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The Law-of-Nations Origins of the Marshall Trilogy

ABSTRACT. Federal Indian law is sometimes seen as a purely domestic part of American law, but its origins are in the law of nations. The Marshall Trilogy – *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, three Supreme Court decisions authored by Chief Justice Marshall that are foundational for American federal Indian law – relied on law-of-nations sources. In particular, *The Law of Nations*, an eighteenth-century treatise by Emer de Vattel, provided a central influence on Marshall's opinion in *Worcester*. In early national American legal thought, Vattel was a leading authority on the law governing the rights and obligations subsisting among nations. Recognizing the important role that the law of nations played in the foundations of federal Indian law underscores the deep roots of tribal sovereignty in American law and clarifies current doctrinal disputes.

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INTRODUCTION

Three cases, *Johnson v. M'Intosh*,¹ decided in 1823; *Cherokee Nation v. Georgia*,² decided in 1831; and *Worcester v. Georgia*,³ decided in 1832, all authored by Chief Justice Marshall and collectively known as the Marshall Trilogy, form the basis of American federal Indian law.⁴ Over two hundred years after *Johnson*, federal Indian law continues to be the subject of significant contestation at the Supreme Court. In 2020, writing for the majority in *McGirt v. Oklahoma*, Justice Gorsuch reiterated the continuing vitality of *Worcester*: “Indian Tribes [are] ‘distinct political communities, having territorial boundaries, within which their authority is exclusive . . . which is not only acknowledged, but guaranteed [sic] by the United States,’ a power dependent on and subject to no state authority.”⁵ The tribal sovereignty envisioned by *Worcester* is more expansive than current doctrine provides,⁶ but *Worcester*’s “broad principles” continue “to be accepted as law.”⁷ In 2022, however, writing for the majority in *Oklahoma v. Castro-Huerta*, Justice Kavanaugh wrote that “the ‘general notion drawn from Chief Justice Marshall’s opinion in *Worcester v. Georgia*’ ‘has yielded to closer analysis’” and that “a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law.”⁸ More recently, Justice Barrett’s majority opinion in *Haaland v. Brackeen* acknowledged the muddy state of current case law: “We have often sustained Indian legislation without specifying the source of Congress’s power, and we have insisted that

1. 21 U.S. (8 Wheat.) 543 (1823).

2. 30 U.S. (5 Pet.) 1 (1831).

3. 31 U.S. (6 Pet.) 515 (1832).

4. See *infra* Section I.A.

5. 140 S. Ct. 2452, 2477 (2020) (quoting *Worcester*, 31 U.S. (6 Pet.) at 557).

6. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) (“Long ago the Court departed from Mr. Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries, *Worcester v. Georgia*, 6 Pet. 515, 561 (1832).” (footnote omitted)); Dylan R. Hedden-Nicely, *The Reports of My Death Are Greatly Exaggerated: The Continued Vitality of Worcester v. Georgia*, 52 SW. L. REV. 255, 258 (2023) (“[T]he Court has abandoned *Worcester*’s categorical prohibition on state jurisdiction in Indian country . . .”).

7. Hedden-Nicely, *supra* note 6, at 258 (“[U]ntil the Court ‘openly avow[s]’ its intent to overrule *Worcester*, we must remain faithful to its narrow authorization of state power in Indian country, as well as its broad recognition of tribal sovereignty and federal primacy over the relationship with tribal nations.” (quoting *Worcester*, 31 U.S. (6 Pet.) at 554)); see also *Williams v. Lee*, 358 U.S. 217, 219 (1959) (“Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained.”).

8. 597 U.S. 629, 652 (2022) (quoting *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962)).

Congress's power has limits without saying what they are.”⁹ Barrett, after raising this uncertainty, declined to resolve it. At a time of significant tumult in federal Indian law doctrine, a return to the origins of federal Indian law can provide a firmer foundation for understanding the current legal status of Native Nations.

Federal Indian law is sometimes seen as a purely domestic part of American law, but the foundations of federal Indian law are built on the law of nations. In the early national period, the field now known as international law was referred to as the law of nations.¹⁰ While domestic-law sources, such as the Constitution, statutes, and case law, are relatively scarce in the Marshall Trilogy, law-of-nations sources, such as the custom of nations, treaties, and law-of-nations treatises,¹¹ are abundant. In particular, *The Law of Nations*, a treatise by Emer de Vattel, proved a central influence on *Worcester*. Recognizing the important role of the law of nations in the Marshall Trilogy helps us better to understand tribal sovereignty and to recognize its persisting vitality in American law.

9. 599 U.S. 255, 279 (2023).

10. Emer de Vattel provides a definition of the law of nations (*le droit des gens*). 1 E. DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY 67 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1797) [hereinafter VATTEL, THE LAW OF NATIONS] (“The Law of Nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights.”); 1 E. DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS 2 (London 1758) (1757) (“*Le Droit des Gens est la science du droit qui a lieu entre les nations, ou Etats, & des obligations qui répondent à ce droit.*”). All subsequent references to Vattel will be to the 1797 edition. In this Comment, I will use “law of nations” when discussing the Marshall Trilogy and “international law” when discussing current doctrine, reflecting contemporary usages. Jeremy Bentham coined “international law” in the late eighteenth century. Hidemi Suganami, *A Note on the Origin of the Word “International,”* 4 BRIT. J. INT’L STUD. 226, 226 (1978); MARK WESTON JANIS, AMERICA AND THE LAW OF NATIONS 1776-1939, at 10-15 (2010). The transition from “law of nations” to “international law” was gradual. See MORTON A. KAPLAN & NICHOLAS DEB. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 62 (1961) (“In the century from 1815 to 1914 the law of nations became international law.”); JENNIFER PITTS, BOUNDARIES OF THE INTERNATIONAL: LAW AND EMPIRE 25 (2018) (“Vattel’s *Droit des gens* was arguably the most globally significant work of European political thought through the 1830s, and in the changing reception of Vattel we can track the ragged transition from the intellectual world of the eighteenth-century law of nations to that of the professional international lawyers of the later nineteenth century.”).

11. See 1 VATTEL, THE LAW OF NATIONS, *supra* note 10, at 17 (contrasting custom and treaties as sources of authority with the “judicious and rational application of the principles of the law of nature to the affairs and conduct of nations and sovereigns”).

Many scholars have emphasized the importance of sovereignty in federal Indian law,¹² and Justice Gorsuch has given eloquent expression to these arguments in recent cases.¹³ The role of Vattel as an influence on the Marshall Trilogy, however, has inspired comparatively little analysis.¹⁴ While previous scholars have listed Vattel (alongside Francisco de Vitoria and Hugo Grotius)¹⁵ as an influence on the Marshall Trilogy and noted the importance of international law for federal Indian law,¹⁶ the depth of Vattel's influence has escaped scholarly attention. There has also been a lack of scholarly attention to Marshall's innovative use of Vattel's *The Law of Nations*—which explicitly approved of British-American colonialism¹⁷—in the service of tribal sovereignty.¹⁸

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12. See, e.g., Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1796 (2019); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1059 (2015); Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549, 557 (2022).
 13. See *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 667–68 (2022) (Gorsuch, J., dissenting) (“Tribes are not private organizations within state boundaries. Their reservations are not glorified private campgrounds. Tribes are sovereigns.”); *Haaland v. Brackeen*, 599 U.S. 255, 332 (2023) (Gorsuch, J., concurring).
 14. *But see* FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 265–66 (2009) (briefly discussing Vattel's influence on the Marshall Trilogy); S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 16–19 (1996) (same); Gregory Ablavsky, “*With the Indian Tribes*”: *Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1043–44 (2018) (discussing Vattel's influence on Justice Thompson's dissent in *Cherokee Nation*); Ian Hunter, *Vattel in Revolutionary America: From the Rules of War to the Rule of Law*, in *BETWEEN INDIGENOUS AND SETTLER GOVERNANCE* 12, 20–22 (Lisa Ford & Tim Rowse eds., 2013) (arguing that the “Vattelian” view “that the justice of the legal order is itself not founded in justice” influenced Chief Justice Marshall's opinion in *Johnson*); Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 82–83 (2012) (arguing that “Marshall expressly adopted the international law definition of ‘protection,’ especially the writings of Emer De Vattel,” in *Worcester*); Matthew L.M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 ME. L. REV. 305, 325–36 (2023) (noting “Justice Gorsuch[’s] invo[cations of] Emer de Vattel’s treatise” in his dissent in *Castro-Huerta*).
 15. See, e.g., Blythe W. Marston, Note, *Alaska Native Sovereignty: The Limits of the Tribe-Indian Country Test*, 17 CORNELL INT’L L.J. 375, 376 n.7 (1984); Dario F. Robertson, Comment, *A New Constitutional Approach to the Doctrine of Tribal Sovereignty*, 6 AM. INDIAN L. REV. 371, 378 n.30 (1978).
 16. See, e.g., Davis, Biber & Kempf, *supra* note 12, at 576; Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 74 (1996); Ablavsky, *supra* note 12, at 1059–84; Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1751 (2003).
 17. See 1 VATTEL, *THE LAW OF NATIONS*, *supra* note 10, at 216–17.
 18. While many held that Vattel's work should only apply in Europe, others, such as Edmund Burke, argued that it should constrain European colonialism. See PITTS, *supra* note 10, at 90–91 (“Vattel's extraordinarily influential book proved a powerful resource for both those arguing for an international community restricted to Europe and those who sought to appeal to a universal law of nations to chastise and rein in European agents they believed were abusing

While scholars have previously recognized that the law of nations has influenced federal Indian law, they have generally overlooked Vattel. Felix S. Cohen, often called the “father of federal Indian law,”¹⁹ traced the origins of American federal Indian law to Spain, pointing to Vitoria.²⁰ Subsequent scholars, generally citing Cohen, credit Grotius and Vitoria as influences on the Marshall Trilogy in the same breath as Vattel.²¹ Unlike Vitoria and Grotius, Chief Justice Marshall actually cited Vattel in the Trilogy. While my argument is based largely on citations, Cohen’s argument is based on broad and abstract influences. Cohen contends that the “first principle of our own Indian law, the equality of races,” can be traced to Vitoria.²² Whether or not one accepts Cohen’s argument that “one may find in the writings of Vitoria the first clear formulation of the principle of tribal self-government,”²³ the more direct influence of Vattel matters. When Marshall cited Vattel,²⁴ he cited him as an authority on the law of nations in Europe. Applying the law of nations to federal Indian law suggests not only that Native Nations have a right to self-government but that the same law of nations that governs relations among European states also protects tribal sovereignty. According to Vattel, limited national sovereignty persists even in the absence of full sovereignty.²⁵ Likewise, even though Native Nations lack full sovereignty, tribal sovereignty persists.

The law-of-nations reasoning of the Marshall Trilogy demonstrates the centrality of tribal sovereignty to federal Indian law. The “law of domestic

their growing military advantage in the course of their commercial and imperial expansion in both hemispheres.”); Iain Hampsher-Monk, *Edmund Burke’s Changing Justification for Intervention*, 48 HIST. J. 65, 73 n.47 (2005) (“Burke . . . use[d] Vattel in defending the autonomy of the Raja of Benares . . .”).

19. Blackhawk, *supra* note 12, at 1801.
20. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 17 (1942).
21. See, e.g., Marston, *supra* note 15, at 376 n.7 (citing Cohen, *supra* note 20, at 11-12) (arguing for the influence of Vitoria, Vattel, and Grotius on *Johnson and Worcester*); Robertson, *supra* note 15, at 378 n.30 (quoting Cohen, *supra* note 20, at 17) (“While Vitoria himself is not directly cited in any of the early opinions of the United States Supreme Court on Indian cases, these opinions frequently refer to statements by Grotius and Vattel that are either copied or adapted from the words of Vitoria.”); see also John Howard Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669, 681 & n.84 (1978) (citing Cohen, *supra* note 20) (“Spanish colonial law . . . formed the basis of current United States domestic law on Indian affairs, and was itself heavily influenced by the European scholars Vattel, Vitoria and Grotius . . .”).
22. Cohen, *supra* note 20, at 11.
23. *Id.* at 13.
24. See *infra* Section II.B.
25. See *infra* Section II.B.

nations,”²⁶ fashioned by Chief Justice Marshall to manage American colonialism, did not categorize Native Nations as distinct nations out of caprice or carelessness. Rather, Marshall carefully applied law-of-nations principles from Vattel²⁷ to the American colonial context, categorizing Native Nations as domestic nations and acknowledging the power of the federal government over them, but still affirming their sovereignty.²⁸ The sovereignty of Native Nations animated the Marshall Trilogy and remains foundational to federal Indian law.

The law-of-nations origins of federal Indian law have important ramifications for contemporary doctrine, providing further evidence for currently contested claims. First, “Indian” is a political category that is not subject to constitutional limits on racial classifications.²⁹ Second, Congress’s “plenary” power should be understood to be “exclusive,” because it excludes the states, but it should not be understood to be “absolute,” because the Constitution limits Congress’s power.³⁰ Third, the Indian Commerce Clause, like the Foreign Commerce Clause, confers more expansive federal authority than the Interstate Commerce Clause, but none of the three Commerce Clauses grant Congress the authority to extinguish sovereignty.³¹

The arguments in this Comment also have important originalist implications. While there are plentiful nonoriginalist reasons to support tribal sovereignty, the evidence demonstrates that the Founders understood federal Indian law to be rooted in law-of-nations conceptions of sovereignty. Scholars and jurists have provided originalist arguments for the persistence of tribal

26. Justice Gorsuch persuasively argues that “extensive tradition supports treating certain sovereigns – Tribes among them – as *sui generis* entities falling outside the foreign/domestic dichotomy.” *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 414 (2023) (Gorsuch, J., dissenting). This unique status is reflected in the term “domestic dependent nations”: “domestic” distinguishes Native Nations from foreign nations, but Native Nations are not domestic for all purposes, as Chief Justice Marshall “deliberately chose the term *nations*, stressing also that “[i]n the general, nations not owing a common allegiance are foreign to each other.” *Id.* at 1707 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831)). I use the term “domestic nations” in this Comment because Marshall’s emphasis on dependence was misplaced, and the term “domestic nations” by itself sufficiently captures the unique status of Native Nations in American law without any reference to dependence.

27. See *infra* Section II.B.

28. See, e.g., *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18.

29. See *infra* Section III.A.1.

30. See *infra* Section III.A.2.

31. See *infra* Section III.A.3.

sovereignty,³² the political nature of Indian status,³³ and the federal government's exclusive – but not absolute – power over Indian affairs.³⁴ The important influence of Vattel on the origins of federal Indian law adds further weight to these positions.

This Comment proceeds in three parts. Part I contextualizes the Marshall Trilogy and canvasses scholarship asserting the domestic nature of federal Indian law. Part II demonstrates the centrality of the law of nations to the Marshall Trilogy and the influence of Vattel in particular. Part III explores the implications of these arguments for contemporary federal Indian law doctrine.

I. FEDERAL INDIAN LAW FOUNDATIONS

The Marshall Trilogy cases form the foundation of federal Indian law. Section I.A will provide historical background necessary to understand the context and holdings of the Marshall Trilogy. Section I.B will examine the tendency among scholars and judges to approach federal Indian law as a branch of domestic law.

A. *The Marshall Trilogy*

The Marshall Trilogy provided foundational determinations of the nature of Native title, the legal status of Native Nations, and the enforceability of state law on Native land. Chief Justice Marshall characterized the dispute in *Johnson* as an action of ejectment brought by the successor in interest to a private purchase from the Piankeshaw against the holder of a federal land patent, both claiming title to the same land.³⁵ The Court rejected the ejectment action on the grounds that title derived from private purchases from Native Nations could not be

32. See, e.g., Ablavsky, *supra* note 12, at 1083-88; *Haaland v. Brackeen*, 599 U.S. 255, 307-14 (2023) (Gorsuch, J., concurring).

33. See, e.g., Ablavsky, *supra* note 12, at 1084-87; *Brackeen*, 599 U.S. at 310 (Gorsuch, J., concurring).

34. See, e.g., M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 337 (2018); *Brackeen*, 599 U.S. at 318-19, 326-27 (Gorsuch, J., concurring).

35. Compare Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 L. & HIST. REV. 67, 69 (2001) (arguing that "there likely was no real conflict between the litigants' land claims"), with Sheila Simon, *Johnson v. M'Intosh: 200 Years of Racism that Runs with the Land*, 47 S. ILL. U. L.J. 311, 312 (2023) ("[D]espite assertions to the contrary, the land claimed by the two parties to the case was overlapping."), and LINDSAY ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLE OF THEIR LANDS 196 n.15 (2005) ("[I]t appears that M'Intosh had lands within the area sufficient for the federal court to have jurisdiction to hear the case.").

valid.³⁶ Georgia's ultimately successful efforts to dispossess the Cherokee Nation of its land provided the background for *Cherokee Nation* and *Worcester*. In *Cherokee Nation*, the Court held that it had no original jurisdiction to hear a suit brought by Native Nations, because they are "domestic dependent nations," not "foreign States."³⁷ In *Worcester*, Georgia imprisoned a white missionary for living on Cherokee land without a state license. The Court held that Georgia law had no force inside the lands of the Cherokee Nation.³⁸

Before *Cherokee Nation* and *Worcester*, the United States had long treated the Cherokee as a sovereign nation. In 1785, the Cherokee Nation and the United States signed their first treaty, the Treaty of Hopewell. North Carolina refused to recognize the treaty, and President Washington proved unable or unwilling to enforce it. White settlers poured into Cherokee territory.³⁹ The 1791 Treaty of Holston protected the illegal settlers by moving the border west but "solemnly guarantee[d] to the Cherokee nation, all their lands not hereby ceded."⁴⁰ The 1798 Treaty of Tellico moved the border west once again. A series of treaties between 1804 and 1816 further reduced the size of the Cherokee Nation.⁴¹ In 1827, gold was discovered in the Cherokee Nation within the borders of Georgia. White Georgians were determined to take the land from the Cherokee. The Cherokee Nation responded by adopting a written constitution and declaring themselves independent of state or federal jurisdiction. Georgia reiterated its claims to jurisdiction and began selling Cherokee land via public lottery.⁴²

In 1830, the Cherokee brought a case to the Supreme Court under its original jurisdiction to hear cases between a U.S. state and a foreign nation, arguing that Georgia law was void in Cherokee territory.⁴³ In 1831, the Supreme Court, holding that the Cherokee were not "foreign," ruled against the Cherokee Nation.⁴⁴ After the decision, press reports indicated that the discouraged Cherokee were considering abandoning the legal fight against Georgia.⁴⁵ Chief Justice Marshall,

36. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 603-05 (1823). For more on the context and consequences of *Johnson*, see generally BLAKE A. WATSON, *BUYING AMERICA FROM THE INDIANS: JOHNSON V. MCINTOSH AND THE HISTORY OF NATIVE LAND RIGHTS* (2012).

37. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-20 (1831).

38. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832).

39. Ronald A. Berutti, Note, *The Cherokee Cases: The Fight to Save the Supreme Court and the Cherokee Indians*, AM. INDIAN L. REV. 291, 294-95 (1992).

40. *Id.* at 295; Treaty of Peace and Friendship, Cherokee Nation-U.S., July 2, 1791, 7 Stat. 39.

41. Berutti, *supra* note 39, at 295-96.

42. *Id.* at 296-97.

43. *Id.* at 300.

44. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831).

45. Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 533 (2002).

in what one scholar has characterized as “an extraordinary move [that] illustrates the extralegal (or partisan) qualities that would be an integral part of the Court’s handling of *Worcester*,” asked Justices Thompson and Story to issue a dissenting opinion supporting the Cherokee’s claims on the merits.⁴⁶ The opinion, which now appears in the report as though it was an original part of the report, was written only after the Justices had already issued the decision.⁴⁷ Marshall intended his machinations to sway public opinion against President Jackson without jeopardizing the Court.⁴⁸

Chief Justice Marshall’s efforts paid dividends. The Cherokee seized on Georgia’s arrest of four white missionaries for violating the state’s law against unauthorized residence on Cherokee land to bring a case before the Supreme Court. The Georgia governor offered pardons to all four, but Samuel Worcester and Elizur Butler rejected the pardon offers so that the constitutionality of Georgia’s law could be litigated.⁴⁹ This time, the Cherokee won, and the Supreme Court declared Georgia’s laws to have no effect in the Cherokee Nation.⁵⁰ “The Cherokee nation,” Marshall concluded, “is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force . . .”⁵¹ Only the Cherokee Nation, “treaties,” and “acts of Congress” could regulate Cherokee land.⁵²

The Georgia courts ignored the Supreme Court’s decision.⁵³ Worcester stayed in prison. When South Carolina defied President Jackson during the nullification crisis, however, his views on the *Worcester* case shifted, and he began pressuring Georgia to release Worcester. In December 1833, Georgia repealed the law that Worcester had been convicted under. Some months later, the state allowed Worcester to leave prison.⁵⁴

46. *Id.* at 533; Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 514-18 (1969).

47. Magliocca, *supra* note 45, at 533; Burke, *supra* note 46, at 514-18.

48. Magliocca, *supra* note 45, at 490 n.13; Burke, *supra* note 46, at 528.

49. Magliocca, *supra* note 45, at 533-34; Jill Norgren, *Lawyers and the Legal Business of the Cherokee Republic in Courts of the United States, 1829-1835*, 10 L. & HIST. REV. 253, 286-92 (1992); Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 893-95 (2003).

50. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832).

51. *Id.* at 561.

52. *Id.*

53. Magliocca notes that Chief Justice Marshall maneuvered such that President Jackson would not be put in a position to defy *Worcester*. Magliocca, *supra* note 45, at 545 & n.272.

54. Edwin A. Miles, *After John Marshall’s Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. S. HIST. 519, 527-40 (1973).

The fate of the Cherokee Nation would prove far more tragic. In 1835, the United States negotiated the Treaty of New Echota with a faction of the Cherokee. The Cherokee tribal assembly rejected the proposal by a vote of 2,225 to 114. A second, much more sparsely attended vote, held after Georgia sent troops to imprison Cherokee leadership, approved the treaty by a vote of seventy-nine to seven. In 1836, the Senate, over the objections of the defenders of the Cherokees, ratified the treaty by a single vote.⁵⁵ The treaty gave the Cherokee two years to leave. In May 1838, the federal government began forcibly removing the remaining Cherokees.⁵⁶ Estimates for the death toll vary. Of the eighteen thousand Cherokees whom the United States forced west, between four and eight thousand Cherokees may have lost their lives during the Trail of Tears from hunger, exposure, disease, and violence.⁵⁷

Despite disagreement as to Chief Justice Marshall's motives,⁵⁸ there is scholarly consensus on the importance of the Marshall Trilogy. These three cases, scholars generally agree, form the "foundation of federal Indian law."⁵⁹ The "great case of *Johnson v. M'Intosh*" established the federal government's right to

55. Magliocca, *supra* note 45, at 551-52.

56. Carl J. Vipperman, *The Bungled Treaty of New Echota: The Failure of Cherokee Removal, 1836-1838*, 73 GA. HIST. Q. 540, 540, 558 (1989).

57. Magliocca, *supra* note 45, at 522; AMY H. STURGIS, *THE TRAIL OF TEARS AND INDIAN REMOVAL* 60 (2007).

58. Compare Neyooxet Greymorning, *The Anglocentric Supremacy of the Marshall Court*, 10 ALB. GOV'T L. REV. 191, 191-92 (2017) (arguing that "upon closer analysis, the Court [in *Worcester*] is discovered not necessarily protecting the sovereign rights of an Indigenous people, but rather protecting and elevating the rights of an infant federal government over the rights of its individual States"), with Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 405 n.107 (1993) (conceding that it is "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" but contending that "for whatever it might be worth, contemporaneous evidence supports the proposition that Chief Justice Marshall . . . [was] quite sympathetic to the plight of the tribes").

59. E. Andrew Long, *The New Frontier of Federal Indian Law: The United States Supreme Court's Active Divestiture of Tribal Sovereignty*, 23 BUFF. PUB. INT. L.J. 1, 4-5 (2004); Elizabeth Ann Kronk, *Indian Claims and the Court of Federal Claims: A Legal Overview, Historical Accounting and Examination of the Court of Federal Claims' and Federal Circuit's Impact on Federal Indian Law*, 6 J. FED. CIR. HIST. SOC'Y 59, 62 (2012); DAVID H. GETCHES & CHARLES F. WILKINSON, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 37 (2d ed. 1986); J. S. Thomson, *Federal Indian Policy: A Violation of International Treaty Law*, 4 W. ST. U. L. REV. 229, 230 (1977). *But see* Vine Deloria Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 969 (1996) (questioning "why the Cherokees are separated out by [Felix] Cohen in [the *Handbook of Federal Indian Law*] on the basis of their history and treaties and yet cases involving them form the foundation of 'federal Indian law'").

extinguish Native title by purchase or just war.⁶⁰ *Cherokee Nation* provided the categorization of Native Nations as “domestic dependent nations,”⁶¹ which remains law today.⁶² While some cases have sought to reduce *Worcester*,⁶³ the case still lies at the root of the current doctrine that the Constitution recognizes tribal sovereignty as distinct from state and federal sovereignty.⁶⁴

B. Federal Indian Law, Domestic Law, and the Law of Nations

Existing doctrine and scholarship generally conceive of federal Indian law as a branch of domestic law.⁶⁵ Noting that “many advocates of Indian rights have begun to look to international human rights law in search of broader protections than those found in U.S. domestic law,” Greg Rubio contrasts international human rights law with “the body of domestic law under which an Indian plaintiff

60. Kades, *supra* note 35, at 67.

61. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

62. *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 70 (2016).

63. *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962); *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 652 (2022).

64. *Williams v. Lee*, 358 U.S. 217, 219 (1959); Hedden-Nicely, *supra* note 6, at 258.

65. See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 805-06 (2014) (Sotomayor, J., concurring) (“[T]he principal dissent analogizes tribal sovereign immunity to foreign sovereign immunity This analogy, however, lacks force Two centuries of jurisprudence therefore weigh against treating Tribes like foreign visitors in American courts.”); *Castro-Huerta*, 597 U.S. at 636-37; Blackhawk, *supra* note 12, at 1796 & n.26 (“Although never intended to be exhaustive, notably absent from the survey that follows is the field of international law. That field is undoubtedly part of public law and undoubtedly impacted by colonialism, but this Article focuses its attention on matters more domestic and reserves those worldlier—and thornier—interventions for future work.”); Frickey, *supra* note 16, at 42 (“[D]espite the backdrop of international law and sovereignty, there has been [a] seemingly complete domestication of federal Indian law issues”). *But see*, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (“Although we early rejected the notion that Indian tribes are ‘foreign states’ for jurisdictional purposes under Art. III, we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments.” (citations omitted)); Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507, 547 (2011) (“Indigenous peoples remain hopeful that emerging principles of international law will produce tangible benefits in terms of safeguarding rights to land and natural resources.”). Frickey had a sophisticated conception of the relationship between international and domestic law. Frickey, *supra* note 16, at 95 (“As Marshall himself understood, it was only by reference to its ‘origin’ in international law that congressional power over Indian affairs could become part of our domestic law. ‘Holding’ historical and contemporary international law ‘in our recollection’ does ‘shed light’ on congressional plenary power in much the same way as sunshine disinfects. It is time to domesticate this most undelimited of domestic powers by internationalizing our understanding of it.”).

might normally seek redress: federal Indian law.”⁶⁶ A handful of cases, finding *Worcester* to have “yielded to closer analysis,”⁶⁷ announced that the era in which the Court considered the Tribes to be “distinct nations” had ended in the late nineteenth century.⁶⁸ The most extreme version of this position was staked out by Justice Thomas in his concurrence in *United States v. Lara*. While noting that *Worcester* recognized the Tribes as “independent political communities,” he concluded that “the tribes never fit comfortably within the category of foreign nations,” and, since 1871, “the political branches no longer considered the tribes to be anything like foreign nations.”⁶⁹ Further, he opined that “it is at least arguable that the United States no longer considered the tribes to be sovereigns.”⁷⁰ The recent decision in *Castro-Huerta* did not endorse Thomas’s speculation that Indian sovereignty had come to an end, but it did echo earlier skeptical assessments of *Worcester*’s continued vitality.⁷¹

While the Court’s characterization of federal Indian law as domestic has generally served to weaken tribal sovereignty,⁷² several scholars have situated federal Indian law in American domestic law to instead fortify Indian rights. Maggie Blackhawk, for example, argues that federal Indian law is an important paradigm case within American public law.⁷³ She states that the “policentric constitutionalism of federal Indian law,” in which Congress has played a more central role in constitutional lawmaking than in other more “juricentric” domains of constitutional law, “has provided a stable and reflective body of law, however imperfect, that has succeeded in mitigating some of the worst effects of American colonialism.”⁷⁴ Several scholars have argued that the Indian canons—requiring ambiguous statutes and treaties to be construed in Native Nations’ favor—are best

66. Greg Rubio, *Reclaiming Indian Civil Rights: The Application of International Rights Law to Tribal Disenrollment Actions*, 11 OR. REV. INT’L L. 1, 2-4 (2009).

67. *Castro-Huerta*, 597 U.S. at 636 (quoting *Organized Vill. of Kake*, 369 U.S. at 72); *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 762 n.2 (1998) (quoting *Kake*, 369 U.S. at 72).

68. *Castro-Huerta*, 597 U.S. at 636 (quoting *Kake*, 369 U.S. at 72).

69. *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

70. *Id.*

71. See *Castro-Huerta*, 597 U.S. at 636-37.

72. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978); *Castro-Huerta*, 597 U.S. at 636-37.

73. See Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2205 (2023); Blackhawk, *supra* note 12, at 1800 (“[I]nteractions between the national government and Native Nations shaped the warp and woof of United States constitutional law from the Founding. . . . [F]ederal Indian law and the history of colonialism [are] a paradigm case to structure our constitutional histories, [which] add[s] depth to our understanding of constitutional law doctrines, and inform[s] the theorization of general principles of public law.”).

74. Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, *supra* note 73, at 2292.

understood, like other general principles of statutory construction, as a counter-majoritarian default rule.⁷⁵ This reading of the Indian canons, while intending to safeguard tribal sovereignty,⁷⁶ severs the Indian canons from their origin in the “generally accepted principles of the law of nations at the time of the Founding,” under which states “retained whatever measure of sovereignty they did not expressly surrender by agreement,”⁷⁷ and joins them to domestic legal protections for “discrete and insular minorit[ies].”⁷⁸

Scholars have largely analyzed the Marshall Trilogy cases under the rubric of domestic law. For example, several legal scholars have found important analogues between federal Indian law and constitutional law. Blackhawk places “the Trilogy at the center of antebellum nationalism.”⁷⁹ Along with *McCulloch v. Maryland*⁸⁰ and *Gibbons v. Ogden*,⁸¹ she argues, the Trilogy is key to Chief Justice Marshall’s nationalist project.⁸² Similarly, Todd B. Adams contends that “it is wrong to consider the [Marshall Trilogy] cases separately from the general course of American constitutional law” and that the cases are “important to the study of constitutional law as an early example of how the Court failed to protect a persecuted minority.”⁸³ While Frickey emphasizes Marshall’s use of treaties, he analogizes Marshall’s approach to Indian treaties to his approach to

75. See, e.g., Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2192-93, 2211-12 (2002); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 460-61, 483, 507 (1989).

76. Elhauge, *supra* note 75, at 2192 (“[M]any statutory canons do favor the politically powerless, including . . . the canon favoring Indian tribes.”); Sunstein, *supra* note 75, at 460 (“There is no reason to think that [construing ambiguous statutes and treaties in Native Nations’ favor] will tend accurately to describe congressional intent in particular cases. It is instead a judge-made rule responding to obvious disparities in bargaining power and to inequitable treatment of Native Americans by the nation in the past.”).

77. Davis, Biber & Kempf, *supra* note 12, at 559-60 (“[T]he Indian canon of construction . . . is thought to be unique to federal Indian law. To the contrary, however, the Indian canon’s foundations include generally accepted principles of the law of nations at the time of the Founding.” (footnote omitted)).

78. Elhauge, *supra* note 75, at 2211 (“Another canon that has no roots in constitutional law, but that provides similar protection to a discrete and insular minority, is the canon that ambiguous statutes and ties should be construed to favor Indian tribes.”).

79. Blackhawk, *supra* note 12, at 1795.

80. 17 U.S. (4 Wheat.) 316 (1819).

81. 22 U.S. (9 Wheat.) 1 (1824).

82. Blackhawk, *supra* note 12, at 1795.

83. Todd B. Adams, *Reintegrating the Marshall Trilogy into U.S. Constitutional Law: How the Court Failed to Protect a Persecuted Minority for Facially Neutral Reasons*, 19 DARTMOUTH L.J. 6, 7 (2021).

constitutional law.⁸⁴ Plentiful evidence supports these valuable scholarly contributions. A full understanding of the Marshall Trilogy, however, requires recognition of its foundations in the law of nations.

The law-of-nations origins of federal Indian law hold important implications for current doctrine. Justice Gorsuch has forcefully articulated a vision of federal Indian law doctrine grounded in *Worcester's* law-of-nations principles. Dissenting in *Castro-Huerta*, Gorsuch emphasized the law-of-nations character of the Marshall Trilogy. Importantly – if fleetingly and in passing – he mentioned the importance of Vattel for federal Indian law, something few scholars and even fewer Justices have done. “As was true of ‘tributary’ and ‘feudatory states’ in Europe,” Gorsuch wrote, “the Cherokee did not cease to be ‘sovereign and independent’ [after colonization began], but retained the right to govern their internal affairs.”⁸⁵ Gorsuch cited first to Vattel’s *Law of Nations* and then to Chief Justice Marshall’s citation of Vattel in *Worcester*.⁸⁶ Concurring in *Brackeen*, he quoted *Worcester*, noting that “the settled doctrine of the law of nations” holds that “a weaker power does not surrender its independence – its right to self-government, by associating with a stronger and taking its protection.”⁸⁷ Gorsuch concluded, “Our Constitution reserves for the Tribes a place – an enduring place – in the structure of American life. It promises them sovereignty for as long as they wish to keep it.”⁸⁸

84. Frickey, *supra* note 58, at 385 (“Chief Justice Marshall’s fundamental approach was to envision an Indian treaty as quasi-constitutional in nature.”). Frickey ultimately did not consider whether “external” or “internal” factors to the Treaty of Hopewell guided Chief Justice Marshall’s analysis to be a productive avenue of inquiry. *Id.* at 412 n.140 (“[On the one hand,] 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.”). In other scholarship, Frickey placed more emphasis on international law. See Frickey, *supra* note 16, at 37 (“[I]f international law notions of inherent sovereignty provide the only justification for even this more limited conception of congressional power, it follows that the Constitution is inextricably linked to international law on issues of Indian affairs.”).

85. *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 658 (2022) (Gorsuch, J., dissenting) (first citing 1 E. DE VATEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 60–61 (Northampton, Mass., Thomas M. Pomfroy 1805); and then citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)).

86. *Id.*

87. *Haaland v. Brackeen*, 599 U.S. 255, 311–23 (2023) (Gorsuch, J., concurring) (quoting *Worcester*, 31 U.S. (6 Pet.) at 560–61).

88. *Id.* at 333.

Some scholars have recognized the influence of international law on federal Indian law. Scholars have analyzed *Johnson*, with its long discussion of the doctrine of discovery, with a law-of-nations lens.⁸⁹ Felix S. Cohen's claim that the origins of American federal Indian law can be found in Spain has enjoyed decades of scholarly influence.⁹⁰ Instead of Vattel, Cohen believed that federal Indian law's origins traced back to doctrines developed by Vitoria.⁹¹ More recently, scholars have noted the influence of law-of-nations treatises, as well as examples of divided sovereignty in the Holy Roman Empire and British India, on areas of federal Indian law such as the Indian canon of construction.⁹² Gregory Ablavsky has argued that while the law of nations was often used as an instrument of colonialism, European law-of-nations authorities such as Vattel at times provided the "raw materials" to construct arguments for tribal sovereignty that sounded in American law.⁹³ As the next Part demonstrates, Chief Justice Marshall ultimately used Vattel in the service of tribal sovereignty.

II. THE LAW OF DOMESTIC NATIONS AND THE MARSHALL TRILOGY

The law of nations was central to the Marshall Trilogy. Section II.A highlights the law-of-nations nature of much of Chief Justice Marshall's reasoning in the Trilogy. Section II.B explores the importance of Vattel to the Marshall Trilogy. Importantly, Vattel, more than other authorities – such as Grotius and Vitoria – was a central influence on Marshall's decision in *Worcester*.

89. See, e.g., Simon, *supra* note 35, at 334-47; Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1068-1103 (2000).

90. Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43-44 (1947); Cohen, *supra* note 20, at 1-11; Robert A. Williams Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 1 (1983) (quoting Cohen, *supra* note 20, at 3); Clinebell & Thomson, *supra* note 21, at 681 n.84 (citing Cohen, *supra* note 20); Marston, *supra* note 15, at 376 n.7 (citing Cohen, *supra* note 20, at 11-12); Samuel Piccolo, *Indigenous Sovereignty, Common Law, and Natural Law*, 67 AM. J. POL. SCI. 1, 10 (2023) ("Felix Cohen long ago demonstrated 'the Spanish origins of Indian rights in the law of the United States.'"). But see R.P. Boast, *Felix Cohen and the Spanish Moment in Federal Indian Law: A Study in Law, Politics and Historiography*, 39 VICTORIA U. WELLINGTON L. REV. 419, 455 (2008) ("The case for a significant 'Spanish' contribution to Federal Indian law and to aboriginal title law generally seems unconvincing.").

91. See Cohen, *supra* note 20, at 11.

92. See Davis, Biber & Kempf, *supra* note 12, at 587-602.

93. Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783-1795*, 106 J. AM. HIST. 591, 612 (2019) ("Vattel had not written for indigenous peoples, but he and his predecessors had inadvertently provided them raw materials for a powerful legal argument.").

A. *The Law of Nations*

Although much prior scholarship has focused on the Marshall Trilogy's connection to domestic law,⁹⁴ domestic sources of authority make a comparatively slight appearance in the Marshall Trilogy. Instead, Chief Justice Marshall cited primarily to law-of-nations sources: the established practices of European states, treaties, and Vattel. Section II.A.1 reveals the relative scarcity of domestic-law sources in the Marshall Trilogy. Section II.A.2 demonstrates the importance of law-of-nations sources.

1. *The Relative Absence of Domestic-Law Sources in the Marshall Trilogy*

Chief Justice Marshall made comparatively slight use of domestic sources of law—the Constitution, statutes, and case law—in the Marshall Trilogy. In *Johnson* and *Worcester*, domestic-law sources do not prove determinative. The Constitution makes a more prominent appearance in *Cherokee Nation*, but it still does not crowd out law-of-nations reasoning.

The relative unimportance of domestic-law sources in *Johnson* is surprising, because the case might have been resolved without any recourse to the law of nations. Chief Justice Marshall's opinion in *Johnson*—the first case of the Marshall Trilogy to be decided—makes no reference to the U.S. Constitution. Marshall's opinion makes only a brief reference to a 1779 Virginia statute,⁹⁵ and a glancing reference to the “acts of the several colonial assemblies,” whose relevance to the case at hand Marshall deems “at most, equivocal.”⁹⁶ Marshall's inattention to these statutes is all the more remarkable because the 1779 Virginia statute could have been dispositive. The statute reiterated (or reinstated) a (possibly repealed) 1662 prohibition on direct purchases of land from Indians.⁹⁷ If the 1662 statute was good law at the time of the sale, this point alone could have decided the case by statutorily prohibiting one of the *Johnson* parties' titles.⁹⁸ As Sheila Simon observes, the core holding of *Johnson*, the federal government's “exclusive right to extinguish the Indian title,” is “based apparently not on any law, but on the practice of England and other countries,” the custom of nations.⁹⁹

94. See *supra* Section I.B.

95. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 585 (1823).

96. *Id.* at 604 (“The acts of the several colonial assemblies, prohibiting purchases from the Indians, have also been relied on, as proving, that, independent of such prohibitions, Indian deeds would be valid. But, we think this fact, at most, equivocal.”).

97. See Kades, *supra* note 35, at 102–03.

98. *Id.* at 83, 103.

99. Simon, *supra* note 35, at 331.

Marshall only cites his prior decision in *Fletcher v. Peck* and the English case of *Campbell v. Hall* after he has already reached his conclusion.¹⁰⁰

The Constitution does, however, make a prominent appearance in *Cherokee Nation*. While Chief Justice Marshall made no citations to specific statutes or case law, he parsed the language of the Constitution to determine the status of Native Nations in American law. Marshall looked to the “numerous treaties made with [the Cherokee Nation] by the United States,” to conclude that the United States “recognize[d] them as a people capable of maintaining the relations of peace and war,”¹⁰¹ but he turned to the Constitution to determine that the Cherokee Nation could not be termed “a foreign state.”¹⁰²

In *Worcester*, Chief Justice Marshall used domestic-law sources to define the relationship between the federal government and Georgia, but Marshall did not rely on domestic-law sources to determine the bounds of tribal sovereignty. Marshall cited the Constitution to hold that the treaties with the Cherokee “compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect,” but he did not use the Constitution to define the contours of tribal sovereignty.¹⁰³ Marshall made even less use of state statutes, only briefly referencing the Georgia statutes that the Court declared unconstitutional.¹⁰⁴ Marshall did, however, cite several acts of Congress as an interpretive aid in understanding the intent of the United States in making treaties with Indian nations. “The treaties and laws of the United States,” Marshall wrote, “contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.”¹⁰⁵ Marshall used the laws of the United States, like its treaties, to shed light on the relationship between Native Nations and the federal government. The cases that Marshall cited in *Worcester*, such as *McCulloch v. Maryland*¹⁰⁶ and *Cohens v. Virginia*,¹⁰⁷ were used not to define tribal sovereignty, but to establish the supremacy of the federal “constitution, laws, and treaties.”¹⁰⁸ Marshall used domestic-law sources to determine the relationship between the federal government and Georgia but not to determine

100. *Id.*; *Johnson*, 21 U.S. (8 Wheat.) at 592 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)); *id.* at 594 (citing *Campbell v. Hall* (1774) 98 Eng. Rep. 1045; 1 Cowp. 204)).

101. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

102. *Id.* at 15–20.

103. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 539 (1832).

104. *Id.*

105. *Id.* at 557.

106. *Id.* at 537 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

107. *Id.* at 562 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)).

108. *Id.*

the bounds of the Cherokee Nation's sovereignty, a question he used law-of-nations sources to resolve.

2. *The Prominence of Law-of-Nations Sources in the Marshall Trilogy*

Chief Justice Marshall primarily used law-of-nations sources to conceptualize tribal sovereignty, rather than domestic constitutional law. While others have noted the role treaties play in the Marshall Trilogy,¹⁰⁹ the centrality of law-of-nations sources in the Marshall Trilogy runs much deeper than Marshall's use of treaties.

a. *Custom of Nations*

The general practice of European states is central to Chief Justice Marshall's theory of the doctrine of discovery in both *Johnson* and *Worcester*. According to the doctrine of discovery, rooted in European practice, European governments acquired "absolute title" to land in the Americas through discovery, subject only to the residual Native title, which "the discoverers possessed the exclusive right of acquiring."¹¹⁰ In *Johnson*, the doctrine of discovery appears to leave the land's Native inhabitants with a mere right of occupation, whereas in *Worcester*, the doctrine appears to grant some limited ownership rights.¹¹¹ In *Johnson*, Marshall described the discovery doctrine as "a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented."¹¹² Though no treaty explicitly announced the right, Marshall recognized that the practice of European nations established a customary law that he applied in the context of American colonialism. Similarly, in *Worcester*, Marshall gave an argument rooted in historical practice about the customary right of Native self-government: "[O]ur 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."¹¹³ In *Worcester*, as in *Johnson*, Marshall located the origin of the right of discovery in the

109. See Frickey, *supra* note 58, at 385; Pearl, *supra* note 34, at 305.

110. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591-92 (1823).

111. See *id.* at 574; *Worcester*, 31 U.S. (6 Pet.) at 544; Watson, *supra* note 65, at 507; WATSON, *supra* note 36, at 328-34.

112. *Johnson*, 21 U.S. (8 Wheat.) at 573.

113. *Worcester*, 31 U.S. (6 Pet.) at 547.

custom of nations, “[t]he actual state of things, and the practice of European nations.”¹¹⁴

b. Colonial Charters

Chief Justice Marshall also used colonial charters in the Marshall Trilogy. Marshall used these colonial charters as further evidence of the custom of nations. *Johnson* references the colonial grants and charters of Rhode Island, the Plymouth Colony, Massachusetts, New Netherlands, New England, New York, New Jersey, Pennsylvania, Maryland, and the Carolinas.¹¹⁵ Native land, Chief Justice Marshall argued in *Johnson*, could not be lawfully purchased in colonial America outside the bounds of a charter.¹¹⁶ The lawful purchase of Native land relied on the authority of the Crown to issue a charter; the background common-law rules of property were themselves insufficient.¹¹⁷ In *Worcester*, Marshall again made use of a long list of charters to make a claim about Native title.¹¹⁸ Colonial charters, he maintained, “were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more.”¹¹⁹ Marshall also used charters to prove that Great Britain treated Native Nations as independent sovereigns: “such [was the] practical exposition of the charters [Great Britain] had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.”¹²⁰

c. Treaties

Lastly, treaties played a significant role in all three cases of the Marshall Trilogy. In *Johnson*, Chief Justice Marshall called upon European treaties – among them, the Treaty of Paris, the Treaty of Utrecht, and the Treaty of Aix-la-Chapelle – to support his construction of the right of discovery.¹²¹ The treaties proved for Marshall that “all the nations of Europe, who have acquired territory

114. *Id.* at 546.

115. *Johnson*, 21 U.S. (8 Wheat.) at 576-79, 601.

116. *Id.* at 579 (“Yet almost every title within those governments is dependent on these grants.”).

117. *Id.* at 604 (rejecting “the general proposition, that a title acquired from the Indians would be valid against a title acquired from the crown, or without the confirmation of the crown”).

118. *Worcester*, 31 U.S. (6 Pet.) at 545-46.

119. *Id.* at 545.

120. *Id.* at 548-49.

121. *Johnson*, 21 U.S. (8 Wheat.) at 581-83.

on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.”¹²²

Similarly, construction of treaty language is at the very heart of *Cherokee Nation* and *Worcester*. In these cases, Frickey writes, “Chief Justice Marshall repeatedly stressed the sovereign-to-sovereign relationship between tribes and the British crown and its successor, the United States.”¹²³ Marshall went out of his way to emphasize the agency of the Cherokee in making treaties with the United States. For example, in *Worcester* he stated:

If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain [the treaty] as the Cherokees? We may ask, further: did the Cherokees come to the seat of the American government to solicit peace; or, did the American commissioners go to them to obtain it? The [1785 Treaty of Hopewell] was made at Hopewell, not at New York.¹²⁴

Though the text of the Treaty of Hopewell could be construed as extinguishing Cherokee sovereignty,¹²⁵ the United States negotiated with the Cherokee Nation as with a sovereign nation. Frickey argues that Marshall “set up a strong, albeit implicit, presumption against reading any particular treaty provision to effectuate an abandonment of tribal sovereignty,” making the spirit of Indian treaties a guiding force in their interpretation.¹²⁶ “Chief Justice Marshall’s interpretation of the foundational Indian treaty in *Worcester*,” Frickey writes, “mirrored his general approach to the United States Constitution, for he construed the treaty flexibly in order to promote its underlying constitutive purposes.”¹²⁷ But Marshall’s approach to reading Indian treaties follows naturally from a basic principle of the law of nations: the strong presumption against interpreting treaty language to effectuate an abandonment of sovereignty.¹²⁸ Law-of-nations principles are sufficient to avoid construing treaties as abandoning sovereignty without any additional reasoning specific to Native Nations.

122. *Id.* at 584.

123. Frickey, *supra* note 58, at 408.

124. *Worcester*, 31 U.S. (6 Pet.) at 551.

125. Treaty of Hopewell, Cherokee Nation-U.S., Nov. 28, 1785, 7 Stat. 8; Frickey, *supra* note 58, at 399 (“[In] the Treaty of Hopewell of 1785 . . . the [Cherokee Nation] arguably surrendered its autonomy.”).

126. Frickey, *supra* note 58, at 397.

127. *Id.* at 385.

128. 1 VATTEL, THE LAW OF NATIONS, *supra* note 10, at 292.

B. *Vattel*

While Chief Justice Marshall considered many law-of-nations sources, Vattel's *The Law of Nations* proved a particularly important influence. Other law-of-nations authorities – such as Grotius and Vitoria – did not have the same directness or depth of influence. Vattel is no longer familiar to many American lawyers, but he was widely known at the time of the Marshall Trilogy. Vattel was born in 1714 in Neuchâtel, “a hereditary principality [that] was chafing at domination under Prussia, with whom it shared a king although it was arguably an independent sovereign state, as Vattel himself insisted.”¹²⁹ The heterogeneity of eighteenth-century European states provided the context for Vattel's masterpiece.¹³⁰ *The Law of Nations* proved immensely influential throughout Europe and the United States.¹³¹ Vattel's influence on the early national American elite is undeniable, though scholars disagree as to how far it reached.¹³²

Regardless of the extent of Vattel's influence generally, his influence on Chief Justice Marshall is unmistakable. Indeed, Vattel was more important to the Marshall Trilogy than any other law-of-nations theorist, including Grotius and Vitoria. For one, neither Grotius nor Vitoria are cited in the Marshall Trilogy by any Justice.¹³³ Vattel, however, is cited by Marshall in *Worcester*,¹³⁴ and in Justice Thompson's dissent in *Cherokee Nation*¹³⁵ – which was written at Marshall's request.¹³⁶

And yet, Vattel is a curious text for Chief Justice Marshall to have cited in support of tribal sovereignty. Vattel, for his part, explicitly rejected Native title in British North America on natural-law grounds. According to Vattel, there is “an obligation to cultivate the earth,” and “those nations” claiming more land

129. PITTS, *supra* note 10, at 69.

130. *Id.* at 68–91, 230 n.77.

131. *Id.* at 68–71; Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 390 (2010); Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547, 548 (2012).

132. Compare Vega, *supra* note 131, at 390 (arguing that “the writings of Emmerich de Vattel had the greatest influence on the early United States”), with Richardson, *supra* note 131, at 548 (conceding the “copious evidence” supporting the claim that “Vattel was one of several publicists extensively cited by the Founders as part of their commitment to a broad canon of law-of-nations writing” but contending that there is no evidence to support the stronger claim that “the Founders were Vattelians”).

133. Grotius is, however, cited by counsel in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 563 (1823).

134. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

135. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 53 (1831) (Thompson, J., dissenting).

136. See *supra* notes 46–48 and accompanying text.

than they can “settle and cultivate” do not hold legal title.¹³⁷ “Their unsettled habitation in those immense regions,” Vattel wrote, “cannot be accounted a true and legal possession”¹³⁸ Thus, while Vattel condemned “the conquest of the civilized empires of Peru and Mexico” as a “notorious usurpation,” he allowed, in the same sentence, that “the establishment of many colonies on the continent of North America may . . . be extremely lawful,” because the “people of these vast countries rather over-ran than inhabited them.”¹³⁹ Vattel judged that the “Spaniards violated all rules, when they set themselves up for judges of the Inca Athualpa”¹⁴⁰ and maintained that Montezuma would have been justified “in seizing a convenient opportunity to recover his rights, to emancipate his people, and to expel or exterminate the Spanish horde of greedy, insolent, and cruel usurpers[.]”¹⁴¹ Still, he could not “help praising the moderation of the English puritans who first settled in New England; who . . . purchased of the Indians the land of which they intended to take possession.”¹⁴² For Vattel, the Native Americans living in British North America might have had a moral claim to receive payment for their land, but they possessed no legal right.

These passages about the Americas, however, are glancing asides in *The Law of Nations*, the great bulk of which concerns European nations.¹⁴³ Vattel’s discussion of divided sovereignty in Europe proved most important to the Marshall Trilogy. A “weak state,” Vattel maintained, “which, in order to provide for its safety, places itself under the protection of a more powerful one” does not “divest[] itself of the right of government and sovereignty.”¹⁴⁴ By analogy, Native Nations, even if subject to the greater power of the United States, could similarly retain sovereignty.

In *Johnson*, although Chief Justice Marshall ultimately decided to rely on the custom of nations as grounds for the doctrine of discovery,¹⁴⁵ counsel for the respondent, contending that Native peoples could not sell land to private citizens, put forward three arguments based on Vattel: (1) the doctrine of discovery completely terminated all Native titles;¹⁴⁶ (2) Native Nations were once

137. 1 VATTEL, *THE LAW OF NATIONS*, *supra* note 10, at 216.

138. *Id.*

139. *Id.* at 38.

140. *Id.* at 290.

141. *Id.* at 673.

142. *Id.* at 216–17.

143. ANAYA, *supra* note 14, at 16–19; PITTS, *supra* note 10, at 71–72.

144. 1 VATTEL, *THE LAW OF NATIONS*, *supra* note 10, at 83.

145. See *supra* notes 111–112 and accompanying text.

146. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 567 (1823). The argument that discovery destroyed Native title is not in Vattel’s text exactly, but it mirrors the logic and conclusion of

independent, but they lost their sovereignty when they entered into the dominion of European states;¹⁴⁷ and (3) Native peoples “are of that class who are said by jurists not to be citizens, but perpetual inhabitants with diminutive rights.”¹⁴⁸ Curiously, despite citing Vattel three times, counsel did not cite to Vattel’s direct reference to Native Americans in *The Law of Nations*.

After *Johnson*, debates about the correct application of Vattel to the question of Native title only grew in importance as tensions between the Cherokee Nation and Georgia intensified. Jeremiah Evarts, writing under the pseudonym “William Penn,” wrote a series of articles for the *National Intelligencer*, defending the Cherokee Nation’s right to its land.¹⁴⁹ In one article, reprinted in the *Cherokee Phoenix*, the Cherokee Nation’s newspaper, Evarts confronted Vattel’s embrace of colonialism: “In answer to this legal argument, the Cherokees have only to say, that, even if Vattel had the power, by a flourish of his pen, to dispossess a nation of its patrimonial inheritance, the present case does not come within the limits which he has prescribed.”¹⁵⁰ Evarts argued that the “Cherokees are not an ‘erratic people,’ to use the phrase of Vattel, so . . . the case [does not] answer[] to [Vattel’s] description.”¹⁵¹ He concluded that “[n]o respectable lawyer, unless he is entirely deranged in his intellect, as a consequence of violent party feelings, will say that the doctrine of Vattel would take the lands of the Cherokees, and give them to Georgia.”¹⁵² John Ridge, writing under the pseudonym Socrates,¹⁵³ presented a similar line of defense in the *Cherokee Phoenix*, quoting a historian’s assessment “that the Cherokees differ in many respects from other Indian nations, that have wandered from place to place, and fixed their habitations on separate Districts. From time immemorial they have had possession of the same

Vattel’s claim that Europeans could appropriate the “unsettled habitation” of Native people. 1 VATTEL, THE LAW OF NATIONS, *supra* note 10, at 216. On this theory, Native peoples could not sell land to private citizens because they had no land to sell.

147. *Johnson*, 21 U.S. (8 Wheat.) at 568; see 1 VATTEL, THE LAW OF NATIONS, *supra* note 10, at 85.

148. *Johnson*, 21 U.S. (8 Wheat.) at 569; see 1 VATTEL, THE LAW OF NATIONS, *supra* note 10, at 218.

149. See Francis Paul Prucha, *Protest by Petition: Jeremiah Evarts and the Cherokee Indians*, 97 PROC. MASS. HIST. SOC’Y 42, 46 (1985).

150. “William Penn” (Jeremiah Evarts), *Present Crisis in the Condition of the American Indians*, CHEROKEE PHOENIX, NOV. 11, 1829, at 2; see also Theda Purdue, *Rising from the Ashes: The Cherokee Phoenix as an Ethnohistorical Source*, 24 ETHNOHIST. 207, 212-213 (1977) (discussing the use of the *Cherokee Phoenix* as a source).

151. “William Penn,” *supra* note 150, at 2.

152. *Id.*

153. See Kelly Wisecup, *Practicing Sovereignty: Colonial Temporalities, Cherokee Justice, and the “Socrates” Writings of John Ridge*, 4 NATIVE AM. & INDIGENOUS STUD. 30, 30-31 (2017).

territory which at present they occupy.”¹⁵⁴ The arguments for Cherokee exceptionalism could not accomplish much for a general recognition of Native title, but they could be used to defend the Cherokee Nation from hostile applications of Vattel.

In *Cherokee Nation*, while Chief Justice Marshall did not cite Vattel, Justice Thompson, who wrote a dissent at Marshall’s request,¹⁵⁵ enlisted Vattel in defense of the Cherokee Nation, closely following arguments advanced by counsel.¹⁵⁶ “Tributary and feudatory states,” Thompson wrote, citing Vattel, “do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state.”¹⁵⁷ The relationship between the Cherokee Nation and the United States had no precise precedents in Europe, but Thompson’s strategic invocation of Vattel gave the Cherokee Nation firm recourse to the law of nations as a state — a diminished state, to be sure — just as much entitled to its remaining sovereignty as Vattel’s native Neuchâtel.¹⁵⁸

In *Worcester*, Chief Justice Marshall finally turned to Vattel, echoing Justice Thompson’s reasoning in *Cherokee Nation*:

A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. “Tributary and feudatory states,” says Vattel, “do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state.”¹⁵⁹

“The Cherokee nation, then,” Marshall concluded, “is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force”¹⁶⁰

154. “Socrates” (John Ridge), *Strictures*, CHEROKEE PHOENIX, Mar. 13, 1828, at 2. Whether because of misprint or intentional change, the quotation in the *Cherokee Phoenix* reads “many respects” while the original text reads “some respects.” See 2 ALEXANDER HEWATT, AN HISTORICAL ACCOUNT OF THE RISE AND PROGRESS OF THE COLONIES OF SOUTH CAROLINA AND GEORGIA 201 (London, Alexander Donaldson 1779).

155. Magliocca, *supra* note 45, at 533.

156. Burke, *supra* note 46, at 516.

157. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 53 (1831) (Thompson, J., dissenting).

158. See 1 VATTEL, THE LAW OF NATIONS, *supra* note 10, at 84.

159. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 520 (1832).

160. *Id.*

Among European states, the law of nations did not make racial distinctions, but there was a racialized tradition in the law of nations, in which racialized others – Native inhabitants and Native and Black enslaved people – did not receive any protection from the law of nations.¹⁶¹ The doctrine of discovery comes from this racialized tradition, in which the law of nations is merely an agreement among European nations about how to divide the New World. When Vattel finally made his appearance in a majority opinion in the Marshall Trilogy,¹⁶² however, it was on the side of the Cherokee Nation. Chief Justice Marshall utilized Vattel as a proof-text for the continued sovereignty of Native Nations. The same rules that protected nations with limited sovereignty in Europe would protect Native Nations in the United States.

The Law of Nations, like all texts, is malleable. One could object that even if the Founders were Vattelians,¹⁶³ embracing Vattel does not require embracing tribal sovereignty. If, however, one accepts the key move that Chief Justice Marshall made in *Worcester* – extending to Native Nations the same law-of-nations protections that European states enjoyed – limited, but persisting, tribal sovereignty follows. Squaring Vattel’s account of limited sovereignty in Europe with a rejection of tribal sovereignty requires a racialized law of nations.

In *Worcester*, Chief Justice Marshall cited the law of nations as applied in Europe; he did not cite a European authority on the application of natural law to colonization, such as Vitoria. Cohen concedes that “[w]hile Vitoria himself is not directly cited in any of the early opinions of the United States Supreme Court on Indian cases, these opinions frequently refer to statements by Grotius and Vattel that are either copied or adapted from the words of Vitoria.”¹⁶⁴ Vitoria was involved in disputes about the racial fitness of Native peoples – arguing that the Native inhabitants of the Americas were entitled to the protections of natural law.¹⁶⁵ The continuing relevance of Vitoria, Cohen argues, is that, now, as in the past, there exists “a native population in possession of areas rich in natural resources but without the techniques, or without the incentives, needed for the full development of these resources, and, on the other hand, a population with the desire and techniques to exploit these material resources” and Vitoria provides guidance on how to achieve a “*modus vivendi* for racial groups of varying

161. See ANAYA, *supra* note 14, at 19; APRIL LEE HATFIELD, *BOUNDARIES OF BELONGING: ENGLISH JAMAICA AND THE SPANISH CARIBBEAN*, 1655–1715, at 228–38 (2023).

162. *Worcester*, 31 U.S. (6 Pet.) at 520, 561.

163. See *supra* note 132 and accompanying text.

164. Cohen, *supra* note 20, at 17. Grotius is not cited in any of the opinions of the Marshall Trilogy.

165. See *id.* at 11–12; ANAYA, *supra* note 14, at 9–13; 2 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION 169–70* (1978).

cultures.”¹⁶⁶ A federal Indian law based on Vitoria is one based on a colonial relationship to the Native population – even if, as Cohen argues, it is founded on “the equality of races.”¹⁶⁷ A federal Indian law founded on Vattel, however, is not based on colonialism; it is based on the principles of sovereignty and nation-to-nation relationships that governed the relations among European states. This law-of-nations tradition is precisely the legal authority that Marshall invoked in *Worcester* when he cited Vattel, and this tradition still forms the foundation of federal Indian law today.

III. THE LAW OF DOMESTIC NATIONS TODAY

The law-of-nations origins of federal Indian law have important implications for current doctrine. Section III.A will explore how uncovering the Marshall Trilogy’s roots in the law of nations sheds new light on the political nature of Indian status in American law, the limits of Congress’s “plenary” power in Indian affairs, and the meaning of the Indian Commerce Clause. Section III.B will examine how the law-of-nations origins of federal Indian law provide further weight to originalist arguments for the persistence of tribal sovereignty.

A. *The Law of Nations and Contemporary Federal Indian Law*

The status of Native Nations in American law is a frequent site of contestation and change. Recently, in a series of seismic and inconsistent decisions, the Supreme Court initiated a new wave of upheaval in federal Indian law. On the one hand, Chief Justice Roberts and Justices Kavanaugh, Thomas, and Alito have expressed skepticism about *Worcester*’s contemporary relevance.¹⁶⁸ Justice Kavanaugh has also suggested that “Indian” might be treated as a racial rather than political category,¹⁶⁹ a reconceptualization that would have far-reaching consequences for federal Indian law. As the Court has noted, “Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations,” and “[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and

166. Cohen, *supra* note 20, at 21.

167. *Id.* at 11.

168. These five Justices comprised the majority in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), which held that *Worcester* had “yielded to closer analysis.” *Id.* at 2493, 2502 (quoting *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962)).

169. *Haaland v. Brackeen*, 599 U.S. 255, 332 (2023) (Kavanaugh, J., concurring).

the solemn commitment of the Government toward the Indians would be jeopardized.”¹⁷⁰ On the other hand, Justice Gorsuch, often with the support of the Court’s liberal Justices, has defended the continued vitality of *Worcester* and tribal sovereignty in his opinions, concurrences, and dissents. He has also reaffirmed the political nature of Indian status.¹⁷¹ A fuller understanding of the law-of-nations influences on the Marshall Trilogy exposes the fundamental errors of recent opinions questioning tribal sovereignty and underscores the soundness of Gorsuch’s jurisprudential project.

1. “Indian” as a Political – Not Racial – Category in Federal Law

It is a long-settled principle in American law that “Indian” is a political category and not a racial one. Recently, however, several prominent legal voices have questioned this consensus and have sought to recategorize Indian status as racial. Although the majority did not reach the merits of the equal-protection challenge, the 2023 case of *Haaland v. Brackeen* renewed the issue of whether Indian status is racial or political. Justice Kavanaugh, in his concurrence, noted his opinion that “the equal protection issue,” though not properly raised in the case at hand, “is serious.”¹⁷² Presumably, Kavanaugh found convincing Judge Duncan’s argument when the case was before the Fifth Circuit that the Indian Child Welfare Act’s (ICWA) preference for “Indian over non-Indian families [for the purpose of placing Indian adoptees] violates the equal protection component of the Fifth Amendment.”¹⁷³ Justice Gorsuch, in his concurrence, reaffirmed “the bedrock principle that Indian status is a ‘political rather than racial’ classification.”¹⁷⁴

Rooting federal Indian law in the law of nations demonstrates the political rather than racial nature of “Indian” status. As the *Mancari* Court rightly noted, the very text of the Constitution negates the racial categorization of Native Americans. “Article I, § 8, cl. 3, provides Congress with the power to ‘regulate Commerce . . . with the Indian Tribes,’ and thus, to this extent, singles Indians

170. *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

171. *Brackeen*, 599 U.S. at 309-10 (Gorsuch, J., concurring).

172. *Id.* at 333 (Kavanaugh, J., concurring).

173. *Brackeen v. Haaland*, 994 F.3d 249, 401 (5th Cir. 2021) (opinion of Duncan, J.); see also Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2658 (2022) (arguing that the Fifth Circuit decision in *Brackeen* “threatens long-established federal laws that apply to Indian tribes and their citizens,” potentially leading to real-world consequences, including “weakened legal protections for tribes and other Indigenous peoples [which] can mean a loss of land and housing, loss of children, weakened political and judicial institutions, poorer health, greater poverty, language loss, and damage to cultural and religious practices”).

174. *Brackeen*, 599 U.S. at 310 (2023) (Gorsuch, J., concurring) (quoting *Mancari*, 417 U.S. at 553 n.24).

out as a proper subject for separate legislation,” and “Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties.”¹⁷⁵ As Judge Costa explained when *Brackeen* was before the Fifth Circuit, “[The Framers] viewed relations between the United States and Indian tribes as governed by the law of nations.”¹⁷⁶

The influence of Vattel’s *Law of Nations* on *Worcester* underscores the law of nations’ centrality to federal Indian law. While Vattel discussed American colonialism,¹⁷⁷ Chief Justice Marshall instead cited Vattel’s discussions of divided sovereignty in Europe.¹⁷⁸ The law of nations among European states provided the intellectual context for the foundations of federal Indian law. The salient divisions among European states under the eighteenth-century law of nations were political, not racial. Likewise, the position of Native Nations in American law is political, not racial.

2. *The Limits of Congress’s “Plenary” Power*

While a long line of Supreme Court cases has characterized Congress’s power over Indian affairs as “plenary”¹⁷⁹ (generally defined by dictionaries as “absolute”¹⁸⁰), *Brackeen* reaffirmed that plenary does not mean absolute in the context of Indian affairs.¹⁸¹ Writing for the majority, Justice Barrett explained that Congress’s Indian affairs power “is plenary within its sphere, but even a sizeable sphere has borders.”¹⁸² In concurrence, Justice Gorsuch reasoned that “Congress’s power with regard to the Tribes is ‘plenary’ in that it leaves no room for State involvement,” but that the “inherent sovereign authorities that belong to

175. *Mancari*, 417 U.S. at 552.

176. *Brackeen*, 994 F.3d at 453 (Costa, J., concurring in part and dissenting in part).

177. See *supra* notes 137-142 and accompanying text.

178. See *supra* notes 159-162 and accompanying text.

179. *Brackeen*, 599 U.S. at 256-57 (citing *United States v. Lara*, 541 U.S. 193, 200 (2004); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 470 (1979); *Winton v. Amos*, 255 U.S. 373, 391 (1921); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899)) (“In a long line of cases, we have characterized Congress’s power to legislate with respect to the Indian tribes as ‘plenary and exclusive.’”).

180. *Id.* at 374 (Alito, J., dissenting) (“The term ‘plenary’ is defined in one dictionary after another as ‘absolute.’”).

181. *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion)) (“The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.”); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

182. *Brackeen*, 599 U.S. at 276.

the Tribes” cannot be divested, even by Congress.¹⁸³ Justice Thomas, like Gorsuch, rejected the Court’s prior characterization of the plenary power, dismissing the plenary power doctrine as “judicial *ipse dixit*,”¹⁸⁴ but he came to a very different conclusion than Gorsuch about the consequences of bounded federal authority. While for Gorsuch, the negative space that results from the Constitution limiting state and federal government authority is left to Native Nations, for Thomas, the negative space resulting from bounded federal authority is left to the states (a position echoed by Justice Alito).¹⁸⁵

The logical conclusion of Chief Justice Marshall’s application of Vattel in *Worcester* found expression in Justice Gorsuch’s concurrence in *Brackeen*. Native Nations do not possess complete sovereignty, but they do possess significant inherent sovereign powers which can only be extinguished through voluntary surrender. Vattel noted that a protected sovereign nation, subject to the “encroachments” of its limited sovereignty by the protecting nation, loses its sovereignty only when its acquiescence to these acts is “voluntary” and not based on “violence and fear.”¹⁸⁶ While Marshall did not import Vattel wholesale but rather adapted his work to the American context, a long train of contested¹⁸⁷ usurpations¹⁸⁸ of tribal sovereignty cannot substitute for the voluntary surrender of sovereign authority.¹⁸⁹

183. *Id.* at 327 (Gorsuch, J., concurring) (quoting Ablavsky, *supra* note 12, at 1014) (“[T]he Court use[d] the term [plenary] interchangeably with ‘exclusive.’”).

184. *Id.* at 335 (Thomas, J., dissenting).

185. *Id.* at 338 (Thomas, J., dissenting) (“At each turn, history and constitutional text thus point to a set of enumerated powers that can be applied to Indian tribes – not some sort of amorphous, unlimited power than can be applied to displace all state laws when it comes to Indians.”); *id.* at 374 (Alito, J., dissenting) (“We need not map the outer bounds of Congress’s Indian affairs authority to hold that the challenged provisions of ICWA lie outside it. We need only acknowledge that even so-called plenary powers cannot override foundational constitutional constraints.”).

186. 1 VATTEL, THE LAW OF NATIONS, *supra* note 10, at 210.

187. See, e.g., JULIE L. REED, SERVING THE NATION: CHEROKEE SOVEREIGNTY AND SOCIAL WELFARE, 1800-1907, at 60-90 (2016); CHRISTINE K. GRAY, THE TRIBAL MOMENT IN AMERICAN POLITICS: THE STRUGGLE FOR NATIVE AMERICAN SOVEREIGNTY 1-25 (2013); NATIVE AMERICAN SOVEREIGNTY 1-63 (John R. Wunder ed., 1996).

188. See, e.g., Grace M. Schwartzman & Susan K. Barnard, *A Trail of Broken Promises: Georgians and Muscogee/Creek Treaties, 1796-1826*, 75 GA. HIST. Q. 697, 698-701 (1991); JILL ST. GERMAIN, BROKEN TREATIES: UNITED STATES AND CANADIAN RELATIONS WITH THE PLAINS CREE, 1868-1885, at 345-52 (2009); JOHN TULLY, CROOKED DEALS AND BROKEN TREATIES: HOW AMERICAN INDIANS WERE DISPLACED BY WHITE SETTLERS IN THE CUYAHOGA VALLEY 65-96 (2016).

189. Cf. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (“Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.”).

While the plenary power of Congress over Indian affairs is a long-accepted feature of federal Indian law, the Constitution provides strong protections for tribal sovereignty. On the one hand, only a clear-statement rule constrains Congress's ability to "break the promise of a reservation."¹⁹⁰ On the other hand, Justice Gorsuch suggested in *Brackeen* that the Constitution does not grant Congress the authority to extinguish tribal sovereignty. "[O]ur founding document," Gorsuch writes, "does not include a plenary federal authority over Tribes."¹⁹¹ Rather, Gorsuch explains that "Congress's power with regard to the Tribes is 'plenary' in that it leaves no room for State involvement."¹⁹² Among the powers Congress does not have, Gorsuch argues, is the power to extinguish tribal sovereignty:

Nothing in the [Indian Commerce] Clause grants Congress the affirmative power to reassign to the federal government inherent sovereign authorities that belong to the Tribes. In that way, the Indian Commerce Clause confirms, rather than abridges, principles of tribal sovereignty. As it must. It is "inconceivable" that a power to regulate non-Indians' dealings with Indians could be used to "divest Tribes] of the right of self-government." Otherwise, a power to manage relations with a party would become an instrument for "annihilating the political existence of one of the parties." No one in the Nation's formative years thought that could be the law. They understood that Congress could no more use its commerce powers to legislate away a Tribe than it could a State or a foreign sovereign.¹⁹³

Therefore, Gorsuch concludes, the Constitution promises Native Nations "sovereignty for as long as they wish to keep it."¹⁹⁴

While Gorsuch's analysis may not currently have the support of a majority of Justices, it is consistent with Vattel's conception of sovereignty. For Vattel, only voluntary surrender could extinguish the sovereignty of a nation in possession of limited sovereignty.¹⁹⁵ Under this reasoning, Native Nations—nations in possession of limited sovereignty—can only lose their sovereignty through their freely given and uncoerced assent. Even a clear statement from Congress would, by itself, be legally insufficient to extinguish tribal sovereignty. An act of

190. *Id.* at 2462.

191. *Haaland v. Brackeen*, 599 U.S. 255, 318 (2023) (Gorsuch, J., concurring).

192. *Id.* at 327 (quoting *Ablavsky*, *supra* note 12, at 1014).

193. *Id.* at 325-26 (citations omitted) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 554 (1832)).

194. *Id.* at 333.

195. See *supra* note 188 and accompanying text.

Congress could no more extinguish the sovereignty of the Cherokee Nation than it could extinguish the sovereignty of Oklahoma or France.

3. *The Indian Commerce Clause*

The Indian Commerce Clause is central to contemporary federal Indian law, and it is often cited as the constitutional source of federal power over Native Nations.¹⁹⁶ Article I, Section 8 grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁹⁷ This sentence creates three commerce powers¹⁹⁸: the Foreign Commerce Clause, the Interstate Commerce Clause, and the Indian Commerce Clause. Scholars have discussed the three Commerce Clauses at length, engaging in extensive debate over the meaning of “commerce” and the differences among the three clauses.¹⁹⁹ While some scholars argue for a narrow economic conceptualization of “commerce” in the Indian Commerce Clause,²⁰⁰ the case for a less cramped understanding is more convincing.²⁰¹

Recognizing the law-of-nations foundations of federal Indian law has implications for interpreting the Indian Commerce Clause. As Justice Gorsuch has argued, the constitutional text uses the word “among” for the states and “with” for foreign nations and Indian Tribes, suggesting “a shared framework for Congress’s Indian and foreign commerce powers and a different one for its interstate commerce authority.”²⁰² Justice Thomas, however, has claimed that “there is no

196. See Ablavsky, *supra* note 12, at 1014 (“While gesturing to other constitutional provisions, the Court has largely relied on the Indian Commerce Clause . . . to justify the federal government’s exclusive power against states and plenary power over tribes.” (footnotes omitted)).

197. U.S. CONST. art. I, § 8.

198. See *Haaland v. Brackeen*, 599 U.S. 255, 320 (2023) (Gorsuch, J., concurring) (“Contained in a single sentence, what we sometimes call ‘the’ Commerce Clause is really three distinct Clauses rolled into one: a Foreign Commerce Clause, an Interstate Commerce Clause, and an Indian Commerce Clause.”).

199. See, e.g., Christopher R. Green, *Tribes, Nations, States: Our Three Commerce Powers*, 127 PA. ST. L. REV. 643, 649–69 (2023); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 6 (2010); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 815 (1999); Stephen Andrews, *In Defense of the Indian Commerce Clause*, 9 AM. INDIAN L.J. 182, 183–84 (2021); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1058 (1995).

200. Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 215 (2007) (arguing that in the eighteenth-century “‘commerce with the Indians’ and ‘commerce with Indian tribes’ . . . almost invariably meant ‘trade with the Indians’ and nothing more”).

201. Ablavsky, *supra* note 12, at 1026 (“[E]vidence suggests that Indian ‘commerce’ did mean something different in 1787 and 1788 than foreign or interstate commerce.”).

202. *Brackeen*, 599 U.S. at 321 (Gorsuch, J., concurring).

basis to stretch the Commerce Clause beyond its normal limits” when it comes to federal Indian law.²⁰³ As Thomas and Chief Justice Marshall have noted, the Commerce Clause provides strong evidence that Native Nations are not “foreign state[s].”²⁰⁴ The question is whether “domestic dependent nations”²⁰⁵ should be treated more like states or foreign nations for Commerce Clause analysis.

The important role that Vattel and the law of nations played in the Marshall Trilogy provides further evidence – in addition to the evidence advanced by Justice Gorsuch²⁰⁶ and others²⁰⁷ – that an original understanding of the Commerce Clause leads to an interpretation of Congress’s Indian Commerce Clause powers as more like its Foreign Commerce Clause powers than its Interstate Commerce Clause powers. Reading the Indian Commerce Clause as more in line with the Foreign Commerce Clause underscores the limits of Congress’s “plenary” power over Indian affairs: Congress’s “plenary” power “leaves no room for State involvement,” but this “plenary” power is not absolute insofar as the “inherent sovereign authorities that belong to the Tribes” cannot be divested, even by Congress.²⁰⁸

The Court’s rationale for Congress’s exclusive authority over foreign commerce also closely matches the Framers’ motivations in drafting the Indian Commerce Clause. The Court has explained that, regarding the Foreign Commerce Clause, “the Framers’ overriding concern [was] that ‘the Federal Government must speak with one voice when regulating commercial relations with foreign governments.’”²⁰⁹ Similarly, the Framers had good reason to want the United States to speak with one voice to Native Nations, as “the period under the

203. *Id.* at 355 (Thomas, J., dissenting).

204. *Id.* at 358 (Thomas, J., dissenting) (“As Marshall reasoned, Indian tribes were not ‘foreign state[s]’ in the sense of the constitution,” as shown in part by the Commerce Clause’s delineation of States, foreign nations, and Indian tribes.” (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831))).

205. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

206. *Brackeen*, 599 U.S. at 324 (Gorsuch, J., concurring) (“If the Constitution’s text left any uncertainty about the scope of Congress’s Indian commerce power, early practice liquidated it.”); see also *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 407 (2023) (Gorsuch, J., dissenting) (“Properly understood, Indian Tribes ‘occupy a unique status’ that is neither politically foreign nor domestic The inclusion of [the Indian] Commerce Clause power suggests that Tribes were not reachable either by Congress’s foreign commerce power or by its domestic (interstate) commerce power.”).

207. See, e.g., Green, *supra* note 199, at 659-63; Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 629 n.82 (1994).

208. *Brackeen*, 599 U.S. at 325-26 (Gorsuch, J., concurring).

209. *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 449 (1979) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

Articles of Confederation was marred by significant conflict, driven by state and individual intrusions on tribal land.²¹⁰ The federal government would make treaties, and states would violate them, destroying the credibility of the federal government.²¹¹ The Framers, when drafting the Constitution, omitted the ambiguous language of the Articles of Confederation concerning each state’s “legislative right” in “affairs with the Indians,” which had left room for states to try to interpose themselves and deal directly with the Tribes; the Framers made no indication that states had any power at all in Indian affairs.²¹²

Law-of-nations principles of sovereignty, which limit the reach of Congress’s power in foreign countries, also apply to Native Nations. The Foreign Commerce Clause uses “with” rather than “among,” suggesting that Congress does not have general global authority to regulate foreign commerce, as it has general national authority to regulate interstate commerce.²¹³ Further, “background principle[s]”²¹⁴ of territorial jurisdiction and sovereignty at the time of the Founding inform the reading of the Foreign Commerce Clause, suggesting it grants Congress less power over foreign nations than over the states.²¹⁵ Conceptions of sovereignty informed by the law of nations animated the foundations of federal Indian law,²¹⁶ and the same background principles of sovereignty that limit the Foreign Commerce Clause power also limit Congress’s authority under the Indian Commerce Clause; “Tribes enjoy a power to rule themselves that no other governmental body – state or federal – may usurp.”²¹⁷

210. *Brackeen*, 599 U.S. at 309-10 (Gorsuch, J., concurring).

211. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1035 (“Indians, [Secretary at War Henry Knox and the congressional Committee on Indian Affairs] believed, were generally ‘well behaved’ and could be placated through sensible treaties, which many Indians ‘faithfully Observed.’ But states and squatters did not share this commitment, and their repeated violations of national treaties destroyed federal credibility.” (footnote omitted)).

212. ARTICLES OF CONFEDERATION AND PERPETUAL UNION (July 12, 1776), reprinted in 5 JOURNALS OF THE CONTINENTAL CONGRESS 546, 550 (Worthington Chauncey Ford ed., 1906) (“The United States assembled shall have the sole and exclusive Right and Power of . . . Regulating the Trade, and managing all Affairs with the Indians.”); *Brackeen*, 599 U.S. at 316 (Gorsuch, J., concurring) (“[T]he Constitution came with no indication that States had any similar sort of power. Indeed, it omitted the nettlesome language in the Articles about the ‘legislative right’ of States.”).

213. U.S. CONST. art. I, § 8; Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 971-72 (2010).

214. Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 33 (2006).

215. Colangelo, *supra* note 213, at 972.

216. See *supra* Part II.

217. *Brackeen*, 599 U.S. at 310 (Gorsuch, J., concurring).

B. *Originalism and the Persistence of Sovereignty*

In their search for the original meaning of tribal sovereignty at the Founding, courts have come to markedly different conclusions on the place of Native Nations in the country's legal order. The conceptual tensions in federal Indian law have a centuries-long history, and the Supreme Court has wrestled with the question of tribal sovereignty from the beginning. In *Cherokee Nation*, Chief Justice Marshall famously described Indian Tribes as "domestic dependent nations."²¹⁸ As the Supreme Court recognized in 2011, however, the Court has "described the federal relationship with the Indian tribes using various formulations,"²¹⁹ each of which has had to compete with one another. The question of the "metes and bounds of tribal sovereignty"²²⁰ remains unsettled. Justice Thomas has pronounced the current doctrine an unworkable contradiction, arguing that "the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously."²²¹ Thomas's confusion arises from a misunderstanding of Founding Era conceptions of sovereignty. Divided sovereignty makes repeated appearances in Vattel's *Law of Nations*.²²² As other scholars have shown, the historical case of divided sovereignty in the Holy Roman Empire also informed the Framers²²³ and continues to prove instructive today. The Founders were well aware of the political structure of the Holy Roman Empire: James Madison and Alexander Hamilton invoked it in the Federalist Papers,²²⁴ and delegates in several state ratification conventions invoked it as well.²²⁵ The prominence of Vattel and the law of nations in the Marshall Trilogy further clarifies the original understanding of tribal sovereignty.

Originalism is a contested method of constitutional interpretation.²²⁶ It is also just one of several interpretive methods that can be used to embrace tribal

218. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

219. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011).

220. *United States v. Lara*, 541 U.S. 193, 201 (2004).

221. *Id.* at 215 (Thomas, J., concurring).

222. See *supra* Section II.B.

223. See Davis, Biber & Kempf, *supra* note 12, at 586-606; see also *id.* at 617-19 (discussing knowledge of the Indian princely states in the early American republic).

224. *Id.* at 603 n.383; THE FEDERALIST NO. 22, at 144-45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 43 at 275 (James Madison) (Clinton Rossiter ed., 1961).

225. Davis, Biber & Kempf, *supra* note 12, at 603 n.384.

226. See, e.g., James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 670 (2007) ("[T]here are numerous varieties of originalism, and . . . the only thing they agree upon is their rejection of moral readings."); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 6 (2009) ("[T]he arguments for hard originalism are based on faulty logic

sovereignty. Despite their frequent disagreements about constitutional interpretation, the Democrat-appointed Justices have nearly always signed on to Justice Gorsuch's originalist²²⁷ opinions on federal Indian law.²²⁸ An opposition to colonialism,²²⁹ a belief in decentralized power,²³⁰ or even a commitment to basic fairness – that if a solemn national promise memorialized in a treaty between two sovereigns is to be broken, Congress must at the very least clearly acknowledge its intention to break the country's word²³¹ – can all lead to support for tribal sovereignty.

Nevertheless, amidst the liveliness of ongoing originalist debates, this Comment demonstrates that the most faithful originalist account is supportive of tribal sovereignty. For one, Justice Thomas's contention that “the tribes either are or are not separate sovereigns”²³² cannot be squared with an originalist

or erroneous premises and . . . even the best case for soft originalism is extremely implausible.”); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 627 (2008) (“Plain-meaning originalists continue to cherry pick quotes and present this amateurish research as systematic historical inquiry.”); Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 632-33 (1987) (“It may be a necessary fiction for lawyers and jurists to believe in a ‘correct’ or ‘true’ interpretation of the Constitution in order to carry on their business, but we historians have different obligations and aims.”).

227. See Pearl, *supra* note 34, at 272.

228. All the Democrat-appointed Justices signed on to Justice Gorsuch's opinions in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685 (2022), and his dissents in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), and *Arizona v. Navajo Nation*, 599 U.S. 555 (2023). In *Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019), only Justice Ginsburg joined Gorsuch's concurrence. In *Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434 (2021), Justices Thomas and Kagan joined Gorsuch's dissent. In *Denezpi v. United States*, 596 U.S. 591 (2022), Kagan and Justice Sotomayor and joined Parts I and III of Gorsuch's dissent. In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023), Gorsuch wrote a lone dissent. In *Haaland v. Brackeen*, 599 U.S. 255 (2023), Sotomayor and Justice Jackson joined Parts I and III of Gorsuch's concurrence.

229. See, e.g., Blackhawk, *supra* note 12, at 1805 (“[D]octrines that furthered colonialism ought to take their place in the anticanon and doctrines that mitigated colonialism ought to take their place in the canon.”).

230. *Id.* at 1869 (“One of the primary benefits of multisovereign regimes is that power, including its distribution and limits, can be varied and defined by the community closely governed by that sovereign. This means that the communities define both the structure of their governing institutions and the rights that they hold against that sovereign. Decentralized power allows communities to define rights for themselves.”).

231. See *McGirt*, 140 S. Ct. at 2459, 2462 (“On the far end of the Trail of Tears was a promise. . . . [I]t's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so.”).

232. *United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J., concurring).

understanding of sovereignty. The Commerce Clause,²³³ the Marshall Trilogy,²³⁴ Vattel's *The Law of Nations*,²³⁵ and the influential historical example of the Holy Roman Empire²³⁶ all reflect the Founding Era reality of divided sovereignty. Article I,²³⁷ the Marshall Trilogy,²³⁸ and the Fourteenth Amendment²³⁹ also underscore that Indian status is a political and not a racial category. The three cases of the Marshall Trilogy, of course, were decided after the ratification of the Constitution, but they represent the Court's earliest²⁴⁰ attempts to answer important doctrinal questions of federal Indian law. As one originalist scholar notes, "Marshall's approach to three foundational cases" can shed light on "the historical culture of the early Founders and stakeholders"²⁴¹

It is telling that Justices Thomas, Alito, and Kavanaugh, who (to varying degrees) endorse originalism in other areas of law,²⁴² have fairly little to say

233. See *supra* Section III.A.3.

234. See *supra* Part II.

235. See *supra* Section II.B.

236. See Davis, Biber & Kempf, *supra* note 12, at 586–606.

237. *Haaland v. Brackeen*, 599 U.S. 255, 310 (2023) (Gorsuch, J., concurring) ("Similarly, the Commerce Clause vests in Congress the power to 'regulate Commerce with foreign Nations,' 'among the several States,' and 'with the Indian Tribes,'—conferrals of authority with respect to three separate sorts of sovereign entities Even beyond that, the Constitution exempts from the apportionment calculus 'Indians not taxed.' This formula 'ratified the legal treatment of tribal Indians [even] within the [S]tates as separate and sovereign peoples, who were simply not part of the state polities.'" (first quoting U.S. CONST. art. I, § 8, cl. 3; then quoting U.S. CONST. art. I, § 2, cl. 3; and then quoting Clinton, *supra* note 199, at 1150)).

238. *Id.* ("Because the United States 'adopted and sanctioned the previous treaties with the Indian nations, [it] consequently admit[ted] the Tribes' rank among those powers who are capable of making treaties.'" (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832))).

239. *Id.* ("The Fourteenth Amendment would later reprise [Article I's] language [concerning 'Indians not taxed'], confirming both the enduring sovereignty of Tribes and the bedrock principle that Indian status is a 'political rather than racial' classification." (first citing U.S. CONST. amend. XIV, § 2; and then quoting *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974))).

240. Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery*, *Johnson v. McIntosh*, and *Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 304 n.3 (1992) ("Two earlier Supreme Court rulings, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), and *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812), also concerned the issue of Indian land title In neither case did the Court clearly define Indian title or United States/Indian relations.").

241. Pearl, *supra* note 34, at 302.

242. See *Gamble v. United States*, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring); Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 512 (2019) ("The second theme of Justice Alito's jurisprudence is originalism, though not in the traditional sense of the word that one might associate with Justice Scalia."); *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); Eric J. Segall, *Does Originalism Matter Anymore?*, N.Y. TIMES (Sept. 10, 2018),

about original understanding in their federal Indian law cases. In *Brackeen*, Alito claimed that the case was more about children than anything else and that children would be better off without ICWA.²⁴³ In *Castro-Huerta*, Justice Kavanaugh appeared to disavow originalism. He acknowledged:

In the early years of the Republic, the Federal Government sometimes treated Indian country as separate from state territory – in the same way that, for example, New Jersey is separate from New York. Most prominently, in the 1832 decision in *Worcester v. Georgia*, 6 Pet. 515, 561, this Court held that Georgia state law had no force in the Cherokee Nation because the Cherokee Nation “is a distinct community occupying its own territory.”²⁴⁴

Kavanaugh, however, believed that the original understanding was wrong on this score, quoting a 1962 decision holding that the “general notion drawn from Chief Justice Marshall’s opinion in *Worcester v. Georgia* . . . has yielded to closer analysis.”²⁴⁵ To buttress this conclusion, Kavanaugh also cited cases from 1859,²⁴⁶ 1930,²⁴⁷ 1946,²⁴⁸ 1992,²⁴⁹ and 2001.²⁵⁰ For Kavanaugh, the understanding in “the early years of the Republic”²⁵¹ appears to be a less useful guide than more recent Supreme Court decisions in interpreting the Constitution – at least when it comes to the sovereignty of Native Nations.

While Justice Thomas in his dissent to *Brackeen* claimed to be arguing for a return to “the Constitution’s original meaning in the area of Indian law,”²⁵² his views on Indian law discount the original understanding of tribal sovereignty. Concurring in *United States v. Lara*, after noting that “Chief Justice Marshall further described the tribes as ‘independent political communities, retaining their original natural rights,’ and specifically noted that the tribes possessed the power to ‘mak[e] treaties,’” Thomas concluded that “the 1871 Act tends to show that

<https://www.nytimes.com/2018/09/10/opinion/kavanaugh-originalism-supreme-court.html> [<https://perma.cc/8D8R-A5SN>].

243. *Brackeen*, 599 U.S. at 363–65 (Alito, J., dissenting).

244. *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 636 (2022).

245. *Id.* (quoting *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962)).

246. *Id.* at 637 (citing *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366, 370 (1859)).

247. *Id.* (citing *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930)).

248. *Id.* (citing *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946)).

249. *Id.* (citing *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 257–58 (1992)).

250. *Id.* (citing *Nevada v. Hicks*, 533 U.S. 353, 361 (2001)).

251. *Id.* at 2493.

252. *Haaland v. Brackeen*, 599 U.S. 255, 371 (2023) (Thomas, J., dissenting).

the political branches no longer considered the tribes to be anything like foreign nations. And it is at least arguable that the United States no longer considered the tribes to be sovereigns.²⁵³ Thomas's citation to the 1871 Act is questionable not least because in the same opinion he labels the Act "constitutionally suspect."²⁵⁴ But "nevertheless," Thomas reasoned, the Act "reflects the view of the political branches that the tribes had become a purely domestic matter."²⁵⁵ For Thomas, a constitutionally suspect 1871 Act of Congress and current federal policy are more reliable guides to constitutional meaning than Chief Justice Marshall's opinions. "Justice Thomas's record on Indian law," M. Alexander Pearl concludes, "reflects an anti-originalist understanding of the Constitution that reaffirms longstanding historical misconceptions of the fundamental precepts of the United States and applies contemporary understandings to constitutional language."²⁵⁶ When it comes to federal Indian law, the importance of original meaning appears to wane for some of the conservative Justices.

Eliding original meaning, some Justices claim that tribal sovereignty has dissolved over time. In *Castro-Huerta*, Justice Kavanaugh, quoting *United States v. McBratney*, argued:

"[A]dmission of a State into the Union" "necessarily repeals the provisions of any prior statute, or of any existing treaty" that is inconsistent with the State's exercise of criminal jurisdiction "throughout the whole of the territory within its limits," including Indian country, unless the enabling act says otherwise "by express words."²⁵⁷

Federal Indian law's foundation in the law of nations demonstrates the weakness of this analysis. Vattel makes clear that sovereignty can persist despite an involuntary absence of its exercise.²⁵⁸

Liechtenstein provides a concrete example of persisting sovereignty. Liechtenstein had been a principality within the Holy Roman Empire since 1719.²⁵⁹ In 1806, after the Holy Roman Empire dissolved, Liechtenstein was a founding member of the Confederation of the Rhine.²⁶⁰ The Confederation of the Rhine also dissolved, the Congress of Vienna upheld Liechtenstein's sovereignty in

253. *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring in the judgment).

254. *Id.* at 218.

255. *Id.*

256. Pearl, *supra* note 34, at 272.

257. *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 654 (2022) (quoting *United States v. McBratney*, 104 U.S. 621, 623-24 (1881)).

258. See *supra* note 186 and accompanying text.

259. Davis, Biber & Kempf, *supra* note 12, at 601.

260. *Id.*

1815, and today Liechtenstein is a fully sovereign state.²⁶¹ As with Liechtenstein, the limited nature of the sovereignty of Native Nations is no argument that tribal sovereignty has disappeared. There is a strong presumption in international law – at the time of the Founding and today – favoring the persistence of sovereignty.²⁶²

The originalist evidence is clear. The Founding generation did not see sovereignty as being all or nothing. Limited sovereignty, in both theory and practice, was well known to the Framers. Further, the law-of-nations understanding at the Founding clearly held that limited sovereignty persists until voluntary surrender. Vattel acknowledged that “patient acquiesce” to encroachments on limited sovereignty can become “in length of time a tacit consent that legitimates the rights of the usurper.”²⁶³ Vattel, however, also emphasized that “silence, in order to shew tacit consent, ought to be voluntary.”²⁶⁴ Without voluntary surrender, a train of usurpations, even a long-standing one, “gives no rights to the usurper.”²⁶⁵

Native Nations possess limited sovereignty. While there was not universal consensus in the Founding Era that Native Nations possessed limited sovereignty or that the laws of nations protected people who were not white (as Georgia’s flagrant flouting of *Worcester* demonstrated),²⁶⁶ the earliest Supreme Court cases on the subject – the Marshall Trilogy – made clear that Native Nations do possess limited sovereignty and the law of nations does apply to them. The sovereignty of Native Nations, therefore, persists indefinitely absent voluntary surrender.

261. *Id.* at 601-02.

262. *Id.* at 584 (“States might choose to surrender their sovereign rights in a treaty, but they had to make that intent clear. This clear statement rule followed from the mutual recognition of equal sovereignty among states.” (footnote omitted)); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 89 (2d ed. 2007) (“There is, as we have seen, a strong presumption in favour of the continued statehood of existing States, despite sometimes very extensive loss of actual authority.”).

263. 1 VATTEL, *THE LAW OF NATIONS*, *supra* note 10, at 210.

264. *Id.*

265. *Id.*

266. See *supra* notes 53-54 and accompanying text.

CONCLUSION

Untethered from its foundation in the law of nations, federal Indian law can appear “schizophrenic”²⁶⁷ and “incoherent.”²⁶⁸ The nature of tribal sovereignty, however, fits comfortably into Founding Era thought about sovereignty and the law of nations. This close fit is unsurprising. The law of nations exerted a strong influence on the Marshall Trilogy and contributed to the foundations of federal Indian law, defining the contours of tribal sovereignty.

Law-of-nations sources were instrumental to the Marshall Trilogy. Marshall’s application of the law of nations to conceptualize tribal sovereignty offers guidance to the resolution of contemporary doctrinal debates in federal Indian law. The origins of federal Indian law in the law of nations explains why Indian status is political and not racial.²⁶⁹ It explains why the plenary power of Congress in Indian affairs is “plenary” in the sense that it excludes states but is not “plenary” in the sense that it is absolute and without limits.²⁷⁰ It explains why “commerce” has a different meaning in the Indian Commerce Clause than in the Interstate Commerce Clause.²⁷¹ Most importantly, it explains why the Constitution ensures that Native Nations will possess “sovereignty for as long as they wish to keep it.”²⁷²

If the Supreme Court pays closer attention to the importance of the law of nations in the Marshall Trilogy, *Castro-Huerta* may, in time, “yield[] to closer analysis.”²⁷³ While, as Justice Gorsuch lamented, the Court “wilt[ed]” in *Castro-Huerta*, in future decisions it may again stand firm and demonstrate that “even in the ‘[c]ourts of the conqueror,’ the rule of law mean[s] something.”²⁷⁴

267. *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring in the judgment).

268. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 434 (2005) (“[F]ederal Indian law has been remarkably incoherent . . .”).

269. *See supra* Section III.A.1.

270. *See supra* Section III.A.2.

271. *See supra* Section III.A.3.

272. *Haaland v. Brackeen*, 599 U.S. 255, 333 (2023) (Gorsuch, J., concurring).

273. *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 636 (2022) (quoting *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962)).

274. *Id.* at 657 (Gorsuch, J., dissenting) (second alteration in original) (quoting *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823)).