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From Independence to Wardship: The Legal Process of Erosion of American Indian Sovereignty, 1810–1903

WALTER L. WILLIAMS

The expansion of the United States at the expense of Native Americans during the nineteenth century is usually seen strictly in military terms. This belief has been reinforced by countless Hollywood movies of the cavalry chasing Indians through the West; thus, many people incorrectly believe that Indians were simply conquered by White armed force. This view, however, ignores the realities of the situation. Especially in the early nineteenth century the U.S. government was young and relatively weak. Dominance over Native peoples was a gradual process and its accomplishments were achieved more through diplomatic and legal manipulation than by military conquest. Native Americans were much more successful resisting militarily than they were in controlling the legal processes by which self-government was stolen from them.

Expansion was believed to be an integral part of America's destiny from the beginning. In addition to the problems of overcoming geographical obstacles, American expansion faced rival claims to the land from two types of potential opponents; other Western imperialist powers, who made counterclaims of sovereignty to a particular territory, and the Native occupants of that land.

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Since the early colonial period, Europeans and Euro-Americans had debated whether those Peoples called Indians had a legal right to the lands they occupied. The U.S. followed in the tradition set by the European imperialist powers by boldly proclaiming its sovereignty over all territory gained through negotiation with those Western powers. The territory east of the Mississippi was made a part of the U.S. by the treaty with Britain in 1783, ending the Revolutionary War. The addition of the Louisiana Territory from France in 1803, Florida from Spain in 1819, the Northwest from Britain in 1846 and the Southwest from Mexico in 1848 all presented a rather clear-cut legal process of expansion. At least that is the image presented. But this process of negotiated expansion among the Western powers left uncertain the status of the Native peoples who actually occupied those lands.

After the decline of the colonial fur trade few Americans were interested in the contributions of Indians to the economy. The Indians' land, in short, was more desirable to an expanding nation of immigrants than was their trade or their labor.

Realities, however, dictated that Indian nations had to be dealt with if expansion were to proceed. The mechanism for gaining more land was the one most familiar to Indians who had been dealing with European imperialists for two centuries: the treaty. The U.S. therefore, had to follow the British model of dealing with Indian nations through treaties if they hoped to get more land.

INDEPENDENT OR DEPENDENT NATIONS

By agreeing to deal with Indian tribes and nations through treaties, the U.S. government tacitly negated its claim to full sovereignty over the lands negotiated with other Western powers and recognized the independence of those Indian nations with whom it dealt. In ceding parts of their land to the United States, agreeing to pacts of alliance, or even authorizing the United States to oversee its relations with other states, the Indian signers did not relinquish their sovereignty or control of their internal affairs. Rather their position was one that is familiar in international law, of small states which concede their autonomy in foreign affairs to a neighboring power in exchange for a guarantee of internal self-rule and specified rights.[1]

Such a situation is considerably different than one of conquest and unconditional surrender, and the treaty was the most common relationship between Indians and the U.S. for nearly a century of their interaction.[2] Treaty-making was so common because it was much easier, and cheaper, for the government to negotiate with Indians than to fight them. This was true through much of the century, even though the power of the U.S. was steadily increasing while the power of the Indians was declining.[3]

In this state of affairs, the government tried to obtain treaties with any group of Indians strong enough to resist White settlement. Though the federal government was too weak to conquer all Indian groups directly, its goal was to establish full sovereignty over all the Indian lands. Since Native peoples were not generally given citizenship, such a concept implied that Indians (if they were thought of at all) were considered as subject people. The disparity between this goal and the reality of treaty-making produced considerable debate among early American policymakers concerning the disposition of the Native American population.

The most popular view among western expansionists favored extermination or at least a recognition that it was God's plan that "inferior" peoples would disappear in the face of "advancing civilization." In opposition to this antagonistic view was Thomas Jefferson's idea of incorporating Indians into the citizenry. Although touted for its humanitarianism, Jefferson's policy was in fact designed to eliminate the independent Indian societies (and their title to the land) by making them individual farmers. By the 1820s, however, pressure for land expansion negated these experiments in incorporation, and all native Peoples with significant landholdings were ordered to remove themselves to the new "Indian Territory" (today's Oklahoma). Even the Indians who were acculturating peacefully were included in the 1830 Removal Act which was pushed through Congress by the expansionist Andrew Jackson.[4]

The celebrated era of Jacksonian Democracy was hardly democratic for non-Whites in America. The early nineteenth century witnessed a movement toward a homogeneous society through the elimination of minorities. The proposed solution for Black people, as popularized by the American Colonization Society, was to send them to colonies in West Africa. Several thousand Afro-Americans emigrated and formed the nucleus of the nation of

Liberia.[5] For Indians the emigration was to be to the west in a segregated Indian Territory.

Forced removal, as implemented in the 1830s by President Jackson, was a tragedy for Native Americans. Not only did thousands of Native people die on their "trail[s] of tears" to the west, but the coercion which the government used to dispossess them from their lands represented a further decline in Indian power. Only the Seminoles, with the advantages of geography on the Florida frontier, and with the assistance of their Black runaway-slave allies, managed to wage a full scale war against removal. Although they were able to inflict great damage on the U.S. Army during a war lasting nearly seven years, even the Seminoles were forced to agree to removal in 1842. By undermining the policy of incorporation the Jacksonians destroyed the most promising model for voluntary Indian acculturation along the lines of multicultural nationalism.[6]

The horrors of removal cannot conveniently be blamed on "evil" politicians or military leaders, because the policy was supported by a majority of White Americans. It is testimony to the dangers of unlimited majority rule to over-run the rights of minorities that is of significance. The removal policy was of crucial importance to those Native groups which were displaced, but in terms of future U.S. Indian policy other decisions were more far reaching. Notwithstanding Andrew Jackson's feeling that any recognition of Indian sovereignty through treaties was "an absurdity," the government did continue the treaty-making process during this era.[7] The more long-range threat to American Indian sovereignty was incorporated into the political establishment, ironically, by a Founding Father who has most often been presented as a defender of the Indians: John Marshall. As Chief Justice of the federal Supreme Court, Marshall wrote the decisions that would solidify a legal demotion of status for indigenous Americans that even Andrew Jackson did not manage to accomplish.

Such a change emerged only gradually in Supreme Court rulings. These rulings reflected, of course, the thoughts of other political leaders. But what is notable is the extent to which Supreme Court decisions played a central role in the demotion of tribes from independent states. One of the earliest cases that came before the court involving Indian lands was *Fletcher v. Peck.*

This case grew out of a land deal that the Georgia legislature enacted, granting lands still under Indian control to a private company. In 1810 Marshall wrote the majority opinion for the court when he ruled that Georgia did have the right to grant title to lands even before the Indians had agreed to cede them. "The reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved," he argued. In stark contrast to the language of the treaties, which emphasized the permanance of Native reserved lands, Marshall had attached a "temporary" label. On the other hand, he did state that Indian title "is certainly to be respected by all courts, until it be legitimately extinguished." But that title, even while still owned by the Indian tribe, "is not such as to be absolutely repugnant to seisin in fee on the part of the state."[8]

Such an inconsistency from the treaties prompted a sharp dissent from Justice William Johnson, who felt the need for dealing justly with "the Indian nations. . . . Innumerable treaties formed with them acknowledge them to be an independent people. . . . I must consider an absolute right of soil as an estate to them and their heirs." The only limitations on the tribes, he emphasized, were those which they had given up in their treaties, such as the right to deal with other European nations and to allow the United States to exercize authority over non-Indians within their tribal boundaries.[9] But Johnson's protest was not accepted by the majority who agreed with Marshall's decision.

The next significant case regarding Native sovereignty was *Johnson and Graham's Lessee v. William McIntosh* (1823). This case was a dispute between two White landowners, one of whom had bought land directly from the Illinois Indians while the other had legal title from the United States. John Marshall decided, since the Illinois had signed a treaty ceding the land to the U.S., that the legal holder was the man who got it from the federal government. While such a decision was necessary to prevent mass confusion in landowning titles, Marshall went on to justify United States domination over Indians. The Natives were, he suggested, "fierce savages" with whom it was impossible for the settlers to either mix with or govern.[10]

Marshall wrote at great length about the European "doctrine of discovery" by which the European nations "respected the rights of the natives, as occupants, [but] they asserted the

ultimate dominion to be in themselves; and claimed . . . a power to grant the soil, while yet in possession of the natives." The U.S. had inherited this dominion from the 1783 Treaty of Paris with Britain and from the Louisiana Purchase from France, which gave the United States "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow. . . . This is incompatible with an absolute and complete title in the Indians."[11]

While managing to avoid mention of the treaties altogether, Marshall did recognize the absurdity of a European "discovery" in negating Native sovereignty. He admitted that the Indians were "the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it." But "however extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted . . . it becomes the law of the land, and cannot be questioned. . . . This restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable . . . it may, perhaps, be supported by reason." Marshall was clearly being plagued by his conscience on this matter, since he knew that the U.S. had not in fact conquered the tribes, but he decided in essence that the needs of the expansionist Americans overrode the rights of the Indian nations.[12] Despite Marshall's uncertainties, and his reassurances of Native occupancy rights, this would not be the last time that such a result would occur.

With decisions like *Fletcher v. Peck* and *Johnson v. McIntosh* the stage was set for momentous decisions on the question of Indian sovereignty. These new cases facing the Supreme Court grew out of the 1830s removal question. It is not surprising that the focus of the legal battles in the 1830s would be on the Cherokees. One of the most acculturated groups of Indians, the Cherokee Nation had formed a government modeled on that of the U.S. in the hope that a peaceful "civilized" policy would be most effective for the retention of their lands. Much of the remaining Cherokee land was within the chartered limits of the state of Georgia, and the Georgia state government pressured for removal. In 1830 the state legislature passed an act to enforce Georgia laws over the Cherokee lands and abolish the Cherokee government. Punishment of up to four years in prison was set for any Cherokee who attempted to govern their lands and enforce Indian landowning

rights. Georgia parcelled out the Cherokee lands to Whites, prohibited Cherokees from testifying in court against Whites, and took control of all gold mining in the territory. Consequently, in accord with their peace policy, the Cherokees responded with a legal defense rather than a military one. In 1831 they brought suit in the U.S. Supreme Court.[13]

In the case *Cherokee Nation v. Georgia* the state of Georgia contended that the matter was completely internal to Georgia and, therefore, the Supreme Court had no jurisdiction.[14] The Cherokees, on the other hand, held that various treaties between them and the U.S. had recognized their sovereignty as "a foreign state, not owing allegiance to the United States, nor to any state of this union."[15] Furthermore, since laws and treaties of the federal government were constitutionally supreme over state laws and the Constitution gave the Supreme Court jurisdiction between "a state and a foreign state," the Court did have jurisdiction.[16]

Speaking for the majority of the Court, Chief Justice John Marshall denied the Cherokee suit. Although he expressed sympathy for the Indians' situation and admitted that the treaties did recognize them as "a state," Marshall asserted that Indian states were not *foreign* states. He wrote:

> The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . They acknowledge themselves in their treaties to be under the protection of the United States. . . . They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and domination of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory.[17]

Marshall went on to suggest that the phrase in Section 8, Article I of the Constitution, which gave Congress the right to regulate trade "with foreign nations and among the several states, and with Indian tribes," implied this distinction between foreign states and Indians.[18] Thus, Marshall belabored a minor White-held concept in the Constitution relating to trade, rather than provisions and concepts agreed to by Indians, to justify this arbitrary reduction from sovereignty.

If the Cherokee Nation did not constitute a foreign state, then what was its legal status? The Court's opinion in defining the legal conception of Indians was guarded:

> They may, more correctly, perhaps, be dominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will . . . They are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[19]

The importance of this concept of "domestic dependent nations" in limiting Indian sovereignty as expressed in the treaties, is highlighted by an analysis of the dissenting opinion by Justices Smith Thompson and Joseph Story. This dissent argued that any group of people who operate their own government and have not expressly given up their right of self-government, are sovereign. If treaties with the Cherokee government were recognized by the U.S., the dissenters argued, then those treaties are part of the supreme law of the land until revoked.[20]

The long range negative implications of the Marshall decision were blunted, because the Court invited the Cherokees to bring another suit in which they did not claim to be a foreign state. Since Georgia was not deterred in her plans to take over Cherokee lands, another case soon came before the Court. The state had passed a law requiring all Whites in the Cherokee country to obtain a license from the governor of Georgia and sign an oath of allegiance to Georgia. In 1831 Samuel A. Worcester and several other Whites residing on Cherokee lands were arrested for refusing to sign this oath. Worcester, a Congregational missionary from New England, had played a prominent role in Cherokee acculturation. He was proud of the Cherokees' "progress" in converting to Christianity and western lifestyles, and he did not want to see his work destroyed in a disastrous takeover by Georgia. Consequently, Worcester and the others refused to acknowledge Georgia's rule and were sentenced to four years imprisonment.[21]

This harsh treatment caused Georgia to incur the wrath of many New Englanders and northern churchmen. By the time *Worcester v. Georgia* reached the Supreme Court in 1832, the case had taken on a sectional nature which reflected the emerging "states' rights" controversy. Again Marshall spoke for the majority of the Court in the decision. This time it was a victory for the

Cherokees. Since the Constitution, treaties and an 1819 Congressional Act all stated the supremacy of the federal government in Indian affairs, a state could not have jurisdiction over unceded Indian territory. Marshall concluded that only the federal government could negotiate with Indians and Indian lands were "completely separated from that of the states."[22]

Since there was no claim that the Cherokees were a foreign sovereign nation in the Worcester case but only that they were not under Georgia jurisdiction, Marshall enunciated a policy directly affirming Indian internal self-rule. Although the treaties acknowledged that the Cherokees were under the protection of the U.S., he wrote, "Protection does not imply the destruction of the protected."[23] He further stated:

> This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master. . . . The settled doctrine of the law of nations [Marshall made an analogy to tributary and feudatory states in Europe] is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection.[24]

By having used the words "treaty" and "nation" in their full diplomatic sense, Marshall argued, "We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."[25] Marshall thus came close to adopting the original Cherokee claim that they were indeed an independent foreign state.

Despite the favorable nature of Marshall's decision in *Worcester v. Georgia,* the Cherokees' case went unenforced. Georgia continued unabated efforts to extend her authority over the Cherokee lands. So the Cherokees appealed to the President to enforce the federal law as decided in *Worcester v. Georgia*. If Jackson did not actually say, "John Marshall has made his decision, now let him enforce it," he might as well have said it, because he did nothing. Jackson was completely committed to Georgia, and the only alternative he offered was removal. Moreover, Jackson's commitment was one of political expediency; he could not afford to alienate another southern state in 1832. At that same time, South Carolina was threatening to secede over the question of

nullification, relating to tariffs and slavery.[26] Although further research is needed on this point, Jackson seems to have succeeded in isolating South Carolina by promising Indian removal to the other southern states. This political maneuver may have been crucial in keeping the South loyal to the federal government. Unfortunately the Cherokee case had become intertwined in other issues affecting American politics.

Although Marshall's stipulations favorable to Indians later provided a basis for more positive cases in the twentieth century, this did not occur in the nineteenth century. Federal policymakers and courts would ignore the Worcester decision and instead emphasize Marshall's earlier limitation of sovereignty in *Cherokee Nation v. Georgia*. Eventually Indians would lose even the partial independence implied in the term "domestic dependent nation" and would be considered in Marshall's terms of a "ward" in a state of "pupilage" to the government.

Even within the *Worcester v. Georgia* case, there were ominous portents for the future of Native land rights. In a concurring statement, Justice John McLean expressed a seldom noted but crucial qualification. He wrote:

> The exercise of the power of self-government by the Indians, within a State is undoubtedly contemplated to be temporary. . . . A sound national policy does require that the Indian tribes within our States should exchange their territories, upon equitable principles, or eventually, consent to become amalgamated in our political communities. At best, they can enjoy a very limited independence.[27]

Furthermore, McLean suggested that if an Indian group became "incapable of self-government, either by moral degradation or a reduction of the numbers," then a state government could extend its laws over them.[28] By not stipulating that such a transferral of power be agreed to by Indians, or even defining who would decide the question of degradation, this statement further limited indigenous sovereignty. Even though Marshall's decision was not so limiting, the statement of such opinions by Justice McLean signified a continuing legal struggle over Native sovereignty.

Another limitation of *Worcester v. Georgia* arose from the context in which it was argued. John Marshall was a Federalist and

a believer in a strong central government. In the Worcester case, as in many of his decisions, he affirmed national jurisdiction over states rights, and he probably exerted as much influence on the growth of the federal government as did any of the Founding Fathers. Accordingly, Marshall's purpose in *Worcester v. Georgia* was to establish that Indian policy was not a power of the states but solely that of the national government. For Marshall, more important issues were at stake than Indian rights. In limiting states rights *vis a vis* Indian nations, the U.S. government was affirming federal power over Indians.

The Cherokees had exchanged a particular legal victory for a long-range defeat. Even though the Court did recognize their treaty rights, "domestic dependent nation" status was a long way from the original sovereignty from which the treaties had been negotiated. Both Cherokee cases consistently applied Marshall's goal of extending national government power, not only over the states, but over Native American nations as well.

THE DECLINE OF TREATY-MAKING

Until the 1840s, most of the Native tribes and nations which entered into treaties with the U.S. were eastern groups which had treaty relationships with European powers during the colonial period. The treaties with the young American government followed the format of earlier treaties* and their guarantees provided a degree of strength to the eastern Indians. Though removal was forced on the large eastern Nations, treaties were still being negotiated.

Nevertheless, the legal position of the removed Nations was weakened because they could no longer claim sovereign rights to their land through ancient occupancy. The land in Indian Territory was a clear exchange for their homelands and everything they had in the ancient homeland went with this exchange, as was stated time and again in the treaty negotiations prior to removal. Nevertheless, later federal officials could incorrectly claim that the removed Nations received their lands as a

*Ironically, via this case, the U.S. domesticated, through case law, the various eastern tribal nations with which it made treaties after the American Revolution of 1776 in order to legitimize its *nation* status among western nations, a status which was not quickly recognized by the monarchies of the "old world."

grant from the government. Furthermore, the removal treaties themselves contained additional limitations on tribal governments. For example, the 1835 New Echota treaty with the Cherokees stipulated that laws passed by the Cherokee government "shall not be inconsistent" with the U.S. laws. This limitation provided the basis for the next legal challenge to Native nationhood, in an 1846 Supreme Court case *U.S. v. William Rogers*.[29]

William Rogers was a White man who lived in the Cherokee Nation and considered himself a Cherokee citizen. When he was accused of killing another White adopted-Cherokee on Cherokee land, he was taken out of Indian Territory and tried in a White court. Rogers claimed that U.S. courts did not have jurisdiction over him and that he should be tried in a Cherokee court because the treaty specified Cherokee control over its territory. Speaking for the Supreme Court, Chief Justice Roger Taney delivered a decision denying Rogers's position.

After John Marshall's death in 1835 President Jackson had appointed Taney, his attorney general, to take Marshall's place. Taney was, like Jackson, an opponent of Indian rights. Consequently he went beyond the legal necessity of merely deciding that Rogers was a White citizen of the U.S. and thus subject to its laws. Instead, Taney's decision went further than required (a tactic he would use a decade later in the *Dred Scott* case) and declared, "Congress may by law punish any offense committed there [in the Indian Territory], no matter whether the offender be a white man or an Indian."[30] In contrast to previous decisions, Taney moved to challenge Marshall's concept of limited sovereignty by asserting that Indians:

> have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was . . . [treated] as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.[31]

Such an argument was, of course, historically inaccurate because it denied the existence of the many treaties with Indian Nations, but it set the stage for denial of treaty rights. By claiming that the

Cherokees held their new lands under the authority of the government, it opened the door for Congress to become involved in local matters in Indian Territory in violation of the treaties.

While self-government was declining for eastern Indians, it was no better for Native people in the western part of the continent by mid-century. Though the Americans paid France for its claims to the vast Louisiana Territory in 1803, relatively little interaction occurred between U.S. citizens and western Indians during the following decades. All of this changed in the 1840s, however, with the addition of vast new tracts of land in the Northwest, Texas, the Southwest and especially California.

When the U.S. won the Southwest and California in the war with Mexico, the Natives were placed in a weakened relation with the newly-arrived Americans. Moreover, the coastal California Natives who earlier rose up in numerous revolts had been ruthlessly put down and were converted into a labor force for large Spanish mission estates.* When the Spanish missionaries suddenly withdrew in 1834, during the Mexican war of independence, the "mission Indians" were thrown into a state of disorganization and cultural disintegration. The survivors were weakened and scattered by the time the new American rulers arrived.[32]

The U.S. government was ill-prepared to deal with its new Indian populations. After the end of the Seminole War the national government became less interested in Indian matters and in 1849 transferred the Bureau of Indian Affairs from the War Department to the newly organized Department of the Interior. Such a categorization of Indian affairs into "interior" matters was an indication that American policymakers were thinking of Indians less and less as independent Peoples.

This lack of governmental preparation was especially disastrous for California Indians. By 1849 a massive "gold rush" of incoming White miners and settlers occurred. As prospectors and settlers overran much of California within the next few years, Indian land was illegally confiscated. The Indians were unable to oppose the invasion and many Native groups were brought close to extinction through the popular "sport" of Indian killing. This massive

*The Tribes in reference, during the Spanish and Mexican periods, were mainly those south of the Sonoma Mission.

depopulation of California Indians was brought about by settlers and miners, often with the connivance of government officials.[33]

In 1850 Congress dispatched some agents to California Indian tribes. They hastily negotiated eighteen treaties in California, opening up more lands for White settlement. These treaties of course marked a massive land loss by Indians, but they did provide payment for the lands and recognition of geographically defined reservations which would be guaranteed to the Natives. After the treaties were signed, White settlers quickly moved into the newly opened land. However, further disaster befell the Indians when the U.S. Senate refused to ratify those treaties, because of political pressure from the California legislature opposing any treaty-making. The government did not bother to return the lands to the Indians or to inform them that the treaties were not ratified, so California Natives were left without official recognition or treaty guarantees for the rest of the century. Further depopulation followed.[34] Such double-dealing is indicative of the ability of one branch of government to negate what another branch had promised, a factor that would continue to be of disastrous consequence for Native people.

In other areas of the West, the federal government often cast itself as the protector of Indians who resisted settler encroachment. When the independent state of Texas joined the Union in 1845, the government inherited a tinderbox not only involving Mexico but also Indians of the Southern Plains. The state government did not recognize Indian rights to lands and freely parcelled out land grants to settlers, so the Texas frontier was the scene of intermittent warfare throughout the 1840s and 1850s. The initial U.S. response was to place the Indians on a series of segregated reservations under federal control. The reservation idea in the late 1840s, concluded one historian, was an "alternative to extinction," with the implication that Indians would remain a separate but permanent part of the American future.[35] Significantly, this future would be firmly under the control of the U.S. government. But in Texas the application of the reservation idea failed because of continued White intrusions onto the reservations. In 1859 the federal government agreed to return to the removal policy, and Texas Indians were compelled to join a growing concentration of Native people in the Indian Territory.

Despite the failure of the reservation concept in Texas and California, U.S. policy by mid-century became firmly committed

to reservations. This policy did offer at least some control over White expansion, but it was not conducive to a recognition of Native sovereignty. The implication of the government's role as "protector" of Indians was a change that was not lost to the Bureau of Indian Affairs. As the government increased its power over Indians, they were no longer considered primarily as enemies to be defeated or won over. But they were not citizens either. What they were left with was a status most correctly described by John Marshall's concept of "wardship."

The major rights still guaranteed to Indian Nations were those contained in the treaties. It took the American Civil War to arouse sentiment favoring the ending of even those guarantees.

With the formation of the Confederate States of America in 1861 several of the removed Nations in Indian Territory signed treaties with the rebel government. Not only were most of the economic and social ties of the southeastern Indians with the South, including the use of Black slaves by some Indians, but the Confederates offered good treaty terms to the Chickasaws, Choctaws, Creeks and Cherokees. Moreover, the tribes held considerable resentment against the U.S. government for lagging in the fulfillment of earlier treaty terms and were disappointed that they were left unprotected with the sudden withdrawal of U.S. troops. Bitter controversy raged among the removed tribes to decide whether to remain neutral or join sides. Eventually the neutralists agreed to sign a treaty of peace with the Confederacy.[36]

This move infuriated the North. At the same time, events in the West among the Sioux caused the Union to feel threatened by Indians as well as by the South. The Santee Sioux had remained in their Minnesota homeland despite increasing pressures to move west. In the process they lost the vast majority of their lands in exchange for government promises of annuity payments. In 1862 the government was preoccupied with the Civil War and Congress neglected to pass an appropriations act for the Santee. The Indians, by now almost totally dependent on government supplies since they had little remaining lands, faced starvation. Tension increased until warfare broke out. In the lightning Sioux attacks which followed, the whole midwest frontier was thrown into turmoil. Rumors circulated that numerous western tribes were ready to ally with the Confederacy to destroy the Union.[37] Other Indian wars broke out in Colorado in 1864, also in reaction against White expansion onto Indian lands.

Nevertheless, some Whites believed that Indian wars were a traitorous "stab in the back" to aid the seceded South.

Even though treaties were again used as the most expedient means to end these series of wars with Plains Indians during the 1860s, sentiment grew to end the practice.[38] Although Americans disagreed about whether Indians should be exterminated or assimilated, there was no disunity over the denial of Indian sovereignty. It is perhaps most appropriate to quote Commissioner of Indian Affairs Ely S. Parker, himself a Seneca, who was appointed in 1869 by President Ulysses S. Grant as a "friend" of the Indian. Parker, like other government spokesmen, believed strongly that Native people must come under complete U.S. domination so that they could be assimilated. His policies were clearly different from Marshall's limited sovereignty concept of less than four decades earlier. Parker wrote:

> The Indian tribes of the United States are not sovereign nations, capable of making treaties, as none of them have an organized government of such inherent strength as would secure a faithful obedience of its people in the observance of compacts of this character. They are held to be wards of the government, and the only title the law concedes to the lands they occupy or claim is a mere possessory one. But because treaties have been made with them . . . they have become falsely impressed with the notion of national independence. It is time that this idea should be dispelled, and the government cease the cruel farce of thus dealing with its helpless and ignorant wards.[39]

Sentiment in Congress against treaty-making grew until a resolution was passed, as part of the Indian Appropriations Act of 1871, that no further treaties would be made with Indians. The immediate issue was resentment by the House of Representatives because the Senate had exclusive power in approving Indian treaties. But as in much Indian policy that appears hastily improvised, the end of treaty-making fits into a larger pattern of denial of sovereignty. By refusing to deal with tribal governments through treaties, the U.S. was moving away from a collective approach to Indians (as "domestic dependent nations") and more toward an individual approach (as "helpless and ignorant wards"). The relation between treaty status and sovereignty is clearly stated in the act itself,

> "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[40]

Native guarantees of self-government had suffered another setback.

THE DENIAL OF SOVEREIGNTY

In ending treaty-making, Congress at least declared that all prior treaties remained in effect. Thus by the treaty guarantees, many Indians retained their self-rule concerning internal matters on their reservation. By this time Native people had clearly lost their external status, but the next three decades would see them lose their right to control their own internal affairs as well.

Even before Congress ended treaty-making, a Supreme Court decision had ruled that Congress could unilaterally modify treaties already in existence. In another case relating to the Cherokees in 1870, the Court decided that a treaty and an Act of Congress were of equal constitutional status, so the most recent enactment would apply. In 1868 Congress had passed a nationwide tax on tobacco; the Cherokees claimed they should not be subject to the tax because their 1866 treaty had specifically promised that none of their farm products would be subject to any tax "which is now or may be levied by the United States." The Court did not deny the legality of the Cherokee position but stated that the 1868 tax superceded the 1866 treaty because it was more recent. Despite a dissent by two justices claiming that treaty promises should not be so lightly overturned, the majority decision held that "the act of Congress must prevail as if the treaty were not an element to be considered."[41]

The Supreme Court was not the only government agency which moved to deny treaty rights. Commissioner of Indian Affairs Edward P. Smith, in his 1873 report, clearly recognized the implication of sovereignty provided by the treaties. He called for the complete abrogation of Indian treaties when he complained that:

> We have in theory over sixty-five independent nations within our borders, with whom we have entered into treaty relations as being sovereign peoples; and at

> the same time the white agent is sent to control and supervise these foreign powers, and care for them as wards of the Government. This double condition of sovereignty and wardship involves increasing difficulties. . . . All recognition of Indians in any other relation than strictly as subjects of the Government should cease.[42]

Without the power of citizenship, and with remaining guarantees of treaty rights, Native people would most accurately be described by Commissioner Smith's categorization as "subjects of the Government," being little different from colonial subjects in the European imperial domains in Africa and Asia.

The next area of tribal home rule to be infringed upon concerned the right of tribal governments to handle their own criminal jurisdiction within reservations. The U.S. had traditionally claimed jurisdiction over crimes against Whites committed on reservations but otherwise had left internal matters between one Indian and another under the authority of the tribal governments. Section 2146 of the Revised Statutes specifically exempted crimes by one Indian against another, on a reservation, as outside of the authority of U.S. Courts.[43] It would be left to the Supreme Court to strike down even those treaty guarantees of self-rule in the cases of *Ex Parte Crow Dog* and *U.S. v. Kagama.*

Crow Dog, a Brule Sioux, was accused of killing another Sioux man on their reservation. A U.S. territorial court had convicted him of murder, even though he claimed that the courts did not have jurisdiction and he should be dealt with under tribal laws. His lawyer therefore appealed to the Supreme Court which heard his case in 1883.[44] The Court voided Crow Dog's conviction and turned him back to his tribal government. The decision was based on Section 2146, and the Court noted that it had always been government practice not to interfere with internal laws on reservations.[45] This decision has been seen as a victory for tribal authority, but there are negative implications which the Court made within that decision.

In speaking for the Court, Justice Stanley Matthews wrote that Indians were:

> Subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian . . . as a dependent com-

> munity who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society.[46]

Not only was this decision ethnocentric and patronizing but it ignored the fact that Native people *had* been self-governed before the establishment of U.S. authority. The justices had created a historical myth that Indians "had always been" dependent wards. Even as the Court moved to solidify the government's control, by ignoring guarantees of sovereignty implicit in treaties, it piously stated its hope that Native Americans *might* become self-governed.

Moreover, after noting that past U.S. policy had been not to interfere with reservation internal matters, the decision ended with the statement: "To justify such a departure, in such a case, requires a clear expression of the intention of Congress."[47] By inviting Congress to pass a law giving it jurisdiction over reservations, the Court again implied that Congress had the right to revoke treaties and substitute new policies over Native people without their agreement.

It did not take Congress long to respond to such an invitation. As part of the Indian Appropriations Acts of 1885 the government enacted the Major Crimes Act to extend U.S. jurisdiction over murder and other major crimes committed by anyone on a reservation.[48] No agreement was sought from Indians, even though this act violated the terms of numerous treaties. A court challenge to this act was not long in coming, and the case of *U.S. v. Kagama* reached the Supreme Court within the year. Kagama, a Hupa Indian, was accused of killing another Hupa on their California reservation. The Court ruled that even though this was a change of policy, Congress did have the power to enforce its laws within the reservations and could bring Kagama to trial in a U.S. court. While making no mention of treaty guarantees, Justice Samuel Miller's decision for the Court emphasized that Indian inhabitants of California owed their allegiance to the U.S. because of the acquisition of that area from Mexico. Miller admitted *no* amount of sovereignty to Native peoples because:

> Indians are within the geographical limits of the United States. The soil and people within these limits

> are under the political control of the Government of the United States. . . .
>
> The right of exclusive sovereignty . . . must exist in the National Government, and can be found nowhere else.[49]

This decision quoted liberally from Taney's 1846 decision in *U.S. v. Rogers* but significantly misquoted Marshall's concepts. While ignoring *Worcester v. Georgia* altogether, Miller referred to *Cherokee Nation v. Georgia* as establishing that "the Cherokees were not a State or nation," but instead were "local dependent communities."[50] Such a flagrant twisting of Marshall's concept of "domestic dependent nations" is remarkable, especially since Marshall specified in both cases that the Cherokees were a state.

The Kagama decision, despite its misstatements of facts, became the basis for future U.S. Indian policy. The gradual evolution from independence, to "domestic dependent nations," to "local dependent communities," typifies the methods by which the government established its control over Native Americans. Moreover there was a strong element of condescension in *U.S. v. Kagama.* After noting that Indians owe no allegiance to the state governments, the Court proclaimed the necessity of the federal government to protect them from the states. In a very real sense, the decision noted, Indians "are communities dependent on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power." The decision went on to suggest that "the power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection."[51]

It is indeed ironic that, in an era when the federal government was taking a "hands-off" attitude toward the problems of the poor and was abandoning protection of the rights of Afro-Americans, it was moving so strongly to solidify its control over its Indian "subjects" under the justification that they needed protection. By deciding to govern Native people directly, rather than through treaties, the Court noted that Congress was taking a "new departure."[52] The government did so with the blessings of the Supreme Court. It might be argued that the Court's decisions merely reflected the realities of the decline of Indian power, but the justifications to break treaties were integral steps in establishing U.S. dominance over Native self-government.

There were several other important Supreme Court cases relating to Native Americans during the late nineteenth century, but most of them dealt with the question of Indian citizenship and thus are beyond the scope of this study. On the question of citizenship rights the Court rendered some positive decisions, in contrast to their denials of sovereignty.

The next major case concerning Native sovereignty was *Stephens v. Cherokee Nation*, decided in 1898. The background of this case revolved around the generosity of the Cherokees in allowing individual Whites to settle within their lands. In making this allowance, of course, the Cherokee Nation did not automatically admit those Whites to political and voting status within their tribal government.

By the 1890s several thousand Whites were living in the Indian Territory, and they pressured Congress to abolish the tribal governments and admit a White government into the Union as the State of Oklahoma. As part of the 1893 Indian Appropriations Act, Congress created a commission to negotiate with the Five Civilized Tribes for the extinguishment of their tribal title to their lands. This Dawes Commission seized upon the non-participation of the White settlers in the tribal governments in order to claim, in its May 7, 1894 report to the Senate, that those governments should be abolished. The report labeled the tribal system "not only non-American, but it is radically wrong."[53] The Commission ordered the Cherokee tribal government to admit White residents to citizenship and voting rights. Such a move would have meant the loss of their treaty-guaranteed right of self-rule; the Cherokees refused. Several White residents sued the Cherokee government, and the case reached the Supreme Court just as Congress passed the Curtis Act of June 28, 1898. The Curtis Act abolished the tribal governments in the Indian Territory, without the agreement of the Indians and in violation of their treaties.[54]

In presenting the opinion of the Court in *Stephens v. Cherokee Nation*, Chief Justice Melville Fuller admitted that the Cherokee treaties of 1835, 1846, and 1866 had all guaranteed self-rule, undisturbed possession of their lands, and no inclusion within a state without their consent. Nevertheless, he quoted *U.S. v. Rogers* and *U.S. v. Kagama* to establish that Indians were dependent wards and that Congress had the power to supercede treaties without the agreement of the Indians. Furthermore, he wrote, Congress had "paramount authority" over Indians, so it could

do as it wished to decide tribal membership or even abolish tribal governments altogether.[55] He did not provide any legal justification for this view, either from the Constitution or from the treaties; no such authority was ever granted in those documents.

The Supreme Court thus recognized a power that Congress had been claiming for itself for over a decade. The major question of the century in Indian-White relations had been land control, so it is hardly surprising that the final legal defeat of Native rights would be over land. That defeat would be marked by the 1903 decision in *Lone Wolf v. Hitchcock*. Given the previous court decisions, the Lone Wolf case marks the solidification of United States policy in denying authority to tribal governments, including the right to hold land.

Communal land control by the tribes had been attacked by White "reformers" as a retarding influence to Native assimilation. These reformers, who considered themselves humanitarians because they opposed military extermination policies, felt that the only hope for Indians was to break up the reservations into individual landholdings. Having no respect for Native cultures and tribal communalism, the reformers pushed for an allotment of Indian lands. In 1887 Congress passed the Dawes General Allotment Act, which directed the Bureau of Indian Affairs to end communal property holding, allot a set amount of land to each Indian family (usually 160 acres), and open the "surplus" lands to White settlement. Although allotment was not enacted with every Indian group, for the next forty-five years over eighty million acres was lost from Native control through the operation of the Dawes Act.[56]

Allotment was pressured upon various Indian Groups at different times, including the Kiowas and Comanches in 1892. In that year a government agent convinced a group of these tribesmen to sign a document agreeing to the sale of "surplus" lands left over after the allotment of their shared reservation. Soon after its presentation to Congress, the tribal governments adopted a memorial to Congress denying the validity of the agreement. They quoted their 1868 treaty of Medicine Lodge, in which the United States government specifically promised that "No treaty for the cession of any portion or part of the reservation . . . shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male

Indians."[57] Not only did this memorial point out that the number of signators was less than three-fourths of the adult males, but those who did sign claimed that the terms of the agreement had been fraudulently misrepresented to them. Nevertheless, in 1900 and 1901 Congress passed laws to carry through with the allotment of the Kiowa and Comanche reservation. Since they stood to lose about two million acres of their best lands, Lone Wolf and his fellow tribesmen immediately took the government to court.[58]

The Supreme Court reached its decision in *Lone Wolf v. Hitchcock* in 1903. The opinion denied the claims of the Kiowas and Comanches, and was devastating in its impact upon Native rights. Justice Edward White, who wrote the decision, ignored the promises in the 1868 treaty, because to uphold the treaty would, he feared, "limit and qualify the controlling authority of Congress . . . when the necessity might be urgent for a partition and disposal of the tribal lands."[59] This limitation of power, as promised in the treaty signed by Congress, was exactly what the Indians were claiming; but the Supreme Court decided that such a limitation could not be tolerated.

Justice White stated flatly that when "treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate [the treaty] existed in Congress."[60] In referring to *U.S. v. Kagama*, the Court repeated that Indians were in a relation of dependency, as wards of the government. Thus without qualification, "Full administrative power was possessed by Congress over Indian tribal property."[61] Not only was treaty-making ended, but the guarantees promised in former treaties were meaningless if Congress chose to ignore them. Furthermore, this decision even removed the Court itself as a means of relief, and left an appeal only to Congress. Justice White stated that the Court "must presume that Congress acted in perfect good faith in the dealings with the Indians . . . The judiciary cannot question or inquire." He concluded that "Congress possessed full power in the matter."[62]

Thus, by the dawning of the twentieth century, as America consolidated its control over colonial subjects in its new overseas empire, the United States Supreme Court had ruled that Congress held virtually unlimited power over American Indians.[63] No longer were Native peoples independent nations capable of making treaties with the United States; no longer were they even

"domestic dependent nations." They were not nations at all, but only powerless subjects without any treaty guarantees that the government was bound to respect. This condition had not come about suddenly, but by a gradual twisted process of legal interpretation in which the Indian nations had no say.

Neither the Constitution nor the treaties stated that Indians would be "helpless wards" under the "full power" of the government. Instead, the treaties had promised specific guarantees of self-rule and respect. The problem with this was that Native Americans believed the promises of those treaties. They have continued to assert that the government is bound to enforce the treaties today. Witness a typical testimony before Congress, of a Seneca leader in 1960, pleading that more of their land not be taken from them without their consent, in violation of the treaty between the Seneca Nation and President George Washington:

> My people really believe that George Washington read the 1794 Treaty before he signed it, and that he meant exactly what he wrote. For more than 165 years we Senecas have lived by that document. To us it is more than a contract, more than a symbol; to us the 1794 Treaty is a way of life. . . . Break our Treaty, and I fear that you will destroy the Senecas as an Indian community.[64]

In 1972 Indians of various tribes joined a march to Washington, on a "Trail of Broken Treaties," to call national attention to their denial of self government.[65]

The Supreme Court decisions culminating in *Lone Wolf v. Hitchcock* represent the low mark of Indian sovereignty. In the twentieth century the Court has reversed some of its previous rulings, and returned to the more positive *Worcester v. Georgia* precedent in granting more respect to Native self-government. Recently Indian lawyers have attempted to build upon the positive aspects of earlier decisions in order to get treaty rights enforced.[66] Still, it is undeniable that there is far to go before the independent status of Indian nations, as represented by the treaties, will be enforced.

If federal legal concepts of Native Americans return to the treaties and the Constitution, a long history of Supreme Court decisions must be overturned. It is impossible to understand the loss of Indian sovereignty without attention to the critical role of the

Supreme Court. To Native Americans the Supreme Court in the nineteenth century was not a neutral arbiter as much as it was an integral part of the legal justification for the loss of sovereignty, in the long decline from Indian independence to wardship.

NOTES

1. An excellent study, which proposes a "compact" theory of governmental relations between the United States and Indian Tribes based on the treaties, is Russell Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980). For an assessment of their thesis, see Walter L. Williams, "American Indian Legal Status: A Review of Recent Interpretations," *American Indian Culture and Research Journal* 5:2 (1981) 83–92. An even more recent valuable study of Indian legal status, with a focus more on the twentieth century, is Vine Deloria, Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983).

2. See, for example, the representative treaties reprinted in Wilcomb E. Washburn, ed., *The American Indian and the United States: a Documentary History* (New York: Random House, 1973), 4 vol.

3. Don Russel, "How Many Indians Were Killed? White Man versus Red Man: the Facts and the Legend," *The American West*, 10 (July 1973), 42–63. These figures ignore the biggest causes of Indian deaths during warfare with Whites: starvation and exposure. They do, however, show continued military effectiveness of Native fighting forces, by pointing out that in battle deaths alone there were more Whites than Indians killed.

4. There is a large and growing literature on the Removal period. See, for example, Bernard W. Sheehan, *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian* (Chapel Hill: University of North Carolina Press, 1973); Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes of Indians* (Norman: University of Oklahoma Press, 1932); Angie Debo, *The Rise and Fall of the Choctaw Republic* (Norman: University of Oklahoma Press, 1934); Arthur H. De Rosier, *The Removal of the Choctaw Indians* (Knoxville: University of Tennessee Press, 1970); Angie Debo, *The Road to Disappearance: A History of the Creek Indians* (Norman: University of Oklahoma Press, 1941); Henry T. Malone, *Cherokees of the Old South; A People in Transition* (Athens: University of Georgia Press, 1956); John K. Mahon, *History of the Second Seminole War* (Gainesville: University of Florida Press, 1967); Edwin McReynolds, *The Seminoles* (Norman: University of Oklahoma Press, 1957).

5. Philip Staudenraus, *The African Colonization Movement 1816–1865* (New York: Columbia University Press, 1961). More research needs to be done to understand the intellectual connections between this colonization movement and its contemporary movement for Indian removal.

6. Mary Young, "Indian Removal and the Attack on Tribal Autonomy: the Cherokee Case," *Indians of the Lower South: Past and Present*, John K. Mahon, ed. (Pensacola: Gulf Coast History Conference, 1975), pp. 127, 134. See also Harry Kersey, "The Cherokee, Creek, and Seminole Responses to Removal:

a Comparison" and Holatte Cvpvkke, "Drove Off Like Dogs–Creek Removal," in the same volume.

7. Ronald N. Satz, *American Indian Policy in the Jacksonian Era* (Lincoln: University of Nebraska Press, 1975), p. 10. Satz's study is representative of a current revisionist interpretation, stressing a more benign view of Jackson, which this author does not share. For a more critical recent approach, see Michael Paul Rogin, "Liberal Society and the Indian Question, *"Politics and Society,* 1 (May 1971), 269–312; and his psychohistory *Fathers and Children: Andrew Jackson and the Subjugation of the American Indian* (New York: Knopf, 1975).

8. *Fletcher* v. *Peck* 10 U.S. 87, 142–43 (1810).

9. Ibid., 10 U.S. 146–47.

10. *Johnson & Graham's Lessee* v. *William McIntosh* 21 U.S. 542, 589–90 (1823).

11. Ibid., 21 U.S. 574, 587–88.

12. Ibid., 21 U.S. 574, 591–92.

13. *Cherokee Nation* v. *Georgia,* 30 U.S. 1 (1831).

14. Ibid., 30 U.S. 12.

15. Ibid., 30 U.S. 3.

16. Ibid., 30 U.S. 2–10.

17. Ibid., 30 U.S. 16–18.

18. Ibid., 30 U.S. 18.

19. Ibid., 30 U.S. 17.

20. Ibid., 30 U.S. 49–58.

21. Althea Bass, *Cherokee Messenger: A Life of Samuel A. Worcester* (Norman: University of Oklahoma Press, 1936); *Worcester* v. *Georgia* 31 U.S. 520–28 (1832).

22. *Worcester* v. *Georgia,* 31 U.S. 557–560.

23. Ibid., 31 U.S. 552.

24. Ibid., 31 U.S. 554, 560.

25. Ibid., 31 U.S. 558. See also J.C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review,* 21 (February 1969): 500–31.

26. William Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836* (New York: Harper and Row, 1965).

27. *Worcester* v. *The State of Georgia,* 31 U.S. 593.

28. Ibid.

29. *U.S.* v. *William Rogers,* 45 U.S. 567, 573.

30. Ibid., 45 U.S. 572.

31. Ibid.

32. Robert F. Heizer and Alan J. Almquist, *The Other Californians: Prejudice and Discrimination Under Spain, Mexico, and the United States to 1920* (Berkeley: University of California Press, 1971).

33. Ibid., James F. Downs, "California," *North American Indians in Historical Perspective,* ed. Eleanor B. Leacock and Nancy O. Lurie (New York: Random House, 1971), pp. 289–316; Theodora Kroeber, *Ishi in Two Worlds* (Berkeley: University of California Press, 1969), pp. 11–114; Virginia P. Miller, *Ukomno'm: The Yuki Indians of Northern California* (Socorro, NM: Ballena Press, 1979).

34. Ibid.

35. Robert A. Trennert, *Alternative to Extinction: Federal Indian Policy and the Beginnings of the Reservation System, 1846–1851* (Philadelphia: Temple University Press, 1975).

36. Annie H. Abel, *The Slaveholding Indians* 3 vols. (Cleveland: Arthur Clark,

1919–1925); Grant Foreman, *The Five Civilized Tribes* (Norman: University of Oklahoma Press, 1934; Rpt. 1966); Edmund Danziger, *Indians and Bureaucrats: Administering the Reservation Policy During the Civil War* (Urbana: University of Illinois Press, 1974).

37. Roy Meyer, *History of the Santee Sioux: United States Indian Policy on Trial* (Lincoln: University of Nebraska Press, 1967).

38. Francis Paul Prucha, *American Indian Policy in Crisis: Christian Reformers and the American Indian, 1865–1900* (Norman: University of Oklahoma Press, 1976); Robert Winston Mardock, *The Reformers and the American Indian* (Columbia: University of Missouri Press, 1971); Loring Priest, *Uncle Sam's Stepchildren: The Reformation of United States Indian Policy, 1865–1887* (New Brunswick: Rutgers University Press, 1969); Henry Fritz, *The Movement for Indian Assimilation, 1860–1890* (Philadelphia: University of Pennsylvania Press, 1963).

39. Quoted in Wilcomb Washburn, *The Indian in America* (New York: Harper & Row, 1975), p. 237. See also the 1868 report of the Indian Peace Commission, quoted in ibid., p. 71–72.

40. *16, United States Statutes at Large* 544, 566, Chapter 120 (March 3, 1871); Section 2079 *United States Revised Statutes.*

41. *The Cherokee Tobacco,* 78 U.S. 616, 618, 621, 622.

42. Quoted in S. Lyman Tyler, *A History of Indian Policy* (Washington, D.C.: Government Printing Office, 1973), pp. 84–85.

43. Section 2146, Title XXVIII, *U.S. Revised Statutes,* 18 Stat. 318 (February 18, 1875).

44. *Exparte Crow Dog,* 109 U.S. 556 (1883).

45. Ibid., 109 U.S. 558, 572.

46. Ibid., 109 U.S. 569.

47. Ibid., 109 U.S. 572.

48. 23 Stat. 385, Section 9.

49. *U.S.* v. *Kagama,* 118 U.S. 379–380.

50. Ibid., 118 U.S. 379–382.

51. Ibid., 118 U.S. 384.

52. Ibid., 118 U.S. 382.

53. *Stephens* v. *Cherokee Nation,* 174 U.S. 451 (1898).

54. Ibid., 174 U.S. 445–451. *U.S. Statutes At Large* 30: 497–505 (June 28, 1898 Curtis Act).

55. *Stephens* v. *Cherokee Nation* 174 U.S. 483–488 (1898).

56. There is a large body of writing on allotment, including Wilcomb Washburn, *The Assault on Indian Tribalism: the General Allotment (Dawes Act) of 1887* (Philadelphia: Lippincott, 1975); Wilcomb Washburn, *Red Man's Land, White Man's Law,* (New York: Scribner, *A Study of the Past and Present Status of the American Indian,* 1971); and the previously cited books by Henry Fritz, Robert Mardock, and Loring Priest. For evaluation of the long-range disastrous results of allotment, see D.S. Otis, *The Dawes Act and the Allotment of Indian Lands,* edited by Francis Paul Prucha (Norman: University of Oklahoma Press, 1973); Lawrence F. Schmeckebier, *Office of Indian Affairs: Its History, Activities and Organization* (Baltimore: Brookings Institute Monograph 48, 1927); Lewis Meriam et al., *The Problem of Indian Administration* (Baltimore: Brookings Institution, 1923); and Kirke Kickingbird and Karen Ducheneaux, *One Hundred Million Acres* (New York: MacMillan, 1973).

57. *Lone Wolf* v. *Hitchcock* 187 U.S. 554.
58. Ibid., 187 U.S. 554, 557–61.
59. Ibid., 187 U.S. 564.
60. Ibid., 187 U.S. 566.
61. Ibid., 187 U.S. 568.
62. Ibid.
63. The argument that there is a close connection between U.S. policies dominating Indians and American imperialist expansion abroad, is made in Walter L. Williams, "United States Indian Policy and the Debate over Philippine Annexation: Implications for the Origins of American Imperialism," *Journal of American History* 66 (March 1980): 810–31.
64. George D. Heron (Seneca) speech to the Subcommittee on Indian Affairs, U.S. House of Representatives, about the construction of Kinzua dam on Seneca land; as quoted in Jack Forbes, ed., *The Indian in America's Past* (Englewood Cliffs, N.J.: Prentice-Hall, 1964), p. 70.
65. Vine Deloria, Jr., *Behind the Trail of Broken Treaties* (New York: Delta, 1974). Historian Wilcomb Washburn, in *Red Man's Land, White Man's Law,* has condemned the tendency of courts to base their decisions on non-legal suppositions about de facto Indian independence in recent times. Laws and treaties "recognizing the distinct and separate status of Indian political units are modified on the basis of the erosion of that independence occasioned by violation of those instruments by later representatives of the United States. It is sad to see decisions overturned by reference to later violations of those decisions" (p. 185). General works on the native legal situation, with an emphasis on recent eras, are Monroe Price, *Law and the American Indian: Readings, Notes + Cases* (Indianapolis: Bobbs-Merrill, 1973); Felix Cohen, *Handbook of Federal Indian Law* (Washington, D.C.: Government Printing Office, 1941, revised 1982); Imre Sutton, *Indian Land Tenure: Bibliographical Essays and a Guide to the Literature* (New York: Clearwater, 1975); Vine Deloria, Jr., ed., *Of Utmost Good Faith* (San Francisco: Straight Arrow Press, 1971); William A. Brophy and Sophie D. Aberle, *The Indian: America's Unfinished Business; Report of the Commission on the Rights, Liberties, and Responsibilities of the American Indian* (Norman: University of Oklahoma Press, 1966); a special issue on Indians and the law, of *Law and Contemporary Problems* 40 (Winter 1976); various issues of *American Indian Law Review* and *The Indian Historian.*
66. Report of Task Force Number 9, *American Indian Policy Review Commission Report* (Washington, D.C.: Government Printing Office, 1977); Deloria Vine, Jr. and Lytle, Clifford M., *American Indians, American Justice* (Austin: University of Texas Press, 1983).