# 5

# Governing the United States and Tribal Rights

Since the United States assumed the Indian tribes were conquered peoples,[1] the United States attempted to impose its will on tribes and take their land. James Duane, a member of the Continental Congress who would go on to serve as New York City's first mayor,[2] told the governor of New York in 1784: "I would never suffer the word 'nation' or 'six nations' or 'confederates,' or 'council fire at Onondago' or any other form which would revive or seem to confirm their former ideas of independence they should rather be taught that the public opinion of their importance has long since ceased."[3] Duane's sentiments were widely shared, and there was good reason. As foes who inflicted serious blows upon the Americans during the war, many Americans believed tribes owed the United States reparations.[4] On top of this, the fledgling United States did not have the capital to pay troops, so those who served in the Revolutionary War were promised land.[5] Land under tribal control was also the only asset available to finance the United States' wartime debts.[6] Though Americans surged west, executing on the United States land claims would not be simple.

[1] Francis Paul Prucha, The Great Father: The United States Government and the American Indians 17 (abr. ed. 1986).

[2] *Duane, James*, U.S. House of Representatives: Hist., Art & Archives, https://history.house.gov/People/Listing/D/DUANE,-James-(D000508)/ [https://perma.cc/2US7-8GEB].

[3] Wilcomb E. Washburn, *Indians and the American Revolution*, AmericanRevolution.org, www.americanrevolution.org/ind1.php [https://perma.cc/7NLQ-WT5Q].

[4] Gregory Ablavsky, *The Savage Constitution*, 63 Duke L. J. 999, 1015 (2014).

[5] *Id.* at 1016; *Military Register & Land Records*, Off. of the Ky. Secretary of St., https://sos.ky.gov/land/military/Pages/default.aspx [https://perma.cc/B8GF-S99C].

[6] Ablavsky, *supra* note 4, at 1015.

## 5.1 TRIBAL RESISTANCE

Notwithstanding Duane's belief, Indian tribes remained a formidable military threat. Britain maintained a presence along the present-day Canadian border, and the Louisiana territory was still under Spanish dominion. Accordingly, the tribes retained access to guns and other European supplies. If the United States tried to take tribal lands by force, it would be in for a costly fight. This was the last thing the United States wanted: It was broke and lacked a standing army. Even if the United States *could* defeat tribes in war, the financial burden of armed conflict would likely sink the newly formed nation.

Thus, in 1784, the United States entered the Treaty of Fort Stanwix with the Haudenosaunee. The Mohawk, Onondaga, Seneca, and Cayuga agreed to cede some of their lands as reparations for their alliance with Britain; however, the Tuscarora and Oneida secured their land as they fought with the Americans.[7] The treaty text proclaimed the document was a product of the United States' "liberal and humane views" and required goods to be paid to the tribes.[8] Similar treaties would be enacted between tribes and the United States in the ensuing years.[9]

Treaties failed to stop white intrusions onto tribal land. In fact, a Shawnee chief peacefully confronted the Americans who were invading his territory. The Kentucky militia murdered the chief though he was carrying only a copy of the treaty that secured his rights and an American flag.[10] This murder was not an isolated event. American settlers did not consider killing Indians a crime – even if the Indians were peaceful.[11] Fearing a war with tribes, George Washington ordered General Josiah Harmar, of the United States Army, to remove the Americans who settled upon treaty-guaranteed tribal lands. Harmar evicted settlers but to no avail.[12] The tide of American settlers kept coming.

The United States' inability to honor its treaties forced tribes to act. By 1786, the Haudenosaunee, Cherokee, Delaware, Chippewa, Huron, Shawnee, Ottawa, Potawatomie, Twichtwee, and the Wabash Confederacy had formally allied as the United Indian Nations (UIN). The UIN sent a

[7] Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly 47 (1994).
[8] Treaty with the Six Nations, Art. IV, Oct. 22, 1784, 7 Stat. 15, 16.
[9] Prucha, Great Father, *supra* note 1, at 17.
[10] Ablavsky, *supra* note 4, at 1024–25.
[11] Colin G. Calloway, The Indian World of George Washington 399 (2018); *id.* at 404.
[12] Ablavsky, *supra* note 4, at 1018–19.

letter to Congress expressing their desire for friendship despite Americans killing "several imminent Chiefs" who were peaceful. The UIN stated treaties should be ratified by all members of the UIN and declared, "[I]f fresh ruptures ensue we hope to be able to excultrate ourselves, and shall most assuredly with our limited force be obliged to defend those rights and privileges which have been transmitted to us by our ancestors."[13]

War with the UIN posed an existential danger to the United States.[14] The United States lacked the financial wherewithal for a war with tribes; in fact, Congress had to borrow $16 dollars to make payment to a delegation of Indians in June of 1786.[15] Appreciating the gravity of the situation, Congress enacted an Ordinance for the Regulation of Indian Affairs in August of 1786.[16] The 1786 Ordinance divided Indian affairs into southern and northern regions with a superintendent responsible for each region. The regional superintendents were required to regularly correspond with the Secretary of War. The 1786 Ordinance forbade anyone but American citizens from residing in the Indian territory; moreover, the 1786 Ordinance required Americans wishing to reside among the tribes to first obtain a license from the regional superintendent. As a prerequisite to acquiring the license, the would-be licensee's good character had to be established by a certificate from the governor of his state.[17] By restricting access to the Indian territories to American citizens of good character, the United States could prevent – or at least try to – Indians from obtaining arms from Spain and Great Britain. Plus, the good character provision would theoretically help promote peaceful commercial relations between tribes and the United States, thereby easing tensions.

To bolster the 1786 Ordinance, Congress enacted the Northwest Ordinance in July of 1787.[18] The Northwest Ordinance declared:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in

[13] *Id.* at 1026; *Indian Nations vs. Settlers on the American Frontier: 1786–1788*, Nat'l Archives DOCSTeach, www.docsteach.org/activities/printactivity/indian-nations-vs-settlers-on-the-american-frontier-1786%E2%80%931788 [https://perma.cc/V3FK-87DR].

[14] Ablavsky, *supra* note 4, at 1025.

[15] *Id.* at 1026.

[16] *An Ordinance for the Regulation of Indian Affairs (Aug. 7, 1786)*, *in* 31 J. Continental Cong., 1774–1789, at 490–93 (Roscoe R. Hill ed., 1934).

[17] *Id.*

[18] Joseph J. Ellis, American Creation: Triumphs and Tragedies in the Founding of the Republic 134 (2008).

just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.[19]

However, the "just and lawful wars" clause mitigated the Northwest Ordinance's high-minded rhetoric. "Just and lawful" are relative terms, and Americans believed their victory in the Revolutionary War left them, in the words of George Washington, "as the sole Lords and Proprietors" of what would become the United States.[20] Consequently, Americans argued tribes' refusal to hand their land to white settlers was grounds for a "just and lawful" war.[21] The 1787 Ordinance also set forth the procedure by which lands in the Northwest Territory could become states, so at best, the United States only intended the tribes would keep their lands temporarily.[22] The Northwest Ordinance did nothing to slow the invasion of treaty-guaranteed Indian lands.

Although Americans universally agreed tribal lands should be (if they were not already) incorporated into the United States, war was not President Washington's or Secretary of War Henry Knox's preferred method of acquiring tribal lands, the two men with the greatest influence over the United States Indian policy under the Articles of Confederation.[23] Washington expressed his desire to obtain tribal lands by purchase rather than conquest in a 1783 letter explaining:

I am clear in my opinion, that policy and oeconomy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return us soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence, and without that bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them.[24]

[19] Ordinance of 1787: The Nw. Territorial Gov't, § 14, art. 3.

[20] Letter from Geo. Washington, General, to the Governors of the States (June 8, 1783), https://founders.archives.gov/documents/Washington/99-01-02-11404 [https://perma.cc/V8BK-457C].

[21] Juan Perea, *Denying the Violence: The Missing Constitutional Law of Conquest*, 24 U. Pa. J. Constitutional L. 1245–46 (2022).

[22] Ellis, *supra* note 18, at 134.

[23] *Id.* at 128.

[24] Letter from George Washington, General, to James Duane, Head of Comm. of Indian Affairs of the Cont'l Cong (Sept. 7, 1783), Founders Online, https://founders.archives.gov/documents/Washington/99-01-02-11798 [https://perma.cc/4FSU-4HLY].

That is, purchase is cheaper than conquest.

Washington expected tribes to disappear as the American civilization expanded. This meant the United States could pledge annuities to tribes in perpetuity with no expectation of a continued tribal existence. Knox also thought "in a short period the Idea of an Indian on this side the Mississippi will only be found in the page of the historian."[25] While Knox may have believed Indians were doomed, he still viewed tribes as posing an existential threat to the United States. In 1787, Knox opined "that the finances of the United States … render them utterly unable to maintain an Indian war with any dignity or prospect of success."[26]

Aside from the impracticality of seizing tribal lands by conquest, both Washington and Knox considered Indian policy a matter of national honor. Both were key figures in the Revolutionary War. Both were well-aware that claiming tribal lands by the sword – in blatant violation of treaties – contradicted their revolutionary republican ideals.[27] Furthermore, Knox genuinely believed tribes had valid rights to their land. He stated:

> The Indians being the prior occupants, possess the right of the Soil – It cannot be taken from them unless by their free consent, or by the right of Conquest in case of a just War – To dispossess them on any other principle, would be a gross violation of the fundamental Laws of Nature, and of that distributive justice which is the glory of a nation.[28]

But as things stood, neither President Washington nor Secretary Knox could do anything to prevent American settlers from violating tribal lands. The national government lacked power over states under the Articles of Confederation. While the Articles bestowed the regulation of trade with Indians to the federal government, the Articles contained the caveat, "provided that the legislative right of any State within its own limits be not infringed or violated."[29] Settlers believed their states had just claims stretching from their western border to the Mississippi River;[30] thus, states believed the federal government had no authority to prevent them

[25] Letter from Henry Knox, Secretary of War, to George Washington, U.S. President (July 7, 1789), Founders Online, https://founders.archives.gov/documents/Washington/05-03-02-0067 [https://perma.cc/JB66-3Z3S].
[26] Ablavsky, *supra* note 4, at 1026.
[27] Ellis, *supra* note 18, at 131.
[28] Enclosure to Letter from Henry Knox, Secretary of War, to George Washington, U.S. President (June 15, 1789), Founders Online, https://founders.archives.gov/documents/Washington/05-02-02-0357-0002 [https://perma.cc/87LK-R6PV].
[29] Articles of Confederation of 1781, art. IX, para. 4.
[30] Ablavsky, *supra* note 4, at 1046.

from expanding west.[31] Consequently, Henry Knox and many others blamed the frontier violence on states encouraging their citizens to march west, even going so far as to note the Indians were "well behaved."[32] John Jay, a president of the Continental Congress who would go on to serve as the inaugural Chief Justice of the United States Supreme Court, wrote in the Federalist Papers, "[T]here are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants."[33]

## 5.2 INDIAN TRIBES AND THE UNITED STATES CONSTITUTION

The weakness of the federal government, as epitomized by its failure to prevent states and their citizens from violating tribal treaties,[34] led to the Constitutional Convention.[35] While several issues garnered attention, Indian affairs were at the forefront of the Founders' minds. Granting the federal government exclusive authority over Indian affairs would prevent conflicts between state and federal Indian policy, thereby reducing tribal tensions. A stronger central government would enable the United States to enforce its treaties with tribes and prevent further violence on the frontier. Moreover, a stronger central government capable of collecting taxes and mustering an army meant a much more formidable American military.

A national army capable of defeating Indian tribes was crucial to the Constitution's ratification. Federalists and Anti-Federalists vigorously debated how much power the federal government should possess.[36] Federalists, those in favor of a stronger central government, argued that the power to muster a national army was needed to protect Americans from "murdering savages" and "Indian depredations."[37] Anti-Federalists believed a strong federal government could easily turn tyrannical. While

[31] *Id.*
[32] *Id.* at 1035.
[33] The Federalist No. 3 (John Jay).
[34] James Madison, *Vices of the Political System of the U. States* (Apr. 1787), *in* I The Papers of James Madison (William T. Hutchinson et al. eds., 1962).
[35] *Constitutional Convention and Ratification, 1787–1789*, U.S. Dep't of St. Off. of the Hist., https://history.state.gov/milestones/1784-1800/convention-and-ratification [https://perma.cc/632N-2LGW].
[36] *The Great Debate*, ConstitutionFacts.com, www.constitutionfacts.com/us-articles-of-confederation/the-great-debate/#:~:text=There%20were%20two%20sides%20to,of%20the%20Bill%20of%20Rights [https://perma.cc/BME9-NN7A].
[37] Ablavsky, *supra* note 4, at 1060.

Anti-Federalists could downplay threats of European invasion from across the Atlantic, the threat of tribal war was different as conflicts were ongoing with no end in sight.[38] Indeed, Alexander Hamilton wrote in Federalist No. 24, "The savage tribes on our Western frontier ought to be regarded as our natural enemies, [Britain and Spain] natural allies, because they have most to fear from us, and most to hope from them."[39] Appeals to popular fears of tribal war succeeded as the Constitution came into force on June 21 of 1788.[40]

In addition to serving as a catalyst for the Constitution's ratification, tribal governments influenced the Constitution's structure. Europe was ruled by monarchs during the American Revolution. While some tribal governments resembled monarchies, many were democratic.[41] Separation of powers was common in tribal governments. Accordingly, John Adams, a leading revolutionary figure who would become the United States' second president, wrote tribal governments should be studied because "the existence of the three divisions of power is marked with precision that excludes all controversy."[42] Benjamin Franklin modeled his Albany Plan of Union – the first significant proposal to create a collective government among the American colonies[43] – on the Iroquois Confederacy.[44] Several other Founders were familiar with tribal governments through their roles as treaty negotiators and commissioners. Their experience with tribes influenced their views of government structure.[45]

Indian tribes' footprint on the text of the Constitution is clear. Indians are mentioned twice explicitly. "Indians not taxed" is included in the Apportionment Clause, Article One, Section Two of the Constitution. The practical implication of the Apportionment Clause is Indians were not included in state populations for purposes of determining the number of representatives a state would have in Congress. The rationale behind the Apportionment Clause is simple: Indians were citizens of their tribe and not the United States. Thus, the Apportionment Clause acknowledges tribes are separate governments.

[38] *Id.* at 1066.
[39] The Federalist No. 24 (Alexander Hamilton).
[40] *U.S. Constitution Ratified*, Hist. (updated June 16, 2022), www.history.com/this-day-in-history/u-s-constitution-ratified [https://perma.cc/5T8R-FEZL].
[41] Robert J. Miller, *American Indian Constitutions and Their Influence on the United States Constitution*, 159 Proceedings of the Am. Phil. Soc'y 32, 33 n.6 (2015).
[42] *Id.* at 39 n.42.
[43] *Albany Plan of Union, 1754*, U.S. Dep't of St. Off. of the Hist., https://history.state.gov/milestones/1750-1775/albany-plan [https://perma.cc/2ZZP-QR4U].
[44] Miller, *American Indian Constitutions*, *supra* note 41, at 37 n.29.
[45] *Id.* at 38 n.31.

The Commerce Clause, Article One, Section Eight also acknowledges tribes as governments. The Commerce Clause grants Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." As "with" precedes both "foreign nations" and "Indian tribes," the clause recognizes tribes as sovereigns outside the bounds of the Constitution. Hence, tribes – to this day – are not restrained by the United States Constitution because they are separate sovereigns. The plain text of the Commerce Clause only permits Congress to regulate commercial matters with Indian tribes. The Clause's text does not authorize the United States to manage the internal affairs of an Indian tribe any more than it authorizes Congress to manage the internal affairs of Great Britain or France.

Tribes' constitutionally recognized sovereignty meant tribes were dealt with through treaties, the constitutional mechanism designed for interacting with foreign sovereigns as set forth in Article Two, Section Two. The Constitution explicitly forbids states from entering treaties, meaning states were not permitted to form relations with other sovereigns.[46] To prevent conflicts over treaty enforcement as well as other federal laws, Article Six of the Constitution makes the United States' treaties and federal law "the supreme law of the land." This was done, in part, to prevent states from encroaching upon Indian policy.[47]

Indeed, one of the primary purposes of the Constitution was to prevent states from interfering with tribal affairs. States had some authority over Indian affairs under the Articles of Confederation, and James Madison named state meddling in tribal affairs as a reason the Articles of Confederation failed.[48] Accordingly, the Constitution grants the federal government exclusive authority to determine Indian policy through the Commerce Clause and Treaty Clause. Furthermore, the Constitution expressly prohibits states from "enter[ing] into any Treaty, Alliance, or Confederation."[49] An Anti-Federalist admitted as much, writing:

> It is … evident that this state, by adopting the new government, will enervate their legislative rights, and totally surrender into the hands of Congress the management and regulation of the Indian trade to an improper government, and the traders to be fleeced by iniquitous impositions, operating at one and the same time as a monopoly and a poll-tax.[50]

[46] U.S. Const. art. 1, § 10.
[47] Prucha, Great Father, *supra* note 1, at 19.
[48] *See* Madison, *supra* note 34.
[49] U.S. Const. art. 1, § 10.
[50] The Antifederalist No. 45.

If there was any about doubt of states' place in Indian affairs, in 1790 President George Washington explained to the Seneca Nation, "The general Government only has the power to treat with the Indian Nations, and any treaty formed and held without its authority will not be binding."[51]

## 5.3 THE CREEK TREATY

The Creek Confederacy, a multiethnic tribal coalition, was on the United States' southeastern border. The Creek maintained commercial ties with Europe through ports in Spanish Florida and New Orleans;[52] hence, the United States had limited ability to assert economic pressure on the Creek. Moreover, it meant the Creek had access to a steady supply of firearms. Further magnifying hazards posed by the Creek, the Confederacy was under the leadership of Alexander McGillivray. McGillivray was three-quarters European by blood and received a classical education. His understanding of European customs combined with his fluency in English and Spanish allowed him to play the United States, Britain, and Spain off against one another.[53]

McGillivray's political acumen enabled him to acquire centralized leadership over the Confederacy, though each village and tribe within it had historically been autonomous.[54] As a result, McGillivray could summon more than 5,000 Creek warriors at any time[55] – five times the size of the Indian force causing mayhem for the United States in the Northwest Territory. This figure would be significantly larger if other southeastern tribes allied with the Creek.[56] In a military conflict, the United States may have been able to prevail, but the financial cost would have crippled the nation. And if the Creek united with the northwestern tribes, the United States was in grave peril. Secretary of War Knox and President Washington knew this.[57]

Knox advised Washington to take preemptive action and form a treaty with the Creek. Washington agreed in 1789. This was the first treaty

[51] *George Washington Address to Seneca Chiefs, Dec. 29, 1790*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-07-02-0080 [https://perma.cc/L798-CYS3].
[52] ELLIS, *supra* note 18, at 140, 144.
[53] Andrew K. Frank, *Alexander McGillivray*, ENCYC. OF ALA. (updated June 27, 2013), http://encyclopediaofalabama.org/Article/h-2313 [https://perma.cc/54JX-2XWF].
[54] *Id.*
[55] ELLIS, *supra* note 18, at 144.
[56] *Id.* at 148.
[57] *Id.*

the United States pursued with a foreign power since the Constitution's ratification.[58] Washington dispatched a commission to negotiate a treaty with McGillivray in territory the Creek and the state of Georgia were currently disputing.[59] McGillivray, however, had no interest in participating. He could outgun the United States; plus, he knew from tribes farther north that the United States' word was of little value. Nonetheless, McGillivray attended the treaty discussion at the behest of Spain, his primary source of weapons and goods.[60] Distrustful of the Americans' intentions, McGillivray arrived at the negotiation with a retinue of 900 armed men.[61] McGillivray rejected all the United States' terms. He departed the treaty conference with the result he expected while the United States was vexed.[62]

A year later, the calculus changed. Georgia illegally sold twenty million acres within the borders of the Creek Nation.[63] The Creek may have been able to defeat Georgia and the United States at war, but an immortal tide of settlers was another matter.[64] Washington and Knox were also perturbed because Georgia's conduct subverted federal authority over Indian affairs. A treaty was needed. Washington and Knox offered to negotiate directly with McGillivray in the United States capital. McGillivray accepted.[65]

McGillivray and twenty-seven Creek leaders were escorted from Georgia to New York.[66] Along the way, the Creek delegation was warmly treated. The delegation remained in New York for a month, and a deal was reached. The Creek pledged "to be under the protection of the United States of America, and of no other sovereign whosoever"; hence, the Creek were supposed to cease their dealings with Britain and Spain. The Creek agreed to permit a large settlement of whites to remain and in return were guaranteed a territory stretching from northern Florida to Tennessee and running from western Georgia to Mississippi.[67]

[58] *Id.* at 140.
[59] *Id.* at 142.
[60] *Id.* at 145.
[61] *Id.* at 142.
[62] *Id.* at 146–47.
[63] Kathy Weiser-Alexander, *Yazoo Land Scandal of Georgia*, LEGENDS OF AM. (updated Nov. 2021), www.legendsofamerica.com/yazoo-land-scandal/ [https://perma.cc/DX3L-S3C7] (Georgia's behavior was infamously corrupt and culminated in the 1810 Supreme Court case of *Fletcher* v. *Peck*.).
[64] ELLIS, *supra* note 18, at 150.
[65] *Id.* at 150–51.
[66] *Id.* at 152.
[67] *Id.* at 157.

Americans were explicitly barred from entering Creek territory without a passport.[68] Additionally, there were two secret articles. One provided $60,000 of trade goods to the Creek. The other granted McGillivray and other Creek leaders paid commissions in the United States Army.[69] In August of 1790, the United States Senate ratified the treaty.[70]

Washington's and McGillivray's high hopes were dashed nearly as soon as the treaty was signed. Americans continued to disregard the law and invade treaty-secured Creek lands. Georgia never even pretended to assist the United States in honoring the treaty. Knox dispatched federal troops to slow the surge of American settlers, but it was like trying to stop a swarm of locusts with a fly swatter.[71] McGillivray unsuccessfully attempted to muster Spanish and northern tribal support.[72] He died a few years later, and with his death, the Creek Confederacy lost its best hope of preserving its lands.[73] This would only lead to further conflicts. Washington acknowledged as much, explaining to Congress: "In vain may we expect peace with the Indians on our frontiers so long as a lawless set of unprincipled wretches can violate the rights of hospitality, or infringe the most solemn treaties, without receiving the punishment they so justly merit."[74]

## 5.4 FROM TREATIES TO TRADING POSTS

Since treaties were perpetually ignored by Americans,[75] Congress passed an Act to Regulate Trade and Intercourse with the Indian Tribes in 1790.[76] Like the 1786 Ordinance, the Act required Americans seeking to trade with Indians to first obtain a license from the regional Indian superintendent. Licensed traders were to follow the rules established

[68] Treaty with the Creek Nation, Art. VII, Aug. 7, 1790, 7 Stat. 35, 37.
[69] Ellis, *supra* note 18, at 157–58.
[70] *Id.* at 156.
[71] *Id.* at 160–61.
[72] *Id.* at 160.
[73] *Id.* at 161.
[74] *George Washington, Third Annual Address to Congress, Oct. 25, 1791*, Am. Presidency Project, www.presidency.ucsb.edu/documents/third-annual-address-congress-0 [https://perma.cc/3CCH-8DFV].
[75] Prucha, Great Father, *supra* note 1, at 31, 32; Letter from George Washington, U.S. President, to Edmund Pendleton, Chief Just. of Va. (Jan. 22, 1795), Founders Online, https://founders.archives.gov/documents/Washington/05-17-02-0282 [https://perma.cc/GW2Z-7PNA].
[76] An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. §§ 177, 261–264 (2024)).

by the president in all matters relating to Indian commerce. The Act also authorized the United States to prosecute American citizens and inhabitants who committed crimes against Indians in tribal territory or trespassed into tribal territory. By federalizing crimes by Americans against Indians, Congress hoped to prevent further violence on the frontier as tribal punishments of whites were likely to provoke war and states were unlikely to prosecute or convict their citizens for crimes against Indians.[77] Significantly, the Act declared tribal lands could only be acquired by the United States. This was intended to prevent Americans from surging into tribal lands as the inability to obtain lawful title theoretically created a disincentive to settle on tribal lands. Aside from reducing the probability of tribal war, this provision granted the United States a monopsony on tribal lands. The noncompetitive market meant Indians would have little bargaining power in land sales. Congress repeatedly reauthorized Indian trader laws; however, they proved ineffective at stopping Americans from infringing on tribal lands.[78]

Washington knew frontier conflicts would rage until Americans respected tribal treaty rights, and he knew Americans would continue to violate the law so long as they could profit. Accordingly, Washington believed the United States government should operate Indian trading posts, known as the factory system.[79] Unlike private traders, the federal trading posts would not be motivated by profit but were merely hoping to cover their costs.[80] That is, federal trading posts were primarily intended to build amicable relations with tribes as Washington noted, "[T]he trade of the Indians is a main mean of their political management."[81] Congress obliged Washington and appropriated $50,000 for Indian trading posts in 1795.[82]

[77] Prucha, Great Father, *supra* note 1, at 34; Ablavsky, *supra* note 4, at 1044; Letter to Edmund Pendleton, *supra* note 75.

[78] Prucha, Great Father, *supra* note 1, at 32–33.

[79] Royal B. Way, *The United States Factory System for Trading with the Indians, 1796–1822*, 6 Miss. Valley Hist. Rev. 220, 227 (1919).

[80] Prucha, Great Father, *supra* note 1, at 35; Robert J. Miller, *The Federal Factory System*, Encyc. of U.S. Indian Pol'y & L., Cong. Q. Press, March 7, 2009, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1355236 [https://perma.cc/6WBZ-RN2F].

[81] *George Washington, Special Message to the U.S. S., Aug. 4, 1790*, Am. Presidency Project, www.presidency.ucsb.edu/documents/special-message-3530 [https://perma.cc/BGU3-4M55].

[82] Prucha, Great Father, *supra* note 1, at 35.

The federal trading posts began with success. Thus, Congress reauthorized the program with triple the funding a year later.[83] When the trading posts were up for reauthorization in 1803, President Jefferson explained their purpose:

> [W]e consequently undersell private traders, foreign & domestic, drive them from the competition, & thus, with the good will of the Indians, rid ourselves of a description of men who are constantly endeavoring to excite in the Indian mind suspicions, fears & irritation towards us. A letter now inclosed shews the effect of our competition on the operations of the traders, while the Indians, perceiving the advantage of purchasing from us, are soliciting generally our establishment of trading houses among them.[84]

In addition to offering goods at discount prices, trading posts were usually located near forts. Proximity to military bases meant the United States had the capacity to enforce Indian trading regulations.[85] Trading posts were not an example of government benevolence. Jefferson expressed his true intentions for the Indian factory system in 1802: "[E]ncouraging these and especially their leading men, to run in debt for these beyond their individual means of paying; and whenever in that situation, they will always cede lands to rid themselves of debt."[86]

The Indian factory system began to lose its appeal after the War of 1812. Britain was no longer able to supply tribes with arms, and Spain's control of Florida was diminishing by the day.[87] Thus, the United States did not need trading posts to build good will with tribes. Additionally, several people doubted whether the trading posts ever worked. For example, in 1809 the governor of the Illinois Territory declared, "I have never been able to discover, and I defy any man to specify, a solitary public advantage that has resulted from it [the factory system] in this country."[88] There were only twenty-eight trading posts, a paltry number given the expansive

[83] *Id.*

[84] *Thomas Jefferson, Confidential Message to Congress Concerning Relations with the Indians, Jan. 18, 1803*, Am. Presidency Project, www.presidency.ucsb.edu/documents/confidential-message-congress-regarding-the-lewis-and-clark-expedition [https://perma.cc/PV59-G3ER].

[85] Prucha, Great Father, *supra* note 1, at 36.

[86] *Memorandum for Henry Dearborn on Indian Policy*, Papers of Thomas Jefferson, Princeton U. Libr., https://jeffersonpapers.princeton.edu/selected-documents/memorandum-henry-dearborn-indian-policy [https://perma.cc/A5EU-B572].

[87] *The U.S. Acquires Spanish Florida*, Hist. (updated Feb. 17, 2022), www.history.com/this-day-in-history/the-u-s-acquires-spanish-florida [https://perma.cc/UX7C-BQL].

[88] Prucha, Great Father, *supra* note 1, at 38.

Indian territory,[89] and long journeys made trading posts unattractive to Indians.[90] Furthermore, Indians associated the trading posts' low prices with low quality as a federal report on Indian trading posts noted, "[T]he Indians, who are good judges of the quality of the articles they want, are of the opinion, that the Factor's goods are not so cheap, taking into consideration their quality, as those of their private traders."[91] Private Indian traders also actively lobbied to end the factory system.[92] Congress ultimately obliged in 1822.[93] Upon the closure of the federal Indian trading posts, federal officials confirmed the Indians' assessment of trading post goods, deeming the items on hand of such poor quality as to not even be worth giving away.[94] Likewise, Indian trading posts did little – if anything – to prevent tribal lands from being invaded by Americans.[95]

## 5.5 TITLE TO INDIAN LANDS

Although private purchases of Indian lands had been illegal since before the United States' founding, a highly doctored version of the 1772 Camden-Yorke Opinion on the land rights of the East India Company in India was used as legal authority to validate private purchases of land directly from Indian tribes in the United States.[96] These private purchases became a source of controversy when the United States began selling western lands to raise money and encourage western settlement.[97] The controversy came to a head when William McIntosh purchased western lands from the federal government that Thomas Johnson, a former United States Supreme Court Justice,[98] and his business partner had purchased directly from the Illinois tribes.[99]

[89] *Id.* at 36.
[90] Jedidiah Morse, A Report to the Secretary of War of the United States on Indian Affairs 56 (1822).
[91] *Id.*
[92] Prucha, Great Father, *supra* note 1, at 39.
[93] *Id.*
[94] Way, *supra* note 79, at 233–34.
[95] *Id.* at 234–35.
[96] Jack M. Sosin, *The Yorke-Camden Opinion and American Land Speculators*, 85 Pa. Mag. Hist. & Biography 38, 40 (1961).
[97] *Johnson* v. *McIntosh 1823*, Encyclopedia.com, www.encyclopedia.com/law/legal-and-political-magazines/johnson-v-mcintosh-1823 [https://perma.cc/BGD7-62F7].
[98] Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 L. & Hist. Rev. 67, 99 (2001).
[99] *Johnson* v. *McIntosh 1823*, *supra* note 97.

Johnson died in 1819 and his heirs commenced an ejection proceeding against McIntosh.[100]

Historians have confirmed the tracts of land owned by Johnson and McIntosh did not intersect.[101] While McIntosh prevailed at trial, he did not raise any defenses relating to the tracts' lack of overlap. If the tracts did not overlap, there was no issue. McIntosh's failure to raise this defense has led historians to believe the parties colluded, or McIntosh, like so many other Americans, simply wanted an answer to one of the foremost issues of the day: Do tribes own their land?

In 1823, a unanimous Supreme Court held the Indian tribes do not own their land. The opinion was simple enough. Christian Europeans acquired title to the Americas upon their "discovery" of the new world. Every European nation accepted the Doctrine of Discovery as international law. The United States was heir to Great Britain's claims, and no nation abided by the Doctrine of Discovery more ardently than Great Britain.[102] Chief Justice Marshall explained:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[103]

Chief Justice Marshall further elaborated, "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[104] Therefore, private individuals could not lawfully acquire land from Indian tribes because tribes possessed only "the right of occupancy," and only the discovering European nation could extinguish Indian title.

Chief Justice Marshall's description of the Doctrine of Discovery as an "extravagant … pretension" suggests he may have believed it was suspect – legally, morally, or both. Accordingly, he bolstered the opinion by

[100] Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. Pa. L. Rev. 1065, 1092 (2000); Kades, *Great Case*, *supra* note 98, at 99.

[101] Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. Rev. L. & Soc. Change 531, 541 (2021).

[102] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 576 (1823).

[103] *Id.* at 591.

[104] *Id.* at 588.

denigrating Indians, averring, "[W]e think, find some excuse, if not justification in the character and habits of the people whose rights have been wrested from them."[105] Chief Justice Marshall further stated, "[T]he character and religion of its [North America's Indigenous] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency."[106] Indian inferiority led Chief Justice Marshall to declare, "To leave them in possession of their country, was to leave the country a wilderness."[107] Thus, tribes could be rightfully dispossessed of their land in the name of advancing civilization. Perhaps Chief Justice Marshall was unsure about the morality of his contention because he noted, "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits."[108]

Nevertheless, Chief Justice Marshall was not wholly unsympathetic to Indian plight. In *Johnson* v. *M'Intosh*, Chief Justice Marshall admits whites caused the vast majority of conflicts between tribes and the United States.[109] He believed, according to one biographer, the United States' treatment of the Indians "impresses a deep stain on the American character."[110] Chief Justice Marshall, an educated Virginian, almost certainly knew most tribes in the eastern United States were primarily agricultural.[111] However, if Chief Justice Marshall acknowledged tribes were

[105] *Id.* at 589.
[106] *Id.* at 573.
[107] *Id.* at 590.
[108] *Id.* at 588.
[109] *Id.* at 590.
[110] John Edward Oster, The Political and Economic Doctrines of John Marshall 125 (1914).
[111] John Marshall wrote of George Washington's campaigns to destroy Indian towns, crops, and orchards in the book he authored of Washington's life, and he could not have reported so had Marshall not believed Indians were agricultural. See John Marshall, The Life of George Washington 180–92, 331, 354, 413, 415 (1838), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/849/0439_LFeBk.pdf [https://perma.cc/ASN7-SSXF]; Speeches of the Passage of the Bill for the Removal of the Indians Delivered in the Congress of the United States 252 (1830), www.minotstateu.edu/library/_documents/digital_collections/ecollections_na_remove.pdf [https://perma.cc/U5C8-ZRF4]; Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 Wash. & Lee J. Civ. Rts. & Soc. Just. 315, 336–37 (2017); Leonard P. Liggio, *John Lock and the Example of Native America*, Libertarianism (Dec. 1, 1979), www.libertarianism.org/publications/essays/editorial-john-locke-example-native-america [https://perma.cc/6U5F-TGGM].

agricultural, they would have indisputable property rights in the land under the leading theory of property of the era.

According to John Locke's influential Second Treatise, an individual's application of labor to land – such as farming – creates a property right.[112] Under Lockean theory, merely roaming the earth in search of game does not vest the hunter with property rights in the territory he roams.[113] Hence, Chief Justice Marshall likely classified Indians as "hunters" to subvert their property rights. Whatever his personal feelings about the case may have been, Chief Justice Marshall admitted he was not a neutral arbiter of justice but a judge in the "[c]ourts of the conqueror,"[114] a fact epitomized by deciding the rights of tribes without including a single Indian party in the case.

*Johnson* is rightfully condemned for undermining tribal property systems and sovereignty; nevertheless, Chief Justice Marshall's opinion does acknowledge tribes' right to exist as sovereigns. While *Johnson* ranks the Indian right of occupancy, or Indian title, inferior to the United States title, *Johnson* clearly declares, "It has never been contended, that Indian title amounted to nothing." Chief Justice Marshall would write years later, "[Indians'] right of occupancy is considered as sacred as the fee simple of the whites."[115] Given the political reality of the era, Chief Justice Marshall could have easily erased all Indigenous land rights. Instead, he chose to recognize tribal property rights under federal law. And though *Johnson* prohibits Indians from alienating title to their land, it does affirm tribes' right "to use it according to their own discretion." The opinion expressly notes that those who purchase land from Indians are "subject to their laws."[116] Accordingly, *Johnson* preserved tribes' ability to continue as governments.

Although the opinion relies on discredited theories, few decisions in world history have cast such an enduring legacy. Chief Justice Marshall's opinion did what no prior act of government had been able to do – prevent Americans from purchasing lands directly from Indian tribes. To be sure, Americans still violated treaties and illegally settled on Indian lands;

[112] Morag Barbara Arneil, "All the World Was America": John Locke and the American Indian (1992) (Ph.D. dissertation, U.C. London), https://discovery.ucl.ac.uk/id/eprint/1317765/1/283910.pdf [https://perma.cc/8YY7-5VHW].

[113] John Lock, Second Treatise of Government Chap. V., Sect. 26 (2003) (ebook), www.gutenberg.org/files/7370/7370-h/7370-h.htm [https://perma.cc/QHF7-AJQJ].

[114] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823).

[115] Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

[116] *Johnson*, 21 U.S at 593.

however, *Johnson* v. *M'Intosh* made clear lawful land title could never be acquired directly from an Indian or a tribe. Contemporary readers may cringe at the opinion, but all land tenure in the United States – to this very day – finds its roots directly in *Johnson* v. *M'Intosh*.[117]

✦✦✦

Tribes had a significant impact on the structure of the Constitution and its ratification. While the Constitution vested the federal government with authority over Indian affairs, the newly formed federal government lacked the capacity to uphold its treaty obligations to tribes. *Johnson* v. *M'Intosh* solved the problem of illegal purchases. However, *Johnson* did not quell the rapidly increasing American population's desire for tribal lands. A solution was needed. Many Americans believed Indian removal was the answer.

[117] Crepelle, *Lies, Damn Lies*, *supra* note 101, at 543.