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# ABORIGINAL RIGHTS AND CONSTITUTIONAL CONFLICT: THE MARSHALL COURT, STATE AND FEDERAL SOVEREIGNTY, AND NATIVE AMERICAN RIGHTS UNDER THE 1789 CONSTITUTION

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# ABORIGINAL RIGHTS AND CONSTITUTIONAL CONFLICT: THE MARSHALL COURT, STATE AND FEDERAL SOVEREIGNTY, AND NATIVE AMERICAN RIGHTS UNDER THE 1789 CONSTITUTION

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## I. INTRODUCTION

American courts have been significantly involved in determining the content and scope of Indian rights and the relationship these legal claims have with federal and state authority.[1] This jurisprudence exhibits the theoretical and practical complexity of allocating rights and authority among overlapping national, state, and tribal sovereignties. Moreover, unlike other common law settler states, American Indian law is premised on the notion of an efficacious tribal sovereignty. [2] This sovereignty pre-exists the American state but is subsumed within the American federation. Yet at the same time the law also exhibits a clear federal dominance; the national government has both the right and the power to override state and tribal authority and sovereignty in its exercise of its constitutional authority over Indians.

This paper argues that the federal-state conflict that arose prior to the American Civil War has profoundly influenced much of the protective aspects of Native American jurisprudence, as found in the seminal Marshall Court opinions. As this law developed in light of state-federal conflict, the underlying policy and legal doctrines, while beneficial to Native American interests, ultimately had little to do with Indian self-determination or protective legal rules. This Antebellum Civil War period was characterized by intense philosophical and legal arguments concerning the nature of the American federation. The Marshall Court in particular became an important, if not primary, proponent of a national view of sovereignty, which it grounded in the international sovereignty of the national government and the 1789 constitutional text. Early American Indian jurisprudence, which was built upon principles of international law, pre-existing British imperial policy, and the various policies (peaceful, aggressive, assimilative) that the nascent United States used in dealing with the tribes, was an area in which this debate developed. The nationalist-minded Marshall Court essentially formulated an Indian Law which, emphasized federal authority and left little room for the states to exercise jurisdiction

[1] I will use the terms "Indian(s)", "Native American(s)" and "indigenous" interchangeably in this paper. When discussing the national and state law concerning Indians, I will use the term Indian Law.

[2] Peter Karsten, Between Law and Custom: "High and Low Legal Cultures" in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand 1600 – 1900 (Cambridge Univ. Press 2002).

over the tribes. At the same time, the Marshall Court used the international aspect of Indian law to depreciate the conception of state sovereignty advocated by the proponents of state rights. The concomitant federal dominance of the pre-confederation international tribes was a further justification for a national conception of sovereignty and federal authority.

From a legal perspective these developments were not necessarily adverse to Native American interests. Their continued governmental existence, property rights, and law were guaranteed by the federal government and legally enforceable. Moreover, the legal efficacy of the Federal-Native American treaty process (which, despite the fraud, misrepresentation, and duress that often-accompanied creation), set forth the mechanism by which the tribes as governmental entities were incorporated into the American federation. Further it established reserved rights for the tribes. However, because they developed in the context of state-federal conflict, the underlying legal discourse had little to do with Indian rights, interests, or continued existence either as a moral, ethical, or legal obligation. Rather the issue involved which jurisdiction had primary authority over Native Americans. Indeed, the history of American policy towards the tribes has been generally hostile towards them as governmental entities holding distinct political and legal rights.[3] And the affirmation of federal dominance inherent within the Court's tribal jurisprudence necessarily established the basis for the extension of federal authority under the plenary power doctrine (i.e. that the 1789 constitution grants the Federal government complete authority over Native Americans)[4] and the conceptual basis for the political question doctrine[5] which precluded judicial vindication and enforcement of Native American rights.

[3] William Bradford, "With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice, 27 AM. INDIAN. REV. 1 (2002).

[4] "The power of Congress over Indian Affairs may be of a plenary nature; but it is not absolute." United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946)(plurality opinion); The Plenary Power Doctrine is sourced in the Commerce Power, Treaty Power and is rooted in [(as suggested in dicta by Supreme Court in United States v. Lara, 541 U.S. 193 at 201 (2004)], "the "preconstitutional powers" of the Federal Government. United States v. Curtiss-Wright Export Corp, 299 U.S. 304 at 315-22 (1936).

[5] "The judicial power over cases and controversies has been limited when the question presented concerns "subject matter that the Court deems to be inappropriate for judicial review….the Court has observed that while there is

## II. AMERICAN INDIAN POLICY INTO THE 19TH CENTURY

American Indian policy after the American War of Independence built upon British and colonial precedent. While often honored only in the breach, the policy presumed that Indian land cessions would be obtained by purchase and that inter-tribal relations were not subject to colonial jurisdiction without consent of the tribe. Prior to 1754, when the British appointed Imperial superintendents located in North America to manage political relations between the British and the Indians, the individual colonial governments had primary responsibility for Indian affairs. They negotiated their own treaties, developed policies and rules concerning land acquisition and jurisdiction, and extended colonial jurisdiction over particular tribes and Indians based on their relationship to the colonial government.[6] The *Proclamation of 1763* sought to completely centralize colonial-Indian relations in the Imperial Crown. It established land purchasing procedures, required licenses and bonds for Indian traders, and sought to establish a boundary between settled areas and tribal lands. Nevertheless, the responsibility for interpreting and enforcing legal rules (from whatever source) continued to be the responsibility of local colonial officials such that in practice there remained considerable variation

"no blanket rule" regarding a judicial consideration of "whether Indians are recognized as a tribe" the question contains "familiar attributes of political questions." These categories of cases that have been identified share some characteristics that make them "beyond judicial cognizance." Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666 at 683-4 (2016).

[6] ALDEN T. VAUGHAN, NEW ENGLAND FRONTIER: PURITANS AND INDIANS, 1620-1675 (Little, Brown and Co. 1965); Yasi Kawashima, *Jurisdiction of the Colonial Courts over the Indians in Massachusetts, 1689-1763,* 42 THE NEW ENG. Q. 532 (1969); Vaughan and Kawashima describe three different relationships that the tribes and individual Indians had with the colonial government. The first category included those tribes who were completely independent of colonial jurisdiction and outside of the colonies boundaries. The second group involved tributary tribes or tribes within the colonial boundary over which the colony had nominal jurisdiction. The third category included those Indians who were jurisdictional treated no differently than other colonists. *See also* Mark D. Walters, *Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal and Customary Laws and Government in British North America*, 33 OSGOODE HALL L. J. 785 (1995).

among the colonies concerning the scope of Indian rights recognized by colonial governments. [7]

Following the American Revolution, the Articles of Confederation reflected a mixture of both the centralizing impulse found in late pre-revolution imperial policy as well as the earlier colony-specific approach.[8] Overlaying the jurisdictional bifurcation was the early attitude of the successful revolutionaries that Indian tribes were "conquered" peoples who had no rights but those granted them by the newly independent states or national government. Early Confederation Congress committee reports emphasized that the "right of soil" and territorial sovereignty belonged to the United States and that tribes could "remain only on her sufferance."[9] The result was that the individual states and United States used high-handed tactics to secure uncompensated land cessions. After some initial successes securing cessions in this way it became apparent that the approach was unworkable in practice. The state and national governments lacked the military power to enforce their claimed rights or secure ceded territory. The tribes resented the American claims to their territory and with British support waged successful military action against American forces and settlers. At the same time, there was considerable disagreement between national and state officials concerning the scope of state power over Indian affairs.[10]

As the 1780s progressed there was a growing consensus that the unilateral approach towards the tribes was neither effective nor just. As Jones notes, the problems with the unilateral approach "forced"

[7] Francis Paul Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834 13-20 (Univ. of Neb. Press, 1970).
[8] Robert N. Clinton, "*The Dormant Indian Commerce Clause*," 27 CONN. L. REV. 1055 (1995) (Article IX reflects the disagreement concerning tension between national authority and the extent of state control over Indians gives Congress "the sole and exclusive rights and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated...").
[9] Reginald Horsman, *United States Indian Policies, 1776-1815*, *in* HANDBOOK OF NORTH AMERICAN INDIANS, VOLUME 4: HISTORY OF INDIAN-WHITE RELATIONS 29 (William C. Sturtevant, ed., Smithsonian Inst., 1988).
[10] Dorothy V. Jones notes that these initial American efforts approached Indian affairs as "a domestic problem." As the efforts to maintain peace, secure American territory from other European powers and obtain land for settlement along the frontier failed American officials were "forced to consider relations *with* the Indians, rather than a unilateral policy *for* the Indians." DOROTHY V. JONES, LICENSE FOR EMPIRE COLONIALISM BY TREATY IN EARLY AMERICA 147-148 (Univ. of Chicago Press, 1982).

Americans officially "to consider relations *with* the Indians, rather than a unilateral policy *for* the Indians." As part of this new approach, it was preferred by many policy makers that the federal government should be given primary authority over Indian tribes which was reflected in the 1789 constitution. In 1787, the Northwest Ordinance set forth a new approach to dealing with tribes and avoiding the excesses of American frontiersman and state policies. Article III of the Ordinance in part stated:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.[11]

The Washington Administration fully implemented a renewed commitment to treaty making, the recognition of the Native Americans' peaceable right to the possession of their lands, and the purchase of land coupled with a uniform national strategy to coordinate Indian affairs. The policy, building on the approach outlined in Art. III of the Ordinance, sought to maintain peace, acquire land, and regulate trade in a way that recognized that the United States had "only limited sovereignty" over Indian Territory and that "the limitations [on federal/state authority] were set by the rights of the Indians inhabiting the land." [12] It presumed that the preferred instruments that should be used in the Indian-American relationship were diplomatic intercourse and treaties. The United States would obtain Indian land by purchase. State and federal jurisdiction, if only in theory, over the tribes was not assumed. As the tribes were in fact politically

[11] *The Northwest Ordinance, 1787;* https://www.ourdocuments.gov/doc.php?flash=false&doc=8 [https://perma.cc/V2YG-U87W].

[12] JONES, *supra*, note 10, at 147 (At page 161 Jones points out that federal Indian policy was partly a product of local political struggles over land because each state laid down conditions for it to give up their claims to western Indian lands to the national government).

independent and could solicit support from Great Britain and Spain, the policy was not only expedient but was also a recognition that the possessory rights asserted by the tribes had a legal basis within the American legal system.[13] The policy also provided for the "civilization" and assimilation of the tribes, an aspect that was increasingly emphasized in later administrations. [14] Signatory tribes were provided with agricultural implements, blacksmith equipment, and other sundry items to facilitate a sedentary agricultural lifestyle. Further, schools were established to introduce the signatory tribes to reading, writing, and Christianity. The Trade and Intercourse Acts of 1790, 1793, 1796, and 1799 codified this approach for the next two decades.

With expansion of American jurisdiction across the Mississippi watershed, federal policy underwent a dramatic shift. The Jackson Administration viewed the treaty making process and federal obligations that resulted from it as an "absurdity" and an "anachronism."[15] The Administration believed that it was "farcical to treat with the Indian tribes as though they were sovereign and independent nations…"[16] The tribes, Jackson wrote, "have only a possessory right to the soil, for the purpose of hunting and not the right of domain…." [17] As such, they were subject to American national sovereignty and state jurisdiction by way of treaty, or if necessary, without their consent. Rather than treat with the tribes to

[13] *Id.* at 157-186. The recognition of aboriginal title is specifically spelled out in the Treaty of Greenville (1795) where the United States relinquished its jurisdictional and land title claims over previously ceded Indian land north of the Ohio River and south of the Great Lakes. Article 5 of the Treaty states: "To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: the Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon, so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States, and no other power whatever." Article 7 of the treaty provided for the right to hunt on ceded lands mentioned in the treaty.

[14] PRUCHA, *supra*, note 7, at 213-224.

[15] Ronald N. Satz, American Indian Policy in the Jacksonian Era 10 (Univ. of Neb. Press 1975).

[16] PRUCHA, *supra*, note 7 at 233.

[17] *Id.* at 234.

mediate Native American-settler relations, the Administration believed that Indian and settler co-existence was fundamentally incompatible. It advocated the complete removal of the tribes in the east of the Mississippi River; a policy enacted by the *Indian Removal Act of 1830*.[18]

The removal policy was not altogether new. It was premised on continued use of treaties to extinguish the tribes' interest in territory to facilitate settlement of the frontier. "Civilization" and assimilation remained policy objectives. In order to placate critics, Jackson also proposed that removal would be voluntary and the tribes would be compensated for relinquishing their lands. Nevertheless, Jackson's position that non-removed tribes would be subject to state law and his refusal to prevent the extension of state authority over territory guaranteed by treaty made emigration to the west hardly "voluntary." The tribes that choose to remain would be subject to state and territorial law; a local law that state officials, federal officials, and Native Americans understood to be destructive of tribal political organization and lifestyle.[19] By the end of the 1840s many of the eastern tribes had removed west.

However, due to tribal resistance and outcry from various humanitarian groups the removal policy was abandoned. The federal government returned to treaty making to extinguish title, establish reservation for the sole benefit of the contracting tribes, and provide for the subsequent provision of the tribes. Meanwhile, the reservations were extensively modified and diminished in the late 19th and early 20th centuries by way of the *General Allotment Act of 1887*.[20] The General Allotment Act of 1887 reversed previous policy that sought to remove tribal governments from settler society through the creation of reservations. Allotment was enacted in the hope that individual Native Americans would abandon their tribal

[18] Indian Removal Act, Ch. 148, 4 Stat. 411 (1830).
[19] See for example, Acts of the General Assembly of the State of Georgia 1830 Section 5, "an Act to prevent the exercise of assumed and arbitrary power, by all persons under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia, occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory," 9dec. 22, 1830), Acts of the General Assembly of the State of Georgia, Annual Session in November and December 1830 (Milledgeville: Carmak & Ragland, 1831) at 114-117.
[20] Dawes Act, ch. 119, 24 Stat. 388 (1887).

identity and adopt "the habits of civilized life". [21] Nevertheless, despite allotment and its objective of destroying tribal organisations and the Indian cultural distinctiveness, the underlying commitment to tribal sovereignty in law and policy continued to be the basis of federal policy.

## III. FEDERAL SUPREMACY, STATE SOVEREIGNTY, AND AMERICAN INDIAN LAW

### *A. The Problem of Sovereignty in the Antebellum United States*

During the development of Federal Indian Policy discussed above, the wider American polity was engaged in an existential struggle over the meaning of the federal union. The fundamental issue concerned whether the individual state governments or the federal government were the primary sovereign governmental entity in the American federation. The controversy surrounding this issue of sovereignty revolved around those who advocated that the sovereign authority resided in Congress and the federal government (the Theory of National Supremacy) and those who located it in the states (the Compact Theory). Both theories accepted John Locke's idea that individuals voluntarily unite together in political bodies to promote mutual safety and advantage, and that by doing so, they establish a governmental authority to which every citizen subjects themselves.[22] Both theories assumed that the people were the only true "sovereign" entity who in turn delegated their authority to the governmental entity. Thus:

> The government...of the state, is that portion, only of the sovereignty, which is by the constitution entrusted to the public functionaries: these are the agents and servants of the people."[23]

[21] D.S. Otis, *The Dawes Act and the Allotment of Indian Lands*, UNIV. OF OKLA. PRESS at 7 (1973).

[22] "The commonwealth seems to me to be a society of men constituted only for preserving and advancing their civil goods....It is the duty of the civil magistrate, by impartially enacted equal laws, to preserve and secure for all the people in general, and for every one of his subjects in particular, the just possession of these things that belong to this life." John Locke, *Letter on Toleration* 65-67 (John Gough ed., Clarendon Press 1968).

[23] Sir William Blackstone, Blackstone's Commentaries Vol. 1 app. 7., (St. George Tucker ed., 1969).

The difference between the two theories was whether the primary political society in the American federation was co-extensive with the state polities or was national in scope. This issue resolved itself into differing perspectives on the nature of the act or agreement that led to the ratification of the 1789 United States Constitution.

The Theory of National Supremacy looked to the language of the Preamble of the 1789 Constitution.[24] It was premised on the Lockean idea that the federal government was an act of the entire people of the United States who created civil and political society as a means to protect themselves from the vicissitudes of the state of nature. Therefore, it was not a creation of the state's themselves.[25] The Marshall Court was a leading exponent of this view in its national jurisprudence. In *McCulloch v. Maryland*, the court stated the position forcefully. "The government," the court declared, "proceeds directly from the people":

> It is established in the name of the people...in order to form a more perfect union, establish justice, ensure domestic tranquility, and ensure the blessings of liberty to themselves and their prosperity.[26]

The fact that the national government had enumerated powers related only to its capacity to do certain tasks, and it did not diminish its overall pre-eminence in the federal system. From this perspective, the states were not co-equal sovereigns independent of the federal government. Rather, they acted as complementary but

[24]The Preamble to the Constitution of the United States reads: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl.

[25] "Whenever, therefore, any number of men so unite into one society, as to quit everyone his executive power of the law of nature, and to resign it to the public, there, and there only, is a political, or civil society. And this is done wherever any number of men, in the state of nature, enter into a society to make one people, one body politic, under one supreme government, or else when anyone joins himself to and incorporates with, any government already made." John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, *in* MAN AND THE STATE: THE POLITICAL PHILOSOPHERS (107-108 (Saxe Commines and Robert N. Linscott eds., 1947). For a discussion of the Lockean precepts to John Marshall's jurisprudence *see* ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL (Princeton University Press, 1968).

[26] McCulloch v. Maryland, 17 U.S. 316, 403-404 (1819) [hereafter *McCulloch*].

necessarily inferior governments. As stated by Chief Justice John Marshall in *Gibbons v. Ogden*:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is necessary to interfere, for the purpose of executing some of the general powers of government.[27]

From this formulation, it followed that a state could not exclude federal authority, nor could it prevent the federal government from pursuing federal objectives within its territory. Like the state government, the federal government acted directly on the individual. It did not act through the instrumentalities of the state. As such, the federal government had both the authority and duty to promulgate, execute, and enforce its laws throughout the nation.[28]

The Theory of National Supremacy not only held that the language of the 1789 Constitution established the preeminence of the federal government, but it also assumed that the federal government was the successor in interest to the British Crown. As such, it possessed international sovereignty, which was not held by the states.[29] This authority was formally transferred by the treaty ending the Revolutionary War. As the court observed in *Johnson v. M'Intosh*:

> By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but also the "propriety and territorial rights of the United States....By this treaty, the powers of government, and the right to the soil, which had previously been in Great Britain, passed definitively to these States [*sic*].[30]

[27] Gibbons v. Ogden, 22 U.S. 1, 195 (1824).
[28] Cohens v. Virginia, 19 U.S. 264 (1821).
[29] *See* FRANCES HOWELL RUDKO, JOHN MARSHALL AND INTERNATIONAL LAW: STATESMAN AND CHIEF JUSTICE ( 1991).
[30] Johnson v. M'Intosh, 21 U.S. 543, 584 (1823).

Nonetheless, in spite of the positive transfer of authority and proprietary rights by Great Britain in the Treaty in 1783, the court's claim to federal international sovereignty from this perspective is was not the equal to that proposition that the 1789 Constitution conferred supremacy in international affairs to the national government at the time the Constitution was ratified. This second proposition suggests that the national government, as a creation of the "sovereign" states is entrusted by those states to engage in foreign relations on their behalf. Rather, the court posited that the individual states themselves never had international standing under positive or customary international law at any time. As stated by Justice Story in his *Commentaries on the Constitution of the United States*:

> From the moment of the declaration of independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation de facto, having a general government over it created, and acting by the general consent of the people of all the colonies. The powers of that government were not, and indeed could not be well defined. But its exclusive sovereignty, in many cases, was firmly established; and its controlling power over the states was in most, if not all national measures, universally admitted.[31]

Thus, the international aspect of the federal government was accompanied by the accruements of international sovereignty. This international sovereignty was never held by the states and was always denied the states. Instead the federal government's international sovereignty arose from the initial collective steps of the individual colonies to resist British sovereignty. And it was not related in any way to state sovereignty or the institutional arrangements by which the states transferred authority to the national government in the 1781 Articles of Confederation or the 1789 Constitution.

[31] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES VOL. 1 203 (1970); Marshall wrote Story regarding his *Commentaries* stating, "It is a subject [the constitution] on which we concur exactly. Our opinions on it are, I believe, identical." ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL VOL. 4 569-70 (1919).

The court supported its position that the national government had international sovereignty to which the states could never be competent by observing that other international states had only recognized the national government (either the Continental Congress or the Confederation Congress) prior to the 1789 Constitution; that the 1789 Treaty Power[32] presumed international recognition by other sovereign states; that only the federal government had the right to wage both offensive and defensive war, and opining that no authority was superior to the federal government when it was exercising its enumerated powers.

Proponents of the Compact Theory were vehement opponents of this view. Supporters of the Compact Theory generally subscribed to the idea that the federal government resulted from a compact between the states "as states" and was not the creation of the American people in their sovereign capacity. The supporters of this theory (the Compact Theory) argued that all the national governments of the United States (the Continental Congresses, the Confederation Congress, and the 1789 Federal Government) were the creation of independent and sovereign states, and that the national government exercised no authority over the states or the people that the states did not themselves possess prior to its creation. They claimed that the 1789 Constitution, despite the language of the preamble, the various powers granted the federal government, and limitations of state jurisdiction, in no way diminished the underlying sovereignty and authority of each state. The federal government had neither domestic nor international pre-eminence but had a residual sovereignty and a paramount interest in international affairs. From this perspective the United States was simply a confederated republic similar to the Swiss confederation described by Swiss international law theorist Emmerich Vattel:

> In short, several sovereign and independent states may unite themselves together by perpetual

[32] Art. VI, sec. 3 of the U.S. Constitution reads "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." A treaty "is in its nature a contract between two nations." Where it is negotiated and ratified with the consent of two-thirds of the Senate it is "to be regarded in courts of justice as equivalent to an Act of the legislature." Foster and Elam v. Neilson, 27 U.S. 253, 314 (1829).

> confederacy, without each ceasing to be a perfect state. They will form together a federal republic: deliberations in common will offer no violence to the sovereignty of each member, though they may, in certain respects put some constraints on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfil the engagements into which he willingly entered.[33]

The Compact Theory squarely posited that the states, as states, were the original Lockean civil society. From the moment of the 1776 Declaration of Independence, each individual colony became a *de facto* and *de jure* independent sovereign state in the domestic and international spheres. They had behaved as such at the Continental Congresses.[34] These independent states then entered into the Articles of Confederation and the 1789 Constitution in order to manage certain affairs common to them all. The powers of the 1789 national government were specifically enumerated powers, which partook a sovereign quality in the area of international relations, but in no way did the 1789 national government's exercise of their powers diminish the sovereignty of the individual states. As such, the individual states and the federal government were co-equal sovereigns under the 1789 Constitution.[35] As co-equal sovereigns, each state could judge the content of federal statutes and judge the constitutionality of particular federal acts, notwithstanding the national judiciary or other national political branches.

[33] Emmerich de Vattel, The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns 18 (Luke White, trans., 1792). Vattel's 1758 Treatise was the most important works on the law of nations in the eighteenth century. Vattel was cited as a major source of contemporary wisdom on questions of international law in the American Revolution and in the early period of the republic.

[34] Claude H. Van Tyne, Sovereignty in the American Revolution: An Historical Study, 12 AM. HIST. REV. 529 (1907).

[35] *See* Jefferson to Samuel H. Smith, August 2, 1823 in which the former president referred to the national and state governments as "two coordinate governments, each sovereign and independent in its department....The one may be strictly called the Domestic branch of government which is sectional but sovereign, the other the foreign branch of government equally sovereign on its own side of the line...." JEAN SMITH, JOHN MARSHALL: DEFINER OF A NATION 664 (1996).

In the decades following President Washington's tenure, the Compact Theory gained more adherents.[36] As partisan fervor rose between the Federalist Party and the nascent Democratic-Republican Party of Thomas Jefferson, the Democrats emphasized the idea of state assent to the Union and the principle of undiminished state sovereignty to argue for a more limited notion of federal authority.[37] Less than a decade after ratification of the 1789 Constitution, Jefferson declared that the powers of the federal government were the result of a "compact to which the states are parties." This compact was one where "each state acceded [to it] as a state" and one in which each state "is an integral party."[38] Later, in *McCulloch*, the counsel for Maryland explicitly put forth this argument against national authority.[39] The position was advanced by Georgia in the Cherokee cases (1829-1834) and the state of South Carolina in the 1832 tariff dispute. In these disputes, both states argued, consistent with Compact Theory, that the national government had no authority to enforce federal legislation. Further, Georgia and South Carolina insisted that each individual state retained an absolute right to judge for itself the constitutionality of various federal laws.[40]

### *B. Conceptions of Sovereignty and State and Indian Land Rights in Antebellum America*

#### 1. Sovereignty and International Law

During the Marshall Court era (1804-1835), international law theorists posited that the sovereignty of a state consisted of two

[36] During the debate regarding the ratification of the 1789 Constitution, the constitutional convention had recognized that legislative ratification of the Articles of Confederation undermined the authority of the national government. For example, James Madison stated in 1788 that "among the defects of the confederation, that in Many of the States, it had received no higher sanction than a mere legislative ratification." ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS 224 (Bantam Books 1982).
[37] Stanley Elkins & Eric McKitrick, The Age of Federalism 719-726 (1993).
[38] Joseph Story, *supra,* note 31 Commentaries on the Constitution of the United States 329 (Da Capo Press 1970).
[39] McCulloch v. Maryland, 17 U.S. 316, 363-369 (1819).
[40] Albert J. Beveridge, The Life of John Marshall Vol. 4 555-573 (1919).

parts: internal sovereignty and external sovereignty.[41] Internal sovereignty is the "right of control" which is inherent in the people of any state, or vested in its ruler, by the constitution or by municipal law.[42] As the Vattel noted:

> Every Nation which governs itself, under whatever form [democracy, aristocratic, monarchy], and which does not depend on any other Nation, is a *sovereign State*. Its rights are, in the natural order, the same as those of every other State. Such is the character of the moral persons who live together in a society established by nature and subject to the Law of Nations. To give a nation the right to a definite position in this great society, it need only to be truly sovereign and independent; it must govern itself by its own authority and its own laws. [*emphasis in original*][43]

The sovereign state had both the right and duty to preserve its existence and expect the obedience of individuals who lived within its border to abide by its rules.

> When men, by the act of associating together, form a State or Nation, each individual agrees to procure the common good of all, and together agree to assist each in obtaining the means of providing for his needs and to protect and defend him.[44]

This control over individuals and the competence to make law or legislate and bind the political society differentiated the sovereign state from a non-sovereign state. "Sovereignty" as international

[41] I owe this topology to Henry Wheaton. Wheaton was the Court Reporter for the Marshall Court from 1816 and 1827. He oversaw twelve volumes of the U.S. Reports. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (William Beach Lawrence ed., 6th ed.1855).
[42] *Id.* at 29-30.
[43] Emmerich De Vattel, Le Droit des Gens, ou Principes de la Loi Naturelle, appliques a la Conduite et aux Affairs des Nations et des Souverains, in THE CLASSICS OF INTERNATIONAL LAW 11 (George D. Gregory trans., James Brown Scott ed.,1964).
[44] *Id.* at 13.

theorist Pufendorf stated, "is properly used only as over men...."[45] The ability to bind members of the society must be paramount within that society.

Regarding internal sovereignty, American legal theory posited that actual sovereignty rested with the American people.[46] Government has a derivative sovereignty which was the result of the erection of some governmental authority.[47] The Marshall Court accepted this proposition as axiomatic of the American experiment. As the court stated in *Marbury v. Madison*:

> That the people have an original right to establish for their future government, such principles, as in their opinion, shall most conduce to their own happiness is the very basis on which the whole American fabric has been erected.[48]

The sovereignty of the people, upon the creation of the state and national governments, was the assertion of the absolute right of control within the territory of the United States. As Chief Justice Marshall noted:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is

[45] Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*," *in* THE CLASSICS OF INTERNATIONAL LAW 585 (C.H. Oldfather & W.A. Oldfather trans., James Brown Scott ed., 1964).

[46] "It has been thought a considerable advance towards establishing the principles of Freedom to say that Government is a compact between those who govern and those who are governed; but this cannot be true, because itis putting the effect before the cause; for as man must have existed before governments existed, there necessarily was a time when governments did not exist, and consequently there could originally exist no governors to form such a compact with. The fact therefore must be that the individuals themselves, each in his own personal and sovereign right, entered into a compact with each other to produce a government: and this is the only mode in which governments have a right to arise, and the only principle on which they have a right to exist. THOMAS PAINE, THE RIGHTS OF MAN (1974) 35 (Hypatia Bradlaugh Bonner ed., 1937).

[47] "Power in the People is like in the sun, native, original, inherent, and unlimited, by anything human. In government it may be compared to the reflected light of the moon; for it is only borrowed, delegated and limited by the intention of the people, whose it is, and whom governors are to consider themselves responsible...." William Blackstone, Blackstone's Commentaries Vol 1. app. 9 (St. George Tucker ed., 1969) (quoting Burgh, *Political Disquisitions*, vol. 1, c. 2).

[48] Marbury v. Madison, 5 U.S. 137, 176 (1803).

> susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction....[49]

In *McIlvaine v. Coxe's Lessee*, the court ruled that the internal sovereignty of the United States was complete from the time the states declared themselves independent.[50]

Contrary to internal sovereignty which is premised on the exercise of exclusive authority within a territory, external sovereignty is the sovereignty conferred upon a sovereign state by it engaging in intercourse with other sovereign states. A state which possesses internal sovereignty and control does not need to seek external sovereignty as it is completely independent. However, if a state wishes to engage in the obligations and rights of states, to benefit from that society of nations, then it must be recognized as being sovereign in an external sense. International sovereign states are juridically equal regardless of their actual internal and external power.

The society or community of international states or nations is where the international relations of a state are maintained. There are no rights bestowed on individuals. Rather, the rights and duties are owed to other members of the society of nations. The issues, for the most part, are those of war, peace, and commerce. External sovereignty is evidenced by the use of treaties for peace, alliances, or commerce in external relations and the use of force on external neighbors in defense of the sovereign state.

The Marshall Court subscribed to the view that external sovereignty was a function of recognition by other states. This concern was partially the result of the fact that some states, such as the revolutionary United States, in their efforts to become independent, had no practical means of entering the society of nations without recognition. Prior to recognition and entry into the society of sovereign states, international law conferred no rights upon a rebellious state, a colony, or an internally sovereign state. International law had no concern for the rebellious or revolutionary state, other than the developing law of neutrality, and the law did not consider the revolutionary state worthy of recognition. Rather,

[49] Schooner Exchange v. McFaddon & Others, 11 U.S. 116, 136 (1812).
[50] McIlvaine v. Coxe's Lessee, 29 U.S. 209, 211 (1808).

in these types of internal conflict, the rights and duties of the sovereign asserting a right of dominion were to be considered as dispositive by other sovereign states. The Court in *Rose v. Himely*, which involved the seizure of a ship by the rebellious colony of St. Domingo, recognized the importance of the assertions of claims of sovereignty by a state recognized under the law of nations:

> It has been argued, that the colony, having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations, as a sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of Vattel have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide, whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.[51]

Thus, recognition was in many ways tantamount to actual independence and sovereignty regardless of a particular revolutionary government's dominion and authority over its territory or the efforts by an established sovereign to prevent statehood. As such, the failure of the international community to recognize the individual states (as opposed to the national government which was recognized) during the revolutionary was evidence of their diminished sovereignty within the American federation.

2. Doctrine of Discovery

The issue of who would control the alienation of Indian lands in the post-revolutionary period and who had jurisdiction over the

[51] Rose v. Himely, 8 U.S. 241, 271 (1808).

tribes brought into sharp focus the divergent theoretical underpinnings of the American federation discussed above. The three contending legal doctrines on the legal status and rights of Indian tribes were the Doctrine of Discovery, the Doctrine of the Landed States, and the Doctrine of Natural Rights. Each had a different conception of Indian rights, which, in turn, supported a different interest in the debate concerning who would control the sale and settlement of frontier lands. Ultimately, the issue involved which level of government could claim pre-eminent status as a receptacle of the sovereign will of the American people. The Marshall Court was the fulcrum of the debate and systematically undermined the legal positions that would challenge federal supremacy.

The Doctrine of Discovery, as articulated by Chief Justice Marshall in *Johnson v. M'Intosh*, holds that Indians maintained occupancy rights subject to the right of extinguishment by the federal government. Any other extinguishment of Indian title or alienation of Indian land title by either Indians or the states was void under this Doctrine.[52]

The Doctrine of Discovery was perhaps most forcefully asserted in the *Royal Proclamation of 1763.* The Proclamation stated that the Indians had a continued right to occupancy in their lands subject to the Crown's right of first purchase.[53] The rights of Indians to lands not ceded or purchased by the Crown were reserved for the occupying Indians. Private citizens were strictly enjoined from making purchases and settlements from the Indians without license from the Crown. The federal government asserted this claim as successor in interest to the Crown, as well as under the 1789 federal Constitution, which granted the federal government the authority to regulate commerce "with the Indian Tribes", and its treaties were declared to be supreme law.

[52] The doctrine was extensively debated, by both proponents and critics. Its critics in international law were many. Grotius, for example did not recognize discovery as establishing full title. Pufendorf noted "The bare seeing a thing or the knowing where it is, is not judged sufficient title of Possession." M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT IN BACKWARD TERRITORY 131 (1926) (quoting Pufendorf).

[53] For an in-depth discussion of the Proclamation see Robert N. Clinton, The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-States Conflict Over the Management of Indian Affairs, 69 BOS. UNIV. L. REV. 329 (1989).

The Doctrine of Discovery was grounded in positive international law. [54] Positive international law assumed that dominion or sovereignty of newly discovered territory need not depend upon ownership of property, but rather, was grounded on the consent of other state actors to the "principal of exclusivity" regarding the newly discovered territory. The states whose "sovereign" consent was considered necessary were those European states engaged in discovery and conquest. The principle of exclusivity overlay a more fundamental premise of the international system; that all title ultimately rests upon the sword or the pre-emptive power of the state to purchase land. Hugo Grotius, the international legal theorist, stated that:

> [A]ccording to the law of nations, not only the person, who makes war upon just grounds; but any one whatever, engaged in regular and formal war, becomes absolute proprietor of everything which he takes from the enemy: so that all nations respect his title, and the title of all, who derive through him their claim to such possessions.[55]

The Doctrine of Discovery had little room for either the "non-civilized" states or for the indigenous inhabitants of territory claimed by European states. [56] The exclusivity claimed by one international actor necessarily derogated the sovereign rights of the indigenous peoples regardless of the actual state of affairs on the ground. European legal theorists simply side-stepped the issue of "actual" tribal control of the land by denying that indigenous states had sovereignty in the international sphere. It then followed that the claims and rights of any indigenous inhabitants were subordinate to those of the first European discoverer and that discoverer's successors. The legal relations governing the discoverer and the indigenous people were determined by the internal law of the

[54] F. Von Der Heydte, *"Discovery and Annexation in International Law*" 29 AM. J. OF INT'L L. 448 (1935).
[55] HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 335 (A.C. Campbell trans., M. Walter Dunne, ed., 1901).
[56] For example, Pope Alexander's Papal Bull of 1493 whereby he sought to divide the new world between Spain and Portugal. The Pope reserved from his grant to Spain all lands which had been occupied by any other "Christian" nation. Henry Wheaton, *Elements of International Law*, *in* THE CLASSICS OF INTERNATIONAL LAW 201-202 (James F. Scott ed., 1936).

discoverer. This law could either protect the ownership rights of the tribes and individual Indians or be destructive of their interests. In any event, the Doctrine of Discovery provided no legal basis for the tribes to assert any rights under international law or within the domestic law of the European discoverer.

### 3. Doctrine of the Landed States

The "landed" states were those states which had colonial charters that granted them land beyond the Appalachian Mountains. [57] The charters, in one form or another, had granted the colonies who held them all title and ownership of land held by the Crown within the prescribed limits of the charter, whether or not the land was occupied by Indians. The states asserted a right to control and alienate Indian lands based on their Crown charters and their sovereignty as states gained in the revolutionary struggle.

It has been argued that these claims to the frontier land were essentially a legal formulation by elites in each landed state to secure western lands from the central government after the revolution freed the colonies from British control.[58] Be this as it may, the landed states did not derive their claim over Indian lands from positive international law or prerogatives of the British Crown. Rather, the doctrine was based upon a Lockean conception of society and property. Locke argued that things in nature which were removed from their natural state by human labor became an individual's property.[59] For those who settled the frontier, Locke stated that "he who appropriates land to himself by *his* labor, does not lessen but increases the common stock of mankind. [*emphasis in original*]"[60] Concomitant with the appropriation of property from nature for the private good, free individuals have the right to consent to

[57] The "landed" states included Virginia, New York, New Hampshire, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia. The landless states included Maryland, Pennsylvania, Rhode Island, Delaware, New Jersey.

[58] Gordon Wood, The Creation of the American Republic 1776-1787 162-196 (1969).

[59] John Locke, *Two Treatise of Government in* MAN AND THE STATE: THE POLITICAL PHILOSOPHERS 327-329 (Saxe Commines & Robert N. Linscott eds., 1963).

[60] *Id.* at 336.

government to order their relations. The consent of individuals to the creation of government is the basis of sovereignty. [61]

The resultant formula held that individuals and their sovereign states had both the right and duty to possess and develop the wild and vacant lands held by the Indians. Thomas Jefferson stated this thesis in "*A Summary View of the Rights of British America*" in 1774:

> The fictitious principle that all lands belong originally to the king, they [the colonists] were early persuaded to believe real, and accordingly took grants of their own from the crown....It is time therefore for us to lay this matter before his majesty, and to declare that he has no right to grant lands of himself. From the nature and purpose of civil institutions, all the lands within the limits which any particular society has circumscribed around itself, are assumed by that society, and subject to their allotment; this may be done by themselves, assembled collectively, or by their legislature, to whom they may have delegated sovereign authority. And if they are allotted in neither of these ways, each individual of the society may appropriate to himself such lands as he finds vacant, and occupancy will give him title.[62]

Additionally, the fact that Indians generally used territory for hunting rather than agriculture gave additional impetus to the idea that the Americans could appropriate land under Lockean justifications.[63]

[61] Thomas Paine, The Rights of Man 103-106 (1974).

[62] Thomas Jefferson, *A Summary View of the Rights of British America*, *in* THE PORTABLE THOMAS JEFFERSON 18-19 (Merrill D. Peterson ed., 1985).

[63] For example, John Quincy Adams in 1802 discussed the scope of the Indians' possessory rights. "The Indian right of possession itself stands, with regard to the greatest part of the country upon a questionable foundation. Their cultivated fields, their constructed habitations, a space of ample sufficiency for their subsistence, and whatever they had annexed to themselves by personal labor, was undoubtably by the laws of nature theirs. But what is the right of a huntsman [?][*sic*]...Shall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world? Shall he forbid the wilderness to blossom like a rose? Shall he forbid the

While the Doctrine of Discovery essentially posited that the sovereign claim was an "exclusionist act" to keep other sovereigns out, the Doctrine of Landed States claimed that state sovereignty over the Indian frontier arose from the cultivation and habitation of land by citizens of the state government who is asserting sovereignty. In this sense, Indian title and jurisdiction over Indians was also a matter controlled by municipal law. Civil society did not protect the interests of aboriginals who engaged in occupations such as hunting. However, where the Doctrine of Discovery was essentially unconcerned about the rights of indigenous inhabitants, the Doctrine of the Landed States denied at the level of theory that Indians held anything more than temporary occupancy rights or that they were sovereign in any respect due to their non-agricultural existence and incompetence to form a civil society.

4. Doctrine of Natural Rights of Indians

The natural rights of the Indians to own and possess their territory in a manner that would be upheld by American courts were supported by those who wished to protect individual purchases from them. If tribes could convey full title in fee, huge land purchases from them would benefit land speculators who were moving west ahead of state and federal authority. This perspective necessitated a legal position that held that tribes were independent entities on the international plane and that individual Indians had the same natural rights, particularly with respect to property, as Europeans.

The Doctrine of Natural Rights of Indians had two primary sources. First, the doctrine extended the logic of Locke and his Republican proponents in America to individual Indians and Indian tribes. Samuel Wharton, a long-time speculator and member of the Continental Congress, set forth this view in the 1781 pamphlet *"Plain Facts: Being an Examination into the Rights of the Indian Nations of America to their Respective Countries*," which he published to persuade the delegates to affirm land company claims

oaks of the forest to fall before the axe of industry and rise again transformed into habitations of ease and elegance?" Howard R. Beram, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637, 639-640 (1978) (quoting John Quincy Adams).

in Virginia's proposed northwest cession.[64] Wharton declared that Indians followed the "first immutable law of nature" in exercising their God-Given rights of self-preservation—rights that necessarily included the right to acquire, hold, and alienate property. [65] Because the Indians had natural rights, Europeans could not deprive them of the use and enjoyment of their dominions. Unless the particular tribe was conquered, the law of these societies remained in effect. Non-conquered Indians could sell their land to whomever they pleased,, and the federal and state governments were bound to recognize the conveyance.[66]

Second, the Doctrine of Natural Rights outright rejected the idea that the discovery of new lands extinguished the proprietary rights of the Indians as a matter of international law. This point of view was exposited by Victoria, a Dominican priest and legal theorist. Victoria stated that Indians "were true owners, both from the public and private standpoint" and that the "discovery of them by the Spaniards had no more effect on their property than the discovery of the Spaniards by the Indians had on Spanish property." [67]

*C. Federal and State Sovereignty and the Early Indian Cases*

These various conceptions of state, federal and Indian sovereignty and rights, promoted by different contending interests in early American society, clashed in the seminal Marshall Court Indian law cases. The impact of these foundational opinions, *Fletcher v. Peck*, *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, has been much disputed. Robert A.

[64] Samuel Warton, Plain facts: Being an Examination into the Rights of the Indian Nations of America, to their respective Countries; And a Vindication of the Grant from the Six United Nations of Indians, to The Proprietors of Indiana, Against the Decision of the Legislature of Virginia Together With Authentic Documents Proving That the Territory, Westward of the Allegany Mountain, never belonged to Virginia (1781), https://archive.org/details/plainfactsbeinge00whar; *See also* James D. Anderson, *Samuel Wharton and the Indians' Rights to Sell Their Land: An Eighteenth-Century View*, 63, The W. Pa. Hist. Mag. 121 (1980); Robert A. Williams Jr., Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America 298-300 (2005).

[65] *Id.* at 4-5.

[66] *Id.*at 26-28, 112.

[67] Felix S. Cohen, *Original Indian*, 32 MINN. L. REV. 28, 45 (1947). *See also* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1942).

Williams argues that these early opinions of Chief Justice John Marshall were representative of, or "reinforced",", racial stereotypes that justified the savagery and injustices inflicted upon the tribes by the colonial project and the ascendancy of white American civilization.[68] Lindsay Robertson has argued that the *Johnson v. M'Intosh* opinion was crafted by Justice Marshall to address several contemporary political problems between Virginia and Kentucky concerning land grants to revolutionary war veterans. He argues that Marshall's opinion went beyond the legal issues in the *M'Intosh* case (which according to Robertson concerned the effect of the *Royal Proclamation of 1763* on pre-revolutionary war Indian land purchases), so that Marshall could ground sovereign title under the Discovery doctrine and establish a precedent to extend state jurisdiction over the tribes in a manner which ignored both inherent tribal rights to autonomy and federal constitutional prerogatives.[69]

Yet these cases, despite the use of racist language, images of Indian savagery and Marshall's immediate political objectives, fundamentally espouse a notion of federal supremacy over the states and tribes. Placed in the context of the federal-state dispute and the various justifications for the legal efficacy of Indian rights,

[68] Robert A. Williams Jr., Like A Loaded Weapon: The Rehnquist Court, Indian Rights, And The Legal History Of Racism In America (2005).

[69] LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 77-94 (New York: Oxford University Press (2005)); *See e.g.* Caldwell v. State, 1 Ala. 327 at 327, 470-72 (1832), where Taylor, J. of the Supreme Court of Alabama writes "After a patient and laborious investigation, I can find nothing, either in ancient charters; the conduct of any European power, or the opinion of any respectable writer of older date than 1825, which tends in the remotest degree to countenance the opinion that the Indian tribes have ever been considered as distinct and independent communities. In the language of Chief Justice Marshall, in the case of *Johnson* vs. *McIntosh*, "discovery gave an exclusive right to extinguish the Indian title of occupancy either by purchase or conquest; and gave them" (the discoverers) "also, a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise." "The circumstances of the people" did not "allow them to exercise" jurisdiction over many of the tribes within the limits of the colonies at an early day." Those tribes lived beyond their reach or control, and wandered over immense forests which the people of the colonies never had penetrated, and within and beyond which, they had no intercourse. But so fast as these forests disappeared before their extending settlements, and those once distant tribes were brought within reach of the laws, and in contact with the settlements of their civilized and more powerful neighbors; so far, in fine, "as the circumstances of the people would allow them to exercise" jurisdiction and sovereignty over their persons and their country; thus fast they were brought under the influence of those laws, and compelled to yield to that jurisdiction and sovereignty."

the Court's notion of national supremacy necessarily enhanced tribal sovereignty when it grounded national and international sovereignty in the federal government. The Court accepted the idea of legally enforceable Indian property rights and recognized that tribes were self-governing entities within the American legal system. Moreover, as part of the effort to demonstrate that the national government was supreme within the American federation, the Court compared and contrasted tribes with the states – emphasizing the historical reality of the sovereign and independent tribes to the dependent colonial non-sovereign status of the states.

Yet the Court's conception of national power, with its demonstration that federal authority both trumped and subsumed the pre-existing sovereign tribes, also established that Indian rights were ultimately subject to federal power; and their rights and possessions could be disregarded without their consent or legal intervention by the courts. This "legal discourse of empire" over the Indians fully surfaced only after the triumph of the nationalist conception of sovereignty in the American Civil War with the abandonment of the treaty-making in 1871 by Congress and articulation of the plenary power doctrine in *United States v. Kagama* and *Lone Wolf v. Hitchcock*.[70] In this sense, American Indian law is imbricated with the sovereign and institutional prerogatives of the national state and the socio-economic dominance of the American settlers. Nevertheless, the contest over which level of government is supreme within the federal structure carved out a set of legal principles and legal doctrines that are modestly solicitous of Indian rights. Despite legislative policies directed towards assimilation and the judicial re-interpretations that have significantly narrowed the scope of tribal sovereignty, these principles continue to inform Indian jurisprudence.

### 1. *Fletcher v. Peck*

In *Fletcher v. Peck*, the Marshall Court held that a Georgia statute, which annulled a previous conveyance of public lands authorized by a prior enactment, as violative of the obligation of contracts clause (Art. I, § 10) of the Constitution.[71] While essentially

[70] United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[71] The Contracts Clause is found at U.S. Const. art. I, §X

a contracts clause case, *Fletcher v. Peck* remains the first major case regarding the nature of tribal rights and Indian title. The case involved a grant of land by the State of Georgia to an individual. Only Indians occupied the land. After several years, the original grant was rescinded by the Georgia legislature because of alleged undue influence by various interested individuals at the time of the original grant.

Considering the question of Georgia's right to convey the land, the Court directly confronted the issue of whether the state had title to it. The plaintiff argued that Georgia was never seized of the land at the time of conveyance, so there was no valid conveyance. Instead, it was the property of either the United States or the Indians. He argued that the reservation of land for the Indians in the Proclamation of 1763 "excepts the lands on the western waters from the colonies within whose bounds they would otherwise have been...." As these lands were not part of Georgia at the commencement of the War of Independence, but were acquired in the war, the actual title lay with the United States, not Georgia. Such conquests, the plaintiff argued, were "made by joint arms, for the joint benefit of the United States, and not for the benefit of any particular state." [72] As Georgia did not own the land, the conveyance was void.

The Court rejected this argument. "The question of whether the vacant lands within the United States became joint property or belonged to the separate states… at one time threatened to shake the American confederacy to its foundation." It would not disturb the compromise. [73] Instead, title to all lands conquered or occupied during the War of Independence went to "the people of the several states."

> [A]ll the right and Royal prerogatives devolved upon the people of the several states, to be exercised in such manner as they should prescribe, and by such governments as they should erect. The right of disposing of the lands belonging to a state naturally devolved upon the legislative body; who were to enact such laws as should authorize the sale and conveyance of them.[74]

[72] Fletcher v. Peck, 10 U.S. 87 at 125, 142 (1810).
[73] *Id*. at 142.
[74] *Id.* at 121.

With the rejection of the idea that the western lands were held in fee simple by the United States, the Court needed to consider the nature of the conveyance. The dilemma facing the Court on this issue was acute. In 1802, Georgia had conveyed all the interest it had in the frontier lands to the federal government when the 1796 Non-Intercourse Act was renewed. [75] In this session, the parties agreed that Indian lands would be preserved from seizure or entry without their consent and that Indian rights would be defended against white settlers by the federal government.[76] However, prior to this 1802 cession, the Georgia legislature had "vested absolutely" those lands in a private individual. The *Fletcher* Court noted,,"[T]he grant, when issued, conveyed an estate in fee simple to the grantee,...This estate is transferable." [77] Yet this perfect title at common law could lead to an ejectment action against the Indian occupiers.[78] The conveyance and the theoretical possibility of an ejectment action directly challenged national supremacy in Indian affairs.[79]

The Court accepted the argument that Georgia had the right to dispose of lands within its territory. However, the Court did not embrace the argument that sovereignty and title of the frontier lands had passed from Great Britain directly to the States at the time of the revolution.[80] Rather, the Court reaffirmed federal authority and hinted at the underlying sovereign pre-eminence of the national government. The Court lessened Georgia's governmental authority by disaggregating the legal construct that merged all sovereign authority and title in the Crown. This concept, if adopted in *Fletcher,* would have buttressed the claim that the states were the pre-eminent receptacles of sovereign authority in the American federal system. Also, the Court upheld Indian title as an encumbrance on the land which the state could not extinguish without federal assistance. Thus, the Indian title actually upheld federal pre-eminence. As such, the Court, consistent with

[75] PRUCHA, at 43-50 (1962).
[76] 4 Albert J. Beveridge, The Life of John Marshall 539 (1919).
[77] *Fletcher,* 10 U.S. at 134.
[78] "It was doubted whether a state can be seized in fee of lands, subject to the Indian title, and whether a decision that they were seized in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title." *Fletcher,* 10 U.S. at 142.
[79] WILLIAMS, *supra* note 68, 65 at 305-307.
[80] *Id.* at 308.

international law, found that the federal government had both dominion and sovereignty in an absolute sense.

English legal theory had posited that a "fundamental maxim and necessary legal principle" of land tenure is "the King is the universal lord and original proprietor of all in his kingdom" and that "all lands were originally granted out by the sovereign, and are [the tenures], therefore, holden, either mediately or immediately of the crown."[81] American legal theorists adopted the same principle.[82] From this legal construct, it would follow that an independent sovereign Georgia, as successor to the Crown, would be the ultimate source of unencumbered title. Nevertheless, the *Fletcher* Court, after ruling that Georgia did indeed have possession and authority to transfer the land in question, did not hold that Georgia was the source of all land titles as sovereign.

First, the Court preserved the derivation of title from the British Crown as to the exterior boundaries of the territory. After a long recitation of the respective transfers of land under the British Crown, the Court noted that the Proclamation of 1763 was:

[81] BLACKSTONE, *supra*, note 23 at 50, 52 n. 6.

[82] It is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king was the original proprietor of all the land in the kingdom, and the true and only source of title.1 In this country we have adopted the same principle, and applied it to our republican governments; and it is a settled and fundamental doctrine with us, that all valid individual title to land, within the United States, is derived from the grant of our own local governments, or from that of the United States, or from the crown, or royal, chartered governments established here prior to the revolution. This was the doctrine declared, in this state, in the case of Jackson v. Ingraham, and it was held to be a settled rule, that our courts could not take notice of any title to land not derived from our own state or colonial government, and duly verified by patent. Even with respect to the Indian reservation lands, of which they still retain the occupancy, the fee is supposed to reside in the state, and the validity of a patent has not hitherto been permitted to be drawn in question, under the pretext that the Indian right and title, as original lords of the soil, had not been extinguished. This was assumed to be the law of the land, by the Supreme Court of this state in Jackson v. Hudson,3 and the same doctrine has been repeatedly declared by the Supreme Court of the United States.4 The nature of the Indian title to lands lying within the jurisdiction of a state, though entitled to be respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to a seizin in fee on the part of the government within whose jurisdiction the lands are situated. Such a claim may he consistently maintained, upon the principle which has been assumed, that the Indian title is reduced to mere occupancy. JAMES KENT, COMMENTARIES ON AMERICAN LAW, LECTURE 50 OF THE FOUNDATION OF TITLE TO LAND, *available at* https://lonang.com/library/reference/kent-commentaries-american-law/kent-50/ [https://perma.cc/9CHL-Z8XP].

> a temporary arrangement suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved but is not conceived to amount to an alteration of the boundaries of the colony.[83]

If the Court had wished to emphasize the limits and the authority of Georgia as a "sovereign and independent" entity, and recognized as such by Great Britain in the treaty ending the revolutionary war, this long recitation would have been unnecessary.[84] The Court simply would have stated that the territory of Georgia was delimited by the convention between South Carolina and Georgia of April 1787, as described in the opinion. At that time, prior to the 1789 Constitution, both would have been sovereign and independent states with the authority and capacity to determine their own borders by mutual agreement. While mentioning the convention, the Court did not find it dispositive of the issue. Instead, the Court, relying on earlier British acts, clearly insisted that the state of Georgia existed only within the pre-existing limits of the colony of Georgia, which were drawn under the sovereign prerogative of the British Crown.

Second, the derivation of title as to the exterior boundaries of Georgia was paralleled by the continued existence of Indian title, recognized by and derived from the Crown under the Doctrine of Discovery, and now held by the federal government. Alienation was subject to national restrictions. The Court noted that Indian title was not absolutely repugnant to seisin in fee on the part of the State.[85]

[83] *Fletcher* 10 U.S. at 142.

[84] *Id.* at 141.

[85] The dissent of Justice Johnson suggests the radicalism of the Court's reasoning in this regard. "We legislate upon the conduct of strangers or citizens within their [the Indian tribes] limits, but innumerable treaties formed with them acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching on their territory, makes it unnecessary to insist upon their right of soil. Can, then, one nation be said to be seized of a fee-simple in lands, the right of soil of which is in another nation? It is awkward to apply the technical idea of fee simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs...In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it." Johnson went on to argue that the rights of the state to Indian lands within their boundaries was the right of pre-emption and the right of conquest which was ceded to the federal government. *Id.* at 146-47. In *M'Intosh v. Johnson* the Court found that such rights never belonged to the individual states.

At the same time, the conveyance could not diminish the Indian title. Notwithstanding the seisin in fee, "Indian title...was certainly to be respected by all courts, until it was legitimately extinguished."[86] As the *M'Intosh* Court noted a decade after *Fletcher*, Indian title was not "a right to property and dominion, but a mere right of occupancy.[87] Nevertheless, the Court's pronouncement had the effect of precluding an ejectment action, thereby preserving federal supervision over the Indians, while maintaining Georgia title. Indian title was "to be respected by all Courts," (*emphasis added*) but Georgia had no pre-emptive right to extinguish such title. As such, its title could not be sustained in state or federal courts against the tribes. Federal supremacy protects Indian title, notwithstanding a state conveyance. These restrictions were found in the nature of the constitution.

> Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass.[88]

Moreover, as the federal government was created by all the people of the several states, it possessed the right and inherited Royal prerogative which allowed it to encumber Georgia's title. In the end then, Georgia's conveyance of land in *Fletcher*, a conveyance that the legislature of Georgia had the authority to transact concerning land "within the State of Georgia" and under the jurisdiction of the state, could not undermine federal authority to determine the final disposition of land occupied by the tribes.[89] Individual grantees needed the federal government to extinguish Indian title.

[86] *Id*. at 154.
[87] "As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign and independent nations." STORY, *supra* note 31 at 15 §152.
[88] *Fletcher,* 10 U.S. at 136.
[89] *Id.* at 142.

Finally, the Court refused to find any sovereignty in Georgia's assertion of title over its western lands as they became settled. The Court's characterization of the land in question left little doubt that the Lockean civil society – the source of sovereignty -- was to be found at the national level. Given the argument made by the Plaintiff concerning the title to the western lands by right of conquest, the Court had the opportunity to find Georgia's title in conquest or recognition of Great Britain but chose not to do so. Under international law, acquisition of title by conquest is an assertion of sovereign right or can lead to sovereignty.[90] Rather, the international law precepts the Court used in *Fletcher* pointed away from finding any significance in Georgia's title. The land claimed and subsequently conveyed in *Fletcher* was considered "vacant" by the Court even though it was assuredly occupied by Indians. This use of the term "vacant" could not have been used without deliberation. The seizure and ownership of vacant land, as Georgia's arms may have done in the revolutionary war, as opposed to settled or occupied land, does not bring the title of those lands within the ambit of sovereign authority. According to Pufendorf, a state or group of men cannot acquire sovereignty over vacant land by seizing it by just force.

> For since no right inheres in such things [vacant lands] to prevent any man being able to claim them for his own ...no special title is needed to secure dominion over them, but mere physical apprehension with the intention to keep them for one's own is enough. But since men are by nature all equal, and so no one is subject to another's authority, it follows that mere force and seizure are not sufficient to constitute legitimate sovereignty over men, but that there is need of some other additional title. Therefore, when Grotius, Bk. II, Ch. iii, Section 4 lays it down that, 'Of things which properly belong to no one, two are capable of seizure, sovereignty and

[90] "But according to the law of nations, not only the person, who makes war upon just grounds; but any one whatever, engaged in regular and formal war, becomes absolute proprietor of everything which he takes from the enemy: so that all nations respect his title, and the title of all, who derive through him their claim to such possessions." HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 335 (A.C. Campbell trans., 1901).

> dominion, in so far as the latter is distinguished from the former", the word "sovereignty" should not be taken in its proper sense, and as that which is exercised over men, but of sovereignty over territories, the effect of which is that no one should settle in them against our will, unless he is willing to become our subject. For otherwise a man is not included in those things which belong to no one, but he who is not another's is his own.[91]

In Pufendorf's terms, it appears that the Court placed sovereignty in the federal government. Georgia could not claim sovereignty over all individuals, citizens and non-citizens within its territory.[92] Georgia could claim authority and title over the land, but the Court found that the authority over individuals – the Indians – lay in the national government. For Indian title (which implies Indian occupation and use) is "certainly to be respected by all courts, until it be legitimately extinguished."[93] The Court reinforced these restrictions by also noting that the restrictions of Indian title on fee simple ownership are due to the Proclamation of 1763, an act of the sovereign British Crown.

The Court anchored its distinction between title and sovereignty by extending Lockean logic to the disposition of the lands. As Jefferson had observed, the nature and purpose of civil institutions and all land around and within a particular society, "are assumed by that society and subject to their allotment only." This may be done by "themselves, assembled collectively, or by their legislature, [or their] delegated sovereign authority." The *Fletcher* decision emphasized national authority and involved national sovereignty. The Court noted that the vacant land issue "within the United States" was "compromised" among the national government and the states.

91 5 SAMUEL PUFENDORF, SAMUEL PUFENDORF ON THE LAW OF NATURE AND NATIONS (O.H. Oldfather & W.A. Oldfather eds., Oceana Publications, Inc 1964) (1688).

92 Chief Justice John Marshall noted that "The jurisdiction of courts is a *branch* (emphasis in original) of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction...." *Schooner Exchange*, 11 U.S. at 136 (1812).

93 *Fletcher*, 10 U.S. at 142-43.

It was not for the individual states to allot territory in a Lockean sense – it was for the national government and national civil society.

### 2. *Johnson v. M'Intosh*

*Johnson v. M'Intosh* was an ejectment action brought by individuals who claimed title to land purchased from the United Illinois and Wabash Land Companies. The companies in turned claimed title based on a purchase from Indians in present-day Indiana and Illinois.[94] The issue in *M'Intosh* was whether a valid title could be obtained from a tribe by a private purchaser. The Court found that the tribe could not convey good title because all title in the United States was grounded in the federal governments' exclusive pre-emptive right to extinguish Indian title. Chief Justice Marshall, writing for a unanimous court, grounded this pre-emptive right as a corollary of the Discovery doctrine, an international law doctrine that equated "discovery" by European nations with exclusive title of the discovered land. Marshall recognized how "extravagant the pretension of converting the discovery of an inhabited country into conquest may appear" nevertheless held the title did not depend upon European occupation or conquest for its validity.[95] This "conquest by discovery" thesis wedded sovereign radical title and the extinguishment of Indian title, aspects of sovereignty that were incidental to state sovereignty under the Compact Theory, on the one hand, with international participation and recognition, characteristics possessed only by the federal government as successor in interest to the British Crown on the other hand.

Modifying and elaborating on *Fletcher*,[96] the Court returned to the concept that *all* title in America ultimately resided in the

[94] M'Intosh, supra note 30. Eric Kades, History and Interpretation of the Great Case of Johnson v. M'Intosh, 19 L. & HIST. REV. 67 (2001).

[95] *M'Intosh*, 21 U.S at 591.

[96] In *Fletcher v. Peck*, the Court considered the question of whether the "vacant lands within the United States became joint property, or belonged to the separate states". Marshall, C.J. writing for the Court noted that at one time this issue "threatened to shake the American confederacy to its foundation" held that all title to all lands conquered or occupied during the War of Independence went to "the people of the several states." Chief Justice Marshall noted that "[A]ll the right and Royal prerogative devolved upon all the people of the several states, to be exercised in such manner as they should prescribe, and by such governments as they should erect. The right of dispose of the lands belonging to a state

sovereign and that this title to land was the direct result of the sovereign participating in the international system.

> While the different nations of Europe respected the rights of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.[97]

The Discovery doctrine, as understood by Marshall, allowed the European states to claim "[a]n absolute dominion" over lands not yet occupied by them -- not by virtue of any conquest of, or cession by, the Indian natives, but as a right acquired by discovery. As such Indian title was not "a right to property and dominion, but a mere right of occupancy."[98]

> All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.[99]

This title was exclusive, and the tribes could dispose of property only according to the rules of the discoverer state. "An absolute title to lands cannot exist, at the same time, in different persons, or in different governments."[100] As the federal government was successor in interest to the British Crown and held sole pre-emptive rights to extinguish Indian title, a private purchaser of

naturally devolved upon the legislative body; who were to enact such laws as should authorize the sale and conveyance of them. *Fletcher*, 10 U.S. at 121.

[97] *M'Intosh*, 21 U.S. at 574.

[98] "As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign and independent nations." STORY, *supra* note 31, §152.

[99] *M'Intosh* 21 U.S. at 588.

[100] *Id.* at 587.

Indian lands held no title.[101] In short, despite tribal occupancy and use of their traditional territories, the tribes held no legal title recognized under the Discover's law to their territory

The facts of *M'Intosh* provided an opportunity for the Court to acknowledge the pre-existing sovereignty of the states from the 1776 Declaration of Independence because Virginia, which held title to the land prior to transferring it the federal government, had rejected the land claim in 1779, 10 years prior to the creation of the federal government in 1789. If the state and federal governments were co-benefactors of the British Crown's sovereign rights under the Discovery doctrine, if Virginia was a sovereign state under international law prior to 1789 and thus successor-in-interest of the British Crown, if national sovereignty was in some sense dependent on Virginia acceding to the 1789 constitution "as a state," then land title to the area would have definitively passed to Virginia (as an international state) and subsequently to the national government when Virginia ceded the land to the Confederation Congress in 1784. In such circumstances, the 1779 rejection of the claim by the Virginia legislature would have conclusively ended the matter.

Marshall, however, argues that Virginia's sovereignty and independence from the onset of the Revolutionary War did not have the quality necessary for Virginia to assume international rights and obligations. First, he equivocated on the point that the 1783 international treaty ending the War of Independence was an acknowledgement of individual state, as opposed to national sovereignty.

> By this treaty [that ended the War of Independence], the powers of government, and the right to soil, passed definitively to these States. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than which we before possessed, or to which Great Brian was entitled. It has never been doubted, *that either the United States, or the several*

[101] Moreover, the extinguishment of Indian title by the federal government did not provide fee simple title to a previous purchaser of land from the Indians; the federal government could convey land over which it had extinguished Indian title regardless of the previous purchase.

> *states*, had clear title to all the lands within the boundary lines described in the treaty....[102]

If the Court had understood Virginia as possessing both internal sovereignty and external sovereignty after 1783, it would have been unnecessary to contrapose the "United States or the several states", particularly where Marshall in the earlier *Fletcher* case rejected the argument that the territory conquered by American revolutionary forces during the war was the property of the United States. [103] Second, Marshall questioned Virginia's power (as opposed to right) to rescind the title obtained by the original *M'Intosh* purchasers, a rather curious observation given Virginia's assertion of sovereignty over the area -- unless one assumes that Virginia held only a subsidiary sovereignty under the British Crown and American national government. In response to petitions to recognize the transaction, Virginia had passed legislation in 1779 declaring Virginia's exclusive right to purchase Indian land and annulling any previous purchases by private parties. This 1779 legislation could have been construed by the Court as voiding the United Illinois and Wabash Land Companies purchase. However, Marshall did not hold the 1779 Act dispositive as an exhibition of Virginia's sovereign state legislative power; rather he found it to be an additional example of the practice that colonial governments had historically claimed exclusive rights to purchase land from the Indians.

> Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revivals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.[104]

[102] *M'Intosh,* 21 U.S. at 584-85 (Emphasis added).
[103] *Fletcher,* 10 U.S. at 142.
[104] *Id.* at 585.

Instead, the Court reached back toward the idea that only one international sovereign can be the source of all title. It grounded that title on the right of self-preservation and conquest, legal rights only within the provenance of an international sovereign. In doing so, it excluded the states as a locus of complete sovereignty.

Marshall's nationalist perspective lies in his finding that Indian sovereignty was immediately diminished by European discovery (as an extension of state- sanctioned or affirmed exploration) and tribes or individual Indians had no natural right to the lands they occupied. That the Discovery doctrine necessarily diminishes Indian title or that the "[c]onquest gives title which the Courts of the conqueror cannot deny" was not new. [105] However, by articulating the "conquest by discovery" thesis, the *M'Intosh* Court forcefully asserted that the tribes had neither international rights nor natural or positive rights save what the European conquers granted them or what they maintained for themselves by force. This was contrary to recognized international practice, but the Court noted: "The law which regulates, and ought to regulate in general, the relations between the conqueror and the conquered, was incapable of application to a people under such circumstances."[106] Thus even if tribes wished to recognize and sell individual property, thereby enabling them to improve and cultivate the land and exercise their natural law right to property, they could not. Likewise, a grant of individual property could not "separate the Indian from his nation, nor give a title which our Courts could distinguish from the title of his tribe...." unless the sale was recognized in a treaty.[107] The Court, emphasizing the *legal* effects of the Discovery doctrine,

[105] *Id*. at 588. Vattel, for example, wrote: "Their [the Indians] unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it and settle it with colonies. The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence; if each nation had, from the beginning, resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. We do not therefore, deviate from the views of nature, in confining the Indians within narrower limits." E. VATTEL, THE LAW OF NATIONS, §209 (Chitty Ed., 1883); *See* also L.C. Green, *Claims to Territory in Colonial America*, in THE LAW OF NATIONS AND THE NEW WORLD (The Univ. of Alberta Press, 1989).
[106] *M'Intosh,* 21 U.S. at 596.
[107] *Id.* at 593.

characterized the tribes as dependent nations regardless of their actual dependence or independence in fact. [108]

Without a natural right to their lands or sovereignty, the tribes would need to claim various rights under positive international law as sovereign, independent people or derive whatever rights they had from the municipal law of the sovereign. The Discovery doctrine presumptively eliminated any rights under international law, but Marshall nevertheless understood the doctrine as incorporating legal rights to occupancy into the municipal legal system based on the tribes' formerly independent and sovereign status.

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[109]

These rights were necessarily incorporated into federal law because it was the sole successor-in-interest to the British Crown and held radical title to all lands over which Indian title had not been extinguished.

Actual relations with the Indians reinforced the national character of the Indian rights based on the international status of the federal government and the former pre-discovery status of the tribes. According to the Court, the peculiar relationship between the British/Americans and the Indians was similar to, but differed in many respects, from the political relations among foreign nations. Practices similar to international intercourse, such as diplomatic exchanges and entering into treaties with tribes, were carried out because the tribes were "yet too powerful and brave not to be dreaded as formidable enemies."[110] The reasons for this were not

[108] *Id.* at 597.
[109] *Id.* at 574.
[110] *Id.* at 596.

principled but practical. The Indians were "fierce savages" who could not be "safely governed as a distinct people" until the "conquest is complete."[111] Hence:

> Indian inhabitants are to be considered merely as occupants...However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.[112]

Under the circumstances where assertions of *dominium* are: 1) legally efficacious; and 2) pretensions to be realized only through cession, acquiesce or conquest of the tribes; or 3) the results of actual conquest by military force, the Discovery doctrine ultimately resolves itself into an issue of the United States' right of self-preservation and right of conquest.

> We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and

[111] *Id.* at 587-88.
[112] *Id.* at 591-92.

> established as far west as the river Mississippi, by the sword.[113]

The states are incompetent in this regard. Discovery and the claim of absolute *dominium* is an assertion of power "now possessed by the government of the United States, to grant lands, [and it] resided, while we were colonies, in the crown or its grantees." The predations of the tribes threatened the security of the crown and its grantees. Self-preservation is a natural right of the sovereign. The United States has both the right and duty to defend itself as a sovereign entity. As Pufendorf pointed out, "The general rule for the conduct of supreme sovereigns is: Let the safety of the people be the supreme law…For sovereignty is conferred upon them with the intention that through it there may be secured the end for which states are established."[114]

This natural right of the federal government to defend its citizens and the corresponding denial of any natural right of the tribes is mirrored by the Court's denial of a state's natural right of sovereignty under Lockean principles. The Court refused to find natural or positive rights in the Lockean claim to state sovereignty – a presumption which underlay the Compact Theory.[115] It would not

[113] *Id.* at 588.

[114] PUFENDORF, *supra* note 91 at 18-19.

[115] The states generally did not justify their occupation and possession of lands was not based on positive international law or as successors-in-interest to the prerogatives of the British Crown. Rather they based their claims on a Lockean conception of society and property. Locke argued things in nature that were removed from their natural state by human labor became that individual's property. For those whose settled the frontier, Locke stated that "he who appropriates land to himself by his labor, does not lessen but increases the common stock of mankind." John Locke, *Two Treatise of Government* in *Man and the State: The Political Philosophers* 336 (Saxe Commines & Robert N. Linscott eds., 1963); The resultant formula held that individuals and their sovereign states had both the right and duty to possess and develop the wild and vacant lands held by the Indians. Thomas Jefferson stated this thesis in "*A Summary View of the Rights of British America*" in 1774: "The fictitious principle that all lands belong originally to the king, they [the colonists] were early persuaded to believe real, and accordingly took grants of their own from the crown....It is time therefore for us to lay this matter before his majesty, and to declare that he has no right to grant lands of himself. From the nature and purpose of civil institutions, all the lands within the limits which any particular society has circumscribed around itself, are assumed by that society and subject to their allotment only. This may be done by themselves, assembled collectively, or by their legislature, to whom they may have delegated sovereign authority: and, if they are allotted in neither of these ways, each individual of the society

speculate "whether agriculturalist, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits."[116] Rather the title of lands and ultimate dominion is acquired and maintained by force. This is not to say that the Court did not ascribe to a Lockean view of political society. Instead, the society it focused on was decidedly national. Marshall noted this when he acknowledged the incongruity between natural law and the position advanced by the Court:

> As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in a particular case, and given us as the rule of our decision.[117]

The national character of Locke's political society is further elaborated by the Court when it asserts "Conquest gives title that the Courts of the conqueror cannot deny."[118] The Court is national; the conquest is national. The right of conquest—and conquest by force of law under the Discovery doctrine—is held only by the absolute sovereign under international law.

The national focus is further evidenced by the different characterizations of Indian lands given by the Court in *M'Intosh* and the earlier *Fletcher* case. Marshall writing for the *Fletcher* majority

may appropriate to himself such lands as he finds vacant, and occupancy will give him title." Thomas Jefferson, *The Portable Thomas Jefferson* 18-19 (Merrill D. Peterson ed., 1985); For a discussion of the Lockean argument used by the states, *see* ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT THE DISCOURSES OF CONQUEST 287-317 (1990).

[116] *M'Intosh,* 21 U.S. at 587.

[117] *Id.* at 572.

[118] *Id.* at 588.

described the Indian lands subject to the dispute as "vacant"; a characterization seemingly disputed by Justice Johnson's dissent. In *Fletcher*, Johnson had argued that the tribes in the disputed area "retain a limited sovereignty, and the absolute proprietorship of their soil." [119] As vacant land, the Crown would have assumed sovereignty and title. From this nationalist perspective, the contentious issue that existed between the Federal government and Georgia, the issue of who held sovereignty or radical title, or the nature of Indian title, simply disappears. The only question for the Court was whether the Georgia legislature could convey the land. The *M'Intosh* Court characterized the Indian land and the assertion of sovereignty by the Crown under the legal pretext of discovery quite differently.[120]

Thus, the colonies were an extension of the sovereign authority of the Crown, and the territory "discovered" was already part of the nation that discovered it. Discovery occurs and possession is taken prior to actual occupation under the authority of an existing imperial government. Yet the territory over which sovereignty was asserted in *M'Intosh* was not deemed vacant or *terra nullius.* It was occupied by tribes, who the Court admitted, were "rightful occupants of the soil" and who were "in fact independent."[121] Marshall describes them as "fierce savages," whose occupation was war and who "were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence."[122] Given this characterization from an international law perspective, the conquest of such peoples, either by force or by law, is an affirmation of sovereignty. Where force is necessary, it is the prerogative of the national sovereign government. For the right to use force, according to Vattel, "or to make war, is given to Nations only for their defense and for the maintenance of their rights...."[123] This right to wage just war is the sole prerogative of sovereigns and "[w]ar in a just cause

[119] Johnson concludes: "What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits." This right could not be conveyed by Georgia legislature. *Fletcher* at 10 U.S. 102- 103.

[120] *See also* LINDLEY, *supra* note 52, at 114.

[121] *M'Intosh,* 21 U.S. at 574, 586.

[122] *Id.* at 590.

[123] VATTEL, *supra* note 33, at 243.

is therefore, according to the natural law...a natural mode of acquiring title."[124]

### 3. *Cherokee Nation v. Georgia*

*M'Intosh* held that the exclusive power of extinguishing Indian title allowed the federal government to enter into treaties or go to war to clear the land for settlement. This power descended from Great Britain and was established by the *M'Intosh* Court to be part of the natural right to self-preservation and just war. Yet the rights under natural and international law (and established by British practice) that would have normally been accorded a conquered people were not available to the tribes. After *M'Intosh*, the legal nature of Indian tribes and how these entities would enter into the American legal system became increasingly important as the tribes sought to use the courts to defend themselves in the face of increased settlement and declining military power.

One means of securing rights "within" the American legal system was by treaty yet the notion that treaties would be used to incorporate the tribes into the American federal system brought a new set of issues. A treaty under the Supremacy Clause of the 1789 Constitution led to an assertion of federal authority in areas that may be reserved for the states. This had been a longstanding objection to the constitution, and the extension of federal power faced increased political opposition from the states.[125] There also remained the issue of how the pre-existing sovereignty and independence of the tribes would be incorporated into the federal system. The Compact Theory and the National Supremacy Theory both assumed that the sovereignty of the people of the United States was singular and unitary; that is the sovereign people delegated various powers to their chosen units of government. Recognition of Indian sovereignty and independence within the internal boundaries of the United States, but outside of the categories established by American

[124] *Id.* at 307.

[125] "And the senate has moreover, various and great executive powers, viz., in concurrence with the president-general, they form treaties with foreign nations, that may control and abrogate the constitutions and laws of the several states. Indeed, there is no power, privilege or liberty of the state governments, or of the people, but what may be affected by virtue of this power." *The Address and reasons of Dissent of the Minority of the convention of Pennsylvania to their Constituents, December 18, 1787* in *The Anti-Federalist Papers and the Constitutional Convention Debates* 251 (Ralph Ketcham, ed. (1986).

political theory, the constitution, and international law, threatened the underlying assumption of complete internal sovereignty of the American people and the external sovereignty of the United States. As Justice Johnson noted in his concurrence in *Cherokee Nation*:

> We had then just emerged ourselves from a situation having much stronger claims than the Indians for admission into the family of nations; and yet we were not admitted, until we had declared ourselves no longer provinces, but states, and showed some earnestness and capacity in asserting our claim to be enfranchised. Can it be supposed, that when using those terms ["foreign" and "state" as found in the constitution], we meant to include any others than those who were admitted into the community of nations, of whom, most notoriously, the Indians were no part?[126]

For the Court that espoused the pre-eminent version of the federal government, the recognition of Indian sovereignty and independence within the borders of the United States brought additional problems. For example, if Indian sovereignty (even if only a residual of pre-existing sovereignty and independence prior to conquest and discovery) was accorded recognition by the courts, it would add force to the argument that each states' pre-existing internal sovereignty and external sovereignty was in some sense a check on federal sovereignty. As Justice Johnson pointed out above, the states had "much stronger claims...for admission to the family of nations...."

The Court resolved these issues in *Cherokee Nation*, which concerned the right of the Cherokee Tribe, pursuant to a treaty with the federal government, to directly enforce its treaty rights in federal court. The Cherokee commenced an original action for an injunction in the United States Supreme Court to prevent Georgia from extending its jurisdiction over a reservation established by a federal treaty. The laws of Georgia, the Cherokee alleged, "go directly to annihilate the Cherokees as a political society and to seize...the lands of the nation which have been assured them by the United States

[126] Cherokee Nation v. The State of Georgia, 30 U.S. 1, 26 (1831).

Government, in solemn treaties repeatedly made and still in force."[127]

The Court began its analysis by admitting that the Cherokee were a "distinct and independent society."

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of judges, been completely successful. They have been uniformly treated as a state, from the settlement of our country.[128]

Yet, for the majority of the judges, the existence of an independent Cherokee nation was not enough. For purposes of Article III of the 1789 Constitution, the Court concluded that Indian tribes were not *"foreign states"* and the Court therefore did not have jurisdiction.[129] Building on the distinction between sovereignty and independence he delineated in *Johnson,* Justice Marshall commented that foreign nations are generally "nations not owing a common allegiance" to each other. However, "[i]ndian territory is admitted to compose a part of the United States:"

> In all the Cherokee dealings with the United States they are considered within the jurisdictional limits of the United States. Moreover, they acknowledge themselves, in their treaties, to be under the protection of the United States, [and] they admit that the United States shall have the sole and exclusive right of regulating trade with them and managing their affairs as they think proper....[130]

[127] *Id.* at 14.
[128] *Id.* Of the five Justices who participated in the case three (Marshall, Thompson, Story, JJ) recognized the Cherokee as a "state." Marshall did not find them to be a foreign state for purposes of Article III. Johnson and Baldwin, JJ did not recognize the Cherokee as a state.
[129] "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made...and between a State, or Citizens thereof, and foreign States, Citizens, or Subjects." U.S. CONST. art. III, § 2.
[130] *Cherokee Nation,* 30 U.S. at 15.

Rather than deeming the Cherokee an independent foreign state, the majority held that the Cherokee and other tribes are "domestic dependent nations [that] are in a state of pupilage; [and] their relation to the United States resembles that of a ward to his guardian."[131]

Given that the *M'Intosh* Court emphasized that conquest and war were the currency of American-Indian relations, the use of the ward-guardian relationship is curious. Analogizing the ward-guardian relationship to aboriginal people had circulated for some time, and it was ascribed to in other colonial jurisdictions, but it was not widely accepted at the time.[132] Nevertheless, the use of the concept in the treaty context suggests incorporation of the tribes into the American legal system under the authority and protection of the federal government. While under this ward-guardian relationship, the ward tribe has no rights save those asserted or recognized by the federal government, it is nevertheless presumed that there are a set of legally protected interests held the protected party.

It is also curious that even from its nationalistic perspective, the Court found that Indian "nations" were competent to make a treaty or contract without recognizing the corresponding right to enforce the contract in federal court. For the Court, Indian relations remained essentially issues of war and peace, or federal domination. In international law, the Indian tribes were conquered people who

[131] *Id.* at 27.

[132] Vitoria stated that there may be instances where "It might therefore be maintained that in their own interests [the Indians] the sovereigns of Spain might undertake the administration of their country...so long as this was clearly for their benefit." He doubted however that the idea would not be abused. Francisco de Vitoria, *De Indis et De Ivre Belli Relectiones*, in THE CLASSICS OF INTERNATIONAL LAW 160-161 §18 (Ernest Nys ed., James Brown Scott ed., John Pawley Bate trans., Oceana Publ'ns, Inc., 1964); It is said that Edmund Burke first formulated the duties of a colonial power in terms of trusteeship in a speech in the House of Commons on Fox's India Bill of 1783. "All political power which is set over men...ought in some way or other exercised ultimately for their benefit. If this is true with regard to every species of political dominion, and every description of commercial privilege, none of which can be original self-derived rights, or grants for the mere private benefit of the holders, then such rights or privileges, or whatever else you chuse (sic) to call them, are all, in the strictest sense, a trust; and it is of the very essence of every trust to be rendered accountable: and even totally to cease, when it substantially varies from the purposes for which alone it could have a lawful existence." LINDLEY, *supra* note 52, at 330.

had, despite the Court's rhetoric, ceased to be a states.[133] Prior to their elimination as independent states however, the "habits and usages" of Indian relations were essentially a government-to-government policy matter which did not include a consideration of the respective rights by the federal courts. The Court noted:

> At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution....[134]

Thus, the *Cherokee Nation* Court, by refusing jurisdiction, was simply emphasizing the international status that had once existed with the tribes and their now conquered status. The residual nature of the relationship precluded both the Court and the states from interfering with the policy of the federal government political branches.

It has been argued that the decision in *Cherokee Nation* avoided a political crisis between the Court and federal government, on the one hand, and the Jackson Administration and the states on the other.[135] However, in avoiding a political crisis, the Court reasserted federal authority in three ways.

First, Marshall limited the reach of the Eleventh amendment to its terms in the case.[136] Georgia, claiming sovereign immunity, had

[133] "But a people, that has passes under the domination of another, can no longer form a state, and in direct manner make use of the law of nations. Such were the people and kingdoms which the Romans rendered subject to their empire; the most, even of those whom they had honored with the name of friends and allies, no longer formed states. Within themselves they were governed by their own laws and magistrates; but without, they were in everything obliged to follow the orders of Rome; they dared not of themselves make either war or an alliance, and could not treat with nations." Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* 18, § 11 (Dublin, Ireland: Luke White,1792).

[134] *Id.* at 17.

[135] See Joseph C. Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 STAN. L. REV. 500, 514-16 (1969).

[136] The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." U.S. CONST. amend. XI.

refused to answer or accept the jurisdiction of the Court in the case. Marshall cited Article III, Section 2 of the constitution, and stated that "the party defendant [Georgia] may unquestionably be sued in this court." In so holding, Marshall indicated that the Eleventh Amendment did not grant Georgia or any state a general defense of sovereign immunity. He asserted federal jurisdiction over states in those areas beyond the terms of the amendment, a broad interpretation in an era of increasingly strident assertions of state authority.

Second, Marshall set the groundwork for the federal pre-emption of all state authority over tribes under the Indian Commerce Clause. The Cherokee argued that the commerce clause intended "to give the whole power of managing" Indian affairs to the federal government, thus "removing those doubts in which the management of Indian affairs" that had prevailed under the Articles of Confederation.[137] Marshall agreed to the exclusive constitutional grant of authority to the federal government, even though his reasoning did not confer jurisdiction.

> Had the Indian tribes been foreign nations, in the view of the convention; this exclusive authority of regulating intercourse with them might have been, and, most probably, would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nation.[138]

This broad grant of legislative power, excluding or precluding state jurisdiction, recapitulated *McCulloch* while going beyond the justification for federal authority under the dormant commerce clause outlined in *Gibbons v. Ogden.*[139]

Third, the Court avoided a political crisis by reasserting the position that certain disputes concerning external sovereignty and international law—recognition of foreign states, when a state of war exists, or how to dispose of confiscated property during hostilities—are questions of "policy" rather than of "law" and continue to

[137] *Cherokee Nation*, 30 U.S. at 19.
[138] *Id.* (emphasis added).
[139] Gibbons v. Ogden, 22 U.S. 1 (1984).

reserve these issues for the federal government.[140] The judiciary had the duty "to decide upon individual rights, according to those principles which political departments of the nation have established." It did not have jurisdiction to decide those great issues involving a sovereign in its external relations.[141] From this perspective, the federal government retained absolute internal and external sovereignty. The issue of whether Indian treaties were enforceable obligations depended upon the federal political departments.[142] The authority, however, including the authority to pre-empt and override state jurisdiction, remained in the federal government as a whole.[143] The sovereign always retained the authority to disregard a treaty and face whatever internal or international disapprobation that might arise.

### 4. *Worcester v. Georgia*

It is ironic that the Court cited the "former" sovereignty of the tribes to justify continued and permanent domination of them by the federal government in *Cherokee Nation*. The tribes' "diminished" sovereignty had its roots in international law and was the consequence of the Discovery doctrine set forth in *M'Intosh.* In *Worcester v. Georgia,* the Court extended this notion and asserted the pre-existing and pre-eminent sovereignty of the national government by virtue of its international relations with the tribes.[144] At the same time, it denied the pre-existing sovereignty of the states and their incapacity to act in the international sphere as did the tribes.[145]

[140] Brown v. United States, 12 U.S. 110, 128-29 (1814); *see also Schooner Exch.,* 11 U.S. at 135.
[141] Foster v. Neilson, 27 U.S. 415, 433 (1829).
[142] Chief Justice John Marshall noted that "The jurisdiction of courts is a *branch* (emphasis in original) of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction...." *Schooner Exch.*, 11 U.S. at 136.
[143] For a further discussion of the Law-Politics distinction as Marshall understood the term, *see* William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 944-953 (1978).
[144] *Worcester*, 31 U.S. at 515.
[145] *Id.*

*M'Intosh, Cherokee Nation*, and *Fletcher* were used by the individual states to extend their jurisdiction to individual Indians, tribes and Indian country.[146] They argued that the effect of the Discovery doctrine as outlined in *M'Intosh,* and the idea that the Indian title was not incompatible with state possession of the land in *Fletcher,* precluded the tribes from exercising full sovereignty over their territory and their members while providing them with only a permissive occupancy of their lands.[147] This occupancy, which provided for a nomadic non-agricultural lifestyle, could not interfere with the advance of the frontier. Moreover, the extension of state jurisdiction and termination of the permissive use was a matter of policy and was not reviewable by courts.[148] Federal efforts, either by treaty or through the commerce power to protect Indians and prevent the extension of state jurisdiction were unconstitutional because they impermissibly trenched on state sovereignty.

No state was more assertive in this regard than Georgia. Georgia had ceded its western territory (which subsequently became Alabama and Mississippi) in 1802 to the United States with the understanding that the federal government would extinguish Indian title within its remaining borders as quickly as possible. After gold was discovered in territory reserved to the Cherokee by treaty, Georgia had passed a series of laws assuming jurisdiction over

[146] *See* Caldwell v. The State, 1 Ala. 327 (1832), where Saffold, J. of the Alabama Supreme Court noted: "The circumstance of the United States having the ultimate right of soil, cannot impair the right of sovereignty. There is no incongruity in the proposition that the right to the public domain resides in the United States, while the ordinary right of empire, over the same territory, is vested in the state government. Such is, and has been, the condition of most or all the new states. While the United States have possessed and exercised the right to dispose of the unappropriated lands, and even to remove intruders from them, the states, containing them, have, as uniformly, exercised the ordinary municipal government."

[147] "The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state." *Fletcher,* 10 U.S. at 142-43.

[148] In *Cherokee Nation,* Marshall stated "That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might perhaps be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savours too much of the exercise of political power to be within the proper province of the judicial department." *Cherokee Nation,* 30 U.S. at 39.

Cherokee country after efforts to move them west by mutual agreement had failed.

*Worcester* involved the arrest and conviction by Georgia of a U.S. citizen who had entered Cherokee country to proselytize under a federal law but contrary to Georgia law. The Court reversed the conviction stating that: "the whole power of regulating the intercourse with [the Indians] is vested in the United States" and Georgia had no jurisdiction over the Cherokee territory established by federal treaty.[149] Historically, the Court noted, the power of regulating the relationship with the Indians did not extend to the regulation of their internal affairs. Marshall noted, "He [the king] ...never intruded into the interior of their affairs or interfered with their self-government so far as respected themselves only."[150] This condition was guaranteed by treaties, first with the British Crown and later with the United States. As the Cherokee nation is recognized by treaty as a separate independent entity, state authority within Indian country is "extra-territorial" and *ultra vires.*

> The Cherokee nation, then, is distinct occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, in which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with the treaties and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[151]

The decision in *Worcester* was not enforced. Either President Jackson refused to enforce the ruling or deficiencies in federal law made enforcement impracticable.[152]

Marshall grounded the opinion in *Worcester* on international law and concepts of federal supremacy arguing that the establishment of

[149] *Worcester,* 31 U.S. at 501.
[150] "[O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, who might seduce them into foreign alliances." *Id.* at 496.
[151] *Id.* at 561.
[152] Joseph C. Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 STAN. L. REV. 500, 525 (1969).

the United States through the 1783 Treaty ending the Revolutionary War did not include full recognition of internal and external sovereignty in each of the states while full sovereignty passed to the national American government. Echoing *McCulloch* and the commerce power case *Gibbons v. Ogden,* the Court argued that the change from the Articles of Confederation to the 1789 Constitution fundamentally altered the relationship between the states and the federal government. [153] Marshall opined again that the 1789 constitution provided that federal authority was supreme within the sphere of its enumerated powers: [154]

> That instrument [the U.S. Constitution] confers on congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free action. The shackles imposed on this power, in the confederation, are discarded.[155]

The fundamental pre-eminence of the federal government under the 1789 constitution was not the sole factor in the Court's decision. The Court, as it did in *M'Intosh* and *Cherokee Nation*, firmly grounded the tribes within the ambit of international law recognizing the previous sovereignty of the tribes and their exclusive intercourse with the Federal government.

Marshall argued that the Discovery Doctrine did not provide the states with sovereignty over the tribes because diminished tribal sovereignty remained while ultimate radical title vested in the federal government. The states could not extend their sovereign and jurisdiction over the tribes because the basis of their sovereignty was exclusively territorial.

As mentioned above international law theorists posited that the sovereignty of a state consisted of two parts, internal sovereignty

[153] *Gibbons*, 22 U.S. at 1.
[154] Charles F. Hobson argues that the principle significance of *Gibbons* lay "not so much in building up and centralizing federal power as in circumscribing state power." CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 138-149 (1996).
[155] *Worcester*, 31 U.S. at 500.

and external sovereignty. Internal sovereignty is the "right of control" which is inherent in the people of any state, or vested in its ruler, by the constitution or by municipal law.
The sovereign state had both the right and duty to preserve its existence and expect the obedience of individuals who lived within its border to abide by its rules. This control over individuals and the authority to make binding law, was the primary paramount difference between a sovereign and non-sovereign state.[156]

From this perspective, the Discovery doctrine does not provide the discovering nation with sovereignty over the tribes. The Discovery doctrine, Marshall wrote:

> [R]egulated the right given by discovery among the European discoverers but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase but did not found that right on a denial of the right of the possessor to sell.[157]

This diminished international sovereignty preserves the right of self-government to the tribes and provides the federal government with the exclusive right (as international sovereign) to incorporate the tribes into the American federal system or the internal sovereignty of the United States. The incorporation was either through tribal agreement by way of treaty, by which a tribe does not lose its residual sovereignty, or by conquest.

This tribal sovereignty is contrasted to the sovereignty of the individual states. The Court found that the practices of European nations and the United States treated the tribes as international sovereigns.

> The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have

[156] 4 Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* in THE CLASSICS OF INTERNATIONAL LAW 585 (1964).
[157] *Worcester*, 31 U.S. at 495.

> applied them to Indians, as we have applied them to the other nations of the earth.[158]

These practices, as set forth in British foreign policy documents and American treaties, treated the Indians as equals under international law. For the most part, the tribes, as was generally acknowledged and required by international practices, had voluntarily agreed to enter into treaties ceding territory. Thus, in the *Worcester* Court's opinion, the tribes had some external sovereignty at least at the time they signed the treaties regardless of whether their land lay within the external borders of the United States. The diminished sovereignty of the tribes due to the operation of the Discovery doctrine is irrelevant in this analysis as the capacity of the tribes to wage war (as allies or enemies) conferred on them an international though dependent status. The relationship then created by treaties is delimited by and grounded in international law. The Court stated (quoting Vattel) "[t]ributary and feudatory states 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."[159]

Further while the tribes were recognized as independent and sovereign nations under international law, *i.e.* having external sovereignty, their characteristics also suggested they had internal sovereignty. The tribes had territory with clearly delineated borders within which they asserted exclusive authority to enforce their own law. Within this territory they had both the right and practice of self-government. In addition, the tribes had agreed to certain codes of conduct regarding non-citizens within their territory and demanded different treatment for their citizens from the federal government. Finally, the tribes had the ultimate sovereign right of war and peace, a right recognized to inhere only in international sovereigns.

In contrast, the colonies as described in *Worcester* were found to have no external or internal sovereignty—ultimate authority and title was asserted by the British Crown under the Discovery doctrine. This title granted proprietorship to Great Britain and the colonies as grantees of the Crown but had no impact on the independence of the tribes. Marshall wrote, "these grants asserted a title against Europeans only, and were considered a blank paper so

[158] *Id.* at 500-501.
[159] *Id.* at 501.

far as the rights of the natives were concerned."[160] Unlike the tribes, the boundaries of the colonies were set by the Crown. Moreover, the Crown could modify the rights of individuals within those boundaries such as it did by the *Royal Proclamation of 1763.*[161] Crucially from an international law perspective, the power of making offensive and defensive war, the ultimate prerogative of the international sovereign was not given the colonies by the Crown. "The power of making war is conferred by these charters on the colonies, [but] *defensive* war alone seems to have been contemplated."[162]

> It is the sovereign power alone...which has the right to make war...War is either *defensive* or *offensive*. The purpose of defensive war is simple, namely self-defense; the purpose of offensive war varies according to the different interest of nations, but in general it relates to the enforcement of certain rights or to their protection. A sovereign attack a nation, either to obtain something which he lays claim or to punish the nation for an injury he has received from it or to forestall and an injury it which is about to inflict upon him.... [163]

The inability to wage offensive and defensive war, according to international law, would prevent the colonies from acquiring dominion and sovereignty over the Indians by right of conquest or as grantees of the crown. All the success of their arms would redoubt to the benefit of the British sovereign.[164]

Under the Compact Theory and the Doctrine of the Landed States, the assertion of independence by the united colonies and the states should have changed their previous dependence upon the

[160] *Id.* at 497.
[161] *Id.* at 496.
[162] *Id.* at 545 (emphasis in original) (The court found that the Crown conferred the power of defensive and offensive was but "only on just cause" on the colony of Rhode Island).
[163] *See* VATTEL, *supra* note 33, at 235-36.
[164] *See* GROTIUS, *supra* note 55, at 335. "But according to the law of nations, not only the person, who makes war upon just grounds; but any one whatsoever, engaged in regular and formal war, becomes absolute proprietor of everything which he takes from the enemy: so that all nations respect his title, and title of all, who derive through him their claim to such possessions."

Crown. However, the *Worcester* Court does not understand the revolution to have changed the non-sovereign status of each colony. According to the Compact Theory, each state became a sovereign independent nation within the society of nations at the time they declared independence. Instead, the *Worcester* Court emphasized the "sovereign" role of the Confederation Government and Continental Congress prior to the 1789 constitution. From this perspective, the international affairs aspect of Native American relations is crucial evidence of the pre-eminence of the national government. The relations of war and peace and international relations in general, the Court stated, were recognized by all the colonies as residing in the Crown. As the revolution commenced, the colonies sent delegates to the Continental Congress and later to the Confederation Congress.

> Congress, therefore, was considered as invested with all the power of war and peace, and congress dissolved our connection with the mother country and declared these United Colonies to be independent states. Congress employed diplomatic agents, negotiated treaties and signed treaties.[165]

Moreover, "from the same necessity and on the same principles, Congress assumed the management of Indian affairs in the name of the colonies and later for the Confederation." Attempts were made to have treaties of peace and trade with the Indians, but "[t]hese not proving successful, war was carried on under the direction and with the forces of the United states [*sic*]... The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe."[166] The Articles of Confederation simply adopted this state of affairs:

> That instrument [the Articles of Confederation] surrendered the powers of peace and war to congress, and prohibited them to the states, respectively unless the state be actually invaded.....The 1789 Constitution in contrast confers "on congress the powers of war and peace;

[165] *Worcester,* 31 U.S. at 500.
[166] *Id.* at 558.

> of making treaties, and of regulating commerce....[167]

The Court emphasized the non-international status of the states when it then asserts that neither the colonies nor later the states could alter the rights of the tribes because the power of making treaties, (and breaking treaties) was transferred directly from the British Crown to the federal government.[168] Despite the 1776 Declaration of Independence or the 1783 Treaty, for the Court, the transfer of authority from the Crown to the United States did not include the recognition of internal and external sovereignty in each of the states. The authority went from the British Crown directly to the federal government.

*D. Supreme Sovereignty and Tribal Rights in the American System*

The collision of national and state governments in the first decades of the 19th century created a reticence on the part of the Marshall Court regarding the sovereign premonitions of the individual states. The Compact Theory, which was the driving ideological engine for state authority and the concomitant deprecation of federal authority, was an anathema to those with nationalistic orientation.[169] In the Marshall Indian cases discussed above, the Court particularly depreciated the authority and international sovereignty of individual states when it discussed the relationship between tribes and the federal government. In many respects, of course, the Court was commenting on the status of the states after the establishment of the 1789 constitution. However, the cases suggest that the Court advocated a more radical position -- that the states were never actually sovereign in an international or

[167] *Id.* at 558-599.

[168] "The actual state of things at the time [the founding of the colonies], and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending them first, the protection of Great Britain, and afterwards that of the United States." *Id.* at 560.

[169] Chief Justice Marshall, for example, noted that: "The argument in all its forms is essentially the same. It is founded, not on the words of the constitution, but on its spirit, a spirit extracted, not from the words of the instrument, but from his view [counsel for Virginia] of the nature of our union and of the great fundamental principles on which the fabric stands." Cohens v. Virginia, 19 U.S. 257, 295 (1821).

external sense during and after the revolution, and "states," they did not have capacity to create the federal government. This perspective echoed the Court's position in *McCulloch* where Marshall argued that the states, despite their "international" premonitions, were incompetent to form a federal union represented by the federal government.

> It has been said, that the people already surrender all their powers to the State sovereignties and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain settled in this country. *Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves.* To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when "in order to form a more perfect union," it was necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and deriving its powers directly from them, was felt and acknowledged by all.[170]

Because all state action was sub-national, the Lockean concepts privileging state authority and state claims to Indian lands were also discarded. The early cases make clear that only the federal government could claim sovereignty to various Indian lands as successor in interest to Great Britain where the corresponding state claimed (based on Locke) that cultivators were more legitimate than hunters and gatherers.

> To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village,

[170] McCulloch v. Maryland, 17 U.S. 316, 404 (1819) (emphasis added).

> and an occasional corn field interrupted, and gave some variety to the scene.[171]

From this perspective, the national government of the United States, from the Continental Congress through the Confederation Congress, and the 1789 federal government had always been the pre-eminent receptacle of the sovereignty of the American people.

This depreciation of state authority embedded tribal rights within the American legal system as federally guaranteed rights. Rhetorically, the Court placed the tribes back into the international sphere and used international law to justify the federal government's exclusive authority as a demonstration of its sovereign prerogative in the domestic and international arenas. As such, from these early cases until the present, American law has recognized that Indian tribes retain an international/national character and residual sovereignty. This sovereignty provides for, among other things, a right of self-government and guarantees them a possessory interest in their lands. It also includes a duty of protection and fair dealing on the part of the United States.

These tribal rights were the result of the judicial recognition that Indian tribes had a pre-existing sovereignty and independence that only could be diminished by federal authority. This federal authority remained exclusive and paramount. The tribes, although analogous to international states, were not equated with other international "state" actors such as Great Britain or the federal government. While the recognition that discovery did not annul their pre-existing rights arising from the natural right to possession of their lands, it did not mean that the Indians were entitled to the same "natural rights" that other individuals and societies had to the lands they occupied. Instead, it signified that the federal government had the exclusive right to determine the status of Indians within the legal system -- not that federal government or federal courts needed to *recognize* those rights. The result was an expansion of federal authority under the Article I commerce power and the plenary power doctrine.[172] Under

[171] *Worcester*, 31 U.S. at 498.

[172] Arguably the Indian commerce clause was not designed to give Congress exclusive or plenary power over Indian tribes but was designed to resolve conflicts between the federal and state governments over the management of commercial and political relationships with the tribes. "The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and

this legal discourse, the fact that an Indian tribe has a treaty with the federal government did not alter the fact that they are a "conquered" people who had acquired no rights to their possessions under international law despite their previous international status. The treaty rights or common law possessory interests could be conditioned or subject to statutory diminishment.[173] This potential for defeasement or the unilateral diminishment of Indian legal authority within the constitutional system is inherent in the federal-tribal relationship. For the Court, as set forth in *M'Intosh* and reiterated in *Worcester,* all rights and title in the United States rested ultimately upon conquest. Conquest, or the act of making war or extinguishment of title by purchase, resided exclusively in the national government, and with it, the power to alter the status and law of conquered peoples. As Native American tribes were held by the Court to fall within the status of "conquered peoples" regardless of the actual ability of the United States to establish jurisdiction on the ground, Federal supremacy and plenary power followed as a constitutional corollary.

contradictory. The power is there restrained to Indians, not members of any States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in Federal Councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on their internal rights of legislation, is absolutely incomprehensible. Federalist 42 (Madison), ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST PAPERS (1788).
The basic rules concerning the scope of the power conferred by the commerce clause within the borders of the United States were set forth in the case *Gibbons v. Ogden* and *Wilson v. Black Bird Creek Marsh Company*. *Gibbons* noted that the right of commerce derived from "those laws whose authority is acknowledged by civilized man throughout the world." The Constitution merely found the existing right and gave the federal government the power to regulate commerce. States could not hinder free exchange and the right of intercourse between state and state." This power to prevent certain acts which burden trade (the dormant commerce clause) did not need to be exercised by the federal government in order to restrict state action. *Blackbird Creek* limited the reach of the dormant commerce clause where the burdens to commerce were incidental state action which improved local welfare and health. Thus the commerce clause was intended to remove barriers to trade not confer general powers on the Federal government. *Gibbons*, 22 U.S. at 27; Wilson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829).

[173] United States v. Cook, 86 U.S. 591 (1873) (explaining that Indian possessory interest allows Indians to use lands for whatever purpose provided it is for improvement); The Cherokee Tabacco Case, 78 U.S. 616 (1870) (explaining that jurisdiction of United States extends to all territory of United States and federal statute supersedes earlier federal treaty).

Nevertheless, the preclusion of state authority in American Indian jurisprudence has also given rise to legal doctrines that can be protective of Indian rights against the federal government. These doctrines justify federal power but also include corresponding principles legally protective of tribal interests. First, the tribes are independent entities that possess inherent sovereignty:

> The powers of Indian tribes are, in general, "inherent powers of a limited sovereignty which has never been extinguished." Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.[174]

This sovereignty, while subject to complete extinguishment and regulation by Congress, nevertheless remains an independent source of authority over tribal members and land. It can also provide a basis for the replacement of state regulation with tribal regulation of off-reservation usufructuary activities.

Second, the opinions in *Cherokee Nation,* and more particularly in *Worcester,* held that the tribe had the contractual capacity to create legally binding obligations that are enforceable in federal and state courts. The 1789 Constitution made treaties self-executing, but the issue of contractual capacity had not been addressed. The British Crown and other European governments had entered into treaties of cession that recognized the sovereign authority of the aboriginal chiefs, but attitudes were changing – even as the federal government implemented a policy of conciliation, treaty making, and civilization towards the tribes. Anger over indigenous hostility and violence directed at settlers; frustration over the rejection of Christianity and "civilization"; the idea of Manifest Destiny; as well as the growing acceptance of "scientific" theories which posited that related race to lower intellectual prowess and cultural development, led many Americans to conclude that Native Americans were inferior and borne to servitude.[175]

[174] United States v. Wheeler, 435 U.S. 313, 322-323 (1978) (citations omitted).
[175] As stated by historian Alden Vaughan: "A certain type of cultural relativity and moral absolutism combined…to show that though white and red man were of the same biological mould, the Indian possessed customs that fitted him perfectly to his level of development in the history of man, but the level was far

These attitudes spilled over into the legal system. "Where is the rule to stop?" asked Justice Johnson as he argued against the notion that the Cherokee constituted a state in *Cherokee Nation*: "Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?" [176] Nevertheless, the *Worcester* majority simply held that the contractual capacity related to self-government, the status of the other contracting party, and the use of a treaty was a political decision of the federal government.[177] This act of recognition itself was arguably an act only an international sovereign could make.[178]

Third, treaty making process is circumscribed by the Reserved Rights Doctrine. The existence and continued traction of the Reserved Rights doctrine with its corresponding reservation of usufructuary hunting, fishing, and gathering rights owes its existence to judicial recognition of the tribe's diminished sovereignty and independent character. On one hand, the doctrine can be understood in contract terms: as an application of rule construing an agreement against the drafter, as a recognition that contracts involving land must use precise language, and that implied terms of a contract must not be contrary to the underlying purposes of the agreement. On the other hand, the Reserved Rights doctrine is due to recognition that the tribes retain a diminished international sovereignty and right of self-government over a particular territory. While the national government holds radical title to the territory, the fee is united only by cession or a conquest i.e. it is sourced in a grant

inferior to that of the white European. The savage was the zero point of human society. ALDEN T. VAUGHAN, ROOTS OF AMERICAN RACISM: ESSAYS ON THE COLONIAL EXPERIENCE 21-22 (Oxford Univ. Press, 1995); ROBERT F. BERKHOFER, JR., SALVATION AND THE SAVAGE: AN ANALYSIS OF PROTESTANT MISSION AND THE AMERICAN INDIAN RESPONSE, 1787-1862 11 (Univ. of Ky., 1977).

[176] *Cherokee Nation*, 30 U.S. at 25.

[177] In his *Worcester* concurrence, Justice M'Lean was explicit that self-government, not sovereignty, was crucial to contractual capacity. It is said that these treaties are nothing more than compacts, which cannot be considered as obligatory on the United States, from a want of power in the Indians to enter into them. He writes " What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self -government. Is it essential that each party shall possess the same attributes of sovereignty, to give force to the treaty? This will not be pretended: for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self -government, and the power to perform the stipulations of the treaty." *Worcester,* 31 U.S. at 581.

[178] *See* Rose v. Himely, 8 U.S. 241, 271 (1808).

of pre-existing allodial rights from a previously subsisting legal entity. Indeed, courts have continuously recognized and applied the idea that treaties with Indians are analogous to international treaties. "[T]he powers to make treaties with the Indian tribes is," the Court stated in *United States v. Forty-Three Gallons of Whiskey*, "…coextensive with that to make treaties with foreign nations." [179] Under international law rules of treaty interpretation, the relinquishment of these pre-existing rights, either self-government or implied rights which enable the continued existence of the contracting party, such as hunting rights, is preserved by treaty unless explicitly extinguished.[180]

[179] United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 197 (1876). The foreign nature of the individual Indians and the tribes was contrasted with that of slaves in the infamous *Dred Scott* case by Chief Justice Taney. Taney wrote "The situation of this [the slave] population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupillage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people." Dred Scott v. Sandford, 60 U.S. 393, 403-404 (1857).

[180] Vattel, supra note 33, at 3-4. I do not mean to argue that international law rules control the federal, state and tribe relationship or that there has be a direct incorporation of international law rules of treaty interpretation into American Indian law. This would ignore the Discovery Doctrine which presumes that international law rules do not apply. I simply note that international rules regarding consent and the scope of agreement between sovereigns and the

Related to Reserved Rights doctrine is the recognition of residual sovereignty, which provides a mechanism for the exercise of tribal law and authority over areas outside the territorial boundaries of the reservation. Within the context of the state-federal disputes, sovereignty was considered co-extensive with territory, but tribal sovereignty was articulated as sovereignty over its members. The state may hold sovereignty and authority over the territory within borders, but tribal sovereignty, or control and jurisdiction over tribal members, remained in the tribe, guaranteed by and subject to federal authority. Absent federal action to diminish this sovereignty, the right to regulate tribal membership remains both an inherent right and a federally guaranteed right. This right of regulation over members has been an important aspect in the exercise of off-reservation hunting, fishing, and gathering rights. In many circumstances' tribal regulation of members outside of the reservation can supersede to state regulation.

Fourth, American Law has incorporated a more extensive and legally enforceable notion of federal fiduciary obligation towards the tribes than those recognized in other common law settler states such as Canada and New Zealand. The anomalous position of tribes arising from their prior occupation, possession and defense of territory in North America coupled with the inapplicability of Anglo-American legal and constitutional categories, has given rise to federal fiduciary and trust obligations towards the tribes and tribal property. These obligations interpose federal authority between the tribes and the individual states and provide a legally enforceable standard on federal action.[181] In addition, this process led to the

interpretation of treaties have influenced the legal interpretation of Indian treaties and statutory agreements.

[181] "These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." United States v. Kagama, 118 U.S. 375, 383-844 (1886); "Our construction of these statutes and regulations [relating to federal management of forests owned by the tribe or allottees within the reservation] is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized

development of the protective canons of treaty interpretation. [182] In the legal analysis relating to the substance of treaty negotiations the doctrine and canons create a presumption that the United States would not use its superior power and knowledge to the detriment of the tribes and interprets treaty language in a manner more solicitous of tribal perspectives.

More significantly this reasoning led to the Court to hold that treaties were legal obligations rather than simply non-enforceable political commitments of Congress and the Executive. The federal government had inherited this duty of protection from the British Crown and it remained a primary justification for federal resistance to state assertions of jurisdiction over the tribes. Nevertheless, where the Indians gained some traction in treaty law, the fiduciary relationship and the political nature of the tribal-federal relationship been also used to diminish tribal authority. In the late 19th century, as might expected by the discussion above, the fiduciary relationship was used as justification for the exercise of plenary federal power over the tribes and the increased use of the Political Question doctrine to dispense with treaty protections.[183]

"the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." United States v. Mitchell, 463 U.S. 206, 225 (1983) (citing Navajo Tribe v. United States, 624 F.2d 981 (Ct. Cl. 1980)).

[182] "[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana. v. Blackfeet, 471 U.S. 759, 766 (1985) (citing County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 1985); Choatte v. Trapp, 224 U.S. 665 (1912). "In construing any treaty between the United States and an Indian tribe, it must always…be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." Jones v. Meehan, 175 U.S. 1, 10-11 (1899) (citation omitted).

[183] *Kagama*, 118 U.S. at 384. The political question doctrine was most forcefully articulated in *Lone Wolf v. Hitchcock*, which presumes that Congressional

Finally, the federal government has plenary and exclusive authority over Indian tribes.[184] In *United States v. Kagama*, the Court following the logic of the Marshall trilogy, stated that Congress had complete power as a trustee over the tribes and it had the complete authority and power to determine when tribal self-government would end. The Court held this authority not to be one of the enumerated powers in the constitution but held it was the result of the federal governments "course of dealing" with the tribes from which had risen a "duty of protection and with it the power."[185]

actions with regard to Indians are not subject to review by the courts. *Lone Wolf*, 187 U.S. at 566; It was never fully accepted by the U.S. Supreme Court even at the time it was articulated. In *Delaware Tribal Business Committee v. Weeks*, the Court noted that government authority over tribal property, although plenary may be challenged when the governmental action infringes on constitutional rights because Indian rights are rooted within the constitution. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

[184] "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985) (citing U.S. CONST. art. 1, § 8, cl. 3).

[185] The major sources of federal authority over the tribes are the commerce clause, the treaty power, the property clause and the trust relationship that the federal government owes the tribes due to their dependent status. Art. I, § 8, cl. 3. of the U.S. Constitution states that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…." As the federal government ceased signing treaties with the tribes in 1871 this clause has become a more important source of federal authority. The treaty power and the supremacy clause found in Art. IV "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding"; incorporate federal foreign affairs power and international law principles into the federal-tribe relationship. The trust relationship is premised on the dependent status of the tribes and is a structural aspect of the tribal-state-federal relationship. As the U.S. Supreme Court noted in *United States v. Kagama*: "These Indian tribes are the wards of the nation. They are communities dependent on the United States--dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *Kagama*, 118 U.S. at 383-344; The courts have also found that the federal government has authority over the tribes and the states derived from its fee ownership of Indian lands. U.S. CONST. art. IV, sec. 3, cl. 2 states in part that: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States…."; In *United States v. Winans*,

As such, the power to regulate Indian tribes is completely federal. This regulatory authority enables the federal government to legally disregard treaty rights as well as terminate legal recognition of tribal entities if it so chooses.[186] States are excluded from extending their jurisdiction and regulation to Indian tribes and land unless specifically authorized by Congress. This is so even in those areas constitutionally deemed to be important aspects of state sovereignty such as control over natural resources.[187]

## IV. CONCLUSION

This paper has argued that the federal state conflict which occurred prior to the American Civil War informed the judicial decision-making in early Indian jurisprudence and these institutional disputes have had a significant impact on the existence and scope of Native American Law in the United States.

It is clear that the Marshall Court did not agree that the federal government and the States were co-equal sovereigns nor was their

Justice McKinna quoted: "By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition." United States v. Winans, 198 U.S. 371, 383-384 (1905) (citing Shively v. Bowlby, 152 U. S. 1, 38 (1893)); "The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised." *Winans*, 198 U.S. at 383-384; *See also* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 UNIV. of PA. L. REV.195 (1984).

[186] For example, *The Menominee Termination Act* established a mechanism to "to provide for orderly termination of Federal supervision over the property and members" of the tribe. Under its provisions, the tribe was to formulate a plan for future control of tribal property and service functions theretofore conducted by the United States. Once approved the tribe's relationship with the federal government would be severed and its property and members would become subject to the law of the state within which their reservation was located. Local governance structures in the state would be extended into the former reservation. The Menominee Termination Act, 68 Stat. 250 (1954).

[187] For example, Justice O'Connor writing for the majority, stated in *Mille Lacs v. Minnesota*; "Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999).

relative authority and power in the federal system reciprocal. The federal government penetrated the states, but a state could not assert their jurisdiction in areas of federal authority -- particularly in those areas that involved fundamental issues of sovereignty like "war and peace," "treaties," and "title to and jurisdiction over territory." In this sense, the federal government is (and was) "more" sovereign. It has both internal and external sovereignty. It existed on both the domestic and international plane. It claimed jurisdiction over the entire area and population of the United States as the Lockean civil society. Each state, on the other hand, while "sovereign," was analogous to a tribe in that it held a "diminished sovereignty" within the federal system. Unlike a tribe, however, its residual sovereign powers had nothing whatsoever to do with the fundamental legal issues of war and peace. Indeed, with the Union victory in American Civil War, the logic of absolute federal authority as set forth in *Kagama* became manifest. Ironically, the legal basis of the continued or renewed exercise of treaty rights has been bound up in the same determination of paramount and exclusive federal authority. These rights include the legally enforceable nature of Indian treaties, Reserved Rights doctrine, the fiduciary duty toward the tribes, and the protective canons of treaty interpretation.

The Marshall Court, by analogizing tribes to foreign states and recognizing their independence and self-government as collective entities, provided a framework through which the tribes were incorporated into the federal system. Yet despite these positive rights, the vindication of federal authority resulted in the legal determination that the federal government holds exclusive and absolute power over the tribes. This power is not the power and authority as understood in liberal theory and falls short of genuine federal relationship subsisting between the federal government and the tribes. Tribal collectivities are not constitutive of the national state; they are excluded from the Lockean contract by which state authority is legitimated in American political theory. Rather, they are "subjects," analogous to conquered people in law in that their legal entitlements and rights are essentially non-protected and subject to defeasement at the will of the sovereign national American state. While the constitution explicitly recognized the existence of Indians and Indian tribes, accommodations for their "dependent" status and natural rights, using accepted categories of

international law and natural law, were available. This is not to say that racial intolerance, bigotry, and greed did not also diminish the fortunes of the tribes in their quest to protect their lands and right to self-government.[188] The white European settlers and citizens of the United States may have simply been unwilling to recognize any legal or political protections for the Indians, regardless of the fulminations of legal scholars and courts.

[188] The Constitution mentions Indians and Tribes two times. In both in the Indian Commerce Clause; “foreign nations, states and Indian tribes” and in the so-called "Indians not taxed" clause. Art. I, § 8, cl. 3; Art. I, § 2. Indians were considered members to be members of their respective tribes rather than citizens or property (as in the case of African American slaves under *Dred Scott*).