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ARTICLE

MARSHALLING PAST AND PRESENT: COLONIALISM, CONSTITUTIONALISM, AND INTERPRETATION IN FEDERAL INDIAN LAW

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Federal Indian law is often dismissed as esoteric and incoherent. In this Article, Professor Frickey argues that this need not — and should not — be the case. Rather, he claims, federal Indian law represents the intersection of colonialism and constitutionalism in the American historical experience. As such, it is central to our understanding of American public law. Moreover, Professor Frickey contends that a coherent, normatively sensitive approach to contemporary federal Indian law is possible.

Professor Frickey identifies, in the three foundational federal Indian law opinions written by Chief Justice John Marshall, an ingenious, evolving effort to mediate the tensions between colonialism and constitutionalism. According to Professor Frickey, Chief Justice Marshall achieved this subtle accommodation by conceiving of Indian treaties and other documents that adjust the exclusive sovereign-to-sovereign relationship between the federal government and tribes as constitutive texts. As such, Chief Justice Marshall's interpretive approach to them mirrored his approach to the federal Constitution. Unfortunately, the Supreme Court and contemporary commentators have lost sight of Chief Justice Marshall's approach. Professor Frickey outlines the implications of a return to a constitutive vision and concludes that such a method is both more coherent and more sensitive to the underlying issues of federal Indian law.

I. INTRODUCTION

In 1987, the American legal community celebrated the bicentennial of the Constitution. Five years later, few of the same people paid much attention to the quincentennial of Christopher Columbus' contact with the western hemisphere. If that event had any current

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significance, it seemed largely social or cultural, not legal. The Constitution and Columbus do not conjoin in contemporary thought.[1]

To be sure, the Supreme Court entertained many cases during those intervening five years that considered the current legal situation of America's indigenous peoples.[2] But on the surface, at least, these were marginal cases involving issues that paled in comparison to the great legal debates of the day. The questions they presented seem exquisitely dull: for example, whether, under the Indian Mineral Leasing Act of 1938,[3] a state may tax the extraction of oil and gas on an Indian reservation by a non-Indian company,[4] or whether land patented by the federal government to a tribe or its members pursuant to the Indian General Allotment Act of 1887[5] was subject to a county's property tax.[6] Merely to state the issues reveals their obscurity to almost all of the Court's vast audience. As Justice Blackmun noted in one case, resolving the issue there required "wander[ing] the maze of Indian statutes and case law tracing back 100 years."[7] For most of those who follow the Court, these cases were almost certainly

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[1] Outside the mainstream of the American legal community, of course, these generalizations do not hold. In 1987, as in other recent years, representatives of American Indian tribes pressed their claims for recognition under international law at the United Nations. *See* Howard R. Berman, *Perspectives on American Indian Sovereignty and International Law, 1600 to 1776*, *in* EXILED IN THE LAND OF THE FREE 125, 126 (Oren R. Lyons & John C. Mohawk eds., 1992). For an interesting essay detailing the tortuous fit between American constitutional law and American Indian status, see Vine Deloria, Jr., *The Application of the Constitution to American Indians*, *in* EXILED IN THE LAND OF THE FREE, *supra*, at 281, 281–315.

[2] *See* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992); Blatchford v. Native Village of Noatak, 111 S. Ct. 2578 (1991); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); Duro v. Reina, 495 U.S. 676 (1990); Employment Div. v. Smith, 494 U.S. 872 (1990); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Hodel v. Irving, 481 U.S. 704 (1987); United States v. Cherokee Nation, 480 U.S. 700 (1987); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

[3] 25 U.S.C. §§ 396a–396f (1988).

[4] *See Cotton Petroleum Corp.*, 490 U.S. at 166.

[5] Ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

[6] *See County of Yakima*, 112 S. Ct. at 685–86. Probably the only case that involved Indians in this period that was viewed to be of general significance was *Employment Division v. Smith*, which considered the claim that the Free Exercise Clause of the First Amendment forbade a state from penalizing the sacramental use of peyote in the Native American Church. *See Smith*, 494 U.S. at 874. Although this case involved issues of deep concern to Indians, it was not, strictly speaking, much of a federal Indian law case, because it was grounded on general constitutional principles, *see id.* at 890, rather than on principles generated in the specific field of Indian law to resolve disputes involving tribes or their members.

[7] *County of Yakima*, 112 S. Ct. at 694 (Blackmun, J., concurring in part and dissenting in part).

viewed as "crud," even if "kind of fascinating,"[8] "peewee" cases,[9] perhaps even "chickenshit cases"[10] — all epithets reportedly directed at federal Indian law cases by the Justices themselves when they considered petitions for certiorari or, worse yet, when they were assigned the unenviable task of drafting majority opinions for those cases.

We can only speculate what Justices Stevens and Scalia said when the Chief Justice assigned them the two cases described above. All that can be ascertained from the public record is that they generated workmanlike majority opinions that avoided all of the emotions underlying these epithets, including fascination. In fairness to Justices Stevens and Scalia, other recent Indian law opinions have not made good bedtime reading either.

The purpose of this Article is to suggest that it does not have to be that way. Federal Indian law does not deserve its image as a tiny backwater of law inhabited by impenetrably complex and dull issues. From the standpoint of scholarly interest, few areas, if any, are more fundamental to an assessment of the normative and institutional components of American law. Indeed, federal Indian law is rooted in the most basic of propositions about the American constitutional system: it is inescapably the product both of the colonization of the western hemisphere by European sovereigns and of the corresponding displacement of indigenous peoples.

Even minimal reflection upon the tension between colonization and American constitutionalism should uncover the foundational place federal Indian law occupies in public law. In a country that prides itself on following the rule of law, the justifications for colonization uttered by those European explorers and recognized by the Supreme Court itself — to impose Christianity upon the heathen, to make more productive use of natural resources, and so on[11] — do not go down easily in the late-twentieth century. That the Constitution itself mentions Indians only three times — twice to exclude "Indians not taxed" from the apportionment calculation for the House of Representatives[12] and once to delegate authority to Congress to regulate commerce "with the Indian tribes"[13] — demonstrates the extent to which that foundational document established a government for the colonizers and treated Indians and tribes as outsiders.

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[8] H.W. PERRY, JR., DECIDING TO DECIDE 262 (1991) (quoting an unidentified Supreme Court Justice).

[9] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 58 (1979) (purporting to quote Justice Harlan).

[10] *Id.* at 359 (purporting to quote Justice Brennan).

[11] *See infra* pp. 386, 387–88; *infra* note 55.

[12] U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

[13] *Id.* art. I, § 8, cl. 3.

Federal Indian law is thus rooted in the fundamental contradiction between the historical fact and continuing realities of colonization, on the one hand, and the constitutional themes of limited government, democracy, inclusion, and fairness that, on the other hand, constitute part of our "civil religion."[14] It is the one area of law in which the (constitutional) bicentennial and the (Columbian) quincentennial meet. My claim in this Article is that, although the federal Indian law crafted in the early-nineteenth century by Chief Justice John Marshall[15] assisted the implementation of colonization in a variety of ways,[16] it did not abandon the civil religion entirely. Further, I will argue that, when properly understood, the method by which Chief Justice Marshall accommodated colonialism and constitutionalism is of both theoretical interest and current practical significance.[17]

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[14] *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–53 (1988).

[15] Chief Justice Marshall did not, of course, invent these principles out of thin air. For a look at the historical background that informed Chief Justice Marshall's work, see, for example, ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 312–17 (1990); Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 367–68 (1989); and Robert N. Clinton & Margaret T. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 19–37 (1979).

[16] American law generally did so as well. *See* Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 715, 718–35 (1986). In particular, it is troubling that Chief Justice Marshall's opinion in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), discussed below at pp. 385–90, ratified the use of the rule of law as the means to acquire the Native American land estate.

[17] Because Chief Justice Marshall's decisions form a foundation for the analysis of many federal Indian law issues, several important studies in the field have considered them with some care. *See, e.g.*, CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 24, 30–31, 39–40, 55–56 (1987); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3, 23–34; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 201–05 (1984). In this Article, my particular interest is the precise interpretive steps taken by Chief Justice Marshall, which have not been examined in prior studies. For a study tracing Chief Justice Marshall's interpretive canons through later cases, see Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time Is That?*, 63 CAL. L. REV. 601, 612–14 (1975).

Robert Williams has crafted a thoughtful study of the European vision of conquest and colonization that provides the backdrop for the Marshall decisions. *See* WILLIAMS, *supra* note 15, at 325–28. As I will explain, to some extent Chief Justice Marshall accepted this tradition uncritically, especially in his first principal decision. *See infra* pp. 385–90. The goal of this Article, however, is to suggest that the cumulative effect of his three decisions is to mediate colonization and constitutionalism, rather than simply to defer to the former. One cannot deny, though, that these decisions are not what Native Americans would have liked them to be and that they beg many of the central normative questions involved in colonization. For a useful historical overview that does not shirk these normative questions, see G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 703–40 (1988).

In *Johnson v. McIntosh*,[18] Chief Justice Marshall first attempted to address the basic question of colonization and constitutionalism. May "the Courts of the conqueror,"[19] to use the eye-opening term Chief Justice Marshall coined, recognize any protections for indigenous peoples, or are their judges bound in strict allegiance to their colonial heritage? Part II of this Article analyzes how, in *Johnson*, Chief Justice Marshall seemed to resolve this question largely by privileging colonial pretensions to the exclusion of other considerations. This resolution of the problem of colonization and constitutionalism was ephemeral, however. Later, Chief Justice Marshall ingeniously attempted to mediate the tension between colonialism and constitutionalism in his two other principal federal Indian law opinions, *Cherokee Nation v. Georgia*[20] and *Worcester v. Georgia*.[21] Part III examines in detail the interpretive methodology Chief Justice Marshall developed in these cases to achieve some potential, partial reconciliation of colonialism and more normatively attractive visions of law. Part IV places these interpretive strategies in a broader theoretical framework and argues that Chief Justice Marshall's fundamental approach was to envision an Indian treaty as quasi-constitutional in nature. The treaty, like a constitution, provided the structural framework and linkages between the United States and the tribe for what promised to be a long-standing, if not eternal, sovereign-to-sovereign relationship. Chief Justice Marshall's interpretation of the foundational Indian treaty in *Worcester* mirrored his general approach to the United States Constitution, for he construed the treaty flexibly in order to promote its underlying constitutive purposes. Part IV then contrasts this interpretive approach to that engaged in by the current Supreme Court in federal Indian law cases. The Article concludes by suggesting that the interpretive legacy of John Marshall better resonates with the fundamental normative and institutional problems of federal Indian law today than does the current Court's considerably more grudging approach.

II. EMBRACING COLONIALISM: *JOHNSON V. MCINTOSH*

Johnson v. McIntosh was the first significant federal Indian law case in the Supreme Court.[22] It involved a dispute between two non-Indians to the title of a parcel of land. One party traced his title

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[18] 21 U.S. (8 Wheat.) 543 (1823).

[19] *Id.* at 588.

[20] 30 U.S. (5 Pet.) 1 (1831).

[21] 31 U.S. (6 Pet.) 515 (1832).

[22] For a discussion of earlier Marshall Court cases that involved Indians, see WHITE, cited above in note 17, at 706–08.

back to a conveyance from a tribe to a non-Indian; the other established that his title flowed from a later transaction in which the tribe sold the land to the United States, which then patented the land in fee simple. On these facts, the Supreme Court found good title in the party whose title ultimately flowed from the United States. In explaining the basis for this conclusion, Chief Justice Marshall constructed the initial legal framework for federal Indian law.

Chief Justice Marshall first examined the justifications for European colonization of the "new world":

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.[23]

Because these competing European sovereigns were all after the same thing, it became necessary to develop a rule to avoid conflicts among them. "This principle," Chief Justice Marshall explained, "was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."[24] Under this scheme, for purposes of Anglo-American law the Indians held their lands under what amounted to only a tenancy at sufferance, which could be acquired only by the European discovering sovereign, not by any private party or other government. That sovereign could extinguish Indian title "either by purchase or by conquest."[25]

In *Johnson*, Chief Justice Marshall did not engage in a full legal, much less normative, defense of the theory of discovery and conquest. Instead, he asserted that the Court was compelled to embrace the theory for institutional reasons. The non-Indian portions of the country had been settled based on this theory, he stressed, which rendered it impossible for the Court to undo by law what had already occurred in fact.[26] Moreover, he acknowledged that the Court was hardly situated to serve as an impartial umpire of this dispute. In a remarkable passage, he wrote that "[c]onquest gives a title which the Courts

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[23] *Johnson*, 21 U.S. (8 Wheat.) at 572–73.

[24] *Id.* at 573.

[25] *Id.* at 587.

[26] Almost all of the discussion in the opinion makes this point. *See, e.g.*, *id.* at 591 ("[I]f the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; . . . it becomes the law of the land, and cannot be questioned.").

of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[27] The message was simple: in order to claim a land title enforceable in the Supreme Court of the United States, one must demonstrate that the title flows from that government or its predecessor.[28]

Chief Justice Marshall did not completely avoid the normative issues in *Johnson*, however. He wrote that the theory of discovery and conquest found "some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them,"[29] which Chief Justice Marshall sharply contrasted to the nature of European peoples. Chief Justice Marshall acknowledged that, under European conceptions of international law, conquered peoples did not automatically lose pre-existing rights.[30] Conquered Europeans became subjects and eventually citizens of the conqueror, ultimately assimilated into "one people" with the victors or governed as a distinct people.[31] "Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired"[32] and that the conquered be governed on a par with the victors. Pre-Columbian aboriginal property rights could not be fully recognized in American law, however, because Indians had proved themselves incapable of incorporation into the post-Columbian colonies:

> [T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to

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[27] *Id.* at 588. Chief Justice Marshall returned to this theme later in the opinion: "[i]t is not for the Courts of this country to question the validity of [the conqueror's] title, or to sustain one which is incompatible with it." *Id.* at 589.

> However [the restricted nature of Indian title] may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps be supported by reason, and certainly cannot be rejected by Courts of justice.

Id. at 591–92.

[28] The traditional reading of *Johnson* is that it held that, after discovery and conquest, tribes possessed only "original Indian title," a right of occupancy subject to extinction by the federal government. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 487 (Rennard Strickland ed., 1982) [hereinafter HANDBOOK]. A more imaginative, narrower, but still plausible reading is simply that only land titles traceable to the post-colonial sovereign are enforceable by the courts of that sovereign; under this reading, the party who traced his title to a transaction between the tribe and a non-Indian should have taken his claim up with the tribe. *See* Ball, *supra* note 17, at 23–29; J. Youngblood Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75, 93–96 (1977).

[29] *Johnson*, 21 U.S. (8 Wheat.) at 589.

[30] *See id.* at 589–90.

[31] *Id.*

[32] *Id.* at 589.

> leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.
>
> What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.[33]

This summary clearly demonstrates that, in its first extended exposure to federal Indian law, the Court in *Johnson* did not mediate the tension between colonialism and constitutional government as much as it simply preferred the former. Chief Justice Marshall relied in part upon two starkly colonial visions. One was *cultural superiority* — the Christian nature and "superior genius"[34] of the Europeans, who would exploit the resources of the continent efficiently, as compared to the primitive economic system and savagery of the natives, who thus were incapable of assimilation into the "superior" culture. The other was *judicial inferiority*, based on the situatedness of the judges themselves. United States courts simply could not adjudicate the most basic questions about the way that non-Indians had colonized and converted aboriginal lands into fee-simple lands for their own use. Chief Justice Marshall cleverly played both of these themes against each other. Ultimately, he never directly addressed whether the outcome in *Johnson* could be justified normatively under visions of cultural superiority.[35] Instead, he based the decision upon judicial incompetency to resolve the underlying normative questions. But even though he refused to address colonialism in general — "[w]e will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits"[36] — and

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[33] *Id.* at 590.

[34] *Id.* at 573.

[35] At every opportunity, Chief Justice Marshall attempted to deflect the normative questions rather than address them directly. Indeed, the tone of his opinion allows the interpretation that Chief Justice Marshall himself may have had some qualms about colonization. For example, he referred to the colonizers' "ambition" and implied that their actions required some "apology," although the colonizers themselves "found no difficulty in convincing themselves" of the rightness of their conquest. *Id.* at 572–73. Similarly, he described the colonizers' rationale as an "excuse, if not justification," for their deeds. *Id.* at 589. A third example is his description of the European theory of conquest as "pompous." *Id.* at 590. There are other examples in the opinion as well.

[36] *Id.* at 588. In a later case, Justice McLean did briefly address this question. *See infra* note 76.

more particularly did "not mean to engage in the defence of those principles which Europeans have applied to Indian title,"[37] his opinion immunized both broad questions of colonialism and narrower questions concerning its implementation from any sober second thought of judicial review.

To put the matter most starkly, by denying that full Indian property rights could be recognized and enforced in "the Courts of the conqueror,"[38] and by suggesting that legally enforceable title must flow from the United States government standing as successor to the colonies, *Johnson* seemed to establish a rigid dichotomy between power and law. Colonialism, *Johnson* seemed to say, raises almost exclusively nonjusticiable, *normative* questions beyond judicial authority and competence. Colonialism was thus prior to, and the antithesis of, constitutionalism, which involves justiciable, *legal* questions about judicially enforceable limits on governmental action traceable to the founding of the United States. In short, a legal claim was defined as one found within the legal system of the colonizing government.

Extended to its logical conclusion, this dichotomy between exercises of (colonial, nonjusticiable) power and questions of (domestic, justiciable) law would render federal Indian law an unattractive subject indeed. The fundamental contradiction between colonialism and constitutionalism would be resolved by considering the issues relating to the former to be settled extrajudicially, and therefore nonjusticiable as moot in post-colonial America. Constitutionalism would play only an assimilationist role in federal Indian law, to guarantee Indians the protections available to other residents of the United States. A tribe would possess no sovereignty, and Indians would be treated, at best, as a racial or cultural minority.[39]

Even though all these themes were present in *Johnson*, however, that case was an unlikely vehicle for cementing them into American law. Recall that no tribe or Indian was even a party to the case. Non-Indian litigants sought a definitive resolution of a claim to non-Indian land from United States courts, and the party who traced his title to a grant from the United States prevailed. In short, *Johnson* can be read much more narrowly: instead of definitively privileging the colonial to the constitutional regime, perhaps *Johnson* merely concluded that the rights of members of the colonizing community

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[37] *Johnson*, 21 U.S. (8 Wheat.) at 589.

[38] *Id.* at 588.

[39] Ironically, even though Chief Justice Marshall ultimately rejected this approach, *see infra* Part III, the current Supreme Court may well have difficulty distinguishing between tribal sovereignty and what today would be considered "discrete and insular minority" status. *See infra* pp. 424–26.

must flow from their own government.[40] On this understanding, *Johnson* leaves room for later adjudication that more precisely addressed the rights, if any, tribes and Indians might claim in United States courts. Indeed, the opinion was not entirely silent on whether tribes retained sovereignty despite colonization. Chief Justice Marshall wrote that, upon discovery, the tribes' "rights to complete sovereignty, as independent nations, were necessarily *diminished*," not destroyed.[41]

This narrower understanding of *Johnson* thus leaves room for later resolution of the full legal ramifications of colonization within a framework in which tribes retained some sovereignty. This interpretation provides the best way to make sense of Chief Justice Marshall's two subsequent primary opportunities to establish federal Indian law principles. Both cases involved litigants who supported tribal sovereignty within the framework of United States law. In deciding these disputes, Chief Justice Marshall developed a way to mediate colonialism and constitutionalism, to use the rule of law to protect surviving tribal authority to some extent.

III. ABANDONING UNILATERAL COLONIAL ASSUMPTIONS: THE CHEROKEE CASES

A. Laying the Foundation: Cherokee Nation v. Georgia

In *Cherokee Nation v. Georgia*,[42] the tribe brought an original action in the Supreme Court to seek injunctive relief against a series of draconian Georgia laws that purported to apply to its reservation. Unlike in *Johnson*, in *Cherokee Nation* there was an Indian party in the case and Indian sovereignty was a central aspect of the controversy. Moreover, rather than challenge the very premises of colonization, the Cherokee crafted their position to fall on the "law" side of Chief Justice Marshall's power-law dichotomy, by positing the issue as whether the Georgia legislature had acted outside of its authority under United States constitutional structures.

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[40] *See supra* note 28.

[41] *Johnson*, 21 U.S. (8 Wheat.) at 574 (emphasis added). The full passage provides some sense of Chief Justice Marshall's vision of the retained rights of the Indians:

> In the establishment of these relations [among European discovering sovereigns], the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Id.

[42] 30 U.S. (5 Pet.) 1 (1831).

In dismissing the case, Chief Justice Marshall held that it did not come within the Court's original jurisdiction, because the Cherokee Nation was not a "foreign state."[43] But this was no ordinary dismissal. Chief Justice Marshall could have prepared a simple and short opinion to justify this outcome, reasoning that, whatever might be the sovereign status of the Cherokee Nation, it exists within the boundaries of the United States, and therefore is in no sense "foreign." Such an approach would have avoided all normative questions, as *Johnson* purported to do. It also would have had the added virtue of a traditional legal gloss, for this approach, unlike *Johnson*'s deferential, political-question-like approach, presents a plausible interpretation of Article III of the Constitution. That was not, however, what Chief Justice Marshall chose to do.

Chief Justice Marshall's opinion in *Cherokee Nation* began in a starkly normative vein and assumed the truth of the underlying facts and legal conclusions alleged by the Cherokee, even though Georgia had never appeared in the case either to admit or to deny them and had never formally been declared to be in default.[44] The first three paragraphs of the opinion, which discuss the merits of the dispute rather than the analytically anterior question of jurisdiction, are so fascinating that they require full quotation:

> This bill is brought by the Cherokee nation, praying an injunction to restrain the State of Georgia from the execution of certain laws of that state, which, *as is alleged*, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.
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> If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.
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> Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause?[45]

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[43] *Id.* at 16–20.

[44] *See* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 513 (1969).

[45] *Cherokee Nation*, 30 U.S. (5 Pet.) at 15 (emphasis added). The analytical structure of *Cherokee Nation* — discussing the merits first and jurisdiction last and finding the absence of jurisdiction a convenient way to avoid a direct confrontation between the Court and a powerful institutional opponent — is similar to Chief Justice Marshall's method in Marbury v. Madison,

Once he faced the jurisdictional question, Chief Justice Marshall again reached conclusions about tribal sovereignty that were not necessary to resolve the matter. He first stated that a tribe is a sovereign — "a distinct political society, separated from others, capable of managing its own affairs and governing itself"[46] — before he decided whether it is a "foreign nation" as contemplated by Article III's provision of the Court's original jurisdiction. Moreover, rather than proceed immediately to the conclusion that, whatever kind of sovereigns Indian tribes are, they are not "foreign" sovereigns, Chief Justice Marshall took the trouble to conceptualize the nature of their sovereignty. He called them "domestic dependent nations" that "occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[47]

It may be tempting to dismiss these discussions by Chief Justice Marshall as mere musings about platonic notions of sovereignty, rather than about sovereignty under United States law — in other words, dictum that fell on the normative (nonjusticiable) side of the dichotomy suggested in *Johnson*.[48] Later in *Cherokee Nation*, however, Chief Justice Marshall tied his conclusion that tribes were sovereigns directly to the Constitution itself. He quoted the Commerce Clause in full — Congress may "regulate commerce with foreign nations, and among the several states, and with the Indian tribes"[49] — not merely to demonstrate that tribes are different from "foreign nations," but also to confirm the sovereign status of tribes. Chief Justice Marshall wrote: "We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term 'foreign nations;' not we presume, because a tribe may not be a nation, but because it is not foreign to the United States."[50]

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5 U.S. (1 Cranch) 137 (1803). For a brief elaboration of the parallels between the two cases, see DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 139 (3d ed. 1993).

[46] *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

[47] *Id.* at 17.

[48] That characterization would ignore, however, that Chief Justice Marshall based his conclusion of tribal sovereignty not only on the self-governing capacities of the Cherokee, but also upon the fact that the colonies and eventually the United States itself uniformly treated Indian tribes as sovereigns, as evidenced by their treaties with them and the passage of statutes consistent with those treaties. *See id.* at 16–17.

[49] *Id.* at 18 (quoting U.S. CONST. art. I, § 8, cl. 3).

[50] *Id.* at 19. Of course, just because a tribe possesses sovereignty recognized under domestic law does not mean that the tribe can easily bring suit for a violation of its sovereignty. Elsewhere in *Cherokee Nation*, Chief Justice Marshall stated:

> At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the

B. Mediating Colonialism Through Interpretation: Worcester v. Georgia

Although the Cherokee Nation itself failed to obtain Supreme Court assistance in its dispute with Georgia, a non-Indian litigant soon sought the aid of that forum in a case that raised essentially the same issues as *Cherokee Nation*. In *Worcester v. Georgia*,[51] the state imprisoned a non-Indian missionary for refusing to comply with state laws that required him to have state permission to be on the reservation and to swear a loyalty oath to the state. As in *Cherokee Nation*, the issue was therefore whether Georgia law applied on the Cherokee reservation. Chief Justice Marshall held that the Georgia law was preempted by the exclusive sovereign-to-sovereign relationship that existed between the tribe and the federal government.[52] In so holding, the Chief Justice had to rebuff arguments that the tribe

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government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the union.

Id. at 18. Read most broadly, this language suggests that violations of tribal sovereignty are nonjusticiable, notwithstanding Chief Justice Marshall's efforts throughout the rest of the opinion to bring the concept of tribal sovereignty within domestic law. Read in context, however, Chief Justice Marshall seemed merely to provide an explanation why the Framers would not have had tribes in mind when they framed the original jurisdiction of the Supreme Court. The next sentence of the opinion stated:

> Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such, that we should feel much difficulty in considering them as designated by the term *foreign state*, were there no other part of the constitution which might shed light on the meaning of these words.

Id. Chief Justice Marshall then turned to another "part of the constitution," the Commerce Clause, which did distinguish "tribes" and "foreign nations." *See id.*

[51] 31 U.S. (6 Pet.) 515 (1832).

[52] Chief Justice Marshall concluded that United States law treated Indian tribes that had not given up their sovereignty as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." *Id.* at 557. "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states," he stated, "and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Id.* Under the Constitution, Chief Justice Marshall continued, the federal government rightfully possessed this authority, based on the war power, the treaty power, and the power to regulate commerce with tribes, as well as the notion that the federal government is the successor to the British crown, in which power to deal with tribes resided rather than in the colonies. *See id.* at 558–559. Accordingly, the tribe's exclusive relationship with the United States left Georgia with no power to regulate the tribe. In Chief Justice Marshall's words:

> The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Id. at 561.

had lost its sovereignty, either through the legally operative effects of discovery and conquest or by ceding it in a treaty, and had therefore become legally indistinct from other residents of Georgia.[53] In considering these arguments, Chief Justice Marshall translated the dictum on tribal sovereignty in *Cherokee Nation* into a full-fledged holding that defined the sovereign status of Indian tribes.

After *Johnson*, the normative questions surrounding colonization might have seemed beyond the scope of judicial comment. Nonetheless, Chief Justice Marshall revisited them in *Worcester*. He began the substantive portion of the opinion[54] with three remarkable paragraphs in which he seemed to express serious qualms about colonization.[55] Then, in the fourth paragraph, in a move of extraordinary cleverness, Chief Justice Marshall simultaneously acknowledged and partially deflated the "judicial incompetency" theme of *Johnson*:

> 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. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.[56]

Especially when read together with Chief Justice Marshall's opinion in *Cherokee Nation* and the rest of his *Worcester* opinion, these four

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[53] *See id.* at 542–48.

[54] The earlier part of the opinion considered whether the Court had jurisdiction to hear the case. *See id.* at 536–41. This would be unremarkable but for the contrary way Chief Justice Marshall structured his opinion in *Cherokee Nation*, in which conclusions about the merits came first and jurisdiction was addressed later. *See supra* note 45. Of course, there is a fundamental difference in the two cases: unlike in *Cherokee Nation*, in *Worcester* Chief Justice Marshall concluded that the Court had jurisdiction to address the merits of the case. *See Worcester*, 31 U.S. (6 Pet.) at 541.

[55] Chief Justice Marshall wrote:

> 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 sons 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, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufacturers?

Worcester, 31 U.S. (6 Pet.) at 542–43.

[56] *Id.* at 543.

paragraphs did not so much repudiate the colonial vision of *Johnson* as domesticate it through a more careful normative and temporal analysis. Chief Justice Marshall essentially admitted that colonization, with its accompanying theories of discovery and conquest, was difficult to defend normatively. Rather than blinding themselves to this conclusion, Chief Justice Marshall continued, American courts should recognize it as part of the fabric of federal Indian law.

To be sure, opening the door to normative considerations could not fundamentally alter all aspects of the judicial role. As *Johnson* indicated, the judiciary was simply powerless to review the *historical* aspects of colonization. American courts were the "Courts of the conqueror"[57] and could not turn against the government and people from which they derived their authority. It follows in *Worcester* that courts could not invalidate the root assumptions of colonization. Chief Justice Marshall thus implicitly endorsed the plenary power of Congress to implement colonization,[58] a notion later squarely embraced by the Court.[59] Moreover, any effort to undo the settled aspects of colonization would be futile. American courts could not annul the effects of the theories of discovery and original Indian title, upon which all Euro-American land titles were based.

These prudential concerns about judicial restraint, Chief Justice Marshall suggested, matter far less when indigenous peoples are challenging *current* efforts to destroy whatever rights they still possess. To return to Chief Justice Marshall's language in *Worcester*, "existing pretensions" are subject to judicial scrutiny, and their lawfulness must be informed by "holding" an honest assessment of colonization "in our recollection."[60] Thus, the appropriateness of state regulation of tribal autonomy was open to judicial scrutiny in *Worcester*. Moreover, although the *existence* of congressional plenary power over tribes was probably settled, *Worcester* left open the possibility that an *exercise* of that power could be subjected to some kind of judicial evaluation.[61]

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[57] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 588 (1823).

[58] Later passages in *Worcester* also support this conclusion. *See Worcester*, 31 U.S. (6 Pet.) at 557–62.

[59] *See* United States v. Sandoval, 231 U.S. 28, 46–47 (1913); Lone Wolf v. Hitchcock, 187 U.S. 553, 565–67 (1903); United States v. Kagama, 118 U.S. 375, 383–85 (1886). For an excellent discussion and critique of the later cases that explicitly embraced this theory, see Newton, cited above in note 17, *passim*. I have serious qualms about the plenary power doctrine as a congressional sword against tribes (as opposed to a preemptive shield against state regulation of tribes). *See* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1139–42, 1204–05 (1990).

[60] *Worcester*, 31 U.S. (6 Pet.) at 543.

[61] In my judgment, Chief Justice Marshall's three decisions, when read together, ratified the existence of Euro-American colonial power over Indians, but at the same time began the process of setting structural and procedural limits on the exercise of that power. Under *Worcester*, it became clear that the federal courts would invalidate efforts by states to implement colonization. *See supra* note 52 and accompanying text. In addition, although Congress did have this power,

The dichotomy drawn in *Johnson* between power and law, between the normative and the justiciable,[62] was thus reshaped into a distinction between historical wrongs, whose adjudication would too seriously threaten settled Euro-American rights and expectations, and current "pretensions."

Under this revised vision of federal Indian law, it was crucial to determine exactly what the history of colonization had conclusively settled for purposes of American law. *Worcester*, unlike *Johnson*, provided Chief Justice Marshall with a salient context in which to reflect upon this question. For although *Worcester* nominally involved the rights of a non-Indian, it required the resolution of a controversy between the Cherokee Nation and the State of Georgia concerning whether the tribe possessed current rights rooted in positive American law: a treaty with the United States. *Worcester*, then, involved a situation far removed from a Euro-American land claimant challenging the long-ago-settled patterns of establishing Euro-American land title. This context, combined with an admitted concern about the normative questions surrounding colonization, seemed to sharpen Chief Justice Marshall's focus on the relevant colonial history. Indeed, in this context, Chief Justice Marshall imaginatively rewrote the historical assumptions upon which *Johnson* had seemingly been premised.

Chief Justice Marshall began his revisionist history by rejecting the notion that Europeans had understood the discovery of the continent and settlement of the sea coast to give them authority over Indians and their lands. This "extravagant and absurd idea . . . did not enter the mind of any man"[63] during the initial colonial period. Ignoring the notion in *Johnson* that Indian title could be extinguished by conquest, Chief Justice Marshall wrote that upon discovery, the European colonizers simply possessed "the exclusive right of purchasing such lands as the natives were willing to sell."[64] Moreover, Chief Justice Marshall denied that colonization and conquest were the same and stressed that one justification for the former — the conversion of the Indians to Christianity — would be better accomplished "by conciliatory conduct and good example; not by extermination."[65]

Chief Justice Marshall then returned to the themes of tribal sovereignty that had surfaced in *Cherokee Nation*. He concluded that, in all its dealings with natives, Great Britain had considered tribes to

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it was subject to judicial interpretation to protect against all but clearly intended harshness. *See infra* pp. 399–411 (discussing Chief Justice Marshall's attribution of benign purposes to federal Indian treaty).

[62] *See supra* pp. 388–89.

[63] *Worcester*, 31 U.S. (6 Pet.) at 544–45.

[64] *Id.* at 545.

[65] *Id.* at 546.

be nations "capable of governing themselves under [Britain's] protection."[66] Concerning the controversy in *Worcester*, Chief Justice Marshall wrote that "our history furnishes no example . . . of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances."[67] According to Chief Justice Marshall, the United States had embraced these visions of tribal sovereignty when it succeeded the crown.[68]

It follows from these general propositions that, prior to the Columbian contact, the Cherokee possessed complete sovereignty, and that when discovery transformed the tribe into a "domestic dependent nation[]"[69] (to use the language of *Cherokee Nation*), the Cherokee retained all control over their "internal affairs," including their lands. Thus, if in 1832 the Cherokee no longer had that power, it must have been the result of either a unilateral act by the greater sovereign, the United States, such as a federal statute that proclaimed that tribal sovereignty was terminated,[70] or a bilateral act, such as a treaty with the United States in which the tribe abandoned its sovereignty. Because no unilateral federal act had terminated Cherokee sovereignty, the decision in *Worcester* turned on whether the tribe had ceded its sovereignty by treaty, so that its members and lands had become legally indistinguishable from other residents and areas of Georgia.

Having worked so hard to establish that a reservoir of tribal sovereignty had survived discovery, Chief Justice Marshall was not eager to conclude that the Cherokee had abandoned it through subsequent treaty negotiations. Consistent with the notions established at the outset of *Worcester*,[71] Chief Justice Marshall constructed the historical context for this question. His sense of the treaty negotiations between the British crown and later the United States on the one hand, and tribes on the other, strongly suggested that the former had not sought and the latter would not have desired any loss of internal tribal authority.[72] By envisioning the treaty negotiation context in this way, Chief Justice Marshall set up a strong, albeit implicit, presumption against reading any particular treaty provision to effectuate an abandonment of tribal sovereignty. He applied that presumption rigorously when he turned to the interpretation of the federal

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[66] *Id.* at 548; *see id.* at 547–49.

[67] *Id.* at 547.

[68] *See id.* at 549–50.

[69] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[70] *See supra* p. 395. A unilateral act by a state that purported to terminate tribal sovereignty would violate the ultimate holding in *Worcester* that the tribal-federal relationship is an exclusive one and that federal treaties and statutes that recognize tribal sovereignty preempt inconsistent state law. *See supra* note 52.

[71] *See supra* p. 396.

[72] *See Worcester*, 31 U.S. (6 Pet.) at 547–49.

treaties with the Cherokee.[73] In addition to this presumption, he also emphasized another reason to be suspicious of any argument that the Cherokee had agreed to relinquish internal sovereignty: the treaties in question had been negotiated in a language foreign to the Cherokee, and therefore the tribe could not be held strictly accountable for the nuances of treaty text.[74]

In his defense of Cherokee sovereignty and territory in these ways despite, as we shall see, treaty language that pointed to the contrary conclusion, Chief Justice Marshall had no opposition with which to contend. As it had in *Cherokee Nation*, Georgia had refused to appear in *Worcester*.[75] Nor was an elaborate dissenting opinion filed in *Worcester*.[76] Despite this lack of critical challenge and validation, the methodology of Indian treaty interpretation adopted by Chief Justice Marshall — supposedly embodied in the modern Indian law canons of interpretation[77] — may often be taken to be beyond serious jurisprudential doubt. Indeed, much of federal Indian law scholarship now rests on a positivist allegiance to the perceived techniques of *Worcester* and later cases.[78]

C. The Interpretive Strategies of Worcester

Chief Justice Marshall's interpretive method in *Worcester* is not self-evidently correct, however. Indeed, its elements are highly controversial. The identification of the debatable moves and an assessment of their validity are worthy tasks for both Indian law scholars and practicing lawyers and judges. These inquiries probe fundamental aspects of federal Indian law — not just as issues of historical or scholarly curiosity, but also as matters relevant to current practice.[79]

A critical analysis of Chief Justice Marshall's approach does not require starting from scratch. Even though Georgia refused to participate in the proceeding and no Justice in *Worcester* publicly decried

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[73] *See id.* at 551–56.

[74] *See id.* at 551, 552–53.

[75] *See* Burke, *supra* note 44, at 521.

[76] Justice McLean wrote an opinion concurring in the judgment in *Worcester*. *See Worcester*, 31 U.S. (6 Pet.) at 563–96 (McLean, J., concurring in the judgment). He largely agreed with Chief Justice Marshall, although he did opine that a tribe could lose its sovereignty de facto, through assimilation and the loss of a separate character, as well as de jure — for example, by ceding it away by treaty. *See id.* at 593–94.

Justice Baldwin simply noted his dissent in *Worcester* and stated that his views had not changed from those expressed in his dissent in *Cherokee Nation*. *See id.* at 596 (statement of Baldwin, J., indicating that a dissent was filed but not reported).

[77] For a survey of these canons, see Wilkinson & Volkman, cited above in note 17, at 617–20.

[78] *See* HANDBOOK, *supra* note 28, at 221–25; WILKINSON, *supra* note 17, at 46–52; Wilkinson & Volkman, *supra* note 17, at 623–24.

[79] On the possibility of reviving Chief Justice Marshall's legacy, see below Part IV.C.

Chief Justice Marshall's methods, opinions existed that took a starkly contrary approach. In *Cherokee Nation*, Justices Johnson and Baldwin[80] concurred in the judgment dismissing the action, but for reasons far different from those given by Chief Justice Marshall. Both Justice Johnson and Justice Baldwin concluded that the Cherokee had no sovereignty at all. Justice Johnson's opinion in *Cherokee Nation* is an especially fine counterpoint to Chief Justice Marshall's later opinion in *Worcester*. Presumably the Marshall-Johnson debate would have been rekindled in *Worcester* but for the fact that illness prevented Justice Johnson from attending the Court's session that Term.[81] In any event, Justice Johnson's opinion in *Cherokee Nation* is more than sufficient to provide a framework to challenge Chief Justice Marshall's opinion in *Worcester*.

Recall Chief Justice Marshall's general presumptions that, prior to discovery, tribes possessed complete, inherent sovereignty; that discovery had reduced their sovereignty only with respect to external sovereign relations; and that in the treaty-making process neither Great Britain nor the United States had sought to interfere with internal tribal governance. These presumptions, left unchallenged in *Worcester*, made it rather simple to counter the apparent force of some of the provisions of the foundational treaty with the Cherokee, the Treaty of Hopewell of 1785,[82] in which the tribe arguably surrendered its autonomy.

For example, the treaty began as follows: "The Commissioners Plenipotentiary of the United States, in Congress assembled, give peace to all the Cherokees, and receive them into the favour and protection of the United States of America, on the following conditions."[83] As Justice Johnson argued in *Cherokee Nation*, this language appears to embody a Cherokee surrender to superior power — an abandonment of sovereignty in return for whatever protections the United States might wish to bestow on the tribe.[84] Chief Justice Marshall quickly dismissed this argument. He pointed out that, because peace was a bilateral bargain sought by both parties, and because the United States actually went to Hopewell to make the treaty, "[t]he word 'give,'. . . has no real importance attached to it."[85]

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[80] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20–31 (1831) (Johnson, J., concurring in the judgment); *id.* at 31–50 (Baldwin, J., concurring in the judgment).

[81] *See* WHITE, *supra* note 17, at 732. See also the cover page of VI Peters Reports, which indicated that Johnson "was prevented attending the court during the whole term by severe and continued indisposition." 31 U.S. (6 Pet.) cover page (1832).

[82] Treaty of Hopewell, Nov. 28, 1785, U.S.-Cherokee, 7 Stat. 18.

[83] *Id.*, 7 Stat. at 18.

[84] *See Cherokee Nation*, 30 U.S. (5 Pet.) at 23 (Johnson, J., concurring in the judgment) ("This is certainly the language of sovereigns and conquerors, and not the address of equals to equals.").

[85] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551 (1832). Chief Justice Marshall made much

But two of the provisions of this treaty were not so easily overcome, as evidenced by Chief Justice Marshall's elaborate discussion of them in *Worcester* even in the absence of any counterargument by a party or a dissenting Justice. To construe them to preserve tribal authority, Chief Justice Marshall had to develop a more elaborate theory of Indian treaty-making and its interpretive consequences.

The fourth article set forth the "boundary allotted to the Cherokees for their hunting grounds."[86] As Justice Johnson argued in *Cherokee Nation*,[87] this language strongly suggests that the Cherokee had granted all their land and whatever sovereign power they possessed to the federal government, which had then "allotted to" the Cherokee the use of certain of those now-public lands for hunting. This interpretation is supported by the fact that, in the treaty, the Cherokee had yielded extensive territory to the United States.[88] Moreover, this interpretation would promote the purposes of colonization, as understood in *Johnson*, for it would lodge in non-Indian hands the conclusive power over future development of the land from its status as "hunting grounds" into use by "agriculturalists and manufacturers."[89] It would consider the tribe to have at most a property interest in land, rather than any sovereign power, again consistent with the major thrust of *Johnson*.[90]

Chief Justice Marshall provided two justifications for rejecting this interpretation of the fourth article. Each has become a central feature of federal Indian law interpretation.

First, Chief Justice Marshall stressed that the treaty was negotiated and written in English, a language foreign to the tribal negotiators. They should not have been expected, therefore, to "distinguish the word 'allotted' from the words 'marked out.'"[91] Nor would the words "hunting ground" have suggested any limitation to the tribe, because "[h]unting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other."[92] In other words, the term "hunting ground" should be construed as the Indians would have understood it — complete land possession and control — rather than as non-Indians would have — at most an exclusive license to hunt.

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the same point concerning the third article of the treaty, which acknowledged that the Cherokee were under the protection of the United States and no other sovereign. *See id.* at 551–52.

[86] Treaty of Hopewell, *supra* note 82, 7 Stat. at 19.

[87] *See Cherokee Nation*, 30 U.S. (5 Pet.) at 23 (Johnson, J., concurring in the judgment).

[88] *See* CHARLES C. ROYCE, THE CHEROKEE NATION OF INDIANS 24 (1975).

[89] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 543 (1823).

[90] *See Cherokee Nation*, 30 U.S. (5 Pet.) at 23 (Johnson, J., concurring in the judgment) ("It is clear that [the treaty] was intended to give them no other rights over the territory than what were needed by a race of hunters . . . .").

[91] *Worcester*, 31 U.S. (6 Pet.) at 552.

[92] *Id.* at 553.

In effect, Chief Justice Marshall appeared to view the Indian treaty as a contract of adhesion — an agreement in which the negotiation process had not been one of arm's-length bargaining between equal adversaries and in which the more powerful party bore full responsibility for all contractual drafting.[93] It is critical to appreciate that Chief Justice Marshall's approach, which in late-twentieth-century contract law seems a simple maneuver related to power disparity and contract drafting, actually had enormous substantive and institutional consequences in early-nineteenth-century federal Indian law. In essence, Chief Justice Marshall placed the responsibility upon the federal treaty negotiators to ensure that tribes understood what they were abandoning through the treaty. This duty was especially important because it applied retroactively to existing treaties as well as prospectively to future negotiations.[94] Whereas in *Johnson* Chief Justice Marshall understood the Court to have some responsibility for rationalizing the *historical* and settled components of colonization, in *Worcester* he signaled that *further* encroachments upon tribes — the ongoing process of colonization — would receive no special assistance from the judiciary. The executive branch, when it negotiated treaties, and the Senate, when it ratified them, were the only institutions appropriate to do the problematic work of further colonization. The judiciary would not enforce their work unless it was compelled to do so.

Second, Chief Justice Marshall concluded that to give the fourth article the plain meaning of its text — particularly the word "allotted" — would be inconsistent with the fundamental nature of the transactions at the heart of Indian treaties.[95] The following is his discussion in support of this conclusion:

> The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject. When, in fact, they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they might not understand the term employed, as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction; that it must, we think, be taken in the sense in which it was most obviously used.[96]

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[93] On contracts of adhesion generally, see, for example, E. ALLAN FARNSWORTH, CONTRACTS §§ 4.26, 4.28 at 480, 506–10 (2d ed. 1990).

[94] *See Worcester*, 31 U.S. (6 Pet.) at 554.

[95] *See id.* at 552–53. A similar awareness of the "spirit" of the treaty informed Chief Justice Marshall's interpretation of the ninth article. *See infra* pp. 403–04.

[96] *Worcester*, 31 U.S. (6 Pet.) at 552–53.

In this compact, stealth-like fashion, Chief Justice Marshall laid the foundation for one of the most important components of federal Indian law. He conceptualized an Indian treaty as a grant of rights from a tribe to the United States, rather than a cession of all tribal rights to the United States, which then granted back certain concessions to the tribe. Chief Justice Marshall reasoned that Indian treaties were not acts of complete tribal surrender to the conquering government. Instead, they were reservations by the tribe of all rights not clearly granted to the United States — hence the term "reservation" for the lands retained by the tribe. Although this "reserved rights doctrine" is usually associated with later cases in which the Supreme Court squarely embraced it,[97] this doctrine is rooted in a subtle Marshallian move in *Worcester*.

That this interpretive strategy was employed almost casually should not, however, obscure its controlling power in *Worcester*. For the text of the fourth article, read without any background presumptions, certainly appears to contain "language of concession on our part, not theirs," as Justice Johnson argued in his separate opinion in *Cherokee Nation*.[98] Conceptualizing an Indian treaty as an act of tribal surrender to a conquering government and a request for gratuities from the conqueror would have been fully consistent with the colonial principles that seemed at the heart of *Johnson*.

What drove Chief Justice Marshall to reject the powerful arguments for interpreting the fourth article as a cession of tribal sovereignty over their lands? How did he end up interpreting words to denote something other than their ordinary meanings — "allotted to" to mean "reserved by," and "hunting grounds" to mean "lands"? The only plausible explanation, I believe, is normative. Rather than approach the interpretive questions as normatively neutral exercises, Chief Justice Marshall found some reason to work hard to counter the ordinary textual meaning of the fourth article. Although the principles or motivations for doing so are not evident in his discussion of the article, his interpretation is fully consistent with the normative nuances that began the substantive portion of *Worcester*.[99] The result is an interpretation far afield from the normative and institutional assumptions of *Johnson*. Given his opinion in *Johnson*, one might have expected Chief Justice Marshall to promote the power of the "culturally superior" society (the United States) and to abdicate any judicial responsibility to stem the tide of colonization.

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[97] *See* Winters v. United States, 207 U.S. 564, 576–77 (1908); United States v. Winans, 198 U.S. 371, 381–82 (1905).

[98] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 23 (1831) (Johnson, J., concurring in the judgment).

[99] *See Worcester*, 31 U.S. (6 Pet.) at 542–48.

Chief Justice Marshall's treatment of another article of the treaty reveals even more of his evolving normative perspective on Indian law. Like that of the fourth article, the language of the ninth article required some innovative interpretation to preserve tribal sovereignty. It provided:

> For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, *and managing all their affairs in such manner as they think proper.*[100]

At first glance, at least, the text of the ninth article seems even more contrary to the interests of the Cherokee than the text of the fourth. Indeed, when the ninth article is read in context with all other parts of the treaty, there is considerable force to Justice Johnson's conclusion in *Cherokee Nation* that the article amounts to "a relinquishment of all power, legislative, executive and judicial to the United States."[101]

Chief Justice Marshall could not disagree with Justice Johnson's interpretation merely by reference to language barriers and the reserved rights doctrine that he had already put in place to construe the fourth article. The words of the ninth article are hard to blur simply by labeling them fuzzy or legalistic, as he had with "allotted to" in the fourth article, or clearly of culturally subjective quality, as he had with "hunting grounds" in the same provision. Rather, another, even more vigorous interpretive principle was needed to save tribal sovereignty from the ninth article.

Indeed, if a pun may be pardoned, a more spirited principle cannot be found in federal Indian law. For Chief Justice Marshall concluded that the "spirit," or purpose, of Indian treaties in general, and the Treaty of Hopewell in particular, trumped the apparent plain meaning of the ninth article.[102] Indian treaties, according to this construct, are premised on the continuing nature of tribal sovereignty — they are ongoing arrangements between sovereigns. More specifically, the

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[100] Treaty of Hopewell, *supra* note 82, 7 Stat. at 20 (emphasis added).

[101] *Cherokee Nation*, 30 U.S. (5 Pet.) at 24–25 (Johnson, J., concurring in the judgment). Justice Johnson stated:

> [A]lmost every attribute of sovereignty is renounced by them in that very treaty. They acknowledge themselves to be under the sole and exclusive protection of the United States. They receive the territory allotted to them as a boon, from a master or conqueror; the right of punishing intruders into that territory is conceded, not asserted as a right; and the sole and exclusive right of regulating their trade and managing all their affairs in such manner as the government of the United States shall think proper; amounting in terms to a relinquishment of all power, legislative, executive and judicial, to the United States, is yielded in the ninth article.

Id.

[102] *See Worcester*, 31 U.S. (6 Pet.) at 553–54.

purpose of the ninth article, according to its own terms, was to protect and benefit the Indians. An interpretation that robbed the tribe of the power of self-government, of the capacity to control future cessions of its lands, and of the ability to safeguard its security interests would stand in stark opposition to these fundamental purposes and would conflict with any plausible assumptions about the tribe's understanding of the treaty.

But how could the general spirit of the treaty trump the specific language of its ninth article? For Chief Justice Marshall, the linkage between purpose and text was accomplished by limiting the loss of sovereignty to the specific topic of the ninth article — trade. Chief Justice Marshall noted that the tribe's cession of its power to trade might plausibly work to the tribe's benefit.[103] This limiting construction was the best way to accommodate the ninth article's specific purpose — to regulate trade; to promote its articulated general purpose — to protect tribes; and to preserve the treaty's overall purpose — to maintain an ongoing sovereign-to-sovereign relationship. Had a broader effect that destroyed tribal sovereignty "been intended, it would have been openly avowed," Chief Justice Marshall wrote.[104] Thus, Chief Justice Marshall held that the tribe retained sovereignty despite the Treaty of Hopewell.[105]

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[103] *See id.* at 554.

[104] *Id.* The entire passage is worth consideration:

> To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave, made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true, as respects the management of all their affairs. The most important of these, are the cession of their lands, and security against intruders on them. Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognise the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

Id. at 553–54.

[105] Chief Justice Marshall continued this generous approach to treaty interpretation when he considered a subsequent treaty as well. *See id.* at 554–56. As Richard Collins has pointed out, Chief Justice Marshall constructed the context of *Worcester* by measuring Cherokee sovereignty from an early point, at which the tribe had considerable strength, and then construed later diminutions of that sovereignty through subsequent treaties narrowly against that earlier context.

It is important not to overstate the nature of the tribal sovereignty recognized in *Cherokee Nation* and *Worcester*. The former denied that a tribe was a full-fledged foreign sovereign under international law and instead limited its sovereignty to that of a "domestic dependent nation[]" in a "state of pupilage" that had a relationship to the federal government that "resembles that of a ward to his guardian."[106] Furthermore, when it held that states had no sovereignty over Indian country, *Worcester* certainly reached a conclusion beneficial to tribes, but the decision may have been compelled to a large extent by Chief Justice Marshall's nationalist perspective.[107] It is also important to note that the immediate practical impact of *Worcester* was minimal: the federal government removed the Cherokee from Georgia shortly after Chief Justice Marshall handed down the decision.[108] But even this realistic appraisal, which recognizes that these cases in no way turned back the colonial clock, does nothing to undermine the conclusion that they repudiated the unilateral colonial assumptions seemingly present in *Johnson*. Moreover, the interpretive techniques in *Worcester* provided a framework for deciding future federal Indian law cases.

See Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 375–76 (1989).

[106] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[107] It seems impossible to determine the degree to which Chief Justice Marshall's decision in *Worcester* resulted from his evolving normative perspectives on federal Indian law, rather than from his instinct to centralize in the federal government the authority to resolve questions of national importance. Both concerns led to the same outcome in *Worcester*. The extraordinary lengths to which Chief Justice Marshall went to recognize and preserve tribal sovereignty in the face of arguably conflicting treaty language do suggest, however, that *Cherokee Nation* and *Worcester* cannot be dismissed as merely further examples of the federalist agenda of the Marshall Court. In addition, for whatever it might be worth, contemporaneous evidence supports the proposition that Chief Justice Marshall and Justice Story were quite sympathetic to the plight of the tribes that were being encroached upon by states in the southeastern United States. *See* 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 542 n.1 (1919) (quoting an 1829 letter from Chief Justice Marshall to Justice Story); WHITE, *supra* note 17, at 731 (quoting an 1832 letter from Justice Story to his wife prior to the arguments in *Worcester*); *id.* at 731–32 (quoting a letter from Justice Story to his wife following the arguments in *Worcester*); *id.* at 736 (quoting a letter from Justice Story to his wife following the issuance of the opinion in *Worcester*).

[108] *See generally* GRANT FOREMAN, INDIAN REMOVAL 251–312 (1932) (discussing the subsequent removal of the Cherokee from Georgia and other southeastern states). It would be a mistake, however, to conclude that Chief Justice Marshall issued the opinion in *Worcester* without fear of adverse practical consequences. Prior to *Cherokee Nation* and *Worcester*, President Andrew Jackson had refused the tribe's request for federal assistance to protect their treaty rights. Following *Worcester*, an unprecedented constitutional confrontation between the executive branch and the Court occurred. *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 729 (1926) (calling the controversy "the most serious crisis in the history of the Court"). For it was about *Worcester* that President Andrew Jackson supposedly said, "John Marshall has made his decision: *now let him enforce it!*" 1 HORACE GREELEY, THE AMERICAN CONFLICT 106 (Hartford, O.D. Case & Co. 1864). The whole story is well presented in Burke, cited above in note 44, 500–32.

These considerations warrant a more thorough theoretical exploration, rather than merely a description, of the interpretive methodology of that case.

IV. QUASI-CONSTITUTIONALISM BY INTERPRETATION: THE POTENTIAL LEGACY OF *WORCESTER*

A. Understanding Chief Justice Marshall's Methodology

Although the interpretive techniques Chief Justice Marshall used in *Worcester* are fascinating, their precise nature and justification are rather obscure, and they may at first appear largely ad hoc. Careful examination of his approach, however, reveals a systematic and attractive theory of Indian treaty interpretation that is consistent with Chief Justice Marshall's overall approach to the interpretation of certain kinds of public law documents.

1. Sovereignty, Not Contract. — One justification for Chief Justice Marshall's approach might be based on contract and consent. As previously noted, Chief Justice Marshall treated the fourth article of the Treaty of Hopewell much like a provision in a contract of adhesion and narrowly interpreted it against the more powerful party that drafted it in language inaccessible to the other contracting party.[109] Scholars have noted the analogy to contracts of adhesion in this context.[110] There are some serious problems, however, with embracing this contract-of-adhesion theory as the doctrinal support for Chief Justice Marshall's approach is *Worcester* and for an overall approach to Indian treaty interpretation.

To begin with, the explanation is somewhat anachronistic. The theory of adhesion contracts is largely a twentieth-century notion.[111] Of course, Chief Justice Marshall may have intuited the general approach and then applied it in the Indian treaty context, but I know of no evidence that clearly supports that conclusion.

The more basic problem with the contractual analogy is that it fails to explain the way Chief Justice Marshall interpreted the ninth article of the treaty. There he relied on the "spirit" or purpose of Indian treaties in general, and on promises of preventing injuries to the tribe in particular, to establish a framework for narrow construction of the article's seeming abandonment of tribal sovereignty. Such a purposive approach[112] is more commonly associated with statutory

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[109] *See supra* p. 401.

[110] *See* Wilkinson & Volkman, *supra* note 17, at 617–18.

[111] *See, e.g.*, 1 FARNSWORTH, *supra* note 93, § 4.26, at 480 n.4.

[112] In my judgment, there are three basic approaches to statutory interpretation: textualism, which implements plain textual meaning; intentionalism, which implements actual or presumed legislative intent; and purposivism, which implements actual or presumed public-policy purposes

interpretation than with contractual interpretation. In the purposive model of statutory interpretation, a court attributes benevolent purposes to a legislature, because our system assumes that legislators seek to promote the public interest. The court then construes ambiguities in the statute to promote these purposes.[113] These benign assumptions about the nature and purposes of public lawgivers do not translate easily into the private lawmaking process of contract formulation. Our system of law assumes that both parties to a contract bargain in self-interest rather than in the public interest. Thus, when Chief Justice Marshall attributed benign purposes to the federal government's negotiations, drafting, and ultimate agreement concerning the Treaty of Hopewell, he must have viewed the federal government's actions as the exercise of sovereignty in the public lawmaking process, and not that of bargaining in private lawmaking.[114]

A theory of sovereignty, then, rather than contract, better explains Chief Justice Marshall's interpretation in *Worcester*. But note that to indulge in benign presumptions about the purposes of an Indian treaty, as Chief Justice Marshall did, seems starkly inconsistent with the colonial assumptions of *Johnson*.[115] Are those assumptions no longer relevant in federal Indian law after *Worcester*? Or can *Johnson* and *Worcester* be reconciled?

As we have seen, portions of the *Worcester* opinion provide hints that Chief Justice Marshall was only reformulating and narrowing the continuing significance of *Johnson*, rather than abandoning all the

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attributed to a rational, public-spirited legislature. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324–45 (1990).

[113] For the most commonly accepted formulation of purposive statutory interpretation, see HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1200 (tent. ed. 1958). Benevolent assumptions may be counterfactual in a given case, but an interpreting court might embrace them anyway in order to promote the overall coherence and normative attractiveness of the law. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250–56 (1986).

[114] This assumption makes particular sense in the context of Indian treaties. The purpose behind construing adhesion contracts against the drafter is to protect weaker parties against unreasonable terms in contracts, the details of which they cannot influence. That purpose logically collapses into a theory of unconscionability, under which a court abandons fictions about enforcing objective manifestations of the intent of the parties to a bargain and, more honestly, simply refuses to enforce a contractual term because of its manifest unfairness. *See, e.g.*, 1 FARNSWORTH, *supra* note 93, §§ 4.26–4.28, at 478–517. The theory that a provision in an Indian treaty is voidable if it is manifestly unfair to the tribe would be a powerful weapon for tribal advocates indeed — far too powerful ever to work its way into American law.

[115] Of course, if one views Christianizing the heathen and otherwise converting them to European ways as "benign," to interpret an Indian treaty to promote these ends might be consistent with the purposive approach, even if the ultimate consequence involved the destruction of the tribes. This analysis demonstrates that purposive interpretation cannot avoid normative questions about the plausible purposes attributable to a sovereign act.

underpinnings of that precedent.[116] That proposition is strengthened when one examines his interpretive strategy in *Worcester* within a particular conceptual framework of sovereignty — constitutionalism.

2. Indian Treaties as Constitutive Documents. — In *Cherokee Nation* and *Worcester*, Chief Justice Marshall repeatedly stressed the sovereign-to-sovereign relationship between tribes and the British crown and its successor, the United States.[117] He rightly understood that this relationship extended far beyond anything like a contractual model. Rather, it involved a mixture of brute force — *Johnson*'s assumptions of conquest and colonization, which are literally matters of war and peace — and territorial sovereignty — cessions of land from the tribe to the United States, with remaining land reserved for the tribe. In this context the treaty became, in essence, the piece of positive law that reflected the *constitutive* relationship between two sovereigns. This linkage between the tribe and the United States, as a matter of law rather than sheer power, was the element missing in *Johnson v. McIntosh*.

That this connection was made in the form of a "treaty" between sovereigns does not defeat the constitutional analogy. Because the treaty involved the relation of a domestic dependent nation and the larger government to which it was inextricably tied and by which it was geographically surrounded, the treaty stood less as a matter of international law than of domestic law. The United States Constitution functions in part as a "treaty" among formerly sovereign states that structures the relations of the national government internally and with those states; the Treaty of Hopewell performed similar functions for the United States and the Cherokee Nation.

The notion that Chief Justice Marshall considered the treaty quasi-constitutional in nature can be tested by assessing whether he treated it as an ordinary aspect of public law, like a statute, or like a more fundamental, constitutive document.[118] A recent study has suggested that, when they interpreted statutes, Chief Justice Marshall and other judges of his era searched for the construction that cohered best with the objective intentions of the enacting Congress, as revealed through statutory text and canons of interpretation, rather than for the most equitable or functional outcome.[119] This approach stands in sharp

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[116] *See supra* pp. 394–96.

[117] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551–52 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

[118] In his thoughtful study of federal Indian law, Charles Wilkinson briefly suggests that "the organic governmental side of Indian treaties and treaty substitutes should be construed in the same manner as constitutional provisions." WILKINSON, *supra* note 17, at 104. As my discussion in the text shows, I agree with this proposal. My argument, however, is not only that this approach is analogically sound and normatively attractive, but also that in fact it is essentially the approach Chief Justice Marshall established in the first place.

[119] *See* John C. Yoo, Comment, *Marshall's Plan: The Early Supreme Court and Statutory*

contrast to what Chief Justice Marshall actually did when he construed the fourth and ninth articles of the Treaty of Hopewell. Indeed, far from approaching the treaty as a statute or other ordinary document of positive law, Chief Justice Marshall approached it in *Worcester* in the same way he undertook the interpretation of the federal Constitution itself.

Chief Justice Marshall's most famous efforts to establish principles of constitutional interpretation are found, of course, in *Marbury v. Madison*[120] and *McCulloch v. Maryland*.[121] In these cases, he emphasized that the very nature — or "spirit," to use his language in *Worcester* — of a written constitution is to provide enforceable limits on lawgivers[122] and simultaneously to give them the flexibility necessary to govern in a functional manner.[123] Chief Justice Marshall's famous words in *McCulloch*, which warned that judges "must never forget, that it is *a constitution* we are expounding,"[124] posit an essentialist view of a constitution as the constitutive document of a complex government in an ever-evolving society; if the document that provides the undergirding and framework for that government cannot serve functional ends over time, the society will founder.

In *Worcester*, Chief Justice Marshall attributed a similar nature to an Indian treaty. It was the constitutive document providing the undergirding and framework for an ongoing (tribal) government-(federal) government relationship. It was, if you will, the joinder of two sets of "We the People," and it therefore resonated with *Marbury*'s notion that constitutional authority flows from the people them-

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Interpretation, 101 YALE L.J. 1607, 1615–26 (1992). This Comment's conclusions, which paint Chief Justice Marshall as something of a textualist in statutory interpretation, give me some pause. All American judges are presumptive textualists: they follow relatively clear statutory language absent some strong reason to deviate from it. When contemporary scholars label a judge a textualist, they mean that the judge is willing to stick with relatively clear statutory text, perhaps filtered through canons of interpretation, even in circumstances in which a less rigid interpreter would be pulled strongly in another direction by the intentions of the legislature, by the purposes that can be attributed to the statute based on the assumption that the legislature adopted the statute to promote the public interest, or by constitutional or other public values that surround the controversy. *See generally* Eskridge & Frickey, *supra* note 112, at 340 (exploring textualism as a method of statutory interpretation). On my reading, the Comment clearly demonstrates only that Chief Justice Marshall shared the universal preference for relatively clear statutory meaning, and not that Chief Justice Marshall stuck with textualism in hotly contested cases in which other Justices presented strong nontextualist arguments. In any event, my argument does not depend much upon the conclusions of the Comment, because even a more flexible approach to statutory interpretation than that posited by the Comment would almost certainly allocate more weight for text than did the approach Chief Justice Marshall took in *Worcester*.

[120] 5 U.S. (1 Cranch) 137 (1803).

[121] 17 U.S. (4 Wheat.) 316 (1819).

[122] *Marbury*, 5 U.S. (1 Cranch) at 176–78.

[123] *McCulloch*, 17 U.S. (4 Wheat.) at 411–25.

[124] *Id.* at 407.

selves.[125] The treaty was a sovereign act of law rather than of sheer power — that is, of conquest.

That the treaty was in writing was also significant. Its written nature facilitates its future interpretation as a fundamental framework within which governmental power is structured and limited, another theme that resonates with *Marbury*.[126] Its written quality also facilitates judicial enforcement, because "[i]t is emphatically the province and duty of the judicial department to say what the law is."[127] But as a written document of constitutive quality, an Indian treaty cannot possibly embody all the details, subtleties, and functional requirements of the sovereign-sovereign relationship. It is like the Constitution in this respect as well, as Chief Justice Marshall understood it in *McCulloch*: "Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[128] In short, to borrow again from *Mc-*

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[125] In *Marbury*, Chief Justice Marshall wrote:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

Marbury, 5 U.S. (1 Cranch) at 176. In *McCulloch*, Chief Justice Marshall echoed this theme that the Constitution flows from the people rather than from the states. *See McCulloch*, 17 U.S. (4 Wheat) at 403–05.

[126] Chief Justice Marshall noted the written nature of the Constitution in *Marbury*:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

Marbury, 5 U.S. (1 Cranch) at 177.

[127] *Id.*

[128] *McCulloch*, 17 U.S. (4 Wheat.) at 407. The full passage from *McCulloch* reads as follows:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is *a constitution* we are expounding.

Id.

Culloch, the "character of the instrument" requires that it not be given "the properties of a legal code."[129]

The parallels between *McCulloch* and *Worcester*, then, are strong indeed.[130] Both involved significant deviations from textual plain meaning to promote the spirit of the underlying constitutive documents. *McCulloch* broadly interpreted the terms of the Necessary and Proper Clause of Article I to empower Congress to make any laws that were "appropriate" to legislative ends.[131] A more limited construction, Chief Justice Marshall concluded, would not enable Congress "to perform the high duties assigned to it, in the manner most beneficial to the people."[132] Similarly, *Worcester* interpreted "allotted [to]" to mean "reserved [by]" and "hunting grounds" to mean "lands," in order to be consistent with the specific purpose of the article in question — simply to establish "the dividing line between the two nations."[133] To the same effect is *Worcester*'s conclusion that the ninth article of the treaty, which included an apparent delegation to Congress of the exclusive power to manage "all [the tribe's] affairs," amounted to a delegation that concerned only trade, the specific subject of that article.[134] Moreover, in both *McCulloch* and *Worcester*, Chief Justice Marshall stressed that his flexible interpretations were consistent with the historical backgrounds and settled expectations that surrounded the interpretive disputes.[135]

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[129] *Id.* at 415.

[130] They include the obvious fact that both opinions produced federalist outcomes: *McCulloch* provided Congress generous legislative flexibility and protected the federal government from taxation by states, *see id.* at 425–37, and *Worcester* centralized in the federal government all questions of Indian affairs, *see Worcester*, 31 U.S. (6 Pet.) at 557–61.

[131] *McCulloch*, 17 U.S. (4 Wheat.) at 421. *McCulloch*'s test for compliance with the Necessary and Proper Clause of Article I is as follows: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.*

[132] *Id.*

[133] *Worcester*, 31 U.S. (6 Pet.) at 552–53.

[134] *See id.* at 553–54.

[135] In *McCulloch*, Chief Justice Marshall relied upon the first Congress's charter of an earlier bank of the United States, following a full debate, as strong evidence that such legislation was constitutional. *See McCulloch*, 17 U.S. (4 Wheat.) at 401–02. He also noted that opponents of the earlier measure had changed their minds on the constitutional question when it became apparent that a national bank was in the national interest. "It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance." *Id.* at 402. Similarly, in *Worcester*, Chief Justice Marshall asserted that, from earliest colonial times, the European sovereigns had dealt with tribes as sovereigns that possessed full authority over their internal matters. *See Worcester*, 31 U.S. (6 Pet.) at 559. The United States had not only inherited that tradition, it had entered into treaties and enacted statutes to implement it. For Chief Justice Marshall, the question in *Worcester* boiled down to this: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all

3. Quasi-Constitutional Clear-Statement Rules. — In both *McCulloch* and *Worcester*, Chief Justice Marshall went to great lengths to immunize a constitutive document from a construction that would violate its underlying nature and purposes. As explained below,[136] he essentially created a clear-statement rule of interpretation, under which only crystal-clear text could trump the spirit of the document under construction. In *McCulloch*, he concluded that, "unless [its] words imperiously require it," the Constitution should not be interpreted to forbid the exercise of Congress's enumerated powers through all feasible means.[137] *Worcester* contains a similar passage in which Chief Justice Marshall refused to read the ninth article of the Treaty of Hopewell to "convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties."[138] "Had such a result been intended," Chief Justice Marshall wrote, "it would have been openly avowed."[139]

In *Worcester* and *McCulloch*, Chief Justice Marshall used this stringent approach to protect the spirit of a constitutive document from evisceration by the apparent meaning of its text. The clear-statement canon, then, was applied to the *internal* interpretation of such documents.[140] By raising a treaty to constitutive status, however,

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intercourse with them shall be carried on exclusively by the government of the union. Is this the rightful exercise of power, or is it usurpation?" *Id.* at 557–58. Finding that the Constitution lodged the exclusive power over Indian relations in the federal government, as it had been in the British crown, Chief Justice Marshall concluded that the exercise of federal authority was lawful and the Georgia statutes preempted. *See id.* at 558–63.

[136] *See infra* pp. 414–15.

[137] *McCulloch*, 17 U.S. (4 Wheat.) at 408. Chief Justice Marshall wrote:

> But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, *that* raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers.

Id. at 408–09.

[138] *Worcester*, 31 U.S. (6 Pet.) at 554.

[139] *Id.*

[140] Technically speaking, because in *Worcester* and *McCulloch* Chief Justice Marshall sought to protect the spirit of constitutive documents from defeat at the hands of their text, he was

Chief Justice Marshall implicitly opened the door to the creation of a clear-statement canon to protect the treaty from invasion by subsequent positive law that would arguably be inconsistent with it. This approach would require, for example, that a statute adopted by Congress not be interpreted to abrogate a provision in an earlier treaty unless the statute unmistakably requires that interpretation. Such an *external* application of a clear-statement rule is no stranger to contemporary public law. Indeed, as we shall see, the current Supreme Court has frequently used clear-statement rules to protect structures constitutive of fundamental sovereignty from erosion. To understand this point, it is first necessary to consider various approaches to interpretive canons, including clear-statement rules, and then to assess the situations in which each kind of canon applies.

Interpretive techniques come in many varieties. They can usually be summed up in "canons," which are simply rules of thumb that, by dint of judicial repetition, take on the appearance (though hardly the reality) of rules of law.[141] Some canons are linguistic in nature and purport to guide the construction of a legal document, such as a statute, in accordance with ordinary rules of language.[142] Other canons simply adopt a basic interpretive approach, such as textualism, which follows plain textual meaning; intentionalism, which follows legislative intent; or purposivism, which follows statutory purposes.[143]

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engaged in the internal application of a very stringent "purpose approach" to the documents and not the external application of a clear-statement rule rooted in concerns extrinsic to the documents. What is most relevant, though, for the present analysis is the degree of vigor with which Chief Justice Marshall allowed seemingly clear text to be trumped, not whether the interpretation was based on an internal or an external canon. In any event, the distinction between internal and external sources of interpretive vigor is a thin one in *Worcester*. Recall Chief Justice Marshall's view that the underlying international law and historical practices demonstrated that Cherokee sovereignty survived discovery and all other events prior to the signing of the Treaty of Hopewell, and that neither the United States nor the Cherokee were likely to have deemed such a treaty a cession of tribal sovereignty. *See supra* pp. 396–97. Surely these factors contributed to Chief Justice Marshall's vigorous protection of Cherokee sovereignty against apparently contradictory treaty language. If these factors are viewed as external to the treaty, Chief Justice Marshall's interpretive method could be deemed an external clear-statement rule designed to protect sovereignty under international law. On the other hand, if such factors are viewed as merged into the treaty because they are the "legislative history" and purposes for it, his method looks more like an internal "purpose approach" applied with unusual vigor. In my judgment, this inquiry amounts to little more than a labeling process that does not advance the analysis.

[141] For a famous, amusing, but ultimately too flippant presentation of the canons as rules of thumb that always carry with them a "counter-canon," see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

[142] *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 639–46 (1988).

[143] On these three basic interpretive approaches, see Eskridge & Frickey, cited above in note 112, at 324–45. These kinds of canons have little precedential force to them, as revealed in the

Both the linguistic canons and the canons that establish a fundamental method of interpretation guide the internal interpretation of the document. By contrast, some other canons go outside the document and create an exception to the basic interpretive approach for cases that implicate certain important values.[144] In most instances, these policy-based canons operate either as tiebreakers at the end of the basic interpretive analysis or as rebuttable presumptions at the outset of the interpretive process.[145] The force this kind of canon has in a given case is likely to be linked to how well a vigorous application of it would promote the canon's underlying purposes on the facts.[146]

Clear-statement rules are policy-based canons of a different order of magnitude. They go beyond end-game tiebreakers, and even beyond initial rebuttable presumptions, to require that a document be interpreted a certain way unless unambiguous statutory text or, perhaps, absolutely compelling legislative history requires a contrary conclusion.[147] In *McCulloch* and *Worcester*, Chief Justice Marshall approached interpretation with this degree of vigor. Because no clear constitutional text denied Congress the discretion to use all feasible

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confusion within the current Court over which of these basic techniques should be followed in statutory interpretation cases. *Compare* Chisom v. Roemer, 111 S. Ct. 2354, 2368 (1991) (majority opinion of Stevens, J.) (using legislative intent and statutory purpose to trump the textual meaning of a statute) *with* West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1147 (1991) (majority opinion of Scalia, J.) (employing a textualist approach and repudiating inquiries about legislative intent and statutory purpose).

[144] *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1009 (1989) (enumerating "the Constitution, evolving statutes, policy, and common law" as sources for public values in statutory interpretation); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 466 (1989) (proposing constitutional norms, institutional concerns, and the counteraction of statutory failure as principles for statutory interpretation in the regulatory state). The distinction between internal and external application of canons, although of theoretical significance, does not bear on Chief Justice Marshall's analysis. *See supra* note 140.

[145] For example, the rule of lenity provides that ambiguous federal criminal statutes should be construed in favor of the defendant. Today, it appears that this canon embodies only an end-of-the-interpretive-game tiebreaker, rather than an initial interpretive presumption. *See* United States v. R.L.C., 112 S. Ct. 1329, 1338 (1992) (plurality opinion of Souter, J.).

[146] For example, arguably the rule of lenity in federal criminal cases is designed to promote fair notice to the citizenry of what constitutes criminal conduct, to limit prosecutorial discretion, and to protect the police power of the states against federal encroachment. Thus, we might expect the rule to be invoked if a United States Attorney appointed by a Republican President sought to prosecute major state Democratic Party figures for political corruption, especially if the corrupt acts might not have violated state law and might not have resulted in any monetary loss to the state. *See* McNally v. United States, 483 U.S. 350, 359–61 (1987).

[147] If either clear statutory text or very clear legislative history will trump the canon, the canon functions as a traditional clear-statement rule; if only unmistakable statutory text will do, the canon functions as a "super-strong clear-statement rule," to borrow a term Bill Eskridge and I have coined. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4 (1992).

means to implement its enumerated powers, *McCulloch* held that Congress had that discretion. Because the Treaty of Hopewell nowhere contained language that terminated the sovereignty of the Cherokee Nation in so many words, that sovereignty survived.

Clear-statement rules, because they can radically bend documents away from their apparent meaning, are used sparingly. Their primary justification today is to guard against the erosion of constitutional structures that are difficult to protect by more direct forms of judicial review. As a recent study demonstrates,[148] the present Supreme Court has adopted particularly stringent clear-statement rules as an aspect of "quasi-constitutional law"[149] in order to protect values rooted in federalism[150] and the separation of powers[151] from evisceration at the hands of Congress. The Court has been especially vigilant in the former context and has held that Congress may invade the states' Eleventh Amendment immunity from suit in federal court or regulate core state functions "only by making its intention unmistakably clear in the language of the statute."[152]

The rationale for these canons is straightforward. Federalism and the separation of powers are fundamental to our system, but the Court cannot easily protect them through constitutional invalidation. Most separation of powers and federalism questions essentially ask whether Congress adopted legislation that "goes too far" in invading the domain of the executive or of the states. It is difficult to find some principled way to draw this line, and in the modern regulatory state there is an evident need for wide-ranging congressional authority.[153] Yet because

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[148] *See id.* at 615–29.

[149] By "quasi-constitutional law" I mean, essentially, a kinder and gentler form of judicial review. Since *Marbury*, of course, the Court has deemed itself empowered to invalidate laws made by a policymaking branch as inconsistent with the national constitutive document, the Constitution. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803). Quasi-constitutional interpretive techniques do not result in the invalidation of such laws, but rather strive to construe them to accord with judicially defined values purported to be rooted in that constitutive document.

[150] *See* Gregory v. Ashcroft, 111 S. Ct. 2395, 2402–03 (1991) (holding that a clear-statement requirement must be satisfied before a federal statute will be held to regulate core state functions); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (requiring a clear statement before a federal statute will be held to have abrogated the states' Eleventh Amendment immunity from suit in federal court); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16–17 (1981) (subjecting the federal conditions that accompany federal funding of joint federal-state programs to a stringent clear-statement rule).

[151] *See* EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1230, 1236 (1991) (protecting the executive's foreign relations power against congressional encroachment by requiring that, to apply extraterritorially, a federal statute must contain a clear statement to that effect); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 233 (1986) (reading a congressional directive narrowly to preserve the executive's foreign relations power).

[152] *Atascadero*, 473 U.S. at 242; *see also Gregory*, 111 S. Ct. at 2401 (applying *Atascadero*'s standard to congressional regulation of core state functions).

[153] Thus, in the area of separation of powers, the Court has not enforced the nondelegation

the values rooted in the separation of powers and in federalism are central to our constitutional system, their very underenforcement at the constitutional level has led the Court, at the statutory interpretive level, to apply stringent clear-statement rules to federal statutes that endanger those values.[154]

This approach has significant institutional implications both for the Court and for Congress. It provides the Court with a structural lodestar to cut through the complexities of a difficult statutory case. The state gets the benefit of a strong presumption in favor of its sovereignty, and the opposing party bears the burden of marshalling the legal complexities and finding clear evidence of congressional support for its position. If, as is often the case, state sovereignty survives the challenge, the burden of combatting inertia and seeking legal change lies with the party who sought to intrude upon state authority. If this party undertakes the lobbying effort necessary to obtain federal legislation to overturn the Court's decision, it must do so openly, by clear language in a bill. In theory, at least, this approach encourages a fair fight in Congress, which is structurally better suited than the Court to weigh state sovereignty against other interests. Because it is much easier to kill legislation than to pass it,[155] states ultimately retain all the institutional and procedural advantages in conflicts over their sovereignty, but Congress retains the capacity to erode state sovereignty whenever the national interest is sufficiently strong.

These rationales for employing clear-statement rules in the federalism and separation of powers contexts fit Chief Justice Marshall's methodology in *Worcester* well. The "Courts of the conqueror" cannot realistically be expected to invalidate even harsh colonial measures in

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doctrine, *see* Mistretta v. United States, 488 U.S. 361, 371–79 (1989) (refusing to find a violation of the nondelegation doctrine in Congress's creation of an independent sentencing commission), and it has upheld unconventional federal governmental arrangements in tension with other separation of powers values, *see id.*; Morrison v. Olson, 487 U.S. 654, 677 (1988) (upholding Congress's investment of a specially created court with the power to appoint independent counsel). Similarly, after flirting for nearly a decade with an approach that interposed the Tenth Amendment as a barrier to congressional regulation of core state functions pursuant to its commerce power, the Court abandoned this approach in 1985 in large part because of the impossible line-drawing problems. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47, 556–57 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)). This debate is not settled, however. In New York v. United States, 112 S. Ct. 2408 (1992), the Court invalidated on federalism grounds one aspect of the federal regulation of states pursuant to a statute adopted under Congress's commerce and spending powers. *See id.* at 2428.

[154] *See* Eskridge & Frickey, *supra* note 147, at 630–32. Whether the application of stringent clear-statement rules to promote these particular values is appropriate is, of course, another question. For a critique, see *id.* at 632–46.

[155] *See, e.g.*, KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 314–15, 395–96, 398 (1986).

the name of the very constitution established by the colonizers. How can such courts determine when Congress or the executive "goes too far" to promote colonization? How could a decree that made such a judgment be enforced, in any event? These concerns do not mean, however, that the courts must slavishly enforce colonial measures to the limits of their plausible meanings. By centralizing the power over Indian affairs in the federal government, by conceptualizing the relationship of tribes with the federal government as a sovereign-to-sovereign one, by envisioning an Indian treaty as the constitutive document of that sovereignty and structure, and by protecting treaty-recognized sovereignty and structure from erosion by all but crystal-clear treaty text, Chief Justice Marshall built a complex, institutionally sensitive interpretive scheme. His approach to the problems of colonization, then, parallels the current Court's efforts to domesticate important but essentially nonjusticiable questions of governmental structure by creating clear-statement rules. Both techniques have been justified by the centrality to these disputes of a constitutive document of sovereignty — an Indian treaty in the first instance, and the American Constitution in the second.

Because of this parallel, it is not surprising that the Supreme Court has long applied a clear-statement requirement to congressional acts that appear to invade tribal sovereignty. The clearest example is the principle that, absent compelling evidence, a court should not hold that a federal statute has abrogated an Indian treaty.[156] Unilateral federal treaty abrogation, one of the starkest acts of colonization, is within the discretion of Congress, the Court has held, and thus injunctive relief is unavailable to prevent the abrogation.[157] That the counterpoint to this deference in judicial review has been some vigilance in statutory interpretation — if plausible, to interpret the statute not to abrogate the treaty — is a natural extension of Chief Justice Marshall's work in *Worcester*. Just as contemporary decisions protect against all but express repeals of values rooted in the Constitution, the Indian treaty abrogation doctrine protects against all but clear repeals of values rooted in the spirit of Indian treaties.

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[156] *See* Wilkinson & Volkman, *supra* note 17, at 623–34. In United States v. Dion, 476 U.S. 734 (1986), the Court concluded that the canon concerning Indian treaty abrogation is not a clear-statement rule of the "super-strong" variety discussed above in note 147. The Court held in *Dion* that there was no "per se rule" that required that the abrogation be embodied in an explicit statement in statutory text; clear legislative history can lead to an abrogation as well. *Dion*, 476 U.S. at 739.

[157] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565–68 (1903). If the abrogation of the treaty results in a taking of tribal land that the federal government had recognized in the treaty, the Fifth Amendment requires just compensation. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 423–24 (1980).

B. The Court and Federal Indian Law: Losing Touch with Chief Justice Marshall

My argument thus far has suggested considerable similarity between Chief Justice Marshall's method in *Worcester* and the current Court's use of clear-statement rules. Unfortunately, these parallels break down where the overlap is greatest: in contemporary federal Indian law. As we shall see, the current Court's approach to federal Indian law is in great tension with Marshall's model.

A century and a half has passed since Chief Justice Marshall generated his approach.[158] In that period, at least three developments

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[158] This is not the place for an extended discussion of interpretation throughout all of federal Indian law since 1832. For present purposes, three points should suffice.

First, almost any generalization about the subject is treacherous. Over the years, the Court has had significant problems with the intricacies of Indian law and the precedential effect of prior decisions. Commentators have bewailed the incoherence of rather recent cases, *see, e.g.*, Russel L. Barsh, *The Omen:* Three Affiliated Tribes v. Moe *and the Future of Tribal Self-Government*, 5 AM. INDIAN L. REV. 1, 1 (1977) ("The Court lacks direction."); Robert Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D. L. REV. 434 (1981); Robert S. Pelcyger, *Justices and Indians: Back to Basics*, 62 OR. L. REV. 29, 30 (1983) ("The Court's lack of consistency and predictability has been noted, even by the Justices themselves."), but in fact the same complaint can probably be made about the entire corpus of federal Indian law. Nonetheless, as the discussion in the text that follows indicates, I believe that the Court in recent years has demonstrably altered its approach to interpretation in Indian law.

Second, until recently, at least, the primary theory of interpretation posited by the Court has been intentionalism. This approach makes some sense, in a field in which congressional power over Indian affairs is said to be plenary. Yet congressional intent does not explain, much less justify, the outcomes in many major federal Indian law cases. *See* Frickey, *supra* note 59, at 1137–42.

Third, rather than adhere rigorously to congressional intent, until recently, at least, the Court has tended to justify its opinions in federal Indian law by reference to canons of interpretation that are traceable to Chief Justice Marshall's opinion in *Worcester*. For the primary study on the canons, see Wilkinson & Volkman, cited above in note 17, at 623–34. Although they are phrased in a variety of ways, the canons are designed to promote narrow interpretation of federal treaties, statutes, and regulations that intrude upon Indian self-determination and to promote broad interpretation of provisions that benefit Indians. *See id.* at 623–34. Many of the most important Indian victories in the Supreme Court were justified by reference to these canons. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373, 392–93 (1976) (resolving statutory ambiguities in favor of the Indians, as discussed below at pp. 429–32); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (stating that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (quoting Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934))). In my judgment, these victories came about not through a positivistic judicial allegiance to the canons as rules of law, but through a judicial sensitivity to the Indian context that was fostered by the canons. Properly understood, the canons call upon the judge to become sensitized to the Indian interests in the case, to conceptualize a tribe as a distinct and sovereign political community under American domestic law, to reexamine the fit between routine Euro-American legal doctrines and the tribal context, to recognize a tradition of protection of Indian rights against all but crystal-clear encroachments, and to abandon obsolete congressional intent if later developments have repudiated it. *See* Frickey, *supra* note 59, at 1174–1203, 1216–40.

might appear to undercut Chief Justice Marshall's method and to defeat the parallelism between canonical protection of tribal and state sovereignty. Yet ultimately none of these developments explains the current Court's sharp deviation from Chief Justice Marshall's approach.

First, respect for tribal sovereignty may be harder to generate when the Court has confidently declared for a century that congressional power over tribes is plenary.[159] These decisions, in line with Chief Justice Marshall's basic assumptions in *Worcester*,[160] view the *existence* of plenary congressional power over tribes as part of the sovereign-to-sovereign relationship settled at the point of colonization. Nonetheless, consistent with Chief Justice Marshall's approach, the current Court has held that the *exercise* of that power is still subject to limitation by clear-statement interpretive requirements. Tribal sovereignty is thus similar to state sovereignty, another beneficiary of clear-statement interpretive protection, for the Court allows Congress essentially plenary authority to subject states to federal judicial jurisdiction and regulation.

Second, states today look much more like sovereigns than do some tribes. For example, unlike the Cherokee Reservation in *Worcester*, some Indian areas today have lost much of their distinctive character and contain many non-Indian residents. Some of the Court's relatively recent cases have involved this difficult context, which arose from the allotment process of the late-nineteenth and early-twentieth centuries, in which a portion of the reservation was divided into individual parcels for tribal members and the remainder opened for homesteading by non-Indians.[161]

To apply Chief Justice Marshall's legacy in this context is no simple matter. To bring his method to bear in these cases would require, at a minimum, that the Court confront this situation directly. An eval-

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[159] The principal cases are those cited above in note 59.

[160] *See supra* p. 395.

[161] The process is explained in Solem v. Bartlett, 465 U.S. 463 (1984). *Solem* is the Court's principal recent decision on whether the allotment process terminated the reservation, diminished its size, or left the reservation boundaries intact. *See id.* at 466–67. Several other important recent cases have involved allotment issues. *See* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S. Ct. 683, 694 (1992) (allowing a county to impose an ad valorem tax but not an excise tax on land owned by a tribe or members on an allotted reservation); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 432 (1989) (plurality opinion); *id.* at 446–47 (Stevens, J., announcing the judgment of the court in one of the consolidated actions and concurring in the judgment in two others) (limiting tribal authority to zone fee simple lands owned by non-members to those lands located in the "closed" portion of an allotted reservation); Montana v. United States, 450 U.S. 544, 557 (1981) (denying the tribe any general authority to regulate non-member hunting and fishing on fee simple lands owned by non-members on an allotted reservation); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (denying the authority of a tribal court to exercise criminal jurisdiction over a non-Indian person living on the reservation).

uation of the level of residual tribal sovereignty in each case would parallel Chief Justice Marshall's inquiry in *Worcester* into whether the inherent sovereignty of the Cherokee Nation survived the Treaty of Hopewell. By acknowledging the conflicting interests at play, the Court could require Congress to authorize any substantial change clearly.[162] In any event, not all federal Indian law cases will be shaped by allotment. Many cases still involve unallotted reservations or other contexts in which tribal sovereignty has retained significant contextual support, and the Court has not even clearly signaled a methodological shift in the context of allotment.[163] Whatever its com-

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[162] This problem is worth much more extended discussion than I can provide here. My understanding of the Marshall legacy cannot render these cases simple, for among other things sometimes their facts simply negate the strength of Indian sovereignty arguments. The most obvious example is *Oliphant*, in which only about fifty of the nearly 3,000 residents of the reservation were tribal members. *See Oliphant*, 435 U.S. at 193 n.1. There is considerable force to Vine Deloria's observation that the facts of *Oliphant* "make the Indian argument not only moot but demonstrate that it was based on an idea of sovereignty having little relation to actual reality." Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 215 (1989). A clear-statement approach based on Chief Justice Marshall's legacy would, however, retain a baseline of Indian sovereignty and render outcomes like *Oliphant* deviations from that baseline because of their unique facts. *See* Robert Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543, 581–87 (1985).

Because of its facts, *Oliphant* was a horrible test case from the tribal perspective. Resolving the case on its facts would have allowed other tribes the opportunity to make persuasive arguments in support of their territorial exercises of criminal jurisdiction over non-members. Thus, *Oliphant* could have been resolved as a de facto extinguishment of a particular tribe's "external sovereignty" (its ability to regulate nonmembers), instead of a rule of universal application to all tribes. This would have placed the burden of seeking legal change upon nonmembers, who have greater access to Congress, the institution that should be forced to confront such problems.

[163] The decisions cited above in note 161 surely reflect some deviation from undiluted notions of tribal sovereignty because of the allotment process. Yet in its most recent decision, the Court declined an opportunity to distinguish formal reservations that retain a distinctively Indian quality from reservations devastated by allotment.

Oklahoma Tax Commission v. Sac & Fox Nation, 113 S. Ct. 1985 (1993), involved a typical allotment setting. An 1867 treaty established the Sac and Fox reservation. Pursuant to an 1891 agreement, the tribe ceded almost all of the reservation to the federal government. Its members had a right to choose an allotment of one quarter section within the ceded area, and the rest of the land became available for non-Indian homesteading. Oklahoma sought to tax the income of tribal members who lived within the boundaries of the original reservation, even if their income was earned on Indian trust land. The Oklahoma Tax Commission attempted to distinguish McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), which held that Arizona could not tax the income earned on the Navajo reservation by a tribal member who lived there, by arguing that the 1891 agreement had disestablished the Sac and Fox reservation. In a unanimous opinion, Justice O'Connor rejected this argument and concluded that, even if the reservation no longer existed, *McClanahan* applied to tribal members who lived on and earned their income on federal trust lands. *See Sac & Fox*, 113 S. Ct. at 1990–91.

This holding is directly contrary to the argument made by the United States, as amicus curiae, that tribal immunity from state taxation should depend upon the presence of either a

plexities, then, the allotment process poses no insurmountable barrier to the modern application of Chief Justice Marshall's approach.

Third, many federal Indian law decisions, especially those dealing with developments since the mid-nineteenth century, turn not on treaty language, but on the text of seemingly more mundane instruments of law, such as statutes, executive orders, and federal regulations.[164] For example, millions of acres of Indian lands are located on reservations established by executive order.[165] This difference in form should not, however, substantially alter judicial methodology. Some of these non-treaty enactments embody agreements with tribes that would have been handled by treaty in former eras. Many of the rest embody unilateral alterations of prior treaties. In any event, because all are constitutive in nature — all adjust a sovereign-to-sovereign, structural relationship based on Chief Justice Marshall's understanding of the earliest colonial practices prior to the negotiation of any treaty — the canon should apply to them, too.[166] Consistent

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formal reservation or a coherent "reservation community." Brief for the United States as Amicus Curiae at 16–20, *Sac & Fox*, (No. 92-259). The United States noted that the Navajo involved in *McClanahan* lived and earned income on "undiminished formal reservation land," *id.* at 17, and then seized upon language in *McClanahan* stating that "[i]t followed from th[e] concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries." *Id.* (quoting *McClanahan*, 411 U.S. at 168). Presumably the United States intended to contrast the large, isolated, distinctively Indian, self-governing, formal reservation of the Navajo — the epitome of Indian sovereignty today — with the common context that resulted from allotment, in which reservation boundaries are not clear, if they have survived at all, the tribe as an entity may exercise little authority, and Indian trust land and non-Indian land held in fee simple are scattered about like contrasting squares on a checkerboard. *See, e.g.*, DeCoteau v. District County Ct., 420 U.S. 425, 429 n.3 (1975).

Declining this opportunity to establish contextual limits to tribal sovereignty, the Court in *Sac & Fox* took as its baseline for tribal-taxation immunity the federal statutory definition of Indian country, which includes Indian allotments as well as de jure reservations and "dependent Indian communities." *Sac & Fox*, 113 S. Ct. at 1991 (citing 18 U.S.C. § 1151 (1948)). Although this scheme is articulated in a criminal statute, the Court has long borrowed the statutory definition for civil purposes as well. *See, e.g.*, *DeCoteau*, 420 U.S. at 427 n.2 (citing *McClanahan*, 411 U.S. at 177 n.17); Kennerly v. District Ct., 400 U.S. 423, 424 n.1 (1971); Williams v. Lee, 358 U.S. 217, 220–22 nn.5, 6 & 10 (1959). In this way, the Court has expanded a congressional jurisdictional arrangement to protect tribes and their members against state jurisdiction and has left to Congress the responsibility to revise that scheme if it works hardship on states. That approach is consistent with the Marshall legacy.

[164] Treaty-making with Indians ended in 1871. *See* Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566, 566 (codified as amended at 25 U.S.C. § 71 (1988)). Legislation replaced treaties because the House of Representatives demanded a role in federal Indian policy. *See* HANDBOOK, *supra* note 28, at 127–28. Since that time, federal Indian law has been incorporated into statutes, regulations, and executive orders.

[165] *See* ROBERT N. CLINTON, NELL JESSUP NEWTON & MONROE E. PRICE, AMERICAN INDIAN LAW: CASES AND MATERIALS 718–19 (3d ed. Michie Co. 1991).

[166] *See* WILKINSON, *supra* note 17, at 103–05. Even federal regulations, the most mundane of these non-treaty sources of positive law, are promulgated against the backdrop of the executive branch's fiduciary responsibility toward Indians. *See, e.g.*, HANDBOOK, *supra* note 28, at 225–28. Thus, even if, in some circumstances, they lack much constitutive quality, ambiguities in

with this notion, the Court has drawn no fundamental interpretive distinction between reservations established by statute or executive order and those protected by treaty.[167]

Nonetheless, the current Supreme Court has recently moved away from Chief Justice Marshall's model in dramatic fashion. It has not justified this shift by reference to any longstanding historical, doctrinal, or contextual development. Indeed, the Court has supported this switch more by ipse dixit than explanation. But whatever the motivating rationale, the Court has simultaneously deflated the power of the Indian law canon and privileged other values, in particular federalism.

In its most important recent decision, *Cotton Petroleum Corp. v. New Mexico*,[168] the Court held that a state could impose its severance tax upon oil and gas extracted by a non-Indian company from tribal lands on an Indian reservation.[169] The extraordinary tension between this case and *Worcester* is patent. Recall that, in *Worcester*, Chief Justice Marshall concluded that, absent clear tribal or congressional authorization, an Indian reservation remains "a distinct community occupying its own territory, with boundaries accurately described, in which the laws of [the state] can have no force."[170] *Cotton Petroleum* instead stated, apparently as a general proposition, that "[s]tates and tribes have concurrent jurisdiction over the same territory."[171] Turning Chief Justice Marshall's clear-statement approach almost completely on its head, the Court in *Cotton Petroleum* then concluded that the state could tax because Congress had failed to prohibit it from exercising that power.[172]

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regulations should also be resolved in favor of Indian interests. *See* Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1332 (10th Cir. 1982).

[167] *See* Antoine v. Washington, 420 U.S. 194, 199–200 (1975); HANDBOOK, *supra* note 28, at 224. Of course, in a situation in which the executive order or statute was truly a unilateral federal act, the "contract of adhesion" methodology is inapt. *See id.* at 224 n.60.

[168] 490 U.S. 163 (1989).

[169] *See id.* at 173–93.

[170] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

[171] *Cotton Petroleum*, 490 U.S. at 192.

[172] *See id.* at 189. One wonders what Chief Justice Marshall would say if he could read the following passage from *Cotton Petroleum*:

> [A] multiple taxation issue may arise when more than one State attempts to tax the same activity. If a unitary business derives income from several States, each State may only tax the portion of that income that is attributable to activity within its borders. Thus, in such a case, an apportionment formula is necessary in order to identify the scope of the taxpayer's business that is within the taxing jurisdiction of each State. In this case, however, all of Cotton's leases are located entirely within the borders of the State of New Mexico and also within the borders of the Jicarilla Apache Reservation. Indeed, they are also within the borders of the United States. There are, therefore, three different governmental entities, each of which has taxing jurisdiction over all of the non-Indian wells. The federal sovereign has the undoubted power to prohibit taxation of the Tribe's lessees by the Tribe, by the State, or by both, but since it has not exercised that power, concurrent taxing jurisdiction over all of Cotton's on-reservation leases exists. Unless

What happened in *Cotton Petroleum* to Chief Justice Marshall's clear-statement rule? In its only allusion to the canon, the Court in *Cotton Petroleum* wrote that, "although state interests must be given weight and courts should be careful not to make legislative decisions in the absence of congressional action, ambiguities in federal law are, as a rule, resolved in favor of tribal independence."[173] This language reveals much about the extent to which the Indian law canon has been degraded: here it appears to be something approximating only a weak end-of-the-game tiebreaker. Moreover, the passage demonstrates a strong preference for state authority, consistent with the current Court's federalism-protecting clear-statement rules discussed earlier.[174]

Cotton Petroleum involved, however, a situation far removed from those in which the Court has developed its federalism-protecting clear-statement rules.[175] More important, even if quasi-constitutional, structurally rooted interpretive techniques should come to the state's assistance, why should not the tribe be able to respond with an even stronger structural canon, Chief Justice Marshall's clear-statement rule? It should not matter that a non-Indian company was involved in *Cotton Petroleum*, for some of the practical effects of the tax fell upon the tribe, and in any event a non-Indian — Worcester himself

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and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over all of Cotton's leases.

Id. at 188–89 (citations omitted).

How could the Court make such a statement? The question is impossible to answer completely. To some extent, the inconsistency between this language and Chief Justice Marshall's approach may be explained by the opacity and lack of salience of federal Indian law today, which in my judgment allows the Justice responsible for the majority opinion unusually broad latitude in the choice of rationale and wording. Justice Stevens, the author of *Cotton Petroleum*, is a leading advocate on the Court of overturning much of Chief Justice Marshall's legacy. *See infra* p. 439. In addition, as explained below, *Cotton Petroleum* was an odd case in which tribal interests were never adequately incorporated into the legal or factual context. *See infra* pp. 434–35. It was thus a case in which the context, although technically arising in Indian country, seemed especially non-Indian in character. This contextual warping of the case may have contributed to the extent to which a majority of the Court viewed it as implicating essentially no Indian interests. Whatever may be the explanation for this language in *Cotton Petroleum*, it does not necessarily signal the end of the Marshall legacy. *See infra* pp. 435–39.

[173] *Cotton Petroleum*, 490 U.S. at 177.

[174] *See supra* p. 415.

[175] As discussed earlier, Gregory v. Ashcroft, 111 S. Ct. 2395 (1991), the principal case creating a somewhat general federalism-protecting clear-statement rule, questioned whether Congress, pursuant to its commerce power, had clearly subjected core state functions to federal regulation. *See id.* at 2402–03. The other major areas in which a federalism-protecting clear-statement rule has been applied are even more specialized than the setting in *Gregory*. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (discussing congressional waivers of states' Eleventh Amendment immunity to suits in federal court); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16–17 (1981) (treating federal grants to states). It is hard to see how any of these areas is at all analogous to the Indian law setting.

— was the subject of the asserted state regulation in *Worcester*, as well. Nor should it matter that the case involved a conflict between the regulatory jurisdiction of a state and a tribe; that is, of course, precisely the setting in *Worcester*.[176]

The primary explanation for the Court's language in *Cotton Petroleum*, I believe, is that the quasi-constitutional, structural nature of Chief Justice Marshall's approach is lost on the current Court. The canon has little bite because it seems so blatantly normative — "you should help those poor Indians" — and normative in a fuzzy, liberal direction at that.[177] If I am right that the Justices perceive the canon as designed to promote a public value that favors Indians as a downtrodden minority, the Justices are not alone. The two principal recent commentaries on the substantive canons treat the Indian law canon the same way. William Eskridge categorizes that canon as part of a cluster of canons that protect discrete and insular minorities — "*Carolene* groups" — against legislative oppression.[178] Similarly, Cass Sunstein calls the Indian canon "the most conspicuous example" of an interpretive principle that favors "disadvantaged groups."[179]

In the hands of sympathetic commentators, this conceptualization might seem innocuous. In truth, though, by masking the essential differences between the legal and cultural situations of Native Americans and of America's racial minorities, this conceptualization is antagonistic to the most basic claim put forward by American Indians: the claim to be free from assimilative forces and to make and be governed by their own laws. It is not a conceptualization, then, that Native American leaders would likely embrace even if it could produce a few judicial victories along the way. In any event, in the hands of the current Court, this conceptualization of the canon has quite the opposite effect. Its patently value-laden nature renders it easily trumped by federalism principles.[180]

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[176] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542 (1832). Many years after *Worcester*, the Supreme Court allowed state jurisdiction to creep into Indian country when only non-Indians were involved and the Court found no Indian interest contrary to the exercise of state jurisdiction. The foundational case to this effect is United States v. McBratney, 104 U.S. 621 (1882), which held that a state court has exclusive jurisdiction to prosecute a crime by one non-Indian against another non-Indian that occurred in Indian country, *see id.* at 624.

[177] *See* Frickey, *supra* note 59, at 1221.

[178] Eskridge, *supra* note 144, at 1032–34.

[179] Sunstein, *supra* note 144, at 483.

[180] The confusion between basing the Indian law canon on structural and constitutive concerns and tying it simply to a public value of protection of disadvantaged groups is itself rooted in Chief Justice Marshall's foundational cases. As noted earlier at p. 392, in *Cherokee Nation* Chief Justice Marshall stated that tribes were "in a state of pupilage" with a relationship to the United States that "resembles that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The Court later embraced this notion of a federal guardianship over subordinate peoples to justify congressional plenary power over tribes. *See* United States v. Kagama, 118 U.S. 375, 383–84 (1886) ("These Indian Tribes *are* the wards of the Nation. . . .

With all due respect, the commentators are wrong to categorize the Indian law canon as designed to protect disadvantaged minorities. They overlook that the Indian law canon is essentially structural and institutional and was not established to promote equality or to combat political powerlessness.[181] Much more important, the Court has committed the same error, and its error threatens to destroy much of the force of the Indian law canon. There is nothing "neutral" or "value-free" about the Court's preference for structural principles, involving federalism and the separation of powers, over nonstructural principles such as individual rights or interpretive protections for "disadvantaged groups."[182] But even if values rooted in the Constitution somehow

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From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."). The Court also began to refer to this conception of tribes when restating the Indian law canon. *See, e.g.*, Carpenter v. Shaw, 280 U.S. 363, 367 (1930) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."). Even *Worcester* may provide minimal support for this conception, for the "contract of adhesion" theory embodied in a portion of it was based on the premise that the tribe was weaker than, and dependent upon the good faith of, the United States. *See supra* p. 401.

Both of these interpretive developments — rooting the canon upon the helplessness of the Indians and upon a contract of adhesion analogy — influenced the drafting of important Burger Court federal Indian law opinions. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1979) (relying on the contract of adhesion analogy); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973) (describing the canon as primarily designed to protect weak and defenseless people). It is unsurprising, then, that Eskridge and Sunstein, writing near the outset of the Rehnquist Court, conceptualized the Indian law canon as one designed to benefit disadvantaged peoples. Nonetheless, the structural and constitutive flavor of the canon had been reaffirmed in other prominent Burger Court opinions. *See* Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'" (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980))).

In my judgment, federal Indian law at the dawn of the Rehnquist Court contained a good deal of confusion caused, at least in part, by analogies to other, more familiar areas of law, like constitutional equal protection jurisprudence, and by a failure to distinguish the dictum of *Cherokee Nation* from the holding of *Worcester*. The Rehnquist Court has further deflated the Indian law canon. The primary reason is that this Court is hardly interested in generous construction of federal statutes and other provisions to promote the lot of disadvantaged peoples. *Cf.* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071 (1991) (overriding several Rehnquist Court opinions that narrowly construed federal statutes prohibiting employment discrimination). Because the structural and constitutive bases for the canon have become obscured, Native Americans have suffered the same interpretive fate as racial minorities. This problem is aggravated by the fact that the tribes' usual opponents in Rehnquist Court cases have been the states, and that, for the current Court, federalism is a public-law value of extreme importance. *See supra* p. 415.

[181] This error is perhaps understandable when one considers that, amidst the pervasive murkiness of federal Indian law, analogies to more familiar public law doctrines become almost irresistible.

[182] *See* Eskridge & Frickey, *supra* note 147, at 629–44.

automatically deserve heightened interpretive protection, the Court has articulated no neutral reason to prefer federalism to Indian sovereignty, as Chief Justice Marshall conceptualized it. Of course, the Supreme Court has the power to prefer the former to the latter, but such a decision warrants intense scrutiny and discussion, which have not occurred.[183]

Indeed, in some recent cases the Indian law canon has almost disappeared from view. Consider the quintessentially structural case of *Blatchford v. Native Village of Noatak*.[184] The Supreme Court held that an Indian tribe could not sue a state in federal court. The Court first concluded that the Eleventh Amendment applies to tribes in the same way that it does to most other plaintiffs. Thus, absent a state waiver of Eleventh Amendment immunity, the tribe could not sue the state unless Congress had abrogated that immunity.[185] The Court then found no congressional abrogation because the federal jurisdictional statute upon which the tribe relied was not clear enough to satisfy the super-strong clear-statement rule associated with Eleventh Amendment immunity.[186] Whatever might be said about these conclusions, the most remarkable aspect of this case is that the majority never mentioned the Indian law canon at all, even in its deflated, nonstructural form.[187] The Court has strayed far from a view of the formative documents of federal Indian law as constitutive and structural in nature.[188]

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[183] In my judgment, absent a clear expression of congressional intent, resolution of the federalism-Indian sovereignty conflict should be largely a case-by-case inquiry, as long as the inquiry is governed at the outset by a strong presumption that preserves tribal immunity from state regulation. For a paradigmatic case that embraces this approach, see Bryan v. Itasca County, 426 U.S. 373 (1976), discussed below at pp. 429–32. There may be isolated instances in which, even absent a clear congressional directive, congressional programs have encouraged non-Indians to live in Indian country to the extent that the non-Indians have developed a strong, reasonable reliance interest in freedom from tribal regulation. *See* cases cited *supra* note 161. To address this complex scenario would require extensive discussion beyond the scope of this Article. In any event, any inroads into tribal sovereignty should be clearly attributable to Congress, not to unilateral colonial conclusions by the Court.

[184] 111 S. Ct. 2578 (1991).

[185] *See id.* at 2581–83.

[186] *See id.* at 2584–86.

[187] It was left to the dissent to construct an argument based on the canon. *See id.* at 2589–90 (Blackmun, J., dissenting).

[188] Not every recent case deflated the Indian law canon as starkly as did *Cotton Petroleum* and *Blatchford*. *See, e.g.*, County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 688 (1992) (purporting to follow a super-strong clear-statement rule adopted in Montana v. Blackfeet Tribe, 471 U.S. 759 (1985), to protect a tribe and its members from state taxation of activities in Indian country). Nonetheless, even a case that articulates a strong canon in form may not give it much weight in fact.

The *Yakima* case is a good example. It involved the incredibly complicated question whether fee simple land on a reservation that is owned by a tribe or its members and that was originally patented pursuant to the General Allotment Act of 1887, *see* Ch. 119, 24 Stat. 388 (codified as

C. Reviving Chief Justice Marshall's Approach: Some Exploratory Thoughts

How much, if anything, can be retrieved of Chief Justice Marshall's legacy? Maybe no one should even try to exhume his perspective. The history of federal Indian law since Chief Justice Marshall has been filled with tragedy, a story in which the rule of law often has become a vehicle to rationalize what can only be understood as crimes against humanity.[189] More basically, any effort to retrieve Chief Justice Marshall's approach will strike some critics as wrong, not because it comes far too late, but because his vision is irredeemably tainted by the poison of colonization.[190] The conclusion that federal Indian law cannot be reconstructed and thus is worthy only of critique is understandable. Nonetheless, my own judgment is that

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amended in scattered sections of 25 U.S.C.), is subject to taxation by the county in which the reservation resides. To assess the question required consideration of, among other things: (1) the original 1887 Act, which says nothing directly about state taxation of Indian land; (2) a 1906 proviso to it, *see* 25 U.S.C. § 349 (1988), which suggested that at least some kinds of land in Indian hands may be taxed by the state; (3) a 1934 statute that directly repudiated the allotment policy for the future, but failed to repeal the General Allotment Act formally, *see* Indian Reorganization Act of 1934, ch. 576, §1, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (1988)); (4) a 1948 federal criminal statute that defined "Indian country," *see* 18 U.S.C. § 1151 (1988); (5) decisions that concluded that the 1948 statute, although in form only governing federal criminal jurisdiction, created a presumptive barrier against state civil regulation in Indian country notwithstanding earlier statutory regimes, *see, e.g.*, DeCoteau v. District County Ct., 420 U.S. 425, 427 n.2 (1975); (6) a decision that seemed to hold that this territorial protection against state regulation prevailed over the General Allotment Act's provision that authorized state jurisdiction over fee lands that were once in the allotment format, *see* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477–79 (1976); (7) a rather recent decision that invoked a clear-statement rule that provided that congressional authorization of state taxation of tribes and their members in Indian country shall not be found unless Congress has "made its intention to do so unmistakably clear," Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985).

Eight members of the Court concluded in *Yakima* that Congress had unequivocally authorized the imposition of the county property tax. In my judgment this conclusion is not necessarily wrong, but vigorous application of the *Blackfeet Tribe* clear-statement rule noted above, which is formulated similarly to the federalism-protecting rules currently in vogue with the Court, *see supra* p. 415, could easily have led to a contrary conclusion. *See Yakima*, 112 S. Ct. at 695–96 (Blackmun, J., concurring in part and dissenting in part). In any event, would it not be surprising if the Court, in an Eleventh Amendment case with a maze of federal statutory and decisional confusion, found a congressional abrogation of the state's immunity? The lesson is that judicial outcomes are governed less by the phraseology of the canon than by the extent to which the canon relates to a context of heightened salience to a majority of the Court.

[189] *See* Strickland, *supra* note 16, at 718–35.

[190] For a short but strongly argued essay along these lines, see Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, ARIZ. J. INT'L & COMP. L., Fall 1991, at 51, 70–74. For more future-oriented commentary by other prominent scholars, see Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 109–58 (1993); and Nell Jessup Newton, *Let a Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 ARK. L. REV. 25, 73–75 (1993).

room remains for scholarly work that criticizes federal Indian law from the inside and that assumes that the legal interpretive community is not closed to arguments in this field.[191]

Even if I am correct, however, any attempt to revive Chief Justice Marshall's model is admittedly fraught with both contextual and doctrinal problems. Much has happened to tribes in the century and a half following *Worcester*, much of it not beneficial to them. Much, too, has happened to the corpus of federal Indian law. Even aside from recent developments in cases such as *Cotton Petroleum*, the large and unruly body of precedent creates additional barriers to the development of a coherent approach to federal Indian law, much less to a revival of a full-fledged clear-statement rule of the "super-strong" variety.[192]

What is most important, however, is not whether Chief Justice Marshall's precise statement of the canon begins to appear afresh in our law. Canons are mere formulations. Standing alone, a canon cannot be expected to control judicial outcome, particularly in a context removed from the one that gave birth to the canon. The most important result of a revival of Chief Justice Marshall's legacy would be that judges would be compelled to view Indian law afresh in today's context. The issues would be structural, involving conflicts among sovereigns, and not contests between sovereigns and disadvantaged groups who seek judicial solicitude with hat in hand. Tribes would not win every new case, and situations in which congressional actions have radically eroded the Indian social context would still prove particularly troublesome.[193] But the spirit of the structural, constitutive approach would force judges to do the hard work exemplified by John Marshall in *Worcester* — to challenge rather than to accept blindly assumptions rooted in colonialism, of which there are many today; to interpret documents of positive law flexibly in order to promote the ongoing sovereign-to-sovereign relationship of the tribe and the federal government; to keep the judiciary out of the business of imposing new forms of colonialism; and to refuse to relieve Congress of the responsibility to determine expressly whether future exercises of colonialism should occur.

In this way, *Worcester* stands as the preeminent, paradigmatic case for what "doing federal Indian law" should be all about. In federal Indian law, as elsewhere, paradigmatic cases teach us more than the formulation of any rule.[194] To be sure, to implement Chief

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[191] *See* Frickey, *supra* note 59, at 1231–40 (discussing relatively recent cases in which the Supreme Court reached pragmatic decisions that promote tribal interests).

[192] For example, the Court has refused to apply a super-strong clear-statement rule in the context of congressional abrogation of Indian treaties. *See supra* note 156.

[193] *See supra* note 161.

[194] *See* Frickey, *supra* note 59, at 1218–19.

Justice Marshall's model would require a fair measure of nuance and subtlety, and all the practical implications of doing so cannot be identified with complete specificity. Nonetheless, it should be valuable to explore some paradigmatic cases that shed light on the practical implications of the approach. I have selected two cases: one, a Burger Court case in which the Court performed remarkably consistently with the model, and the other the Rehnquist Court decision that seems most starkly in conflict with it.[195]

1. Embracing the Model: Bryan v. Itasca County. — In 1953, Congress adopted Public Law 280,[196] one of the most assimilationist laws in the history of federal Indian policy. The current version of this law delegates to six specified states criminal law enforcement responsibility for Indian country within their borders.[197] The statute also grants the states wide-ranging civil jurisdiction.[198] Subsection (a) of the civil provision states:

> Each of the States . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .[199]

The clause that involves "civil laws . . . of general application" appears to encompass state tax laws. Any doubt would seem to be alleviated by subsection (b) of this provision, which provides certain exceptions to the grant of civil jurisdiction, including one for the "taxation of any real or personal property . . . belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States."[200] This language in subsection (b) would be

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[195] One could perform a similar exercise for any number of recent decisions, such as those collected above in note 2. Because most recent cases have involved highly complicated statutory schemes, however, I hope that the reader will forgive me for forgoing them.

[196] Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. §§ 1161–1162 (1988); 25 U.S.C. §§ 1321–1322 (1988); 28 U.S.C. § 1360 (1988)).

[197] *See* 18 U.S.C. § 1162(a).

[198] *See* 28 U.S.C. § 1360. Other states may opt into this criminal and civil jurisdictional scheme. *See* 25 U.S.C. §§ 1321–1322 (reflecting a 1968 amendment that conditions state assumption of jurisdiction upon tribal approval).

[199] 28 U.S.C. § 1360(a).

[200] *Id.* § 1360(b). In fuller context, subsection (b) states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon

superfluous if subsection (a) did not reach state tax statutes in the first place. Moreover, by carving out certain clear exceptions to the general power to tax, the statute implies that no other exceptions exist.

Nonetheless, in *Bryan v. Itasca County*,[201] the Court held that the statute did not confer upon the states any power to tax Indians in Indian country. The opinion for the Court was not an artful one. It asserted that the conclusion that the statute delegates to states this power to tax "is foreclosed by the legislative history of Pub. L. 280 and the application of canons of construction."[202] But the legislative history of Public Law 280 is essentially silent on the question.[203] Similarly, the formulation of the canon that the Court quoted was hopelessly inapplicable to the context before it.[204] If its canonical underpinnings are uprooted in this way, *Bryan* seems wrongly decided. Freed from the burden of interpretive proof required by a canon, the state had a persuasive argument that the most plausible hypothesis about likely legislative intent and statutory public policy purposes resolved the statutory ambiguities in its favor.[205]

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the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

Id.

[201] 426 U.S. 373 (1976).

[202] *Id.* at 379.

[203] For an elaboration on the legislative history of Public Law 280, see Frickey, cited above in note 59, at 1167 n.176.

[204] The Court stated that, "in construing this 'admittedly ambiguous' statute, we must be guided by that 'eminently sound and vital canon,' that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" *Bryan*, 426 U.S. at 392 (citations omitted) (quoting federal Indian law cases). The problem with this formulation is that Public Law 280 is hardly a statute passed for the benefit of tribes; the very point of the law is to impose supervening state jurisdiction over Indians in Indian country, contrary to *Worcester*. Perhaps Public Law 280 was designed to benefit tribal members, at the expense of tribal sovereignty, by bringing more "law and order" to the reservation, but such a reading strips the canon of its constitutive quality.

[205] Public Law 280 was adopted by the Congress with perhaps the strongest assimilationist views about federal Indian policy in modern times. In addition to Public Law 280, this Congress passed a concurrent resolution that announced a federal policy of terminating the unique federal status of Indian tribes. *See* H.R. Con. Res. 108, 83rd Cong., 2d Sess. (1953). Thus, an "imaginative reconstruction" of likely legislative intent — a standard interpretive technique employed in the absence of direct evidence of legislative intent, see, for example, Eskridge & Frickey, cited above in note 112, at 329–30, 357–58 — would suggest that, had Congress thought about the issue, it would have desired the states to tax Indians in Indian country. Moreover, a "purpose" approach to statutory interpretation, *see supra* pp. 406–07, would also allow the state to tax. The purpose of Public Law 280 was, at a minimum, to curb lawlessness on Indian reservations by bringing them within state law enforcement and by providing state judicial jurisdiction over civil matters arising in Indian country. *See Bryan*, 426 U.S. at 379–86. The statute provided no federal funding for these new state responsibilities, however. To provide the states with a means to recoup some of their expenses would, therefore, be entirely consistent with the statute's animating purposes; indeed, it might help ensure that the states would take their jurisdictional responsibilities seriously.

What drove the Court's result in *Bryan* seems to have been an appreciation of the structural values at stake. Any federal delegation to states of power to intervene in Indian country would, of course, under *Worcester* constitute an abrogation of any Indian treaty that is silent with respect to state jurisdiction over Indian tribes.[206] The Court in *Bryan* feared that tribal government would be undermined, even destroyed, and tribes would become "little more than 'private, voluntary organizations,' . . . if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments."[207] In a footnote, the Court elaborated on the destructive effects of conferring on states general civil regulatory power over reservation Indians.[208] The Court noted that current federal Indian policy favored tribal self-government and quoted a lower court decision that "courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'"[209] Finally, the Court stressed that the same Congress that had adopted Public Law 280 had enacted several statutes that terminated the federal status of certain tribes.[210] Congress therefore had shown itself capable of clearly subjecting reservation Indians to the full scope of state law, but it had apparently chosen a narrower compass in Public Law 280. "[W]e conclude," the Court wrote, "that construing Pub. L. 280 *in pari materia* with these [termination statutes] shows that if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so."[211]

The Court in *Bryan* had to give some meaning, of course, to the second clause of the civil jurisdiction provision, which contained the expansive language about the application of state civil laws of general application. The Court decided that the primary thrust of the provision was to create state court jurisdiction over civil causes of action that arise in Indian country. The clause that refers to state civil laws of general application was narrowly construed to provide that, in such

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[206] This conclusion follows from the reserved-rights doctrine. *See supra* p. 402. The analysis should not differ for tribes that are authorized to hold lands by a federal statute, executive order, or other "treaty substitute." *See supra* pp. 421–22.

[207] *Bryan*, 426 U.S. at 388 (citations omitted) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

[208] *See id.* at 388–89 n.14.

[209] *Id.* at 389 n.14 (quoting Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975)).

[210] *See id.* at 389.

[211] *Id.* at 390.

state court actions, the court shall use state law, rather than tribal law, rules of decision.[212]

Unartful drafting aside, *Bryan* represents as close an instinctive approximation of Chief Justice Marshall's methodology in *Worcester* as is found in any modern case. Both Courts saw the conflicts to be structural and rooted in sovereignty, rather than to involve the regulation of a disadvantaged minority group. Both Courts assumed a baseline of ongoing tribal sovereignty that should be judicially protected against all but clear congressional intrusion. Both resolved the disputes in a way that left the burden to seek change upon those who would promote colonization. Illustratively, in *Bryan* the choice was whether to leave the burden of legislative inertia — that is, the burden of seeking congressional action — on the states or on the tribes. The notions of a baseline of tribal sovereignty and an ongoing federal-tribal relationship, coupled with the states' superior access to Congress,[213] fully support the resolution of this issue in *Bryan*. Moreover, the interpretive strategy used in each case to domesticate expansive language that seems destructive of tribal sovereignty is essentially identical. Both cases limited the intrusion upon tribal prerogatives to the specific subject of the provision in question — state court jurisdiction in *Bryan*, trade in *Worcester*. *Bryan*, a unanimous opinion, demonstrates that the Court in the modern era remains able to apply Chief Justice Marshall's basic approach, at least for disputes in which there is no significant non-Indian interest at stake.[214]

2. Mangling the Model: Cotton Petroleum Corp. v. New Mexico. — In 1924, Congress expressly empowered states to tax mineral production on Indian lands.[215] Fourteen years later, in the Indian Mineral Leasing Act of 1938,[216] Congress adopted comprehensive legislation to govern mineral leasing in Indian country. The 1938 Act contained no provision authorizing state taxation. It did not expressly

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[212] *See id.* at 383–84. As the Court observed, this interpretation is consistent with the title of the provision and some of the sparse legislative history. *See id.* at 384–86 & n.11. It is also consistent with the subsequent legislative history of Public Law 280, represented by the 1968 amendments to the statute. *See id.* at 386–87. This construction does leave in doubt the meaning of subsection (b) of the civil jurisdiction provision, quoted above in note 200. As the Court explained, no matter how Public Law 280 is construed, a literal reading of subsection (b) makes little sense. *See id.* at 390–93. Moreover, whatever its negative implications might suggest, the subsection certainly does not "expressly authorize" state taxation of reservation Indians. *Id.* at 391.

[213] States are among the most successful lobbyists for congressional overrides of Supreme Court decisions. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 348 (1991).

[214] Compare the cases cited above in note 161, in which the Court refused to authorize tribal criminal or civil authority over non-members who live in Indian country.

[215] *See* Ch. 210, 43 Stat. 244 (1924) (codified at 25 U.S.C. § 398 (1988)).

[216] Ch. 198, 52 Stat. 347 (1938) (codified as amended at 25 U.S.C. §§ 396(a)–(f) (1988)).

repeal the provision of the 1924 Act that allowed state taxation, but it did contain a general repealer clause that proclaimed that all Acts "or parts of Acts inconsistent herewith are hereby repealed."[217] The Court has considered whether states may tax the extraction of minerals in Indian country pursuant to leases executed under the 1938 Act in two different contexts. Its first decision, near the end of the Burger Court, is plainly consistent with the Marshall legacy; its second, by the Rehnquist Court, turns the Marshall approach on its head.

The first case, *Montana v. Blackfeet Tribe of Indians*,[218] held that a state could not tax the royalty interest of a tribe.[219] The Court rejected the State's argument that the 1924 provision that authorized state taxation applied to the tribe's royalty interest because it was not inconsistent with anything in the 1938 Act, and therefore the provision survived the effect of the general repealer clause.[220] Concluding that "standard principles of statutory construction do not have their usual force in cases involving Indian law,"[221] the Court cited *Bryan v. Itasca County* for the proposition that "States may tax Indians only when Congress has manifested clearly its consent to such taxation."[222] Because "[n]othing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to that Act,"[223] the Court held that the royalty income was beyond the reach of the states' taxation powers. Any implications that flowed from the language of the general repealer clause were insufficient to "satisfy the requirement that Congress clearly consent to state taxation."[224] In this instance, appropriate use of the Indian law canon cut through the otherwise immense complexities of a convoluted statutory scheme and provided a simple way to resolve the dispute. The Court was able to structure the legislative burden of inertia in a way that was sensitive to tribal concerns and comparative congressional access. These "jurisprudential brush clearing" and "institutional referral" qualities are among the most attractive features of the canonical approach.[225]

I have already identified the second case, *Cotton Petroleum Corp. v. New Mexico*,[226] as perhaps the Rehnquist Court's prime offender

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[217] *Id.*
[218] 471 U.S. 759 (1985).
[219] *See id.* at 764–68.
[220] *See id.* at 766–68.
[221] *Id.* at 766.
[222] *Id.* (citing Bryan v. Itasca County, 426 U.S. 373, 393 (1976)).
[223] *Id.*
[224] *Id.* at 767.
[225] *See supra* p. 416.
[226] 490 U.S. 163 (1989).

of the Marshall legacy.[227] As discussed earlier,[228] this case expressed the general proposition, completely contrary to *Worcester*, that an Indian reservation is within the territorial jurisdiction of three sovereigns: the state, the tribe, and the federal government. At a minimum, a revival of the Marshall legacy requires rejection of that dictum. Once that is done, a complex, but factually doubtful, case remains.

In *Cotton Petroleum*, the question was whether the state could tax the production of oil and gas by a non-Indian company that held a mineral lease to reservation lands under the 1938 Act.[229] The 1938 Act is just as silent on this question as it is on the taxation of the tribe's royalty interest at issue in *Blackfeet Tribe*. In several earlier cases in which the governing federal statutes were unclear, the Court ultimately denied the state this kind of taxing authority over non-Indian contractors on the ground that the federal and tribal interests in freedom from state interference outweighed any state concerns.[230] In those cases, however, it was clear that the state tax, if imposed on the non-Indian contractor, would ultimately redound to the economic detriment of the tribe. In contrast, in *Cotton Petroleum* — an action brought by the non-Indian contractor for a tax refund in which the tribe was neither a party nor an active participant in structuring the case — the record failed to demonstrate that payment of the tax would harm the tribe, either by effectively imposing the practical incidence of the tax on the tribe or by interfering with the tribe's ability to impose a severance tax on the contractor.[231] The earlier cases also involved situations in which states provided no services in Indian country linked to the activity that they sought to tax. Again in contrast, in *Cotton Petroleum* the state had demonstrated that it provided services of value related to the oil and gas production at issue.[232]

Thus, *Cotton Petroleum* was a poor vehicle to resolve the general issue of the state power to tax non-Indian mineral contractors. The

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[227] *See supra* pp. 422–23.

[228] *See supra* note 172 and accompanying text.

[229] Unlike the Blackfeet Reservation in *Blackfeet Tribe*, which had been created by treaty, the Jicarilla Apache Reservation involved in *Cotton Petroleum* was created by executive order. Thus, the Indian Oil Act of 1927, ch. 299, 44 Stat. 1347 (codified at 25 U.S.C. § 398 (1988)), rather than the 1924 Act involved in *Blackfeet Tribe*, governed reservation mineral leases prior to the adoption of the 1938 Act. *See id.* § 398a. This distinction, however, made no difference in *Cotton Petroleum* because the 1927 Act, like the 1924 Act, contained an express provision that authorized state taxation. *See id.* § 398c.

[230] *See* Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 837–39, 846 (1982); Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 164–66 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149–51 (1980).

[231] *See Cotton Petroleum*, 490 U.S. at 184–87 (distinguishing prior cases). In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), the Court upheld the authority of the tribe to impose a severance tax upon a non-Indian mineral producer, even though the tribe held the royalty interest in the mineral production as well. *See id.* at 150–51.

[232] *See Cotton Petroleum*, 490 U.S. at 185–86.

record is devoid of evidence of the tribe's interests, and the arguments against the imposition of the state tax were crafted to serve the interests of the contractor, not the tribe.[233] To accept the record in this case at face value, one must assume that the imposition of the tax had no effect upon the tribe's revenue, which simply seems implausible. Even if the tax was not passed back to the tribe, surely the presence of the state tax placed an otherwise artificial ceiling on the level of the tribe's taxation of the contractor. Yet the state courts concluded to the contrary.[234] This case demonstrates the peril that arises when the Indians are taken out of Indian law.[235]

It seems odd to attempt to apply the Marshall legacy in this setting, in which tribal interests have been artificially depreciated.[236] In brief, an attempt to do so would start with a presumption against the state power to tax, because state taxation represents both an invasion of tribal sovereignty and an intrusion on the exclusive federal-tribal relationship. Under Chief Justice Marshall's approach that presumption should be overcome only on a showing of clear evidence that the federal statute in question delegates taxing authority to the states.

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[233] The lower courts explicitly addressed the tension between the positions of the contractor and of the tribe. The Court of Appeals of New Mexico noted that "[t]his appeal is unique in that the primary parties differ sharply as to the proper legal approach to apply." Cotton Petroleum v. State, 745 P.2d 1170, 1172 (N.M. Ct. App. 1987). Cotton Petroleum argued that the multiple (tribal and state) taxation impermissibly burdened interstate commerce. *See id.* Contrary to the position taken by the tribe in an amicus brief, which urged the state court to invalidate the tax on federal Indian law preemption grounds, Cotton Petroleum "contend[ed] that this case is not a preemption case because the economic impact on the Tribe is minimal and is not a primary consideration." *Id.* In light of this conflict, the tribe urged the Supreme Court to decline to take jurisdiction over the appeal because the case was not an appropriate vehicle to consider the Indian law preemption question. *See* Brief of the Jicarilla Apache Tribe as Amicus Curiae in Opposition to the Appellants at 3, *Cotton Petroleum* (No. 87-1327).

[234] *See Cotton Petroleum v. State*, 745 P.2d at 1175. *Cotton Petroleum*, then, may be much ado about dictum. When the dictum inconsistent with *Worcester* is swept away, the case turns out to be based on such an implausible setting that it is unlikely to control many future controversies. In a recent opinion, the Ninth Circuit recognized as much. *See* Gila River Indian Community v. Waddell, 967 F.2d 1404, 1410–12 (9th Cir. 1992) (accepting the tribe's argument and distinguishing *Cotton Petroleum* on several grounds). In *Waddell*, the court essentially ignored the wide-ranging dictum in *Cotton Petroleum* and applied the presumption against state taxation of non-Indian contractors found in the cases that preceded *Cotton Petroleum*. *See id.* at 1407–09. It relied upon the facts in the case — which, unsurprisingly, demonstrated that the imposition of the tax would redound to the economic detriment of the tribe and that the state provided no services specifically tied to the activity sought to be taxed — to distinguish *Cotton Petroleum* and to hold that the state could not tax the contractor. *See id.* at 1410–12. The facts developed in *Waddell* are much more likely to be replicated in later cases than the artificial "facts" of *Cotton Petroleum*.

[235] All too often, as Vine Deloria once said, "what is missing in federal Indian law are the Indians." Deloria, *supra* note 162, at 205.

[236] Of course, standing alone, Chief Justice Marshall's opinion in *Johnson v. McIntosh* is subject to the same qualification.

Recent decisions, however, indicate that, even when Congress does not grant states the power to regulate, states may assert their authority in Indian country if the tribal interest in immunity is deemed to be weak and countervailing non-Indian interests are viewed as strong.[237] These cases do not so much abandon Chief Justice Marshall's methodology as they add an additional step to it — a weighted balancing test — in certain circumstances. Under this approach, weighed against the presumption of reservation immunity would be the state's two basic concerns in *Cotton Petroleum*: a general interest in raising revenue from the activities of a non-Indian entity to which the state provides services off the reservation and a specific interest in receiving a quid pro quo for the services it provides on the reservation. Consistent with Chief Justice Marshall's preference for an exclusive federal-tribal relationship, earlier cases conclusively demonstrate that the first of these interests is insufficient to outweigh the federal and tribal interests in freedom from state interference.[238] The second interest is more substantial in theory, but weaker in fact. The record demonstrated that the state provided around $89,000 in benefits to Cotton Petroleum's operations on the reservation from 1981 through 1985; the state collected $2.3 million in taxes during that period.[239] Nor would the state be powerless without the ability to tax; obviously, it could refuse to contribute future services unless an arrangement on revenue sharing is reached.[240] Again, in ambiguous circumstances, leaving the burden for seeking a change in the status quo on the state, rather than the tribe, seems preferable.

Moreover, it may be unnecessary to attack *Cotton Petroleum* at this level of complexity in order to demonstrate its inconsistency with

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[237] *Compare* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980) (holding that vendors in Indian country must collect state tax on cigarettes sold to non-members, because to hold otherwise would encourage Indian tribes "to market an exemption from state taxation") *with* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219–20 (1987) (holding that state laws that regulate bingo do not apply in Indian country, because operations do not offer to non-members an exemption from some state law concerning a product imported to the reservation, but rather represent an investment of value in modern facilities for extended recreational activities by non-members) *and* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341 (1983) (finding a tribal hunting and fishing resort immune from state regulation of non-member patrons and emphasizing that the resort produced permanent benefits for the tribe "far removed" from such situations as "on-reservation sales").

[238] *See* Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 845 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150 (1980).

[239] *See Cotton Petroleum*, 490 U.S. at 185. Relevant federal expenditures were $1.2 million and tribal oil- and gas-related expenditures were $736,000 for this same period. *See id.* at 207 n.11 (Blackmun, J., dissenting).

[240] "The national trend during the last decade in state-Indian disputes has been toward negotiations between state and tribal governments. The parties, better than any judge, can establish detailed, workable regulatory systems to resolve problems through cooperation and coordination." Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 404.

the Marshall legacy, even as that legacy has evolved in recent cases. Recall that *Worcester* conclusively ousted state law from Indian country.[241] Rearrangement of this jurisdictional barrier is within Congress's plenary power, but the canonical approach requires Congress to speak clearly if it wishes to do so. Absent clear congressional direction, even a modern-day dilution of *Worcester* still suggests that states should have no role in Indian country unless significant non-Indian interests are involved and no legitimate tribal interest is present to counterbalance them.[242] Again, the virtue of Chief Justice Marshall's approach is that it makes the argument for reservation immunity from state regulation straightforward and presumptively correct, and it forces the state to bear the burden of presenting the complex side of the case in a highly persuasive fashion.

Such clear congressional consent to redesign the jurisdictional barriers in Indian country is simply absent in *Cotton Petroleum*. As *Blackfeet Tribe* indicated, the relationship between the 1938 Act, which contains no congressional consent to state taxation, and the prior law that did is hardly a model of clarity. Even if the canon in *Cotton Petroleum* should not be as stringent as the one invoked in *Blackfeet Tribe*, because the former case involved non-Indians and a clearer state interest in taxation, there seems to be no reason to find that the presumption against state taxation was overcome. Moreover, counterbalancing the state's interests in the case is a significant tribal sovereignty interest; surely in reality, if not in the record in that case, the tribe's practical ability to tax the non-Indian contractor is inversely related to the state's power to tax that entity.

3. Retrieving the Model. — In the last analysis, despite its dictum, *Cotton Petroleum* seems an inappropriate, and perhaps even unlikely, vehicle to rework federal Indian law fundamentally. Some other recent Rehnquist Court cases in which the Marshall legacy has been depreciated might also ultimately prove to be of little precedential value because of their unusual facts.[243] The major blows struck to

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[241] *See supra* note 52 and accompanying text.

[242] For an excellent analysis that reaches a similar conclusion based on a survey of Burger Court opinions, see Clinton, cited above in note 158, *passim*.

[243] Blatchford v. Native Village of Noatak, 111 S. Ct. 2578 (1991), discussed above at p. 426, involved the Eleventh Amendment immunity of the states, one of the murkiest topics in constitutional law. As explained above in note 188, County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992), involved a setting so complicated that to generalize from it will be difficult.

South Dakota v. Bourland, 113 S. Ct. 2309 (1993), is potentially more significant. In that case, the Court concluded that a congressional act that eliminated a tribe's preexisting authority to exclude non-members from reservation lands also implicitly abrogated the tribe's authority to regulate non-member usage of those lands. *See id.* at 2316–18. Ordinarily, there would be nothing exceptional about such a holding, which merely reflected the principle that the loss of a greater power implies the loss of a lesser included power. In my judgment, however, the

the Marshall legacy by the Rehnquist Court up to this point, then, are in dicta. Thus, there remains room to return to Chief Justice Marshall's venerable approach. Indeed, to retrieve his methodology would have the significant practical virtue of providing the Court with a structural lodestar to guide it through otherwise impenetrable legal and contextual complexities and to provide the foundation for a consistent pattern of precedents.

The case for reviving Chief Justice Marshall's legacy thus has significant power as a theoretical matter and is hardly foreclosed by the Court's current doctrinal situation. Candor requires, however, an acknowledgment that the prospects of a revival of Chief Justice Marshall's legacy are questionable. One simple factor, unrelated to the nature of the entity to be taxed or the oddities of any trial record, may explain the differing outcomes in *Blackfeet Tribe* and *Cotton Petroleum*. In the four years between those cases, the Court changed composition significantly. Justice Powell, who wrote the majority opinion in *Blackfeet Tribe*, and Chief Justice Burger, who joined it, left the Court. The two new Justices, Justices Scalia and Kennedy, were in the majority in *Cotton Petroleum*. Indeed, only one member of the *Blackfeet Tribe* majority joined *Cotton Petroleum*: Justice O'Connor. The three other Justices in the *Blackfeet Tribe* majority (Justices Brennan, Marshall, and Blackmun) dissented in *Cotton Petroleum*. The three Justices in dissent in *Blackfeet Tribe* (Justices White, Rehnquist, and Stevens) were in the majority in *Cotton Petro-*

Marshall legacy counsels against such a result. Following Chief Justice Marshall's approach, tribes should retain all authority that Congress has not explicitly abrogated.

Notwithstanding its tension with the Marshall legacy, *Bourland* may have little effect upon later cases. Most fundamentally, as with any federal Indian law case, *Bourland* can to some extent be confined to the unique facts and statutory and regulatory texts upon which it was based. The opinion itself suggested further limitations. First, *Bourland* purported to follow the canonical approach faithfully. *See id.* at 2316 (stating that "we usually insist that Congress clearly express its intent" to abrogate tribal interests and quoting *County of Yakima*, 113 S. Ct. at 693, for the proposition that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"). Thus, at most, *Bourland* represents a misapplication, rather than a repudiation, of the legacy. Accordingly, it is far less radical than *Cotton Petroleum*, which seemed to abandon presumptions that favor the retention of tribal authority over, and the exclusion of state power from, Indian country. Moreover, *Bourland* contained some caveats about the reach of its holding. *See id.* at 2316 & n.9 (failing to reach the issue whether the tribe would have lost its regulatory authority had the area in question been a "closed" or "pristine" one); *id.* at 2320 (leaving open the question whether tribal authority could be premised on the consent of non-members or on the importance of that authority to tribal interests). In addition, during the same Term in which it decided *Bourland*, the Court also decided the *Sac & Fox* case, in which it jealously guarded tribal immunity from state regulation. *See* Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985, 1990–91 (1993). Read together, *Sac & Fox* and *Bourland* reveal not a Court marching lock-step toward a repudiation of the Marshall legacy, but at most a Court groping haltingly with individual cases in a highly complex area of law.

leum.[244] For at least one day and one case, Justice Stevens, who has consistently maintained that state law should routinely apply in Indian country absent some clear congressional indication to the contrary,[245] had the allies to craft a majority opinion to that effect.

As I have stated, most of the doctrinal shift in *Cotton Petroleum* is in dicta, and the odd record in that case should make it distinguishable from future controversies. Whether the judicial will exists to limit *Cotton Petroleum* to its facts is another matter. One of the most vital questions in contemporary federal Indian law is whether the methodology suggested in *Cotton Petroleum* will prove to be ephemeral. As the treatment of prior cases in *Cotton Petroleum* itself demonstrates, the precedential effect of federal Indian law decisions is often weak. Moreover, *Cotton Petroleum* did not purport to overrule *Blackfeet Tribe* or any of the cases in which the Court had held that non-Indian contractors are immune from state taxation where legitimate tribal prerogatives are implicated. In a future case, then, a majority should feel free to return to the soundest, and obviously the most longstanding, approach taken to federal Indian law: that of Chief Justice Marshall. And that majority should feel equally free to say, if "the dissent accuses [them] of repeating what it announces as Chief Justice Marshall's misunderstanding," three words in reply: "We are honored."[246]

V. CONCLUSION

To emulate Chief Justice Marshall in *Worcester* requires many things, including judicial courage. Chief Justice Marshall's *Worcester* decision outraged not only the State of Georgia, but President Andrew Jackson as well. It produced what was, up to that point, the most

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[244] The same explanation applies to the relationship between *Cotton Petroleum* and *Ramah Navajo*, the last case before *Cotton Petroleum* to immunize non-Indian contractors from state taxation. The majority in *Ramah Navajo* consisted of the *Cotton Petroleum* dissenters (Justices Brennan, Marshall and Blackmun), two Justices gone from the Court by the time of *Cotton Petroleum* (Chief Justice Burger and Justice Powell), and Justice O'Connor. An attempt to justify Justice O'Connor's voting pattern in *Cotton Petroleum*, *Blackfeet Tribe*, and *Ramah Navajo* would, in my judgment, depend at least in part on accepting the oddities of the record in *Cotton Petroleum* to distinguish it from prior cases, without undermining the precedential value of those decisions.

[245] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 227 (1987) (Stevens, J., dissenting); Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 854–55 (1982) (Rehnquist, J., joined by Stevens, J., dissenting); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 159 (1980) (Stevens, J., dissenting).

[246] American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2471 n.7 (1992) (responding to the dissent of Justice Scalia, which asserted that the majority was relying upon Chief Justice Marshall's misunderstanding in a later opinion of one of his own earlier opinions).

serious conflict between the Supreme Court and another federal branch in American constitutional history.[247]

It is too much, I suppose, to ask the current Justices to risk the institutional survival of the Supreme Court on the outcomes of federal Indian law cases. But it is not too much to ask them to recognize that federal Indian law is about institutional survival as well — the perpetuation of the oldest continuous sovereigns on this continent.[248] The Court's current structural clear-statement rules concerning federalism and the separation of powers serve much the same function as would a properly conceptualized and revitalized Indian law canon. Indeed, the Indian law canon has a much longer and much more venerable heritage than the Court's current canons of preference.[249] Recognizing this fact might help the Justices and their professional audience to see that federal Indian law disputes are not "crud"[250] or "peewee" cases,[251] but structural, quasi-constitutional cases of the first rank, opportunities for revisiting — after all these centuries — the ongoing, and probably never-ending, dilemmas of constitutionalism in a colonial society.

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[247] *See supra* note 108.

[248] Perhaps a central reason that some Americans, likely including some jurists, are insensitive to tribal claims is that they cannot conceive of any public policy justification for allowing the sovereignty of tribes to continue. From this vantage point, the fact that this continent was occupied at the point of Columbian contact is merely an accident of history, and nothing in our current value system suggests that the descendants of these non-Western peoples should have any claim to group rights or sovereignty. It has, after all, been five hundred years.

Moreover, our current culture prizes equality highly. The unique powers of tribes, as well as the bundle of legal immunities, privileges, and burdens associated with being Native American, cut against the grain of a vision of uniform American citizenship. For a fine explanation of how "[t]he great achievement and noble aspiration of equality is, at the same time and without abandoning its goodness and nobility, destructive of tribes," see Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2306 (1989).

A complete rejoinder to such perceptions would require another article. Ball, above, skillfully takes up the defense of tribal separateness. In addition, Frank Pommersheim has written an outstanding essay that explains how sovereignty over its land is vital to the survival of the tribe. *See* Frank Pommersheim, *The Reservation as Place*, 34 S.D. L. REV. 246, 250–51 (1989). For present purposes, note that for the Supreme Court the issue is not whether tribes survive, for under the Court's decisions that issue rests within Congress's plenary power, but how clearly Congress must speak before the status quo in Indian affairs will be deemed to have been changed for the worse for tribes. Chief Justice Marshall sought to force Congress to do the work of further colonization; there is no reason to disrupt this institutional balance between Court and Congress today in any way that disadvantages tribes.

[249] *See, e.g.*, Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2589–90 (1991) (Blackmun, J., dissenting) (noting that the Indian law canon dates back to the mid-nineteenth century and is so "rooted in the unique trust relationship between the tribes and the Federal Government that it is inherent in the constitutional plan").

[250] PERRY, *supra* note 8, at 262 (quoting an unidentified Supreme Court Justice).

[251] WOODWARD & ARMSTRONG, *supra* note 9, at 58 (purporting to quote Justice Harlan).