

THE MARSHALL TRILOGY AND THE CONSTITUTIONAL DEHUMANIZATION OF AMERICAN INDIANS

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ABSTRACT

This article argues that the trio of early 19th century opinions written by Chief Justice John Marshall that greatly limited tribal sovereignty should be seen within the context of the Supreme Court's tendency to periodically play amateur anthropologist and hear cases that require it to determine whether a particular sector of the American population is fully human under our law. Unlike other racial and biological groups the Court has sought to legally dehumanize, the basic holdings of the Marshall Trilogy have never been overturned and the blatant racism at the heart of these cases has never been adequately redressed.

*“What law have I broken? Is it wrong for me to love my own?
Is it wicked in me because my skin is red?”*

--*Sitting Bull* (Johnson 1891, 201)

“Nits make lice.”

--*Col. John Chivington*¹ (Brown 2001, 90)

I. THE COURT AS PERSON-DEFINER

While it is too simple to say that racism was the sole cause of the conquest and subjection of the North American native population, it was certainly at the heart of it, just as racism was not the sole cause but was nonetheless at the heart of the antebellum slave system. There was an attitude of greedy supremacy behind Indian land snatching just as there was behind the intercontinental slave trade. And just as the south's “peculiar institution” had a U.S. Supreme Court case, *Dred Scott v. Sandford* (60 U.S. 393 1856), in which the court dehumanized an entire race of people by affirming and promoting bigoted legal doctrines, so did the system of expropriating Indian territories--three cases, in fact. This article seeks to explain these three cases within the context of the court's historical role of defining who is and is not (or what divisions of the human species are or are not) persons under the fundamental law of the land, the U.S. Constitution.

A few times each century, it seems, The Supreme Court really does transcend its role as a judicial tribunal and, by dint of the extraordinary constitutional issues of the cases at bar, finds itself ruling as aspiring philosopher kings. These can be dangerous moments for our republic. Oftentimes these cases involve a decision about whether a particular sector of our population—a particular racial or biological category of person—is fully human for purposes of protection under our constitution. These are cases in which the court is not judging a person's actions but instead whether the constitution recognizes the members of certain groups as persons at all. The aims of this chapter are modest. They

1 Col. Chivington led the notorious 1864 massacre at Sand Creek.

are only to demonstrate that such cases periodically occur and that when they do the most basic rights of an entire group of persons can be placed in jeopardy.

When in 1857 the court declared in *Dred Scott* that, because of their race, African Americans are incapable of becoming U.S. citizens and are so “inferior that they had no rights which the white man was bound to respect” the court was not just making a legal determination. It was making a pseudo-anthropological (and diabolically philosophical) statement on what, exactly, it means to be fully human. Along with so many other questions central to America’s identity as a nation, the merits of *Dred Scott* were ultimately re-argued on the battlefield of The Civil War. With the defeat of the confederacy, the core holdings of this case, for which the court will forever live in infamy, were quickly repealed with the passage of The Thirteenth, Fourteenth and Fifteenth Amendments.

The court rendered a similarly dehumanizing (though less infamous and politically combustible) race-based ruling in 1944 with *Korematsu v. U.S.*, (323 U.S. 214 1944). Here the court upheld the military’s race-based policy of interning 110,000 Japanese-Americans and Japanese nationals living in America, including children, in contravention of their most fundamental rights. The court reasoned that because of the pressing need to win the war with imperial Japan and the diversion of governmental time and resources enforcing due process of law would require, the clause in the Fifth Amendment which reads “[N]or shall any *person* . . . be deprived of life, liberty or property without due process of law”² was to be suspended for this racial group. In other words, it was the court’s judgment that, because the government could not be bothered to find and legally prosecute actual traitors and subversives, all members of that racial group, however innocent, would be treated as if they were among the guilty. Racially, Japanese Americans had effectively been deemed a kind of lower-order person to whom the protections of the constitution did not apply. As a constitutional matter, *Korematsu* is still good law and in its most vital aspects will remain with us, it seems, in perpetuity. It is a constitutional tragedy uniquely immune from our political system’s two usual methods of reversing bad constitutional decision-making by the court: 1) passage of a constitutional amendment or 2) a rehearing by the court.³ This is because rights are usually won or lost when the court classifies them as either fundamental (i.e., “of the very essence of a scheme of ordered liberty” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) or non-fundamental. When the right the government seeks to abridge is deemed fundamental the government must meet the extremely high burden of showing that the abridgement of that right is narrowly tailored to meet a compelling state purpose and that the government action or statute is the least restrictive means of achieving serving that purpose.⁴ It is a nearly impossibly high burden.

2 (emphasis added). The Constitution is a document containing its share of tragedy and farce and its use of the word “person” is both tragic and farcical. Slaves in America were, of course, legally regarded as property. Slavery is referred to three times in the Constitution: in the Three-fifths Clause, the Importation Clause and the Fugitive Slave Clause; but never by name. U.S. CONST. art. I, § 2 cl. 3; U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. art. IV, § 2, cl. 3. Instead in each clause slaves are euphemistically referred to as “persons.” In terms of their legal rights the use of the appellation “persons” was meaningless. Slaves were treated under law as property, not persons. For instance, in *Dred Scott* the court struck down the Missouri Compromise as violating the Fifth Amendment because it deprived a person (i.e. a slaveholder) of his property (i.e. slaves) without due process of law.” *Scott v. Sandford* 60 U.S. 393, 450-52 (1857).

3 See Goetting 2006, 136-37.

4 *U.S.v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938).

Korematsu is an extremely rare exception in which the court fully recognized that Fred Korematsu's fundamental rights were being violated yet thought the government's internment policy had successfully met this "strict scrutiny" standard. As I have argued elsewhere, "[I]f the state's interest is compelling enough, any right, no matter how fundamental, can be alienated. In this way, *Korematsu* will always be good law." (Goetting 2006, 136)

The court's tendency to recognize categories of persons who are less equal than others is not limited to issues of race. In the 1927 case of *Buck v. Bell* (274 U.S. 200 1927), the court passed judgment on the constitutional personhood of the mentally retarded when it upheld a eugenics-based Virginia compulsory sterilization statute designed to purge the population of "defectives" and the "feeble minded." The court supported Virginia's presumption that unless the mentally handicapped were divested of their right to parenthood and bodily integrity their offspring would either drain state welfare resources or have future generations of "defectives" who will cause our nation to be "swamped with incompetence." The court concluded that Emma, Carrie and Vivian Buck—mother, daughter and granddaughter—were each "socially inadequate" and that compulsory vasectomies and salpingectomies were remedies compatible with the constitution that the state might use against all those designated likewise. Carrie Buck's claim that she was being denied her Fourteenth Amendment guarantee of "equal protection of the laws," not because of anything she did but rather because of who she was (someone designated mentally retarded and institutionalized by the state) did not impress the court. "Three generations of imbeciles," Justice Oliver Wendell Holmes, Jr. wrote in his majority opinion, "is enough" (274 U.S. 200)

While the constitutional holding in this case has not been overturned, the legal potency of *Buck* was perhaps somewhat vitiated by *Skinner v. Oklahoma* (316 U.S. 535 1942), which, while not addressing the rights of the mentally handicapped, limited the power of states to use compulsory sterilization generally by recognizing the right to have offspring as fundamental under the Fourteenth Amendment's Due Process Clause. *Skinner* struck down a punitive eugenics statute in Oklahoma that mandated sterilization for criminal recidivists. However, even while announcing a fundamental right to reproduce, the court in *Skinner* struck down the statute not so much on the issue of compulsory sterilization per se as on an exemption in the statute that protected those convicted of certain upscale crimes like embezzlement and political corruption. The court found that the disparity in treatment between what we would now call street and white-collar criminals was "artificial" and amounted to a violation of The Fourteenth Amendment's Equal Protection Clause. At no point, though, was the holding of *Buck*, which applied to non-criminals who had not offended the state other than with their "feeble-mindedness," ever repudiated. It was instead explicitly affirmed. The court reasoned that, no longer a threat to reproduce, those forcibly sterilized might be able to leave the state institution, thus freeing up space for someone else. This, the court insisted, is a "saving feature." *Buck*, though weakened, is still the law of the land.

It is more than a coincidence that there is a tendency in many of these person-defining cases, like *Korematsu* and *Buck*, for the state to present false evidence and defraud the court. As he chronicles in his *A People's History of the Supreme Court*, Peter Irons (2006) was able to successfully vacate Fred Korematsu's conviction by proving that the solicitor general who argued that case willfully suppressed FBI and other intelligence documents stating that Korematsu and his fellow Japanese-American

internees were not the threat the government argued they were. (Irons 2006, 362-364) Likewise, Paul A. Lombardo has earned widespread acclaim for his 1985 article and 2008 book on *Buck*, in which he convincingly argues that not only were none of the Bucks retarded, as contemporaneous documents (including those showing Vivian Buck was on her school's honor roll) and research into subsequent life of Carrie Buck plainly show (Lombardo 1985, 61), but that a bevy of characters, including Carrie Buck's own attorney, colluded to mislead the court system and guarantee that the Virginia eugenics statute would be upheld (Lombardi 1985, 50-60). As these cases show, the superciliousness and contempt that causes dominant groups to dehumanize others is fertile soil for a whole host of other evils, duplicity first among them.

1973's *Roe v. Wade* (410 U.S. 113, 1973) was a person-defining case of a different sort and is in many ways a marked departure from the cases mentioned above. In this case the Court interpreted the Due Process Clause of the Fourteenth Amendment in a way that established a woman's fundamental privacy right to abortion during the first trimester of pregnancy. While it would be grossly inaccurate and unfair to characterize those who sought to win that right as being actuated by a supremacist's contempt for fetuses, it is nonetheless the case that here the Court was required to give the Constitution's answer to the basic biological question of whether fetuses are persons. While the Court explicitly declared that it had no interest in answering when, exactly, human life begins, (410 U.S. 159, 1973) choosing not to decide, in this instance, was inevitably to have something like the force and effect of making a choice. Abortion, the Court averred, was a women's rights issue, not a fetal rights issue. The Court conducted what it believed was a purely legal and textual investigation of how the Constitution uses the word "person," including an examination of how courts had previously interpreted the term, and determined that "[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn." (410 U.S. 158, 1973) Therefore fetuses are not afforded any of the rights, including the right to life, guaranteed by the Fourteenth Amendment's Due Process Clause. Instead the issue of abortion should be resolved by balancing the privacy rights of pregnant women against the state's interests "in safeguarding health, in maintaining medical standards, and in protecting potential life."

But the Court's own logic defeated its attempt to avoid answering the biological question of when life begins. If there is a fundamental right to abort first trimester fetuses, as the Court maintains, those fetuses certainly in some fashion have been categorized as belonging to a different biological—even ontological—class of being. The Court's ruling in *Roe* was not the product of agnosticism on the biological question of when human life begins. Instead the Court answered that question quite clearly: It begins sometime after the first trimester. When determining the limits of a woman's right to abortion, the Court in *Roe* refers to the state's interest in "at least potential life," (410 U.S. 150, 154, 156) and, as any student of Aristotle will tell you, the difference between potential and actual is the difference between non-existence and existence. The Court's designation of a fetus as a potential life (410 U.S. 150, 154), rather than an actual one, affirms and justifies its decision to render the fetus a constitutional non-person. Whatever one thinks of the merits of the Court's judgment on this issue in *Roe*, one cannot escape the conclusion that it is as much a judgment about membership in our species as it is an interpretation of the Fourteenth Amendment.

All of these person-defining cases require the court to stretch beyond its judicial competence into controversial questions of philosophy and science that Supreme Court justices, mere lawyers decked in robes, simply are not equipped to resolve. The court's answer to the question of the personhood of the American Indian is one of the great tragedies of American history.

II. PSEUDO-ANTHROPOLOGY AS THE BASIS FOR TWO RACIST LEGAL STRUCTURES

A sequence of early 19th century Supreme Court opinions by Chief Justice Marshall—*Johnson v. M'Intosh*, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*—known collectively as the Marshall trilogy, interpreted the constitution in a way that defined tribal Indians as less than fully human, thereby justifying past depredations and providing legal impetus and justification for others that would follow. The Marshall trilogy constitutes the foundation of American Indian law. These cases still determine the limits of tribal self-government and how tribes relate to state and federal governments in our federalist system. This article focuses on just one dimension of these complex and influential cases—how they dehumanized the tribal Indian under the constitution and thereby facilitated the continuation of the government's unconscionable policies of land expropriation and political subjection. Though over 175 years old, these cases are far more than of just historical interest. They remain the fundamental law of the land, taught in every course on American Indian Law. They continue to be the Court's, and therefore the Constitution's, definitive statement on the personhood of tribal Indians.

The comparisons between The Marshall trilogy and the abovementioned cases, especially *Dred Scott*, to which it is in some ways is more similar than the others, are not made lightly or without awareness of their inexactitude. One of the most fascinating and horrifying facts of American legal history is the way courts, despite their constitutional role as the branch most jealous of individual rights, have been complicit with the other branches in constructing two very distinct hegemonic systems of racial subjugation, one for Native Americans another for African Americans, each one buttressed by its own unique (and uniquely perverse) legal principles and justifications.

While Chief Justice Marshall was at times in his own mind sympathetic to the plight of the tribes while hearing these cases,⁵ this sympathy was nonetheless soaked with the common racist condescension of his time. Both Native Americans and African Americans were often caught between the virulent racism of those who openly sought to crush their liberty and a softer kind, like Marshall's, that was animated less by explicit rancor than a lordly sense of paternalistic superiority. Marshall did not outwardly show hate for Indian tribes in his opinions but rather a conviction that they were comprised of desperate children in need of help. Though Chief Justice Taney manumitted his own slaves and as a young attorney had at least one abolitionist client (Steiner 2006), the racism of his opinion in *Dred Scott* is of the former, fiercer and more direct kind, as one might expect from an appointee and close political

5 Marshall's feelings toward Native Americans as a race are hard to pin down. Prof. Fletcher quotes from an 1828 letter written by Marshall to Justice Story in which the former refers to Native Americans as "a fierce and dangerous enemy whose love of war made them sometimes the aggressors, whose numbers and habits made them formidable, and whose cruel system of warfare seemed to justify every endeavor to remove them to a distance from civilized settlements." (Fletcher 2008 citing Brown 1968, 213). While historical psychoanalysis of this kind is inevitably inexact and often fruitless, it seems fairly safe to say that Marshall's attitude thawed between writing this letter and the Cherokee cases described infra.

advisor of the man most responsible for the Trail of Tears, President Andrew Jackson. And while some mixture of condescension and contempt are integral parts of any racist legal system, these two cases became both harbingers and spiritual microcosms of the separate systems of racist oppression they defended and perpetuated. Marshall's oft emphasized belief that native peoples were puerile, innocent and in desperate need of the federal government's beneficent guidance became the prevailing spirit of the soon-following reservation system, which sought to improve the tribes by inculcating in them the blessings of Christianity and western culture. Taney's overt denunciation of the very notion that black people could have any rights at all, let alone equality under the law, became the animating spirit of vicious and degrading Jim Crow legislation in the south. While understanding and respect for the gravity of each these vast and ornate systems of legalized racial oppression requires that their many distinctions be borne in mind, they both ultimately stem from the same basic legal (and pseudo-anthropological) premise recognized and upheld by the court in *The Marshall Trilogy* and *Dred Scott*—that because these groups are not white the highest law in the land, the constitution, regards them as less-than-human and undeserving of its full protection. “An inferior race of people,” (21 U.S. 543, 569, 1823) Chief Justice Marshall writes of Native Americans in *M'Intosh*; “beings of an inferior order,” (60 U.S. 407) Chief Justice Taney writes of African Americans in *Dred Scott*. This is the very essence of racism winnowed down to a single idea--the place where Marshall's condescension and Taney's contempt prove themselves identical.

III. TREATIES AND LANDSNATCHING

It would have been suicidal at the beginning of the European colonization of North America for the vastly outnumbered settlers to rely primarily on military tactics to achieve their goal of displacing tribes, as European states had often done with other newly discovered lands. Instead of physical force, colonists more frequently used cunning and manipulative treaties to swindle tribes. As Prof. Kades points out in his magisterial work on this subject (Kades 2000), brutality would have been a poor tactic for the colonists. Great wars and massacres of the kind that would come to take hold of the popular imagination were actually rather rare considering the amount of land the settlers were taking. The work of destroying native peoples and their culture was usually much more mundane. Disease and game-thinning did the killing.(Kades 2000, 1073) Treaties did the stealing. For the most part, this was extermination not with a sword but with a pen and a handshake.

The English pilgrims settling North America and native tribes had very different understandings of what treaties were and how they would be enforced. Settlers marveled at the tribes' innocence of the very notion of private property. “There is no *meum* and *tuum* (mine or thine) amongst them,” according to puritan preacher Robert Gray (Kades 2000, 1076) To the settlers land was meant to be owned by individuals and farmed for crops that could be eaten or sold for profit. To the tribes it was to be shared and respected. Hunter-gatherers, as many tribes were, did not use the land correctly, the settlers thought. To allow them to continue occupying it was to let it go to waste.

Generally speaking, to Indians treaty-making was friend-making. These agreements were sacred covenants based on mutual *agape*, not realpolitik. The peace pipe created bonds of amity that should be honored readily and with deep-seated commitment, not reluctantly or out of legal obligation. They were rarely entered into cynically or with a spirit of evasion and wealth maximization. If a treaty partner

grew weaker over time it was understood that the stronger party's obligation to the weaker would increase rather than vice-versa (Getshes *et al.* 1998, 77), Tribes often sought the aid of treaty partners beyond the four corners of the document, presuming that the friendship created by their agreement was consideration enough for the favor (Getshes *et al.* 1998, 76). Treaties would be renewed with commemorative festivals, celebrations and great shows of comradeship with the intent of preserving the love and affection the original treaty signified (Getshes *et al.* 1998, 79-80). The custom of using treaties as whites did, as political expedients or self-interested maneuvers in a slow-moving cold war to grab more land, was incomprehensible.

The U.S. emerged from its war for independence against Britain as a fragile union of states with a weak national government. Many tribes, stung by the brutal treatment of colonists before and during the war, including Washington's wholesale slaughter of the Six Nations Confederacy in western New York, had sided with the British (Joseph 1994, 269). While prolonged and bloody fighting with Native American tribes continued in many areas of the country, at this early point in its history, on the heels of difficult and protracted war, the U.S. lacked the resources and will to continue fighting a full-scale war of the kind it had just won against Britain. Instead, Washington wrote the head of the Continental Congress' Committee of Indian Affairs, James Duane, that he thought that it would be "expedient" to construct a policy of ostensible forgiveness and conciliation with the hitherto enemy tribes (Getshes *et al.* 1998, 83-84). Their plan was to acquire tribal lands by agreement rather than martial annexation:

[W]e will draw a veil over what has past...[P]olicy and [economy] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their lands in preference to attempting to drive them by force of arms out of their Country. (Getshes et al. 1998, 84)

As difficult as it is to ascribe tolerance and virtue to the general responsible for the murderous raids against the Six Tribes Confederacy during the war for independence, in the years immediately after the war Washington was comparatively sympathetic to the plight of Indian tribes and, as president, would express outrage over their maltreatment by frontiersman and local governments. Washington believed treaties with tribes should be honored by both sides alike and he had little patience for whites who failed to do so (Getshes *et al.* 1998, 90). That said, Washington, like every U.S. politician of that era understood that the inevitable trajectory of U.S. politics and culture was expansion into the western frontier, which meant confrontation with the tribes currently residing there.

The result of Washington's policy of bloodless land acquisition was a series of treaties like the 1785 Treaty of Hopewell signed by the Choctaws and Chickasaws in the south, which, amongst many other things, set up carefully delimited areas for white settlement in exchange for promises to protect tribes from white incursion by state governments and individual frontiersman. These treaties were exploited by whites from the outset, many of whom believed that the federal government lacked the constitutional authority to bind them. Whites ignored treaty provisions, often with savage cruelty, more or less whenever it suited them. States sometimes subverted federal treaties by negotiating their own agreements with tribes. This general flouting of federal law and policy outraged Washington and set in motion a forty-four year (1790-1834) anthology of legislation collectively known as The Trade and

Intercourse Acts that was designed to reaffirm federal supremacy on the issue of Indian affairs and set up the rules guiding America's westward expansion (Getshes *et al.* 1998, 87-93). These laws established two legal doctrines that would be affirmed in the Marshall Trilogy cases: 1) Only the federal government, never the states or private citizens, has the power to acquire tribal land. 2) The only legal method of acquiring title to tribal land is by treaty.

Treaties are by definition international. They are agreements between autonomous nations. Recognition of national sovereignty has always been tacit in the very idea of treaty-making (U.S. Const. Art. II, § 2, cl. 2.). The Constitution has rules governing the treaty-making process—i.e., they must be made by the president and approved by 2/3 of the senate. By choosing treaties as the method by which to acquire tribal lands the government was often able to achieve its goal of acquiring land bloodlessly.⁶ More than that, treaties also covered the expropriation of tribal land with the veneer of legal and moral legitimacy. While Washington's administration was comparatively scrupulous in its desire to deal decently with tribes, future administrations would apply a far more sinister moral calculus to the treaty-making and enforcement process, using coercion, duress, legal trickery, intercultural confusion and other shady means to reach an agreement, and then behaving as if their agreements were true meetings of the minds rather than the one-sided predatory instruments of greed so many of them actually were.

Legally, the Trade and Intercourse Acts established or affirmed multiple legal principles that would prove constitutionally problematic and would be taken up in the Marshall Trilogy. Not only was a treaty then understood as a compact between nations, which presumes the national sovereignty and independent statehood of all signing parties (Getshes *et al.* 1998, 57), but these treaties in particular also presumed that tribes held legal title to the land the government was taking—that is, that the Indians legally *owned* the land before the government took it from them. Treaties were meant to represent the transfer of legal title to the land from one party to another. These two basic premises of the Trade and Intercourse Acts—that Indian tribes were sovereign states and that they could hold legal title to land—were in conflict with the English common law and a number of colonial laws which expressly denied that tribes were sovereign nations capable of selling land (Kades 2000, 1079) The government was in a quandary. Taking tribal lands by force was generally too costly yet the most effective way of obtaining them, the treaty, had the off-putting effect of treating tribes too much like legal equals. The Marshall Trilogy would solve this quandary once and for all.

IV. JUDGING THE PARTS BY THE WHOLE

The federal courts almost never dealt directly with the constitutional rights of individual tribal Indians in the early 19th century. Tribal Indians born in the United States were not given U.S. citizenship as whites were⁷, and because tribes generally existed outside or on the periphery of the American body politic and judicial system, courts usually ruled on the constitutional rights of entire tribes rather than on the individuals comprising them. There were no major Supreme Court cases during the early years of the republic ruling directly on whether individual Native Americans were “persons” under the Fifth Amendment's Due Process Clause or “citizens” under Article III, Section 2, Clause 1, as was the case

6 Prof. Kades calls the enlightened self-interest by which settlers appropriated tribal lands “the theory of efficient expropriation.” (Kades 2000, 1073).

7 *Indian Citizenship Act* of 1924 (43 Stat. 253, 1924) ended this policy.

with African Americans in *Dred Scott*. The rights of the individual tribal Indian could only be ascertained indirectly from the court's rulings on the rights and prerogatives of tribes as collective political entities. The framers of the Constitution anticipated regular interaction with tribes and the phrase "Indian tribes" exists in the text of the Constitution (U.S. Const. Art. I, § 8, cl. 3). For this reason it makes sense that federal courts would hear cases requiring them to flesh out what this phrase within our most sacrosanct body of law means. However, the document never speaks about tribal Indians having rights apart from their tribe. The constitutional standing of the particular tribal Indians was therefore derivative: courts would render judgments on the rights of tribes and then, by inference, these judgments were filtered down to individual tribal members. The courts judged the parts implicitly through their judgments of the whole. To the extent the courts granted tribes sovereignty they granted individual tribal Indians liberty, as sovereignty was limited so were the liberties of its members. To the extent courts regarded tribal governments as political equals it regarded Native Americans as equal to the white citizens of the United States.

V. JOHNSON V. M'INTOSH

The first case in The Marshall Trilogy, *Johnson v. M'Intosh* (1823), dealt with the kind of interest Indian tribes could legally hold in land. Chief Justice Marshall invoked the Discovery Doctrine⁸ to answer this question. The Discovery Doctrine is a piece of international law that originated during the middle ages with the Crusades and was meant to preserve peace amongst Christian European nations who were regularly "discovering" new lands during the age of exploration. To European explorers newly charted land was *vacuum domicilium*, an empty domicile, and the natives occupying it, because they were non-Christian, were *perpetui inimici*, perpetual enemies (Getshes *et al.* 1998, 54-55). Only colonizing (i.e. "discovering") Christian nations could hold a fee simple estate in land. Native peoples in colonized nations held a lesser "aboriginal title." Aboriginal title meant little more than the right to use and occupy the land and was sometimes referred to as the "Indian right of occupancy." (Getshes *et al.* 1998, 70))

Marshall was a great admirer of his fellow Virginian, George Washington, about whom he published a lavish five-volume biography. Like Washington, Marshall thought of the federal government as the only entity capable of protecting tribes from the cruel depredations of land-hungry settlers and state governments. The Discovery Doctrine and aboriginal title, entrenched into our constitutional law by Marshall's opinion in *M'Intosh*, prohibited states and individuals from buying tribal land by divesting the tribes of their right to sell it. *M'Intosh* put tribal land completely under the protection of its lawful owners, the federal government. Marshall reasoned that under the Discovery Doctrine England had acquired title to North America by conquest. Aboriginal title was a lower-order estate in land subordinate to absolute legal dominion enjoyed by the British government. The federal government, Marshall declared, had inherited these lands by virtue of the Treaty of Paris (1783), which marked America's victory over the British during the war for independence (21 U.S. 584). Aboriginal title holders could not sell or rent their interests in land to states or private citizens. They could only sell their right to occupy to the federal government.

⁸ For more reading on the Discovery Doctrine, see Angus Love et al., *The Supreme Court, Tribal Land Claims, and the Doctrine and Discovery; Trampling on the Walking Purchase*, 65 *Guild Prac.*, 104

M'Intosh made it clear that, in the everyday sense of the term, the tribes owned no land whatsoever. More than that, by eliminating all its competition this case made treaty-negotiations for the tribes' (right to occupy) land much easier for the federal government. In the words of Prof. Kades, "The rule of *M'Intosh* was part and parcel of a larger process: efficient (cheap) European expropriation of Indian lands." (Kades 2000, 1104)

The Discovery Doctrine as limned in *M'Intosh* is still good law and this case is included in most law school property textbooks. However, Marshall's opinion in *M'Intosh* has as much to do with political and human rights as it does property law and its effect not just on the wealth but on the autonomy and fundamental dignity of tribes under U.S. law has been fantastically profound. Marshall was very explicit that his decision to apply the Discovery Doctrine was based on the longstanding tradition of racism and ethnocentrism inherent in the laws dealing with native peoples. Anglo-American law has always recognized Native Americans "as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government" (21 U.S. 569). By depriving the tribes of land ownership (and citizenship) based on the "inferiority" of their race and culture Marshall was making a political and anthropological judgment. Tribes, Marshall is stating, may not own land (or become citizens) because they are not as human as whites are.

The American war for independence was fought largely to vindicate the political and property rights of the colonial bourgeois. Many of the founding fathers accepted the Lockean view that the political and property rights they were fighting for were inextricably linked. This linkage profoundly influenced early American legislation and legal interpretation. "The people who own the country ought to govern it," John Jay, the first Chief Justice of the Supreme Court once famously said (Monaghan 1935)⁹. It is no coincidence that while ruling that tribes cannot own land Marshall reminds us that they also cannot be citizens. After all, if the tribes lack the capacity for land ownership due to their racial inferiority, as *M'Intosh* states, it only stands to reason that they also lack the capacity for the more sophisticated task of self-government. Tribes were "fierce savages" (21 U.S. 590) and "their rights to complete sovereignty as independent nations," Marshall writes, "were necessarily diminished" (21 U.S. 574). To Marshall the tribes could not handle the responsibilities attached to land ownership and the political rights and autonomy that flow therefrom. *M'Intosh* thus rendered tribes both permanent tenant-occupants of land owned and controlled by the U.S. government and foreshadowed subsequent cases that would make them perpetual political subordinates.

VI. THE CHEROKEE CASES

There was never any serious doubt amongst politicians during America's first century that, though assimilation had been tried in numerous places, it would not work and tribes would not be incorporated into the larger American polity. Rancor between whites and the tribes was especially vicious in the south, where the racism and greed of settlers was limitless and without let. As early as the Jefferson administration a consensus began to develop that the federal government should begin pressuring tribes to uproot and remove beyond the western pale of white settlement (Hirsh 2009). In 1804 future president William Henry Harrison brokered a sham removal treaty with the Sauk and Fox tribes,

9 This quote cannot be found in Jay's extant writings but is reputed to be among the Chief Justices favorite sayings.

whereby the Sauk and Fox ceded their land in what would become Indiana for money and federal protection.¹⁰ A similar arrangement was made in 1818 with the Delaware. A policy of full-blown nation-wide ethnic cleansing had begun, pushing tribes into the more agriculturally barren lands of the plains. It would reach its climax with the remaining two cases of the Marshall trilogy, whose aftermath would include both a legendary confrontation between the executive and judicial branches and the Trail of Tears.

From presidents Jefferson to Van Buren the objective of the federal government was to resettle tribes to land newly acquired in the Louisiana Purchase. In 1802 Jefferson brokered the Compact of 1802 with Georgia whereby the latter ceded a wide range of its western territory (now Alabama and Mississippi) in exchange for a promise that, eventually, the federal government would extinguish the title tribes had to land in that state (Burns 2004, 177). The cause of Indian removal brought together a perverse political coalition—landgrabbers impatient to see the tribes go and humanitarians impatient to see the tribes free of the abuses of the landgrabbers. Of course, many of the former pretended to be the latter, conveniently insisting that only removal could save tribes from extermination.

President Andrew Jackson had been a successful and prolific crusader against Indian tribes throughout his military career and, though the Cherokee pleaded with him to honor peace treaties signed by previous administrations guaranteeing protection, Jackson supported Georgia's depredations against the tribe in that state. Jackson had long been an advocate of Indian removal and his blood-stained resume in previous Indian wars—including the killing of 800 traditionalist Creek Indians at Horseshoe Bend in 1814 (NPS 2003) and the razing of over 300 Seminole homes in the First Seminole War in 1818 (Remini 1988, 121) - was well-known by Americans of every race. Jackson is America's quintessential Indian killer. Though he has been celebrated in recent years with a spate of biographies written by award-winning authors whose works minimize his malevolence and in places border on hagiography,¹¹ he is considered "the equivalent of Hitler" to scholars like Donna Akers, whose great-great-grandmother walked the Trail of Tears."¹²

From the outset of his administration Jackson viewed passage of an official and authoritative federal Indian Removal Act, such as President Monroe had outlined in an 1825 message to Congress, as a fundamental goal of his presidency. He knew from years of personal experience as an unscrupulous treaty negotiator how much a removal statute that enabled the executive branch to negotiate "treaties"

10 Four low-level chiefs, without authority, signed the treaty, unbeknownst to the Sauk and Fox tribal councils. James Lewis, *The Black Hawk War of 1832*, <<http://lincoln.lib.niu.edu/blackhawk/page1.html>> (last visited Sept. 7, 2009).

11 The most renowned Jackson biographers, while not altogether exonerative, are quite forgiving of Jackson. National Book Award-winner Robert Remini writes that Jackson had "humanitarian concerns--and they were genuine..." (Remini 1988, 219). He also writes that "[i]t was not greed or racism that motivated him. He was not intent on genocide. He was not involved in a gigantic land grab..." (Remini 1988, 114). Pulitzer Prize nominee Sean Wilentz writes that Jackson was "not overtly malevolent," Sean Wilentz, *Andrew Jackson* (2005, 139), "not genocidal" and that he "may well have spared them [the Cherokees]...obliteration." *Id.* at 142. Perhaps the most admiring recent biography is Jon Meacham's Pulitzer Prize-winning *American Lion: Andrew Jackson in the White House*. Jon Meacham, *American Lion: Andrew Jackson in the White House* (2008). His fawning treatment of Jackson is best summed up by Tina Brown in her blurb on its behalf: "Meacham argues that Jackson should be in the pantheon with Washington, Jefferson and Lincoln." Tina Brown, *Blurb* for Jon Meacham, *American Lion: Andrew Jackson in the White House* (2008).

12 *Andrew Jackson* (History Channel television broadcast Nov. 18, 2007).

would help him in his effort to rid the eastern United States of Indian tribes. Jackson had become adept at putting tribes under duress with intimidation and threats, which he sometimes enforced with wholesale violence. When in 1820 he told the Choctaw during a removal negotiation “If you refuse...the [Choctaw] nation will be destroyed,”(Remini 1988, 114) they had every reason to believe him. Jackson’s removal treaties, before and after his presidency began, were nearly always the very quintessence of victor’s justice.

In Jackson’s annual address to Congress in 1830 he sang the praises of the ongoing removal policy and urged for its aggrandizement. Under the careful maintenance of the federal government, removal, he insisted, would actually benefit the tribes remaining in the east tremendously. It would help them “cast off their savage habits and become an interesting, civilized, and Christian community...How many of our own people would gladly embrace the opportunity of removing west on such conditions?”¹³ Removalists often couched their policies in humanitarian terms, no matter how brazen their lies or feeble their rationalizations. Wilson Lumpkin, who served as a U.S. Congressman, Governor and U.S. Senator from Georgia during this period once said of removal that it was the Cherokees’ “only hope of salvation...No man entertains kinder feelings toward the Indians than Andrew Jackson”(Remini 1988, 214). Southern tribes like the Cherokee knew they were in jeopardy, as did the whites, many of them missionaries, who stood alongside them. Passage of the *Indian Removal Act* of 1830, which would bring about a sequence of unconscionable removal treaties and the deaths of thousands, was just months away.

Impatient for the federal government to fulfill the promise made with the Compact of 1802, Georgia brutally asserted itself over the Cherokee, snatching land and passing menacing statutes that interfered with tribal autonomy in ways that violated the treaties of Hopewell and Holston. The land was too lush and fertile to go to waste on Indians, Georgians thought. When gold was discovered in 1827 the lust for Cherokee land became insatiable. Ultimately the Georgia Legislature completely abolished the Cherokee Nation, seized and distributed all nine million acres of its land—land that would quickly be populated with slaves and newly planted cotton.

Senator Theodore Freylinghuysen of New Jersey and other missionary-minded northeastern legislators opposed the Removal Act, denouncing it as racist. They unavailingly sought an amendment to the Removal Act to guarantee free and fair negotiations with the tribes (Remini 1988, 213). The bill was passed into law, finally, after bitter and protracted debate. The evangelization efforts of those like Freylinghuysen had been especially effective amongst the Cherokee Nation in Georgia, who had adopted many of the trappings of the dominant white culture. There were schoolhouses, churches, a newspaper, a constitution with a tripartite government modeled on the U.S. Constitution,¹⁴ even black slaves working Cherokee plantations (Meltzer 1993, 73). The only threat the Cherokee Nation posed to the Georgians was to their acquisitiveness.

13 Taken from Andrew Jackson's Second Annual Message to Congress in 1830. <<http://www.pbs.org/wgbh/aia/part4/4h3437t.html>> (Last visited September 7, 2009)

14 Many historians believe that the tripartite system of government of the U.S. Constitution is itself modeled after that of the Iroquois Confederacy. See Cynthia Feathers & Susan Feathers, *The Iroquois Influence on American Democracy*, 63 *Guild Prac.* 28.

Knowing the Cherokee Nation was losing with the legislative and executive branches, Frelinghuysen advised Cherokee Chief John Ross to seek relief from the Supreme Court, where they could argue that Georgia's anti-Cherokee statutes violated federal law. The Cherokee seemed to have a strong case. The Supremacy Clause of the U.S. Constitution (art. VI, § 2) is clear that when state and federal laws conflict--as Georgia's laws plainly conflicted with federal treaties and Trade and Intercourse Acts--federal laws prevail. Moreover, the Cherokee argued that, as a sovereign and foreign nation of the kind capable of entering into treaties with the U.S. government, they were not subject to Georgia's laws. However, the court chose not hear this case on the merits. *Cherokee Nation v. Georgia* (30 U.S. 1 1831), the second case of the Marshall trilogy, was instead dismissed on jurisdictional grounds. The Cherokee Nation, the court ruled, did not have standing to bring suit.

Article III of the constitution grants the U.S. Supreme Court jurisdiction over cases between "a State, or the Citizens thereof, and foreign states." (Art. III, § 2) The issue in this case, then, was whether Indian tribes were "foreign states" like England, France and other nations the federal government recognized as sovereign and independent. With this case, finally, the court was compelled to determine what kind of polity Native American tribes were and, by extension, how much liberty and self-government the people comprising them would be allowed. The six voting justices on the court could hardly have been more divided on this issue. The court was "split" (Getshes *et al.* 1998, 111) three ways: two justices, Johnson and Baldwin saw the tribes as "possessing no sovereignty at all." (Getshes *et al.* 1998, 111) Another two, Thompson and Story, ruled that tribes were fully fledged independent nations with full political sovereignty (Getshes *et al.* 1998, 111). Justice McLean agreed with Chief Justice Marshall's opinion, which attempted to carve a kind of middle path. It is Marshall's opinion that spoke for the court and, since its publication, it has had the force and effect of binding constitutional law.

Marshall reasoned that tribes are not foreign (they exist on U.S. soil) and they are not sovereign states (*M'Intosh* says they are under the "pupilage" of the federal government (21 U.S. at 569)). They are instead something altogether unique in U.S. law—*sui generis*—they are "domestic dependent nations." "Domestic" because they exist within U.S. borders; "dependent" because the federal government ultimately owns and controls their lands and interacts with states and foreign powers on their behalf; yet still a "nation" because, though limited and revocable by congress, the tribes still possess some of the elements of self-government. "Their relation to the United States," Justice Marshall tells us, "resembles that of a ward to his guardian" (30 U.S. 17).

However perverse and galling this guardian-ward "trust" relationship might seem in light of the federal government's subsequent history as a perpetual abuser of Native Americans, in his own mind, by placing the tribes safety in the hands of the federal government, Marshall was safeguarding them from what we would now call genocide at the hands of a merciless Georgia state government. "They look to our government for protections; rely upon its kindness and its power; appeal to it for relief of their wants." (Smith 1996, 517)

Had Justice Thompson's dissenting opinion prevailed, and tribes had won their jurisdictional argument and been recognized as fully sovereign foreign nations, it is hardly certain that the Cherokee would have won this case on the merits. Georgia might very well have argued that the recognition of a sovereign Cherokee Nation within its borders violates Art. IV. Sect III of the Constitution, which reads

“no new states shall be formed or erected within the Jurisdiction of any other State...without the consent of the legislatures of the states concerned.” Such speculation is purely academic, though, given the Court’s refusal to hear the case.

Georgia did not recognize the Court’s authority to hear cases on the constitutionality of its laws and, in protest, did not appear to make any arguments in this case or the subsequent and related case, last in the Marshall trilogy, *Worcester v. Georgia* (31 U.S. 515 1832). The same year *Cherokee Nation* was heard, 1830, a Cherokee named George Tassel was convicted of murder in a Georgia state court for a killing that occurred in Cherokee territory. Tassel challenged the legality of his conviction in an appeal to Chief Justice Marshall himself. Marshall agreed to hear the case and issued a writ of error. Georgia hanged Tassel anyway (Garrison 2002, 125). Georgia’s contempt for both the Cherokees and the U.S. Supreme Court had become, literally, homicidal.

The next year Samuel Worcester, a Vermont missionary to the Cherokees who had translated “Amazing Grace” into their language (Swiderski 1996, 91), and his companion Elizur Butler were found guilty of violating a Georgia law that banned all non-Indians from living amid the Cherokees without a license. They appealed their verdict to the U.S. Supreme Court. Now, finally, the court would rule on the constitutionality of Georgia’s efforts to destroy the native population in that state.

The Court roundly struck down the laws Georgia had passed to harass the Cherokee. However, Marshall’s argument was not rooted in the tribes’ innate right to be let alone or the blatant inhumanity of Georgia’s aggressively cruel policies. Instead Marshall saw Georgia’s laws as a violation of the guardian-ward or “trust” relationship between tribes and the federal government described in *Cherokee Nation* the year before. To Marshall the issue in *Worcester* was one of federalism. The Indian Commerce Clause in the U.S. Constitution, Marshall reasoned, grants the U.S. Congress plenary power over the tribes (31 U.S. at 559). Moreover, it has been firmly established that treaties are the method by which tribes should be dealt with and treaties are the exclusive province of the federal government. “The constitution, by declaring treaties...to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.” (31 U.S. at 559)

Just because tribes are “domestic dependent nations...associating with a stronger [nation] and taking its protection” (31 U.S. at 561)¹⁵ does not mean they necessarily forfeit *all* their independence and self-government, Marshall reasoned. “The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.” The Constitution, Marshall ruled, gives the federal government absolute power over the tribes. State governments, such as Georgia’s, have no authority to pass laws on Indian affairs. Georgia’s ruthless Indian policies violated federal law and were struck down.

Marshall’s controversial opinion in *Marbury v. Madison* (5 U.S. 137 1803). in 1803 made the Court the ultimate interpreter of the Constitution. The Court went on to rule in 1816 that the federal courts have the power to strike down state actions that violate federal law (*Martin v. Hunter’s Lessee*, 14 U.S. 304 1816). But, though the Court had widened its power to interpret the law against the other branches of the federal government and the states with these rulings, it lacked the power to enforce them. The

15 Marshall writes as if the tribes entered freely into the trust relationship.

Constitution's Executive Vesting Clause (Art II, § 1) had given all federal law enforcement power, including the power to enforce Marshall's ruling in *Worcester*, to the president. The President at that time was Andrew Jackson, who vehemently disagreed with Marshall both on the newly gained powers of the Court in general and on its ruling in *Worcester* in particular. Jackson believed the president's interpretation of the Constitution should be as binding as the Court's and that he, as President, should not be compelled to enforce rulings he thinks erroneous (Wilentz 2005, 141). He viewed *Worcester* as a usurpation of Georgia's rightful power as a sovereign state confronted with antagonists living within its boundaries: "Absolute independence of the Indian tribes from state authority can never bear intelligent investigation," (Remini 1988, 219) he stated. The Cherokees' victory in this case had won them nothing and, by eliciting a ruling that placed Indian tribes permanently under the authority of a federal government that in decades to come would often prove as merciless as Georgia, would cost all tribes dearly. Jackson refused to enforce the ruling. Knowing no authority would stop them, Georgia was free to continue doing its worst.

In 1834 Jackson's War Department offered the Cherokee a removal treaty that was roundly rejected in a tribal referendum. In 1835 while the Cherokee Nation's rightful leader, John Ross, was in Washington pleading for his tribe, a small party of Ross' political antagonists, recognized as legitimate by scheming government officials, signed the Treaty of New Echota, to the fury and consternation of Ross, the Cherokee General Council and most of the Cherokee population (Josephy 1994, 328-329). Even Georgia's governor, William Schley, saw the treaty for what it was: "[I]t was not made with sanction of their leaders," he said (Perdue and Green 2004, 114).

The treaty gave the Cherokee two years to prepare. The pro-treaty faction and some others voluntarily emigrated west to present day Oklahoma. The leader of this faction, Major Ridge, and his son would soon be assassinated along with others for their perfidy (Josephy 1994, 331). Most Cherokee would not leave. In 1838 General Winfield Scott marched down to Georgia with 7,000 men (Josephy 1994, 331) to round them up into concentration camps before their forced march of 800-850 miles westward along the Trail of Tears.

Corrupt and incompetent government officials (Spring 1996, 83) hired the cheapest contractors, mishandled the logistics and otherwise did a sloppy and slipshod job shepherding the Cherokee to their new location. 4,000 died of disease (Josephy 1994, 331), starvation and exposure in the holding camps or during the six month march across the American southeast.

VII. CONCLUSION

The Marshall trilogy is more than merely a collection of legal opinions, just as the document it interprets, the Constitution, is more than merely a system of laws. These Supreme Court opinions provided all Americans with a definitive statement on how our nation's self-defining document regards the original inhabitants of this land. It is no coincidence that, having been assured by the court that tribes are incapable of understanding and appreciating liberty and property, the federal government and the American people would spend the next several decades systematically stealing as much of both as they could. *M'Intosh* made the tribes tenants on their own land with the federal government serving as perpetual landlord (21 U.S. 585). The guardian-ward or "trust" relationship described in the two Cherokee cases made them that same government's permanent political subjects (30 U.S. 17). The still-

existing system of limited and revocable sovereignty described in these cases is the very essence of political domination and hegemony, allowing the tribes self-government, as it does, until their true governors choose to intervene.

These three cases remain the constitutional foundation and framework within which all Indian law is practiced in the U.S. There have been no major constitutional amendments or reinterpretations regarding the personhood and fundamental dignity of the tribal American Indian. On these issues the Constitution means today precisely what it meant in the early 19th century--and will continue with this meaning until tribes are granted real ownership of their land and are recognized as sovereign and foreign powers, un beholden to the federal government, as the Cherokees argued they were back in 1830.

This article is dedicated to my newborn son, Lucas Augustine Goetting. I can't wait to hear what he thinks of all this.

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