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EUROPEAN'S 'RIGHT OF DISCOVERY' TO THE AMERICAN CONTINENT AND THE CONNECTION TO THE MARSHALL COURT'S REMOVAL OF NATIVE AMERICAN SOVEREIGNTY THROUGH THE MARSHALL TRILOGY CASES

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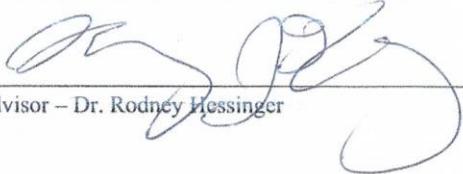
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NATIVE AMERICAN SOVEREIGNTY THROUGH THE
MARSHALL TRILOGY CASES

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Kathryn D. Less
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The essay of Kathryn D. Less is hereby accepted:



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Today, according to the Bureau of Indian Affairs, there are approximately 1.9 million American Indians and Alaska Natives divided between 567 federally recognized American Indian tribes living within the borders of the United States. These tribes, in conjunction with the Bureau of Indian Affairs, hold 55 million acres of land in trust with the United States.¹ How the United States government and these tribes govern and respect each other has a complicated and long history. Much of this history stems from the emerging differences of land ownership between European colonizers and Native tribes. In American Indian beliefs, land was not owned by the individual, but by the clan or tribe. Land was used to benefit the whole tribe, not to improve an individual's worth.² Native Americans believed that all village or clan property rights were held with one person, the clan leader or chief. Those property rights only extended towards things on or from the land, not the land itself. This was in direct conflict with European and American beliefs on land ownership.³ While Europeans did have traditions of communal claims on the land, there was a much greater emphasis on private property. From the European perspective, land was made up of any resources or commodities that could be used for profit. Land was privately held and used to promote the wealth of individuals.⁴

The differences in opinions of land usage and ownership allowed Europeans and Americans to rationalize taking land away from the tribes. They believed that Natives lacked the skills to utilize all land and resources in the area. Under European beliefs, they had civil ownership, using land for raising crops and animals, and Native Americans had

¹ U.S. Department of Interior Indian Affairs.

² Nash, *Red, White and Black*, 23-24.

³ Cronon and Demos, *Changes in the Land*, 59-63.

⁴ Nash, *Red, White and Black*, 22-23. Cronon and Demos, *Changes in the Land*, 19-20.

natural ownership of the land, holding it for the commons.⁵ Because of this, Europeans believed that the only land that Native Americans actually owned was that which they used for agricultural purposes. Native American tribes claimed ownership, however, to all territory they used. This was often in conjunction with other tribes, sharing rivers, parcels of land, and even plants within villages.⁶

Native Americans have been living on this continent since before European exploration ever began. However, Europeans claimed the “New World” as their own, dealing with tribes one at a time. These claims were done based on the discovery principle or doctrine. Europeans, upon landing on the American continent, claimed ownership of the land. This ownership “derived from the ancient claim that Christians were everywhere entitled to disposes non-Christians of their land.”⁷ Any non-Christians were also considered uncivilized. For example, in the Massachusetts Bay Colony, colonists believed that Native Americans in the area did not truly own the land they lived on because of their way of life. The colonial belief was that God made land to be farmed; the Natives did not farm or cultivate their land, so they did not hold real titles to it.⁸ From the perspective of Europeans and Americans, religious beliefs were the standard of civilization, and civilization was needed to claim land.

This principle allowed Europeans to claim land as their own and was transferred to other European countries and eventually the United States through war and conquest. The discovery doctrine was never applied to Native Americans because of the difference

⁵ Cronon and Demos, *Changes in the Land*, 56.

⁶ Cronon and Demos, *Changes in the Land*, 63.

⁷ Nash, *Red, White and Black*, 95.

⁸ Kades, “History and Interpretation of the Great Case of the ‘Johnson v. McIntosh,’” 72.

of land use and lack of Christianity. The Americans followed European definitions of land and were able to claim the American continent as their own by defeating the British in the Revolutionary War.

Over time, many historians have studied the impact of the Supreme Court, more specifically the Marshall Court, and its connection to the removal of Native American land and the end of tribal sovereignty. The three cases under the Marshall Court that impacted the rights of Native Americans are *Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832), more commonly referred to as the Marshall Trilogy. *Johnson v. McIntosh* described the details of the discovery doctrine, applying it to the United States. This case also followed the Proclamation of 1763 precedent, prohibiting individuals from buying Native land. While *Cherokee Nation v. Georgia* was not actually ruled on, the Supreme Court still took the time to reiterate the discovery doctrine and declare Native American tribes as “domestic dependent nations.”⁹ *Worcester v. Georgia* determined that the federal government alone could interfere with Native Americans, maintaining the dominance the national government had over Native affairs.

One such historian, David Wilkins, has already connected the importance of the discovery doctrine to *Johnson v. McIntosh*.¹⁰ In his book, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*, he expounds upon a series of Supreme Court cases throughout the 19th and 20th centuries that have negatively affected

⁹ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

¹⁰ In his work, *American Indian Sovereignty and the U.S. Supreme Court*, David Wilkins emphasizes how Native Americans lost rights throughout American history. He delves into the role of the Supreme Court during different time periods, highlighting what he calls the most important to Native Americans.

Native Americans. In regards to the Marshall Trilogy, *Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, Wilkins only discusses how *Johnson v. McIntosh* impacted Native Americans. He skips over *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. Here, the impact of all three cases on Native American sovereignty will be studied as a whole. While they can be taken individually, looking at the cases as a group, the Marshall Trilogy, allows a deeper understanding of the progression of the Court and the American government towards Native removal.

Using Wilkins' research as a stepping stone, I want to continue the study of how the discovery of the American continent claimed by Europeans was applied to the United States and used by the Marshall Court to end Native claims to sovereignty throughout the entire Marshall Trilogy. I believe it is because of the use of the discovery doctrine by the Marshall Court, specifically Chief Justice Marshall and Justice McLean, through three Supreme Court rulings in the 19th century that allowed the American government to truly begin the takeover of all aspects of tribal life. These rulings, *Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, set the tone for how the American government and people viewed American Indian tribes throughout the 19th century.

Other historians, such as Charlotte Cote,¹¹ have claimed that these rulings establish tribes as sovereign entities; she claims in "Historical Foundations of Indian Sovereignty in Canada and the United States" that Native American sovereignty was established in *Johnson v. McIntosh* and *Cherokee Nation v. Georgia*. According to Cote,

¹¹ Charlotte Coté writes on how Native Americans have fought to maintain their own culture and identity throughout the formation of the United States. She looks into the importance of the Marshall Trilogy to Native American sovereignty, but she is more critical of how the government had and has worked to keep their own priorities first and foremost, instead of those of the Native Americans and tribes.

these two cases “uniformly upheld the American tribes’ sovereignty and retainment of self-governing powers with their own respective tribal boundaries.”¹² I will argue that they actually undermine tribal sovereignty by using the discovery doctrine to establish tribes as domestic dependent nations, culturally inferior, and dependent wards to the federal government. Chief Justice John Marshall and Justice McLean’s explanation, use, and application of the discovery doctrine throughout *Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia* would later be used to rationalize why and how old agreements and treaties with tribes could be ignored, removing tribes from their land and their sovereign authority.

Before I can discuss the basis of the federal government’s control of Native American sovereignty, I want to discuss what sovereignty and a nation are and which rights should come with these. According to Miriam-Webster Dictionary, sovereignty is a “supreme power especially over a body politic” or “freedom from external control.” According to tribes, this sovereignty was held within the power of tribal or village leaders. However, it was not that individual chief that owned and controlled all the land, but for the entire village to use and make decisions on it together.¹³ Native American tribes hold and exercise inherent sovereignty, meaning that they had control over land well before any other people were on the continent.¹⁴ Their sovereignty is not dependent on wording of the Constitution or permission from the United States government. At times today, the federal government recognizes this sovereignty through treaties and the commerce clause of the Constitution. During the 18th and 19th centuries, the

¹² Cote, “Historical Foundations of Indian Sovereignty,” 19.

¹³ Cronon and Demos, *Changes in the Land*, 60.

¹⁴ Wilkins, *American Indian Sovereignty and the U.S. Supreme Court*, 20-21.

Anglo-American broadly understood sovereignty as a concept justifying both personal control over private property and a political principle outlining the ultimate power within a specific political jurisdiction... European notions of sovereignty contained strong impulses to divest indigenous populations of their land and to deny them the right to exert their own claims of sovereignty.¹⁵

We can see here that sovereignty, like land ownership, was viewed very differently by Europeans and American Indians.

Miriam-Webster Dictionary defines a nation as “a territorial division containing a body of people of one or more nationalities and usually characterized by relatively large size and independent status.” Based on this definition, it could be argued that before European exploration and colonization in North America, Native American tribes were nations, holding ‘independent status.’ However, once colonization began through modern times, it was more difficult to apply this definition to tribes. They were no longer truly independent nations, but they still maintained some sovereignty over their own affairs. Once the United States was formed, tribes no longer experienced “freedom from external control.”

This relationship between the American Indian tribes and the United States government took many years to form and continuously changed. The federal government often used precedents set during the colonial period to rationalize its own actions, including the British Proclamation of 1763. The American Indians were the party that suffered most under this relationship, having dealt with wars, massacres, reservations, and continued changes to laws affecting them.

Extensive and aggressive movement over the Appalachian Mountains by the British colonists started after the French and Indian War in 1763. Prior to the war, the

¹⁵ Kennedy, “Not Worth a Pinch of Snuff,” 200-201.

French colonists and Native Americans had a peaceful relationship. Many of the French colonists were male, learning survival tips from Natives and marrying Native women. With France's defeat, the discovery doctrine shifted to Great Britain, gaining sovereignty of all western land through the Mississippi River. Native Americans living there argued that they had never been conquered and thoroughly disagreed with this assessment.¹⁶ Natives Americans at the time "conceived themselves as living in their own territories under their own free and independent governments."¹⁷ However, the new flood of British colonists, including many families, pushed to settle further west using the discovery doctrine; these colonists did not all hope to have peace with the Natives as the French had. To compromise and maintain peace, the British Parliament passed the Proclamation of 1763. This document stated that "... the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds..."¹⁸ The document continued, stating that land must be bought from tribes and that Natives were to be dealt with via the British Crown through treaties only. Encroachment by British colonists on Indian land was not allowed.¹⁹ With the Proclamation of 1763, the British government set a precedent for the future Americans to follow. From this time forward, individual land purchases would not be tolerated in North America.

¹⁶ Jennings, *The Indian's Revolution*, 334.

¹⁷ Jennings, *The Indian's Revolution*, 322.

¹⁸ The Royal Proclamation of 1763.

¹⁹ Cote, "Historical Foundations of Indian Sovereignty", 74.

Over the next ten years, the Proclamation of 1763 went unenforced and the British eventually fought and lost the American Revolution. Just like in 1763 after the French and Indian War, the discovery doctrine shifted to the Americans, receiving sovereignty and control over all lands east of the Mississippi River. The Americans “felt that victory over Great Britain has been simultaneously a conquest of the Indians, and that it made the Indians’ lands forfeit to their conquerors.”²⁰ Similar to the British after 1763, the Natives again disagreed with this claim and fought to maintain their sovereignty. This was officially settled in 1795 with the Treaty of Greenville. This treaty followed the example of the Proclamation of 1763, stating “the said Indian tribes, again acknowledge themselves to be under the protection of the said United States, and no other power whatever.”²¹ This document made it clear who was controlling whom and what the relationship between the United States government and tribes was.

With this treaty, the federal government continued the precedent set by the British. The United States federal government would deal with American Indians solely, through the work of treaties, the same as would be done in settling disputes with any other foreign power. The United States had “negotiated hundreds of treaties with Indian nations on a government to government basis to obtain Indian lands and settle land disputes.”²² By working with the tribes as whole units, not as individuals, the United States government confirmed the idea that American Indian tribes were sovereign entities. From the Native perspective, “in signing these treaties, the tribes saw this as

²⁰ Jennings, *The Indian’s Revolution*, 343.

²¹ Wilson, *The Treaty of Greenville*.

²² Riley, "The History of Native American Lands and the Supreme Court," 369.

recognition of their exclusive authority over their territories and acknowledgement of their distinct political communities or nations.”²³ However, to the United States, “treaties with Indians did not imply Native consent to colonization. Rather, they reflected imperial formalism and declining Indian power in the region.”²⁴ This is another concept that was viewed drastically differently by the two parties involved. Native Americans believed the treaties were helping to maintain their sovereignty, while the Americans saw treaties as a way to keep tribes under their influence. The government pushed to keep peace with the tribes, but left the possibility of future land removal there. Native Americans knew that in order to survive, they would need to give up something. The goal was to remain peaceful with the United States government. By making treaties with Native American tribes, the federal government recognized their limited sovereignty for the time being. There would need to be a clear decision made through a more powerful source to determine Native American rights and sovereignty in the states and western lands.

Even before the Treaty of Greenville was issued, the Founding Fathers specifically mentioned Indians twice in the Constitution. Article I, Section 2 discusses House of Representative apportionment, excluding “Indians not taxed”²⁵ from the population. Later in the same article, Section 8 states Congress’s power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”²⁶ Including American Indians in this way, tribes were at the mercy of the federal government. They were not taxable because they were not part of the country; however,

²³ Cote, "Historical Foundations of Indian Sovereignty, 16.

²⁴ Whaley, “Oregon, Illahee, and the Empire Republic,” 159.

²⁵ The United States Constitution.

²⁶ The United States Constitution.

the federal government could regulate commerce between the states and the tribes. These references, along with the treaty principle, almost guaranteed that Natives would only be able to make arrangements with the United States government. This principle was not set as constitutional law, however, until the Marshall Court decided *Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832). These three cases, the Marshall Trilogy, collectively used the application of the discovery doctrine to the United States to promote further control of Native Americans by the federal government. *Johnson v. McIntosh* described the details of the discovery doctrine, applying it to the United States. While *Cherokee Nation v. Georgia* was not actually ruled on, the Supreme Court still took the time to reiterate the discovery doctrine and labeled Native American tribes as domestic dependent nations. *Worcester v. Georgia* continued to promote the United State's right of discovery and maintained the federal government's power over tribes during a period of increased states' rights.

The first case of the Marshall Trilogy was the 1823 ruling of *Johnson v. McIntosh*.²⁷ In this case, both parties claimed rights to the same tract of land; however, the land had been originally purchased in 1773 and 1775 by an individual from an American Indian tribe, the Piankeshaw. The issue was whom the land actually belonged to. Was the original sale from the Piankeshaw tribe legal? Who were Native Americans allowed to sell land to? In the landmark ruling, Chief Justice John Marshall went into great detail on the discovery of America and the dealings that Europeans had with American Indian tribes over land. Marshall explained this idea, citing the fact that while tribes were the

²⁷ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

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.²⁸

The Supreme Court believed that Europeans rightfully claimed the land upon its discovery; those governments set up how to deal with the tribes residing on the land. This discovery later applied to the United States, through conquest and treaty, after the victory over the British in the Revolutionary War.

Marshall, along with many Americans at the time, also believed the tribes were not civilized enough to hold land, partially because of their difference in religious beliefs;

The right of discovery given by this commission is confined to countries "then unknown to all Christian people," and of these countries Cabot was empowered to take possession in the name of the King of England. Thus asserting a right to take possession notwithstanding the occupancy of the natives, who were heathens, and at the same time admitting the prior title of any Christian people who may have made a previous discovery.²⁹

Tribes were uncivilized, different from the American people in all aspects of their culture. Tribes did not hold the basic natural rights from the Declaration of Independence, life, liberty, and the pursuit of happiness, that Americans so firmly believed in and fought for during the American Revolution. They were not civilized enough to hold land and decide for themselves who to sell it to or whom to buy it from.

The tribes of Indians inhabiting this country were fierce savages whose occupation was war and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible

²⁸ Riley, "The History of Native American Lands and the Supreme Court," 372.

²⁹ Johnson v. McIntosh, 21 U.S. 543 (1823).

because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.³⁰

In later cases, Marshall would expound on how the Cherokee have become more civilized, but they still practiced a different form of religion and therefore were still uncivilized.

In the end, Marshall ruled that private citizens could not buy land directly from American Indian tribes.

The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented. Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.³¹

Johnson v. McIntosh set the constitutional precedent that only the United States government can purchase land from, and interact with, American Indian tribes, borrowed from the Proclamation of 1763. This constitutional precedent was set without ever referencing the Constitution in the opinion.³² The Court implied that the tribes could not sell their land to specific people because they did not actually own the land.³³ This opinion went back to what was earlier discussed on the differences between European and Native American property ownership. The trust relationship between tribes and the federal government was established, meaning that tribal land would be protected by the federal government, but the tribes only temporarily held that land. This Indian title was

³⁰ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

³¹ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

³² Kades, "History and Interpretation of the Great Case of the 'Johnson v. McIntosh,'" 110.

³³ Ford, "The Myth of Tribal Sovereignty," 402.

not a legitimate land title in the eyes of Americans because Natives were only hunters and gatherers. Using colonial and European definitions, to truly own land, it needed to be farmed and harvested.³⁴ An Indian title included land that was held by the federal government because of the discovery principle, but tribes were allowed to occupy it legally, protected from individual buyers.³⁵

Throughout much of the opinion, Marshall focused on whether or not Indians held land titles that could be bought and sold by whomever the tribes wanted. “By generating this question and then answering it negatively, Marshall’s court, in the process of this unanimous opinion both created and recreated a set of legal rationalizations to justify the reduction of Indian rights without allowing any room for listening to the Indian vote.”³⁶ This case impacted the rights of the tribes in America, but no tribal leaders were consulted on their ideas or opinions in the matter. Marshall appeared to be giving more freedom to the tribes by protecting their rights to own land, but in *Johnson*, tribal sovereignty was legally limited because of the application of the discovery doctrine. In the opinion Marshall explained the discovery principle and broadened it to include the United States.

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery have as exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.³⁷

³⁴ Kades, “History and Interpretation of the Great Case of the ‘Johnson v. McIntosh,’” 72.

³⁵ Riley, “The History of Native American Lands and the Supreme Court,” 372.

³⁶ Wilkins, *American Indian sovereignty and the U.S. Supreme Court*, 30.

³⁷ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

We can see here that it was the Court's duty to rewrite the rules to benefit the new needs of the country. This brings in the political question of these cases. The precedent had already been set to allow tribes and American Indians control over their own lands. But the rules needed to be changed. "By preserving a unitary entity to deal with the Indians, Marshall's opinion helped the United States continue to present a united political, military, and economic front, facilitating low-cost acquisition of Indian lands."³⁸ Removal was necessary to fulfill expansionists' dreams, Manifest Destiny, and any precedents set lead directly to future problems and further limitations of Indian rights. While Wilkins suggests that these precedents, "discovery doctrine, the inferior status of Indian property rights, the notion of conquest, the allegedly inferior cultural standing of tribes, the impaired ability of tribes to sell their 'incomplete' title, and the diminished political status of tribes,"³⁹ would be used to further diminish the rights of tribes and rationalize the removal of the American Indian population because America was in the midst of expansion, that study is not completed through his work.

The discovery doctrine was first explained in *Johnson v. McIntosh*, but was soon used again to further diminish the sovereign rights of Native Americans, labeling the relationship between the United States and tribes as that of a ward to its guardian. While the Marshall Court determined there was lack of original jurisdiction in *Cherokee Nation v. Georgia* (1831), it did not stop Chief Justice Marshall from writing an opinion on the case. *Cherokee Nation* builds on what was originally stated in *Johnson*, connecting the

³⁸ Kades, "History and Interpretation of the Great Case of the 'Johnson v. McIntosh,'" 72.

³⁹ Wilkins, *American Indian Sovereignty and the U.S. Supreme Court*, 31.

two cases. Even though it was ruled that the tribe in question was not a foreign nation, as required under Article III of the Constitution, the Court determined that

The Cherokees are a State. They have been uniformly treated as a State since the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our Government plainly recognize the Cherokee Nation as a State, and the Courts are bound by those acts.⁴⁰

By labeling the Cherokee as a state and not a foreign nation, Marshall brings the discovery doctrine into this case as well. Because of the transfer of discovery right and subsequent claims to land by the American government, the Cherokee cannot be viewed as an independent nation. Even without original jurisdiction, Marshall decided to write an opinion on the case, adding to the diminished status of tribal sovereignty and further chipping away at Native Americans' rights.

The other part of the case involved Georgia laws regarding newly struck gold on Cherokee land. Georgians immediately called for the seizure of the lands and removal of the Cherokee. In response, the state of Georgia wrote laws that took away the Cherokee's rights to their own land; the tribe claimed that this went against their ability to govern themselves and their protected land titles from the federal government. In the opinion read by Chief Justice Marshall in *Cherokee Nation v. Georgia*, the principle set by the Proclamation of 1763, protecting American Indian tribes from all but the federal government, was reaffirmed, but Marshall also took the opportunity to describe the

⁴⁰ Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

Cherokee and other tribes living in American territory, adding ‘ward to his guardian’ to the labels applied to tribes through the discovery doctrine.

The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned, right to the lands they occupy until that right shall be extinguished by a voluntary cession to our Government. It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They 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; meanwhile, they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father.⁴¹

Justice Johnson, in his own opinion, stated that tribes could not be deemed states because they are “a people so low in the grade of organized society as our Indian tribes most generally are.”⁴² Justice Johnson controversially continued to state that the Cherokee and other tribes never were sovereign nations.

They never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle that discovery gave the right of dominion over the country discovered... The right of sovereignty was expressly assumed by Great Britain over their country at the first taking possession of it, and has never since been recognized as in them otherwise than as dependent upon the will of a superior.⁴³

He used the doctrine of discovery from *Johnson* to limit the Cherokee’s rights, contributing additional support for Marshall’s claim that the Natives are domestic dependent nations living within the confines of American territory and protection. The Supreme Court, without actually ruling on the case, used the precedents from *Johnson v.*

⁴¹ Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

⁴² Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

⁴³ Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

McIntosh to continue to set the tone for how the American government should view Native Americans.

Continuing what was started in *Johnson* and *Cherokee Nation*, the last of the Marshall Trilogy was decided in 1832, *Worcester v. Georgia*. The issue at the heart of this case was whether Georgia's law regulating who could go on tribal land was legal or not. Unlike in *Cherokee Nation v. Georgia*, the Court ruled they did have jurisdiction over this case because the case involved an American citizen. The state of Georgia seized an American minister from Cherokee land because he had broken Georgia law. *Worcester* successfully challenged Georgia's ability to govern the Cherokee people and land, accomplishing what *Cherokee Nation* was unable to do because of problems with jurisdiction. Like the previous two cases, *Worcester vs. Georgia* also continued to apply the discovery doctrine to America and determine tribal sovereignty without consulting tribes.

To begin, in his opinion, Marshall, for the third time in this trilogy of rulings, expounded upon and explained the right of discovery claimed by European explorers. "This principle, suggested by the actual state of things, was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession."⁴⁴ This continued explanation goes to defend why and how the United States government could regulate and control the tribes. Without this principle, first cited in *Johnson*, these cases and the government would have no legal standing to control the tribes. Tribes would need to be allowed their own sovereignty and dealt with as true foreign nations. Marshall also

⁴⁴ *Worcester v. Georgia*, 31 U.S. 515 (1832).

took the time to explain how the tribes dealt with the European and American use of the discovery doctrine; he conveyed this message while characterizing the tribes as simple minded and as only looking for gifts from the Europeans. “So long as their actual independence was untouched and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country.”⁴⁵ Marshall wanted to continue the characterization of the tribes as uncivilized. According to him, the tribes did not truly understand what this discovery doctrine meant for them, but they went along with it anyways because they often received gifts from the European conquerors.

Marshall continued to rationalize this relationship through a treaty from the 1790s; the Cherokee Nation willingly acknowledged that they were “under the protection of the United States of America, and of no other sovereign whosoever.”⁴⁶ He made mention that the different tribes were reliant upon the Europeans “for the supply of their essential wants and for their protection from lawless and injurious intrusions into their country.”⁴⁷ Before the Revolutionary War, the Cherokee received this protection from the British, but with the end of the war, it “led naturally to the declaration on the part of the Cherokees that they were under the protection of the United States, and of no other power.”⁴⁸ Through this interpretation, Marshall described the Cherokee as needing protection, even though they had been on the continent for many years before the

⁴⁵ Worcester v. Georgia, 31 U.S. 515 (1832).

⁴⁶ Worcester v. Georgia, 31 U.S. 515 (1832).

⁴⁷ Worcester v. Georgia, 31 U.S. 515 (1832).

⁴⁸ Worcester v. Georgia, 31 U.S. 515 (1832).

Europeans. Finally, he made it seem as though this agreement was the idea of the Cherokee and not the United States government.

In regards to the constitutionality of Georgia's laws in the case, it was found that "the said laws of Georgia are unconstitutional and void because they interfere with, and attempt to regulate and control the intercourse with the said Cherokee Nation, which, by the said Constitution, belongs exclusively to the Congress of the United States."⁴⁹ With this, the relationship between the federal government and the tribes was maintained. A state could not write any laws governing the land or the people already controlled by the tribes. This was a principle that had been set before the United States was a country and would remain the principle. The United States was acting on their discovery rights to make treaties with the Cherokee; this was a right of the country not of the states.

These same treaties and laws also determined that "The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress."⁵⁰ Georgia's law governing who could go into that land was ruled unconstitutional. Tribal governments had the sole power to write any laws that governed their own lands and the people on them. Tribes were able to maintain their sovereignty in this case because it benefited the federal government at that time. If the Supreme Court had ruled in the favor of Georgia, the federal government would lose all

⁴⁹ Worcester v. Georgia, 31 U.S. 515 (1832).

⁵⁰ Worcester v. Georgia, 31 U.S. 515 (1832).

power to control and manipulate the tribes themselves. They wanted to maintain the dominance that the federal government had over tribes.

In his concurring opinion in *Worcester v. Georgia*, Justice McLean agreed that the Cherokee were subject to federal government protection, but he also went on to explain sovereignty. Unlike Justice Marshall, McLean does mention the discovery rights of America and European countries. He also explained the relationship between the American government and tribes; “at no time has the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty.”⁵¹ The tribes, including the Cherokee, never actually owned the land because of the discovery doctrine. According to Justice McLean, their limited sovereignty was temporary.

The exercise of the power of self-government by the Indians, within a State is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government, in the extinguishment of their title...But a sound national policy does require that the Indian tribes within our States should exchange their territories, upon equitable principles, or eventually consent to become amalgamated in our political communities.⁵²

Finally, Justice McLean explained when and why a tribe should give up their rights to self-government. In his opinion, he stated that the tribes only held limited independence and because of this were constantly faced with settlers encroaching on their lands. This would cause problems for the state and “it would be inconsistent with the political welfare of the States and the social advance of their citizens that an independent and

⁵¹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁵² *Worcester v. Georgia*, 31 U.S. 515 (1832).

permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of State authority.”⁵³

This case is an outlier to what the first two pave the way for. This case was clearly political in ways that the others were not, setting in writing what Marshall and other Justices were unwilling to do previously. Within their opinions in *Cherokee Nation v. Georgia*, Chief Justice Marshall and Justice Johnson both state that ruling on the case would take away powers from Georgia. Marshall specifically said that the Cherokee’s original case would “require us to control the Legislature of Georgia, and to restrain the exertion of its physical force.”⁵⁴ Justice Johnson concurred; “I cannot entertain a doubt that it is one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal.”⁵⁵ While the Court had been unwilling to rule previously, in *Worcester v. Georgia*, the issue of whose power the tribes were under was determined. Marshall used this case to place tribes fully under the protection and control of the federal government, continuing the practice that tribal land could not be taken by a state or individual person, only the federal government.⁵⁶

These three cases set the tone for Native American sovereignty rights for the rest of the 19th century. By applying the discovery doctrine to the United States, the courts created “domestic dependent nations,” describing tribes in such a way that they needed American help and protection. Beginning with the Marshall Trilogy, the courts characterized Natives as “culturally deficient, in need of cultural improvement, domestic

⁵³ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁵⁴ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁵⁵ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁵⁶ Kades, “History and Interpretation of the Great Case of the ‘Johnson v. McIntosh,’” 108.

dependent nations, dependent wards” and used the principles of the “rule of discovery of land, political doctrine question, plenary power of Congress, trust doctrine” to set the tone for federal Indian law.⁵⁷ By establishing “federal Indian law,”⁵⁸ the United States Supreme Court also incorrectly labeled all Natives the same even though there are many different tribes with different cultures and ways of life. This umbrella characterization showed that “from the beginning of its relations with the Indians, the Supreme Court’s legal consciousness has stressed tribes’ allegedly inferior relation to the prevailing lifestyle of Euro-American.”⁵⁹ They needed the federal government to protect them and provide the necessities of life.

According to historian Alexandra Harmon⁶⁰ in her work, “American Indians, American Law, and Modern American Foreign Relations,” the principle of plenary power itself stated the “federal government has nearly unlimited authority over American Indians, that Congress may not only regulate Indian affairs but may even abrogate Indian treaties unilaterally and terminate tribes’ status under United States law as recognized polities.”⁶¹ This doctrine was achieved because of the Marshall Trilogy and the extension of the discovery doctrine to the United States federal government. By using the Marshall Trilogy rulings and the discovery doctrine together, the federal government was able to claim ownership of the territory and exercise control over the tribes. Throughout all three

⁵⁷ Wilkins, *American Indian Sovereignty and the U.S. Supreme Court*, 9.

⁵⁸ Wilkins, *American Indian Sovereignty and the U.S. Supreme Court*, 1.

⁵⁹ Wilkins, *American Indian Sovereignty and the U.S. Supreme Court*, 10.

⁶⁰ Alexandra Harmon writes on how the Supreme Court and United States government has abused the trust that Native Americans have if those institutions to claim influence and power over them. She believes that Native Americans hold sovereignty without help of the United States government, but that the government will not allow tribes to make their own decisions on matters that concern themselves.

⁶¹ Harmon, “American Indians, American Law, and Modern American Foreign Relations,” 948.

of the mentioned cases, Marshall admits Native sovereignty but also coined demeaning phrases limiting that sovereignty. These and the subsequent court cases revolving around the rights of the tribes “admit that the United States government can choose to limit tribes’ independence at any time. Thus, the ‘sovereignty’ referred to, is no sovereignty at all...tribal power stems from and is inferior and subject to the United States via Congressional whim.”⁶²

Because of the limited protections under the Marshall Trilogy, American Indian sovereignty was repeatedly questioned and ignored during the second half of the 19th century. These three rulings, *Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, “legitimized unsavory colonialism in past events...show[ing] an attempt to soften the colonialism with constitution-style rules.”⁶³ The growing desire to settle the west, achieve Manifest Destiny, and assimilate the American Indian forced Natives in the west to deal with new settlers and encroachments on their tribal land. Not only were Native Americans attempting to maintain sovereignty during a time when expansion was the way of the land, but also when state’s rights versus the power of the federal government was dividing the country.

Following the *Worcester* ruling and the subsequent removal of the Cherokee to the newly defined ‘Indian Territory,’ the state of Alabama sought to claim tribal land as their own and remove the Creek tribe, similar to what Georgia had wanted to do with the Cherokee. Even though *Worcester* had established native sovereignty, it “proved to be an ineffective counter to southern legislative aggression...the southern judiciary refused to

⁶² Ford, “The Myth of Tribal Sovereignty,” 406.

⁶³ Kades, “History and Interpretation of the Great Case of the ‘Johnson v. McIntosh,’” 112.

submit to the constitutional mandate of federal judicial supremacy”⁶⁴ and the federal executive branch continued its policy of Indian removal practiced since Thomas Jefferson.⁶⁵ What had been a decisive blow to states’ rights became an ineffective claim to power by the federal government, most specifically the Supreme Court. The Alabama state court used Marshall’s opinions against the tribes, claiming the Creek were “not intelligent enough to lay claim to national sovereignty...Indian inferiority demanded that Native Americans be treated differently under Anglo-American law.”⁶⁶ The Creek were not civilized and could not hold land titles. While Marshall had never claimed the Cherokee were not able to hold land titles, in his cases he did describe how tribes were uncivilized, setting the precedent that Alabama used here. The Alabama courts also used the guardian and ward analogy of *Worcester*, stating the state of Alabama as the guardians of the Creek and other tribes within its boundaries, not the national government.⁶⁷ While the rights of Native American tribes guaranteed by *Worcester v. Georgia* went unenforced, the principle of discovery and Native American weakness were used to rationalize what Alabama did.

Later on in the century, the United States ended the treaty system with the American Indian tribes with the Indian Appropriations Act; now only through executive orders, acts of Congress, or judicial rulings would changes be made to Indian policy. Under this law, tribes would no longer be considered independent nations within the

⁶⁴ Garrison, “Beyond Worcester,” 429.

⁶⁵ Scherer, “Now Let Him Enforce It,” 17.

⁶⁶ Garrison, “Beyond Worcester,” 436-437.

⁶⁷ Garrison, “Beyond Worcester,” 445.

borders of the United States; they were fully wards of the United States government.⁶⁸ Finally, in 1887, the Dawes Act took away any of the last vestiges of sovereignty that tribes still claimed to hold because of perceived sovereignty rights and ideas of self-government stated in the Marshall Trilogy. But by this point, tribes entered into the time Justice McLean had foreshadowed in *Worcester v. Georgia*; tribes could no longer be “an independent and permanent power” and “must give way to the greater power which surrounds it.”⁶⁹ The Dawes Act allowed much of the tribal land to be confiscated, redistributed, and settled as American territory in the west in an effort to further civilize American Indians. The land granted to individual Natives was often poor for farming, and Natives were forced to sell the land before they wanted to, relying on the Bureau of Indian Affairs for more and more help, becoming wards that the federal government needed to take care of.⁷⁰

Today, American Indian tribes are able to exercise their inherent rights as nations, within the confines of the federal government. These powers come from the establishment of sovereignty; “legislative, judicial and regulatory powers...the inherent powers include powers to determine their form of government, to define membership, to administer justice and enforce laws, to tax, to regulate property use.”⁷¹ These are powers that are inherent to American Indian tribes because they were on American soil before Europeans ever claimed the land as their own through the discovery doctrine. There is a delicate balance, however, between tribal sovereignty and the power of the United States

⁶⁸ Riley, "The History of Native American Lands and the Supreme Court," 369.

⁶⁹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁷⁰ McGrath, "The Model Tribal Probate Code," 409-410.

⁷¹ Cote, "Historical Foundations of Indian Sovereignty," 20-21.

government.⁷² While the government recognizes their sovereignty in these areas, tribes cannot have powers that “belong to or conflict with those of the dominant sovereign,”⁷³ referring to the United States government. When these powers overlap, the federal government takes precedence and can override tribal sovereignty at any time, limiting American Indian tribes’ rights as sovereign states, only truly having as much power as the federal government wants them to have.⁷⁴ This sovereignty has remained in a delicate balance between maintaining it and adhering to the laws of the United States.

Unfortunately for American Indians,

in United States law, tribal sovereignty has become largely a product of an ad hoc decision-making process that remains unguided by any analytical framework...Even though Indian sovereignty is recognized by law, the powers derived from this doctrine remain vague so that, powers of self-government cannot be objectively determined in advance before a ruling by a court.⁷⁵

These rights as sovereign nations should have never been legally taken away from Native American tribes. However, by applying the discovery doctrine to the United States and by describing Native American tribes as ‘domestic dependent nations’ and wards of the state, Chief Justice Marshall’s language was used during a pivotal time of Indian law creation and Manifest Destiny to slowly chip away at those rights. Not only were sovereign rights taken away, but the very land that tribes held and used for countless years prior to European settlement of North America.

⁷² Conner, “Information versus Ideology,” 57.

⁷³ Cote, “Historical Foundations of Indian Sovereignty,” 21.

⁷⁴ This comes from ideas based on Cote, Riley, and Conner.

⁷⁵ Cote, “Historical Foundations of Indian Sovereignty, 22.

Sovereignty means “freedom from external control.”⁷⁶ That is not something tribes had once European colonization began. American Indian tribes experienced control of every aspect of their lives and land. *Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia* appear to grant tribes more rights and protections; in reality, they did little of that. By claiming they were uncivilized and needed the federal government’s protection, the United States Supreme Court laid the framework for taking away tribal land and rights. Tribes would never be allowed to govern themselves and live how they had while continuing to live within the confines of United States territory. They would forever be treated as domestic dependent nations, “a form of political organization under which a relatively homogeneous people inhabits a sovereign state.”⁷⁷

⁷⁶ Miriam Webster Dictionary, “Sovereignty.”

⁷⁷ Miriam Webster Dictionary, “Nation-state.”

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