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Indian Rights and the Marshall Court

The Founders' organizing vision of a white racial dictatorship imposed over Indian tribes by the United States, so evocatively signified by George Washington's Indian policy paradigm of "the Savage as the Wolf," reflected the continuing force of a long-established language of racism in America. The stereotypes of the Indian tribes on the frontiers of white settlement as uncivilized, war-loving, and irreconcilably savage enemies had been used by colonizing Europeans since their first encounters with the native peoples of the New World.

The Indian policy metaphor of "the Savage as the Wolf" was therefore no sudden inspiration of the Founders' racial vision of America as a white Anglo-Saxon, fee-simple empire of liberty.[1] Emerging out of the most ancient and widely disseminated stories of origin and myth appropriated by the Western colonial imagination, the idea of the Indian as hostile savage was received and perpetuated by the Founders through a diverse and influential set of sources, texts, and narrative traditions.[2] This archive of incommensurable and alienated forms of human otherness reinforced the notion that the American Indian was a paradigm example of uncivilized savage humanity. The organizing significance to

the Founders of this colonial-era racial fantasy about the Indian's irredeemable nature cannot be overstated.[3] As Roy Harvey Pearce wrote in his classic study on the idea of the Indian as savage in America, the Indian became the symbol "for all that over which civilization must triumph" in the Founders' colonial imagination.[4] Denied the right to exist as "truly other, something capable of being not merely an imperfect state of oneself,"[5] the Indian's doomed fate was inextricably tied to white America's ascendant destiny on the continent. The rise of a superior form of civilization would necessarily entail the destruction of the savage race.

The organizing power of the idea of the Indian as incommensurable savage inspired a new art of imperial government administered by the West's first modern settler-state society, the United States of America. Directed to the task of extinguishing the Indian's radically constructed otherness, the Founders' first Indian policy was the inaugural step in defining a white racial identity for the United States as a nation.[6] The legacy of white racial superiority over Indian tribes that constitutes such a vital, defining part of our nation's history and cultural heritage begins with the Founders' will to empire and the Founding-era vision of eliminating "the Savage as the Wolf" from the territory of the United States.

Given that this language of Indian savagery is so deeply embedded in the history and culture of the colonial era and given that it played such an important role in organizing the Founders' first Indian policy and in defining a national identity for the United States following the Revolutionary War, it is not surprising to find it being used by the justices of the Supreme Court when they were first asked to address important questions of Indian rights during the early decades of the nineteenth century. Steadfast beliefs in white superiority and Indian savagery can in fact be identified as central organizing principles in the Court's first set of landmark decisions on Indian rights. In three seminal opinions for the Court, *Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832),[7] Chief Justice John Marshall, a member of the founding generation himself, developed a legal model of Indian rights that relied upon the same basic language that the Founders had used in defining the first U.S. Indian policy. As used in Marshall's model of Indian rights under U.S. law, this language served to justify the legal imposition of the white racial dictatorship over the

tribes that had been envisioned as the ultimately intended goal of the Founders' inaugural Indian policy paradigm of treating "the Savage as the Wolf."

Amazingly, unlike with the decisions in *Dred Scott* and *Plessy v. Ferguson,* the justices of the Supreme Court continue to cite this trio of archaic, racist judicial precedents from the early nineteenth century in their present-day opinions on vitally important questions of Indian rights to property, self government, and cultural survival. The model of inferior and diminished Indian rights under the Constitution and laws of the United States laid out in these three seminal cases continues to define the Court's approach to all questions of Indian tribal rights. The justices, in fact, routinely cite and quote from these cases, despite Marshall's blatantly obvious perpetuation of a stereotype-ridden and overtly hostile and demeaning language of racism (see chapter 3).

Clearly one reason why *Johnson, Cherokee Nation,* and *Worcester* are still being dutifully followed by the present-day Supreme Court is because these three seminal opinions of the Marshall model were written by the person whom generations of American law students have been taught to regard as the greatest chief justice of all time. Generations of U.S. lawyers, in turn, have treated these three opinions by Marshall as if they were sacred texts, with oracular status when it comes to thinking and talking about Indians and their rights. They have been taught to believe that when used and interpreted correctly, the principles and doctrines derived from these foundational cases can work reliably and steadily enough to protect Indian rights in a legal system constructed upon a Founding-era vision of white racial supremacy and dictatorship intended to be established over the entire continent of North America. Firm in this belief, and stressing the importance of stare decisis, they keep telling us, in their legal briefs, treatises, and law review articles, that the Supreme Court must continue to abide by the correct interpretation of the legal principles laid out in the Marshall Model of Indian Rights. In this sense, to borrow from the postcolonial theorist Homi K. Bhabha, these three opinions by Marshall, which initiated this revered early-nineteenth-century judicial model of diminished Indian rights in the Supreme Court's Indian law, function as "signs taken for wonders."[8]

In his essay "Signs Taken for Wonders," Bhabha identifies a crucial, organizing scene "in the cultural writings of English colonialism." It is a scene that repeats itself, he says, insistently after the early nineteenth

century, "and through that repetition, so triumphantly *inaugurates* a literature of empire." It is the scene, he writes, "played out in the wild and wordless wastes of colonial India, Africa, the Caribbean, of the sudden, fortuitous discovery of the English book."[9]

According to Bhabha, "like all myths of origin," the discovery of the English book is "memorable for its balance between epiphany and enunciation." Its discovery, he writes, is "at once a moment of originality and authority." But Bhabha also identifies in this great, revelatory discovery of the English book "a process of displacement that, paradoxically, makes the presence of the book wondrous to the extent to which it is repeated, translated, misread, displaced." The English book stands as emblem and insignia of colonial authority. A "signifier of colonial desire and discipline," the discovery of the English book becomes, as Bhabha describes it, an inaugural force in the cultural organization of the West's will to empire over non-Western peoples—evidence of "signs taken for wonders."[10]

In many ways, the Marshall Model of Indian Rights plays much the same kind of inaugural and paradoxical organizing role in the Supreme Court's Indian law as Bhabha's wondrous "English book" plays in the cultural writings of English colonialism. Its insistent use by the Supreme Court as a foundational source of the precedents and principles for deciding virtually all questions of Indian rights under U.S. law indeed identifies the Marshall model as a "moment of originality and authority," seeking to assimilate the Indian's radically conceived alterity within the complex schema of constitutional principles and legal values promoted by a self-identified superior form of civilization and its enlightened system of colonial governmentality. But this judicial act of authoritative interpretation of Indian rights also represents a highly problematic process of displacement and ambivalence as well. The Marshall model's organizing paradigm of Indian savagery and incommensurability triumphantly inaugurates an authoritative legal discourse of empire and judicially sanctioned white racial dictatorship in which Indians, so long as they remain in their backward state of civilization, are recognized as perpetually opposed colonial subjects possessing a hybrid form of inferior and diminished rights under U.S. law.[11] In this sense, the Supreme Court's "Indian law" always functions ambivalently in its limiting and unappealable pronouncements on Indian rights, as, simultaneously, a form of *anti*-Indian law. In carrying out its perpetu-

ally unresolved mission in the Supreme Court's Indian rights decisions, the Marshall model, "like all myths of origin,"[12] insistently repeats that moment of tension when the irreducible legal significance and ambiguous legal meanings of the Indian's essential savage nature as colonized subject are revealed and announced in Marshall's three oracular Indian law opinions.

The sacred, mythical, mystical nature of these three nineteenth-century opinions reveals itself in the fact that *Johnson, Cherokee Nation,* and *Worcester* have been traditionally referred to by legal scholars and historians of the Supreme Court's Indian law as the "Marshall Trilogy."[13] The revered, pundit-like status of the ghost of John Marshall is even more forcefully reflected in the fact that virtually every Indian rights decision of the Supreme Court contains at least one and often numerous citations to the cases of the Marshall Trilogy. Even today, in the twenty-first century, the Supreme Court insistently and unembarrassedly cites these early-nineteenth-century texts as authoritative precedents in defining Indian rights; faithfully repeated and adhered to despite their racist judicial language of Indian savagery, they function as signs taken for wonders in the Supreme Court's Indian law decisions (see chapters 10 and 11).

Johnson v. McIntosh

The Supreme Court's unanimous decision in *Johnson v. McIntosh,* written by Marshall in 1823, is, without question, the most important Indian rights opinion ever issued by any court of law in the United States. Its signal importance in the Supreme Court's Indian law derives from the fact that *Johnson* incorporated the European colonial era's "doctrine of discovery" as the originating source of Indian rights under U.S. law.[14] In a case in which Indians weren't even represented (the legal controversy in *Johnson* was between two non-Indian parties fighting over legal title to the same piece of land, a parcel that had once been occupied by Indians), *Johnson* held that European "discovery" of Indian-occupied land in the New World, in Chief Justice Marshall's oft-cited words, 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."[15]

According to the carefully scripted legal history lesson that begins

Marshall's opinion, the principle of white racial superiority asserted by the doctrine of discovery and validated by the Supreme Court in *Johnson* was part of the colonial-era European Law of Nations. The two-step process—discover and consummate by possession—legalized by the discovery doctrine was relied upon by all the colonizing, "great nations of Europe," Marshall tells us, to justify their claims to superior rights over all the lands held by the Indian tribes of the New World:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all.

The fact that there were Indians already living upon these newly discovered lands didn't matter much as far as the first European discoverer's superior rights under the discovery doctrine were concerned. As Marshall explained, the "character and religion" of the New World's inhabitants "afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."[16] Indian tribes, in other words, were presumptively regarded under the discovery doctrine and European colonial-era conceptions of international law as an inferior race of peoples who could be lawfully conquered and colonized. Conquest, in fact, perfected the superior title of the European nation that had acquired the rights of discovery to the lands occupied by Indians under the doctrine.

According to the colonial-era model of Indian rights that Marshall begins to adumbrate in *Johnson,* the doctrine of discovery provided a much-needed organizing legal principle of colonial governmentality for Europeans to regulate and apportion their conquests and claims to "ascendancy" over the Indians of the New World. The European colonial powers, in Marshall's felicitous words, "were all in pursuit of nearly the same object," that is, control and empire over the lands of non-European peoples deemed inferior by Europeans. It therefore became "necessary in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves." That "principle" of white racial superiority under European international law, as Marshall noted, was embodied in the doctrine of discovery. The doctrine of dis-

covery assigned the exclusive legal rights to conquer and colonize the Indian tribes of North America to the first European nation that had happened to "discover" and then effectively occupy their lands.[17]

Like all the other European colonizing nation-states, as Marshall explained, the United States, as successor to Great Britain's imperial interests under the European Law of Nations, recognized this foundational principle of white racial superiority and applied it to the entire North American continent. The United States had incorporated the doctrine of discovery as the original legal source of its exclusive colonial authority over Indian tribes and the lands they occupied:

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.[18]

Two highly distinctive elements of Chief Justice Marshall's model of Indian rights can be seen clearly emerging out of his opinion for the Court in *Johnson*. First is the overarching principle of European racial and cultural superiority over the Indians of the New World. Because of their savage "character and religion," Indians were regarded as inferior peoples with lesser rights to land and territorial sovereignty under the European Law of Nations. They therefore could be lawfully conquered and colonized by any European-derived nation that desired to undertake the effort.[19] Second, the doctrine of discovery functioned under the European Law of Nations as part of a transnational legal discourse, considered authoritative, for regulating the claims of European racial superiority over the Indian tribes of the New World. According to the Marshall Model of Indian Rights, under this principle of white racial superiority, the rights of conquest and colonization belonging to Great Britain as first European discoverer of the tribes of North America and the lands they occupied had devolved to the United States when it won the Revolutionary War. Under the doctrine of discovery, the United States possessed the "exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[20]

A third distinctive element of the Marshall Model of Indian Rights also can be seen at work throughout the text of *Johnson*. Marshall uses

the same stereotypes and imagery of Indian savagery to validate the denial of Indian rights in *Johnson* that the Founders had used to construct their exclusionary Indian policy paradigm following the Revolutionary War.

The Court's discussion of Indian rights in the case, in fact, expressly reprises and relies upon this familiar language of Indian savagery that the Founders had originally appropriated as part of their system of colonial governmentality. Marshall uses this language of racism in *Johnson* to justify and excuse the principle of European white supremacy that had been asserted by invading Europeans under the doctrine of discovery:

> But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[21]

At another point in his opinion, Marshall again uses this language of Indian savagery and implacability to assert that the "character and habits of the people whose rights have been wrested from them" provided "some excuse, if not justification," for the legal principles adopted by Europeans:[22]

> What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.[23]

The chief justice even resurrected the once-inspiring Revolutionary-era refrains of Washington's "Savage as the Wolf" Indian policy paradigm in describing the inevitable process of white dispossession of Indian land that had characterized the history of European colonization of the New World:

> Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.[24]

Besides its judicial appropriation and rearticulation of the organizing racist belief held by the Founders—that savage Indian tribes could be lawfully conquered and colonized by European-derived peoples—the Marshall Model of Indian Rights as elaborated in *Johnson* put forward one further distinctive element, one that comes to assume a critical role in many of the Supreme Court's most important future Indian law decisions. This fourth element seeks to explain and defend the Supreme Court's passive institutional role in enforcing and perpetuating the Founders' racist vision of Indian rights under U.S. law. Very much as Chief Justice Roger Taney would in his *Dred Scott* opinion (see chapter 2, "The Founders Made Him Do It"), Marshall went to great pains in *Johnson* to explain why the Court shouldn't be blamed for sanctioning this racial dictatorship. Though admittedly "opposed to natural right, and to the usages of civilized nations," the doctrine of discovery, Marshall declared in *Johnson,* was "indispensable to that system under which the country has been settled."[25] In other words, it was the "system" of colonial governmentality adopted by Europeans in the New World and unequivocally acceded to by the Founders that required the Court to rule the way it did in *Johnson v. McIntosh.* As Marshall explained, the principle of racial discrimination contained in the discovery doctrine had been "adapted to the actual condition of the two people" and "may, perhaps, be supported by reason and certainly cannot be rejected by Courts of justice."[26]

The European Law of Nations' discovery doctrine and the system of colonial governmentality perpetuated under it reflected the distilled legal experience of more than two centuries of racial warfare and ethnic-cleansing campaigns brought by Europeans against the Indian tribes of

America. In *Johnson,* the doctrine was appropriated by the Court to give legal sanction to the privileges of aggression and racial superiority asserted by Europeans in the New World. The Supreme Court, according to Marshall, was a creature and instrument of the system established under the doctrine of discovery and the European Law of Nations. The Court was therefore powerless to resist the doctrine's continuing force in interpreting Indian rights under U.S. law. As Marshall himself famously declared in *Johnson,* "Conquest gives a title which the courts of the conqueror cannot deny."[27]

As measured by today's racial sensibilities, *Johnson v. McIntosh* has to be considered one of the most thoroughly racist, nonegalitarian, undemocratic, and stereotype-infused decisions ever issued by the Supreme Court. It elevates a European colonial-era fantasy of white racial supremacy and dictatorship over entire continents of nonconsenting, non-European peoples into a skeletal principle of the U.S. legal system. From our present-day, supposedly more enlightened, post-*Brown* racial perspective, *Johnson v. McIntosh* ranks with *Dred Scott* and *Korematsu* as one of the most disturbing examples in legal history of the Supreme Court's unconstrained and unappealable reliance on negative racial stereotypes in its declaration of the reigning and supreme law of the land. If *Johnson v. McIntosh* were to be issued today as a binding legal precedent by the Court, the justices' decision would be regarded as not only being in bad racial taste but as grossly violative of a host of contemporary international human rights standards relative to indigenous tribal peoples.[28]

Every major standard-setting and adjudicative body in the contemporary international human rights system that has examined the rights of indigenous peoples has concluded that states have an obligation to recognize and protect indigenous peoples' cultural survival and the property rights sustaining their continued existence in a postcolonial world. Furthermore, under the evolving norms of the international human rights system in the twenty-first century, states have a clear duty to meaningfully consult with the indigenous communities affected before taking any legal actions interfering with their human rights, most particularly with respect to the lands and natural resources that sustain their cultural integrity and survival as indigenous peoples.[29]

But Marshall's opinion for the Supreme Court in *Johnson* imposed the European colonial-era doctrine of discovery on tribes in a case in

which Indians were not even represented before the Court. Furthermore, as judged by contemporary standards at least, through his use of racist language and imagery at critical junctures in his opinion in *Johnson,* Marshall showed himself to be thoroughly bigoted and biased against Indians in a very important case involving their most basic human rights as indigenous peoples. He showed no discomfort or embarrassment at all in using the "s" word, that is, "savages," to describe Indians and to justify their lesser rights under U.S. law in his opinion in *Johnson.*[30] A contemporary reading of this foundational precedent of the Marshall model strongly suggests that the greatest chief justice of all time was also one of the most Indianophobic, racist justices of all time, at least when it came to giving his opinion on Indian rights in the "great case of *Johnson v. McIntosh.*"[31]

Whether Marshall was a "racist," as defined by our own more highly refined, twenty-first-century, post-*Brown* contemporary racial sensibilities, or whether he really meant all the horrible, misinformed things he said about Indians in *Johnson,* however, are questions that are quite beside the point that needs to be made about this foundational precedent of the Supreme Court's Indian law. With respect to the legal principle established by the case, what should really matter to us is that Marshall's early-nineteenth-century opinion for the Court denied Indian tribes the same rights as their European colonizers because Indians were regarded, under the European Law of Nations and the doctrine of discovery, as an inferior race of savages. What should really matter, therefore, in terms of our present-day understanding of Indian rights as interpreted by the Supreme Court, is that *Johnson v. McIntosh* is still the reigning and supreme law of the land in the United States. In fact, unlike *Dred Scott,* its antiquated and discredited nineteenth-century counterpart minority rights decision negating black Americans' rights to citizenship, *Johnson v. McIntosh* and the stereotype-infused model of Indian rights that it incorporates into U.S. law are relied upon frequently and without any form of discomfort, embarrassment, or even qualification as governing the Indian rights decisions of the present-day Supreme Court justices (see chapter 8).

No one presently sitting as a justice on the Supreme Court seems to have the least problem with *Johnson*'s legalized presumption of Indian racial inferiority, its incorporation into U.S. law of a European colonial-era legal doctrine of conquest and colonization, its use of an antiquated

racist judicial language of Indian savagery to define Indian rights, or its declaration that the justices can unfortunately do nothing about the resulting white racial dictatorship imposed upon tribes. Marshall's opinion in that 1823 precedent is simply regarded as stare decisis by the justices and by most present-day advocates and scholars of the Court's Indian law as well. Like signs taken for wonders, the rights-destroying, jurispathic force of Marshall's early-nineteenth-century perpetuation of a language of Indian racial inferiority is still regarded as a vital, authoritative precedent in the present-day Supreme Court's Indian law.

Marshall's Opinions in the *Cherokee* Cases

In *Johnson v. McIntosh,* Marshall laid out a model of Indian rights with four clearly identifiable elements organizing its approach to defining the legal relationship between Indian tribes and the United States. This four-part model of Indian rights adumbrated by Marshall would come to exercise a profound and directive impact on the Supreme Court's future Indian law decisions.[32]

First and foremost, the Marshall Model of Indian Rights recognizes the exclusive right of the United States to exercise supremacy over Indian tribes on the basis of the Indians' presumed racial and cultural inferiority. The Marshall model then applies the European colonial-era doctrine of discovery as a regulative legal principle to define the scope and content of that right to white privilege as covering the entire continent of North America. Additionally, the model perpetuates a long-established language of racism to justify the specific set of rights and prerogatives of conquest and privilege under the discovery doctrine. Finally, it absolves the justices for perpetuating the discovery doctrine as part of U.S. law by viewing it as "indispensable" to the European-derived "system" of colonial governmentality "under which the country has been settled."

Chief Justice Marshall continued to apply and refine these basic elements which he first outlined in *Johnson* in his two subsequent controlling opinions for the Supreme Court, *Cherokee Nation v. Georgia,* decided in 1831, and *Worcester v. Georgia,* decided in 1832. Referred to collectively by Indian law scholars and advocates as the *Cherokee* cases, these two seminal decisions completing the Marshall Trilogy were issued by the Marshall Court in direct response to the Cherokee Nation's

efforts to prevent the state of Georgia from extinguishing the tribe as a distinct, self-governing society within its borders.

Under the state-controlled form of white racial dictatorship that Georgia sought to impose upon the Cherokees, tribal self-government and territorial rights would be abolished. Stripped of their tribal citizenship and lands, individual Cherokees would be subject to the onerous, racially discriminatory legal regime imposed by Georgia on all "free persons of color" within its sovereign borders. As legally designated second-class citizens of color, they would be unable to testify in "any suit in any court created by the constitution and laws of this state to which a white man may be a party." They would be unable to vote, unable to serve in the state militia, and unable to send their children to Georgia's public schools under the racial apartheid laws that would apply to the Cherokees under state jurisdiction.[33]

The Cherokees, after being rebuffed by President Andrew Jackson and his Democrat-controlled Congress in their pleas for protection of their rights under their treaties negotiated with the United States, turned to the Supreme Court in an effort to block Georgia from extending its racist regime of state laws over the tribe's federally established, treaty-guaranteed reservation.[34] The Marshall Court—and just about everyone else in the United States, including the Cherokees—quite clearly recognized at the time just what Georgia's assertions of state jurisdiction and sovereignty over the tribe's federally reserved territory would mean for the Cherokees, who would be legally treated as "free persons of color under Georgia law if they remained in the state." The "Cherokee codes" were designed as the first strike in an ethnic-cleansing campaign that would enable the state to take control over the immensely valuable Indian lands within its borders and make them available to Georgia's white citizen farmers and plantation owners.[35]

The legalized form of white racial supremacy that Georgia sought to impose upon the Cherokee Nation and its reservation was ultimately designed to force the tribe to accept removal to an Indian Territory beyond the Mississippi River. Today, such ethnic-cleansing activities on the part of any government in the world would be deemed a crime of genocide, punishable by international law. In early-nineteenth-century America, forced relocation and resettlement, in the form of Congress's infamous Removal Act of 1830,[36] was the official, legislated policy of

the U.S. federal government toward all the Indian tribes east of the Mississippi River.[37]

Cherokee Nation v. Georgia

In *Cherokee Nation v. Georgia,* the Cherokees filed suit against enforcement of Georgia's laws on their territory under Article III of the Constitution, which granted original jurisdiction to the Supreme Court in suits between "foreign states" and "states" of the Union, such as Georgia.

Before even examining the substantive legal issues involved in the case, Marshall, characteristically,[38] first addressed the jurisdictional question presented by the case. Could the Cherokees and other Indian tribes be regarded as "foreign states" under Article III of the Constitution, and therefore able to bring suit against Georgia under the Court's original jurisdiction? On that precise legal question, Marshall expanded upon his interpretation of the model of Indian rights that he had first laid out in *Johnson* and held against the Cherokees. Indian tribes could not be regarded as "foreign states" as that term is used in the Constitution:

> [I]t 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.[39]

To reach this legal conclusion that Indian tribes were "domestic dependent nations" rather than "foreign nations" and therefore had no right to a judicial hearing under the Supreme Court's grant of original jurisdiction, Marshall turned directly to the European colonial-era doctrine of discovery that he himself had incorporated into U.S. law in his 1823 opinion in *Johnson*. In that case, the doctrine's principle of white racial superiority was called upon to define the diminished property rights belonging to Indians under U.S. law. In *Cherokee Nation,* Marshall relied upon the doctrine to define a related discriminatory form of inferior *political* status for Indian tribes under the Constitution.

In fact, in *Cherokee Nation,* the doctrine of discovery provides the organizing principles of Marshall's entire reasoning process relative to Indian political rights and status under the Constitution. Indian tribes, according to his model of Indian rights as developed, applied, and expanded upon in this second case of the trilogy, could never be recog-

nized as "foreign" nations under the Constitution. The discovery doctrine's racially discriminatory principle respecting the diminished rights of Indians in their lands inalterably placed the tribes under the superior political sovereignty of the United States. The doctrine, as Marshall carefully explained in *Cherokee Nation,* marked the relationship between Indian tribes and the United States by "peculiar and cardinal distinctions which exist nowhere else." These "peculiar" differences proved, in his opinion, "that 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." Unlike those of "foreign states," the tribes' political rights and status, according to Marshall, were defined by reference to the overriding organizing principle of white supremacy embodied in the European colonial-era doctrine of discovery. Indians under U.S. law, *Cherokee Nation* holds, "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 relation to the United States resembles that of a ward to his guardian."[40]

This critical passage in *Cherokee Nation* represents the textual source of one of the most important legal principles generated by the Marshall Trilogy and the model of Indian rights that it incorporates into the Court's Indian law. The guardian-ward relationship, announced for the first time by the Court in *Cherokee Nation,* is the source of what is called the "trust doctrine" in Indian law. Under the Marshall model, the trust doctrine is supposed to function as a primary protective principle of Indian rights under U.S. law.[41]

Cherokee Nation's delineation of Indian tribes' "domestic dependent nation" status and of the guardian-ward relationship makes it, along with *Johnson,* one of the most important decisions ever issued by the Supreme Court on Indian rights. The Court's ruling that Indian tribes could not be regarded as "foreign" nations under the Constitution meant that the Cherokees, in Marshall's words, "cannot maintain an action in the courts of the United States." Though Georgia's laws, as pleaded by the tribe, sought "directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force,"[42] the Constitution, according to the holding of *Cherokee Nation* and the Marshall Model of Indian Rights,

literally left them incapable of defending themselves before the Supreme Court from these state-sponsored acts of what Rennard Strickland has called "genocide-at-law."[43]

Cherokee Nation substantially reinforced and expanded upon the basic elements of the model of Indian rights that Chief Justice Marshall had first laid out in *Johnson. Cherokee Nation,* like *Johnson,* expressly recognizes the exclusive right of the United States to establish a racial dictatorship over tribes, regulated by the doctrine of discovery. As "domestic dependent nations," Marshall wrote in *Cherokee Nation,* the tribes were "so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility."[44]

As in *Johnson,* Marshall also relied on the rights-destroying jurispathic force of a language of Indian savagery to justify U.S. hegemony over Indian tribes. In *Cherokee Nation,* this long-established language of racism conveniently provides Marshall with the interpretive principle for understanding the Founders' original intent toward Indian tribes in drafting Article III of the Constitution:

> In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the union.[45]

In stating his holding on the rights-destroying, jurispathic force of the Founders' language of Indian savagery on Indian rights in the United States, the chief justice further developed the elemental theme of judicial self-absolution that had been first stated in *Johnson:* The Court cannot be held responsible for perpetuating this "peculiar" form of white racial dictatorship. According to Marshall, "If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted,

and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future."[46]

Like *Johnson, Cherokee Nation* also has to be regarded as one of the most racist decisions ever issued by the Supreme Court. Marshall's controlling opinion for the Court in *Cherokee Nation,* which provided no effective judicial remedy for Indian tribes to protect their basic human rights to property, self-government, and cultural survival under U.S. law, affirmed the racial dictatorship of the United States over Indian tribes, and based its holding on a racist language that described Indians as bloodthirsty, "tomahawk"-wielding savages who were simply too uncivilized to be recognized under the U.S. Constitution as possessing any original right of legal access to the Supreme Court as a "foreign state." Yet *Cherokee Nation* is cited without embarrassment or discomfort as still good law and binding precedent by the present-day justices of the Rehnquist Supreme Court.[47] Signs taken for wonders, and evidence of the continuing jurispathic force of the Marshall model's racist, judicially sanctioned language of Indian savagery in the Supreme Court's Indian rights decisions.

Worcester v. Georgia

The Marshall Model of Indian Rights was completed and significantly refined by Marshall's celebrated opinion in the case of *Worcester v. Georgia*. Marshall's oft-cited and highly revered opinion for the Court in this third and final case of the Marshall Trilogy held that the federal government, and not individual states, possesses the exclusive right to exercise control over Indian affairs.

Following the Supreme Court's decision in *Cherokee Nation,* Georgia convicted two New England Protestant missionaries, William Worcester and Samuel Butler, of violating its laws prohibiting anyone from entering Cherokee territory without a license from the state. An appeal to the U.S. Supreme Court was taken on the white missionaries' behalf by the Cherokees' attorney, former attorney general of the United States William Wirt. The suit challenged Georgia's enforcement of its laws in the Cherokee Nation's territory.

Worcester v. Georgia thus required the Supreme Court to address for the first time the important legal question of whether it was the federal government or an individual state that exercised the superior rights

of sovereignty and jurisdiction recognized under the doctrine of discovery. *Worcester* would decide, once and for all, which level of colonial government, state or federal, would have what Marshall had called in *Johnson* the "exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest" under U.S. law.[48]

In *Worcester*'s opening paragraphs, the chief justice carefully reviewed the basic elements of his heretofore incomplete model of Indian rights. He began by drawing upon the by now familiar judicial language of Indian savagery that he had used in *Johnson* to set the stage for his discussion of the origins of the doctrine of discovery in the European colonial era:

> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.[49]

The chief justice then quoted directly from his earlier opinion in *Johnson* to show how the doctrine of discovery had guided the European colonial powers in establishing and extending their respective claims to white racial dictatorship over Indian tribes in America:

> The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "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." 8 Wheat. 573.[50]

Worcester's introductory paragraphs also contain the Marshall model's usual concession of judicial impotency to do very much about the wrongs inflicted upon Indians under the doctrine of discovery. Marshall says in *Worcester* that it "is difficult to comprehend the proposition, that the

inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors." But always the racial realist in his opinions, he went on to explain, "power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend." Such was "the actual state of things," according to Marshall in *Worcester.*[51]

This prefatory, proto-Foucauldian genealogy of the doctrine of discovery, jurisgeneratively arising out of "power, war, and conquest"[52] is followed by a lengthy and detailed defense of *Worcester*'s principal holding, that the laws of Georgia, according to Marshall's famous declaration, could have "no force" in the Cherokee Nation.[53] In denying Georgia jurisdictional power over the territory of the Cherokee Nation, the Court's holding recognized the federal government's exclusive colonial supremacy and control over Indian affairs under the Constitution and laws of the United States.[54]

In defending this controversial holding, which would elicit defiant responses from Georgia, the other southern states seeking removal of all tribes within their borders, and President Jackson himself,[55] Marshall's *Worcester* opinion provided a far more carefully crafted and nuanced discussion of the precise legal effects of the discovery doctrine on Indian rights than he had initially adumbrated in *Johnson* or *Cherokee Nation*.

The doctrine, according to the more refined and expanded rendition offered up by Marshall in *Worcester,* was a necessary tool of colonial governmentality developed as part of an art of imperial government during the European colonial era. It functioned, in theory at least, as a means of avoiding inconvenient, unnecessary, and debilitating wars for empire in the New World between the competing European colonial powers.[56] As Marshall declared in *Worcester,* in plain rebuttal to the southern states, like Georgia, seeking to expel Indian tribes,[57] the doctrine simply gave to the European nation making a discovery of Indian-occupied land in the New World "the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it." It did not, as his opinion in *Worcester* carefully explained, operate in any way to

interfere with the tribes' preexisting rights of self-government, "so far as respected themselves only."[58]

Worcester's more carefully refined delineation of the precise scope and content of the rights acquired by the first European discoverer under the discovery doctrine represents one of the Marshall model's most important statements on the principle of diminished tribal sovereignty in the Supreme Court's Indian law. However, it is worth noting that Marshall's heroic defense of Indian rights to self-government in the United States relies heavily on the jurispathic force of a familiar racial stereotype of Indians as "warlike" savages. Marshall, now the cautious judicial minimalist in his Indian law decisions, found the perfect instrument for proving his case that Georgia's laws could have no force in the Cherokee Nation: the language of Indian savagery given legal authority and validation by the Crown's colonial charters.

Worcester's more refined analysis of retained tribal sovereignty under the Supreme Court's Indian law begins with Marshall's limiting assertion that the Crown, in its relations with the Indian tribes of North America, never claimed any right under the principles of the discovery doctrine to intrude "into the interior of their affairs." Thus, Georgia, whose charter rights within its territorial boundaries derived solely from the Crown's prerogatives of conquest and colonization under the doctrine of discovery, could make no claim to "legitimate power" to govern the Cherokees or interfere in their internal affairs.[59] The discovery doctrine, under this minimalist interpretation, functioned only to constrain the external relations of the tribes with other European colonial nations.[60] It only gave, as Marshall had explained in *Johnson,* "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest," and nothing more, under the European Law of Nations.

Having laid out this detailed and judicially cautious rendition of the tangible, real-world legal effects of the doctrine of discovery on Indian rights, the chief justice then drew upon the jurispathic force of the language of Indian savagery to explain the reasons for recognizing this inherent right of self-government in the tribes. The tribes of America, as *Worcester* explains, were, "fierce and warlike in their character," their "principal occupation" was hunting, and their land was "more used for that purpose than for any other."[61] They were, in other words,

too savage and hostile for the Crown to effectively govern them as loyal subjects, obedient to the control of designated English colonial authorities. The colonial charters granted by the Crown to the British North American colonies, the organic legal documents of all the colonial governments in British North America, in fact uniformly recognized the warlike, irreconcilable character of the Indian tribes of North America in an imperial language of Indian savagery that brooked no superior sovereignty over its prerogatives and privileges of discovery and conquest under English law.

The first Crown charter issued to the Jamestown colony had legally empowered and commended the Virginia Company to "bring the Infidels and Savages, living in those Parts, to human civility, and to a settled and quiet Government."[62] Georgia's own Crown charter, its originating, organic text of legal meaning and jurisgenerative governing authority in North America, was cited specifically by Marshall to demonstrate that this immutable principle of the Indian's implacable savage nature was deeply embedded in the legal language of the Crown's charters to the English colonies in North America:

> ". . . and whereas our provinces in North America have been frequently ravaged by Indian enemies, more especially that of South Carolina, which, in the late war by the neighbouring savages, was laid waste by fire and sword, and great numbers of the English inhabitants miserably massacred; and our loving subjects, who now inhabit there, by reason of the smallness of their numbers, will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages."[63]

The imperial language of Indian savagery used in this and the other royal charters cited and relied upon at length in *Worcester* demonstrated, at least in Marshall's view, that the Crown had never presumed to consider the Indians as domestic subjects to be governed by royal decree or proclamation. Rather, the Indian tribes of North America were regarded by the Crown as "barbarous nations, whose incursions were feared, and to repel those incursions, the power to make war was given."[64] They were, in other words, lawfully recognized by the Crown as hostile, savage, and violent enemies implacably opposed to England's assertions of sovereignty and dominion over North America under the

doctrine of discovery. They were incommensurable others, and only the Crown possessed the power and the right of discovery and conquest over these radically opposed forms of savage humanity.

This was the "actual state of things" at the time the charters were granted. The broadly drawn racial iconography of Indians as fierce, warloving, and hostile savages contained in those royally generated jurispathic texts provided the governing legal principles and racial precepts of colonial governmentality, indigenous to British North America, that the Court now had to apply to all questions of Indian rights under the Constitution and laws of the United States.

The Indians were simply too uncivilized and "barbarous" to be brought under the immediate and direct control of any European colonial power in North America: "Fierce and warlike in their character, they might be formidable enemies or effective friends." To cement their friendship and cooperation against the other European colonial powers, the English Crown had no choice but to recognize the tribes' actual independence and therefore "their right to self government."[65] At an early point in the Crown's formal relations with the tribes of the original Atlantic seaboard colonies,[66] limited recognition of Indian forms of self-government was viewed as a convenient operating principle of colonial governmentality for North America. It was in the interests of the Crown and its colonies to recognize this fundamental principle throughout British North America as the law of England's colonial empire.

These reasons of state and sovereign self-interest were precisely why the power of dealing with the tribes by treaty under the discovery doctrine, "in its utmost extent, was admitted to reside in the crown."[67] It was an imperially exercised power made necessary by the conditions of colonial governmentality in a territory occupied by hostile savages but claimed by England's imperial rights of discovery and conquest. Only the Crown possessed the paramount authority under the doctrine of discovery to extinguish the Indians' title of occupancy, by purchase or by conquest, and perfect England's rights to superior sovereignty over North America.

Following the Revolutionary War, as Marshall next explained, the power of exclusive colonial control over Indian affairs recognized in the Crown under the doctrine had devolved to the federal government of the United States: "The 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."[68] The laws of Georgia, therefore, as Marshall famously declared in *Worcester,* could have no force within the Cherokee Nation.

Worcester significantly expanded and refined the principles of the doctrine of discovery. According to the Marshall model as rendered in *Worcester,* the Indian's savage nature and fierce resistance to English claims of superior sovereignty required a pragmatic, limited recognition of Indian rights to self-government and property. It was also necessary that sovereign supremacy over Indian tribes be centralized in the Crown, which required an ultimate freedom and authority to negotiate with the tribes over the scope and content of those rights. That supreme form of imperial sovereign power over the tribes, *Worcester* holds, was now possessed by the U.S. federal government over all aspects of Indian affairs under the Constitution and laws of the United States.

Worcester v. Georgia completed the Marshall Trilogy and refined the basic elements of the Marshall Model of Indian Rights by fixing the balance of colonial power and control over Indian affairs under the Constitution of the United States in favor of the federal government. In that sense, *Worcester* is rightly regarded as a landmark victory, in theory at least, for Indian rights. Its principle of federal supremacy in Indian affairs theoretically immunizes tribal Indians from many forms of state encroachment on tribal rights and interests.[69] As the *Cherokee* cases demonstrate, state laws directed at Indian country in the past have oftentimes sought to impose highly onerous and sometimes even virulent, genocidal forms of white racial dictatorship upon Indians.[70] From our post-*Brown* racial perspective, however, the problem with this final and most celebrated case of the famous Marshall Trilogy is that it embraces and perpetuates a racist language of Indian savagery to rationalize the recognition of these retained rights of a limited form of tribal sovereignty under the doctrine of discovery. *Worcester*'s primary importance as the third and final case of the Marshall Trilogy is that it underscores the multiplicity of legitimating jurispathic functions performed by the language of Indian savagery in the Marshall model. Signs taken for wonders, *Worcester* reveals how the same basic hybrid image of the Indian as inferior savage with limited rights can be used to justify not only the jurispathic denial but also the Supreme Court's steadfast protection of Indian self-government and property rights under

U.S. law. According to *Worcester*'s authoritative legal interpretation of this European-derived form of colonial governmentality, the U.S. federal government, and no other sovereign power, possesses the exclusive privileges of white racial dictatorship over Indian tribes in the United States.

Conclusion: The Jurispathic Power of the Language of Indian Savagery Perpetuated by the Marshall Model of Indian Rights

We have identified four principal elements of the Marshall Model of Indian Rights as it arises out of *Johnson* and the two *Cherokee* cases.[71] First, the Marshall model is based upon a foundational set of beliefs in white racial superiority and Indian racial inferiority. Second, the model defines the scope and content of the Indian's inferior legal and political rights by reference to the doctrine of discovery and its organizing principle of white racial supremacy over the continent of North America. Third, the model relies on a judicially validated language of Indian savagery to justify the asserted privileges. Finally, the Court's role as a creature and instrument of these originating sources makes it impossible for the justices to do anything meaningful or lasting to protect Indian rights from the continuing rights-denying jurispathic force of the language of racism used to justify the discovery doctrine's racially discriminatory legal principles.

The doctrine of discovery, first incorporated into the Marshall model by *Johnson*'s diminishment of Indian rights to property and self-rule, next applied in *Cherokee Nation* to define an inferior political status for tribes as "domestic dependent" nations under the Constitution, and then finally used by the Court in *Worcester* to justify exclusive federal authority over Indian affairs, provides a powerful illustration of what happens when the justices validate a principle of racial discrimination in one of their legal decisions on minority rights. Just as Justice Jackson predicted in his dissent in *Korematsu,* such a principle then "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Johnson, Cherokee Nation,* and *Worcester,* as I show in the remaining chapters of this book, have been used repeatedly by the Supreme Court to expand in our law the principle of racial discrimination perpetuated by the doctrine of discovery.