BETWEEN MEDIEVAL AND MODERN: THE SEVENTEENTH-CENTURY ORIGINS OF THE DOCTRINE OF DOMESTIC DEPENDENT NATIONS

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PROLOGUE

THE ARTICULATION: THE CHEROKEE CASES AS A SUMMARY OF COLONIAL LEGAL PRACTICE

As United States Chief Justice John Marshall's career and life drew to a close in the 1830s, the Supreme Court decided a series of cases that laid the foundation for the official government treatment of indigenous peoples throughout the rest of American history. The series of cases, which defined Native American tribal polities as neither completely irrelevant nor as entirely independent foreign nations, came to be known to lawyers of subsequent generations as the "Cherokee Trilogy." Not only did the Marshall Court clearly articulate the concept of the Domestic Dependent Nation for the first time in the Cherokee Trilogy, but the three cases also represented the final touches to the American federalist system developed by the venerable Chief Justice. Indeed, critics of Marshall often accuse him of adding an Indian nation tier of federalism not present in the Constitution, which speaks of separation of powers in reference only to the state and federal levels. Interestingly, however, the judicial opinions themselves, all of which were written by Marshall, rely on relatively little recourse to the United States Constitution or the intent of its framers. Instead, they borrow most of their persuasive arguments from the colonial period and couch them in terms of international law. The application of international law in regards to the native people of the new world by Anglo-Americans in

the colonial period led the Marshall Court to its decision, as becomes clear upon a careful examination of the opinions of the Cherokee Trilogy. In fact, the legal concept of a domestic dependent nation evolved, in all but name, during the course of the seventeenth century from the introduction of nascent European ideas of international law into colonial practice combined with traditional Native American practices of deference and fluidity in forming social groups, practices that waves of epidemic strengthened within Amerindian survivors in the decades preceding permanent European settlement. Together, the pragmatic adaptability of Native American practice and the intellectual flexibility of field of law in its infancy gave birth to a legal scheme that paradoxically recognized both sovereignty and dependency in Amerindian polities, a scheme incorporated into U. S. law by Marshall's decisions.

The first case included in the Cherokee Trilogy (though it does not, in fact, deal directly with the Cherokee) reached the United States Supreme Court nearly a decade before its more famous descendents. *Johnson v McIntosh*, decided in 1823, dealt with competing claims to a piece of land by two Anglo settlers in Illinois. The plaintiff in the case, who had purchased the disputed land directly from the Illinois and Piankeshaw Indians, hoped to evict the defendant, who had received the same land in the form of a grant by the United States government.[1] The controversy in the case centered on "the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country."[2] Of course, in answering the question, the Court also needed to account for the fact that the original European colonists and their descendents had essentially taken the entire continent from the Indians, albeit in a

[1] *Johnson v. McIntosh*, 21 U. S. 543 (1823).

[2] Ibid., 572.

piecemeal fashion. In fact, the piecemeal nature of the acquisition of land by the Europeans led to the very problem behind the case. In essence, the Supreme Court sought to determine at what point title transferred from the Native Americans to European settlers. Rather than deciding title on an ad hoc basis for every individual parcel of land, Marshall chose to embrace a definitive scheme that could apply to all cases disputed on original title. He did so by referencing colonial history and international law.

First, Marshall addressed the European ascension to dominance of North America, although not without twinges of guilt. His opinion wryly notes that the "potentates of the old world found no difficulty in convincing themselves that they made complete compensation to the inhabitants of the new, by bestowing on them civilization and Christianity."[3] While Marshall's wording in the case indicates sympathy for the Indians, he accepted the existence of the predominantly white United States as a *fait accompli*. Having reached that pragmatic conclusion, Marshall went on to note that the European colonial powers had in fact developed a scheme, through international law, to claim land from the natives. He referred to this legal device as the Doctrine of Discovery.[4] Marshall defined the Doctrine of Discovery as the principle "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments."[5] Marshall went on to observe that "the exclusion of all other Europeans, necessarily gave to the nation making the discovery the

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[3] *Johnson v. McIntosh,* 573.

[4] Ibid.

[5] Ibid.

sole right of acquiring the soil from the natives."[6] Thus, only the government of the nation with the right of Discovery could legally transfer title to land.

Marshall next deftly dealt with the fact that much of the land claimed by the Europeans remained under Indian control for generations after discovery. He did so by recognizing a right of occupancy, but not title, in the land's original inhabitants, and although "the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves."[7] The "ultimate dominion" included the ability to transfer title. Thus, land grants by European governments "have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy."[8] Therefore, according to Marshall, all the Court needed to do was to trace title back to the European government with title by virtue of discovery.

Marshall proceeded to engage in just such an exercise. He noted that the land in question in the case lay within the discovery claims of Great Britain and that by the Treaty of Paris of 1783, which ended the American War for Independence, "the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States."[9] Marshall also alluded to the fact that the individual states ceded all western land claims to the federal government under the Constitution, which resulted in title officially passing to the United States.[10] However, Marshall also viewed it as possible to trace the right of occupancy or aboriginal title. He stated that the "person

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[6] *Johnson v. McIntosh*, 573.

[7] Ibid., 574.

[8] Ibid.

[9] Ibid., 584.

[10] Ibid., 586.

who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased."[11] In other words, individuals possessed the ability to buy—and Indians possessed the ability to sell—right of occupancy. The right of occupancy, of course, gave way in the face of full title derived from discovery. Thus, Marshall found for the defendant in the case.[12]

Besides setting up a scheme for finding title based on the international law principle of the Doctrine of Discovery, Marshall also imported the international law principle of the Doctrine of Conquest as dicta in *Johnson v. McIntosh*. Marshall alleged that "conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals might be."[13] He listed the right to abrogate aboriginal title, meaning the ability to revoke the Indians' right of occupancy arbitrarily, as among those gained by the conqueror.[14] Furthermore, the right of Britain to abrogate title had passed to the United States and had "been maintained and established as far west as the river Mississippi, by the sword."[15] Thus, the Marshall Court, in one swift stroke, provided Native Americans with at least some rights to land while also providing Congress with the means to take away the same rights.

Although *Johnson v. McIntosh* dealt solely with land title derived from the claims of Indians and did not directly touch upon notions of indigenous sovereignty and jurisdiction, by referencing both international law and colonial history, Marshall created

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[11]*Johnson v. McIntosh*, 593.

[12]Ibid., 594.

[13]Ibid., 588.

[14]Ibid.

[15]Ibid., 588.

the framework to settle those very issues in the future. Indeed, the twin questions of Indian sovereignty and jurisdiction arose directly in a case that reached the Supreme Court less than a decade after the *Johnson v. McIntosh* decision.

In 1831, the Cherokee nation sued the state of Georgia in an attempt to stop white incursions onto Cherokee land. The Cherokee filed their suit in the Supreme Court of the United States as the court of origin under the assumption that the Cherokee nation constituted a state as defined by international law.[16] Article III of the Constitution confers original jurisdiction to the Supreme Court for cases involving a controversy between one of the states and a foreign nation.[17] If the Cherokee, in fact, did not possess statehood under international law, then the Supreme Court lacked jurisdiction, a fact which Marshall well recognized.[18] In answering the question of whether or not the Cherokee tribe constituted a state, Marshall provided the first clear articulation of the concept of the domestic dependent nation.

Marshall began his opinion by recounting how the Cherokee did indeed fulfill the requirements for statehood under international law. He said:

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has in the opinion of a majority of the judges, been completely successful.[19]

In Marshall's opinion, then, the Cherokee did seem to fulfill the traditional criteria for statehood under international law. However, he went on to note that "the condition of the

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[16]*Cherokee v. Georgia*, 30 U.S. 1 (1831).

[17]Constitution of the United States of America, Article III.

[18]*Cherokee v. Georgia*, 15-16.

[19]Ibid., 16.

Indians in relation to the United States is perhaps unlike that of any other two people in existence."[20] Specifically, according to Marshall, "the Indian territory is admitted to compose a part of the United States."[21] Furthermore, the Cherokees had specifically acknowledged themselves to have been under the protection of the United States by treaty.[22] These facts contradicted the notion that the Cherokee could be considered a state under international law.

Marshall, although he had specifically acknowledged that the Cherokee possessed many of the attributes of statehood, also recognized that an entirely foreign state could not logically exist within the boundaries of the United States. The tension between the two ideas led him to conclude that "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."[23] Thus, the Supreme Court dismissed the Cherokee nation's claim for want of jurisdiction.[24]

Because the Supreme Court dismissed the case for lack of jurisdiction, the concept of domestic dependent nations remained a mere dictum following *Cherokee v. Georgia*. It remained so for all of a year. In 1832, the Court handed down the conclusion of the Cherokee Trilogy in *Worcester v. Georgia*, yet another opinion written by Marshall. The plaintiffs in *Worcester*, Congregationalist missionaries from New

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[20]*Cherokee v. Georgia*, 16.

[21]Ibid., 17.

[22]Ibid.

[23]Ibid.

[24]Ibid., 20.

England, sought to have their criminal convictions under Georgia state law for ministering to the Cherokees in Georgia without a state license overturned on the grounds that Georgia did not possess jurisdiction over Cherokee territory.[25] This case gave Marshall the opportunity to incorporate his earlier dicta officially into American jurisprudence.

Marshall's opinion in *Worcester* represents the clearest articulation of the concept of domestic dependent nations in early American history. It also represents an expansion of the notion as it was introduced in *Cherokee.* In the latter case, Marshall found that the Cherokee were a domestic dependent nation in order to deny them the full rights that a truly independent state under international law would have enjoyed. However, in *Worcester* Marshall used the same concept to buttress the Cherokees' rights vis-à-vis the state of Georgia. In so doing, Marshall fully fleshed out the idea that had been limited to a scant paragraph in his earlier opinion.

The *Worcester* opinion begins with a reiteration of the Doctrine of Discovery as articulated in *Johnson v. McIntosh*, and indeed Marshall cited his earlier work.[26] Marshall then made the same allusion to the Doctrine of Conquest as earlier, but discussed it in much greater length, and in so doing described limits on the rights of Conquest not present in the earlier decision. For instance, although Marshall acknowledged that the various colonial charters granted the colonies the right to wage defensive war; he alleged that the British crown granted them that power "only for defence, not for conquest."[27] Of course, Marshall's emphasis on certain powers

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[25] *Worcester v. Georgia*, 31 U.S. 515 (1832).

[26] Ibid., 543-544.

possessed solely by the crown and not individual colonies mirrored his views of the relationship between federal and state power.

After establishing that only the British sovereign enjoyed the right of Conquest in the colonial period, Marshall then noted that the crown possessed other rights not shared by the individual colonies. The Proclamation of 1763 struck Marshall as particularly important as it completely prevented colonial governors from authorizing any intrusions upon Indian territory, even though Great Britain had gained that territory's title.[28] Marshall took that fact to mean that Great Britain considered Indian tribes "as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged."[29] Two important developments derived from these precedents. First, the United States inherited the exact rights and powers enjoyed by Great Britain, which meant that the federal government possessed powers over the native tribes that the states did not. Second, Marshall noted that the United States adopted the traditional forms used by the British when it negotiated new treaties with tribes, including the Cherokee, thereby implicitly accepting at least some form of statehood for Native American polities.[30] Building on these concepts, Marshall concluded that the "treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the

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[27]*Worcester v. Georgia*, 546.

[28]Ibid., 548.

[29]Ibid., 548-549.

[30]Ibid., 551-556.

government of the union."[31] Marshall then applied the general principle to the specific case of the Cherokee to find that Georgia could not attempt to regulate contact with the Cherokee constitutionally, and thus the Supreme Court declared Georgia's act void and the judgment of Georgia's courts nullified.[32]

The Domestic Dependent Nation scheme articulated in the cases of the Cherokee Trilogy remains in effect in United States law to this day. Nonetheless, three things stand out when one considers the Cherokee Trilogy as a whole. First of all, one is struck by the suddenness of the articulation of the very idea of domestic dependent nations. Nothing similar had ever been clearly espoused in either domestic or international law. Largely for this reason, scholars often assume that Marshall created the concept out of whole cloth. For example, one legal scholar accuses Marshall of adapting legal doctrines to reach pre-determined results and of relying on "a corrupt reading of history."[33] Allegedly, Marshall committed such grievous breaches of legal ethics in order to avoid a losing political battle with the State of Georgia.[34] Similarly, a noted historian of Jacksonian America portrays Marshall's decision as driven purely by the Chief Justice's nationalist federalism.[35] However, further examination reveals that the assumptions held by historians and lawyers alike rest on faulty grounds. For instance, at one point in *Worcester*, Marshall compared the wording of the Articles of Confederation to that of the Constitution, noting that the Articles granted Congress merely the right of regulating

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[31]*Worcester v. Georgia*, 557.

[32]Ibid., 561.

[33]Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw-Hill, Inc., 1996), 101.

[34]Ibid., 102-103.

[35]H. W. Brands, *Andrew Jackson: His Life and Times* (New York: Doubleday, 2005), 487-493.

trade with the Indians while the Constitution added treaty-making power, indicating a broader grant of authority along the lines of that enjoyed by the British crown during the colonial period.[36] Surely this comparison between the two governing documents would have been enough to advance a federalist agenda in the hands of a master of legal legerdemain like Marshall, yet he did not base his opinion on the comparison but merely brought it in as evidence of a tiny segment of his argument, that the powers of the British crown passed to the U.S. Congress. Furthermore, the presence of a federalist agenda does not adequately address Marshall's motivations as he clearly genuinely sympathized with the plight of the Cherokees as evidenced by the opening paragraph of his opinion in *Cherokee*:

> If Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.[37]

Yet, despite his obvious sympathy, Marshall invoked the concept of domestic dependent nations thereby requiring that the Supreme Court dismiss the case for lack of jurisdiction. For these reasons, the belief that Marshall made up domestic dependent nations out of thin air cannot hold true. Regardless of the suddenness with which the phrase entered constitutional jurisprudence, the phrase was all Marshall created, as the Chief Justice clearly believed that he was merely articulating a concept already present in Anglo-American law.

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[36] *Worcester v. Georgia*, 558-559.

[37] *Cherokee v. Georgia*, 15.

Marshall's stress on maintaining continuity with the colonial past represents the second obvious aspect of the Cherokee Trilogy. A multitude of allusions to colonial events of note abounds throughout the three cases, as can be seen through the example of Marshall's treatment of the Proclamation of 1763 as discussed above. Furthermore, in at least two of the three cases, *Johnson* and *Worcester*, Marshall engaged in relatively lengthy narrations of the colonial process itself by way of importing the Doctrines of Discovery and Conquest. Indeed, the frequent recourse to international law is the third striking feature of the Cherokee Trilogy and goes hand in hand with the emphasis on continuity with colonial policies. Marshall, at least, believed that the laws of nations, at least from the Anglo-European point of view, governed the interactions between radically different peoples during large parts of the seventeenth and eighteenth centuries.

This belief by Marshall was not without its own difficulties, chief of which was the fact that nothing in international law contained anything remotely similar to domestic dependent nations. Nonetheless, Marshall believed that he was accurately articulating what was in fact a common colonial practice derived from international law. The problems inherent in his belief can easily be reconciled when one considers the timing of two imminently relevant events: the successful founding of British colonies in North America and the development of international law as distinct from the medieval laws of Christendom. Both of these events occurred over the course of the seventeenth century. Thus, while Native American polities did not coincide exactly with European notions of statehood, the field of international law in its infancy remained flexible enough to incorporate them at least partially into its corpus, as enacted in America. International law in its completed form found its articulation in scholars who remained in Europe and

thus does not include a concept of a quasi-state such as domestic dependent nations.[38] However, if one examines actual legal practice in the colonies through the lens of international law, one discovers that Marshall correctly interpreted the precedents he saw and merely articulated the concept of domestic dependent nations and did not create it.

Unfortunately, no extant scholarship bridges the several fields necessary to perform such an examination. Legal works on domestic dependent nations for the most part pay only cursory attention to the events and ideas that predate Marshall. For example, the most widespread treatise on American Indian law spends a scant paragraph on colonial practices in what amounts to a brief paraphrase of Marshall's summary of colonial practice in *Worcester v. Georgia*.[39] The only major work by a legal scholar directly on the Cherokee cases themselves likewise provides only a cursory narrative of colonial times, and limits that narrative to Cherokee history and events directly referenced by Marshall.[40] Furthermore, legal works on the subject inevitably focus predominantly on United States domestic law, as Marshall's cases proved decisive for that field. In fact, the author of the most thorough work on the Cherokee Cases from the legal perspective addresses international law only in her introduction and quickly dismisses its impact on Marshall.[41] Thus, legal scholars with their understandable focus

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[38]The Montevideo Convention on the Rights and Duties of States of 1933 (49 Stat. 3097; Treaty Series 881), which itself merely codifies earlier international legal traditions, defines states under modern international law. One of the stated requirements for statehood is political independence. Therefore, a dependant nation cannot be a nation under modern international law.

[39]William C. Canby, Jr., *American Indian Law in a Nutshell*, 4th Edition (St. Paul, MN: Thomson West, 2004), 12.

[40]Norgren, 11-27.

[41]Ibid., 7.

towards current United States law fail to explore fully the factors that contributed to the seventeenth century antecedents to it.

Historians have not ventured much further. Scholars of Jacksonian America who touch upon the Cherokee Cases naturally focus on the early nineteenth century context and ramifications of the cases. Indeed, the fact that the litigation of *Worcester* occurred contemporaneously with the nullification crisis has led many historians to gloss over even the underlying facts of the case.[42] Needless to say, then, historians of the 1830's possess no interest in verifying either Marshall's legal reasoning or his reading of the colonial record. Given the volume of writing on colonial times, it comes as somewhat of a surprise that historians of British North America have also remained silent on these specific points.

To a large extent, the failure by colonial historians to trace the origin and development of what became the dominant American legal approach to indigenous polities stems from the nature of the development of the history of first contact between European and Amerindian. Through a combination of bias and lack of sources, early works on colonial America treated the Indians as little more than an extension of scenery, while focusing entirely on the European view.[43] Only after the civil rights movements of the 1960's and 1970's did an interest in rewriting history to include Amerindian agency take hold. To get around the problem of the dearth of primary sources from the Native American perspective, historians adopted many investigative techniques from anthropologists and developed a technique referred to as ethnohistory, which consists of

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[42]Edwin A. Miles, "After John Marshall's Decision: *Worcester v. Georgia* and the Nullification Crisis," *The Journal of Southern History* v. 39, No. 4 (November, 1973), 519-544, 519-520.

[43]Daniel K. Richter, *Facing East from Indian Country: A Native History of Early America* (Cambridge, MA: Harvard University Press, 2001), 7-8.

studying a society through its artifacts and folklore as well as through a critical reading of sources recorded by outsiders to the society while maintaining a proper ethnographic perspective of the fact that the recorders lay outside the culture being studied.[44] As a result of the ethnohistorical approach, however, most modern works on first contact in North America maintain a thoroughly cultural perspective and only indirectly touch upon the law.[45] Furthermore, works that do address directly the legal relationships between English colonists and Amerindians either deal only with broad themes of common law such as jurisdiction[46] or focus on specific sets of legal interactions like possession and control of livestock or the regulation of alcohol.[47] As such, lawyers and historians alike have left Marshall on an island in the formation of the domestic dependent nation doctrine.

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[44]James Axtell, *The European and the Indian: Essays in the Ethnohistory of Colonial North America* (New York: Oxford University Press, 1981), 3-15.

[45]James Axtell, *The European and the Indian: Essays in the Ethnohistory of Colonial North America* (New York: Oxford University Press, 1981); William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983); Francis Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (New York: W. W. Norton , 1975); James H. Merrell, *The Indians' New World: Catawbas and Their Neighbors from European Contact through the Era of Removal* (Chapel Hill, NC: University of North Carolina Press, 1989); Daniel K. Richter and James H. Merrell, eds., *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600-1800* (Syracuse, NY: Syracuse University Press, 1987); Daniel K. Richter, *Facing East from Indian Country: A Native History of Early America* (Cambridge, MA: Harvard University Press, 2001); Daniel K. Richter, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (Chapel Hill, NC: University of North Caroline Press, 1992); Neal Salisbury, *Manitou and Providence: Indians, Europeans, and the Making of New England, 1500-1643* (New York: Oxford University Press, 1982).

[46]Katherine A. Hermes, "Jurisdiction in the Colonial Northeast: Algonquian, English and French Governance", *The American Journal of Legal History*, v. 43, No. 1 (January, 1999), 52-73; Yasuhide Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630-1763* (Middletown, CT: Wesleyan University Press, 1986); Jenny Hale Pulsipher, *Subjects unto the Same King: Indians, English, and the Contest for Authority in Colonial New England* (Philadelphia: University of Pennsylvania Press, 2005).

[47]Virginia DeJohn Anderson, *Creatures of Empire: How Domestic Animals Transformed Early America* (New York: Oxford University Press, 2004); Peter C. Mancall, *Deadly Medicine: Indians and Alcohol in Early America* (Ithaca, NY: Cornell University Press, 1995).

This study will show that adequate precedent existed in colonial practice for Marshall to believe that he was merely articulating a well-established legal doctrine. Furthermore, it will show how such a self-contradictory concept as a domestic dependent nation came about as a result of the coincidental timing of English colonization in North America and the development of international law in Europe. Doing so requires that the arguments be divided into three distinct parts.

The first part deals with the preconditions for the development of the notion of domestic dependent nations. Chapter one briefly explores sixteenth century English experiences in Ireland by way of contrasting the treatment of a people considered a distinct other before and after the development of the notion of a nation, domestic dependent or otherwise. It shows that the medieval mentality and its accompanying legal system were incapable of allowing conquered people any degree of constitutional autonomy as a polity. Although the medieval model did influence early Virginia, such feudal ideas had become intellectually obsolete by the time the Puritans arrived in Massachusetts Bay. Furthermore, Massachusetts, not Virginia, became normative for the Anglo-American experience in terms of dealing with the indigenous peoples.[48] As such, chapter one finally traces the initial development of international law and the concept of the state as defined by international law. As with any gradually developing idea, pinpointing an exact time for the birth of the concept of the state cannot be attempted, but by briefly looking at both general European history and specific acts in England, it can be determined by what date the concept of the state had clearly entered the British

[48]The treatment and classification of native social polities under colonial law developed in a completely different manner than the economies and governments of the Anglo-American colonies themselves. For the latter process, Virginia is widely considered normative. See Jack P. Greene, *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture* (Chapel Hill, NC: University of North Carolina Press, 1988).

consciousness, specifically the English Puritan consciousness, a date that corresponds to the political development of Massachusetts.

The second part delves into the early colonial practices themselves. Chapter two focuses on issues of the sovereignty and jurisdiction of Native American polities as adjudicated by the General Court of the Massachusetts Bay Colony from its founding until the period following King Philips War. This necessarily includes the mercantilist policies of the Massachusetts General Court in regards to trade with the Indian tribes. Although some historians argue that the legal system of colonial Massachusetts placed more importance upon local courts[49], this thesis focuses on the General Court for several important reasons. First of all, international law generally does not get applied by local courts, but only by higher courts operating as proxies of states themselves. Similarly, in the case of colonial Massachusetts, the General Court also acted as the legislative body of the colony, implying that the sovereignty of Massachusetts rested in the General Court, a fact significant in the application of international law. Finally, local courts were more apt to deal with Native Americans as individuals, while the General Court dealt with Native American tribes as polities. Thus, records of the General Court are much more valuable in seeking to determine the impact of international law upon relations between the Amerindians and the Anglo settlers. The records do in fact illustrate practices remarkably similar to Marshall's Domestic Dependent Nations.

The third part then seeks to address the process by which the British Crown adopted the system that evolved in Massachusetts and used it throughout its colonial possessions in North America, often as a stratagem to curtail the expansion of other

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[49]T. H. Breen, *Puritans and Adventurers: Change and Persistence in Early America* (New York: Oxford University Press, 1980), 3-24; George Lee Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (New York: Macmillan, 1960), 163-168.

European powers particularly France. It also explores the role that Native Americans themselves played in the development of the system. Chapter three seeks to show these processes mostly through a synthesis of a number of secondary works by scholars with specific regional expertise on the subject of first contact. The picture that emerges from such a synthesis to a large degree matches Marshall's description of British colonial legal practices towards the indigenous people of North America, thereby demonstrating that Marshall did not invent Domestic Dependent Nations but merely articulated an established colonial practice.

CHAPTER ONE: FROM MEDIEVAL TO MASSACHUSETTS

When various groups of Europeans crossed the Atlantic to establish permanent settlements beginning in the sixteenth and seventeenth centuries, they entered what to them was a new world and encountered a new people. However, they brought with them old world paradigms that determined the course that each new encounter followed. The experiences that shaped the determinant paradigms included encounters with groups of people Europeans viewed as others, if not necessarily in the same context as occurred in the Americas.[50] Despite the differing contexts, each European nation's previous experiences with others often strongly influenced how that nation's interaction with new world natives progressed. In the case of the English, the majority of encounters with others came in dealings with the inhabitants of neighboring Ireland.

The English of the early modern period certainly viewed the Irish as others, as various surveys of contemporary English writings verify. Such surveys not only describe Elizabethan English attitudes towards Gaelic Irish as individuals but also recount sixteenth-century English impressions of Gaelic Ireland as a collective polity.[51] The English saw the former as decidedly uncivilized. English travelers to some of the more

[50]Howard Mumford Jones, "Origins of the Colonial Idea in England," *Proceedings of the American Philosophical Society* v. 85 n. 5 (September, 1942), 448-465, 449.

[51]Nicholas P. Canny, *The Elizabethan Conquest of Ireland: A Pattern Established 1565-76* (Hassocks, UK: The Harvester Press Limited, 1976); Steven G. Ellis, *Tudor Ireland: Crown, Community and the Conflict of Cultures, 1470-1603* (New York: Longman Group Limited, 1985); Pádraig Lenihan, *Consolidating Conquest: Ireland 1603-1727* (Harlow, UK: Pearson Education Limited, 2008); David Beers Quinn, *The Elizabethans and the Irish* (Ithaca, NY: Cornell University Press, 1966).

rural areas of Ireland discovered much to their shock that the Irish did not even know how to bake bread but subsisted on rough oat cakes.[52] English observers also often described the Irish as immoral, filthy, lice-ridden, and lazy in the extreme.[53] To a large degree, however, the English attributed these and other negative qualities of Irish individuals to the inferiority of the Gaelic polity itself. To Elizabethan Englishmen with centuries' worth of concepts of constitutional government structuring their own society, the highly aristocratic Gaelic system of land ownership based on a Celtic concept of clan appeared chaotic. Many of them "found it difficult to recognize the existence of any order in the Irish polity."[54] The English found to their dismay that the less structured nature of the Gaelic polity, lacking as it did any constitutional limitations on power, also led to an overly militarized society in which warfare occurred constantly and in which the peasant class possessed even less rights than elsewhere in Europe.[55] Yet, the harshest English criticism of the Irish polity centered on Gaelic agricultural practices, as "in English opinion, a basic defect of Irish agrarian life was that it conduced to laziness and, indeed, to dissipation. Tending cows and horses seemed… an easy excuse for not doing harder labor in the fields."[56] According to the English world view, civilization could only be achieved through cultivation, and therefore the Irish, who lacked fully sustainable, non-pastoral agriculture, fell far short of civilized status. The Elizabethan English, then, saw the Irish not only as different, but also as inferior.

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[52]Quinn, 63.

[53]Quinn, 68-69, 76-77; Canny, *Elizabethan Conquest of Ireland*, 117-136; Lenihan, 41-44.

[54]Quinn, 36.

[55]Quinn, 38-42; Canny, *Elizabethan Conquest of Ireland*, 119-121; Ellis, *Tudor Ireland*, 41-44.

[56]Quinn, 76.

The English characterization of the Irish as other did not arise overnight. After all, England first imposed itself upon Ireland in a series of Anglo-Norman conquests in the twelfth century. Yet, Elizabethan writers attached a greater exoticism to Ireland than their forebears had. No doubt this tendency stems, in part, from the fact that the polity of England had undergone more changes than that of Gaelic Ireland in the intervening centuries. Historians, however, advance another factor as contributing to the increasing marginalization of the Irish into early modern times. Their argument posits that the concept of otherness, particularly an uncivilized otherness, played an integral role in medieval European consciousness. Originally, the great untamed forests described as wildernesses and the outlaws who lived in them represented the uncivilized other, while the Court with its ritualized ceremony and intricate code of manners embodied the normative and civilized.[57] By the late medieval period, the expanse of wilderness in England had been greatly diminished and the great forests had become the exclusive provinces of the crown and were in fact subject to their own legal code.[58] Thus, the English concept of other transferred to Ireland, which situated as it is at the eastern edge of the Atlantic, took on an exotic aura as the far frontier of Europe and the last stop before the edge of the world.[59] However, when Columbus and subsequent explorers discovered the "New World," Ireland began to lose its otherness, as this concept transferred to the Americas and their inhabitants.[60] Indeed, the dates of the establishment of the first English colonies in America and the final conquest of Ireland and the

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[57]Joep Leerssen, "Wildness, Wilderness, and Ireland: Medieval and Early-Modern Patterns in the Demarcation of Civility." *Journal of the History of Ideas, v. 56, no. 1*(January, 1995), 25-39 at 27-28.

[58]Ibid., 29.

[59]Ibid., 31-32.

[60]Ibid., 32.

incorporation of its inhabitants into the English polity as subjects of the crown correspond to a remarkable degree. Thus, some historians see an ever-transferring concept of otherness as inherent in European self-definition.

More conventional works of history than those dealing with the history of ideas also support the notion of a transferal of, or at the very least an extension of, Irish otherness to the newly discovered North America. For instance, one scholarly comparison of early modern English writings on the Irish with writings on Amerindians notes how often English travelers in America directly compared the new world inhabitants with the Irish despite what strikes a modern eye as a blatant dissimilarity between the various objects of comparison.[61] Such a practice certainly suggests a pre-conceived notion of other. Furthermore, the trait that the English saw as most damning in the Gaelic Irish, namely a lack of sustained agriculture, also condemned the Amerindians in Anglo eyes. In point of fact, many of the Native American tribes with whom the English came into contact practiced a sophisticated form of semi-nomadic agriculture ideally suited for the vast forests of eastern North America. Their agricultural practice centered on the "Three Sisters" of maize, beans, and squash planted together by hand in the same plot. By planting their crops in this manner, Amerindians not only provided a high yield-per acre of a balanced diet, but also preserved soil quality.[62] Nonetheless, the English settlers to the new world failed to identify seemingly chaotic and random plots in the middle of the forest as ingenious agriculture and instead noted the lack of orderly

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[61]Quinn, 25.

[62]William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983), 43-44; Neal Salisbury, *Manitou and Providence: Indians, Europeans, and the Making of New England, 1500-1643* (New York: Oxford University Press, 1982), 30-34; Daniel K. Richter, *Facing East from Indian Country: A Native History of Early America* (Cambridge, MA: Harvard University Press, 2001), 55-57.

fields, fences, and plows, a fact that contributed to their identifying the indigenous people as others.[63]

Interestingly, the aspect of European farming that the Native Americans lacked that met with the most derision from the English took the form of domesticated livestock. While the Indians lived well in tune with the migration habits of wild animals and very successfully supplemented their diet with fresh meat and fish, they possessed no livestock.[64] The English colonists even condemned the one domesticated animal the Native Americans did possess, alleging that Indian dogs were not truly domesticated and could not bark but only howl and growl in the manner of wolves.[65] Thus, while the English looked down on the Gaelic Irish for eschewing hard agricultural labor in favor of spending time with their herds, they sneered even harder at the Amerindians for not domesticating livestock at all.

Of course, the English did not limit the concept of other in the case of either Ireland or America to the natives but extended the concept to each respective land as well. English writers of the Elizabethan period often exaggerated the positive qualities of Ireland, particularly in terms of climate and fertility of land.[66] Similarly, the Puritan settlers to New England two generations later viewed their newly acquired home as a

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[63]Cronon, 128; Richter, *Facing East from Indian Country*, 54-59; Virginia DeJohn Anderson, *Creatures of Empire: How Domestic Animals Transformed Early America* (New York: Oxford University Press, 2004), 80-81.

[64]Virginia Anderson, 17; Cronon, 128.

[65]Virginia Anderson, 34.

[66]Quinn, 58.

providential garden that God gave them to dutifully cultivate.[67] The use of the same trope, that of the bountiful garden, for both Ireland and America reinforces the notion that early modern English applied the same concept of other to America and its inhabitants that they had earlier ascribed to Ireland and the Gaelic Irish.

Building on the similarities in the ways in which the early modern English identified first the Irish and then the Native Americans as others, historians have also noted the similarities in the active English response to the two sets of encounters. Specifically, the English engaged in schemes of aggressive colonization based on land acquisition in both Ireland and America.

In Ireland, English colonization grew out of the medieval practice of surrender and regrant. Essentially, surrender and regrant called for the surrender of claims by rebellious Irish lords in exchange for the promise by the Crown of a regrant of their traditional landholdings, usually augmented by new holdings as well. The advantages of this policy from the English point of view included the avoidance of protracted military campaigns and the hope that since the Irish lords would technically thereafter hold their lands from the crown, they could be induced to follow English legal structures.[68] However, the policy failed miserably and only encouraged further noble intrigue.[69] After an attempt to modify the system in favor of lesser lords at the expense of the more

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[67]Jorge Canizares-Esguerra, *Puritan Conquistadors: Iberianizing the Atlantic, 1550-1700* (Stanford, CA: Stanford University Press, 2006), 205-214.

[68]Nicholas P. Canny, The *Elizabethan Conquest of Ireland*, 2; Lenihan, 3-5; Ellis, *Tudor Ireland*, 137-142.

[69]Lenihan, 4-5.

powerful magnates by Sir William Cecil, Elizabeth's Principal Secretary, also failed, the English actively decided to embark on a policy of colonization.[70]

Sir Henry Sidney, who had been appointed Lord Deputy of Ireland in 1566, originally advanced the colonization scheme as the only possible, cost-effective means of solving "the Irish problem" and quickly gained Cecil's ear. Indeed, Cecil even called for more colonization than Sidney asked for, mostly because he thought it would save the Crown considerable expense.[71] Sidney's plan consisted of the establishment of a number of garrisons intermittently throughout the troublesome parts of Ireland, particularly Ulster, to support larger groups of civilian colonists who Sidney envisioned settling broad swathes of the country, employing Gaelic peasants as agricultural labor, and bringing the shining light of civilization to the Emerald Isle in a strictly private venture.[72] Furthermore, Sidney believed that the garrisons themselves would be self-sustaining as they were to be given land directly by the crown in return for their military services, an idea decidedly reminiscent of the feudal past.[73] Thus, private colonization as an attempt to solve the Irish problem at one and the same time represented a break with and a continuation of medieval practices.

Historians have long noticed the similarities between the beginnings of English colonialism in Ireland and the establishment of the first Spanish colonies in the Americas. Indeed, most experts argue that "Sidney was familiar with Spanish views on colonial settlement, and it may have been this which made him enlarge the scope of English

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[70]Canny, *Elizabethan Conquest of Ireland*, 62-63; Lenihan, 8.

[71]Canny, *Elizabethan Conquest of Ireland*, 63.

[72]Ibid., 72-76.

[73]Ibid.

colonization plans."[74] After all, Sidney served as emissary to Spain from 1553-1556.[75] Other studies suggest that Spain and Portugal jealously guarded their colonial secrets and that the English actually took their inspiration from the Mediterranean colonies of the maritime power Venice.[76] The Spanish model itself took strong influence from the medieval Mediterranean commercial empire of the Crown of Aragon which bore a striking resemblance to the Venetian model.[77] No matter its exact origin, the fact remains that the English colonial effort in Ireland greatly resembled the Spanish colonial ventures in the New World.

Specifically, the English adventure in Ireland and the Spanish conquest of the Americas mirrored each other in terms of method, actors, and goals. Private parties licensed by the respective crowns carried out each endeavor. Furthermore, both the Spanish and the English came to see the indigenous inhabitants of their respective colonial areas as inferior and in need of domination by the superior culture so that they might learn the benefits of civilization.[78] The private parties who participated in each conquest also resembled each other. In Ireland, sons of new gentry of the West Country in England, in need of more land and somewhat experienced in military matters through their association with the Dudleys and the wars in France, bore the brunt of the English

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[74]Quinn, 106.

[75]Canny, *Elizabethan Conquest of Ireland*, 66.

[76]Howard Mumford Jones, 449-450.

[77]Hugh Thomas, *Rivers of Gold: The Rise of the Spanish Empire, from Columbus to Magellan* (New York: Random House, 2003), 17-19, 63; J. H. Elliott, *Imperial Spain 1460-1716* (London: Penguin Books, 1963), 27-28.

[78]Canny, *Elizabethan Conquest of Ireland*, 133-134; Lenihan, 41-44; Tzvetan Todorov, *The Conquest of America*, trans. Richard Howard (New York: Harper & Row, 1982), 154-155.

effort.[79] In Spanish America, similarly destitute yet militarily experienced *hidalgos*, largely from outlying regions such as Extremadura, carried out the conquests of Mexico and Peru.[80] Finally, the English and Spanish possessed the same basic goals for their sixteenth century colonial ventures. Each purported to adhere to a religious agenda. The English desired to solve the problem of Roman Catholic recalcitrance in Ireland which remained high even amongst the Anglo-Irish descended from the Norman invasions of Ireland of the thirteenth and fourteenth centuries.[81] The Spanish, on the other hand, sought to spread Catholicism to a new continent.[82] Yet, in practice, the individuals who actually engaged in the colonial adventures, whether English or Spanish, cared more about acquiring the natural resources and exploiting natives as labor.[83] Religion merely provided a convenient justification. Given the overwhelming similarity between the two approaches, it should not surprise anyone that historians generally consider the English colonial enterprises in Ireland to be based on the prior Spanish expeditions to the New World.

The historiography on the matter takes the argument one step further, however. Besides noting the similarities between English Ireland and the Spanish Americas and concluding that the former took inspiration from the latter, historians use similarities between colonial Ireland and early English colonies in Virginia to argue that English

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[79]Canny, *Elizabethan Conquest of Ireland*, 72-76.

[80]Thomas, 347, 357, 479-488; Todorov, 54-57; Elliott, 62-65.

[81]Lenihan, 5-8; Canny, *Elizabethan Conquest of Ireland*, 123-127.

[82]Elliott, 68-69; Todorov, 154-156.

[83]Canny, *Elizabethan Conquest of Ireland*, 123-127; Elliott, 68-69.

settlers to North America actively based their colonies on the earlier ventures in Ireland.[84] In addition to remarking on the similarities in the methods and motivations of English settlers to Ireland and Virginia, scholars point out that the careers of many of the individuals involved in colonial enterprises span both sides of the Atlantic. In other words, some of the very same people who served in Ireland, most notably Walter Raleigh and Humphrey Gilbert, later led expeditions to Virginia.[85] Furthermore, older relatives of more heroes of the New World, such as John Winthrop and William Penn, had previously availed themselves of the Irish opportunity.[86] Thus, historians of early modern Ireland now describe English activities there as a direct dry-run of the successful colonization of North America.

Historians of colonial America also point to the plantations in Ireland as a blueprint for North American settlement. For example, one noted colonial scholar states that the early settlers to Virginia, seeking crops that would appeal to English markets, "initially patterned their thinking on the English experience in Ireland, where such products were produced on units managed by the English but worked largely by native labor."[87] The same study argues that Virginia and the other southern colonies provided the normative structure of economic development that later English colonies followed.[88]

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[84]Quinn, 106-122; Canny, *Elizabethan Conquest of Ireland*, 162; Jack P. Greene, *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture* (Chapel Hill, NC: The University of North Carolina Press, 1988), 7-9.

[85]Nicholas Canny, *Kingdom and Colony: Ireland in the Atlantic World 1560-1800* (Baltimore: The Johns Hopkins University Press, 1988), 7.

[86]Ibid.

[87]Greene, 9.

[88]Ibid., 207.

In essence, then, the historians suggest that the early modern adventures in Ireland served as the dominant model for most English colonization in North America.

However, several problems persist with the dominant view. First of all, some historians dispute whether English ventures in Ireland mounted to colonialism at all. For example, one specialist of the early modern British Isles contends that the methods of government introduced in Ireland by Sidney and his peers constituted no more than a "continuing institutional development on English lines."[89] Under this view, the introduction of new administrative methods by the English in Ireland amounted not to an imperialistic or colonial agenda but only the standard Tudor state-building that also occurred in England. In fact, in another study the main proponent of the state-building view directly compares English actions in Ireland to those in the northern marches of England along the border with Scotland. In each case, the crown set up temporary councils with broad executive powers not only to secure what the monarchy perceived as national borders but also to counterbalance the powers of the notoriously powerful local magnates.[90] Indeed, the argument makes a certain deal of sense when one considers that a not insignificant amount of the English problems in Ireland stemmed not from the Gaelic lords and their followers but from the old Anglo-Irish Lords Palatinate with landholdings outside the English Pale and therefore outside the jurisdiction of the crown-sanctioned government in Dublin.[91] At any rate, the claim that Ireland experienced the first wave of English colonialism remains disputed.

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[89]Steven G. Ellis, *Tudor Ireland,* 151.

[90]Steven G. Ellis, *Tudor Frontiers and Noble Power: The Making of the British State* (Oxford: Oxford University Press, 1995).

[91]Canny, *Elizabethan Conquest*, 18-21; Lenihan, 1-3.

The truth probably lies somewhere in between the colonial and state-building models. Assuming for the moment that the Elizabethan English engagements in Ireland were in fact colonial in nature, it is still far from certain that the settlers to North America patterned their ventures after the earlier Irish enterprises. After all, even proponents of the colonial model for Tudor Ireland admit that the scheme ultimately failed and that eventually Elizabeth and her advisors settled on crown-funded conquest and occupation to solve the ongoing Irish instability.[92] Why would colonists setting out for the New World attempt to replicate a scheme that by the founding of Jamestown had already failed in Ireland? The answer no doubt comes from the fact that the Spanish colonial efforts in America still held quite a luster to English eyes. Indeed, an earlier historical work on colonial North America suggests that Virginia's founders consciously followed a model borrowed directly from Spain.[93] While subsequent scholars have shown that aspiring English conquistadors took the Spanish model to Ireland before North America, the overwhelming success of Spain in the New World no doubt led the English adventurers to dismiss the Irish as a special case and to count on greater success when applying the same methods to Amerindians.

The final problem with the description of Ireland as a colonial blueprint for later American ventures stems from the fact that ultimately the inhabitants of North America met a much different fate at the hands of the intervening English than did the Irish. After completing the conquest of Ireland in 1603, the English viewed the Gaelic Irish as subjects of the crown ostensibly in possession of rights protected by the Common Law.

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[92]Lenihan, 8-19; Ellis, *Tudor Ireland*, 278-312; Quinn, 133-142.

[93]Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W. W. Norton & Company, Inc., 1975), 99-100.

However, in practice the Irish became a laborer class for a new English landholding society.[94] Yet, in English North America, no such large scale adoption of native peoples as a laborer class occurred. In fact, Native American tribes retained rights as polities throughout the colonial period and indeed still retain those rights under current United States law. This discrepancy in ultimate treatment of native people casts serious doubt on the full applicability of the historical model of Ireland as a dry-run English colony, at least as far as first contact with the Amerindians goes.

A couple of factors could help explain why the English settlers to North America treated the Indians differently than had their counterparts in Ireland. First of all, one should not discount the possible effect of racism. After all, however different the Gaelic Irish might have been from the English in custom and appearance, the Amerindians differed to a greater degree from either and on a much more fundamental physical level. However, several factors limit the use of racism as a full explanation for the segregation, rather than the adoption as a low class of labor, of the Indian nations. First, the leading treatise on racism in colonial Virginia suggests that racism against did not occur on a large scale until Nathaniel Bacon used Native Americans as a collective scapegoat in a populist maneuver to consolidate support for his rebellion against the wealthy ruling class in Virginia in the 1670s.[95] Thus, the sort of institutionalized racism that could affect official policy seems lacking in the early colonial development of English North America. Indeed, as late as 1719, the English crown actively encouraged by the "grant of fifty acres of land free from the payment of any quit-rent for ten years" the intermarriage

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[94]Ellis, *Tudor Ireland*, 314-315.

[95]Morgan, 328-329.

of white men to Indian women *and* of white women to Indian men.[96] The English treatment of Native Americans diverged from the English treatment of the native Irish, therefore, before the onset of racism on a serious scale.

Beyond looking at subtle shifts in English attitudes towards the different groups of indigenous peoples, one can point to two intervening events that suggest that English colonists in North America did not follow the pattern earlier established in Ireland when treating with the natives. First, the Puritan settlers to New England introduced a different, competing model of colonization. Second, concepts of international law, particularly the concept of the state, developed rapidly as the Reformation and its resulting religious turmoil neared final settlement in Europe. The latter development no doubt played at least some role in influencing Puritan actions in New England, given the combined political and religious factors that led to the emigration to the New World in the first place. Together, the founding of a Puritan society in New England and the development of international law created an alternate path for new English colonies to follow in relations with Amerindians.

In establishing the colony of Massachusetts Bay in 1629, the Puritans, like their fellow Protestants in Plymouth, possessed vastly different goals than did their former countrymen in Virginia or Ireland. While the English adventurers to Virginia and Ireland mimicked their conquistador predecessors by seeking land and wealth to benefit them in their native country, the early colonists to New England sought to create an entirely new society–albeit one they viewed as English society perfected–and entirely new homes. To that end, the members of the Massachusetts Bay Company even illegally took the royal

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[96]*Royal Instructions to British Colonial Governors, 1670-1776 v. 2,* ed. Leonard Woods Labaree (New York: D. Appleton-Century Company, Inc., 1935), 470.

charter empowering them to settle and govern territory in New England with them to the new territory itself thereby creating a "colony dominated by Puritans who proclaimed their allegiance to King and Church but clearly expected to be free of both."[97] The desire of the Puritans to build a society independent of the establishment in England, as well as the generally poor nature of the soil, resulted in the development of mixed farming in New England as opposed to the cash crops that settlers in other colonies sought in order to make quick fortunes.[98] Because their goals did not hinge upon a staple crop grown for profit, Protestant colonists in New England did not require as large a source of ready labor as did colonies in Ireland, Virginia, or Spanish America.

Puritanism itself also contributed to the New England colonists' tendency not to view the natives as instant labor. The Calvinist doctrine of Grace necessarily involved a strong work ethic, for anyone not striving in accordance with God's commands marked himself as not yet having received Grace.[99] Thus, because its founders envisioned their efforts as fulfilling divine will to create a society of the Elect, each laboring in godly bliss, Massachusetts "was to be a society with laborers but without a distinct laboring class."[100] As such, the Puritans possessed no interest in incorporating Native Americans en masse into their society as laborers.

Freed, then, from both the need and the justification to force Native Americans into the fields as virtual slaves, the Puritan settlers in New England needed to turn

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[97]Neal Salisbury, *Manitou and Providence: Indians, Europeans, and the Making of New England, 1500-1643* (New York: Oxford University Press, 1982), 164.

[98]James E. McWilliams, *Building the Bay Colony: Local Economy and Culture in Early Massachusetts* (Charlottesville, VA: University of Virginia Press, 2007), 1-3.

[99]Stephen Innes, *Creating the Commonwealth: The Economic Culture of Puritan New England* (New York: W. W. Norton & Company, 1995), 127-130.

[100]*Ibid.*, 79.

elsewhere for guidance in dealing with Amerindian polities. Furthermore, while religion did provide some motivation in the belief of a duty to convert the Indians to Christianity, the colonists in Massachusetts stressed "the exemplary conduct of settlers rather than preaching by ministers as the principal means of conveying the message to the Indians."[101] Also, the limiting notion of the spiritual elect precluded the widespread creation of large-scale communities of natives under European leaders for purposes of conversion as occurred in Spanish America. Thus, Puritan religion offered little practical guidance on the matter of managing relations with Amerindians.

Conversely, the emerging collection of ideas coming to be known as the laws of nations, itself partially tracing its origins to ideas derived from the Protestant Reformation, provided a basic framework for dealing with foreign polities. In particular, the new concept of the state, or nation, as the basic unit of sovereignty upon which all international relations rested proved helpful in determining the rights and responsibilities of each group.[102] Indeed, the Puritans embodied many of the new ideas of the state when they attempted to form their own society autonomous from the Crown.

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[101]Salisbury, 178.

[102]The words "state" and "nation" are interchangeable under customary international law, and the legal definition of each word differs from those normally used by historians. While historians generally use the word "nation" to signify a group of people sharing common traditions, lawyers define a nation as "a community of people inhabiting a defined territory and organized under an independent government; a sovereign political state." [*Black's Law Dictionary: Seventh Edition*, ed. Bryan A. Garner (St. Paul, MN : West Group, 1999), 1045.] Thus, international law governs relations between independent states which may or may not be comprised of nations in the sense of the word as used by historians. Similarly, when historians speak of the development of the modern "state," they usually mean the set of regular government apparatuses established to consolidate control from the center over formerly unrestrained powers in the localities. While such a process can, in fact, create a state as international law defines it, it does not necessarily fulfill all the legal requirements of statehood. The Montevideo Convention of 1933 neatly sums up the qualifications for statehood under customary international law as a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. [Montevideo Convention on the Rights and Duties of States, 49 Stat. 3097; Treaty Series 881.] Thus, the state serves as the basic unit of sovereignty under international law, a fact also present in the definition of nation. Therefore, the terms state and nation will hereafter be used interchangeably.

When the first Puritan settlers landed on the shores of New England, however, the concept of the nation as a sovereign unit was still evolving. Traditionally, scholars of international law pointed to the Treaty of Westphalia of 1648, ending the Thirty Years War, as the first hard recognition of sovereign states in international jurisprudence. More recent scholars, however, stress the evolutionary nature of the concept of the state by tracing its roots back through the sixteenth and latter half of the fifteenth centuries.[103] Nonetheless, even the strongest proponents of earlier origins of the state admit that sovereign states did not exist in more than idea until the middle of the seventeenth century.[104] They also acknowledge that the writings of the Dutch humanist Hugo Grotius, although drawn heavily on earlier sources, contain the first reference to the Laws of Nations as a coherent body of law.[105] The first half of the seventeenth century, then, saw both the conscious development of international law and the first establishment of recognized sovereign states. The Puritans, many of whom originally hailed from East Anglia and had long interacted with the Dutch, were aware of political developments in the Low Countries, as well as the role that their shared religion played in those developments.[106]

The reason that the Treaty of Westphalia initially assumed so much importance lies in the fact that it acted as the instrument of the first recognition of sovereign states. In so doing, it represented a concrete example of the evolving notions of sovereignty and

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[103]Randall Lesaffer, ed., *Peace Treaties and International Law in European History* (Cambridge, UK: Cambridge University Press, 2004), 9-11.

[104]Ibid., 13.

[105]Ibid., 12.

[106]Roger Thompson, *Mobility and Migration: New England, 1629-1640* (Amherst, MA: The University of Massachusetts Press, 1994), 19.

of the state. In part, the Treaty of Westphalia guaranteed the independence of the United Provinces of the Netherlands as a sovereign state despite the fact that the United Provinces organized themselves as a republic and did not, at least in name, create a sovereign monarch.[107] In a drastic departure from the medieval view still practiced by its Hapsburg opponents, the sovereignty of the United Provinces therefore rested in the state itself and not in the person of a divinely ordained king. The shift in the view of sovereignty from manifesting in the person of a sovereign to resting in the state itself ushered in the modern international system.

The Treaty of Westphalia also demonstrates the link between the development of international law and the Protestant Reformation. Besides supporting the notion of divine right monarchy as part of God's natural order, the Catholic Church also provided canon law as a pan-European system. Indeed, scholars recognize ecclesiastical law as one of the major impediments to the development of a true international system during the Middle Ages.[108] However, the Reformation not only broke the universal power of the Church but also shattered the notion of a united Christendom.[109] Canon law could no longer operate as a fully pan-European system and the Laws of Nations based on modern sovereign states rose to take its place. Fittingly, the treaty that first recognized the existence of states embodying sovereignty also protected those Protestant states from the major Catholic powers of the era.

Although determining the exact date that an evolutionary concept came into existence cannot be achieved, one can with a reasonable degree of certainty say by what

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[107]Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: MacMillan, 1954), 62.

[108]Ibid., 17.

[109]Lesaffer, 12.

date an idea certainly existed. Grotius gave voice to a clearly articulated system of international law by publishing his masterwork, *On the Law of War and Peace*, in 1624.[110] The formal recognition of modern sovereign states occurred in 1648 with the settlement of the Thirty Years War. Events in England show a similar progression for the idea of the state there, as well. Like their counterparts on the Continent, English thinkers began to slowly develop the concept of the sovereign state, or commonwealth as they termed it, from at least the early sixteenth century.[111] However, the English did not adopt the abstract concept into actual law until the mid-seventeenth century.

A quick survey of a succession of Parliamentary Acts makes clear when the shift from the personal sovereignty to state sovereignty roughly occurred in England. Although some noted scholars have read modern nationalist thoughts into the preamble of the Act in Restraint of Appeals of 1533,[112] the actual wording of the act refers to England as the more traditional "empire" rather than the modern "state." The Act goes on to assert that England was "governed by one supreme head and king having the dignity and royal estate of the imperial crown of the same, unto whom a body politic… be bounded and owe to bear next to God a natural and humble obedience."[113] Clearly, then, the Henrician Parliament viewed sovereignty as resting with the monarch. Not until the next century does one find examples of sovereign statehood active in English law.

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[110]Nussbaum, 104-105.

[111]G. R. Elton, *The Tudor Constitution: Documents and Commentary* (Cambridge, UK: Cambridge University Press, 1972), 230-234.

[112]G. R. Elton, *The Tudor Revolution in Government: Administrative Changes in the Reign of Henry VIII* (Cambridge, UK: Cambridge University Press, 1959).

[113]Act in Restraint of Appeals (1533: 24 Henry VIII, c. 12) in Elton, *Tudor Constitution,* 344.

The constitutional and religious crises that pervaded Stuart England gave rise to more active assertions of state sovereignty as opposed to royal sovereignty. For instance, in 1629, the House of Commons issued a protestation declaring in part that:

> whosoever shall counsel or advise the taking and levying of the subsidies of Tonnage and Poundage, not being granted by Parliament, or shall be an actor or instrument therein, shall be likewise reputed an innovator in the Government, and a capital enemy to the Kingdom and Commonwealth.[114]

While the Protestation lacked the authority of an active law, it clearly contains the elements of a more modern concept of sovereignty. First of all, the Protestation treats kingdom and commonwealth as synonyms. Also, it declares anyone paying tonnage and poundage to be a traitor despite the fact that the treasonous act took the form of paying the king. Under the older view of personal sovereignty of the monarch, the law defined treason as an act against the king. Yet, in 1629, the House of Commons alleged that acting for the king could constitute treason to the commonwealth. The very same principle passed from dictum to law with the conviction of Charles I on the charge of treason and his subsequent execution on the Thirtieth of January, 1649.[115] The shift to a modern view of state sovereignty is a clear prerequisite for executing a ruling monarch for treason. Thus, one can spot clearly articulated concepts of state sovereignty in England by 1629 and can point to 1649 as the date by which sovereignty rested in the state in England.

The dates which signify the adoption of the concept of the modern sovereign state into English consciousness and law therefore correspond to a remarkable degree with the

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[114]Protestation of the House of Commons, 2 March 1629, http://history.wisc.edu/sommerville/361/Protest1629.htm [accessed on 07/07/2008.]

[115]Trial of Charles I, 1649, http://history.hanover.edu/courses/excerpts/212trial.html [accessed on 07/07/2008.]

dates of similar occurrences on the Continent. In 1624, Grotius published his masterwork articulating his vision of an international system resting on the sovereignty of states. Five years later, members of Parliament expressed the concept of the commonwealth in their Protestation. In 1648, the Catholic Hapsburg powers signed a treaty that recognized the sovereignty of Protestant states without monarchs, and in 1649, radical Protestants in England executed their monarch for treason against the state.

The important dates in the development of international law also hold great significance in the history of English colonization in North America. When the Puritans founded Massachusetts Bay Colony in 1629, the concept of a state with sovereignty vested in itself had already entered both the English and general European consciousnesses, particularly amongst Protestant communities. Yet, the concept had not yet been adopted fully into active law or fully defined. Thus, while the concepts of sovereign states and the Laws of Nations that bound them influenced the Puritans in their actions to establish a new saintly community, they remained flexible enough to be adapted to the unique situations of colonists to the New World. Indeed, the *Commonwealth* of Massachusetts and her sister Puritan colonies proceeded to act as de facto sovereign states, though they still owed at least nominal allegiance to the crown of England.

Massachusetts, acting as a sovereign state in fact if not in name, developed its own laws and took its own actions in accordance with the new views of sovereignty expressed in the seventeenth century. The actions taken by Massachusetts involved dealing with the original inhabitants of its new jurisdiction. Because of the beliefs and goals of the Puritan citizens of the colony, the New English settlers did not require nor

desire the incorporation of Native Americans into their society as a laboring class. Guided in part by the same principles of international law that led them in creating their own polity, therefore, the colonists of Massachusetts developed a new system of dealing with natives that marked a drastic shift from the colonial practices of the English in Ireland or the Spanish in other parts of the New World. The policy that evolved from the Puritans' actions took the form of what later came to be known as Domestic Dependent Nations as the next chapter will make clear.

CHAPTER TWO

PURITAN LEGAL PRACTICES TOWARDS NATIVE AMERICAN POLITIES

A society's laws reveal many insights as to how a culture views outside groups of people. After all, laws govern the everyday interactions among people and therefore tend to be more practical and less idealistic than other forms of cultural expression such as literature or philosophy. In the English Common Law system, two separate processes create laws. First, legislative bodies, from local to national, formally draft the law through the passage of statutes.[116] Second, the judiciary, by interpreting and applying the law, creates precedents that possess the binding power of law through the doctrine of *stare decisis*.[117] These two processes work hand in hand in any English Common Law jurisdiction. However, in seventeenth-century Massachusetts one body, the colonial General Court, fulfilled both roles. Therefore, an examination of the General Court's treatment of outside groups speaks volumes as to the attitudes of the colonists of seventeenth-century Massachusetts towards outsiders. This chapter will explore the treatment of Native Americans as distinct groups by the General Court of the colony of Massachusetts in the seventeenth century.

[116]Garner, *Black's Law Dictionary*, 1420.

[117]Ibid., 1414.

The freemen of the colony of Massachusetts first created the General Court as a permanent body in a political coup of sorts in May 1634.[118] Prior to the formation of the General Court, power rested in the hands of the governor and his assistants as provided for by the royal charter of the Governor and Company of the Massachusetts Bay in New England.[119] Fortunately for subsequent historians, membership in the two bodies overlapped, and so the records of the General Court contain the earlier decisions as well. In fact, the Court of Assistants continued to meet periodically as a judicial body, though the General Court decreed itself the chief civil authority in the commonwealth for judicial matters as well as legislative.[120] Thus, acting as both the legislature and the judicial court of highest appeal for Massachusetts, the General Court possessed ample power to deal with the Native Americans legitimately on behalf of all the English settlers in the colony.

The General Court possessed clearly defined power in regards to the English colonists, but the way in which Native American entities fit into the formal power structure of colonial New England remained much less well defined. The General Court, therefore, faced the daunting task of incorporating a distinctly non-western people, with non-western power structures, into a western legal system. Perhaps the easiest way to have done so, short of enslaving them outright, would have been to regard Native American political entities as foreign states. Yet, the political entities of Native Americans did not resemble fully the western European notion of a state. Hugo Grotius, in his master work *The Rights of War and Peace*, which he first published in 1624,

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[118] Charles J. Hilkey, *Legal Development in Massachusetts, 1630-1686* (Honolulu: University Press of the Pacific, 2003), 14-17; David Thomas Konig, *Law and Society in Puritan Massachusetts* (Chapel Hill, NC: The University of North Carolina Press, 1979), 20-21.

[119] Hilkey, 9-14; Konig, 19-20.

[120] Hilkey, 30-31; Konig, 21-34.

defined a state as "a perfect body of free men, united together in order to enjoy common rights and advantages."[121] To the English colonists of Massachusetts, the Native Americans, even within a tribe, must have seemed only nominally united, particularly since many of the tribes encountered by the colonists consisted of the remnants of other polities decimated by rampant epidemics of disease accidentally introduced by European trading ships.[122] Furthermore, the English concept of a free man also called for private land ownership on the individual level, a concept foreign to Native Americans. Despite the discrepancies from the standard definition, the General Court of Massachusetts often chose to treat American Indian societies as foreign states.

The General Court (and its predecessor) chose to treat various Native American political entities as foreign states frequently during the first decade of the Massachusetts colony, when the English settlers remained relatively unsettled and weak in relation to the Indians. For instance, in May 1631, the assistants sitting as a General Court noted that "Chickataubott & Saggamore John p[ro]mised unto the Court to make satisfaccon for whatsoeuer wronge that any of their men shall doe to any of the Englishe."[123] This entry reflects the treatment of Native American tribes as states in two ways. First, the statement implies that Chickataubott and Saggamore John hold leadership positions over other Native Americans in a recognized political entity. Second, the two sachems, as the government of the Native American state, entered into an agreement with the General Court, which constituted the government of the Massachusetts colony. The General

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[121] Hugo Grotius, *The Rights of War and Peace*, trans. A. C. Campbell (Washington, DC: M. Walter Dunne, Publisher, 1901), 25.

[122] Cronon, *Changes in the Land*, 88-90.

[123] *Records of the Governor and Company of the Massachusetts Bay in New England, 1628-1696*, v. 1, ed. Nathaniel B. Shurtleff (Boston: Press of William White, 1853), 87, [CD-ROM], Archive CD Books USA, 2006.

Court did not attempt to extend its jurisdiction over individual Native Americans but rather entered into an agreement with the leadership of the Native American entity to adhere to a scheme of state responsibility. In this case, treating the local Native American entity as a state advanced the General Court's goal of trying to prevent malfeasance by individual Native Americans.

The colonists also entered into agreements with leaders of Native American entities to resolve individual disputes. For example, in September 1632 the governor and his assistants induced Saggamore John, on behalf of the Native Americans, to agree "to fence their corne against all kinde of cattell."[124] This agreement obviously attempted to resolve disputes regarding the destruction of Native American agriculture by the colonists' free-ranging livestock. Indeed, the destructive nature of English livestock caused much contention wherever English settlers interacted with Native Americans.[125] In the present case, the governors of Massachusetts clearly hoped that the fencing of Native American grain supplies would prevent damage from livestock and preclude future disputes, as well as clearly define for Amerindians the notion of ownership of private property. However, when another dispute did arise, a court held by the governor and his assistants agreed that Sir Richard Saltonstall should pay the Native Americans for the damage his cattle did to their grain.[126] Thus, the leadership of Massachusetts entered into agreements with what served as the government of the local Native American polity even in order to solve private disputes.

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[124] *Records of Massachusetts Bay in New England*., v. 1, 99.

[125] Virginia DeJohn Anderson, *Creatures of Empire,* 3.

[126] *Records of Massachusetts Bay in New England*, v. 1, 102.

The General Court also applied the laws of war, a specific subset of the Laws of Nations as described by Grotius, to Native American entities during the first decade of English settlement in Massachusetts, thereby strongly implying statehood on the part of Native American tribes. In April 1637, a special session of the General Court gathered "for the speciall occation of prosecuting the warr against the Pecoits."[127] Tellingly, the Court determined that the war had "been undertaken upon just ground" and "should bee seriously prosecuted."[128] In essence, by taking the first step of determining the war to be just, the General Court extended the strictures of international law, at least in form, to the Pequots, for according to Grotius no war could be legal unless it rested upon justified grounds such as defense or the recovery of property wrongly taken by force.[129] By acknowledging the need to find the war just, the powers of Massachusetts implicitly recognized that the Pequots enjoyed protection for sovereign states offered by the laws of nations.

In actuality, the bloody Pequot War crushed the Pequot tribe as a polity and "paved the way for the establishment of English hegemony in southern New England."[130] Interestingly, even biased participants in the war referred to the Pequots as a nation. For example, John Underhill penned an account of how "that insolent and barbarous nation, called the Pequeats…were drove out of their country, and slain by the sword."[131]

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[127] *Records of Massachusetts Bay in New England*, v. 1, 192.

[128]Ibid.

[129]Hugo Grotius, *The Law of War and Peace*, trans. Louise R. Loomis (Roslyn, NY: Walter J. Black, Inc., 1949), 71-72.

[130]Alfred A. Cave, *The Pequot War* (Amherst, MA: University of Massachusetts Press, 1996), 1.

[131]John Underhill, "News from America, or a Late and Experimental Discovery of New England." Charles Orr, ed., *History of the Pequot War* (Cleveland: The Hellman-Taylor Company, 1897), 49.

Similarly, Philip Vincent described the Native Americans as "distinguished into divers petty nations."[132] Vincent went on to note that several of the diverse nations joined the English while others allied with the Pequots.[133] Ultimately, of course, the English and their allies emerged victorious.

In the aftermath of their victory, the authorities of Massachusetts once again applied principles of international law to the Pequots. Specifically, the General Court cited the doctrine of conquest to help itself to Pequot land in November of 1637.[134] International law in the seventeenth century not only allowed the taking of territory as a result of conquest but also described conquest as a means by which one state could forcibly render another state into a non-state.[135] Indeed, the English settlers followed such a course, even going so far as dividing the surviving Pequots amongst the tribes allied with the colonists.[136] Furthermore, the colonists forced the Pequot survivors to agree that "none should inhabit their native Country, nor should any of them be called Pequots any more."[137] Thus, the invocation of international law, even in terminating the Pequots as an entity, indicates that the General Court of Massachusetts repeatedly treated Native American tribes as foreign states, at least as a justification for the colony's actions, during the first decade of the existence of Massachusetts.

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[132]Philip Vincent, "A True Relation of the Late Battell fought in New-England, between the English and the Pequet Salvages, with the present state of things there." Charles Orr, ed., *History of the Pequot War* (Cleveland: The Hellman-Taylor Company, 1897), 98.

[133]Ibid., 100-101.

[134] *Records of Massachusetts Bay in New England*, v. 1, 216.

[135] Grotius, *The Law of War and Peace*, 330.

[136]John Mason, "A Brief History of the Pequot War: Especially of the memorable Taking of their Fort at Mistick in Connecticut in 1637." Charles Orr, ed., *History of the Pequot War* (Cleveland: The Helman-Taylor Company, 1897), 40.

[137]Ibid.

After the first decade of settlement, the treatment of Native American tribes as states waned, yet the General Court continued to rely on this legal device in certain circumstances. The instances during the 1640s in which the General Court treated Native American polities as states almost universally occurred in dealings in which the Native Americans enjoyed positions of strength relatively removed geographically from the English settlements. For example, in September 1642 the General Court sent Sergeants John Leveret and Edward Hutchinson as emissaries to negotiate with the Native American leader Meantonomo, who was showing signs of hostility.[138] The General Court instructed them to demand of Meantonomo that he deliver an Indian suspected of rape within the jurisdiction of Massachusetts and also that he cease harboring runaway Pequot slaves.[139] By demanding extraditions such as these, the General Court implicitly recognized Meantonomo's people as a separate jurisdiction. The General Court took this approach again the following year when it instructed the governor to write to the Indians to request the return of English children whom the Indians had taken captive.[140] Thus, when dealing with American Indian groups that continued holding territory apart from the English settlements, the General Court continued to treat Native American polities as states throughout the 1640s.

The General Court also continued to treat stronger Native American groups as states. In particular, when dealing with the relatively large and powerful Narangaset and Mohegan tribes, the Court resorted to a state-based system. The General Court went so

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[138] *Records of Massachusetts Bay in New England*, v. 2, 23.

[139] Ibid.

[140] Ibid., v. 2, 52.

far as to treat the Mohegans as an allied state. In autumn 1645 the General Court passed several provisions authorizing the raising of a militia and the financial support for an expedition to aid Uncas, sachem of the Mohegans, in his struggles against the Narangasets.[141] Furthermore, when the expedition proved successful, the Court once again imposed principles of international law upon the defeated Native American polity, this time in the form of tribute.[142] The term tribute generally implies that the indebted party constitutes a foreign state, as opposed to the term tax, which would imply that the indebted party was merely a subject of the jurisdiction. As such, the General Court continued to treat powerful Native American polities as states throughout the 1640s.

As the strength and population of the English settlers increased relative to that of the Indians, however, the General Court invoked notions of statehood in dealing with Native Americans less and less often. In fact, in the twenty-five years between 1650 and 1675, at only one time did the General Court of Massachusetts treat with Native American polities fully as states. The sole instance occurred in October 1667, when the Narangaset and Nipmuck tribes appealed to the General Court to arbitrate a dispute between the two tribes.[143] The Court, through a committee, held that "the Narraganset (at the desire & request of this Court) shall restore unto the Nipmuck Indians within twenty days, all such goods & things as they tooke from them."[144] Note that the Court's decision was "at the desire & request" and did not take the form of an outright Court order. The non-compulsory wording implies the independence of the disputants from the natural

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[141]*Records of Massachusetts Bay in New England*, v. 2, 122, 137.

[142]Ibid., v.2, 151.

[143]Ibid., v. 4 part 2, 357-361.

[144]Ibid., v.4 part 2, 359.

jurisdiction of the court. Furthermore, the fact that the proceeding took the form of arbitration means that the concept of Native American polities as states had not completely disappeared even as the English became the dominant regional power. Yet, the fact that the two tribes approached the General Court for arbitration indicates that the Amerindians recognized the practical hegemony of the English colonies.

While the Indians retained their tribal governance, such institutions entered into relationships with Massachusetts and other English entities more in the role of dependent states than in the role of equals. For example, in May 1665, royal commissioners informed the General Court that the Narrangasetts had complained to the King, whom they acknowledged as possessing jurisdiction over them, that Massachusetts had been violating their tribal rights.[145] The Narrangasetts, although realizing the practical necessity of submitting to English jurisdiction in limited fashion, still viewed themselves as partially sovereign. The General Court did not disagree with the Narragansett assessment but merely informed Charles' representatives that the Indians lied about colonial transgressions.[146] Thus, even as circumstances forced some Native American tribes into positions of dependency, both the Indians and the colonists still saw Amerindian polities as partially-sovereign entities.

In the middle of the 1670s, the notion of treating Native American groups as more fully sovereign foreign states returned as a recurrent theme in the jurisprudence of the Massachusetts General Court. Of course, such resurgence did not occur in a vacuum but came about through desperation. King Philip's War, generally considered to be one of the deadliest wars in American history, began in June 1675, when the Wampanoag tribe

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[145]*Records of Massachusetts Bay in New England*, v. 4-2, 190.

[146]Ibid.

rebelled against the colony of Plymouth. The conflict quickly escalated and soon embroiled all New England, including Europeans and Native Americans.[147] The situation looked so dire for the English settlers that they began to question whether God had deserted them:

> Behold how great a matter a little fire kindleth. This fire which in June was but a little spark, in three months time is become a great flame, that from East to West the whole Country is involved in great trouble; and the Lord himself seemeth to be against us, to cast us off, and to put us to shame, and goeth not forth with our Armies.[148]

In the midst of the crisis, the General Court of Massachusetts desperately sought allies and thus, once again, treated certain Native American tribes as independent states.

The General Court addressed several Native American groups in the manner of states in an effort to solicit aid against the Wampanoag threat. For example, in February 1676,[149] the Court ordered that all recourse be taken to obtain the aid of the Mohegans, Pequots, and Ninicrafts, and to induce those tribes to "cutt off the Indians in present hostility."[150] Later that year, the General Court asked that "all meete endeavors be used to engage the Mohawkes, or other Indians, friends to the English, for their help & assistance thereon."[151] Furthermore, the General Court treated friendly tribes as true allies. For instance, in October 1675 the Court dispatched a number of soldiers to help the Punckepages man their fort against the enemy onslaught.[152] Had the colonists

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[147]James D. Drake, *King Philip's War: Civil War in New England, 1675-1676* (Amherst, MA: University of Massachusetts Press, 1999), 1.

[148]Increase Mather, *The History of King Philip's War* (Bowie, MD: Heritage Books, 1990), 92.

[149]All dates have been adjusted to the modern calendar with January 1st as the first day of the year.

[150]*Records of Massachusetts Bay in New England*, v. 5, 72.

[151]Ibid., v. 5, 123.

deemed the Punckepages subservient conscripts instead of an allied state, the government of Massachusetts would have dispatched orders to them directly. Facing the desperation of King Philip's War, the Massachusetts General Court once again proved willing to imbue Native American tribes with one of the defining characteristics of independent statehood, namely the ability to enter into agreements with other states.

Following the war, references to the treatment of Native American groups as states disappear from the seventeenth century records of the Massachusetts General Court. Although it has been alleged that some treatment of Native American tribes as independent states, particularly of those tribes in present-day Maine or those beyond the borders of Massachusetts, persisted in Massachusetts well into the eighteenth century, for all practical purposes the treatment of Indian polities as states within the near confines of Massachusetts proper ceased with the end of King Philip's War.[153] This fact confirms a trend already evident in the legal record during the decades preceding the war, namely the General Court's decreasing resort to legal devices requiring the treatment of Native American groups as states as defined by Europeans.

While the treatment of Indian tribes as states declined, a related trend also occurred. Slowly, the General Court began to assert its jurisdiction more and more over Native Americans and to bring them increasingly under its control. During the first decade of the existence of Massachusetts, the General Court only asserted its jurisdiction over individual Native Americans, and only rarely at that. An example of an exercise of jurisdiction over a Native American as an individual by the court occurred in July 1640.

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[152] *Records of Massachusetts Bay in New England*, v. 5, 55.

[153] Yasuhide Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630-1763* (Middletown, CT: Wesleyan University Press, 1986), 21-23.

At that time, the court ordered two Indian women to be whipped as punishment for insolently abusing an Englishwoman.[154] Yet, even instances of extending English jurisdiction over individual Native Americans remained rare during the first decade of the colony's existence.

In the next decade, however, instances of the General Court assuming jurisdiction over Native Americans increased precipitously. Moreover, the court actively imposed its jurisdiction collectively over entire Native American polities. For example, in May 1643 the General Court recorded the document by which Pumham and Saconoноco, the sachems of Shawomuck and Petuxet respectively, placed themselves and all of their subjects under the jurisdiction of the colony of Massachusetts.[155] The next year saw the Indian leaders Wossamegon, Nashowanon, Cutshamache, Macanomet, and Squa Sachim similarly submit to Massachusetts jurisdiction and explicitly place all of their followers under English law.[156] Submissions to colonial authority such as these reflect the growing power of the English settlers, as well as the adaptability of the Indians whose polities already existed in a state of flux due to the waves of epidemics which preceded English settlement.[157]

The colony's increasing power led minor Indian leaders to place themselves under the General Court's jurisdiction in an attempt to protect themselves from more powerful Native American neighbors. The record clearly reflects this process. Of particular relevance, however, is the fact that the General Court took its duty to protect its new

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[154]*Records of Massachusetts Bay in New England*, v. 1, 297.

[155]Ibid., v. 2, 40.

[156]Ibid., v. 2, 55.

[157]Cronon, 88-90.

subjects quite seriously. For instance, in May of 1644, the court ordered that "there may be forthwith ten English men, well armed, sent unto [Pumham and Sacononoco], & that they may there build the Indians a strong house of pallizado, & to be a guard unto them."[158] The court took this action in order to protect its new Native American subjects from "the cruelty & bluddymindedness of the Narangasets."[159] Thus, during the 1640s, the General Court of Massachusetts extended its protection, as well as its jurisdiction, over a number of small Native American polities, which began to take on a more dependent nature than they had previously adopted.

The General Court did not limit its protection of Indians within its jurisdiction to mere physical protection. It also took steps to protect the souls of its new wards. Indeed, historians have long noted the Puritan tendency towards proselytizing to the natives.[160] On one instance, the court issued an order in November 1644 that required county courts to provide instruction in the word of God to the Indians living within their jurisdictions.[161] Similarly, the General Court decreed that "civilized" laws should be made known to converted Indians once a year.[162] Finally, the court went so far as to create a separate Court of Quarter Sessions specifically for Indian converts living under Massachusetts jurisdiction, so long as the new court only heard matters concerning solely

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[158] *Records of Massachusetts Bay in New England*, v. 2, 72.

[159] Ibid.

[160]Canizares-Esguerra, *Puritan Conquistadors*, 210-211; Kawashima, *Puritan Justice and the Indian*, 110; Richter, *Facing East from Indian Country*, 95-96; Salisbury, *Manitou and Providence*, 178-180.

[161]*Records of Massachusetts Bay in New England*, v. 2, 84.

[162]Ibid., v. 2, 178.

Native American parties.[163] By providing for what it saw as Native American spiritual protection, the General Court of Massachusetts extended its control over those Native Americans who had voluntarily submitted to its jurisdiction, while at the same time keeping Indian institutions separate from those serving Anglos.

During the 1640s, the court also engaged in a couple of instances in which it extended its jurisdiction over Native Americans non-voluntarily. One such instance concerned the issue of its subjects' souls. In November 1646, the General Court ordered that "no Indian shall at any time pawwaw or performe outward worship to their false gods, or to the devil, in any part of our jurisdiction, whether they be such as dwell here, or shall come hither."[164] The extension of jurisdiction to vagrant and visiting Indians reflects the traditional ties in western European law between jurisdiction and territory, yet the result was an extension of Massachusetts law over Native Americans who had not voluntarily submitted to its jurisdiction, as their understanding of jurisdiction differed. The court also forcibly asserted its control over the Pequots. In the wake of the Pequot War, some of the surviving members of the defeated tribe lived under the jurisdiction of Massachusetts. In 1646, the court arbitrarily ordered the relocation of a number of Pequots from the plantation of John Winthrop to what was, in essence, a reservation.[165] This action clearly demonstrates the power and control the General Court began to assert over Native American polities in the 1640s as it extended its jurisdiction over weaker

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[163]*Records of Massachusetts Bay in New England*, v. 2, 188.

[164]Ibid., v. 2, 177.

[165]Ibid., v. 2, 160-161.

tribes. However, even as Massachusetts asserted jurisdiction over the Indians, the Court made sure to keep them in separate political units.

The trend of extending colonial jurisdiction over Native American polities, begun in earnest in the 1640s, continued throughout the next couple of decades. For example, in May 1658 the General Court created the offices of Indian Commissioners in order to adjudicate several Indian plantations and further encourage civilization amongst the Native Americans.[166] Also, the court made sure to keep these posts occupied, as seen by the appointment of Captain Daniel Gookin to fill a vacancy created by death at one of the Praying Towns of the famed missionary John Eliot.[167] Thus, even while the General Court continued to treat some Native American polities as sovereign states, it brought yet more Native American polities under its jurisdiction and administration as ward states.

The General Court of Massachusetts continued to assert its jurisdiction over some Native American polities even during the resurgence in its treatment of some tribes as nations during the period of King Philip's War. In fact, the court in many ways used its expanded jurisdiction to enact emergency measures designed in response to the dire events of the war. For instance, in October 1675 the General Court prohibited individual Native Americans from entering Boston unguarded.[168] The earlier expansion of colonial jurisdiction to apply throughout its territory regardless of whether specific Indian groups had submitted to it made possible this use of police power by the court. Also, the court once again resorted to the relocation of tribes under its jurisdiction. For instance, it

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[166]*Records of Massachusetts Bay in New England*, v. 4 part 1, 334.

[167]Ibid., v. 4 part 2, 34.

[168]Ibid., v. 5, 46.

ordered the removal of the entire Naticke tribe to Deare Island in October 1675.[169] A month later, noting that it had "for weighty reasons, placed sundry Indians (that have subjected to our government) upon some islands for their and our security," the court ordered that "none of the said Indians shall presume to goe off the said islands voluntarily, upon paine of death."[170] Furthermore, the Court promised capital punishment against any English settler foolhardy enough to try to help the Indians escape their internment.[171] Having ordered the internment of these Native Americans for security reasons, the court did not then neglect their relative well-being, on several occasions supplying them with provisions.[172] Thus, the General Court used its jurisdiction over various Native American groups to enact emergency measures aimed at the colony's security while attempting to treat the Indians under its jurisdiction as both potential dangers and wards of the colony.

The General Court of Massachusetts did not limit its use of jurisdiction over Native Americans during King Philip's War to harsh emergency measures such as relocation. In fact, the most common use of assertion of jurisdiction by the General Court during the conflict took the form of the raising of armed companies of Indians to serve under English commanders. For instance, in May 1676 the court ordered Major Gookin to raise and provision seventy able Indians to serve with the Massachusetts forces.[173] Similarly, the General Court conscripted Native Americans from Long Island

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[169]*Records of Massachusetts Bay in New England*, v. 5, 57.

[170]Ibid., v. 5, 64.

[171]Ibid.

[172]Ibid., v. 5, 64, 84.

[173]Ibid., v. 5, 85.

to serve the public, while providing for the protection of their women and children who were to live with English garrisons at various plantations.[174] Native conscripts and volunteers differ from the Amerindians serving as allies in that they served directly under Puritan commanders. The Court proved as willing to conscript Native Americans under its jurisdiction as it was to appeal to tribes that it treated as allied states during the exigencies of King Philip's War.

In the aftermath of King Philip's War, the General Court of Massachusetts asserted its control over Native Americans within its jurisdiction even more rigidly. In May 1677 the court enacted four provisions that brought Native Americans under strict English control. First, Indian children were to be raised in English households as servants during which time they were to be instructed in Christianity. Second, the children of hostile Indians were enslaved but still provided with Christian instruction. Third, the court established four specific reservations for the Praying Indians. Finally, the law required that any Indians traveling armed in the forest carry a certificate of permission from the General Court, which they had to present to any English settler who asked to see it.[175] Four years later, the court went even further, declaring that "all Indians that belong to this jurisdiction, except prentices or covenant servants for yeares, are to live among & under government of the Indian rulers of Naticke, Punkapauge, or Wamesit, which are places allowed by this Court."[176] In essence, the colony confined all Native Americans in Massachusetts to three reservations. The court listed imprisonment

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[174]*Records of Massachusetts Bay in New England*, v. 5, 86-87.

[175]Ibid., v. 5, 136.

[176]Ibid., v. 5, 327-328.

as the penalty for failing to submit to this order.[177] By 1681, therefore, the General Court had extended not only its jurisdiction but also its direct control to the entirety of the territory of Massachusetts.

King Philip's War and its aftermath served as a capstone to the trend of the expansion of the jurisdiction of the General Court of Massachusetts and the expansion of its direct control over Native Americans, in just the same way that the war represented the culmination of the steady decrease in instances in which the court treated Indian polities as completely independent states. Indeed, the two trends were intrinsically, inversely related. As the jurisdiction of the General Court grew, its likelihood to treat a Native American tribe as a fully sovereign state shrank. Furthermore, both trends reflect a relative growth in the power of the English settlers at the expense of the natives.[178] Another trend present in the legal treatment of Native Americans by the English settlers over the course of the seventeenth century also supports this conclusion.

Although the General Court regularly addressed issues of sovereignty and jurisdiction, most cases involving Native Americans centered on more practical issues. A significant number of General Court decrees dealing with practical issues focused on title to land. The Native Americans of New England did not engage in private ownership of land, as did the Europeans, but instead relied on concepts of shared, communal rights to use of the land. Furthermore, multiple families or even multiple villages often shared different rights of usufruct on the same land.[179] As such, Europeans faced many difficulties in determining what transfers of land constituted valid purchases. The court

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[177]*Records of Massachusetts Bay in New England*, v. 5, 328.

[178]Kawashima, 225-235; Salisbury, 183-190.

[179]Cronon, 62-67.

and its predecessor addressed this difficulty in several decisions over the course of the first decade of the Massachusetts colony. For instance, in March 1634 a court held by the governor and assistants ordered that "noe person whatsoever shall buy any land of any Indian without leave from the Court."[180] The court meant to keep close track of transfers of land from Native Americans to English settlers. Indeed, on several occasions throughout the 1630s, the General Court itself recorded the transfer of land from specific Indian sachems to English settlers.[181] Given the drastic differences between the property systems of the Native Americans and the English settlers, the court naturally involved itself in a number of questions of title to land in the first decade of the Massachusetts colony.

Following the Pequot War, new issues involving title to land confronted the General Court. As discussed above, the court laid claim to the land of the Pequots via the doctrine of conquest. Despite the sudden, massive expansion of available land for the colonists, the General Court persisted in its insistence that land claims go only through the court itself. As such, on four separate occasions in the 1640s, the court granted portions of Pequot land to individual English settlers for the establishment of plantations.[182] Throughout the first two decades of the Massachusetts colony, every case dealing with title involved the transfer of land, in one form or another, from Native Americans to English colonists.

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[180]*Records of Massachusetts Bay in New England*, v. 1, 112.

[181]Ibid., v. 1, 201, 252.

[182]Ibid., v. 2, 71, 241, 241, 261.

Starting in the early 1650s, however, the pattern abruptly reversed itself. At this point, the General Court actually began granting land back to Native Americans. For example, in October 1651 the court granted Sagamore George the use of twenty acres of good planting ground.[183] Furthermore, the court provided that any civilized Indians living within townships were entitled to the normal allotment of planting lands for those towns.[184] The court even granted eight thousand acres of land from their former territory to the conquered Pequots.[185] Perhaps the most significant step taken in this regard occurred in 1654 when the General Court officially recognized the creation of John Eliot's Praying Towns, independent townships inhabited solely by converted Native Americans.[186] Furthermore, on two separate occasions in the 1660s, the General Court allocated additional land to Eliot's Praying Indians.[187] Thus, after the first couple of decades of the Massachusetts colony, cases involving land title before the General Court generally consisted of the Court granting land rights back to Native Americans under its jurisdiction. In essence, rather than incorporating Amerindians as a laboring class, the General Court established Native American communities as separate but dependent polities.

The trends in the General Court's dispensing of title to land no doubt also reflected the growing relative power and stability of the English settlements of New England. In the initial decades of the Massachusetts colony, the settlers concerned

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[183]*Records of Massachusetts Bay in New England*, v. 4 part 1, 69.

[184]Ibid., v. 4 part 1, 102.

[185]Ibid., v. 4 part 2, 53.

[186]Ibid., v. 4 part 1, 192.

[187]Ibid., v. 4 part 2, 82-83, 109.

themselves more with obtaining valid title to their land. Later, after more or less achieving hegemony over large portions of the region, the General Court took a more magnanimous approach and provided for the Native Americans under its jurisdiction. However, it did so in a way that ensured the segregation and dependency of the Indian polities. As such, the trend in land and title cases corresponds nicely to the closely related trends involving sovereignty and jurisdiction.

In addition to regulating the acquisition of land title, the Massachusetts General Court also regulated trade with the Native Americans. Unlike some of the other issues involving Indians that came before the General Court, for the most part the treatment of the regulation of trade between Native Americans and English settlers remained relatively constant. Many of the regulations for trade with the Native Americans reflect a mercantilist agenda. For instance, as early as March 1631 the Court of Assistants prohibited the trading of hard money to the Indians.[188] The Court of Assistants took further action in June 1632, ordering the creation of official trading houses for Indians at every plantation.[189] Later, the General Court continued these mercantilist practices by establishing a monopoly for the lucrative fur trade.[190] Such actions continued throughout the seventeenth century, as on four separate occasions between 1641 and 1668 the General Court either prohibited individuals from trading with the Native Americans or limited such trade to registered agents of the court.[191] The General Court also prohibited (at least in theory) the Dutch and the French from trading with any Indians under the

[188]*Records of Massachusetts Bay in New England*, v.1, 83.

[189]Ibid., v. 1, 96.

[190]Ibid., v. 1, 179.

[191]Ibid., v. 1, 322, v. 2, 86, v. 4 part 1, 291, v. 4 part 2, 399.

jurisdiction of Massachusetts.[192] Although the court maintained a fairly constant regulation of trade with Native Americans, the consistency can be explained as an economic agenda congruent with the theories of mercantilism that dominated at that time.

The General Court of Massachusetts, however, possessed more than mere economic goals when it regulated trade with the Native Americans, as becomes clear when one considers the extensive amount of legislation limiting the alcohol trade with the Indians. In July 1633 a court of the governor and assistants banned the trading or giving of wine or spirits to any Native American.[193] However, the General Court softened this stance a decade later as it noted that it was not "fit to deprive Indians of any lawful comfort which God aloweth to all men by the use of wine."[194] Thereafter it became legal to sell alcohol to Native Americans but only "so much as may be fit for their needful use or refreshing."[195] However, it soon became apparent to the Court that further regulation was needed to prevent drunkenness among the Native Americans. Twice in the next decade the General Court limited the sale of alcohol to the Indians to specifically ordered individuals.[196] Furthermore, in May 1657 the court once again banned the sale of alcohol to Indians altogether.[197] This still did not solve the problem, so in 1666 the court enacted a statute that authorized individual colonists to detain drunken Indians. Furthermore, it ordered that such Indians be held in jail until they turned colony's evidence and gave the

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[192]*Records of Massachusetts Bay in New England*, v. 4 part 1, 21.

[193]Ibid., v. 1, 106.

[194]Ibid., v. 2, 85.

[195]Ibid.

[196]Ibid., v. 2, 258, v. 4 part 1, 201.

[197]Ibid., v. 4 part 1, 289.

local authorities the name of their alcohol supplier.[198] Several years later, the court added public whipping to the fines that served as punishment for the sale of liquor to Native Americans.[199] Thus, the colonial authorities sought either to limit or prohibit the sale of alcohol to Indians throughout the seventeenth century.

No doubt much of the justification for the prohibitionist stance towards the Native Americans on the part of the General Court derived from the Calvinistic notions of Puritanism. Indeed, as discussed above, even the one piece of legislation relaxing the regulation of the sale of liquor to the Indians referenced God. However, in a very persuasive argument, one historian asserts that underlying the religious motivation was a fear of wild Indians losing control of themselves in drunken fits of rage against English settlers.[200] According to this argument, the legislation designed to limit the Indians' consumption of alcohol can be viewed as an attempt to alleviate a potential danger to the English settlements. Surprisingly, then, the relative rise in power of the English *vis-à-vis* the Native Americans and the corresponding shift of Indian tribes from sovereign to dependent do not seem to have caused a shift in the legal trend in the regulation of trading alcohol with the Indians. The fact that the mercantile regulation of the alcohol trade continued even after the Amerindians had assumed a clearly dependent position illustrates the fact that their dependent position did not entirely eliminate their status as nations separate from Massachusetts.

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[198] *Records of Massachusetts Bay in New England*, v. 4 part 2, 297.

[199] Ibid., v. 4 part 2, 564.

[200] Peter C. Mancall, *Deadly Medicine: Indians and Alcohol in Early America* (Ithaca, NY: Cornell University Press, 1995).

The General Court's regulation of trading firearms and other weaponry to Native Americans also shows no change in response to the growth of the relative strength of the English colonists. At the very onset of the Massachusetts colony in September 1630, the predecessors to the General Court passed a decree prohibiting anyone from directly or indirectly permitting an Indian from using any sort of firearm.[201] Two years later, the assistants established branding as the penalty for selling firearms to Native Americans.[202] In May 1637 the General Court extended the ban on selling firearms to Indians to include the prohibition of repairing any firearms that the Indians had gotten their hands on.[203] By 1660 both horses and boats had joined the list of items prohibited in the trade with Native Americans, and in both of these instances the court explicitly stated that the security of the English colonists from the Indians remained its primary goal in enacting such legislation.[204]

As with the ban on trading alcohol, one piece of legislation did relax the prohibitions on trading weapons to Native Americans. In April 1668, the General Court allowed officially registered fur trade agents to trade arms to non-hostile Indians; however, by doing so, the fur trade agents incurred a fairly steep half-yearly tax liability.[205] Rather than representing a true liberalization of the ban on trading firearms with Indians, this statute probably indicates that an illicit trade had been going on all the while, most likely from outside the colony's borders. By allowing their own agents to

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[201]*Records of Massachusetts Bay in New England*, v. 1, 76.

[202]Ibid., v. 1, 100.

[203]Ibid., v. 1, 196.

[204]Ibid., v. 4 part 1, 255-256, v. 4 part 1, 277.

[205]Ibid. , v. 4 part 2, 364-365.

trade firearms to Native Americans, the General Court probably hoped to exert some control over the process and to make a tidy profit at the same time. At any rate, this law was repealed during the early stages of King Philip's War for obvious reasons.[206]

Once again, the aftermath of King Philip's War saw the culmination of a legal trend as the General Court reiterated the absolute prohibition of providing firearms to Indians in March 1681.[207] It is interesting to note that the achievement of absolute hegemony over southern New England did not lead to a lessening of the restrictions on the trade in firearms with the Indians, nor, one can infer, to a lessening of the underlying fear of armed and potentially dangerous Native Americans. Thus, the regulation of the firearm trade with Native Americans, as well as the regulation of the alcohol trade with them, did not experience much variation over the course of the seventeenth century despite the radical shift in the relative power of the English settlers and Indian tribes over the same time. Regardless of the Anglo-American dominance over the indigenous groups, Puritans still viewed Amerindians as outsiders.

One area of regulation of trade with Native Americans by the General Court that did show an interesting trend over time was the appropriation by the English settlers of Native American wampum as legal tender. The term wampum refers to strings of beads made from the shells of whelks and quahog clams. Wampum was, in fact, "highly prized in much of eastern North America long before European contact."[208] However, Dutch traders turned wampum into a trade commodity in the 1620s in an effort to dominate the

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[206]*Records of Massachusetts Bay in New England*, v. 5, 44-45.

[207]Ibid., v. 5, 304-305.

[208]Daniel K. Richter, *Facing East from Indian Country: A Native History of Early America* (Cambridge, MA: Harvard University Press, 2001), 45.

fur trade.[209] The English colonists in Massachusetts proved keen to emulate their European neighbors.

The General Court of Massachusetts first made reference to wampum as a legal tender within the colony in November 1637. At that time the Court decreed that "wampampege should passé at 6 a penny."[210] Over the next twenty years, the court adjusted the rate at which wampum could be used for legal tender four times.[211] The general trend over this time was towards a weaker wampum and a stronger penny. Furthermore, in May 1649 the court discontinued the practice of accepting wampum for tax payments.[212] Finally, in 1661 the General Court repealed the use of wampum as legal tender in Massachusetts altogether.[213] In the area of wampum, then, a trend was established in the General Court's regulation of trade with Native Americans. Towards the beginning of the colony, the court accepted the use of wampum as legal tender for minor debts. Yet, as the stability and relative economic strength of the English settlements increased, the General Court's enthusiasm for wampum waned. In this one regard, the General Court's regulation of trade between English settlers and Indians does indeed mirror the trends in the General Court's treatments of sovereignty, jurisdiction, and land title, towards a dependent nation status for Amerindian tribes.

In conclusion, over the course of the seventeenth century, the General Court of Massachusetts clearly responded to events regarding Native Americans in an ad-hoc

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[209]Richter, *Facing East from Indian Country*, 45.

[210] *Records of Massachusetts Bay in New England*, v. 1, 208.

[211] Ibid., v. 1, 302, v. 1, 329, v. 2, 261, v. 4 part 1, 36.

[212] Ibid., v. 2, 279.

[213] Ibid., v. 4 part 2, 4.

manner without ever creating a comprehensive, underlying doctrine. Yet, the Court did often apply principles of the laws of nations. International law remained new and flexible enough to be used as guidance in any number of strategic situations. As such, the Court used many different approaches, some even seemingly contradictory, but all legally justified, often at roughly the same time. Yet, when one considers the judicial record of the colony of Massachusetts from its beginning until its loss of autonomy to James II and the Dominion of New England, one sees a pattern emerge. As the relative power of the English settlers increased, they became less likely to accept Native American polities as sovereign equals and more likely to treat Indians as subjects or wards. Yet, the colonists did not wish to incorporate the natives fully into their society, and so put the Indians into separate, dependent polities. Both the notion of separate, dependent polities and the ward-like nature of their relationship with the governing institutions of the dominant settler societies continued to be a theme in English policy towards Amerindians even as the Crown took greater control of that policy as the next chapter will show.

CHAPTER THREE

ROYAL GOVERNORS AND SACRED CONFEDERATIONS: OTHER ACTORS IN THE DEVELOPMENT OF DOMESTIC DEPENDENT NATIONS

Over the course of the seventeenth century, the General Court of Massachusetts slowly developed a system governing relations with Native American polities. The system enabled the Puritan authorities to deal with Amerindian groups as units for administrative efficiency while ensuring that the colonists maintained the upper hand. A further advantage of the arrangement from the Puritan point of view lay in the fact that by maintaining native units of administration, Massachusetts prevented the large-scale incorporation of individual Indians into Anglo society. Also, the system possessed enough flexibility that the Commonwealth could apply legal justification to any number of situations. The legislators and judicial officials of Massachusetts derived the system from principles of the laws of nations, a new set of jurisprudence, which itself encompassed a myriad of scenarios. Yet, not all international legal principles, which arose from distinctly European circumstances, fit precisely with the new experiences of settlers to the Americas. In particular, the definition of statehood as consisting of a definite population, a definite territory, a government, and the ability to enter into agreements with other states failed to cover adequately Native American social organizations. As a result, the members of the General Court found themselves sometimes treating with Indian tribes as sovereign states and at other times protecting

tribes as dependencies. Eventually, the Court settled on the legal scheme that later came to be known as domestic dependent nations.

One must remember, however, that the Massachusetts Bay Colony was not the only actor in the development of the notion of domestic dependent nations. The other colonies of early New England, various Native American tribes, and the Crown of England all played a role in the development and dissemination of the Massachusetts legal structure for administering relations with Amerindians. This chapter will show how these other agents contributed to the extension of the Massachusetts model across the rest of British North America, thereby creating the precedent from which John Marshall took the idea of domestic dependent nations.

First, Massachusetts did not act alone in forming its policy regarding the Amerindians. After all, Massachusetts Bay entered into an arrangement with the colonies of Plymouth, New Haven, and Connecticut known as the United Colonies of New England mostly for reasons of common policy and defense regarding the natives.[214] The other colonies of New England followed policies similar to those of Massachusetts on their own as well. For instance, Plymouth colony extended state status to the Indians it encountered by entering into treaties with them. Also, the leaders of Plymouth made sure that their dealings with natives went through what they saw as the proper channels, namely the local sachems.[215] Similarly, military commanders in Connecticut happily took on Narrangasett allies who acted under their own command during the Pequot War.[216] Yet, none of the English colonies maintained interest in legally vesting full

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[214]Salisbury, *Manitou and Providence,* 233-235.

[215]Ibid., 115-116, 117-120.

sovereignty in Indian polities in the long term. As such, the Native American tribes local to each colony entered into more dependent relationships with the various colonial administrations, just as occurred in Massachusetts. For example, in the aftermath of the Pequot War, New Haven established reservations for the local Indian bands that formerly served as tributaries to the Pequots. New Haven kept the local tribes and their leaders intact, but confined them to certain areas and left them utterly dependent on the Europeans for protection. New Haven also provided strict rules for keeping natives and settlers segregated.[217] Thus, the desire to segregate Indians while maintaining the internal cohesion of their social organization for administrative purposes proved to be common in the New England colonies.

In large part, the policies used by the New England colonies reflected changing strategic considerations. For instance, one historian notes how the colony of Plymouth initially exercised a greater deal of magnanimity towards Native Americans than it did later because at first its population remained small and because of its proximity to a stronger Amerindian confederation.[218] Later, particularly in the aftermath of the Pequot War when the Indians' power drastically waned with the destruction of the Pequot as an entity, the colonies began a concentrated effort to put the other tribes in more subsidiary positions to the colonies.[219] Interestingly, the same study asserts that Massachusetts Bay always enjoyed a position of strength relative to its Indian neighbors, and so acted in a more domineering fashion towards Native Americans than did the other colonies from

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[216]Mason, "Brief History of the Pequot War", 24-25.

[217]Salisbury, 226-227.

[218]Ibid., 115-116.

[219]Ibid., 224-230.

first contact onwards, even claiming jurisdiction over local tribes as early as 1929.[220] While such an argument requires an unwarrantedly cynical reading of the judicial record, it does seem likely that Massachusetts, as the strongest colony, would be the most likely to achieve supremacy by force. Yet, the General Court of Massachusetts went to lengths to provide legal justification for its actions. As such, one may view the experience of Massachusetts to be a good representation of that of the rest of New England during the seventeenth century.

Of course, strategic considerations did not act solely upon the English colonies. The Native Americans also made conscious decisions based on the circumstances in which they lived; Amerindians did not suffer relegation to dependency status by English force of arms alone. In fact, the Indians had taken drastic steps in the face of extreme crisis before permanent English settlers even arrived on the shores of North America. Old world diseases arrived in New England via maritime traders by at least 1616, and proceeded to devastate Amerindian populations, with some villages suffering mortality rates of 95%, as the Native Americans possessed no genetic or acquired resistance to the new diseases.[221] Even epidemics with lesser mortality rates caused great chaos in native polities as the diseases tended to strike the ablest, most productive members of society, adults in their prime, the most virulently.[222] The catastrophic disorganization wrought by the epidemics forced the surviving Native Americans to band together in new villages and confederations that served as amalgamations of older social units.[223] By the time the

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[220]Salisbury, 186-187.

[221]Cronon, *Changes in the Land*, 85-87.

[222]Richter, *Facing East from Indian Country*, 60-61.

[223]Cronon, 89.

Puritans and other English arrived to make permanent settlements in New England, therefore, the Amerindians already possessed experience in shifting allegiance out of necessity.

Many Native American groups later applied the same flexibility in allegiance to European entities as they did to indigenous ones. Often, tribes saw the English settlements as competition no different from rival bands of Indians. Thus, the Mohegan and Narragansett willingly allied with the European colonists to break the power of the Pequots.[224] As the English colonies grew in strength, some tribes made the strategic decision to submit to colonial authority in return for protection, in much the same way that they submitted to stronger tribes prior to European settlement. The first sachem to submit to the authority of Massachusetts Bay even told the officials accepting his submission both nature and custom encouraged inferiors to be subject to superiors in strength in order to gain protection against common rivals.[225] In a similar fashion, many tribes tried to submit directly to the King in the hopes that he would protect them from their rivals the colonies, which they clearly saw as distinct entities. Such actions became common especially after the English capture of New Amsterdam as that action removed the Dutch who had previously acted as a counterbalancing force to the Puritan colonies.[226] Of course, the colonies treated submissions to the King as submissions to the colonies as well, since their authority ostensibly, though somewhat dubiously, derived from royal charter. At any rate, Amerindian polities often played an active role in the

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[224]Jenny Hale Pulsipher, *Subjects unto the Same King: Indians, English, and the Contest for Authority in Colonial New England* (Philadelphia: University of Pennsylvania Press, 2005), 22-23.

[225]Ibid., 27.

[226]Ibid., 80.

development of the domestic dependent nations system as they sometimes voluntarily entered into dependent arrangements for strategic reasons. Such actions are hardly surprising considering the heavy toll wrought by disease and the resulting loss of power, as well as the tradition among the tribes of weaker groups submitting to stronger confederations.

As their actions show, Native Americans realized that they dealt with disparate entities within the English community in New England and that those entities included the English monarchy across the sea. Indeed, the Crown took more and more of an active interest in directly administering relations with the Amerindians as the turmoil of the civil war and interregnum in England died down. Indeed, after several failed attempts at reasserting royal authority in New England, including an aborted attempt to join all of the colonies of New England into one administrative unit with New York known as the Dominion of New England, William and Mary issued a new charter for Massachusetts (which was now to include Plymouth and Maine) rendering it a royal colony in 1691. Just because royal authorities now had control, however, it did not mean that the Indian policy of Massachusetts was going to change as the new governors faced the same strategic considerations as had the General Court.[227]

Indeed, Massachusetts as a royal colony in the eighteenth century continued the practices towards the Native Americans originally developed by the Puritan officials of the seventeenth century. For instance, Indian tribes who survived the upheaval of King Philip's War with their social organization intact continued to enjoy features of sovereignty. Particularly on the sparsely populated northern border of Massachusetts, diplomacy and treaty making remained the dominant forms of discourse between colonial

[227]Breen, *Puritans and Adventurers*, 92-105.

officials and Amerindian polities.[228] By entering into treaties with tribes, the royal officials of Massachusetts recognized the Native American polities as states. Yet, the agreements made between various Indian groups and Massachusetts in the eighteenth century invariably required the Amerindians to acknowledge the lordship of the English king in what amounted as the first step in the shift from fully sovereign statehood to domestic dependent statehood.[229] Native American polities along the more settled western border of Massachusetts came even further under the colonial sphere of influence by accepting the protection of the English authorities.[230] Of course, the most dependent Indian entities of all remained those groups living on reservations within the territory of Massachusetts Bay Colony.[231] Thus, in its Indian policy, the royal colony of Massachusetts Bay in the eighteenth century perpetuated a number of the legal devices devised by the General Court in the preceding century.

Eighteenth-century Massachusetts jurisprudence regarding Native Americans also illustrates the fact that at all times colonial Indian policy and its legal justification remained inherently flexible depending upon strategic concerns. In the north, Amerindians remained powerful relative to scattered white settlements and so retained more sovereignty. As the English colonists settled the western portion of Massachusetts more heavily, the native tribes became much more dependent than sovereign. In truth, though, Indian policy and its strategic concerns became much less of an issue in Massachusetts following King Philip's war in the 1670s, when Native Americans in

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[228]Kawashima, *Puritan Justice*, 22-23.

[229]Ibid., 23.

[230]Ibid., 23-24.

[231]Ibid., 33.

southern New England suffered an irreversible loss of power. Indeed, those tribes located near to European settlements who escaped punitive slavery or confinement to reservations, fled to the unsettled west or to French Canada.[232] Though interactions with Native American polities therefore lessened in frequency in New England, royal officials applied the same policies developed in seventeenth century Massachusetts to relations with Amerindian tribes in other colonies where Indians remained a pressing strategic concern.

English representatives, both colonial and royal, interacted with Native American polities to the largest degree in the Middle Colonies, particularly New York and Pennsylvania. The strategic location of these colonies along natural thoroughfares between the English colonies on the Atlantic seaboard and the French settlements in Canada, enabled the natives of the region to balance the two European powers against each other and to maintain a greater independence than Indians in regions becoming increasingly dominated by just the English. The Iroquois, in particular, benefited from this strategic position.[233] Unsurprisingly, New York served as the birth place of the most elaborate procedure for governing relations between Native American polities and English settlers, as in the 1670s, representatives from the Iroquois Confederacy and Sir Edmund Andros, the royal governor of New York, forged the first links in the series of treaties that became known as the Covenant Chain.[234]

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[232]Kawashima, 234.

[233]Fred Anderson, *Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754-1766* (New York: Vintage Books, 2000), 12-16.

[234]Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (New York: W. W. Norton & Company, 1975), 222.

At the time of the initial agreements of the Covenant, both New York and the Iroquois Confederacy were fairly new entities. The English had only captured New Amsterdam from the Dutch in the previous decade and converted it into the royal colony of New York. Andros himself represented the first efforts of the English Crown to reassert control over the colonies; James II did not choose Andros to oversee the Dominion of New England by mere coincidence.[235] Similarly, the Iroquois Confederacy as a political entity only coalesced in the mid-seventeenth century in response to crises wrought by disease and war in each of the Five Nations.[236] Though the Confederacy derived from an earlier spiritual League centered on a system of rituals called the Good News of Peace and Power, the League prior to the 1660s exercised no common foreign or military policy.[237] Coincidentally, the fall of New Amsterdam to the English served as one of the catalysts in pushing the several Iroquois tribes into closer cooperation by removing their access to European firearms which they previously acquired from the Dutch.[238] The Iroquois Confederacy approached the English in friendship as one of their first collective acts, and Andros saw the opportunity to increase the prestige of his new colony. Thus, the alliance between the Iroquois and the English began.

Each of the initial parties to the Covenant Chain, the Iroquois Confederacy and New York, as young polities, sought to strengthen its position relative to outside rivals by entering into friendship with the other. The Iroquois needed European weapons and aid

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[235]Pulsipher, 54, 253-254.

[236]Daniel K. Richter, "Ordeals of the Longhouse," *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600-1800*, Daniel K. Richter and James H. Merrell, eds. (Syracuse, NY: Syracuse University Press, 1987), 19-22.

[237]Ibid., 16-19.

[238]Ibid., 21.

against tribes to their west and north whom they had recently antagonized in a series of conflicts known as the "Beaver Wars." The fact that the other tribes benefited from alliance with the French only increased the Iroquois need to secure English aid.[239] Andros wished to achieve the primacy of New York over the Puritan colonies in New England, and his means of doing so involved making New York the major English actor in all negotiations with Native Americans.[240] The system that the Iroquois and Andros concocted addressed both sides' desires.

The Covenant Chain, whose origins lay in the initial meeting between Andros and the Iroquois, dominated Anglo-Indian relations through the Seven Years' War. Andros and the Iroquois concluded their alliance in enough time for the Mohawks to provide vital assistance to the New England colonies in the form of fighting against their traditional tribal enemies the Mohicans who had joined King Philip's uprising of Algonquin peoples.[241] Andros used the aftermath of King Philip's war to bring the New England colonies into the Covenant Chain with New York as the primary agent of communication with the Indians. He also offered sanctuary to many of the defeated tribes provided they recognized the supremacy of New York. The Iroquois also benefited from the arrangement, particularly the Mohawks, as the English authorities in New York saw the Iroquois Confederacy as the ideal polity for administering the other tribes as well.[242] Thus, the Covenant Chain set up a system in which New York represented the interests of

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[239]Richter, "Ordeals of the Longhouse", 20-21.

[240]Jennings, *Invasion of America*, 322.

[241]Ibid., 314-315.

[242]Ibid., 322-324.

the English Crown, and therefore the other colonies, and the Iroquois spoke for all Indians allied with the English over whom they held dominion.

Andros and the Iroquois did not content themselves with primacy over the Puritan colonies and the defeated tribes of New England. Almost contemporaneously with the conclusion of King Philip's War and resulting covenant, the Chain expanded to include Virginia and Maryland, which had recently defeated the Susquehanna in a war very similar to the one in New England. In the following decades, various royal governors and Iroquois emissaries also arranged for the inclusion of the Delaware Indians of Pennsylvania and even purportedly the tribes of the Ohio Valley.[243] Its creators designed the Covenant Chain as a grand system for regulating all relations between English colonies and their allied sovereign tribes and slowly implemented that system from region to region.

Interestingly, the Covenant Chain took on aspects of both European and Iroquoian culture in its character. First, the English clearly attached principles of international law to the Chain and their dealings with the Iroquois. For example, initially Andros sought to settle the aftermath of King's Philip's War by his personal assurance to oversee the actions of the Mohawks as well as the resettlement of defeated tribes from New England, but the Puritan colonies insisted upon an official treaty.[244] Indeed, periodic written treaties became a dominant feature of the Covenant Chain relationship with a particularly famous round of treaties signed in 1701.[245] As noted above, the very process of treaty

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[243]Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its beginnings to the Lancaster Treaty of 1744* (New York: W. W. Norton & Company, 1984), 145-171.

[244]Jennings, *Invasion of America*, 322.

making invoked international law and implied sovereignty on its signatories. However, much of the procedure and ceremony of meetings of the Covenant Chain came directly from traditional Iroquois practice. For instance, entrance to the Covenant required representatives of a polity personally to accept the Great Peace in a traditional Iroquois ceremony, a fact that at one point led to trouble as officials of Maryland attempted to speak on behalf of tribes allied with their colony.[246] In essence, the Covenant Chain incorporated legal traditions of both the English and the Iroquois in its forms and procedures.

Unsurprisingly, given the disparate nature of the Covenant Chain and its sources, the signatory parties viewed the Chain in distinctly different terms. For example, the English viewed it as one solid system giving them useful Indian allies made up of nominally sovereign yet clearly dependent nations.[247] In arriving at this view, the representatives of the English Crown chose to view the Iroquois as not only a state in the European sense, but also as an empire possessing dominion over other native polities, so that the dependency of the Iroquois to the English could be extended by proxy to the dependents of the Iroquois themselves. By such a process, the English also managed to advance a claim over territory to which the French possessed better claim under the law of nations' doctrine of discovery.[248] However, the English view amounted to no more than a legal fiction. Even if one chooses to find all the requirements for European-style

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[245]Richard L. Haan, "Covenant and Consensus: Iroquois and English, 1676-1760", *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600-1800*, Daniel K. Richter and James H. Merrell (Syracuse, NY: Syracuse University Press, 1987), 52-53.

[246]Jennings, *Ambiguous Iroquois Empire*, 162-163.

[247]Haan, 41-42.

[248]Jennings, *Ambiguous Iroquois Empire*, 10-11.

statehood in Amerindian polities, the Iroquois Confederacy consisted only of a loose alliance based on a spiritual peace among five (later six) separate political entities.[249] Furthermore, the Iroquois did not really forge an actual political empire by conquest but merely advanced their cult of the Good News of Peace and Power, sometimes by diplomacy, and sometimes by strength of arms.[250] For example, the Iroquois did not conquer the Delaware tribe as English observers believed but had entered into a spiritual agreement with them in which the Delaware assumed the role of the "woman" keeping peace amongst the six "man" nations while the "men" protected the Delaware in a sort of ritualistic system of collective security.[251] Nonetheless, the English viewed the Covenant Chain in terms that made sense to their European worldview, terms derived from international law.

The Five Nations of the Iroquois viewed the Covenant Chain in a distinctly different fashion. In fact, they probably did not view it as a single chain, at all, but rather a series of independent agreements.[252] Furthermore, the various Iroquois tribes viewed the Covenant as a relationship of "brothers" much as they viewed the relationship amongst themselves. Because they did not view themselves as dependents of New York, the Iroquois felt free to adopt a policy of neutrality regarding the two European powers in 1701.[253] Of course, the Iroquois retention of full sovereignty did not mean that dependent relationships did not exist within the Chain. For example, as discussed above the

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[249]Richter, "Ordeals of the Longhouse", 16-27.

[250]Ibid., 15-19.

[251]Jennings, *Ambiguous Iroquois Empire*, 161-162.

[252]Haan, 42.

[253]Ibid., 50-53.

Delaware tribe constituted a dependent of the Iroquois in the ritualistic sense of Native American tradition.[254] The Delaware also later by treaty entered into a dependent relationship in the European tradition with Pennsylvania.[255] Overall, however, the Iroquois possessed a distinctly different view of the Covenant Chain than did the English officials.

The Covenant Chain serves as an excellent example of the three factors that combined over the course of a couple of generations of sustained contact between English colonists and Native Americans to form the system later known as domestic dependent nations. First, principles of international law induced Anglo-American officials to approach Indian polities as states, at least initially. Yet, Native American tribes and confederacies did not exactly match the European definition of the state, a fact not lost on the colonists and which they later exploited. Tellingly, the importation of the forms of international law to the Covenant Chain occurred at the behest of New Englanders who, at the time of the Chain's forging, had already developed a notion of the domestic dependent state out of the laws of nations. Second, the established traditions and rituals of Amerindians played an important role in the formation of the Chain. In particular, the tradition of weaker tribes ceremoniously submitting to more powerful nations in a spiritual bond of dependency contributed to the ultimate formation of domestic dependent nations. Finally, strategic considerations greatly influenced the participants in the Covenant Chain. The European settlers recognized the more powerful tribes as fully sovereign and reduced weaker tribes to dependency as facts on the ground allowed. Native American polities entered into agreements either for military aid and

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[254]Jennings, *Ambiguous Iroquois Empire*, 161-162.

[255]Ibid., 245-248.

protection against traditional rivals or out of sheer desperation in the face of catastrophe. Together, the three factors set the inhabitants of early modern North America down the path to domestic dependent nations.

Though the English colonists and the Amerindians possessed different notions of not only the Covenant Chain but also what it meant to be dependent, ultimately strategic reality dictated whose view dominated. To the Anglo-American victors went the spoils and the continent, while surviving Indian polities resigned themselves to total dependency. British domination of North America became a fact in the wake of the Seven Years' War. With the removal of France as a rival, the British crown actively sought to achieve the dependent relationship with Native Americans envisioned by the English version of the Covenant Chain. The Crown pursued its policy through two officers appointed as Superintendents of Indian Affairs and by taking all rights to treat with natives away from colonial governors.[256] Furthermore, King George also issued the Proclamation of 1763, dividing North America between Indian and European, yet asserting sovereignty over all.[257] By keeping its subjects segregated by race, the British government, though possessing different motives than its Puritan predecessors, continued one of the prime practices of the seventeenth century General Court of Massachusetts that led to domestic dependent nations. In practice, the white authorities limited Amerindians to a restricted territory and claimed dominion over them while maintaining them in their political groupings and allowing them a modicum of self-government. The royal policy owes its origins to Andros's original Covenant Chain. Although Andros himself adopted

[256]Richter, *Facing East from Indian Country*, 208-211.

[257]Ibid.

many practices earlier established by his Dutch predecessors,[258] the Puritan leaders in New England contributed the final framework of the Covenant Chain.[259] Furthermore, as discussed in Chapter One, many of the international legal principles that influenced the Puritans originated in the Netherlands, so the two systems blended quite seamlessly. Thus, the notion of domestic dependent nations first developed out of nascent international law in Puritan Massachusetts and passed via the Covenant Chain into royal policy and into law over all of British North America.

[258]Daniel K. Richter, "Cultural Brokers and Intercultural Politics: New York-Iroquois Relations, 1664-1701," *The Journal of American History* v. 75 no. 1 (June, 1988), 40-67.

[259]Jennings, *Invasion of America*, 322.

EPILOGUE

THE LEGACY OF SEVENTEENTH-CENTURY PURITAN-ALGONQUIN LEGAL INTERACTIONS

When John Marshall incorporated the legal device of domestic dependent nations into United States constitutional law and gave it the name by which it is still known, he cited only late colonial practices such as the Proclamation of 1763. Doing so fit Marshall's federalist agenda, since by the aftermath of the Seven Years' War, the Crown had taken regulation of Indian affairs away from the various colonies. However, the royal practice of treating native tribes as only partially sovereign states harkened to a time earlier in the colonial past when both colonies and confederacies operated with sovereignty, and sometimes surrendered sovereignty, in accordance with the newly developing laws of nations, the traditions of the indigenous peoples, and circumstances on the ground. The interactions between the two groups and their ideologies in early colonial Massachusetts led to the development of the idea Marshall recognized. The interactions also accounted for the different path that relations between colonists and natives took in North America as opposed to those in Ireland or Spanish America. Ultimately, the Puritan colonists and later royal officials used the doctrines that developed in seventeenth-century Massachusetts to justify dispossessing Native Americans and expanding British power. Marshall used the same doctrine in an attempt to protect the Cherokee Nation from the depredations of the state of Georgia.

Unfortunately for both Marshall and the Cherokee, his attempt largely failed at the time. At first, the state of Georgia refused to obey the Supreme Court order to release the missionaries being held for violation of what Marshall declared an unconstitutional Georgia statute.[260] The missionaries' plight only later reached resolution through the combined political tricks of the repeal of the state statute and an unsolicited gubernatorial pardon in the face of the Nullification Crisis and the resulting sudden unpopularity of states' rights as an issue.[261] The Cherokees possessed no such luck, as in 1838, in a policy remarkably consistent with that of the earlier British Proclamation, the United States Army forcibly removed the Cherokee from their ancestral homelands and sent them across the Mississippi into a designated Indian Territory.[262] Although Marshall failed in his attempt to protect the Cherokee, he did succeed in importing the doctrine of domestic dependent nations into United States law.

Over a century and a half after Marshall's decisions articulating the existence of domestic dependent nations, Native American polities finally benefited from the legal protection he sought to give them. Part of Marshall's legal doctrine of domestic dependent nations included the forbiddance of states to apply jurisdiction over Indian lands.[263] In the 1980's, the state of California attempted to shut down a poker room run by Cabazon Indians on tribal land. The tribe took California to court and won an important victory that reaffirmed Marshall's limitation of state jurisdiction.[264]

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[260]Edwin A. Miles, "After John Marshall's Decision: *Worcester v. Georgia* and the Nullification Crisis:, *The Journal of Southern History* v. 39 no. 4 (November, 1973), 519-544 at 528-529.

[261]Ibid., 533-534.

[262]Richter, *Facing East from Indian Country*, 242.

[263]*Worcester v. Georgia*, 31 U.S. 515 (1832).

Essentially, the Supreme Court ruled that no state could prevent a recognized Native American tribe from running any sort of gambling it saw fit. National outrage over the decision prompted federal action, and so Congress passed the Indian Gaming Regulatory Act. This act limited the type of gambling tribes could run to that allowed by the state generally, including charity gambling. It also required states to negotiate in good faith with Indian tribes as to how to administer the gambling.[265] Although Congress limited the broad authority of the *Cabazon* decision, it still allowed room for many Native American tribes to conduct large-scale gambling operations.

In an act of historical karma, the Mashantuckets, a band of Pequots, the sovereign tribe first reduced to dependent status by English settlers, took full advantage of their legal status. The state of Connecticut issued a law allowing full-scale charity gambling in 1987, primarily at the request of Mothers Against Drunk Driving.[266] The Mashantuckets later used this state statute to assert their right to operate a fully functional casino. After the state of Connecticut failed to negotiate with the Pequots in good faith in the time specified by the Indian Gaming Regulatory Act, a federal district court granted the Mashantucket claim.[267] The Mashantucket Pequots then opened what would become the world's most profitable casino and greatly improved their economic situation.[268] Thus, the legacy of the legal scheme created in seventeenth-century New England out of ideas

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[264] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

[265] Indian Gaming Regulatory Act, 25 U.S.C. 2701 (1988).

[266]Kim Isaac Eisler, *Revenge of the Pequots: How a Small Native American Tribe Created the World's Most Profitable Casino* (New York: Simon & Schuster, 2001), 125.

[267] Ibid., 129-130.

[268] Ibid.

of international law blended with native traditions allowed its first victims to regain a portion of what they had lost.

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