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PERSISTING SOVEREIGNTIES

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From the first days of the United States, the story of sovereignty has not been one of a simple division between the federal government and the states of the Union. Then, as today, American Indian tribes persisted as self-governing peoples with ongoing and important political relationships with the United States. And then, as

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today, there was debate about the proper legal characterization of those relationships. The United States Supreme Court confronted that debate in McGirt v. Oklahoma *when, in an opinion by Justice Neil Gorsuch, it held that the reservation of the Muscogee (Creek) Nation "persists today." The Court's recognition of the persistence of Tribal sovereignty triggered a flurry of critical commentary, including from federal lawmakers who share Justice Gorsuch's commitment to originalism. But the early history of federal Indian law supports the persistence of tribal sovereignty.*

Through its treaty practice and opinions of its Supreme Court, the United States recognized Indian tribes as political communities whose pre-constitutional sovereignty persisted despite their incorporation within U.S. territory. According to the Marshall Court, tribes were "nations" with whom the United States had entered into treaties. The terms "treaty" and "nation," the Court explained in Worcester v. Georgia*, had "well-understood meaning[s]" under the law of nations and applied to tribes as they applied "to the other nations of the earth." This Article explores the meaning of those terms as they applied to Indian tribes through the first comprehensive analysis of the international law commentary cited by the Marshall Court as well as historical examples of shared sovereignty that were familiar to lawyers during the early Republic.*

In particular, this Article explores two consequences of tribes' status as "states" and "nations" during the early Republic. First, it provides an international law foundation for the Indian canon of construction's rule that tribal sovereignty is preserved unless expressly surrendered. Like states under international law, tribes retained whatever measure of sovereignty they did not expressly surrender by agreement. Accordingly, a court interpreting an Indian treaty must construe ambiguous terms to retain tribal sovereignty. Today, this rule of interpretation is known as the Indian canon of construction and is thought to be peculiar to federal Indian law. To the contrary, however, the Indian canon's foundations include generally accepted principles of the law of nations at the time of the Founding. Second, this understanding of Indian tribes implies that the sovereignty of tribes is not divested by their incorporation within the United States as dependent sovereigns and persists despite periods in which federal and state governments have prevented its exercise. This principle not only justifies the Court's recognition of tribal persistence in McGirt*, but also has important implications for contemporary debates in federal Indian law.*

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INTRODUCTION

In the fall of 1775, Koquethagechton, the speaker of the Lupwaaeenoawuk, the Great Council of the western Delawares, traveled to Fort Pitt for talks with officials of the Second Continental Congress of the thirteen American

colonies as well as representatives from the Haudenosaunee Confederacy, the Shawnee Nation, the Ottawa Nation, and the Wyandot Nation.[1] A few months earlier, the Continental Congress had authorized the creation of a Continental Army, which was already laying siege to the British forces in Boston.[2] It would be nearly a year, however, before the Congress declared that the colonies were "Free and Independent States," not subjects of the British Crown.[3] By contrast, a western Delaware declaration was forthcoming at Fort Pitt. Koquethagechton informed the Congress's representatives that the Kalalamint, Walapachakin, and Ohokon had allied as "the Delaware Nation," free and independent of the Haudenosaunee Confederacy and neutral in the conflict between the Crown and the colonies.[4]

Three years later, in the fall of 1778, Koquethagechton traveled again to Fort Pitt. He and two other tribal leaders, Gelelemend and Kageshquanohel, acting as "Deputies and Chief Men of the Delaware Nation,"[5] met with agents of the "United States of North-America" to negotiate a treaty.[6] Worried that his people would soon be "trapped in a corner," Koquethagechton sought a military alliance and the promise of mutual assistance and protection from the United States.[7] For its part, the fledgling American republic needed the Delaware Nation's support and free passage for American troops through Delaware lands.[8] The Treaty of Fort Pitt, negotiated where downtown Pittsburgh now stands, acknowledged the Delawares as a "nation" and pledged the parties to a mutual "confederation" between "states."[9]

A skilled diplomat, Koquethagechton had declared the independence of the Delaware Nation and obtained recognition through the first treaty negotiated between the United States and an Indian nation.[10] He would not

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1 *See* RICHARD S. GRIMES, THE WESTERN DELAWARE INDIAN NATION, 1730–1795, at 184-85 (2017). Koquethagechton was also known as "White Eyes." Richard S. Grimes, *Book Review, Rob Harper, Unsettling the American West: Violence and State Building in the Ohio Valley (2018)*, 13 W. VA. HIST.: J. REG'L STUDS. 103, 103 (2019).

2 *See* Caroline Cox, *The Continental Army*, *in* THE OXFORD HANDBOOK OF THE AMERICAN REVOLUTION 161, 163 (Edward G. Gray & Jane Kamensky eds., 2015) (explaining the origins of the Continental Army).

3 *See, e.g.*, ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE 17 (2012) (explaining that on July 2, 1776, Congress decided to declare the independence of the colonies).

4 GRIMES, *supra* note 1, at 184-85.

5 *Id.* at 204 (internal quotation marks omitted).

6 Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13. This treaty is also commonly known as the "Treaty of Fort Pitt."

7 *See* GRIMES, *supra* note 1, at 204 (internal quotation marks omitted).

8 *See* Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 924 & n.93 (2010) (noting that continued British presence in Canada prompted early treatymaking with the Delaware Nation).

9 Treaty with the Delawares, *supra* note 6, arts. IV & V.

10 *See* GRIMES, *supra n*ote 1, at 205.

live to see the treaty broken or to watch as less favorable treaties were negotiated between the Delaware Nation and the United States.[11] But his vision lived on in a Delaware prayer—one that begins: "We belong unto a nation"[12]—and through the Treaty of Fort Pitt's model of political and legal relations between American Indian tribes and the United States.

In 1832, the United States Supreme Court looked to the Treaty of Fort Pitt as representative of the political relationship between Indian tribes and the United States.[13] The case, *Worcester v. Georgia*, was the culmination of a legal and political campaign by the Cherokee Nation to hold the United States to its treaty promises to protect the Nation's sovereignty and lands from encroachment by white settlers and state officials.[14] In ruling that the state of Georgia could not legislate over the lands of the Cherokee Nation, a sovereign nation, the Court considered the history of U.S. treaties with Indian Tribes, beginning with the Treaty of Fort Pitt. "This treaty," the Court explained, "is formed, as near as may be, on the model of treaties between the crowned heads of Europe."[15]

What was this international law "model of treaties"? This Article offers the most comprehensive answer to that question to date, some of which is based upon translation of foreign sources as yet unexplored by scholars of federal Indian law.[16] Legal scholars have emphasized the Marshall Court's

11 In December 1778, Koquethagechton was murdered, perhaps by white militia, a fact that the United States attempted to cover up to preserve diplomatic relations with the Delaware Nation. *Id.* at 208-09; Herman Wellenreuther, *White Eyes and the Delawares' Vision of an Indian State,* 68 PENN. HIST.: J. OF MID-ATL. STUDS. 139, 160 (2001) (concluding that white militiaman murdered Koquethagechton).

12 *See* GRIMES, *supra* note 1, at 261 (quoting RICHARD C. ADAMS, *Thanksgiving Oration of the Delawares*, *in* THE ANCIENT RELIGION OF THE DELAWARE INDIANS AND OBSERVATIONS AND REFLECTIONS 24 (1904)).

13 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 549 (1832) ("The language of equality in which [the treaty] is drawn, evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States.").

14 *See id.* at 537-38.

15 *Id.* at 550.

16 As Carole Goldberg has put it, "the question of comparison of tribes with foreign nations lingers for teachers of federal Indian law." Carole Goldberg, *Critique by Comparison in Federal Indian Law*, 82 N.D. L. REV. 719, 727 (2006). In addressing that question, this Article builds upon existing scholarship on the international law origins of federal Indian law, the treatment of Indigenous Peoples in international law, and the original understanding of the relationship between Indian tribes and the United States. *See, e.g.*, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 103-10 (2d ed. 2004) (distinguishing rights to self-determination of Indigenous Peoples under contemporary international human rights law from the sovereignty of nation-states); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 6-7 (1990) (arguing that "discourses of conquest" of Indigenous Peoples have a long history within Western political and legal thought, theology, and international law); Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795*, 106 J. AM. HIST. 591, 593 (2019) [hereinafter Ablavsky, *Species*] ("[E]xplor[ing] the legal contests between Native

reliance upon international law but have not reconstructed the meaning of its terms through analysis of the international law commentary cited by the Marshall Court in the foundational cases of federal Indian law and examples of shared sovereignty that were familiar to lawyers at the time.[17] This Article fills that gap and explores implications of this understanding for contemporary debates about the sovereignty of Indian tribes.

The relationships between tribes and the federal government have continued to the present day—over two centuries of tribal persistence in the face of removal, conflict, and dispossession. The nature of those relationships provides the framework for determining questions essential to the sovereignty

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leaders and U.S. representatives in the early American borderlands as interpretive struggles over the late eighteenth-century law of nations."); M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 272 (2018) ("[O]riginalism actually provides a basis to advance a strong vision of tribal sovereignty and an exceptionally limited federal role in tribal communities."); Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1033-35 (2018) [hereinafter Ablavsky, *Meanings*] (discussing original public meanings of "tribe," "Indian," and "nation" under U.S. and international law); Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *"We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T. & ADMIN. L. 397, 414-15 (2017) (briefly comparing American Indian tribes and Indian princely states as an international legal context for understanding the sovereignty of Indian tribes); Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 155 (2008) (arguing that original understanding held that Indian tribes were "political entities," not racial groups); Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 119-20 (2002) ("[The Treaty of Fort Pitt] embodied a paradigm for tribal [] federal relations that can only be described as one of international self-determination."); John Howard Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669, 679 (1978) (arguing that "most" Indian tribes "qualify as states under international law . . . ."); Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1110-11 (2013) (providing an account of the original public meaning of early Indian treaties in light of the law of nations).

17 While this Article's close reading of the law of nations is different and more detailed than those offered in earlier commentary, its arguments build upon several strands in the literature. Most directly, it draws upon Gregory Ablavsky's recent and important work exploring interpretive contests over the law of nations between tribal leaders and the U.S. in the late eighteenth and early nineteenth centuries, see Ablavsky, *Species*, *supra* note 16, at 593, and Robert Clinton's argument that the model of early tribal–federal relations was one of international diplomacy, Clinton, *supra* note 16, at 119-20. Its account of the international law origins of the Indian canon has important parallels with Anthony Bellia and Bradford Clark's recent argument that the original understanding of American federalism encompassed principles of treaty interpretation from the law of nations. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 846 (2020) ("The Founders were well versed in the law of nations, and prominent Founders understood . . . rules [of treaty interpretation] to govern the surrender of sovereign rights by the American 'States' in both the Articles of Confederation and the Constitution."). This account differs from that sketched in a perceptive student comment, which noted similarities between the Indian canon and principles of treaty interpretation from the law of nations. *See Indian Canon Originalism*, *supra* note 16, at 1110. Finally, this Article owes a debt to Philip Frickey's argument that the Marshall Court's "fundamental approach was to envision an Indian treaty as quasi-constitutional in nature." Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 385 (1993).

and wellbeing of Native communities in the United States, and to the interactions between Native and non-Native communities throughout the country. The characterization of that relationship, for instance, is at the heart of whether tribal governments have authority over child custody and adoption proceedings for children with direct connections to tribes,[18] or whether tribes can exercise criminal jurisdiction over non-Indians who commit crimes against tribal members on tribal lands.[19]

Last Term, the United States Supreme Court confronted the debate about tribal sovereignty in *McGirt v. Oklahoma*.[20] The question before the Court arose when a criminal defendant challenged the State of Oklahoma's authority to prosecute him on the ground that the alleged crime occurred in "Indian Country," specifically the reservation of the Muscogee (Creek) Nation, over which the State lacked criminal jurisdiction.[21] In an opinion by Justice Neil Gorsuch, the Court held that the Creek Nation's reservation "persists today."[22] Treaties between the United States and the Creek Nation recognized the Nation's sovereignty and pledged the United States' protection for its lands.[23] Congress has never broken this treaty promise, upon which the Creek Nation continues to depend.[24] The State of Oklahoma argued that its historic practices of exerting authority over the Creek Nation's lands authorized it to continue to do so, notwithstanding the Creek Nation's objection.[25] The Court held that Oklahoma's argument could not be reconciled with policies "deeply rooted in this Nation's history."[26] The Marshall Court had recognized that "[t]ribes were 'distinct political communities'" whose right to self-government was "'guarantied by the United States.'"[27] Tribal sovereignty persists under federal law, the *McGirt* Court reasoned, unless and until the United States breaks the promises upon which tribes depend.[28]

The Court's recognition of the persistence of Tribal sovereignty triggered a flurry of critical commentary. Federal lawmakers who share Justice

18 *See* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (considering the constitutionality of the Indian Child Welfare Act in light of the history of federal–tribal relationships).

19 *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 204 (1978) (holding that Indian tribes, as domestic dependent nations, are implicitly divested of authority to exercise criminal jurisdiction over non-Indians).

20 McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

21 *Id.* at 2459.

22 *Id.* at 2462.

23 *See id.* (explaining that the United States "assured a right to self-government" to the Creek Nation through treaties).

24 *Id.* at 2468 ("[I]n all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation.").

25 *See id.* at 2476 (summarizing Oklahoma's argument).

26 *Id.* at 2476 (internal quotations omitted) (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)).

27 *Id.* at 2477 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)).

28 *See id.* at 2482 ("If Congress wishes to withdraw its promises, it must say so.").

Gorsuch's commitment to originalism treated the case as an unprecedented surrender of state sovereignty to tribes.[29] Legal scholars joined the critical chorus, with one arguing that Gorsuch's opinion was incoherent and would "serve only to undermine textualism."[30] These critics apparently shared the premise that the story of sovereignty in the United States has been one of a simple division between the federal government and the states of the Union. On that premise, *McGirt* "has literally cut Oklahoma in half,"[31] and portends the future loss of "Manhattan."[32] But the story of sovereignty was not that simple in 1778, when the Treaty of Fort Pitt was signed, or in 1832, when the Marshall Court read that treaty as evidence of the United States' recognition of the sovereignty of Indian tribes.

This Article offers a new account of the significance of the federal government's original recognition of tribes as "states" and "nations." In *Cherokee Nation v. Georgia*, Chief Justice Marshall concluded that the federal "government [had] plainly recognize[d] the Cherokee Nation as a state," that is, "as a distinct political society."[33] And in *Worcester v. Georgia*, its most thorough statement on tribal sovereignty, the Marshall Court reasoned that tribes were "nations" with whom the United States had entered into treaties.[34] The terms "treaty" and "nations," the Court explained, had "well-understood meaning[s]" under the law of nations and applied to tribes as they applied "to the other nations of the earth."[35] Through a close reading of international law commentary, and an analysis of examples of shared sovereignty, this Article provides historical support for the persistence of tribal sovereignty.

Encounters between Indigenous Peoples and European colonial powers shaped the law of nations and the modern conception of sovereignty.[36] Indian

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29 *See, e.g.*, Senator Ted Cruz (@tedcruz), TWITTER (July 9, 2020, 11:52 AM), https://twitter.com/tedcruz/status/1281269895519514625?s=20 [https://perma.cc/S5TD-PUZG] ("Neil Gorsuch & the four liberal Justices just gave away half of Oklahoma, literally.").

30 Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, CATO INST. (July 24, 2020), https://www.cato.org/commentary/justice-gorsuchs-legal-philosophy-has-precedent-problem [https://perma.cc/K7HV-Y7ZX?type=image].

31 *Id.*

32 *See* Senator Ted Cruz, *supra* note 29 ("Manhattan is next.").

33 *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

34 *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-61 (1832) (noting that the term "nation" was applied by the U.S. government to Indians "as [the United States had] applied [it] to the other nations of the earth").

35 *Id.* at 559-60.

36 *See, e.g.*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 15-16 (2005) (arguing that sovereignty doctrines were first developed by Spanish jurists in response to the "novel problem" of contact with Indigenous Peoples); EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS 3-6 (2002) (arguing that Grotius' theories of sovereignty molded and were molded by colonial and imperial interactions between Europeans and non-Europeans); MICHAEL HARDT & ANTONIO NEGRI, EMPIRE

tribes and European colonists treated with one another on the North American continent while this conception was still developing. Then, as today, facts on the ground did not fit within a definition of sovereignty as one supreme and indivisible authority within a territory. And then, as today, Indian tribes drew non-Indians into their traditions of diplomacy while simultaneously drawing upon the legal and political traditions of colonial powers, including international law. The law of nations, as the law of empire, did not correspond to Indigenous conceptions of relations among peoples. By the nineteenth century, when the Cherokee Nation filed a bill proclaiming its sovereignty with the Supreme Court, the law of nations already provided ground for racialized arguments against recognition of tribal sovereignty. Yet it also furnished concepts of nationhood and divided sovereignty that Indian tribes marshalled in defense of their lands and rights. When the Cherokee Nation's lawyers argued as much to the Supreme Court, the Court held that the United States had consistently recognized the national sovereignty of Indian tribes.[37]

To understand the significance of this recognition requires turning to the contemporary international law commentary on and other historical examples of divided sovereignty. "Nations," as Emer de Vattel, the most influential international law commentator for Americans, defined the term, were "bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage. . . ."[38] A "sovereign state" was a "nation that govern[ed] itself."[39] In *Cherokee Nation v. Georgia*, Chief Justice Marshall invoked these background understandings from the law of nations when he reasoned that tribes, though not "foreign states" within the meaning of Article III of the Constitution, were "domestic dependent nations" with federally guaranteed rights to self-government.[40] In *Worcester v. Georgia*, Marshall drew explicitly upon the law of nations in holding that "Indian nations" had not waived their "right to self government, by associating" with the United States.[41] Under "the settled doctrine of the law of nations," tribes, like other "[t]ributary and feudatory states," did not "surrender [their]

70 (2000) (noting that the modern concept of sovereignty has roots in European colonial practices and the subsequent resistance of colonized peoples).

37 *See supra* note 33 and accompanying text (discussing the Court's holding in *Cherokee Nation*).

38 EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY, Preliminaries § 1, at 67 (Béla Kapossy & Richard Whatmore eds., 2005) (1797).

39 *Id.* bk. I, § 4, at 83.

40 30 U.S. (5 Pet.) 1, 15-17 (1831) ("They may, more correctly, perhaps, be denominated domestic dependent nations.").

41 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

independence" by accepting the "protection" of the United States.[42] This sort of relationship was familiar from historical and contemporary examples of imperialism.

Under the model of inter-sovereign relations adopted by the U.S. as a colonial power, inherent tribal sovereignty persists despite tribes' status as dependent nations. To be clear, the idea that Indian tribes are dependent sovereigns served U.S. interests. The Marshall Court linked the constitutional authority of national government in Indian affairs with the sovereignty of Indian tribes. It did not question U.S. sovereignty, much less hold that Indian tribes were independent states on the international plane. Thus, the Marshall Trilogy is not a critique of colonial rule, though such critiques were available then and persist today.[43] To understand the idea that sovereignty could be divided and dependent in colonial settings is to recognize but not resolve the challenge of constitutional redemption.[44]

In exploring dependent sovereignty, this Article develops two case studies that existing scholarship on Indian tribes has yet to address. These case studies show that under the law of nations, dependent sovereigns may be revived to fully sovereign status, or at least achieve greater sovereignty than they had held in the past. First, this Article discusses the Holy Roman Empire, which covered Germany and other portions of central Europe for over one thousand years. The Empire provides examples of dependent sovereignty, and its dissolution in the first decade of the nineteenth century under the pressure of Napoleonic France occurred early in the existence of the independent American Republic.[45] The Holy Roman Empire was regularly drawn upon by the Framers in the debates over the Constitution and provided examples of divided sovereignty for international law commentators.[46] This case study thus sheds light upon the meanings of the

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42 *Id.* at 560-61 (internal quotations omitted).

43 Tribal leaders objected to colonial assertions of sovereignty over tribal lands. *See* CHARLES W.A. PRIOR, SETTLERS IN INDIAN COUNTRY: SOVEREIGNTY AND INDIGENOUS POWER IN EARLY AMERICA 22 (Leigh K. Jenco ed., 2020) (discussing how representatives of the Haudenosaunee Confederacy in the eighteenth century "firmly rejected" the English Crown's assertions that they were a conquered people). In the eighteenth century, some Enlightenment thinkers also "challeng[ed] the idea that Europeans had any right to subjugate, colonize, and 'civilize' the rest of the world." SANKAR MUTHU, ENLIGHTENMENT AGAINST EMPIRE 1 (2003). For a contemporary critique of the Marshall Trilogy and the law of colonialism, see, e.g., ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).

44 *See* Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CAL. L. REV. 1751 (2017) (arguing that colonialism poses fundamental challenges to constitutional redemption).

45 *See infra* Section III.A (discussing history of Holy Roman Empire).

46 *See, e.g.*, THE FEDERALIST NO. 19 (James Madison with Alexander Hamilton) (focusing upon structure of governance in Holy Roman Empire).

terms "nation" and "state" during the early Republic, including as applied to Indian tribes.

Second, we discuss the princely states of India.[47] This case study plays a different role in our analysis. India was part of the "American imaginary" during the eighteenth and nineteenth centuries,[48] and the Framers, as well as the Marshall Court, were aware of the Indian princely states. But while the relationships between the British and the princely states began to be elaborated concurrently with the American Revolution, the denouement occurred over a century and a half later.[49] At the time of the founding, Britain was consolidating its colonial empire by subordination of the princely states, which retained some form of sovereignty throughout the British colonial period.[50] In describing (and legitimating) this imperial project, British lawyers drew upon the Marshall Court's characterization of Indian tribes as "domestic dependent nations."[51] After Britain withdrew from India in 1949, these states were integrated by India in a process that has parallels with U.S. engagement with Indian nations, but in a more complete way.[52] Thus, we look to the Indian princely states in a comparative mode for what they teach about general understandings of dependent sovereignty in international law.

Drawing upon these case studies and commentary on the law of nations, this Article explores two consequences of tribes' status as "states" and "nations" during the early Republic. First, it provides a foundation for the Indian canon of construction's rule that tribal sovereignty is preserved unless expressly surrendered. Like states under international law, tribes retained whatever measure of sovereignty they did not expressly surrender by agreement. As Vattel summarized it, a principle of the law of nations provided that "in an affair of so delicate a nature as that of government," the right of another sovereign to interfere "cannot . . . be extended beyond the clear and

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47 *See infra* Section III.B (discussing history of Indian princely states).

48 RAJENDER KAUR & ANUPAMA ARORA, *India in the American Imaginary, 1780s–1880s*, *in* INDIA IN THE AMERICAN IMAGINARY, 1780S–1880S, at 7 (Anupama Arora & Rajender Kaur eds., 2017) ("India has been part of the American imaginary since Christopher Columbus set out to find a new trade route to India and landed instead on the shores of the Americas.").

49 *See generally* MICHAEL H. FISHER, INDIRECT RULE IN INDIA: RESIDENTS AND THE RESIDENCY SYSTEM 1764–1858 (1991) (providing overview of day-to-day relationships between British India and the princely states); *see also infra* subsection III.B.1 (discussing development of British colonial rule and its relationships with princely states in India).

50 *See, e.g.*, WILLIAM LEE-WARNER, THE NATIVE STATES OF INDIA 31 (1979) [1910] (stating that princely states had "internal sovereignty."); *see also infra* Section III.B (discussing the sovereignty of princely states during the period of British colonial rule).

51 *See* LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900, at 271-72 (2010) (discussing the apparent invocation of Chief Justice Marshall's neologism to describe Indian princely states).

52 *See infra* subsection III.B.2.

express terms of the treaties" into which they have entered.[53] Accordingly, a court interpreting an Indian treaty must construe ambiguous terms to retain tribal sovereignty. Today, this rule of interpretation is known as the Indian canon of construction and is thought to be unique to federal Indian law.[54] To the contrary, however, the Indian canon's foundations include generally accepted principles of the law of nations at the time of the Founding.

Second, this Article's account shows that some of the most common claims about the dependency of Indian tribes are overly simplistic—or simply wrong. We address the modern idea, stated by the Court in 1978, that tribes' dependency necessarily implies limits on their sovereignty.[55] This modern idea makes a claim about dependency's historical meaning. But dependency, this Article shows, meant a guarantee that tribes would persist as self-governing peoples. Tribal sovereignty is not divested by tribes' incorporation as dependent sovereigns within the United States and persists despite periods in which federal and state governments have prevented its exercise. This principle—that tribal sovereignty persists—has important implications for contemporary controversies, including the Court's recognition of tribal persistence in *McGirt*. It is relevant not only for originalist debates about the status of Indian tribes,[56] but also for the precedents and history that have long been important to federal Indian law, a field in which arguments from historical practice play a central role.

The argument proceeds in four Parts. Part I sketches federal recognition of Indian tribes as sovereign "states" and "nations" in the early Republic. Part II explores one implication of this recognition of sovereignty by identifying the international law foundations of the Indian canon of construction. Part III presents the two case studies on the persistence of sovereignty in the Holy Roman Empire and the princely states of India. Part IV explores some implications of these case studies for legal issues arising in federal Indian law today.

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53 VATTEL, *supra* note 38, bk. II, § 57, at 292.

54 *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (stating that Indian canon of construction is "rooted in the unique trust relationship between the United States and the Indians").

55 United States v. Wheeler, 435 U.S. 313, 323 (1978) ("[Referring to] those aspects of sovereignty . . . withdrawn . . . by implication as a necessary result of their dependent status.").

56 This history is relevant to multiple strands of originalist analysis of the status of Indian tribes, including what might be termed the "original law" of tribal sovereignty as well as the original public meaning of the U.S. Constitution's recognition of "Indian tribes" as political communities with whom the United States might engage in "commerce." *See infra* notes 172–175 and accompanying text. *See generally* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 820 (2019) (describing originalism as "a claim about the current force of past law," that "makes use of history only for limited purposes"); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 275 (2017) (discussing "[p]ublic meaning originalism").

I. THE RECOGNITION OF TRIBAL SOVEREIGNTY IN THE EARLY REPUBLIC

In July 1830, the *Cherokee Phoenix*[57] published an "Address of the Committee and Council of the Cherokee Nation in General Council Convened to the People of the United States."[58] The Council "state[d] what we conceive to be our relations with the United States" and called upon the United States to fulfill its treaty promises by respecting the sovereignty of the Cherokee Nation.[59] As "an independent people," the Cherokee Nation chose in 1785 to come "under the protection of the United States" through the Treaty of Hopewell while retaining "their rights of self-government and inviolate territory."[60]

These concepts—the Cherokee Nation as "an independent people" that entered into a treaty of protection with the United States—invoked the law of nations. Independent nations that governed themselves by their own laws were entitled to recognition as sovereign states. Such nations could, if they chose, enter into treaties of protection with another sovereign and thus limit their sovereignty to the extent specified in the treaty.

In *Worcester v. Georgia*, the U.S. Supreme Court rested upon this "settled doctrine of the law of nations" in holding that Georgia had no authority to encroach upon the Cherokee Nation's territory.[61] The United States had recognized Indian tribes as "nations" and entered into "treaties" with them, applying terms with "definite and well understood meaning[s]" as they were "applied . . . to the other nations of the earth."[62]

This Part provides the background necessary to understand the implications and complications of an Indian tribe's invocation of the law of nations in struggles over sovereignty during the early years of the Republic. Indian tribes drew upon their own laws and diplomatic traditions while seeking footholds for recognition of their sovereignty in the laws of colonial powers and the law of nations. In the Trilogy, particularly in *Worcester*, Marshall took a position in the ongoing contest over the political status of Indian tribes, one that echoed the Cherokee Nation Council's statement to the people of the United States. And while the position that the Supreme Court took recognized Indian tribes as sovereigns, it also denied them recognition as foreign states,

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57 The *Cherokee Phoenix* continues to be published today and is now available online. *See* CHEROKEE PHOENIX, https://www.cherokeephoenix.org/ [https://perma.cc/47SK-2DLB].

58 Extra, *Address of the Committee and Council of the Cherokee Nation in General Council Convened to the People of the United States*, CHEROKEE PHOENIX & INDIANS' ADVOC. (New Echota, Ga.) (July 24, 1830), https://www.loc.gov/item/sn83020874/1830-07-24/ed-1/ [https://perma.cc/P6FF-JSZS].

59 *Id.*

60 *Id.*

61 31 U.S. (6 Pet.) 515, 560-61 (1832).

62 *Id.* at 559-60.

holding instead that tribes had been incorporated within the United States and limning their sovereignty within the legal and political traditions of colonial rule.

A. *Indigenous Diplomacy and Relations Among Nations*

The 1778 Treaty of Fort Pitt promised a confederation that never came to be. After Koquethagechton's murder in December 1778,[63] his fellow diplomat Gelelemend led a delegation of Delawares in petitioning the Congress and General George Washington. The petition explained that the Delaware Nation was "a free and Independent People," and had always "[d]eclared them selves [sic] to be."[64] It pointed out that the United States had not fulfilled its treaty promises to provide goods to the Delaware Nation. While pledging continued friendship, the petition questioned the validity of the Treaty of Fort Pitt and asserted the neutrality of the Delaware Nation in the American Revolution.[65]

Replies from General Washington and the Congress recognized the Delaware Nation's independence and repeatedly invoked concepts and images from Indigenous traditions of diplomacy. General Washington addressed the Delaware Nation's representatives as "Brothers" and shared his appreciation with "[t]he things you now offer to do to brighten the chain" of friendship "between the people of those States, and their Brothers of the Delaware Nation."[66] Congress, labeling itself the "Great Councel [sic] of the United States of America," promised that it would soon be able to fulfill its treaty promise to provide goods to the Delawares.[67] Its alliance with France—which Congress, drawing upon a diplomatic idiom of the Six Nations of the Haudenosaunee (Iroquois), labeled a "Covenant Chain"[68]—would soon be joined by "[o]ther mighty nations," and together they would resume the trans-Atlantic trade necessary for the United States to meet its

63 *See supra* note 11 and accompanying text.

64 *See* Speech of Delawares to Washington and Congress (May 10, 1779), *in* FRONTIER ADVANCE ON THE UPPER OHIO, 1778–79, at 317, 320 (Louise Phelps Kellogg ed., 1916) [hereinafter Speech of Delawares].

65 *See id.* at 320 (stating that Treaty of Fort Pitt had been "falsely interpreted" to the Delaware leaders who signed it, including Gelelemend).

66 Gen. George Washington to the Delaware Chiefs (May 12, 1779), *in* FRONTIER ADVANCE ON THE UPPER OHIO, 1778–79, at 322 (Louise Phelps Kellogg ed., 1916) [hereinafter Washington Reply].

67 Speech of Congress to Delaware Chiefs (May 26, 1779), *in* FRONTIER ADVANCE ON THE UPPER OHIO, 1778–79, at 340, 342 (Louise Phelps Kellogg ed., 1916) [hereinafter Congress Reply].

68 *See* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800, at 113-23 (1997) [hereinafter LINKING ARMS TOGETHER] (discussing the origins of the Iroquois Covenant Chain and its significance in the Confederacy's diplomacy).

treaty promises.[69] As to the issue of neutrality, the Congress said that the Delaware leaders "know best whether this is the General opinion of your Nation," but complained that "many of your young Men have joined the Senecas and taken up the Hatchet against Us" and stated that "you cannot be surprised that our Warriors ask for, & expect the Assistance of such as profess to be our Friends."[70] Congress concluded by recognizing the independence of the Delaware Nation, stating with respect to disputes among the Delawares that "[t]he great Councel [sic] have never interposed with respect to the Claims or bounds of their Indian Friends . . . ."[71]

This exchange reveals first that Indian tribes had drawn settlers into their diplomatic traditions. As Professor Robert Williams explains, diplomacy between Indians and non-Indians during the colonial period and the early Republic was truly intercultural.[72] Diplomatic idioms of the Haudenosaunee Confederacy—such as the "Covenant Chain" to which Congress referred in its reply to the Delaware petition—"pervaded the diplomacy of northeastern North America."[73] In this tradition, "diplomatic relations were extensions of kinship."[74] Such terms "had precisely understood meanings" for Indians, as Shawnee Chief Blue Jacket explained during the 1795 negotiations of the Treaty of Greenville, which included the Delaware Nation and other western tribes.[75] The term "brothers" referred to "formal equals in a relationship of connection," one that entailed mutual duties and mutual respect: brethren in a treaty partnership did not "command one another."[76] As expressed for the Haudenosaunee in the Gus-Wen-Tah, or Two Row Wampum, the ideal for international relations was two vessels "travelling down the same river together," with neither nation "try[ing] to steer the other's vessel."[77] General Washington and Congress used "Brothers" and "Brethren" in this way in their

69 Congress Reply, *supra* note 67, at 342 ("We have also the best reasons to expect that with the assistance of our powerful Allies . . . these United States be possessed of the means of Establishing a great Trade with all the world and supplying the wants of such of their Indian Brethren . . . .").

70 *Id.* at 342.

71 *Id.*

72 *See* LINKING ARMS TOGETHER, *supra* note 68, at 70-71, 81-82 (noting the incorporation of traditional Indian terms of kinship and ceremony into diplomacy).

73 COLIN G. CALLOWAY, PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY 16 (2013) (describing various Iroquois customs that became commonplace in diplomatic relationships).

74 Davis, *supra* note 44, at 1796 (discussing the Iroquois tradition of referring to European allies as "fathers" or "brothers").

75 LINKING ARMS TOGETHER, *supra* note 68, at 71 ("Kinship terms . . .defined the politically correct seating arrangements at the [treaty signing]. . . .").

76 *Id.* at 71-72 (distinguishing "brothers" and "children" in the Indian terminology of the era, with the former describing a relationship of mutual respect and equality).

77 Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 291 (quoting Indian Self-Government in Canada, Report of the Special Committee (back cover) (1983)).

replies to the Delaware petition.[78] This usage, which is emblematic of the period, reveals that Indigenous Peoples' conceptions of diplomacy shaped contests over sovereignty.

Tribal representatives repeatedly rebuffed attempts by non-Indians to treat them as conquered peoples. In 1688, representatives of the Mohawk Nation reminded New York's governor that they were "Brethren," not his "children."[79] And in 1721, when an English negotiator addressed them as agents of the Crown, representatives of the Haudenosaunee Confederacy replied, in effect, "says who?"[80] At Fort Stanwix in 1784, the Haudenosaunee Confederacy faced a similarly aggressive stance from U.S. negotiators, who asserted that the Haudenosaunee Confederacy was a conquered people, not a "free and independent nation."[81] These negotiations resulted in a treaty that heavily favored U.S. interests, one that the Council of the Haudenosaunee Confederacy refused to ratify.[82] In response to the U.S.'s pretensions of conquest, the "United Indian Nations," a confederation of powerful Indian tribes that included the Haudenosaunee Confederacy, the Cherokee Nation, and the Delaware Nation, petitioned Congress on December 18, 1786.[83] Addressing Congress as "Brothers," the United Indian Nations criticized the United States for its position during the Fort Stanwix negotiations and requested negotiation of a new treaty.[84] Looking beyond the U.S.'s borders, the United Indian Nations hoped that its approach would "appear just and reasonable in the Eyes of the World."[85] Should the U.S. not pursue a peaceful path, the United Indian Nations warned that they were ready "to defend those

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78 *See* Washington Reply, *supra* note 66, at 322 (referring to the Delaware as "brothers" throughout); *see also* Congress Reply, *supra* note 67, at 341 (referring to the Delaware as "[b]rethren" throughout).

79 LINKING ARMS TOGETHER, *supra* note 68, at 72.

80 *See* PRIOR, *supra* note 43, at 22 (quoting the Iroquois representative's response to English negotiators who addressed Iroquois as "conquered peoples" tasked with expanding English territory: "'Tho' great Things are well remembered among us, yet we don't remember that we were ever conquered by the Great King, or that we have been employed by that Great King to conquer others; if it was so, it is beyond our Memory.'").

81 *See* GRIMES, *supra* note 1, at 239 ("James Duane, an American diplomat . . . reminded [the Iroquois leaders] that they were . . . a 'subdued people,' defeated in battle, and reduced to a minor player in the peace settlement between Great Britain and the United States.").

82 *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1022-24 (2014) [hereinafter Ablavsky, *Savage Constitution*].

83 *See id.* at 1025-26 (discussing how the allied Indian tribes committed to voiding unfavorable treaties and defending their independence).

84 Speech of the United Indian Nations at their Confederate Council, Dec. 18, 1876, *in* NATIONAL ARCHIVES: DOCSTEACH, https://www.docsteach.org/documents/document/united-indian-nations [https://perma.cc/DA97-ZFJB] (criticizing Congress for failing to negotiate with the entire confederacy and calling for the resumption of treatymaking).

85 *Id.*

rights and privileges which have been transmitted to us by our ancestors."[86] Congress responded by recommitting the United States to the diplomatic tradition it had adopted during the Revolution.[87]

B. *Tribal Sovereignty and the Law of Nations*

The 1779 exchange between Delaware leaders, General Washington, and the Continental Congress also shows that Indian and non-Indian leaders used concepts from the law of nations to characterize their relationships. In the 1779 petition, Gelelemend and his fellow leaders described the Delawares as "a free and Independant [sic] People,"[88] just as Kageshquanohel had done in 1777 when meeting with the British governor of Detroit,[89] and as Koquethagechton had done in 1776 with agents of the Second Continental Congress.[90] Despite their disagreements over strategy,[91] these Delaware leaders shared a commitment to the sovereignty of their Nation, which they signaled by invoking the idea of a "free and independent state" under the law of nations.

After the U.S. victory over the British, tribal leaders continued to invoke this term of art when they claimed that tribes were "Free and Independent States."[92] The idea that states were the site of sovereign authority is often traced to the 1648 Peace of Westphalia ending the Thirty Years' War that began within the Holy Roman Empire.[93] So-called Westphalian sovereignty entailed equality of states and a principle that no one state would interfere in

86 *Id.*

87 *See* Ablavsky, *Savage Constitution*, *supra* note 82, at 1026 ("This pan-Indian union to defend Native land and sovereignty profoundly threatened the United States . . . . The only option . . . was to return to the customary practice of paying for Indian lands." (citations omitted)).

88 *See* Speech of Delawares, *supra* note 64, at 320.

89 GRIMES, *supra* note 1, at 201 ("[Kageshquanohel] assured the British of Delaware neutrality: 'We are a free & independent Nation, we are in friendship with all Nations & we desire to remain so . . . .'").

90 *Id.* at 185-86 (asserting the independence of the western Delaware against Iroquois claims of subordination and presenting himself as one of three chiefs "[a]ppointed for the Delaware Nation" (internal quotations omitted)).

91 Though he respected it when he signed the 1778 Treaty of Fort Pitt, Kageshquanohel questioned Koquethagechton's decision to seek an alliance with the Americans. After Koquethagechton's death, Kageshquanohel turned towards the British, and by March 1781 the Lupwaaeenoawuk had decided to ally with the Crown. *See* GRIMES, *supra* note 1, at 209-20 (discussing the demise of the Delaware-American diplomatic relationship and the turn towards an alliance with Great Britain).

92 Ablavsky, *Species*, *supra* note 16, at 597 (explaining that Haudenosaunee and Creek leaders invoked the Declaration of Independence's concept of "Free and Independent States" to argue for tribal sovereignty).

93 *See* Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251, 264-68 (2001) (describing traditional narratives placing the origin of state-based sovereignty with the 1648 Peace of Westphalia, but arguing that this story is mythical); *see also infra* subsection III.A.1 (discussing Westphalia's significance in detail).

the internal affairs of another.[94] When the Americans declared their independence, they did so as thirteen "Free and Independent States" with authority to do all "Acts and Things which Independent States may of Right do."[95] As Professor Gregory Ablavsky recounts, tribal leaders such as Joseph Brant (Mohawk) and Alexander McGillivray (Muscogee Creek) relied upon the same term of art that Americans invoked in declaring their independence.[96]

Tribal claims to sovereignty rested upon several centuries of precedent. Tribes received representatives of European nations and sent delegations of their own across the Atlantic. Anishinaabe, Cherokee, Haudenosaunee, Missouria, Muscogee (Creek), Osage, and Otoe delegations variously visited Britain and France.[97] During their visit to England, for instance, Tejonihokarawa, Onioheriago, Sagayenkwaraton, and Etowaucum, diplomats from the Mohawk and Mohican Nations, presented Queen Anne with a wampum belt and gifts, who responded to this Indigenous tradition by gifting various goods—from cotton to brass kettles, tobacco boxes to a "Magick [sic] Lanthorn with Pictures"—as well as 200 guineas.[98]

Tribes made treaties with the Dutch, French, Spanish, and, of course, the British. The Mohawk Nation and the Dutch forged the Silver Covenant Chain by treaty.[99] Through the Great Peace of Montreal, a "triumph of Iroquois diplomacy," the French recognized nearly forty Indian nations as independent sovereigns.[100] Like the Dutch, English, and French before them, Americans liked to peddle the "Black Legend," which characterized Spanish

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94 *See, e.g.*, Marcílio Toscano Franca Filho, *Westphalia: A Paradigm? A Dialogue Between Law, Art and Philosophy of Science*, 8 GERMAN L.J. 955, 956, 963 (2007) (discussing "[t]he symbolic character of the Westphalia Peace Treaties" in the development of the concept of state sovereignty); *see also infra* subsection III.A.1 (discussing the "myth of Westphalia").

95 The DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

96 Ablavsky, *Species*, *supra* note 16, at 598 (noting the invocation of state-centric concepts of sovereignty by indigenous leaders).

97 JACE WEAVER, THE RED ATLANTIC: AMERICAN INDIGENES AND THE MAKING OF THE MODERN WORLD, 1000–1927, at 138 (2014) (noting transatlantic tribal diplomatic missions prior to 1927).

98 Cole Hawkins, Across the Great Water: Indigenous Tobacco and Haudenosaunee Diplomacy in Early Modern England, 1550–1750, at 57-60 (2020) (M.A. thesis, University of Alberta) (on file with University of Alberta) (internal quotations omitted) (discussing gifting in early Native American diplomacy in Great Britain).

99 *See, e.g.*, Yale D. Belanger, *The Six Nations of Grand River Territory's Attempts at Renewing International Political Relationships, 1921–1924*, 13 CANADIAN FOREIGN POL'Y J. 29, 31-32 (2007) (describing a treaty between the Dutch and the Mohawk Nation that led to the forging of the Silver Covenant Chain).

100 J.A. Brandão & William A. Starna, *The Treaties of 1701: A Triumph of Iroquois Diplomacy*, 43 ETHNOHISTORY 209, 229-32 (1996) (evaluating the Iroquois Nations' role and objectives in the treaty); *see also* GILLES HAVARD, THE GREAT PEACE OF MONTREAL OF 1701: FRENCH-NATIVE DIPLOMACY IN THE SEVENTEENTH CENTURY 3-4, 179 (Phyllis Aronoff & Howard Scott trans., 2001) (describing the "Great Peace of Montreal," a treaty between nearly forty Native nations and the French).

practices towards Indigenous Peoples as uniquely tyrannical and violent.[101] But Spain too entered into treaties with Indian tribes, including a 1784 treaty of peace and friendship initiated by McGillivray, the Creek leader.[102]

From the perspective of the United States, the most important precedent was British practice. Here, too, there was substantial support for tribal leaders who demanded recognition of tribal sovereignty. Treaties with the British Crown often referred to tribes as "nations," a point that Chief Justice Marshall highlighted in his *Worcester* opinion.[103]

The United States' treatymaking practices, which began during the Revolution, continued under the U.S. Constitution. In June 1787, while the Constitutional Convention was ongoing, the Cherokee Nation, the Chickasaw Nation, and the Choctaw Nation sent representatives to Philadelphia.[104] They met with U.S. leaders, including George Washington and Henry Knox, who would go on to design the Washington Administration's Indian policy.[105] As Mary Sarah Bilder has recently shown, these meetings secured "an acceptance of Native Nation sovereignty" and a "strong national federal government role" in Indian affairs.[106] These commitments were reflected in the Commerce

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101 *See, e.g.*, MARÍA DEGUZMÁN, SPAIN'S LONG SHADOW: THE BLACK LEGEND, OFF-WHITENESS, AND ANGLO-AMERICAN EMPIRE 4-5, 76 (2005) (describing the Black Legend and its use as a "typological emblem" of intolerance, cruelty, and barbarity in the justification of U.S. imperialism). In the early nineteenth century, Americans might have been expected to look to the practices of the newly independent Latin American states in shaping their relations with Indigenous Peoples. But these states adopted policies towards Indigenous Peoples that differed from the treaty-based relations in the early American Republic. *See generally* Guillermo de la Peña, *Social and Cultural Policies Towards Indigenous Peoples: Perspectives from Latin America*, 34 ANN. REV. ANTHROPOLOGY 717, 719-21 (2005) (describing Latin American countries' paper commitment to universal civil liberties for all individuals and the reality of policies that continued to expropriate the labor of Indigenous Peoples). As the United States expanded westward, particularly after the *Intervención estadounidense en México*, or the Mexican-American War, Spanish and Mexican law and practice concerning Indians became directly relevant to U.S. lawmaking. *See, e.g.*, An Act to Confirm the Land Claim of Certain Pueblos and Towns in the Territory of New Mexico, Pub. L. No. 35-5, 11 Stat. 374 (1858) (confirming title to lands owned by sixteen Pueblos based upon rights recognized by Spanish and Mexican law).

102 *See* Jack D.L. Holmes, *Spanish Treaties with West Florida Indians, 1784–1802*, 48 FLA. HIST. Q. 140, 140-41 (1969) (describing McGillivray's efforts to secure Spanish protection for the Creek against American encroachment, culminating in a formal treaty with Spain); *cf.* Naomi Sussman, *Indigenous Diplomacy and Spanish Mediation in the Lower Colorado-Gila River Region, 1771–1783*, 66 ETHNOHISTORY 329, 330-31 (2019) (highlighting the role of Spanish mediators in brokering peace agreements between Indigenous Peoples).

103 Chief Justice Marshall accurately summarized the Crown's treaty practices in *Worcester v. Georgia*. 31 U.S. (6 Pet.) 515, 547-49 (1832) ("[Great Britain] considered . . .[Indian] nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and [Great Britain] made treaties with them, the obligation of which [Great Britain] acknowledged.").

104 Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 FORDHAM L. REV. 1707, 1707 (2021).

105 *Id.*

106 *Id.*

Clause, which assigned Congress the power to regulate commerce "with the Indian Tribes," as well as with other political communities, namely, "foreign Nations."[107] Article I also excluded "Indians not taxed"—that is, Tribal members residing within the boundaries of States—for purposes of apportionment of Representatives.[108] This provision, the only other mention of Indians in the Constitution prior to the Fourteenth Amendment's enactment, suggested that Indian tribes were separate political communities.[109] Diplomacy and treatymaking, not representation and voting, would be how the United States would treat with Indians. The United States would enter into treaties with tribes just as it entered into treaties with foreign nations under Article II's Treaty Clause.[110]

The first treaty negotiated under the new Constitution was the 1790 Treaty of New York with the Creek Nation.[111] During the early years of the Republic, the United States entered into treaties with many different tribes, including the powerful "Civilized tribes" of the Southeast, who increasingly found themselves threatened by southern States.[112] These treaties, much like the Treaty of Fort Pitt, recognized the tribes as self-governing peoples.[113] The United States often pledged not only to respect, but also to protect, tribal sovereignty and lands.[114]

Some jurists and commentators, however, saw in the Indian Commerce Clause's reference to "tribes" a confirmation that Indians lacked political sovereignty.[115] As Ablavsky has explained, Americans sometimes used "tribes" in a "quasi-anthropological" sense to refer to Indians as "uncivilized" groups

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107 U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause also authorizes Congress to regulate "[c]ommerce . . .among the several States," the third sovereigns identified by the Clause. *Id.*

108 *Id.* art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

109 *See, e.g.*, Davis, *supra* note 44, at 1768 (arguing that the "Indians 'not taxed'" provision of Article I helps confirm that the Constitution recognized Indians "as separate peoples").

110 U.S. CONST. art. II, § 2, cl. 2.

111 Eliga Gould, *Independence and Interdependence: The American Revolution and the Problem of Postcolonial Nationhood, Circa 1802*, 74 WM. & MARY Q. 729, 745 (2017).

112 *See, e.g.*, Clinton, *supra* note 16, at 120 ("As a direct result of the incursions [by the government and people of the United States] on their territory and their sovereignty experienced by the southeastern tribes as a result of illegal state laws, these tribes carefully negotiated for explicit guarantees . . . .").

113 *See id.* ("[T]hese tribes carefully negotiated for explicit guarantees of a commonly understood relationship that theretofore had assumed total tribal control over Indian country.").

114 *See, e.g.*, Treaty with the Cherokees, Cherokee-U.S., art. III, Nov. 28, 1785, 7 Stat. 18 (acknowledging Cherokees to be under the protection of the United States); Treaty with the Choctaws, Choctaw-U.S., art. II, Jan. 3, 1786, 7 Stat. 21 (acknowledging the same); Treaty with the Chickasaws, Chickasaw-U.S., art. II, Jan. 10, 1786, 7 Stat. 24 (acknowledging the same).

115 *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 27 (1831) (Johnson, J., concurring) ("I think it is very clear that the constitution neither speaks of [Indians] as states or foreign states, but as just what they were, Indian tribes . . . which the law of nations would regard as nothing more than wandering hordes . . . .").

who did not possess sovereignty.[116] In one reading, the Constitution referred to Indian "tribes" in the same sense and thus implicitly denied them sovereignty under U.S. law.[117]

Commentary on the law of nations could be cited both to support the recognition of tribal sovereignty and to support the notion that "tribes" lacked sovereignty. One such authority was Francisco de Vitoria, the Dominican theologian and jurist whose advice was sought (and later rebuked) by Charles V, the Holy Roman Emperor and Spanish King.[118] Vitoria simultaneously recognized that Indigenous polities possessed their own laws and had claims to their own lands while arguing that "Spaniards . . .[,] [as] the ambassadors of Christendom," had a unique authority to wage just war and seize Indigenous lands.[119] In his treatise on the laws of war, Alberico Gentili, the Regius Professor of Civil Law at Oxford and sometime consultant to the English government, agreed with Vitoria that the Spanish had "honourable cause for waging war" against Indigenous Peoples for their "sins . . . contrary to human nature . . . ."[120] Hugo Grotius, who built upon Vitoria's and Gentili's work, penned in 1604 a justification for the Dutch East India Company's expansion in the East Indies titled *De Jure Praedae*.[121] His magnum opus, published in 1625, offered a way of thinking about dividing sovereignty that provided a basis for recognition of Indigenous sovereignty within the colonial order.[122]

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116 Ablavsky, *Meanings*, *supra* note 16, at 1042 ("[The] quasi-anthropological and historical context [of the term 'tribe'] emphasized Natives' common descent and supposed lack of civilization.").

117 *See, e.g.*, *Cherokee Nation*, 30 U.S. at 27 (Johnson, J., concurring) (reading the term "tribes" in the constitution as synonymous with "wandering hordes . . . .").

118 *See* Fernando De Los Rios, *Francisco de Vitoria and the International Community*, 14 SOC. RSCH. 488, 491-92 (1947).

119 FRANCISCO DE VITORIA, *On the American Indians (De Indis)*, *in* POLITICAL WRITINGS 231, 283 (Anthony Pagden & Jeremy Lawrance eds., 1991); *see also* ANGHIE, *supra* note 36, at 26 (arguing that Vitoria's insistence that the laws of war only recognize Christian subjectivity excluded Indians from claims of sovereignty). *But see* EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 54 (2016) (reading Vitoria to recognize Indigenous communities' "right to self-government," subject to their protection of individual rights).

120 ALBERICO GENTILI, DE IURE BELLI LIBRI TRES 121-22, *translated in* 2 THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed., John C. Rolfe trans., 1964) (1612). For a discussion of Gentili's career, see Valentina Vadi, *At the Dawn of International Law: Alberico Gentili*, 40 N.C. J. INT'L L. & COM. REG. 135, 140 (2014).

121 *See* MARTINE JULIA VAN ITTERSUM, PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES 1595–1615, at xix (A.J. Vanderjagt ed., 2006) (discussing the motivation behind Grotius' *De Jure Praedae*).

122 *See* KEENE, *supra* note 36, at 3 (arguing that Grotius's theory that sovereignty was "divisible" had a "striking proximity" to European colonial and imperial practices).

Like Grotius, Emer de Vattel rejected the notion that non-Christian nations could not enter into treaties with Christian nations.[123] His 1758 *Law of Nations*, translated into English two years later, held that "[d]ifferent people treat with each other in quality of men," not under their religious "character."[124] This treatise was among the most influential legal commentaries in the early Republic. According to Benjamin Franklin, a copy of the treatise, which the diplomat Charles Dumas mailed to him from The Hague, was "continually in the hands of the members of our Congress now sitting" in 1775.[125] Vattel argued that the Spanish unjustly usurped Indigenous sovereignty when they conquered Mexico and Peru.[126] Vattel's definition of sovereignty in terms of "nations" and "states" undergirded this argument. "Nations," he wrote, are "bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage . . . ."[127] And a "sovereign state," he went on, is a "nation that governs itself . . . without dependence on any foreign power . . . ."[128] It was not hard to criticize Spanish colonialism on those premises. At the same time, accepting the premise that Indians in North America were "wandering tribes" and thus distinct from sovereign states,[129] Vattel concluded that European colonization could be "extremely lawful" if colonists reserved sufficient lands for the Indians' use.[130]

American lawyers were also familiar with a conception of sovereignty as supreme and indivisible authority within a territory—one that, some argued, ruled out recognition of inherent tribal sovereignty. Blackstone's *Commentaries on the Law of England*, a leading treatise in the United States,[131] defined sovereignty as "supreme, irresistible, absolute, uncontrolled authority . . . ."[132]

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123 *See* VATTEL, *supra* note 38, bk. II, § 162, at 342 (arguing the law of nature creates a "common safety" that makes difference of religion irrelevant when contracting alliances).

124 *Id.*

125 James Brown Scott, *Preface* to 1 E. DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS 1A-2A (James Brown Scott ed., 1916) (1758) (quoting Letter from Benjamin Franklin to Charles W. F. Dumas (Dec. 19, 1775) (internal quotations omitted)).

126 VATTEL, *supra* note 38, bk. I, § 81, at 130 (discussing Spain's "notorious usurpation" of those "civilised [sic] empires"); *id.* bk. IV, § 37, at 672-73 (arguing that Moctezuma I was justified in resisting conquest).

127 *Id.* Preliminaries, § 1, at 67.

128 *Id.* bk. I, § 4, at 83.

129 *Id.* bk. I, § 209, at 216 (arguing that "unsettled habitation in those immense regions cannot be accounted a true and legal possession").

130 *Id.* bk. I, § 81, at 130 (concluding that European colonization was lawful if they "confin[e] themselves within just bounds").

131 *See, e.g.*, Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 240 (2005) (noting Blackstone's "influential" thinking regarding sovereignty).

132 1 WILLIAM BLACKSTONE, COMMENTARIES *49.

American jurists then cited—and still cite—Blackstone for the principle that sovereignty is supremacy and indivisibility.[133]

Opponents of tribes, such as Georgia state officials, cited this conception of sovereignty to argue that the federal government could not recognize the sovereignty of tribes within their borders.[134] They could buttress this argument by citation to those strains within political philosophy and international law commentary that racialized Indians, describing them as nomads without sovereignty and justifying the taking of their lands on that basis.

C. *Tribes as "Nations" and "States"*

The conflict between the state of Georgia, which denied tribal sovereignty under the law of nations and United States law, and the Cherokee Nation led to one of the most fiercely contested debates about sovereignty in the early Republic. In a series of opinions known as the Marshall Trilogy, the Supreme Court took a side in that debate. It canvassed the practice of the British Crown and the United States and considered the law of nations to conclude that the United States had recognized inherent tribal sovereignty while incorporating tribes within U.S. territory.

In the first case of the Trilogy, *Johnson v. M'Intosh*, the Court concluded that the United States has "ultimate title" to Indian lands under the doctrine of discovery, a concept intended to address the potential for disputes among colonial powers regarding rights to acquire Indigenous lands.[135] The upshot of the Court's holding was that only the United States government held the right to extinguish Indian title "by purchase or conquest."[136] Tribes could not, for instance, sell their lands to private parties or the states without U.S. involvement, nor could they enter into treaties with foreign nations.[137] Chief Justice Marshall pointed to the practice of European colonial powers to hold that tribes retain "the Indian title of occupancy" but cannot freely alienate

133 *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 458 (1793) (Wilson, J., concurring) (citing Blackstone for the proposition that a sovereign "owes no kind of objection to any other potentate upon earth"); Alden v. Maine, 527 U.S. 706, 715 (1999) (citing Blackstone for the proposition that sovereignty entails a pre-eminence that makes one immune to suit).

134 *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1047 (2015) [hereinafter Ablavsky, *Indian Commerce*] (discussing arguments that appealed to state sovereignty against federal recognition of tribal sovereignty).

135 21 U.S. (8 Wheat.) 543, 592 (1823). *See generally* Robert J. Miller, *The Doctrine of Discovery: The International Law of Colonialism*, 5 INDIGENOUS PEOPLES' J. L., CULTURE & RESISTANCE 35, 36 (2019) (describing the doctrine of discovery).

136 *Johnson*, 21 U.S. at 545.

137 *Id.* at 573 ("The rights thus acquired being exclusive, no other power could interpose between [the colonial power and the colonized]."), 591 ("Indian inhabitants are . . . to be deemed incapable of transferring the absolute title to others.").

their lands because the United States holds "ultimate title" to them.[138] In reaching this result, Marshall drew a racialized distinction between European Christians, whose title would be respected in cases of conquest, and Indian tribes, whose title would be limited because they could not be "incorporated with the victorious nation."[139] While *Johnson* did not squarely address the question of whether Indian tribes are sovereign nations, its holding, which has never been overruled, supported the United States' assertion of ultimate territorial authority over Indian lands.

Roughly a decade later, the Court faced the question of tribes' status as political communities within United States law. In *Cherokee Nation v. Georgia*[140] and *Worcester v. Georgia*,[141] the second and third cases in the Marshall Trilogy, the Court considered whether the State of Georgia had authority to regulate the lands of the Cherokee Nation and to terminate the authority of the Tribal government. The Court's answer to this question recognized the inherent sovereignty of tribes as "domestic dependent nations" incorporated within the territory of the United States.[142]

The Cherokee Cases arose when the state of Georgia, with the assistance of the administration of President Andrew Jackson, sought to remove the Cherokee Nation from their ancestral lands to new lands west of the Mississippi River.[143] In response to Georgia's efforts, representatives of the Cherokee Nation lobbied the federal government, including developing a broad grass-roots campaign based in the North,[144] and also pursued litigation to have the federal government keep its treaty promises to protect the Nation's lands.[145]

The Cherokee Nation's attorneys first sued Georgia in the Supreme Court.[146] They invoked the Court's original jurisdiction over controversies

138 *Id.* at 592.

139 *Id.* at 589-90 (explaining that "tribes of Indians inhabiting this country" were an exception to the general rule that "the rights of the conquered to property should remain unimpaired").

140 30 U.S. (5 Pet.) 1 (1831).

141 31 U.S. (6 Pet.) 515 (1832).

142 *Cherokee Nation*, 30 U.S. at 17 ("[Indian tribes] may, more correctly, perhaps, be denominated dependent nations.").

143 For a summary of the history of the Cherokee cases, see RENNARD STRICKLAND, *The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases*, *in* INDIAN LAW STORIES 64-79 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011).

144 *See id.* at 66, 76 (describing Cherokee lecture tours and northern responses to Georgia's efforts).

145 *See id.* at 72-79.

146 *Cherokee Nation*, 30 U.S. at 1-2.

between a "foreign state" and a "State."[147] The Nation's theory was that a polity whose citizens are not U.S. citizens is a "foreign state" under Article III.[148]

To establish that the Cherokee Nation was a state, the Nation's attorneys looked to the law of nations. At oral argument, John Sergeant, one of those attorneys, argued that the Cherokee Nation met "the very definition of a *state*, according to the most approved writers on public law," which included Grotius, Burlamaqui, and Vattel.[149] Sergeant stressed that the Cherokee Nation's treaty-based dependency upon the protection of the United States did not surrender its sovereignty.[150] Citing Vattel, Sergeant argued that "[a] state is still a state, though it may not be of the highest grade, or even though it may have surrendered some of its powers of sovereignty."[151] To this Sergeant added an argument that to construe the treaties between the Cherokee Nation and the United States as a surrender of sovereignty would be "an absurdity," for it would "suppose[] that by entering into a treaty the very rights are given up which are reserved by the treaty."[152] This argument, which, as Part II will show, was founded in the law of nations, is now reflected in the Indian canon of construction.

William Wirt, Sergeant's co-counsel, centered his argument on Vattel's definition of a "state."[153] As Wirt put it, "Vattel says, '*nations* or *states* are bodies politic, societies of men united together to procure their natural safety and advantage by means of their union.'"[154] Not only did the Cherokee Nation meet this definition, Wirt argued, it met "the definition of any other writer who has written on the law of nations."[155] Again citing Vattel, Wirt argued that "states . . . [may bind] themselves to another more powerful, by an *unequal alliance*," while retaining their sovereign right to self-government, which the Cherokee Nation had done by accepting U.S. protection.[156] This conception of dependent sovereignty is reflected in the detailed case studies in Part III and the discussion of doctrinal implications in Part IV.

147 *See id.* at 15.

148 *Id.* at 16 (considering Cherokee Nation's argument that "[a]n aggregate of aliens composing a state must . . . be a foreign state").

149 JOHN SERGEANT, SELECT SPEECHES OF JOHN SERGEANT, OF PENNSYLVANIA 90 (E.L. Carey & A. Hart eds., 1832) (emphasis in original).

150 *Id.* at 90.

151 *Id.* (citing VATTEL, *supra* note 38, bk. I, §§ 5–6, at 83)

152 *Id.*

153 THE CASE OF THE CHEROKEE NATION AGAINST THE STATE OF GEORGIA: ARGUED AND DETERMINED AT THE SUPREME COURT OF THE UNITED STATES, JANUARY TERM 1831, at 70 (Richard Peters ed., 1831) [hereinafter CASE OF THE CHEROKEE NATION] (argument of William Wirt).

154 *Id.* (emphasis in original).

155 *Id.* at 71.

156 *Id.* at 71-72 (internal quotations omitted).

The Court in *Cherokee Nation* dismissed the case on jurisdictional grounds.[157] Chief Justice Marshall's opinion, which has become canonical, agreed with Sergeant and Wirt that the Cherokee Nation was a "state . . . [that is] a distinct political society."[158] But, Marshall reasoned, the Cherokee Nation was not "foreign."[159] It was, rather, a "domestic dependent nation" located within the claimed borders of the United States.[160]

The multiple opinions in *Cherokee Nation* reflected the ongoing debate about tribes' status under federal law. Justice Thompson would have held that the Cherokee Nation was a "foreign state" entitled to sue in the Supreme Court.[161] He reasoned that the Cherokee Nation had "place[d] itself under the protection of a more powerful [state], without stripping itself of the right of government and sovereignty. . . ."[162] Such "[t]ributary and feudatory states," he asserted, remain foreign states.[163] By contrast, Justice Johnson and Justice Baldwin distinguished Indian tribes from "states" in a way that echoed those strands of international legal commentary that labeled "tribes" as uncivilized groups lacking sovereignty.[164]

The dispute between the Cherokee Nation and Georgia returned to the Court in *Worcester v. Georgia*.[165] Georgia had imprisoned a Northern missionary, Samuel Worcester, for residing in Cherokee territory in violation of Georgia law.[166] Worcester, represented by the Cherokee Nation's attorneys, sought habeas relief from the federal courts, arguing that Georgia's law was invalid under the U.S. Constitution and the United States' treaties with the Cherokee Nation.[167]

The Court held that the Constitution and the Cherokee Nation's treaties prohibited Georgia from regulating the Cherokees' territory.[168] Chief Justice Marshall's opinion drew heavily on Vattel's *Law of Nations* in holding

157 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831) (holding that Court lacked jurisdiction to address the Cherokee Nation's claim).

158 *Id.* at 16.

159 *Id.* at 17.

160 *Id.*

161 *Id.* at 58 (Thompson, J., dissenting).

162 *Id.* at 52-53.

163 *Id.*

164 *Id.* at 27 (Johnson, J., concurring) (describing tribes as "an anomaly unknown to the books that treat of states"); *id.* at 43 (Baldwin, J., concurring) ("The character of the Indian communities had been settled by many years of uniform usage under the old government: characterized by the name of nations, towns, villages, tribes, head men and warriors, as the writers of resolutions or treaties might fancy; governed by no settled rule. . . .").

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

166 *See id.* at 537-38 (quoting the indictment and Worcester's plea for dismissal).

167 *See id.* at 538-39 (quoting from Worcester's plea).

168 *See id.* at 562 ("[Georgia's acts were] repugnant to the constitution, laws, and treaties of the United States.").

that Indian tribes have federally recognized inherent sovereignty that is not subordinate to the sovereignty of the States of the Union:[169]

> [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. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.[170]

In entering into "treaties" with them, and labeling Indians as "nations," Marshall explained, the United States had used terms with "definite and well understood meaning[s]" and applied those terms "as we have applied them to the other nations of the earth. They are applied to all in the same sense."[171]

The remainder of this Article reconstructs the intellectual framework within which Marshall's reference to a "settled doctrine of the law of nations" made sense. It offers a close reading of the international law commentary that was familiar to the Marshall Court as well as European practice upon which this commentary was based.

This history is relevant to understanding the status of Indian tribes under U.S. law from multiple methodological perspectives. Historical analysis has long been important within the field of federal Indian law, perhaps uniquely so.[172] For originalists interested in the "law of the past," this Article's history

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169 *See id.* at 561-62 ("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 . . . .").

170 *Id.* at 560-61.

171 *Id.* at 559-60. Even as the Court issued its opinion in *Worcester*, the policy of the federal government towards Indian tribes was beginning to change. For instance, fourteen years later in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), the Court would state: "The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied." *Id.* at 572. This statement was in tension with *Worcester*, though it was technically true that the Marshall Court did not hold that tribes were independent nations with international personality. *See* 31 U.S. (6 Pet.) at 560-61. It was a harbinger of the turn in federal policy towards treating tribes as subject to federal control in the late nineteenth century.

172 *See, e.g.*, Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1757 (1997) ("[U]nless injected with a heavy dose of historical perspective and legal realism, formal lawyerly analysis not only often fails to illuminate the issues in federal Indian law, but can also result in deceiving conclusions.").

sheds light upon the original U.S. law of Indian tribal sovereignty, a law that, we argue, must be understood in light of the law of nations.[173] And for original public meaning analysis, our account is relevant to identifying presuppositions of the constitutional text about the status of Indian tribes.[174] In particular, it contributes to the debate about the meaning of the Indian Commerce Clause's recognition of "Indian tribes" as entities that, like "foreign Nations," would have "commerce with" the United States.[175] Our history suggests a background assumption of Indian tribal sovereignty conveyed by the Indian Commerce Clause as well as the Treaty Clause, the latter of which provided authority for the federal government to enter into treaties not only with foreign nations, but also with Indian tribes.

II. THE RETENTION OF SOVEREIGNTY: THE INTERNATIONAL LAW ORIGINS OF THE INDIAN CANON OF CONSTRUCTION

This Part turns to the interpretation of Indian treaties by identifying the international law origins of the Indian canon of construction. In *Worcester v. Georgia*, the Marshall Court held that Indian tribes retain sovereign rights that they do not clearly surrender by treaty, with one exception.[176] Ambiguous terms in Indian treaties should therefore be construed to retain inherent Tribal sovereignty.[177] The typical view is that this Indian canon of treaty construction is *sui generis*. This Part shows, however, that the Indian canon is consistent with background understandings of the rights of sovereign states and maxims of treaty interpretation recognized by the law of nations.

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173 *See* Baude & Sachs, *supra* note 56, at 812 (discussing "original-law originalism" as looking to the "law of past," such that "the present law . . . comprises the rules that were law at the Founding, and everything that has lawfully been done under them since"). For further discussion of the importance of the law of nations to debates about sovereignty during the Founding period, see *infra* notes 380-402 and accompanying text.

174 *See* Solum, *supra* note 56, at 289 ("Presupposition is communicative context provided by an unstated assumption or background belief that is conveyed by what is said.").

175 U.S. CONST. art. I, § 8, cl. 3. We do not attempt here to resolve that debate. *Compare* Ablavsky, *Indian Commerce*, *supra* note 134, at 1028-30 (arguing that "commerce with Indians did not exclusively mean trade," rather that "trade with Indians was an expansive category that encompassed more than . . . narrowly economic transactions" and connoted "diplomacy and politics"), *with* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 214-16 (2007) ("'[C]ommerce with Indian tribes' . . . meant 'trade with Indians' and nothing more.").

176 31 U.S. at 559 ("Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, . . . with the single exception . . . which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. . . .").

177 *See id.* at 554 (holding that any intent to surrender tribal sovereignty "would have been openly avowed").

A. *The Indian Canon of Construction*

The Indian canon of construction is a rule for the interpretation of ambiguous provisions in treaties, statutes, regulations, and executive orders concerning Indian affairs.[178] The canon holds that ambiguous provisions in treaties are to be interpreted as the Indians would have understood them.[179] Ambiguities in Indian-related legislation or regulations must be interpreted in Indians' favor.[180] Application of the Indian canon preserves Tribal sovereignty and property rights by requiring a clear statement before extinguishing or diminishing those rights.[181]

This canon is often treated as *sui generis*. The Supreme Court has said that the "standard principles of statutory construction do not have their usual force in cases involving Indian law."[182] These principles, the Court has explained, are "rooted in the unique trust relationship between the United States and the Indians."[183] Congress has similarly referred to this "special relationship" between the United States and tribes as the basis for the Indian canon of construction.[184] The trust relationship imposes upon the United States fiduciary duties to support Tribal self-determination and protect Tribal property rights.[185] The historical origins of this often-vexed relationship

178 *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02, at 116-18 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK].

179 *See* Winters v. United States, 207 U.S. 564, 576 (1908) ("By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."); *see also* Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring) (noting that the Court must "give effect to the terms as the Indians themselves would have understood them" when dealing with a tribal treaty (quoting Minnesota v. Mille Lacs Band Chippewa Indians, 526 U.S. 172, 196 (1999) (internal quotation marks omitted))).

180 County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) ("[Ambiguous statutes] are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) (internal quotation marks omitted))).

181 *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014) ("[C]ourts will not lightly assume that Congress in fact intends to undermine Indian self-government."); United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 346, 353-54 (1941) (holding that Tribal property rights and sovereignty are preserved unless Congress' intent to abrogate them is unambiguous).

182 Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

183 County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).

184 H.R. REP. NO. 101-877, at 24 (1990).

185 *See* Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) (holding that, in light of the trust relationship, the conduct of the federal government in its dealings with tribes should be "judged by the most exacting fiduciary standards"); *see also* H.R. REP. NO. 101-877, at 24 (acknowledging the government's fiduciary obligation and responsibility to protect Indian property); President Richard M. Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970), https://www.presidency.ucsb.edu/documents/special-message-the-congress-indian-affairs [https://perma.cc/N5D2-5D9N] (stating that U.S. must encourage "[s]elf-determination among the Indian people" in order to fulfill its special trust responsibility to Indians).

include traditions of Indigenous diplomacy as well as the paternalistic pretensions of colonial powers.[186] Today, the United States no longer presumes the authority of a "guardian" over its "wards."[187] The trust responsibility instead is rooted in the government-to-government relationship between the United States and tribes.[188] As a manifestation of that relationship, the Indian canon of construction favors Tribal interests, presuming that the tribes, who did not consent to the constitutional authority of the United States, retain their sovereignty and property unless they clearly surrender them or Congress clearly intends to take them.[189] Thus understood, the Indian canon is an exceptional doctrine of federal Indian law founded in the unique history of the nonconsensual incorporation of tribes within the United States.

Some public law scholars, by contrast, have classified the Indian canon with other general principles of statutory construction by reimagining it as a counter-majoritarian default rule. In this account, the Indian canon protects Indians as a discrete and insular minority from political processes that are skewed against their interests.[190] Thus, the Indian canon is like the rule of lenity in criminal law, which protects the underrepresented and politically powerless.[191]

This account gets the Indian canon wrong. Indian tribes are not politically powerless. Many tribes have sophisticated and successful lobbyists.[192] Over the past several decades, the enactment of myriad federal statutes supporting tribal self-determination reflect tribes' success in lobbying the political branches to

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186 *See, e.g.*, Davis, *supra* note 44, at 1805 (arguing that federal officials have claimed "plenary power [over Indians] as trustees"); Robert A. Williams, Jr., *"The People of the States Where They Are Found Are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 994 (1996) (arguing that Indigenous traditions of trust among peoples have been incorporated within federal Indian law).

187 *See* Rey-Bear & Fletcher, *supra* note 16, at 409 (tracing development of trust relationship away from paternalistic guardian-ward framework).

188 COHEN'S HANDBOOK, *supra* note 178, § 2.02[2], at 116-18.

189 *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014) (applying Indian canons to require a clear statement from Congress before concluding that a statute abrogates tribal sovereign immunity).

190 *See, e.g.*, Nicholas S. Bryner, *An Ecological Theory of Statutory Interpretation*, 54 IDAHO L. REV. 3, 12 (2018) (placing the Indian canon alongside interpretative canons like criminal law's rule of lenity which "tip the scales towards vulnerable or underrepresented interests"); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2192-93 (2002) (arguing that the Indian canon, as a "canon that favor[s] the politically powerless," is best understood as a "preference-eliciting default rule[]" which encourage legislative precision); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 483 (1989) (arguing that courts should resolve interpretive doubts in favor of disadvantaged groups, including Indian tribes, to ensure that regulatory and statutory protections are not defeated during the implementation process).

191 Bryner, *supra* note 190, at 12 (drawing this analogy).

192 *See* Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 B.Y.U. L. REV. 1159, 1163 (noting that an increasing number of Indian tribes have used lobbying to demonstrate tribal resilience and protect their sovereignty).

recognize their rights.[193] Nor is the Indian canon rooted in the historical powerlessness of Indian tribes. To the contrary, it is founded in the federal government's recognition of their sovereignty under the law of nations.

B. *The Indian Canon and the Law of Nations*

The Marshall Court adopted the Indian canon of construction when recognizing inherent Tribal sovereignty. In *Worcester v. Georgia*, the Court construed an ambiguous provision in an Indian treaty to preserve rather than to diminish Tribal sovereignty.[194] According to the Court, a treaty should not be read to "annihilat[e] the political existence of one of the parties. . . .," unless such "a result . . . [is] openly avowed."[195] Chief Justice Marshall provided no citation for this clear statement rule. Instead, he treated it as self-evident that the surrender of sovereignty in a treaty required a clear statement.[196]

What made this clear statement rule self-evident? This section reconstructs the intellectual milieu within which a sovereignty-preserving rule of treaty interpretation would have seemed self-evidently correct. As Vattel put the point, "[a] sovereign state cannot be constrained" in its right to self-government "beyond the clear and express terms of [its] treaties."[197] This sovereignty-preserving principle is the international law foundation for the Indian canon of construction.

Worcester construed the 1785 Treaty of Hopewell between the Cherokee Nation and the United States to preserve the Cherokees' right to self-government.[198] The ninth article of the Treaty was ambiguous on this score. It stated that:

> [F]or the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the [U.S.] citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs*, as they think proper.[199]

The Court confronted the possibility that this article surrendered the Cherokee Nation's sovereignty.[200] If so, it would imply that Georgia had the

193 *See id.* at 1177-220 (presenting series of case studies of successful tribal lobbying of Congress).

194 31 U.S. (6 Pet.) 515, 554 (1832).

195 *Id.*

196 *Id.* ("Had such a result been intended, it would have been openly avowed.").

197 VATTEL, *supra* note 38, bk. II, § 57, at 292.

198 *Worcester*, 31 U.S. at 554.

199 *Id.* at 553 (quoting Treaty of Hopewell art. IX, Nov. 28, 1785, 7 Stat. 18).

200 *See id.* at 553-54 (considering whether "the expression 'managing all their affairs' [was] . . . a surrender of self-government").

authority to regulate Cherokee territory.[201] The Court, however, rejected this reading of the Treaty's ninth article.[202]

In construing the Treaty of Hopewell to preserve Tribal sovereignty, the Court adopted the Indian canon of construction. The Court rejected a reading that would "convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties." [203] It was "inconceivable," the Court reasoned, that the Cherokee Nation's representatives would have understood a "phrase . . . slipped into an article" to surrender the Nation's sovereignty over its territory.[204] That would have been inconsistent with the Treaty's nature and purpose to provide for the "'benefit and comfort'" of the Cherokee Nation. [205] And, more importantly, it would have been inconsistent with treaty practice generally.[206] A surrender of the right to self-government, which is by its nature inconsistent with the sovereignty of the contracting parties, required a clear statement.[207]

Chief Justice Marshall may have introduced this clear statement rule into the case himself, although it reflected the tenor of the arguments offered by the Cherokee Nation's counsel.[208] Georgia's attorneys did not appear because the State's official position was that the Supreme Court proceedings were illegitimate.[209] By all accounts, John Sergeant and William Wirt, representing the Cherokee Nation, presented oral arguments that were similar to those they had offered a year earlier in *Cherokee Nation v. Georgia*.[210] Those earlier arguments were published in two contemporaneous volumes.[211] According to the published versions, Wirt cited the general principle that treaty interpretation sought to ascertain the intent of the parties.[212] He pointed to the text of the Treaty of Hopewell, as well as the later Treaty of Holston, arguing that the Court should construe both to recognize the Cherokee

201 *See id.*

202 *See id.* at 554 (holding that the Treaty of Hopewell "treat[s] the Cherokees as a nation").

203 *Id.*

204 *Id.*

205 *Id.* (quoting Treaty of Hopewell art. IX, Nov. 28, 1785, 7 Stat. 18).

206 *Id.* ("Such a construction would be inconsistent with the spirit of this and of all subsequent treaties . . . .").

207 *See id.* ("Had such a result been intended, it would have been openly avowed.").

208 *See id.* at 529-30 (quoting argument from the pleadings filed by Worcester's counsel, who were also the Cherokee Nation's counsel).

209 STRICKLAND, *supra* note 143, at 71 ("The Supreme Court, the state believed, had no jurisdiction over Georgia's internal affairs and Georgia was not bound by any of the Court's decisions.").

210 *Id.* at 74 ("The arguments and supporting evidence [proffered by the Cherokee Nation's attorneys in *Worcester*] were essentially the same as in the . . . *Cherokee Nation* case.").

211 *See* SERGEANT, *supra* note 149, at 90 (quoting Grotius to argue that "[t]he Cherokee nation is a state" that "'deliberates and takes resolutions in common; and becomes a moral person,'" which is "the very definition of a state. . . ."); CASE OF THE CHEROKEE NATION, *supra* note 153, at 53 (similarly quoting Grotius to argue for statehood of the Cherokee nation).

212 CASE OF THE CHEROKEE NATION, *supra* note 153, at 93.

Nation as a sovereign.[213] To the extent that some ambiguous provisions could be construed as surrendering sovereignty, Wirt argued that the Court should consider the treaty's purpose and substance, as well as the circumstances of its negotiation.[214] He added that the treaty should be understood as the Indians understood it, taking account of the fact that it was written in English and interpreted for them,[215] lest the honor of the United States be impugned.[216] In later cases, the Supreme Court would stress this justification,[217] which Justice Baldwin's concurring opinion in *Worcester* emphasized.[218] But Chief Justice Marshall instead founded the Indian canon rooted in a sovereignty-preserving clear statement rule.[219] Marshall's rationale echoed Sergeant's argument that to read the Treaty of Hopewell as a surrender of sovereignty would be absurd.[220]

The question is, why might it have been absurd to read an Indian treaty impliedly to surrender a Tribe's right to self-government? Certainly, some lawyers and jurists thought at the time that the Treaty of Hopewell must be read that way.[221] Chief Justice Marshall did not, and his reliance upon the law of nations to recognize the Cherokee Nation as a sovereign provides a foundation for his announcement of the Indian canon in *Worcester*.

The Marshall Court concluded that the Cherokee Nation and the United States had a political relationship familiar from European practice.[222] Under "the settled doctrine of the law of nations," the Court explained, "a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection."[223] A surrender of the right to self-government would require more than a treaty promise of protection between sovereigns. Such a promise created a well-understood

213 *Id.* at 86-94 (commenting on the terms of the treaties).

214 *Id.* at 94.

215 *See id.* at 83 (suggesting that certain English "idiomatic expressions" appearing in some parts of the treaty may have been lost in translation).

216 *See id.* at 92.

217 *See, e.g.*, United States v. Winans, 198 U.S. 371, 380 (1905) (maintaining that the Court will construe the treaty as the Indians understood it, and "'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection.'" (quoting Choctaw Nation v. United States, 119 U.S. 1, 28 (1886)).

218 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (Baldwin, J., concurring) ("How the words of the treaty were understood by this unlettered people . . . should form the rule of construction.").

219 *Id.* at 554 ("Had [elimination of Cherokee sovereignty] been intended, it would have been openly avowed.").

220 *See* SERGEANT, *supra* note 149, at 90 (maintaining that an interpretation of the Treaty as relinquishing sovereignty "is an absurdity").

221 *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 22-23 (1831) (Johnson, J., concurring) (arguing that Treaty of Hopewell surrendered tribal sovereignty).

222 *Worcester*, 31 U.S. at 559 (comparing the relationships between Indian nations and European nations with the relationship between the United States and the Cherokee Nation).

223 *Id.* at 560-61.

relationship between sovereigns, in the Americas no less than in Europe, where "more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies."[224] Properly understood, the Treaty of Hopewell created a tributary relationship between the United States and the Cherokee Nation, which retained their right to govern themselves notwithstanding the ambiguity of Article 9 of the Treaty.[225]

The Law of Nations provided a foundation for this approach to treaty interpretation. As Vattel explained, a treaty should not be construed to surrender a state's sovereignty unless it did so clearly.[226] This canon was an application of the maxim that a treaty, where ambiguous, should be interpreted to avoid "odious" results such as the cession of a state's right to self-government.[227]

According to Vattel, Grotius, Pufendorf, and other commentators, the goal of treaty interpretation was to determine the intent of the parties. To ascertain this intent, an interpreter should begin with the words of the treaty.[228] Treaty terms should be given their ordinary meaning, unless they were terms of art.[229] This meaning would control where "a deed is worded in clear and precise terms,— when its meaning is evident, and leads to no absurd conclusion[s]. . . ."[230]

At the same time, commentators recognized that ambiguity was inevitable. Vattel, who offered the most systematic discussion of treaty interpretation, began his chapter on treaty interpretation by highlighting the "imperfection of language" and the possibility that questions would arise that the parties did not foresee.[231] The aim in interpreting ambiguous text remained the same as with clear text: to construe the parties' intent. To do so might require, however, looking beyond the words of the treaty to what

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224 *Id.* at 561.

225 *See id.* (quoting Vattel's analysis of tributary states).

226 VATTEL, *supra* note 38, bk. II, § 57, at 292 (noting that a recission of the right to self-government cannot "be extended beyond the clear and express terms of the treaties.").

227 *Id.* bk. II, § 308, at 439.

228 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE bk. II, ch. XVI, § XII, at 389, 858 (Richard Tuck ed., 2005) (1625) (explaining that interpretation begins with the "[w]ords" of the treaty); SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS, bk. V, ch. XII, § II, at 301 (Basil Kennet trans., 3d ed. 1717) ("The true End and Design of Interpretation is, To gather the Intent of the Man from most probable Signs . . . . Words, and other Conjectures . . . ." (emphasis omitted)); VATTEL, *supra* note 38, bk. II, § 263, at 408 (labeling principle that clear terms of treaty control as the first "general maxim of interpretation").

229 *See* PUFENDORF, *supra* note 228, bk. V, ch. XII, § III, at 301 ("Words . . . are to be understood in their proper and most known Signification. . . .").

230 VATTEL, *supra* note 38, bk. II, § 263, at 408.

231 *Id.* bk. II, § 262, at 407.

Grotius and Pufendorf called "conjectures,"[232] and which Vattel systematized into a list of interpretive maxims.[233]

Some of these maxims of treaty interpretation concerned the subject-matter and circumstances of the treaty negotiation.[234] The subject matter could guide a choice between different common usages of a term,[235] with an interpreter "affix[ing] such meaning to the expressions, as is most suitable to the subject or matter in question."[236] The circumstances, such as "the reason of the law, or of the treaty,—that is to say, the motive which led to the making of it, and the object in contemplation at the time," were also crucial to construing an ambiguous treaty provision.[237] Such circumstances should not be used "in order to wrest, restrict, or extend the meaning of a deed which is of itself sufficiently clear . . . ."[238] At the same time, however, "great attention should be paid to . . . . the reason [of the treaty]" when resolving ambiguities in the treaty's meaning or its application.[239]

Other maxims concerned the consequences of interpreting the treaty in a particular way. The distinction between "favourable" and "odious" consequences was among the most important.[240] This distinction was a guide to determining when to construe an ambiguous provision in its "more extensive sense" or rather to give it a "more limited sense."[241] As Grotius summarized it, "we must understand the Words in their full Extent" when concerned with favorable things but confined to their most restrictive meaning when concerned with odious things.[242] Favorable things "tend[ed] to the common advantage in conventions, or . . . ha[d] a tendency to place the contracting parties on a footing of equality. . . ."[243] By contrast, odious things included "every thing that is not for the common advantage, every thing that tends to destroy the equality of a

232 GROTIUS, *supra* note 228, bk. II, ch. XVI, § IV, at 851-52 ("Conjectures are necessary, when Words and Sentences are . . . [o]f several [s]ignifications, which the Rhetoricians call . . . Doubtful, and Ambiguous." (emphasis omitted)); PUFENDORF, *supra* note 228, bk. V, ch. XII, § V, at 303 ("When a single Word or Sentence is capable of several Significations, Conjectures are necessary to find out the true [meaning]." (emphasis omitted)).

233 VATTEL, *supra* note 38, bk. II, §§ 311-21, at 443-447 (presenting a systematic list of maxims of treaty interpretation).

234 *See, e.g.*, GROTIUS, *supra* note 228, bk. II, ch. XVI, § IV, at 852 (identifying three principal sources of conjecture as "the Matter, the Effect, and the Circumstances or Connection" of the treaty); PUFENDORF, *supra* note 228, bk. V, ch. XII, § VII, at 305 (same).

235 GROTIUS, *supra* note 228, bk. II, ch. XVI, § V, at 852-53 (discussing how terms can be defined in a way "agreeable to the Subject-Matter").

236 VATTEL, *supra* note 38, bk. II, § 280, at 416 (emphasis omitted).

237 *Id.* bk. II, § 287, at 422 (emphasis omitted).

238 *Id.* at 423.

239 *Id.* at 422-23.

240 *Id.* bk. II, § 300, at 433 (emphasis omitted).

241 *Id.* bk. II, §§ 299, 230, at 432-33.

242 GROTIUS, *supra* note 228, bk. II, ch. XVI, § XII, at 858-59.

243 VATTEL, *supra* note 38, bk. II, § 301, at 434.

contract, every thing that onerates [that is, burdens] only one of the parties, or that onerates the one more than the other. . . ."[244] Of course, the distinction between favorable and odious things led to borderline cases. The basic principle, however, was that "we ought, in cases of doubt, to extend what leads to equality, and restrict what destroys it . . . ."[245]

The surrender of sovereignty was among the odious things disfavored under this principle. States might choose to surrender their sovereign rights in a treaty, but they had to make that intent clear.[246] This clear statement rule followed from the mutual recognition of equal sovereignty among states. With respect to its self-government, "[a] sovereign state cannot be constrained . . . except it be from a particular right which [the state itself] has given to other states by [its] treaties. . . ."[247] Because the right to self-government was the core of sovereignty, a surrender of it "cannot . . . be extended beyond the clear and express terms of the treaties."[248] Such a surrender would be "odious" insofar as it would "tend[] to change the present state of things" at the expense of one of the parties.[249]

Commentators often cited the treaty ending the Second Punic War between Rome and Carthage to illustrate this principle.[250] In that treaty, Rome promised that Carthage "should be a free City," and that Carthaginians would "have their Liberty, their Laws, all their Lands, [and] the full Possession of all their Goods. . . ."[251] Nevertheless, Rome thereafter demanded that the Carthaginians demolish their city and move to new lands "at a greater Distance from the Sea. . . ."[252] According to the Romans, this demand did not violate their treaty promise because "the Spot of Ground, upon which the City stood, was not *Carthage*."[253] Not so, Vattel, Grotius, and Pufendorf argued. Rome's demand that Carthaginians surrender their lands and remove to a spot farther from the sea was odious. To be sure, Carthage had surrendered its "full entire Liberty" through the peace treaty; it had, for example, promised not to wage an offensive war without Rome's permission.[254] Carthage, having conceded some measure of its external sovereignty, was no longer completely independent.[255] Yet Carthage's surrender of sovereignty should be understood

244 *Id.* (emphasis omitted).
245 *Id.*
246 *Id.* bk. II, § 57, at 292.
247 *Id.*
248 *Id.*
249 *Id.* bk. II, § 305, at 436 (emphasis omitted).
250 *See, e.g.*, PUFENDORF, *supra* note 228, bk. V, ch. XII, § XVI, at 311.
251 *Id.* (emphasis omitted).
252 *Id.*
253 *Id.* (internal citation omitted).
254 *Id.* bk. V, ch. XII, § XV, at 310-11.
255 GROTIUS, *supra* note 228, bk. II, ch. XVI, § XV, at 864.

in its more restrictive sense, rather than expansively, as Rome asserted.[256] Otherwise, the treaty promise "would be *Odious*, as inconsistent with the very Being of the State of *Carthage*."[257] As Vattel put it, only "a positive engagement in the most express and formal terms" could bind Carthage otherwise.[258]

Chief Justice Marshall was well versed in this approach to treaty interpretation when he penned the Cherokee cases. In his one and only oral argument before the Supreme Court, then-attorney John Marshall argued for a clear statement rule in a treaty case so as to avoid an evident hardship.[259] Marshall's co-counsel argued in support of this rule by citing Vattel's distinction between "odious" terms, which are disfavored, and "favourable" terms, which are construed broadly.[260] In the late eighteenth and early nineteenth centuries, it was common for litigants in treaty cases to cite Vattel's methodology before the Court, and the Justices followed suit.[261]

These international law foundations for the Indian canon of construction have not been noticed by commentators.[262] Yet the correspondence is apparent. As Vattel and other commentators instructed, Marshall began with the text of the treaty, seeking to understand its "necessary meaning," not mechanically, but by reference to the entire treaty, its purpose, and the understanding of the parties.[263] Where the treaty provisions' meaning was clear, Marshall did not resort to other rules of interpretation. But where the treaty was ambiguous, as it was in the ninth article of the Treaty of Hopewell, Marshall looked to background principles of treaty interpretation.[264] And in doing so, the Chief Justice rejected the result of surrendering the Cherokee Nation's

256 PUFENDORF, *supra* note 228, bk. V, ch. XII, § XVII, at 311 (discussing the "Enlargement" of Rome's rights through interpretation).

257 *Id.* bk. V, ch. XII, § XV, at 311.

258 VATTEL, *supra* note 38, bk. II, § 309, at 442.

259 *See* Andrew Tutt, *Treaty Textualism*, 39 YALE J. INT'L L. 283, 331 (2014) (discussing Marshall's argument in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)).

260 *See Ware*, 3 U.S. at 215 (recounting argument of Alexander Campbell, Marshall's co-counsel).

261 *See* Tutt, *supra* note 259, at 293 (noting the treatment of Pufendorf, Grotius, Blackstone and Vattel as authoritative sources of law by lawyers in the early republic, and particularly so in the context of international law).

262 To our knowledge, only one other work has noted similarities between the Indian canon and principles of treaty interpretation from the law of nations, arguing that this law supported interpreting treaties the ways Indians would have understood them. *See Indian Canon Originalism*, *supra* note 16, at 1110 ("[T]he original 'public meaning' of these Indian treaties should be understood to include an instruction to judges to read their words in accordance with their 'tribal meaning.'"). It sketches an argument that the Indian canon was based upon the protectorate relationship between tribes and the United States. *See id.* ("[T]he original public meaning of these provisions was to create a 'protectorate' relationship between the tribe and the federal government. . . ."). But, as this Part has shown, the sovereignty-preserving canon of the law of nations was not limited to protectorate relationships, and commentators' discussion of it in that context was an application of a more general principle.

263 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551 (1832).

264 *Id.* at 553-54.

sovereignty—as he put it, of "annihilating [its] political existence."[265] Such an odious outcome would have required a clear statement. The ninth article of the Treaty could be construed narrowly to concern trade and thus to preserve Tribal sovereignty without doing violence to its terms.[266] When Marshall adopted this sovereignty-preserving interpretation of the Treaty, he was applying a settled methodology for construing ambiguous terms in treaties between sovereign states.

* * *

Recognizing the international law foundations of the Indian canon has important implications for its rationale and operation. The canon need not be founded in the paternalistic idea that the United States is a "guardian" for tribes. As this Part has shown, Chief Justice Marshall suggested that understanding in a dictum in *Cherokee Nation* but went in a different direction with *Worcester*, where he rooted a sovereignty-preserving clear statement rule in the political relationship between the Cherokee Nation and the United States. That relationship, he concluded, was not unprecedented. The Cherokee Nation was a "state" under the law of nations. The terms of the law of nations applied to it as to other states. Like other states that had accepted the protection of a stronger state, the Cherokee Nation retained its sovereignty. Thus, the Indian canon was not rooted in the powerlessness of Indian tribes. Nor does it cease to apply today when many tribes have become politically powerful. Its force persists, just as the sovereignty of the tribes persists.

III. The Persistence of Sovereignty

Courts and commentators have raised doubts about the persistence of sovereignty for tribes. In *City of Sherrill v. Oneida Indian Nation of New York*, for example, the Court stated that federal law "preclude[s] [a] Tribe from rekindling embers of sovereignty that long ago grew cold."[267] But the tribes' sovereignty is more resilient than the Court suggested in *Sherill*. Indeed, dependent sovereigns may even be revived to fully sovereign status, or at least exercise greater sovereignty than they have in the past.

To demonstrate the persistence of sovereignty, this Part offers two detailed historical case studies that shed light on understandings of dependent sovereignty in the law of nations. First, this Part discusses the

265 *See id.* at 554.
266 *See id.* ("The great subject of the article is the Indian trade.").
267 544 U.S. 197, 214 (2005).

Holy Roman Empire, which dissolved in the first decade of the nineteenth century—early in the existence of the independent American republic. Here, fragments of the Empire not absorbed by other states eventually became independent sovereigns, despite their prior status as dependencies of the Empire. The Holy Roman Empire was well known to the Founders and informed their understandings of sovereignty under the law of nations. It is therefore directly relevant to the history of the early Republic's relationship with Indian tribes and to debates about the originalist understanding of tribal sovereignty under the U.S. Constitution.

Second, this Part discusses the princely states of India. At the time of the founding, Britain was consolidating its colonial empire over the Indian subcontinent. A key component of this imperial project was subordination of the princely states, which retained some sovereignty throughout the British colonial period. The nature of the relationships between the British Crown and the princely states began to be elaborated concurrently with the American Revolution. Its denouement occurred a century and a half later. When Britain withdrew from India in 1949, the princely states' sovereignty persisted, with some claiming independence. These states were then quickly incorporated by India.

Through a comparison across these three contexts—the tribes' relationship with the U.S., the Holy Roman Empire, and the princely states of India—this Part sheds light on the persistence of sovereignty under international law. It also discusses the limits of sovereignty's persistence—that is, when eighteenth century (and current) international law might "cut off" the strands of sovereignty.

A. *The Holy Roman Empire*

Established after the end of the Western Roman Empire in the first millennium CE, the Holy Roman Empire continuously existed until 1806.[268] It was not only long-lived but also geographically capacious. In its early centuries, the Empire included about half of present-day Italy and lands in France in addition to its central European territory. Over time, it contracted northwards and eastwards. Within this area, the Empire's political organization was hugely complex, comprising about 1,800 territories at its

268 For survey histories of the Holy Roman Empire, see generally 2 JOACHIM WHALEY, GERMANY AND THE HOLY ROMAN EMPIRE: FROM THE PEACE OF WESTPHALIA TO THE DISSOLUTION OF THE REICH 1648–1806 (R.J.W. Evans ed., 2012) [hereinafter 2 WHALEY, GERMANY AND THE HOLY ROMAN EMPIRE]; JOACHIM WHALEY, THE HOLY ROMAN EMPIRE: A VERY SHORT INTRODUCTION (2018) [hereinafter WHALEY, THE HOLY ROMAN EMPIRE]; JAMES J. SHEEHAN, GERMAN HISTORY: 1770–1866 (1989).

height.[269] The Peace of Westphalia (1648) marks the chronological beginning of this Section. The 1648 settlement resolved the devastating Thirty Years War between Protestant and Catholic sovereigns within the Empire,[270] but also gave rise to new problems of governance as imperial institutions and territorial rulers alternately competed and relied on one another.

The Holy Roman Empire after 1648 is an important historical example for shared and dependent sovereignties. On the one hand, the territorial rulers within the Empire, the imperial estates [*Reichsstände*], gained unprecedented rights with the peace settlement—most famously, the right to enter into alliances with foreign powers.[271] But on the other hand, the imperial institutions maintained their authority and continued to stitch together the Empire until its dissolution in 1806. This co-constitutive system gave rise to a vast literature on the character of sovereignty in the Empire, both by constitutional publicists in the seventeenth and eighteenth centuries and in present-day historiographical literature.[272]

This Section draws on German and English-language historiography on the Holy Roman Empire to think through the theory and practice of sovereignty in the Holy Roman Empire from 1648 until 1806, and in the Empire's short-lived successor, the Confederation of the Rhine between 1806 and its end in 1813. By revisiting the beginnings of modern sovereign statehood in Europe, this Section shows how ideas of shared sovereignty persisted well past the Peace of Westphalia, and how sovereignty only emerged in fits and starts in the German lands even after 1806.

1. *Landeshoheit*: Practices of Rule in the Holy Roman Empire, 1648–1803

The Holy Roman Empire confounds present day expectations of sovereignty and statehood. It was multiethnic, subsuming Germans, Flemings, Walloons, Italians, Czechs, and Slovenes,[273] and, since the Reformation in 1517, was both Catholic and Lutheran.[274] The Empire was also multifaceted in terms of the variety of forms of government within it, including estatist, absolutist, and

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269 1 HANS-ULRICH WEHLER, DEUTSCHE GESELLSCHAFTSGESCHICHTE: ERSTER BAND VOM FEUDALISMUS DES ALTEN REICHES BIS ZUR DEFENSIVEN MODERNISIERUNG DER REFORMÄRA 1700–1815, at 47 (C.H. Beck ed., 1987).

270 *Id.*

271 *See infra* notes 284–287 and accompanying text.

272 *See infra* subsection III.A.2.

273 SHEEHAN, *supra* note 268, at 15.

274 *See id.* at 16 ("Confessional hatreds and dynastic ambitions split the Reich internally. . ."); WHALEY, GERMANY AND THE HOLY ROMAN EMPIRE, *supra* note 268, at 11 ("Schönborn thus succeeded in combining both Catholics and Protestants in a union dedicated to upholding the Peace of Westphalia.").

republican modes of rule.[275] A number of imperial territories were ruled by foreign monarchs, who as a result gained access to the Imperial Diet [*Reichstag*].[276] Our present-day vocabularies of sovereignty strain to describe this assemblage. Illustrating this difficulty, the twentieth-century German historian Hans-Ulrich Wehler described the constitutional status of the imperial knights after 1648 as "pseudo-sovereign" [*Pseudosouveränen*], capturing bygone constitutional realities with today's concepts.[277]

While the Peace of Westphalia has traditionally been highlighted in international law and history as the hour of birth of modern sovereign statehood out of the feudal history of Europe, a growing body of work in history and political science tempers this "Westphalian myth."[278]

In the "myth" story, the Peace of Westphalia turned the Empire into a shell and deposited true sovereignty in its constituent members.[279] In contrast, critical scholarship emphasizes how the Peace reconstituted the Empire. Pushing against the myth, the German historian Karl Otmar von Aretin argued that it would be wrong to describe most German territories after the Peace of Westphalia as states at all, with the exceptions of powerful Brandenburg-Prussia and Austria.[280] Other than these two, the imperial

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275 1 DIETER GRIMM, DEUTSCHE VERFASSUNGSGESCHICHTE, 1776–1866: VOM BEGINN DES MODERNEN VERFASSUNGSSTAATS BIS ZUR AUFLÖSUNG DES DEUTSCHEN BUNDES 43 (Suhrkamp ed., 1988).

276 SHEEHAN, *supra* note 268, at 15 ("Foreign monarchs . . . had a part in imperial affairs by virtue of their possessions within the Reich."). Before the Peace of Westphalia, the Imperial Diet was the legislative body of the Holy Roman Empire, made up of three councils: the electoral council (which had the power to elect the Emperor), the council of Imperial Princes, and the council of Imperial Cities. *Id.* at 16. With the Westphalian settlement in 1648, the Diet became more akin to a forum of princes who represented their own—rather than the Emperor's—interests and passed only two notable laws. *Id.* at 17. The Imperial Diet ceased to exist with the end of the Holy Roman Empire in 1806. WHALEY, THE HOLY ROMAN EMPIRE, *supra* note 268, at 120.

277 WEHLER, *supra* note 269, at 47.

278 BENNO TESCHKE, THE MYTH OF 1648: CLASS, GEOPOLITICS, AND THE MAKING OF MODERN INTERNATIONAL RELATIONS 3 (2003) (arguing that 1648 was not the origin of the modern international system of sovereign states). *See generally* DANIEL H. NEXON, THE STRUGGLE FOR POWER IN EARLY MODERN EUROPE: RELIGIOUS CONFLICT, DYNASTIC EMPIRES, AND INTERNATIONAL CHANGE (2009); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999); ANDREAS OSIANDER, THE STATES SYSTEM OF EUROPE, 1640–1990: PEACEMAKING AND THE CONDITIONS OF INTERNATIONAL STABILITY (1994); STÉPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW: THE WORD *SOVEREIGNTY* IN BODIN AND VATTEL AND THE MYTH OF *WESTPHALIA* (2004).

279 *See, e.g.*, Daniel Philpott, *Sovereignty*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2020), https://plato.stanford.edu/entries/sovereignty [https://perma.cc/W7ZA-F5U3] ("[With the Peace of Westphalia] states emerged as virtually the sole form of substantive constitutional sovereignty in Europe. . . .").

280 KARL OTMAR VON ARETIN, DAS ALTE REICH, 1648–1806, at 59-60 (1993); *see also* Osiander, *supra* note 93, at 270 ("The Peace of Westphalia did not establish the 'Westphalian system' based on the sovereign state[,] . . . [but i]nstead it confirmed and perfected . . . a system of mutual relations among autonomous political units that was precisely not based on the concept of sovereignty.").

estates continued to derive their authority and protection from the imperial constitution.[281] Rather than a sharp break with the feudal past, James Sheehan argued, the Peace of Westphalia "acknowledged without seeking to resolve the historical conflicts between universality and particularism, between the imperial ideal and the reality of state power."[282] Full sovereignty, in other words, continued to be elusive even after 1648. Instead, the imperial constitution as it emerged from the Westphalian settlement allocated full sovereignty neither to the imperial institutions nor to the imperial estates.

The "myth" gets part of the story right. The Peace of Westphalia really did give more rights than ever before to the imperial estates while weakening the imperial institutions in comparison. Article VIII Paragraph 1 of the Treaty of Osnabrück granted the imperial estates "the free exercise of their territorial rights, both spiritual and temporal."[283] This territorial sovereignty [*Landeshoheit*] included the rights to interpret laws, declare war, make peace, enter into alliances, raise taxes and levies, quarter soldiers, and reinforce old garrisons.[284] With the right to enter into alliances, the imperial estates became subjects under international law.[285] In this regard, the imperial estates were more sovereign than the Emperor, who needed the agreement of the Imperial Diet to do so.[286] Further bolstering the *Landeshoheit* of the imperial estates, the treaty prohibited imperial institutions from "interfering in the affairs of the territories, as long as they did not violate imperial laws . . . ."[287] Throwing into relief the new strength of the imperial estates, there was by contrast, as Grimm points out, no imperial government, administration, or standing army, and barely an imperial budget.[288]

But to stop there, as the myth does, disregards the ways in which the Empire *did* continue to exist and the territorial sovereignty of the imperial estates remained limited.[289] Even after 1648, the territories remained legally subordinate to the Empire and Emperor, which meant that territorial laws had to follow imperial laws.[290] This stipulation had teeth. The two supreme

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281 ARETIN, *supra* note 280, at 60.

282 SHEEHAN, *supra* note 268, at 16.

283 Peace Treaty of Osnabrück art. VIII § 1, Oct. 24, 1648, *translated in From the Reformation to the Thirty Years War (1500–1648): Peace Treaties of Westphalia (October 14/24, 1648)*, GERMAN HISTORY IN DOCUMENTS AND IMAGES, http://ghdi.ghi-dc.org/pdf/eng/87.%20PeaceWestphalia_en.pdf [https://perma.cc/7ZAZ-8GMJ].

284 *Id.* art. VIII § 2.

285 ARETIN, *supra* note 280, at 19.

286 *Id.* at 19, 75, 244; MICHAEL KOTULLA, DEUTSCHE VERFASSUNGSGESCHICHTE: VOM ALTEN REICH BIS WEIMAR (1495–1934), at 102-04 (2008).

287 ARETIN, *supra* note 280, at 11.

288 GRIMM, *supra* note 275, at 44.

289 SHEEHAN, *supra* note 268, at 16.

290 ARETIN, *supra* note 280, at 19.

courts of the Empire, the Aulic Council [*Reichshofrat*] and the Imperial Chamber Court [*Reichskammergericht*], supervised the territories.[291] In fact, part of what set the imperial estates apart from entities that were not in a direct feudal relationship with the Empire was their access to and protection by the imperial courts. Further, the imperial estates' right to enter into alliances was limited by the stipulation that those alliances were not to be directed against the Emperor, the Empire, public peace, or the Treaty of Osnabrück.[292] This limitation on territorial sovereignty went hand in hand with the continued relevance of imperial institutions. Even the post-Westphalian Empire, Dieter Grimm argues, "remained significant as a forum for the peaceful resolution of conflicts, the protection of the small imperial estates from the larger ones, and the protection of subjects from their territorial rulers."[293]

The limitation of *Landeshoheit* from above and below could go hand in hand. Subjects resisted territorial sovereignty from below by bringing complaints to the Aulic Council, which then interfered from above.[294] For example, when the duke of Mecklenburg-Schwerin tried to abolish the territorial estates under his rule, Emperor Leopold I intervened to reaffirm the constitutional guarantee of the territorial estates in 1659.[295] But the Emperor's actions did not put an end to the chicanery of the territorial estates. Following the War of the Spanish Succession (1701–1714), another duke attempted to make the territorial estates pay for his standing army.[296] In response, Emperor Karl VI prompted the occupation of Mecklenburg-Schwerin, the removal from office of the duke in 1728, and the installation of a new administration.[297] In another case, the prince of Nassau demanded staggering taxes from his subjects, which was similarly reined in by the forced

291 *Id.* at 60, 86. Their work often progressed very slowly. One case took almost two centuries. *See* SHEEHAN, *supra* note 268, at 19.

292 Treaty of Osnabrück, *supra* note 283, art. VIII § 2.

293 GRIMM, *supra* note 275, at 44. Sheehan cites Mack Walker's description of the empire as the "'incubator'" that kept the small states "alive in an increasingly hostile environment." SHEEHAN, *supra* note 268, at 20. *See* MACK WALKER, GERMAN HOME TOWNS: COMMUNITY, STATE, AND GENERAL ESTATE, 1648–1871, at 18 (1998) (describing how the empire's general lack of foreign interference allowed small polities to develop highly idiosyncratic political structures).

294 ARETIN, *supra* note 280, at 72. In general, the estates of the realm included the clergy, the nobles, and free peasants and townspeople (*Bürger*). *See* ESTATES, OXFORD ENCYCLOPEDIA OF THE REFORMATION (Hans J. Hillebrand ed., 2005 online ed. 1996), https://www.oxfordreference.com/view/10.1093/acref/9780195064933.001.0001/acref-9780195064933-e-0483?rskey=XgQnUc&result=481 [https://perma.cc/8CWW-HDCR]. For a detailed discussion of the history of the estates of the realm, see generally *id.*

295 ARETIN, *supra* note 280, at 95.

296 *Id.* at 95.

297 *Id.*

transfer of the principality's administration by the Aulic Council.[298] Territorial sovereignty was limited not only in theory but also in practice.

But territorial rulers could also transgress the constitutional structure set up by the Peace of Westphalia without major consequences. Particularly brazen examples for the centrifugal forces at work in the Empire were alliances with enemies of the Empire (especially France), which violated Article VIII Paragraph 2 of the Treaty of Osnabrück.[299] Imperial princes established defensive alliances against the Empire under the leadership of "The Sun King" Louis XIV, joined him in warfare against the Empire, and even concluded favorable secret treaties with him at war's end.[300] These treaties, Michael Kotulla insists, "were clearly acts of treason," and the weakness of the Empire was made evident by the fact that the offending rulers were not punished.[301]

And yet, as Aretin argues, the increasing strength over time of the centrifugal forces emanating from the powerful territories should not diminish the importance of the persisting imperial constitution as "unifying bond and as a guarantor of existing law."[302] Over the course of the eighteenth century, he continues, the Emperor became the protector of the small and comparatively less powerful imperial estates—weak princes, counts, imperial knights, and imperial cities—while the larger territorial rulers challenged the hierarchical structure of the Empire.[303]

In this context, "*Reichsunmittelbarkeit*—a position directly under the authority of the Reich—" helped smaller imperial estates assert themselves against more powerful neighbors.[304] Dependency, here, increased territorial sovereignty. James Sheehan provides the example of the Bishop of Olmütz, who maintained the "symbols of independent sovereignty"—minting coins, dispensing justice, and maintaining an armed guard—much to the dismay of the surrounding Habsburg realms.[305] While incomparable to the Habsburg

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298 *Id.*

299 Treaty of Osnabrück, *supra* note 283, art. VIII § 2.

300 *See* SHEEHAN, *supra* note 268, at 20-21 (describing how some principalities in the west, as well as Bavaria, entered alliances that had close ties to France); ARETIN, *supra* note 280, at 197.

301 KOTULLA, *supra* note 286, at 124-25. Aretin, arguing more carefully than Kotulla, writes that Frederick William's actions merely "came close to" treason. ARETIN, *supra* note 280, at 270. On the treasonous secret treaties of the Prince of Brandenburg and the Elector of Saxony following the Dutch Wars, see KOTULLA, *supra* note 286, at 124-25.

302 ARETIN, *supra* note 280, at 34.

303 *Id.* at 34, 99, 105, 360. Aretin cites the German legal historian Karl Siegfried Bader, who noted that from 1780 onwards, the Aulic Council interfered in the administration of the imperial cities almost every year. *Id.* at 109.

304 SHEEHAN, *supra* note 268, at 26.

305 *Id.* at 26-27. The Habsburg Monarchy was a sprawling collection of states united under the Habsburg dynasty from the thirteenth century until its dissolution following the First World War in 1918. From 1438 until 1806, the Emperor of the Holy Roman Empire always came from the

territories in size and power, *Reichsunmittelbarkeit* afforded the Bishop formal legal equality within the Empire. An even more extreme example of the divergence between formal legal equality and size of territory was the Stein family, which owned only about 1,600 acres, subdivided into twenty-four parcels.[306] But due to their *Reichsunmittelbarkeit*, they ruled over their lands more or less undisturbed, acting as "judge and policeman, tax collector and ecclesiastical authority."[307] As Sheehan makes clear, this type of rule could only function in the context of the Empire. The Stein family's territories were not fully sovereign states but were rather deeply embedded in the institutions of the Empire.[308]

Thus, both in terms of its constitutional structure and its political practice, the Holy Roman Empire after the Peace of Westphalia confounds expectations grounded in the "Westphalian Myth." Full sovereignty resided neither with the Empire nor with the imperial estates. Instead, as this Section has shown, the concept of territorial sovereignty [*Landeshoheit*] was central. *Landeshoheit* was a "bundle of historically acquired rights" rather than an integrated system of full sovereignty.[309] And yet, *Landeshoheit* did constitute a kind of dependent sovereignty: one embedded in the constitutional structures of the Empire and able to exert territorial rule precisely because of this membership.

2. *Reichspublizistik*: Republic of Princes or Imperial Monarchy?

The constitution of the Holy Roman Empire after 1648 also confounded conceptions of sovereignty at the time.[310] The friction between dominant concepts of sovereignty and the Empire's constitutional reality prompted a sustained scholarly debate about the possibilities of shared and dependent sovereignties. This debate found expression in treatises collectively referred to as *Reichspublizistik*, or "the science of imperial constitutional law."[311] The debate gave rise to theories of sovereignty that would eventually find expression in the commentary on the law of nations, particularly the work of

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Habsburg dynasty, even as the lands of the Habsburgs also went beyond the boundaries of the Empire. *See generally* WHALEY, THE HOLY ROMAN EMPIRE, *supra* note 268.

306 SHEEHAN, *supra* note 268, at 27.

307 *Id.*

308 SHEEHAN, *supra* note 268, at 26 ("In the course of the eighteenth century, families like the Steins were frequently under siege . . . their legal status questioned by those who denied them true sovereignty.").

309 HELMUT QUARITSCH, STAAT UND SOUVERÄNITÄT 403-04 (1970) ("Bündel historisch erworbener Einzelrechte . . . .").

310 *See* SHEEHAN, *supra* note 268, at 15 ("The more people expected political authority to be united, compact, and uniform, the more difficulty they had understanding and accepting the Reich." (internal quotations omitted)).

311 MICHAEL STOLLEIS, PUBLIC LAW IN GERMANY, 1800–1914, at 2 (2001).

Vattel, and would, in turn, appear in the reports of the United States Supreme Court in the Marshall Trilogy.

The theorists involved in the *Reichspublizistik* debate responded to the problem posed by Jean Bodin's influential conception of sovereignty when confronted with the realities of rule in the Empire. To be a state, according to Bodin, was to command absolute, indivisible, and non-transferable sovereignty,[312] a definition that would become "the bottleneck of statehood" across Europe.[313] As Bodin looked to the sixteenth-century Holy Roman Empire, he located sovereignty exclusively with the imperial estates at the Imperial Diet.[314] Just before the signing of the Treaty of Osnabrück, Bogislaw Philipp von Chemnitz (writing under the pen name "Hippolithus a Lapide") registered his agreement with Bodin: the imperial estates assembled in the Imperial Diet were indeed the bearers of sovereignty in the Holy Roman Empire, and the Emperor was at most "primus inter pares."[315] In this interpretation, the pre-1648 Empire was a pure aristocracy.[316]

After the Peace of Westphalia, Samuel von Pufendorf's publication of *De statu imperii Germanici* (1667) embraced Bodin's concept of unlimited sovereignty as the "bottleneck of statehood."[317] Based on this definition, the treatise argued that it was impossible to fit the Empire into established constitutional categories such as monarchy or aristocracy.[318] The Empire was, Pufendorf remarked famously, "irregulare aliquod corpus et monstro simile"—

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312 On Bodin's concept of sovereignty, see STEVEN SCHÄLLER, FÖDERALISMUS UND SOUVERÄNITÄT IM BUNDESSTAAT: IDEENGESCHICHTLICHE GRUNDLAGEN UND DIE RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS 67 (2016).

The seventeenth-century *Reichspublizistik*, Aretin proposes, can be divided into three main streams: first, on one end of the spectrum, there were those who conceptualized the Empire as a universal monarchy with the Emperor at its helm; second, there were others who saw the Empire as a corporative structure; and third, at the other end of the spectrum, there were those who conceptualized the Empire as a federal structure. ARETIN, *supra* note 280, at 38-39.

313 THOMAS MAISSEN, DIE GEBURT DER REPUBLIC: STAATSVERSTÄNDNIS UND REPRÄSENTATION IN DER FRÜHNEUZEITLICHEN EIDGENOSSENSCHAFT 107 (2006) ("Nadelöhr der Staatlichkeit . . . ."); *see also* HANS BOLDT, DEUTSCHE VERFASSUNGSGESCHICHTE BAND 1: VON DEN ANFÄNGEN BIS ZUM ENDE DES ÄLTEREN DEUTSCHEN REICHES 1806, at 272 (1984) (describing a scholarly perspective which sees the Empire as falling short of the Bodinian ideal of the all-powerful sovereign state).

314 ARETIN, *supra* note 280, at 37.

315 HIPPOLITHUS A LAPIDE, DISSERTATIO DE RATIONE STATUS IN IMPERIO NOSTRO ROMANO-GERMANICO (Freistadii, 1647), *discussed in* ARETIN, *supra* note 280, at 37.

316 BOLDT, *supra* note 313, at 272. Aretin identifies Bogislaw Philipp von Chemnitz's *Dissertatio* as "the low point of journalistic contributions to the question of the unity of the Empire." ARETIN, *supra* note 280, at 37. Hans Fehr similarly characterizes von Chemnitz's argument as a "severe overstatement" of the power of the imperial estates. HANS FEHR, DEUTSCHE RECHTSGESCHICHTE 237-38 (1921).

317 1 MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND: REICHSPUBLIZISTIK UND POLICEYWISSENSCHAFT 1600–1800, at 182-83 (1988). Pufendorf published *De statu imperii Germanicii* under the pen name Severinus de Monzambano. BOLDT, *supra* note 313, at 272.

318 STOLLEIS, *supra* note 317, at 234.

a monster-like body politic.[319] This monster was "a system of sovereign state entities that regardless formed a comprehensive body . . . [that] 'fluctuated' between monarchy and confederation."[320] This fluidity contributed to the Empire's weakness, Pufendorf argued.[321]

But other constitutional scholars challenged Bodin's conception of sovereignty and suggested more capacious definitions. Writing five years after the publication of *De statu imperii Germanici*, Ludolf Hugo (1632–1704) argued that the Empire housed different kinds of sovereignties.[322] There were, he suggested, the unlimited *ius majestatis* of the Empire and the limited *ius territoriale* of the imperial estates.[323] *Ius majestatis* encompassed external affairs, maintaining peace, and imperial legislation; *ius territoriale*, meanwhile, extended to internal decrees, judgments and laws, as well as the implementation of imperial decrees.[324] Accordingly, historians have interpreted Hugo's work as imagining the Holy Roman Empire as an empire of "states within a state," or even one composed of "graded"[325] and "divided"[326] sovereignty.[327] Both governments—imperial and territorial—were sovereign, but their sovereignty was of different qualities. In this model, as German jurist Helmut Quaritsch observes, the territories were conceptualized at minimum, if not as full states, then still as "analogous to states."[328]

Going beyond Hugo's twofold sovereignty, Gottfried Wilhelm Leibniz suggested a tripartite model of relative sovereignty (as compared to Bodin's concept of absolute sovereignty).[329] At the top, the Emperor possessed

319 BOLDT, *supra* note 313, at 272. According to Aretin, Pufendorf attenuated his terminology in later editions of *De statu imperii Germanicii* and fully deleted it in the edition of 1706. ARETIN, *supra* note 280, at 346.

320 STOLLEIS, *supra* note 317, at 234.

321 *Id.* at 234.

322 LUDOLF HUGO, DE STATU REGIONUM GERMANIAE, ET REGIMINE PRINCIPUM SUMMAE IMPERII REIPUBLICAEAEMULO NEC NON DE USU AUTORITATE JURIS CIVILIS PRIVATE, QUAM IN HAC PARTE IURIS PUBLICI OBTINEt (Helmstadium 1672), *discussed in* Schäller, *supra* note 312, at 86-88.

323 SCHÄLLER, *supra* note 312, at 86.

324 *Id.* at 87-88.

325 *See id.* at 86 (discussing "abgestuften Hoheitsgewalt [graduated sovereignty]").

326 *See* QUARITSCH, *supra* note 309, at 409 (discussing "geteilten Souveränität [shared sovereignty]").

327 *See* SCHÄLLER, *supra* note 312, at 86 (characterizing Hugo as depicting the Empire as a "state within a state" ("Staaten im Staat") based on an idea of "graded sovereignty" ("abgestufte Hoheitsgewalt")); QUARITSCH, *supra* note 309, at 409 (pointing to Hugo as the origin of "divided sovereignty" ("geteilten Souveränität")).

328 QUARTISCH, *supra* note 309, at 409.

329 GOTTFRIED WILHELM LEIBNIZ, ENTRETIEN DE PHILARÈTE ET D'EUGÈNE SUR LA QUESTION DU TEMPS AGITÉE À NIMWEGUE TOUCHANT LE DROIT D'AMBASSADE DES ELECTEURS ET PRINCES DE L'EMPIRE (1677), *discussed in* ARETIN, *supra* note 280, at 354; GOTTFRIED WILHELM LEIBNIZ, CAESARINUS FÜRSTENERIUS (1677), *discussed in* ARETIN, *supra* note 280, at 354. Leibniz's theory, it should be noted, was motivated by the goal of justifying the right of imperial estates to send ambassadors to international peace conferences. ARETIN, *supra* note

absolute *majestät*, followed by the powerful princes, who maintained internal and external *suprematus* (including the rights to enter into alliances and send ambassadors to peace negotiations).[330] At the bottom, Leibniz established for the first time a third category, one that had not been included in the settlement of 1648 or Hugo's thought: weak imperial estates, which did not have external *suprematus* nor absolute *majestät* but merely internal *superioritas* (or Landeshoheit), and therefore could not enter into treaties with foreign powers.[331]

The debates of the imperial publicists oscillated between arguments about the Holy Roman Empire as a Republic of Princes and as an Imperial Monarchy. They found a resolution in a treatise penned by Johann Jacob Moser in 1769.[332] Coming down on neither side of the debate, Moser conceded that "Germany [was simply] governed the German way."[333] The Emperor was not absolutely sovereign, but neither were the territorial rulers. This was the "capitulation of political theory faced with an excessively complicated reality," as Stolleis noted, but it was also a fruitful conceptual innovation.[334] Looking for concepts to describe the German way of government, Moser coined the term of "semi-sovereignty" ("*Halbsouveränität*") for states that were subjects of international law even though they were not fully sovereign.[335]

To sum up, the provocation of Bodin's concept of sovereignty gave rise to a voluminous body of scholarship that tried to locate the seat of sovereignty in the Holy Roman Empire and to classify its constitutional structure. Torn between conceptual purity and complicated constitutional reality, some contributors to this debate redefined sovereignty itself to include new ideas of shared, dependent, graded, and semi-sovereignty.

This debate over the meaning of sovereignty in the Empire was important for the development of broader understandings of sovereignty in European international law. For instance, Vattel drew heavily on the Holy Roman

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280, at 354. The concept of *suprematus*, Quaritsch notes, was part of Leibniz's attempt to portray the large territorial rulers as sovereign, which was in line with his brief to advocate for the Duke's international legal standing. QUARITSCH, *supra* note 309, at 402. On Leibniz's theory of relative sovereignty, see generally Janneke Nijman, *Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defense of the Holy Roman Empire* (Inst. for Int'l L. & Just. Working Paper 2004/2). Nijman describes Leibniz' work as articulating a three-tiered theory of "relative sovereignty." *Id.* Nijman also notes that Leibniz was the first to use the phrase "international legal person" in 1693. *Id.* at 4.

330 ARETIN, *supra* note 280, at 354; STOLLEIS, *supra* note 317, at 237.

331 ARETIN, *supra* note 280, at 354.

332 JOHANN JACOB MOSER, VON DER TEUTSCHEN REICHS-STÄNDE LANDE, DEREN LANDSTÄNDEN, UNTERTHANEN, LANDES-FREYHEITEN, BESCHWERDEN, SCHULDEN UND ZUSAMMENKÜNFTEN (Frankfurt & Leipzig, Olms 1769), *discussed in* ARETIN, *supra* note 280, at 40-43.

333 STOLLEIS, *supra* note 317, at 236 (quoting J.J. Moser).

334 *Id.*

335 Moser first used the term in his 1777 I *Versuch des neuesten Europäischen Völker-Rechts in Friedens-und Kriegs-Zeiten*. QUARITSCH, *supra* note 309, at 417.

Empire in developing his concept of sovereignty.[336] Vattel cited the example of Neuchâtel, a principality that was located within Switzerland, but which was ruled by the King of Prussia (himself a vassal of the Holy Roman Emperor), as an example of the complexity of sovereign relationships.[337] Vattel used these examples to develop his theory that dependent sovereignty could exist and still have meaningful sovereign power.[338] Vattel, looking to the Holy Roman Empire as an example, "stop[ped] short of the modern idea" that independence and supremacy are necessary attributes of states; rather, he recognized that "fact[] [was] to the contrary," insofar as "states which recognized the supremacy of the Holy Roman Empire did not cease to be states, although on many points their sovereign jurisdiction was restricted in one way or another."[339] As the Empire showed, dependency did not preclude sovereignty.

3. Sovereignty in Flux: The Dissolution of the Holy Roman Empire and the Establishment of the Confederation of the Rhine, 1803–1813

From 1803 until 1815, a series of conflicts collectively known as the Napoleonic Wars pitted the powers of Europe against France in shifting military coalitions.[340] These wars ended with Napoleon's defeat at Waterloo in June 1815 and the remaking of Europe's political map at the Congress of Vienna.[341] During this period, small secular and ecclesiastic territories were incorporated into larger territories within the Empire through the twin processes of mediatization and secularization.[342] This process reduced the

336 *See, e.g.*, VATTEL, *supra* note 38, bk. II, at 284-87 (discussing the hierarchy of sovereignty within the Empire); *id.* bk. I, § 196, at 208-09 (using the example of Austria's relationship with Lucerne when both were part of the Empire to discuss the nature of protected sovereignty); *id.* bk. I, § 135, at 162 (noting the example of Holland and the Empire, when Holland was still part of the Empire).

337 *Id.* bk. I, § 9, at 84.

338 *See id.* bk. I, § 6, at 83 (concluding that even states in protectorate or tributary arrangements with more powerful states do "not, on this account, cease to rank among the sovereigns"); *id.* bk. I, § 8, at 84 (stating that a feudatory or feudal relationships wherein one state is subordinate to another "does not prevent the state or the feudatory prince being strictly sovereign"); *id.* bk. I, § 192, at 207 (stating that protected states may still retain sovereignty).

339 Charles G. Fenwick, *The Authority of Vattel*, 8 AM. POL. SCI. REV. 375, 378 (1914).

340 On the Napoleonic Wars, see generally MIKE RAPPORT, THE NAPOLEONIC WARS: A VERY SHORT INTRODUCTION (2013), and ALEXANDER MIKABERIDZE, THE NAPOLEONIC WARS: A GLOBAL HISTORY (2020).

341 MIKABERIDZE, *supra* note 340, at 591-614.

342 In this context, mediatization describes the process of demoting a territorial ruler from his immediate status under the Holy Roman Emperor to a mediate status through annexation of his territory by a larger one. By losing the immediate status, territorial rulers also lost their seats and votes at the Imperial Diet and could be sued at the courts of the annexing territory (and not, as before, only at the Aulic Council and the Imperial Chamber Court). Secularization was the abolition of the temporal powers of ecclesiastical rulers, and the incorporation of ecclesiastical territories into larger, secular territories. Both processes resulted in a dramatic consolidation of territories in the

Empire's erstwhile 1,800 territories to a mere 30 by 1806.[343] This dramatic transfer of sovereignty and territory happened under the pressure of French military victories but was still implemented by law, even if that law went against core stipulations of the Westphalian settlement.[344]

This subsection will summarize the dissolution of the Holy Roman Empire in three stages, beginning with the Imperial Recess (*Reichsdeputationshauptschluss*) (1803), continuing with the Peace of Pressburg (Bratislava) (1805), and concluding with the Treaty of the Confederation of the Rhine (1806).[345]

The details, while complex, point towards two conclusions relevant to this Article's thesis. First, through mediatization and secularization, the Holy Roman Empire reallocated and consolidated some of its dependent sovereignties, raising the question of whether and to what extent a more powerful sovereign may extinguish the sovereignty of its dependencies. Second, the dissolution of the Empire also underscored the persistence of sovereignty, as some dependencies, such as Liechtenstein, emerged as full sovereigns on the international plane.

a. *Stage 1: The Imperial Recess*

Following the defeat of the Holy Roman Empire in battle, the Imperial Diet passed the Imperial Recess of 1803, which instituted a formal process to draw up a new pan-German constitution.[346] It stipulated that all imperial territories to the left (west) bank of the Rhine be ceded to France, and set up a compensation scheme for those territorial rulers who lost land there by providing new lands for them on the right bank of the Rhine.[347] While the impetus for the territorial reorganization came from power politics and warfare, it was implemented through the formal institutional mechanisms of the Empire: first by resolution of the Imperial Diet, and then by ratification of Emperor Francis II.[348] The Imperial Recess brought with it radical territorial change: almost 4,000 square miles of formerly clerical territories changed their ruler, along with 3.2 million inhabitants (one seventh of the

Holy Roman Empire. *See, e.g.*, WEHLER, *supra* note 269, at 363 (describing the role of secularization and mediatization in the shrinking of the Holy Roman Empire).

343 *Id.* at 47, 363.

344 *See id.* at 364 (explaining that while the interventions constituted a "legal revolution," the new law disregarded fundamental guarantees of the Peace of Westphalia).

345 In doing so, this section follows Michael Stolleis' periodization. *See* STOLLEIS, *supra* note 317, at 1 ("The years 1803 to 1806 . . . present important markers for the constitution of the Holy Roman Empire. . . .").

346 *See* WEHLER, *supra* note 269, at 363-64 (describing the process by which the conditions imposed by France in the Treaty of Lunéville were formally adopted as law by the Empire).

347 *Id.*

348 *Id.*

population of the Empire).[349] Only six imperial cities survived the Recess.[350] At the same time, the South German states of Bavaria, Württemberg, Baden, Hesse, and Nassau enjoyed large territorial gains.[351] Bavaria and Nassau doubled in size, Württemberg more than doubled, Hesse-Darmstadt tripled, and Baden almost quadrupled in size.[352] These states proceeded to implement internal reforms to manage this territorial expansion, including the monopolization of legislation, taxation, and personnel staffing of local governments.[353] While using the institutions of the Empire, the Recess disregarded the guarantee to existence for all members of the Empire and violated guarantees stipulated in the Peace of Westphalia regarding the worldly possessions of religious orders.[354]

b. *Stage 2: The Peace of Pressburg*

The second stage of land consolidation began with the Peace of Pressburg (Bratislava) of 1805, which was signed between Napoleon and Emperor Francis II following French victories at the battles of Ulm and Austerlitz.[355] As in the case of the consolidations brought about by the Imperial Recess, the consolidation and growth of the larger states under the Peace of Pressburg brought with it the end of the territorial sovereignty of many smaller entities. The imperial cities of Augsburg and Nuremberg were incorporated, and imperial knightage in Bavaria was abolished.[356] Across the territories of the Empire, roughly 350 knightly families ruling over 1,500 "pseudo-sovereign dwarf territories" ("quasi-souveränen Zwergländern") and 350,000 subjects submitted to the new territorial sovereignty of the winners of mediatization.[357] These included the South German states (Bavaria, Baden, and Wurttemberg), as well as Prussia, which received a fivefold increase in land area and nearly as much in additional population.[358] With the Treaty of Schönbrunn, signed just before the Peace of Pressburg, France granted Prussia the right to annex the Electorate of Hanover, which Prussia immediately did in contravention to the constitution of the Empire.[359]

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349 WEHLER, *supra* note 269, at 364.

350 These cities were Hamburg, Bremen, Lübeck, Frankfurt, Augsburg, and Nurnberg. *Id.*

351 Hans A. Schmitt, *Germany Without Prussia: A Closer Look at the Confederation of the Rhine*, 6 GER. STUDS. REV. 9, 20 (1983).

352 *Id.*

353 *See id.* at 20-21 (describing the administrative authority of each state's ministry, advised by a council of state).

354 WEHLER, *supra* note 269, at 364.

355 MIKABERIDZE, *supra* note 240, at 213.

356 WEHLER, *supra* note 269, at 365.

357 *Id.*

358 *Id.* at 366.

359 *Id.*

c. *Stage 3: The Treaty of the Confederation of the Rhine.*

Through the Treaty of the Confederation of the Rhine (hereinafter "*Rheinbundakte*"), signed on July 12, 1806, sixteen territorial rulers of the Empire were bound together under the protection and dominance of Napoleon I.[360] While the Confederation was established at Napoleon's behest, formally the *Rheinbundakte* was a treaty under international law between the territorial rulers and the French Emperor.[361] To join or not to join was a decision made by the territorial rulers themselves.[362]

At the top of the Confederation's structure was the French Emperor, who, while not himself a member of the Confederation, held the title of the Protector of the Confederation of the Rhine.[363] The highest office within the Confederation was held by the Prince-Primate (designated by Napoleon I), but, as the *Rheinbundakte* noted, this title did not infringe on the sovereignty enjoyed by any of the confederated states.[364] The sovereign rights of the component rulers included "legislation, supreme jurisdiction, supreme police power, military recruitment or conscription, and taxation."[365] But in reality, their sovereignty was also limited in important ways, often even more so than it had been within the Holy Roman Empire.[366] The rulers had to remain independent of all powers foreign to the Confederation, and if a ruler wanted to transfer his sovereignty "fully or only in part,"[367] he could only do so for the benefit of one of the confederated states, resulting in a prohibition of "the alienation of territory."[368]

360 KOTULLA, *supra* note 286, at 289.

361 *See id.* at 289 (explaining that the *Rheinbundakte* served a dual purpose as both the legal basis for the new Confederation and the constitution of the Confederation).

362 *See* 2 WHALEY, GERMANY AND THE HOLY ROMAN EMPIRE, *supra* note 268, at 617-18 (describing rulers' indecisiveness surrounding the decision of to join the Confederation). There was a brief moment in the Spring of 1806 during which the three largest south German territories—Baden, Württemberg, and Bavaria—sought a course independent from either the Holy Roman Empire or France, but these attempts proved to be outmatched by French military might. *Id.* at 637. This independent course involved the gradual removal of Baden, Württemberg, and Bavaria from the Imperial Chamber Court, and meetings between ministers from these states to resolve territorial issues between them without recourse to the Empire or France. *Id.*

363 KOTULLA, *supra* note 286, at 289.

364 Treaty of the Confederation of the Rhine art. 4, July 12, 1806 (France), *at Confédération des États du Rhin*, DIGITHÈQUE DE MATÉRIAUX JURIDIQUES ET POLITIQUES, https://mjp.univ-perp.fr/constit/de1806.htm [https://perma.cc/3U24-3B2Y] [hereinafter Rheinbundakte] ("The title 'Prince Primate' is not associated with any advantages against the full sovereignty of each confederated power.")

365 *Id.* art. 26; *see also* KOTULLA, *supra* note 286, at 290-291 (noting the rights allocated to Confederation members).

366 *See* KOTULLA, *supra* note 286, at 291 (noting that members of the Confederation lost the right to engage in foreign policy decisions, including those relating to war, peace, and alliances).

367 Rheinbundakte, *supra* note 364, art. 7, 8.

368 Schmitt, *supra* note 351, at 13 (internal quotation marks omitted).

On August 1, 1806, the sixteen territorial rulers of the Confederation of the Rhine left the Holy Roman Empire, even though the constituent states of the Empire did not have the right to secede.[369] Following an ultimatum issued by Napoleon I, Emperor Francis II resigned on July 27.[370] As he laid down his crown, Francis II also declared an end to the Empire, decreeing that "we regard the bond which until now tied us to the state of the Reich as dissolved."[371] On August 6, 1806, the Empire ceased to exist.[372]

The Confederation of the Rhine gained new members after the dissolution of the Empire; in total, twenty-three additional rulers joined the Confederation between late 1806 and 1808 through accession treaties.[373] The territorial rulers' ratification of these treaties reflected their standing as international legal subjects.[374]

One example of the persistent sovereignty that component members of the Empire held after the Empire's dissolution is Liechtenstein, a small principality on the Rhine between Austria and Switzerland. Like other small and middling German states, Liechtenstein emerged as a sovereign in 1806 and was a founding member of the Confederation of the Rhine.[375] Liechtenstein had been a principality within the Holy Roman Empire since 1719 under the Liechtenstein family.[376] With the dissolution of the Empire, Liechtenstein, like other German states, made the choice to join the Confederation of the Rhine. Liechtenstein's rulers implemented modernization reforms that centralized governance, as the territorial estates could no longer bring claims in the imperial courts against them.[377] Liechtenstein's sovereignty was upheld at the Congress in Vienna in 1815, and the small state remains "the only part of the Napoleonic territorial system,

369 *See* WEHLER, *supra* note 269, at 367-68 (noting the members of the Confederation illegally seceded from the Empire). *See also* 2 WHALEY, GERMANY AND THE HOLY ROMAN EMPIRE, *supra* note 268, at 643.

370 2 WHALEY, GERMANY AND THE HOLY ROMAN EMPIRE, *supra* note 268, at 643-44.

371 *Id.* at 644.

372 *Id.*

373 KOTULLA, *supra* note 286, at 290 (noting that Article 39 of the treaty anticipated these additions).

374 Of course, the fact that they entered into these treaties with Napoleonic France—and not the Confederation of the Rhine itself—showed the dominance of the French Emperor. *Id.*

375 PIERRE RATON, LIECHTENSTEIN: HISTORY AND INSTITUTIONS OF THE PRINCIPALITY 25 (1970).

376 DIETER J. NIEDERMANN, LIECHTENSTEIN UND DIE SCHWEIZ: EINE VÖLKERRECHTLICHE UNTERSUCHUNG 47-48 (1976).

377 MARZELL BECK, LIECHTENSTEIN IN EUROPA 59 (1984).

which has survived unchanged . . . ."[378] Today, Liechtenstein is a member of the United Nations and a recognized nation-state.[379]

In conclusion, the Holy Roman Empire responded to the pressures and defeats of the Napoleonic Wars through a series of formal reorganizations only to succumb in the end. Mediatization and secularization led to a reallocation and consolidation of imperial lands at the expense of small and ecclesiastical imperial estates. Middling German states like Baden, Bavaria, and Wurttemberg were the winners of this land consolidation and gained territory, status, and rights. For many of these states, the end of the Holy Roman Empire in 1806 did not render them completely independent sovereigns, as most were immediately absorbed into the Confederation of the Rhine and ultimately into the German Empire and subsequent federal states. Liechtenstein, however, provides an exception—when member states of the Holy Roman Empire were able to choose their own way, they ascended to full sovereignty as a member of the international community.

4. The Influence of the Holy Roman Empire on the Framing of the Constitution and the Early Republic

The Holy Roman Empire presented an important case study for the framers of the U.S. Constitution as they wrestled with questions of state versus national sovereignty, and for the debates over the ratification of the Constitution. During the debates in the Convention in the summer of 1787, the Empire's structure was repeatedly cited as evidence of the problems with a weak central government,[380] as an example of an elected monarchy that was relevant to debates about the federal executive power,[381] and as an example of the advantages and disadvantages of equal representation for the members of

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378 RATON, *supra* note 375, at 16, 25.

379 *Member States*, UNITED NATIONS, https://www.un.org/en/about-us/member-states#gotoL [https://perma.cc/2NDT-4Z4C].

380 *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 282, 285-86 (Max Farrand ed., 1911) (describing Alexander Hamilton's argument on June 18th that the weaknesses of German Confederation could be avoided by placing sovereignty in a central government); *id.* at 294 (statement of Alexander Hamilton) (discussing authority of "the diet of Germany," a deliberative forum that had limited legislative authority); *id.* at 294, 296 (statement of Alexander Hamilton) (examining "the federal institution of Germany" and asking whether its "councils are weak and distracted"); *id.* at 314, 319-320 (statement of James Madison) (noting risk of foreign interference by allying with individual members of a federal union, citing the example of Germany); *id.* at 343 (statement of James Wilson) (arguing that Empire, among "other Confederacies," showed weaknesses of confederated governments); *id.* at 529-30, 551 (statement of Gouverneur Morris) (noting Germany as the example of the risk of foreign intervention in a weak federal state).

381 *See id.* at 282, 290-91 (statement of Alexander Hamilton) (discussing the example of Germany); *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 109-10 (Max Farrand ed., 1911) (statement of James Madison) (highlighting Germany as an example of the risk of a legislatively elected executive).

a federal system.[382] Madison and Hamilton frequently invoked the Empire as an example in the Federalist Papers.[383] Supporters and opponents of the Constitution during the ratification process often also cited the Empire.[384] Opponents argued that the Empire demonstrated how a relatively weak federal state might function well.[385] In his correspondence with Thomas Jefferson, James Madison wrote that the new Constitution "presents the aspect rather of a feudal system of republics," referring to the Empire among other European federal systems such as Switzerland and Holland.[386] Perhaps most significantly, Madison heavily drew on the examples of contemporary

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382 *Compare* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 380, at 446, 449 (statement of James Madison) (noting that in Germany and Holland, despite equality of representation, small states were oppressed due to external threats and domination by larger states), *with id.* at 453, 454 (statement of Luther Martin) (arguing for that the equality of representation could not be workable, as it was in Germany, where the smaller states did not complain on sharing representation with larger states).

383 *See, e.g.*, THE FEDERALIST NO. 22, at 144-45 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (criticizing the Holy Roman Empire's component-state regulations on commerce, which caused conflict between states); THE FEDERALIST NO. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961) (using the Empire as a positive example of how federal systems can advance free trade); THE FEDERALIST NO. 43 at 275 (James Madison) (Clinton Rossiter ed., 1961) (quoting Montesquieu for the proposition that the Empire was less successful as a federation than Holland or Switzerland because it had different kinds of polities within it, such as kingdoms, aristocratic states, and cities).

384 The Empire was frequently invoked during the Virginia ratification convention by supporters of the Constitution. *See* The Virginia Convention, Saturday, 7 June 1788 Debates, *in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 1035, 1040 (John. P. Kaminski & Gaspare J. Saladino eds., 1990) (statement of Patrick Henry) (describing Germany as "[c]ontinually convulsed with intestine divisions, and harassed by foreign wars"); Speech by James Monroe (June 10, 1788), The Virginia Convention, Tuesday, 10 June 1788 Debates, *in id.* at 1103, 1106 (statement of James Monroe) (describing Germany as "a league of independent principalities" with "no analogy to our system"); The Virginia Convention, Saturday, 7 June 1788 Debates, *in id.* at 1007, 1009 (statement of Francis Corbin) (describing the coercive power inherent in the confederate government of Germany). It was also drawn upon in the New York ratification convention and in the South Carolina ratification convention. *See* The New York Convention, Journal, Thursday, 19 June 1788, *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1682, 1686-87 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler & Charles H. Schoenleber eds., 2008) (citing the Germanic league as proof "that no government formed on the basis of the total independency of its parts, could produce the effects of union"); Speech of Charles Pickney (May 14, 1788), *in* 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES SOUTH CAROLINA 330-31 (John P. Kaminski, Michael E. Stevens, Charles H. Schoenleber, Gaspare J. Saladino, Jonathan M. Reid, Margaret R. Flamingo, David P. Fields & Timothy D. Moore eds., 2016) (discussing Switzerland, Germany, and Holland).

385 *See* Letter from The Federal Farmer to the Republican (Jan. 23, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 330, 333 (Herbert J. Storing ed., 1981) (discussing the examples of Germany and Holland); Letter from A Farmer (Mar. 28, 1788), *in* 5 THE COMPLETE ANTI-FEDERALIST 44, 44 (Herbert J. Storing ed., 1981) (citing the example of Germany).

386 Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 442, 445 (John P. Kaminski, Gaspare J. Saladino & Richard Leffler eds., 1981).

and historical federal governments, including the Holy Roman Empire, when he drew up the basic structure of the Virginia Plan, which in turn was central to the debates and outcomes of the Constitutional Convention.[387]

Likewise, European thinkers who drew heavily on the Empire in developing concepts of sovereignty, such as Vattel, were also influential in the constitutional debates over the nature of sovereignty in federal and confederal states, particularly as to the question of equal representation of members within a federal state.[388] As LaCroix has noted, European thinking about sovereignty, particularly Vattel, was deeply influential in shaping American understandings of sovereignty in the years leading up to the Constitutional Convention.[389] LaCroix explains that the "availability of this alternative body of political philosophy helped shape the colonists' intellectual framework. . . ."[390]

International law commentators were read and cited during the early years of the Republic. Indeed, American lawyers in the eighteenth and early nineteenth centuries studied not only Vattel, but also Grotius, Pufendorf, and Burlamaqui, among others.[391] These writers "were an essential and significant part of the minimal equipment of any lawyer of erudition in the eighteenth century."[392] And they frequently cited these commentators, especially Vattel,

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387 *See* James Madison, Notes on Ancient and Modern Confederacies (1789) (unpublished manuscript and notes), https://www.loc.gov/resource/mjm.02_1036_1063 [https://perma.cc/S7CJ-VHRJ] (describing the structures and flaws of various European confederacies); *see also* JOSEPH J. ELLIS, THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783–1789, at 126-139 (2015) (providing an overview of Madison's work and noting importance of Virginia Plan); ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 147 (2010) (noting importance of Madison's work in development of Virginia Plan).

388 *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 380, at 436, 438 (statement of Luther Martin) (reading passages from Locke & Vattel about the need for equality of representation of states to protect sovereignty). Governor Clinton of New York, a key opponent of the Constitution, cited Vattel in his speech at the New York ratification convention. *See* George Clinton, Remarks Against Ratifying the Constitution at the New York State Convention (July 11, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 384, at 2142, 2143 (citing with praise Vattel's concepts of sovereignty and independence); *see also* House of Representatives Debates (January 18, 1788), *in* 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 384, at 153 (mentioning Vattel during South Carolina ratification debates).

389 LACROIX, *supra* note 387, at 11, 18-20, 79-80, 106, 124-26.

390 *Id.* at 80.

391 *See* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 35 (1952) ("It was axiomatic among them that the Law of Nations, applicable to individuals and to states, was an integral part of the law which they administered or practiced.").

392 *Id.*

in their briefs and oral arguments,[393] as the arguments concerning Indian tribal sovereignty in the Marshall Trilogy underscore.[394]

The most direct evidence of the Holy Roman Empire's importance to debates about tribal sovereignty comes from the negotiations between British and U.S. diplomats that led to the Treaty of Ghent, which ended the War of 1812. One ground of disagreement between the two sides concerned Indian tribes, as the British government sought concessions from the U.S. to protect the interests of tribes that had allied with the Crown.[395] The Americans countered that the British had no right to negotiate for Indian tribes within the United States.[396] Pointing to the example of the Holy Roman Empire, as well as U.S. treaty practice, which had "treat[ed] with [Indian] tribes as independent nations," the British argued there was precedent for their seeking to negotiate for their tribal allies.[397] The American negotiators, led by John Quincy Adams, rejected the analogy to the Holy Roman Empire, instead offering a racialized distinction between "the political situation of these civilized communities and that of the wandering tribes of North American savages."[398]

This exchange underscores the relevance of the Holy Roman Empire to contemporary debates about tribal sovereignty, which were not settled by the negotiations at Ghent. Still, the Americans' argument, to which the British responded by dropping their attempt to negotiate on behalf of their tribal allies,[399] might be taken as evidence that the Holy Roman Empire is irrelevant to the meaning of the terms "nations" and "states" as used in the Marshall Trilogy and U.S. treaty practice. After all, the American ministers' grounds for rejecting the analogy to the Holy Roman Empire invoked the strand of international law commentary that, as Vattel put it, characterized Indians as

393 *See* Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1, 67 (1999) ("[I]n all, in [judicial decisions of] the 1780s and 1790s, there were nine citations to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and a staggering ninety-two to Vattel.").

394 *See supra* Parts I & II.

395 *See* Letter from Henry Gouldburn & William Adams, the Ministers, to the American Ministers (Oct. 8, 1814), *in* 3 AM. STATE PAPERS 721, 723 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) (proposing that the U.S. end all hostilities with Indian nations and "restore to such tribes . . . all the possessions, rights, and privileges, which they may have enjoyed"). We thank Greg Ablavsky for raising this point.

396 *Id.* at 722 (seeking to understand "the precise ground upon which [the American delegation] resist[s] the right of His Majesty to negotiate with the United States on behalf of the Indian nations, whose co-operation in the war His Majesty has found it expedient to accept").

397 *Id.* (drawing on the Treaty of Munster).

398 Letter from John Quincy Adams, James A. Bayard, Henry Clay, Jonathan Russell & Albert Gallatin, the American Ministers, to the British Ministers (Oct. 13, 1814), *in id.* at 723, 724.

399 Letter from Henry Goulburn & William Adams, the British Ministers, to the American Ministers (Oct. 21, 1814), *in id.* at 724, 724-25 (accepting the American proposal regarding the Indian nations); Letter from Henry Goulburn & William Adams, British Ministers, to the American Ministers (Oct. 31, 1814), *in id.* at 726, 726 (same).

"wandering tribes" without sovereignty.[400] But the American negotiators did not deny that Indian tribes might exercise sovereignty within the colonial order of the United States. Instead, their aim was simply to deny that tribes had international personality in the way that some tributary and feudatory states within the Holy Roman Empire did. The outcome of negotiations at Ghent which ended the war were consistent with this distinction. Article IX of the Treaty of Ghent required the United States to negotiate treaties with the tribes that had allied with the British.[401] In 1815, the tribes agreed to come under the protection of the U.S. through these treaties.[402]

Thus, the Treaty of Ghent and its aftermath is consistent with the Marshall Court's holding that tribes were incorporated within the U.S. by treaty. In *Cherokee Nation*, the Court held that tribes were "domestic dependent nations," not foreign states.[403] But in analogizing tribes to tributary and feudatory states, *Worcester* drew upon an intellectual framework that recognized divided sovereignties of various sorts, with one of the most important examples being the Holy Roman Empire.

B. *The Indian Princely States*

This Article's second example of the development of shared sovereignty comes from British India. British India developed a form of indirect rule over protected indigenous states that provides important parallels to both the Holy Roman Empire and U.S. interactions with Native polities. And while these events occurred half a world away, and their conclusion was in the mid-twentieth century, there is evidence that early developments in British India influenced the young American republic.

British engagement with India began with the creation of the British East India Company in 1600, followed by the slow establishment of trading posts at various points along the Indian coast in the seventeenth century, including Bombay, Madras, and Calcutta.[404] Over the course of the 18th century, leading employees of the Company began to establish effective political control over areas around these posts, especially Madras and Calcutta, in part to advance their personal fortunes.[405] Through a series of wars and treaties, the Company established a small empire, theoretically under the suzerainty of the Muhgal

400 *See supra* note 129 and accompanying text.

401 Treaty of Peace and Amity (Treaty of Ghent), U.S.-Great Britain, Dec. 24, 1814, 8 Stat. 218, 222-23.

402 Colin G. Calloway, *The End of an Era: British-Indian Relations in the Great Lakes Region After the War of 1812*, 12 MICH. HIST. REV. 1, 5 (1986).

403 30 U.S. (5 Pet.) 1, 17 (1831).

404 *See* JOHN KEAY, INDIA: A HISTORY 370-71 (2000).

405 *Id.* at 371-77, 384, 388-93.

Empire in Delhi.[406] As the Mughal Empire collapsed, East India Company power began to expand across India, displacing Indian and European competitors.[407] By the mid-19th century, the Company was the dominant political entity on the subcontinent; all of India was either under the Company's direct rule or under the rule of Indian princely states that were in a subordinate relationship to the Company.[408] A massive revolt in 1857 almost dethroned Company power; after the defeat of the revolt by British troops, the British government took control of governance of Indian from the Company, and held it until Indian independence in 1947.[409]

1. The Nature of Indian Princely States

Even at its peak between 1857 and Indian independence in 1947, British direct rule extended over only a portion of India—about forty percent of the area of India, and one-third of the population, was located in the "princely states."[410] These entities, sometimes called "native states" or "vassal states," were states governed by an Indian ruler who was a hereditary monarch; depending on what kinds of entities were included in the category, there were 500 to 600 princely states located within British India.[411]

The largest princely states had a wide range of governmental functions: armies and police, courts, mints to coin money, taxation systems, and more.[412] These states might have millions of subjects and cover large areas of territory.[413] States on the coast had the power to impose customs duties different from those imposed by the British in their directly ruled territories.[414] The smallest states—of which there were hundreds—might include a village or two, had almost no formal government systems, and had policing and local justice functions essentially managed by the British government.[415]

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406 *See generally* 3 BARBARA N. RAMUSACK, THE NEW CAMBRIDGE HISTORY OF INDIA, PART 6: THE INDIAN PRINCES AND THEIR STATES, chs. 2-3 (2004).

407 KEAY, *supra* note 404, at 377-82, ch. 16.

408 *Id.* at ch. 17.

409 *Id.* at 436-447.

410 JOHN MCLEOD, SOVEREIGNTY, POWER, CONTROL: POLITICS IN THE STATES OF WESTERN INDIA, 1916–1947, at 8 tbl.1 (1999).

411 Charles H. Alexandrowicz, *Treaty and Diplomatic Relations Between European and South Asian Powers in the Seventeenth and Eighteenth Centuries*, 100 RECEUIL DE CORS 203, 215 (1960); RAMUSACK, *supra* note 406, at 2-3, 89.

412 *See* RAMUSACK, *supra* note 406, at 2, 24-25 (discussing the broad autonomy of larger "successor" states).

413 For example, the southern Indian state of Hyderabad. *See* MCLEOD, *supra* note 410, at 8 tbl.1.

414 *See id.* at 88-90 (describing "fierce" disputes between the princes of coastal states and the British government over sea customs and ports).

415 *See* WILLIAM LEE-WARNER, THE NATIVE STATES OF INDIA 376-77 (2d ed. 1910) ("In fact more than 400 separate states were claiming to be treated as sovereignties, of whom the majority

The largest states had formal treaty relationships with the British Crown—relationships that generally began with the British East India Company, which until 1858 was the governing authority for the areas of India under British control.[416] Small states usually had no treaty arrangement with the British government.[417] Treaty terms varied substantially in their terms from state to state.[418] Treaties generally prohibited princely states from entering into diplomatic relations with any other governments besides the British government, including other Indian princely states; they generally restricted how the state could use its military forces; and they often required payments by the state to the British Crown.[419]

In "British India" (the term used to refer to the portions of India directly ruled by the East India Company or after 1857 by the British Crown) the British Parliament and the Viceroy (the senior British executive official in India) had direct control over governance, with Acts of Parliament determining the law and governance structure, supplemented by decrees and laws by the Viceroy and various British Indian legislative councils.[420] Initially, however, Acts of Parliament had no legal effect in the princely states (at least in theory), and their residents, unlike those in British India, were not British subjects.[421] Over time, the British Parliament increasingly intervened in the affairs of the princely states through ordinary legislation—such that by the 1940s, Acts of Parliament were used to force the merger of extremely small princely states with larger ones (a process known as "attachment") even over the objections of those small states.[422] And the end of British empire in India was the product of an Act of Parliament as well, the Indian Independence

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were without the means of providing any sort of public administration."); RAMUSACK, *supra* note 406, at 3-4.

416 *See generally* KEAY, *supra* note 404, at ch. 16, 17; RAMUSACK, *supra* note 406, at 2-4, 51-52.

417 *See* RAMUSACK, *supra* note 406, at 51-52, 9 (noting that treaties were less common than *sanads* and letters to Indian states); *see also* IAN COPLAND, THE PRINCES OF INDIA IN THE ENDGAME OF EMPIRE, 1917–1947, at 219 (1997) ("[O]nly about forty states possessed formal treaties with the crown . . . .").

418 *See* COPLAND, *supra* note 417, at 68-69 (1997) (explaining that while some treaties contained "an unambiguous guarantee of internal independence," others "gave the [British] government an equally unambiguous right to intervene").

419 *See* RAMUSACK, *supra* note 406, at 48-49, 60 (noting treaty terms which imposed tributes and restricted relations); MICHAEL H. FISHER, INDIRECT RULE IN INDIA: RESIDENTS AND THE RESIDENCY SYSTEM, 1764–1858, at 193-98 (1991) (describing military restrictions imposed by treaty).

420 *See* V.P. MENON, THE STORY OF THE INTEGRATION OF THE INDIAN STATES 10 (1956); LEE-WARNER, *supra* note 415, at 346.

421 *See* MENON, *supra* note 420, at 10 (discussing the legal relationship between Parliament and Indian citizens); LEE-WARNER, *supra* note 415, at 346 ("It has never been contended that Parliament can pass laws operative in foreign territory on those who are not British subjects.").

422 *See* MCLEOD, *supra* note 410, at 138-46 (describing the attachment process in Parliament and resistance by the petty states).

Act.[423] Day-to-day relationships between British India and the princely states were managed by the Company's Governor-General up to 1857, and after that by a Viceroy acting through a Political Department and Residents, and by British officials posted to individual princely states or supervising relationships with groups of princely states.[424] Control by the British government over princely states was thus mediated through government-to-government relations managed by the executive branch.[425]

Central to British legal theories as to Britain's control over the princely states was the concept of paramountcy—that the British Crown, as the paramount ruler of India, had certain core powers that it held vis-à-vis all states, regardless of any treaty provisions.[426] Paramountcy was usually used to justify key forms of intervention in internal rule by a state—most importantly, the right to approve the succession of one ruler after the death of another ruler; the right to govern the state during the minority of a child ruler; the right to intervene in the internal governance of a state to redress "gross misrule" by a ruler, up to and including deposition of that ruler; and prior to 1858 (when the British renounced the power), the power to annex a territory completely if the ruler died without an heir, or because of misrule by the ruler.[427] The British Crown also generally reserved jurisdiction over

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423 INDIAN INDEPENDENCE ACT 1947, 10 & 11 Geo. 5 c. 30 (UK).

424 For an overview of the Resident system, see generally FISHER, *supra* note 419.

425 LEE-WARNER, *supra* note 415, at 359 (explaining the boundaries of British sovereignty and princely autonomy within India during the colonial period); *see* BENTON, *supra* note 51, at 261 (noting a distinction between legislative power over British India and executive power over princely states).

426 A public letter from the Viceroy in 1926 put it thusly:

> [The British Crown] is supreme in India, and therefore no Ruler of any Indian State can justifiably claim to negotiate with the British Government on an equal footing. Its supremacy is not based only on Treaties and Engagements but exists independently of them, and quite apart from its prerogative in matters relating to Foreign Affairs and policies, it is the right and duty of the British Government . . . to preserve peace and good order throughout India . . . .

COPLAND, *supra* note 417, at 55.

427 The quotation is from LEE-WARNER, *supra* note 415, at 283. *See* MCLEOD, *supra* note 410, at 169, 178 (discussing British approval of succession and intervention for child rulers and "maladministration"); RAMUSACK, *supra* note 406, at 107, 118-21 (discussing British approval of succession and discipline of "princely misconduct"). *See also* FISHER, *supra* note 419, at 208-19 (describing at length the political and economic steps taken to expand and strengthen indirect British rule); COPLAND, *supra* note 417, at 55 ("The right of the British Government to intervene in the internal affairs of Indian States is another instance of the consequences necessarily involved in the supremacy of the British Crown." (quoting Viceroy Reading's letter to Osman Ali)); *cf.* LEE-WARNER, *supra* note 415, at 195-96 (describing the light-handed intervention approach of the British in India, as compared to the United States' approach generally). For discussion of annexation, see FISHER, *supra* note 419, at 257-58, outlining the steps taken by the British to annex valuable properties within princely state, and KEAY, *supra* note 404, at 434, 446, providing the timeline of British Governors-General of India, mentioning the legal and economic ramification of annexing princely state property, and describing the political aftermath of annexation.

crimes involving Europeans within princely states,[428] mandated extradition of fugitives from justice by the princely states to British authorities,[429] and also reserved British jurisdiction over the management of railroads and telegraphs that crossed princely states.[430] Paramountcy also implied that the British Crown had primary responsibility for the defense and security of India as a whole—the paramount power had exclusive powers in foreign affairs and defense (even where the treaties did not mention those topics or where there was no treaty relationship),[431] and generally had an obligation to defend the princely states against internal rebellion and external threat.[432] In general, the precise borders between British and Indian princely state sovereignty were fluid and hard to define.[433]

In part because of the fluid nature of sovereignty for Indian princely states, the relationship between Britain and the Indian princely states was hard to categorize for many international and constitutional legal scholars in the nineteenth century.[434] There was general agreement that Indian princely states were not fully independent actors for international law purposes,[435] and were subsidiary to the British Crown in matters of foreign affairs, but more dispute about whether the states had any existence as sovereign entities separate from the British Crown.[436] However, observers with the most

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428 *See* FISHER, *supra* note 419, at 199-207 (describing British mechanisms for limiting the authority of princely states over Europeans); LEE-WARNER, *supra* note 415, at 267-69 (explaining the long-standing British tradition of claiming the right to try its own citizens in its colonial lands and justifying the practice in colonial India).

429 CHARLES LEWIS TUPPER, OUR INDIAN PROTECTORATE: AN INTRODUCTION TO THE STUDY OF THE RELATIONS BETWEEN THE BRITISH GOVERNMENT AND ITS INDIAN FEUDATORIES 368-69 (1893) (describing the extradition laws and arrangements applicable to British subjects, both European and Indian, during the colonial period).

430 MENON, *supra* note 420, at 12 (framing British actions in India regarding railroad and telegraph infrastructure development as "encroachment on [the princes'] internal sovereignty").

431 LEE-WARNER, *supra* note 415, at 256 (stating the paramountcy of the British government and British companies when it came to treaty or non-treaty relations with Indian states).

432 Taraknath Das, *The Status of Hyderabad During and After British Rule in India*, 43 AM. J. INT'L L. 57, 61-62 (1949) (noting that the Maharaja is absolute in ruling his subjects, except in matters of public concern, defense, external affairs, and justice).

433 RAMUSACK, *supra* note 406, at 55 (noting that the Indian Rulers' sovereign rights generally fluctuated relative to the Crown's sovereign rights); FISHER, *supra* note 419, at 441 (noting that the boundaries of sovereignty shifted over time, beyond those boundaries outlined in treaties, in response to changing political realities); BENTON, *supra* note 51, at 243 ("Most of the tensions surrounding the legal and political status of the princely states were never in fact resolved . . . .").

434 LEE-WARNER, *supra* note 415, at ix-xi (noting inconsistent characterizations of princely states as independent, subordinate, and semi-sovereign by various writers).

435 Das, *supra* note 432, at 62, 67 (noting statements in 1891 and 1929 by the British Government that princely states had no independent existence and were not subjects of international law); LEE-WARNER, *supra* note 415, at 254-55, 390-93 (noting that the princely states had an utter lack of international legal personality).

436 LEE-WARNER, *supra* note 415, at ix-xi.

knowledge of British governance structures in India—senior British bureaucrats in the colonial government in India—generally identified the relationship as one of shared sovereignty, where the British Crown retained defense, foreign affairs, communications and the right to intervene in a limited manner in internal affairs, and the remaining functions of internal governance being reserved to the states.[437] British, and later Indian, courts generally recognized Indian princely states and their rulers as having immunity from judicial process, often seen as a component of sovereignty,[438] and Indian rulers of course regularly asserted their sovereign status.[439] And while some modern scholars have characterized the sovereign powers of Indian princely states as effectively nonexistent,[440] the weight of the most recent work emphasizes the real sovereignty and power of these rulers within the framework of overall British control.[441]

437 For examples, see the influential writings of William Lee-Warner, a senior British Indian bureaucrat, LEE-WARNER, *supra* note 415, at 31-33, 399, arguing that princely states should be thought of as "semi-sovereign states," the writings of Charles Lewis Tupper, another influential British commentator in the late nineteenth century, TUPPER, *supra* note 429, at 13, stating that "the most striking feature" of Indian princely states is "the remarkable illustration which it affords of the divisibility of sovereignty," and perhaps most importantly, the analysis provided by Henry Maine, a leading international legal scholar who also served as the most senior lawyer in British India in the middle of the nineteenth century. M.E. GRANT DUFF, *Kathiawar States and Sovereignty* (March 22, 1864), *in* SIR HENRY MAINE: A BRIEF MEMOIR OF HIS LIFE WITH SOME OF HIS INDIAN SPEECHES AND MINUTES 320-21 (Whitley Stokes, ed., New York H. Holt. & Co. 1892) (stating that Indian states "are in the enjoyment of some measure (although a very limited measure) of sovereignty, and that therefore the territory which they include is properly styled foreign territory"). For summaries by later scholars consistent with this position, see, e.g., RAMUSACK, *supra* note 406, at 94-95, and BENTON, *supra* note 51, at 238-39, 246-49, which describes the princely states as "represent[ing] an intermediate case in the continuum from subordinate society to semiautonomous and potentially independent state" and analyzes Maine's work.

438 *See, e.g.*, Maharaja Bikram Kishore of Tripura v. Province of Assam, [1949] 17 ILR 64 (Calcutta HC) (stating the various powers, sources of power, and privileges of sovereigns in India); *see also* TUPPER, *supra* note 429, at 364-65 (describing the sovereign immunity arrangements in place for princes).

439 *See* FISHER, *supra* note 419, at 444 (noting that Indian Rulers continued to assert and portray sovereignty, despite political realities). The relevant treaties also generally called Indian rulers sovereign. *Id.*

440 *See* NICHOLAS B. DIRKS, THE HOLLOW CROWN: ETHNOHISTORY OF AN INDIAN KINGDOM 384 (1987) (arguing that the princes, referred to as colonized lords, were the "gentrified managerial elite" in India under the British). Dirks drew his conclusions from a detailed ethnohistory of a single south Indian princely state.

441 *See, e.g.*, MCLEOD, *supra* note 410, at 7 ("For as this book will show, the rulers were not anyone's puppets."); RAMUSACK, *supra* note 406, at 2 ("British imperialists did not create the princely states as states or reduce them to theatre states where ritual was dominant and governmental functions relegated to imperial surrogates.").

2. Impact of Indian Independence on Princely States

The denouement of British indirect rule occurred with the independence of India, and that process provides insights as to how dependent sovereigns might see their powers expand as the suzerain power restores sovereignty to the dependent power. As British power retreated, the princely states (briefly) gained back powers they had long lost. However, those powers were themselves quickly forfeited to the newly independent government of India through a process that exemplifies the power of a suzerain state, at least by the twentieth century, to determine the contours of the sovereignty of the dependent state.

In the 1940s, the British Crown increasingly understood that after the end of the war India would move towards independence.[442] That in turn raised the question of what the Crown should do about its relationships with the princely states.[443] As noted above, both the treaties and paramountcy implied an ongoing commitment by the British government to protect the political and territorial integrity of the states.[444] However, the realities of an independent India made the ongoing presence of British troops to implement those commitments infeasible.[445] On the other hand, transferring paramountcy, treaty rights, and obligations with the princely states to the new Indian or Pakistani governments would subordinate the hereditary state monarchs to new nationalist governments that were organized around an ideology of popular governance—a prospect which the state rulers did not support.[446] The British also believed transfer of treaty rights would be an illegal unilateral change to the treaties.[447]

To resolve the dilemma, the British decided to unilaterally renounce paramountcy and all treaties with the states[448]—a position codified in an Act of

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442 KEAY, *supra* note 404, at 495-99 (discussing political pushback in India following the commencement of World War II).

443 RAMUSACK, *supra* note 406, at 267-71.

444 COPLAND, *supra* note 417, at 217-26.

445 *See id.* at 219-26 (recounting the delicate situation facing the British in providing military support to princely states in the early 1940s).

446 KEAY, *supra* note 404, at 489-95.

447 *See* MENON, *supra* note 420, at 59 (recounting how the princes affirmed their desire to gain political credence and solve the Constitutional issue); T.T. POULOSE, SUCCESSION IN INTERNATIONAL LAW: A STUDY OF INDIA, PAKISTAN, CEYLON AND BURMA 40 (1974) (claiming that the British believed that treaty obligations with rulers should not change by unilateral British action).

448 *See* MCLEOD, *supra* note 410, at 156 (recounting that the British Cabinet Mission declared that Indian independence would bring the end to all paramountcy and its corresponding legal implications); MENON, *supra* note 420, at 61, 66 (explaining that the princes envisioned the states as independent in the new India, describing the contents of the Memorandum of 12 May 1946). The text of the British position was announced in a statement by a cabinet-level mission to develop independence plans for India: "all the rights surrendered by the States to the paramount power will return to the States . . . ." COPLAND, *supra* note 417, at 222-23 (quoting the Memorandum of 12 May

Parliament, the Indian Independence Act of 1947.[449] That, however, raised the difficult question of what the implications of the renunciation of paramountcy were for the international status and sovereignty of the princely states and their relationships with the new states of India and Pakistan. The British initially concluded that the states could choose to join either India or Pakistan or maintain some form of separate status (perhaps even independence),[450] although the Viceroy in charge of overseeing the transition to independence (Lord Mountbatten) eventually told the princely state rulers that they had to choose between joining either India or Pakistan, and that they would be wise to join the state that they were economically and geographically integrated with (which left almost all states no choice).[451] The princely state rulers argued that they could become fully independent if they wished.[452] The Indian Government asserted that it had stepped into the role of the British Crown as paramount power, and therefore had the power to oversee the states and that the states remained subordinate to India[453]—although India's declarations on this point were

1946). The British renunciation of paramountcy was also intended to give the states more bargaining power with independent India. *Id.* at 249-50.

449 Indian Independence Act 1947, 10 & LL Geo. 5 c. 30 (UK).

450 *See* RAMUSACK, *supra* note 406, at 271-72 (stating that British position in 1946 is that Britain "would not coerce the princes to accede" to India); A.C. Lothian, *Book Review*, 44 J. OF ROYAL CENT. ASIAN SOC'Y 58, 58 (1957) (reviewing V.P. MENON, THE STORY OF THE INTEGRATION OF THE INDIAN STATES (1956)) (noting statements in Parliament by Prime Minister during debates in 1947 on Indian independence that "with the ending of the Treaties and Agreements the States regain their independence"); POULOSE, *supra* note 447, at 45 & n.58 (outlining the British position that, with Indian independence, princely states become independent as well).

451 *See* KEAY, *supra* note 404, at 502 (describing Mountbatten's proposal); MENON, *supra* note 420, at 81-84 (explaining the internal politics of the move from paramountcy to independence and Mountbatten's role in the ultimate outcome); RAMUSACK, *supra* note 406, at 273 (discussing the details of the Instrument of Accession and the timeline of new states joining India). However, Mountbatten still emphasized that after accession the states would have as much sovereignty as they had before independence. MENON, *supra* note 420, at 108-09; *see also* COPLAND, *supra* note 417, at 256 (statement by recounting that Mountbatten said to the princes that "[his] scheme leaves [them] with all [the] practical independence [they] can possibly use").

452 *See* MENON, *supra* note 420, at 63-64 (discussing Hyderabadi assertions of independence); *id.* at 71 (discussing the rulers' assertions of independence during the Constituent Assembly); *id.* at 76 (discussing the power of the Constituent Assembly to negotiate the end of paramountcy with the Crown and post-paramountcy independence of the states); *id.* at 84 (discussing Bhopali assertions of sovereignty).

453 *See id.* at 484-85 (noting that the end of paramountcy brought Indian independence, but that the systems that facilitated the paramountcy were not destroyed); POULOSE, *supra* note 447, at 34-37 (describing the differing views of the British government, the Indian Rulers, and the new Indian government regarding the transfer of paramountcy). For strong statements of the Indian governmental position, arguing that British rule had destroyed any sovereignty on the part of the states and that many were never independent in their entire history, see VB KULKARNI, PRINCELY INDIA AND THE LAPSE OF BRITISH PARAMOUNTCY 1, 49, 213 (1985), which describes the states as "neither fish nor fowl but a red-herring across the path of India's constitutional progress," whose sovereignty was ended by British occupation and which had "no relevance from the historical or constitutional point of view" post-independence.

sometimes hedged,[454] and in retrospect, senior Indian officials in charge of integrating the states conceded that the states could obtain some sort of autonomy or even independence after the renunciation of paramountcy.[455]

In practice, the vast majority of princes signed standard form agreements to accede to either India or Pakistan (depending on which state they were surrounded by).[456] The standard accession agreements for states to join India included the transfer to the Indian government of power over foreign affairs, military and security, and communications—all areas that had been under the control of the British Crown.[457] They also included "[s]tandstill [a]greements" in which all preexisting relations between the state and British India were maintained between the state and the new Government of India.[458] Three states in India tried to either negotiate better terms, accede to Pakistan even though they were surrounded by Indian territory, or to achieve independence. In all three cases, Indian troops eventually entered the state to ensure or protect accession by the state to India.[459] There were two princely states that also took (at least initially) different paths. The Himalayan Buddhist kingdoms of Sikkim and Bhutan, on the border between India and Tibet, were

454 *See* POULOSE, *supra* note 447, at 49 n.75 (quoting the Indian government's statement before the U.N. Security Council that the princely states did not have "sovereign independence that would enable them to become Members of the United Nations" because they lacked international recognition but that they could negotiate "some other political relationship other than accession").

455 V.P. Menon negotiated the accession of the states and then the integration of those states into India. He acknowledged that the "actual position" of states post-independence "would be difficult to define" but that they were not part of India or Pakistan and that the states that did not accede could be independent. MENON, *supra* note 420, at 100, 112; *id.* at 476 ("I have explained the implications of the lapse of paramountcy. The rulers became undisputed masters in their own States, possessing unrestricted sovereignty and completely independent of the Government of India.").

In fact, in a speech before the Indian Constituent Assembly that framed the Indian constitution, the minister for the Government of India charged with integrating the princely states conceded that "[i]n their various authoritative pronouncements, the British spokesmen recognized that with the lapse of paramountcy, technically and legally the States would become independent." GOVERNMENT OF INDIA, WHITE PAPER ON THE INDIAN STATES 120, 123 (2d ed. 1950). The minister made this concession to justify lifetime pension payments to princes to persuade them to step down from their positions: "There was nothing to compel or induce the Rulers to merge the identity of their States . . . . [The pension payments were the] minimum which we could offer to them as *quid pro quo* for parting with their ruling powers . . . ." *Id.* at 124.

A leading present-day international legal scholar argues that, with the lapse of British paramountcy, "it was arguable that those States which had not acceded [to India or Pakistan] were rendered fully independent." JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 322-23 (2d ed. 2006).

456 MENON, *supra* note 420, at 96-97; *id.* at 108-09 (noting that India drafted these arrangements and that they were uniform for classes of states).

457 *Id.* at 108-109.

458 *Id.* at 111 (noting the commonality of Standstill Agreements).

459 *See* KEAY, *supra* note 404, at 510-14, for a description of the tumult in Junagadh, Hyderabad, and Jammu and Kashmir.

princely states subject to British suzerainty,[460] although Bhutan in particular had treaty relationships that gave it broad autonomy.[461] Post-independence, India likewise recognized the independence of Bhutan, albeit with a treaty in which Bhutan agreed to be "guided" by India in its foreign policy.[462] India also recognized Sikkim's status as a separate entity, albeit with Indian control over foreign affairs and defense.[463] In the mid 1970s, the king of Sikkim was deposed and the state joined India.[464] However, Indian courts held that before Sikkim acceded to India, it was a foreign state separate from India that warranted immunity from judicial process.[465]

Thus, we have evidence that there was at least some restoration of sovereignty for the princely states with the British renunciation of paramountcy and treaty relationships—at least the amount of sovereignty necessary to make choices (albeit practically constrained choices) about which successor state to join, and the theoretical possibility of independence. For Bhutan and Sikkim, greater autonomy existed after independence, though with only Bhutan proceeding to real independence.[466] But this window of sovereignty was soon to be closed.

After accession by the Indian princely states to India in 1947, the Indian government over the next few years integrated the states into India. Legally, this took the form of the states signing new agreements that transferred increasing amounts of power to the Indian government.[467] Eventually all of the princely states were fully incorporated into India, with any remnant of

460 *See* RAMUSACK, *supra* note 406, at xiv (identifying Sikkim and Bhutan as princely states); LEE-WARNER, *supra* note 415, at 53-56 (showing that Bhutan was added as an Indian treaty map in 1774 and Sikkim in 1817).

461 *See* LEE-WARNER, *supra* note 415, at 158 (stating that both Bhutan and Sikkim were "tributary" to the British and faced limited intervention, mainly for "the promotion of peace and order on their frontiers").

462 *See* CRAWFORD, *supra* note 455, at 288-89 (giving Bhutan as an example of a protected State with independence).

463 *See* ALFRED M. KAMANDA, A STUDY OF LEGAL STATUS OF PROTECTORATES IN PUBLIC INTERNATIONAL LAW 139-40, 143 (1961) (describing Indian control under post-independence treaties over Sikkimese defense and foreign relations and stating that "Sikkim hardly possesses international personality").

464 THE STATESMAN'S YEARBOOK 2003: THE POLITICS, CULTURES AND ECONOMIES OF THE WORLD 868 (Barry Turner ed., 2002).

465 *See* Agarwala v. Union of India, (1980) AIR 1980 (Sik.) 22 (holding that after 1950 Sikkim was a protected state under Indian protection, and therefore Sikkim was a foreign state for purposes of immunity claims in Indian courts before 1975).

466 *See Bhutan and the UN*, THE PERMANENT MISSION OF THE KINGDOM OF BHUTAN TO THE U.N. IN N.Y. (2017), https://www.mfa.gov.bt/pmbny/?page_id=174 [https://perma.cc/6LCM-DW7H] (demonstrating that Bhutan is now a member of the United Nations, which requires existence as a sovereign state recognized by the international community).

467 For additional discussion of these agreements, see MENON, *supra* note 420, at 220-22, 236-37, 244, showing an agreement expanding federal powers over Union of Central Indian States, *id.* at 254, 256-58, 261, 263-64, 266, showing the same for the Rajasthani Union, *id.* at 286-88, showing the same for Travancore and Cochin Union, and *id.* at 295-96, showing the same for Mysore.

sovereignty eliminated, and their territories incorporated into new component states of the Indian Union.[468] This incorporation operated through generous offers of tax-free pensions for rulers to cede their sovereignty,[469] through appeals to the patriotism of the rulers, and through pressure by the Indian government such as the mobilization of popular protests calling for incorporation into India, and high-stakes and rushed negotiations.[470] By 1950, the princely states had signed away their existence as separate entities, and were fully incorporated as units of the Indian federal system—in the large-scale reorganizations of all Indian federal units in the 1950s, the states' very existence on the political map of India was erased.[471]

3. Lessons for Dependent Sovereignty from Indian Princely States

The history of the Indian princely states provides striking parallels with both the Holy Roman Empire and federal Indian law in the United States. In both India and the Holy Roman Empire, we saw long-standing relationships of shared sovereignty between a central government (the East India Company and the British Crown, and the Holy Roman Empire) and subsidiary sovereign states (the Indian princely states and the constituent units of the Holy Roman Empire). Indeed, a range of commentators in the nineteenth and twentieth centuries, both European and Indian, noted the parallels between the governance structure of British India and the Holy Roman Empire or feudal Europe more generally.[472] The repeated patterns of

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468 For examples of the merger of princely states into larger units and their eventual absorption into the federal system of India, see *id.* at 220-22, 236-37, 244, discussing the Union of Central Indian States, *id.* at 254, 256-58, 261, 263-64, 266, discussing Rajasthani, *id.* at 295-96, discussing the conversion of Mysore into province, *id.* at 298-99 discussing the establishment of federal control over states in Himachal Pradesh, *id.* at 300-02, discussing the federal takeover of states such as Tripura and Kutch, *id.* at 304-06, discussing the federal takeover of Bhopal, *id.* at 309 discussing the federal takeover of Cooch Behar, and *id.* at 465-6, noting how unions of princely states were eventually merged into Indian federal system.

469 For a discussion of such incentives, see COPLAND, *supra* note 417, at 265-66.

470 For specific examples of this pressure on princely states, see MENON, *supra* note 420, at 159-60, 165-68, describing pressure on small eastern princely states, *id.* at 185-91, describing pressure on Kathiawar states, *id.* at 202-06, describing pressure on Gujarat states, *id.* at 215-22, describing creation of Union of Central Indian States, *id.* at 298-99, describing pressure on states in Himachal Pradesh, *id.* at 300-02, describing pressure in Kutch and Tripura, and *id.* at 309, describing pressure in Cooch Behar.

471 *See* COPLAND, *supra* note 417, at 263-66.

472 *See, e.g.*, Alexandrowicz, *supra* note 411, at 286 n.133 (1960) ("Similarly as in the Holy Empire a distinction between unqualified and relative sovereigns appeared in the East Indies. It implied the existence of divisible sovereignty."); CHARLES H. ALEXANDROWICZ, THE LAW OF NATIONS IN GLOBAL HISTORY 65, 75 (David Armitage & Jennifer Pitts eds., 2017) (demonstrating the similarities between the disappearance of the Mughal Empire in India and the Holy Roman Empire in Europe in impacting the law of nations); FISHER, *supra* note 419, at 447 (highlighting Sir Henry Maine's argument that Indian princes were "limited sovereigns who had transferred some of their sovereign rights to the British," though not all agreed with this opinion); LEE-WARNER, *supra*

the existence and functioning of dependent sovereignty in widely different contexts provide support for the claims that dependent sovereignty is a concept with broad applicability in international law and a range of imperial systems.

We can also gain important understandings about the extent to which dependent sovereignty can persist or be restored. The Indian princely states have been identified by contemporary international legal scholars as an example of protected states that have some sort of sovereignty,[473] sovereignty that can be restored in whole or in part if protection is removed[474]—as we saw, at least in theory, in the case of the Indian princely states.

Finally, as with the Holy Roman Empire, dissolution often took legal forms even as it proceeded under political imperatives—the Government of India may have used pressure and suasion to get rulers to sign agreements to cede power to newly independent India, but those agreements were signed.[475]

4. Knowledge of the Indian Princely States in the Early American Republic

Not all of this history is relevant for an originalist understanding of U.S. constitutional law, of course, even if it sheds light on conceptions of sovereignty in modern international law. But knowledge about the British Empire flowed throughout their colonies. Americans, both before the Revolution and in the early years of the Republic, were aware of the Indian princely states and their relationship with the British. Americans followed newspaper accounts of British India and, more generally, India was part of the "cultural and political imaginary" of the early republic.[476] As Lauren Benton has shown, the influence flowed more prominently in the other direction, with British lawyers in the

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note 415, at 32-33 (drawing parallels between the "varying degrees" of sovereignty in the Native states of India and within the British Empire).

473 *See* CRAWFORD, *supra* note 455, at 286-88, 296-97 (characterizing Indian princely states as suzerain states, a form of protected states, that have equivalence to international protectorates that are "regarded as continuing as States for at least some purposes" and "still enjoy some separate legal personality, including legal rights vis-à-vis the protecting State," even though they are not states for international law purposes).

474 *See id.* at 318-20 (noting that protected status can be ended through a transfer of power or treaties between the protecting and protected state, restoring the sovereignty of the protected state).

475 *See* COPLAND, *supra* note 417, at 261-65 (arguing that, with a signature "on the dotted line," Indian princes signed away their states' sovereignty). Actors participating in the accession and integration of the Indian princely states during Indian independence drew explicit analogies to the mediatization of the units of the Holy Roman Empire as that Empire dissolved. *See* MENON, *supra* note 420, at 172 (speaking about integration of princely states in light of the mediatization introduced by Napoleon); *id.* at 227-28 (showing the author's notification of states that he is prepared for mediatization).

476 KAUR & ARORA, *supra* note 48, at 6; *see also* Rosemarie Zagarri, *The Significance of the "Global Turn" for the Early American Republic: Globalization in the Age of Nation-Building*, 31 J. OF EARLY REPUBLIC 1, 11-15 (2011) (demonstrating connections between India and the United States through the exchange of people and goods since the late 1700s).

late nineteenth century taking up American law's conception of "domestic dependent nations" in their descriptions of the princely states.[477]

The British began establishing treaty relationships with Indian states in the second half of the eighteenth century, and some of those relationships took the form of creating subsidiary relations with these states.[478] For example, in 1798 and 1800 the East India Company entered into treaties with Hyderabad (one of the largest states, located in south-central India) that restricted Hyderabad's military and foreign affairs in return for British protection.[479] Other significant early treaties by the Company occurred in 1764 with Awadh and 1799 with Mysore.[480]

Americans were aware of the East India Company's purchases of land in India and argued over their import for the legal relationship between the United States and Indian tribes. Direct evidence for this awareness comes from the *Johnson v. M'Intosh* litigation.[481] The plaintiffs in that case submitted a redacted copy of the so-called Yorke-Camden opinion into the record.[482] That was a 1757 opinion from the Attorney General and Solicitor General of Britain in response to a request for guidance from the East India Company.[483] The Company wanted to know if it needed letters patent from the Crown when buying land from the princes; Yorke and Camden said that the Company did not.[484] In 1773, a redacted version of this opinion started to circulate in America.[485] American land speculators may have edited the opinion to make it look as if it concerned the title of American Indians to their lands, rather than the rights of the Indian princely states.[486] But it was clear enough to the Justices in *Johnson* that the opinion concerned the East

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477 *See* BENTON, *supra* note 51, at 271-75 (noting the irony of British lawyers embracing Marshall's reasoning at the same time that it was being replaced in the United States by more full-throated assertions of plenary power).

478 *See* LAUREN BENTON & LISA FORD, RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800–1850, at 89 (2016) ("[Starting in the late eighteenth century,] the East India Company repeatedly signed treaties with states that ceded control over external affairs in exchange for protection by the Company . . . .").

479 RAMUSACK, *supra* note 406, at 26-27, 62.

480 *Id.* at 32, 68; KEAY, *supra* note 404, at 392-402. The treaty with Mysore restricted that state's foreign affairs. *See* RAMUSACK, *supra* note 406, at 70 ("Mysore could not communicate with any foreign power without the prior knowledge and *sanction* of the British." (emphasis in original)). Other early treaties were a 1795 treaty with Travancore, and a 1791 treaty with Cochin. *Id.* at 34; *see also* Alexandrowicz, *supra* note 411, at 284 (highlighting the history of the 1799 Mysore treaty).

481 21 U.S. (8 Wheat.) 543 (1823).

482 Jedediah Purdy, *Property and Empire: The Law of Imperialism in* Johnson v. M'Intosh, 75 GEO. WASH. L. REV. 329, 343 (2007).

483 *Id.* at 342.

484 *Id.* at 342-43.

485 *Id.* at 343.

486 Jack M. Sosin, *The Yorke-Camden Opinion and American Land Speculators*, 85 PA. MAG. HIST. & BIOGRAPHY 38, 39, 49 (1961).

India Company and the princely states. In his opinion for the Court, Chief Justice Marshall reasoned that the Yorke-Camden opinion was irrelevant because it concerned land transfers from "Princes" in India, whereas the issue before him in *Johnson* concerned land transfers from "sachems" in America.[487] This distinction is consistent with the thrust of the *Johnson* opinion, which, unlike Marshall's later opinion in *Worcester*, did not emphasize that tribes were "states" or "nations" under the law of nations.[488]

A second piece of evidence suggests that the Framers were aware of developments in British India: the impeachment of Warren Hastings, who served as the first Governor-General of Bengal for the East Indian Company.[489] Hastings was charged with, among other things, violating the sovereignty of the ruler of the vassal state of Benares by demanding additional troops and monetary payments in excess of what the ruler owed the Company.[490] One of the prosecutors—the famous politician and writer Edmund Burke—drew on Vattel to argue that a protecting state violates the law of nations when it encroaches upon the sovereignty of a subsidiary state.[491] The trial of Hastings was a major event in British politics, lasting years in the House of Lords.[492] It also attracted attention in the United States, where the impeachment trial overlapped with the Constitutional Convention. In the Convention, during the debates about impeachment, George Mason argued that the Hastings' trial counseled that the grounds for impeachment should be broader than treason.[493] Mason's arguments led to the adoption of the current definition of impeachment as "high crimes [and] misdemeanors."[494]

487 *Johnson*, 21 U.S. at 600.

488 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832).

489 C.H. ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES (16TH, 17TH, AND 18TH CENTURIES) 20-23 (1967). For background, see generally Mithi Mukherjee, *Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings*, 23 LAW & HIST. REV. 589, 589 (2005) (considering the impeachment of Warren Hastings "one of the key political trials in the history of the British empire.").

490 P. J. MARSHALL, THE IMPEACHMENT OF WARREN HASTINGS 88-107 (1965); *see also* 2 EDMUND BURKE, THE SPEECHES OF THE RIGHT HONOURABLE EDMUND BURKE ON THE IMPEACHMENT OF WARREN HASTINGS 20-118 (H.G. Bohn ed., 1857) (summarizing the relevant charges).

491 11 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 240-41 (John C. Nimmo ed., 1887) ("I will refer your Lordships to Vattel, Book I Cap. 16, where he treats of the breach of such agreements, by the protector refusing to give protection . . . .").

492 *See* MARSHALL, *supra* note 490, at 64, 76 (noting that the impeachment of Hastings was the first impeachment in Britain since 1746, and the length of the trial); Mukherjee, *supra* note 489, at 625 (calling the trial a "decisive moment in the history of empire").

493 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 381, at 550 (statement by George Mason on September 8, 1787).

494 *Id.* (internal quotation marks omitted).

C. *Persistence and Termination of Sovereignty Under International Law*

Our conclusions from these two case studies align with understandings in international law as to the persistent sovereignty of protected, tributary, or dependent states. As in India, the termination of a protectorate over a protected state generally will result in the restoration of the sovereignty of that protected state.[495] A sovereign polity can survive traumatic changes to its territory and its governance structures.[496] On this understanding, even the dramatic changes undergone by many federally recognized Indian tribes—be it removal from their original territories by the federal government, dispossession of the majority of their original lands, reorganization of their governing structures, or the loss of much of their original populations to disease and war—do not by themselves terminate their sovereign status.

These conclusions from modern international law are also consistent with the understandings of seventeenth- and eighteenth-century international law, relevant for the framers of the Constitution. Vattel argued that a protected state might regain full sovereignty if the more powerful state violates provisions of the protecting treaty:

> When a nation has placed itself under the protection of another that is more powerful, or has even entered into subjection to it with a view to receiving its protection,—if the latter does not effectually protect the other in case of need, it is manifest, that, by failing in its engagements, it loses all the rights it had acquired by the convention, and that the other, being disengaged from the obligation it had contracted, re-enters into the possession of all its rights, and recovers its independence, or its liberty.[497]

On the other hand, sovereignty may be terminated under modern international law where continuity of a political entity comes to an end. "[E]ffective submersion and disappearance of separate State organs in those of another State over a considerable period of time will normally result in the extinction of the State . . . ."[498] The illegality of the disappearance of a state may cut against recognizing its disappearance,[499] while consent by the

[495] CRAWFORD, *supra* note 455, at 318-20; *id.* at 700-01 ("Continuation of a State entity under a regime such as a protectorate with some degree of international personality may preserve the legal identity of the State over time.").

[496] *Id.* at 700 ("A State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three.").

[497] VATTEL, *supra* note 38, bk. I, § 196, at 208; *see also* PUFENDORF, *supra* note 228, bk. VIII, ch. VI, § XXVI, at 102 (stating that if a nation frees itself from another country, "without doubt [it] recover[s] its Liberty, and ancient State").

[498] CRAWFORD, *supra* note 455, at 701.

[499] The United States and several European nations refused to recognize the Soviet absorption of the Baltic states (Estonia, Latvia, and Lithuania) in 1940. The reemergence of these nations as

subordinated state to its disappearance would obviously cut in favor of the termination of sovereignty.

These modern principles are roughly consistent with those from Vattel and contemporaneous theorists. Vattel emphasized that a state that resists subordination may maintain its sovereignty, even in the face of conquest—and on the other hand, a polity may consent to terminate its separate status. As he put it, if a dependent sovereign "does not resist the encroachments of that power from which it has sought support, . . . [then] its patient acquiescence becomes in length of time a tacit consent that legitimates the rights of the usurper."[500] Also consistent with modern principles, Vattel argued that a state's separate sovereignty is terminated if it is fully absorbed into another state.[501] But sovereignty persists where a state resists encroachments on its sovereignty.

IV. THE FUTURE OF TRIBAL SOVEREIGNTY

This Part explores some of the implications of this comparative history for core doctrines in the field of federal Indian law, including inherent tribal sovereignty, the plenary power doctrine, the implicit divestiture doctrine, and the diminishment and disestablishment doctrines. Put simply, Part III's analysis calls into question common arguments that tribes are necessarily divested of sovereignty by their status as "domestic dependent nations"[502] or by the passage of time.

A. *The False Dichotomy Between Dependency and Sovereignty*

Part III's first implication is that some critics of federal Indian law have drawn a false dichotomy between dependency and sovereignty. Among these critics is Justice Clarence Thomas, who has argued that Indian tribes' dependent status is inconsistent with their claims to sovereignty. Thomas's reasoning is based on juxtaposing the plenary power doctrine with the doctrine of inherent tribal sovereignty.[503] The two doctrines, he argues, are necessarily inconsistent.[504]

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independent polities in the late 20th century suggests how long it may take for an illegal annexation to result in the extinction of a state. *Id.* at 689-90, 703; *see also* Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481, 487 (1992) (noting this example).

500 VATTEL, *supra* note 38, bk. I, § 199, at 210.

501 *Id.* bk. I, § 200, at 211. Grotius reached a similar conclusion that a nation "perishes" "when the Subjects, either of their own Accord are disunited on the Account of a Pestilence, or a Sedition, or are by Force so scattered, as that they cannot more re-unite, which often happens in War." GROTIUS, *supra* note 228, bk. II, ch. IX, §§ IV-VI, at 669-70.

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

503 United States v. Lara, 541 U.S. 193, 214-15 (2004) (Thomas, J., concurring).

504 *Id.*

The plenary power doctrine holds that Congress has plenary power with respect to Indian affairs.[505] The Court has formulated this doctrine in various ways since its inception in the late nineteenth century. One formulation emphasizes that Congress has some measure of *exclusive* authority over Indian affairs.[506] Another emphasizes the *encompassing* nature of Congress's authority over a broad range of subject matter areas involving Indians, from Indian child welfare to environmental regulation.[507] A third formulation treats Congress's exercise of its authority as a *political question*—on this view, for instance, Congress may break the United States' treaty promises to tribes without judicial review.[508]

The doctrine of inherent tribal sovereignty traces back to *Worcester's* holding that the United States had recognized tribes as "distinct, independent political communities" with rights of self-government.[509] Under this doctrine, tribes have sovereign authority that preexists the Constitution and does not depend upon it or any action of Congress.[510]

Justice Thomas suggests that the plenary power doctrine and the doctrine of inherent tribal sovereignty are irreconcilable. He argues that "the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously."[511] "[Because] the sovereign is by definition, the entity 'in which independent and supreme authority is vested,'" a dependent entity like a tribe is not sovereign.[512] In Thomas's view, "[i]t is quite arguably the essence of sovereignty not to exist merely at the whim of an external government," that is, not to exist under plenary power.[513]

To this conceptual argument Thomas adds an historical claim. In 1871, Congress enacted a statute prohibiting the negotiation of additional treaties with Indian nations or tribes.[514] According to Thomas, this conclusion

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505 *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[Discussing t]he plenary power of Congress to deal with the special problems of Indians . . . .").

506 *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) (reasoning that the Court should "tread lightly" when making law related to Indians out of "a proper respect" for Congress's plenary power).

507 *See Mancari*, 417 U.S. at 552 (emphasizing that an "entire Title of the United States Code"—the one involving Indian affairs—is an exercise of Congress's plenary power).

508 Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) ("The power exists to abrogate the provisions of an Indian treaty . . . .").

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

510 *See* Talton v. Mayes, 163 U.S. 376, 382-84 (1896) (holding that a tribe's "powers of local government" do not "spring[] from the constitution of the United States" and that the "existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers").

511 United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring).

512 *Id.* at 218 (quoting *Sovereign*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

513 *Id.*

514 An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes, for the Year Ending

"reflects the view of the political branches that the tribes had become a purely domestic matter."[515] And if Indian affairs are a purely domestic matter, he suggests, it is doubtful that tribes retain sovereignty.[516]

Ultimately, these tensions lead Thomas to seriously question whether tribes can be understood as true sovereigns, or alternatively, whether Congress has power to constrain that sovereignty.[517] In the end, Thomas never answers the questions he raises or provides any clear indication which choice he would make, whether it would be to reject tribal sovereignty, Congressional power, or perhaps both.[518] Accordingly, Thomas has stated: "It is time that the Court reconsider these precedents."[519]

Part III illustrates that Thomas's dichotomy is a false one historically. Dependent sovereignty was recognized by a range of leading international legal scholars in the seventeenth and eighteenth centuries. The concept of dependent sovereignty was realized in the Holy Roman Empire contemporaneously, as well as in subsequent decades through the British relationships with princely states in India. It was a concept that the framers of the Constitution would have been well aware of, and indeed drew upon in developing their own conceptions of federalism in drafting the Constitution itself.

Justice Thomas's conceptual argument trades on a conception of sovereignty as supreme and indivisible. Such a conception was familiar to the Founders.[520] Yet they were also familiar with notions of divisible and shared sovereignty. By the time of the Founding, there was a voluminous body of scholarship on the Holy Roman Empire and a set of well-rehearsed debates between those who saw sovereignty as indivisible and those who defined it more capaciously to include relationships between more powerful and dependent sovereigns.[521] Johann Jacob Moser's conceptual innovation—"semi-sovereignties"—was an example.[522] Although American lawyers may not have been versed in all the works and complexities in this debate, they were familiar with the international legal commentary that distilled the debate about the

June Thirty, Eighteen Hundred and Seventy-Two, and for Other Purposes, ch. 120, Pub. L. No. 41-120, 16 Stat. 544 (1871).

515 *Lara*, 541 U.S. at 218.

516 *See id.* at 219 (explaining that since the U.S. did not view the tribes as foreign nations, it did not consider them to be sovereign).

517 *Id.* at 225 ("The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty.'").

518 *See* United States v. Bryant, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring) ("I continue to doubt whether either view of tribal sovereignty is correct.").

519 *Id.*

520 *See supra* notes 131–134 and accompanying text.

521 *See supra* notes 311–339 and accompanying text.

522 *See supra* note 335 and accompanying text.

Holy Roman Empire.[523] Vattel, for example, used examples from the Empire to illustrate the concept of sovereignty divided between a more powerful state and another accepting its protection.[524] This concept—not Justice Thomas's definition of sovereignty as supreme and indivisible—formed the basis for the Supreme Court's conclusion that tribes were sovereign under federal law.

Still, the dichotomy between plenary power and dependent sovereignty is plausible. If a more powerful sovereign has the power to extinguish a subordinate sovereign's authority to govern, then in what sense is the dependent sovereign "sovereign"? At times, the United States government has claimed that Congress has this authority.[525] For Justice Thomas, this claim calls into question the foundation of tribal sovereignty.

Whether Congress has a plenary power to extinguish tribal sovereignty unilaterally is a long-contested question of constitutional law that this Article does not try to answer. But the histories explored in this Article suggest that it is by no means clear that the Founders would have understood Congress to possess constitutional authority to extinguish tribal sovereignty unilaterally. Moreover, even if such a power exists, history suggests that it does not preclude the existence of inherent tribal sovereignty as a matter of law.

Thomas's critique has force insofar as the legal duties and powers of a more powerful state in a protectorate relationship were (and remain) ambiguous. Ablavsky has argued that the plenary power doctrine evolved from "the first federal leaders' narrow claims of sovereignty over Native nations," though it was "not what the doctrines' creators had intended."[526] Indeed, the potential for a conception of plenary power has existed within the law of nations itself, as the examples of the Holy Roman Empire and the princely states suggest. At the same time, commentators such as Vattel emphasized the duty of a powerful state to respect the sovereignty of a dependent state.[527] The Marshall Court's early accounts of the protectorate relationship between tribes and the United States took the Treaty of Fort Pitt as emblematic of the original understanding and emphasized the federal government's responsibility to protect tribal sovereigns.[528] Given this emphasis, the Marshall Court's citations to Vattel are unsurprising, insofar as his commentary support this account of the duty of protection.[529] But another

523 *See supra* notes 391–394 and accompanying text.

524 *Supra* note 338 and accompanying text.

525 *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

526 Ablavsky, *Indian Commerce*, *supra* note 134, at 1082.

527 *See supra* notes 491, 497 and accompanying text.

528 *See supra* note 13 and accompanying text.

529 *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832) (citing Vattel on issues of treaty interpretation).

concept of protection gradually took hold in U.S. case law, one that emphasized the federal government's paramount authority over U.S. territory.[530] This latter account, which is at least in tension with the Marshall Trilogy's account of dependent sovereignty, finds some support in the histories of the Holy Roman Empire and the princely states.

To unpack this tension, it is useful to begin with the law of nations commentary upon which the Marshall Trilogy relied. This commentary called into question the idea that a protecting sovereign had legal authority unilaterally to extinguish a dependent sovereign's sovereignty. Conquest of one state by another was, of course, familiar from the law of nations during the early Republic. But the early United States did not treat tribes as conquered peoples as a matter of law. Rather, the federal government entered into protectorate relationships with tribes, which the Marshall Court in *Worcester* classified as "tributary" or "feudatory."[531] In such a relationship, the more powerful sovereign has a duty of protection, and "[p]rotection does not imply the destruction of the protected."[532] In practice, to be sure, the more powerful sovereign may violate this duty of protection by seeking unilaterally to terminate the sovereignty of the protected state. But international law commentators reasoned that a dependent sovereign that resisted conquest maintained its sovereignty as a matter of law.[533]

Vattel's account of the principles that applied when a more powerful state encroached upon a dependent sovereignty is instructive. A basic principle of treaty law applicable in the protectorate context, he explained, was that a breach of the treaty of protection could discharge the obligations of the other party.[534] For instance, "if the more powerful nation should assume a greater authority over the weaker one than the treaty of protection or submission allows, the latter may consider the treaty as broken . . . ."[535] Otherwise, the dependent nation would lose the sovereignty that it sought to protect through its treaty with the more powerful nation, which, if it unilaterally assumes authority over the dependent nation, is a "usurper."[536]

The histories of the Holy Roman Empire and the Princely States complicate the picture. In both cases, the more powerful sovereign extinguished the sovereignty of some of its dependencies. The Imperial Diet in the Holy Roman Empire extinguished hundreds of dependent sovereigns

530 United States v. Kagama, 118 U.S. 375, 379 (1886) (reasoning that plenary power arises from United States' duty to protect tribes, who "are within the geographical limits of the United States").

531 *Worcester*, 31 U.S. at 560-61.

532 *Id.* at 552.

533 *See supra* Section III.C.

534 VATTEL, *supra* note 38, bk. I, § 198, at 209.

535 *Id.*

536 *Id.* bk. I, § 199, at 210.

within the Empire as part of mediatization in 1803.[537] The British government claimed it held the power to extinguish and annex Indian princely states from early in its relations with those states.[538] After 1858, the British government disclaimed any willingness to extinguish sovereignty, but in the waning days of the Raj the British forced the consolidation of hundreds of petty princely states.[539] After independence, India extinguished almost all of the rest.[540] Yet even if these histories are evidence that the United States Congress has unilateral authority to extinguish tribal sovereignty under the U.S. Constitution and Indian treaties, they undermine Justice Thomas's suggestion that such a plenary power is inconsistent with the current federal recognition of inherent tribal sovereignty. Rather, the dependent components of the Holy Roman Empire and the Indian princely states were considered sovereigns regardless up until the moment they disappeared.

Nor is it necessarily significant that the more powerful sovereign governs its relations with dependent sovereigns through domestic legislation rather than through treaties or similar tools. The relations between the various component states of the Holy Roman Empire and the imperial center were regulated and altered at times through treaties, as in the Treaties of Westphalia, but also through what we might today more clearly understand as domestic institutions, such as the imperial tribunals.[541] And even more directly, the British parliament at times exercised the power to legislate with respect to princely states, even as Britain asserted that those states had sovereignty.[542] Accordingly, the fact that the United States moved from a treaty framework to a domestic legislation framework to govern its relationships with tribes is not determinative of whether tribes have sovereignty.

B. *The Implicit Divestiture Doctrine and the Territorial Jurisdiction of Dependent Sovereigns*

The historical context from Part III can also help answer questions about whether some forms of sovereign power are per se excluded to dependent sovereigns. The modern Supreme Court has developed a doctrine of implicit divestiture under which the federal courts may declare that the incorporation of tribes as domestic dependent nations impliedly divests them of some

537 *See supra* notes 340–344 and accompanying text.

538 *See supra* notes 426–433 and accompanying text.

539 *See supra* note 422 and accompanying text.

540 *See supra* subsection III.B.2.

541 *See supra* notes 289–298 and accompanying text.

542 *See supra* note 420–423 and accompanying text.

aspects of their sovereignty.[543] In these cases, the Court has concluded that tribes' status as dependent sovereigns necessarily implies that their territorial jurisdiction over non-member Indians and non-Indians is limited.

The primary example is the Court's jurisprudence concerning tribal criminal jurisdiction over non-Indians and non-members. In *Oliphant v. Suquamish Indian Tribe*, the Court held that incorporation of tribes within the United States implicitly divested them of criminal jurisdiction over non-Indians.[544] The Court reasoned that just as tribes were divested of the authority to transfer their lands freely, so too they were divested of the authority to try non-Indians for crimes committed in Indian Country.[545] This case, which inaugurated the implicit divestiture doctrine, has been disastrous for public safety in Indian Country. According to the Indian Law and Order Commission's comprehensive 2013 report, for example, *Oliphant*'s denial of tribal jurisdiction over non-Indians has contributed to the disproportionate rates of violence against Native women.[546] In *Oliphant*, the Court reasoned that the potential destructive consequences of denying tribal jurisdiction over non-Indian wrongdoers do not determine whether tribes have such jurisdiction.[547] Rather, the Court emphasized the potential consequences of permitting tribes to regulate outsiders. The Court suggested that tribes' incorporation into the United States denies them "the right of governing . . . person[s] within their limits except themselves."[548] In *Duro v. Reina*, the Court extended *Oliphant* to hold that tribes did not have the power to exercise criminal jurisdiction over Indians who are non-members of the prosecuting tribe, on the grounds that where "the prosecution [is] a manifestation of external relations between the Tribe and outsiders, [and] such power [is] inconsistent with the Tribe's dependent status."[549] In other words, under this position "the tribes' lack of inherent criminal jurisdiction over nonmembers is a necessary legal

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543 *See* Montana v. United States, 450 U.S. 544, 565 (1981) (asserting the validity of "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"); United States v. Wheeler, 435 U.S. 313, 326 (1978) ("[An i]mplicit divestiture of sovereignty has been held to have occurred . . . [with respect to] the relations between an Indian tribe and nonmembers of the tribe.").

544 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and punish non-Indians.").

545 *Id.* at 209 (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), for the proposition that "inherent limitations on tribal power . . . stem from their incorporation into the United States.").

546 INDIAN L. & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES, at ix (2013) (finding that denial of tribal criminal jurisdiction has been disastrous and recommending that Congress restore federal recognition of plenary tribal criminal jurisdiction over tribal lands).

547 *Oliphant*, 435 U.S. at 212 ("[W]e are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians.").

548 *Id.* at 209 (quoting Fletcher v. Peck, 6 Cranch 87, 147 (1810)) (emphasis omitted).

549 Duro v. Reina, 495 U.S. 676, 686 (1990).

consequence of the basic fact that the tribes are dependent on the Federal Government."[550]

The modern Court's implicit divestiture doctrine does not necessarily follow from the idea of dependent sovereignty under the law of nations. The Court has given other justifications for the implicit divestiture doctrine, which we do not address.[551] But *Oliphant* purported to derive the doctrine from the historical understanding of tribes' status under the Marshall Trilogy. As Part III has shown, however, dependent sovereigns are not necessarily limited to exercising authority over only their citizens. Within the Holy Roman Empire, territorial states could enter into treaties with foreign powers as long as they did not violate the Peace of Westphalia and were not directed against the Empire.[552] In *Cherokee Nation v. Georgia*, Marshall echoed the American negotiators' position at Ghent in labeling tribes "domestic dependent nations" rather than foreign states, thus rejecting the idea that tribes had the international personality that territorial states enjoyed within the Holy Roman Empire.[553] But in analogizing Indian tribes to tributary and feudatory states, such as those within the Empire, *Worcester* invoked an intellectual framework of dividing sovereignty that was far more nuanced than the modern Court's implicit divestiture doctrine. Within that framework, the mere fact that a sovereign is dependent does not necessarily mean that the sovereign lacks the authority to enter into foreign treaties, much less to exercise territorial jurisdiction over non-citizens or non-members. When understood in this intellectual context, the Cherokee cases and the early Republic's treaty practice are inconsistent with the modern Court's reflexive conclusion that dependency necessarily implies divestment of territorial jurisdiction.

C. *The Restoration of Sovereignty*

The historical evidence that dependent sovereigns such as tribes were considered sovereigns in the eighteenth and nineteenth centuries provides strong support for recent scholarship that has emphasized that decisions by Congress or the federal Executive to recognize (or not) tribal governments are political decisions, similar to decisions by those branches to represent

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550 United States v. Lara, 541 U.S. 193, 228 (2004) (Souter, J., dissenting).

551 For example, we do not address questions as to whether tribal exercise of criminal jurisdiction over non-members may be contrary to the overall structure of the Constitution or particular provisions of the Constitution because non-members are unable to participate in the political life of the tribe. *See id.* at 211-14 (Kennedy, J., concurring) (raising these objections to tribal jurisdiction over nonmembers).

552 *See supra* notes 284–287 and accompanying text.

553 30 U.S. (5 Pet.) 1, 17 (1831).

foreign governments or admit states to the Union.[554] If dependent sovereigns like tribes are, at their core, sovereigns like foreign nations or U.S. states, then relations between the federal government and tribes should be treated by the courts in like manner—with deference to the decisions by the political branches about when to recognize tribes and how to structure the relationship with tribes.[555]

In the modern era, the U.S. Congress has structured the federal government's relationship with tribes through its self-determination policy. This policy, which emerged in the 1970s, recognizes tribes as polities with rights to self-government and supports their exercise of self-determination in a wide range of areas, including the provision of government services, environmental regulation, and child welfare, to name but three examples.[556] As part of the self-determination policy, Congress has occasionally restored federal recognition of tribal sovereignty by overturning judicial decisions that held tribes' dependent status had divested them of some aspect of their pre-constitutional authority.

Congress did exactly that in response to the Court's decision in *Duro* that tribes lack jurisdiction to try non-members. In 1991, Congress enacted the so-called *Duro* fix,[557] "recogniz[ing] and affirm[ing]" that tribes have "inherent" authority to bring misdemeanor prosecutions against Indians who are not members of the prosecuting tribe.[558] More recently, in the Violence Against Women Reauthorization Act [VAWA Reauthorization], Congress sought to address the problem of violence against Indigenous women that *Oliphant* helped create by authorizing tribes to prosecute some crimes of domestic and sexual violence by non-Indians. In the leadup to enactment of the 2013 VAWA Reauthorization, a House Legislative Report questioned its constitutionality, asking whether Congress has authority "to recognize inherent tribal sovereignty over non-Indians."[559]

The constitutionality of Congress's response to *Duro* came before the Court in *United States v. Lara*.[560] In that case, Billy Jo Lara, a member of the

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554 *See* Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 537 (2020) ("The political branches, primarily Congress, must make political choices on the question of which Indian affairs laws apply to which tribes.").

555 *Id.* at 525 ("Like foreign nations and individual states, Indian tribes are sovereign entities. Legislative and executive decisions about the scope of the federal government's relationship with those entities are political questions. As a result, they are subject only to limited judicial review.").

556 *See* COHEN'S HANDBOOK, *supra* note 178, §§ 19.04, 11.01, 22.02 (discussing statutes that have supported tribal self-determination with respect to government services, water quality regulation, and child welfare).

557 *See, e.g.*, Alex Tallchief Skibine, United States v. Lara*, Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47, 47 (2004) (referring to the "*Duro* fix").

558 25 U.S.C. § 1301(2).

559 H.R. REP. NO. 112-480, at 57-60 (2012).

560 United States v. Lara, 541 U.S. 193 (2004).

Turtle Mountain Band of Chippewa Indians, had been convicted by the Spirit Lake Tribe of the crime of "violence to a policeman."[561] After this tribal law conviction, the federal government charged him with the federal crime of assaulting a federal officer.[562] Lara challenged the federal prosecution on double jeopardy grounds.[563] He argued that the tribal conviction was pursuant to delegation from the federal government and therefore violated double jeopardy.[564] Of course, if the Spirit Lake Tribe had convicted Lara pursuant to its own sovereignty, separate from the federal government, then the dual convictions posed no double jeopardy problem under the dual sovereignty doctrine.[565] But, Lara argued, when Congress restored tribal criminal jurisdiction over Indian non-members through the *Duro*-fix,[566] any such extension must have been a delegation from Congress, raising significant double jeopardy and other constitutional issues because a tribe exercises criminal jurisdiction on behalf of the federal government whenever it prosecutes Indian non-members.[567]

The Court rejected Lara's double jeopardy challenge. It held that Congress could restore tribal criminal jurisdiction over Indian non-members.[568] *Duro*'s holding that tribes' dependent status impliedly divests them of jurisdiction over non-members "reflect[ed] the Court's view of the tribes' retained sovereign status as of the time the Court" decided that case.[569] The Court's conclusion that a measure of tribal sovereignty had been implicitly divested did not prohibit Congress from restoring the federal government's recognition of that sovereignty.[570]

The Court's conclusion that Congress had restored federal recognition of tribes' inherent sovereignty has been met with several criticisms. One is that the conceptual distinction between inherent and delegated authority is incoherent and unmanageable. The authors of the *American Indian Law Deskbook*, a treatise prepared by states attorneys general, have concluded that "'inherent' tribal authority under the majority's approach [in *Lara*] is in large

561 *Id.* at 196 (internal quotation marks omitted).

562 *Id.* at 197.

563 *Id.*

564 *Id.* at 197.

565 *See* United States v. Wheeler, 435 U.S. 313, 329-30 (1978) ("Since tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred.").

566 *See* 25 U.S.C. § 1301(2) (legislation restoring tribal criminal jurisdiction over Indian non-members "recognized and affirmed" "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians . . . ."); *Lara*, 541 U.S. at 199 (interpreting statute as restoring tribal sovereignty, not delegating federal power to tribes).

567 *Lara*, 541 U.S. at 207-08 (discussing Lara's arguments).

568 *Id.* at 210.

569 *Id.* at 205 (emphasis omitted).

570 *See id.* at 205.

measure whatever Congress deems it to be."[571] As applied in the double jeopardy context, one scholar has suggested, the doctrinal distinction is unmanageable whenever "one government (a state, a tribe, or territory) exercises criminal jurisdiction only with the permission of another (the federal government)."[572] The "more plausible view" is that the restored sovereignty of the tribes is derivative of federal sovereignty and therefore subject to federal "constitutional constraints."[573] Once tribal sovereignty has been divested (by tribes' dependent status), it may be restored, but any such restoration makes the federal government "responsible" for tribes' exercise of that sovereignty going forward.[574]

A second criticism, often paired with the first, is that Congress's attempt to restore tribal sovereignty is inconsistent with the original understanding of the federal/tribal relationship. Commentators raised this objection to the VAWA Reauthorization Act, arguing that tribal courts exercising jurisdiction over non-Indians are acting as federal courts and therefore are subject to the Article II appointments process for federal judges and the Article III limits on federal judicial power.[575] For the Court to conclude otherwise "would constitute an example of constitution-making rather than constitutional interpretation."[576] "The history of relations between the United States and tribes," going all the way back to the Framers, confirms that tribal courts are exercising federal authority when they act pursuant to a statute restoring tribal sovereignty and therefore must be subjected to constitutional constraints.[577]

The upshot was summed up by Justice Souter in his dissenting opinion in *Lara*.[578] As a matter of logic and of history, Souter suggested, the only options for tribes are subordination to the federal government or independence as a nation-state.[579]

The history discussed in this Article suggests that the options are not so simple. It provides support for the Court's reasoning in *Lara* and a partial response to the criticisms of that opinion. In particular, Part III's examples show, as an historical matter, that Justice Souter drew a false dichotomy in

571 AMERICAN INDIAN LAW DESKBOOK § 5:5, at 315 (2020 ed.).

572 Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 696 (2013).

573 *Id.* at 722 (discussing the impact of Supreme Court cases on tribal sovereignty).

574 *Id.*

575 *See* Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 BYU J. PUB. L. 1, 8 (2012) (arguing that Article II and Article III are implicated by Congress empowering tribal courts).

576 *Id.* at 39.

577 *Id.*

578 *See Lara*, 541 U.S. at 229-30 (2004) (Souter, J., dissenting).

579 *See id.* at 229 ("[E]ither Congress could grant the same independence to tribes that it did to the Philippines . . . or this Court could repudiate its existing doctrine of dependent sovereignty.").

arguing that Congress may restore a tribe's sovereignty only by freeing it from its dependent status.[580] To be sure, a dependent sovereign could go its own way and become an independent nation-state under international law, as Liechtenstein did after the end of the Holy Roman Empire.[581] But that is not the only option. A dependent sovereign's sovereignty persists and may be partially restored, as in the case of all of the subsidiary sovereigns in the Empire that received greater powers in the wake of the Peace of Westphalia of 1648;[582] or in the case of Baden, Bavaria, and Wurttemberg after the dissolution of the Holy Roman Empire;[583] or the case of the Indian princely states, which were guaranteed protection from annexation by the British Crown after 1857.[584]

D. *The False Equivalence Between Non-Exercise and Diminishment of Sovereignty*

Across multiple doctrinal areas, there is a common argument against tribal sovereignty. In a word, the argument is that sovereignty unexercised is sovereignty lost. The logic is that de jure sovereignty may be de facto diminished in particular ways if a sovereign does not exercise it in those ways. A sovereign that fails to enforce its criminal code may, for instance, lose the authority to do so. At some point, the passage of time will "preclude [a] Tribe from rekindling embers of sovereignty that long ago grew cold."[585]

This argument has appeared in various guises during the tribal self-determination era as tribes have reasserted their treaty rights and sovereign authority over their lands. It is in implicit-divestiture cases such as *Oliphant*, where the Court repeatedly emphasized that Indian tribal courts had not heard prosecutions under tribal law against non-Indians until the 1970s.[586] The argument is more prominent in *Sherrill*, which held that an Indian tribe could not obtain injunctive relief to protect its immunity from state and local taxation over lands it had recently repurchased from non-Indians within the boundaries of its reservation.[587] Too much time had passed, the Court

580 *See* discussion *supra* Part III.

581 *See* discussion *supra* subsection III.A.3.c.

582 *See supra* notes 284–287 and accompanying text (showing that the new imperial estates had greater rights to enter into alliances).

583 *See supra* notes 361–379 and accompanying text (discussing the treaty of the confederation of the Rhine).

584 *See supra* notes 418–420 and accompanying text.

585 City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 214 (2005).

586 *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196-97 (1978) ("The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon.").

587 *See Sherrill*, 544 U.S. at 214 (declining to grant injunctive relief based on a unification theory).

reasoned, since the tribe had sought to exert any authority over those lands.[588] *Sherill* has expanded beyond issues of equitable relief, with litigants citing it for an overarching principle that tribes lose aspects of their sovereignty by not exercising it. Perhaps the most prominent example of this argument appears in the reservation diminishment cases, which have addressed whether the boundaries of a tribe's reservation may contract as a matter of law as a result of the tribe not exercising its sovereignty to exclude non-Indians as a matter of fact.[589] Most recently, the argument arose in this context in *McGirt*, where Oklahoma argued that its history of exercising jurisdiction within the treaty-recognized boundaries of the Reservation, combined with the Creek Nation's non-exercise of its sovereignty, was evidence that the Reservation had ceased to exist as Indian Country over which the Creek Nation had authority.[590] The Court rejected the argument and explained it is for Congress to disestablish a reservation, not for the Court to do so through common lawmaking.[591]

The contrast between *Oliphant* and *Sherrill* on the one hand and *McGirt* on the other helps clarify the two ways that the federal courts might treat a Tribe's non-exercise of its sovereignty. The first way is to hold that tribes, as dependent sovereigns, lose sovereignty that they do not exercise. The other is to hold that tribes, as dependent sovereigns whose sovereignty the United States has promised to protect, may develop the capacities to exercise aspects of their sovereignty that have lain dormant.[592]

The first position, suggested in *Oliphant* and *Sherrill*, may seem intuitive. As James Wilson, one of the drafters of the Constitution, put it, the common law changes with "the circumstances, the exigencies, and the conveniences of the people," such that the passage of time "silently and gradually withdraws its customary laws."[593] An example is the doctrine of desuetude, which holds that a court may abrogate dormant criminal statutes that have not been enforced for many years. Where there have been "open, notorious and pervasive violation[s] of the statute," and a "conspicuous policy of nonenforcement," a

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588 *Id.*

589 *See, e.g.*, Nebraska v. Parker, 577 U.S. 481, 486-87 (2016) (discussing a case in which the Omaha tribe sought to assert jurisdiction over a town from which the tribe had a "longstanding absence . . . .").

590 *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2468-70 (2020) (outlining Oklahoma's arguments in the case).

591 *See id.* at 2468 (citing to the Court's reasoning in Solem v. Bartlett, 465 U.S. 463 (1984)). The Court's reasoning recalls Blackstone's principle that "no custom can prevail against an express act of [] parliament . . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES *76.

592 *See* Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329, 344 (2008) (proposing this potential understanding of dependent sovereignty that has yet to be exercised).

593 *See* John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 568 (2014) (quoting 1 THE WORKS OF JAMES WILSON 453-455 (James DeWitt Andrews ed., 1896)) (internal quotation marks omitted).

court may declare that a criminal statute has "become void."[594] Doing so ensures that the criminal law has contemporary public support and provides fair notice to those subject to it.[595] Prosecutorial authority unexercised (for long enough) is prosecutorial authority lost.

Yet the second position, suggested in *McGirt*, is also a familiar one. It was stated, for instance, in the famous federalism case, *In re Neagle*, where the circuit court reasoned that a sovereign power may "remain[] latent, or dormant, ready to be called into action, whenever the exigencies of the case, or times, require it."[596] A power not exercised may await its moment. According to the Court in *McGirt*, just such a moment had arrived for the Creek Nation.[597]

The histories of dependent sovereignty explored in this Article counsel against drawing a false equivalence between non-exercise and diminishment of sovereignty. Not every instance of non-exercise amounts to a surrender of sovereignty, as Vattel explained in the context of dependent sovereigns.[598] Only where a dependent sovereign "does not resist the encroachments of that power from which it has sought support, . . . if it preserves a profound silence, when it might and ought to speak,—its patient acquiescence becomes in length of time a tacit consent that legitimates the rights of the usurper."[599] The key here is "acquiescence": only if it can be said that the dependent sovereign has voluntarily consented to encroachments upon its sovereignty will the passage of time lead to diminishment of that sovereignty. Vattel stressed "that silence, in order to shew tacit consent, ought to be voluntary."[600] For example, where the more powerful state coerces its silence, that is, where "the inferior nation proves that violence and fear prevented its giving testimonies of its opposition," there is no consent and therefore no surrender of sovereignty.[601] In such a case, "silence . . . gives no right to the usurper."[602]

These principles, if applied to cases such as *Sherrill*, would lead to different results. In that 2005 decision, the Court treated the Oneida

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594 State v. Donley, 607 S.E.2d 474, 479 (W. Va. 2004) (quoting Committee on Legal Ethics v. Printz, 416 S.E.2d 720, 726 (W. Va. 1992)).

595 *See* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 30 ("[A] criminal law cannot be enforced if it has lost public support."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 592 (2001) ("These used-to-be-real-crimes that remain on the books create obvious notice problems.").

596 39 F. 833, 856 (C.C.N.D. Cal. 1889), *aff'd sub nom.* Cunningham v. Neagle, 135 U.S. 1 (1890).

597 *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2467 (2020) ("Today the Nation is led by a democratically elected Principal Chief, Second Chief, and National Council; operates a police force and three hospitals; commands an annual budget of more than $350 million; and employs over 2,000 people.").

598 *See* VATTEL, *supra* note 38, bk. I, §199, at 210 (explaining that the rights of nations are protected even during a non-exercise of power).

599 *Id.*

600 *Id.*

601 *Id.*

602 *Id.*

Indian Nation's failure to bring a lawsuit challenging the clearly unlawful purchase of its lands in 1795 as a surrender of sovereignty over those lands.[603] But the Court did not inquire about the circumstances of the Oneida's failure to sue. Nor did it ask whether the Oneida had tacitly consented to the usurpation of its property rights. Yet, as Joseph Singer has shown, the Oneidas faced various barriers to bringing a lawsuit until at least 1966, when Congress confirmed the capacity of federally recognized Indian tribes to sue in federal court without the consent of the United States.[604] And the Oneidas sued four years later, in 1970.[605] In other words, once the Oneidas had the capacity to assert their right to self-determination, they did so. Rather than seeing the case as one about dying "embers of sovereignty,"[606] the Court might have seen it as one of persistent sovereignty exercised in an era of tribal self-determination.

CONCLUSION

In *McGirt v. Oklahoma*, the U.S. Supreme Court suggested that the future of federal Indian law may lie in a return to first principles.[607] Among these are the recognition of inherent tribal sovereignty and the treaty system. "On the far end of the Trail of Tears was a promise," Justice Gorsuch's opinion began.[608] That promise, contained in treaties between the Creek Nation and the United States, was that the federal government would respect and protect the tribe's sovereignty. Upon that promise the Creek Nation relied and continues to depend.

As this Article has shown, the modern idea that dependency necessarily implies limits on sovereignty is too simple. Dependency also entailed the protection and persistence of dependent sovereigns. Early on, the United States recognized tribes as "states" or "nations" entitled to depend upon the United States government's duty to protect their sovereignty. This relationship was not unprecedented under the law of nations. To the contrary, there was a well-understood set of principles, including a sovereignty-preserving canon of treaty interpretation, that confirmed that a state retains its sovereignty even when it depends upon

603 *See* City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 216-17 ("This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court . . . preclude OIN from gaining the disruptive remedy it now seeks.").

604 Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 620 (2006) (describing the need for 28 U.S.C. § 1362).

605 *See id.* at 621 ("The Oneida Indian Nation brought suit four years after the passage of [28 U.S.C.] § 1362 in 1966. . . .").

606 *Sherrill*, 544 U.S. at 214.

607 140 S. Ct. 2452, 2476-77 (2020) (citing historical understandings of tribal sovereignty).

608 *Id.* at 2459.

another state for protection. This sovereignty persists so long as the nation does, and Indian tribes are nothing if not persistent. A return to first principles, this Article has argued, must begin by recognizing tribes as persisting sovereigns.