

AMERICAN INDIAN TRIBES AND THE FEDERAL GOVERNMENT: AN  
EXAMINATION OF THE FOUNDATIONS AND EXTENT OF A UNIQUE  
POLITICAL RELATIONSHIP

by

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## **DEDICATION**

This work is dedicated to my wife Jennifer G. Riley Arthur without whose love and tireless support this endeavor could not be accomplished, nor would it have a purpose.

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## TABLE OF CONTENTS

	<b>Page</b>
ACKNOWLEDGEMENTS.....	v
CHAPTER	
INTRODUCTION .....	1
PART I.....	5
1. AMERICAN INDIAN TRIBES AND THE CONSTITUTION .....	6
2. THE COURTS DEFINE THE STATUS OF AMERICAN INDIAN TRIBES.....	11
I. The Doctrine of Discovery .....	11
II. The Doctrine of Discovery in the United States.....	31
III. The Cherokee Cases (Cherokee Nation v. Georgia and Worcester v. Georgia).....	38
3. CONGRESS CREATES POLICY .....	53
I. The End of Treaty Making .....	53
II. Ex Parte Crow Dog (1883).....	56
III. United States v. Kagama (1886).....	58
IV. Lone wolf v. Hitchcock (1903) .....	61
V. Allotment and Assimilation (1871-1928).....	64
VI. Indian Reorganization (1928-1945) .....	67
VII. Termination (1945-1961) .....	70
VII. Self-Determination (1961-Present) .....	73
PART II.....	77
4. EXPLORING THE POLITICAL POSITION OF AMERICAN INDIAN TRIBES: ARE FUNDAMENTAL CHANGES IN THE TRIBAL/FEDERAL GOVERNMENT RELATIONSHIP NECESSARY? .....	78
BIBLIOGRAPHY.....	85

## INTRODUCTION

The relationship between the United States and the American Indian tribes within its borders is a complex and ever evolving one. There are 562 federally recognized tribes on 322 federally recognized reservations.<sup>1</sup> American Indian tribes once inhabited the entire North American continent and interaction with those tribes began immediately upon the European “discovery” of the Americas. The story of the relationship between the tribes and federal government is the story of the United States itself. The laws, institutions, the Constitution, and even the shape of the United States are all related to and in some ways derived from the Indian tribes that were here at their inception. The relationship between the United States and American Indian tribes is as important as it is unique. Although the study of this unique political relationship has not always been deemed important, it is clear after the 237 years since the founding of the United States that there can hardly be a more important subject for those interested in understanding the history and government of the United States or political philosophy and political science in general.

Important questions need to be asked by political scientists regarding the development of Indian law, its current state, and its future. It is the point of this scholarly undertaking to ask simply, is Indian law in the United States sound? Is Indian law in the United States efficient, effective, and in conformity with the principles outlined in the United States Constitution? If the answer to these questions is no, and I believe that it is, then *why* is Indian law unsound? Why is Indian law ineffective, inefficient and not in line

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<sup>1</sup> David H. Getches, and Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Material on Federal Indian Law* (Saint Paul: West Publishing Company, 2005), 9.

with the United States Constitution? Throughout this work I will endeavor to find and suggest satisfactory answers to these questions. I will begin Part I by examining the United States Constitution and the status of American Indian tribes as described within it.

In Part I, Chapter 2, I will examine from where Indian law is derived, that is to say, from what philosophical or political or legal principle/s is Indian law in the United States founded? I will endeavor to explore the history of the unique relationship of the United States and American Indian tribes by examining some important events, ideas, debates and developments of Indian law at the time of first contact between Europeans and Native Americans before the founding of the United States. I will contend that the principles and ideas from which the United States borrowed from the European kingdoms, most notably Spain, negatively impacted the development of Indian Law in the United States.

In the second half of Part I, Chapter 2, we will focus on the foundations of American Indian law in the courts beginning with the so-called Doctrine of Discovery. We will proceed to examine some of the important Supreme Court decisions of the 19<sup>th</sup> and 20<sup>th</sup> centuries that define the tribal/federal government relationship. I will demonstrate that the decisions of the courts left tribes with reduced sovereignty and without legal protections while simultaneously awarding Congress exorbitant power over American Indian tribes. I will also explore the idea that the vagaries of the United States Constitution in regards to Indian tribes left the Courts with too much room for interpretation, which led to negative consequences for American Indians.

In Part I, Chapter 3, we will explore the Congressional policies that represent the four eras of Indian law: Allotment and Assimilation, Indian Reorganization, Termination,

and Self Determination. I hope to demonstrate why Congress oscillated between each of these eras of policy and why each was a failure at least partially if not completely. I will also examine whether or not Congress should have had such sweeping power to create policy in the field of Indian affairs in the first place and determine to what extent Congressional policy has negatively impacted American Indian tribal governments.

Once we have a complete understanding of the foundations and extent of the political relationship between the American Indian tribes and the federal government of the United States we will proceed to Part II, where I will propose that the lack of a firm Constitutional foundation for the development of Indian law is the cause of great difficulty in protecting the rights and sovereignty of the American Indian tribes. I will also discuss the flaws in the development of Indian law in the United States and the ramifications of those flaws.

The importance of such research goes beyond the scope of Indian law alone. In the process of this study, I hope to come to some conclusions about the principles on which the United States was founded and the rights of individuals and societies as a whole. In the author's acknowledgments in the great scholarly work, *The Handbook of Federal Indian Law*, Felix S. Cohen wrote,

“What has made this work possible, in the final analysis is a set of beliefs that form the intellectual equipment of a generation – a belief that our treatment of the Indian in the past is not something of which a democracy can be proud, a belief that the protection of minority rights and the substitution of reason and agreement for force and dictation represent a contribution to civilization, a belief that confusion and ignorance in fields of law are allies of despotism, a belief that it is

the duty of the Government to aid oppressed groups and the understanding and appreciation of their legal rights, a belief that understanding of the law, in Indian fields as elsewhere, requires more than textual exegesis, requires appreciation of history and understanding of economic, political, social, and moral problems. These beliefs represent, I think, the American mind in our generation as it impinges upon one tiny segment of the many problems which modern democracy faces.”<sup>1</sup>

The importance of the work of Cohen and his colleagues in the field of Indian law cannot be overstated. However, the importance of such research cannot be confined to one generation alone. The ideals described by Cohen in his acknowledgment are as important today as they were in his generation, if not more so. It is the point of this intellectual work to carry on the tradition of scholars like Cohen even if on the smallest scale.

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<sup>1</sup> Felix S. Cohen, *Handbook of Federal Indian Law* (Albuquerque: University of New Mexico Press, 1971), XXXI.

**PART I**

## CHAPTER 1

### American Indian Tribes and the Constitution

Any discussion about American law or politics must include an examination of the U.S. Constitution; the foundation of all law in the United States and the document that binds the diversity of peoples and ideas across the country together to work politically in an stable framework. It was designed to be the starting point of any discussion about the laws and public policy that would affect the direction of the nation as a whole. It was meant to insure that American ideals like freedom, equality, and popular government would endure into the future despite an ever-changing world and infinite unforeseeable contingencies. Article VI of the Constitution illustrates the idea that the Constitution and the laws derived from it are the ultimate authority above and beyond various interest groups and political factions that are inevitably present in a democratic state, “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and the treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>1</sup> Although the Constitution mentions Indian tribes only twice, in Article I Section 8 and Article XIV Section 2, it must be the starting point for any examination of the foundations and development of Indian law in the United States. If the Constitution is in fact the “supreme law of the land,” then the interaction of the U.S. government and the Indian tribes within its borders must be in conformity with it.

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<sup>1</sup> James Madison and Alexander Hamilton, and John Jay, *The Federalist Papers* (New York: Penguin Group, 1987), 498.

During the 18<sup>th</sup> century, at the time of the nation's founding, treaty-making was the accepted course of interaction with the Indian tribes. The acquisition of land, alliances, or goods from tribes was negotiated, agreed upon and written down as it was with any foreign government. The Federalist Papers, written in defense of the Constitution and against the Articles of Confederation, and the Constitution itself both support treaty making with the Indians by the Federal Government as opposed to private groups and states. As we have seen, the Constitution includes treaties made by the government as the supreme law of the land. Yet treaties were broken and in 1871 the treaty making process with regards to American Indian tribes was done away with entirely. While it is not the purpose of this paper to recount the entire history of broken treaties throughout American history, it is important to examine how the Federal government defines its power in regards to Indian tribes. What is the Constitutional basis for U.S. government policies in regards to Indian affairs?

The power to make treaties is conceded to the President with the consent of two-thirds of the Senate by Article II Section 2 of the U.S. Constitution.<sup>1</sup> At the time of the nation's founding, treaties with Indian tribes were important to foreign affairs. Preventing Indian nations from forming alliances with foreign governments was crucial to preserving the United States. Additionally, the power to make treaties was justified as belonging in the sphere of the Federal government, as opposed to the states, in order to prevent individual states from taking forcible action against the tribes which might do harm to the nation as a whole. In Federalist III Publius (Jay) writes that, "Such violences are more frequently occasioned by the passions and interests of a part than of the whole, one or

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<sup>1</sup> Madison and Hamilton, and Jay, *The Federalist Papers*, 496.

two states than of the Union. Not a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish offenses, have given occasion to slaughter of many innocent inhabitants.”<sup>1</sup> It’s clear that the founders believed in the importance of the federal government to be the authority in dealing with Indian tribes, but it is also clear that tribes were seen as having some sovereignty, some ability to negotiate with the United States over important political matters.

The treaty making clause then is very important to the development of Indian law in the United States and to defining the scope and limitations of federal power over Indian affairs. But in its actual use, the treaty making clause was always linked closely to the commerce clause.<sup>2</sup> Article I Section 8 of the Constitution states that, “Congress shall have the power...to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”<sup>3</sup> It is this clause from which most laws and government action regarding Indian affairs derives its authority. Its interpretation is crucial in defining the political relationship of tribes to the United States government. “With the exception of the treaties signed in 1815 as a requirement of the Treaty of Ghent, and with the exception of the Indian-removal treaties of the 1820s and 1830s, all treaties signed with Indians prior to 1849 can be said to have expressed the concern for the regulation of commerce with the tribes.”<sup>4</sup> Treaties then were the primary means of

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<sup>1</sup> Madison and Hamilton, and Jay, *The Federalist Papers*, 96.

<sup>2</sup> Vine Deloria, Jr. and David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations* (Austin: University of Texas Press, 2000), 60.

<sup>3</sup> Madison and Hamilton, and Jay, *The Federalist Papers*, 493.

<sup>4</sup> Deloria, Jr. and Wilkins, *Tribes, Treaties, Tribulations*, 60.

conducting diplomacy with the Indian tribes and the treaties were most often used to regulate commerce.

As time went on and circumstances changed the commerce clause took on a different role in the area of U.S./Indian relations. Treaties were used less and less and those that were made were often not honored. A treaty requires agreements by both parties, “Its objects are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.”<sup>1</sup> This would be the concept that the United States found increasingly problematic as the country began to grow in size and power. Increasingly the federal government began asserting its authority over Indian tribes outside of the treaty making process and the commerce clause was the means by which it derived its authority to do so. The commerce clause has been described as a, “reservoir of enormous powers”<sup>2</sup>. As we shall see in later chapters, the use of the commerce clause in conjunction with judicial interpretation and definition of the relationship between the United States and domestic Indian tribes, completely replaced treaty-making and left Congress with “plenary” power over Indian affairs. The change from treaty-making to the concept of plenary power has had and still has enormous consequences for U.S./tribal relations.

Article XIV Section 2 of the Constitution states that, “Representatives shall be apportioned among the several States according to their respective numbers, counting the

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<sup>1</sup> Madison and Hamilton, and Jay, *The Federalist Papers*, 425.

<sup>2</sup> Vine Deloria, Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 40.

whole number of persons in each State, excluding Indians not taxed.”<sup>1</sup> This clause is important as it seems to reinforce the idea also expressed in the commerce clause as well as the inclusion of tribes in the treaty-making process, namely that tribes have a certain degree of sovereignty. They are different than states for taxing purposes and are similar to states and foreign governments in regard to the regulation of commerce. The question is to what degree are they sovereign? Where do American Indian tribes fall in the federalist system designed by the founding fathers and laid out in the Constitution? To what extent Indian tribes are sovereign is crucial to the discussion of their role in the federal system. Likewise, the extent of and foundations of the power of the state and national governments in regards to American tribes is equally important.

As we have seen, the language in the Constitution is vague and can be interpreted in different ways. In fact, interpretation of the language and meaning of the various clauses in the constitution is the most important factor in the development of the relationship between the United States and American Indian tribes. That interpretation is affected most significantly by the judicial branch of the United States government, primarily the Supreme Court.

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<sup>1</sup> Madison and Hamilton, and Jay, *The Federalist Papers*, 503.

## CHAPTER 2

### The Courts Define the Status of American Indian Tribes

#### I. The Doctrine of Discovery

Political interaction between American Indians and Europeans began with the discovery of the New World in the 15<sup>th</sup> century. Immediately upon landing in the Americas the Spaniards claimed land already occupied for their own. The exploitation of resources, the establishment of colonies, and the subjugation of entire peoples were a direct result of the European's belief that they had a legitimate right to the newly discovered lands of the western hemisphere. The foundations of that belief did not begin in the New World however; it began in the Old World.

To the Europeans of the time, the discovery of new lands and the establishment of colonies, trading posts and military strongholds were a strategic necessity. The crusades had failed to establish a Christian kingdom in the holy land and the Islamic kingdoms were viewed with suspicion and fear. Popes, European kings and the adventurous explorers that sailed the world in their name believed that a mighty Christian kingdom, ruled by a powerful monarch known as Prestor John existed somewhere in Africa or Asia. Finding Prestor John's kingdom became part of the larger global strategy of the Christian monarchies, who believed that by discovering the long lost Christian kingdom they would gain a valuable ally in the wars against the Muslim world.<sup>1</sup>

Portugal gained its claims to African territories in the middle part of the 15<sup>th</sup> century, in part, because those territories were seen as crucial to turning the balance of

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<sup>1</sup> Charles E. Nowell, "The Historical Prestor John," *Speculum*, vol. 28, no. 3 (July 1953): 435.

world power away from the Muslims and in favor of the European kingdoms. By spreading Christianity and civilization while searching for the mythical kingdom of Prestor John, Portugal gained a right to colonize territories it “discovered”. Colonization required the legal justification for the acquisition of newly discovered lands and the dismissal of the political rights of the established communities inhabiting them. Discovering lands and establishing trading posts and colonies was one thing, but maintaining possession of them was quite another. It was also necessary to establish some universally recognized law that would prevent other European states from claiming the new lands for themselves or undermining the discovering colonial power’s authority in the new lands. Thus to promote Christianity and to prevent discord and the eventuality of war between the Catholic kingdoms of Europe, Pope Nicolas V issued the Papal bull known as *Romanus Pontifex* in 1455. The Papal bull granted Portugal exclusive right to Africa and threatened anyone who disobeyed the edict with excommunication.<sup>1</sup>

The establishment of Portugal with exclusive power in Africa left the other European kingdoms to look in different parts of the world for new lands.<sup>2</sup> The precedent was established and the church would continue to support the “discovering” kingdoms claims to new lands above and beyond those of rival kingdoms and the native inhabitants. When Columbus discovered the America’s he proceeded to claim all of the lands as the rightful dominion of Spain. His justification for doing so was that the peoples inhabiting this New World were not Christians. “Columbus apparently presumed that he could lawfully claim ‘discoveries’ of already inhabited territories for the Spanish Crown

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<sup>1</sup> Native Web, “The Bull *Romanus Pontifex* (Nicholas V), January 8, 1455,” <http://www.nativeweb.org/pages/legal/indig-romanus-pontifex.html> (accessed February 1, 2013).

<sup>2</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 45.

wherever he encountered indigenous peoples who diverged from Christian-European cultural norms of religious belief and civilization.”<sup>1</sup> Just as in Africa, the conversion of “uncivilized” Peoples in the New World to Christianity by European kingdoms was seen as a necessary justification for ownership of the discovered lands.

Pope Alexander VI supported Spain’s discoveries in the New World via the Papal bull *Inter caetera Divine* which was issued in 1493.<sup>2</sup> Immediately upon its discovery, the New World became a part of the political maneuvering of the European kingdoms who sought to amass power and wealth through the exploitation of its resources. Both Spain and Portugal established colonies in the Western Hemisphere and sought protection from other kingdoms who might intrude on those colonies. Having the Pope’s backing was enough to establish a recognized legal right to those lands and resources. “To support their claims, Spain and Portugal sought the support of Pope Alexander VI, ‘the appointed servant of God.’ The whole earth belonged to God, and the Pope, as God’s representative, had the authority, the Spanish and the Portuguese argued, to dispose of it as he saw fit.”<sup>3</sup> As it happened, Pope Alexander VI was firmly in the pocket of the Spanish monarchy.<sup>4</sup> “The Papal proclamation, which was reaffirmed in the 1494 treaty of Tordesillas, drew a north-south line through the Western Hemisphere. All of the New World to the west of the line was under Spain’s control; everything to the east, under Portugal’s.”<sup>5</sup> With the support of the church Spain was free to carry out its plans for the colonization,

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 45.

<sup>2</sup> Native Web, “The Bull *Inter Caetera* (Alexander VI), May 4, 1493,” <http://www.nativeweb.org/pages/legal/indig-inter-caetera.html> (accessed February 1, 2013).

<sup>3</sup> Sharon O’Brien, *American Indian Tribal Governments* (Norman: The University of Oklahoma Press, 1989), 38.

<sup>4</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 46.

<sup>5</sup> O’Brien, *American Indian Tribal Governments*, 38.

conversion, and exploitation of the vast majority of territories in the New World without interference from other Europeans.

Because of the near monopoly that Spain enjoyed over lands in the New World, the development of its legal traditions in dealing with the native inhabitants had a lasting effect on the other European kingdoms that would follow in Spain's footsteps as well as the nation states that would eventually form throughout the Americas. At the start, the question of how the Spanish should proceed with their newly discovered lands was not entirely clear however. As soon as the tales of the wonders of the New World reached the shores of Spain the debate about the best way to proceed with colonization was hotly contested. At issue were questions of morality toward the native inhabitants, the legality of claims to the lands newly discovered by Spain but inhabited since time immemorial by the natives, and of course politics – both domestic and global.

Although Papal pronouncements were a powerful justification for Spain's new empire they were not considered by everyone, not even everyone within the church, to carry legal ramifications. The most important contributor to the Spanish legal theory concerning the Americas was a Dominican priest and Scholar named Franciscus de Vitoria.<sup>1</sup> Vitoria did not hold the view that European Kingdoms held title to the lands of the New World simply by discovering them.<sup>2</sup> For Vitoria, the discovering kingdom did not hold an exclusive title to the land. The tribes that currently occupied the territory had to be deprived of their natural right to that territory via negotiation or a just war. His approach to Indian rights in the 16<sup>th</sup> century was very similar to the enlightenment ideals of natural rights that would greatly influence the European kingdoms and eventually the

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 48.

<sup>2</sup> Cohen, *Federal*, 46.

United States legal tradition. It was from this line of reasoning that negotiating with the peoples of the new world became the accepted way of acquiring title to their lands.

According to the Felix Cohen, “The idea that land should be acquired from Indians by treaty involved three assumptions: (1) That both parties to the treaty are sovereign powers; (2) that the Indian tribe has a transferrable title, of some sort, to the land in question; (3) that the acquisition of Indian land could not be left safely to individual colonists but must be controlled as a governmental monopoly.”<sup>1</sup>

In Europe during the 15<sup>th</sup> and early 16<sup>th</sup> century, the prevailing idea about Spain’s right to possess and despoil the Americas was based on the fact that the local inhabitants were not Christians and that the Papal Bulls provided legitimacy for Spanish control of the New World.<sup>2</sup> Vitoria built his case for the legality of the Spanish conquest on a dismissal of the prevailing idea that non-Christians could own no property. “On the contrary, writes Vitoria, the Indians were at the time of the conquest ‘in peaceful possession of their goods, both in terms of private and of common law,’ and hence were at the time not slaves. Also, it is fallacious to argue that the Indians are not entitled to ownership of their property because they are sinners and infidels or because they appear to be insane.”<sup>3</sup> The idea then that conquest, and with it the transfer of sovereignty and property, was justified simply on religious grounds was ably disputed from the very beginnings of the Spanish discovery of the New World.

Vitoria finds seven reasons in which the “conquerors” of the New World justify their actions in regards to the property and persons of the native inhabitants: 1) The

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<sup>1</sup> Cohen, *Federal*, 47.

<sup>2</sup> Justus M. van der Kroef, “Francisco de Vitoria and the Nature of Colonial Policy,” *The Catholic Historical Review*, vol. 35, no. 3 (July 1949): 131.

<sup>3</sup> *Ibid.*, 142.

authority of the monarch, 2) The authority of the Pope, 3) The right of occupation and discovery, 4) Refusal to become converts, 5) The sins of the Indians, 6) Voluntary Indian recognition, 7) God's special favor.<sup>1</sup> By successfully contradicting these assumptions, Vitoria undercuts the legality of the Spanish conquest by pointing out the fallacious basis by which the Spanish claim property in the New World.

Vitoria argues quite compellingly that a monarch's power is still subject to natural law and from natural law flow civil or human law. Justus M. Van der Kroef describes Vitoria's position thus, "Even if there were a human law establishing world-supremacy of the emperor, that law would have no validity, because law presupposes in turn jurisdiction; and if the emperor, before the existence of such a law did not have supreme power over the world, those living before the existence of the law could not be held responsible under it."<sup>2</sup> The crucial point made by Vitoria in this instance is that a law established on the whim of a monarch does not on its own hold binding validity because the monarch must have jurisdiction over the subjects to whom the law applies. It's very difficult to see why the Spanish monarch would be seen as having jurisdiction over the lands and peoples of the Americas.

To the Assumption of the authority of the Pope to give away lands currently in possession of one society to another Vitoria argues that the Pope has no such authority. Vitoria disputes the idea that the Pope has power over temporal matters of the earth. He argues that Christ had no such temporal power on earth, so even if Christ's power did pass on to the Pope as his successor on earth, temporal power did not.<sup>3</sup> Interestingly,

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<sup>1</sup> van der Kroef, "Francisco de Vitoria and the Nature of Colonial Policy," 144.

<sup>2</sup> Ibid., 146.

<sup>3</sup> Ibid., 147.

Vitoria, a Dominican friar, utilizes scripture in order to point out that the Pope lacks jurisdiction in temporal matters. This demonstrates that even within the Church there was disagreement about the extent of Papal authority over lands and peoples of the New World.

Does the right of discovery give to the new discoverer absolute control over the lands and people of the newly discovered territories? Vitoria argues that it does not and his reasoning is among the most important for our purposes in this paper because it contradicts the assumption that Chief Justice John Marshall would use in the 19<sup>th</sup> century to justify the supremacy of the federal government in Indian affairs in the United States. Van der Kroef explains that, “Like Grotius in later years, Vitoria maintains that the act of discovery only confers the legal title of sovereignty if the discovery is in no one’s possession at the time. This view would in later centuries be worked out to the extent that discovery and ownership of what is discovered became one and the same thing. Vitoria’s view that the original owner may not be dispossessed by the new discover – came in that period – notably of 19<sup>th</sup> century imperialism – to be disregarded.”<sup>1</sup> In the United States in the 19<sup>th</sup> century, when the discovery doctrine became law, there was no doubt that the lands of the Cherokee and other tribes were possessed by the tribes. However, The Supreme Court would have to disregard Vitoria’s conception of the rights of discovery in order to avoid political turmoil.

If the states or empires cannot derive legitimacy based on the jurisdiction of the Pope, the monarchy, or the simple act of “discovery” then from where do the powers of these governments derive their authority? We have already discussed the first three of

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<sup>1</sup> van der Kroef, “Francisco de Vitoria and the Nature of Colonial Policy,” 148.

Vitoria's seven identified justifications. The final four are the Indians refusal to become Christian converts, the other sins of the Indians, voluntary Indian recognition and God's special favor. Vitoria dismisses the Indians refusal to become converts by arguing that if the natives have not heard the word of God then they are not in rebellion against the faith, they are simply unaware of its existence. Therefore, conquests on those grounds seem unfounded.<sup>1</sup> He goes on to argue that if a preacher informs an Indian of the gospel and the Indian still does not convert, the fault lies with the preacher and not the Indian. It is a failure of the preacher to convince the Indian, not the failure of the Indian to be convinced. Therefore, in Vitoria's view, justification for conquest is not legal on these grounds either.<sup>2</sup>

In regards to the other sins of the Indian Vitoria is referring to the transgressions of the native inhabitants of the New World against the laws and social norms of the Old World. Vitoria argues that if the Pope has no jurisdiction over the native inhabitants (as he has already pointed out) then they are not subject to the edicts of the Pope and the church. There can be no legal justification for war and subsequently conquest on these grounds either.<sup>3</sup> Van der Kroef explains Vitoria's argument as, "Besides, Natural law, like all law emanates from God. If the Indians knew of natural law they would also know of Christ's precepts and laws which also come from God. The Indians clearly know neither one nor the other."<sup>4</sup> If the natives do not know of the laws of God and nature then they cannot justly be punished or vanquished and their lands absorbed into another political body. The simple fact that a culture is different and not Christian, is not reason

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<sup>1</sup> van der Kroef, "Francisco de Vitoria and the Nature of Colonial Policy," 149.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., 150.

<sup>4</sup> Ibid., 151.

enough to wage war against them. Justification for the conquest is not convincing here either.

Vitoria's argument against voluntary Indian recognition is a simple one. At the time of the first interaction with the Europeans, Indians were often persuaded to recognize the Spanish monarchy. Vitoria points out that many Indians who recognized Spain, "...were prompted by fear and based on ignorance."<sup>1</sup> Although this point seems to be Vitoria's weakest argument and perhaps counterintuitive (one may be inclined to believe that a person can choose to give consent to whichever ruler he or she chooses), such a choice made by a few within a society cannot carry with it the power to abolish the sovereignty of the initial ruler and the people who resist the change. In other words, a few Indians choosing to recognize the Spanish crown cannot be said to give a legal right to the Spanish to declare war on those that do not.

Finally, Vitoria dismantles the seventh justification for conquest of the New World by arguing that God's special favor of the Spanish over the Indian is not justification for war and enslavement. Even if God had abandoned the Indians due to their lack of belief (as the argument went), the Spaniards still had no legal authority to confiscate their land and enslave their populations as was the case at the time.<sup>2</sup> Vitoria's argument is again a rather compelling one to counter a somewhat flimsy justification.

Franciscus de Vitoria's arguments against the legality of Spanish colonial policy in the 16<sup>th</sup> century are sound and persuasive; his is not, however, the only important voice of opposition. While Vitoria combatted the legality of Spanish colonial policy, others condemned the Spanish government for their immoral actions toward the native

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<sup>1</sup> van der Kroef, "Francisco de Vitoria and the Nature of Colonial Policy," 151.

<sup>2</sup> Ibid.

inhabitants in the New World. The most important of these opponents was a man named Bartolome de las Casas.

Las Casas was a Dominican Priest who sailed from Spain to the Santo Domingo in 1502. Although his motives for travelling to the New World are not known, it is clear that he was appalled by what he found when he arrived. Las Casas witnessed many atrocities Such as the beheading and disembowelment of natives including women, children and old people.<sup>1</sup> Las Casas took particular issue with the Spanish repartimiento or encomienda system which utilized Indian slave labor as a way to farm lands and extract the valuable minerals of the Americas. Las Casas himself was probably a slaveholder at first,<sup>2</sup> but would disavow such oppressive colonial policies, free his slaves and eventually become known and the “protector of the Indians.”

Like Vitoria, Las Casas disputed the Spaniards claims that despoliation of the New World was a “just war” or that the Papal Donation of 1493 provided additional legitimacy to Spanish claims. Upon seeing the disastrous consequences of colonial policy on Native populations Las Casas was convinced the Spanish monarchs were simply uninformed about the actions of the colonists and set out to take the truth back to Spain.<sup>3</sup> The Las Casas biographer Lawrence A. Clayton writes that, “In orchestrating his defense of the Indians and undermining the claims of the conquistadors, Las Casas drew on all laws, both God-given and man-made. If what the Spanish were doing to the Indians could be proven illegal, then the conquest itself was illegal.”<sup>4</sup> Las Casas would spend much of

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<sup>1</sup> Lawrence A. Clayton, *Bartolomè de las Casas: A Biography* (Cambridge: Cambridge University Press, 2012), 33.

<sup>2</sup> Clayton, *Bartolomè*, 33.

<sup>3</sup> *Ibid.*, 41.

<sup>4</sup> *Ibid.*, 44.

his life bringing his concerns about the validity of the conquest and his concern for the mistreatment of the Indians to the Courts of Spain in the hope that some legislation might curb the Spanish transgressions.

The first real attempt by the Spanish government to legislate the conquest came in the form of a set of laws known as the Laws of Burgos in 1512 and amended in 1513. Concerned Dominican Priests, like Las Casas, detested the Spanish treatment of the Indians and they were able to convince King Ferdinand that something must be done. The King called a royal council to debate the issue and the Laws of Burgos were the result of the deliberations. The laws contained provisions such as the prohibition of calling Indians “dogs”<sup>1</sup> and a requirement that a specific document be read aloud to Indians who did not accept Spanish claims. The *requerimiento*, as the document was called, based Spanish claims to authority on the Papal donation of the lands in the New World to Spain by the Pope.<sup>2</sup> The *requerimiento* was meant to provide legitimacy for the use of force and enslavement of Indian populations by essentially offering them a choice of accepting Spanish authority as derived from the Pope or facing the consequences. Clayton explains that, “If the Indians accepted the rule of the Spaniards – as read to them by the Requirement – Then all was well and good. If they should resist, then the Spaniards claimed the right to enforce their will – and of course, Christianity – by force.”<sup>3</sup> However, even if the law was based on some legitimate authority (which was in question), it was not implemented as designed.

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<sup>1</sup> Clayton, *Bartolomé*, 65.

<sup>2</sup> Henry Kamen, *Empire: How Spain Became A World Power, 1492-1763* (New York: HarperCollins Publishers Inc., 2003), 97.

<sup>3</sup> Clayton, *Bartolomé*, 66.

The Spanish colonists and conquistadors in the New World largely ignored the Laws of Burgos and the *requerimiento* and continued to pillage and enslave indigenous populations virtually at will. In her book *American Indian Tribal Governments* Sharon O'Brien notes that, "The Indians, who did not understand Spanish, were generally nowhere in sight when the Spanish arrived. More often than not, the document was read in a loud voice to the surrounding trees."<sup>1</sup> Las Casas, who contended that a simple donation of the lands of the New World by the Pope lacked the legitimacy of empowering colonists to despoil the Indians, found the *requerimiento* equally illegitimate. He reportedly did not know whether to laugh or to cry when he first read the document.<sup>2</sup> Las Casas, Vitoria, the Dominican Priests and others who disagreed with Spanish colonial policy continued to push for major reforms.

By the 1530s those who can be called allies of Las Casas and of the indigenous peoples of the New World held powerful positions in the Church, the government, and in intellectual circles of Spain. Charles the V became King of Spain in 1516 and there was hope that with the new King would come new colonial policy. In 1537 Pope Paul III issued a series of three bulls known as *Sublimus Deus* which rejected the idea that the Church sanctioned the use of violence and slavery toward non-Christians in the New World and reinforced the idea that the Indians had a right to their lands and possessions. In 1539 Franciscus de Vitoria published *Des Indies* which culminated in the rejection of the 7 justifications for conquest discussed earlier. In 1542 King Charles V, who was by now also the Holy Roman Emperor, issued a set of edicts known as the New Laws. These laws concerned the Spanish colonization of the Americas and the interaction between the

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<sup>1</sup> O'Brien, *American Indian Tribal Governments*, 39.

<sup>2</sup> Kamen, *Empire*, 97.

Spanish and the Indians. It appeared as though significant change was taking place in the Church and in Spanish colonial policy.

Pope Paul III's issuance of *Sublimus Deus* in 1537 was in many ways a rejection of the Papal bull of 1493 donating the lands "discovered" by Spain to the Spanish crown. The Pope proclaimed that,

"...We define and declare by these our letters, or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen it shall be null and of no effect."<sup>1</sup>

Pope Paul II's edict was meant to have a positive effect on Spanish colonial policy by recognizing Indian sovereignty and rejecting the idea that war and slavery were condoned by the church if directed at non-Christians. If Las Casas and the Dominican friars were finding arguments in the Spanish royal court that cited the Papal pronouncements of the late 15<sup>th</sup> century as providing the foundational legitimacy for the horrors of the conquest, then the Pope was trying to remove that foundation. Nevertheless, one year later Charles V would demand a renouncement of *Sublimus Deus* by the Pope. The Holy Roman

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<sup>1</sup> Lewis Hanke, "Pope Paul III and the American Indians," *The Harvard Theological Review*, vol. 30, no. 2 (April 1937): 72.

Emperor did not want the Pope intervening in such a major way with Spanish colonial policy. Lewis Hanke writes in the *Harvard Theological Review* that, “To make the matter unmistakably clear to all, the Emperor had prevailed upon the pope to issue another brief on June 19, 1538, which revoked ‘all other briefs or bulls issued before in prejudice of the power of the Emperor Charles V as King of Spain and which might disturb the good government of the Indies.’ At least this was the sense of the brief as understood by the Spaniards.”<sup>1</sup> The Emperor no doubt perceived a political threat to his power over the Spanish claims to the colonies of the western hemisphere by the Papal pronouncement. In the end Pope Paul III did not revoke *Sublimus Deus*, but only the penalties for disobeying it, which effectively nullified it. Hanke states that, “According to our present evidence, Paul never withdrew the bulls in which the official Christian doctrine of the spiritual equality of all men was reaffirmed, but he did revoke the ‘letters in the form of a brief’ which provided for the enforcement of the doctrine in America by the threat of severe ecclesiastical penalties.”<sup>2</sup> The Pope was unable to apply real pressure on the Spanish government in the Americas to alter colonial policy.

In 1539 Vitoria published *De Indis*, which called into question the legitimacy of Spanish colonial policy. Vitoria was a Professor at the University of Salamanca and his ideas were well-respected. *De Indis* subject matter and conclusions were an affront to the authority of the Spanish government in the Americas however. The same year it was published, the emperor had the book suppressed.<sup>3</sup> The King of Spain could not allow such ideas to undermine his authority regardless of their veracity.

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<sup>1</sup> Hanke, “Pope Paul III and the American Indians,” 87.

<sup>2</sup> *Ibid.*, 91.

<sup>3</sup> Clayton, *Bartolomè*, 273.

In fact, Charles V agreed with much of what Las Casas, Pope Paul III and Vitoria proposed. Charles himself was a supporter of Las Casas and the others who claimed that the treatment of the Indians in the Americas was immoral and contrary to scripture and natural law. Politically, however, he could not afford to have his legitimacy questioned and/or undermined so openly. In his biography of Las Casas, Lawrence A. Clayton writes that, “Furthermore, the Emperor Charles V was very conscious of his soul and where it would spend eternity. That he was also conscious of his authority and dominion, and took seriously challenges to his legitimate authority to govern over his possessions in the Indies was also true. So he squelched the publication of *De Indis* for a while. To suggest that the emperor’s claim to sovereignty over the Indies was somehow unfounded and illegal could be too easily corrupted by rebellious subjects elsewhere (as happened in Ghent shortly thereafter) to take matters into their own hands.”<sup>1</sup> If colonial policy in the New World needed a drastic change, then it would have to come from Charles V himself.

In 1542 Charles V signed a decree known as the New Laws. These laws were directly influenced by the work of Las Casas.<sup>2</sup> The laws were an attempt at widespread reform in the administration of the colonies in the Americas and the regulation of the interaction between the Indians and Spaniards. Clayton states that,

“Five basic principles and actions were clearly articulated:

1. The dignity of the Indian as subjects of the crown.
2. The elimination of Indian slavery.
3. Provisions for the extinction of the *encomienda* as a principal form of exploiting the Indians as labor and vassal.

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<sup>1</sup> Clayton, *Bartolomè*, 274.

<sup>2</sup> *Ibid.*, 282.

4. Prohibiting further wars of conquest.

5. Strict and detailed laws and decrees for the enforcement of all of the above.”<sup>1</sup>

The New Laws essentially crippled the government sanction of slavery in the Americas by revoking *encomiendas* held by public officials and clergy, no new *encomiendas* would be created and all existing *encomiendas* would be passed on to the government upon the death of their present owners.<sup>2</sup> Additionally, the New Laws limited expeditions of discovery, banned Indian slavery and required that nothing be taken from the native population unless by trade.<sup>3</sup> The laws seemingly changed the political dynamic in the New World by recognizing the human rights of the Indians and also by recognizing them as rightful owners of their property. Las Casas and the others were not satisfied however, they pushed for an extension of the New Laws. He presented a memorial to King Charles V asking for tighter enforcement of the laws and in the memorial, presented in 1543, also requested that, “...Indian tribute should go to native rulers, and not the Spanish crown. The Native rulers were – the only truly legal, sovereign rulers of the land.”<sup>4</sup> This was a bold proposition considering it again questioned Spain’s (and the King’s) legitimacy and authority over the Indians, but Charles V did see the injustices of the Spanish conquest and he did attempt to rectify them.

The debate in Spain over the colonization of the Americas transcended the enslavement of and mistreatment of the Indians and questioned the rights of the Spanish monarchs to claim the New World for themselves. The conquest and its consequences were not an undisputed realization of destiny and a justification of western values, culture

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<sup>1</sup> Clayton, *Bartolomé*, 282.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, 183.

and religion. Even at the time many questioned the morality and legality of the Spanish conquest. Yet even with the backing of Pope Paul III, Las Casas, Vitoria, and to some extent even the King of Spain and Holy Roman Emperor Charles V himself, those who disagreed with the right of the Spaniards to enslave the indigenous population and appropriate the land of the New World were disappointed. Despite the New Laws, slavery and the encomendero system persisted in the colonies and at one point the New Laws were suspended all together because of their unpopularity.<sup>1</sup> The political situation in the New World simply could not be so drastically changed by an edict from the monarchy back in Spain.

The truth is that the Spanish government across the Atlantic had very little control over the development and enforcement of laws in the New World. The way in which the conquest unfolded in the Americas is very different than is often understood. A careful examination of the facts demonstrates that the New World was colonized by individuals bent on accruing wealth and fame regardless of Papal pronouncements, concerns for human rights, or even the laws of kings. In his book *Empire: How Spain Became a World Power 1492-1763*, Henry Kamen argues that, “Neither Ferdinand nor Charles V perceived the American venture as one of ‘conquest’. When the Spaniards extended their energies to the lands beyond the ocean, they did not – despite the proud claims of their chroniclers – conquer them. The occupation and development of the New World was a little more complex than a mere act of subjugation.”<sup>2</sup> No matter the Church’s stance on Indian rights, the intellectual discourse in Spain, or the King’s prerogative and the

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<sup>1</sup> Kamen, *Empire*, 142.

<sup>2</sup> *Ibid.*, 95.

creation of laws, other factors greatly affected the development of colonial policy in the New World.

One of these factors is the extent to which Spain exerted real power in the western hemisphere. The Spanish never conquered and controlled the lands that they claimed. Kamen writes that, “Well over two centuries after the period of alleged conquest, and long after cartographers had drawn up maps in which the virtual totality of America was depicted as being ‘Spanish’, Spaniards in reality controlled only a tiny part of the continent, mainly the fertile coastal areas of the Caribbean and Pacific.”<sup>1</sup> The Spanish empire made a fortune in the New World based on gold, silver, etc. but there was no standing Spanish army to take and defend the lands that Spain claimed for itself. There was no government bureaucracy in the great majority of the lands that Spain claimed. In fact, most of the land claimed by the Spanish government did not even contain Spaniards. How was it then that Spain was able to claim “conquest” and possession of such a vast area?

When the Spanish conquistadors under Cortés crossed into mainland Mexico in 1519 they found themselves in the midst of advanced civilizations with a complex political dynamic of their own. The Aztec empire had been asserting its dominance over other Indian nations by violence and political maneuvering. By the time the Spanish arrived the Aztec emperor Montezuma had a vast network of tributary states under his control. These states were often required to pay tribute to the empire by sending slaves, food and other forms of tribute to Montezuma. Many of these states resented their

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<sup>1</sup> Kamen, *Empire*, 96.

subjugation and sought to re-establish their own sovereignty and self-government. Cortés found many Indian states willing to join his forces in overthrowing the Aztec empire.

Cortés worked diligently at creating alliances with the rebellious Indian governments. Early on he was able to seal an alliance with the Tlaxcalan people and his forces swelled from around 500 to over 5,000. The alliance would have huge implications for the Spanish forces and their ability to overthrow the Aztecs.<sup>1</sup> By the time Cortés defeated the Aztec capital of Tenochtitlan he had over 300,000 Indians in his army and only around 900 conquistadors.<sup>2</sup> The Aztecs could not have been beaten without the alliances of the surrounding Indian states. It was, in fact, because of the advanced political and social understanding of the Indians in Mexico, including recognition of sovereignty and the desire for self-rule that led to the overthrow of the Aztec empire. Kamen explains that, “It is unjust to minimize the astonishing daring of the conquerors. But it is also essential to remember that Spanish military success was made possible only by the help of Native Americans... The crucial help was, of course, that from military allies. Both against the Mexicas and the Incas the Spaniards were able to count on alliances with native peoples, who exploited the situation for their own purposes.”<sup>3</sup> Some of the native peoples chose to participate in the overthrow of the Aztec and Inca empires and to recognize the sovereignty of the Spanish, but others did not.

Much of the Americas remained unconquered. While the Spanish and their Indian allies could claim possession of the gold and silver mines won in the wars with the Inca and Aztec empires it is difficult to see how they were able to claim possession of the rest

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<sup>1</sup> Kamen, *Empire*, 100.

<sup>2</sup> *Ibid.*, 104.

<sup>3</sup> *Ibid.*, 113.

of the New World. Many Indian peoples also found the Spanish claims without validity and made war upon the Spaniards. Kamen writes that, “The survival of an unconquered America is often described as ‘revolts’ or ‘rebellions’, terms which suggest mistakenly that the natives were somehow reneging on an accepted allegiance. The major Indian actions against Spaniards were in fact always ‘wars’, legitimate acts from inside their own free sovereign territory against incursions by strangers from outside.”<sup>1</sup>

The discovery and conquest of America was neither a discovery nor a conquest. Even if there was a conquest the Spanish government could hardly take credit for it. Cortés crossed into Mexico without the permission of the Spanish government. Most of the discoveries and conquests of the New World attributed to Spain came from individual actors and mercenary armies in collaboration with the surrounding Indian populations. Kamen writes that, “The world’s greatest empire of the 16<sup>th</sup> century, consequently owed its survival to an absence of direct control.”<sup>2</sup> Kamen argues that the colonists in the New World were effectively on their own and ruled with what was tantamount to a free hand. “By the late 16<sup>th</sup> century, effective political and economic power in America was firmly in the hands of the Settlers rather than the crown.”<sup>3</sup> It is the political situation described by Kamen that demonstrates why laws from the monarchy back in Spain were watered down or ignored in the Americas.

The Laws of Burgos, the New Laws, the Papal decree *Sublimus Deus* all demonstrate a concern for the morality of the Spanish “conquest” of the New World and its consequences on Indian populations. The work of Vitoria, Las Casas and others

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<sup>1</sup> Kamen, *Empire*, 116.

<sup>2</sup> *Ibid.*, 142.

<sup>3</sup> *Ibid.*

demonstrate a concern for the legality of Spanish claims to the New World by right of discovery to leave open the possibility of conquest in the first place. Even when such concerns were ignored in favor of spoliation, slavery, etc. the Spanish conquistadors recognized Indian sovereignty over their territory by forming alliances and treating with them. Furthermore, other European nations did not recognize the sweeping claims of the Spanish to the lands of the New World.<sup>1</sup> Other nations, seen as pirates by the Spanish government, eventually began to trade and explore areas claimed by the Spanish.

In the face of such historical events that would seem to counter the legality and practicality of claiming vast stretches of land inhabited by native peoples based solely on the rights of discovery, this fragile doctrine would again arise in the New World. This time it would be used by the United States to justify its right to claim most of the North American continent. Despite the fact that the Constitution lends itself more toward respect for tribal sovereignty and claims no such right to the lands and resources of the American Indians (See Articles I Section 8 and XVI Section 2), the Supreme Court found that old notions of discovery conveying ultimate title were acceptable and beneficial. The so-called “discovery doctrine” would become the foundation of Indian Law in the United States when Chief Justice John Marshall used the principle in the seminal Supreme Court case *Johnson v. M’Intosh* in 1823.

## **II. The Doctrine of Discovery in the United States**

Chief Justice John Marshall’s opinion in the case *Johnson v. M’Intosh* would become the foundation of American Indian law in the United States. Lindsay G.

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<sup>1</sup> Kamen, *Empire*, 257.

Robertson argues that, “Marshall’s incorporation of the discovery doctrine in the *Johnson* opinion led to political catastrophe for Native Americans.”<sup>1</sup> Because the *Johnson* case established the right of the United States to the land it claims, it is arguably the most important case ever decided in regards to Indian law. The decision has had tremendous and lasting consequences for American Indian tribes in North America and is still central to the political relationship between those tribes and the United States government.

Even before the new American republic was formed, the right of Indians to the land that they occupied was an important political and legal question. The United States needed a legal foundation for the occupancy and use of the land it claimed. Just as it had for the European kingdoms in Africa and the Americas during the 15<sup>th</sup> century, the doctrine of discovery would be that foundation. Not only did the United States need a legal claim to the lands it coveted in order to prevent the European powers from interfering, it also needed to establish its claims as prior to and superior to the claims of private entrepreneurs that sought to exploit the young nations vast natural resources for their own fortune. The Federal Government had to establish a legal right to both the lands already settled and the lands that would inevitably be settled in the future. The question was not if the Indians could be deprived of the land that they occupied, but by whom.

In 1763 King George III proclaimed that all of the lands west of the Allegheny Mountains were reserved for the use of the Indians. The Crown could negotiate with the tribes for possession of the land, but individual colonists and colonial administrators were

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<sup>1</sup> Lindsay G. Robertson, *Conquest by Law: How The Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005) xiii.

restricted from doing so.<sup>1</sup> The Revolutionary War would provide the perfect opening for enterprising business men to grab large tracts of land from the tribes west of the mountains and make their fortunes in the event that the colonies won the war for independence. David Murray was a perfect example of such an enterprising businessman. He found willing investors and started the Illinois and Wabash companies and negotiated two large land transactions with the Piankashaw tribe totaling around 23,000 acres. “Assuming both titles held, Murray and his companies would control the transportation routes for the greater part of the northwest fur trade.”<sup>2</sup>

The British victory in the French and Indian War opened up the western territories for exploration and occupation. But to whom did that land belong? The colonists believed that they had a right to the land. However, the Proclamation of 1763, which reserved the land for use by the Indians, demonstrated the English Crown’s authority over Indian country. In fact, the dispute over the right to acquire lands in the west was a significant factor in the outbreak of hostilities between the colonists and the British.<sup>3</sup> If the Illinois and Wabash companies were to hold a legal title to the Indian lands that they purchased, it would depend upon the United States, as victor in the Revolutionary War, and the way in which the young nation would view Indian land title and transactions meant to acquire that land.

Although Murray purchased the lands from the Piankashaw in 1773, *Johnson v. M’Intosh* would not be decided until 1823. In the years between the purchase and the Supreme Court decision the Illinois and Wabash companies tried in vain to have their

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<sup>1</sup> Robertson, *Conquest*, 6.

<sup>2</sup> *Ibid.*, 14.

<sup>3</sup> *Ibid.*, 6.

purchase recognized by the government of the United States. Congress continually refused to recognize the companies' titles to the lands because they predated the founding of the country. If Congress were to recognize the title it would necessarily diminish the claims of the United States to all territory inherited from the English via the victory in the revolution. If the American Indian tribes were allowed to sale their land to whomever they wished, the government might find itself dealing with land disputes between private citizens and tribes over boundary issues, or worse, find itself bordered by foreign governments who managed to purchase the land. Congress reserved the right to treat with the Indians over any land claimed by the United States by way of inheritance to those claims from the English. By the time the case appeared before the court, the United States had negotiated treaties with many tribes in the West and through those treaties had obtained title to the lands including those claimed by the Illinois and Wabash companies. "The government then sold the lands to private parties, including an 1818 sale to William McIntosh. The validity of that sale was challenged...by a successor to one of William Murray's pre-Revolutionary land purchases. Daniel Webster argued for the validity of the earlier transfers from the tribes, pointing out that both the English and the French had treated the tribes as sovereigns and as such they should have the power to sell."<sup>1</sup> But Chief Justice John Marshall's court would find that Indian tribes were not the rightful owners of the land and, therefore, were not legally able to sell their lands to whomever they wished.

Marshall's decision leaned heavily on the discovery doctrine established by the European kingdoms hundreds of years in the past. He claimed that the United States

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 62.

inherited the title to the lands formerly claimed by Britain and France which were won in the wars of the 18<sup>th</sup> century. The opinion of the court is strikingly similar to the arguments presented in Spain upon landing in the New World as discussed early in Part I. Marshall's opinion claimed that the tribes could not be the rightful owners of the land that they occupied and that it was up to the European powers to divide up the new world between themselves. European governments must respect each other's rights to the lands that they claimed, but not the rights of the inhabitants. Marshall states that,

“On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them a people over whom the superior genius of Europe might claim ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with one another, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title may be consummated by possession.”<sup>1</sup>

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 63.

Why did the Supreme Court, the highest court in the nation, a nation that fought fiercely against the political concepts of the old European monarchies and created a new republic founded on enlightenment ideals that arose, in part, as a contradiction to the authority and values of the Old World, borrow from the playbook of the Old World empires for such an important decision? Alexander Hamilton wrote in Federalist Number One that, “It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”<sup>1</sup> But it is exactly accident and force that the Chief Justice cites as the foundation of America’s title to the lands it claimed when he writes,

“However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with the concomitant principle, that the Indian inhabitants are to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two

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<sup>1</sup> Madison and Hamilton, and Jay, *The Federalist Papers*, 88.

people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.”<sup>1</sup>

With his decision the Chief Justice adopts archaic political tradition into U.S. law against some of the key principles of the American founding as espoused by Hamilton; namely the principle of freedom of choice for societies of men. Although the Indians themselves were often guilty of ignoring the rights of their neighbors through conquest and empire and although many of the nations of Europe were also guilty of such action, it was not inevitable that the United States adopt those same principles. Franciscus de Vitoria and others argued against such unjustifiable action nearly 400 years prior to the Court’s decision.

Marshall confuses the case in *Johnson v. M’Intosh* as one of property rights alone. But in labeling all Indian tribes as “occupants” of their land, he necessarily undercuts their sovereignty and political rights; they cannot decide for themselves if, or to whom, they will sell their land. If the native inhabitants of the continent are simply occupants then they are essentially leasing the land from the Federal government. One of the issues, of course, with leasing as opposed to owning the land is the ever-present threat of eviction. The only safe-guard against eviction in the scenario defined by Justice Marshall is the good faith actions of the United States government. Unfortunately for many American Indian tribes, that safe-guard would not be enough.

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<sup>1</sup> Madison and Hamilton, and Jay, *The Federalist Papers*, 67.

### **III. The Cherokee Cases (*Cherokee Nation v. Georgia* and *Worcester v. Georgia*)**

Along with *Johnson v. M'Intosh* the two Cherokee cases make up what is known as the Marshall trilogy. In these three Supreme Court opinions Chief Justice Marshall defines the status of American Indian tribes and their relationship to both the federal government and the states. These court decisions in the first half of the 19<sup>th</sup> century would have profound influence on the development of U.S./tribal relations. Although the cases deal with particular circumstances (*Johnson v. M'Intosh* doesn't even involve Indian litigants) they would be applied broadly in many future disputes in the Supreme Court and can accurately be said to be the foundation of Indian Law in the United States.

#### ***Cherokee Nation v. Georgia* (1831)**

By the 1830s the westward drive of U.S. immigration was in full swing. The battle between the states and the federal government for political power, economic control and territory was also heating up. Persistent political questions arose during this period about the jurisdiction of the federal government to interfere with state prerogatives, state jurisdiction over its Indian inhabitants, and the sovereignty of tribes or their right to exist as political entities at all. In *Cherokee Nation v. Georgia* the Supreme Court was faced with defining exactly what the relationship between tribes and the federal and state governments was. On the surface of the case was the question of whether or not the state of Georgia could implement its laws in Cherokee territory, but at its heart was the question of whether and to what extent an Indian tribe was a political entity and where they fit into the federal political system.

The Cherokee Nation was located in what is now Northwestern Georgia in 1827. Georgia had agreed to abandon its claims on lands to the west in 1802 in return for a promise by the federal government to extinguish Indian land title in the state.<sup>1</sup> As we have seen in our examination of *Johnson v. M'Intosh*, the Supreme Court held that tribes did not own the land on which they resided, it rightfully belonged the United States as the inheritors of the lands of the “discovering” nation. But the government was also bound by treaties with the Cherokee which held the force of law and could not be easily extinguished. The Cherokee Nation had established its own constitution, had a bi-cameral legislature, a capitol and its own written language. Simply ignoring Tribal claims to their territory was not possible. But, when gold was discovered in 1827 in the territorial possession of the Cherokee nation Georgia moved to establish its sovereign control over the territory. “Georgia enacted a series of laws in 1827 which, in effect, would have abolished the Cherokee government and distributed Cherokee lands among five Georgia counties. All tribal ‘laws, usages and customs’ were annulled and Georgia law was extended over all Cherokee lands. In addition, the Cherokee legislature was prohibited from meeting.”<sup>2</sup> The Cherokee would argue that Georgia did not have the jurisdiction to impose its laws on a sovereign people and they looked to the federal government to honor its treaty obligations.

Unfortunately for the Cherokee, the President was in favor of a policy of Indian removal. President Andrew Jackson, like Thomas Jefferson, did not believe that Indians and colonists could live together and he adopted a policy of westward expansion and

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 93.

<sup>2</sup> *Ibid.*, 96.

Indian removal soon after winning the Presidency.<sup>1</sup> The President's stance on Indian removal would exclude him from being a potential ally to the Cherokee cause. The legislative branch of the federal government however, was another story.

The Cherokee did find support in the United States Congress and the debate over Indian removal was a volatile one. Nevertheless, Jackson and his supporters won the day. "The Indian Removal Act was passed on May 28, 1830, after vigorous debate in which the eastern senators and representatives deplored the policy as a violation of American honor."<sup>2</sup> With both the executive and legislative branches of government, as well as the Georgia state legislature, favoring confiscation it would be up to the judicial branch to stop the forcible removal of the Cherokee from their homes. In 1831 the dispute reached the Supreme Court still lead by Chief Justice John Marshall.

The case before the Supreme Court was a complex one. At issue was not simply the removal of the Indians from a certain piece of land. It was a case that could potentially define the political power of the Indian tribes to the states and to the federal government, the state's power in relation to the federal government, and the court's power in relation to the other branches of federal government. Chief Justice Marshall's opinion was carefully calculated to consider all of these factors. As Sharon Obrien writes in *American Indian Tribal Governments*, "Legally, the Cherokee Nation v. Georgia case was about Cherokee sovereignty and rights. But politically it involved the future of the Supreme Court. President Andrew Jackson had campaigned for office on a pledge to move the tribes westward. But a Supreme Court ruling that the Cherokees were a foreign

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<sup>1</sup> Deloria, Jr. and Lytle, *American Indians*, 6.

<sup>2</sup> *Ibid.*, 7.

state would have prevented the government from moving the tribes.”<sup>1</sup> In addition, Marshall had to consider his “Discovery Doctrine” expressed in *Johnson v. M’Intosh* and incorporate that idea into the Cherokee decision. In fact, Lindsay G. Robertson argues that, “The discovery doctrine survived because it facilitated Indian removal.”<sup>2</sup> Marshall built upon his earlier decision and the political sovereignty of the tribes in the United States was reduced still further.

Marshall and the court understood perfectly well what the Georgia laws would do to the Cherokee nation. Chief Justice Marshall begins his decision, “This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokee as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.”<sup>3</sup> The first issue to be decided was not whether or not Georgia could legally enact the laws in Cherokee territory but whether or not the court had the jurisdiction to hear the case.

Marshall pointed to Article III of the constitution which gives the Supreme Court jurisdiction over cases brought by a foreign government against any of the states.<sup>4</sup> If the Cherokee were to have the ability to bring the suit to the Supreme Court they would have to be found to possess the sovereignty of a foreign nation. However, Marshall could not recognize the Indian tribes as foreign nations as it would certainly undermine his decision in *Johnson v. M’Intosh*, which held that the tribes were something other than sovereign

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<sup>1</sup> O’Brien, *American Indian Tribal Governments*, 57.

<sup>2</sup> Robertson, *Conquest*, 143.

<sup>3</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 104.

<sup>4</sup> The Constitution of the United States of America, Article 3, Section 2.

governments, unable to fully possess the lands that they occupied. Marshall's decision states, "In the general, nations not owing a common allegiance are foreign to each other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."<sup>1</sup> It is here that Marshall again restates his idea of the "discovery doctrine." He argues that the Indian tribes have a right to the land that they occupy until the title to the land is extinguished, but because they reside within the borders of the United States they cannot be said to be completely sovereign as a foreign nation is. Marshall writes that, "They may more correctly be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to its guardian."<sup>2</sup> If the tribes were to be seen as foreign governments then they would be allowed to make alliances with other governments to the potential detriment of the United States. Marshall's description of the "discovery doctrine" in *Johnson v. M'Intosh* has already addressed this issue.<sup>3</sup> So Marshall's description of the political status of Indian tribes is something less than foreign nations, or at least, quantifiably different.

As we have seen Article I, Section 8 of the U.S. Constitution grants Congress the authority, "To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."<sup>4</sup> This passage of the Constitution seems to place the sovereignty of Indian tribes on par with foreign nations and with states. However, the Marshall Court

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 105.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, 63.

<sup>4</sup> Madison and Hamilton, and Jay, *The Federalist Papers*, 493.

points out that by listing the tribes alongside the states and foreign governments, the framers intended to illustrate a distinct difference in the relationship between the federal government and each of the other entities. This interpretation allows for a reinforcement of Marshall's description of Indian tribes as "domestic dependent nations". Marshall writes that, "Had the Indian tribes been foreign nations, in the view of the convention; this exclusive power of regulating intercourse with them might have been, and most probably would have been, specifically given, in language indicating that idea, not in the language contradistinguishing them from foreign nations."<sup>1</sup> If then, the Cherokee Nation was neither a foreign nation nor a state; it could not bring a suit against the state of Georgia to the Supreme Court.

The *Cherokee Nation* case defines for the first time the status of Indian tribes in relation to the federal government. Tribes are not states, nor are they foreign nations, but they do retain some sovereign power that distinguishes them. Consequently, the Marshall court found that the Cherokee Nation could not bring suit against Georgia in the Supreme Court. Interestingly, the Court was not unanimous in its decision. The difference of opinion largely rested on the degree of sovereignty that Indian tribes possess. "The Court then had seven members, and Justice Duvall was absent, leaving a 2-2-2 split: Marshall and Mclean seeing the tribes as "domestic dependent nations"; Johnson and Baldwin viewing them of possessing no sovereignty at all; and Thompson and Story concluding that that the Cherokee Nation was a foreign nation possessing sovereignty in the international sense."<sup>2</sup> The Cherokee case, decided by a split court, weakened the sovereignty and thereby the political status of Indian tribes in the United States to a

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 106.

<sup>2</sup> *Ibid.*, 110.

fragile level. Other Supreme Court cases and Congressional action very often base the legality of those actions on the Cherokee decision and Justice Marshall's "domestic dependent nations" view of the sovereignty of Indian tribes.

The development of Indian law in the United States, the entire history of the United States, would be very different if the Court had accepted the view of Justices Thompson and Story in regards to the sovereignty of Indian tribes. Justice Thompson wrote the dissenting opinion. In the dissent Thompson relies on Emer de Vattel's description of sovereignty as,

"...Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states; are to be considered as so many free persons, living together in the state of nature. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as any other state. Such are moral persons who live together in a natural society, under the law of nations. It is sufficient if it be really sovereign and independent: that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns, those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state,

that in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority is left in the administration of the state... Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion, that they form a sovereign state.”<sup>1</sup>

If tribes were considered sovereign in the sense that Justices Story and Thompson believed that they should be, then the Constitution allows them to file suit against the state of Georgia; when seen from Justice Marshall’s point of view, the tribes lack such political power. The interpretation of the Constitution’s Article I Section 8 as placing Indian tribal sovereignty as something less than foreign governments and beneath the authority of the federal government is controversial. The Commerce Clause seems to imply Indian sovereignty not to deny it. However, The Constitution is not explicit enough to prevent interpretation on this issue. The politically reduced status of American Indian tribes’ in the United States can in some way be attributed to the fact that Justice Marshall’s view of tribal sovereignty won out against the opposing view of Justice Thompson’s dissent. The view of tribes as domestic dependent nations as opposed to something more akin to foreign governments reduces their political power and their ability to check the interference of the federal government into their affairs.

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 110.

### *Worcester v. Georgia (1832)*

Although the Supreme Court found that Indian tribes could not sue states in federal court and had found the political status of Indian tribes to be that of “domestic dependent nations”, the court was forced to further clarify the relationship between tribes, the individual states and the federal government shortly after the *Cherokee Nation v. Georgia* decision. When a missionary named Samuel Worcester and several other men were arrested for being in Indian country without a license, in violation of the laws of Georgia, they were arrested and sentenced to four years hard labor.<sup>1</sup> The issue before the court was whether or not Georgia’s laws were applicable in Cherokee territory. This time the court would find that the plaintiff did have a right to sue in the Supreme Court given that they were citizens of the United States.

The Cherokee were not a litigant in the *Worcester v. Georgia* case, but the case had everything to do with the political status of the Cherokee nation. Chief Justice Marshall would again set out to define tribal political sovereignty, this time with a view toward the authority of individual states in Indian country. If the Court was to find that Georgia could not enforce its laws in Cherokee territory then the policy of Indian removal would be impeded. Robertson states that, “By invalidating the purported assertion of state laws, the Court would remove the teeth from the Indian Removal Act: if states could not validly impose their laws on tribes within their limits, the tribes would have no incentive to remove.”<sup>2</sup> *Worcester v. Georgia* would provide a means for the Court to further define the sovereign status of Indian tribes, but also the political power of individual states in relation to the federal government.

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 112.

<sup>2</sup> Robertson, *Conquest*, 130.

Chief Justice Marshall described the issue before the Court, “The legislative power of a state, the controlling power of the constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.”<sup>1</sup> But the Chief Justice could also have added the authority of the court to his statement. Marshall knew well that the authority of the Supreme Court was also at stake in this case.

The *Worcester v. Georgia* case appeared before the court in a tense national atmosphere. When the Court issued its decision that Georgia laws did not apply to the Cherokee nation, many wondered whether or not Georgia would obey the Court’s order.<sup>2</sup> President Jackson seemed to side with Georgia so it was apparent that some showdown was imminent. If the Court could be effectively ignored then its ability to function would necessarily be diminished. Fortunately for Marshall and the Supreme Court, the state of South Carolina decided to test the waters and disregard all federal laws in its domain. “On November 24, 1832, while the nation awaited the issuance of the mandate, a convention called by the South Carolina legislature took advantage of Georgia’s so far successful resistance to the federal government and issued an ordinance by which the state claimed the authority to nullify federal statutes within its borders.”<sup>3</sup> South Carolina’s actions forced President Jackson to seek a compromise in order to avoid a national crisis. He was forced to convince Georgia to release Worcester and the other missionaries. Because of the Supreme Court’s decision in *Worcester v. Georgia*, Indian

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 113.

<sup>2</sup> *Ibid.*, 112.

<sup>3</sup> Robertson, *Conquest*, 136.

removal could not proceed as a state prerogative, it would be up to the United States Congress and the authority granted to the President in the Indian Removal Act of 1830 to make treaties with the tribes that would allow for relocating the tribes to the west.

Chief Justice Marshall's decision was based on a revised view of Indian sovereignty in the United States. In light of the events that had taken place since his decision in *Johnson v. M'Intosh*, namely the Indian Removal Act and the attempts by the state of Georgia to dismantle the Cherokee nation, Marshall saw the error in his "discovery doctrine" decision. Proponents of Indian removal quoted Marshall's *Johnson v. M'Intosh* decision and it became the legal basis of the Indian Removal Act legislation.<sup>1</sup> If the tribes were nothing more than tenants on land owned by the United States, then why couldn't they be removed from that land by the states as rightful owners? This was the question that Marshall had to clarify by changing his interpretation of tribal sovereignty. Robertson argues that *Worcester v. Georgia* was an attempt by Marshall to reverse himself and prevent Indian removal. But ultimately that attempt would be unsuccessful. "Indeed, when given the first real opportunity to do so in *Worcester v. Georgia*, he reversed himself, a reversal the Court subsequently ignored. The discovery doctrine survived because it facilitated Indian removal."<sup>2</sup> In *Worcester v. Georgia*, Marshall's description of tribal sovereignty and from where it is derived is very different from his description in *Johnson v. M'Intosh*.

Chief Justice Marshall describes Indian tribes as completely sovereign in the *Worcester* case. He clearly adopts some of the language used by Justice Thompson in his

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<sup>1</sup> Robertson, *Conquest*, 128.

<sup>2</sup> *Ibid.*, 143.

dissent in *Cherokee Nation v. Georgia*.<sup>1</sup> The native inhabitants of America at the time of discovery did not give up their right to exist as a political association with the arrival of the “discovering” European settlers. Chief Justice Marshall describes the situation:

“This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquire legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.”<sup>2</sup>

The change in the Chief Justice’s conception of the rights and authority acquired by the discovering nation over the Indian tribes from *Johnson* to *Worcester* is subtle but carries with it massive ramifications. Marshall had previously stated in *Johnson v. M’Intosh* that:

“The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive

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<sup>1</sup> Deloria, Jr. and Lytle, *American Indians*, 32.

<sup>2</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 114.

right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.”<sup>1</sup>

On the one hand the Chief Justice expresses the idea that the title to Indian lands can be acquired by purchase or conquest (*Johnson v. M'Intosh*) while on the other hand he holds that the Indians have every right to their land unless are willing to sell it (*Worcester v. Georgia*). In *Worcester* Marshall implies that the Cherokee are not a conquered people that have forfeited their land to the state of Georgia, but a sovereign people with every right to their land. He changed his stance from one of discovery *conveying title* to Indian lands to a view that discovery gave the discovering nation a right to *negotiate* with the tribes for their land, a right that would pass to the federal government from the English government not to individual states. Chief Justice Marshall now seems to agree with Justices Story and Thompson's dissent in the *Cherokee Nation* case. He actually uses the same quote from Vattel that was used in Justice Thompson's dissent in *Cherokee Nation*, “A weak state, in order to provide for its safety, may place itself under the protection of a more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. ‘Tributary and feudal states,’ says Vattel, ‘do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state.’ At the present day, more than one state may be considered as holding its right of self-

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 65.

government under the guarantee and protection of one or more allies.”<sup>1</sup> Marshall holds that the state of Georgia has no right to interfere with the sovereign government of the Cherokee nation.

Marshall goes on to reinforce his view of tribal sovereignty in *Worcester v. Georgia* by pointing out the Treaty of Hopewell, the peace treaty made by Congress and the Cherokee to end hostilities after the revolution, was of mutual benefit and was developed and agreed to as sovereign to sovereign.<sup>2</sup> If the Cherokee Nation was a sovereign political entity which controlled the land that was agreed to by treaty, then it must still be so. If that status is to change it would fall under the federal government’s jurisdiction under the terms of the Constitution. Marshall writes 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 government of the Union.”<sup>3</sup> In *Worcester v Georgia* the Supreme Court found that the states could not interfere with the affairs of the Indian tribes, that was the jurisdiction of the federal government, as well as reinforcing the idea that negotiation (the treaty-making process) was the means by which interaction with the tribes was to take place:

“If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States. They interfere forcibly with the relations established

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 119.

<sup>2</sup> *Ibid.*, 115.

<sup>3</sup> *Ibid.*, 118.

between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.”<sup>1</sup>

Marshall’s court, in this case, found that Georgia could not enforce its laws in Cherokee territory. The Court ordered Georgia to reverse and annul the sentence of Samuel Worcester. But from a larger view the court had found that states could not interfere with the sovereignty of Indian tribes, therefore, Indian removal could not be enacted at the state level. Whether or not the state of Georgia, or the federal government for that matter, would recognize the decision made by the Court was in serious doubt at the time of the decision. If not for the nullification crisis of 1832, President Jackson would probably not have interfered in the matter and allowed Georgia to ignore the Court. However, to avoid a major crisis, the President negotiated the release of Worcester and backed the court’s decision. Although *Worcester v. Georgia* was a victory for Indian tribes, it was a short-term victory. The removal program would continue only if it would be the federal government and not the states that ultimately saw that the Indians were removed to the western territories. The American Indian tribes had been saved from persecution by the individual states, but their condition of reduced sovereignty as expressed in the Marshall trilogy still left them completely at the mercy of the federal government.

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 120.

## CHAPTER 3

### Congress Creates Policy

#### I. The End of Treaty Making

The Supreme Court's decisions in the Marshall trilogy left Indian affairs in the hands of the federal government alone. The tribes were now "domestic dependent nations"; they retained some sovereignty and their consent via treaty was still necessary to enact policy. However, Congressional power over Indian affairs continued to grow and on March 29, 1871 Congress ended the treaty making process all together.<sup>1</sup> From 1871 onward the relationship between the tribes and the federal government would be conducted by agreements ratified by both houses of Congress. The end of treaties demonstrates a further loss of sovereignty and political power for the tribes and an increase in federal power. It is at this point that the interaction between the federal government and the tribes ceased to resemble a government to government relationship. In *Cherokee Nation v. Georgia* Chief Justice Marshall wrote of Indian tribes that, "Their relation to the United States resembles that of a ward to his guardian."<sup>2</sup> These words would be used to demonstrate Congress' absolute power over tribes over the next century. By the first decade of the 20<sup>th</sup> century Congress would be said to have plenary or complete power over Indian tribes including the power to legislate tribes out of existence.<sup>3</sup> Congress would use this plenary power to enact sweeping policy in the area of Indian affairs beginning with the period known as Allotment and Assimilation (1871-

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<sup>1</sup> Cohen, *Federal*, 66.

<sup>2</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 105.

<sup>3</sup> Deloria, Jr. and Lytle, *American Indians*, 40.

1928), followed by Indian Reorganization (1928-1945), Termination (1945-1961) and eventually Self-Determination (1961-Present).

As the population of the United States began to grow and spread ever-further west, it became clear to many that the Indian tribes were an impediment that needed to be removed. Not many at the time believed that the tribes would be able to govern themselves in such a way as to be neighboring communities to white civilization. Felix Cohen describes the situation that led to the abolition of treaty making, “The advancing tide of settlement in the years following the close of the Civil War dispelled the belief that it would ever be possible to separate the Indians from the whites and thus give them an opportunity to work out their salvation alone. Assimilation, allotment, and citizenship became the watchwords of Indian administration and attacks on making treaties grew in force.”<sup>1</sup> The tide in Congress, and equally in the society that Congress represented, was toward dismantling tribal sovereignty and absorbing the tribes into “civilized society.”

The U.S. House of Representatives began to assert its power in the relationship between the federal government and the Indian tribes. Although the Constitution left treaty-making in the hands of the President and the Senate,<sup>2</sup> the feeling in the U.S. House was that if treaty-making was not the primary way to treat with the tribes, then they could assert their authority over Indian administration. States could not interfere with the relationship of the tribes and federal government, as Chief Justice Marshall found in the Cherokee cases; but if the House of Representatives could end treaty-making, then the states would have an increased political position in the creation of Indian policy. Treaties gave way to agreements which required ratification by both houses of Congress and this

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<sup>1</sup> Cohen, *Federal*, 66.

<sup>2</sup> The Constitution of the United States of America, Article 2, Section 2.

requirement is the only way that they differ from treaties according to Cohen.<sup>1</sup> However, some have argued that the usurpation of power by the House originally granted to the President and Senate by the constitution was illegal.<sup>2</sup> Additionally, it has been argued that the dismantling of the treaty-making process deprived from the tribes the degree of sovereignty that they are entitled to under the Constitution and the decisions of the Supreme Court up to that point. From the passage of the Appropriations Act of 1871 forward, Indian tribes are placed in a position of complete dependence on the U.S. government with very little ability to influence Congressional policy. DeLoria and Wilkins write that:

“After the disclaimer of treaty making in 1871, any previous constitutional protections for the Indians were no longer recognized. The doctrine of discovery, which justified the claims of the United States, was at that time nullified. Indians were made subjects of the country but had no rights and no standing to contest their change in status. Unfortunately there have been no corrective actions taken to remedy the situation. Indian tribes are still recognized as sovereigns by the United States, but they are deprived of the one power all sovereigns must have in order to function effectively – the power to say “no” to other sovereigns.”<sup>3</sup>

After the federal government put an end to treaty making in 1871 the Indian tribes in the United States found the struggle against the erosion of their sovereignty and the increase of Congressional power over their affairs more difficult than ever.

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<sup>1</sup> Cohen, *Federal*, 67.

<sup>2</sup> Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1996), 48.

<sup>3</sup> Deloria, Jr. and Wilkins, *Tribes, Treaties, Tribulations*, 70.

As the American colonists spread west and rubbed up against the Indian tribes with increased frequency and hostility the federal government found it necessary to regulate the affairs of tribes, even the internal affairs of tribes, without relying on the cumbersome, slow and sometimes unpredictable process of treaty making. The Supreme Court would again be asked to define the scope of federal power in Indian affairs. When the era of treaty making came to an end the Court would decide cases that would re-define the relationship between the American Indian tribes and the federal government during the second half of the 19<sup>th</sup> and early 20<sup>th</sup> centuries. Three of those crucial cases demonstrate the change in the Supreme Court's view of tribal sovereignty and the justification for the enormous increase in Congressional power in of Indian affairs.

## **II. *Ex Parte Crow Dog* (1883)**

In 1881, Crow Dog, a member of the Brulé band of the Sioux tribe, killed a tribal leader named Spotted Tail as a result of a factional conflict on a reservation.<sup>1</sup> Crow Dog was convicted of murder and sentenced to death but he argued that the United States had no jurisdiction over crimes committed by one member of a tribe against another of the same tribe on an Indian reservation. The case eventually made its way to the Supreme Court. *Ex Parte Crow Dog* was argued in 1883 and the Court's decision was an important reason why Congress passed the Seven Major Crimes Act of 1885.<sup>2</sup>

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<sup>1</sup> Jeffrey Ostler, *The Lakotas and the Black Hills: The Struggle for Sacred Ground* (New York: Penguin Group, 2010), 113.

<sup>2</sup> Judith L. Andress and James E. Falkowski, "Self -Determination: Indians and the United Nations: The Anomalous Status of America's 'Domestic Dependent Nations,'" *American Indian Law Review*, vol. 8, no. 1 (1980), 102.

Crow Dog had already been punished by the tribe on the reservation in the way that was customary at the time. His defense was based on the fact that only the Sioux tribe had the jurisdiction to punish him and not the district court in which he was convicted their judgment was therefore void.<sup>1</sup> The case, once again, revolved around the issue of tribal sovereignty. If American Indian tribes retained jurisdiction to govern their own internal affairs then the right to create laws and punish law-breakers was inherent in that sovereign jurisdiction.

The District Court that had convicted Crow Dog based their opinion that the U.S. government maintained jurisdiction over the Sioux tribe on the stipulations of a treaty ratified in 1868 and an agreement that was ratified in 1877. The Supreme Court found the language of the treaty and the agreement lacking in regards to the United States' ability to obtain control over the internal affairs of the tribe. The Court's decision draws upon earlier opinions like the *Worcester v. Georgia* decision written by Chief Justice Marshall; the Indian tribes maintain their sovereign status and their ability to govern themselves despite being at a political disadvantage to the United States. The *Ex Parte Crow Dog* decision states that, "To give the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time."<sup>2</sup>

The Court found that the United States did not have the jurisdiction to try and punish Crow Dog. Like the Marshall Court it held that tribes were political entities that were not

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 153.

<sup>2</sup> *Ibid.*, 156.

completely subject to the United States government. The decision would lead Congress to take stronger action in an attempt to gain control over tribal affairs and secure the upper hand in the political relationship between the tribes and the federal government. It should be noted that the Supreme Court referred to the superiority of the white race over the red man in its decision and that line of reasoning would be at the heart of the disastrous policies of the federal government during the period of allotment and assimilation which will be discussed in detail below. The decision states, “It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by the superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their savage nature; one which measures the red man’s revenge by the maxims of the white man’s morality.”<sup>1</sup>

### **III. *United States v. Kagama* (1886)**

When Congress put an end to the treaty making process in 1871 it fundamentally changed the relationship between tribes and the federal government. Congressional legislation became more far reaching in Indian affairs and beyond the original intention of the U.S. Constitution. Indian law scholar N. Bruce Duthu writes that the result of the 1871 act created a paradox in which the government both recognized and diminished the sovereignty of the Indian tribes.<sup>2</sup> “Additionally, by unilaterally altering the rules of engagement between the federal government and Indian tribes, Congress claimed a prerogative to legislate in Indian affairs in a manner that was disconnected both from the

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 156.

<sup>2</sup> Bruce N. Duthu, *American Indians and the Law* (New York: Viking, 2008), 169.

literal language of the Constitution and from long-standing federal practice.”<sup>1</sup> In response to the Supreme Court’s *Ex Parte Crow Dog* decision Congress enacted the Seven Major Crimes Act in 1885 as a part this new prerogative to legislate in Indian Affairs. The following year the Supreme Court would hear a challenge to the law from tribal members of the Hoopla Valley Reservation.

The tribe maintained that the Congress of the United States did not have the jurisdiction to pass such sweeping legislation on Indian Territory. The argument was based around the wording in the Constitution giving Congress the ability to regulate commerce with Indian tribes. The tribe felt that the passage of laws regulating crime and punishment on Indian reservations was beyond the limits of the Congressional power to regulate commerce. The Court agreed with the tribe regarding the commerce clause, but still held that Congress could in fact pass legislation governing the internal affairs of Indian tribes. The Court’s decision regarding the commerce clause states:

This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under this provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of

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<sup>1</sup> Duthu, *American Indians*, 169.

commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.”<sup>1</sup>

The Constitution then does not provide for the type of legislative control over Indian affairs that Congress was asserting and has asserted since. Instead the basis for such power was again to be found in Justice Marshall’s conception of the discovery doctrine from *Johnson v. M’Intosh*. The Court in *United States v. Kagama* explained that the discovery of America by Europeans and gave the ultimate title to all lands therein to the discoverer and eventually the United States as inheritors of that title.<sup>2</sup> The Court recognized the inherent sovereignty of the tribes to govern themselves, but continued to borrow from Justice Marshall; this time from his declaration of tribes as domestic dependent nations. Because the tribes were dependent on the United States, Congress has the power to regulate their affairs. The court asserted that, “From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, wherever the question has arisen.”<sup>3</sup>

The logic of the Court seems to be that the discovery of North America gave the discoverers the right to the land occupied by the Indian tribes, but the tribes maintain sovereignty and the ability to govern themselves until they begin making treaties, which exposes their weak state, a state so weak that they become dependent on the federal government, this dependency allows for the federal government to do away with treaties

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 159.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

altogether and begin legislating the internal affairs of the tribes. N. Bruce Duthu sums up the Court's opinion as, "In essence, the Court ruled that the only constitutional provision expressly enumerating Congress's powers in Indian affairs did not authorize that body to write a law governing the internal affairs of the Indian tribes. Nonetheless, the Court upheld the law as an appropriate exercise of Congress's guardianship authority over Indian people and tribes. The Court essentially gave Congress a blank check to legislate in Indian affairs when it declared Congress free from the constraints of the Constitution in this particular context."<sup>1</sup> The door was now open for Congress to enact sweeping legislation and completely change the nature of the relationship between American Indian tribes and the United States government. The Constitution was not the basis for the discovery doctrine, which gave the United States ultimate title to all land on the continent, nor was it the basis for Congressional power over Indian affairs; instead the chance circumstances of discovery and the weak political and military state of the tribes authorized Congress' power.

#### **IV. *Lone Wolf v. Hitchcock* (1903)**

Congressional power in Indian affairs has been characterized as plenary or absolute and unqualified.<sup>2</sup> This expression of the absolute authority of Congress was first used in the Supreme Court decision in the case of *Lone Wolf v. Hitchcock* in 1903. The case was brought before the court to decide whether or not Congress had the power to pass legislation that violated terms of a previously ratified treaty or agreement. "The federal government in *Lone Wolf* attempted to obtain 2.5 million acres of Kiowa,

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<sup>1</sup> Duthu, *American Indians*, 169.

<sup>2</sup> Deloria, Jr. and Lytle, *American Indians*, 40.

Comanche, and Kiowa-Apache lands. The Jerome Commission, sent to negotiate with the tribes, was unable to obtain the approval of three-quarters of the adult males of the tribes as required by an 1867 treaty. The Senate, nevertheless, acting as if it had received the tribe's consent, passed an act that varied considerably from the original agreement made by the tribe."<sup>1</sup> The Court would have to decide if Congress was bound by the treaties that the federal government made with the tribes or if Congress could simply abandon inconvenient treaty stipulations and enact legislation as it saw fit without regard to prior agreements and/or treaties.

In *Lone Wolf* the Court found that Congress could in fact enact legislation that violated agreement terms or abrogated treaties because of its duty to protect their wards. During the Allotment and Assimilation era the acquisition and parceling out of Indian lands was seen as a benefit to the tribes on the road to "civilization". If a treaty was seen as hindering that process Congress could simply pass legislation to get around the terms of the treaty. The decision in *Lone Wolf* justified enormous power for Congress and weakened the political position of Indian tribes drastically leading some to term the *Lone Wolf* decision as the opening of the floodgates.<sup>2</sup> The federal government would no longer need the consent of the tribes to acquire their lands.

The Supreme Court decision was written by Justice Edward D. White. Justice White begins his decision by stating that limiting Congress to actions that fell within the bounds of treaties or agreements would be too strict and would limit the government's ability to protect the Indian tribes.<sup>3</sup> Building on the *Kagama* decision the court finds that

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<sup>1</sup> Deloria, Jr. and Lytle, *American Indians*, 43.

<sup>2</sup> Duthu, *American Indians*, 75.

<sup>3</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 182.

Congress' ability to enact legislation affecting the Indian tribes proceeds from its duty as protector of the tribes not from the constitution or from the treaties and agreements (consent) of the tribes. Although the Court recognized that past Supreme Court decisions held that treaties made with the Indians were "sacred", Congressional power to abrogate those treaties was always inherent.

The Court goes further and adds that not only does congress have the power to abrogate treaties with the tribes, but there is essentially no check on that power. Congressional power over Indian affairs is not only extra-Constitutional but is virtually unlimited. Justice White writes that, "Plenary power over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."<sup>1</sup> The Court somewhat surprisingly limits itself from interfering with Congressional policy; judicial review is essentially nullified in cases dealing with Indian land cases. The only check on Congress' ability to abrogate treaties is what's termed "good-faith". The Lone Wolf decision states, "When, therefore treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith toward the Indians."<sup>2</sup> But good-faith alone, without judicial review, is hardly enough to ensure justice between two political entities in the federal system. As a result of the Lone Wolf decision Congressional power grew to an unprecedented level while tribes were left with very little protection under the law.

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 183.

<sup>2</sup> *Ibid.*

## V. Allotment and Assimilation (1871-1928)

The allotment and assimilation era of Indian law began with the end of treaty making in 1871. The speed with which the nation was growing and the need for more and more land was insatiable. The Indian tribes controlled vast tracts of land, particularly in the west, and the pressure on government officials to wrest that land from the “savages” was enormous. As we have seen Congressional power in Indian affairs grew greatly during this time period. With the power to enact sweeping legislation in Indian Territory came the responsibility to develop policy that was productive both for the United States and the Indian tribes. Policy during this period revolved around gaining access to Indian lands for settlers and assimilating Indian populations into white society.

During this era the U.S. government gained control over a huge portion of land previously held by the Indian tribes and destroying the social, cultural, and political unity of many of the tribes along the way. N. Bruce Duthu writes that, “The allotment policies of the late nineteenth century wreaked havoc on the territorial integrity of tribal homelands, with Indian land holdings falling from about 138 million acres in 1887 to about 48 million acres in 1934, the year congress ended the allotment system. Tribes faced immense pressure from the federal government during this period to cede lands to accommodate white settlers moving into territories promised to Indian tribes.”<sup>1</sup> Because allotment and assimilation policies were developed and enacted quickly and without any real input of the tribes, the negative effects on the American Indians was severe and widespread. Although the reservation system and assimilation policies may have been put in place with the best interest of the tribes in mind, which is of course arguable, the

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<sup>1</sup> Duthu, *American Indians*, 75.

policies were culminated in a cultural and political disaster for American Indians. By the end of the Allotment and assimilation era tribes would be at the mercy of Congressional legislation for their very existence with very little legal protection.

On February 8, 1887 President Cleveland signed the Dawes Act, also known as the General Allotment Act. *The Handbook of Federal Indian Law* describes the Act:

“The chief provisions of the act were: (1) a grant of 160 acres to each family head, of 80 acres to each single person over 18 years of age and to each orphan under 18, and of 40 acres to each other single person under eighteen; (2) a patent in fee to be issued to every allottee but to be held in trust by the government for 25 years, during which time the land could not be alienated or encumbered; (3) a period of 4 years to be allowed the Indians in which they should make their selections after allotment should be applied to any tribe – failure of the Indians to do so should result in selection for them at the order of the Secretary of the Interior; (4) citizenship to be conferred upon allottees and upon any other Indians who had abandoned who had abandoned their tribes and adopted “the habits of civilized life.”<sup>1</sup>

The objective of the Dawes Act was to divide tribal property into lots small enough to be farmed by a single family thus accomplishing the goal of trimming down the total size of reservations leaving the “excess” land in the hands of the government to be handed out to white settlers and to “civilize” the Indians by turning them into farmers. After 25 years the

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<sup>1</sup> Cohen, *Federal*, 208.

Indian would own his property free and clear. Proponents of the Act believed land ownership by individuals would solve all problems. “Private property, they believed, had mystical magical qualities about it that led people directly to a “civilized state.”<sup>1</sup> The Dawes act would also break the coherence and consistency of tribal life which was viewed as detrimental to the Indians. “The Supreme aim of the friends of the Indian was to substitute white civilization for his tribal culture, and they shrewdly sensed that the difference in the concepts of property was fundamental in the contrast between the two ways of life. That the white man’s way was good and the Indian’s way was bad, all agreed.”<sup>2</sup>

Unfortunately the Dawes Act failed to solve the “Indian problem.” The break-up of tribal culture meant the break-up of families in many instances and the loss of cultural identity. Many Indian children were sent off to boarding schools to be assimilated to white culture. Also, becoming a farmer as not as easy it may seem. Often proper equipment and funds to adequately adopt a farming life were lacking. Changing the habits and customs of centuries cannot happen overnight especially when it’s forced and not chosen. The goal of acquiring more land for white settlers and removing some of the impediments to western settlement through the downsizing of reservations was not successful either. Some tribe members sold their land while others maintained theirs creating a problem known as checker-boarding; a piece of land owned by a white settler

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<sup>1</sup> Deloria, Jr. and Lytle, *American Indians*, 9.

<sup>2</sup> Cohen, *Federal*, 208.

might be bordered on 2 or 3 sides by Indian Reservation land blurring the lines of government jurisdiction and creating other legal problems.<sup>1</sup>

Of course not everyone who was a “friend of the Indian” was a proponent of the General Allotment Act. Senator Henry M. Teller of Colorado spoke out many times against the enactment of allotment legislation. Senator Teller implored, “If I stand alone in the Senate, I want it put upon the record my prophecy in this matter, that when 30 or 40 years shall have passed and these Indians shall have parted with their title, they will curse the hand that was raised professedly in the defense to secure this kind of legislation and if the people who are clamoring for it understood Indian character, and Indian laws, and Indian morals, and Indian religion they would not be here clamoring for this at all.”<sup>2</sup> Senator Teller did have some skill in prophecy, by the 1920’s the allotment and assimilation policies of the United States had fallen out of favor and were generally thought of as a complete failure. In 1928 a government study into the economic and social status of the Indians showed the appalling state of affairs left by allotment legislation. With the election of FDR in 1933 a major policy change was imminent and in June of 1934 Congress passed the Indian Reorganization Act.

## **VI. Indian Reorganization (1928-1945)**

The release of the government sponsored research study title *The Problem of Indian Administration* was released in 1928 it was clear that the government needed a new strategy in Indian affairs. The report, “...called for radical revisions in almost every

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<sup>1</sup> Deloria, Jr. and Lytle, *American Indians*, 70.

<sup>2</sup> Cohen, *Federal*, 209.

phase of Indian affairs, including the appropriation of considerably more funds.”<sup>1</sup> The Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, was a New Deal program introduced by the Roosevelt administration that intended to meet the demands of those calling for radical reform. Part of the government’s new strategy would be involving the Indian tribes in the legislative process as opposed to the allotment policies of the past which imposed the governments will on tribes in a forced assimilation program. The tribes were invited to provide their input in developing a new strategy.

When the provisions of the act were finalized the government’s policy ended allotment and began an era in Indian relations of a significant move toward self-government. Respect of Tribal sovereignty and the culture of the Indian tribes were hallmarks of the new policies. The Wheeler-Howard Act was meant to be a complete turnaround from allotment era policies, the thrust of which was to, “...undermine the tribal sovereignty principles of the Marshall trilogy.”<sup>2</sup> A century after Chief Justice Marshall handed down his decisions in *Johnson v. M’Intosh* and the Cherokee cases, the federal government was still trying to define the extent to which tribes should be allowed to determine their own fates. The Wheeler-Howard Act was meant to be a huge step forward in *bringing* American Indian tribes down the road to self-sufficiency.

The end of allotment era legislation was a victory for the Indian tribes. Provisions of the act ended the parceling out of land, allowed the individual tribes to vote on whether or not to enact the legislation on the reservations, enabled the tribes to organize a government, create a constitution and by-laws specific to their communities and to, “...prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands,

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<sup>1</sup> Deloria, Jr. and Lytle, *American Indians*, 12.

<sup>2</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 186.

or other tribal assets without the consent of the tribes; and to negotiate with the Federal, State, and local governments...”<sup>1</sup> Overall the act provided more resources and more authority to tribal governments for the management of their internal affairs.

Indian reorganization under the Wheeler-Howard Act was not without its problems, however. The authors of *Cases and Materials on Federal Indian Law* write that, “Modern-day critics of the IRA contend that in many ways, the goals of the IRA era reforms ultimately were not all that different from the goals of previous Indian policies. The IRA was yet another incorporative program, established through policies designed by non-Indians.”<sup>2</sup> Though the act’s goals were, at least partially, designed to allow for Indian tribal government to have more control over their internal affairs, in reality Congress and the Executive through the Department of the interior still had great power over Indian tribal policies. Many tribes never even implemented the IRA provisions on the reservation. Some scholars believe that the cultural cohesiveness necessary to implement tribal self-governing provisions of the IRA had been destroyed by the Allotment policies of the previous decades making it impossible to fully realize the potential of the IRA for many of the nation’s Native Americans. Vine Deloria and Clifford M. Lytle contend that:

“The era of allotment had taken a heavy toll on the tribes. Many of the old customs and traditions that could have been restored under the IRA climate of cultural concern had vanished during the interim period since the tribes had gone to the reservations. The experience of self-government according to Indian traditions had eroded and, while the new constitutions were akin to the traditions

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 191.

<sup>2</sup> *Ibid.*, 188.

of some tribes, they were completely foreign to others. The new constitutions called for election of council members and were based on the old “boss farmer” districts, which had been drawn when the allotment policy dictated that the Indians would be taught to farm. Familiar cultural groupings and methods of choosing leadership gave way to the more abstract principles of American democracy, which viewed people as interchangeable and communities as geographical marks on a map.”<sup>1</sup>

The damage had been done by past policies of the federal government; some of that damage was irreparable despite good intentions. Congress and the federal government had gained great power in the administration of Indian affairs over the centuries but the proper or most effective way to wield that power was not yet perfected. The federal government’s Indian policies would continue to fluctuate for the foreseeable future.

## **VII. Termination (1945-1961)**

By the end of World War II another wholesale change in Indian policy was deemed necessary. Once again the federal government would back track into policies resembling the allotment and assimilation era. In 1945 John Collier, the architect of the IRA legislation, was accused of socialist tendencies and decided to resign.<sup>2</sup> The popular notion in the federal government was to cut cost in Indian affairs by terminating tribes from the federal register forcing immediate assimilation into American society. Deloria and Lytle write that:

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<sup>1</sup> Deloria, Jr. and Lytle, *American Indians*, 15.

<sup>2</sup> *Ibid.*, 16.

“A strange coalition of forces now called for the unilateral termination of federal assistance to Indians: conservatives wanted the federal budgets cut and deeply believed that the Indians, once freed from government restrictions, would experience a much more profound reawakening; liberals now ashamed to realize that some of America’s laws were reminiscent of the racial restrictions imposed on minorities by the Axis powers. Whom they had recently defeated, sought immediate release of America’s racial minorities from the onerous burden of discriminatory legislation.”<sup>1</sup>

The attitude of the federal government toward American Indian tribes had once again shifted away from respect for tribal sovereignty. The Republicans took control of Congress and the Presidency in 1953 and set about introducing new legislation designed to undermine tribal government in favor of increased state control over American Indians.

The first Congressional action was House Concurrent Resolution 108 (67 Stat. B132) introduced by Representative William Henry Harrison of Wyoming. The resolution did not in itself create any new laws but signaled a shift in government policy. Interestingly there was very little opposition and hardly any debate at all.<sup>2</sup> The act paved the way for future termination legislation that began in 1954. It should be noted that the dramatic change in Indian policy came without regard to any academic studies which could easily have served as expert testimony to the proposed change in Indian policy and the effects of that change. “The massive record of testimony on the termination bills is perhaps most surprising for what it fails to contain. In more than 1,700 pages of

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<sup>1</sup> Deloria, Jr. and Lytle, *American Indians*, 17.

<sup>2</sup> *Ibid.*, 18.

testimony there is no statement by a sociologist, an anthropologist, a social worker, or anyone else trained in the social sciences.”<sup>1</sup> The plenary power of Congress was exercised with very little debate or oversight. The tribes that were affected by termination legislation would pay dearly, losing everything that made them tribes at all including recognition by the federal government.

The legislation enacted during the termination era all had common provisions which included:

1. Fundamental changes in land ownership patterns were made.
2. The trust relationship was ended.
3. State legislative jurisdiction was imposed.
4. State judicial authority was imposed.
5. All exemptions from state taxing authority were ended.
6. All special federal programs to tribes were discontinued.
7. All special federal programs to individuals were discontinued.
8. Tribal sovereignty was effectively ended.<sup>2</sup>

Essentially the relationship between the federal government and the American Indian tribes that had existed since the founding of the United States was to be extinguished altogether representing a massive change in government policy and legal tradition.

Fortunately for most of the American Indian tribes termination policies never directly reached their reservations. The era of termination did strike fear into the heart of Indian country however and demonstrates a warning for future generations about the ability of the federal government to fundamentally change the relationship between

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 203.

<sup>2</sup> *Ibid.*, 206-207.

Indian tribes and the federal government on a dime with its expansive power. In the end only 109 tribes and bands were terminated, just over 1.3 million acres of land and 11,466 individuals were affected; a total of 3.2 percent of Indian trust land.<sup>1</sup> The larger and more politically savvy tribes were able to navigate the rough political waters of the termination era without significant loss of land and rights. The real significance of the era of termination is the complete disregard for tribal sovereignty and the desire to retrace the steps of allotment and assimilations which demonstrates the inconsistency of U.S. government policy toward the American Indian tribes.

### **VIII. Self-Determination (1961-Present)**

The destructive policies of the termination era galvanized tribal governments and their supporters to work hard to change the federal government's stance on Indian policy. Throughout the late 50's and 60's Indian tribes worked with government officials to create a political atmosphere more favorable to the interests of American Indians and their governments. The termination program was eventually defeated through a concerted effort by groups like the National Congress of American Indians (NCAI).<sup>2</sup> The tribal groups eventually found allies in Washington who saw the error in the termination policies of the past and wanted to institute more efficient and effective programs. State governments also began to favor a change in policy as they realized the difficulty of taking on the responsibilities that had previously fallen under federal jurisdiction.<sup>3</sup>

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 205.

<sup>2</sup> *Ibid.*, 217.

<sup>3</sup> *Ibid.*

Lyndon Johnson's Great Society Program in the 1960's was the first expression of the government's change in ideology regarding Indian affairs.

It was the election of Richard Nixon to the Executive office that officially put an end to the failed policies of the termination era however. In a speech delivered to Congress in 1970 President Nixon laid out the course of action for what would become known as the era of Indian Self-determination. The President's speech was titled *Message From The President of the United States Transmitting Recommendations For Indian Policy* and it began by stating:

“It is long past time that the Indian policies of the federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”<sup>1</sup>

The President's speech called for Self-determination without termination; he called the policy of forced termination, “wrong, in my judgment.” He called upon Congress to reject termination programs and to reject the idea that the government should run support programs like hospitals and schools instead of the tribes themselves. Nixon stated that the tribes should not, “lose federal money because they reject federal control.”<sup>2</sup> The old argument for respecting tribal sovereignty was again in favor over increasing federal control in Indian country. Through the federal government's change in attitude the

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<sup>1</sup> Getches and Wilkinson, and Williams, Jr., *Cases and Material*, 218.

<sup>2</sup> *Ibid.*, 219.

American Indian tribes benefitted greatly. Deloria and Lytle write that, “In spite of a brief fling with termination of federal supervision, tribal governments emerged in the closing decades of the twentieth century in a much better position and with higher status than they had entered it.”<sup>1</sup>

Much federal legislation beneficial to the Indian tribes has been passed in the decades of self-determination including: The Indian Child Welfare Act of 1978, The American Indian Religious Freedom Act of 1978, the National Indian Forest Resources Management Act and the Tribal Self-Governance Act of 1994. Recently President Obama signed into law the violence Against Women Reauthorization Law of 2013 which provides “Increased protections for Native American Women and other victims previously left vulnerable by gaps in the law.”<sup>2</sup> The President also made a reversal of Bush Administration policy and under his leadership the United States became the last nation to drop its opposition to the United Nations Declaration on the Rights of Indigenous Peoples in 2010.<sup>3</sup> The increased level of political sophistication of tribal governments, particularly in the lobbying process, as well as an increased awareness by citizens and government officials about the importance of cultural diversity and the right to self-government have helped create many improvements in the relationship between Indian tribes and the federal government in the last century. However, the question

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<sup>1</sup> Deloria, Jr. and Lytle, *American Indians*, 24.

<sup>2</sup> The White House, “President Signs 2013 VAWA – Empowering Tribes to Protect Native Women,” <http://www.whitehouse.gov/blog/2013/03/07/president-signs-2013-vawa-empowering-tribes-protect-native-women> (accessed March 20, 2013).

<sup>3</sup> Valerie Richardson, “Obama adopts U.N. manifesto on rights of indigenous peoples,” *The Washington Times*, December 16, 2010, <http://www.washingtontimes.com/news/2010/dec/16/obama-adopts-un-manifesto-on-rights-of-indigenous-/?page=all> (accessed March 8, 2013).

remains whether more needs to be done to protect and empower tribal sovereignty in the future.

## **PART II**

## CHAPTER 4

### **Exploring the Political Position of American Indian Tribes: Are Fundamental Changes in the Tribal/Federal Government Relationship Necessary?**

The political relationship between the American Indian tribes and the government of the United States is complex and unique. In order to define the foundation and extent of that relationship we must take into consideration the changing circumstances of history and the development of American society and the Indian tribes within that unsteady context. In fact, change is probably the word that best describes the political relationship between the tribes and the federal government over the past two centuries. Interaction between the United States and the American Indian tribes has been based on treaties and the doctrine of discovery, to agreements and plenary power; from the sanctity of tribal sovereignty to domestic dependent nations and from assimilation to self-determination. But what makes stable and coherent policy impossible in Indian affairs in the United States? Why does policy seem to shift every generation or with every change in regime?

Ultimately the answer to these questions seems to be a lack of a Constitutional basis for the nature of the relationship between the United States and Indian tribes. Without that beginning point, that unquestionable definition of the proper place of the Indian tribe in the federal system of the U.S. or the limits of federal power over the tribes, policy will continue to oscillate with the particular circumstances of a given era. The chosen course of action for American Indian law will continue to be a shot in the dark made in accordance with social and cultural prejudices of a given generation without any baseline of unquestioned principles. A Constitutional definition of the scope of federal powers in relation to Indian tribes would provide that baseline. The political situation of the American Indian tribes is a precarious one. It is a situation unlike other areas of

American law. For example, individual states are allowed representation in both houses of Congress, a principle that would never be considered up for debate. The Constitution clearly outlines the extent to which states are sovereign and beyond the scope of federal power; the Constitution lacks such clarity in regards to Indian tribes. Laws that proceed from principles outside of the Constitution can be dangerous and the justness of those laws cannot be easily quantified. Just laws are most easily recognized when they proceed from a starting point that most would agree is just and timeless, not from principles that seem to slant the rules of the game for one side over another or are likely to change at any given time.

Chief Justice Marshall's decision in *Johnson v. M'Intosh* sets the foundation of American Indian law on unstable and arguably unjust grounds. Marshall's discovery doctrine subverts the idea that all peoples have an interminable right to govern themselves in the lands that they consider home. By basing the American government's right to Indian lands on an unsound principle of the superiority of western civilization over the civilizations that were "discovered," the relationship between tribes and the federal government was unjust from the start. In my opinion the discovery doctrine, to borrow a phrase from Chief Justice Marshall, is "repugnant to the constitution" (*Worcester v. Georgia*). The principles of self-government for all men are necessarily hindered by a doctrine that suggests that some societies deserve to be free to govern themselves and retain their sovereignty while others are left completely at the mercy of others.

Lindsay G. Robertson concludes that, "Discovery converted the indigenous owners of discovered lands into tenants on those lands. The underlying title belonged to

the discovering sovereign. The indigenous occupants were free to sell their ‘lease,’ but only to the landlord, and they were subject to eviction at any time. More than 180 years later, the discovery doctrine is still the law.”<sup>1</sup> This assessment of the discovery doctrine demonstrates the political inferiority of the Indian tribes in relation to the United States government from very early on. Thus tribal sovereignty was diminished if not completely nullified. The federal government has wrestled with the question of the extent of tribal sovereignty from the time of *Johnson v. M’Intosh* to the present. Do tribes have the right to govern themselves? And if so, then to what extent does the federal government have any power over tribal affairs.

These questions have never completely been answered. In fact, the history of tribal/federal government relations is really the story of oscillation between respect for tribal sovereignty and the increase of federal power to a plenary or absolute level. Chief Justice Marshall himself realized the difficulty in reconciling these contentious ideals. By the time he issued the Supreme Court’s judgment, in *Worcester v. Georgia*, he was already favoring the sanctity of tribal sovereignty over the principals outlined in the doctrine of discovery. Thus it’s clear that basing Indian law in principles found outside of those expressed in the Constitution caused major problems from the beginning.

The Constitution does address the relationship between Indian tribes and the federal government in Article 2, Section 8 (The Commerce Clause). That article states that “The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” A strict reading of this clause demonstrates that Indian tribes are to be regarded with some degree of irrevocable

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<sup>1</sup> Roberston, *Conquest*, X.

sovereignty as are both states and foreign nations. The expanse of federal power into the domain of tribal affairs such as the 7 Major Crimes Act, as expressed in *U.S. v. Kagama*, seems to be a stretch of the powers enumerated by the Commerce Clause. Therefore, the Court was forced to rely on the principles of the discovery doctrine to justify the enormous plenary power of Congress expressed in *Lone Wolf v. Hitchcock*.

The end of treaty making in 1871 and the beginning of what was essentially unilateral legislative action without input or representation of the American Indians themselves absolutely disregarded the principles set forth in the American founding. The fact that the United States could pass such broad and sweeping legislation, affecting such a large number of people, has had disastrous results. The failed policies of allotment and assimilation, as well as termination were a direct result of majority oppression of minority rights in direct conflict with the Constitution and the principles expressed in *The Federalist Papers*. Madison writing as Publius in Federalist X addressed the importance of protecting minority rights from majority oppression. He states,

“By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and

violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.”<sup>1</sup>

In Federalist X, Madison’s cure for majority oppression of minority rights is a republican form of government. Unfortunately for the American Indian tribes, the end of treaty making diminished their sovereignty and ability to negotiate with the federal government as one nation to another nation. However, the small amount of sovereignty that the tribes are said to maintain in American Indian law prevents them from having real representation in the federal government, i.e., members of the House of Representatives and/or Senate. The grey area that the American Indian tribes find themselves in does not contain Constitutional checks on federal power. If the American Indians are a part of the United States, then they deserve political power akin to states or at the very least some representation in Congress. If they are foreign governments, then they deserve the respect that comes through the treaty-making process and recognition as such from the United States government and international political bodies such as the United Nations.

It’s this dilemma that has led some scholars to suggest major reform to American Indian policy in the United States. Some have suggested a return to the treaty making process as it is the only legitimate form of negotiating between the tribes and the federal government that can be traced back to the Constitution or international law.<sup>2,3</sup> Prior to the American founding, treaty making was the accepted form of interaction between Indian tribes and the European governments. Nothing about the commerce clause of the

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<sup>1</sup> Madison, Hamilton, and Jay, *The Federalist Papers*, 125-126.

<sup>2</sup> Deloria, Jr. and Wilkins, *Tribes, Treaties, and Tribulations*, (Austin: University of Texas Press, 2000).

<sup>3</sup> Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*, (Austin: University of Texas Press, 1996).

Constitution seems to indicate a major change in that interaction. Therefore, barring Chief Justice Marshall's incorporation of the discovery doctrine into American law, there is no legal basis for the enormous power that the federal government claims over Indian tribes. The Chief Justice himself did not intend for such power to be attributed to the federal government when he made his decision in *Johnson v. M'Intosh* as we can see by his espousal of the sanctity of tribal sovereignty in *Worcester v. Georgia*.

Without formal representation in Congress, including a constitutional amendment guaranteeing tribal sovereignty, or a return to treaty making, the tribes can have no assurance that their ability to exist (let alone thrive) will be maintained in perpetuity. The policies of the United States toward American Indian tribes will continue to be determined by chance and circumstance, rather than sound legal principles based upon justice and the rights of societies to representative governments regardless of race or military power. A solution to the problems presented above might be the complete incorporation of American Indian tribes into the federalist system, complete with formal representation in both Houses of Congress via Constitutional amendment. Amending the Constitution to define the status of American Indian tribes and guaranteeing their ability to exist and to check attacks on their sovereignty would prevent potentially disastrous policy changes within the United States government that would endanger or eliminate American Indian tribal governments. The 13<sup>th</sup> Amendment eliminates slavery and the 19<sup>th</sup> Amendment ensures that women have a voice in American society; these are issues that obviously cannot be left to the whims of states or individual generations. There are political issues in the United States that stand as an affront to the spirit of the Constitution and to human rights although they are not always recognized as such. The politically

vulnerable status of the first Americans is one such issue. The relationship between American Indians and the United States government deserves to be established explicitly in the fabric of the Constitution and not left to interpretation or prejudice.

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