

5-24-2021

The Blind Eye: Jus Soli, And The "Pretended" Treaty Of New Echota

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Recommended Citation

Rossi, Christopher Robert (2021) "The Blind Eye: Jus Soli, And The "Pretended" Treaty Of New Echota," *American Indian Law Journal*: Vol. 9 : Iss. 2 , Article 8.

Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol9/iss2/8>

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Cover Page Footnote

Associate professor of political science, UiT, The Arctic University of Norway. The author thanks the editors of this journal for many thoughtful comments and suggestions and Kevin Washburn, Adrien Wing, and Don Ford at the University of Iowa College of Law for additional thoughts and assistance.

THE BLIND EYE: *JUS SOLI*, AND THE “PRETENDED” TREATY OF
NEW ECHOTA

By Christopher R. Rossi¹

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¹ Associate professor of political science, UiT, The Arctic University of Norway. The author thanks the editors of this journal for many thoughtful comments and suggestions and Kevin Washburn, Adrien Wing, and Don Ford at the University of Iowa College of Law for additional thoughts and assistance.

I. INTRODUCTION

The Treaty of New Echota,² the most notorious of the nearly seventy treaties created to perfect Indian removal toward the end of the Andrew Jackson presidency (term of office: 1829-1837),³ serves as a totemic reminder of the fate of North American Natives and their engagement with international law. The legal rationalizations that justified removal ultimately forced between 100,000 to 125,000 southeastern Natives of the United States to relocate.⁴ Notwithstanding improprieties associated with the conclusion of the treaty itself (amplified by “whisky and other inducements”⁵), the treaty also serves as an indirect expression of the “enlarged philanthropy” and underlying formalism that influenced the western civilizing mission (*mission civilisatrice*).⁶ This formalism reflected a Christian entitlement to land that European nations had asserted and applied among themselves in their colonial endeavors,⁷ and it entered American jurisprudence as part of this western inheritance.

Within the United States historical context, this underlying rationale had less to do with Native sovereignty and self-determination and more to do with Antebellum struggles with federalism.⁸ Early American republicanism divided power among executive, judicial, and legislative branches. Calibrating the checks and balances among these newborn chambers and in relation to states’ rights created many early nineteenth century

² See Treaty with the Cherokee, U.S.-Cherokee, Dec. 29, 1835, 7 Stat. 478 [hereinafter Treaty of New Echota].

³ See *The U.S. Foreign Policy on Indian Removal and Its Impact on Democracy*, ESRI, <https://www.arcgis.com/apps/Cascade/index.html?appid=7bf38b6b77b6412caf95e636ed9616af> [<https://perma.cc/PYD3-34BY>] (last visited June 23, 2020) (noting almost 70 treaties).

⁴ See Christina Snyder, *How the Forced Removal of the Southeast’s Indians Turned Native Lands into Slave Plantations*, ZÓCALO (Jan. 2, 2018), <https://www.zocalopublicsquare.org/2018/01/02/forced-removal-southeasts-indians-turned-native-lands-slave-plantations/ideas/essay/> [<https://perma.cc/J2DA-JYD9>] (estimating 100,000); *Trail of Tears*, HIST.COM (July 7, 2020), <https://www.history.com/topics/native-american-history/trail-of-tears> [<https://perma.cc/GWT4-KSAX>] (estimating nearly 125,000).

⁵ JOHN P. BROWN, *OLD FRONTIERS: THE STORY OF THE CHEROKEE INDIANS FROM EARLIEST TIMES TO THE DATE OF THEIR REMOVAL TO THE WEST*, 1838, at 498 (1938).

⁶ See Alfred Balch to Andrew Jackson, Jan. 8, 1830, LIB. CONG., https://www.loc.gov/resource/maj.01074_0281_0284/?sp=1&st=text [<https://perma.cc/639B-H3VL>] (noting that “[t]he removal of the Indians would be an act of seeming violence. But it will prove in the end an act of enlarged philanthropy.”). For a discussion of the emergence of the late 18th century idea of the civilizing mission as a broadly interpreted western counter to barbarism, see generally ILYA LAZAREV, *THE ENLIGHTENMENT, PHILANTHROPY AND THE IDEA OF SOCIAL PROGRESS IN EARLY AUSTRALIA: CREATING A HAPPIER RACE?* (2018). On its contorted philanthropic purpose in terms of French, British, and American imperialism, see Kodjo Afagla, *Shattering the Civilizing Claims of Colonialism: George Lamming’s Natives of My Person*, 3 REVUE DU CAMES, LITTÉRATURE, LANGUES ET LINGUISTIQUE 69 (2015).

⁷ Edward Dumbauld, *John Marshall and the Law of Nations*, 104 U. PA. L. REV. 38, 54 (1955).

⁸ See Guy C. Charlton, *Aboriginal Rights and Constitutional Conflict: The Marshall Court, State and Federal Sovereignty, and Native American Rights under the 1789 Constitution*, 8 AM. INDIAN L.J. 149, 150 (2019) (citing Reginald Horsman).

jurisdictional and political uncertainties.⁹ Complicating this federal-state interface was the historically less considered constitutional reference to Indian tribes,¹⁰ which itself constituted a third sovereign sphere in the mindset of early American founders.¹¹ However, the federal-state narrative dominated attention, and it produced seedlings of legal formalism that would attach “rights of soil” to the successors of metropolitan rule and not to the Native peoples who claimed the ancestral hunting grounds as homeland for millennia.

What Enlightenment rationale oriented early Confederation Congress committee reports toward the conclusion that the “‘right of soil’ and territorial sovereignty belonged to the United States and that tribes could ‘remain only on her sufferance’[?]”¹² Moreover, why did this simple presumption assign superior English rights to land in America? Rights acquired by conquest provide a partial answer, and was unquestionably part of the law of nations at this time.¹³ As the United States Supreme Court held in *Harcourt v. Gaillard* (1827), “[w]ar is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails, can only derive validity from treaty stipulations.”¹⁴ However, this classical principle subordinated territorial claims to the exercise of effective control over the seized territory.¹⁵ In fact, the conquest of the North American Indians did not result immediately with the founding of the Jamestown colony in 1607, nor was that the settlers’ initial intention.¹⁶ The resolution of the Indian question remained a contested issue for more than 200 years.

Imputing the right of soil to colonists, as opposed to Natives, needed time to take shape. European descendants began to compartmentalize and minimize the moral dissonance associated with colonization that would achieve broader expression in the form of the fraudulent Treaty of New Echota, and broadest expression in the form of Manifest Destiny. Although popular history has tended to periodize and magnify the singular

⁹ Note the high political stakes involved in *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing the power of judicial review by the Supreme Court); *McCulloch v. Maryland*, 17 U.S. 316 (1819) (depriving states of the power to tax the federal government); *Fletcher v. Peck*, 10 U.S. 87 (holding a state law unconstitutional).

¹⁰ The U.S. Constitution references Indian Tribes in U.S. CONST. art. I, § 2, cl. 3 (excluding Indians not taxed); art. I, § 8, cl. 3 (regulating commerce with Indian tribes); and the U.S. CONST. amend. XIV, § 2 (regarding apportionment, excluding Indians not taxed).

¹¹ See Kevin Washburn, *Moving Forward on Native American Rights*, UI CTR. HUM. RTS. (Aug. 5, 2020), <https://uictr.uiowa.edu/programs/racial-equity-and-human-rights-series/moving-forward-on-native-american-rights/> (30:52 time mark).

¹² Charlton, *supra* note 8, at 153.

¹³ LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 288-89 (1905) (noting that “subjugation as a mode of acquiring territory” was among the earliest of accepted principles governing the law of nations).

¹⁴ *Harcourt v. Gaillard*, 25 U.S. (12 Wheat.) 523, 528 (1827).

¹⁵ See Marcelo G. Kohen, *Conquest*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW__ (2015).

¹⁶ Jamestown, and all early North American settlements, were founded as entropôts, akin to the *Kontors* of the Hanseatic League and *fondachi* of Italian city states, to promote international trade on the Atlantic seaboard coastline, not as a springboard into the conquest of the North American interior. See James O’Mara, *Town Founding in Seventeenth-Century North America: Jamestown in Virginia*, 8 J. HIST. GEOGRAPHY 1 (1982) (discussing the initial purpose for the founding of the colony).

significance of Columbus's landing in the West Indies in 1492, the appropriation of this land space necessitated legal justification.¹⁷ The right of soil became an important construct of the colonial mindset of entitlement, and its elements extended far beyond fifteenth century claims of title by discovery.¹⁸ The right of soil attached first to the question of sovereignty before it grew into a question attaching to the acquisition of citizenship.¹⁹ The sovereign implications of the right of soil would become particularly important in the early nineteenth century due to competitions over the North American interior, and it would also serve as a salve to anoint the fraudulent conveyance at New Echota, which importantly helped to rewrite the course of American expansionism.

This article investigates the mindset that created a treaty mask that turned a blind eye to fraud. The dispossession of Native treaty guarantees depended on another treaty—the Treaty of New Echota. This irony also depended on the blind eye turned toward the *jus soli* principle, or perhaps the reformulation or birthright citizenship to explain how the reformulated principle overlooked Native possessory interests. The settler notion of *jus soli* carried deep within it an exclusionary idea about how sovereignty was to be asserted.

Jus soli is the Latin rule that assigns nationality to a person born to the soil. The factor connecting citizenship to nationhood is the geographical place where the person is born, not the citizenship status of the parents. The principle grew out of the early modern expression that based personal claims to land and inheritance on birthright connections to the sovereign domain. It appeared in common law as early as 1608 in *Calvin's Case*, where the birthright citizenship principle was extended to the *postnati*.²⁰ It was readily received into the infant American republic's construction of *jus gentium*, which jurists conceived to be a species of universal law.²¹ In *Calvin's Case*, the King's Bench ruled that a Scotsman was not an alien, although alien born to England, and could claim testamentary benefits to land in England because he was born to British soil.²² *Jus soli* dominated the assignment of nationality throughout most of the Americas because it promoted immigration to a

¹⁷ Most immediately, note the Treaty of Tordesillas (1494), which intended to calm the fast-rising dispute between Spain and Portugal over newly-discovered land. The agreed upon division line (following a meridian line 370 leagues west of the Cap Verde Islands) granted lands east of the line to Portugal and lands west of the line to Spain. On the status and treatment of Amerindians, and on Spanish rights to conquest, see FRANCISCO DE VITORIA, *RELECTIO DE INDIS* (1531); BARTOLOMÉ DE LAS CASAS, *BREVÍSIMA RELACIÓN DE LA DESTRUCCIÓN DE LAS INDIAS* (José Miguel Martínez Torrejón ed. 2006) [1552].

¹⁸ See Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 388 (2006) (influentially describing settler colonialism as an invasion to be construed in terms of structural developments, not epiphenomenal events).

¹⁹ An 1822 Indian Commission report to the James Madison administration held that “[t]he right of soil, or the absolute property . . . belong[ed] to the Sovereign, or State under whose authority the discovery and settlement were made.” JEDIDIAH MORSE, *A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES ON INDIAN AFFAIRS* 279 (1822) (comprising a narrative of a tour performed in the summer of 1820 under a commission from the President of the United States, for the purpose of ascertaining, for the use of the government, the actual state of the Indian tribes in our country).

²⁰ *Calvin's Case* (1608) 77 ER 377, 394 (K.B.) (establishing in common law the *jus soli* (birthright citizenship) principle).

²¹ See Dumbauld, *supra* note 7, at 38-39 (citing Chief Justice John Marshall's belief).

²² *Calvin's Case* (1608) 77 ER 377 at 377-78 (discussing the facts of the case).

continent bereft of labor and surfeit of land.²³ Yet, the settler mindset circumvented *jus soli*'s application to persons most obviously defined by the principle—the Natives who were born to the soil of the Americas. The interesting presumption, as noted by United States Supreme Court Chief Justice John Marshall in *Johnson v. M'Intosh* (1823) was that this principle did not actually apply to the Natives. He wrote, while the Europeans:

respected the rights of the Natives, as occupants, they asserted the ultimate *dominion* to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.²⁴

Marshall referenced this expression of *dominion* at the outset of the case,²⁵ noting the corporate creation under the seal of English King James I of a land conveyance to the first Colony of Virginia in 1609.²⁶ This credential was his initial point of reference for the ensuing discussion about good title to lands. Historian Peter d'Errico noted Marshall's fundamental assumption that the history of the Natives, apart from what may be read as a softening or maturation of his thinking in the later *Worcester* case,²⁷ did not actually begin with the Natives or considerations of *jus soli*, but with the construction of monarchical sovereignty and the chain of title that linked from that point forward.²⁸

A second Latin principle, *jus sanguinis*, established the competing rule of law.²⁹ It based a child's nationality on the nationality of the parents through the bloodline relationship, not on the geographical place where the person is born. *Jus sanguinis* predominated throughout Europe due to the continent's more restrictive immigration practices.³⁰ It influenced early twentieth century European citizenship due to dogmatic definitions of race, ethnicity, and nationhood.³¹ However, the rise of liberalism and human

²³ See James Brown Scott, *Nationality: Jus Soli or Jus Sanguinis*, 24 AM. J. INT'L L. 58, 58-59 (1930).

²⁴ *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) [hereinafter *Johnson v. M'Intosh*].

²⁵ *Id.* at 543.

²⁶ Scott, *supra* note 23, at 543-44.

²⁷ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

²⁸ Peter d'Errico, *John Marshall, Indian Lover?*, 39 J. West (2000),

https://www.umass.edu/legal/derrico/marshall_jow.html [<https://perma.cc/66BQ-VD42>].

²⁹ See Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 18, 19 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) (noting the commonly adopted classification schemes of *jus soli* and *jus sanguinis*). This binary contraposition is now antiquated and now admits to hybrid formulations. See generally Gerard-René de Groot & Olivier Vonk, *Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding Ius Sanguinis and Ius Soli*, 65 NETH. INT'L L. REV. 319 (2018).

³⁰ See Weil, *supra* note 29, at 18 (noting *jus sanguinis* historically formed to protect and preserve national ethnic character).

³¹ See Christian Joppke, *Citizenship between De- and Re-Ethnicization*, 44 ARCHIVES EUROPÉENNES DE SOCIOLOGIE, 429, 436 (2003).

rights after WWII broadened the understanding of *jus sanguinis* and changed European notions about membership in political community.³²

Although state practice in the Americas favored *jus soli*, *jus sanguinis* left an early and indelible impress on the Americas. The sixteenth century viceroys, who ruled over the formative political divisions and *audiencias* (regional capitals) of the New World, and their subordinates, the *encomenderos*, who lorded over the massive territories that would ultimately transform into the modern *latifundia* system, subdued the Native populations of Central and South America as *peninsulares*. They were the direct *Spanish-born* surrogates of the crown who based their claims to the New World on the status *jus sanguinis* provided. Their bloodline carried with it the pedigree, the permission, the capital, the charters, the subordinates, and the slaves to dominate the New World.

Peninsulares also imported to the Americas a blood-based elitism that spread an enduring pigmentocracy across the hemisphere, producing hierarchically descending admixtures of *creoles*, *mestizos*, *mulatos*, and *moriscos*, bookended by *blancos* and *indígenas*.³³ In an ethno-geographic sense, the ascriptive attribute of *jus sanguinis* and its association with European ethnicity and identity politics contrasted with and ultimately yielded to the functional attribute of *jus soli*, which stimulated immigration and abetted territorial acquisition and expansion.³⁴ However, the separation of *jus soli* and *jus sanguinis* was not as neat as these heuristic categories suggest. Hybridized classes of pigmentocracy endured, only to be magnified by the early seventeenth century importation of African slaves.

The *jus soli* principle powerfully but subtly affected the post-colonial entitlement to land in the New World. It impacted a trilogy of Cherokee cases decided by the United States Supreme Court,³⁵ each penned by Chief Justice Marshall. These cases meant to balance the rule of law while addressing the recognized abridgment and ultimate dispossession of Native ancestral territory and treaty rights, all of which were framed totemically by the fraudulent Treaty of New Echota.

The first of these cases, *Johnson v. M'Intosh* (1823), provided the controlling principle that impacted Native sovereignty claims: the European discovery of America “gave exclusive title to those who made it,” and that such a priority of this discovery doctrine “necessarily diminished” the power of Indian nations “to dispose of the soil at

³² See generally William Safran, *Citizenship and Nationality in Democratic Systems: Approaches to Defining and Acquiring Membership in the Political Community*, 18 INT'L POL. SCI. REV. 313 (1997) (discussing ascriptive and functional constructions of nationality and changing notions of membership in political community).

³³ The Museo Nacional del Virreinato, in Tepotzotlán, Mexico houses an anonymous 18th century oil on canvas painting depicting stylized 16 racial groupings that represent the *Sistema de castas colonial*. On the caste system generally and as mostly applied in India, see LOUIS DUMONT, *HOMO HIERARCHICUS: ESSAI SUR LE SYSTÈME DES CASTES* (1966).

³⁴ See Weil, *supra* note 29.

³⁵ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); See generally *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

their own will, to whomsoever they pleased.”³⁶ The case associated the discovery doctrine with the phrase “of the soil,” referencing this connection eight times in the judgment.³⁷ However, these telluric references attached as the intellectual and historical default position of benefit only to the colonists after their migratory arrival in the New World, and not to the indigenous inhabitants who had historically occupied these homelands. This ascription of migratory significance to colonists while denying “of the soil” rights to the Natives drew from a bedrock principle that would rationalize Native displacement, secure colonial entitlement, rework a principle imported from Roman law, and apply it to the westerners who constructed it. It would serve as a jurisprudential talisman to assert Christian authority and secure an undisturbed chain of title linking royal authority to republican rule. It selectively wove political and historical concepts into “a garment fit for a king and yet free of any king’s claims,” producing “a legal theory suitable for a ‘democratic’ empire,”³⁸ dressed up in part by the Treaty of New Echota. To discuss this connection between the European Enlightenment value assigned to the discovery doctrine, and its relation to the principle of *jus soli*, it is first important to place into context the circumstances leading to the signing of the fraudulent treaty.

II. THE BETRAYAL

John Ross (1790-1866; *Kooweskoowe*) served as Principal Chief of the Cherokee Nation between 1828-1866.³⁹ He was a creative, subtle and “skilled political operator,”⁴⁰ privately educated, half Scottish, and one-eighth Cherokee.⁴¹ Although unable to speak

³⁶ *Johnson v. M’Intosh*, at 574 (emphasis added). For a discussion of the global reach of the discovery doctrine, see generally 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 (2011).

³⁷ *Johnson v. M’Intosh*, at 545 (associating the phrase with owners and proprietors); 563 (proprietors who could not be “devested” of their rights); 570 (establishing one of the first principles of colonial law); 574 (relating to rightful occupancy; connecting to the original fundamental principle of discovery); 575 (relating to the exclusive right to acquire); 586 (allowing for reservations and stipulations); and 603 (connecting to powers of government).

³⁸ d’Errico, *supra* note 28.

³⁹ Ross rose through the ranks of the fractious, clannish, and confederated structure of the Cherokee Nation. Following 1817 land cession deals that resulted in a geographic split of the Cherokee, along with the creation of the Cherokee Nation West (of the Mississippi River), Ross joined and eventually became leader of the consolidated National Council in 1828, and he assumed that position until his death in 1866. See Walter H. Conser, Jr., *John Ross and the Cherokee Resistance Campaign, 1833–1838*, 44 J.S. HIST. 191, 193 (1978).

⁴⁰ STEVE INSKEEP, JACKSONLAND: PRESIDENT ANDREW JACKSON, CHEROKEE CHIEF JOHN ROSS, AND A GREAT AMERICAN LAND GRAB 7 (2016).

⁴¹ Interethnic relations among Cherokees and white traders and backwoodsmen of the ante-Revolutionary period were common, and many of the “leading men” of the Cherokee had more white than Indian blood. Under the former laws of the Cherokee Nation, “anyone who could prove the smallest portion of Cherokee blood was rated as Cherokee, including many of one-sixteenth, one-thirty-second, or less of Indian blood.” HANDBOOK OF AMERICAN INDIANS NORTH OF MEXICO 913 (Frederick Webb Hodge, ed., 1907). For more, see generally THEDA PERDUE, MIXED BLOOD INDIANS: RACIAL CONSTRUCTION IN THE EARLY SOUTH

Cherokee fluently, he grew up among Cherokee children and Cherokee leaders such as Pathkiller (*Nungnoheehdahee*) and Charles Renatus Hicks favored him.⁴² Ross's fluency in English, his previous service as an Indian agent for the United States government, and his diplomatic ability to elide between cultures affirmed his standing as a major negotiating asset in the Cherokees' bid to preserve tribal sovereignty in the face of encroaching United States interests. After Pathkiller and Hicks died within weeks of each other, Ross assumed a leadership position and one year later became Principal Chief.⁴³ He guided the Nation through a period of factional politics, forced migration, internal Civil War, the United States Civil War (politically siding with the Confederacy), and reconstruction.⁴⁴

Of the many challenges in his career, history settles on one seminal event. On December 29, 1835, he and a delegation of Cherokees were in route to Washington, D.C. for negotiations on tribal sovereignty. Unknown to him, a group of twenty other Cherokees, led by Major John Ridge (*Ca-nung-da-cla-geh*, "the man who walks on the mountaintop"),⁴⁵ his son John, and John's cousin, the pro-assimilation *Cherokee Phoenix* newspaper editor Elias Boudinot (*Gallegina Uwati*),⁴⁶ had brokered a deal with Indian Commissioners of the Jackson administration, General William Carroll and John

(2003) (discussing acculturation and miscegenation among Native peoples in the North American southeast); and FAY A. YARBROUGH, *RACE AND THE CHEROKEE NATION: SOVEREIGNTY IN THE NINETEENTH CENTURY* (2008) (discussing themes of interracialism and identity in Native American culture).

⁴² See GARY E. MOULTON, JOHN ROSS, CHEROKEE CHIEF 33 (1978) (noting Hicks particularly as Ross' mentor).

⁴³ See ROBERT J. CONLEY, A CHEROKEE ENCYCLOPEDIA 119 (2007) (following William Hicks' short stint as Principal Chief).

⁴⁴ See generally MOULTON, *supra* note 42. On the belabored decision to side with the Confederacy, see Gary E. Moulton, *Chief John Ross During the Civil War*, 19 CIVIL WAR HIST. 314, 318 (1973) (announcing at the Cherokee National Conference "the time has now come . . . to adopt preliminary steps for an alliance with the Confederate states."). Two-thirds of Cherokee men fought for the Union, however after the Union troops abandoned nearby Fort Gibson, Ross (himself a plantation and slave owner) sided with the Confederacy. After the war, the Cherokee Nation signed its last treaty with the United States, the punitive Treaty of 1866. See *History*, CHEROKEE NATION, <https://www.cherokee.org/about-the-nation/history/> [<https://perma.cc/E9KH-6JF8>].

⁴⁵ See Brian Hicks, *The Cherokees vs. Andrew Jackson*, SMITHSONIAN MAG. (Mar. 2011), <https://www.smithsonianmag.com/history/the-chokees-vs-andrew-jackson-277394/> [<https://perma.cc/X5D7-7QZJ>] (translating literally Ridge's Cherokee naming into English). Ridge fought alongside western Tennessee forces of General Andrew Jackson against the British and Creek Red Sticks in the War of 1812. Jackson awarded him the rank of Major for the role he and his 500 Cherokees played in defeating the Creeks in the 1814 Battle of Horseshoe Bend, and for negotiating Creek Chief Lamochattee's surrender to Jackson, which forced the cession of 25 million acres of Creek land (about one-half of present-day Alabama and one-fifth of Georgia) to the United States. For his efforts and in consideration of his land holdings and business interests, Ridge earned the rank and title for which he thereafter became known. In the 1820s and 1830s he served as Speaker of the National Cherokee Council. See *The Life of Major Ridge*, CHIEFTAINS MUSEUM, <https://chieftainsmuseum.org/2011/05/history-of-chieftains/> [<https://perma.cc/B6B5-GS3G>]; See *Indian Treaties and the Removal Act of 1830*, ST. DEP'T. OFF. HIST., <https://history.state.gov/milestones/1830-1860/indian-treaties> [<https://perma.cc/86BP-2R37>].

⁴⁶ See generally RALPH HENRY GABRIEL, ELIAS BOUDINOT CHEROKEE & HIS AMERICA (1941); CHEROKEE EDITOR: THE WRITINGS OF ELIAS BOUDINOT (Theda Perdue ed., 1996).

Schermerhorn. The deal concluded the Treaty of New Echota, which was signed on that day.

The unofficial Cherokee ‘Treaty Party’, comprised of not one member empowered to convene a National Council for such a treaty-making purpose,⁴⁷ ceded ancestral land in the southeast to the United States in exchange for five million dollars, a promised Cherokee-appointed delegate to the United States House of Representatives,⁴⁸ and new land 1,200 miles to the west; in and around present-day Tahlequah, Oklahoma. The treaty extended citizenship to heads of households desiring to remain⁴⁹ in line with treaty provisions extended to the Cherokees in 1817 and 1819.⁵⁰ However, Jackson later struck that provision.⁵¹ Jackson’s rejection underscored the fundamental disjunction in the American mindset, which did not view the Cherokees as “citizens to begin with even as sovereignty was claimed over them.”⁵² They were not of the soil or the bloodline in the same way the European presentations of *jus soli* or *jus sanguinis* claimed to be. A nebulous category had to be constructed for them—domestic dependents. This category, at best, made them quasi-sovereigns in need of tutelage and guardianship.⁵³ This constructed category of diminished capacity helped to overlook the Treaty Party’s lack of credentials and standing to conclude the New Echota Treaty. Domestic dependency asserted an endemic quality of infancy to the character of Native Americans, which Europeans assumed required guardianship. Guardianship, done partly for the good of Natives, nevertheless required the contested means by which the settlers secured Native signatures.

In *Jackson v. Wood* (1810), New York’s celebrated jurist and soon-to-be Chancellor of the Court of Chancery (1814-1823), James Kent, described the inapplicability of *jus soli* citizenship to Native Americans as follows:

⁴⁷ BROWN, *supra* note 5, at 499 (noting the right to call a National Council vested only in the Principal Chief or his delegate).

⁴⁸ Art. 7, Treaty of New Echota, *supra* note 2 (holding “[the Cherokee] shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.”). For background, see Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 PUB. INT. L.J., 91 (2005). In August 2019, the Oklahoma-based Cherokee Nation and its 370,000 citizens (representing the largest of the three federally-recognized Cherokee tribes) announced its intention to appoint Kimberly Teehee to serve as the Cherokee delegate. The treaty is silent on the question of the delegate’s status as a voting or non-voting member of the House, should the measure take effect. See Harmeet Kaur, *The Cherokee Nation Wants a Representative in Congress, Taking the US Government up on a Promise it Made Nearly 200 Years Ago*, CNN (Aug. 25, 2019), <https://www.cnn.com/2019/08/25/politics/chokeee-nation-congressional-delegate-treaty/index.html> [https://perma.cc/BN5H-5CUU].

⁴⁹ See art. 12, Treaty of New Echota, *supra* note 2 (provided they reside in North Carolina, Tennessee, or Alabama).

⁵⁰ KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600-2000, at 60–61 (2015).

⁵¹ See BROWN, *supra* note 5, at 498 (including a promise of 160 acres of land, as well).

⁵² PARKER, *supra* note 50, at 61.

⁵³ Marshall “more correctly” denominated them as “domestic dependent nations.” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.), at 17.

Their political relation to this state is peculiar, and *sui generis*. If they are not *aliens* in every sense, because of their dependence as a tribe, and their right to protection, they cannot be considered as subjects *born under allegiance*, and bound, in the common law sense of the term, to all its duties.⁵⁴

This nuanced interpretation of *jus soli* connected the right of soil to the embedded European understanding of fealty. This fealty attached to a sovereign authority framed according to the features of European history, identity, political structure, and geo-space (specifically land cultivation). The Scotsman in *Calvin's Case*, although alien to England, shared a common allegiance to the crown, thus entitling him to the same rights of ownership as had belonged to the English. An unusual circumstance necessitated this extension of allegiance: When Elizabeth I died without issue in 1603, the Tudor dynasty came to an end, passing the crown to her cousin—the Scottish Stuart, King James VI.⁵⁵ He unified Scotland, England, and Ireland and ruled as James I, necessitating a reconsideration of common law inheritance structure. The conveyance in *Calvin's Case* established the *jus soli* principle: “all persons born within any territory held by the King of England were to enjoy the benefits of English law as subjects of the King.”⁵⁶

Jus soli, once imported to the United States, carried with it a pre-existing fealty condition that Natives simply could not possess, despite some later attempts at assimilation.⁵⁷ Abstractly, this element of *jus soli* bore some resemblance to the Spanish *Requerimiento* (1513), which divinely ordained a right to possess the territories of the New World based on theological qualities internal to Christendom, which were unknown and unavailable to “savages.”⁵⁸

III. THE RESPONSE

The complete southeastern cession of Cherokee Nationhood to the federal government created paroxysms within the tribe. Ross denounced the instrument as a

⁵⁴ Jackson v. Wood, 7 Johns. 290, 295 (N.Y. Sup. Ct. 1810) (emphasis added).

⁵⁵ See generally Christian Schneider, *A Kingdom for a Catholic? Pope Clement VIII, King James VI/I, and the English Succession in International Diplomacy (1592-1605)*, 37 INT'L HIST. REV. 119-41 (2014) (detailing the succession politics involving the death of the Virgin Queen, Elizabeth I, the last of the six monarchs of the House of Tudor).

⁵⁶ Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 73-74 (1997).

⁵⁷ See generally FREDERICK HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* (1984).

⁵⁸ See generally Marcelo Gabriel Zorrilla, *El Acta de Requerimiento y la Guerra Justa*, 885 REVISTA DEL NOTARIADO 247 (2006); Lewis Hanke, *The "Requerimiento" and Its Interpreters*, 1 REVISTA DE HISTORIA DE AMÉRICA 25 (1938). See also Pope Nicholas V's DUM DIVERSAS (1452) and Pope Callixtus III's INTER CATERA (not to be confused with pope Alexander VI's INTER CATERA of 1493), which granted Portugal territorial rights of discovery along the West Coast of Africa.

“pretended treaty,” “deceptive to the world and a fraud upon the Cherokee people.”⁵⁹ A petition denouncing the treaty collected 15,964 Cherokee signatures, which represented a huge majority of the tribal population.⁶⁰ Ross formally protested to the United States Congress, describing the treaty as a denationalization and disenfranchisement “effected by the . . . venerated . . . sacred appellation of treaty.”⁶¹

Ridge, however, viewed the treaty as a rational, political attempt to preserve dwindling tribal sovereignty and cultural cohesiveness in the face of overwhelming odds. Jackson had made this point explicitly clear in an 1835 circular addressed to the Cherokees: “[Y]ou cannot remain where you are now. . . . You have but one remedy within your reach. And that is, to remove to the West.”⁶² Ridge’s few defenders construed Jackson’s message as the one-and-only option—a Hobson’s Choice.⁶³ Jackson’s friend and Commissioner of Indian Treaties, Alfred Balch,⁶⁴ viewed removal as a charitable expression of stewardship. He wrote to Jackson that “[r]emoval of the Indians would be an act of *seeming* violence;”⁶⁵ it would prove to be in their interest as “[t]hese untutored sons of the Forest, cannot exist in a state of Independence, in the vicinity of the white man. If they will persist in remaining where they are, they may begin to dig their graves and prepare to die.”⁶⁶ Historian Peter Onuf argued that the “ideological rationale for an expansive republican empire” depended on a self-serving logic establishing Indian removal as an expression of guardianship.⁶⁷

⁵⁹ *Letter from John Ross, Principal Chief of the Cherokee Nation of Indians: In Answer to Inquiries from a Friend Regarding the Cherokee Affairs with the United States, Followed by a Copy of the Protest of the Cherokee Delegation, Laid Before the Senate and House of Representatives at the City of Washington, on the Twenty-first Day of June, Eighteen Hundred and Thirty-six*, DIGITAL LIBR. GEORGIA, https://dlg.usg.edu/record/dlg_zlna_pam017#text [<https://perma.cc/DZL5-YLK2>].

⁶⁰ BROWN, *supra* note 5, at 499 (of an estimated population of 17,000). There is some dispute about the number of dissenting Cherokees. An 1835 census indicated that there were 16,743 Cherokees residents, not counting their slaves. Three thousand Cherokees had already enrolled to remove, and it appears the signatures of Cherokee women and children were counted among the petitioners denouncing the treaty. See Kenneth Penn Davis, *The Cherokee Removal, 1835-1838*, 32 TENN. HIST. SOC’Y 311, 316 (1973).

⁶¹ LETTER FROM CHIEF JOHN ROSS TO THE SENATE AND HOUSE OF REPRESENTATIVES, RED CLAY COUNCIL GROUND, CHEROKEE NATION (Sept. 28, 1836).

⁶² Andrew Jackson, *To the Cherokee Tribe East of the Mississippi, Mar. 16, 1835*, GILDER LEHRMAN INST., <https://ap.gilderlehrman.org/resource/andrew-jackson-choke-tribe-1835> [<https://perma.cc/KY8V-CF4Z>].

⁶³ *Hobson’s Choice*, MERIAM WEBSTER, <https://www.merriam-webster.com/dictionary/Hobson%27s%20choice> [<https://perma.cc/V726-YFHT>] (defining the phrase as “an apparently free choice when there is no real alternative”). Ridge made this decision at great personal cost given his extensive land, ferry, and business holdings in the land he had to give up.

⁶⁴ Balch owned the plantation next to Jackson’s plantation in Tennessee, from which their close friendship began. See Alfred Balch—*Friend of Andrew Jackson*, BALCHIPEDIA (Dec. 31, 2017), [http://balchopedia.wikidot.com/alfredbalch1#:~:text=Alfred%20Balch\(September%2017%2C%201785,Le wis%20then%20eventually%20Anna%20Newman](http://balchopedia.wikidot.com/alfredbalch1#:~:text=Alfred%20Balch(September%2017%2C%201785,Le wis%20then%20eventually%20Anna%20Newman) [<https://perma.cc/UYQ6-87G6>].

⁶⁵ *Letter from Alfred Balch to Andrew Jackson, January 8, 1830*, LIBR. CONG., https://www.loc.gov/resource/maj.01074_0281_0284/?sp=1&st=text [<https://perma.cc/X8L7-6MDX>] (last visited Sept. 13, 2020).

⁶⁶ *Id.*

⁶⁷ Peter S. Onuf, “*We Shall All Be Americans*”: *Thomas Jefferson and the Indians*, 95 INDIANA MAG. HIST. 103, 136 (1999). Historian Glenn Tucker traced this rationalization to Jefferson dexterous belief that depriving Natives of their land would help them to better lives. See GLENN TUCKER, *TECUMSEH: VISION OF GLORY* 136–40 (1973).

Ridge probably accepted Balch's fatal conclusion, and the decision to remove came at considerable personal expense given the sizeable business holdings he had to give up.⁶⁸ History debates the suggestion that Ridge had no option but to sign the treaty. However, Ross' subsequent efforts to void the treaty also failed, suggesting that a violent fate awaited the Cherokees in their encounter with United States regardless of the diplomatic pathway taken to stay or go.⁶⁹

Ridge also claimed that he signed his own death warrant by committing his name to the treaty.⁷⁰ His prediction came true, and not for him alone. On June 22, 1839, Ridge, his son, and nephew were killed in closely connected attacks following a purported and discreet tribal verdict of treason.⁷¹

IV. THE BETRAYAL IN BROADER CONTEXT

Considered fraudulent even among supporters of Jackson's administration,⁷² the United States Senate nevertheless ratified the treaty on May 23, 1836 by one vote.⁷³ Prominent white opposition included important names;⁷⁴ adding to the general resistance movement arising in protest of the poor treatment of Natives that had spread among

⁶⁸ Ridge's decision to sign the treaty came with direct, personal costs to his land holdings and established business interests in Georgia. He had been the third wealthiest Cherokee at that time, operating a 200-acre plantation with 15-30 Black and Native slaves, a trading post, and a ferry across the Oostanoulah River. *See Cherokee Leader Major Ridge and the Indian Removal Act*, GPB EDUC, YOUTUBE, at 2:00 (Sept. 12, 2019) <https://www.youtube.com/watch?v=fHkWHlmekPY>.

⁶⁹ Supreme Court Justice Joseph Story (1779-1845), considered one of the four most important justices of the nineteenth century, foretold of a similar fate for the Cherokee. In route to the 1832 opening session of the Supreme Court in Washington, D.C., Story encountered two Cherokee Chiefs in Philadelphia. Fully aware of the forces working against their Nation, and although impressed with knowledge of the law and advocacy skills, he wrote to his wife: "I never in my whole life was more affected by the consideration that they and all their race are destined to destruction." . . . "I feel, as an American, disgraced by our gross violation of the public faith towards them . . . [and] in the course of Providence there will be dealt to us a heavy retributive justice." LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 741 (1974) (quoting Story's 1832 letter to his wife). For a debate about the motivations behind the removal campaign, as construed as an act to avoid or promote annihilation, see generally 2 ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM, 1822-1832 (1998) (supporting the thesis from Jackson's leading biographer that Jackson sought to avoid the decimation of the tribe through removal), and ANTHONY F. C. WALLACE, THE LONG, BITTER TRAIL: ANDREW JACKSON AND THE INDIANS 5 (1993) (calling Jackson "the political prime mover of the Indian-removal process," and supporting the thesis that Jackson pursued a policy of coercion).

⁷⁰ JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION 295 (1988).

⁷¹ *See* Will Chavez, *Cherokee Historic Profile: The Murder of Elias Boudinot*, CHEROKEE PHOENIX (Apr. 30, 2012), <https://www.cherokeephoenix.org/Article/index/6214> [<https://perma.cc/MZT5-VFXX>] (discussing the retribution); *See also* *The Life of Major Ridge*, CHIEFTAINS MUSEUM, <https://chieftainmuseum.org/2011/05/history-of-chieftains/> [<https://perma.cc/6QLH-6QZ8>].

⁷² Carl J. Vipperman, *The Bungled Treaty of New Echota: The Failure of Cherokee Removal, 1836-1838*, 73 GA. HIST. Q. 540, 540 (1989).

⁷³ *See* Matthew L. Sundquist, *Worcester v. Georgia: A Breakdown in the Separation of Powers*, 35 AM. INDIAN L. REV. 239, 247 (2010).

⁷⁴ *See* Ovid Andrew McMillion, *Cherokee Indian Removal: The Treaty of New Echota and General Winfield Scott* 30 (Aug. 2013) (M.A. thesis, East Tennessee State University) (including Daniel Webster, Edward Everett, Theodore Frelinghusen, Henry R. Storrs, John Quincy Adams, Sam Houston, and Davy Crockett).

progressive communities and churches of the Northeast.⁷⁵ Anticipating violence in the four states overlapping with the Cherokee Nation, Jackson mustered 10,000 troops from Tennessee, North Carolina, Alabama, and Georgia to keep the peace.⁷⁶ The ratification set a two-year deadline for the Cherokees' exodus. On May 17, 1838, Jackson's successor, President Martin Van Buren (1782-1862) issued the order to Major General Winfield Scott: "cause the Cherokee Indians yet remaining in North Carolina, Georgia, Tennessee, and Alabama to remove to the West."⁷⁷ This directive commenced the "most notorious tragedy of forced removal" that became known as the Trail of Tears (*Nunahi-duna-dlo-hilu-I*).⁷⁸

The forced march resulted in the death of one-quarter of the Cherokee people.⁷⁹ It represented a stunning *dénouement*—the complete dispossession of 26 million acres of ancestral land in Georgia alone, all taken within the first 40 years of the nineteenth century.⁸⁰ More than a historical act of betrayal, Cherokees commonly regard the treaty as the cause of implacable problems that continue to beset the Nation.⁸¹

Many reasons contributed to the taking of the Cherokees' ancestral hunting grounds. Land speculation, Manifest Destiny, railroad barons intent on penetrating the interior with roads and access lines, all combined as factors to put pressure on Cherokee tribal holdings. Additional causes included the influx of frontier settlers, the 1828 election of removal-minded President Jackson, the 1828 discovery of gold in Cherokee Territory (in Dahlonega, northwestern Georgia), and the 1830 Indian Removal Act.⁸² By 1832, the political and personal safety situation in Georgia had deteriorated to such an extent that the Cherokees moved their capital from New Echota to Red Clay, Tennessee. The relocation,

⁷⁵ See generally JEREMIAH EVARTS, *CHEROKEE REMOVAL: THE "WILLIAM PENN" ESSAYS AND OTHER WRITINGS* (Francis Paul Prucha ed., 1982) (reprinting the popular 24 essays written with Christian conviction of the immorality of Andrew Jackson's Indian removal policy); CLAUDIO SAUNT, *UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY* (2020) (noting the fraudulent claims of white Northeasterners).

⁷⁶ R. G. DUNLAP TO EAST TENNESSEE VOLUNTEERS, SEPT. 14, 1836, IN REPORT OF THE SECRETARY OF WAR, S. EXEC. DOC. NO. 120, 25th Cong., 2d Sess. 1837–38, 41.

⁷⁷ *Major General Winfield Scott's Orders No. 25 Regarding the Removal of Cherokee Indians to the West, May 17, 1838*, DOCS TEACH, NAT'L ARCHIVES, <https://www.docsteach.org/documents/document/scott-order-25> [<https://perma.cc/MCW9-WSW3>] (authorizing the forced removal of the Cherokee) (last visited Sept. 13, 2020).

⁷⁸ Vipperman, *supra* note 72, at 540.

⁷⁹ *Indian Removal 1814-1858*, PBS, <https://www.pbs.org/wgbh/aia/part4/4p2959.html> [<https://perma.cc/8H7D-TCAU>] (noting that four thousand of the sixteen thousand Cherokees forcibly removed "died of cold, hunger, and disease on their way to the western lands.").

⁸⁰ BAKER, *supra* note 69, at 733. Moreover, the Cherokees had already surrendered half of their ancestral land by the end of the Revolutionary War in 1783. See Tim Alan Garrison, *Cherokee Removal*, NEW GA. ENCYCLOPEDIA (July 23, 2018), <https://www.georgiaencyclopedia.org/articles/history-archaeology/cherokee-removal> [<https://perma.cc/8DTB-R6WE>].

⁸¹ Shereen Marisol Meraji, *A Treacherous Choice and a Treaty Right*, NPR (Apr. 8, 2020), <https://www.npr.org/transcripts/824647676> [<https://perma.cc/BSJ4-CQJ8>] (recording the statement of Principal Chief of Cherokee Nation Chuck Hoskin, Jr.).

⁸² Indian Removal Act of 1830, Pub. L. 21-148, 4 Stat. 411 (mandating that all Native Americans east of the Mississippi River relocate to land west of the Mississippi).

however, only delayed their forced removal by six years.⁸³ More tragedy would follow the diaspora. “Old Settlers”—Natives who had voluntarily removed to the West in 1805 and 1806 to preserve traditional ways—violently clashed with Ross’s later arriving assimilationists over governance of the Oklahoma Territory, a clash that further and perhaps irrevocably splintered the Nation.⁸⁴

Indications of this diaspora stretched back for decades. However, the unsettled political status of the interior beyond the Appalachians occupied more immediate attention than resolution of the Indian question. This status involved competing French, British, Spanish, and encroaching American interests. It first had to play out through the conclusion of the French and Indian War (1756-1763); the promulgation of the Confederated Congress’ Northwest Ordinance (1787), which outlined the process for admitting new states northwest of the Ohio River;⁸⁵ the Louisiana Purchase (1803);⁸⁶ and the War of 1812, which was fought in part over competing British, Native, and American claims to the interior.

Equally unresolved throughout this period was the deeply conflicted early Republican mindset toward Indian diplomacy. Thomas Jefferson (1743-1826) often wrote with great admiration of Natives,⁸⁷ and of the melancholy sequel of their history.⁸⁸ However, Jefferson’s idea of Indian removal:

had its origins in the long-held view that the migration of eastern Indian tribes across the Mississippi River would be good for both whites and Native Americans. It would provide economic opportunity for the former and give the latter time and space in which to develop their potential for what the Anglo-European mindset thought of as civilization.⁸⁹

⁸³ See *Red Clay-James F. Corn Interpretive Facility*, <http://wsharing.com/WSphotosRedClay2.htm> [<https://perma.cc/KD6Q-7WQU>] (presenting slides, images, and artifacts of Cherokee Red Clay).

⁸⁴ See Mary Young, *The Cherokee Nation: Mirror of the Republic*, 33 AM. Q. 502 (1981) [hereinafter *The Cherokee Nation*]. See generally JOHN SEDGWICK, *BLOOD MOON: AN AMERICAN EPIC OF WAR AND SPLENDOR IN THE CHEROKEE NATION* (2018) (detailing internecine problems involving removal and nationhood among Cherokee).

⁸⁵ See *Document for July 13th: “An Ordinance for the Government of the Territory of the United States North-West of the River Ohio,”* NAT’L ARCHIVES, <https://www.archives.gov/historical-docs/todays-doc/index.html> [<https://perma.cc/9ZJR-BDE2>] (ordinance adopted on July 13, 1787); See generally PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* (2019).

⁸⁶ A Convention Between the United States of America and the French Republic (Louisiana Purchase), Fr.-U.S., Apr. 20, 1803, General Records of the U.S. Government; Record Group 46, NAT’L ARCHIVES, <https://www.archives.gov/legislative/features/louisiana-statehood/louisiana-purchase.html> [<https://perma.cc/NW72-WYA5>].

⁸⁷ See, e.g., *Thomas Jefferson to John Adams, June 11, 1812*, FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-05-02-0100> [<https://perma.cc/X3X4-SXQC>] (expressing “awe & veneration” for Cherokee warrior and orator Outassete).

⁸⁸ THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, Query XI, Aborigines (1785), reprinted in <http://xroads.virginia.edu/~Hyper/JEFFERSON/ch11.html> [<https://perma.cc/7L3G-EACR>].

⁸⁹ See generally S. Charles Bolton, *Jeffersonian Indian Removal and the Emergence of Arkansas Territory*, 62 ARK. HIST. Q. 253 (2003).

Crucial to a general early republican understanding of civilization was the idea that settlers should exercise dominium over the land by converting it from its natural state into individually farmed plots of land.⁹⁰ This conception differed from the mere occupancy and transient hunting and fishing practices that conformed to European conceptions of Native uses of vast communal acreage. Jefferson's idea of introducing Natives to the "practice of husbandry and of the household arts" was not only meant to avert the precarious economics of subsistence, but it also intended to create a material association that more tightly bound the natural world to the reasoned world of human interconnection.⁹¹ Jefferson "argued that Indian peoples could only benefit by submitting to the discipline of the market, paying their debts to merchant creditors, and exchanging portions of their vast land reserves for the capital needed to make farms."⁹²

Jefferson seemed to prefer a policy of cooptation or gradual circumscription, whereby Natives would "pare . . . off"⁹³ and eventually integrate with the white society.⁹⁴ They would take on debt (which would force them to sell off land), engage with trading houses, adopt agrarian lifestyles, and possibly "in time . . . incorporate with us as citizens."⁹⁵

Thomas Paine (1737-1809) expressed this cooptation in progressive, directional terms. He emphasized the evolutionary movement from a natural state to a civilized state as a process of land cultivation: "for though every man, as an inhabitant of the earth, is a joint proprietor of it in its natural state, it does not follow that he is a joint proprietor of cultivated earth."⁹⁶ In words foreshadowing Marshall's discovery doctrine and the assignment of *dominium* to those who "made it," Paine wrote that "the additional value made by cultivation . . . became the property of those who did it[.]"⁹⁷ As Natives did not make the Earth, their natural right to occupancy could not stand in the way of those who added value to soil through cultivation, which Paine described as one of the supreme human inventions.⁹⁸ *Jus soli* thereby contained a subtle but essential qualitative component, a component based on improving, clearing, and parceling of the land. Cultivation not only added value and utility to the land, it generated taxable revenue for the sovereign. It incentivized the right of inheritance, strengthened fealty to the political order, and

⁹⁰ *Id.*

⁹¹ Thomas Jefferson, *First Annual Message to Congress, Dec. 8, 1801*, AVALON PROJECT, https://avalon.law.yale.edu/19th_century/jeffmes1.asp [<https://perma.cc/HK6Z-2R8J>].

⁹² Peter S. Onuf, "We Shall All Be Americans": Thomas Jefferson and the Indians, 95 *IND. MAG. HIST.* 103, 136 (1999).

⁹³ *From Thomas Jefferson to William Henry Harrison, Feb. 27, 1803*, FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-39-02-0500> [<https://perma.cc/79MZ-YLM4>] [hereinafter *Jefferson, Letter to William Henry Harrison*].

⁹⁴ Christian B. Keller, *Philanthropy Betrayed: Thomas Jefferson, the Louisiana Purchase, and the Origins of Federal Indian Policy Removal*, 144 *PROC. AM. PHIL. SOC'Y* 39, 41 (2000).

⁹⁵ *Jefferson, Letter to William Henry Harrison, supra* note 93.

⁹⁶ THOMAS PAINE, *AGRARIAN JUSTICE* 9 (1999) [1797], <http://piketty.pse.ens.fr/files/Paine1795.pdf> [<https://perma.cc/A3BW-MRPY>].

⁹⁷ *Id.*

⁹⁸ *Id.*

promoted the vested interests of nationhood. Labor directed toward land cultivation marked a key feature of progressivism in the early republican mindset, and it served as the emerging Lockean basis for private property,⁹⁹ as well as liberalism, in North America.¹⁰⁰

Jefferson did not believe Native peoples could obstruct the pull of human history from the natural to the civilized state. He labeled any such resistance “foolhardy.”¹⁰¹ Embedded in this logic was a view that Natives were misguided in their “sanctimonious reverence” for ancestral customs, which treated reason as a “false guide,” and self-improvement as a “perilous innovation.”¹⁰² According to Jefferson, ancestral thinking marked the dominance of the Natives’ anti-Enlightenment view of progressivism. “[T]hey, too, have their anti-philosophers, who find an interest in keeping things in their present state.”¹⁰³ Notwithstanding this view, Jefferson maintained a textured appreciation for the plight of the Native people in view of the wrongs that had been committed against them. He harbored an idea of recovering Native esteem from this process of cooptation, and yet he could not escape from hauntings of “justice and fear” for “the injustices we have done them.”¹⁰⁴

V. LAND GRANTS, THE OHIO VALLEY, AND MORE FRAUD

The turbulent status of the interior, reflected at the outset by the three Powhatan Wars between the Algonquin alliance and the first English colonists at coastal Jamestown,¹⁰⁵ belied the philosophical underpinnings of the discovery doctrine as a source of sovereignty as much as the discovery doctrine abridged the political status of Natives as

⁹⁹ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19–22; see generally ch. V (1986) [1690] (noting that the “wild Indian, who knows no enclosure” shares Nature as a “tenant in common”; adding that human labor takes “out of the hands of nature, where it was common,” and “enclose[es] it from the common”).

¹⁰⁰ See Duncan Ivison, *Locke, liberalism and empire* 86, 92 in THE PHILOSOPHY OF JOHN LOCKE: NEW PERSPECTIVES (Peter R. Anstey ed., 2003) (noting the view that Amerindians did not live in properly civil societies because they did not cultivate the land beyond what they could use and lost out on what commercial development could bring to market economies and commercial systems).

¹⁰¹ *Jefferson, Letter to William Henry Harrison*, supra note 93.

¹⁰² Thomas Jefferson, *Second Inaugural Address* (Mar. 4, 1805), AVALON PROJECT, https://avalon.law.yale.edu/19th_century/jefinau2.asp [<https://perma.cc/GJ46-QVSB>].

¹⁰³ *Id.*

¹⁰⁴ *From Thomas Jefferson to Benjamin Hawkins, 13 August 1786*, FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-10-02-0159> [<https://perma.cc/V7JH-VQRE>] (“The two principles on which our conduct towards the Indians should be founded are justice and fear. After the injuries we have done them, they cannot love us, which leaves us no alternative but that of fear to keep them from attacking us.”).

¹⁰⁵ See J. Frederick Fausz, *An “Abundance of Blood Shed on Both Sides”: England’s First Indian War, 1609-1614*, 98 VA. MAG. HIST. & BIO. 3 (1990) (discussing the first Anglo-Powhatan War, 1609-1614). The second Powhatan War lasted from 1622-1632, and the Third Powhatan War from 1644-1646. For more the Powhatan Wars and the Algonquin alliance leaders, Powhatan (*Wahunsenacawh*) and his brother *Opechancanough*, see generally Kevin E. Grimm, *The Tidewater Wars, 1609-1946*, in THE ROUTLEDGE HANDBOOK OF AMERICAN MILITARY AND DIPLOMATIC HISTORY: THE COLONIAL PERIOD TO 1877 (2014).

a resistance force. Contrary to the Enlightenment notion, the European discovery of America did not immediately yield uncontested title “to those who made it.”¹⁰⁶

Moreover, in 1763, a general design to monetize the North American interior intensified. Britain’s King George III attempted by Royal Proclamation to prevent land-hungry colonists from jumping over the Appalachian Mountains and settling into the backwoods expanse of the Ohio Valley.¹⁰⁷ This “claim-jumping” threatened to interfere with the revenue-generating private enterprises established through previous land grant charters from the king.¹⁰⁸ The Proclamation attracted the support of the Shawnee Nation, which later aligned with the British during the Revolutionary War to staunch encroachments into Shawnee Territory caused by the overlapping and westward-stretching colonial claims of Virginia and Kentucky.¹⁰⁹ The alliance ultimately proved catastrophic for the Shawnees, who unknowingly had all of their land ceded to the United States by their British ally with the signing of the 1783 Treaty of Paris, which ended the Revolutionary War.¹¹⁰ This lesson proved instrumental in forging Tecumseh’s (*Tekoomsē*) confederated Native resistance movement during the War of 1812, in view of divergent long-term political interests with the British and the superior military strength of the United States.¹¹¹

Land hunger and frontier expansion pressured Native populations and also created territorial competitions and parity concerns among newborn American states. To quell these emerging state competitions over control of the interior, states began ceding trans-Appalachian land originally chartered to colonies back to the crown’s successor, the United States. Those transfers intended to end westward land competitions among the original colonies over territorial claims that both “state and national governments lacked the military power to enforce.”¹¹²

¹⁰⁶ Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

¹⁰⁷ See *Royal Proclamation, 1763*, INDIGENOUS FOUND., https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/ [<https://perma.cc/57QK-QDEW>].

¹⁰⁸ See generally C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43 (1949) (discussing the fundamental connection between rights to the soil as the chief basis of American colonization and charter issuance from the king).

¹⁰⁹ See Colin G. Calloway, “*We Have Always Been the Frontier*”: *The American Revolution in Shawnee Country*, 16 AM. INDIAN Q. 39, 47 (1992) (noting the influx of 80,000 non-Natives into Shawnee country between 1775-1790).

¹¹⁰ See Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, <https://www.loc.gov/law/help/us-treaties/bevans/b-gb-ust000012-0008.pdf> [<https://perma.cc/Q6MR-UKGJ>].

¹¹¹ The Shawnee confederated Native tribes under Tecumseh’s leadership to protect ancestral land during the War of 1812, bringing the union into an uneasy alliance with the British. His forces suffered a debilitating defeat in the Battle of Tippicanoe and he died in the Battle of Thames, which functionally destroyed coordinated Native resistance to western white advancement into the Ohio Valley. More has been written about Tecumseh than any other Native North American. For a leading biography, see generally JOHN SUGDEN, *TECUMSEH: A LIFE* (1997).

¹¹² Charlton, *supra* note 8, at 153.

Virginia began the charter cession process to the Continental Congress in 1784.¹¹³ Georgia perfected its transfer with the 1802 Georgia Compact, ceding Yazoo country (now comprising Mississippi and Alabama) to the United States.¹¹⁴ In exchange, Georgia secured a promise that the United States would use its constitutional treaty-making power to negotiate the removal of remaining Native populations from Georgia “as rapidly as possible.”¹¹⁵ When that effort stalled (over an extended 36-year period), Georgia took matters into its own hands.

Removal could not happen fast enough for Georgians. As early as 1795, almost every member of the Georgia legislature had conspired to sell land along the Yazoo River, which debouches into the Mississippi River.¹¹⁶ This region comprised thirty-five million acres of undeveloped land populated as Indian Reserve.¹¹⁷ The Georgia legislators set up a scheme to purchase land from the state for cotton production as hidden investors in land companies.¹¹⁸ The companies secured the land at prices well below market value and then resold the titles at vastly inflated prices, creating a nationwide Gordian entanglement of good and bad faith purchasers and resellers once the scheme unraveled.¹¹⁹ The profiteering ignored Native interests even more than the political problem of dealing with Spain’s vice-grip over the port of New Orleans, through which exports of projected Yazoo cotton commerce would need to pass.¹²⁰ The graft scandalized the Georgia legislature and all involved were voted out of office.¹²¹

¹¹³ See generally Peter Onuf, *Toward Federalism: Virginia, Congress, and the Western Lands*, 34 WM. & MARY Q. 353 (1977).

¹¹⁴ David A. Nichols, *Land, Republicanism, and Indians: Power and Policy in Early National Georgia, 1780-1825*, 85 GA. HIST. Q. 199, 199 (2001); Mary Young, *The Exercise of Sovereignty in Cherokee Georgia*, 10 J. EARLY REPUBLIC 43, 45 (1990) [hereinafter *Sovereignty in Cherokee Georgia*].

¹¹⁵ Nichols, *supra* note 114, at 199.

¹¹⁶ Nichols, *supra* note 114. For a detailed description of the Yazoo Delta Region leading to its confluence at the Mississippi River, see generally FRANK E. SMITH, *THE YAZOO RIVER* (1988).

¹¹⁷ See *id.* at 208.

¹¹⁸ *Id.* at 200 (describing the Georgia legislature’s conduct as motivated by the cotton boom and partisan state level politics).

¹¹⁹ The sale of the thirty-five million acres to the four land companies for \$500,000 ended up in the pockets of legislators, state officials, newspaper editors, and other influential Georgians. See George R. Lamplugh, *Yazoo Land Fraud*, NEW GEORGIA ENCYCLOPEDIA, <https://www.georgiaencyclopedia.org/articles/history-archaeology/yazoo-land-fraud> [<https://perma.cc/G39G-HKZN>]. Good faith speculators who had acquired land from the Yazoo companies “pressed Congress for payment, but for more than a decade, congressmen sympathetic to Georgia rebuffed them.” *Id.*

¹²⁰ See CHARLES HOMER HASKINS, *THE YAZOO LAND COMPANIES* 5-6 (1891) (noting “[t]value of western [Yazoo] lands for commercial and agricultural purposes depended almost entirely on the navigation of the Mississippi, over which Spain exercised sole control.”).

¹²¹ News of the scandal produced some of the “wildest scenes ever witnessed in Georgia.” Legislators involved in the scandal “fled to other states or concealed themselves in their own counties.” One who fled “was followed and murdered in South Carolina.” William Estill Heath, *The Yazoo Land Fraud*, 16 GA. HIST. Q. 274, 281 (1932).

VI. THE FEDERAL BLIND EYE

A new Georgia legislature rescinded the Yazoo Land Fraud legislation in 1796.¹²² However, in *Fletcher v. Peck* (1810), the Supreme Court invalidated the reform-minded Georgia legislature's action.¹²³ The Court let stand the fraudulent conveyances on grounds of the United States Constitution's Contract Clause.¹²⁴ The Court reasoned that a binding agreement under the Contract Clause could not be invalidated even if illegally secured.¹²⁵ Although seemingly at odds with public policy, the strengthening federal view intended to tamp down rampant beggar-thy-(out-of-state)-neighbor practices. The Court aimed to uphold a national policy supportive of private transactional rights that states had been less interested in honoring as among themselves.¹²⁶

The holding served as a barometer of the unsettled relationship between federal and state authority, which ultimately let stand the huge land fraud in order to preserve the rational power of compact and private property "from the effects of those sudden and strong passions to which men are exposed."¹²⁷ The strong passions of the case had been stoked by states' rights supporters, who essentially attempted to assert their *jus soli* interests as derived from the 1802 Georgia Compact. The inability of the federal government to uphold in timely fashion its part of the Compact—the removal of the Creeks and Cherokees from a land space identified by the promoters of cotton culture—while at the same time weakening a state's authority over its own territory by invalidating a state law, necessitated Georgia's defense of the *jus soli* principle that would lead to the Treaty of New Echota and the Trail of Tears. This case provided a foretelling glimpse at the coming formalistic gloss that would honor the terms of the New Echota Treaty despite overwhelming evidence of fraudulent dispossession. The right of soil attaching to federal treaty-making power overrode the political practice that impeded the good faith performance of compacts (*pacta sunt servanda*).

VII. CHEROKEES REFUSE TO MOVE

The Yazoo Land Fraud did nothing to abate other self-help efforts by Georgians to secure Indian removal. According to historian Julie Reed, the political turmoil in Cherokee Territory turned into an unrelenting "lawlessness . . . on the ground."¹²⁸ Georgia land sharks, claim jumpers, and squatters had already begun promoting the distribution of

¹²² Jane Elsmere, *The Notorious Yazoo Land Fraud Case*, 51 GA. HIST. Q. 425, 426 (1967).

¹²³ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

¹²⁴ *Id.* (noting U.S. Const. art. 1 §10 cl. 1, "no state shall . . . pass any . . . law impairing the obligation of contracts.").

¹²⁵ *Id.* at 132.

¹²⁶ *Id.* at 134.

¹²⁷ *Id.* at 138.

¹²⁸ Meraji, *supra* note 81 (recording comments by Penn State historian and Cherokee Nation citizen, Julie Reed).

Native land through a series of land lotteries beginning in 1805.¹²⁹ The so-called Cherokee land lotteries accelerated with two more lotteries in 1832 and another in 1833, and yet the Cherokees refused to move.¹³⁰ These lotteries ultimately sold off three-quarters of Georgia to 100,000 white settlers at deeply depreciated prices.¹³¹ Ross complained directly to President Jackson that the lotteries had been enforced by “[a]rmed bands . . . parading thro’ their country.”¹³²

In 1828, Georgia declared its intention to take control of all Cherokee land.¹³³ Georgia nullified the Cherokee Constitution, forbade the Cherokee Council to assemble, and prohibited Cherokees from mining gold on their own territory.¹³⁴ Vigilantes and land speculators commonly coerced, defrauded, bribed or bartered titles out of the hands of individual Cherokees. These conveyances turned the Cherokee Nation into a checkerboard of holdings while simultaneously constricting the efficiency of Cherokee rulemaking and the sense of personal security over remaining Cherokee homesteads.¹³⁵ Following the New Echota Treaty, the Georgia militia forced some Cherokees to pay back rent for squatting on farms that they used to own.¹³⁶

Ironically, Ridge had earlier “pushed a law through the Cherokee Council setting death as the penalty for selling tribal lands.”¹³⁷ This act may have unwittingly created for Ridge the legal instrument that signed his own death warrant. Although intended to stop the piecemeal loss of Cherokee territory by applying the death penalty to private

¹²⁹ See Jim Gigantino, *Land Lottery System*, NEW GA. ENCYCLOPEDIA (Feb. 17, 2006), <https://www.georgiaencyclopedia.org/articles/history-archaeology/land-lottery-system> [<https://perma.cc/8HX7-R5LH>] (noting other such lottery sales in 1807, 1820, 1821, and 1827).

¹³⁰ As a collective, the Seminoles also resisted removal from the southeast for the longest period, and many individual Natives fled into the southeastern hills rather than remove. For recordings by Native authors who identify with ancestors who refused to remove, see generally THE PEOPLE WHO STAYED: SOUTHEASTERN INDIAN WRITING AFTER REMOVAL (Geary Hobson et al. eds., 2010) (including, *inter alia*, perspectives from Natives of the Pamunkey, Lumbee, Catawba, and Chickasaw Tribes). For Tribe-specific studies of the politics and pressures of removal, see generally MICHAEL D. GREEN, THE POLITICS OF INDIAN REMOVAL: CREEK GOVERNMENT AND SOCIETY IN CRISIS (1985); ARTHUR H. DEROSIER JR., THE REMOVAL OF THE CHOCTAW INDIANS (1970); Linda Hogan, *Response: New Trees, New Medicines, New Wars: The Chickasaw Removal*, 42 CAN. REV. COMP. LITERATURE 121 (2015); JAMES W. COVINGTON, THE SEMINOLES OF FLORIDA (1993).

¹³¹ See Gigantino, *supra* note 129.

¹³² *Letter from J. Ross et al. to Andrew Jackson*, LIBR. CONG., (Jan. 23, 1835), https://www.loc.gov/resource/maj.01089_0067_0069/?sp=1&st=text [<https://perma.cc/TH8H-RM7N>].

¹³³ See generally BRIAN HICKS, TOWARD THE SETTING SUN: JOHN ROSS, THE CHEROKEES, AND THE TRAIL OF TEARS (2011).

¹³⁴ See Gary C. Anders, *The Reduction of a Self-Sufficient People to Poverty and Welfare Dependence: An Analysis of the Causes of Cherokee Indian Underdevelopment*, 40 AM J. ECON. & SOC. 225, 228 (1981).

¹³⁵ See Meraji, *supra* note 81 (recording comments by historian Julie Reed).

¹³⁶ See Robin Patric Clair, *Organizing Silence: Silence as Voice and Voice as Silence in the Narrative Exploration of the Treaty of New Echota*, 61 W. J. COMM. 315, 321 (1997) (quoting an 1836 letter of complaint from Ridge to Andrew Jackson).

¹³⁷ *The Life of Major Ridge*, *supra* note 45. Ridge more than legislatively argued for the death penalty. He helped to kill Cherokee Chief Doublehead for profiteering through the sale of tribal hunting grounds, and he led the objection to U.S. Indian agents’ coaxing of Principal Chief Black Fox’s proposal to move west in 1808. See Hicks, *supra* note 45.

transactions, Ridge later inverted that practice with the Treaty of New Echota, which perfected the wholesale loss of tribal land through international agreement. The former law embraced Cherokee legislative process, while the latter treaty circumvented the same. However, both the Cherokee domestic penalty of death and the international treaty shared a common point. The instruments indicated the growing intramural factionalism that had come to split the Nation. This factionalism would further penetrate and ultimately fracture the national identity politics of the tribe during its removal to land reserved for it in Oklahoma, which had already been populated by Western Nation Cherokees in the first decade of the nineteenth century.

VIII. APPEASEMENT STRATEGY

As had been the case with the Shawnees in their fateful alliance with Britain, the Cherokee Nation's identity was informed by interactions with the whites. Ridge served under Jackson at the Battle of Horseshoe Bend (1814), which destroyed the Creeks' military might and their calculated alliance with the British.¹³⁸ Horseshoe Bend convinced important other southeastern Natives peoples, particularly the Cherokees, Chickasaws, and Choctaws, of the need to adopt a strategy of appeasement with the whites, realizing they could not defeat them in war.¹³⁹ As one of the largest and wealthiest tribes, the Cherokees applied these strengths toward the creation of a proto-Indian state within the United States: they alphabetized their language (with Sequoyah's 1825 creation of a syllabary), achieved mass literacy, adopted a written constitution in 1827, assimilated and acculturated as Christians with the translation of the Bible into Cherokee, published a national bilingual newspaper called the *Cherokee Phoenix*, and modeled legislative, judicial, and educational practices on the American republic through support of separation of powers, bicameral legislative structure, and church mission schools.¹⁴⁰ They also adopted agricultural technologies and sartorial styles of the white settlers.¹⁴¹ The agricultural improvements bid up the cost of removal efforts and created the perception among Georgians that the

¹³⁸ See Alice Taylor-Colbert, *Major Ridge (ca. 1771-1839)*, NEW GA. ENCYCL. <https://www.georgiaencyclopedia.org/articles/history-archaeology/major-ridge-ca-1771-1839> [https://perma.cc/DB27-HGYZ].

¹³⁹ The principal exception was the Seminole people of Florida, who resisted in federal incursions to retrieve runaway slaves (1817-1818, the First Seminole War), the Second Seminole War (1835-1842), and the Third Seminole War (1855-1858); See generally JOHN MISSALL & MARY LOU MISSAL, *THE SEMINOLE WARS: AMERICA'S LONGEST INDIAN CONFLICT* (2004).

¹⁴⁰ Sequoyah's syllabary began with 115-200 symbols, reduced to 86 symbols when published, after which the last symbol was dropped, making for 85 symbols. See APRIL R. SUMMITT, *SEQUOYAH AND THE INVENTION OF THE CHEROKEE ALPHABET* 61 (2012). The Cherokees achieved almost universal literacy, surpassing Southern white command of written English and contributing to the intellectual and diplomatic skills of the Nation. See generally JAMES W. PARINS, *LITERACY AND INTELLECTUAL LIFE IN THE CHEROKEE NATION 1820-1906* (2013).

¹⁴¹ See William G. McLoughlin, *Thomas Jefferson and the Beginning of Cherokee Nationalism, 1806 to 1809*, 32 WM. & MARY Q. 547, 547 (1975). On the sartorial styles, see Young, *The Cherokee Nation*, *supra* note 84, at 516 (discussing adoption of frock coats, pantaloons, stiff collars, and top hats).

Cherokee leadership had evolved into a “bourgeois planter aristocracy, much like the Georgians’.”¹⁴² For their efforts they achieved recognition as one of the Five Civilized Tribes of the American southeast,¹⁴³ an appellation that ultimately failed to satiate United States land hunger and expansion designs toward the Mississippi River.

IX. WHAT ABOUT *WORCESTER*?

Other problematic clashes between federal and state authority loomed large. In 1830, Georgia extended jurisdiction over previously exempted Cherokee Territory¹⁴⁴ and executed a Cherokee national named Corn Tassel who had been accused of murdering another Cherokee in Cherokee Territory.¹⁴⁵ Corn Tassel argued that he could only be tried in the courts of his nation, and not by the courts of the State of Georgia.¹⁴⁶ The Supreme Court granted his writ in error and issued a citation to Georgia to show cause for proceeding, but the court never heard this element of the case.¹⁴⁷ Georgia’s governor referred the writ to the legislature, which resolved to “disregard every and any mandate and process that should be served upon them,”¹⁴⁸ a clear challenge to the meaning of the Constitution’s Supremacy Clause.¹⁴⁹ Accordingly, Georgia refused to recognize the jurisdiction of the Supreme Court, refused to send legal counsel to argue its case before the Court, and executed Corn Tassels immediately, thus mooting out the writ of error question.¹⁵⁰

Sensitive to the pro-removal sentiment of Congress, which had recently enacted the Indian Removal Act, aware of the futility of seeking redress in hostile Georgia state courts, and concerned about delay via an action launched in federal district court, the Cherokee Nation then devised a plan to vindicate its sovereign rights through a direct appeal to the

¹⁴² Young, *Sovereignty in Cherokee Georgia*, *supra* note 114, at 49.

¹⁴³ For historical background, *see generally* GRANT FOREMAN, *THE FIVE CIVILIZED TRIBES: CHEROKEE, CHICKASAW, CHOCTAW, CREEK, SEMINOLE* (1934). The usage of the term “civilized” meant to differentiate these tribes from other tribes, described as “merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions.”; *THE DECLARATION OF INDEPENDENCE* (US 1776) (“He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”).

¹⁴⁴ *See* Treaty of Hopewell, Nov. 28, 1785, U.S.-Cherokee, 7 Stat. 18 (detailing agreed upon boundary divisions between the Cherokees and the United States).

¹⁴⁵ *The State v. George Tassels*, 1 Ga. Rep. Ann. 478, 1 Dud. 229 (1830). *See generally* Robert S. Davis, *State v. George Tassel: States’ Rights and the Cherokee Court Cases, 1827-1830*, 12 J. S. LEGAL HIST. 41 (2004).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Swindler, *infra* note 191, at 9 (quoting the Georgia resolution).

¹⁴⁹ U.S. CONST. art. VI.

¹⁵⁰ *See Georgia, the Cherokee, and the Execution of Corn Tassel*, NATIVEAMERICANNETROOTS (Dec. 14, 2015), <http://nativeamericannetroots.net/diary/2033> [<https://perma.cc/3JW2-F2E3>].

Supreme Court. It employed a provision of the Constitution that granted the Court “original jurisdiction” to hear cases between a state and a foreign nation.¹⁵¹

The case *Cherokee Nation v. The State of Georgia* (1831) sought to enjoin Georgia from enforcing its laws that after 1828 sought to restrict Cherokee sovereign authority.¹⁵² The argument before the Court turned on the basis of the supremacy of treaty law between the United States and Indian nations as opposed to the state law issued by Georgia to regulate Indian relations. Chief Justice Marshall noted that the Cherokee Nation consisted of a state with an independent people, however, he hedged on the question of whether it was a *foreign* state, owing to “peculiar and cardinal distinctions which exist nowhere else.”¹⁵³ Significantly, Marshall drew attention in the Constitution to the term “foreign nations,” which in his view did not include Native Tribes in relation to treaties because another section of the Constitution regulated commerce with foreign nations “*and with the Indian tribes.*”¹⁵⁴ He concluded that the Cherokees were not a foreign nation within the meaning of the Constitution.¹⁵⁵ He reasoned: “if the Indian tribes are foreign nations, they would have been included without being specifically named, and being so named imports something different from the previous term ‘foreign nations’.”¹⁵⁶ ‘Something different’ meant that the Cherokees (and each individual tribe) were a “domestic dependent nation.”¹⁵⁷ Marshall reasoned that:

They occupy a territory to which we assert a title *independent of their will*, which must take effect in point of possession when their right of possession ceases; meanwhile, they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian.¹⁵⁸

Because the judicial power to hear original jurisdiction cases only extended to cases between a state and a foreign nation, Marshall ruled that the Court lacked jurisdiction to hear the Cherokees’ claims, and the case was dismissed.¹⁵⁹

Soon thereafter, a more direct opportunity to secure the jurisdiction of the Court arose, resulting in a clear-cut, 5-1 majority decision supporting Native sovereignty rights. And yet even this case, *Worcester v. Georgia* (1832), again written by Marshall, could not forestall the removal campaign.¹⁶⁰

¹⁵¹ U.S. CONST. art III, § 2, cl. 1 (conferring jurisdiction in controversies “between a state, or the citizens thereof, and foreign states”).

¹⁵² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

¹⁵³ *Id.* at 16.

¹⁵⁴ *Id.* at 62. See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”). *Id.* at 62.

¹⁵⁵ *Cherokee Nation*, 30 U.S. at 20.

¹⁵⁶ *Id.* at 62.

¹⁵⁷ *Id.* at 17.

¹⁵⁸ *Id.*

¹⁵⁹ *Cherokee Nation*, 30 U.S. at 39.

¹⁶⁰ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The case came before the Court due to Georgia's imprisonment of two white missionaries for living in Cherokee Territory and refusing to obtain a state license to live there.¹⁶¹ One of the missionaries, Worcester, also served in a federal capacity as the postmaster of the Cherokee capital city of New Echota.¹⁶² His federal status brought directly into conflict the applicability of Georgia state law.¹⁶³ The judgment asserted the sovereignty of Native American nations as separate from the United States and "completely separated from that of the states,"¹⁶⁴ and the court held that the Cherokee Nation consisted of "a distinct community occupying its own territory . . . in which the laws of Georgia can have no force."¹⁶⁵ This victory for the Cherokees included judicial recognition that the Constitution vested authority in the United States government to regulate relations with Natives and that "the treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states."¹⁶⁶

Perhaps most important, Marshall nuanced and reformulated the discovery doctrine principle that he articulated nine years earlier in *Johnson v. M'Intosh*.¹⁶⁷ There, the Court bestowed sovereignty (meaning the underlying fee title to the land of the New World) on the European discoverers and conquerors of the New World using language that naturally assumed the rational connection between Enlightenment values, Christianity, and civilization.¹⁶⁸ *M'Intosh* introduced the proposition that the proper chain of title over the land occupied by Natives had to trace from this immanent principle of *dominium* embedded in and created by the western legal mindset. Native peoples implicitly lost whatever powers of external sovereignty they ever possessed by virtue of their incorporation into the United States.¹⁶⁹

¹⁶¹ *Id.* at 529.

¹⁶² See Tim Alan Garrison, *Worcester v. Georgia (1832)*, NEW GA. ENCYCLOPEDIA (2004), <https://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832> [<https://perma.cc/7EJV-69V3>].

¹⁶³ See *id.*

¹⁶⁴ *Worcester*, 31 U.S. at 519.

¹⁶⁵ *Id.* at 561; see also *id.* at 520 ("[A]nd which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves.").

¹⁶⁶ *Id.* at 557 (holding as well that Indian Tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive . . . which is not only acknowledged, but guaranteed by the United States").

¹⁶⁷ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823) (establishing territorial possession according to the discovery principle).

¹⁶⁸ *Id.* at 570 (citing to Locke, Grotius, Vattel, and Montesquieu, Marshall wrote: "All the proprietary rights of civilized nations on this continent are founded on this [discovery] principle. The right derived from discovery and conquest, can rest on no other basis; and all existing titles depend on the fundamental title of the crown by discovery."). See also *id.* at 576–77 ("[A]sserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.").

¹⁶⁹ FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 244 (1982). The discovery doctrine powerfully influenced the idea that settler nations own the underlying title to tribal land basis and was exported to English-speaking nations around the world, forming the basis for the Aboriginal Property Rights rule in Australia, the Maori Land Rights rule in New Zealand, Mayan land rights in Belize, First

In the early nineteenth century maturation process of the Supreme Court, and with regard to the Court's role as a balancer of interests between competing congressional and executive functions, the developing republican legal order adopted an internalist dimension that sustained the rule of law through the judiciary's own self-formed means of applying core principles to ever-changing factual circumstances. The self-contained recourse to these principles reflected the doctrine of immanence, which later in the century contributed to the fuller expression of legal formalism.¹⁷⁰ Legal formalism was a method that asserted that mature, introspective, judicial analysis of legal principles could produce the one and only solution to a case. Judges needed no supplements outside of the law itself to administer justice. If the roots of formalism emphasized the role of the judge to find the applicable legal principle to solve a dispute, they also embedded an often unexamined and pre-formed importation of assumptions—actually not immanent to aboriginal Native experience at all—which inexorably drew from the deep cisterns of the European *jus publicum* and Christian Europe. The dogmatic assertion of the discovery doctrine, based on conquest and Christian entitlement, created the unexamined proposition that the right of soil belonged to the proper inheritors of New World title, the Christian Europeans themselves.

However, in *Worcester*, Marshall massaged his previous meaning of the discovery doctrine by nuancing the idea that Native Americans “retained considerable inherent sovereignty.”¹⁷¹ He adjusted his rationale because southern states, principally Georgia, had aggressively constructed their own possessory colonial charter claims granted by the original suzerain, the crown of England.¹⁷² Georgia based its claim on the *M'Intosh* ruling and the descent of the chain of title conveyed by the crown charter. Georgia also had been emboldened by the Supreme Court ruling in *Harcourt v. Gaillard* (1827), which affirmed “[t]here was no territory within the United States that was claimed in any other right than that of some one of the confederated states; therefore, there could be no acquisition of territory made by the United States distinct from, or independent of some one of the

Nations' Land rights in Canada and possibly elsewhere. See also Lindsay Robertson, *Cherokee Cases (1/3): Johnson v. M'Intosh*, YOUTUBE, at 17:32 (Aug. 28, 2018), <https://www.youtube.com/watch?v=u9etyRazLvk>.

¹⁷⁰ The doctrine of immanence suggests that “the rationality of law lies in a moral order immanent to legal material.” Earnest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 955 (1988). This idea projects the belief that law presents “a self-contained internalist dimension—a provenance of plenitude or immanent moral rationality” where legal reasoning looks within the body of law, not outside of law, to ascertain the correct rule application. See Christopher R. Rossi, *The Widening Gyre: Legal Formalism and International Law's Sense of Place*, 11 NOTRE DAME J. INT'L & COMP. L. 107, 116 (2021).

¹⁷¹ William Walters, *Review Essay: Preemption, Tribal Sovereignty, and Worcester v. Georgia*, 62 OR. L. REV. 127, 131 (1983).

¹⁷² In *M'Intosh*, Marshall wrote: “The title of the crown (as representing the nation) passed to the colonists by charters, which were absolute grants of the soil; and it was a first principle in colonial law, that all titles must be derived from the crown.” *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 570. Earlier in the opinion, Marshall indeed recognized that sovereignty had been “held, occupied, and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil.” *Id.* at 545. However, these rights were lost due to application of the discovery doctrine and its corollaries pertaining to purchase or conquest.

states.”¹⁷³ As the self-proclaimed successor of interest and as the landlord of territory chartered to it,¹⁷⁴ the Georgia General Assembly began enacting laws in 1828-1829 with the intent of administratively absorbing Cherokee Country into four nine-square-mile districts and subdivided land lots.¹⁷⁵ Georgia’s legislative action did not depend on whether the Cherokees removed from Georgia.¹⁷⁶ Acting essentially as a leaseholder, Georgia intended to change the terms of Cherokee tenancy by declaring that all Indian customs and laws would be null and void after June 1, 1830.¹⁷⁷

Marshall may have sensed that his core discovery doctrine principle had taken on an unanticipated life of its own.¹⁷⁸ He may have recognized that the aggressive assertion of states’ rights could jeopardize a delicate, judicially-informed federation model that had established the courts as the branch competent to pass judgment on the meaning of the Constitution. The rising tension between the federal government and states as to where originary title properly vested required judicial re-visitation.¹⁷⁹ The significant yet oblique outcome of the Cherokee Trilogy cases is that Native American rights were often subsumed by discussions about competing federal-state rights to the soil, leading to an abridgement of discussions about aboriginal title.¹⁸⁰

In *Worcester*, Marshall elaborated on language employed in *M’Intosh* in order to curtail Georgia’s bold assertions of state power. However, in crafting the *Worcester* opinion, Marshall artfully avoided any mention of amending *M’Intosh*, possibly to avoid undermining the nascent legitimacy of the Supreme Court’s self-designated competency to serve as final arbiter of the meaning of the Constitution.¹⁸¹ In *Worcester*, Marshall may have crafted a cupboard into which over-extended invocations of the discovery doctrine could be stored.

¹⁷³ *Harcourt v. Gaillard*, 25 U.S. (12 Wheat.) 523, 526 (1827).

¹⁷⁴ See Young, *Sovereignty in Cherokee Georgia*, *supra* note 114, at 61-62 (noting “[u]nder the inherent sovereign rights of the state, devolved from the British Crown, Georgians were the proprietors of Georgia. Indians were, at best, tenants-at-will, and at Georgia’s will they must seek another landlord.”).

¹⁷⁵ Young, *Sovereignty in Cherokee Georgia*, *supra* note 114, at 43, 50.

¹⁷⁶ Young, *supra* note 114, at 50; *Cherokee County*, HIST. ATLAS GA. COUNTIES, <https://georgiainfo.galileo.usg.edu/histcountymaps/cherokeehistmaps.htm> [<https://perma.cc/PH3S-D447>].

¹⁷⁷ See LAWS OF THE COLONIAL AND STATE GOVERNMENTS, RELATING TO INDIANS AND INDIAN AFFAIRS 199 (1979); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 503 (1969) (noting laws precluding the rights of Natives to testify in cases involving whites).

¹⁷⁸ See generally LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005) (discussing the political means by which Marshall’s discovery doctrine circumvented Native occupancy in western stretches of Virginia and what would become Kentucky to uphold bartered land concessions to Revolutionary War soldiers as payment for service).

¹⁷⁹ Marshall wrote in *Worcester*: “The ambiguous phrases which follow the grant of power to the United States, were so construed by the states of North Carolina and Georgia as to annul the power itself.” *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

¹⁸⁰ The *Worcester* decision has been read to uphold the proposition that federal authority over Indian affairs preempts the exercise of state authority, however arguments arise over whether the Constitution actually precludes state action over Indian affairs. See Walters, *supra* note 171, at 133, 135.

¹⁸¹ The question of the *compétence de la compétence* to interpret the meaning of the Constitution had been decided by Marshall’s decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Marshall reasoned in *Worcester* that the conveyance of title to land in the New World contradicted the “extravagant and absurd idea” that the colonial “settlements made on the sea coast” provided the license “to govern the people, or occupy the lands from sea to sea.”¹⁸² Such a thought:

[D]id not enter the mind of any man. [The land grants] were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.¹⁸³

Marshall construed the charter claims as “incompatible with the lofty ideas of granting the soil, and all its inhabitants from sea to sea [to the new colonies] . . . [T]hese grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned.”¹⁸⁴ Elsewhere, Marshall wrote:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.¹⁸⁵

Of this decision, which condemned the “extraterritorial” reach of Georgia’s legislature over Cherokee Territory,¹⁸⁶ Jackson purportedly said, “John Marshall has made his decision, now let him enforce it.”¹⁸⁷ Stylizing the Supreme Court as a foreign court with no right to enforce its judgment at the state level, Georgia’s governor refused to release the

¹⁸² *Worcester*, 31 U.S. (6 Pet.) at 517.

¹⁸³ *Id.* at 545.

¹⁸⁴ *Id.* at 546.

¹⁸⁵ *Id.* at 559.

¹⁸⁶ *Worcester*, 31 U.S. (6 Pet.) at 542; *Id.* at 516 (noting “the extraterritorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee Nation.”). See Walters, *supra* note 171, at 132 (noting that the usage of the word “extraterritorial” implies that “Georgia could not legislate within Cherokee territory because the Cherokees constitute a separate sovereign so that Georgia’s action would be extraterritorial and therefore impotent.” This interpretation would indicate Marshall rejected the federal preemption doctrine because the state lacked coexistent jurisdictional authority in the first place.).

¹⁸⁷ Historians dispute that Jackson actually made this claim, although if he did not say it, he probably would have thought it. See BAKER, *supra* note 69, at 745. Shortly after the decision, Jackson wrote: “The decision of the Supreme Court has fell still born, and they find they cannot coerce Georgia to yield its mandate.” 4 CORRESPONDENCE OF ANDREW JACKSON, 1829-32, at 430 (John Spencer Bassett ed., 1929) (noting as well that the Cherokees were not strong enough to avoid destruction through resistance).

imprisoned missionaries from hard labor.¹⁸⁸ The Jackson administration also sent emissaries to tribes to inform them that the decision was incorrect, persuading the Chickasaws, Choctaws, and Muscogee Creek to prepare to remove.¹⁸⁹ Georgia and the Jackson administration's contemptuous refusal to recognize or enforce the Court's judgment quickly took on the ominous tone of a major constitutional crisis. However, shortly thereafter, an even more imposing federal state crisis arose.

Southern discontent with a series of post-1815 protective tariffs, including the so-called 1828 Tariff of Abominations and the insufficient tariff reduction act of 1832, prompted the South Carolina legislature to nullify the perceived pro-Northern federal legislation and defy the collection of duties, bringing the nation to the "verge of Civil War."¹⁹⁰ In an unscripted but obvious way, South Carolina invoked the condominium understanding between Georgia and the Jackson administration over non-enforcement of federal authority in Cherokee Territory and applied this rationale much more broadly to a state's non-enforcement of federal revenue collection and tariff policy. Turning a blind eye toward state actions that threatened the federal treasury proved much more dangerous for the Jackson administration than the blind eye it had turned toward a state's administrative dealings with Natives within its own borders. Jackson committed full attention to the nullification crisis after pressuring the Georgia governor to pardon Worcester and his fellow missionary.¹⁹¹

Described as one of Marshall's "most courageous and eloquent opinions,"¹⁹² and "foundational" in terms of modern federal Indian law,¹⁹³ the *Worcester* opinion precluded state interference in internal tribal affairs without Congressional authorization. The case also recognized that "tribes retained considerable inherent sovereignty" unless Congress explicitly limited those rights.¹⁹⁴ However, the reformulation of the discovery doctrine in *Worcester*, which rejected the "extravagant and absurd" idea that states could extend the license derived from colonial settlements to govern the peoples and lands from sea to sea,

¹⁸⁸ See Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. SOUTHERN HIST. 519 (1973) (noting that the two Congregationalist missionaries "remained in the Milledgeville penitentiary until ten months after the decision.").

¹⁸⁹ See Lindsay Robertson, *Cherokee Cases (3/3): Worcester v. Georgia*, YOUTUBE, at 19:31 (Nov. 7, 2013), https://www.youtube.com/watch?v=jzBVC2sTZ_U.

¹⁹⁰ WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836*, at ix (1966).

¹⁹¹ Jackson postured to resolve the Worcester stalemate in Georgia by negotiating a pardon for Worcester (and co-defendant Butler) in order to concentrate attention on the South Carolina crisis. See generally William F. Swindler, *Politics as Law: The Cherokee Cases*, 3 AM. INDIAN L. REV. 7 (1975) (noting Georgia's and the Jackson administration's attempts to ignore the judgment but mentioning the South Carolina nullification crisis, which later led to the release of the missionaries). Displeased with Jackson's tactics, the Governor delayed the pardon until the last day before the Supreme Court reconvened for its next term. See Robertson, *Cherokee Cases: Worcester v. Georgia*, *supra* note 169, at 18:58. See generally also Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. S. HIST. 519 (1973) (noting they remained incarcerated until ten months after the decision).

¹⁹² *Williams v. Lee*, 358 U.S. 217, 219 (1959).

¹⁹³ Walters, *supra* note 171.

¹⁹⁴ *Id.* at 131.

never fully developed due to compositional changes to the Supreme Court beginning in its 1836 term. With Jackson appointees in control, the Court found five occasions in the next eight years to reinsert the *Johnson v. M'Intosh* standard that Europeans acquired the underlying fee title to all discovered lands.¹⁹⁵

X. CONCLUSION

The United States Supreme Court recognized in 2020 that a fraudulent promise awaited Natives “on the far end of the Trail of Tears Forced to leave their ancestral lands in Georgia and Alabama, [they] received assurances that their new lands in the West would be secure forever.”¹⁹⁶ Recognizing a “sadly familiar pattern,” the Court lamented that the promise often had been broken.¹⁹⁷ When the “price of keeping [promises became] too great, . . . [the United States] just cast a blind eye.”¹⁹⁸

Casting new light on the blind eye, the Court ruled in *McGirt v. Oklahoma* that about 19 million acres of land throughout much of eastern Oklahoma that had been reserved for the Creek Nation since the nineteenth century remained a Native American Territory.¹⁹⁹ By subjecting the blind eye to the scrutiny of the roman law principle of *ex injuria jus non oritur* (legal rights cannot arise from wrongdoing)²⁰⁰ the Court wrote: “Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.”²⁰¹ Legal scholars immediately hailed the decision as “a stunning reaffirmance of the nation’s obligations to Native Americans.”²⁰²

Another forgotten promise also stood at the beginning of the Trail of Tears, a promise of reciprocated good faith between the negotiating parties. The deal inducing the removal of Cherokees to the Oklahoma Territory more than turned a blind eye to the promise of federal representation in the United States House of Representatives, which

¹⁹⁵ Robertson, *Cherokee Cases: Worcester v. Georgia*, *supra* note 169, at 21:47.

¹⁹⁶ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (noting that the promise in this case specifically applied to the Creek Nation).

¹⁹⁷ *Id.* at 2482.

¹⁹⁸ *Id.*

¹⁹⁹ The doctrine of recognition, although political in nature and often arising in violent confrontations of cession or annexation did not admit of the unrestricted pretense of negotiating with persons considered to lack standing to represent the government. Such a practice cannot be ignored, however. The 2014 Russian annexation of Crimea was based on a fraudulent referendum.

²⁰⁰ See generally, Christopher R. Rossi, “*Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur and the Elusive Search for Equilibrium after Ukraine*,” 24 *TULANE J. INT’L & COMP. L.* 143-73 (2015).

²⁰¹ *McGirt*, 140 S. Ct. at 2482.

²⁰² Ronald Mann, *Opinion Analysis: Justices Toe Hard Line in Affirming Reservation Status for Eastern Oklahoma*, SCOTUSBLOG (July 9, 2020, 7:15 PM), <https://www.scotusblog.com/2020/07/opinion-analysis-justices-toe-hard-line-in-affirming-reservation-status-for-eastern-oklahoma/> [<https://perma.cc/9Y7W-WQJF>]; Dahlia Lithwick, *What’s Behind Neil Gorsuch’s Stunning Win for Indigenous People*, SLATE (July 13, 2020, 3:34 PM), <https://slate.com/news-and-politics/2020/07/mcgirt-v-oklahoma-neil-gorsuch-tribal-rights.html> [<https://perma.cc/DP9B-EZKK>] (discussing the opinion with Erwin Chemerinsky, who noted the decision’s “enormous implications”).

remains a contested issue to this day.²⁰³ It also ignobly validated the exodus of Natives from their ancestral *nomos* by turning a blind eye to a fraudulent treaty itself. If the blind eye is a metaphor for valuing political expediency over the rule of law, one cannot help but wonder how the atoning *McGirt* dictum impacts Marshall’s important expression of the discovery doctrine in *Johnson v. M’Intosh*, which undergirded the fraudulent conveyance of Native land through the politically expedient expression of immanent values of Christian identity, European civilization, *jus soli*, and Enlightenment notions of land cultivation.

Perhaps the Jackson administration could have parried criticism by noting that the legal personality of the Cherokee Nation depended on the Jackson administration’s political decision to deal with the Ridge faction rather than the Ross faction—an adaptation of the emerging doctrine of state recognition (known as the constitutive theory) that conveys the legal personality of statehood on the purely internal political decision of other states.²⁰⁴ However, the requirements of state recognition could only imperfectly apply. The Jackson administration had already abjured the notion that a Cherokee State existed within the United States due to its two-fold reliance on the discovery doctrine as articulated in *M’Intosh*, and the “domestic dependent” status of the Nation expressed in *Cherokee Nation v. The State of Georgia*. Furthermore, it would be anachronistic to apply the competing theory of state recognition—the declaratory theory—to the situation at hand as this theory arose in the 1933 Montevideo Convention and had not congealed in the nineteenth century (despite a prolonged historical evolution).²⁰⁵ However, one of its four provisos required “a capacity to enter into relations with other states,”²⁰⁶ which the Ridge faction did not possess. The Jackson administration tacitly recognized Ridge’s lack of capacity to represent the Tribe as it had already entered into negotiations with the Ross faction in January 1835. Ross told Jackson the Cherokees would remove for a \$20 million fee.²⁰⁷ Jackson deemed the amount outrageous.²⁰⁸ Ross probably proposed the sum knowing it was a non-starter but thinking to buy time.²⁰⁹ Here, he may have made his “biggest mistake”²¹⁰ when he petitioned to allow the Senate to “grant us as liberal terms as the Senate . . . would be willing to allow.”²¹¹ The Senate responded with an offer of only \$5

²⁰³ See Harmeet Kaur, *The Cherokee Nation Wants a Representative in Congress, Taking the US Government up on a Promise it made nearly 200 years ago*, CNN (Aug. 25, 2019, 6:40 AM) <https://www.cnn.com/2019/08/25/politics/ Cherokee-nation-congressional-delegate-treaty/index.html> [<https://perma.cc/B88H-39FC>] (noting continuing resistance and obstacles).

²⁰⁴ See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 19–28 (2d ed. 2006) (contrasting the constitutive theory of state recognition with the declaratory theory).

²⁰⁵ Note for instance English King Henry V’s stylized reference to the “Regent *so-called* of France” in 1418 negotiations involving Henry’s own interest in subsuming the French throne. See John Fischer Williams, *Some Thoughts on the Doctrine of Recognition in International Law*, 47 HARV. L. REV. 776, 790 (1934).

²⁰⁶ Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

²⁰⁷ Rosser, *supra* note 8, at 104.

²⁰⁸ See *id.* at 105 (quoting Ross’s view in hindsight that President Jackson “considers the terms of our proposition as too extravagant”).

²⁰⁹ See Hicks, *supra* note 45.

²¹⁰ Rosser, *supra* note 488, at 105.

²¹¹ *Id.* (quoting Ross’s letter to Lewis Cass).

million and Ross' rejection of the offer exposed his official delegation to charges of stalling.²¹² To the shock of the Cherokee Nation, the Jackson administration rejected further dealings with its Principal Chief, forced a fraudulent deal on the unofficial Treaty Party, and then used the Treaty of New Echota to pay off political debts owed to states restless with unmet charter-cession claims, anxious for cotton acreage, and suspicious of federal overreach with fiscal and trade policy.²¹³

These values vested the right of the soil in the beneficiaries of a metropolitan chain of title, which declined unassumingly to the American-born progeny of the European Enlightenment. The abridgment of Native interests privileged the European right of soil over indigenous perspectives, and masked irregularities involved in the treaty negotiation process because Cherokee resistance to the treaty was construed as an improper assertion of title involving chartered territory to which Natives could only present a derivative claim. This claim was never based on land improvement, or original fee title, but rather on the assignment of a Native tenancy or occupancy designation provided at the 'sufferance' of the true landlords, who became increasingly frustrated by the obdurate Native refusal to remove.

Although revisited by Marshall in the *Worcester* judgment and forestalled in terms of more textured explication due to the influx of Jackson-appointed Justices to the Court, the discovery doctrine language of *Johnson v. M'Intosh* can be reduced, in essence, to the following:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.²¹⁴

As powerful as the *ex injuria* principle is in relation to historically unkept and now partially remediated promises at the far end of the Trail of Tears, it remains offset by an equally powerful roman law principle that is embedded in the discovery doctrine—*ex factis jus oritur* (law arises from the facts).²¹⁵ The discovery doctrine was recognized by Marshall as “the extravagant pretension” that cannot now be questioned. It is as if he were intimating that one should let bygones be bygones. Such forgiveness was questioned by Justice Gorsuch's opinion in *McGirt*. He noted that unlawful acts remain unlawful despite their factual reality and the sufficient vigor by which they are performed.²¹⁶ It is as if he were

²¹² See *id.* 105-6.

²¹³ See Compromise Tariff of 1833, ch. 55, 4 Stat. 629 (1833) (brokering an agreement accepted by South Carolina to slowly lower tariffs over a ten-year period in exchange for an end to the nullification crisis).

²¹⁴ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823).

²¹⁵ On the uneasy interface between the two roman law principles, see generally Rossi, *supra* note 200.

²¹⁶ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

intimating that remediation for injustice bears no date of expiration. What form a full remedy may take remains a sublime question. Any complete answer will necessarily encounter the memory of New Echota, the mausoleum ghost capital of the Cherokee Nation located at the first step of the Trail of Tears.