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We Live on Their Land: Implications of Long-Ago Takings of Native American Indian Property

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I.  INTRODUCTION

At the dawn of the white man's millenium, the drums of 15 million ghosts echo silently across fields and forests, mountains and deserts, lakes and rivers of once proud peoples. While American society aspires to realize more perfect justice in the twenty-first century, surviving members of great tribes, heirs of a continent, are the poorest of the poor. Iroquois. Cherokee. Choctaw. Seminole. Pueblo. Apache. Navajo. Five hundred nations. Nations that were betrayed, subjugated, plundered and forgotten. We cannot undo that which was done — the breaking of treaties, the trail of tears, all the sorrows of long-ago years. We cannot bring back to the world of the living those who perished in the American holocaust. We cannot take away homes and enterprises of present-day Americans to pay tribute to indigenous people who passed to their final hunting ground in that apocalypse of more than a century ago. But if justice on this earth can be imagined, so can a practical way to achieve it. Provided, that is, we are willing to reconcile ourselves to each other, and to historical truth.
Before the first Europeans landed in what to them was a New World, as many as 15 million indigenous people lived in the area now occupied by the 50 states of the Union.\(^1\) The white man took their land and, in the doing of it, took their lives. The Native Americans were almost exterminated. By 1910, only about 200,000 American Indians still lived. Thus it was “proportionately as if the population of the United States were to decrease from its present level to the population of Cleveland.”\(^2\) The magnitude of mass death was even greater than that of the Holocaust, in which six million Jews perished. The loss of the land, more than two billion acres from the Atlantic to the Pacific, was so vast that it admits of no comparison in world history.

The taking of the continent occasioned untold deaths due to battles, massacres, forced marches, starvation, disease and broken hearts. The white settlers brought from Europe "a terrible collection of poxes and fluxes, flux and fevers for which the reds had little or no natural immunity."\(^3\) An 1855 Sacramento newspaper editorial said:

> The accounts from the North indicate the commencement of a war of extermination against the Indians . . . . The intrusion of the white man upon the Indians' hunting grounds has driven off the game and destroyed their fisheries. The consequence is . . . starvation . . . stealing and killing. Had reasonable care been exercised to see that they were provided with something to eat . . . no necessity would have presented itself for an indiscriminate slaughter of the race.\(^4\)

The destruction of Native American nations is all the more ironic in light of the contribution Indians made to the formation of our country. Our Founders had extensive and generally friendly interactions with the Native Americans, who consequently exerted formative influences on our art, food and culture, our appreciation of nature, and our ideas about democracy. Their disrespect for authority influenced our own revolutionaries. Their penchant for helping others set an example for us. So did their thirst for freedom, and their commitment to participative democracy. Franklin, Jefferson and others internalized Indian political

and social concepts, and embraced ideas of personal liberty that went far beyond anything ever imagined in England, from which the framework of our law came. Iroquois federalism — with six nations (Mohawks, Oneidas, Onondagas, Cayugas, Tuscaroras and Senecas) in a league, having checks and balances, separation of civilian and military authority, limited government, protection of individual rights, and tolerance for all religious views — set a model for our federal system.  

II. INDIAN TRIBES BECAME SOVEREIGN AND INDEPENDENT NATIONS RECOGNIZED PURSUANT TO INTERNATIONAL LAW  

By the time European explorers began arriving along the Atlantic seaboard, Native American nations already were well-established. In fact, the Indian nations possessed the requisite attributes of sovereign, independent states under international law as then it existed. It follows from this that the potentates, agents and exiles of Christian states did not have any right simply to take away that which belonged to the Native Americans.

Francisco de Vitoria, one of the founders of international law, taught that the Europeans had a duty to respect the American Indians' autonomous powers and land entitlements.  


8. Id. at 139.  

thus, the indigenous nations of America were as sovereign as the Christian states of Europe.

Chief Justice John Marshall discussed statehood in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), in which he postulated that the Cherokees were a "dependent domestic" nation.\(^{11}\)

And yet Marshall, writing for the high court the following year in *Worcester v. Georgia*, 31 U.S. 515, 542-543 (1832), acknowledged that the Indian tribes were sovereign and independent nations prior to their discovery by European explorers.\(^{12}\)

As for the significance of the charters granted by the English king, Marshall conceded in *Worcester*, "The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any

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10. [Hugo Grotius, *The Law of War and Peace* 397 (Classics of International Law ed. 1925).]

11. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1830), 16: "Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution?

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

Marshall continued on the next page: "The Indian territory is admitted to compose a part of the United States . . . They may . . . be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will . . . Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian."

12. *Worcester v. Georgia*, 31 U.S. 515, 542-543 (1832). America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

"After lying concealed for a series of ages, the enterprise of Europe guided by nautical science, conducted some of her adventurous into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.

"Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

"But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend."
What William Penn, Lord Baltimore and the other charter holders got by virtue of discovery, Marshall said, was (a) true title subject only to the Indians' mere occupancy and (b) the right to wage "defensive war" which would extinguish even the Indians' occupancy rights.

The Chief Justice noted that the colonists knew the Indians "might be formidable enemies, or effective friends," and so "their alliance was sought by flattering professions, and purchased by rich presents. The English, the French, and the Spaniards, were equally competitors for their friendship and their aid." And he quoted the British superintendent of Indian affairs, a Mr. Stuart, who told Indian leaders in a gathering at Mobile soon after the peace of 1763: "As you may be assured that all treaties with your people will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them." In the network of alliances that existed in the period leading up to the American Revolution, the English crown protected Indian nations from other Europeans, and allied Indians protected the crown colonies from other Indians and from the French. Marshall said the Indian treaties "had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation."

Thus it was recognized that the American Indian nations were sovereign and independent nations until the whites came and took away many of their rights and then declared them to be absorbed within the United States. Justice Thompson's insightful dissent in Cherokee Nation elaborated on the undeniable sovereignty of the Cherokees under international law.

13. Id. at 544-545.
14. Id. at 545.
15. Id. at 545-548, 553.
16. Id. at 515, 543-560.
17. Cherokee Nation, supra note 11, at 52-54: "The terms state and nation are used in the law of nations, as well as in common parlance, as importing the same thing; and imply a body of men, united together, to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral person, have an understanding a will peculiar to itself. . . . Vattel, 1. . . . 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 those of 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. . . . Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long
The practice of the young United States in forming treaties with Indian tribes is evidence that the Framers and ratifiers of the Constitution recognized the status of Indian nations as sovereign and independent nations. Even before the Constitution was ratified, the Confederation negotiated treaties such as the 1778 treaty with the Delaware Nation. Chief Justice Marshall, in the *Worcester* decision, discussed at length the treaty with the Delawares, noting the "language of equality in which it is drawn . . . ." Justice Thompson, in his *Cherokee Nation* dissent, recalled that the treaty with the Delaware Indians may serve to show in what light the Indian nations were viewed by the congress at that day . . . . This treaty, both in form and substance purports to be an arrangement with an independent sovereign power. It . . . contains stipulations relative to peace and war, and for permission to the United States troops to pass through the country of the Delaware nation. And the same recognition of their rights runs through all the treaties made with the Indian nations or tribes, from that day down to the present time.

The adoption of the Holston treaty of 1791 demonstrated the intent of our first President and the senate with respect to recognition of the Cherokee Nation as a foreign power. Justice Thompson pointed out:

The treaty was made soon after the adoption of the present constitution. And in the last article it declared that it shall take effect, and be obligatory upon the contracting parties as soon as the same shall have been ratified by the president of the United States, with the advice and consent of the senate; thereby as self-government, and sovereign and independent authority is left in the administration of the state. Vattel, c.1, pp. 16, 17.

"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. They have always been dealt with as such by the government of the United States; both before and since the adoption of the present constitution. They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same; yielding up by treaty, from time to time, portions of their land but still claiming absolute sovereignty and self government over what remained unsold. And this has been the light in which they have, until recently, been considered from the earliest settlement of the country by the white people. And indeed, I do not understand it is denied by a majority of the court, that the Cherokee Indians form a sovereign state according to the doctrine of the law of nations; but that, although a sovereign state, they are not considered a foreign state within the meaning of the constitution."

showing the early opinion of the government of the character of the Cherokee nation. The contract is made by way of treaty, and to be ratified in the same manner as all other treaties made with sovereign and independent nations; and which has been the mode of negotiating all subsequent Indian treaties. And this course was adopted by President Washington upon great consideration, by and with the previous advice and concurrence of the senate. In his message sent to the senate on that occasion, he states, that the white people had intruded on the Indian lands, as bounded by the treaty of Hopewell, and declares his determination to execute the power entrusted to him by the constitution to carry that treaty into fruitful execution . . . .

Yet another fallacy in the position of those who deny the sovereignty of Indian nations — this one having to do with the citizenship status of the Indians — was pointed out by Justice Thompson. He wrote that the U.S.-Cherokee treaties of December 26, 1817 and March 10, 1819, for example, stipulated that Indians choosing to do so could become citizens of the United States, thereby clearly showing that they were not considered citizens at the time those stipulations were entered into, or the provision would have been entirely unnecessary if not absurd. And if not citizens, they must be aliens or foreigners, and such must be the character of each individual belonging to the nation. And it was, therefore, very aptly asked on the argument, and I think not very easily answered, how a nation composed of aliens or foreigners can be other than a foreign nation.

In the same vein, Justice M'Lean, concurring in Worcester, wrote: "No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties; but we have inflicted the punishment on them as a nation, and not on individual offenders among them as traitors."

Chief Justice Marshall for the court in the seminal case of Johnson v. McIntosh, 21 U.S. 543 (1823), did not deny that the taking of Indian

20. Id. at 71.
21. Id. at 66.
sovereignty and land was unjust and violative of international law.\textsuperscript{23} Although the U.S. Constitution recognizes the valid force of international law, the Framers gave the federal authorities constitutional power to act in violation of international law.\textsuperscript{24} When the United States violates international law, U.S. courts offer no remedy unless the Constitution or laws of the United States were at the same time violated. However, U.S. violation of international law, even when constitutional and in accord with domestic law, does not relieve the United States of its international responsibilities; \textit{i.e.}, its obligations to the world community, under international law — which has the binding force of law even in those instances when United States courts are disabled from enforcing it. Thus the liability of the United States as a member of the world community was acknowledged by Secretary of State Bayard in 1887:

\begin{quote}
It has been constantly maintained and also admitted by the Government of the United States that a government can not appeal to its municipal regulations as an answer to the demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the nation's liability and not its own municipal rules.\textsuperscript{25}
\end{quote}

In the emergent era of colonial expansionism, ethnocentrists such as John Westlake argued that international law existed to protect "civilised" people only and that, since indigenous people were "uncivilised humanity," they could not claim the protection of international law. The British publicist wrote that the

inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out. Accordingly international law has to treat such natives as uncivilized.\textsuperscript{26}

\begin{footnotes}
\item[23] Johnson v. M'Intoch, 21 U.S. 543 (1823).
\item[25] U.S. Foreign Rel. 751, 573 (1887), quoted in \textit{Id}.
\end{footnotes}
If international law, influenced by ethnocentric jurists and publicists, was revised so as to accommodate the claims of white settlers, this author believes it is of doubtful propriety to assert that the American Indian nations were necessarily bound by the revisions. It is a well-accepted principle that "a dissenting state which indicates its dissent from a practice while the [rule of customary international] law is still in a state of development is not bound by the rule of law even after it matures."27

A problem with international law is, this author believes, the general absence of effective enforcement mechanisms and, in the case of early American taking of Indian lands, the absence of any international tribunals at the time of the wrongs suffered. The enlightened approach today is not to pretend that injustice did not occur, but rather to face up to the international obligations implicated by these crimes against humanity — and to fashion creative remedies designed to seek justice insofar as possible, even if it be justice incomplete and long delayed.

III. INTERNATIONAL LAW DOCTRINES OF DISCOVERY AND CONQUEST WERE APPLIED TO THE INDIAN LANDS UNJUSTLY AND DISHONESTLY

This author submits that the conventional legal wisdom holds, in essence, that the Indians were savages who could not understand the concept of owning real property. Inasmuch as they did not understand the concept of land ownership, the white man reasoned, the Indians could not possibly have owned any land. Whites who claimed Indian land could thus rationalize that they were taking that which was not previously owned by anyone. But a case can be made that the Indians generally were more enlightened than the whites who took from them. The indigenous people of North America, in fact, had a more highly developed sense of responsibility with respect to the land and natural resources than the whites who "discovered" it from them.

Alvin M. Josephy, Jr. explained:

A concept concerning the right of land ownership, basically different from that of the white man, was shared by most Indians. To them, land and its produce, like the air and water, were free to the use of the group. No man might own land as

personal property and bar others from it. A tribe, band or village might claim certain land as its territory for farming, hunting, or dwelling, but it was held and used communally. . . . Some tribes, moreover, regarded the earth as the mother of all life and thought it impossible to sell. . . . Generally, most Indians had respect, if not reverence and awe, for the earth and for all of nature and, living close to nature and its forces, strove to exist in balance with them.28

Tecumseh, the great Iroquois chief, informed General William Henry Harrison, at Vincennes in August 1810: "A few chiefs have no right to barter away hunting grounds that belong to all Indians...." Tecumseh explained that "all red men have equal right to unoccupied land. It requires all to make a bargain for all. Until lately, there were no white men on this continent. Then, it all belonged to the red men. Once a happy race, they have been made miserable by the white men who are never contented, but always encroaching. They have driven us from the sea-coast, and will shortly push us into the lakes."29

The Indians came to understand the materialistic values of the white man. It was the whites who did not apprehend the spiritual value of the land and the concept of shared ownership which was common to the Indians.

Today's system of international law evolved from that which was invented by European theorists such as Vitoria. Relying heavily on ecclesiastical humanism and fundamental values taught by the Catholic Church, these theorists tended to view God as the source of all legitimate worldly authority. Historically, the church taught that human beings have fundamental rights given by God, rights that may not be taken unjustly by others. Founders of international law applied this principle of interpersonal morality to the relation between nations. The principle was retained even though international law was secularized by its most influential author, Hugo Grotius, who cast its norms as a law of nature or "dictate of right reason."30

The Christian church, since its founding by Jesus Christ, espoused the Golden Rule and the principles of peace and justice for all people.

Ironically, Pope Alexander VI, head of the church and Vicar of Christ, purported to grant to Spanish monarchs all lands discovered by their agents that were not already ruled by Christian sovereigns. But Vitoria, citing international law concepts based on traditional Christian precepts, taught that the pope lacked power to grant lands already owned by the American Indians. Using language similar to that found in papal bulls, England's King Henry VII issued a charter which purportedly authorized John Cabot to "discover . . . countries, regions or provinces of heathens and infidels . . . which before this time have been unknown to all Christians." Henry VII instructed Cabot to "subdue, occupy and possess" such lands, "getting unto us the rule, title, and jurisdiction of the same."

King James I issued letters patent in 1609 purporting to "give, grant, and confirm" to Robert, Earl of Salisbury, associates and successors, "the lands, countries and territories . . . in that part of North America called Virginia," a territory which included the present states of Virginia, Illinois and areas in between. The title obtained by the English in virtue of the Cabot letters patent passed in 1776 to the newly independent United States.

A. "INDIAN TITLE"

A seminal ruling was pronounced in 1823 by the U.S. Supreme Court in an Illinois land dispute between defendant, William M'Intosh, who traced his title to the Cabot grant, and plaintiffs, devisees of Thomas Johnson, who traced his title to the Pinkeshaw Indians. Chief Justice Marshall — while conceding that the Indian tribes were "independent nations" before "the whites" arrived and decided "to appropriate" Indian lands, and that the original English claims may indeed have been "extravagant" — nevertheless ruled against the validity of the title traced to the Indians. Marshall reasoned that, because the whites'
claims were over the course of time "sustained" 42 "by the sword," 43 "the actual state of things" required the Supreme Court to apply "a new and different rule." 44 The Chief Justice wrote that there was some "excuse, if not justification" for the European land grab in America because of "the character and habits of the people whose rights have been wrested from them." 45 The new rule, created for the purpose of justifying Christian white-supremacist taking of American Indian lands, was the doctrine of discovery and conquest and the correlative notion of "Indian title." 46

The doctrine, as set forth by Marshall in Johnson v. M'Intosh, 21 U.S. 543 (1823), allowed European colonizers — England, Spain, France and Holland — to divide up America for their own convenience and gain. According to this doctrine, the white nation that "discovered" and claimed a particular American territory became its sovereign and holder of ultimate title. If uncivilized heathens happened to live there, the argument went, they merely had a right of occupancy until they were gone — or until their occupancy right was consensually given up, sold for consideration or taken by "conquest." The corollary, the native inhabitants' right of occupancy, was called "Indian title," not to be confused with real title which was held by white supremacists. Further, if the Indians were driven away or subjugated by "conquest," i.e., in a war the whites considered to be just, then the limited Indian title was deemed to be extinguished — and the Indians existed at the mercy of the Christian conqueror, who acquired title free of all legal impairments. 47

This author submits that the precept that Indians were incapable of understanding and holding any claim to land other than mere occupancy was inequitable. It represented an underestimation of the level of culture and intellect of American Indian peoples, and a self-serving rationalization invented by whites who subscribed to the supremacist ideas prevalent among Europeans in the era of discovery.

According to Chief Justice Marshall in M'Intosh, American Indians were "warlike," 48 and "savages," 49 whose land rights, other than mere occupancy, were "wrested" 50 by the whites' "pompous claims" 51 and

42. Id. at 591.
43. Id. at 588.
44. Id. at 591.
45. Id. at 589.
46. Id. at 543.
47. Id. at 571-605.
48. Id. at 586.
49. Id. at 590.
50. Id. at 589.
"superior genius."\(^{52}\) The only land interest that a Native American was
deemed to have the capacity for was the doctrinally limited "Indian right
of occupancy."\(^{53}\) Marshall reasoned that "the rights of the original
inhabitants...were necessarily, to a considerable extent, impaired," and
"their rights to complete sovereignty, as independent nations, were
necessarily diminished," just because "discovery gave exclusive title to
those who made it."\(^{54}\) One of the sad ironies of \(M^{\text{Intoch}}\) was that it
purported to rely on "universal recognition" of "principles" of law,\(^{55}\) even
while it conceded that the "restriction" imposed on Indians' land rights
"may be opposed to natural right, and to the usages of civilized
nations,"\(^{56}\) \(i.e.,\) inconsistent with international law at the time.

The Indian title concept was summed up in Justice Baldwin's concurring
opinion in 1830 in \(Cherokee Nation v. Georgia:\)

> While the different nations of Europe respected the rights of the
natives as occupants, they asserted the ultimate dominion to be
in themselves; and claimed and exercised as a consequence of
this ultimate dominion, a power to grant the soil while yet in the
possession of the natives. These grants have been understood by
all to convey a title to the grantees, subject only to the Indian
rights of occupancy.\(^{57}\)

**B. DISCOVERY THEORY**

As we have seen, apologists for European kings' grants of American
Indian lands to colonizers rationalized that the aboriginal "savages" could
not truly own land because mentally they could not grasp the concept of
land ownership. Concededly, the Native Americans had different ideas
about land rights than the Europeans, but it does not necessarily follow
that the Indians had inferior understanding or inferior rights. John
Winthrop said Indians (who moved farms and villages periodically) were
capable of mere occupancy, not true possession of land, because they
lacked enclosed habitations and permanent cultivation.\(^{58}\) The Europeans
had the idea that a person can have exclusive rights to land or,

\(^{51}\) Id. at 590.
\(^{52}\) Id. at 673.
\(^{53}\) Id. at 574.
\(^{54}\) Id.
\(^{55}\) Id.
\(^{56}\) Id. at 591.
\(^{57}\) Cherokee Nation, supra note 11, at 48.
\(^{58}\) Class notes in author's possession: Andrew Lichterman, Real Property Law lecture, John
    F. Kennedy University School of Law (Walnut Creek, Calif., August 28, 1995).
alternatively, can be the owner of title to land temporarily occupied or physically possessed by someone else. The Indians tended to believe that the land and its resources were provided by the Almighty for people to share on a reasonable basis according to their needs. In the wide open spaces of America, where many tribes were hunters or migratory, this concept made a lot of sense. It did not, by any stretch of logic or fairness, give newly arrived European settlers the right to assert that they were the true owners of title to the land where Indians had lived since time immemorial.

It was a fundamentally wrong-headed argument that the Indians could not own land because they did not understand or claim absolute title or fee interest. It is well understood, even in common law, that no title entails totally absolute rights. No person, no owner, not even the state has an unlimited right to despoil natural resources to the detriment of neighbors or future generations. It is particularly ironic that popes, potentates and plenipotentiaries who claimed to be guided by Christian principles would rely on the difference between Indian and European property theories as a justification for Europeans unilaterally to claim title to Indian lands. The Catholic church itself (one of the largest landowners in the world) teaches respect for the conscientious religious convictions of all people; but of course there have been episodes throughout church history when clerics or even popes — while calling aborigines "infidels" — have themselves deviated from such teachings.

In doctrine traced to Scripture, the church also teaches the idea that the gifts of the earth are provided by God, that human beings are the stewards of the natural world, that we all have a moral duty to respect the rights of not only our neighbors today but also generations to come in the future. The Christian idea of human stewardship of the earth can be analogized to the Native American idea of responsibility for sharing the earth and protecting its blessings for posterity. It is therefore especially ironic that Europeans would so twist the system of international law, derived from Christian humanism, so distort it to allow settlers and colonists to steal America from the Indians.

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59. Declaration of Religious Freedom (Dignitatis Humanae) ch. I, in Walter M. Abbott, S.J., ed., Very Rev. Msgr. Joseph Gallagher, trans. ed., The Documents of Vatican II (1966), 681: "On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of conscience. In all his activity a man is bound to follow his conscience faithfully, in order that he may come to God, for whom he was created. It follows that he is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious."

Grotius disapproved of the notion that discovery of inhabited land confers title on the discoverer, "even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit. For discovery applies to those things which belong to no one."\textsuperscript{61}

According to international law, the discoverer's claim would not be valid unless subsequently consummated by actual occupation of the land by the discoverer's people. Max Huber, arbitrating a dispute between the Philippines and the Dutch East Indies, pointed out that, according to the view that has prevailed at any rate since the nineteenth century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.\textsuperscript{62}

The illegitimacy of the doctrine of discovery as applied to Native Americans was effectively conceded by Joseph Story, nineteenth century U.S. Supreme Court justice, who insisted, nonetheless, that the entitlements based on the doctrine must be permanently accepted merely because they were accepted. In Story's circular line of reasoning:

\begin{quote}
The Truth is, that the European nations paid not the slightest regard to the rights of the native tribes. They treated them as mere barbarians and heathens, whom, if they were not at liberty to extirpate, they were entitled to deem mere temporary occupants of the soil . . . . The right of discovery, thus asserted, has become the settled foundation, on which the European nations rest their title to territory in America; and it is a right which, under our governments, must now be deemed incontestable, however doubtful in its origin, or unsatisfactory in its principles. The Indians . . . have been deemed to be the lawful occupants of the soil, and entitled to a temporary possession thereof, subject to the superior sovereignty of the particular European nation, which actually held the title of discovery.\textsuperscript{63}
\end{quote}

It is a repugnant implication of Justice Story's logic that the victims of a crime against humanity may claim no remedy for the reason that they did not receive a remedy.

\textsuperscript{61} Hugo Grotius, \textit{supra} note 10, at 550.
\textsuperscript{63} Joseph Story, \textit{A Familiar Exposition of the Constitution of the United States} 13-14 (1859), quoted by Steven T. Newcomb, \textit{supra} note 23, at 316-317 n. 84.
The Cabot charter, noted above, purported to give an English discoverer an absolute right to subdue the Indians and to seize and possess their lands, in derogation of all indigenous rights and claims. But international law does not allow settlers to treat native peoples as if they do not exist. The International Court of Justice, holding that the Western Sahara was not terra nullius (i.e., holding that it was not territory belonging to no one) when it had been colonized by Spain in 1884, reported:

State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terra nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' . . . but through agreements concluded with local rulers.\(^{64}\)

C. CONQUEST THEORY

The theory of discovery allowed whites to rationalize taking title to Indian lands even when they recognized the natives' right to (at least temporarily) be on the land which the settlers now claimed they owned. In the alternative, the theory of conquest enabled the white colonies, and subsequently United States authorities, to assert that they owned the land outright and could expel the Indians practically at will. The idea was that, if the white man fought a just war against the Indians and won, the white man got the spoils of war, the rights of conquest, the title in fee simple to the land. The problem is that this conquest theory was frequently asserted following savage military actions in which there was nothing just about the white man's cause. Grotius' international law theory of just war, derived from ancient church fathers, did not sanction conquest by aggressive war; this fact, however, did nothing to slow the white man's conquest of Native American lands.

Emmerich de Vettel, an eighteenth century authority on international law, denounced the white settlers' conquest of Native American lands. He said Europeans who "attacked the American Nations and subjected them to their avaricious rule, in order, as they have said, to civilize them,

\(^{64}\) Western Sahara Case, 1975 I.C.J. 12, 39, quoted by Gordon Bennett, Aboriginal Rights in International Law 5 (1978).
and have them instructed in the true religion — those usurpers, I say, justified themselves by a pretext equally inputs and ridiculous. 65

The armed conquest of Native American lands, attended by the decimation of tribal populations, was a manifestation of not only material greed but also ethnic hate. White warriors who massacred Indians generally did not dissent from the widespread slaughters. Doubtless they approved because of their conception that the Indians were inferior savages. The killers were not merely Indian haters; they were believers in a form of exterminationist racism. 66

D. NO REMEDY IN THE CHEROKEE CASES

Eight years after Marshall propounded the "Indian title" rationalizations in M’Intosh, he announced in Cherokee Nation 67 that an individual state, unlike the United States, could not assert any sovereignty over Indian lands. The decision in Cherokee Nation reaffirmed the doctrine of discovery, but made clear that unconquered Indian tribes nevertheless had not yet lost all of the attributes of sovereign nations and were in fact supposed to be protected by federal authority against any incursions or claims by states. The decision was occasioned by the Cherokees' challenge to statutes Georgia enacted in 1828 which purported to annex the lands of the Cherokee Nation into five Georgia counties, voided Indian contracts, provided guards for gold mines recently discovered in Cherokee lands; and authorized the governor to take possession of gold, silver and other mines.

Marshall noted in Cherokee Nation that federal and Georgia authorities in 1802 agreed that the U.S. government would "extinguish" the Cherokees' title "so soon only as it could be done peaceably and on reasonable terms," and that in the meantime all would respect "the Indian boundary as arranged by the treaties" and "the sovereignty of the Indians, and of their exclusive right to give and to execute the law within that boundary." Marshall also noted that "presidents Monroe and Adams, in succession . . . avowed their determination to protect these complainants

66. Cf. Daniel Jonah Goldhagen, Hitler's Willing Executioners: Ordinary Germans and the Holocaust 416 (1996): "That the perpetrators approved of the mass slaughter, that they willingly gave assent to their own participation in the slaughter, is certain. That their approval derived in the main from their own conception of Jews is all but certain, for no other source of motivation can plausibly account for their actions."
67. Cherokee Nation, supra note 11.
[the Cherokee Indians] by force if necessary, and to fulfill the guarantee given to them by the treaties.” The state of Georgia noted, though, that President Andrew Jackson asserted that he had no power to protect the Indians against the laws of Georgia. 68

Marshall wrote in Cherokee Nation that the congressional act of 1830 provided for exchange of lands with the Indians and for their removal west of the Mississippi, that it "is to apply to such Indians as may choose to remove, and . . . nothing contained in the act shall be construed as authorising or directing the violation of any existing treaty between the United States and any of the Indian tribes."69 The Chief Justice, who had overestimated the savagery of the Indians in his M'Intosh analysis, now underestimated the savagery of the federal authorities under President Jackson. According to Marshall's line of reasoning, it did not even matter that treaties had given titles in fee simple 70 to the Cherokees.

The Cherokee Nation decision recounted forgotten reality:

A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain . . . have yielded the lands by successive treaties . . . until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.71

Marshall's opinion for the court did not reach the question of whether the acts of the Georgia legislature, purporting to take Cherokee land and rights, were violative of the U.S. Constitution. While noting that "the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy,"72 and indicating that the decision would be for the Cherokees if the "courts were permitted to indulge their sympathies,"73 Marshall concluded that the court lacked jurisdiction. Asserting that the tribe is neither a "foreign nation" nor a state, Marshall reasoned that the courts could not hear the Cherokees' case.74 Thus, although Georgia acted unconstitutionally to deprive the Cherokees of land and rights, the federal jurists took the position that no judicial remedy could be obtained. Marshall's 1831 opinion denied the

68. Id. at 7-10.
69. Id. at 9.
70. See M'Lean dissent in Worcester, supra note 12 at 587.
71. Cherokee Nation, supra note 11, at 15.
72. Id. at 17.
73. Id. at 15.
74. Id. at 15-17.
Cherokees' request for an injunction and concluded, ominously: "If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future."  

The racist views that existed at the time were revealed in the concurring opinion of Justice Johnson in *Cherokee Nation*: “Independently of the general influence of humanity, these people were restless, warlike, and signally cruel . . . and it was probably wise to prepare them . . . to incorporate them in time into our respective governments: a policy which their inveterate habits and deep seated enmity has altogether baffled.”

But the proposition that the Cherokees were not a foreign nation was refuted by the eloquent dissent of Justice Thompson:

The circumstance of their original occupancy is here referred to, merely for the purpose of showing, that if these Indian communities were then, as they certainly were, nations, they must have been foreign nations, to all the world; not having any connection, or alliance of any description, with any other power on earth. And if the Cherokees were then a foreign nation; when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community?

They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self government, and become subject to the laws of the conqueror. When ever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate national character. And . . . the right of occupancy is still admitted to remain in them, accompanied by the right of self government, according to their own usages and customs; and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety. But the principle is universally admitted, that this occupancy belongs to them as a matter of right, and not by mere indulgence. They

75. *Id.* at 20.
76. *Id.* at 23-24.
cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent; or unless a just and necessary war should sanction their dispossession.\footnote{77}

The inverse of the doctrine of "Indian title" would be the conception that it was white settlers who became mere occupants on what was rightfully the Indians' land. Then "white title" would be the colonists', somewhat analogous to the Cold War claims of Kremlin agents in far-flung vassal "republics" of the old Soviet Union.

According to Henkin, a state does not cease to be a state because it is occupied by a foreign power .... Thus, Kuwait remained a state notwithstanding its occupation and putative annexation by Iraq in 1990. The United States never recognized the incorporation of Estonia, Latvia and Lithuania into the U.S.S.R.\footnote{78}

Marshall in \textit{Cherokee Nation} acknowledged:

It is the political relation in which one government or country stands to another, which constitutes it foreign to the other. The Cherokee territory being within the chartered limits of Georgia, does not affect the question .... \[I\]t is not perceived that any absurdity or inconsistency grows out of the circumstance, that the jurisdiction and territory of the state of Georgia surround or extend on every side of the Cherokee territory. It may be inconvenient to the state, and very desirable, that the Cherokees should be removed; but it does not at all affect the political relation between Georgia and those Indians. Suppose the Cherokee territory had been occupied by Spaniards or any other civilized people, instead of Indians, and they had from time to time ceded to the United States portions of their lands precisely in the same manner as the Indians have done, and in like manner retained and occupied the part now held by the Cherokees, and having a regular government established there: would it not only be considered a separate and distinct nation or state, but a foreign nation, with reference to the state of Georgia or the United States. If we look to lexicographers, as well as approved writers,

\footnote{77. \textit{Id.} at 54-55.}
\footnote{78. 2 FOREIGN POL'y BULL 33, no. 2 (Sept./Oct. 1911).}
for the use of the term foreign, it may be applied with the strictest propriety to the Cherokee nation.  

Justice Thompson's *Cherokee Nation* dissent noted that the sovereignty of Indian nations was persuasively explained by Chancellor Kent in a New York case, *Jackson v. Goode*, 20 Johns. 193, where the citizenship of an Oneida Indian was at issue:

That Oneidas, he observed, and the tribes composing the six nations of Indians, were originally free and independent nations, and it is for the counsel who contend that they have now ceased to be a distinct people and become completely incorporated with us, to point out the time when that event took place . . . . Still they are permitted to exist as distinct nations, and we continue to treat with their sachems in a national capacity, and as being the lawful representatives of their tribes . . . . No argument can be drawn against the sovereignty of these Indian nations, from the fact of their having put themselves and their lands under the protection of the British crown: such a fact is a frequent occurrence between independent nations. One community may be bound to another by a very unequal alliance, and still be a sovereign state. *Vat.* B. 1, ch. 16, section 194.  

The year after the Marshall court denied the Cherokees' request for an injunction barring Georgia from enforcing the state's anti-Indian statutes, it used another case to strike down the same statutes as repugnant to the U.S. Constitution. Although the high court had found in *Cherokee Nation* that the Indians lacked standing to sue in federal court, it found in *Worcester v. Georgia*, 31 U.S. 515 (1832), that a Christian missionary from Vermont, convicted on a state charge of being on Cherokee land without a state license, did have standing. In *Worcester*, the court reaffirmed the *M'Intosh* "Indian title" theory of diminished Native American land rights, but it held unconstitutional the far-reaching Georgia statutes that took the property and liberty of Cherokee people.

However, the announcement of the decision in *Worcester*, though initially celebrated as a victory for justice, was not followed by redress of grievances. On the contrary, the decision was ignored not only by the states but also by the political branches of the federal government. The

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80. Quoted by Thompson, dissent, in *Cherokee Nation*, supra note 8, at 67-68.
high court had no army to enforce its will. And the atrocities escalated across the United States, as willing executioners unleashed by Andrew Jackson waged a genocidal campaign that was to take the lands and lives of Indian people.

Author William C. Canby, Jr. wrote in 1988:

President Jackson probably did not make the statement about the decision that is popularly attributed to him: 'John Marshall has made his decision; now let him enforce it,' but there is little question that the decision was not popular with the Jacksonians who were anxious to hasten the exodus of the tribes from lands east of the Mississippi. In the end, however, those favoring removal had their way. All but a few remnants of tribes east of the Mississippi were moved to the West under a program that was voluntary in name and coerced in fact. The journeys were often attended with extreme hardship and some became virtual symbols of imposed suffering, such as the Trail of Tears by the Five Civilized Tribes (Cherokee, Choctaw, Creek, Chickasaw and Seminole) from the Southeast to what is now Oklahoma.82

The genocidal policy continued for the greater part of the nineteenth century. A famed general stated that exterminating the Indians was the only way to keep them from becoming government-supported paupers;83 the inhumanity of the statement attributed to General William Tecumseh Sherman was an ironic affront to his own name, but it reflected the violent racism of the era.

E. MIXED RESULTS IN LATER CASES

Indians' land rights had been devastated by the M'Intosh theories of "Indian title," discovery, and conquest. Native rights were further eroded in 1903 when the Supreme Court decided Congress had "plenary power" to take the lands and evict the Indians without compensation. In Lone Wolf v. Hitchcock,84 the high court upheld the taking of two million acres of Apache, Comanche and Kiowa lands in Oklahoma, even though the record showed the takings were the product of years of fraud and misrepresentation by agents of the United States. The taking was lawful, the high court found, because it was approved by Congress, whose power

83. CYRUS TOWNSEND BRADY, INDIAN FIGHTS AND FIGHTERS 11 (1971).
to take from the Indians is unbridled. The court's *Lone Wolf* decision conceded that, in *M'Intosh* and its progeny, "the Indian right of occupancy... has been stated to be... as sacred as the fee of the United States in the same lands." But it distinguished *Lone Wolf* because "in none of those cases was there involved a controversy between Indians and the government respecting the power of Congress to administer the property of the Indians." The power to administer, according to the *Lone Wolf* theory, is the power to annihilate.

The high court in *Lone Wolf* said it "presumed" that Congress, in exercising this unlimited power over Indians, "would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." It is ironic that Christianity was evoked by the discoverers who took Indian land, and by the first Supreme Court which sanctioned the early, incomplete takings, and then was attributed to the Congress which consummated a plenary power to take without any need to compensate or justify. "Be that as it may," the court said in *Lone Wolf*, "the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy... Plenary authority over the tribal relations of the Indians has been... political... not subject to be controlled by the judicial department of the government." Congress, the court added, is just as free to trample Indian rights as it is to violate treaties with foreign nations.85 The *Lone Wolf* decision did not address due process, the Takings clause, or the international obligations of the United States.

A new and different outcome occurred in a 1946 Supreme Court decision that required compensation for lands taken from Indian tribes in Oregon. In *United States v. Alcea Band of Tillamooks*,86 the court decided that, although the federal taking itself was a nonjusticiable political question, there was nonetheless a cause of action arising from the involuntary taking of lands held by original Indian title. Without referring to the Takings clause, the high court said that "taking original Indian title without compensation and without consent does not satisfy the high standards for fair dealing' required of the United States in controlling Indian affairs. *United States v. Santa Fe R. Co.*, 1941, 314 U.S. 339, 356.87 Dissenting, Justice Reed, joined by Justices Rutledge and Burton, saw peril, opening floodgates to litigation: "It is difficult to foresee the result of this ruling in the consideration of claims by Indian tribes against

85. Id. at 564-566.
87. Id. at 46-47.
the United States. We do not know the amount of land so taken. West of
the Mississippi it must be large . . . . [C]harges of unfair dealings may
open up to consideration again legal or equitable claims for taking
aboriginal lands."^88

Consequently, Indian real property claims generally are at the mercy of
Congress, subject to a fairness standard that may depend on the degree of
dererence the Supreme Court decides to show to the legislative branch in
a particular case.

IV. THE TAKING OF THE CONTINENT VIOLATED BINDING
TREATIES, CUSTOMARY INTERNATIONAL LAW AND THE U.S.
CONSTITUTION

The Constitution places the power to make treaties in the president and
the senate,^89 and authorizes the judicial branch to decide cases arising
under treaties.^90 Congress in 1871, during a period of violent anti-Indian
sentiment, enacted a statute which said no Indian tribe could any longer
be recognized as an independent nation with which the United States
could enter into a treaty, but that existing treaties would not be affected;
that law, 25 U.S.C.A. section 71, is still on the books.

That the Constitution's Treaty clause was meant to recognize the
sovereign nationhood of Indian tribes is demonstrated, in this author's
view, by the fact that the contemporaries of the Framers, those who were
involved directly or indirectly in the process of ratification, understood it
to be so. To be sure, the American Constitution is dynamic and its
application must adapt to the needs of changing times. But the true
meaning of its fundamental concepts is better discerned from the
understanding of the ratifiers than from the memory lapses of jurists and
lawmakers a century or two later.~91

89. U.S. Const. II, 2.
90. U.S. Const. III, 2(1).
91. Jack N. Rakove wrote in Original Meanings: Politics and Ideas in the Making of the
Constitution 8-9 (1996): “Meaning must be derived from usage, however...alternative formulations
of original intention and understanding become pertinent. Intention connotes purpose and
forethought.... Understanding, by contrast, may be used more broadly to cover the impressions and
interpretations of the Constitution formed by its original readers — the citizens, polemicians, and
convention delegates who participated in one way or another in its ratification. .... The Constitution
derives its supremacy, in other words, from a direct expression of popular sovereignty, superior in
authority to all subsequent legal acts resting only on the weaker foundations of representation.”
The Treaty clause provides that the president "shall have power, by and with the advice and consent of the senate to make treaties, provided two thirds of the senators present concur." The clause does not distinguish treaties made with Indian nations from treaties made with any other categories of nations. Therefore, the fact that the Framers and ratifiers of the Constitution understood the clause to apply to Indian nations exactly the same as it applied to other nations is demonstrated by the consistent practice of the young United States, in the early decades of our national existence, of: (a) negotiating treaties with long-established Indian nations, and (b) ratifying the pacts by a two-thirds vote of the senate in exactly the same manner as was followed in respect to treaties with non-Indian nations such as England and France.

Justice Thompson’s Cherokee Nation dissent pointed to the Hopewell treaty of 1785 as but one illustration of the U.S. practice of concluding treaties with the Indians. That treaty settled boundary lines between the Cherokee Nation and the United States, and provided, inter alia, for prisoner exchanges and the extradition of fugitives. Thompson asked, "What more explicit recognition of the sovereignty and independence of this nation could have been made? It was a direct acknowledgement, that the territory was under a foreign jurisdiction." And he noted that provisions of Indian treaties were the same as provisions in treaties with non-Indian nations including, England. Similarly, Chief Justice Marshall in Worcester cited the Holston treaty of 1791 as an international agreement between the United States and the Cherokees: "This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting its subjects to the laws of a master." As Justice McLean wrote, concurring in the 1832 Worcester decision, "After a lapse of more than forty years since treaties with the Indians have been solemnly ratified by the general government, it is too late to deny their binding force.

A. LAW OF NATIONS AND SUPREMACY CLAUSES VIOLATED

The Constitution recognizes the law of nations, for it expressly empowers Congress to define and punish offenses against it. Ever

92. U.S. Const. II, 2(1).
93. Cherokee Nation, supra note 11, at 61.
95. Id. at 583.
96. U.S. Const. I, 8(3).
since the founding of the United States, federal and state courts have always treated customary international law as incorporated into U.S. law. International law passed on from the law of England to the American colonies and thence to the United States. U.S. law, which includes our Constitution and treaties, is the supreme law of the land. 97

Prior to the voyage of Christopher Columbus, Indian nations were, as discussed above, sovereign states equal in status to any other states in the world under international law. But Indian sovereignty was ravaged in practice by papal bulls, royal charters, colonial aggressions and later, by corrosive U.S. Supreme Court decisions and anti-Indian policies of the states and the political branches of the federal government.

Hence, this author believes the conclusion is inescapable that the American Indian lands were taken unjustly, in violation of norms of law and morality. The law was manipulated to make it all ultimately legal. But in the name of humanity we must recognize the truth, that we live on their land.

Marshall, in *Worcester*, addressed the Supremacy clause in its application to Indian treaties:

> The constitution, by declaring treaties already made, as well as those to be made, 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. The words 'treaty' and 'nation' are words of our own language, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense. 98

**B. COMMERCE CLAUSE VIOLATED**

Marshall's dicta in *Cherokee Nation* discussed whether the Commerce clause, empowering Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes,"99 indicates whether the tribes were deemed to be nations. He concluded: "The court has bestowed its best attention on this question, and, after

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97. U.S. Const. VI, 2.
mature deliberation, the majority is of the opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.\textsuperscript{100} But this reading of the commerce clause did not take into account the practice of the Framers and ratifiers of the Constitution, who consistently treated the Indian tribes as foreign nations. Nor did it consider the fact that the Framers and ratifiers would not have intended to deny their Indian friends all access to the federal court system. Further, it did not address how the Framers, whether intending to do so or not, could have taken away, by a stroke of the pen, the previously acknowledged sovereignty of independent nations of Indians.

C. **TAKINGS CLAUSE VIOLATED**

The Takings clause of the Fifth Amendment bars governmental taking of private property for public use without just compensation.\textsuperscript{101} As we have seen, the Supreme Court has not paid attention to the Takings clause in cases involving the public taking of Indian lands.\textsuperscript{102} Instead, the court has sometimes applied a more vague concept that some compensation is required by the congressional duty of fair dealing with the Indian tribes. But a logical case can be made that the Takings clause standard should be applied when the government in fact has taken Native American lands for public purposes. After all, there is nothing in the Constitution to suggest that Indians are so inferior as to be inherently denied the protection promised by the Takings clause to all owners of private property.

D. **CONTRACTS CLAUSE**

The Contracts clause\textsuperscript{103} prohibits state impairment of contracts. It does not appear to have direct application to Indian tribes, which are held to be constitutionally immune from state regulation and subject only to federal law. Ironically, though, the first Contracts clause case heard by the U.S. Supreme Court, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), laid the groundwork for the *M'Intosh* line of cases that gave a constitutional excuse for the taking of Native American lands. Fletcher sought to annul Georgia's conveyance of land to Peck's predecessors in interest. Fletcher argued that a royal proclamation in 1763 had

\textsuperscript{100} Cherokee Nation, supra note 11, at 20.
\textsuperscript{101} U.S. Const., Amendment V.
\textsuperscript{102} United States v. Alcea Band of Tillamooks, 329 U.S. 40, supra note 85.
\textsuperscript{103} U.S. Const. I, 10(1).
confirmed Indian tribes' full title in that land, with the result that the state
could not later convey it. The high court ruled for Peck on the issue.
Chief Justice John Marshall, finding that the tribes held only a limited
interest, wrote for the high court: "[T]he Indian title which is certainly to
be respected by all courts, until it be legitimately extinguished, is not . . .
absolutely repugnant to seisin in fee on the part of the state."\(^{104}\) Laurence
Tribe has noted that the *Fletcher* decision, a characteristic Marshall
compromise, "set the course" for Marshall's later decisions denying that
Indians could have full ownership of their land.\(^{105}\) The term Indian title
was introduced to signify a kind of limited title, a right of possession or
occupancy that was expected, in due time, to be extinguished.

E. FIFTH AMENDMENT DUE PROCESS CLAUSE

Literature and jurisprudence derived from the Due Process clause are
very extensive. But there is little or no attention devoted to due process
in major Supreme Court cases involving the taking of Native American
property. The clause in the Fifth Amendment expressly provides, "No
person shall . . . be deprived of life, liberty, or property, without due
process of law."\(^{106}\) The substantive and procedural due process
protections provided to American Indians should be no less than those
assured to all persons by the Constitution.

V. CONCLUSION AND RECOMMENDATIONS: NEW U.S.
Policies Should Honor the Contributions and Re­
Store the Rights of the Indians

The taking of America involved the most extensive land fraud and the
largest holocaust in world history. Chief Justice John Marshall used
international law doctrines of discovery and conquest to rationalize white
supremacist usurpation of Indian nation sovereignty, even while
conceding that the great injustice may have violated international law
principles. Later Supreme Court decisions and policies of the political
branches further ravaged Native Americans' land rights. The Framers of
the Constitution had been profoundly inspired by their many Indian
friends, but in the Jackson era federal troops and ragtag racists ran
roughshod over the Indians, their land and the law. The vast frauds and
atrocities were committed by avowed Christians in the name of a religion

\(^{104}\) *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-143 (1810).
\(^{106}\) U.S. Const., Amendment V.
that unequivocally condemns stealing and violence. Now the surviving remnants of Native American tribes are the most neglected and mistreated ethnic group. Now creative remedies can be fashioned to restore honor to Indian nations and to the United States of America.

Today some 1.5 million Native Americans live on 300 reservations covering more than 52 million acres in 27 states.\textsuperscript{107} They have the worst poverty levels — and shortest life expectancies — of any ethnic group in the United States;\textsuperscript{108} the toll of the American holocaust, thus continuing still, must end.

As we have seen, early decisions of the U.S. Supreme Court pronounced by Chief Justice John Marshall lamented the injustices done to the Native American Indians and the legally questionable means by which land rights were wrested from them. Marshall's rationalizations were followed by generations of court decisions, executive orders, acts of Congress, army expeditions and mob acts of avarice and violence that left almost all the Native Americans dead and almost all their property in white hands. Throughout U.S. history, elected officials have proclaimed policies of fairness and protection toward the Indians who, in the course of it all, have lost their sovereignty, their rights and their sacred lands. Jurists and politicians have been aware of the tragic betrayals, but have never felt they had the capacity to act to bring justice to Indian people. With the dawn of a new millenium, it is high time for America to take specific, practical steps to make up, so far as can be done now, for some of the unspeakable harm that has been wrought against the Indians, on whose land we live.

The federal district judge who decided the \textit{Wounded Knee Cases}\textsuperscript{109} in 1975 found that he was unable to dismiss criminal charges against approximately 65 Indians who were prosecuted in connection with events that allegedly took place on the Pine Ridge Indian Reservation, South Dakota. But he used his opinion in those consolidated cases to proclaim that the injustices done to Native Americans are of such vast and historic proportions that they are beyond the scope of competency of the federal judiciary. While deciding that the Sioux treaty of 1868 did not protect these defendants from federal prosecution, Chief Judge Urbon

\begin{itemize}
\item \textsuperscript{108} Steven L. Pevar, \textit{The Rights of Indians and Tribes}, an ACLU handbook, 2d ed. 1 (1992).
\item \textsuperscript{109} \textit{United States v. Consolidated Wounded Knee Cases}, 389 F.Supp. 235. Indian defendants were charged criminally with acts alleged to have occurred on the Pine Ridge Indian Reservation near Wounded Knee, S.D. in 1973.
\end{itemize}
cried out for the American people and their elected leaders to wake up and finally do something about the way the Indians have been treated. The chief judge wrote:

The Sioux people were once a fully sovereign nation. They are not now and have not been for a long time. Whether they ever will be again is dependent upon actions of the Congress and the President of the United States and not of the courts. There is a residue of sovereignty, however . . . . It cannot be denied that official policy of the United States until at least the late 19th century was impelled by a resolute will to control substantial territory for its westward-moving people. Whatever obstructed the movement, including the Indians, was to be — and was — shoved aside, dominated, or destroyed. Wars, disease, treaties pocked by duplicity, and decimation of the buffalo by whites drove the Sioux to reservations, shriveled their population and disemboweled their corporate body. They were left a people unwillingly dependent in fact upon the United States.

It is an ugly history. White Americans may retch at the recollection of it.

They may also ask themselves questions: How much of the sins of our fore-fathers must we rightly bear? What precisely do we do now? Shall we pretend that history never was? Can we restore the disemboweled or push the waters of the river upstream to where they used to be?

Who is to decide? White Americans? The Native Americans? All, together? A federal judge?

Who speaks for the Sioux? Those traditional people who testified here? Those Sioux of a different mind who did not testify? The officials elected by the Sioux on the eight reservations?

Feeling what was wrong does not describe what is right. Anguish about yesterday does not alone make wise answers for tomorrow. Somehow, all the achings of the soul must coalesce
and with the wisdom of the mind develop a single national policy for governmental action.\textsuperscript{110} Judge Urbom observed that (a) elected officials are "more likely to reflect the conscience and wisdom of the people" than appointed judges; (b) Congress has investigative tools which the courts lack; (c) "relations with American Indians are rooted in international relations," an arena better suited to the political branches; and (d) the Constitution has placed relations with Indian tribes in the province of presidential and congressional power.\textsuperscript{111} Noting that the U.S. Supreme Court had reduced the sovereignty of the Indian nations, Judge Urbom said: "When the Supreme Court speaks clearly, I must honor the statement or be as unfaithful to my duty to the law as the United States has been to its promises to the American Indians." He also expressed his hope that the \textit{Wounded Knee} hearing would "serve to make the citizenry of the United States more aware and more willing to grapple with the hard decisions that need to be made."\textsuperscript{112}

\section*{A. RENEWAL OF NATIONHOOD}

Justice would be served if Indian nationhood could be restored and Indians allowed the opportunity to make real the dream of Crazy Horse: "We would live as our fathers did, and their fathers before them."\textsuperscript{113}

The numerosity argument against Indian nationhood — that it would be troublesome to have to treat each tribe as a nation because there are too many of them — was presented by the concurring opinions of Justices Johnson and Baldwin in \textit{Cherokee Nation}. Johnson wrote: "Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state? We should indeed force into the family of nations, a very numerous and very heterogeneous progeny."\textsuperscript{114} Baldwin feared that "if one is a foreign nation or state, all others in like condition must be so . . . and each of their subjects capable of suing in the circuit courts. This case then is the case of countless tribes, who...as states or aliens, will rush to the federal courts in endless controversies, growing out of the laws of states or congress."\textsuperscript{115} The

\begin{thebibliography}{11}
\bibitem{110} \textit{Id.} at 236, 238-239.
\bibitem{111} \textit{Id.} at 239-240.
\bibitem{112} \textit{Id.} at 240.
\bibitem{113} Quoted by Peter Matthiessen, \textit{In the Spirit of Crazy Horse} ix (1972).
\bibitem{114} \textit{Cherokee Nation}, supra note 11, at 25.
\bibitem{115} \textit{Id.} at 32.
\end{thebibliography}
inequity of the *Cherokee Nation* decision, denying a federal injunction for want of jurisdiction where Georgia by force of arms stole Indian land and gold, is an historic fact. So is the later act of Congress that gave Indians the right to sue in federal courts, a reform whose happy exercise has refuted Justice Baldwin's fear of floodgates open to an unmanageable volume of Indian litigation.

Steven Paul McSloy asked whether the self-determination principles that allow sovereignty and United Nations membership to Saint Kitts and Nevis (139 square miles, 54,775 people), Liechtenstein (62 square miles, 27,074 people), and San Marino (23 square miles, 22,791 people), to name just a few, should apply to the Navajo (166,000 people), the Lumbee (50,000 people), the Cherokee (42,992 people) . . . and other Indian peoples, who in the aggregate still own 52,500,000 acres of land in the contiguous United States, an additional 44,000,000 acres in Alaska, and potentially millions of additional acres presently the subject of land claim litigation.116

The present author recommends that a practical solution to the numerosity problem would be to form agreements whereby the larger Native American Indian nations would have the opportunity to be seated in the United Nations, while smaller ones could join together, if they wished, in confederations, which could be seated in the world organization. But the fact that a state is small should not necessarily exclude it from admission to the family of nations.

Justice Johnson also presented the circular argument that the Cherokee Nation could not be recognized as a nation because it lacked power to sell or transfer its land without the consent of the United States. He compared the Cherokees to small European nations: "They have in Europe sovereign and semi-sovereign states and states of doubtful sovereignty. But this state, if it be a state, is still a grade below them all: for not to be able to alienate without permission of the remainder-man or lord, places them in a state of feudal dependence."117 The argument is circular because it was the United States' predecessors in interest who took away the Indians' sovereign power to alienate the land; this power was taken away without the Indians' knowledge or consent, in violation of international law. Fortunately, since Johnson's assertions were in a

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concurring opinion, his implication that U.S. authorities are feudal lords is without legal force.

Justice Johnson’s concurring opinion in Cherokee Nation unwittingly provided a powerful argument in favor of belated renewal of Indian sovereignty when he analogized the Cherokees to the Jews:

However, I will enlarge no more upon this point; because I believe, in one view and in one only, if at all, they are or may be deemed a state, though not a sovereign state, at least while they occupy a country within our limits. Their condition is something like that of the Israelites, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal and self-government has never been taken from them; and such a form of government may exist though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self-government may exist in them. And such they certainly do possess; it has never been questioned, nor any attempt made at subjugating them as a people, or restraining their personal liberty except as to their land and trade.\(^\text{118}\)

Although Justice Johnson apparently did not appreciate the significance of the whites’ taking of Indian lands, and did not intend to offer any argument in favor of full sovereignty for Indian nations, his analogy to the Jews of Palestine can help us to see more clearly the justification and practical possibility of recognizing Indian sovereignty. More than a century after Johnson’s concurrence in Cherokee Nation, the state of Israel was born and accepted into the community of nations. If the survivors of the Holocaust, in which six million perished, could be allowed to return to their homeland and declare their independence, this author recommends that a similar procedure should be allowed for the descendants of those who survived the American holocaust.

Advocating the admission of Israel to the United Nations, Philip C. Jessup, the United States representative to the Security Council, recited the well-accepted constitutive theory of statehood; the elements are a

\(^{118}\) Id. at 27.
people, a territory, a government, and a capacity to enter into relations
with other states.119

Vine Deloria, Jr. wrote: "[W]ho is to say that Indians cannot regain their
independence in the future? Can one view the re-creation of the state of
Israel, after two thousand years of exile and seriously maintain that the
Oglala Sioux will never ride their beloved plains as rulers of everything
they see? . . . If the U.S. can recognize the historic claim of a specific
people to land in the Middle East, there is no reason in fact or law to
continue to ignore the claim of the native Americans to territorial
sovereignty over a small portion of their historic land."120 After all, as
Susan Lope has pointed out, "Native Americans . . . exist today as
independent cultures, with their own religions, languages and
governments."121

B. INTERNATIONAL INSTRUMENTS

The United States should give consideration to taking a positive
approach toward international law instruments that support the rights of
indigenous peoples. Thus, wherever practical, the United States should
employ its voice and its vote in international forums in support of
implementation of the human rights provisions of these instruments.
These include the 1977 Geneva Draft Declaration of Principles for the
Defense of the Indigenous Nations and Peoples of the Western
Hemisphere ("Indigenous peoples shall be accorded recognition as
nations . . . ." art. 1); the 1984 Panama Declaration of Principles of
Indigenous Rights ("Indigenous people shall have exclusive rights to
their traditional lands . . . ." Principle 9); the 1987 Geneva Declaration of
Principles on the Rights of Indigenous Peoples ("Indigenous nations and
peoples are entitled to the permanent control and enjoyment of their
aboriginal ancestral-historical territories." art. 4); the 1991 Geneva
Convention Concerning Indigenous and Tribal Peoples in Independent
Countries ("The rights of ownership and possession of the peoples
concerned over the lands which they traditionally occupy shall be
recognized." art. 14, para. 1); and the 1995 Draft of the Inter-American
Declaration on the rights of Indigenous peoples (". . . in many indigenous
cultures, traditional collective systems for control and use of land and

119. 3 U.N. SCOR, 383 mtg., Dec. 2, 1948, pp. 9-12, cited by Henken et al, International Law,
supra note 18, at 246.
120. Vine Deloria, Behind the Trail of Broken Treaties: An Indian Declaration of
121. Susan Lope, supra note 106, at 352.
C. RECONCILIATION

A high-level, broad-based commission should be established to conduct a serious public study of the feasibility of restoring Indian nationhood within practical boundaries. The President of the United States should appoint Indians and non-Indians, lawyers and non-lawyers, lawmakers and citizens, historians and futurists to the commission. The members should be people of diverse philosophies and faiths who share a commitment to human rights, an understanding of international affairs, and an open-minded willingness to seek practical compromise.

The State Department should conduct a review of United States obligations with respect to Native Americans under international human rights law. In the meantime, responsible agencies should redouble efforts immediately to improve health, education and welfare standards for Indian people.

And let all Americans learn the history and treasure the culture of the Indians. Let us express our remorse for the betrayals of the past, and begin the millenium with a vow to honor the people of all nations.

Then we shall be reconciled with the descendants of those who welcomed our forebears to the land of the free.

122. Anaya, Indigenous Peoples, supra note 6, appendix at 185-219.