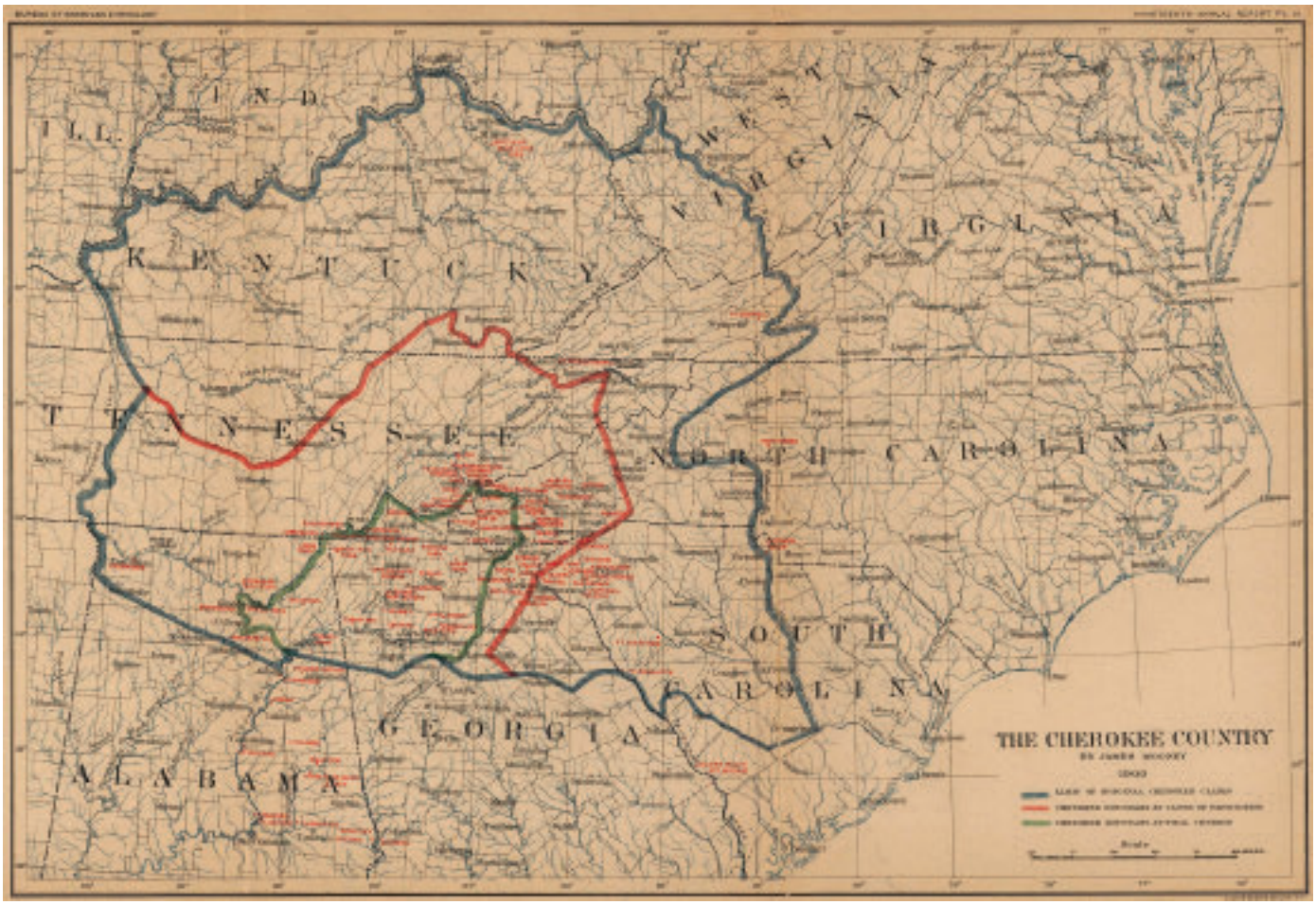

This map, made in 1900 by a James Mooney, shows the shrinkage of Cherokee Country in its original location in the southeastern U.S.

The Foundation of Indian Law in the United States

BY DENNIS J. WHITTLESEY AND PATRICK SULLIVAN

The following brief examines the so-called "*Marshall Trilogy*," comprised of three decisions written by John Marshall, the great Fourth Chief Justice of the U.S. Supreme Court. These decisions laid the foundation for Indian law in the United States and established the allocation of property and jurisdiction between federal, state and tribal governments. The brief also examines *United States v. Wheeler*, a 1978 Supreme Court decision holding that the Fifth Amendment does not bar successive tribal and federal prosecutions because Indian tribes are separate sovereigns.

These case briefs highlight the following principles that constitute the foundation for American Indian Law today: **(1)** that, prior to European contact, Native American society was governed by its own laws; **(2)** that European "discovery" diminished, but did not extinguish, native rights in property and self-government; **(3)** that state law is not applicable to Indian tribes; and **(4)** that the assertion of tribal self-governance and adjudicatory authority is valid to the extent that it does not interfere with federal law.

These cases are a product of their time, and refer to the first American inhabitants disparagingly and falsely. Marshall's references to the natives as "fierce savages," which he knew to be false, was a necessary step in his inevitable conclusion that the colonists' title claims took priority over the rights of the tribes. In *Johnson v. M'Intosh*, the first in the Trilogy, he wrote:

> 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.

Marshall's statement captures the tension between his view that the principle of "discovery" is a "pretension" and his belief that the sheer inertia of the ongoing colonization of Indian land prevented any resolution that did not dispossess the tribes of their title.[1]

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I. JOHNSON V. M'INTOSH, 21 U.S. (8 WHEAT.) 543 (1823).

Johnson v. M'Intosh was a widely watched case the outcome of which would determine the contested ownership of enormous quantities of land purchased by speculators directly from Indian tribes. In fact, ownership of all United States real estate was at issue, as Indian land title is the necessary first link in every American chain of title.[2]

Chief Justice John Marshall stated that the issue before the Court was "the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country." 21 U.S. at 572. If the Indians had such a right, plaintiff Joshua Johnson's title, purchased directly from the Indians, would be valid. Otherwise, defendant William M'Intosh's title, purchased from the Indians by the United States and patented to M'Intosh, would control. Marshall's opinion applied the Doctrine of Discovery as the rule and outlined its principal elements: (1) that discovery vested ultimate title in the discovering nation with a limited right of occupancy remaining in the Indians, (2) that the discoverer had the exclusive right to acquire land from the Indians, and (3) that the Indians retained a diminished sovereignty. *Id.* at 573-585.

Johnson had inherited two tracts of land previously purchased by land speculator William Murray in what is now Illinois and Indiana. Murray purchased one tract from the Kaskasia, Peoria and Cahokia Nations in 1773 and another from the Piankeshaw Nation in 1775, despite warnings that his purchases violated the Royal Proclamation of 1763 prohibiting individuals from purchasing land directly from Indians. Murray repeatedly petitioned Congress to confirm his title to the land but without success. *See Johnson v. M'Intosh* case history, 1823 U.S. LEXIS 293, 25-26.

In the 1780s, all thirteen original states ceded their Western land claims to the general United States government to open the land for orderly expansion and settlement pursuant to the Northwest Ordinance of 1787. In 1803 and 1809, the United States entered treaties with the same tribes Murray had purchased from, purchased the same land from those Tribes, opened land offices and began patenting the land to settlers. William M'Intosh obtained his patent from the federal government in 1818. *Id.* Johnson immediately sued to eject M'Intosh from the land in the District Court of Illinois.

A fascinating ingredient of this litigation is that legal scholars have since determined that the two land claims did not, in fact, overlap, even though the parties stipulated that they did. The entire case appears to have been manufactured by the parties in order to get a court determination as to whether title to land purchased directly from tribes was valid. Author Eric Kades wrote, "McIntosh did not contest a single fact alleged in the complaint, jurisdictional or otherwise. Perhaps he participated in framing the complaint, which became the stipulated facts of the case. Neither the district court nor the Supreme Court questioned any of these facts. Everyone involved, it seems, wanted a decision on the legal question of the validity of private purchases from the Indians."[3]

Johnson lost the case, and, with the consent of M'Intosh, John Marshall's Supreme Court took the appeal. *Id.* at 26. Marshall began his discussion of the power of Indians to convey title by stating that the rule to determine questions of land title must lie not in "abstract justice" but in "those principles also which our own government has adopted." 21 U.S. at 572. Those principles were what would come to be called the Doctrine of Discovery[4]—the law developed between the "potentates of the old world" in order to avoid conflicting settlements and war as they raced to appropriate the new world for themselves. *Id.* at 573.

First, Marshall cited the principle "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Id.* at 573. This principle granted the discovering nation the sole and exclusive right to acquire the discovered land from the Indians and preempted claims of competing nations.

Second, Marshall declared the principle that the Indian occupants lost "complete ultimate title" upon discovery but retained certain rights including a "right of occupancy." *Id.* at 574. Marshall stated, "[i]t has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right." *Id.* at 78. Indian title, while inferior to the title of the discoverer, remained a compensable "legal and just claim to retain possession." *Id.* at 574.

Third, Marshall hinted at an element of the doctrine that he would subsequently elaborate in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*: *that discovery diminished, but did not extinguish, the Indians' sovereignty as nations and right to govern themselves.* Upon discovery, "their rights to complete sovereignty, as independent nations, were necessarily diminished," but discovery left the Indians with "a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise." *Id.* at 587.

After outlining the principles of discovery, Marshall described how the doctrine came to apply to the Indians

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and to this case in particular. In a historical discussion of the settlement of America, he asserted that the principles of discovery were the foundation of the claims of all European explorers and of England in particular. *Id.* at 576. England, France and Spain maintained competing territorial claims in the new world, which they resolved through armed conflict and eventual treaties. *Id.* at 580-584. After the American revolution, the treaty concluding the war confirmed that "the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States." *Id.* at 584.

Marshall explained that the usual "law which regulates, and ought to regulate in general, the relations between the conqueror and conquered" was incapable of application to the Indians. *Id.* at 591. That rule of "title by conquest" required that in European wars between Christian nations, "the rights of the conquered to property should remain unimpaired." *Id* at 589. However, because the Indians were "fierce savages, whose occupation was war," the inevitable consequence was the principle that they must be considered merely as occupants incapable of transferring their land to others. *Id.* at 590. Furthermore, because "the property of the great mass of the community originates in it," the divestiture of Indian title "becomes the law of the land, and cannot be questioned." *Id.* at 591. The alternatives remaining to the colonists were to abandon the country, or to be massacred. *Id.* at 590. Marshall thus ostensibly lamented the "pretension" that discovery of an inhabited country could divest the property rights of the original inhabitants, but reached the conclusion that it was the only possible outcome. *Id* at 591-592.

Marshall found additional support for the principle that Indian title could not be conveyed directly from Indians to individuals in the Royal Proclamation of 1763,[5] which strictly forbade British subjects from purchasing and settling Indian land west of the Mississippi River. *21 U.S.* at 594. The British rule that vested all vacant land in the Crown applied in the American colonies as well. Because the Crown owned title to the vacant lands, subject to Indian occupancy, the King had a right to grant or reserve those lands for Indians, which passed to the United States. *Id.* at 596.

Because Johnson's title was defective for having been purchased directly from the Tribes in contravention of the principles of discovery, the Court held for M'Intosh, whose title had been properly obtained from the United States. *Id.* at 604-605.

II. CHEROKEE NATION V. GEORGIA, 30 U.S. (5 PET.) 1 (1831).

Marshall wrote the succinct lead opinion in which only one other justice joined, with a concurrence of two justices (three justices dissented). His opinion examined the threshold issue of the Court's jurisdiction over an original action brought by the Cherokee Nation, which depended on whether the Nation was a "foreign state." Marshall dismissed the suit finding that, while Indian tribes are "states" retaining many aspects of sovereignty, they are not "states of the Union" or "foreign states" as defined in Article III of the United States Constitution, and therefore "the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states." *Id.* at 17-18. The split decision reflected the fact that the issues of the several states' authority over Indian country, and of the federal authority over the states, were extremely contentious at the time.[6]

"Marshall's unfortunate analogy of Indians as "wards" of the United States took on legal significance in later cases which articulated the specific responsibilities of the federal government to the tribes, which would come to be known as the "trust relationship." While the extent of the Indian trust relationship is still litigated, the federal government still recognizes its trust relationship today."

After successive treaties between the Cherokee Nation and the United States ceded large portions of Cherokee land to the United States, the State of Georgia passed laws in December of 1828 and December of 1829 purporting to annex Cherokee lands into the state, parcel out Cherokee territory, extend state jurisdiction over Cherokee Indians, abolish Cherokee laws, and disestablish the Cherokee Nation government. The legendary Cherokee Chief John Ross brought an action to enjoin Georgia from enforcing those laws, claiming the Cherokee was "a foreign state, not owing allegiance to the United States, nor to any state of this union, nor to any prince, potentate or state, other than their own." *See Cherokee Nation v. Georgia* case history at 1831 U.S. LEXIS 337, 1-23.

While rejecting Chief Ross' claim to be a foreign state, Marshall accepted his characterization of the Tribe: "a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself." *Id* at 16. Marshall stated that the treaties and laws of the British, colonial, and United States governments recognized the Indians as "a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community." *Id.* However, Marshall determined that the Indian "states" were neither states of the Union nor foreign states. Instead, he defined Indian tribes as "domestic dependent nations" with an undivested right to self-government but remaining in a state of "pupilage." His famous description of the place of the Tribes is as follows:

> It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. 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. *Id.* at 17.

Marshall's unfortunate analogy of Indians as "wards" of the United States took on legal significance in later cases which artic-

ulated the specific responsibilities of the federal government to the tribes, which would come to be known as the "trust relationship." While the extent of the Indian trust relationship is still litigated, the federal government still recognizes its trust relationship today.

Ultimately finding that the Cherokee Tribe was neither a state of the Union nor a foreign state, Marshall concluded that the Tribe could not maintain an action in the United States courts. However, he would revisit the issue of tribal sovereignty in *Worcester v. Georgia* to strengthen his characterization of the extent of tribal independence from the states in particular.

III. WORCESTER V. GEORGIA, 31 U.S. 515 (1832).

In a five-to-one decision, the Marshall court held that Georgia laws dissolving the Cherokee reservation and the conviction and sentencing of Samuel Worcester, a missionary, to four years of hard labor for his illegal residence on the Cherokee reservation were unconstitutional. *Id.* at 561.

The opinion described Georgia's laws passed in 1829 and 1830, which mandated the State to "seize on the whole Cherokee country, parcel it out among the neighbouring counties of the state, extend her code over the whole country, abolish [the Tribe's] institutions and its laws, and annihilate its political existence." *Id.* at 542. Marshall's opinion stated the issue before the Court was "whether the act of the legislature of Georgia, under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to, the constitution, laws and treaties of the United States." *Id.* at 541.

Marshall held that state law does not apply on Indian land, as the states had ceded power over Indian tribes to federal government upon admission to the Union, stating "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union." *Id.* at 557.

Marshall described the pre-discovery state of the Indians as follows: "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws." In an apparent retreat from his previous holding in *Johnson v. M'Intosh* that discovery necessarily limited Indian rights, 21 U.S. 543 (1823), Marshall rejected the proposition that discovery "should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors." 31 U.S. at 543.

Marshall found further evidence that British law treated the tribes not as unaffiliated individuals but as nations in the terms of colonial charters granted by the Crown which authorized, when necessary, the "invasion" of the natives, stating that the terms "imply the existence of a country to be invaded, and of an enemy who has given just cause of war." *Id.* at 545.

Marshall concluded that the Europeans had sought and obtained the alliance of the Indians through "flattering professions" and "rich presents," and as a result, "so long as [the Indians'] actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need." *Id.* at 547. Marshall explained that the United States maintained the British policy of seeking alliance with Indians, rather than claiming Indian land or "asserting any right of dominion," in order to maintain the Indians' support which was vital to the revolution. *Id.* at 549.

The Trade and Intercourse Acts, which treated the Indians as nations, incorporated the British policy of non-intercourse and deference to tribal sovereignty into United States law. Those Acts "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *Id.* at 556-557. Furthermore, the United States Constitution itself, by adopting all treaties previously made, recognized the Tribes as ranking "among those powers who are capable of making treaties." *Id.* at 559. The usage of the terms "treaty" and "nation" in legislative and diplomatic proceedings was not accidental: "[w]e have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense." *Id.* at 559-560.

Without expressly overruling his previous opinion in *Cherokee Nation v. Georgia* that Indians are "domestic dependent nations," *Worcester* elevated Indian nationhood over Indian dependence, asserting that Tribes are "distinct, independent political communities, retaining their original natural rights." *Id.* at 559. Those rights were primarily limited by a prohibition on "intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed." *Id.*

The Court rejected the State's argument that treaties divested the tribes of the right to self-government and placed them subject to state law, stating that treaties between nations do not have that effect: "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence, its right to self-government, by associating with a stronger, and taking its protection." *Id.* at 560-561.

Finally, Marshall explained that the United States Constitution's Indian Commerce Clause removed the regulation of Indian affairs from the states and placed it exclusively in the federal gov-

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ernment, as the Constitution "confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians." *Id.* at 559. This authority vested in Congress would come to be known as Congress' "plenary power" over Indian affairs. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

Accordingly, Marshall held that the laws of Georgia could have no force within the boundaries of the Cherokee nation, "but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States." *Id.* at 561. Marshall ordered Worcester's release, which Georgia granted, ending the immediate controversy.

Commentators point out that that Marshall's colonial narrative of the relationship between the colonists and the Indians should not be read as history, but as "lawyer's history, oversimplified to make the holdings appear inevitable."[7] In fact, despite Marshall's strong view of tribal sovereignty in the *Worcester* opinion, President Jackson subsequently ordered the removal of the Cherokee to the West of the Mississippi river – a plan that had been proposed in 1776 by Thomas Jefferson.[8] Despite establishing the legal underpinning of modern-day tribal sovereignty, the opinions relied on a historical narrative which severely departed from the much crueler state of Indian affairs at the time.

Despite the cruel expedience of the *Marshall Trilogy*, the three cases remain the foundation for the distinct rights of Indian tribes and their members which have been preserved over the intervening centuries under great duress. Indian law professor and tribal court judge Frank Pommersheim wrote,

> [Marshall's] process of seeking to blunt the assault of colonization was in many ways successful, particularly if viewed from the perspective of preserving the rights of tribes to exist and to have some measure of sovereign authority. Yet the extent of that authority has never been adequately measured, and has bedeviled Indian law jurisprudence from the very beginning.

THE ULTIMATE DEVELOPMENT OF DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY

To fully understand the evolution of United States Indian law between the *Marshall Trilogy* and today, it is critical to study the legal development of the doctrine of tribal sovereign immunity as explained in the Court's 1998 decisions in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) and *United States v. Wheeler*, 435 U.S. 313 (1978).

The *Kiowa* Court held that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." 523 U.S. at 754. In reaching its decision, the *Kiowa* Court described the origin of the doctrine of tribal sovereign immunity, noting "that it developed almost by accident." *Id.* at 756.

In 1919, the Court decided *Turner v. United States*, 248 U.S. 354 (1919). In that case, the Court dismissed a suit against the Creek Nation by Turner, a non-Indian leaseholder, for damages related to his fence which had been destroyed in a Creek uprising in 1890. *Id.* at 356. In 1906, the Creek government was dissolved and its land allotted to individual Creek Indians pursuant to the Act of March 1, 1901. *Id.* In order to allow Turner's suit to proceed, Congress passed a law allowing the leaseholder's suit to proceed against the dissolved Tribe or its assigns in the Court of Claims. *Id.* Turner filed suit against the Creek Nation and the United States as trustee, and the Court dismissed, stating that Turner's recovery was barred not by "the immunity of a sovereign to suit, but [by] the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Id.* at 358. The *Kiowa* Court emphasized that, in *Turner*, "[t]he fact of tribal dissolution, not its sovereign status, was the predicate for the legislation authorizing suit. Turner, then, is but a slender reed for supporting the principle of tribal sovereign immunity." 523 U.S. at 757.

However, in 1940, the Court decided *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) (USF&G), which held Indian tribes immune from suits based on mineral leases, and cited *Turner* for the rule that "Indian Nations are exempt from suit without Congressional authorization," *id.* at 512, pursuant to "the public policy which protects a quasi-sovereignty from judicial attack." *Id.* at 513. The *Kiowa* Court explained that, in *USF&G*, "Turner's passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit." 523 U.S. at 757.

Subsequent cases, including *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991) also cited *Turner* as authority for the doctrine of tribal sovereign immunity. 523 U.S. at 757. Ominously, the *Kiowa* Court opined that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," expressing concern for potential harm to unsuspecting citizens involved in commerce with tribes, and that "tribal immunity extends beyond what is needed to safeguard tribal self-governance." *Id.* at 758. However, as to the scope of tribal sovereign immunity, the Court deferred that issue to Congress, which, as noted above, has Constitutional plenary power over Indian affairs. *Id.*

In *Wheeler*, the Court reaffirmed that Indian tribes are "self-governing sovereign political communities," reasoning that the source of tribal power to prosecute its own members is an inherent sovereign power that has never been extinguished, rather than a power delegated by the federal government. Accordingly, the Court ruled that tribal and federal prosecutions are brought by separate sovereigns and therefore the Double Jeopardy Clause does not bar successive tribal and federal prosecution. *Id.* at 330.

In 1974, Wheeler, a Navajo tribe member, was charged with disorderly conduct and contributing to the delinquency of a minor in violation of Navajo law. *Id.* at 315. Wheeler pled guilty to the charges and was sentenced to pay a fine or serve a short jail term. *Id.* In 1975, a federal grand jury indicted Wheeler for statutory

rape for the same offence. Wheeler moved to dismiss the indictment on the basis that the tribal court proceedings involved lesser included offenses of statutory rape, so the Double Jeopardy Clause barred subsequent federal prosecution for the same offense. *Id* at 316. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The district court granted Wheeler's motion to dismiss, and the Court of Appeals for the Ninth Circuit affirmed, concluding that, because "Indian tribal courts and United States district courts are not arms of separate sovereigns," the Double Jeopardy Clause barred the federal prosecution. *Id.*

In reversing the Ninth Circuit, the Supreme Court noted its previous decisions that successive state and federal prosecutions for the same offense do not violate the Fifth Amendment, because both governments have "the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each is exercising its own sovereignty, not that of the other." *Id.* at 320 (internal citations omitted). Therefore, when an offender violates both federal and state laws with the same act, "it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *Id.* at 317 (quoting *Moore v. Illinois*, 55 U.S. 13, 19-20 (1852)).

Because the Court's previous decisions denying Fifth Amendment protection to those prosecuted in both federal and state courts rested on the states' inherent sovereignty, the Court proceeded to investigate whether the tribe's power is "part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress." *Id.* at 323. If the source of tribal judicial authority was *inherent*, double jeopardy would not bar successive prosecutions; if, however, it was *delegated*, double jeopardy would apply. *Id.* at 319.

The Court answered that "sovereign power to punish tribal offenders has never been given up by the Navajo Tribe and that tribal exercise of that power today is therefore the continued exercise of retained tribal sovereignty." *Id.* at 323-324. The Court relied on its affirmations of Indian sovereignty in previous decisions, stating that "[a]lthough physically within the territory of the United States and subject to ultimate federal control, [Indian tribes] nonetheless remain "a separate people, with the power of regulating their internal and social relations." *Id.* at 322 (quoting *United States v. Kagama*, 118 U.S. 375, 381-382).

However, the Court held that incorporation of Indian tribes into the United States "necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others." *Id.* at 323. But, in the absence of a divesture of inherent power by treaty or statute, the Tribes retain their inherent sovereign powers. "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.*

The Court cited Chief Justice John Marshall's opinions, *Johnson v. M'Intosh* and *Worcester v. Georgia*, for the respective propositions that Indians could no longer freely alienate Indian land, and could no longer or directly enter into commercial or governmental relations with foreign nations. *Id.* at 326. However, powers of self-government, including the power to prosecute tribe members, are not such powers that would be lost by virtue of a tribe's dependent status through implicit divestiture. The Court quoted *Worcester v. Georgia*: ""[t]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection." 6. Pet. 560-561 (1832).

Finding that tribal power to punish tribal offenders is part of retained, or inherent, tribal sovereignty, the Court held that Double Jeopardy does not bar successive tribal and federal prosecutions. *Id.* at 332. ❄

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[1] See Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* 42-43 (University of California Press, 1995).
[2] *See* Robert J. Miller, *Native America, Discovered and Conquered – Thomas Jefferson, Lewis & Clark, and Manifest Destiny* 50-51(University of Nebraska Press, 2008).
[3] Eric Kades, *The Dark Side Of Efficiency: Johnson v. M'Intosh And The Expropriation of American Indian Lands*, 148 U. Pa. L. Rev. 1065, 1068 (2000).
[4] *See* MILLER at 50.
[5] *See* MILLER at 31-33.
[6] *See* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. Rev. 627, 639 (2006).
[7] *See* Fletcher at 681.
[8] *See* Miller at 90.