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Jill Norgren

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PROTECTION OF WHAT RIGHTS THEY HAVE: ORIGINAL PRINCIPLES OF FEDERAL INDIAN LAW

JILL NORGREN*

*Professor of Government, John Jay College of Criminal Justice, City University of New York. B.A. 1965, University of Pennsylvania; Ph.D. 1974, University of Michigan. I wish to thank

I. INTRODUCTION

Early in the nineteenth century, federal courts began to adjudicate cases that required dealing, first, with the nature of Native American land title, and later, with tribal autonomy and sovereignty. Led by Chief Justice John Marshall, the "mid-wife" of federal Indian law,[1] the United States Supreme Court developed the legal framework that underlies tribal property rights and political sovereignty within the United States. These original principles of federal Indian law were established in a series of Supreme Court decisions ending with *Worcester v. Georgia*[2] in 1832.[3] Although it drew upon European and colonial precedent and authority, the Marshall Court created its own unique vision of United States-Native American relations.

These original principles govern federal Indian law to this day. However, by narrowing and misapplying these principles, or making selective use of precedent, subsequent federal courts have justified federal Indian policies that often were not consonant with the original premises and tenets.[4]

This Article first describes the international law and colonial history that influenced the Marshall Court in the half-dozen early cases critical to the development of federal Indian law. Next, the doctrines in these early cases are described and compared with one

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1. G. Lester, The Territorial Rights of the Inuit of the Canadian Northwest: A Legal Argument 175 (1981) (unpublished dissertation: York University).

2. 31 U.S. (6 Pet.) 515 (1832). For a discussion of *Worcester,* see *infra* notes 176-222 and accompanying text.

3. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson V. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Perhaps because John Marshall authored all four opinions for the Court, many authors present the sequence of cases as a self-contained unit of early federal Indian law. *See, e.g.,* Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality,* 21 STAN. L. REV. 500-02 (1969). Marshall, however, also penned the decision in a case touching upon tribal sovereignty, *New Jersey v. Wilson,* which is discussed less often. *See* New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812). The Court had also accepted the appeal of Corn Tassel, a Cherokee accused of murder, in 1830, but Georgia defied federal judicial power and executed him before the Court could rule on the case. This appeal was intended by the Cherokee Nation and its lawyers to be the original test of sovereignty but that test had to wait until *Cherokee Nation v. Georgia* subsequently was filed. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). For a discussion of *Cherokee Nation,* see *infra* notes 139-74 and accompanying text. The frequent use of *Worcester* as a capstone case has been encouraged by its fine tuning of earlier points of law concerning tribal sovereignty and property rights.

4. *See generally* Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations,* 132 U. PA. L. REV. 195 (1984) (analyzing subsequent supreme court opinions which undercut the view of federal power and Indian sovereignty developed in *Johnson* and *Worcester*).

another. Finally, judicial application of these original principles in the decades immediately following the Marshall Court is analyzed. In the period from the mid-1830s to the mid-1970s there was continuous litigation by, and against, Native American governments. A foundation of case law developed from the Supreme Court decisions of this era characterized by judicial schizophrenia. These decisions, by failing to be consistent, and slowly eroding the intent of the original principles, facilitated dramatic reworking of fundamental principles later in the nineteenth century when the United States pursued policies meant to assimilate Native Americans and terminate tribal government.

II. LAW AND THE EARLY EUROPEANS IN THE NEW WORLD

The autonomy and sovereignty asserted by contemporary Native American governments rests upon historical facts, legal agreements, and ongoing political relations. The presence of Native Americans on the North American continent prior to the arrival of whites is basic to claims of sovereignty. The order of arrival stands as virtually the only undisputed fact of Indian-White relations. By the twentieth century, however, the order of arrival had become a curious piece of information — obvious but commonly dismissed. Nevertheless, as the basis of tribal sovereignty and aboriginal land title, it is the key to subsequent political events and legal principles.

The Europeans who colonized North America in the sixteenth, seventeenth, and eighteenth centuries came for a variety of purposes ranging from gold and trade to permanent settlement.[5] They brought a European ethnocentrism, a desire for wealth, and dealt with aboriginal occupation of North American land in different ways.[6] Eventually, the European nations settled upon treating Native American nations as autonomous, although alien cultures. Through diplomatic — nation to nation — exchanges,

5. *See* S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 17-33 (1965) (discussing the European discovery of America).

6. In the early years of the New World conquest, in their search for valuable minerals, the Spanish often attempted to enslave indigenous people, imposing the system know as *encomienda;* settlement was generally not a primary goal but religious conversion was. *See* L. HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA 19-20, 23-25 (1965). In contrast, Englishmen came as permanent settlers, the French as traders, missionaries, and sometimes settlers, but neither made Native Americans subject people in the early years of settlement. The Spanish crown established a highly centralized law to govern Spanish America. S. MORISON, *supra* note 5, at 38. The British Crown, however, was far more lackadaisical in the concern paid to centralized control of colonial-Native American interactions. *Id.*

land boundaries were outlined and trade relations encouraged. Western European nations also vied for political and military alliances with certain tribes, occasionally causing the Native Americans, ironically, to become agents in the Europeans' struggle to dominate the North American continent.

When the United States Government came into existence, a body of law already existed that incorporated many of the premises upon which the Nation built its legal and political relationship with the Native American governments of the continent. Indeed, the use of law in dealings with tribes was a central premise inherited from European colonial governments.

A. THE SPANISH

The Europeans' use of law as one principle of foreign relations with Native American governments had a long history.[7] Shortly after the Spanish began explorations of the New World, the Spanish monarchy applied for, and obtained, an official document from the Pope known as a papal bull — Inter Caetera of May 3, 1493 — by which the Spanish Crown received "forever" all that Columbus had discovered.[8] In these early years of exploration, the Papacy functioned both to assign lands, and to delimit a theological law of nations and relations with indigenous people.[9] Throughout the sixteenth century, Spanish rulers convened formal boards of inquiry to consider what, if any, rights were due the indigenous people of the newly discovered continent. These inquiries focused upon what actions, including war and enslavement, could be properly pursued in the name of Christianity and the Crown.[10]

In the broadest sense, two positions developed out of these inquiries. One school argued that the so-called Indians were inferior or even inhuman and, thus, marked from birth for subjugation.[11] In contrast, even as they acknowledged the Indian as

7. *See* W. WASHBURN, RED MAN'S LAND, WHITE MAN'S LAW 3 (1971).

8. W. WASHBURN, *supra* note 7, at 5; L. HANKE, *supra* note 6, at 25.

9. W. WASHBURN, *supra* note 7, at 4-6; AMERICAN INDIAN POLICY REVIEW COMMISSION, TASK FORCE ONE: TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP 88-90 (1976) [hereinafter THE FEDERAL-INDIAN RELATIONSHIP]. This theological law was influential only among certain Catholic heads of state. *Id.* at 89. Anti-Catholic bias led governments as well as jurists to disclaim the influence of the Spanish and the Catholic Church in the development of law as it applied to the treatment of indigenous people. *Id.* at 89.

10. *See* F. DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 120, 143 (E. Nys ed. 1917); L. HANKE, *supra* note 6, at 25-26.

11. L. HANKE, *supra* note 6, at 11. Gonzalo Fernández de Oviedo was among the school that believed Indians were inferior to whites, as evidenced by his following statement:

> [The Indians are] naturally lazy and vicious, melancholic, cowardly, and in general a lying, shiftless people. Their marriages are not a sacrament but a sacrilege. They are

a primitive nonbeliever in need of conversion, theologians and missionaries like Franciscus de Victoria and Bartolome de Las Casas asserted a message of brotherhood, and Indian sovereignty and property rights.[12]

Victoria's writings, emphasizing the Indians' right to be recognized as the "true owners" of the lands they occupied, whose "dominion can not be denied to them" set a critical tone in the debate.[13] Victoria wrote that "even those who attribute lordship over the world to the Emperor do not claim that he is lord in ownership, but only in jurisdiction, and this latter right does not go so far as to warrant him converting provinces to his own use or in giving towns or even estates away at his pleasure."[14] Victoria's analysis granted that Europeans held a right to travel, trade, and declare the Gospel among the Indians under the law of nations and divine law, but he denied that discovery by the Spanish conveyed title to Indian land since the Indians already owned such land.[15] Victoria also argued that barring a just war, as defined by the law of nations, the Spanish Crown could not wage war against Indians and therefore could not claim any rights by conquest.[16] Although not always heeded by his own government, Victoria's opinions influenced the development of an international law of exploration in the following two centuries — a body of law that had to be reckoned with by the new government of the United States in the formulation of original principles of Indian law.[17]

> idolatrous, libidinous and commit sodomy. Their chief desire is to eat, drink, worship heathen idols, and commit bestial obscenities. What could one expect from a people whose skulls are so thick and hard that the Spaniards had to take care in fighting not to strike on the head least their swords be blunted?

Id.

12. *Id.* Bartolome de Las Casas was among the "noble Indian" group, as evidenced when he stated:

> God created these simple people without evil and without guile. They are most obedient and faithful to their natural lords and to the Christians whom they serve. They are most submissive, patient, peaceful and virtuous. Nor are they quarrelsome, rancorous, querulous or vengeful. Moreover, they are more delicate than princes and die easily from work or illness. They neither possess nor desire to possess worldly wealth. Surely these people would be the most blessed in the world if only they worshipped the true God.

Id.

13. F. DE VICTORIA, *supra* note 10, at 128.

14. *Id.* at 134.

15. *Id.* at 139.

16. *Id.* at 143-44.

17. Victoria's theories received support in the papal bull of 1537 and later in the Spanish Laws of the Indies (1594) which, in turn, are part of a body of law that comes to have importance as moral force and specifically, as provisions, in treaties. *See* THE FEDERAL-INDIAN RELATIONSHIP, *supra* note 9, at 90. United States federal Indian law, in turn, was influenced by this body of thought and law. *Id.* A United States Task Force has stated:

B. THE DUTCH AND THE BRITISH

By political example and legal treatise, the Dutch and then the British also influenced the early development of United States Indian law contributing, among other legal principles, the practice of acquiring Native American land by treaty. The Dutch followed this path in order not to antagonize Native Americans as trading partners.[18] Felix Cohen has argued that the Dutch practice of entering treaties for Native American land expressed three critical premises, articulated in the early seventeenth century document prepared for the Dutch West Indies Company, which declared: (1) that both parties to the treaty were sovereign powers; (2) that the Indian tribe had a transferable title to the land under discussion; and (3) that the acquisition of Indian lands could not be left to individual colonists but must be controlled by the larger institution of government, or the Crown itself.[19]

Great Britain also made efforts to acquire land by treaty, but British colonists, at least the large landowners, generally were not cooperative. Roger Williams was one of the few who "dared to dismiss European claims to American soil as unjustified and illegal if the prior right of the Indian was not recognized."[20] Full title, according to the Rhode Island leader, resided in the tribe. Greed apparently prevailed, however, as defiant Englishmen negotiated illegal land deals creating chaos in Native American and colonial communities.[21] The Crown periodically attempted to assert direct

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> The Spanish law and Catholic doctrines do have fundamental importance to the questions of Indian affairs...partly because of their past presence in territories which ultimately were to become part of the United States;...because their prior laws have relevance to rights succeeding their departure or land cessions to other nations; and because of the provisions of treaties between the various nations affecting the rights of Indian people.

Id. Cohen argued that Victoria's declaration of human rights is restated in the Northwest Ordinance. *Id.* He also writes that while Victoria was not directly cited in early opinions of the United States Supreme Court, opinions dealing with Native American property rights and sovereignty often refer to the writings of Grotius and Vattel "that are either copied or adapted from the words of Victoria." F. COHEN, THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 248 (1960).

18. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47 (1942).

19. *Id.*

20. Washburn, *The Moral and Legal Justifications for Dispossessing the Indians,* SEVENTEENTH-CENTURY AMERICA 15, 25 (Smith ed. 1959). As early as 1684, colonial New York required approval by the Governor of individual land purchases from tribal governments. Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims,* 31 ME. L. REV. 17, 21 (1979).

21. Some land deals with Native Americans who did not know the language and terms of land agreements were characterized by fraud. Competition among colonists and lack of centralized control by the Crown also resulted in overlapping claims. Government and speculators, for example, would sell land to immigrants. F. COHEN, *supra* note 18, at 47; G. NAMMACK, FRAUD, POLITICS, AND THE DISPOSSESSION OF THE INDIANS: THE IROQUOIS LAND FRONTIER IN THE COLONIAL PERIOD 17-18 (1969); F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 6 (1962); W. WASHBURN, *supra* note 7, at 41.

central control of land policy in order to encourage the orderly growth of the empire. It worried, for example, that the purchase of property within tribal territory by individual colonists placed these British subjects under tribal authority.[22] The British government also saw the legal instrument of treaties as a way of keeping peace with tribal governments and, thus, keeping the tribes out of the French political orbit.[23] Neither of these foreign governments worried that indigenous systems of law held fundamentally different notions of, for example, land tenure.[24]

III. REVOLUTIONARY AND TRANSITION YEARS

The new Americans had no doubts about the propriety of asserting western law as the legal *lingua franca* of negotiations with Native Americans. In addition they felt the need for legal relations reflected acceptance of earlier colonial practice. Moreover, the use of law also expressed an understanding, at least on the part of most national officials, of the impossibility of conquering the tribal governments. Physically exhausted from the war with England, lacking a national treasury, and still facing competition from European sovereigns, the early decades of the American Republic were marked by a pragmatic appreciation of the utility and necessity of lawful and diplomatic relations with tribal

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22. R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 37 (1980). In 1753 the Board of Trade in London began instructing certain colonial governors that they should bar future purchases of Indian land by private individuals. 1 F. PRUCHA, THE GREAT FATHER 22 (1984). This order was generalized in 1761. *Id.* Preliminary steps were taken in 1755 to remove Indian affairs from the colonial governments and to centralize political control in the imperial government. *Id.* at 21. In a major effort to establish a central policy for the management of Indian affairs, George III announced in 1763 a formal boundary between the British colonies and the Indian nations to the West and ordered that no warrants for survey or patents for lands be issued beyond this line. *Id.* at 23. A year later the Board of Trade proposed a plan for the licensing of trade with the Indian nations, but the plan was never formally adopted. *Id.* at 26.

23. G. NAMMACK, *supra* note 21, at 17. The European crowns-of-state who sought to establish colonial empires in the New World understood the potential political and military weight of the Indian nations. *See* G. BEER, BRITISH COLONIAL POLICY 252 (1907). In the war of the French and British in 1754, and in our own Revolutionary War, Indian nations were wooed by both sides as allies who could make a difference in the outcome of war.

24. Native Americans shared neither the Europeans' feudal nor common law traditions regarding sovereignty and property. Nor had they been permitted to contribute to the development of the so-called "international" law of nations. The indigenous tribes had no knowledge of Victoria, Vattel, Blackstone or Locke. But they had, with variations, legal systems of their own. For the most part, these indigenous systems of law stressed communal use of land by related people and individual use of personal property. Systems of citizenship, decision-making, and leadership varied: there were small and organizationally simple tribes like the Shoshone, aggressively competitive people like the Kwakiutl, and large supernations perhaps best represented by the Iroquois League. The European value of trading land as capital was alien to Native American tribes. *See generally* P. FARB, MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE 3-9 (1968) (discussing the diversity of customs, laws, and beliefs among the various Indian tribes).

governments.[25] The United States nonetheless ignored Native American systems of law and what they might have contributed to an international law of property and jurisdiction for the North American continent, proceeding rather with a Euro-centric inquiry--an inquiry that sought principles to allocate power and property among four sets of governments: The Indian nations, the United States and its state governments, and the European "competitors."

The European nations had treated tribal governments as sovereign political communities. The Continental Congress adopted this principle of nation to nation diplomacy, seeking treaties of peace and friendship with tribal governments. Such relations were not easily accomplished, however, as the British had already drawn many tribes into alliances.[26] In addition, many tribes were "as reluctant as other nations to stake their future on an untried, radical 'new order'."[27] Nevertheless, the revolutionary government negotiated a small number of treaties of nonaggression and friendship, including one with the Delaware Tribe in September of 1778,[28] and the alliances with northeastern tribes whose fighting significantly affected the outcome of the war and ultimate land boundaries.

During this period the Continental Congress struggled to wrestle control of the surveying, sale, and governance of western lands (Indian lands) from both state governments and private land companies. Fears of lost revenue, as well as political hegemony, led the national government to establish a frontier policy. A policy was spelled out first in a 1783 proclamation of the Continental Congress,[29] and later in the 1787 Northwest Ordinance, by which the Congress sought to establish nationally directed Indian relations, and to establish peace.[30]

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25. The Continental Congress, and subsequently the government of the United States, conducted nation to nation diplomacy with Native American governments. Alliances were sought with certain Indian governments in the war against Great Britain. Treaties became the primary mechanism of legal relations beginning with the 1778 treaty of alliance with the Delaware nation. *See* Treaty with the Delawares, Sept. 17, 1778, United States-Delaware Indians, 7 Stat. 13; *see also* F. COHEN, *supra* note 18, at 47-62 (discussing a history of Indian treaties).

26. F. PRUCHA, *supra* note 21, at 10, 26-28.

27. R. BARSH & J. HENDERSON, *supra* note 22, at 32. Prucha comments that in contrast to the land purchase and trade abuses of local colonists, the concerned record of imperial officials disposed the tribes to the Crown rather than the Continental Congress. F. PRUCHA, *supra* note 22, at 39-40.

28. Treaty with the Delawares, Sept. 17, 1778, United States-Delaware Nation, 7 Stat. 13.

29. *See* Proclamation of the Continental Congress, Sept. 22, 1783, JOURNALS OF THE CONTINENTAL CONGRESS 24:264 and 25:602 (1922).

30. Northwest Ordinance, July 13, 1787, ch. 8, 1 Stat. 50. Specifically, article III of the Northwest Ordinance provides, in relevant part:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property,

As the first full policy statement governing relations with Native American governments. the Northwest Ordinance was critical to the development of a federal Indian law.[31] The ordinance created what a United States commission subsequently described as a "principled 'bill of rights' for the Indian Tribes, declaring 'their property, rights and liberty' as being inviolate to unconsented invasions or disturbances."[32] It is notable that a 1537 papal bull was, almost word for word, the source of that part of the Ordinance dealing with Native American relations.[33] Together with the treaties of peace and friendship, the Northwest Ordinance affirmed an early framework of relations built upon the laws of nations. It also underscored the central role of the national government rather than state governments, or private companies, in the conduct of diplomacy and law with tribal governments.

The same year, the Constitutional Convention confirmed this principle of national relations by assigning Congress the power "to regulate commerce...with the Indian Tribes."[34] The assignation of such power to the national government followed logically from earlier policy: In 1775 the incipient American Government had divided "Indian country" into three departments for the purpose of nationally directed trade and diplomacy, and the 1777 Articles of Confederation specifically provided for the national direction of relations between the new confederation and tribal governments.[35]

> rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Id. at 52. Men like Washington, Knox, and Jefferson were instrumental in the development of these policies. F. PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 1, 11, 21 (1975). Washington, for example, wrote to James Duane, on September 7, 1783: "I am clear in my opinion, that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country....In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence [sic], and without that bloodshed...." *Id.* at 2.

31. *See* Northwest Ordinance, July 13, 1787, ch. 8, 1 Stat. 50.

32. FEDERAL-INDIAN RELATIONSHIP, *supra* note 9, at 81.

33. *Id.* at 90. Dominican Bernardino de Minaya travelled from Peru to Rome seeking Pope Paul III's support of a policy prohibiting exploitation of the Indians of the New World. W. WASHBURN, *supra* note 7, at 13. After Minaya's audience with the Pope, the Pope issued a papal bull, *Sublimis Deus,* on June 9, 1537, providing in part:

> [T]he said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ...nor should they be in any way enslaved; should the contrary happen it shall be null and of no effect.

Id.

34. U.S. CONST., art. I, § 8, cl. 3.

35. ARTICLES OF CONFEDERATION, art. IX, para. 4 (1777). Article IX, paragraph 4 of the Articles of Confederation provided, in relevant part:

Congress made immediate use of this power by writing the Indian Trade and Intercourse Act of 1790 which mandated federal approval of any purchase of tribal land[36] — a move meant to end the practice of state governments entering diplomatic relations and obtaining land cessions from tribal governments.[37] To regulate the activities of American traders, which often destabilized and confounded United States-Native American diplomacy, the statute further initiated a trade licensing system.[38] The Trade and Intercourse Act also codified existing treaties,[39] a victory for those who argued the wisdom of applying the standards of international law to all dealings with Native American nations.

Thus, in laws of its own making, the early United States Government asserted the sovereign national status of Native American tribes. The United States sought out tribal governments for the purpose of international treaties of alliance, as well as for the legal transfer of title to land. Read together, these treaties, the Northwest Ordinance and the Trade and Intercourse Act, expressed principles of an early federal Indian law. These principles represented a critical commitment to law over raw power at precisely the time when the pressure for more land among whites was growing, and questionable land speculation deals were on the rise in the United States.[40] Indeed, land was a major source of capital for both the states and the new nation. Several states had financed their Revolutionary War costs through the sale of Indian land grants.[41] In the first case discussed below, *Fletcher v. Peck,*[42] one reason Georgia was anxious to accept the bid made by land speculators was her desperate need for funds with which to pay the militia.[43]

The competition for tribal land among whites prompted the United States Supreme Court to discuss federal Indian law, and

> The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the...trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated....

Id. The Articles of Confederation were not ratified and in force until 1781 because Maryland had refused to ratify. F. PRUCHA, *supra* note 21, at 31.

36. Indian Trade & Intercourse Act, July 22, 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (1982)).

37. *See id.* at 137.

38. *Id.*

39. *See id.*

40. *See id.;* Northwest Ordinance, July 13, 1787, ch. 8, 1 Stat. 50; Indian Trade & Intercourse Act, July 22, 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (1982)).

41. Clark v. Smith, 38 U.S. (13 Pet.) 195, 201 (1839).

42. 10 U.S. (6 Cranch) 87 (1810).

43. C. MAGRATH, YAZOO — LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF FLETCHER V. PECK 14 (1966).

caused the Court to address questions of tribal property rights and tribal sovereignty. When the Court entered this discussion, it was an institution of a nation whose leaders had not asserted the conquest of tribal governments, and who understood that the nation lacked the power to do so. At the same time, as de Tocqueville observed in 1830, the nation understood that the law need not be an impotent weapon in the pursuit of hemispheric political and economic goals.[44]

IV. ENTER THE COURT: THE DEVELOPMENT OF DOCTRINE IN FLETCHER, WILSON AND JOHNSON

A. THE YAZOO CASE: FLETCHER V. PECK

Supreme Court involvement in federal Indian law began with *Fletcher v. Peck*,[45] the famous 1810 case best described as a squabble among thieves, and best known in law as the case first used by the Court to extol the sanctity of vested rights in property and thus to secure broad meaning to the contract clause.[46]

The "Yazoo" case grew out of aggressive, and fraudulent, speculative schemes in western (Native American) land claimed by the state of Georgia. The litigation has been described as a "collusive suit, . . . an arranged case between friendly 'adversaries'. . ."[47] Legal action followed the passage of a law by the Georgia Legislature repealing a statute by which the state had sold hundreds of thousands of acres to the New England Mississippi Land Company — of which John Peck was director.[48] Peck had divided the land and resold it at considerable profit to, among others, Robert Fletcher.[49] The repeal law called into question the

44. *See* 1 DEMOCRACY IN AMERICA 368-69 (1945). De Tocqueville wrote:

> The Spaniards pursued the Indians with bloodhounds, like wild beasts....The conduct of the Americans of the United States towards the aborigines is characterized, on the other hand, by a singular attachment to the formalities of law. [They pursued Indian extinction and deprivation of rights] with a singular felicity...and without violating a single great principle of morality....It is impossible to destroy men with more respect for the laws of humanity.

Id.

45. 10 U.S. (6 Cranch) 87 (1810).

46. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142 (1810). For a full discussion of the history and politics of *Fletcher v. Peck*, *see* C. MAGRATH, *supra* note 43, at 14.

47. C. MAGRATH, *supra* note 43, at 54-55. To test often complex land title schemes, the Americans had further developed the British practice of actions of ejectment with fictional adversaries. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 22-23, 64-65 (2d ed. 1985). These pleas were widespread in use and reflected no disrepute on the character of the parties. *Id.*

48. *Fletcher*, 10 U.S. (6 Cranch) at 127-29.

49. *See id.* at 127.

legitimacy of all title alienated pursuant to the repealed statute.[50] Robert Fletcher sued John Peck in federal court, using the court's diversity of citizenship jurisdiction, for a "covenant broken" because he had sold him "that which he did not rightfully possess."[51] From the litigants' perspective, the validity of Georgia's action voiding the land grants formed the core issue in the suit. Men like Fletcher and Peck stood to lose considerable sums if the high court upheld the repeal bill.[52] Invoking the sanctity of contract, however, the Court invalidated the repealing statute, thus satisfying both men's claims.[53]

Indian governments were not direct parties to the case. However, since the land sold originally by Georgia had not been transferred from the tribes by treaty, and since it was not clear whether the disputed land fell within the boundaries of either the United States or Georgia, the Court addressed the question of the legal status of Indian land as it related to the issues of the Yazoo litigation.[54]

Critically, Marshall's majority opinion acknowledged a property right he described as "Indian title," thus establishing for the first time at least a patina of judicial protection — a legitimate legal status for Indian land under American law.[55] Having "Indian title," what specific rights did the tribes hold under international law, or the developing federal law of land tenure? The Court described it as a title "certainly to be respected by all courts" until extinguished, and urged only legitimate extinguishment of title.[56] In short, the justices affirmed the prerequisite of tribal consent to the extinguishment of Indian title, a critically important principle for the protection of Native American property rights dating to the earliest laws of the European colonies in North America, one incorporated by the United States in its Northwest Ordinance.[57] It was conceded, however, to be only a title of occupancy.[58] In the concluding phrase of the opinion, Marshall wrote that Indian title "is not such as to be absolutely repugnant to seisin in fee on the part of the state."[59]

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50. *Id.* at 127-28.
51. C. MAGRATH, *supra* note 43, at 53-54; *see Fletcher,* 10 U.S. (6 Cranch) at 128.
52. C. MAGRATH, *supra* note 43, at 53-54.
53. *See Fletcher,* 10 U.S. (6 Cranch) at 139.
54. *See id.* at 139-43.
55. *See id.* at 142.
56. *Id.* at 142-43.
57. Cohen, *Original Indian Title,* 32 MINN. L. REV. 28, 39-40 (1947); *see* Northwest Ordinance, July 13, 1787, ch. 8, 1 Stat. 50. For language of the Northwest Ordinance concerning consent, see *supra* note 30.
58. *Fletcher,* 10 U.S. (6 Cranch) at 142.
59. *Id.* at 142-43.

The principle that Indian title was not one of fee simple but only occupancy drew upon the so-called "doctrine of discovery."[60] The doctrine of discovery was generally understood as a rule initiated by European nations, at the time of exploration of the New World, to govern these new international relations. To avoid the possibility of overlapping and conflicting settlements, the earliest discoverer obtained the right — against later arrivals — to acquire unoccupied land.[61] The doctrine was a distributional principle that had a succession of interpreters including Victoria, Vattel, Montesquieu, and Blackstone.[62] The doctrine came to be a rationale for the taking of land and, as such, has been described as an "alien European theor[y] that w[as] imposed on the native population."[63]

In the view of the Supreme Court, as the legatee of discovery by earlier Europeans, the state of Georgia had obtained fee simple title and thus, for the purposes of the case, could grant patents to the land even though the state could not eject the tribes.[64] A host of practical and complex questions arose from this distributive formulation assigning dual, or split, property rights to the discoverer nation on the one hand, and Indian nations on the other, but the *Fletcher* opinion did not address such questions. This was apparently because the Court feared an examination of the political character of Indian nations and their land rights would distract from the more central discussion of the contract clause and federal judicial review of state legislation.[65] As the result of the dual property rights assigned, and the Court's failure to address the question of tribal dominion, the Court's attempt in *Fletcher* to build a lexicon of tribal property rights can only be characterized as tentative and inconclusive. The justices, however, may have been well satisfied with the decision which, from their perspective, simultaneously promoted interests of the national government, the states, and Indian nations.

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60. UNITED STATES COMM'N ON CIVIL RIGHTS, INDIAN TRIBES: A CONTINUING QUEST FOR SURVIVAL 16 (1981) [hereinafter INDIAN TRIBES].

61. *Id.* Pursuant to the doctrine of discovery, unoccupied land included land not occupied by Europeans. *Id.*

62. *Id.* at 16-17; *see* 1 W. BLACKSTONE, COMMENTARIES *107-08; B. DE MONTESQUIEU, THE SPIRIT OF LAWS 281-84 (D. Carrithers ed. 1977); E. VATTEL, THE LAW OF NATIONS 98-101, 170-71 (J. Chitty ed. 1883); F. DE VICTORIA, *supra* note 10, at 120. For a clear discussion of Blackstone's interpretation of the discovery doctrine, see Bennett, *Aboriginal Title in the Common Law: A Stony Path Through Feudal Doctrine,* 27 BUFFALO L. REV. 617, 627-34 (1978).

63. INDIAN TRIBES, *supra* note 60, at 16.

64. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142 (1810). The court in *Fletcher* stated: "It is the opinion of the court, that the particular land stated in the declaration appears...to lie within the state of Georgia, and that the state of Georgia had power to grant it." *Id.*

65. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States,* 27 BUFFALO L. REV. 637, 642 (1978).

Tilting toward the Republic, the Court outlined tribal land rights limited to occupancy, with no right of alienation and, therefore, compromised in the context of United States property law.[66] However, on behalf of the tribes, Marshall's opinion asserted a legal right of occupancy that protected the residency of individual tribal members as well as the communal character of tribes.[67] In addition, *Fletcher* also invoked a tribal right of consent before the extinguishment of this occupancy right. But finally, looking to the interests of states, the Court hazarded that Georgia was seised in fee for tribal land and, thus, was also in possession of a significant property right.[68] Viewed together, this tripartite balancing of rights suggests a Court seeking safe but principled ground at a time when the position of the Supreme Court in the American political system was far from secure.[69]

Justice Johnson, however, sharply disagreed that the *Fletcher* majority had laid down acceptable principles of law with respect to Native American sovereignty and property rights.[70] His dissent minced few words in concluding that Marshall had misapplied the law and misunderstood the true nature of tribal dominion and concomitant rights of property.[71] Reluctantly addressing a question he characterized as one of "much delicacy...more fitted for a diplomatic or legislative than a judicial inquiry," Johnson argued that the "national fires" of the tribes in question had not been extinguished and they retained "absolute proprietorship of their soil."[72] Moreover, Johnson noted that "[i]nnumerable treaties...acknowledge [the Indians] to be an independent people, and the uniform practice of acknowledging their right to soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right to soil."[73]

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66. *See Fletcher*, 10 U.S. (6 Cranch) at 142.
67. *See id.*
68. *See id.* at 142-43.
69. One hundred and fifty years after the *Fletcher* decision, a United States Task Force commented upon a central difficulty with the majority's solution:

> By *Fletcher*...the national government was encouraged to pursue its methods of extinguishing Indian title to lands by the process of public treaties. Georgia, on the other hand, was encouraged to regard Indian rights and property claims as being very tenuous in nature; or insufficient in force to prevent the succeeding legislative assault against them by that State in its famed controversies with the Cherokee Nation.

THE FEDERAL-INDIAN RELATIONSHIP, *supra* note 9, at 75.
70. *Fletcher*, 10 U.S. (6 Cranch) at 146 (Johnson, J., dissenting).
71. *Id.*
72. *Id.* at 146.
73. *Id.* at 146-47.

Directing his inquiry to the critical question, Johnson asked, "Can, then, one nation be said to be seised of a fee-simple in lands, the right of soil of which is in another nation?"[74] Having stated that the tribes were "absolute proprietors," Justice Johnson argued the position that would be established as a fundamental principle of federal Indian law twenty-two years later in *Worcester v. Georgia:*[75] "Unaffected by particular treaties, [the discoverer's interest] is nothing more than what was assumed at the first settlement of the country,...a right of conquest, or of purchase....All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets,...a pre-emptive right [of the discoverer]."[76] Then, in a curious twist of politics and jurisprudence, Justice Johnson — an appointee of Jefferson — disputed John Marshall's conclusion that this pre-emptive right could be vested in a state.[77] Rather, he argued, it is a right vested only in the United States following the cession, "by the constitution, [of] both the power of pre-emption and of conquest."[78]

B. NEW JERSEY V. WILSON

The next opportunity for Supreme Court analysis of tribal property rights and tribal sovereignty occurred two years after *Fletcher* in *New Jersey v. Wilson,*[79] a case again involving nontribal litigants. In 1758 a band of the Delaware Indians ceded a large parcel of land to the colony of New Jersey in exchange for tax-exempt, reserved lands.[80] Forty years later the tribes sold this reserved land with the consent of the New Jersey Legislature.[81] The state subsequently resold the land and, a year later, repealed its tax exemption.[82] The non-Indian purchasers appealed this change in tax status first to state courts and then to the United States Supreme Court.[83]

Marshall's opinion for the Court is most interesting for its near avoidance of the Indian question. Framing the issue as

74. *Id.* at 147.
75. 31 U.S. (6 Pet.) 515 (1831). For a discussion of *Worcester,* see *infra* notes 176-222 and accompanying text.
76. *Fletcher,* 10 U.S. (6 Cranch) at 147 (Johnson, J., dissenting).
77. *Id.*
78. *Id.*
79. 11 U.S. (7 Cranch) 164 (1812).
80. New Jersey v. Wilson, 11 U.S. (7 Cranch) 164, 165 (1812).
81. *Id.* at 165-66.
82. *Id.* at 166.
83. *Id.* The New Jersey Supreme Court determined that the act repealing the tax exemption was valid, and declared the land liable to taxation. *Id.*

impairment of contract, and discussing the constitutional implications of such a clause, the Chief Justice failed to discuss directly the pressing question of tribal sovereignty or property rights, writing only that the original colonial purchase would quiet the title of the extensive claims of the Indians.[84] By its silence and by implication, the Court accepted that the rights of the new landowners were identical to those of the tribes originally granted the tax exemption — both mere landowners, neither sovereigns. Nothing in the Court's words challenged New Jersey's assertion that it need not have granted the exemption to the Delaware, supporting the conclusion that the justices believed the state to hold the ultimate fee or dominion of the tribe's territory.[85]

C. JOHNSON V. M'INTOSH: POSSESSORY INTEREST BUT NOT PROPERTY INTEREST

The third case in this sequence, *Johnson v. M'Intosh,*[86] has been called one of the "most misunderstood cases in the Anglo-American law."[87] In addition, it has also become one of the most controversial in the field of federal Indian law.

As in *Fletcher* and *Wilson* which were decided a decade earlier, *Johnson* confronted the Marshall Court with the difficulties of outlining legal doctrine expressive of what the United States characterized as its "unique" relationship with Indian nations, unique because, unable to conquer the tribes, the United States continued its nation to nation political dealings while at the same time asserting an unmitigated racial and cultural superiority.[88] It is also argued that the *Johnson* decision was burdened with Marshall's interest in developing an "Americanized law of real property."[89]

84. *Id.*

85. R. BARSH & J. HENDERSON, *supra* note 22, at 39.

86. 21 U.S. (8 Wheat.) 543 (1823).

87. Berman, *supra* note 65, at 655.

88. *Id.* at 650. The speeches and literature of Europeans and early citizens of the United States were rife with expressions of racial and cultural superiority. The language of justification for the taking of Native American land drew upon Vattel and others who stressed the supremacy of the pastoral-agricultural life over that of the hunter-gathered and who usually misunderstood or did not mention the Native Americans who created towns. *See* E. VATTEL, *supra* note 62, at 100-01. Moreover, the Indian was portrayed as an animal and a savage. *Id.* Authors varied as to whether the Indian could be civilized. *See* R. DRINNON, FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE BUILDING 126-27 (1980) (referring to Indians as varmints); Brackenridge, "*The Animals, Vulgarly Called Indians,*" in THE INDIAN AND THE WHITE MAN 116 (W. Wasburn ed. 1964) (stating that the torturing Indians do to their bodies, justifies their extermination); *see generally* R. BERKHOFER, THE WHITE MAN'S INDIAN (1979) (discussing the various conceptions by whites of the Native Americans).

89. Berman, *supra* note 65, at 643. Professor Berman argues that *Johnson* as part of an early effort to free the law of real property from the restrictions of status relationships grounded in European concepts of feudal tenures. *Id.* at 643 n.31. Berman states:

> By qualifying the issues raised in cases concerning land acquisition from Indian nations in real property terms, Marshall was able to create a law of real property that

The opinion defined property rights — or possessory interests — and articulated principles of a newly limited tribal sovereignty. Unfortunately, this was accomplished in language that is vague and confusing in key passages. Thus, it is not surprising that *Johnson* is often misunderstood.

The controversy in *Johnson* involved land claimed by the plaintiffs as the result of direct tribal grants in 1773 and 1775 and by the M'Intosh faction as the result of a later United States patent obtained after the lands in question were ceded to the federal government by the same tribes.[90] Whether because they did not share western notions of ownership, or for other reasons, the tribes had sold the same land twice.[91] Although it involved no tribal litigants, the case required that the Court determine whether a grant of tribal land obtained by a non-Indian purchaser without the approval of the federal government conveyed a title to be respected in courts of the United States.[92] Regardless of the Court's decision, there would be no immediate tribal "losers" since either way title would be held by whites. In a larger sense, however, tribal prerogatives were very much at issue as the case posed the question of whether tribes could convey title without the consent of the discovering nation.

In *Fletcher* the Court had argued that the state of Georgia, as legatee of discovery, had fee simple title to the land in question rather than the tribes who occupied it.[93] The opinion contained no further explanation of alienation rights or other questions of dominion. The *Fletcher* decision was, however, firmly grounded in the discovery principle.[94] In *Johnson,* the Chief Justice worked from this previously enunciated doctrine, applying it now in the Court's first full-blown interpretation of the nature of tribal sovereignty as well as tribal property rights under United States law.

As described, discovery had been a convention of intra-European diplomacy intended to keep colonial powers from overlapping land claims. In *Johnson,* Marshall undermined the original doctrine, transforming it into a principle of United States-

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arose directly from territorial claims within the United States, which could be interpreted according to principles derived from the 'natural law' philosophy of John Locke.

Id.

90. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 550-60 (1823).

91. *See id.*

92. *Id.* at 555-58, 572.

93. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139-40 (1810). For a discussion of *Fletcher,* see *supra* notes 45-78 and accompanying text.

94. *Id.* For a discussion of the discovery principle, see *supra* notes 60-63 and accompanying text.

Indian relations. Marshall now described the discovery doctrine as not only giving the discoverer the "exclusive right...to appropriate the lands occupied by the Indians,"[95] but also creating the "considerable" impairment of the rights of these original inhabitants. The Indians, he wrote, are "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."[96] *Johnson* thus stands for the principle that Indian title is not one that conveys the right to alienate land — only the holder of fee simple title may alienate, and correspondingly, that tribal sovereignty has been diminished by this limitation upon tribal power.[97]

Yet even as the Court denied this ultimate alienation right to the tribes in favor of the discoverer and her patentee, the Court found that the discovery doctrine simultaneously conveyed the right of perpetual occupancy and "use according to their own discretion" to the holder of Indian title.[98] Because the Court extracted these dual political rights and property titles, *Johnson* has been called both a "brilliant compromise"[99] as well as an opinion "seiz[ing] upon this controversy to establish a judicial mythology that would rationalize the origin of land titles in the United States."[100]

Using legal concepts alien to tribal law, the Court built a theory of land title sympathetic to the interest of the Republic.[101] Not only did the Supreme Court deny the validity of a transaction entered into by an Indian nation, but, by virtue of the chain of discovery rights, a property transaction that had occurred before the Revolutionary War and the creation of the Republic.[102] To

95. *Johnson,* 21 U.S. (8 Wheat.) at 584.

96. *Id.* at 574.

97. *Id.* at 604-05. The plaintiffs failed in their appeal, the Supreme Court determining that title, having been obtained by individuals without the approval of the federal government, could not be sustained in federal court. *Id.*

98. *Id.* at 574.

99. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered,* 31 HASTINGS L.J. 1215, 1223 (1980).

100. Berman, *supra* note 65, at 643.

101. *Id.* at 646. Berman argues that Marshall very deliberately chose the discovery doctrine over other available legal theories upon which to rest this new law of property and diminished tribal sovereignty. *See id.* Berman states that "[a]n extensive literature on the law of nations existed concerning the rights of non-European peoples...Vattel, Grotius, Puffendorf...[and] were introduced in the pleadings of *Fletcher v. Peck* and *Johnson v. McIntosh* to argue the validity of Indian sovereignty." *Id.*

102. W. Veeder, Suppression of Indian Tribal Sovereignty 14 (1973) (unpublished manuscript).

achieve legitimacy for the real property claims of the Republic, Marshall devised prerogatives for the discovering nation that reached into tribal dominion and created a political power and a tribal land title of lesser force. Indian title became one of occupancy and use, not title absolute and complete.[103] In this calculus, however, neither had the United States obtained a title "absolute and complete" because its title, in turn, was subject to the Indian title of occupancy."[104]

The Court's opinion in *Johnson* forwarded important principles of federal Indian law at a critical moment in United States history. Facing increasing resistance to land cessions from eastern tribal nations, uncertain of new colonial ventures on the part of France, Spain, and Russia, and in need of a solidified American law of real property to protect the Republic against all these parties (not to speak of American investors), Marshall knew the political, economic, and moral stakes of the Court's work were indescribable.[105] For the first time, the Court in *Johnson* had applied the principle of parallel property interests enunciated in *Fletcher*.[106] Yet the Court did not satisfy anyone's expectation for a thorough definition of either property rights or each sovereign's political powers. Perhaps, because the stakes were so high, the Court could not afford to be too precise.

Adding to the muddle of possessory rights versus ultimate property rights, halfway through the opinion the Court introduced dicta describing a theory of conquest presumably meant to ratify rights already asserted through the doctrine of discovery.[107] Generally, this dicta has been accepted as the Court's statement of

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103. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

104. *Id.* at 592.

105. Numerous events of international politics as they affected the New World must have weighed on the Court as it wrote an American law of real property: The birth of several new republics in South America had caused concern about intervention in Latin America by the European Holy Alliance; French invasion of Spain in 1823 gave it access to Spain's colonial empire; the United States had only recently obtained all of Spain's holdings east of the Mississippi together with her claim to Oregon country; and Russia was pushing her trading posts from Alaska toward San Francisco Bay. S. MORISON & H. COMMAGER, 1 THE GROWTH OF THE AMERICAN REPUBLIC 452-57 (1962).

106. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142-43 (1810); *Johnson*, 21 U.S. (8 Wheat.) at 596. For a discussion of *Fletcher*, see *supra* notes 45-78 and accompanying text. For a discussion of *Johnson*, see *supra* notes 86-104 and accompanying text.

107. *Johnson*, 21 U.S. (8 Wheat.) at 587-90. Marshall wrote:

> Conquest gives a title which the Courts of the conqueror cannot deny....[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war....to leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were...ready to repel by arms every attempt on their independence. What was the inevitable consequence...? The Europeans were under the necessity either of abandoning the country,...or of enforcing those claims by the sword....

United States conquest of Indian nations. Asserting conquest of Native American nations stands as a curious reasoning because it was unnecessary for purposes of claiming title. Moreover, it was not credible in a political context. The historical record shows clearly that most of the lands alienated to the United States were acquired by purchase rather than military action.[108] Marshall's dicta may, nonetheless, have been aimed at appeasing anti-tribal opinion in the United States. The reference to conquest may have been included as a conceit, a metaphor of European superiority. It permitted Marshall to discuss the Indian as a savage, and to imply that, had the conquest doctrine been used more fully as the basis of the opinion, tribal governments might have been granted even fewer rights.

Moreover, it is also possible that the strongly nationalist Marshall presented conquest as a salvo to accompany the Monroe Doctrine.[109] Apprehension had been high in Washington over a joint French and Spanish expedition into South America, as well as the intentions of the Russians in the northwest. While President Adams mulled his foreign policy options, the Chief Justice may have asserted conquest as an additional statement of American independence and warning against further European colonization.

The *Johnson* decision established, or extended from *Fletcher*, three interwoven principles of federal Indian law: the existence of Indian occupancy title, the discovering nation's exclusive right of extinguishing Indian title, and the requirement of Indian consent for such extinguishment. The decision did not assert any right to govern Native American internal affairs.

Considerable debate exists over the consequences of *Johnson* for Native Americans. On the one hand, it has been argued that in the *Fletcher-Johnson* sequence, "Marshall lent faint color to Jackson's aggression...[because]Indians could be deprived by a legal fiction of their title by 'discovery'."[110] It has also been stated,

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Id. at 588-590. J. Youngblood Henderson argues that Marshall was, in fact, only referring to the conquest of European competitors. Henderson, *Unravelling the Riddle of Aboriginal Title,* 5 AM. IND. L. REV. 75, 92 (1977).

108. Berman, *supra* note 65, at 648. Professor Jean Zorn further suggests that because it was believed that some Indian lands had been taken by conquest, Marshall did not want to imply by omission that these takings were unlawful. Letter from Jean Zorn to Jill Norgren (Aug. 13, 1987).

109. *See* The Monroe Doctrine, Dec. 2, 1823. This United States proclamation occurred after months of discussion with England on the possibility of joint action concerning instability in the New World following rapidly changing political events in France, Spain, and Portugal. The Doctrine, issued only by the United States, asserted that the hemisphere was henceforth not to be newly colonized by European powers, although existing colonies of the European powers would not suffer intervention by the United States. *Id.* The proclamation provided that any violation of this principle by European powers would be perceived as a danger to the peace and safety of the United States. *Id.*

110. Veeder, *supra* note 102, at 17.

however, that the "consequences flowing to the status of Indian lands from [the conquest] theory were nonexistent."[111] While it has been written that the decision left tribes with a title of "mere occupancy and use," others have urged that the opinion should not be clouded by the conquest dicta, negating the relatively small qualification of nonalienability.[112]

Assessing these varied readings requires both presumption and a review of the legal record. There could only be conjecture as to the immediate consequences for tribes of the *Fletcher-Johnson* sequence. No tribe was party to either case. While the decisions guaranteed occupancy title, they assumed implicitly — if not also explicitly — that tribes would shortly permit the "legal extinguishment" the Court demanded.[113] *Johnson* is unclear as to whether the government of the United States could require that Native American governments alienate their land. The two opinions could be seen as encouraging Americans ready and willing to engage tribal governments aggressively in pursuit of Indian land.

It is also argued that Marshall had to deal with the apparent inconsistency of treating for tribal land given the assertion of intrinsic property rights on the part of the discoverer nation. Here it is argued that the Court understood treaties to constitute "legal extinguishment" representing the purchase of occupancy rights, or the removal of a "kind of lien on the discovering nation's sovereignty," not "basic proprietary and political rights in North America, for these flowed from discovery and [symbolic] possession."[114]

The Court's decision in *Johnson* has been called "confusing and occasionally incoherent," its dicta "ponderous."[115] However, it is necessary to consider the task before the Court: the creation and justification of property rights not for a colonial possession, but for a Republic several decades old. Unlike Victoria and Vattel, the Court was not arguing for a sovereign separated from her land by an ocean. Practical politics would not permit Marshall to declare that the Republic give back tribal land or pay a fair purchase price.

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111. Berman, *supra* note 65, at 649. Berman, however, appears to contradict himself by an earlier statement: "[T]he reasoning of the case created a theory of conquest that stands as *a centerpiece for the judicial diminution* of native rights." *Id.* at 644 (emphasis added).

112. *Id.* at 647-49.

113. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142-43 (1810); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 596 (1823). For a discussion of *Fletcher,* see *supra* notes 45-78 and accompanying text. For a discussion of *Johnson,* see *supra* notes 86-104 and accompanying text.

114. G. Lester, *supra* note 1, at 193, 199.

115. Berman, *supra* note 65, at 644, 647.

Marshall's "brilliant compromise," granting simultaneous, but incomplete interests to both the discoverer and the tribes, established the moral and political principle that Native American governments must be respected both as to residential rights and the legal standard by which tribes might be separated from their land — legal extinguishment by the discoverer nation — Indian consent. Because it denied full title to tribes, the decision may be viewed as corrupt. However, in fact, because Indians were not direct parties to this litigation, *Johnson* as well as *Fletcher* involved tribal rights only in the abstract. Given the political constraints on the Court and its ultimately unfounded optimism that the tribes would eventually sell their land, *Johnson* may be contemplated as the Court waiting for the future to happen — hoping to structure a future of United States-Indian relations informed by just and legal standards, but counting upon an ongoing tribal willingness to make land cessions so that the use of deceit and raw power would not be necessary.

V. A CRITICAL JUNCTURE: THE CHEROKEE CASES

A. HISTORICAL BACKGROUND

Whatever stance leaders in the United States maintained with respect to Indian property rights and sovereignty — and there did exist a considerable range in attitude — few believed that tribal governments would ultimately resist offers of land purchase. Regardless of their "momentary" difference, most whites were guided by the belief that it was only a matter of years before all the discussion would be but a moot issue and the Indians would be gone from lands east of the Mississippi which then constituted the border of the United States.[116] For this reason, in some negotiations

116. As a result of 150 years of land deals, by the beginning of the nineteenth century many of the Indian nations had moved inland and were not "visible" to the new Americans. Discussions of a new federal policy of removal of Indian nations to western lands also began in the early nineteenth century. *See* Monroe, First Annual Message, Dec. 2, 1817, in 2 *A Compilation of the Messages and Papers of the Presidents* 17 (J. Richardson ed. 1897); Adams, Fourth Annual Message, Dec. 2, 1828, *id.* at 415-16. The national government also specifically encouraged the belief that the Indian would soon be gone from eastern lands by entering into agreements to remove tribes. In 1802, for example, the United States and Georgia signed an agreement by which Georgia would cede land for the incorporation of the states of Alabama and Mississippi in return for the promise that the United States would, at her expense, extinguish existing Indian title to land within the boundaries of Georgia as soon as it could be done on peaceful and reasonable terms. Georgia Cession, Apr. 26, 1802, in 1 AMERICAN STATE PAPERS: PUBLIC LANDS 126 (1832). In 1830 Congress further committed itself to a formal policy of removal passing the Indian Removal Act. *See* Removal Act, ch. 148, 4 Stat. 411 (1830) (codified as amended at 25 U.S.C. § 174 (1982)). The first treaty of removal followed immediately. *See* Treaty of Dancing Rabbit Creek, Sept. 27, 1830, United States-Choctaw Nation, 7 Stat. 333 (1830).

the national government committed itself to Indian policies with tribes on the one hand and states on the other, which proved contradictory, and ultimately, irreconcilable.

The case of the Cherokee Nation and the state of Georgia — two sovereign populations that lived coterminously in the Southeast — exemplified this conflict. In the eighteenth and early nineteenth centuries, led by astute, often bilingual officials, the Cherokee built a centralized tribal organization bent upon stability and peaceful coexistence. Christian missionaries were welcomed, the agricultural life of whites was increasingly practiced, and land was sold to European governments. By one of these land treaties, the Treaty of Holston of 1791,[117] the United States secured lands and continuing legal and political jurisdiction to the Cherokee Nation in return for certain land cessions. Following the Treaty of Holston, the United States supported the future of the Cherokee Nation with foreign aid, subsidizing the work of white Protestant missionaries and teachers who contributed to the permanence of Cherokee settlements.

In 1802, however, the United States also entered into an agreement with the State of Georgia by which the federal government promised that it would, at its own expense, extinguish Indian title to land "within" the boundaries of the state "as soon as it could be done peaceably and on reasonable terms."[118] For more than two decades, however, the national government failed to act on the 1802 covenant, and further enraged Georgians by completing Indian removal in other states.[119] The contradictions of the 1791 and 1802 policies remained until President Andrew Jackson, early in his first term, announced support for a new Indian removal bill.[120]

Encouraged by Jackson's stance, the Georgia Legislature lost no time in pressing the issue to a hoped-for conclusion. It passed a series of draconian laws — completely violative of existing federal treaties — annexing Cherokee land, annulling the constitution (ironically, modeled after the United States Constitution) and laws of the Cherokee Nation, and substituting the jurisdiction of the state over all individuals living within the borders of the tribe.[121]

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117. Treaty of Holston, July 2, 1791, United States- Cherokee Indians, 7 Stat. 39.

118. W. KENNEDY, 2 MEMOIRS OF THE LIFE OF WILLIAM WIRT 279 (1849). Also by this agreement Georgia ceded land for the incorporation of the states of Alabama and Mississippi. *Id.*

119. *Id.* at 281, 284.

120. *See* G. WOODWARD, THE CHEROKEES 158 (1963).

121. H. MALONE, CHEROKEES OF THE OLD SOUTH 172-73 (1956). Anxious to encourage tribal citizens to move west, the legislature designated Native Americans unequal in legal status barring their participation as "competent witnesses" in Georgia courts. *Id.* at 172.

With these bold statutes Georgia served notice on Congress that she intended an immediate resolution of the "Indian question" and that her actions would not be bound by the doctrine of "expansion with honor," that is, by law rather than force.[122]

The congressional legislation supported by Jackson, "[a]n act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi,"[123] required the federal government to arrange for the removal of southeastern tribes, including the Cherokee, to the western side of the Mississippi.[124] Removal policy had become increasingly popular in the 1820s as an alternative to national policies of either military action against, or assimilation of, the Indian. As an idea, removal had originated with Thomas Jefferson at the time of the Louisiana Purchase.[125] The legal concept centered upon an "exchange" of aboriginal land title in eastern lands for fee simple title, guaranteed by treaty, in homelands to be west of the Mississippi, land that was not ancestral land, and land that was, critically, already occupied by western Indian nations. Guaranteed only by treaty, such title could be abrogated by Congress.

President Jackson very quickly aided, if not endorsed, Georgia's jurisdictional legislation by withdrawing the federal troops sent previously to protect the Cherokee.[126] The President further weakened tribal efforts to resist Georgia's aggressions and to lobby against the Removal Bill, by withholding federal annuities owed to the Cherokee under land cession treaties. In a telling speech, Jackson spelled out the philosophy behind his support of the Removal Act:

> Philanthropy could not wish to see this continent restored to the condition in which it was found by our forefathers. What good man would prefer a country covered with forests, and ranged by a few thousand savages to our extensive republic, studded with cities, towns, and prosperous farms; embellished with all the improvements

122. *Id.*

123. Removal Act, ch. 148, 4 Stat. 411 (1830) (codified as amended at 25 U.S.C. § 174 (1982)).

124. *Id.*

125. F. PRUCHA, *supra* note 22, at 183-84. The acquisition of the vast Louisiana Purchase created space, in the minds of whites, for the removal of Indian nations east of the Mississippi. *Id.* Jefferson believed Indians would be genetically equal to whites but that they were what, today, would be labelled culturally deprived. C. CHINARD, THOMAS JEFFERSON: THE APOSTLE OF AMERICANISM 425-27 (1962). He favored their assimilation into western culture: this would mean their taking up farming which required less land than hunting and gathering. *Id.*

126. Troops were sent in June of 1830 following Georgia's proclamation that she owned all Cherokee land including their gold mines. G. FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES 229-30 (1972). The troops were withdrawn at the insistence of the state. *Id.*

> which art can devise, or industry execute...and filled with all the blessings of liberty, civilization, and religion![127]

The Removal Bill provoked acrimonious debate that polarized the United States. Supporters stated that the unquestioned higher purposes of western civilization demanded that whites have open access to all eastern lands. Congressmen in favor of the removal proposal argued that the United States had never recognized Indian nations as having any attributes of sovereignty and, therefore, no inherent property rights. A half-century of formal diplomacy between the United States and Indian nations was summarily dismissed as something meant only to flatter "their vanity...by the acknowledgement of their name and rank."[128]

Opponents of the legislation, however, felt that other principles had consistently governed United States law with respect to the Indian nations. They labelled removal plans as open and rank assaults on Indian sovereignty. Prominent members of Congress characterized the bill as designed to flout firm and binding treaty obligations, including the Treaty of Holston with the Cherokee. The speech of New York Whig Henry Storrs typified this position:

> The committee [on Indian Affairs] have suggested that we should not give much weight to "the stately forms which Indian treaties have assumed, nor to the terms often employed in them," but that we should rather consider them as "mere names" and "forms of intercourse." If treating these Indian nations as proprietors of a qualified interest in the soil — as competent to enter into treaties — to contract alliance — to make war and peace — to stipulate on points involving and often qualifying the sovereignty of both parties, and possessed generally of political attributes unknown to individuals, and altogether absurd in their application to subjects, is nothing more than "mere names" and "stately forms," then this long practice of the Crown, Colonies, the States, and the Federal Government, indeed, proves nothing. Words no longer mean what words import, and things are not what they are.[129]

127. 7 CONG. DEB. app. x (1830).
128. HOUSE COMM. ON INDIAN AFFAIRS, H.R. REP. No. 227, at 11 (1830).
129. 6 CONG. DEB. 1007-08 (1830).

Storrs' speech suggested that the United States had been complicit by characterizing that sovereignty for the Indians who lacked an understanding of western international law.[130] The congressman continued:

> We have not only recognized them as possessed of attributes of sovereignty, but, in some of these treaties, we have defined what these attributes are. We have taken their lands as cessions — terms totally senseless if they are citizens or individuals. We have stipulated for the right of passage through their country, and for the use of their harbors, for the restoration of prisoners, for the surrender of fugitives from justice, servants, and slaves. We have limited our own criminal jurisdiction and our own sovereignty, and have disenfranchised our citizens by subjecting them to other punishments than our own....You cannot open a chapter of Vattel, or any writer on the law of nations, which does not define your duties and explain your obligations. No municipal code reaches them. If these acts of the Federal Government do not show them to be sovereign to some extent, you cannot show that you have ever acknowledged any nation to be so.[131]

The anti-removal cause drew the support of other prominent members of Congress, including men like Webster, Freylinghausen, and Clay, who were political antagonists of President Jackson and who supported national power over states' rights.[132] These men publicly attacked Georgia's actions and chastised Jackson for ignoring binding treaty obligations. But opponents of the Removal Bill were outnumbered. In a close vote the legislation passed. In the most explicit test of Indian sovereignty before the political branches of the United States Government, Georgia prevailed, Jackson prevailed, and manifest destiny,

130. *Id.* at 1008.

131. *Id.* at 1010.

132. *See* R. SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA 40-41 (1974); Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 507-08 (1969). Most of the men who opposed Jackson and the policy of removal were easterners. Henry Clay from Kentucky, however, was a westerner and leader of the Adams-Clay political faction that opposed the Democratic party led by Jackson and Calhoun. *See* S. MORISON, *supra* note 5, at 421. Critically, the removal debate began in the decade of the 1820s when the Jeffersonian Republican party was breaking up and men like Jackson, Clay, Webster and others competed to establish the new political parties, and vision, of the Union. *See id.* at 422-23. Removal policy became a pawn in a discourse that is somewhat facilely characterized as the nationalist Whigs against the states' rights Democrats. *See id.* at 423-24.

already announced in the Monroe Doctrine seven years before, presented itself more clearly. Yet on the face of the law, formal principles had not been altered. The Removal Act articulated a *voluntary* process of removal to be agreed upon through a process of law.[133] Nevertheless, the tenor of pro-removal debate and the very nature of the bill, assaulted the sanctity of tribal sovereignty and aboriginal land title. As white population density increased and tribal willingness to continue land cessions diminished, the profound contradictions of the 1791 treaty and 1802 agreement could no longer be absorbed passively. Through the Removal Act the political branches acknowledged a new era in which the realities of this new Indian intransigence, together with their "occupancy and use" title, demanded an altered national policy. Removal was that policy, one that on paper appeared accommodating to all parties with its sanitary language of tribal choice and United States financial aid.[134] History was to prove the removal policy something quite the contrary.

With the passage of the Removal Act, the Cherokee's hopes for institutional political support in the United States ended; the political branches of both state and federal governments had united against them. It was at this point that the Cherokee Nation considered the possibility of litigation to untangle the increasingly confused and ambiguous web of text developing in federal Indian law.[135] Their policy options were not extensive. Failure of political attempts to protect their rights left only war or the courts. Unwilling to resort to force, reinforced by what they perceived to be the white man's respect for the law, and encouraged by anti-Jacksonian statesmen like Webster, they chose to put their case before the courts of the United States.

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133. Removal Act, ch. 148, 4 Stat. 411, 411-12 (1830) (codified as amended at 25 U.S.C. § 174 (1982)). The legislation empowered the President to create suitable districts for:

> the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and removal there...[to] forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same.

Id. at 412. The Act also directed that "nothing in this act...shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes." *Id.*

134. *Id.* at 411-12. The Removal Act prescribed that land west of the Mississippi River could be designated "for the reception of such tribes or nations of Indians as may choose to exchange lands where they now reside and remove there." *Id.* at 412. The Act provided that the President could authorize aid and assistance to the Indians as was necessary to enable the Indians to remove to the exchanged land, and as was necessary for their support and subsistence for the first year after removal. *Id.* Five hundred thousand dollars was appropriated to carry out the provisions of the Act. *Id.*

135. W. KENNEDY, *supra* note 118, at 289.

On the advice of the anti-Jacksonians, the Cherokee leadership hired William Wirt and John Sergeant to take their case to the Supreme Court.[136] The choice of legal counsel underlined the political significance of the case. Wirt, former attorney general in the Monroe and Adams administrations, and John Sergeant, former head of the Bank of the United States, were central figures of the anti-Jackson establishment that had chosen to support the Cherokee cause.[137] For them, Cherokee Nation litigation would serve to buttress their opposition to Jackson's narrow and restrictive view of the power of the national government. Although the court was an important final forum for the Cherokee, some have argued that their lawsuit was, in large measure, merely an expedient means for the President's opponents to foil his policies and prevent his reelection.[138]

An opportunity to put the issues of tribal sovereignty and property rights to the test presented itself when Georgia, acting upon its new laws, arrested and convicted a Cherokee citizen, George Tassels (Corn Tassel), on the charge of murder. Attorney Wirt seized the opportunity to assert Indian immunity from state laws.[139] The case was appealed to the United States Supreme Court which directed Georgia to show cause why a writ of error should not be issued against it.[140] The state deliberately ignored the high court's order contending that "the interference by the chief justice of the supreme court of the U. States, in the administration of the criminal laws of this state...[was] a flagrant violation of her rights."[141] Corn Tassel was executed in this extraordinary expression of Georgia's contentious assertion of jurisdiction over citizens of the Cherokee Nation as well as its continued resistance to federal judicial review of state criminal law.

Failing in its attempt to marshall the power of the United

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136. *Id.*

137. *Id.*

138. R. SATZ, *supra* note 132, at 39.

139. *See* T. WILKINS, CHEROKEE TRAGEDY: THE STORY OF THE RIDGE FAMILY AND THE DECIMATION OF A PEOPLE 208 (1970). The Cherokee Nation and its lead attorney, William Wirt of Baltimore, were looking for a case by which to test the rights of the Nation in the face of Georgia's assertion of jurisdiction over it. *See id.* Wirt picked the case of George Tassels, a Cherokee convicted of murdering another Indian within the borders of the Cherokee Nation. *Id.* at 209. Georgia had insisted upon bringing Tassels to trial in its courts where he was sentenced to hang. *Id.* Tassels sued out a writ of error. *Id.* On December 12, 1830, the United States Supreme Court cited the State of Georgia to appear and to show cause why the writ should not be issued. *Id.* Demonstrating her scorn for what officials termed unacceptable federal interference, Georgia ignored the court's order in an act of nullification, and expedited George Tassels' execution. *Id.* Anticipating this assertion of states' rights, Wirt had other litigation waiting by which the Cherokee Nation might challenge state violations of her sovereignty. *See id.;* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

140. T. WILKINS, *supra* note 139, at 209.

141. *Id.*

States judiciary against Georgia in the Corn Tassel case, the Cherokee determined to seek relief by filing a motion in the name of the entire sovereign and independent Cherokee Nation.[142] In *Cherokee Nation v. Georgia*,[143] the Cherokee brought suit as a foreign nation under the United States Supreme Court's original jurisdiction, filing to obtain an injunction and further relief, against Georgia, for property rights violations claimed under the treaties and laws of the United States.[144]

B. DEVELOPMENT OF THE DOCTRINE OF GUARDIANSHIP FOR "DOMESTIC DEPENDENT NATIONS"

Even more explicitly than in the Corn Tassel case, the Cherokee hoped that raising the sovereign nation claim in *Cherokee Nation* would force the Court to clarify principles of federal law as they applied to the political and legal status of Indian nations.[145] Raising these issues, as a direct party to the litigation, would seemingly present the Court with a far broader and more nettlesome question than either *Fletcher* or *Johnson*, which had only required a discussion of land rights.[146] In particular, this litigation demanded that the Court speak to the recognition of tribal dominion as described by the United States in treaties of *its own writing*.[147] Unlike either the *Fletcher* or *Johnson* case, in this litigation the tribe was a direct party claiming legal injury, thus barring a purely abstract judicial consideration of aboriginal rights.[148] Specifically, a Supreme Court decision accepting the Cherokee's claim of sovereignty would prevent states from exercising jurisdiction over Indian tribes. In addition, a favorable opinion would strengthen the Cherokee's hand politically by bringing at least one branch of the government of the United States to their cause.

Chief Justice Marshall's opinion for the Court in *Cherokee Nation*, however, denied the centerpiece of the tribe's case — the argument that the Cherokee Nation was, and should legally be considered, a foreign nation.[149] Instead, the majority noted that the

142. *Cherokee Nation*, 30 U.S. (5 Pet.) at 15.

143. 30 U.S. (5 Pet.) 1 (1831).

144. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

145. *See id.*

146. For a discussion of *Fletcher* and *Johnson*, see *supra* notes 45-78 and notes 86-115 and accompanying text.

147. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

148. *Id.* at 16. For a discussion of *Fletcher* and *Johnson*, see *supra* notes 45-78 and notes 86-115 and accompanying text.

149. *Cherokee Nation*, 30 U.S. (5 Pet.) at 19.

relation of Indians to the United States was unique, "perhaps unlike that of any other two people in existence."[150] The Court stated that Indian nations were not states within the United States, but neither did it "comprehend" them in the "general term 'foreign nations'."[151] Therefore, the Court concluded that tribes like the Cherokee lacked standing to invoke the original jurisdiction of the Supreme Court under article three of the United States Constitution.[152]

Although failure to hear the case on its merits denied the Cherokee the immediate protection of the Court, Marshall's opinion was not a complete defeat for aboriginal rights. In dicta, the majority opinion very specifically acknowledged a national character of Indian tribes, designating the Cherokee as a domestic dependent nation although not a foreign nation.[153] The Court noted that the relationship between the Cherokee and the United States "resemble[d] that of a ward to his guardian."[154] The Court also described the Cherokee Nation as "capable of managing its own affairs and governing itself,...a people capable of maintaining the relations of peace and war, [and] of being responsible in their political character for any violation of their engagements...."[155]

A sweeping interpretation of history, treaties, politics, and the doctrine of discovery resulted in Marshall's characterization of tribes as "domestic dependent nations."[156] Marshall stated:

> The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations...they are considered within the jurisdictional limits of the United States....They acknowledge themselves in their treaties to be under the protection of the United States....
>
> They occupy a territory to which we assert a title independent of their will....[157]

Characterizing tribes as dependent domestic nations diminished the legal and political status of the tribes with respect to

150. *Id.* at 16.
151. *Id.* at 19.
152. *Id.* at 20; *see* U.S. CONST. art. III, § 2 (describing the extent of judicial power).
153. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18.
154. *Id.*
155. *Id.* at 16.
156. *Id.* at 17.
157. *Id.*

the United States. Marshall's opinion suggests, however, that the Court understood "unique" relations largely in terms of foreign affairs and did not support interference in matters of internal tribal governance.[158] That is, the United States as the discoverer nation had a vested property interest in tribal land and was asserting a protectorate status over tribal nations that was congruent generally with international law and, specifically, with discovery doctrine and the eight-year old Monroe Doctrine:

> They look to our government for protection....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.[159]

Thus, while the characterization of tribes like the Cherokee as "domestic dependent nations" was problematic from the aboriginal point of view, the opinion did articulate principles of law that were not altogether destructive of tribal interests.[160] In addition to asserting the national character of tribes, the Court's language of "protection" and "guardian" made explicit that it recognized federal and not state jurisdiction over Indian tribes.[161] Moreover, the Court affirmed the Indians' "unquestionable, and, heretofore, unquestioned right to the lands they occupy,"[162] and clarified the ambiguity of *Johnson* on the subject of Indian consent by indicating that only voluntary cession would be honored in law.[163]

In not considering the case on the merits, the Supreme Court had in no way supported or condoned Georgia's assertion of jurisdiction over the Cherokee. While the majority opinion charted a fairly noncontroversial course hoping, no doubt, to avoid unnecessary confrontation with President Jackson and bumptious pro-removal factions, Indian rights were not forsaken. If Marshall's opinion reflected the cautious approach with the Chief Justice writing that the restraint of the Georgia Legislature and of

158. *Id.* at 16-17.
159. *Id.* at 17-18.
160. *Id.* at 17.
161. *Id.*
162. *Id.*
163. *Id.* Marshall stated that the Indians had an unquestionable right to the lands they occupied, "until that right be extinguished by voluntary cession to our government...." *Id.*

the State's exercise of physical force savored "too much of the exercise of political power,"[164] at the same time he was not too intimidated to express the moral support of the Court: "If Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined."[165]

The fine balancing of interests in *Cherokee Nation* was dictated not only by the politically explosive nature of the case given by the passage of the Removal Act and Jackson's pro-removal stance, but also contemporary attempts by the Jacksonians to repeal the Court's appellate jurisdiction as described in section 25 of the Judiciary Act of 1789, and to limit the term of office of federal judges.[166] Marshall could not make a decision on the merits of the case without estimating the consequences for the Court.[167] In a calculus of politics and law, the majority concurred in a decision informed in some measure by the likelihood of further political attack on the Court.[168] Yet, while the Chief Justice asserted that the Cherokee had asked too much of the Court in this case, his closing text invited more circumscribed litigation selectively addressing the property right issue — in Marshall's words "a proper case with proper parties."[169]

If the majority opinion in *Cherokee Nation* was influenced by the political climate, the dissent signed by Justices Thompson and Story apparently was not.[170] Considering the complaint on the merits and drawing upon Justice Johnson's earlier dissent in *Fletcher*, Justices Thompson and Story argued that the Cherokee Nation constituted a foreign nation as understood by the works of Vattel, had never lost that status through conquest and that it could, therefore, bring an original suit in the Supreme Court.[171]

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164. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831).

165. *Id.* at 15.

166. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 726 (1926); *see Cherokee Nation,* 30 U.S. (5 Pet.) at 20; Removal Act, ch. 148, 4 Stat. 411 (1830) (codified as amended at 25 U.S.C. § 174 (1982)); Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (describing the court's appellate jurisdiction). Another expression of the movement to limit the power of national institutions in general, and the independence and influence of the Supreme Court specifically, was the effort made by some congressmen in 1831 to repeal § 25 of the Judiciary Act of 1789. C. WARREN, *supra* at 736; *see* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87. The Whigs opposed this and defeated the bill. C. WARREN, *supra* at 738, 741. States' rights advocates then tried to push a measure to amend the Constitution so as to limit the term of federal judges. *Id.* at 743.

167. *Cherokee Nation,* 30 U.S. (5 Pet.) at 20.

168. *Id.*

169. *Id.*

170. *Id.* at 50 (Thompson, J., dissenting).

171. *Id.* at 52-64. Justice Thompson argued that the Indian tribes constituted nations by virtue of the definition of "nation." *Id.* at 53. That is, nations consisted of people living together as a society, and governing themselves as a sovereignty. *Id.* Moreover, Thompson noted that the United States had always treated them as a sovereign and independent authority. *Id.* Land had been purchased by the government through treaties; yet, all remaining land not so ceded had remained in the governance of the Indian nation. *Id.* Thompson also emphasized that the Indian nations had

The dissent asserted that the Cherokee Nation properly claimed protection from Georgia's statutes under its treaties with the United States, statutes which if left untouched would "go the length of abrogating all the laws of the Cherokees, abolishing their government, and entirely subverting their national character."[172] The dissent concluded that the laws of Georgia, in violation of acknowledged treaties, were repugnant to the United States Constitution, and therefore, were "void and inoperative."[173] Therefore, Thompson and Story urged an injunctive writ be issued against the state of Georgia.[174]

C. THE SECOND "CHEROKEE CASE"

Even as the Court considered *Cherokee Nation*,[175] Georgia continued her assault upon Cherokee sovereignty. Concerned with the pro-tribal support expressed by missionaries and other whites, the Georgia Legislature enacted a new statute prohibiting the passage of any white person onto Cherokee territory without the permission of the state.[176] Although most whites complied with the law, a handful of missionaries, including Samuel Worcester, defied Georgia and were arrested.[177]

The case of northern missionary Samuel Worcester offered tribal attorneys the opportunity to fashion a new challenge to Georgia's extension of state sovereignty over the Cherokee Nation.[178] The core question in this case, *Worcester v. Georgia*,[179] continued to center upon the constitutionality of Georgia's actions and the right of Indian tribes, as nations, to be protected by the laws and treaties of the United States.[180] The legal posture of the case, however, which came to the Court on a writ of error from Georgia's superior court, had changed significantly because of the legal and political character of the plaintiff.[181] As a white citizen and resident of Vermont, Worcester had standing to challenge the

never been "by conquest, reduced to the situation of subject to any conqueror." *Id.* at 54. As such, Thompson reasoned that, "there is as full and complete recognition of their sovereignty." *Id.* at 55.

172. *Id.* at 75.

173. *Id.* at 77.

174. *Id.* at 78. Thompson stated, "The complaint is not of a mere private trespass, admitting of compensation of damages; but of injuries which go to the total destruction of the whole right of the complainants. The mischief threatened is great and irreparable." *Id.*

175. 30 U.S. (5 Pet.) 1 (1831).

176. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 521-25 (1832).

177. G. FOREMAN, INDIAN REMOVAL 234 (1972); *see Worcester*, 31 U.S. (6 Pet.) at 538.

178. *See Worcester*, 31 U.S. (6 Pet.) at 536.

179. 31 U.S. (6 Pet.) 515 (1832).

180. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 541 (1832); *see* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73.

181. *See Worcester*, 31 U.S. (6 Pet.) at 536.

legality of the state laws.[182] Ending a brief review of the jurisdictional issues, the Chief Justice wrote: "[I]t is...too clear for controversy, that the act of congress, by which this court is constituted, has given it the power, and...the duty, of exercising jurisdiction in this case."[183] In *Cherokee Nation* Marshall had urged tribal attorneys to bring a property rights case.[184] Apparently anxious to address just this issue, the Court dismissed the personal nature of the litigation, stating that Worcester had no less an interest in Georgia's laws "than if they affected his property."[185]

The Court held that Worcester was "apprehended, tried, and condemned, under colour of a law which has been shown to be repugnant to the constitution, laws, and treaties of the United States."[186] The Court did not confine itself to a narrow examination of Georgia's statute.[187] Rather, the Court outlined the clearest, and most pro-Indian, principles embodied in a majority opinion of the time, considerably refining principles announced in earlier Supreme Court opinions, now drawing upon the earlier analysis of Justices Johnson and Thompson.[188]

Worcester has been called the Supreme Court's declaration of "Indian independence."[189] Despite continued support for the pre-emptive rights of the discoverer, *Worcester* sharply defended the unchanged nature of tribal hegemony and property rights.[190] Relying heavily upon interpretation of colonial charters, treaties between England, the United States, and Native American governments, and rethinking the fundamental premises of the discovery-conquest doctrine, the Court now underscored the sovereign national status of tribal governments as recognized in United States law.[191]

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182. *Id.*

183. *Id.* at 541.

184. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831).

185. *Worcester,* 31 U.S. (6 Pet.) at 562.

186. *Id.* The court concluded that the actions by the state of Georgia were violative of the Constitution of the United States after it determined:

> 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.

Id. at 561.

187. *See id.* at 562.

188. *See id.*

189. G. Lester, *supra* note 1, at 200; *see Worcester,* 31 U.S. (6 Pet.) 515 (1832).

190. *See Worcester,* 31 U.S. (6 Pet.) at 560.

191. *Id.* at 548-63.

The refinements of the opinion addressed the ambiguities and illogic of earlier Court text on federal Indian law, specifically the language of "guardianship" and "domestic dependent nation" contained in *Cherokee Nation*,[192] and the assertion of conquest and ambiguity about Indian consent found in *Johnson*.[193] The possible encouragement of its earlier conquest language upon political events in Georgia appears to have been very much on the Court's mind in the *Worcester* opinion.[194] In a long discussion of history and treaties, Chief Justice Marshall veered away from the suggestion of conquest so prominent in *Johnson*,[195] writing that "It is difficult to comprehend...that the discovery...should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors."[196] The opinion described as "extravagant and absurd" the idea that European discovery and settlement constituted conquest or yielded property title under the common law of Europe.[197] Rather, the pre-existing rights of the ancient possessors coupled with European law of discovery granted no more to the settler than the exclusive right to purchase title should tribal governments consent to sell.[198] Underscoring the importance of Indian consent, Marshall described European colonial charters as "grants assert[ing] a title against Europeans only...[that] were considered as blank paper so far as the rights of the natives were concerned."[199] Warning land hungry Americans, a stern Court admonished that "[t]he power of war is given only for defense, not for conquest,"[200] and that extinguishment of property title resulting from aggression would not be recognized.[201] Without explicitly citing *Johnson*, the Court turned its back on that opinion's tough assertion of European conquest of North American tribes.[202]

In *Worcester* the Court that the year before had described tribes

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192. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

193. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587-90 (1823).

194. *See id.; Worcester*, 31 U.S. (6 Pet.) at 543.

195. *Johnson*, 21 U.S. (8 Wheat.) at 587-90. For a discussion of *Johnson*, see *supra* notes 86-115 and accompanying text.

196. *Worcester*, 31 U.S. (6 Pet.) at 543. *Compare Worcester*, 31 U.S. (6 Pet.) at 543 (Court disaffirmed the discovery doctrine's independent conveyance of rights) *with Johnson*, 21 U.S. (8 Wheat.) at 574 (Court stated that discovery gave the discoverer the exclusive right to appropriate lands that the Indians occupied, and that Indian rights in such lands were necessarily diminished by the discovery doctrine).

197. *Worcester*, 31 U.S. (6 Pet.) at 544-45.

198. *Id.* at 545.

199. *Id.* at 546.

200. *Id.*

201. *See id.* at 545-56.

202. *See id.;* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823). For a discussion of *Johnson*, see *supra* notes 86-115 and accompanying text.

as "domestic dependent nations"[203] also concluded: "The Indian nations ha[ve] always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil...."[204] Analyzing the specific legal position of the Cherokee Nation, the Court stated that relevant treaties, such as the Treaty of Holston and the Treaty of Hopewell[205] recognized explicitly the national character of the Cherokees as well as their right to self-government, guaranteed their lands, and imposed on the federal government the duty of protecting these rights.[206]

Still, the guardianship language from *Cherokee Nation* seemingly burdened *Worcester's* characterization of Native American governments as fully sovereign and national in form.[207] Drawing directly upon Vattel to provide the necessary correctives, the Court now wrote:

> [T]he 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.[208]

"Protection" stated the Chief Justice, "does not imply the destruction of the protected."[209]

Consistent with *Johnson* and *Cherokee Nation,* tribal governments were not conceded in *Worcester* to be in complete control of their foreign relations, in particular, the right to cede tribal land to any sovereign other than the discovering nation.[210] The tribe is, thus, meaningfully described as a "nation like any other nation" with the power of internal self-government, but significantly delimited in certain external dealings so that the discoverer nation may protect its pre-emptive rights.[211]

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203. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). For a discussion of *Cherokee Nation,* see *supra* notes 142-74 and accompanying text.

204. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

205. Treaty of Holston, July 2, 1791, United States- Cherokee Indians, 7 Stat. 39; Treaty of Hopewell, Nov. 28, 1785, United States-Cherokee Indians, 7 Stat. 18.

206. *Worcester,* 31 U.S. (6 Pet.) at 551-56.

207. *Cherokee Nation,* 30 U.S. (5 Pet.) at 17.

208. 31 U.S. (6 Pet.) at 561.

209. *Id.* at 552.

210. *Id.; see Cherokee Nation,* 30 U.S. (5 Pet.) at 17; Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

211. *See generally Worcester,* 31 U.S. (6 Pet.) 515 (1832).

Thus refined, the guardian-ward principle is understood as combining an obligation for Indian national welfare with the property right of the discoverer. It is a principle describing the conduct of United States foreign relations. Interpreting treaty text acknowledging the United States to have "the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs,*" the Court underscored its interpretation of the relationship as spelled out in documents of foreign relations: "To construe the expression...into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them....It is...inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject [trade], to have divested themselves of the right of self-government on subjects not connected with trade."[212] Drawing upon the Northwest Ordinance and the commerce clause, Marshall argued that the proper construction of these phrases expressed a charge to the United States Government, not individual states, to carry on trade and intercourse with tribal nations, and to do so according to tribal consent.[213]

Contemporary with the passage of the Removal Act and Georgia's aggrandizing conduct, the Court's message was unequivocal. In the face of considerable animus from its own government, the majority reached out in a conciliatory manner to Native American governments finding not only that a non-Indian, Samuel Worcester, had been condemned under a law "shown to be repugnant to the constitution, laws, and treaties of the United States," but also that tribal nations held significant national political and property rights owed the highest respect by the United States.[214] Although not direct parties in this round of litigation, the Cherokee Nation had finally won their case. Marshall, usually a pragmatic statesman and jurist, seemingly abandoned a calculus of self-serving judicial politics, putting the rights of tribal nations squarely on the line against the announced positions of the political branches of the federal government and the ardent advocates of states' rights.[215]

212. *Id.* at 553-54.

213. *Id.* at 554, 557. In *Worcester,* the Chief Justice cautioned the reader that documents of diplomacy between Native American governments and the United States, written in English, were ultimately controlled by whites and, thus, subject to the mischief of translation and translators. *Id.* at 547, 554, 555, 559-60. Specifically, Marshall points out that "the words nation [and] treaty are words of our language...having definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense." *Id.* at 559-60.

214. *Id.* at 562.

215. *See id.* The extent to which judicial power was put on the line is reflected in the famous,

The limits of the law, however, are amply demonstrated by *Worcester*.[216] Victory for both the missionaries and the Indians depended upon enforcement of the Supreme Court's decision. Here they both lost — the Cherokee with devastating results. Georgia refused to release the missionaries.[217] They languished in prison for several months while negotiations to free them proceeded.[218] Meanwhile, rapidly changing political events resulting from South Carolina's Nullification Ordinance altered the political climate in the United States and any opportunity the Cherokee Nation might have had to use the *Worcester* opinion to invoke the protection of the United States government against Georgia.[219] The danger of civil war over the nullification issue — real or imagined — caused many of President Jackson's former opponents to rally to his support.[220]

At this point the Cherokee government had no influence over the course of events affecting it. To the extent that political support for the tribe's cause had been directly related to anti-Jackson sentiment and rejection of his states' rights position, change in the President's policies as a result of South Carolina's rebellious act brought about a regrouping of the Indians' friends and allies. Jackson's nationalistic proclamation against South Carolina's nullification and the desire to protect the Constitution and the Union required that the fight on behalf of the Cherokee cease and that the Jackson Administration be supported.[221] As only indirect parties to Worcester's case, the Cherokee were unable to pursue further legal action on their own. Pawns in the political game of men like Webster, Wirt and Sergeant, the tribe had no legal recourse when the missionaries reluctantly accepted a pardon early

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perhaps apocryphal, comment by President Jackson following the reading of the opinion: "John Marshall has made his decision, now let him enforce it!" C. WARREN, *supra* note 166, at 754. On the other hand, it is possible to argue that the broad, forthright support of Indian sovereignty expressed in *Worcester* was abstract, and occurred because white men's rights and liberties were directly at issue. For a discussion of politics subsequent to the decision, see Norgren & Shattuck, *Limits of Legal Action: The Cherokee Cases,* 2 AM. INDIAN CULTURE & RES. J. 20-23 (1978).

216. 31 U.S. (6 Pet.) 515 (1832).

217. G. FOREMAN, *supra* note 177, at 235.

218. *Id.*

219. *See* South Carolina Nullification Ordinance (Nov. 23, 1832). South Carolina, on the sixth of a state convention called to consider the question of what it deemed an unconstitutional federal tariff, declared the tariff null and void in that state. D. HOUSTON, A CRITICAL STUDY OF NULLIFICATION IN SOUTH CAROLINA 110 (1968). State officials began organizing an army to enforce the order that tariffs not be collected within its borders and threatened secession if the federal government attempted to use force. *Id.* at 113. Compromise was achieved in the spring of 1833: the tariff was reduced while, at the same time, the President was authorized to use force to collect duties. South Carolina then repealed its ordinance. *Id.* at 129-33.

220. D. HOUSTON, *supra* note 219, at 118-19, 129-33.

221. Burke, *supra* note 132, at 530-31.

in 1833.[222] From this point on, the removal of the Cherokee to the western side of the Mississippi River was only a matter of time.

VI. THE EARLY TEST; MID-NINETEENTH CENTURY APPLICATION OF ORIGINAL PRINCIPLES OF FEDERAL INDIAN LAW

The removal of the Cherokee and other eastern tribes after the *Worcester* decision demonstrated the limits of the judiciary's ability to reconcile basic conflict. In the 1830s, the legal victories of *Worcester* could not be translated by Native American governments into political realities. Moreover, while subsequent courts found continuing authority for Indian sovereignty and property rights in the language and conclusions of *Worcester,*[223] in the decades immediately following, courts also tortured the meaning of the *Worcester* decision, or ignored it, usually in favor of *Johnson's* less supportive language.[224] Federal Indian policy changed and vacillated constantly in these decades: Indian governments were cajoled; they were urged, and made, to remove and remain isolated on reservations; they faced military action and were believed to be a vanishing race; and, beginning in the 1870s and 1880s, the Native American became the object of land allotment legislation designed to "americanize" the individual and draw him out of his isolation, and to end tribal society and government.[225] Vacillating with the nation but ultimately moving in the direction of this assimilation policy, Supreme Court decisions in this period sometimes heeded the principles of *Worcester's* "declaration of Indian independence" and sometimes yielded to a more expansive view of the guardian-ward relationship, and a more restrictive posture concerning Indian occupancy title, and tribal right to govern.[226] A pattern was established in which *Worcester* increasingly became a precedent followed in name rather than substance.

A. EARLY AFFIRMATION OF INDIAN TITLE

The Court's 1835 decision in *Mitchel v. United States,*[227] held

222. G. WOODWARD, *supra* note 120, at 195.

223. *See, e.g.,* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835) (concluding that Indian title was as sacred as that of the whites). For a discussion of *Mitchel,* see *infra* notes 227-34 and accompanying text.

224. *See, e.g.,* United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) (stating that the native tribes had never been treated as independent nations nor regarded as owners of the territories they occupied). For a discussion of *Rogers,* see *infra* notes 236-47 and accompanying text.

225. *See* Welsh, *The Needs of the Time,* AMERICANIZING THE AMERICAN INDIANS 96, 96-99 (F. Prucha ed. 1973).

226. *See* G. Lester, *supra* note 1, at 200.

227. 34 U.S. (9 Pet.) 711 (1835).

faith with *Worcester* even though, curiously, it failed to cite that decision.[228] Writing for the Court, Justice Baldwin asserted that Indian occupancy title was "as sacred as the fee simple of the whites,"[229] and, critically, that "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites...."[230] Moreover, the specific nature of the dispute in *Mitchel* permitted Justice Baldwin to clarify what had been conceded only in dictum in *Johnson v. M'Intosh*, namely, that Indian title included the power to transfer as well as to occupy.[231] This conclusion, along with continuing support for the requirement that tribal consent be obtained to extinguish title, and the Court's explicit statement that culturally diverse lifestyles were not a bar to possession,[232] suggests that the Court had not been daunted by political events in Georgia subsequent to *Worcester*. At the same time, however, the Court maintained its commitment to discovery theory and the dual, or split, nature of Indian land title.[233] If this Court was willing to support *Worcester*, it was not inclined to expand upon it in ways that would undermine the ultimate real estate interests of the United States.[234]

B. EXPANDING THE SCOPE OF FEDERAL POWER OVER TRIBES

Mitchel was immediately followed by several decisions similarly affirming the rights of Indian title.[235] But the tone and direction of Justice Taney's opinion in *United States v. Rogers*,[236] an 1846 criminal rights case, spoke of a new era of judicial interpretation concerning the doctrine of discovery.[237] Describing Native Americans as an "unfortunate race" who have "never been acknowledged or treated as independent nations by the European

228. *See* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835); *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (concluding that Indian nations are independent communities that have natural rights to possess the soil they occupy).

229. *Mitchel,* 34 U.S. (9 Pet.) at 746 (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 48 (1831)).

230. *Id.* In *Mitchel,* the petitioners asserted title to lands in Florida pursuant to grants from various Indian tribes of the Creek confederacy, and which grants were confirmed by Spain prior to the cession of Florida to the United States. *Id.* at 725. The Supreme Court, reversing the decision of the Superior Court of Middle Florida, confirmed Mitchel's title. *Id.* at 761-63.

231. Cohen, *supra* note 57, at 50; *see Mitchel,* 34 U.S. (9 Pet.) at 758-59; Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823).

232. *Mitchel,* 34 U.S. (9 Pet.) at 746.

233. *Id.* at 745-46.

234. *See id.*

235. *See, e.g.,* Lattimer v. Poteet, 39 U.S. (14 Pet.) 4, 14 (1840) (ultimate title in Indian land is encumbered with the right of tribal occupancy); Clark v. Smith, 38 U.S. (13 Pet.) 195, 201 (1839)(same).

236. 45 U.S. (4 How.) 567 (1846).

governments, nor regarded as the owners of the territories they respectively occupied,"[238] the Court held that a white man, although he has married into, and become an acknowledged citizen of an Indian tribe, "is not an Indian" and may not "throw off all responsibility to the laws of the United States."[239] According to the Court, although the murder of one white adopted by the Cherokee Nation by another white, similarly adopted, occurred within the territory of the Cherokee Nation, the Cherokee did not have jurisdiction over the crime because the Trade and Intercourse Act of 1834 concerned with criminal acts in Indian territory only extended the right of jurisdiction to tribes in cases of Indians *born* Indians.[240] The Supreme Court rejected the view of some members of the lower court and the accused, Rogers, that the Cherokee Nation "as a separate and distinct government . . . possessing political rights and powers [could] receive and adopt, as members of their state, the subjects . . . of the United States . . . and to naturalize such subjects . . . and make them exclusively . . . citizens of the said Indian tribe, with regard to civil and political rights and obligations."[241] In the Court's view, a tribe could make a white man a member of the tribe, but not a member of the Indian race, and by its interpretation, the right described in the 1834 legislation applied only to racially Indian members of a tribe.[242]

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237. *See* United States v. Rogers, 45 U.S.(4 How.) 567, 571-72 (1846). In *Rogers,* William S. Rogers, a white man, was charged with the murder of Jacob Nicholson, also a white man, which murder was alleged to have occurred in territory occupied by Cherokee Indians. *Id.* at 571. Rogers asserted that both he and Nicholson had, prior to Nicholson's death, become citizens of the Cherokee Nation, and therefore, the United States court had no jurisdiction in the matter. *Id.*

238. *Id.* at 572.

239. *Id.* at 572-73; *see* Indian Trade & Intercourse Act, ch. 161, § 25, 4 Stat. 729, 733 (1834) (codified as amended at 18 U.S.C. § 1152 (1976)). The Act provides, in relevant part:

> [S]o much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided,* the same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Id. (emphasis in original). The *Rogers* court explicitly approved, for the first time, the racial implications of the Act. *See Rogers,* 45 U.S. (4 How.) at 573. For a discussion of federal criminal jurisdiction in Indian territory, see V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 161-92 (1983) and Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective,* 17 ARIZ. L. REV. 951 (1975).

240. *Rogers,* 45 U.S. (4 How.) at 572-73; *see* Indian Trade & Intercourse Act, ch. 161, § 25, 4 Stat. 729, 733 (1834) (codified as amended at 18 U.S.C. § 1152 (1976)). For the text of § 25 of the Indian Trade & Intercourse Act, see *supra* note 239.

241. *Rogers,* 45 U.S. (4 How.) at 570.

242. *Id.* at 572-73; *see* Indian Trade & Intercourse Act, ch. 161, § 25 (1834) (codified as amended at 18 U.S.C. § 1152 (1976)). For the text of § 25 of the Indian Trade & Intercourse Act, see *supra* note 239. The Court asserted the right to establish criminal jurisdiction within Indian nations:

> [W]e think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of

Reinterpreting the doctrine of discovery to considerably broaden its scope, the Supreme Court now read into that doctrine the right to interfere in internal tribal affairs and to govern Indians.[243] The Court's opinion further diminished the tribal sovereignty acknowledged in the *Cherokee* cases by asserting for the first time that the power of the United States over tribes "need not be tied to treatymaking and execution, or regulation of commerce between Indians and outsiders."[244]

Rogers initiated an era of broad interpretation by federal courts of congressional power to regulate commerce with Indian tribes.[245] The 1834 statute challenged in the *Rogers* case was one of several laws based upon the commerce clause which, however, had "little or no relation to commerce, such as travel, crimes by whites against Indians or Indians against whites."[246] In the decades following *Rogers*, combining this constitutional authority, and sometimes that derived from the property clause,[247] with a broad view of the guardianship authority asserted in *Cherokee Nation*, the Court on the one hand encouraged the political branches to uphold their responsibilities in foreign relations with Indian tribes while at the same time increasingly approved the active regulation of domestic tribal concerns by the federal government. The result mid-century was a legal muddle in which the Courts usually characterized tribes as nations in name and function, did not overturn *Worcester*, but, in fact, permitted the encroachment of the United States Government into domestic tribal policy and individual Indian's rights.

C. POST-ROGERS LIQUOR CASES

This new posture was expressed in a variety of cases involving the regulation of Native American access to liquor. In *United States v. Holliday*,[248] the Supreme Court upheld the use of

> the states, Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian.

Rogers, 45 U.S. (4 How.) at 572. The Court further stated that while the treaty of the United States with the Cherokees guaranteed that nation the right to make laws for its people, these laws "shall not be inconsistent with the Constitution of the United States [or] acts of Congress...regulating trade and intercourse with the Indians." *Id.* at 573.

243. *Rogers*, 45 U.S. (4 How.) at 573.

244. Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 211 (1984). *See Rogers*, 45 U.S. (4 How.) at 573.

245. *See Rogers*, 45 U.S. (4 How.) at 573. The Court invoked political question doctrine as a barrier to judicial examination of the federal government's assertion of sovereignty over tribal governments, stating that the sovereignty question is one "for the law-making and political department of the government, and not for the judicial." *Id.* at 572.

246. F. COHEN, *supra* note 18, at 92. U.S. CONST. art. I, § 8.

247. U.S. CONST. art. IV, § 3, cl. 2.

248. 70 U.S. (3 Wall.) 407 (1865).

sweeping congressional power to forbid the sale of liquor to an "Indian under charge of an Indian agent" although the Indian was living off the reservation, and in one of the states of the United States.[249] In *United States v. Forty-Three Gallons of Whiskey*,[250] the Court concluded that the power to regulate commerce with Indian tribes was "as broad and free from restrictions as that to regulate commerce with foreign nations...."[251] The Court's decision in *Forty-Three Gallons of Whiskey*, like *Holliday*, restricted the jurisdiction of state governments over Indians,[252] but more importantly restricted the right of Indians to be free from United States' liquor regulations specific to Indians where they lived beyond the borders of a reservation.[253] This authority to regulate the Indians themselves, and not merely the land occupied by tribes, eventually meant that federal liquor prohibitions were applied to Indians even when they "had assumed the responsibilities of state citizenship and...held fee simple title to the land they occupied."[254]

The meaning of wardship invoked in the 1830s Cherokee cases — that of a more powerful nation protecting a weaker one from foreign intrusions — shifted decisively in these 1860s and 1870s decisions toward the position announced by Congress in the 1830s. In a House report accompanying the Trade and Intercourse Act of 1834,[255] members of the Committee on Indian Affairs argued that the liquor prohibition provisos were "to enable administrative officials to prevent the manufacture of whiskey by Indians, who believed that they had the right to do as they pleased in their own country, and acknowledged no restraint beyond the laws of their own tribe."[256] In other litigation involving Native Americans, the Court similarly upheld this expanded view of wardship. In *Smith v. Stevens*,[257] for example, the justices argued

249. United States v. Holliday, 70 U.S. (3 Wall.) 407, 416 (1865). *Holliday* involved a challenge to United States interpretation of commerce power, as applied in the Indian Trade & Intercourse Act, that included the right to regulate the sale of liquor to individual Indians, off the reservation as well as on it. *See id.;* Indian Trade & Intercourse Act, ch. 161, § 25, 4 Stat. 729, 729, 732, 733 (1834).

250. 93 U.S. 188 (1876).

251. United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876). In *Forty-Three Gallons of Whiskey,* the United States sought a declaration of forfeiture for spirituous liquor introduced into Chippewa Indian territory, in violation of § 20 of the Indian Trade & Intercourse Act of 1864. *Id.* at 189; *see* Indian Trade & Intercourse Act, ch. 161, § 20, 4 Stat. 729, 729 (1834) (imposing penalty for disposing of liquors to Indians).

252. *Forty-Three Gallons of Whiskey,* 93 U.S. at 195; *Holliday,* 70 U.S. (3 Wall.) at 418.

253. *Forty-Three Gallons of Whiskey,* 93 U.S. at 195.

254. D. GETCHES, D. ROSENFELT & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 183 (1979).

255. *See* Indian Trade & Intercourse Act, ch. 161, § 425 Stat. 729 (1834) (regulating trade with Indian tribes).

256. F. COHEN, *supra* note 18, at 91 (citing H. R. REP. No. 474, 23rd Cong., 1st Sess. 103 (1834) (report from the Committee of Indian Affairs)).

257. 77 U.S. (10 Wall.) 321 (1870).

that Congress was entitled to "safeguard [Indian reservees] against their own improvidence," a power that included the imposition of a restriction on the individual Indian's right of alienation.[258]

D. TAXATION, TREATIES, AND LAND TITLE

In these same years the Supreme Court continued to recognize the "national character" of tribes despite its earlier language in *Rogers*.[259] The Court also acknowledged the validity of binding treaties with tribal nations and the obligations undertaken by the federal government in those treaties.[260] In *The Cherokee Tobacco*,[261] however, the Supreme Court agreed that an act of Congress might supercede a prior treaty with a tribe.[262] Invoking judicial restraint, the *Cherokee Tobacco* majority determined that the imposition of a federal tax on liquor and tobacco despite prior treaty agreement prohibiting the levy of such taxes upon tribes was acceptable.[263] The Court, ironically, reasoned: "The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?"[264] Certainly there is irony in the Court approving the reasonableness of taxing a people described by them as wards in a "state of pupilage."[265] In their dissent, Justices Bradley and Davis argued that Congress had not intended to tax in the Indian Territory and that Congress considered Indian

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258. Smith v. Stevens, 77 U.S. (10 Wall.) 321, 326 (1870). In *Smith,* the Court upheld an act of Congress that provided that Kansas Indians holding reserve title land pursuant to an 1825 treaty between the United States and the Kansas Indians could not sell such land independently, that is, without the approval of the Secretary of the Interior. *Id.* at 323; *see* Act approved May 26, 1860, ch. 61, 12 Stat. 21, 21-22; Treaty with the Kansas Indians, June 3, 1825, United States-Kansas Indians, 7 Stat. 244.

259. *See, e.g.,* The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866) (determining that Indians are under the protection of treaties and the laws of Congress, and that the Indian property is withdrawn from the operation of state laws); *see* United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) (stating that Indians had never been acknowledged or treated as independent nations, nor regarded as owners of territory they occupied). For a discussion of *Rogers,* see *supra* notes 236-47 and accompanying text.

260. *See, e.g., Kansas Indians,* 72 U.S. (5 Wall.) at 757 (determining that Indians are protected by the treaties and laws of Congress); Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 371-72 (1856) (same).

261. 78 U.S. (11 Wall.) 616 (1870).

262. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870). In *Cherokee Tobacco,* the Court addressed the issue of whether Congress had the intent and power, pursuant to the Internal Revenue Act of 1868, to tax tobacco and tobacco products manufactured by citizens of the Cherokee Nation and sold within its boundaries, in the face of an 1866 treaty between the United States and the Cherokee Nation agreeing that such tobacco should be exempt from taxation, and whether, therefore, the seizure of defendants' tobacco in lieu of payment of taxes was legal. *Id.*

263. *Id.*

264. *Id.*

265. *See id.;* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

populations "autonomies invested with the power to make and execute all laws for their domestic government."[266]

Continuing the uncertain pattern, two years after this repudiation of treaty rights and diminution of tribal sovereignty in *Cherokee Tobacco*, the Court rejected, for the third time since *Worcester*, the contention that land grants from the discoverer superceded title based upon Indian treaty.[267] In *Holden v. Joy*,[268] the Court not merely upheld the sanctity of treaties after the earlier aberration, *Cherokee Tobacco*, but cited the consent requirement with approval.[269] One year after the *Holden* decision, however, the Court imposed a narrow reading of the occupancy and use principle, with significant effect for tribal property interests, in *United States v. Cook*.[270]

In *Cook*,[271] Chief Justice Chase wrote that although the right of use and occupancy is unlimited, "[t]he land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be."[272] According to the Court, the cutting of timber had to be related to the improvement of the land, and could not simply be taken to make a sale.[273]

The *Cook* decision contains two opposing principles. On the one hand, the Court described Indian occupancy and use as of unlimited duration.[274] On the other hand, Justice Chase analogized Indian title in *Cook* to that of the tenant for life: "What a tenant for life may do upon the lands of a remainder-man the Indians may do

266. *Cherokee Tobacco*, 78 U.S. (11 Wall.) at 622 (Brady & Davis, J.J., dissenting). In the same period, the Court continued to reject the encroachment of state power upon Native American Tribes. *See, e.g.*, The Kansas Indians, 72 U.S. (5 Wall.) 737, 756, 759-61 (1866) (rejecting, as prohibited by treaty, efforts by the state of Kansas to tax tribes while at the same time that the federal taxing of Indians was approved).

267. *See* Holden v. Joy, 84 U.S. (17 Wall.) 211, 252-53 (1872) (rejecting the contention that land grants from the United States superceded title based upon Indian treaty); Chouteau v. Molony, 57 U.S. (16 How.) 203, 239 (1853) (same); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746-47 (1835) (same). In *Chouteau*, an ejectment action was brought by Chouteau, a Missouri citizen, to recover a large tract of land including the city of Dubuque, title of which he claimed traced back to grants from the Fox Indians. *Chouteau*, 57 U.S. (16 How.) at 221. Molony claimed the land under a patent from the United States. *Id.* For a discussion of *Mitchel*, see *supra* notes 227-34 and accompanying text.

268. 84 U.S. (17 Wall.) 211 (1872).

269. Holden v. Joy, 84 U.S. (17 Wall.) 211, 244 (1872). *Holden* involved a challenge to the validity of a land grant pursuant to treaty to Joy, a Cherokee Indian. *Id.* at 221-22.

270. *See* United States v. Cook, 86 U.S. (19 Wall.) 591, 594 (1873). In *Cook* an action of replevin by the United States against the non-Indian, Cook, to recover possession of logs sold to Cook by reservation Indians was challenged on the grounds that tribal right to occupancy includes the right to sell as well as to make incidental use of land's resources. *Id.* at 592.

271. 86 U.S. (19 Wall.) 591 (1873).

272. United State v. Cook, 86 U.S. (19 Wall.) 591, 593 (1873).

273. *Id.*

274. *Id.*; *see* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 745 (1835) (stating that "Indians were protected in the possession of the lands they occupied and were considered as owning them by a perpetual right of possession...from generation to generation, not as the right of individuals located on particular spots"). For a discussion of *Mitchel*, see *supra* notes 227-34 and accompanying text.

upon their reservation, but no more.''[275] Thus, to improve agriculture, the tribe might legally cut timber, but even dead wood could not simply be sold as a purely entrepreneurial effort.[276] *Cook* thus limited the ability of tribes to enter into, and compete in, the capitalist economy of North America.[277]

VII. CONCLUSION

In the renaissance of tribal rights litigation in the 1970s, the principles of the 1832 *Worcester* opinion were cited as ''direct authority'' to validate claims.[278] Inasmuch as the decision has never been overturned, it contains legal principles of continuing authority. Yet much has changed in United States-Native American relations in these 150 years. Both the letter and the spirit of the principles articulated in *Worcester* have been severely tested: the opinion has been ignored in favor of the earlier *Johnson* decision.[279] The premises of tribal sovereignty and property rights contained in *Worcester* have been rewritten, yielding significantly narrower and weaker tribal prerogatives.

The Marshall Court had a rich body of international law and considerable political relations from which to build a doctrine of federal Indian law. Initially, the Court addressed the question of Indian title as it designed a law of real property for the Republic. It granted no absolute title to tribal land, but rather various rights to different parties. In order to clarify questions of foreign relations with Native American governments and issues of federalism as

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275. *Cook*, 86 U.S. (19 Wall.) at 594.

276. *See id.* In 1889, Congress enacted legislation authorizing the sale of dead wood on Indian reservations, by the members of the tribe, when approved by the President. Act approved Feb. 16, 1889, ch. 172, 25 Stat. 673 (codified as amended at 25 U.S.C. § 196 (1982)).

277. *See Cook*, 86 U.S. (19 Wall.) at 594. *Cook* left several questions unsettled including whether, in recovering the timber or its money value, the United States was to hold such capital in trust for the Indian tribe concerned, or whether it rightfully accrued to the general treasury of the United States. F. COHEN, *supra* note 18, at 314. Only in 1911 did an opinion of the attorney general determine that occupants of Executive Order reservations were entitled to the proceeds of timber sales. *Id.; see* 29 Op. Att'y Gen. 239, 240, 244 (1911).

278. *See, e.g.*, Oliphant v. Suguamish Indian Tribe, 435 U.S. 191, 207 (1978) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832), for the principle that Indian nations are necessarily dependent on the United States for protection from lawless and injurious intrusions into their territory).

279. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279-80 (1955) (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) for the principle that the United States by discovery and conquest had sovereignty over and ownership of Indian lands). Not only the same court, but the same justice, wrote the opinions in *Worcester* and *Johnson* yielding these original principles of federal Indian law. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). It can be argued, therefore, that when the same issues of Indian sovereignty or Indian title are addressed, the discussion in the last opinion, *Worcester*, should be authoritative. This is specifically supported by the significant modifications of *Johnson* in *Cherokee Nation* and, in particular, *Worcester*. *See* Berman, *supra* note 65, at 643.

they affected interactions with tribes, the Court also affirmed the national character of Indian governments.

Increasingly, however, the work of the Supreme Court detoured this law from original intentions, especially as expressed in *Worcester*. The political branches of the United States Government vacillated in their federal Indian policy from the 1830s through the 1870s; so did the Court. Without abandoning a framework of law, the United States sought a social, political, and economic order that would minimize the existence of the Native American by isolation, extermination, or assimilation. In the legal opinions of the Supreme Court in this period, one finds confusion among jurists clinging to the ideal of a nation of laws, while trying to accommodate expansionist nationalist interests in the context of these original principles of Indian law. As the Court wavered in its commitment to original Indian doctrine, it became facile to use *Worcester* as the proper legal vessel to be filled, however, with reworked principles. In time, this evolutionary process made possible a body of late nineteenth and early twentieth century law that entirely recast the status of Native Americans and United States power over them. In developing federal Indian case law consonant with American political and economic goals, the Supreme Court deferred to what it described as the plenary power of Congress in Indian affairs and elevated, indeed, transformed, guardianship into a fiduciary power of sweeping proportions — sheltering certain Native American interests while broadly asserting the prerogatives of an expansionist American state.[280]

280. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384-85 (1886). In *Kagama*, tribal members challenged the constitutionality of extending United States jurisdiction to Indian nations in the case of a major crime. *Id.* at 375-76. The Court upheld the law, determining that tribes are only semi-independent and are not nations. The Court stated, "Indian tribes *are* wards of the nation. They are communities *dependent* on the United States [for protection from their weakness]." *Id.* at 383-84 (emphasis in original).

The right of Indian nations to self government, including but not limited to criminal jurisdiction, can be abrogated by a higher sovereignty. Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903) (articulating the Supreme Court's acceptance of the diminution of tribal rights in the name of guardianship: the plenary power of Congress is not subject to judicial review; Congress may abrogate treaties with tribes as their guardian). *Lone Wolf* involved a suit by Lone Wolf who sought to enjoin implementation of United States legislation transferring title to 2.5 million acres of "excess" Kiowa, Comanche, and Apache land to itself. *Id.* at 560, 564. Lone Wolf argued that transfer could only occur, under terms of an 1867 treaty, with the consent of three-fourths of adult males of the tribe and that the failure to obtain this number violated the treaty's consent requirement and due process of law. *Id.* at 563-64. *Lone Wolf* has been called the Indians' *Dred Scott*. Sioux Nation v. United States, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff'd*, 448 U.S. 371 (1980). *See also, e.g.*, Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899) (affording the Supreme Court the opportunity to assert that the plenary power of Congress derived from the Indians' condition of dependency in a case involving an application for, and review of, Cherokee citizenship as part of an allotment proceeding by claimant whose parents were not Cherokee at the time of his birth); McBratney v. United States, 104 U.S. 621, 624 (1882) (upholding state jurisdiction over the murder of a non-Indian by a non-Indian within an Indian nation contrary to the provisions of the General Crimes Act, which did not grant the extension of such authority onto reservations by states).

If principled law is the core of the rule of law, then the United States must cast out misapplied and reworked law and acknowledge the original principles of federal Indian law. There can be no relief from the often antagonistic relations between Native American governments and the United States over questions of land, mineral and water rights, criminal jurisdiction, regulation of commerce, child custody, and religious freedom, until contemporary courts fully apply these original principles even as they may work against the interests of the United States and non-Indian citizens.