

CHAPTER FIVE

Indian Tribes and the American Constitution

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TEXTS on constitutional law and history uniformly give short shrift to American Indians and to Indian tribal governments. This failure to recognize the proper place of Indian issues in constitutional law traces largely to an implicit presentist bias in the teaching of law: the thrust of legal education is to teach modern, real-world law in order to train professionals who can serve real-world clients. In response to this, constitutional texts for undergraduate and graduate nonlaw students tend to offer a perspective that is more balanced in historical terms. One leading book for undergraduate students explains by way of introduction that "as the amount of current doctrine has increased, historical materials [in law texts] have been curtailed. The normal solution [in books for law students] has been to describe the John Marshall period rather well and then move briskly to at least 1937 before beginning thorough analysis. In undergraduate instruction . . . we have more time to spend on developing the historical continuities, believing that such an investment of time comports well with the general goals of liberal arts as opposed to professional education."

Yet the undergraduate constitutional texts have done little better than the law books in integrating American Indian law into the larger body of constitutional law and history. We should not overstate the point:

"Indians Giving A Talk to Col. Bouquet." Formal proceedings of this kind were a staple of Indian-white relations under both the British and the Americans.

Indian issues are *not* decisive in constitutional law. At the same time, there are several concepts and events from Indian law and policy that simply cannot legitimately be extricated from the essence of constitutional law; others afford valuable enrichment and depth. What has happened, however, is that the constitutional law and history texts have unconsciously bought into the "Vanishing American" idea, and it has tainted the presentation of our most fundamental body of law. All of the books that exclude or minimize Indian issues on this basis are doubly wrong because the premise is wrong: since World War II, Native American issues have come to be of considerable social, political, legal, and economic importance, especially in the American West.

To highlight these conclusions, let us ask a few preliminary questions. *Worcester v. Georgia* was the legal centerpiece in the Cherokee-Georgia conflict of the 1820s and 1830s in which the Supreme Court held firm, on federalist grounds, against assertions of state power. The *Worcester* opinion has been cited more frequently by modern courts than all pre-Civil War Supreme Court opinions save three. In 1959 the Supreme Court described *Worcester v. Georgia* as one of Chief Justice John Marshall's "most courageous and eloquent opinions." Charles Warren, a leading historian of the Supreme Court, called the Cherokee-Georgia question "the most serious crisis in the history of the Court." How, as is the case, can *Worcester v. Georgia* be excluded from virtually all of the constitutional texts?

In *Worcester v. Georgia*, and in modern times, the Court has squarely held that Indian tribes possess inherent sovereignty and that the only other sources of sovereignty in this country are the states and the United States itself. How can it be that our constitutional law texts resolutely instruct us that there are just two sources of governmental authority, state and federal, and wholly ignore Indian tribal sovereignty—a governmental authority that extends over 52 million acres, or 2.5 percent of all land in the country?

My third question involves the dramatic and historic dispute concerning Indian treaty fishing rights in the Pacific Northwest. This has been one of the great racial conflicts of our time, involving, among many other things, the allocation of 50 percent of the Northwest's famous and exquisite salmon and steelhead trout runs (so valuable to both commercial and sports groups) to less than 0.5 percent of the population. In addition to that profound equal protection question, the litigation proceeded against a backdrop of two decades of civil disobe-

dience and refusals to obey federal court orders. In an assessment reminiscent of Charles Warren's description of the importance of the Cherokee-Georgia conflict in nineteenth-century jurisprudence, the Supreme Court in 1979 said no less than this: "The State [of Washington's] extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decree. Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." How is it that some of our most essential books—ones that instruct us on our society's most essential document—are devoid of any mention of this signally important conflict?

The study of constitutional law properly should include a treatment of Indian issues. Before turning to specific areas of constitutional doctrine, it will be useful to develop a foundation by briefly examining the constitutional provisions relating to Indians, the structure of Indian law, and three leading decisions by John Marshall that continue to influence constitutional law.

The Constitution, Indian Law, and the Marshall Trilogy

Indian tribes are mentioned three times in the Constitution. The phrase "Indians not taxed" is used twice, in Article I (allocation of seats in the House of Representatives and levying of direct federal taxes) and in the Fourteenth Amendment (revision of the apportionment formula for the House of Representatives to eliminate the slave fraction). The "Indians not taxed" provisions are of historical importance only; they were intended as a reference to noncitizen Indians, a distinction that was obviated in 1924, when all Indians were made citizens. The third express reference has been the most important to the group. The commerce clause authorizes Congress "to regulate Commerce with foreign Nations, and the several States, and with the Indian Tribes." This specific constitutional recognition of Indian tribal governments is complemented by two sections of Article VI: the reaffirmation of previously negotiated treaties, most of which were with Indian tribes; and the supremacy clause, which makes federal treaties and statutes superior to state laws.

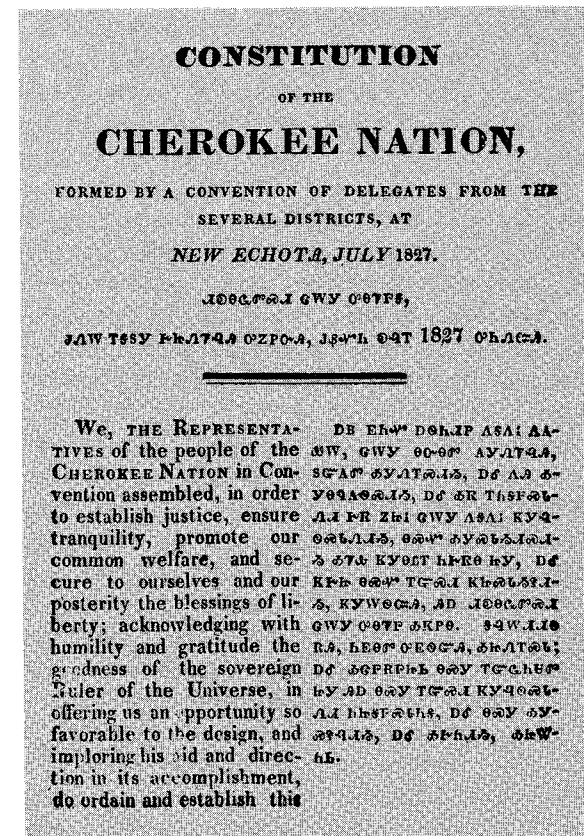
Federal relations with Indian tribes have been carried out through

some four hundred federal treaties and literally thousands of statutes, executive orders, and administrative rules. The most important Indian laws are the treaties, statutes, agreements, and executive orders establishing Indian reservations. Most of Indian law and policy is geographically based, and these are the basic organic laws defining the nature of law and policy within Indian reservations. These documents are exceedingly general so that it has been necessary for the courts to bring specific meaning to these laws by placing them in a larger context of constitutionalism, history, national policy, and morality.

The broad shape of the field of Indian law has been set by a relatively small number of opinions. Even today, perhaps the leading cases are three early opinions by Chief Justice John Marshall. This Marshall Trilogy has been refined by decisions in the century and a half since but, remarkably, the essential principles announced there remain good law today in spite of the societal changes that have occurred throughout the country.

The first decision in the Marshall Trilogy is *Johnson v. McIntosh*, handed down in 1823. Chiefs of the Illinois and Piankeshaw tribes had deeded away parcels of their aboriginal land to settlers—Johnson and others. Later, the tribes treated with the United States, retaining some land as a reservation but transferring most tribal land, including the Johnson parcels, to the United States. Federal officials then issued homestead patents to McIntosh and others for the same land that the tribes had already transferred to the Johnson settlers. The owners of the Johnson parcels sued to establish title based on their prior, tribal deeds.

Chief Justice Marshall's decision is the beginning point for real property law in the United States and is essential to an understanding of the westward expansion. He ruled that the tribes, due to their possession that predated European settlement by so many centuries, held an ownership interest in their aboriginal lands. Their right to occupy, hunt, and fish on that domain was superior to all except the United States, which held a shared title with the tribes and which could obtain tribal title voluntarily by purchase or by military conquest. Marshall's federalist philosophy was then applied to the central issue in *Johnson v. McIntosh*: although the tribes held an ownership interest in real property, they could not transfer it to anyone but the United States. Thus the tribes' attempted sale to Johnson was void, and the McIntosh homestead patent was valid because only the later transaction had a federal imprimatur. The ruling stabilized and federalized frontier prop-



The 1827 Cherokee constitution established a "civilized" government for the tribe; a government the Supreme Court refused to recognize in *Cherokee Nation v. Georgia*.

erty law. It also carried strong suggestions about the place of tribalism within the constitutional framework, notions that were sharpened less than a decade later by the other two cases in the Marshall Trilogy.

The Cherokee-Georgia dispute centered on Georgia state laws that, if valid, would have obliterated the Cherokee Nation by outlawing the tribal legislature and courts and by dividing up Cherokee lands among five counties. In 1831, the Cherokee Nation took the unusual step of bringing an action directly in the Supreme Court, claiming that the

Court had original jurisdiction because the Cherokee Nation was a "foreign nation" and that the Court was empowered to hear filings in cases between foreign nations and states. The Court ruled against the tribe in *Cherokee Nation v. Georgia* and dismissed the case, holding that it lacked power to accept the case because the Cherokee Nation was not a "foreign nation."

But, having explained what the Cherokee Nation was not, the Chief Justice went on to explain what the tribe was. The Cherokee Nation did possess governmental powers—it was, Marshall declared, a "domestic, dependent nation." Further, the Cherokees and other aboriginal peoples had a special relationship with the United States: "The condition of the Indians in relation to the United States is perhaps unlike that of any two people in existence. . . . [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else. . . . Their relation to the United States resembles that of a ward to his guardian." This special obligation has come to be called the trust relationship, and it is the essential concept that has provided Congress with vast power, for good and for ill, to deal in Indian affairs with a latitude found in few other corners of Congress' store of powers.

The final opinion in the Marshall Trilogy, the 1832 decision in *Worcester v. Georgia*, is the most expansive of the set. The controversy involved a Georgia statute requiring permission from the governor for anyone to enter Cherokee territory. The state law was enacted in spite of the federal Trade and Intercourse Acts, which reserved to exclusive federal authority the power to regulate travel in Indian country.

The case arose because two missionaries, Samuel Worcester and Elizur Butler, had refused to comply with the permit requirement and had been sentenced by the Georgia courts to four years of hard labor. Worcester and Butler appealed their convictions to the Supreme Court. Georgia was so contemptuous of the federal treaty and statute, and of asserted federal judicial power, that it refused to file a brief in the Supreme Court or to appear at oral argument. Needless to say, this constitutional, regional, and federal conflict—which coincided with South Carolina's Nullification Ordinance and with Andrew Jackson's second presidential campaign—fell under the eye of the nation.

In the first *Cherokee* case, Chief Justice Marshall had been able both to protect the Court's institutional integrity by avoiding a direct conflict with Georgia and, at the same time, to announce legal principles

favorable to Indians by the procedural device of dismissing the Cherokee Nation's case and announcing the special trust relationship in a judicial aside. In *Worcester*, the Court ruled directly on the legal effects of Georgia's legislative assault and sided with tribal and federal authority.

Chief Justice Marshall's opinion explained that, like Georgia, the Cherokee Nation was a sovereign entity. Indeed, tribal sovereignty long antedated state or federal sovereignty: Indians always had been "a distinct people . . . having institutions of their own, and governing themselves by their own laws." To the Court, it was "an extravagant and absurd idea, that the feeble settlements made on the sea coast" somehow gave the Europeans "legitimate power" over the tribal governments. The Europeans treated the tribes with "great solicitude." Similarly, federal treaties did not obliterate tribal governments. As Marshall pointed out, the United States "treat[ed] them as nations." After the treaties, Indian tribes remained "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." With this matrix of overriding tribal and federal authority, Georgia law could have no place, and it was declared unconstitutional.

This mighty opinion, written in the deep heat of one of history's most charged situations, is by any standard one of the great constitutional, moral, and political statements ever produced by our jurisprudence. Historians still argue over whether President Jackson actually said the words attributed to him in response to the *Worcester* decision, but surely he thought them; and surely it can be said, even today, that the words "John Marshall has made his law, now let him enforce it" continue to epitomize the fragile, multifaceted relationship between the Supreme Court and the presidency.

And even today, although ultimately the force of *Worcester* must be kept in place by one of our smallest minorities and although the Indian and non-Indian societies at the time of the opinions are all but unrecognizable across the gulf of 150 years, John Marshall's words are still the law, and it is still enforced. To be sure, edges have been carved from the absolute tribal immunity from state law announced in *Worcester*, but most aspects of the immunity remain in force. How is it that the words of one human being can carry so much power across so much time? What are the things that make such a thing possible?

MEMORIAL OF THE CHEROKEES.

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One of the many Cherokee efforts to win support from whites, this bi-lingual memorial protested Georgia's efforts to abolish the Cherokee government. In 1832, the U.S. Supreme Court upheld the tribe's position in *Worcester v. Georgia*.

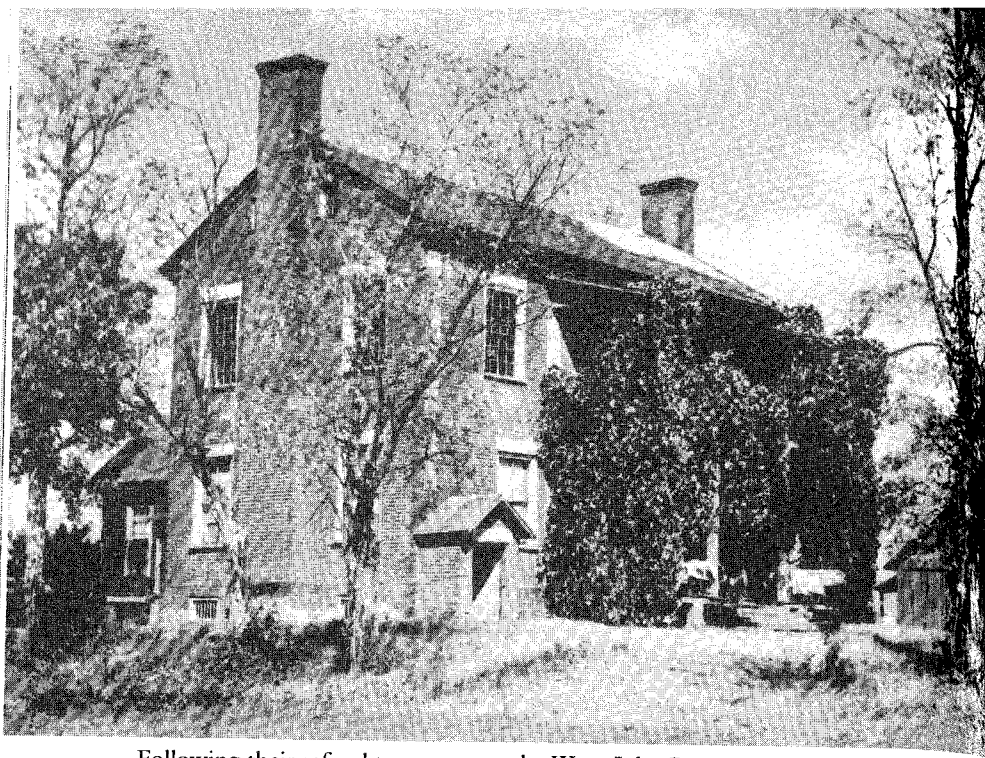
Taken together, the concepts embodied in the Marshall Trilogy continue to define the place of Indian tribes in the larger federal constitutional regime. Indian tribes possess aboriginal title to their ancestral lands, a property interest embedded at the base of American real property law. Indian tribes are sovereigns, governments with substantial legal and political power over their territory and their people and, in many cases, over people from outside the tribes who enter tribal territory. The United States has broad, almost unlimited, power over Indian affairs. Conversely, the United States has a high trust obligation to Indians. Indian law is federalized.

These special principles tracing to the Marshall Trilogy, with variations, help explain the preoccupation with Indian affairs in the First Congress in 1789 and 1790, when the national legislature enacted a comprehensive battery of laws dealing with Indian land transfers, crimes in Indian country, trade with Indians, Indian treaties, and a range of other subjects. The Marshall decisions are the premise for the emotional conflicts over authority, finances, and resources that have raged across Indian country in the twentieth century. They also provide the foundation for analyzing the several constitutional issues to which we now turn. In each instance, Marshall's words have both historical and contemporary ramifications.

The Place of Indian Tribes in the Constitutional Framework

As already noted, the existence of Indian tribes is acknowledged by the Constitution in the Indian commerce clause and in the treaty clause, which affirmed preconstitutional treaties, most of which were with Indian tribes. Relations with Indian tribes were established by means of treaties or treaty substitutes (such as agreements, statutes, and executive orders). An examination of the nature of treaties and treaty substitutes assists in determining the place of tribalism within the constitutional allocation of governmental authority.

Indian treaty negotiations were similar in concept to negotiations with representatives of prospective states over statehood. Both kinds of transactions sought to resolve territorial boundaries, land ownership, and governmental authority. The Tenth Amendment reserves to states the sovereign powers not delegated to the United States. The treaties



Following their refusal to remove to the West, John Ross and other Cherokee leaders were arrested and confined at this house in Spring Place, Georgia. The house had been built in 1795 by Joseph Vann, a "civilized" Cherokee leader.

and treaty substitutes reserve to tribes sovereign powers not expressly or impliedly relinquished to the United States.

In theory, state police powers are more permanent than tribal powers because they are constitutionally established, while tribal powers are lodged in treaties and treaty substitutes, which can be altered without recourse to the constitutional amendment process. In practice, however, congressional power to encroach on state prerogatives under the commerce clause is largely unfettered, just as there are few constitutional restraints on congressional authority over Indian affairs. Tribal and state police powers, in other words, were preserved in the same manner, by reservation and a bilateral contract; were manifested in different ways—the one by treaty or treaty substitute, the other by constitutional provision; and are both subject to the commands of Congress, although the political restraints on Congress are much greater in the case of states.

The two sets of transactions have produced different results in some

respects. States are directly represented in Congress and possess much larger and wealthier citizenries. Accordingly, a greater quantum of reserved state powers remains undisturbed than is the case with reserved tribal powers. Nevertheless, in spite of these differences, treaties and treaty substitutes creating Indian reservations are best understood as organic government documents with legal characteristics similar in many respects to the Tenth Amendment for the states.

Perhaps Congress can unilaterally withdraw all federal recognition of all Indian governments, thereby effectively eliminating most actual exercises of tribal power. Even if such an event were to occur, no federal termination of tribes is final because Congress can and has restored recognition of tribes with which federal ties have previously been severed. Thus, whether under the current system of federal-tribal relationships that has existed for two centuries or under a hypothetical regime of termination, the rule of law requires that tribes continue to be reconciled into our constitutional system.

Indian tribes are part of the constitutional structure of government. Tribal authority was not created by the Constitution—tribal sovereignty predated the formation of the United States—but the Constitution acknowledged the existence of tribes. Although many assumed that Indian tribal governments would simply wither away, the tribes have not died out and the modern presidency, Congress, and the Supreme Court continue squarely to acknowledge this third source of sovereignty in the United States.

Accordingly, while the Supreme Court has recognized that inherent tribal sovereignty is both preconstitutional and extraconstitutional, it has found that direct analogies can properly be made to those governmental entities whose ultimate source of power is the Constitution. The Court made that point in 1982 in *Merriam v. Jicarilla Apache Tribe*:

To state that Indian sovereignty is different than that of Federal, State, or local governments does not justify ignoring the principles announced by this Court for determining whether a sovereign has waived its taxing authority in cases involving city, state, and federal taxes imposed under similar circumstances. Each of these governments had different attributes of sovereignty, which also may derive from different sources. These differences, however, do not alter the principles for determining whether any of these governments has waived a sovereign power through contract, and we perceive no principled reason for holding that the different attributes of Indian sovereignty require different treatment in this regard.

The concept of Indian tribes as constitutionally recognized entities with reserved governmental rights on reservations free of most state authority is a fundamental constitutional principle that ought to be included in every course on constitutional law, history, and policy.

Due Process and Equal Protection

Civil liberties issues arising under the equal protection and due process clauses have long been among the most emotional and troublesome questions in Indian country. The Supreme Court has held that the restrictions on governments contained in the Bill of Rights and in the Fourteenth Amendment do not limit Indian tribes. That is, those amendments, taken together, apply to state governments and the United States government; they do not restrict tribal power. Thus, in 1896, the Supreme Court held in *Talton v. Mayes* that an Indian tribe was not bound by the Fifth Amendment and was not required to provide a grand jury to a criminal defendant in tribal court. More recently, courts have found that the First Amendment's establishment and free exercise provisions do not apply to Indian tribal governments.

In 1968 Congress passed the Indian Civil Rights Act (ICRA) which applied many of the provisions of the Bill of Rights and Fourteenth Amendment to Indian tribes. But rights under the Indian Civil Rights Act differ in several respects from constitutional rights of citizens outside of Indian country. The 1968 act, for example, does not prohibit the establishment of religion. Indian tribes, therefore, are the only governments in the United States that can legally operate as theocracies. Several Pueblos in the Southwest are just that, while other tribes across the country combine republican and theocratic forms of government by having some tribal council members chosen by election and some seats on their councils filled by hereditary chiefs.

Constitutional-type rights under the Indian Civil Rights Act differ in another important aspect. Under the reasoning in the 1978 decision, *Santa Clara Pueblo v. Martinez*, ICRA rights generally can be enforced only in tribal forums, not in federal courts. Thus if Indians have a grievance against their tribal government, they often lack recourse outside of the tribe. For example, a tribal council is prohibited by the free speech clause of the Indian Civil Rights Act from shutting down an opposition newspaper, but tribal forums—a tribal judge or the council

itself—will interpret and implement that free speech guarantee and will decide if the newspaper continues.

These issues become magnified when non-Indians are involved, as has occurred at an accelerated pace since the 1960s when tribes began to reassert their sovereign powers. The Supreme Court ruled in 1978, in *Oliphant v. Suquamish Indian Tribe*, that Indian tribes lack criminal jurisdiction over non-Indians. Tribes do, however, possess civil authority over non-Indians when necessary to implement an important tribal interest. This means that in many circumstances tribal governments can, and do, try non-Indians in tribal courts in civil matters such as automobile accidents and contract disputes; regulate non-Indian reservation businesses; and zone non-Indian land located within tribal boundaries. In most situations, these decisions will be made by members of one race—Indians—against persons of other races. Under the Indian Civil Rights Act of 1968, federal judicial review is limited, and decision-making by tribal forums is emphasized.

These principles seem to clash with commonly held constitutional theory and can spark spirited debate. For example, John Hart Ely's influential book, *Democracy and Distrust*, argues that the essence of the Constitution is not substance but rather an open process that keeps all of the channels of representation open to diverse groups in order to produce truly democratic results. Yet these Indian governments, whose leaders are elected by a racially defined electorate, are outside of the system of constitutional restraints.

This race-based governmental system has been upheld by the Supreme Court, which has gone to considerable lengths to find that tribal governments are not in fact race based. The Court has concluded that political ties were established, by treaty or treaty substitutes, between the United States and tribal governments. This government-to-government relationship means that Indian tribes are recognized under federal law as political and governmental, not racial, entities and that there is no equal protection violation.

There is another context in which Indian law and policy energizes analysis of civil liberties issues. In 1954, *Brown v. Board of Education* rejected the "separate but equal" doctrine and struck down racial segregation in public schools. But Indian reservations are plainly racial enclaves where separatism prevails. On many reservations even the schools are effectively segregated.

This gives us a deeper insight into the antidiscrimination principle of

the Constitution. Separatism for blacks was outlawed because it was forced upon them and because it demonstrably operated to their disadvantage. Indian separatism is allowable because Indians are separatists by choice, because most Indian leaders have voluntarily selected a measured separatism as the single best hope for the future of Indian people. Without the Indian experience, we are led to believe that our Constitution outlaws separatism; with it, we learn that the essential prohibition is against a forced policy that wounds minorities. Numerous aspects of federal policy have wounded Indians, but separatism is not one of them; thus it does not offend the Constitution.

Federal Preemption of State Law

We now accept, based on the body of law that has developed since 1937, the idea that Congress has expansive authority to preempt (i.e., oust or override) state laws. The supremacy clause makes valid federal law superior to a conflicting state law. Several constitutional provisions, most notably the commerce clause, provide ample basis for a far-ranging congressional authority to preempt state laws in most subject matter areas.

Of course, it was not always this way. And, of course, modern concepts of congressional authority do not trace just to 1937. The origins of federal plenary power in the Supreme Court decisions are found in the Marshall era. The Marshall Trilogy is central to this. Indian policy, along with shipping and banking, are the areas in which plenary federal power was first asserted, and first upheld by the Court, in derogation of state authority. Further, when the Federalist view waned after Roger B. Taney replaced Marshall as chief justice, the Court continued to recognize an expansive federal power over Indian affairs, one of the few fields in which federal preeminence was acknowledged. So there is a legitimate place for Indian law in the study of the historical development of federalism and preemption.

The Indian cases continue to be important in Supreme Court preemption law. Even though it is accepted that Congress can override state law, it is often difficult to tell from the face of a particular federal statute whether Congress has actually intended to exercise its broad power to preempt state law. Normally, the Supreme Court presumes that Congress has not intended to override state law unless it does so

in a reasonably explicit manner. In the case of Indian law, however, the special traditions in the field are such that the Court has developed an opposite rule: state laws presumptively do not operate in Indian country unless Congress expressly has allowed state law to apply. This rule sharply limits the powers of state courts and legislatures within Indian country in key areas such as taxation, land-use controls, business regulation, and environmental protection.

The special rule for preemption in Indian law is relevant for two reasons. First, Indian law is a surprisingly large segment of the Supreme Court's work. Between 1960 and 1985, the Court handed down over seventy Indian law cases. The pace was especially swift during the 1970s and early 1980s, when the Court handed down more decisions about Indian law than it did decisions in established fields such as anti-trust, securities, environmental, or international law. Thus the special Indian law rule on state power is significant in its own right. Further, the Indian preemption cases are a fit reminder that constitutional adjudication is not monolithic and that special rules sometimes must be developed to fit the particular history and circumstances of a discrete body of policy.

The Impact of Indian Law on Constitutional Law in the American West

Regionalism is a major force in both American history and literature. Even though we think of law as existing mainly at the federal and state levels, we also have instances of regionalism in the law. One notable instance is the desegregation struggle, which focused on the South. An even better example is what can be called the Law of the American West, an amalgam of water, mining, public land, Indian, and national resources issues that arise most often in the arid western states with large concentrations of federal and Indian lands.

Indian law is central to the Law of the American West. A major political and constitutional development—the carving of new western states from the public domain to implement the westward expansion—cannot be fully understood without an appreciation of the role of Indian policy and law. The Marshall Trilogy established that Indian tribes, as governments, possessed a right of occupancy in their aboriginal lands; the westward expansion could not be consummated under the

property law of the United States until questions of Indian title were resolved. Thus in most instances it was necessary to negotiate Indian treaties before statehood. When that was not done, as when Alaska became a state in 1959, development was thrown into question until the 1971 settlement with the Natives, a massive transaction involving the transfer of 44 million acres and \$1 billion to Alaska Natives pursuant to the Alaska Native Claims Settlement Act.

Political and constitutional power in the western states, then, must be placed in the context of the three landed sovereigns, the United States, the states, and the tribes. The tribes had prior rights. Then the United States acquired some, but by no means all, tribal political and property rights. In the treaties the tribes retained some lands—homelands—as reservations. The subsequent creation of new states by the statehood transactions, then, logically would deal only with the lands that had not previously been set aside for Indians. At that point, representatives of these future states bargained for the transfer of as much federal land as they could manage.

These arrangements, which provided for Indian reservations and the retention of most lands in federal ownership, explain the division of land in the West among the United States, the states, and the tribes, who own about 5 percent of all land in the eleven western states in addition to the extensive Native land holdings in Alaska. This progression of events also helps explain the continuing separatism, in a constitutionally egalitarian nation, of Indian tribes today.

The special status of Indian tribes raises particularly acute questions in regard to western natural resources. The Court has upheld extraordinarily favorable distributions of these resources to Indian tribes. *Winters v. United States*, in 1908, and *Arizona v. California*, in 1963, both recognized extensive Indian reserved water rights, outside of state water law, under dint of federal and tribal authority. Water, because of its scarcity in the American West and its importance to most forms of economic development, is especially controversial, and the question of Indian water is one of the foremost policy issues in the region. Somewhat similarly, in 1979 the Supreme Court upheld the right of the tribes in the Pacific Northwest to harvest up to 50 percent of the valuable salmon and steelhead trout runs. Tribes also possess important deposits of oil, gas, and coal.

All of these decisions, and others involving western resources, had to be made in the face of impassioned opposition based on states' rights

and equal protection. Indians, it has been widely claimed, are "super-citizens" who have been allowed to operate outside of the state laws applicable to other citizens and to benefit from reverse discrimination based on race.

The Supreme Court's response has been the doctrine discussed above in another context, that the treaties are based on the governmental status of tribes, not on race. But debate still swirls over whether the distinction between Indian governments and Indian individuals is arbitrary and superficial, and whether this special, separate treatment is wise national and regional policy.

Conclusion

Indian issues ought to be accorded their rightful place in constitutional law and history. It is unthinkable to build a principled argument for the notion that the *Cherokee* cases—and the epochal controversy that surrounded them—should be excluded as principal cases from the study of constitutional law. The Cherokee-Georgia episode raises classic historical, institutional, and constitutional issues with all the drama and intellectual dynamism that our society can infuse into a set of confrontations and resolutions. These cases belong in the company of the *Dartmouth College Case*, *Gibbons v. Ogden*, and *Marbury v. Madison* itself, a conclusion proved in part by the fact that modern courts have cited the *Cherokee* cases nearly as often as the great cases just mentioned. In addition, constitutional scholarship should squarely acknowledge the existence of Indian tribes as one of the three sources of sovereignty within the constitutional structure.

Indian law bears on the other constitutional issues I have raised in a somewhat different way. Indian cases are not essential to a balanced treatment of freedom of religion, equal protection, or modern preemption law. But Indian law enriches our understanding of those areas demonstrably, and it will breed stimulating debates.

The significance of Indians in the study of the constitution does not rest on a patronizing or romantic view of native issues. Indeed, the bottom reason that Indian issues are at least as relevant in the United States today as they were one hundred years ago is that Indian people themselves have demanded it. Rather than riding off into the sunset, Native Americans have dug in, insisted on choosing a measured sepa-

ratism over assimilation, and have continued to press for their very existence as a discrete race. They, not white society, have dictated their place in constitutional law and history.

From the beginning of the Republic, then, our law has acknowledged the historical fact that Indian tribal sovereignty reaches back into the mists farther than most of us can conceive. Remarkably, that aboriginal authority, and the property rights that complement it, continue to have ramifications in our modern constitutional democracy. Indian law is a blend without peer of constitutional law, history, anthropology, international law, and political science. We lose far too rich an opportunity when we overlook it.

For Further Reading

Many of the ideas raised in this chapter are explored in Charles Wilkinson, *American Indians, Time, and the Law: Historical Rights at the Bar of the Supreme Court* (New Haven, 1987). The standard treatise on Indian law is Felix S. Cohen's *Handbook of Federal Indian Law* (Charlottesville, 1982), a revision of his original 1942 publication. These sources contain specific citations to the various court cases discussed in the essay.

For other examinations of Indians in American political and constitutional history, see Russell L. Barsh and James Y. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley, 1980); Vine Deloria, Jr., *Behind The Trail of Broken Treaties: An Indian Declaration of Independence* (New York, 1974); F. P. Prucha, *American Indian Policy in the Formative Years* (Cambridge, Mass., 1962); and Roy Harvey Peace, *Savagism and Civilization* (Baltimore, 1965).