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JOHN MARSHALL AND INDIAN NATIONS IN THE BEGINNING AND NOW

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INTRODUCTION

In developing its law of relations between the United States and Indian Nations, the modern Supreme Court has acted more frequently and pervasively as a colonial than as an anti-colonial power and has drawn support for both roles from John Marshall's judicial opinions. The Chief Justice lends himself to this double usage, but the Court has over-stretched the colonial Marshall, and often either ignored the chiefly anti-colonial Marshall or represented him as affirming what he plainly denied and as denying what he plainly affirmed.

These interpretive acts do violence to the old texts and to present-day tribes. In what follows, I shall offer brief examples of the contemporary fate of Marshall's primary opinions affecting Native Americans: *Johnson v. McIntosh*,[1] and the Cherokee Cases (*Cherokee Nation v. Georgia*[2] and *Worcester v. Georgia*[3]).

The context of these cases, especially the last two, has been well examined by scholars and was recently and engagingly revisited by R. Kent Newmyer.[4] As Newmyer notes, the Cherokee Cases arose out of an old Georgia antipathy to the Court and arrived in a highly-charged political atmosphere when the Chief Justice was beset with troubles of all kinds: his wife's death, his own old age and illness, the threat of states' rights ideology, the rise of Jacksonian democracy, and in-house divisiveness among the Justices marked by their abrupt abandonment of a shared boardinghouse life in Washington.

Newmyer describes the Cherokee cases as Marshall's "last campaign" and notes that "it may well have been his finest moment."[5] It was a fine moment for the tribes, too, but only a fleeting, early one in their long, ongoing struggle with the Court.

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1. 21 U.S (8 Wheat.) 543 (1823).
2. 30 U.S. (5 Pet.) 1 (1831).
3. 31 U.S. (6 Pet.) 515 (1832).
4. R. Kent Newmyer, *Chief Justice John Marshall's Last Campaign: Georgia, Jackson and the Cherokee Cases*, 23 J. OF SUP. CT. HIST. 76 (1999).
5. *Id.* at 93.

The tribes' fortunes rise and mostly fall in this conflict in a pattern shared with the rise and fall of the Marshall opinions.

I. A BRIEF BACKGROUND SUMMARY OF CASES

In *Fletcher v. Peck*,[6] in 1810, one of the cases that angered Georgians, the Court struck down their reformist legislature's attempt to undo its predecessor's corrupt sale of the state's western territories in the Yazoo land fraud. Although tribes were not directly involved, the status of tribal title was indirectly and secondarily brought into play because the territory included Indian country. Marshall reserved the subject to the last two sentences of his opinion: The tribes had a title "certainly to be respected by all courts, until it be legitimately extinguished," but it was not a title that was "absolutely repugnant to seisin in fee on the part of the state."[7] This fundamentally equivocal dictum was Marshall's first judicial comment on a matter of Indian law.

Thirteen years later in *Johnson v. McIntosh*, again in the absence of direct tribal involvement, a land dispute between non-Indians required that Marshall amplify his thinking about Indian property rights. One party claimed title under a tribal conveyance; the second under a conveyance from the United States to which the tribe had later ceded lands containing the disputed parcel. The theory Marshall employed to support his decision in favor of the second claimant is elusive, and whether the opinion had any real effect on tribal title is debatable. I shall return to the subject in Part III.

A tribe first came to the Court in *Cherokee Nation v. Georgia* in the midst of Marshall's personal and political woes. White settlers had been invading Cherokee territory long before 1827, the year when gold was discovered there and when the state legislature initiated incursions of its own by beginning to assert that Georgia law could be enforced in Indian country.[8] Andrew Jackson was elected President in 1828, and in his first message to Congress, he made it clear that he supported removal of the Cherokee. Congress responded with the Removal Act of 1830. The tribe sought relief from these assaults by bringing an original action in the Supreme Court in 1831. It argued that Georgia law (like Georgia citizens) could not lawfully violate the Cherokee Nation's boundaries. The Chief Justice gave the tribe some encouragement but avoided the critical issue. He held that the Court lacked jurisdiction. The Cherokee Nation was neither a

6. 103 U.S. (6 Cranch) 87 (1810).

7. *Id.* at 142-43.

8. *See generally* WILLIAM MCLOUGHLIN, CHEROKEE RENASCENCE IN THE NEW REPUBLIC (1986) (giving a comprehensive account of the Cherokee Nation in this period and of the case events).

state nor a foreign nation within the meaning of Article III's provision for original jurisdiction. It was instead what he termed a "domestic dependent nation," whose "relation to the United States resembles that of a ward to his guardian."[9] This trope underwrites continuing judicial views of the tribes and also nurtures a current United States' "trust" obligation to the tribes, an issue that I shall take up in Part IV.

The Cherokee Nation was quickly before the Court again in *Worcester v. Georgia*, this time with the procedural bar removed. *Worcester*, Newmyer says, gave the Cherokee "one last chance for survival, Marshall one last opportunity to answer his states' rights critics, and the American people a chance to depose 'King Andrew.'"[10] Georgia had arrested a missionary, Samuel Worcester, for residing in Cherokee territory in violation of the state's law. He was found guilty and sentenced to four years of hard labor. (Georgia eventually pardoned Worcester in 1992.) He appealed to the Court. His case and the substantive merits were properly before the Court. Because he was an American citizen, he rather than the tribe was the party, and he brought an appeal rather than an original action.

Marshall found that Georgia had acted unlawfully and, in the course of his opinion, gave a ringing endorsement to tribal self-government. The Cherokee, he said, had always been considered an independent people and the tribe was, in U.S. constitutional terms, a treaty-making nation.[11]

> 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 have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[12]

The state's extraterritorial venture was void.

The explosive potential of *Worcester* was never realized. The Court avoided an enforcement conflict with Jackson by rising before receipt of formal documentation that Georgia had refused to obey. Georgia never had to obey. Enforcement might have driven Georgians to side with South Carolina secessionists. The Christian supporters of Worcester's missionary enterprise feared for the Union and advised the Cherokee to strike a bargain. The Cherokee surrendered their land and were brutally herded west along the Trail of Tears.

The Court's opinion produced nothing tangible at the time except a small benefit to the Court. *Worcester* and its aftermath

9. 30 U.S. at 17.
10. Newmyer, *supra* note 4, at 86.
11. 31 U.S. at 559-60.
12. *Id.* at 561.

called attention to the fact that the Judiciary Act of 1789 had foreclosed possible avenues of enforcement to the Court. Congress cured the statutory defect in 1833. I take up the current status of *Worcester* in the next section.

II. WORCESTER V. GEORGIA

Native Americans and Native Hawaiians have withstood centuries of assault by disease, terrorism, ethnic cleansing, cavalry, Christian missionaries, Congress, liberal-hearted charities, anthropologists, lawyers, hippies hoping to find themselves, and now the Supreme Court. *Worcester* has currency among the indigenous peoples because it supplies them with language essential for translating their political self-expression as sovereigns —their hopes and their claims for justice— into western and international legal terms.

In recent years Congress and the Executive have often respected the idea of tribal sovereignty, frequently embodied in support of self-determination. And perhaps, to some ill-defined extent, there is popular recognition of the fact that there are communities of native peoples —Indian nations— that are governmentally distinct.

The Court, too, has employed the notion of sovereignty in its talk about native peoples and typically draws on *Worcester* when it does so. Nevertheless, in 1959 the Justices set in motion a fundamental shift in language and approach with *Williams v. Lee*.[13]

Congressional policy has always lurched back and forth between terminating the tribes and supporting their sovereignty. Congress has lately supported tribal self-determination, but *Williams* is the judicial reflection of an earlier termination phase. In the course of a relatively brief opinion, Justice Black averred that "the broad principles of [*Worcester*] came to be accepted as law" but that "over the years [the] Court has modified" them.[14] So had it come to pass that the Congress, in pursuit of its 1950's termination policy, could grant to states the jurisdiction in Indian country "which *Worcester v. Georgia* had denied" them.[15]

This remark about congressional power was unfortunate enough for the tribes. Worse was the further gratuitous comment that, even without authorizing Congressional legislation, the legitimacy of state action affecting reservation Indians turned on whether it infringed tribes' right "to make their own laws and be

13. *See* 358 U.S. 217 (1959) (adjudicating that an action by a non-Indian against an Indian customer for goods sold on credit was one for disposition by tribal rather than state court).

14. *Id.* at 219.

15. *Id.* at 221.

ruled by them."[16] According to the Court in 1959, absent an infringement on tribal lawmaking —an issue for the judiciary to resolve— states could play a role in the Indian country that *Worcester* said was extraterritorial to them. The Court had put itself in position to encourage and sanction state forays into Indian country. (I shall discuss the Court's exercise of this power against tribes and their reservations under the rubric of "incorporation" in the next part.)

Congress's embrace of tribal termination in the 1950's has ended for the time being, but the Court has nonetheless soldiered on in developing the idea of a state presence in Indian country. In 1973 in *McClanahan v. Arizona State Tax Commission*,[17] Justice Thurgood Marshall noted that the freedom of Indians from state jurisdiction was deeply rooted in the nation's history, and he referred to *Worcester*. But then he settled on the "landmark" case of *Williams*. And, after demoting tribal sovereignty to association with "platonic notions," he said that it had become merely "a backdrop" for the interpretation of treaties and federal statutes.[18]

Even the platonic notion backdrop had disappeared by 1989. At least the Court could not see it in *Cotton Petroleum Corp. v. New Mexico*[19] where it upheld a state severance tax on a non-Indian company operating on reservation lands although the tribe imposed its own severance tax and a comprehensive congressional act on mineral leasing in Indian country did not provide for state taxation. Simply and inexplicably, the Court announced: "States and tribes have concurrent jurisdiction over the same territory."[20] One commentator noted:

> It should not matter that a non-Indian company was involved . . . for some of the practical effects of the tax fell upon the tribe, and in any event a non-Indian —Worcester himself— was the subject of the asserted state regulation in *Worcester*, as well. Nor should it matter that the case involved a conflict between the regulatory jurisdiction of a state and a tribe; that is, of course, precisely the setting in *Worcester*.... [T]he quasi-constitutional, structural nature of Chief Justice Marshall's approach is lost on the current Court.[21]

The loss of Marshall's approach is a loss to Native America — and a loss also, I would argue, to the United States' well-being that Marshall sought. Marshall is not without fault here. In the

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16. *Id.* at 220.

17. 411 U.S. 164 (1973) (disallowing a state tax on Indian income earned on the reservation).

18. *Id.* at 171-72.

19. 490 U.S. 163 (1989).

20. *Id.* at 192.

21. Philip Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 423-24 (1993).

first Cherokee case, he employed the figure of tribes as "wards," and it is only too easy first to take the figure as a fact and then to dismiss the possibility that wards are bearers of sovereign, independent, national integrity.

III. JOHNSON V. MCINTOSH

Johnson v. McIntosh's resolution of the conflict between purchasers of land is generally said to stand for the proposition that Indian title cannot be acquired absent federal (or sovereign) consent. This received interpretation cannot be squared with the text, and it certainly sells Marshall short.

The Chief Justice said that a non-Indian could purchase land from Indians and that, in doing so, he would take whatever title the Indian seller held and thereby subject himself to tribal law: "a person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under protection, and subject to their laws."[22] In this case, the claimant had taken title, but Marshall found that the tribe had subsequently extinguished it.

He explored another possibility as well. If the claimant's purchase from the tribe had been authorized or subsequently ratified by the King (or his successor, the state or the United States), the sovereign would be bound and could not subsequently convey valid title to another party. Here, however, in the interest of peace with a formidable, potential enemy, the Crown had expressly forbidden the purchase of tribal land and had not ratified the transaction in issue. Nor had any successor sovereign ratified it.

The tribe had conveyed but later extinguished the title, and no other sovereign had been self-limited by any action of its own with respect to the conveyance. In the process of arriving at these companion conclusions, Marshall ventured to talk about "discovery" and "absolute title," but these fictions had no operative effect, certainly not upon the tribes.[23]

Important for present purposes is what Marshall said along the way about "incorporation." As I have just quoted him as noting, a non-Indian who purchases tribal property thereby "incorporates himself" with the tribe. What Marshall viewed as impossible was the reverse. Tribal members could not be incorporated into the settlers' government. Indians were "high-spirited" and "fierce." They had not been conquered, and they would not mingle. They were "a people with whom it was

22. 21 U.S. at 593.

23. *See* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 A.B.F. RESEARCH JOURNAL 1, 23-28 & n.132, 29.

impossible to mix."[24]

In 1978, *Johnson* underwent a forced metamorphosis into its opposite. Astonishment arises not only from seeing precedent employed to support what it exactly and expressly repudiates — although that, too— but also from finding Marshall's aid enlisted to transform the judicial power of the Court into the principle instrument of American colonialism.[25] Writing for the majority in *Oliphant v. Suquamish Indian Tribe*,[26] Justice Rehnquist found that tribal courts do not have jurisdiction over non-Indians who commit crimes in Indian country. They do not have this jurisdiction because, he said, they lost it through incorporation. The incorporation of the tribe takes place on the page before the reader's eyes. It is a performative utterance. No other act or circumstance of incorporation of the Indian nation had taken place during the interval between *Worcester* and *Oliphant*.[27] Here is the incorporating event:

> Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. [T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.
>
> We have already described some of the inherent limitations on tribal power that stem from their incorporation within the United States. In *Johnson v. McIntosh* . . . we noted that the Indian tribes' 'power to dispose of their soil at their own will, to whomsoever they pleased,' was inherently lost to the overriding sovereignty of the United States.[28]

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24. 21 U.S. at 590.

25. In putting the matter this way I do not utter lonely alarms from the lunatic fringe. I could cite as companion views those of several prominent scholars of the relations between the United States and Indian nations but choose only one because his work on the subject has received what some academic lawyers regard as a secular equivalent to the imprimatur of the Holy. *See generally* Philip Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999); Philip Frickey, *Adjudication and Its Discontents: Coherence and Reconciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997); and Frickey, *supra* note 21.

26. 435 U.S. 191 (1978)

27. If allotment is thought to have been an act of conquest or incorporation in theory —in addition to being the act with no legitimating or constitutional basis that it was in fact— that policy was repudiated by Congress in 1934. And in any event, what reason is there to except purchasers of lands within reservations from Marshall's rule that they incorporate themselves with the tribe?

28. 435 U.S. at 209.

The *Johnson v. McIntosh* which Rehnquist cites is the one in which Marshall said that Indians were not and could not be incorporated into the United States although American citizens could incorporate themselves with the tribes by purchasing tribal land.

The Court had earlier abused tribes with an abuse of *Johnson*, but in a different way. In 1955, *Tee-Hit-Ton Indians v. United States*[29] held that the United States may take aboriginal Indian property without paying the just compensation required by the Fifth Amendment. It purported to do so by following "the rule derived from *Johnson v. McIntosh*." The Court framed this rule as: "the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment."[30] Such a rule can be derived from *Johnson* only by first importing interpretive devices from Wonderland and then employing them to do real harm to real tribes.

In addition to an unacceptable reading of *Johnson*, *Tee-Hit-Ton* shares another phenomenon with *Oliphant*. It, too, is the site of a performative utterance. After a further shameless citation to *Johnson*, it says that the Tee-Hit-Ton have no compensable right in the taken property because they had been "conquered."[31] As Nell Jessup Newton has noted, "the only sovereign act that can be said to have conquered the Alaska natives was the *Tee-Hit-Ton* opinion itself."[32]

The performative utterance in *Tee-Hit-Ton* is like that in *Oliphant*, but it has a separate function. In "conquering" the indigenous people of Alaska, the Court authorized the unconstitutional actions of other branches of the federal government (taking Tlingit timber). In *Oliphant*, by contrast, the Court "incorporated" the Suquamish to authorize its own unconstitutional action (taking Suquamish jurisdiction). When the Court "incorporates" tribes, it independently determines which powers to strip from them and therefore which powers to make available for interested states to assume. So the Court "conquers" tribes to justify the aggressions of other branches of government and "incorporates" them to justify its own.

In addition to criminal jurisdiction over non-Indians, the Court has taken from tribes that it has "incorporated" such things as the powers to: enforce criminal jurisdiction over non-tribal Indians,[33] regulate hunting and fishing on some reservation

29. 348 U.S. 272 (1955).

30. *Id.* at 284-85.

31. *Id.* at 279,284.

32. Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1244 (1980).

33. *See* Duro v. Reina, 495 U.S. 676 (1990) (discussing subsequent restoration by Congress).

lands,[34] regulate liquor,[35] and zone certain lands within a reservation.[36]

The Court's currently preferred way of organizing its incorporation of tribes is set out in *Montana v. United States*. Tribal sovereignty is limited to certain internal tribal issues among members and will no longer cover non-member conduct on the reservation, except where either the non-member consents to tribal jurisdiction or an exercise of civil authority is necessary to counter threats to a tribe's integrity, economic security or health and welfare.[37] Tribal sovereignty will not run with reservation boundaries, and it will not include non-members unless one of the two exceptions applies. The highly contextual determinations that have followed the *Montana* approach offer lawyers no promise of clarity and tribes no hope for an end to the Court's bit-by-colonial-bit diminishment of their sovereignty.

In *Brendale v. Confederated Tribes and Bands of Yakima*,[38] three tangled opinions, none with majority support, offered very different assessments of *Montana's* meaning and produced a tangle of new limits on tribal regulation of reservation land use. *South Dakota v. Bourland*[39] continued the line by taking from tribes the right to regulate hunting and fishing in a reservation area that the federal government opened to the public after requiring the tribe to relinquish it for a reservoir. In *Strate v. A-1 Contractors*,[40] a unanimous Court denied a tribe adjudicatory authority over a personal injury action arising from an accident on a state highway inside the reservation. In the Court's estimation, neither of the two exceptions was satisfied. Voluntary presence within the reservation apparently did not constitute consent to jurisdiction, and careless driving on a public highway through the reservation was apparently not a threat to health or welfare necessitating tribal response.

Such sovereignty-shrinking incorporation of the tribes by the Court would surely surprise John Marshall, not least because he is offered as its original, authorizing source. But he could not —and I suspect would not— claim complete innocence.

Marshall had tried to fashion a rule of law different from that of either conquest or incorporation and thought he had found a satisfactory one in the proposition that a tribe's possession of its land was to be fully protected by the courts at the same time that

34. 450 U.S. 544 (1981).
35. Rice v. Rehner, 463 U.S. 713 (1983).
36. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).
37. 450 U.S. 544, 564-66 (1981).
38. 492 U.S. 408 (1989).
39. 508 U.S. 679 (1993).
40. 520 U.S. 438 (1997).

it could not freely convey "absolute title to it."[41] It was a *pre-Cherokee* and *pre-Worcester* maneuver that he never repudiated.

How would the fiction of "absolute title" do real work? In *Johnson*, Marshall said that a non-Indian purchaser of tribal land did take the tribe's title (and so would incorporate himself with them insofar as the property was concerned). He found that the title so acquired in *Johnson* had subsequently been extinguished by the tribe so that a later conveyance from the United States posed no conflict. He did not have to resolve a conflict between a purchaser from the tribe who still held a title that the tribe had not extinguished and a subsequent purchaser of a title from the United States.

Imagine such a conflict and play the game with me. Presumably each claimant would have acquired the title held by the conveyor: The tribe would convey its title, i.e., occupancy protected by law. The United States would convey what it held, i.e., what Marshall designated as "absolute title," the exclusive right as against other sovereigns to acquire the title by purchase or conquest.

The holder of the title from the United States would take the right either to purchase the "absolute title" from the tribe (or its successor interest) or to gain it by conquest. I doubt that even the present Supreme Court would construe the conveyance as authorizing a United States citizen to make war. Because title by conquest would then be a dead option, what the claimant would have acquired from the United States would be the exclusive right to purchase "absolute title" whenever the tribe (or successor in interest) was willing to sell it and at the seller's price. Perhaps that price would be reduced by the prospective purchaser's monopoly, but not likely, since the seller could still convey to others such lesser title as he held, i.e. the tribes' interest that included everything but the "absolute title."

What a tribe could not do would be to convey its land to a sovereign other than the United States. Or, more accurately stated, a competitor European government could not purchase it. In Marshall's telling of the story in *Johnson*, European powers sought to avoid conflict among themselves by adopting the principle of "discovery," as in Columbus "discovered" America. The nation making a "discovery" of this sort won "the sole right [as against other potentially discovering powers] of acquiring the soil

41. Marshall had an explanation —plausible at least to himself— of how European settlers had acquired Indian land without conquest, incorporation, or purchase: The Indians had abandoned it, and non-Indians simply moved in. *See* Ball, *supra* note 23, at 28 n. 132 (paragraph 4) ("The corollary satisfaction for a mind troubled by what had been done to tribes was the great expanse of western territory which, Marshall might have believed, provided ample room for displaced Indians.") *Id.*

from the natives."[42]

In this sense, and in this sense alone, tribal "rights to complete sovereignty, as independent nations, were necessarily diminished." Or as Marshall would put the matter in *Cherokee Nation*: Foreign nations consider tribes "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 connection with them, would be considered by all as an invasion of our territory and an act of hostility."[43] In the consideration of foreign nations, tribes, like states, which voluntarily surrendered the power, may not enter treaties with nations other than the United States. Nor may they convey their lands to nations other than the United States. (Does this give them less power than states? Can states convey their public lands to the government of a hostile nation?)

Tribes could not convey "absolute title," but this limitation turns out to be a limit on European nations with little real consequence for indigenous American nations. "Absolute title" is the right of a "discovering" sovereign to trump the bid for "absolute title" made by another sovereign player engaged in the game of "discovery." This is a little tautological fiction, but, for whatever reason, Marshall made much of it:

> However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.[44]

Johnson's grandiloquent apologia had no immediate effect on tribes, but it did lay the foundation for courts to do much worse in the future. At least in dictum, he gave them legitimating precedent to commit upon tribes acts that are unnatural and uncivilized ("opposed to natural right, and to the usages of civilized nations").

IV. CHEROKEE NATION V. GEORGIA

The chief modern use of *Cherokee Nation* has been Marshall's reference to tribes as "domestic dependent nations" with its allied figure of tribes as wards of the federal government.

The Supreme Court came to think of tribal wardship as creating a moral obligation: In its dealing with tribes, "the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant

42. 21 U.S. at 573.
43. 30 U.S. at 17-18.
44. *Id.* at 590.

and dependent race."[45] And then the Court thought of it as creating a moral trust, "the distinctive obligation of a trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[46] The obligation and the trust were matters of morality, not law, and were therefore unenforceable. However, in the 1970s a few lower courts began to provide equitable and monetary relief to tribes who sued the United States for breaches of trust, and in 1983 the Supreme Court found that, in the given circumstances, federal statutes and federal control had created a legally redressable trust obligation.[47]

Whether as a moral or as a legally enforceable obligation, an Indian trust is not free of complication for tribes. It has provided significant remedies, but it also bears entailments.

Some years ago, Felix Cohen frankly acknowledged that talk of guardianship legitimates "congressional legislation that would have been unconstitutional if applied to non-Indians."[48] So was the moral obligation invoked to extend United States criminal jurisdiction into reservations, to take tribal property in violation of treaties, and to reduce Indian lands under the Dawes Act (allotment) from 138,000,000 acres in 1887 to 48,000,000 by 1934. And so has the trust obligation been invoked as a defense against paying just compensation for taking tribal property. The Court has said that, when Congress acts "as trustee for the benefit of the Indians, exercising its plenary powers over Indians and their property, as it thinks in their best interests" and "transmutes the property from land to money, there is no taking" in violation of the Fifth Amendment.[49]

Moreover, a successful tribal suit for breach of trust requires the obvious if unstated acknowledgment that there is a trust, that is, that the United States holds the tribe's property as a trustee. At one point, the Bureau of Indian Affairs announced that "the U.S. today holds in trust some 53 million acres for the benefit of and use by Indian tribes and individuals."[50] But how did the U.S. come to hold it? By conquering the tribes? By incorporating them? When? How? And what would John Marshall say?

CONCLUSION

Marshall concluded his opinion in *Cherokee Nation* with the observation:

45. Beecher v. Wetherby, 95 U.S. (5 Otto) 517, 525 (1877).
46. Seminole Nation v. United States 316 U.S. 286, 296 (1942).
47. United States v. Mitchell, 463 U.S. 206 (1983).
48. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 170 (1942).
49. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 408-09 (1980).
50. Department of the Interior, BIA Profile: The Bureau of Indian Affairs and American Indians 7 (1981).

> If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.[51]

The Chief Justice's prophecy has proved correct. The Court has typically failed to protect tribal rights, and greater wrongs have been inflicted. But his prophecy was insufficient. His prescience could scarcely have revealed to him that the wrongs would continue into the twenty-first century and that the Court would not only not redress or prevent them but would become their principle contemporary source.

51. 30 U.S. at 20.