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A Constitutional Conundrum: The Resilience of Tribal Sovereignty During American Nationalism and Expansion: 1810-1871

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INTRODUCTION

Judge Michael Hawkins addresses a number of important issues in his essay on John Quincy Adams' evolving understanding and relationship with slavery and the variegated role that law played in the politics of slavery and the slavery of politics. The essay demonstrates the importance of human personality in influencing and being influenced by political and legal processes. At its heart, the Article is a legal and historical study of the moral dimension and inherent contradictions facing Adams, in particular, and the American Republic, in general, regarding the existence and persistence of the institution of slavery in a nation built upon principles of universal freedom and equality.

In my reading of Judge Hawkins analysis, I found interesting parallels and divergences between the experience of Africans and African-Americans with those of the indigenous nations of the Americas. One parallel already mentioned is that of the inherent contradiction in the United States Constitution that, on the one hand, banned the slave trade after 1808 yet respected the legality of slavery for many more years. Similarly, tribes, through their treaty-based relationship with the United States and preexisting status as distinctive polities, have been dealt with as sovereign bodies, yet Congress and the courts have also asserted plenary (read: absolute) power to terminate or restrain that sovereignty at any time.

Another parallel points to the very question of the humanity of Africans, African-Americans, and American Indians. As Judge Hawkins

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notes, the British House of Commons created a commission to study the slave trade and raised the question "whether 'the slave trade is contrary to the laws of God and the rights of man'"[1] In 1550-1551 at the request of King Charles of Spain, a council of fourteen Spanish politicians and scholars held a great debate at Valladolid between the Dominican friar Bartolome de Las Casas and the Spanish jurist, Juan Gines de Sepulveda. They convened to debate whether or not the application of Aristotle's Theory of Natural Slavery applied to Indians in the New World.[2]

Las Casas, who had been to the Americas, was a strong advocate of Indian rights. He had campaigned against the Spanish conquistadores who wrought great destruction to indigenous societies through institutions like the Encomienda that allowed Spanish landowners to enslave Indians who were required to work the lands of their overlords. He fervently believed that Indians were entitled to respect and should not be subjected to enslavement. Sepulveda, on the other hand, maintained that the human species was naturally divided into two kinds of men: (1) the civilized man, and (2) the barbarian, who was believed to lack essential qualities. Sepulveda believed that Indians had a "natural rudeness and inferiority" which meant they were "born to be natural slaves."[3]

Finally, and to borrow from one of Judge Hawkins' colleagues, John T. Noonan, Jr., there is also a parallel in the manner in which the political and legal processes develop "masks" that are used to conceal the true character of individuals and minority groups as a means to "suppress the humanity of a participant in the process."[4] The humanity of Africans and African-Americans was "masked" in American law by being characterized as "property." Once so characterized, they could be bartered, sold, or even killed without the legal system actually confronting the fact that they were human beings entitled to basic human rights and freedom.

The fields of federal Indian policy and law are also marked by a number of masks, many of which, unfortunately for tribes, persist to this day. These include the masks of Indian "dependency" or "wardship," the masks that assert that Indians were "discovered" and then "conquered,"

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1. MICHAEL DALY HAWKINS, *John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 OKLA. CITY L. REV. 4 (2000) (quoting DAVID BRION DAVIS, SLAVERY IN THE AGE OF REVOLUTION 16 (1973)).

2. *See* LEWIS HANKE, ARISTOTLE AND THE AMERICAN INDIANS (1959).

3. *Id.* at 44.

4. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 20 (1976).

thus reducing their rights vis-a-vis the discovering conqueror. There is also the mask that the United States has plenary (read: absolute) authority over tribes and their resources and rights; and the mask that tribes, by having been "geographically incorporated" into the body politic of the United States have thereby been "implicitly divested" of certain inherent powers of sovereignty like the power of exercising criminal jurisdiction over non-Indians within their borders.[5]

DIVERGENCES BETWEEN INDIAN NATIONS AND AFRICAN-AMERICANS

While the similarities in status and perception of the two groups in relation to the land and American politicians are impressive, the differences are even more remarkable. In part, this is a result of the fact that tribes generally do not consider themselves an integral part of the pluralistic mosaic of the American polity. Tribes perceive of themselves not only as pre-constitutional polities, but as continuing extra-constitutional entities. As one commentator noted when comparing African-Americans and tribal nations: "The overriding goal of the black civil rights movement was to achieve individual equality and individual rights as promised within the philosophy of liberalism. Native American leaders, on the other hand, have historically demanded recognition of their tribal rights as guaranteed by treaties, executive agreements, and congressional statutes."[6] The remainder of this Article critically examines the legal-political situation created for Native peoples by the United States Supreme Court between 1810 and 1871. I begin with 1810 because in this year a Supreme Court decision first broached, though did not directly explicate, the subject of tribal sovereignty. My analysis ends in 1871 because in that year Congress, through an appropriation act rider,[7] unilaterally transformed the political

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5. See, for example, DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE (1997), for an analysis of these and other judicial masks from the very earliest Supreme Court decisions to the end of the twentieth century.

6. Anne M. McCulloch, *Perspectives on Native Americans*, 16 POLITICAL SCIENCE: TEACHING POLITICAL SCIENCE: POLITICS IN PERSPECTIVE 93 (Spring 1989).

7. *See* 16 Stat. 544, 566 (1871). Over 800 treaties were negotiated with the various Indian tribes, although the Senate ratified only about 371. See CHARLES KAPPLER, 2 INDIAN AFFAIRS, LAWS AND TREATIES (1904), for the official, if insufficient, collection of the various ratified treaties. But see VINE DELORIA, JR. & RAYMOND J. DEMALLIE'S, 1-2 DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND

rules of the game between itself and tribal nations by attempting to terminate the treaty process.

I conclude by asserting that in spite of or because of the incongruous and sometimes unique principles emerging from the Supreme Court's Indian case law during this era, the doctrine of tribal sovereignty remained a vital concept undergirding the social and political relationship between the tribes and the federal government. The Court's nineteenth century depictions of tribal status, Indian treaties, state-tribal-federal relations, and other related issues, warrant attention. Despite the purported termination of certain characteristics of tribal sovereignty (like the recognition of the right of tribes to negotiate new treaties after 1871), and the modification of elements of tribal sovereignty, the Court's decisions continue to provide the essential legal, political, and constitutional parameters necessary to develop a comprehension of the distinctive role tribes occupy both inside and outside the intergovernmental process.

EARLY POLITICAL RELATIONS

The Commerce Clause of the Constitution empowers Congress to regulate affairs with tribes. In the formative years of the United States' development, Congress actively sought and established a clear Indian legislative agenda. In fact, during the First Congress in 1789, four of the initial thirteen statutes enacted dealt primarily or partially with Indian affairs.

CONVENTIONS, 1775-1979 (1999), which supplements and dramatically expands Kappler's work by reprinting copies of hundreds of other treaties, agreements, etc., that have not been previously published.

In 1871, the House of Representatives, jealous of their exclusion from the treaty process, and anxious to end the rampant graft and corruption in the Bureau of Indian Affairs handling of treaty appropriations, succeeded in attaching a rider which sought to curtail the negotiation of additional treaties. All previously ratified treaties and subsequent agreements (bilateral agreements continued to be negotiated with tribes until 1914) retained legal force, however. A good contemporary discussion on the history and legal ramifications of the transition from treaty relations to agreement relations in found in George William Rice's *Indian Rights: 25 U.S.C. Sec. 71: The End of Sovereignty or a Self-Limitation of Contractual Ability*, 5 AM. INDIAN L. R. 239-53 (1977). See also the spirited senatorial debates printed in CONG. GLOBE, 41st Cong., 2d Sess, 1098-99, 1638-48 (1870). *See also id.*, app. at 536-48 (1870) (Speech by Senator Eugene Casserly); *id.*, 41st Cong., 3d Sess., 1154, 1810-12, 1821-25 (1871).

Within these four important sources of federal authority relating to tribal matters are: "The power to make war (and presumably, peace); the power to govern territories; the power to make treaties; and the power to spend money."[8] The second of the four statutes reenacted the Northwest Ordinance of 1787. This Act contains a now famous quote which provides "the utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent. . . ."[9] According to Cohen, this Act stood out as the first of "many measures by which Congress, in administering the government of the territories, legislated over Indian affairs with 'plenary' authority."[10] Plenary as defined by Cohen is exclusive and preemptive of state power. Congress could not afford to be lackadaisical in establishing constructive relations with the tribes. Tribal military power could not be wished away. Moreover, the English, Spanish, French, and other competitive European powers complicated matters further because each of these nation states were competing for jurisdiction over various portions of North America. Finally, the struggle between the national government and the individual states was a major concern. Despite the passage of several vital laws, there was still much uncertainty in determining how the actual tribal-federal-state-European power relationship was to be reconciled.

The Supreme Court, initially under the sophisticated and diplomatic pen of Chief Justice John Marshall, would be the federal institution, which defined these broad relations. This Article provides an historical examination of the critical events and personalities of this period, and critically appraises the relatively few Supreme Court decisions, dealing either explicitly or gratuitously with tribal autonomy.

Why are there so few court cases during this more than sixty year period? There are two compelling, though disparate reasons. First, a majority of western tribes (excluding the Five Civilized Tribes) continued to be recognized and treated as foreign separate nations via the treaty route. The second equally important reason focuses on the Five Civilized Tribes. While diplomatically linked to the United States by treaties, their early and extended contact with federal administrators, *before* their voluntary and later forced removal to the Indian Territory, encouraged these tribes to

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8. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 69 (Five Rings Corp. 1986) (1942).

9. 1 Stat. 50, 52 (1789).

10. COHEN, *supra* note 8, at 69.

develop a sophisticated constitutional form of government similar in some respects to the structure of the United States. However, in *Cherokee Nation v. Georgia* in 1831, when the Cherokee Nation attempted to bring a suit directly to the Supreme Court, they were told in explicit terms that their "domestic-dependent" status—Justice Marshall said that they were neither foreign nations nor constitutionally recognized states—precluded such a legal action.[11] Hence, the Court developed a new political status for tribal nations but did not identify a corresponding constitutional responsibility to protect said status because tribes were prohibited from using a direct legal avenue of redress.

The sovereign status of tribal nations was recognized in the Constitution, the Northwest Ordinance, and numerous treaties. However, as noted above, the Supreme Court during this period of national formation, expansion, and civil strife, articulated several crucial rules regarding tribal status and the tribal-federal-state relationship. These doctrines, some moored in colonial law, constitutional law, and international law, some more aptly characterized as "legal fiction," remain the cornerstone depictions of an apparently malleable tribal status that perpetuates internal, external, intertribal, and intergovernmental tension.

MARSHALL: MASTER OF FORCEFUL EQUIVOCATION: 1810-1835

John Marshall, the third Chief Justice, is widely regarded as the most influential individual in establishing the prestige of the Supreme Court. His major opinions advanced federal supremacy over states' rights, established the right of judicial review, and provided an extensive interpretation of the Commerce Clause. Marshall's vaunted, if occasionally enigmatic logic, was equally impressive in the area of Indian law. In five cases, *Fletcher v. Peck* (1810), *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831), *Worcester v. Georgia* (1832), and *Mitchel v. United States* (1835), the Marshall Court both explicated and reinforced doctrines which form the broad parameters of the tribal-federal-state relationship today. These cases, in brief, defined: (1) tribal property rights; (2) tribal political status in relation to the states; (3) tribal political status in relation to the federal government; and (4) tribal land rights and international status.

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11. *See id.*

A. Fletcher v. Peck

Fletcher was the first case to abrogate a state action. However, it is more important because it was the first Supreme Court opinion to broach the subject of Indian property rights. In this case, commonly known as the "Yazoo land fraud case," Justice Marshall ruled that the Georgia legislature had a right in 1795 to sell the State's western territory, although certain Indian tribes occupied it and retained possession of the soil.

While Indians were not parties to this suit, and although Indian land title was not a direct issue, Marshall expressed a view in the last few sentences of his opinion, presaging his next major Indian opinion, *Johnson v. M'Intosh*. *Johnson* would later be misinterpreted by some jurists and commentators as a dilution of tribal rights to land.[12]

Marshall said: "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."[13] Seisin literally means actual possession—in other words, the State could make an outright purchase of tribal land. This is the first precise statement by the Court that tribal rights are for some reason inferior to those same rights when exercised by Anglo-Americans. Justice Johnson dissented on the issue of Georgia's title and noted that Indians were "absolute proprietor of their soil" in which "no other nation can be said to have the same interest."[14] Johnson's dissent would later prove useful to the resourceful Marshall and would serve as a foundation to Justice Marshall's eloquent and most impressive opinion on the vitality of tribal sovereignty.

B. Johnson v. M'Intosh

Thirteen years after *Fletcher*, the Supreme Court returned to the question of Indian land title in *Johnson*. As in *Fletcher*, Indians were not directly involved as parties to this suit. This was a dispute between white men. The specific issue, according to Marshall, was "in a great measure,

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12. *See* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1 AMER. BAR FOUNDATION RES. J. 23 (1987).

13. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142-43 (1810).

14. *Id.* at 147.

confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country."[15]

In *Fletcher*, Marshall devoted all of three lines to a gratuitous description of Indian land title. By the 1820s, a strong sense of nationalism had emerged. This is best evidenced by the issuance of the Monroe Doctrine in which the United States defined its role in international affairs. In *Johnson*, the Federal Government positioned itself in such a manner that "Indian tribal properties became a matter of domestic policy."[16] This is not unusual, by itself. What is unusual, however, is the rationale given by the Court—"the doctrine of discovery"—purporting to justify one of two federal perspectives regarding its understanding of who held legal title to Indian land and the public domain. Either the federal government claimed legal ownership of the United States, or the United States merely asserted the exclusive right to acquire Indian property by purchase or conquest.

The doctrine of discovery, as originated by Marshall, was first employed in the former sense. European nations from the fifteenth through the nineteenth centuries operated under the strange belief that by their mere arrival, and because they represented Christian nations, all "discovered" lands, occupied or not, came under the legal possession of the discovering nation. By contrast, in Marshall's last full Indian-law decision, *Worcester v. Georgia* (1832), the Chief Justice redefined "discovery" as merely an "exclusive principle which shut out the right of competition among those who had agreed to it."[17]

In *Johnson*, Justice Marshall underscored the significance of such a bizarre doctrine in an incredible concession. He noted the following:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of

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15. Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 572 (1823).

16. Vine Deloria, Jr., *Beyond the Pale: American Indians and the Constitution*, *in* A LESS THAN PERFECT UNION 249, 251 (Jules Lobel ed., 1988).

17. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832). See also Robert A. Williams, Jr., *The Medieval and Renaissance Origin of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1-99 (1983), for an extensive treatment on the "discovery" concept; and David E. Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277-315 (1998).

> the land, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. 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.[18]

As a result of the invented concept of "discovery," tribal rights to land, while not "entirely disregarded," were "necessarily, to a considerable extent, impaired."[19] Scholarly interpretations of the doctrines enunciated in *Johnson* run from those asserting that the United States acquired fee simple title to Indian land, meaning that Indians owned only equitable [use and occupancy] title, as contrasted with legal ownership;[20] to those who posit that the United States only gained a preemptive right to purchase Indian land or confiscate it after a just war.[21]

In actuality, because of Marshall's intentional waffling, the opinion clearly supports both views. George Decker, however, raises an interesting point on the issue of "discovery." He notes that "[t]hey [(whites)] allowed no room in this for any reciprocal right to follow any discovery of white men by Indians. This fiction of a right, as against native occupants, arising from discovery of them by white men glossed over the wrong of a forcible intrusion."[22]

Fletcher and *Johnson* involved whites who had conflicting claims to land formerly held by tribal nations, rather than conflicting claims between states or the federal government and tribal groups with opposing claims to land and sovereignty. Furthermore, "these cases did not directly confront

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18. *Johnson*, 21 U.S. (8 Wheat.) at 591-92.

19. *Id.* at 574.

20. *See, e.g.*, George P. Decker, *Treaty Making With the Indians*, 47 RESEARCHES AND TRANSACTIONS OF THE NEW YORK STATE ARCHAEOLOGICAL ASSOCIATION (1920); Vine Deloria, Jr. *The Distinctive Status of Indian Rights, in* THE PLAINS INDIANS OF THE TWENTIETH CENTURY 237, 240 (1985).

21. *See, e.g.*, Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 208 (1984); Ball, *supra* note 12, at 24.

22. Decker, *supra* note 20, at 47.

the Court with questions of the political and property rights of the tribes, its decisions only suggested answers to these problems."[23] Justice Marshall's two other Indian opinions, as well as *Mitchel v. U.S.*, would tackle these fundamental questions.

C. Cherokee Nation v. Georgia

The Cherokee Nation was one of the first tribal entities to successfully attempt a fusion of ancient tribal law ways with Anglo-American legal institutions.[24] This acculturation process, in which the western legal system was modified to Cherokee needs, was well under way by the early 1820s. In that decade alone the Cherokees crafted a constitution loosely modeled after that of the United States, produced a written account of their language, and established the first tribal newspaper.[25] In 1827 they formally announced a fact—that of their political independence— which the federal government already knew and supported, as evidenced by the fourteen ratified treaties with the Cherokee Nation.[26] The Cherokees stated that they were an independent nation with an absolute right to their territory and sovereignty within their boundaries.[27]

The Cherokees declaration enraged Georgia's white population and their government officials. Driven by the recent discovery of gold on tribal lands, but compelled even more by their conception of state sovereignty which they believed could not be rightfully invaded by the federal government, much less by a tribe of Indians, the State enacted a series of debilitating laws designed to oppress Cherokee self-government. These Acts parceled out Cherokee lands to several counties, extended state jurisdiction over the Cherokees, abolished Cherokee laws, and denied the Cherokees the protection of their own laws, etc.[28] The Cherokees, having

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23. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN L. REV. 500, 502 (1969).

24. *See* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT xi (1975).

25. *See id.* at 103, 109.

26. *See* A CHRONOLOGICAL LIST OF TREATIES AND AGREEMENTS MADE BY INDIAN TRIBES WITH THE UNITED STATES 3-31 (1973).

27. *See* Burke, *supra* note 23, at 503.

28. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 7-8 (1831).

failed in their appeals to President Jackson[29] and the Congress,[30] proceeded to file suit in the Supreme Court against Georgia. The Cherokees prayed for an injunction to restrain Georgia's execution of those laws, which the Cherokees said, were in direct violation of "solemn treaties repeatedly made and still in force."[31]

Justice Marshall rendered the Court's fragmented and ambivalent opinion on March 18, 1831. While acknowledging that a more fascinating case "can scarcely be imagined," Marshall first noted that the Court had to ascertain whether it had jurisdiction to hear the case.[32] Since the Cherokees were suing as an original plaintiff, the Court had to decide whether the Cherokee Nation constituted a "foreign state."[33]

After a lengthy opinion, Chief Justice Marshall wrote that "the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state . . . and cannot maintain an action in the Courts of the United States."[34] If they were not a foreign state, then, what were they? Marshall refused to accept either of the opposing opinions at the time—tribes as either foreign nations or tribes as subject nations. Had he declared them subject nations they would have been at the mercy of the states; had he more accurately acknowledged them as foreign nations they would have been independent of federal control.[35]

Instead, the inventive Chief Justice generated an extra-constitutional political status for tribes by characterizing them as "domestic dependent nations."[36] This diluted "national" status has had a lasting effect on tribes in their quest for legal redress. First, it effectively served to preclude tribes from bringing original actions to the Supreme Court because tribes were not considered "constitutional" states. Second, since they were denied status as "foreign nations" they were effectively barred from benefits accorded to fully recognized sovereigns under international law.

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29. *See* Andrew Jackson, *First Annual Message*, *in* I THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790-1966, at 294, 309 (Fred L. Israel ed., 1966) (1829) [hereinafter _ Israel].

30. *See* H.R. REP. NO. 227 (1830).

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

32. *Id.*

33. *Id.* at 16.

34. *Id.* at 20.

35. *See* Burke, *supra* note 23, at 514.

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

Building upon the deceptive legal construct of "discovery," Marshall said that tribes "occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases."[37] Marshall was not through, however. He then wrote several lines containing inaccurate adjectives that would later form the basis of additional "masks" that would prove detrimental to tribes. Marshall alleged that "[m]eanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[38]

Justice Marshall's deeply political opinion was in certain respects similar to his ruling in *Marbury v. Madison.*[39] In that case, facing the resistance of a popular president, and not hindered by the defense counsel's logic, Marshall spoke powerfully on the plaintiff's claims, chided the President, but avoided the "threatened disobedience of the Court's decree by dismissing the case for want of jurisdiction."[40]

The Court's decision in *Cherokee Nation* was extremely splintered. The six Justices (Justice Duvall was absent) presented four diverse sets of views on tribal status. Justice Johnson held that tribes lacked sovereignty but possessed an inherent political power that could mature into sovereignty later. Justice Baldwin simply said that tribes had no sovereignty. Justice Thompson and Justice Story believed that tribal status paralleled that of foreign nations. Chief Justice Marshall and Justice McLean said that tribes were domestic-dependent nations.[41]

On the question of jurisdiction, the majority was against the Cherokees. On the merits, however, the Court divided 4-2 for the Cherokees. The Chief Justice, in fact, insinuated that he sided with the minority on the merits, (he, in fact, encouraged Justice Thompson and Justice Story to write out their dissent). Justice Marshall even suggested a method of getting a case properly before the court in the future.[42] Marshall would have the opportunity to vent these feelings even sooner than he anticipated.

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37. *Id.*

38. *Id.*

39. 5 U.S. (1 Cranch) 137 (1803).

40. Burke, *supra* note 23, at 514.

41. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 31 (1983).

42. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 20; *see also* Burke, *supra* note 23, at 515; DELORIA & LYTLE, *supra* note 41, at 31-32.

D. Worcester v. Georgia

Worcester is often hailed as the most persuasive and elaborate pronouncement of the federal government's treaty-based relationship with tribal nations. Interestingly, tribes were not direct parties to this suit. And while *Worcester* is generally considered the strongest defense of tribal sovereignty, it can more accurately be understood as a "defense of federal over state power."[43] The principals in the case were a group of Christian missionaries, led by Samuel A. Worcester and Elizur Butler, and the State of Georgia. Georgia had enacted a law in the early part of 1831 that prohibited whites from entering Cherokee country without first having secured a state license. Worcester and Butler, who had entered Cherokee territory without state authorization, but with tribal and federal approval, were arrested and later sentenced to four years in prison. The missionaries immediately retained lawyers who brought suit against Georgia's action to the Supreme Court, claiming in part that they were agents of the United States. This raised the question of federal supremacy over state law. Here was the test case Marshall had been waiting for. The Chief Justice noted that:

> The legislative power of a state, the controlling power of the constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.[44]

Unlike his indefinite opinion in *Cherokee Nation*, Marshall courageously declared that all of Georgia's Indian laws were "repugnant to the Constitution, laws, and treaties of the United States."[45] Lifting text almost verbatim from Justice Thompson's dissent in *Cherokee Nation* on the international status of tribes, Marshall said that "[t]he very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its

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43. Newton, *supra* note 21, at 202.
44. Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 536 (1832).
45. *Id.* at 561.

protection."[46] In short, the issue of federal preeminence over state power regarding Indian tribes was settled, at least for the time being. The Chief Justice based much of his defense of federal power on his view of Indian tribes "as distinct, independent political communities."[47] The 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."[48]

Worcester epitomizes Marshall's most gallant effort to rectify some of his previous equivocations. First was the notion of the "doctrine of discovery," which was ambivalent in both *Johnson* and *Cherokee Nation*. In *Worcester*, the Chief Justice boldly stated "[i]t is difficult to comprehend the proposition . . . that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors."[49] Discovery was merely "an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it."[50]

On the issue of tribal political status, Marshall attempted to illuminate the Court's position. In *Cherokee Nation*, tribes were called "domestic dependent nations," not on par with "foreign" states.[51] In *Worcester*, however, tribes were referred to as "distinct, independent communities."[52] In Marshall's words, "[t]he very term 'nation,' so generally applied to them, means 'a people distinct from others.'"[53] Marshall noted, "[w]e have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."[54] The Court overturned Georgia's actions and ordered Worcester's release. Worcester, however, remained in prison until a later deal was struck. Tragically, however, the majority of the Cherokees and over 100,000 other Indians representing

46. *Id.* at 560-61.
47. *Id.* at 559.
48. *Id.*
49. *Id.* at 543.
50. *Id.* at 544.
51. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1,17 (1831).
52. *Worchester*, 31 U.S. (6 Pet.) at 559.
53. *Id.*
54. *Id.* at 559-60.

more than a dozen tribes were eventually coerced into signing treaties leading to their relocation to Oklahoma.[55]

E. Mitchel v. United States

Mitchel is an important opinion for indigenous rights which has received scant attention by legal and political commentators. In part, it has been largely ignored because most writers have concentrated their attention on the so-called Marshall "trilogy"—*Johnson*, *Cherokee Nation*, and *Worcester*. Marshall, possibly because he was near retirement (he stepped down in July 1835), opted not to write this decision and assigned it instead to Justice Henry Baldwin. The Chief Justice did write a brief opening section in which the Court denied the federal government's motion seeking a postponement of the Court's verdict.[56]

Still, *Mitchel* should be added to the list of cases supporting tribal sovereignty and indigenous land rights because the Court's holding fundamentally contradicts the doctrines espoused in *Johnson*. *Mitchel's* key principles include: (1) the doctrine of discovery lacking credibility as a legal principle; (2) tribes as possessors of a sacrosanct title that is as important as the fee-simple title of non-Indians; (3) tribes right to alienate their aboriginal property to whomever they wish, and the question of whether the non-Indian purchaser has the authorization of a sovereign as a matter that cannot be used to reduce indigenous rights; (4) the argument that alleged inferior tribal cultural status, regardless of its differences with Western culture, does not inhibit aboriginal sovereignty; and finally, (5) that tribes as collective polities and their members are entitled to international protections of their recognized treaty rights.[57]

F. Assessing the Marshall Court's Indian Cases

According to Christopher Wolfe "[p]erhaps the broadest or most radical criticism of Marshall would be that his whole approach to interpretation was defective in terms of his own announced ideal: ascertaining and

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55. *See* GRANT FOREMAN, THE FIVE CIVILIZED TRIBES (10th ed. 1989); H. R. REP. NO. 474, 87-89 (1834).

56. *See* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 723-25 (1835).

57. See David E. Wilkins, Johnson v. M'Intosh *Revisited: Through the Eyes of* Mitchel v. United States, 19 AM. INDIAN L. REV. 159 (1994), for a complete analysis of this decision.

applying the will of the law rather than executing his own will."[58] Robert Williams similarly posits that tribal land rights and political status during the Marshall era were "determined by an intense political conflict that sacrificed principles and the 'Rule of Law' to interest and expediency."[59]

John Schmidhauser points out that the major emphasis in decision making on the Marshall Court was the assertion and maintenance of national supremacy over the repeated challenges of states' rights activists.[60] Joseph Burke, succinctly argues that "the real winner in the Cherokee cause was the Supreme Court."[61] These are significant observations. However, the Marshall Court's impact on tribal sovereignty was even more far reaching.

Tribes emerge from this era in a contradictory political status. On one hand, there is the idea of tribes having a status resembling that of a ward to his guardian. On the other hand, tribes are also labeled both as domestic and dependent nations and as distinct and independent communities. The notion of wardship, which Marshall employed as an analogy, lacked any historical basis at the time. The notion of domestic dependency, on the other hand, is only slightly more realistic, though it too was generally inaccurate at the time it was announced. The idea of tribes being independent polities, however, is the most realistic depiction. Vine Deloria sums up the problems such contradictory statuses caused for tribes:

> Since there was no category of "domestic-dependent nations," [in the Constitution] the result was to affirm federal power over the Indians but without describing any corresponding set of responsibilities and, more importantly, without outlining any standards by which the action—or inaction—of the federal government could be judged. The Constitution was relevant to American Indians only to the degree that the courts could identify where the responsibility for the Indians existed; yet there was nothing in the Constitution that required the federal government to fulfill its responsibilities in this regard. [62]

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58. CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 60 (1986).

59. Robert A. Williams, Jr., *Jefferson, The Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 166 (1987).

60. *See* JOHN R. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITOR IN FEDERAL-STATE RELATIONS: 1789-1957, at 29-30 (1958).

61. Burke, *supra* note 23, at 530.

62. Deloria, *supra* note 16, at 253-54.

The long-term ramifications of certain Marshall principles—discovery, the analogy to wardship, and domestic status—have been interpreted as distinct diminutions of tribal sovereignty. However, other Marshall legal ideas—the supremacy of Indian treaties, that tribes are independent communities, that discovery only gave whites preemptive right to purchase Indian lands, that states are precluded from interfering in tribal affairs, and that Indian title is as "sacred as" that of Anglo fee-simple—enabled the sovereignty of tribes to emerge from this era relatively intact. There were, of course, many examples that could be related when tribal rights were abused or oppressed—for example, land clashes, trading, and the beginning of Indian removal. These serious problems notwithstanding, general tribal status was perceived by each branch of the government as extra-constitutional and tribal nations continued to be dealt with via the treaty process, signifying their vitality as nations.

TRIBAL SOVEREIGNTY & WESTERN EXPANSION, 1835-1860S

The three decades between *Mitchel* (1835) and the inception of the American Civil War (1861) were tumultuous years in American history. It began as an era of constrained and massive Indian removal.[63] As noted earlier, from the mid-1830s to the mid-1840s thousands of eastern (and other) Indians were required to sign often fraudulent treaties and accept new lands west of the Mississippi.[64]

The focus of events experienced a dramatic shift beginning in the mid-1840s and continued through the 1850s. These were the years of "Manifest Destiny," when America acquired control of large parts of the far west and unexpectedly, encountered a new Indian frontier.[65] This territory included the annexations of Texas (1845), the acquisition of Oregon (1846), the 1,193,061 square miles of territory involved in the Treaty of Guadalupe Hidalgo with Mexico (1848), and the Gadsden Purchase from Mexico (1853), which added 29,640 square miles to the western states.[66]

Within the span of a decade, the country's size increased by 73%. President Polk in delivering his fourth Annual Message in 1848 stated that "within the last four years eight important treaties have been negotiated

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63. *See* 4 Stat. 411 (1830).

64. *See* WOLFE, *supra* note 58.

65. *See* ROBERT A. TRENNERT, JR., ALTERNATIVE TO EXTINCTION at vii (1975).

66. *See* ENCYCLOPEDIA OF AMERICAN HISTORY 450-51 (Richard Morris ed., 2d rev. ed. 1961).

with different Indian tribes, and at a cost of $1,842,000; Indian lands to the amount of more than 18,500,000 acres have been ceded to the United States."[67]

Felix S. Cohen, however, accurately notes that while the United States paid out some fifty million dollars to various foreign nations for all the continental lands, what the federal government actually acquired "was not real estate, but simply the power to govern and to tax, the same sort of power that we gained with the acquisition of Puerto Rico or the Virgin Islands a century later."[68]

These vast purchases resulted in the physical incorporation into the nation of scores of previously unknown tribes. The result of this cultural collision was a congressional Indian policy "conforming more with the inevitabilities of expansion, one whose most important aspect envisioned a system of reservations, in which the Indians were to be separated from the whites in restricted and well-defined areas."[69]

The reservation policy, however, was only in its experimental stages between the 1830s and 1850s, and would not be fully implemented until the 1860s. In fact, treaties, rather than congressional legislation, formed the bulk of the laws during this era. Nevertheless, Congress, on June 30, 1834, enacted two comprehensive laws which in most respects "form the fabric of our law on Indian affairs to this day."[70] The first is the final Act in a series of Acts "to regulate trade and intercourse with the Indian tribes."[71] The second, enacted the same day, provided for the organization of the Department of Indian Affairs.[72]

Congress, by adopting these laws, developed an "institutional structure for the ill-defined relationship between [itself] and the Indian tribes."[73] The House Committee on Indian Affairs issued a comprehensive and revealing report analyzing these laws and Congress' embryonic relation to the tribes.

> The Committee are [sic] aware of the intrinsic difficulties of the subject—of providing a system of laws and of the administration, simple and economical, and, at the same time, efficient and

67. I Israel, *supra* note 29, at 753-54.
68. Felix S. Cohen, *How We Bought the United States*, COLLIERS, Jan. 19, 1946, at 23.
69. TRENNERT, *supra* note 65, at vii.
70. COHEN, *supra* note 8, at 73.
71. 4 Stat. 729 (1834).
72. *See* 4 Stat. 735 (1834).
73. Deloria, *supra* note 16, at 254.

> liberal—that shall be suited to the various conditions and relations of those for whose benefit it is intended; and that shall, with a due regard to the rights of our own citizens, meet the just expectations of the country in the fulfillment of its proper and assumed obligations to the Indian tribes. Yet, so manifestly defective and inadequate is our present system, that an immediate revision seems to be imperiously demanded. What is now proposed is only an approximation to a perfect system. Much is necessarily left for the present to Executive discretion, and still more to future legislation.[74]

By the late 1840s two additional statutes were enacted having a lasting effect on tribal affairs. The first Act[75] amended the 1834 Non-Intercourse Act, which had organized the Department of Indian Affairs. The Act entailed two significant changes in Indian policy. First, the Act stiffened and broadened the earlier Indian liquor prohibition of annuities to Indian family heads instead of tribal chiefs.[76]

Ostensibly designed to reduce the influence of white traders on tribal leaders,[77] this amendment, in effect "substituted the judgement of federal officials for that of tribal governments on the question of tribal membership, so far as the disposition of funds was concerned. This provision, first in a long series of statutes designed to individualize tribal property."[78]

The second Act established the Department of Interior in 1849.[79] It contained a provision calling for the transfer of the responsibility of Indians from the War Department to the Interior Department. Supporters of this transfer prematurely believed that Indian warfare was ending and that as Indians "transformed from enemies to wards of society, governmental responsibility rightly belonged in the hands of civilians."[80]

Although Congress had the constitutional authority to deal with tribal nations, which it did through sporadic legislation, the Legislature more

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74. H. R. REP. NO. 474, at 1 (1834).
75. *See* 9 Stat. 203 (1847).
76. *See id.*
77. *See* Robert A. Trennert, *William Medill: 1845-49, in* THE COMMISSIONERS OF INDIAN AFFAIRS: 1824-1977, at 32 (Robert Kvasnicka & Herman J. Viola eds., 1979).
78. COHEN, *supra* note 8, at 76.
79. *See* 9 Stat. 395 (1849).
80. TRENNERT, *supra* note 65, at 41.

often deferred to the President and executive branch; especially in the sensitive area of Indian treaties, which were being negotiated by the dozens during this period.[81]

THE TANEY COURT'S INDIAN LAW CASES

Despite the placement of tribes in the Commerce Clause, and despite a proliferation of Indian treaties, and in contradiction of Supreme Court precedent in *Worcester* and *Mitchel*, Justice Taney in an 1846 ruling, *United States v. Rogers*,[82] enunciated a wholly fictitious perspective on tribal political status. Ironically, this unanimous decision, like the *Cherokee* cases, also involved the Cherokees. The Cherokees, however, were not parties to the suit.

William S. Rogers, a white man, residing within Cherokee Indian Territory, had been indicted in a federal circuit court for the murder of Jacob Nicholson, also a white man. The crime had occurred in Cherokee country. A confused circuit court, however, sent the case to the Supreme Court on a certificate of division.[83]

Six questions were certified. First, could a United States citizen voluntarily cede his allegiance to his country? Second, could a federal citizen "transfer" his allegiance to another government? Third, was a tribe "a separate and distinct government" which would enable them to adopt citizens of other governments? Fourth, could a white person so acting "become in his social, civil, and political relations and conditions a Cherokee Indian?" Fifth, did the Twenty-fifth section of the 1834 Trade and Intercourse Act, which exempted from federal jurisdiction crimes committed by an Indian against another Indian, apply only to "full-blood" Indians, or did it also apply to adopted and other persons who resided in Indian territory? Finally, did the Supreme Court have jurisdiction in this case?[84]

Taney, writing for a unanimous court, "abstain[ed] from giving a specific answer to each question."[85] Why? According to the Chief Justice,

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81. *See* KIRKE KICKINGBIRD ET AL., INDIAN TREATIES 26-27 (1977).

82. 45 U.S. (4 How.) 567 (1846).

83. "Certification is a method of taking a case from an appellate court to the Supreme Court in which the former court asks that some question or interpretation of law be certified, clarified, or made more certain." BLACKS LAW DICTIONARY 206 (5th ed. 1979).

84. *See* United States v. Rogers, 45 U.S. (4 How.) 567, 569-70 (1846).

85. *Id.* at 574.

simply because "we deem it most advisable not to express an opinion."[86] In a sparsely worded opinion, only slightly more than three pages long, Taney dramatically and incorrectly rewrote the actual history, legal, and political relationship between tribes and the United States. Contrary to Marshall's *Worcester* opinion, Taney wrongly asserted that the Cherokee tribal lands had "been assigned to them by the United States . . . and they hold and occupy it with the assent of the United States, and under their authority."[87]

The Cherokees and the scores of other tribes then negotiating treaties with the United States were no doubt shocked when they heard Taney's updated and misinterpreted rendition of the "doctrine of discovery":

> The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indian continually held to be, and treated as, subject to their dominion and control.[88]

This Indian case is also the first Indian law opinion that explicitly cites the political question doctrine. Justice Taney, shortly after commenting on the status of Indians as an "unfortunate race," stated that even if Indians had been mistreated "yet it is a question for the law-making and political department of the government, and not for the judicial."[89]

In this era, as noted earlier, Congress was not producing much Indian-related legislation. In fact, Taney in this instance appears to have set Congress up as the culprit. Nevertheless, the explicit reference to the political question doctrine set a stark precedent. In the future, many legitimate inquiries by tribes would be prematurely quashed as a result of this decision. Moreover, the tribal right to determine membership was also severely handicapped by this ruling. As the Court noted, "a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian . . . ."[90]

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86. *Id.* at 569-70.
87. *Id.* at 572.
88. *Id.*
89. *Id.*
90. *Id.*

Finally, Robert Trennert has noted that "[w]e sometimes fail to realize that the formulation of all Indian policies in American history, even the most just, has been based on certain attitudes that could best be described as racial."[91] *Rogers* forcefully elucidates this. In holding that Rogers was not an Indian, the Court asserted that "the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It [the 1834 trade and intercourse law] does not speak of members of a tribe, but of the race generally,—of the family of Indians . . . ."[92]

The *Rogers* opinion is representative of Supreme Court cases emphasizing federal dominance over tribes "coupled with references to the political question doctrine and disregard for both tribal sovereignty and individual rights."[93] Ironically, Chief Justice Taney, who also wrote the infamous *Dred Scott*[94] opinion handed down seven years after *Rogers*, said of tribes in that case that they "were yet a free and independent people, associated together in nations or tribes."[95] 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."[96]

These comments, like many of Taney's remarks in *Rogers* are dicta. But which is the more accurate reflection of tribal status in the mid-nineteenth century? In *Rogers*, tribes are not and have never been recognized as independent nations. In *Dred Scott*, tribes are regarded as the equals of foreign governments. Taney had already expressed what he perceived as the status of tribes in *Rogers*. In *Dred Scott*, he was accurately reflecting the tribes literal status in law and politics, but since his words were dicta he knew they would have no direct bearing on the tribes relationship with the federal government. He appeared to speak so glowingly of the Indians merely as a way of foiling the efforts of African-Americans to gain their legal rights. In short, one minority is used against another minority for the purposes of supporting the majority.

Three years after the devastating *Dred Scott* decision, the Supreme Court was accorded an opportunity to bring some clarity to tribal political

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91. TRENNERT, *supra* note 65, at 1.
92. *Rogers*, 45 U.S. (4 How.) at 573.
93. Newton, *supra* note 21, at 211.
94. 60 U.S. (19 How.) 393 (1856).
95. *Id.* at 403.
96. *Id.*

status, at least as defined from a western perspective. Once again, the suit involved the Cherokee people, though again the tribe was not a direct party. In *Mackey v. Coxe*,[97] a unanimous court, speaking through Justice McLean's pen, held that an administrator appointed by a Cherokee Nation probate court occupied the same position as one appointed by any territory or state. The Court favorably commented that "[t]he Cherokees are governed by their own laws. As a people, they are more advanced in civilization than the other Indian tribes . . . ."[98] Recalling earlier treaty provisions, McLean noted that "whenever [C]ongress shall make provision on the subject, the Cherokee nation shall be entitled to a delegate in the national legislature."[99]

The Court concluded by stating that the Cherokee Nation and, by implication, other tribes, had a political status similar to that of domestic territories. The principal difference being that "the Cherokees enact their own laws . . . appoint their own officers, and pay their own expenses."[100] The sporadic and inconsistent Taney Court decisions, while harmful to tribal sovereignty, did not have a long term effect that minimized the concept's force. The Taney Court, unlike the Marshall Court, was more concerned with "balancing state and federal authority" and exhibited a "keener awareness of the need to maintain the vitality of the state governments than had its predecessor."[101] And while states' rights activists tend to be less supportive of tribal rights, during this period there were not enough confrontations that actually led to radical diminutions of tribal sovereignty. However, Taney did give life to a new doctrinal concept, the political question. Although the concept had been ushered in by Marshall, the Taney Court actually called it into being.[102] Tribal nations still existed outside the scope of Anglo-American law. Western expansion and the gradual encirclement of tribes by non-Indians, increased immigration, the Civil War and Reconstruction, and burgeoning industrialization—fueled in

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97. 59 U.S. (18 How.) 100 (1856).

98. *Id.* at 102. The cultural evolution argument used by the Court to support their claim that the Cherokees "are more advanced" than other tribes is a significant one. The Court proudly noted that "by the national council their laws are enacted, approved by their executive, and carried into effect through an organized judiciary." *Id.*

99. *Id.* at 103.

100. *Id.*

101. SCHMIDHAUSER, *supra* note 60, at 78-79.

102. *See* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER THE LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 84 (1982).

part by transcontinental railroads, would rapidly terminate this geographical isolation.

POST-CIVIL WAR INDIAN REFORM: 1866-1871

Frederick Jackson Turner noted in 1896 that by the end of the Civil War "the West would claim the President, Vice President, Chief Justice, Speaker of the House, Secretary of Treasury, Post-Master General, Attorney-General, General of the Army, and Admiral of the Navy."[103] How was this possible? Turner hypothesized that it had occurred because the West was the "region of action, and in the crisis it took the reins."[104] He described how the "free lands are gone, the continent is crossed, and all this push and energy is turning into channels of agitation."[105]

The focus of much of this "agitated" behavior was, as any creditable history book relates, tribal land, tribal souls, and tribal culture. Within the span of five years, 1866-1871, there occurred several critical shifts as well as continuations in federal Indian law and policy. First, the tribes who had sided with the Confederacy in the Civil War were compelled to negotiate new treaties by which they surrendered vast areas of their homelands. Second, Congress authorized an Indian Peace Commission to negotiate treaties to end the growing hostilities between western tribes and Americans.[106]

Third, in 1869 there was authorized a ten-member Board of Indian Commissioners. Composed of prominent philanthropists, this unpaid group of influential eastern citizens was to work closely with the Secretary of Interior in administering the political relationship between tribes and the United States.[107] Fourth, President Grant, in an effort to eliminate abuses in the Indian Office, and as part of the larger plan to assimilate the tribes, extrapolated his famous "Peace Policy." This policy entailed assigning the Indian agencies scattered throughout the country to various Christian denominations. Grant stated: "No matter what ought to be the relations

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103. Frederick Jackson Turner, *The Problem of the West*, ATLANTIC MONTHLY, Sept. 1896, at 295.

104. *Id.*

105. *Id.* at 296.

106. *See* 15 Stat. 17 (1867).

107. *See* 16 Stat. 13 (1869).

between such settlements and the aborigines, the fact is they do not harmonize well, and one or the other has to give way in the end."[108]

According to President Grant, "a system which looks to the extinction of a race is too horrible for a nation to adopt without entailing upon itself the wrath of all Christendom and engendering in the citizens a disregard for human life and the rights of other, dangerous to society."[109] It was not, however, merely the wrath of other civilized nations that propelled the Grant administration to seek alternatives to wars with the tribes. Economics and railroads also played key roles.

In a report issued by the Senate's Committee on the Pacific Railroad, Senator William Stewart (R., Nevada) wrote that tribes "can only be permanently conquered by railroads. The locomotive is the sole solution of the Indian question, unless the government changes its system of warfare and fights the savages the winter through as well as in summer."[110] Furthermore, Senator Stewart noted that in the last thirty-seven years wars with tribes had cost the United States 20,000 lives and more than $750,000,000. In fact, urged Stewart, "the Chairman of the House Committee on Indian Affairs estimated recently that the present current expenses of our warfare with the Indians was $1,000,000 a week—$144,000 a day."[111] Grant's "Peace Policy," it was believed, could do no worse, and would undoubtedly be far less expensive and more morally upright.

The fifth and most important modification in Indian policy centered on the subject of whether or not to continue the treaty process with tribal nations. The rapidity of western expansion had forced federal officials to rethink their Indian policy. Treaty-making thus came under fire. Commissioner D.N. Cooley, in his 1866 Indian Affairs Annual Report, noted that peace could best be maintained with tribes by treaty arrangements and he urged "the continuance of the policy which has met with such gratifying success during the present and last year."[112] The next year, however, a section of an 1867 law (repealed a few months later) prohibited Indian treaties "until an appropriation authorizing such expense

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108. II Israel, *supra* note 29, at 1199.

109. *Id.* at 1199-1200.

110. S. REP. NO. 219, at 15 (1869).

111. *Id.*

112. 1866 COMM'R INDIAN AFF. ANN. REP. 15, *microformed on* Native American Legal Materials Collection, Title 4163 (Law Library Microform Consortium).

shall be first made by law."[113] This set the tone for a vigorous period of debate between the two houses of Congress on the role of the House, and the need for the treaty process in general. It was, interestingly enough, a debate having little direct impact with the political status of tribes.

In his Annual Report for 1869, the Commissioner of Indian Affairs, Ely S. Parker, a Seneca Indian, rekindled the treaty debate. He believed that the treaty process with tribes should be closed, although he agreed that treaties already in force should be faithfully executed.[114] In debate on a bill introduced in the House in March, 1870, Representative Aaron Sargent (R., CA) asserted that the House would "claim the right, as a large part of the money-appropriating power of this Government, to determine whether contracts binding Congress and the Nation shall or shall not be made."[115]

The following year, on February 11, 1871, Representative William Armstrong (R., PA) introduced the following resolution:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; *and all treaties or agreements hereafter made by and between them, or any of them, and the United States shall be subject to the approval of Congress*: Provided, That nothing herein contained shall be considered to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.[116]

This House resolution, except for the important underscored passage, which was later deleted, was attached as an amendment to the Interior Department's 1872 appropriation bill. Immediately it came under intense, bipartisan scrutiny. The most articulate critiques against the amendment came from three Senators: Garrett Davis (D., KY), Samuel Pomeroy (R., KA), and Eugene Casserly (D., CA). They attacked the measure using solid political, legal, and moral arguments. Messr's Davis and Pomeroy took a constitutional position and vehemently argued that because the treaty-making power was lawfully vested by the Constitution in the President and

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113. 15 Stat. 7, 9 (1867).

114. *See* 1869 COMM'R INDIAN AFF. ANN. REP. 448, *microformed on* Native American Legal Materials Collection, Title 4163 (Law Library Microform Consortium).

115. CONG. GLOBE, 41st Cong., 2d Sess. 1638 (1870).

116. CONG. GLOBE, 41st Cong., 3d. Sess. 1154 (1871) (emphasis added).

Senate, the House had no power to be involved in the process except to pass the necessary appropriation bills to execute the treaties.[117]

Mr. Pomeroy said:

> It would be difficult by a law of Congress to limit the power of the President and Senate over treaties as provided in the Constitution . . . Now, you come in here on an appropriation bill, and by an act of Congress prohibit that power, contract it, limit it, when no law can have anything to do with it. It is a sort of toadyism to the House of Representatives; that is my objection to it.[118]

Mr. Casserly, more prophetically, made this observation:

> I think I understand this subject. I know what the misfortune of the tribe is. Their misfortune is not that they are red men; not that they are semi-civilized; not that they are a dwindling race; not that they are a weak race. Their misfortune is that they hold great bodies of rich lands, which have aroused the cupidity of powerful corporations and of powerful individuals . . . It [adoption of the amendment] is the first step in a great scheme of spoliation, in which the Indians will be plundered, corporations and individuals enriched, and the American name dishonored in history.[119]

Despite these arguments, the Amendment was approved. Representative Sargent (R., CA) proudly noted that the adoption of this measure had three beneficial results: It ended, what he termed, an "improvident system," it would save the federal government millions of dollars, and finally, it gave the House a voice in the process of negotiations with tribes.[120]

Although the treaty process, so named, was unilaterally discontinued, the substance of treaty-making continued in the form of House and Senate approved "agreements" between tribes and the United States. Nevertheless, the ending of the treaty process signaled a real transformation in the form of diplomatic relations between tribes and the United States and presaged major problems for tribes and the tribal-federal relationship. Commissioner

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117. *See id.* at 1822.
118. *Id.*
119. *Id.* at 1825.
120. *See id.* at 1811.

Francis A. Walker, in his 1872 Indian Affairs Annual Report, posed several interesting questions: What of tribal rights to lands which had not been covered by treaty? What about tribes who had not yet been treated with, but who had the same political standing as treaty tribes? How was the federal government legally going to secure title to tribal lands it desired.[121]

The answer, of course, was in the negotiation of bilateral "agreements." However, although negotiations leading to diplomatic arrangements continued, the 1871 Amendment represented a novel and dangerous way of perceiving the political relationship between tribes and the federal government. And although Congress continued to authorize commissions to negotiate agreements, it could, when it so desired, simply enact statutes which did not require tribal consent.[122]

This modification created "a feeling of betrayal among the Indians and vested dictatorial powers in the Indian agents, who were no longer seen as advocates for the tribes but as antagonists who sought to force change and destroy tribal customs and practices."[123]

THE CHASE COURT'S INDIAN-LAW CASES BEFORE TREATY TERMINATION

In *United States* v. *Holliday*,[124] a case involving federal liquor laws, the Supreme Court held that the laws prohibiting liquor sales to Indians were applicable even if the sale occurred outside the confines of a reservation. The Court, speaking unanimously through Justice Miller, relied on the Commerce Clause as postulated in *Gibbons*, stating that "if commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such a tribe, it is subject to be regulated by Congress, although within the limits of a state."[125]

In *Kansas Indians*[126] the question was whether the State of Kansas had the right to tax Indian lands held in severalty by individual Indians of three

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121. *See* 1872 COMM'R INDIAN AFF. ANN. REP. 471, *microformed on* Native American Legal Materials Collection, Title 4163 (Law Library Microform Consortium).

122. *See* Vine Deloria, Jr., *Congress in Its Wisdom: The Course of Indian Legislation*, *in* THE AGGRESSIONS OF CIVILIZATION 107 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984).

123. Deloria, *supra* note 16, at 255.

124. 70 U.S. (3 Wall.) 407 (1866).

125. *Id.* at 419.

126. *In re* Kansas Indians, 72 U.S. (5 Wall.) 737 (1867).

different tribes: the Shawnees, Wea, and Miami. Individuals of these tribes had received land patents under treaties and federal law. Kansas believed it was entitled to tax and had already confiscated the lands of Indians who did not pay the state's real property tax. In fact, the aggregate amount of taxes on just the Shawnee lands alone in 1866 amounted to over $60,000.[127]

An equal point of importance dealt with the larger issue of individual Indian citizenship under the 1866 Civil Rights Act and the Fourteenth Amendment to the Constitution. Commissioner Cooley said "it is claimed that if the final decision is in favor of the right to tax these Indians, they then become, by virtue of the civil rights bill of last session, citizens of the United States."[128]

The Supreme Court, however, unanimously held that Kansas had no right to tax Indian lands. Reaffirming *Worcester's* federal supremacy principle, Justice Davis noted that:

> [I]f the tribal organization of the Shawnees is preserved intact, and recognized by the political departments of the government as existing, then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union.[129]

Compare this essentially "political" definition of tribal status with the explicit "race-based" definition of tribal and Indian status enunciated in *Rogers*.

Furthermore, the Court said that just because the Indians started their suit in state courts this did not make them subject to state law. "[T]he conduct of Indians is not to be measured by the same standard, which we apply to the conduct of other people."[130] Tribes, Justice Davis said, are separate peoples, with separate governments, who receive the protection of the federal government. This protection of tribes did not include a federal right to unilaterally alter tribal status or rights. As the Court observed, tribal rights could only be modified "by treaty stipulation, or a voluntary abandonment of their tribal organization."[131]

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127. *See* 1866 COMM'R INDIAN AFF. ANN. REP. 19, *microformed on* Native American Legal Materials Collection, Title 4163 (Law Library Microform Consortium).

128. *Id.*

129. *Kansas Indians*, 72 U.S. (5 Wall.) at 755.

130. *Id.* at 758.

131. *Id.* at 757.

Ten days after *Kansas Indians* was decided, the Supreme Court issued another equally impressive and similar ruling on the federal government's preeminent role in the field of Indian affairs. In *New York Indians*,[132] the Supreme Court, again unanimously, held that New York's attempts to tax Seneca Indian lands on three different reservations was "illegal and void as in conflict with the tribal rights of the Seneca nation as guaranteed to it by treaties with the United States."[133]

Justice Nelson, citing the rationale of the recent *Kansas Indians* decision, forcefully noted that the exercise of state taxing authority over the Senecas was "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their relations."[134]

CONCLUSION

This lengthy analysis was necessary to elucidate the prevalent attitudes, pertinent laws, and judicial precedents of the United States. In the broad cultural and political/legal landscape painted, this Article tries to show that, in general, tribes and the United States, unlike the relationship between African-Americans and the federal government, were still virtual strangers in a strict constitutional and legal sense. Throughout this period, it has been illustrated how the Supreme Court enunciated a conflicting bevy of legal principles: tribes are "tenants" not owners of their soil, or, tribes are the true owners of their lands; tribes are domestic-dependent nations, or, tribes are distinct and independent nations; tribes resemble "wards," or, tribes have a national status which equals that of foreign governments.

The contention is that despite these conflicting judicial doctrines, in a fundamental political sense tribal sovereign status remained relatively intact although it had certainly been assaulted. A compelling piece of evidence supporting this view is contained in a report issued by the Senate Judiciary Committee in December, 1870, a mere three months before the treaty termination rider.[135] The Committee, by Senate resolution, had been instructed to ascertain the effect of the recently adopted Fourteenth Amendment on tribes and tribal citizens. Specifically, were tribal Indians now citizens of the United States? And, had Indian treaties been invalidated

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132. 72 U.S. (5 Wall.) 761 (1867).
133. *Id.* at 772.
134. *Id.* at 771.
135. *See* S. REP. NO. 268 (1870).

by the Amendment? Senator Matthew Carpenter (R., WI) chaired the Committee and authored the final report.

In a detailed eleven page report, written in part to "fix more clearly in the minds of Congress and the people the true theory of our relations to these unfortunate tribes," the Committee elaborately analyzed the historical relationship between tribes and the United States.[136] In fact, Senator Carpenter stated pointedly that such a report was warranted because of the existence of some "loose popular notions of modern date in regard to the power of the President and Senate to exercise the treaty making power."[137]

Perusing treaties, statutes, Supreme Court decisions, and gauging popular opinion, the Committee report determined that the Fourteenth Amendment had no effect on tribal status and that Indian treaties had not been annulled by its creation. The nature of the report justifies an extended quotation:

> Volumes of treaties, acts of Congress almost without number, the solemn adjudications of the highest judicial tribunal of the republic, and the universal opinion of our statesmen and people, have united to exempt the Indian, being a member of a tribe recognized by, and having treaty relations with, the United States from the operation of our laws, and the jurisdiction of our courts. Whenever we have dealt with them, it has been in their collective capacity as a state, and not with their individual members, except when such members were separated from the tribe to which they belonged; and then we have asserted such jurisdiction as every nation exercised over the subjects of another independent sovereign nation entering its territory and violating its laws.
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> [Thus] [t]o maintain that the United States intended, by a change of its fundamental law, which was not ratified by these tribes, and to which they were neither requested nor permitted to assent, to annul treaties then existing between the United States as one party, and the Indian tribes as the other parties respectively, would be to charge upon the United States repudiation of national obligations, repudiation doubly infamous from the fact that the parties whose claims were thus annulled are too weak to enforce

136. *Id.* at 11.
137. *Id.*

> their just rights, and were enjoying the voluntarily assumed guardianship protection of this Government.[138]

In short, a fundamental nation-to-nation relationship still persisted. Thus, despite forced Indian removal, the sometimes fraudulent treaty negotiations, the beginnings of the reservation period, and the equivocal language in several Supreme Court opinions penned by Chief Justices Marshall and Taney and the few case court rulings, the preponderance of political and legal evidence shows that the essence, if not always the exercise of tribal sovereignty, generally retained a vital force. Federal acknowledgment of tribal status would be pummeled, however, during the next half-century, beginning with the enactment of the General Allotment Act of 1887[139] which established the goal of the individualization of tribal property as the cornerstone of a policy designed to assimilate Indian people into the American polity.

Ironically, even as tribal land liquidation was taking place, and as assimilation was continuing unabated, there were sporadic episodes of federal activity that still reflected the sovereignty of tribal nations. In 1896, for example, on the same day the Supreme Court handed down *Plessy v. Ferguson*[140] which established the "separate but equal" doctrine and sanctioned state "Jim Crow" laws, the Court by an identical majority, 8-1 (with Harlan dissenting in both), held in *Talton v. Mayes*[141] that the United States Constitution's Fifth Amendment did not apply to tribes because their sovereignty existed prior to the Constitution and was dependent upon the will of the Indian people and not the will of the American public. Decisions like *Talton* recognize and affirm the ongoing political sovereignty of tribal nations, a status no other racial or ethnic minority group in the United States possess.

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138. *Id.* at 10-11.
139. 24 Stat. 388 (1887).
140. 163 U.S. 537 (1896).
141. 163 U.S. 376 (1896).