

# Indigenous *lèse-majesté*: Questioning U.S. Federal Indian Law

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## Abstract

United States “federal Indian law” consists of a body of rules rooted in the colonial doctrine of “Christian discovery.” Viewed through the lens of Carl Schmitt’s concept of “sovereign ban,” Christian discovery creates a “state of exception,” placing Native Peoples both inside and outside the constitutional order of the United States *and simultaneously constituting the claim of U.S. sovereignty*. The instability inherent in this double performance emerges as the “paradox of sovereignty.” Native self-determination efforts appear as *lèse-majesté* – “insults to sovereignty” – heretical acts challenging Christian colonial domination.

**Keywords:** United States federal Indian law, Indigenous peoples, Christian colonialism, sovereignty theory, self-determination, critical theory, legal studies

*The blunt fact...is that an Indian tribe is sovereign to the extent that the United States permits it to be sovereign – neither more nor less.*  
United States v. Blackfeet Tribe (1973).

## Introduction: Federal Indian Law is Disturbing?

Carl Schmitt was not referring to U.S. federal Indian law when he wrote “a jurisprudence concerned with ordinary day-to-day questions has practically no interest in the concept of sovereignty. Only the recognizable is its normal concern; everything else is a ‘disturbance’” (2005 [1922]: 12). Any review of federal Indian law will demonstrate a concern with sovereignty in nearly every court case, statute, and regulation. As a recent guide to litigation practice stated, “One of the most universal issues affecting tribes is sovereignty protection. Tribes have a paramount interest in protecting their inherent authority, and maintaining their ability to exercise their sovereign powers” (Gillett & Ross-Petherick, 2013: 1). Though Schmitt’s description of “day-to-day” law does not apply to federal Indian law, his designation of “the concept of sovereignty” as a “disturbance” and his exposi-

tion of “the sovereign exception” may be used to illuminate ongoing tensions within federal Indian law and provide a framework to understand their roots and significance.

U.S. Supreme Court Justice Clarence Thomas provides a high-level, 21<sup>st</sup> century display of the “disturbing” effects of the concept of sovereignty in his critiques of federal Indian law. In *United States v. Lara* (2004), he wrote, “[F]ederal Indian law is at odds with itself. .... The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling ‘sovereignty’” (225). In *United States v. Bryant* (2016), he identified “a central tension within our Indian-law jurisprudence” – the contradiction between “tribal sovereignty” and “plenary power” doctrines: On one hand, Thomas wrote, federal Indian law doctrine states “tribes [hold a] status as ‘separate sovereigns pre-existing the Constitution.’” On the other hand, a contrary doctrine states “Congress [holds] ‘plenary power’ over Indian tribes” (1967).

Thomas' critique stands out not only because he sits on the court that originated and maintains the "disturbance" of federal Indian law, but also because his discussion dispenses with superficial characterizations of the field, which describe it as "confusing," "complex," and "complicated." He issued his bluntest statement in *Lara*: "Federal Indian policy is, to say the least, schizophrenic" (219). Contrast that charge with a typical commentary from the legal profession: "American Indian law cases...are interesting because of the inherent complexities in navigating the complicated landscape of federal Indian law. ... the practice area requires mastery of many complex and continually changing areas of law" (Gillett & Ross-Petherick 9). The blandness of "interesting... inherent complexities" in navigating "inherent sovereignty" belies the turmoil of doctrine that Thomas identifies at the core of federal Indian law.

*Dollar General v. Choctaw Indians* (2015) provides a recent notable example of the turmoil. The Dollar General corporation sought to bar jurisdiction of the Mississippi Band of Choctaw Indians over a tort claim against the company, arguing that "Tribal court jurisdiction over non-members is fundamentally incompatible with the United States' 'overriding sovereignty,'" citing a 1978 supreme court decision, *Oliphant v. Suquamish Indian Tribe* (Dollar General Corp. 2015: 17). The company's attack aimed at excluding all corporations from all "tribal" courts. The Choctaw response focused on *Montana v. United States*, a 1981 decision that permitted "tribal jurisdiction" in certain circumstances, as "exceptions" to the general exception diminishing such jurisdiction.

At oral argument, Justice Breyer questioned one of the Choctaw lawyers, but could not recall the foundational federal Indian law doctrine set forth in 1831 in *Cherokee Nation v. Georgia*:

"JUSTICE BREYER: Now, is there any – and – and what is the word in *Cherokee*? I forget. It's 'something dependent nation.' What kind of – it was – there are two words –

"MR. KATYAL: Domestic dependent –

"JUSTICE BREYER: What?

"MR. KATYAL: Domestic dependent nation?

"JUSTICE BREYER: Domestic? All right (United States Supreme Court 2015: 40).

Breyer continued, "So if, in fact, Tasmania had this kind of official situation, and an American went to Tasmania and got a reasonable judgment, I take it our courts would enforce that." To which the lawyer replied, "Correct" (*Id.*) But the *Cherokee Nation* ruling stands for the rule that Native Nations are not "foreign" nations. As Katyal answered, the U.S. would recognize a Tasmanian decision; but federal Indian law places Native Nations in a "state of exception" from ordinary sovereignty. That a supreme court justice could not recall foundational doctrine and then misapprehended that doctrine marks a high (or low) point of confusion; it calls out for a clarification not simply of the confusion, but of the source of the confusion.

*Cherokee Nation v. Georgia* stands in the middle of an early 19<sup>th</sup> century trilogy of U.S. Supreme Court decisions authored by Chief Justice John Marshall. This "Marshall trilogy" – including *Johnson v. McIntosh* (1823) and *Worcester v. Georgia* (1832) – created the doctrinal platform upon which federal Indian law still operates in the U.S. These three cases continue to be cited in decisions at all levels of the U.S. judicial system, parsed by judges and lawyers seeking bases for decisions in an increasingly complicated maze. In this paper, I forego efforts to work within the maze. Rather, I draw on Schmitt's notion of "state of exception" to show federal Indian law as a "sovereign ban" on Indigenous Peoples, placing them in a "zone of indistinction," where rules and decisions are inherently unstable, confusing, contradictory.

In the first section, I explicate the federal Indian law concept of "tribal sovereignty" as a state of exception that simultaneously constitutes U.S. sovereignty – Native Peoples providing the necessary opposition to that which is "not U.S." Thereafter, I examine the founding U.S. supreme court cases, demonstrating how each enacts a specific and integral aspect of the

“sovereign ban” imposed on Indigenous Peoples: “Christian Discovery,” “Peculiar Relation,” and “Plenary Power.” I follow these sections with a look at “states of exception” imposed globally, reflected in the United Nations Permanent Forum on Indigenous Issues. In the final section I borrow Mark Rifkin’s notion of “sovereign anxiety” to discuss the possibility of an Indigenous refusal of federal Indian law. I conclude with a suggestion that Indigenous refusal of the state of exception would constitute *lèse majesté* – “insult to majesty” – using an old phrase to highlight federal Indian law as a “secularized theological concept” (Schmitt 2005 [1922]: 36).

### Performing Sovereignty: The State of Exception

Conventional definitions of sovereignty fail us. They present abstractions of absolute power held by monarchs that resonated at the 1648 Treaty of Westphalia, but are inadequate to our purpose. Indeed, fault lines running through 21<sup>st</sup> century political and economic institutions – evidenced and exacerbated by “humanitarian” military interventions and transnational corporate pressures on state actors – put notions of absolute sovereignty under siege. Rather than seeing sovereignty as an absolute, I work from the perspective of sovereignty as a performance – akin to a dramatic action, where performers do not simply describe, but create (a character, a role). “[I]t is not that sovereignty exists as a possession.... Sovereignty is what is tactically produced through the very mechanism of its self-justification” (Rifkin 2009: 90). From this perspective, I aim to avoid the pitfalls of reification (seeing the “sovereign,” but not sovereignty) and historicism (seeing sovereignty as something established in a unique event, rather than an ongoing activity).

Schmitt’s famous formulation of sovereignty – “Sovereign is he who decides on the exception” – calls into question the self-congratulatory notion of American politics that legitimate authority rests on “a government of laws, not of men.” As Schmitt writes, “authority proves itself not to need law to create law.” I bypass discussions of Schmitt as an “authoritarian” thinker focused on

the 1920s crises of the Weimar Republic. Instead, I follow Mark Rifkin, who explores Schmitt through the lens of Giorgio Agamben, using Schmitt’s theory that sovereignty declares itself into existence through a “performative act,” a “ban” or “sovereign exception” marking a “zone of indistinction” between law and non-law, to illuminate U.S. federal Indian as an inherently ambiguous and contradictory juridical space. Schmitt says, “What characterizes an exception is principally unlimited authority.... The state remains, whereas law recedes. ... The state suspends the law in the exception on the basis of its right of self-preservation, as one would say” (Schmitt 12). He adds, “It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty” (6).

It would be a truism to say that United States “Indian policy” expresses an assertion of U.S. sovereignty over the Indigenous Peoples of the continent. The basic doctrines in the field expressly assert federal power, such that the phrase “federal Indian law” names a body of rules designed to control Indians, who are excepted from regular legal processes. But to read the field only as a set of rules – “juridical regulations” – leaves everything in a muddle that conventional discourse pronounces as “incredible complexity.” Viewed as a “sovereign ban,” federal Indian law becomes starkly coherent. Rather than a set of rules for deciding cases involving Indigenous Peoples, federal Indian law represents a “state of exception” where Indigenous Peoples are simultaneously excluded from and included within a U.S. claim of national sovereignty. The “paradox of sovereignty” – which “consists in the fact the sovereign is, at the same time, outside and inside the juridical order” (Agamben 1998: 15) – mirrors the paradox of “American Indians,” whom federal Indian law places, at the same time, outside and inside the constitutional order of the United States. Felix S. Cohen’s 1942 “Handbook of Federal Indian Law” – generally regarded as the “bible” of the field – illustrates the situation: “The...fundamental principles [of Indian tribal powers] ... are subject to qualification by treaties

and by express legislation of Congress, but, save as thus qualified, full powers of internal sovereignty are vested in the Indian tribes" (Cohen 1942: 122)<sup>1</sup>.

We may begin here to discern a dual performance in federal Indian law, such that "the production of [U.S.] national space depends on coding Native peoples and lands as an exception" (Rifkin 2009: 95); and that "the supposedly underlying sovereignty of the U.S. settler-state is a retrospective projection generated by, and dependent on, the 'peculiar'-ization of Native peoples" (Rifkin 2009: 91). Joan Cocks suggests that "without an actual, potential, or imagined competitor, no assertion of sovereignty would ever have to be made" (Cocks 2014: 3). I suggest no assertion of sovereignty *could* ever be made without a competitor. Sovereignty consists of the act of producing a competitor – an excluded other, positioned in a state of exception. Giorgio Agamben, discussing Schmitt, says, "what is at issue in the sovereign exception is...the very condition of possibility of juridical rule and, along with it, the very meaning of State authority. Through the state of exception, the sovereign 'creates and guarantees the situation' that the law needs for its own validity" (Agamben 1998: 17). In a nutshell, the federal Indian law notion of "tribal sovereignty" names a *zone of Native non-sovereignty that simultaneously constitutes U.S. federal sovereignty*. The development of federal Indian law as a state of exception defines states and Native competitors against and within the domain of a federal sovereignty.

A 1958 decision involving a treaty between the United States and the Standing Rock Sioux provided an enigmatic phrasing of the "specialness" of the state of exception: "By the very existence of the treaty, providing that the reservation land be set aside 'for the absolute and undisturbed

use and occupation of the Indians'... a special situation has been created.... [S]olemn promises to the Indian people by the government of the United States... stand as the highest expressions of the law regarding Indian land until Congress states to the contrary" (*United States v. 2,005.32 Acres of Land, etc.*: 196). The rule that Native sovereignty exists except to the extent it does not exist provides a textbook example of Schmitt's assertion, "The exception does not only confirm the rule; the rule as such lives off the exception alone."

The 2014 case of *Michigan v. Bay Mills Indian Community* provides a recent example of the sovereign exception at work. Bay Mills had asserted its "tribal" sovereign immunity against a suit by the state. Michigan's brief stated, in a gross understatement, "the scope of tribal immunity is a bit muddled," then went on to argue, "Indian tribes have no rights under the United States Constitution to any attributes of sovereignty. Congress therefore has plenary authority to prescribe the limits of – or eliminate entirely – tribal powers of local self-government." The brief added, by way of comparison, that "state immunity is constitutional... The only authority that Congress has over the states is the power the states themselves transferred to Congress in the Constitution" (State of Michigan 2013: 36). Bay Mills responded with a reminder that Native sovereignty pre-exists the U.S. and the states, but immediately capitulated to the state of exception: "Modern-day Indian tribes are 'self-governing political communities that were formed long before Europeans first settled in North America.' ... Although they no longer possess 'the full attributes of sovereignty,' they still retain 'those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status'" (Bay Mills Indian Community 2013: 48). When the court upheld Bay Mills' argument, many commentators described the decision as a "win" for Bay Mills. But in fact, the court only reaffirmed the sovereign exception Bay Mills had already conceded, stating, "If Congress had [acted], Bay

<sup>1</sup> The editorial history of the *Handbook* since 1942 would provide a chapter all its own in elucidating the genealogy and changing contours of the state of exception: "the history of the *Handbook* reflects the pendulum swings in federal policy" (Brown 1983: 148).

Mills would have no valid grounds to object. But Congress has not done so..." (*Michigan v. Bay Mills Indian Community*: 2039).

Law school academic treatment of federal Indian law generally mirrors the practice of litigators and judges, remaining within the discursive space created by the sovereign exception. While some may acknowledge the state of exception – "Natives were subject to a history and a doctrine not of their choosing" (Ablavsky 2015: 1090) – they limit themselves to harmonizing rules within the exception rather than challenging it. On occasion, they try to carve out a new exceptional space for Natives. Savage, for example, after demonstrating the absence of a constitutional foundation for U.S. "plenary power" over Indians, suggests "a committee of Native Americans and congressional leaders could work out how the numerous unconstitutional statutes regulating every aspect of Native American life should be modified" (Savage 1991: 118). I avoid such approaches; instead, I offer a critical view of federal Indian law *tout court*, as a sovereign performance of domination by the U.S. over Indigenous Peoples.

### **Act One: Christian Discovery as a Right of Domination**

*Johnson v. McIntosh* (1823) – first in a trilogy of early 19<sup>th</sup> century U.S. supreme court cases grappling with the presence of Native Peoples in territory claimed by the United States – articulated a jurisprudential foundation simultaneously constituting U.S. federal Indian law and U.S. property law. The parties to the case were competing non-Native claimants of Native land. Their conflict arose against the background of English property law, in which "possession" – actual occupancy of land – took priority over "pretension" – a claim or aspiration – of ownership. As *Ricard v. Williams* (1822) put it: "Undoubtedly, if a person be found in possession of land, claiming it as his own, in fee, it is *prima facie* evidence of his ownership..." (1822: 105). The difficulty for the adversaries in *Johnson*, each with their pretension of ownership, was that Native Peoples were in posses-

sion of the disputed lands. Almost two centuries later, Lindsay Robertson demonstrated that the parties in *Johnson* were not actually adversaries, but conspirators in "a collusive case [between] speculators in Indian lands" (Robertson 2005: xi). The parties filed a "case stated" – a stipulation of facts – to prevent the court from inquiring into the actual circumstances. No Natives were party to the case; their rights would be defined by those claiming their lands.

The plaintiffs' "action of ejectment" alleged a purchase of land from the Piankeshaw Indians. The defendant replied by alleging a conveyance from the United States. The pleadings thus set up competing bases for ownership of lands acknowledged to be inhabited by Indians. Plaintiffs argued, "[Indian] title by occupancy is to be respected, as much as that of an individual, obtained by the same right, in a civilized state," and concluded, "the only question in this case must be, whether it be competent to individuals to make ... purchases [from the Indians], or whether that be the exclusive prerogative of government" (*Johnson* 563). The defendant disputed that Indigenous Peoples held title, asserting, "Discovery is the foundation of title in European nations, and this overlooks all proprietary rights in the natives. The sovereignty and eminent domain thus acquired, necessarily precludes the idea of any other sovereignty existing within the same limits" (*Id.*).

Chief Justice John Marshall opened the opinion for a unanimous court by rephrasing the plaintiffs' question: "The inquiry is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country" (572). Marshall next elaborated the defendant's argument – the "principle" of "discovery" – as a "right" flowing naturally out of competitive colonization: "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" (573). Marshall emphasized the Christian theological foundation of the

“discovery” doctrine, referring to such texts as the 1496 commission to the Cabots, “to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England.” Colonizers from Christendom asserted “... 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” (576-577). Marshall acknowledged the “extravagant pretension” of the court’s decision, yet insisted on its validity as a sovereign performance, notwithstanding its opposition to “natural right” and in the face of its dubious rationality:

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. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants.... However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice. (591-592)

Marshall thus invoked Christian Discovery not as a violation of common law rules, but as an exception to them, necessary to defend state sovereignty; to reiterate Schmitt, “The state suspends the law in the exception on the basis of its right of self-preservation.” The exception operates as an “inclusive exclusion” (Agamben 27): It excludes Natives from the category of persons whose occupancy gives rise to ownership, while (and so that) Native lands are included in the sovereign order of the pretenders to title. The *Johnson* opinion devolved the sovereign exception of Christian Discovery from the English Crown onto the U.S. federal government: “The power now possessed by the government of the United States to grant lands, resided, while we were col-

onies, in the crown, or its grantees” (587). This jurisprudential move transformed theology into politics, a kind of laundering at the “threshold between ‘the political and the religious’” (Rifkin 103).

Not coincidentally, the state of exception disqualifying Native possession assured title of the Marshall family to thousands of acres in Virginia and Kentucky derived from Lord Fairfax under a 1649 grant by Charles II. A passage in the opinion referring to “the sale of that country which now constitutes Kentucky, a country, every acre of which was then claimed and possessed by Indians” (586) provides a clue to Marshall’s personal interest in the case: By the end of the 1780’s, Marshall claimed ownership of over 200,000 acres in Kentucky. His father and his brothers claimed about twice that amount (Smith 1996: 75n).

Rifkin argues that the U.S. jurisdictional imaginary is made possible “only by *localizing* Native peoples, in the sense of circumscribing their political power/ status and portraying Indian policy as an aberration divorced from the principles at play in the rest of U.S. law...” (97). However, the state of exception for Native Peoples resonates with other cases from the same period (e.g., *Huidekoper’s Lessee v. Douglass*, 7 U.S. 1 (1805)), where the supreme court asserted federal supremacy to prevent state legislatures from protecting actual possessors (settlers) against land speculators (claimants to title). Agamben’s suggestion of “the people as an excluded class” (177) becomes relevant to display the federal Indian law state of exception as part of a broader project: “‘people’...always indicates the poor, the disinherited, and the excluded” (176). Marshall’s opinion produced a general jurisprudential basis for United States federal sovereignty – including supremacy over the states, the people, and ownership of the continent.

*Johnson* has never been overruled. A search on Westlaw (accessed 25 January 2016) showed 330 cases citing *Johnson*, up to and including July 1, 2015. Many other cases rely on “discovery” without citing *Johnson*. For example, *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*

cited the proposition that “fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign – first the discovering European nation and later the original States and the United States” (2005: 204), but cited intermediate decisions rather than *Johnson*, thereby eliding any examination of the theological justification of Christian Discovery.

Explicit reaffirmations of Christian Discovery still occurred in the mid-20<sup>th</sup> century. In *Tee-Hit-Ton Indians v. United States*, the U.S. government cited *Johnson* to urge the court to deny compensation for lumber taken by the U.S. from Tlingit forests. The brief argued that “The Christian nations of Europe acquired jurisdiction over newly discovered lands by virtue of grants from the Popes, who claimed the power to grant to Christian monarchs the right to acquire territory in the possession of heathens and infidels” (United States Department of Justice 1954: 13). The court agreed: “It is well settled that...the tribes...held claim to...lands after the coming of the white man, under...permission from the whites to occupy”; adding, “It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race” (*Tee-Hit-Ton* 279, 281).

### **Act Two: Peculiar Relation as Inclusive Exclusion**

*Cherokee Nation v. State of Georgia* (1831), the second case in the “Marshall trilogy,” sought to stabilize the definition of the state of exception within the ambit of regular constitutional discourse. The Cherokee had filed a suit pursuant to the U.S. Constitution, Article 3, section 2, as a “controversy between a State...and a foreign State,” seeking an injunction to protect themselves against invasion by the state of Georgia, and citing the terms of their treaty with the U.S.

Marshall opened with a question, “Has this Court jurisdiction of the cause?” He acknowledged “the character of the Cherokees as a

State as a distinct political society, separated from others, capable of managing its own affairs and governing itself,” and asserted, “The acts of our Government plainly recognize the Cherokee Nation as a State...” (*Cherokee Nation* 15, 16) But he immediately posed a second question, “Is the Cherokee Nation a foreign state in the sense in which that term is used in the Constitution?” This, he asserted, was “A question of much more difficulty” (16). The “difficulty” of the question, Marshall wrote, arises from “the condition of the Indians in relation to the United States,” which “is perhaps unlike that of any other two people in existence. ...[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else” (16). Marshall summarized the peculiarity in terms of the state of exception created in *Johnson*: “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 occupy a territory to which we assert a title independent of their will” (17). Marshall then went on to coin an *obiter dictum* that survives to this day as core doctrine in federal Indian law: Indians “may more correctly, perhaps, be denominated domestic dependent nations. ... Their relations to the United States resemble that of a ward to his guardian” (17).

Marshall’s opinion in *Cherokee Nation* was not unanimous. Justice Thompson, joined by Justice Story, asserted the court had jurisdiction to hear the Cherokee complaint and room to provide relief. Thompson cited the discussion of “unequal alliances” in Emer de Vattel’s 1758 “The Law of Nations”: “Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion that they form a sovereign state.” That the Cherokee had “yield[ed] up by treaty, from time to time, portions of their land” did not remove their “sovereignty and self-government over what remained unsold” (53-54). Thompson declared Cherokee possession a property right. Echoing

the common law – and referring obliquely to the doctrine of “discovery” – Thompson asserted, “It is immaterial whether [the Cherokee hold] a mere right of occupancy or an absolute right to the soil. The complaint is for a violation, or threatened violation, of the possessory right. And this is a right, in the enjoyment of which they are entitled to protection...” (70). Thompson and Story saw a basis to “protect” the “unequal sovereignty” of the Cherokee against the assertion of Georgia sovereignty, without, however, undoing the state of exception announced in *Johnson*.

This dissent in *Cherokee Nation* marks a line of fracture, reflecting tectonic stresses still at work today in federal Indian law. But the nature of the state of exception assures that whichever way courts respond to such stresses, their decisions can always be countenanced within the “peculiarity” of the exception itself. *United States v. Kagama* (1886) illustrates: “[W]e are not able to see in...the Constitution...any delegation of power to enact a code of criminal law” [a project of federal “supervision”]; “But this power of Congress...arises...from the ownership of the country...” (379-380). A 1997 U.S. Supreme Court decision, *Idaho v. Coeur d’Alene Tribe of Idaho*, also exemplifies this: *Cherokee Nation* barred the Cherokee suit against Georgia by denying Cherokee status as a “foreign nation”; the *Coeur d’Alene* decision blocked Coeur d’Alene’s suit against Idaho on the ground that “Indian tribes ... should be accorded the same status as foreign sovereigns, against whom States enjoy ... immunity [from suit]” (*Idaho* 268-269). The rules of Native sovereignty still live off the exception!

Meanwhile, a 21<sup>st</sup> century comparison of federal Indian law “guardianship” with ordinary trust law demonstrates how far the state of exception departs from the regular legal order: In *United States v. Navajo Nation* (2009), the Court held that “common law trust duties of care, candor, and loyalty” do not apply to the federal “trustee,” despite the latter’s “comprehensive control” of Indian land (295).

### Act Three: Federalism and Plenary Power

In 1832, Marshall wrote the court’s opinion in *Worcester v. Georgia*, last in the foundation trilogy of federal Indian law. The case arose from the same circumstances the Cherokee had attempted to litigate in *Cherokee Nation* – Georgia’s invasion of Cherokee lands. Samuel Worcester, a citizen of Vermont and a missionary from the American Board of Commissioners for Foreign Missions, was preaching the gospel to the Cherokee and working with Cherokee language and printing press projects. Georgia charged Worcester with violating the state’s effort to control access to Cherokee Territory. A jury convicted him – rejecting his plea that the Cherokee Treaty with the U.S. protected his presence among the Cherokee. The County Court sentenced him to “hard labour in the penitentiary” for four years.

Marshall began his opinion by stating the case involved “the personal liberty of a citizen” – thus distinguishing it from *Cherokee Nation* – though he added the case also included “the rights, if they have any, the political existence of a once numerous and powerful people” – i.e., the Cherokee (*Worcester* 536). Parts of the opinion in *Worcester* have been read as disavowing the doctrine of Christian Discovery and federal domination of Indigenous Peoples. Lindsay Robertson, for example, points to the court’s statement that “Discovery...could not affect the rights of those already in possession,” and asserts that *Worcester* thereby “dismantle[d] the discovery doctrine by overruling that part of the doctrine assigning fee title to the discovering sovereign” (2005: 133). But this reading misapprehends the case as establishing a rule, rather than as elaborating a state of exception – in which Native “occupants”...“retain... their original natural rights as the undisputed possessors of the soil...with the single exception of that imposed by irresistible power...” (544, 559). Marshall’s apparently “pro-Indian” statement in *Worcester* does not depart from, but has its root in *Johnson*, where the court declared, “It 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..." (603). *Worcester* reaffirmed the exception defined by *Johnson* – the “ultimate right of domain” of colonial “potentate[s].” The supreme court’s 2001 decision in *Nevada v. Hicks* demonstrates that statements in *Worcester* appearing to affirm an independent “tribal sovereignty” actually reflect the essential indeterminacy of the state of exception:

It was “long ago” that “the Court departed from Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries.” ... [T]he principle that Indians have the right to make their own laws and be governed by them requires “an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.” (361-362, internal citations omitted).

*Worcester*’s parameter of “internal affairs,” while appearing to constrain U.S. sovereign claims to interfere with Native self-government, actually authorizes ongoing invasion of Native societies through federal “civilizing” programs aimed at what Rifkin calls “the translation of Native peoples into aggregates of individual domestic subjects (as either a race or a culture)” (95). Marshall outlined the “civilizing” project in *Worcester*, quoting from an 1819 Act of Congress “for promoting those humane designs of civilizing the neighbouring Indians”: “the President of the United States...in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, [is authorized] to employ capable persons of good moral character to instruct them in the mode of agriculture suited to their situation, and for teaching their children in reading, writing and arithmetic...” (*Worcester* 557). In short, *Worcester*’s dicta on “internal tribal sovereignty” constitute variations of, not departures from, the state of exception – the “peculiar relation” based on the assertion of Christian Discovery.

The true significance of *Worcester* lies in its careful parsing of the topology of the exception: First, it insists on federal supremacy over the states in dealing with “Indian affairs.” Second, it defines a domain of “internal affairs” of the Native Peoples for “their self-government so far as respected themselves only,” under “exclusive” federal control of Indian territory (*Worcester* 547). As a side note, the court’s emphasis on federal supremacy provoked strenuous manoeuvres behind the scenes, coming as it did in the midst of the Nullification Crisis – South Carolina’s rejection of federal tariff authority. *Worcester* and his supporters, in fear of exacerbating the threat of southern states seceding from the Union, accepted a pardon from Georgia’s governor, rather than risk continued conflict between the supreme court and the state (Miles 1973).

The three foundational cases of federal Indian law created a template copied around the world: *Johnson* declared the original state of exception – “ultimate dominion”; *Cherokee Nation* positioned the exception within constitutional discourse – an “inclusionary exclusion”; *Worcester* enlarged the exception into a general federal supremacy. Indigenous Peoples face this legacy globally, where they are challenging states of exception and claimed nation-state rights of domination.

### A Global Challenge to States of Exception

In 1923, Haudenosaunee Chief Deskaheh presented a petition to the League of Nations from the Six Nations Confederacy, asking the League to stop Canadian intrusion into Six Nations territory. Deskaheh asked for “international acceptance of Six Nations political and territorial sovereignty,” in contradistinction to Canadian federal Indian policy, which was “based on the understanding that Indians were a dying race of wards to the government’s guardianship” (Belanger 2007: 30). The petition required a complex strategy, since the League consisted of imperial powers exercising colonial “mandates” – asserting rightful domination over non-state (“tribal”) peoples. There-

fore, coupled with his request for sovereignty, Deskaheh called for "protection" of Six Nations' existence as a people, under terms of treaties with Britain, France, and the Netherlands.

The Six Nations' simultaneous attack on "guardianship" and appeal for "protection" avoided incoherence insofar as it echoed Vattel's theory of "unequal alliances," whereby a weaker state binds itself to a stronger, "without stripping itself of the right of government and sovereignty." Deskaheh asked Six Nations treaty partners – "stronger states" – to defend the "weaker" Six Nations against Canada. When the League refused to allow the petition, Deskaheh concluded, "my appeal to the Society of Nations has not been heard." In the last speech of his life, he "more forcefully than ever...hurled defiance at big nations who disregard the claims of smaller peoples" (Akwesasne Notes 1978, 1981: 25). In 1977, the Mohawk Nation at Akwesasne sent a delegation to the Non-Governmental Organization inquiry into the conditions of Native Peoples at the U.N., Geneva, to assert "a place in the international community" (Akwesasne Notes 6). The inquiry ignited three decades of activism among Indigenous Peoples worldwide, until, in 2007, the United Nations General Assembly adopted a Declaration on the Rights of Indigenous Peoples. Article 3 condemns "all doctrines, policies and practices based on...national origin or racial, religious, ethnic or cultural differences" (United Nations General Assembly 2007).

The title of the U.N. Declaration – Rights of Indigenous Peoples – marks the outcome of an argument won by Indigenous Peoples. Their insistence on the plural form – "peoples," signifying collective self-determination – triggered immense resistance by some states, who argued that Indigenous *people* are individual citizens of the states claiming jurisdiction over their lands, not members of independent *Peoples*. Despite the recognition implied by its title and the Declaration's rhetoric of "self-determination," the document does not automatically overturn domination of Indigenous Peoples by states.

Indeed, the Declaration restates the core issue that preoccupied the U.S. Supreme Court at the creation of federal Indian law: "The condition of the Indians in relation to...States." Every consideration stated in the Declaration was deliberated in the trilogy of Supreme Court opinions: What "degree of sovereignty...[do] the circumstances of [Indigenous] People ... allow them to exercise"? What restrictions, if any, may the State place on "the full use of the lands" of Indigenous Peoples? To what degree, if any, are Indigenous Peoples "dependent on some foreign potentate for the supply of their essential wants and for their protection"? Does a "weaker power ... not surrender its independence – its right to self-government – by associating with a stronger and taking its protection"?

The U.S., a major opponent of the plural "Peoples," voted against the Declaration. In 2010, facing pressure from Indigenous Peoples and embarrassment in the U.N., it reversed its vote – but with a signing statement from its Department of State (2010-12-16) insisting on the continuance of a diminished status for Native Peoples: "The Declaration's call is to promote the development of a concept of self-determination for indigenous peoples that is different from the existing right of self-determination in international law" (3).<sup>2</sup> The State Department reiterated the U.S. state of exception asserting a rightful domination of Indigenous Peoples:

The United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken. (5)

State resistance to the U.N. Declaration demonstrates what Rifkin describes in another context

<sup>2</sup> The State Department Announcement was removed from the Department's website, along with other materials related to U.S. Indian policy, following the inauguration of Donald Trump on 20 January 2017. The Reference in this paper provides a link to the document in the Internet Archive.

as sovereign “anxiety” – an “instability of the “settler-state” arising from a “failure to find a normative foundation” for state power in relation to Indigenous Peoples (Rifkin 90, 106, 97). The Declaration, in its final Article, reflects such anxiety and bows to states’ insistence on a continuing “compulsory relation” with Indigenous Peoples, privileging state geopolitical claims against the possibility of “metapolitical” Indigenous challenges:

Nothing in this Declaration may be...construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States (United Nations General Assembly Art. 46).

The U.N. Declaration, despite – and because of – its limitations, has generated continuing attention to the situation of states and Indigenous Peoples. This leads us to explore some implications of the “anxiety” produced by the continuing “disturbance” of sovereignty issues.

### **Sovereign Anxiety**

Justice Breyer gave no explanation for the reference to Tasmania in his confused question during oral argument in *Dollar General v. Choctaw Indians*. But the reference carries irony: he named a place with its own history of colonization and domination under a state of exception in the name of Christian Discovery. Justice Sotomayor concluded the oral argument in *Dollar General* with a question to the company’s lawyer that revealed her understanding of federal Indian law as a sovereign exception:

What then remains of the sovereignty of the Indians? ...You just want to cherry pick what “sovereignty” means. Because if they’re sovereign, the United States can have treaties with people that basically say in your land, you do what you want; I’m not going to enforce your judgment if I don’t think it’s consistent with due process here. But we don’t dictate to other sovereigns what kind of systems they should have. You’re right we have the power to do that, but it’s still something that we don’t have to exercise. (United States Supreme Court 63)

The Dollar General lawyer replied, in a straightforward affirmation of the state of exception, “The difference is the dependent sovereignty of the Indian tribes” (*Id.*)

Justice Thomas’ call in *Lara* to “examine more critically our tribal sovereignty case law” suggests to “begin by carefully following our assumptions to their logical conclusions and by identifying the potential sources of federal power to modify tribal sovereignty” (223). Notice that he did not encourage a careful analysis of *limitations* on federal power to modify tribal sovereignty. That analysis would have to begin with an acknowledgment of the foundational role of religious doctrine – Christian Discovery – in the state of exception. And it would have to include the present status of that doctrine in international discourse: It has been declared “invalid” under the auspices of the U.N. Permanent Forum on Indigenous Issues, which noted its use “as a framework for justification to dehumanize, exploit, enslave and subjugate Indigenous Peoples and dispossess them of their most basic rights, laws, spirituality, worldviews and governance and their lands and resources. Ultimately it was the very foundation of genocide” (United Nations Permanent Forum I.3).

In *Bryant*, Thomas suggested attention to “tribes’ distinct histories.... to understand the ultimate source of each tribe’s sovereignty and whether it endures” (1968). Whether intended or not, the suggestion to investigate “sovereign endurance” raises a “metapolitical” possibility: namely, that Native peoples might engage in negotiation and self-definition through an “inter/national” (Salaita 2016) process, terminating the state of exception altogether. More likely, Thomas’ formulation only reaffirms the “geopolitical self-evidence [of the U.S.] and its authority to determine what issues, processes, and statuses will count as meaningful within the political system” (Rifkin 91). Thomas’ goal may be to terminate the state of exception by carrying it to its logical conclusion: a sovereign ban like the “allotment” efforts of the late 19<sup>th</sup> century and “termination” efforts of the 1950’s, whereby Native *people*

would be brought within the regular operation of U.S. law and Native *Peoples* would (for purposes of U.S. law) cease to exist.

Meta-political possibilities may indeed arise from increased attention to the doctrinal incoherence of federal Indian law. As Rifkin suggests, “exploiting the kind of logical incoherence and underlying normative crisis toward which Thomas points, the discourse of sovereignty can be mobilized to deconstruct U.S. rule” (108) over Native Peoples. But Native litigants show little inclination to deconstruct the state of exception that constitutes federal Indian law, or to examine its premises. Instead, like a Kafka protagonist struggling to gain access to a mysterious authority, they navigate the maze-way of ever-shifting rules propounded by courts and congress.

As discussed in the Introduction, the Choctaw arguments in *Dollar General* remained within the framework of “overriding U.S. sovereignty” and “diminished tribal sovereignty.” An *amicus* brief submitted by academic historians and legal scholars in support of the Choctaw in *Dollar General*, rather than challenging, also *affirmed* the sovereign exception: “The tribes’ later incorporation into the territory of the United States... restricted their exercise of separate power to the extent that it ‘conflict[ed] with the interests of the [the United States’] overriding sovereignty” (Ablavsky, et al. 2015: 9). Ironically, only the State of Mississippi, in a joint state *amicus* brief supporting the Choctaw, came close to attacking the state of exception, saying it “cast[s] doubt on the inherent rights of all interdependent sovereigns” (2). But Mississippi did not develop the point.

I venture to suggest that the Choctaw and their *amicus* allies failed to challenge the fundamental doctrines of federal Indian law out of fear of provoking the wrath of a Christian polity. The thinking likely goes, “Don’t rock the boat with a fundamental challenge. Take the safe course and pray for the court to let us alone and leave us to our political program in Congress.” But, as Muskogee-Creek Elder Phillip Deere explained, “Many times our Indian People...say that we’re

going to beat [the government] at his own game. But we’re forgetting that we’re in his ballfield and he’s changing the rules right in the middle of the ballgame” (Phillip Deere 2013 [1979]: 25:49). Deere suggested Native Peoples survive only if they proceed on “a spiritual basis.”

### Conclusion

U.S. Federal Indian law consists of a state of exception founded on monarchical despotism – royal prerogative, a right of domination, the “extravagant pretence” of Christian Discovery and its constituents, “peculiarity” and “plenary power.” As John Marshall put it, “The power now possessed by the government of the United States to grant lands [occupied by Indians], resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negate the existence of any right which may conflict with, and control it. ... All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right” (*Johnson* 587-588). The supreme court summarized the doctrine in modern parlance in *United States v. Wheeler* (1978) as “the undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government. ... The sovereignty that the Indian tribes retain...exists only at the sufferance of Congress and is subject to complete defeasance” (319, 323).

Sovereign anxiety acknowledges the possibility of an Indigenous deconstruction of federal Indian law and rejection of the underlying religious-based state of exception. Such an act would question “the validity of the titles [that] has never been questioned.” It would assert rights “which... conflict with” the U.S. claim to power over Indigenous lands. I describe this as an act of Indigenous *lèse majesté* – “insulted sovereignty” – the medieval term for treason against the king and heresy against the church. An Indigenous rejec-

tion of federal Indian law would demonstrate the same “ever active urge to self-government” that opposed theocratic governments in the Middle Ages (Ullmann 1965: 161). Indigenous refusal of federal Indian law would manifest the urge of all peoples to be free of domination, to exercise self-determination in their own territories.

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