *or safely governed as a distinct people . . .*"<sup>219</sup> Again, Indians and Indian tribes, according to the Chief Justice, are either "distinct" or "blended" into the American state. "Distinct" tribes remain apart, like the Cherokee Nation, even though they are surrounded by the territory of a State, such as Georgia.

One current debate raging in the field is whether the political status of Indians, or the special relationship between Indians, Indian tribes, and the federal government, validates differential treatment of Indians under the Equal Protection Clause.<sup>220</sup> Many students may be surprised to learn that

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213. *E.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

214. *E.g.*, *Winters v. United States*, 207 U.S. 564 (1908).

215. *E.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

216. *E.g.*, *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973); *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514 (6th Cir. 2006); *Keweenaw Bay Indian Cmty. v. Michigan*, 784 F. Supp. 418 (W.D. Mich. 1991).

217. *See* *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994).

218. *See* *Cherokee Nation v. Georgia*, 30 U.S. 1, 22-23 (1831) (Johnson, J., concurring); *id.* at 37-39 (Baldwin, J., concurring).

219. *See* *Johnson v. M'Intosh*, 21 U.S. 543, 589-90 (1823) (emphasis added).

220. *E.g.*, *Artichoke Joe's Grand Nation Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003); *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997) (Kozinski, J.); *In re Santos Y.*, 110 Cal. Rptr. 2d 1; 90 Cal. App. 4th 1026 (2001); Goldberg-Ambrose, *Not "Strictly" Racial*, *supra* note 16; L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702 (2001); Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of*

differing governmental treatment of Indians—both positive and negative—is not race-based, but is instead based on what the Court labeled the “political status” of Indian tribes.<sup>221</sup> But more critical is the fact that Indian tribes have a treaty relationship with the federal government, with states, or, in cases that predate the Declaration of Independence, with other nations. And that treaty relationship has evolved into a federal recognition of tribal sovereignty as a political matter. As a result, the “political” status of Indian tribes remains extant. But this conclusion can be challenged in a manner that beginning students of American Indian law should understand.

As a teaching matter, the political status of Indian tribes—as opposed to a race-based status—as implied in the Trilogy, is an important first step in tracing the relationship between the federal government and individual Indians. In the Constitution, Indians were not citizens and therefore not taxed.<sup>222</sup> In the post-Civil War amendments to the Constitution, Indians were not citizens and therefore not taxed.<sup>223</sup> It was not until the Indian Citizenship Act<sup>224</sup> in 1924 that Congress extended citizenship to all American Indians. Although few beyond academia<sup>225</sup> consider the questions, what about those American Indians who did not consent to American citizenship? And can an American Indian born after 1924 reject citizenship?

#### F. LACHES AND “SETTLED EXPECTATIONS”

The importance of preserving the land transactions that established the current regime of property ownership was established in *Johnson*.<sup>226</sup> Chief Justice Marshall reasoned that to disrupt the long-standing tradition of acquiring lands from Indians in accordance with the Doctrine of Discovery would upset the entirety of property ownership and undermine the governments of “New England, New York, New Jersey, Pennsylvania, Maryland,

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*Native Hawaiians*, 106 YALE L.J. 537 (1996); Goldberg, *American Indians and “Preferential” Treatment*, *supra* note 16; Valencia-Weber, *Racial Equality*, *supra* note 16; David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991).

221. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

222. U.S. CONST. art. I, § 2, cl. 3.

223. U.S. CONST. amend. XIV, § 2.

224. See 8 U.S.C. § 1401(b) (2000).

225. *E.g.*, VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 141-48 (1999); David Wilkins, *The Manipulation of Indigenous Status: The Federal Government as Shape-Shifter*, 12 STAN. L. & POL’Y REV. 223, 228 (2001); Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, *supra* note 123, at 246-52; Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L. J. 107 (1999).

226. See *Johnson*, 21 U.S. at 579-80.

and a part of the Carolinas.”<sup>227</sup> Often, Chief Justice Marshall stated that the doctrine cannot even be “questioned.”<sup>228</sup>

The standard story of *Johnson v. M'Intosh* is that it forms the “foundational principle of American property law—that some government, whether state or federal, is at the root of all land titles in the United States, because the original fee simple owner of all the country’s land was the government, not the Indians.”<sup>229</sup> But of course this is an oversimplification, as every individual land transaction between Indians and non-Indians must be scrutinized to determine whether the transaction was valid. This is not such an easy task, despite some blithe assertions.<sup>230</sup> But oversimplifications are necessary to preserve the settled expectations of whatever property interests are at stake. Chief Justice Marshall’s oversimplification of the history of the Doctrine of Discovery helped to preserve the expectations of much of the original thirteen colonies. And now the Supreme Court and lower courts rely upon oversimplifications of tribal histories to deny Indian lands claims.<sup>231</sup> In another common oversimplification, Professor Judith Younger suggested that historical Indian land transactions should be analyzed in light of the multi-billion dollar Indian gaming industry.<sup>232</sup> A recent *Harvard Law Review* note argued that Indian land claims are no

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227. *Id.*

The governments of New-England, New-York, New-Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown unaccompanied by the powers of government, as in the case of the northern neck of Virginia. It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

*Id.*

228. *Id.* at 591.

229. BANNER, *supra* note 32, at 178.

230. See Judith T. Younger, *Whose America?*, 22 CONST. COMMENT. 241, 249 (2005) (reviewing BANNER, *supra* note 32, and ROBERTSON, *supra* note 4) (“The argument, thought up by some ingenious lawyer, goes something like this: we sold our land; the law prohibited us from selling it without federal consent; we didn’t have federal consent; the sale was therefore void; the land is still ours!”) (citations omitted).

231. See, e.g., *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied sub nom.*, *United States v. Pataki*, 126 S. Ct. 2021 (2006).

232. See Younger, *supra* note 230, at 249.

Professor Banner’s discussion of the balance of power between Indians and non-Indians contains no mention of Indian gaming. In 2004, casinos on Indian reservations took in about \$18.5 billion in gross revenues. This seems so significant an amount that it is hard to see how it could not affect the calculus of political power.

*Id.* (footnote omitted).

more than claims for reparations, which is yet another oversimplification.<sup>233</sup> These oversimplifications create genuine injury for Indian nations without significant gaming revenues in their attempts to restore their lost land base or their political stability, both of which were guaranteed by treaty, statute, and federal policy. These oversimplifications also create genuine injury for Indian nations who have never stopped trying to preserve their nationhood and their cultures. It is natural for those retaining Indian property interests in violation of federal law (or those defending the retention of the interests) to resort to such oversimplifications.<sup>234</sup> But it is a disappointing exercise in the use of rhetoric to justify historical injury.

Members of the Marshall Court were concerned that opening the courthouse door to one tribe might mean that more Indian tribes would knock on the door. In Justice Baldwin's concurrence in *Cherokee Nation*, he argued that for the Court to declare that the Cherokee Nation could bring suit against the State of Georgia would create "endless controversies" from "countless tribes."<sup>235</sup> Justice Baldwin, presaging the late Rehnquist Court, wrote in another segment of his *Cherokee Nation* opinion that "Indian sovereignty cannot be roused from its long slumber" by judicial fiat.<sup>236</sup> In *City of Sherrill*, the Court held, "We now reject the unification theory of [Oneida Indian Nation] and the United States and hold that standards of federal Indian law and federal equity practice preclude the Tribe from rekindling embers of sovereignty that long ago grew cold."<sup>237</sup> And so it goes.

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233. See Note, *Availability of Equitable Relief*, 119 HARV. L. REV. 347, 348 (2005) ("[*City of Sherrill*] was correct because the Court was poorly positioned to adjudicate the claims; therefore, these claims are best understood as demands for reparative justice that raised the typical difficulties associated with reparations.").

234. Cf. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* xv (1932) (Charles Scribner's Sons ed., 1952) ("Contending factions in a social struggle require morale; and morale is created by the right dogmas, symbols and emotionally potent oversimplifications.").

235. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 32 (1831) (Baldwin, J., concurring).

My view of the plaintiffs being a sovereign independent nation or foreign state, within the meaning of the constitution, applies to all the tribes with whom the United States have held treaties: for if one is a foreign nation or state, all others in like condition must be so in their aggregate capacity; and each of their subjects or citizens, aliens, capable of suing in the circuit courts. This case then is the case of the countless tribes, who occupy tracts of our vast domain; who, in their collective and individual characters, as states or aliens, will rush to the federal courts in endless controversies, growing out of the laws of the states or of congress.

*Id.*

236. *Id.* at 47 (Baldwin, J., concurring).

237. *City of Sherrill*, 544 U.S. at 214 (quotation marks and footnote omitted).

## G. SELF-GOVERNMENT &amp; TRIBAL LAW

The Marshall Court often acknowledged in passing the existence and viability of tribal law. While a sale of Indian lands to an individual might not be cognizable in an American court, the person purchasing the lands must follow tribal law in order to realize rights and benefits from those lands:

If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.<sup>238</sup>

Meanwhile, Justice Johnson, in his *Cherokee Nation* concurrence, argued that Indian tribes had no government or laws and existed in a “savage state.”<sup>239</sup>

The Court always has been hit or miss when it comes to recognizing the validity of tribal law, much of which is unwritten, unavailable, or inapplicable to nonmembers.<sup>240</sup> Modern federal Indian law does recognize the validity of tribal law in areas involving tribal member interests in Indian

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238. *Johnson v. M'Intosh*, 21 U.S. 543, 593 (1823).

239. *Cherokee Nation*, 30 U.S. at 27-28 (Johnson, J., concurring).

But I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.

*Id.*

240. See generally Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUSTON L. REV. 701, 728-33 (2006) (arguing that intratribal common law is not applicable to nonmembers except when they consent).

Country,<sup>241</sup> but no longer to the extent that the Trilogy anticipated. A critical area of dispute in modern federal Indian law is the extent to which Indian tribes and tribal courts have civil jurisdiction over nonmembers.<sup>242</sup> The Court's current precedents hold that the presumption is against tribal jurisdiction.<sup>243</sup> Justice Marshall's *Johnson* opinion implied that when non-Indians wander into Indian Country and engage in transactions with the Indians, they were subject to tribal laws. A critical teaching point in any Indian law class is following the story of how the law changed over time, despite the fact that Congress has never spoken on the subject of tribal court civil jurisdiction except in support of its exercise.<sup>244</sup>

#### H. POLITICAL QUESTIONS

The Marshall Court, at the time of the Trilogy, was still sorting out its power in the context of the Constitution's separation of powers.<sup>245</sup> The Court sowed the seeds of what would become known as the political question doctrine.<sup>246</sup> The Trilogy advanced the political question doctrine. Justice Johnson, in his *Cherokee Nation* concurrence, argued that, while the State of Georgia may have violated the Cherokee treaties, it was up to the executive to make the Cherokee Nation whole.<sup>247</sup> Professor Philip Bobbitt

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241. *E.g.*, *Williams v. Lee*, 359 U.S. 217 (1959) (holding that tribal courts have exclusive jurisdiction over claims brought against tribal members in disputes arising in Indian Country); *Kobogum v. Jackson Iron Co.*, 43 N.W. 602 (Mich. 1889) (recognizing a tribal marriage).

242. *Compare* *A-1 Contractors v. Strate*, 520 U.S. 438 (1997) (holding that the tribal court did not have civil adjudicatory jurisdiction over a suit involving nonmembers), *with* *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir.) (en banc) (holding that the tribal court did have civil adjudicatory jurisdiction over a suit involving nonmembers and a tribal entity), *cert. denied*, 126 S. Ct. 2893 (2006).

243. *See* *Montana v. United States*, 450 U.S. 544, 560-61 (1981).

244. *See generally* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121 (2006).

245. *See generally* MCCLOSKEY, *supra* note 161, at 35-52; George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 140 U. PA. L. REV. 1, 9-10 (1981).

246. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 207, 246-53 (2002); Wilkins, *Reinvigoration*, *supra* note 225, at 8-10.

247. *See* *Cherokee Nation v. Georgia*, 30 U.S. 1, 30 (1831) (Johnson, J., concurring).

What these people may have a right to claim of the executive power is one thing: whether we are to be the instruments to compel another branch of the government to make good the stipulations of treaties, is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore are very unfit instruments to control the action of that branch of government; which may often be compelled by the highest considerations of public policy to withhold even the exercise of a positive duty.

*Id.*

argued that the Cherokee Nation would not have prevailed even if the Court held that the Nation was a “foreign State.”<sup>248</sup>

After the retirement of Chief Justice Marshall, the Court often relied upon the political question doctrine to avoid difficult questions of Indian law. In *United States v. Rogers*, the Court wrote, “But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet *it is a question for the law making and political department of the government, and not for the judicial.*”<sup>249</sup> The Court relied on this doctrine again and again—to uphold federal criminal jurisdiction in Indian Country;<sup>250</sup> to uphold the federal government’s treaty interpretation;<sup>251</sup> to uphold the federal government’s unilateral abrogation of Indian treaty rights;<sup>252</sup> to uphold the extinguishment of Indian title;<sup>253</sup> and to alienate tribal property without tribal consent.<sup>254</sup> Only since the late 1970s has the Court backed down from its assertion of the political question doctrine,<sup>255</sup> but the Court has not struck down a statute that abrogates a treaty right.

#### I. RACISM

No discussion of the Trilogy is complete without a full reckoning of the racism inherent in the holdings or the racism of the reasoning behind the holdings. Indians are labeled “fierce savages,”<sup>256</sup> prone to massacring helpless non-Indians,<sup>257</sup> and always, always, always “gradually sinking.”<sup>258</sup>

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248. See BOBBITT, *supra* note 73, at 114-15.

If [Marshall] had accepted jurisdiction on the basis urged and had been willing to regard the Cherokee as a foreign nation, the Court would have been unable to oversee a decree and would have had to abandon the issue as a constitutional matter. This follows from our Constitution’s commitment of foreign relations largely to the Executive. Had the Indians been truly a “foreign state” the Constitution and the Court could have offered them no protection.

*Id.* But see BANNER, *supra* note 32, at 216-17 (“When government officials insist that they lack the legal authority to do something, it is virtually always something they would prefer not to do, and that is especially true when it is something that previous administrations had always done. But of course that was no help to the Cherokees.”).

249. *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846) (emphasis added).

250. See *United States v. Kagama*, 118 U.S. 375, 380-81 (1886).

251. See *United States v. Sandoval*, 167 U.S. 278, 290 (1897).

252. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Thomas v. Gay*, 169 U.S. 264, 271 (1898); *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870).

253. See *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941).

254. See *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-08 (1902).

255. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977).

256. *Johnson v. M’Intosh*, 21 U.S. 543, 590 (1823).

257. See *id.* at 590.



Justice Baldwin took the view that the earliest Indian cases before the Court gave the members an opportunity to nip Indian claims in the bud before they became a problem, as in the “maxim *obsta principiis*.”<sup>259</sup>

The superiority of Euro-American culture was never in question. As Euro-American populations advanced, “that of the Indians necessarily receded.”<sup>260</sup> The entire Marshall Court, it appears, was bamboozled by one of the greatest lies ever perpetrated about Indian people—that Indians were hunters and were not (and could not) be farmers. Contemporaneous to the Marshall Trilogy, Henry Schoolcraft, the well-connected Jacksonian charged with surveying the Old Northwest, wrote in 1827 that “[o]ld green fields appeared in spots [on Mackinac Island], which have been formerly cultivated by Indians.”<sup>261</sup> A Detroit newspaper editorial gaped in 1831, “The largest corn I ever saw was raised on these prairies.”<sup>262</sup> And the Cherokee Nation had a surplus of food.<sup>263</sup> According to the Court, however, Euro-American farmers advanced, pushing the Indian “hunters” away into the “unbroken forest.”<sup>264</sup> Under their reasoning, Indian lands used for hunting were not owned; in fact, they were “vacant.”<sup>265</sup>

Justice Johnson’s opinion in *Cherokee Nation* may be one of the most racist opinions ever published by a Supreme Court Justice. Justice Johnson’s opinion was that an Indian tribe could not be a “state,” as defined in international law, for the reason that Indian people were too “low” for that designation.<sup>266</sup> Justice Johnson’s opinion is littered with the

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The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

*Id.*

258. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831).

259. *Id.* at 32 (Baldwin, J., concurring) (writing “[i]n the spirit of the maxim *obsta principiis*,” or to resist the first encroachment).

260. *Johnson*, 21 U.S. at 590.

261. W.B. HINSDALE, *THE FIRST PEOPLE OF MICHIGAN* 146 (1930).

262. *Id.*

263. *See Wishart*, *supra* note 76.

264. *See Johnson*, 32 U.S. at 590-91 (“The country in the immediate neighborhood of agriculturalists became unfit for [the Indians]. The game fled into thicker and more unbroken forest, and the Indians followed.”).

265. *Id.* at 596 (“[N]o distinction was taken between vacant lands and lands occupied by the Indians.”).

266. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 21 (1831) (Johnson, J., concurring) (“I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are.”) (emphasis in original).

proposition that Indians were no more than “hunters.”<sup>267</sup> He seems to focus on this term because of a throwaway line in the Treaty of Hopewell, a treaty signed by the Cherokee Nation and the fledgling United States after the Revolutionary War, defining the territorial lands of the Nation by a rhetorical term as “hunting grounds.”<sup>268</sup> The twisted irony of Justice Johnson’s opinion is that he accepts that the Cherokee Nation is moving away from being a mere “race of hunters”<sup>269</sup> to a viable and “approved form[] of civil government.”<sup>270</sup> As such, he reasoned, because the Nation was moving away from its “hunter” state to a more civilized state, it made perfect sense for state law to apply.<sup>271</sup> Justice Johnson found the federal goal of civilizing Indians laudable, but believed that, due to the “restless, warlike, and signally cruel” nature of Indian people and the “inveterate habits and deep seated enmity” of Indian tribes, such a goal had failed.<sup>272</sup> Such language gives great fodder for commentators to decry federal Indian law as racist.<sup>273</sup>

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267. *Id.* at 22, 23, 24, 28 (“band of hunters” and “hunter horde”).

268. *Id.* at 23 (quoting Treaty of Hopewell, art IV); *see also id.* at 40 (Baldwin, J., concurring).

269. *Id.* at 23 (Johnson, J., concurring).

270. *Id.* at 21 (“I would not here be understood as speaking of the Cherokees under their present form of government; which certainly must be classed among the most approved forms of civil government.”).

271. *Id.* at 23.

The pre-emptive right, and exclusive right of conquest in case of war [the Doctrine of Discovery], was never questioned to exist in the states, which circumscribed the whole or any part of the Indian grounds or territory. To have taken it from them by direct means would have been a palpable violation of their rights. But every advance, from the hunter state to a more fixed state of society, must have a tendency to impair that pre-emptive right, and ultimately to destroy it altogether, both by increasing the Indian population, and by attaching them firmly to the soil. The hunter state bore within itself the promise of vacating the territory, because when game ceased, the hunter would go elsewhere to seek it. But a more fixed state of society would amount to a permanent destruction of the hope, and, of consequence, of the beneficial character of the pre-emptive right.

*Id.*

272. *Id.* at 23-24.

But it is said, that we have extended to them the means and inducement to become agricultural and civilized. It is true: and the immediate object of that policy was so obvious as probably to have intercepted the view of ulterior consequences. Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions during the revolution. The policy, therefore, of enticing them to the arts of peace, and to those improvements which war might lay desolate, was obvious; and it was wise to prepare them for what was probably then contemplated, to wit, to incorporate them in time into our respective governments: a policy which their inveterate habits and deep seated enmity has altogether baffled.

*Id.*

273. *See* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005); Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law’s* *Brown v. Board of Education*, 38 TULSA L.

### III. REASSESSING OF THE TRILOGY

Students of American Indian law can learn the holdings of the Trilogy without much trouble, but the Trilogy occupies a much greater place in American law than its mere holdings. As was true in much of Chief Justice Marshall's greatest work,<sup>274</sup> the more important decisions came in obiter dicta, as the previous Parts suggest. But, perhaps more important than the holdings and the dicta, is the Trilogy's impact on and restatement of American history and legend. This section reassesses the Trilogy using several methodologies of legal analysis, including legal history, law and literature (and mythology), law and economics, and the legal canon.

#### A. THE TRILOGY AS HISTORY

History is written by the victors, as the old saw goes.<sup>275</sup> And legal history often accomplishes the same. As Morton Horwitz wrote of Roscoe Pound's work in legal history: "The main thrust of lawyer's legal history, then, is to pervert the real function of history by reducing it to the pathetic role of justifying the world as it is."<sup>276</sup> Chief Justice Marshall's frequent reference to the "actual state of things"<sup>277</sup> was, according to Professor Bob Miller, a reference to the historical "fact" "that the reality was . . . 'power, war, conquest, give rights, which, after possession, are conceded by the world.'"<sup>278</sup> For the American mind, the question was whether American Indians were weak because they were colonized or they were colonized because they were weak. The English decided it one way—the latter:

As the English consolidated their empire, they made it look as if their using violent means to subjugate or disperse native populations was beside the point. Nature demonstrated that Indians were removed from the prospect of life in America. Their bodies were

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REV. 73, 79, 82, 85 (2002); LaVelle, *Rescuing Paha Sapa*, *supra* note 164, at 78 n.133 ("In my view, federal Indian policy is and always has been infected with powerful strains of both racism and colonialism."); Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51 (1991).

274. *E.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824); *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Marbury v. Madison*, 1 Cranch 137 (1803).

275. See Lawrence M. Friedman, *Introduction* to 4 THEORETICAL INQUIRIES IN LAW 437, 438-39 (2003) ("History has winners and losers, and the winners usually control and dominate the way history gets written. Their story becomes *the* story; and the story of the losers ends up lost or distorted.").

276. Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 281 (1973).

277. *Johnson v. M'Intosh*, 21 U.S. 543, 591 (1823); *Worcester v. Georgia*, 31 U.S. 515, 543, 546, 560 (1832).

278. Miller, *supra* note 53, at 72 (quoting *Worcester*, 31 U.S. at 543).

conceived as unsuited to the places the English had settled, their forms of medicine were adequate to treat their continuing debility, and their conceptions of nature did not promise an easy transition to English learning. Indians did not belong in the plantations the English had made in America. They were uprooted.<sup>279</sup>

In other words, “[t]he indigenous were stripped of significant presence on the land they inhabited not as a condition for colonizing but as a consequence of it.”<sup>280</sup> But for Chief Justice Marshall, attempting to preserve a strong national government in *Worcester*, the strength of the Cherokee Nation was critical as a practical matter to limiting the authority of the State of Georgia to nullify federal law. Moreover, for Marshall, who had once feared the possibility that the Indians would push America into the sea,<sup>281</sup> to admit to British superiority over Indians was (possibly) to admit to American inferiority to Britain. He had to have it both ways: in *Johnson*, he needed weak, dependent Indians; in *Worcester*, he needed strong, independent Indians. And the Court, over the decades and centuries, imagines its Indians as was necessary to reach its holdings.<sup>282</sup>

The “actual state of things” has ripened in the modern Court into the way things “ought to be.”<sup>283</sup> History is used, as it so often is by jurists claiming to be “originalists,”<sup>284</sup> to reach a particular result consistent with

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279. JOYCE E. CHAPLIN, SUBJECT MATTER: TECHNOLOGY, THE BODY, AND SCIENCE ON THE ANGLO-AMERICAN FRONTIER, 1500-1676, 320 (2001), quoted in Christopher Tomlins, *In a Wilderness of Tigers: Violence, the Discourse of English Colonizing, and the Refusals of American History*, 4 THEORETICAL INQUIRIES IN LAW 451, 453 n.2 (2003).

280. Tomlins, *supra* note 279, at 453.

281. See BROWN, *supra* note 22, at 213 (“The Indians were a fierce and dangerous enemy whose love of war made them sometimes the aggressors, whose numbers and habits made them formidable, and whose cruel system of warfare seemed to justify every endeavor to remove them to a distance from civilized settlements.”) (quoting an 1828 letter from Chief Justice Marshall to Justice Story); FAULKNER, *supra* note 23, at 54-55 (“Instead [Marshall] excused the displacement which had occurred by the most narrow argument possible: *the Indians’ war-like savagery made their physical proximity a mortal danger to the conquering settlers*, and only to the extent of that danger might their lands be appropriated.”) (emphasis added).

282. E.g., Lawrence R. Baca, *Diversity and the Federal Bar Association*, FED. LAW., Feb. 2003, at 23, 27-28 (comparing *United States v. Joseph*, 94 U.S. 614 (1876), with *United States v. Sandoval*, 231 U.S. 28 (1913), where the Court came to opposite conclusions as to whether the Pueblo Indians were “Indian” as defined under federal law); Felix Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 263 (1950) (same).

283. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996) (quoting a memorandum from Justice Antonin Scalia to Justice William Brennan, Jr. (Apr. 4, 1990) (*Duro v. Reina*, U.S. Supreme Court No. 88-6546)).

284. See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 669 (1987).

The originalist’s use of history is goal-directed: he wants to understand past thought and action in order to address present concerns. There is nothing wrong with this utilitarian interest in history, but it does pose a serious temptation for the interpreter. In his desire to mine something useful for his purposes, he easily may slip into the

one's political views. Consider then-Justice Rehnquist's dissent in *United States v. Sioux Nation*.<sup>285</sup> He could not resist asserting that the claims of the Sioux Nation to the Black Hills, a place as sacred as the Temple of Jerusalem, were undermined by the "villainy" of the Indians.<sup>286</sup> Yes, the Americans employed "greed, cupidity, and other less-than-admirable tactics,"<sup>287</sup> but the Indians were savages. Quoting Morison:

The Plains Indians seldom practiced agriculture or other primitive arts, but they were fine physical specimens; and in warfare, once they had learned the use of the rifle, [were] much more formidable than the Eastern tribes who had slowly yielded to the white man. Tribe warred with tribe, and a highly developed sign language was the only means of inter-tribal communication. The effective unit

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fundamental historical error of ignoring the past's essential autonomy. Put more concretely, the founders thought, argued, reached decisions, and wrote about the issues that mattered to them, not about our contemporary problems.

*Id.* (footnote omitted).

*But see* Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 165 (2006) ("Consider that neither of the two most prominent 'originalists' on the United States Supreme Court—Justices Scalia and Thomas—has any professional training as historians, but that has not stopped them from criticizing their colleagues and others for failing to abide by what the framers meant."); Morton J. Horowitz, *Foreword—The Constitution of Change: Legal Fundamentalism without Fundamentalism*, 107 HARV. L. REV. 30, 70 (1993); William M. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1484 (1987) ("Indeed, the Court often manipulates originalist arguments to reach results that can better be supported by a dynamic view of the statute.").

[O]riginalist interpretations can be manipulated by a changing and dynamic time frame. For example, after the Civil War, fluctuations in popular support for black aspirations or for Reconstruction among the political elite changed dramatically over time. In such a dynamic and unfolding situation, the expressions of individual views on the scope or purpose of any broad or controversial provision can be expected to change rapidly. Jefferson's changing views on the scope of the First Amendment is such an example.

*Id.* (footnote omitted).

Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

This is not, of course, to say that every judge claiming to follow a textualist or originalist approach will do so in an objective manner. Texts can be misread and history can be manipulated; judges are human; power corrupts; and judges may be tempted to twist the sources to make the cases come out 'the right way.' The point is that in principle the textualist-originalist approach supplies an objective basis for judgment that does not merely reflect the judge's own ideological stance. And when errors are made, they can be identified as such, on the basis of professional, and not merely ideological, criteria. Even in principle, constitutional interpretation based on the judge's own assessment of worthy purposes and propitious consequences lacks that objectivity.

*Id.*

285. 448 U.S. 337 (1980).

286. *Sioux Nation*, 448 U.S. at 435 (Rehnquist, J., dissenting).

287. *Id.*

was the band or village of a few hundred souls, which might be seen in the course of its wanderings encamped by a water-course with tipis erected; or pouring over the plain, women and children leading dogs and packhorses with their trailing travois, while gaily dressed braves loped ahead on horseback. *They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.*<sup>288</sup>

Chief Justice Marshall's view of history, as well as the rest of the members of the Marshall Court who wrote opinions in the Trilogy, was "lawyer's history." "As one scholar noted, 'lawyers' histories force the past to yield an answer that can be stated as a legal rule, while academic historians, on the other hand, recognize that historical research generally offers only an incomplete, conflicting, or evolving process of historical development.'"<sup>289</sup> In Professor Morton Horwitz's criticism of "lawyer's legal history," he argued that these histories are "part of a politically conservative ideology of legalism that has prevailed in America from at least the post-revolutionary period and in England from the beginning of the seventeenth century."<sup>290</sup> Horwitz identified two elements of lawyer's legal history: "the emphasis on continuity and the search for origins."<sup>291</sup> Chief Justice Marshall's reiteration of history that the Doctrine of Discovery originated with the European powers constitutes this search for an origin to the rule reached in *Johnson*. But Professor Banner's work indicates that the on-the-ground reality of Indian land acquisition had little to do with the Doctrine of Discovery—the English purchased a huge portion of the East Coast without regard to the Doctrine of Discovery. That the Doctrine of Discovery did become established law again by the mid-eighteenth century was inconvenient for Chief Justice Marshall's view of a unitary and consistent history—the kind of history a lawyer wants to see on the page. History had to be fudged and so it was.

The same was true for the history of the Cherokee Nation and all Indian tribes. Never mind that Indian corn fields grew the highest corn ever

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288. *Id.* at 436-37 (quoting SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 539-40 (1965)) (emphasis added).

289. David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 *EMORY L.J.* 1377, 1409-10 (1999) (quoting William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602-1791, 1504 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Service) (quoted in George C. Thomas III, *Remapping the Criminal Universe*, 83 *VA. L. REV.* 1819, 1827 n.35 (1997)).

290. Horwitz, *The Conservative Tradition*, *supra* note 276, at 276.

291. *Id.*

seen or that the Cherokee Nation was more than a match for the weak and poverty-stricken Georgia population in 1830. Indians were weaker than the European conquerors from day one of discovery. Well, never mind that so many of the European “conquerors” and “discoverers” would have perished but for the hospitality of local tribes. Indians were weaker then and they were weaker by the time of the Marshall Trilogy. They had to be, in Chief Justice Marshall’s view, in order to make the Doctrine of Discovery and the reading of “protection” as “dependency” palatable. Never mind that Chief Justice Marshall himself wrote that the early days of the American Republic were filled with fear that the Indians would wipe out the entire nation.

Reading the Trilogy as history is a mistake. Reading the Trilogy as an exercise in lawyering is instructive. The Trilogy is lawyer’s history, oversimplified to make the holdings appear inevitable. They’re good lawyering on the part of Chief Justice Marshall, but they did a major disservice to Indian tribes and to the Cherokee Nation. By the time Chief Justice Marshall started to revise his history of the Cherokee Nation in *Worcester*, it was too late.

#### B. THE TRILOGY AS LITERATURE

If the Trilogy is not good history, then perhaps it is fiction? Or literature? Chief Justice Marshall wrote a good story.<sup>292</sup> But in the *Death of the Author*, Roland Barthes wrote, “[W]riting is the destruction of every voice, of every point of origin. Writing is that neutral, composite, oblique space where our subject slips away, the negative where all identity is lost, starting with the very identity of the body writing.”<sup>293</sup> In the Cherokee

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292. *But see* Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2296 (1989).

No version of the American story gives full voice to Native Americans. The American legal order debars the autonomy of tribes and the possibility of dialogue with them as independent centers of sovereignty. This exclusion cannot be overcome in the received rhetorical manner by telling the story of American origins because that story simply entrenches the exclusion.

*Id.* (citations omitted); *see generally* Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605 (2006).

The need to contextualize legal rules is particularly acute in Federal Indian Law. Because the field originated in Anglo-American rather than tribal legal traditions, Federal Indian law is often alien and oppressive to its Indian constituents. Moreover, many students and even practitioners of Indian law are not deeply informed about Indian people, cultures, and places. As a result, lawyers sometimes fail to appreciate how Indian law cases affect Indian communities or how to represent Indian clients effectively. At the very least, there is room for improvement in understanding Indian law and its impact on Indian people.

Carpenter, *supra*, at 605 (footnotes omitted).

293. Roland Barthes, *The Death of the Author*, excerpted in MODERN LITERARY THEORY: A READER, 114, 114 (Philip Rice & Patricia Waugh eds., 2d ed. 1992).

cases specifically and in the entire Trilogy in general, there are two deaths—there is the death of the author of the lead opinions, but there is also the death of the “subject,” the Cherokee Nation and all Indian tribes in the United States.

Chief Justice Marshall (the first death) wrote the Trilogy to serve several purposes, as we understand them. First, he wished to preserve the Union at a time when the Southern states were threatening succession and nullification of federal law. Second, he wished to preserve the distance between Indian tribes and the nascent American Republic. Third, according to Professor Robertson, he wished to protect the land interests in certain colonial militiamen. As a matter of literature, the purposes of the author are irrelevant according to Barthes:

“Linguistically, the author is never more than the instance [of] writing, just as *I* is nothing other than the instance of saying *I*: language knows a ‘subject,’ not a ‘person,’ and this subject, empty outside of the very enunciation which defines it, suffices to make language ‘hold together’, suffices, that is to say, exhausts it.”<sup>294</sup>

And so it is with the writing of Supreme Court opinions. The Trilogy exists and says many things, but the readers of that Trilogy—and future interpreters of those words—may read into (or out of) the Trilogy other things. The legacy of the Trilogy has been mixed. Chief Justice Marshall’s attempt to preserve the Union worked, to the extent that President Jackson sought to enforce federal law against the Southern states in late 1832, but only for another 19 years. The Chief Justice’s attempt to preserve the distance between the Indians and the Americans was a resounding failure—within days of the *Worcester* opinion. While Indian tribes and their treaties often remain on American soil and extant, one has to wonder how much responsibility the Trilogy has for their survival.<sup>295</sup>

As for the Cherokee Nation and the rest of the Indian nations (the second death), the period of removing all Indian nations to areas west of the Mississippi River began in earnest, in part, as a result of the language used by Chief Justice Marshall in the Trilogy. He labeled tribes in *Cherokee Nation* as residing in a “state of pupilage,” and, from his vantage point, asserted that Indian tribes were “wards” of the federal government’s

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294. Barthes, *supra* note 293, at 116.

295. *But see* CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005) [hereinafter WILKINSON, BLOOD STRUGGLE] (tracing the survival of Indian tribes from the mid-twentieth century).



“guardian.”<sup>296</sup> President Jackson’s farewell address echoed Chief Justice Marshall’s sentiment, but the meaning was far different:

This unhappy race—the original dwellers in our land—are now placed in a situation where we may well hope that they will share in the blessings of civilization and be saved from that degradation and destruction to which they were rapidly hastening while they remained in the States; and while the safety and comfort of our own citizens have been greatly promoted by their removal, the philanthropist will rejoice that the remnant of that ill-fated race has been at length placed beyond the reach of injury or oppression, and that the paternal care of the General Government will hereafter watch over them and *protect* them.<sup>297</sup>

All discussion of the political stability, the farm surpluses, the success, and everything of the Cherokee polity in northwest Georgia was lost by Jackson’s 1837 farewell address. President Jackson’s invocation of the federal government’s obligation to “protect” Indian tribes is a vicious parody of the way the word was used in the Cherokee treaties and in the *Worcester* opinion. By the 1870s, federal officials were referring to Indian treaties as “a mere form to amuse and quiet savages, a half-compassionate, half-contemptuous humoring of unruly children.”<sup>298</sup> Indian nations, and the Cherokee Nation, died in the Trilogy’s interpretation as well. Chief Justice Marshall’s interpretation of Indian nations and Indian people “spill[ed] over constantly in to the works clustered around it, generating a hundred different perspectives which dwindle to vanishing point.”<sup>299</sup> The Trilogy’s hopes for Indian nations (such as they were) could not survive the “cultural moment”<sup>300</sup> of later phases of federal Indian policy—removal, assimilation, and termination.<sup>301</sup>

### C. THE TRILOGY AS AMERICAN MYTH

Whatever the intent of the authors and whatever the impact of the Trilogy, another purpose the Trilogy serves is to help justify the ongoing

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296. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1832).

297. Andrew Jackson, Farewell Address, Mar. 4, 1837, 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 294 (1896-1899), *quoted in* FRANCIS PAUL PRUCHA, THE INDIANS IN AMERICAN SOCIETY 14-15 (1985) (emphasis added).

298. FRANCIS A. WALKER, THE INDIAN QUESTION 8 (1874), *quoted in* PRUCHA, *supra* note 297, at 16.

299. TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 119 (2d ed. 1996).

300. Edward Said, *From Opponents, Audiences, Constituencies and Community*, in MODERN LITERARY THEORY, *supra* note 293, at 249, 249.

301. *See generally* Fletcher, *The Supreme Court and Federal Indian Policy*, *supra* note 240.

expansion of the United States through the dispossession of Indian lands—the Trilogy as American Myth. The English brought the theory that natural law compelled the expansion of the Empire because the English believed that “displacement of savagery by civilization was both inevitable and proper. . . .”<sup>302</sup> The Americans, who completed this conquest, expanded upon that arrogance by “w[inning] the Indian wars.”<sup>303</sup> This even makes its way into modern American political discussion, for example, as “some non-Indians’ desire to maintain the federal public lands as *a symbol of American conquest over the west and its original indigenous inhabitants.*”<sup>304</sup>

Colonialism nonetheless requires something more than the mere conquering and annexing of foreign lands. It also includes a mental state of both the conqueror and the conquered. Historian D. K. Fieldhouse elaborated on the necessary mental state for a colonial regime. He noted that a key “basis of imperial authority [is] the mental attitude of the colonist.” His acceptance of subordination—whether through a positive sense of common interest with the parent state, or through inability to conceive of any alternative—makes the empire durable. The durability of the empire is sustained on both sides, that of the rulers and that of the distant ruled, and, in turn, each has a set of interpretations of their common history with their own perspective, historical sense, emotions, and traditions.<sup>305</sup>

One of the most quoted phrases in the Trilogy is Chief Justice Marshall’s claim, “Conquest gives a title which the Courts of the conqueror cannot deny . . . .”<sup>306</sup> This phrase has been quoted by legal commentators and courts hundreds of times and has become part of the language of American Indian law.<sup>307</sup> In fact, one could argue that it is part of the

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302. Walter A. McDougall, *The Colonial Origins of American Identity*, 49 ORBIS: A J. OF WORLD AFF. 7, 14 (2005).

303. Keith Bradsher, *Michigan Pact Resolves Battle over Limits on Indian Fishing*, N.Y. TIMES, Aug. 8, 2000, at A16 (quoting John Lindenau, non-Indian fisherman in Leelanau County, Michigan: “We won the Indian wars and gave it all away.”).

304. Kristen A. Carpenter, *Old Grounds and New Directions at Sacred Sites on the Western Landscape*, 83 DENV. U. L. REV. 981, 1000 (2006) (footnote omitted) (emphasis added).

305. Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 447 (2002) (citing EDWARD SAID, *CULTURE AND IMPERIALISM* 12 (1993), citing in turn D. K. FIELDHOUSE, *THE COLONIAL EMPIRES: A COMPARATIVE SURVEY FROM THE EIGHTEENTH CENTURY* 103 (1965); other citations and footnotes omitted).

306. *Johnson v. M’Intosh*, 21 U.S. 543, 588 (1823).

307. *E.g.*, Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 8 (2004); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992); Prakash, *supra* note 123, at 1071; *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 280 (1955); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 58 (1946)

language of the American myth of victory and destiny. As Walter McDougall wrote, “So, who are we, we Americans? . . . We’re a jealous people who react ferociously against all who dare interfere with our pursuit of happiness.”<sup>308</sup>

The American myth adopted by the Supreme Court in the Trilogy renders the continuing depredation of Indian legal interests more palatable to even the most sympathetic of observers. One commentator argued that older Indian land claims should not be compensable because modern history (read: the American myth) justifies the taking of Indian lands in exactly the way it happened:

[F]or any given historical period, there is simply no reliable way to untangle which property holdings or transactions were tainted by actionable wrongdoing and which (if any) were not. Thus, given what Jeremy Waldron has aptly called the “contagion of injustice,” no genuine attempt at full-scale rectification could be limited to those who directly engaged in overtly unjust acts of appropriation, particularly in a market-based system of exchange in which the impact of one transaction is communicated via the price system throughout the economy.

It follows that the ubiquity of past acts of injustice, coupled with the pervasive effects that such acts have over extended periods of time, makes it reasonable to assume that the material well-being of all living persons has been both enhanced and harmed in varying degrees by past acts of wrongdoing. Indeed, as many commentators have pointed out, as a practical matter, it is highly unlikely that anyone alive today would even exist but for the actual course of historical events.<sup>309</sup>

In other words, for all those settlers who went west and made names for themselves through adventure and bravery (and violence and duplicity, too), none of it would have happened if Indian lands weren’t dispossessed. This, of course, is another way of saying the “courts of the conqueror” cannot intervene in the dispossession of Indian lands. But the American myth made dispossession of Indian lands inevitable. Indian political strength was (and is) unthinkable:

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(Reed, J., dissenting); F.D.G. Ribble, Book Review, 11 VA. L. REV. 413, 414 (1925) (reviewing GEORGE BRYAN, *THE IMPERIALISM OF JOHN MARSHALL* (1924)).

308. McDougall, *supra* note 302, 18-19.

309. Samuel T. Morison, *Prescriptive Justice and the Weight of History*, 38 CREIGHTON L. REV. 1153, 1158 (2005) (emphasis added and quoting Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 11 (1992)).

On June 25, 1876, at the Battle of the Little Bighorn, the combined Indian forces of Sioux and Cheyenne warriors killed over half of the army troopers in the Seventh Cavalry Regiment. This Indian victory spawned a wave of American vengeance against any tribe that resisted settlement on a reservation under the watchful eye of federal troops.

Resymbolized as unfeeling, bloodthirsty savages who understood and respected only greater cruelty than they could inflict, the Indian peoples were successfully recharacterized by the federal government in a new light. No longer the impulsive, willful child who had to be placated with flowery promises and cheap trinkets, the Indian had been recast as the malevolent “other.” It was he—the treacherous, unscrupulous red-devil who raped white women for pleasure and burned wagon trains for entertainment—who merited extermination if he refused to settle on the reservation. It was he who would be forever engraved on the American consciousness as symbolizing the uncontrollable, and therefore dangerous, aspects of an uncivilized human nature. It was he who would be endlessly shot, stabbed, hung, starved, dismembered, buried or burned alive, without a tear shed, in those countless popular western melodramas passed off as the “dime novel” American epic of the Winning of the West.<sup>310</sup>

The American Myth, adopted as Supreme Court legend in the Trilogy, cannot coexist with tribal sovereignty and self-determination in this light. The genius of the Trilogy—the genius of John Marshall—was incorporating that myth into the Supreme Court’s nascent history. As American dominance over the continent grew, so did the Court’s legitimacy.

#### D. THE TRILOGY AS ECONOMIC CASE STUDY

Professor Eric Kades made an interesting and powerful argument that the dispossession of Indian lands by the European and then the American governments was done in the most efficient means possible, saving untold millions in extra land purchase costs.<sup>311</sup> According to Kades:

The rule of *M’Intosh* was part and parcel of a larger process: efficient (cheap) European expropriation of Indian lands. Just as many

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310. Raymond Cross, *Tribes as Rich Nations*, 79 OR. L. REV. 893, 905-06 (2000) (footnotes omitted).

311. See Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

contract, tort, property, and other legal rules promote efficient behavior, *M'Intosh* and a broad range of other colonial and early American laws created rewards and penalties that helped Europeans obtain Indian lands as inexpensively as possible. It is important to stress that the process minimized costs for European colonizers, not for the colonizers and Indians together. This is in contrast with most efficient legal rules that, *ex ante* at least, benefit all participants in a given activity.<sup>312</sup>

But, alas, the Doctrine of Discovery and the other rules used by Euro-Americans to divest Indians of their lands benefited everyone but the Indians. The efficiency—the “neat solution” to the problem of a free-for-all in Indian land speculation—was to “establish[] the United States as the sole purchasing entity.”<sup>313</sup> A Pareto-superior result—“a change in allocations that left at least one person better off and no one worse off”<sup>314</sup>—could not be and was not achieved under this legal regime. Perhaps the result fulfills the Kaldor-Hicks criteria, whereby “a move is efficient whenever the winners win more than the losers lose. . . .”<sup>315</sup> The value of the land generated after the sale to the American government (and then to American citizens and corporations) far, far exceeded the cost of the purchase of the land for the Americans at the time of sale,<sup>316</sup> to the direct detriment of the Indians. But that was okay from an economic perspective, since the Indians’ valuation of the land had no significant value that an economist could measure.<sup>317</sup>

The efficiency argument Kades makes has a great deal of logical power, but it has flaws and weaknesses and, ultimately, fails. One fundamental flaw with Professor Kades’ thesis is that it draws conclusions, based on the historical evidence, that are debatable and impossible to prove. Consider the outcome if *Johnson* had been decided the other way, that the first bona fide purchasers acquired title that was superior (Indian title) to the

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312. Kades, *Dark Side*, *supra* note 311, at 1104 (footnotes omitted).

313. *Id.* at 1112.

314. DAVID W. BARNES & LYNN A. STOUT, *THE ECONOMICS OF CONTRACT LAW* 11 (1992); see NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM AND BEYOND* 21 (2d ed. 2006).

315. Guido Calbresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 *YALE L.J.* 1211, 1221 (1991); see MERCURO & MEDEMA, *supra* note 314, at 26.

316. See Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 *J.L. & ECON.* 39, 43 (1994) (“[T]he marginal value of land to arriving whites greatly exceeded its value to Indian holders.”).

317. *But see* RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 357 (1990) (“I may desperately desire a BMW, but if I am unwilling or unable to pay its purchase price, society’s wealth would not be increased by transferring the BMW from its present owner to me.”).

later bona fide purchasers (the federal government interest). Why is this hypothetical result less efficient than the actual result?

Kades' thesis fails if viewed in this light. Kades argues that the land speculators making direct deals with Indians and Indian tribes would have competed with other land speculators, driving up the cost of land purchase in a classic prisoners' dilemma.<sup>318</sup> He asserts, "The United Companies [parties to the *Johnson* case], for instance, faced no rivals for the lands they sought to purchase, but had they earned fat profits, more competitors would inevitably have begun bidding for Indian lands."<sup>319</sup> But this ignores the established fact that everyone with a little bit of capital had been speculating in Indian lands since before the Revolutionary War. Horace Hagan reported:

The United States had experienced several periods of ardent land speculation. Never, however, has such a frenzy of land speculation gripped the entire country as in the days immediately following the acknowledgement of the independence of the colonies. From the highest to the lowest—from Washington himself to the humblest mechanic—speculation in the newly-acquired and unsettled Western lands was rife. The Mississippi Bubble was repeating itself. In such speculations, the vast fortune of Robert Morris, of Revolutionary fame, was swept away. By such speculations, the judicial ermine of that great statesman and jurist, James Wilson, was smirched. The frenzy was confined to no particular portion of the country. Massachusetts, Pennsylvania, and South Carolina were alike afire with the same fever.<sup>320</sup>

Even decades after the "frenzy" of land speculation began, speculators—many of them American officials—like the parties in *Johnson* were buying Indian lands for bottom dollar prices. And a good portion of these speculators were the people in power in the American government, a point not valued by Kades' efficiency analysis. Professor Banner reports:

Many American officials themselves were investors in Western lands. In an era before there were many business corporations, western land was the main speculative investment available in North America. Anyone with money and a taste for risk, including government officials, found western land attractive. Their interest was in acquiring land quickly and cheaply from the Indians so it

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318. See Kades, *Dark Side*, *supra* note 311, at 1112.

319. *Id.*

320. Hagan, *supra* note 52, at 3.

could be resold at a profit, which was exactly the interest of the settlers on the frontier, the people to whom the speculators hoped to sell the land. That had also been true before the Revolution, but then the power of American officials had been checked by the imperial government, which was staffed by men far less likely to have invested their money in western land.<sup>321</sup>

Given these facts, a theory, at least as plausible as Kades' thesis, is that the establishment of the rule in *Johnson* eliminated one purchaser—the itinerant land speculator—in favor of another—the federal government and its officials who stood to gain from the elimination of all other speculators' interests. The *Johnson* rule probably valued the land speculator with greater political ties to the federal government and its officials than the average speculator trailblazing through the woods and buying land from the Indians he or she encountered. This is one reason why Kades' thesis does not demonstrate why vesting title to Indian lands to the federal government as opposed to the Indians produced the more efficient result.

A second flaw in Kades' thesis is that it works, if at all, only for lands east of the Mississippi River. East of the river, "agriculture was the principal commercial activity . . . [and p]rivate property was thus well established . . ." <sup>322</sup> Where private property regimes were established, the transaction costs to purchasing land were lower and similar to the kind of land purchase contemplated by the *Johnson* rule, with Creek and Cherokee towns exemplifying this regime.<sup>323</sup> But west of the river:

[L]and and the resources on it were effectively a vast commons, because benefits of private ownership were less than for agricultural tribes, and the costs of enforcing any land claims comparatively great . . . . More often than in the east, whites in the west found tribes with no effective ownership of land; the only rights were usufruct and obtained by capture and possession.<sup>324</sup>

Anderson and McChesney, whose work inspired Kades' thesis in part,<sup>325</sup> imply that conquest (that is, violence) was a more efficient means of establishing property ownership in non-Indians west of the River.<sup>326</sup>

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321. BANNER, *supra* note 32, at 124.

322. Anderson & McChesney, *supra* note 316, at 61-62.

323. *See id.* at 62 (citing ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 13-14 (1989)).

324. *Id.*

325. Kades, *Dark Side*, *supra* note 311, at 1072.

326. Anderson & McChesney, *supra* note 316, at 63-64.

Professor Douglas Allen fills in the blanks in that analysis by arguing that the United States' promotion of homesteading was an efficient means of settling the West.<sup>327</sup> According to Allen:

By instigating homesteading, the U.S. government restricted the choices of settlers by providing an incentive to rush to *one area*. The sudden arrival of tens of thousands of people destroyed much of the Indian way of life and forced Indian tribes to accept reservation life or join the Union. The selective and intensive settlement caused by homesteading also reduced the cost of defending any given settlement.<sup>328</sup>

What Allen describes is not the application of the *Johnson* rule, but a policy of the federal government of forced confrontation between settlers (backed by the Seventh Cavalry) and the Indians by encouraging encroachment onto Indian lands through treaty violations. Kades downplays the violence of the Indian-white relations in the West,<sup>329</sup> but homesteading often was an intentional incitement to violence, what Kades calls the way of Machiavelli—or the inefficient way.<sup>330</sup> Anderson and McChesney supply this analysis:

As the zone of controversy shifted westward, however, much of the growing Indian-white violence could be traced to agency costs that made negotiated outcomes unenforceable. Most treaty violations were committed “not by leaders of the United States or of the Indian tribes but rather by members of these groups who could not be controlled by the leadership, or more accurately, who could be controlled only at extremely high cost . . . .

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Treaties signed in good faith by white politicians proved to be unenforceable, as individual whites violated them with impunity . . . . The problem lay with the national government's inability to defend local property rights against local white citizens—a difficulty described as “a massive principal-agent problem.” . . . Also, government employees were notoriously faithless agents,

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327. See Douglas W. Allen, *Homesteading and Property Rights, or, “How the West Was Really Won,”* 34 J.L. & ECON. 1 (1991). Anderson, for one, rejects the efficiency of the Homestead Act. See also Terry L. Anderson & Peter J. Hill, *Cowboys and Contracts*, 31 J. LEGAL STUD. 489, 506-13 (2002); Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American “Ownership Society,”* 79 S. CAL. L. REV. 45, 103 n.149 (2005).

328. Allen, *supra* note 327, at 5 (emphasis in original).

329. Kades, *Dark Side*, *supra* note 311, at 1131-40.

330. See *id.* at 1138-39.



frequently depriving Indians of the consideration due them under treaties. Reservation Indians' raiding local white settlements was frequently viewed not as a treaty violation but as self-help in the face of whites' breach of contract in failing to deliver monetary and in-kind payments promised under treaties.<sup>331</sup>

Given these factors, how was federal ownership of Indian lands (the *Johnson* rule) more efficient? If the Indians retained title to their lands, they would have sold the lands as they saw fit to the non-Indians, represented by the United States in accordance with the Nonintercourse Acts.<sup>332</sup> No one ever complains about the Indians breaking every treaty ever signed. As Professor Rob Williams showed in comprehensive detail, Indians respected treaties and, to this day, seek only to enforce them.<sup>333</sup> One could make a plausible argument that recognizing Indian title in Indian lands would have nullified the need for homesteading or violence or threat of military force. Kades would be hard pressed to find histories of Indian tribes who ceded their lands, only to come back later and demand those lands back by threatening violence. It makes no logical sense to conclude that federal government ownership of Indian lands was more efficient than tribal ownership of Indian lands. But it makes more logical sense that conflict and transaction costs increase dramatically when one party to a land sale (the United States) asserts a highly doubtful and probably illegitimate interest in land in comparison to a land sale where the sellers and the buyers both agree that the sellers own the land. As Anderson and McChesney argue, "For trade to occur, property rights must be well specified and divestible, and agreements enforceable. Otherwise, increased transaction costs will reduce the surplus from negotiation and increase the likelihood of conflict."<sup>334</sup>

The transaction costs in the "efficient" world Kades describes (which is what actually happened) would seem to be higher than in the alternative world. In the Kades world, the United States negotiators do not believe that their negotiating partners, the Indians, retain title to their lands. At worst, they treat the negotiations as a joke or a salve to placate the Indians; at best, they drive a hard bargain on price, safe in the knowledge that the Indians don't have a leg to stand on in terms of title or that the Indians would soon die off from disease or starvation. After the sale, the United States and the

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331. Anderson & McChesney, *supra* note 316, at 63-64; *see also id.* at 61 ("[W]hen whites encountered a tribe without well-defined rights, they would have no choice but to raid.").

332. *See* 25 U.S.C. § 177 (2000).

333. *See generally* ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800* (1997).

334. Anderson & McChesney, *supra* note 316, at 53.

American citizens still don't think the Indians own title to the land they retain, so they tend to disrespect the borders of retained Indian lands. Moreover, because they sold the land for such a low price and under other harsh terms, the Indians' welfare declines. Conflict ensues, with the Americans feeling righteously indignant because they know that the Indians don't own the land they're claiming. The Indians, having nothing to lose, fight to extermination. Kades, somehow, argues that this is the more efficient outcome.

In the alternate world, where the *Johnson* rule is reversed, despite Kades' thesis, transaction costs would be lower or, at worst, equivalent. In this world, the United States negotiators treat the negotiations as real, as a legitimate attempt to reach a meeting of the minds. The land purchase agreements are more evenly weighted, with higher prices for the land and better terms, allowing the Indians to better fend for themselves on their retained lands. Federal officials, one would hope, respect the land interests of the Indians more because they own their land. The "measured separatism"<sup>335</sup> of the time could come to fruition, in theory, depending on the Americans' willingness to quench their greed and attitudes toward expansion.

Kades' thesis suffers from one last problem. Kades' thesis could be restated as this: (1) Americans and their government did not believe Indians were competent enough, or trustworthy enough, or likely to engage in land sale transactions; (2) an efficient way to ensure that non-Indians recognize *amongst themselves* the property interests acquired from Indians is to agree to a system of rules *amongst themselves* (the *Johnson* rule); and (3) use violence, homesteading, and whatever other means necessary to enforce those rules against the Indians. Kades argues that this system was the most efficient way to dispossess Indian land holdings from the Indians. The first part of this restatement is implicit in every portion of Kades' *Dark Side* article—that Indians were incompetent, not trustworthy, and wouldn't sell their lands as often as the non-Indians wanted. This was the "problem" of the American frontier for every American administration well into the twentieth century. The underlying assumption of Kades' efficiency thesis and every other argument in favor of dispossessing Indian tribes of their lands is that the Indians were inferior.

In sum, Kades' thesis is a mere justification, via superficial efficiency and historical analysis, of the "lawyer's history" of Indian lands dispossession as it occurred. It's impossible to disprove *because the American*

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335. WILKINSON, AMERICAN INDIANS, *supra* note 2, at 113.

government precluded any other option with which to compare, thanks to the *Johnson* rule. And a thesis that cannot be disproved is no thesis at all.<sup>336</sup>

Regardless of the merits of Kades' thesis and my rebuttal, the discussion allows for students of Indian law to become acquainted with the rise of law and economics in the academy and, to some extent, in the practice of law. Even the conquest of Indian lands lends itself, for some, to an efficiency analysis. Moreover, the increased use of efficiency analysis has brought a return to the calls for breaking up Indian reservation lands and allotting them to individual Indians.<sup>337</sup> From one disaster to another.

#### E. THE TRILOGY AS CANON AND ANTI-CANON

A final assessment of the Trilogy requires the answer to the question of whether the Trilogy should be studied at all. In short, yes, the Trilogy should be studied. But the Trilogy is a study in contradiction. Depending on one's point of view or political leanings, portions of the Trilogy—whether they be the direct holdings, Chief Justice Marshall's dicta, or even portions of the opinions of the other Justices—are part of the canon of American Indian law, even American law.<sup>338</sup> *Worcester* often fits in with *Marbury*,<sup>339</sup> Justice Holmes' dissent in *Abrams v. United States*,<sup>340</sup> and *Brown v. Board*.<sup>341</sup> Other portions or even the same portions may be, for others, part of the anti-canon of American Indian law. *Johnson v. M'Intosh*

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336. See Samuel J. McNaughten, *What is Good Science?*, 13 NAT. RESOURCES & ENVT. 513, 516 (1999).

The single most important aspect of good experimental design that tests a null hypothesis is the requirement that the experimenter's hypothesis be capable of being disproved by the experiment. To allow a hypothesis of causation to be disproved, the scientist must allow an equal opportunity for the truly opposite, or null, hypothesis to be proven.

*Id.* Compare *id.*, with POSNER, *supra* note 317, at 365 (restating the argument, but not finding it convincing as applied to economics).

337. See, e.g., John Tierney, *Bureaucrats and Indians*, N.Y. TIMES, June 28, 2005, at A23. Tierney restated Terry L. Anderson's argument that

[t]he system leaves Indians with little incentive to work their land or extract the maximum value by improving it. Not surprisingly, Dr. Anderson finds that trust lands are only half as productive as the other parcels of private land on the reservation that were given outright to Indians under the old system.

*Id.*

338. See generally Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 927-29 (2003); Jack M. Balkin, *The Use That the Future Makes of the Past: John Marshall's Greatness and Its Lessons for Today's Supreme Court Justices*, 43 WM. & MARY L. REV. 1321, 1326-27 (2002); Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 487, 496 (2002).

339. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

340. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

341. 347 U.S. 438 (1954).

is listed with *Dred Scott*,<sup>342</sup> *Plessy*,<sup>343</sup> and *Lochner*.<sup>344</sup> For others, the Trilogy is both at the same time, sort of an older *Roe v. Wade*,<sup>345</sup> reaching proper results, but butchering the law in order to do so.<sup>346</sup>

The Trilogy is a microcosm of the contradictions of federal Indian law. There are no clear winners or losers. Consider *Santa Clara Pueblo v. Martinez*.<sup>347</sup> In my sex discrimination class in law school, Professor Catharine MacKinnon described *Martinez* as one of the few times the Supreme Court upheld tribal sovereignty, but they did so at the expense of a woman and her children.<sup>348</sup>

So it goes with the Trilogy. The seeds of federal government recognition of tribal sovereignty are there, but so are the seeds of state intrusion into Indian Country. So much derives from the Trilogy that Vine Deloria and Clifford Lytle remarked, “Marshall’s views in [*Worcester*] established the foundation upon which much of the idea of federal responsibility over Indian affairs is built.”<sup>349</sup> While there is no doubt that the Trilogy is the foundation of federal Indian law, there is a great deal of dispute over whether tribal advocates should even rely upon (read: legitimize) the Trilogy.<sup>350</sup> But there is another view, as suggested by Professor Frank Pommersheim:

I think one of the ways of reading and thinking about the Marshall trilogy is as suggesting a compact theory. Such a theory suggests that there is a meaningful and almost equal, perhaps even equal, relationship between the federal government and Indian tribes. One of the themes I think you find in treaties is that they represent a compact between two sovereign groups of peoples, even if not

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342. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

343. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

344. *Lochner v. New York*, 198 U.S. 45 (1905).

345. 410 U.S. 113 (1973).

346. *E.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). *Cf.* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (making a similar argument about *Brown v. Board*).

347. 436 U.S. 49 (1978).

348. *See generally* CATHARINE A. MACKINNON, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63 (1987). *But see generally* Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL’Y 97 (2004); Gloria Valencia-Weber, *Santa Clara Pueblo v. Martinez: Twenty-five Years of Disparate Cultural Visions*, 14 KAN. J.L. & PUB. POL’Y 49 (2004). *Cf.* Angela R. Riley, *Santa Clara Pueblo: Tribal Sovereignty in a Post-9/11 World*, 82 N.D. L. REV. 953 (2006).

349. DELORIA & LYTLE, *supra* note 48, at 30.

350. *E.g.*, WILLIAMS, *LIKE A LOADED WEAPON*, *supra* note 273; Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75 (2002); Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899 (1999).

equal in terms of power. An essential part of that compact was the recognition of mutual sovereignty. There really are two sovereigns standing on each side of the manifold set of treaties made between Indian tribes and the federal government. In the Marshall trilogy—and this is where I think the crux of Indian law is today—there is a critical reading of *Cherokee Nation* and *Worcester* that describes a compact between the tribes and the federal government.<sup>351</sup>

Students should realize at the outset that the Trilogy is both boon and anathema. And reasonable and intelligent minds can differ on the question.

#### IV. CONCLUSION—THE DANGERS OF READING THE TRILOGY TOO CLOSELY

Despite the breadth of this essay, it would be a mistake to depend too much on the Trilogy—or to blame too much on the Trilogy. The best appellate advocates know that the oral argument before the Supreme Court or other appellate courts is a conversation with the Justices or the judges, a conversation intended to persuade, not to instruct. In the context of federal Indian law, it appears that in order to win a case before the Supreme Court, tribal advocates must demonstrate that the tribal interest implicates an important constitutional concern.<sup>352</sup> Tribal interests almost always bump up against state or local government interests, or federal government interests, or private, non-Indian interests.<sup>353</sup> For the Court, as it has always been, these non-tribal interests are very important. It is tempting to quote *Worcester*'s assertion that state law has no “force” in Indian Country<sup>354</sup> to

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351. Frank Pommersheim, *Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts*, 14 T. M. COOLEY L. REV. 457, 458-59 (1997) (footnotes omitted).

352. *Contra* Lawrence Lessig, *How I Lost the Big One*, LEGAL AFF., Mar.-Apr. 2004, at 57, 59.

Our case had been supported from the very beginning by an extraordinary lawyer, Geoffrey Stewart, and by the law firm he had moved to, Jones, Day, Reavis & Pogue. There were three key lawyers on the case from Jones Day. Stewart was the first; then, Dan Bromberg and Don Ayer became quite involved. Bromberg and Ayer had a common view about how this case would be won: We would only win, they repeatedly told me, if we could make the issue seem ‘important’ to the Supreme Court. It had to seem as if dramatic harm were being done to free speech and free culture; otherwise, the justices would never vote against “the most powerful media companies in the world.”

*Id.*

353. *E.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (tribe versus state); *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (tribe versus state and local government and private individuals); *United States v. Navajo Nation*, 537 U.S. 488 (2003) (tribe versus federal government); *Nevada v. Hicks*, 533 U.S. 353 (2001) (tribe and tribal member versus state official).

354. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

the Supreme Court, but such an assertion doesn't implicate an important constitutional concern. In *Worcester*, it did—federalism. But in the modern Court, when the Justices do not want to respond to the *Worcester* argument, there is nothing that would compel them to<sup>355</sup>—except for an important constitutional concern. In other words, the Trilogy alone is meaningless to a tribal advocate arguing before the Court.

There's a lot of great language in the Trilogy that supports tribal advocates and a lot of language that supports those who oppose tribal interests for whatever reason, but to place a client's interests on the slender reed of the Trilogy is no longer an option. In other words, read the Trilogy closely, but don't bring the Trilogy with you when you're facing Chief Justice Roberts. It is a useful thing for a student to know that advocacy is more than iterating precedent to the Court.

To return to the metaphor of the 200-year-old house described in Louise Erdrich's poem, *The Ritual*, the Marshall Trilogy houses the foundation of federal Indian law. This house's many rooms contain the various doctrines of law that form the substance of federal Indian law, but 200-year-old homes do not age well unless they are updated and retrofitted to include the newest improvements in housing technology. The house that is the Marshall Trilogy does not appear to have been improved. Instead, new rooms have been added to the core, a core that is still aging and rotting away. And no matter how nice the new rooms might be, it is always cold inside the core of that house, an iron cold of the deepest night.

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355. See JED RUBENFELD, *REVOLUTION BY JUDICIARY* 5 (2005) ("In constitutional law . . . there are no such overarching interpretive precepts or protocols. There are no official interpretive rules at all."). *But see* Lessig, *supra* note 352, at 62.

I first scoured the majority opinion, written by Ginsburg, looking for how the court would distinguish the principle in this case from the principle in *Lopez*. The reasoning was nowhere to be found. The case was not even cited. The core argument of our case did not even appear in the court's opinion. I couldn't quite believe what I was reading. I had said that there was no way this court could reconcile limited powers with the commerce clause and unlimited powers with the progress clause. It had never even occurred to me that they could reconcile the two by not addressing the argument at all.

Id.