"THE PEOPLE OF THE STATES WHERE THEY ARE FOUND ARE OFTEN THEIR DEADLIEST ENEMIES": THE INDIAN SIDE OF THE STORY OF INDIAN RIGHTS AND FEDERALISM

Robert A. Williams, Jr.*

INTRODUCTION

There are many sides to the story of Indian rights and federalism. The United States Supreme Court's 1886 opinion in *United States v. Kagama*[1] provides us with one view of the role of the states in our Federal Indian Law:

> Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by congress, and by this court, whenever the question has arisen.[2]

In fact, no theme recurs with more urgency or consistency in the history of Federal Indian Law than the federal government's legal duty to protect Indians from the white racial power and hostility organized by states in our federal system of government.[3] In the traditional histories written by Federal Indian Law scholars, we are continually reminded of the political, legal, and even armed attacks on tribes by surrounding state governments. According to the traditional scholars' side of the story of Indian rights and federalism, the White Man's Indian Law has sought to protect tribes from these attacks with varying degrees of success throughout our nation's history.

---

* Professor of Law and American Indian Studies, University of Arizona. Member, Lumbee Indian Tribe of North Carolina. Portions of this essay are adapted from my book, LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800 (forthcoming 1997), to be published by Oxford University Press.

1. 118 U.S. 375 (1886).
2. *Id.* at 384.
3. *See, e.g.,* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Winters v. United States 207 U.S. 564 (1908); United States v. Winans, 198 U.S. 371 (1905); Williams v. Lee, 358 U.S. 217 (1959); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *cert. denied,* Washington v. United States, 423 U.S. 1086 (1976); Passamaquoddy v. Maine, 528 F.2d 370 (1st Cir. 1975); Oneida v. New York, 470 U.S. 226 (1985); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989); Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995), *cert. denied,* 116 S. Ct. 1851 (1996) (the *Ten Bear* case).

The first half of this Article will be taken up with the story of Indian rights and federalism as told by these Federal Indian Law scholars, and what's wrong with it. First and foremost, it's simply not true, because it is incomplete.

The White Man's Indian Law is not the source of the legal principles which have sought to protect Indian tribes from "the people of the states...their deadliest enemies."[4] Those principles are to be found by listening to the Indian side of the story of Indian rights and federalism. And so the second half of this Article will be devoted to telling this Indian side, which focuses our attention on an ancient Indian legal tradition of a treaty as a relationship of sacred trust and protection, and on how that tradition established the core principles protective of tribalism's cultural survival under our Federal Indian Law.

Their Side of the Story

Traditional scholars of Federal Indian Law invariably begin their side of the story of Indian rights and federalism with Chief Justice John Marshall's seminal opinions for the United States Supreme Court in the *Cherokee Cases*.[5] These are sacred texts as far as Indian law scholarship is concerned.

In the first of these great cases, *Cherokee Nation v. Georgia*,[6] the Cherokees sought to prevent Georgia from exercising jurisdiction within the tribe's federally-recognized, treaty-guaranteed reservation. Marshall held in *Cherokee Nation* that a tribe of Indians within the borders of the United States could not sue to prevent the state of Georgia from attempting to destroy it. The Cherokees, Marshall wrote, did not constitute a "foreign nation" within the meaning of Article III, section 2 of the Constitution—the section which gave the United States Supreme Court original jurisdiction over disputes between states of the Union and foreign nations. The tribes residing within the acknowledged boundaries of the United States, Marshall wrote, could more accurately be described as "domestic dependent nations":

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[7]

In *Cherokee Nation v. Georgia*, Marshall established definitively the diminished status of tribes as sovereigns in our federal system. They were dependent on their guardian, the federal government of the United States, for protection from state jurisdictional intrusions into their territories reserved by treaties with the federal government. Specifically Congress, under the Constitution, as interpreted by Marshall, possessed the "whole power of managing [Indian] affairs."[8]

In the second *Cherokee* case, *Worcester v. Georgia*,[9] the Marshall Court was confronted with a different side of the story of state jurisdictional

---

4. 118 U.S. at 384.
5. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
6. 30 U.S. (5 Pet.) 1 (1831).
7. *Id.* at 17.
8. *Id.* at 18.
9. 31 U.S. (6 Pet.) at 515.

intrusions onto Indian territory and sovereignty. *Worcester* involved Georgia's imprisonment of a white missionary, Samuel Worcester. Worcester had been arrested under a state law making it a criminal offense for whites to reside in the Cherokee Nation without a license and oath of allegiance to the state of Georgia.

Chief Justice Marshall's *Worcester* opinion declared the Georgia laws null and void as they applied to a white man on an Indian reservation. In language which is recited in scores of court cases and law review articles, Marshall declared for the Court as a matter of first principles in our Federal Indian Law:

> The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[10]

The *Cherokee Cases* are without question, Federal Indian Law's most venerated texts. They are regarded as the source of the core protective principles of tribalism's cultural survival under our federal system of government. As spelled out by Chief Justice Marshall in those cases, Indian tribes in our federal system of government are recognized as possessing a residual sovereignty, and the self-governing capacity that goes along with it. The treaties between Indians and the federal government and national laws enacted in light of those agreements pledged the United States to protect the tribes from surrounding state governments like Georgia.

After the dramatic opening scenes provided by the *Cherokee Cases*, the traditional story told by Indian law scholars proceeds to chronicle over time the successes and failures of the federal government in protecting Indian rights according to these Marshallian principles.

For example, consider the standard recitation of what happened to the Cherokees after John Marshall so boldly declared their rights in the *Cherokee Cases*. Despite Marshall's classical rendering of the core protective principles of our Indian law in those cases, the Cherokees, and many other tribes, were forcibly removed from their treaty-guaranteed homelands by Andrew Jackson and the United States Congress. This was a time, the traditional scholars tell us, that the Federal Government failed to live up to its Marshallian-constructed trust responsibility to protect tribes from the people of the states.

The story of Indian rights and federalism told by Federal Indian Law scholars continues on this contrapuntal line, following the rise and fall of the Cherokee Nation's legal fortunes in the early nineteenth century. Indian law, as countless law review articles, books, and casebooks tell us, is punctuated by "good" and "bad" periods, and Marshallian "correct" and "incorrect" lines of cases.

---

10. *Id.* at 561.

The period identified with the landmark Allotment Act of 1887,[11] for example, was a "bad" period for Indian law, according to the literature. During this half-century-long time span, running into the early decades of the twentieth century, the western frontier states pressured Congress for much freer access to Indian-held lands. Congress' Allotment Act policy resulted, in large part, directly from these pressures. It divided the tribal lands of Indian reservations into severalty to individual tribal members. The Act also ordered the huge amounts of "surplus lands" left over after Indian allotments to be made available to whites.

Federal Indian Law scholars are the first to admit that the Supreme Court didn't help matters much by generating so much "bad" case law during this period. In its 1902 decision in *Lonewolf v. Hitchcock*,[12] for example, the Court immunized congressional treaty breaches from judicial review under a novel theory of congressional plenary power in Indian affairs. *Lonewolf* is a particularly egregious example of "bad" Indian law in the traditional scholars' story of Indian rights. It allowed the white people of the states surrounding Indian reserved territories to seize tens of millions of acres of prime Indian agricultural homesteading lands. *Lonewolf* shows us what happens, these scholars tell us, when the White Man's Indian Law fails to abide by the protective principles laid down by Chief Justice Marshall on Indian rights in our federal system of government.

The White Man's Indian Law

There is a fundamental problem with the way that Federal Indian Law scholars tell their side of the story of Indian rights in our federal system of government. As my co-panelist and former Indian Studies colleague at the University of Arizona, Vine Deloria, Jr., used to tell me in his smoke-filled office on the other side of campus, there are never any Indians in the story of Indian rights these traditional scholars tell.[13] That is because the emphasis of

---

11. Ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.). The core of the Allotment Act is now codified at 25 U.S.C. § 331 (1994):

> In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian.

On the Allotment Act, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 130–38 (1982 ed.).

12. 187 U.S. 553 (1903).

13. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989).

> Very few doctrines of present federal Indian law are capable of explaining what the United States did, whether or not it was legal in the sense that governments must bind themselves to certain principles of law, and what the Indians did or felt in response to the government overtures. Indeed, what is missing in federal Indian law are the Indians. It is assumed without further inquiry that the tribes meekly bowed to the dictates of federal actions simply because these actions were clothed in the trappings of law.

Id. at 205.

most scholars who have written on Federal Indian Law focuses exclusively on the story of the "White Man's Indian Law." As told by these scholars, in the history of the White Man's Indian Law, the great struggles for Indian survival that finally culminate in a United States Supreme Court opinion or congressionally enacted statute were fought only by groups of non-Indian judges, lawyers and advocates in the white man's courtrooms and legislatures.

The traditional story of the White Man's Indian Law focuses, almost incessantly, on one dominant theme: the legal rules and principles adhered to in the course of this country's historical dealings with Indian peoples are the exclusive by-products of the Western legal tradition brought to America by the white man. These by-products, so the familiar story goes, were developed here by the courts and policy-making institutions established by the dominant white European-derived society into a redemptive force for perpetuating American Indian tribalism's survival. Without the European Law of Nations and its traditions of treaty diplomacy, without the English common law's recognition of fiduciary duties arising from a guardian-ward relationship, without the elasticity of feudalistic property law concepts to recognize and protect lesser rights of aboriginal occupancy on the land, without the precedent of the King's sovereign prerogatives of centralized control over colonial affairs, and so on; that is, without the White Man's Indian Law—as these scholars tell it—the Indian would no longer be among us.

The Same Old Story

The way in which the story of the White Man's Indian Law deals with the federal government's duty of protection owed to Indian tribes from the people of the states is a classic illustration of what's completely wrong with most Federal Indian Law scholarship. It neglects the Indian's role as an active agent in the development of the rules and principles of our Federal Indian Law which determine the rights of tribes in relation to the federal government and to the states.

The story of Indian rights during the allotment and assimilation era, for example, generally bemoans the decline of Marshallian classicism in our Federal Indian Law. But, the traditional scholars note in relieved tones, the legislation, court decisions, and executive policy initiatives of that "dark age" for Indian law luckily failed to totally destroy tribalism. In the White Man's Indian Law, little, if any, reflection is devoted to the question of just why the reformers failed. The academic chroniclers of the shifting cycles of Indian law simply move on, to consider the next period of Federal Indian Law history, the "good" period of Indian revitalization ushered in by the Indian Reorganization Act of 1934.[14]

In the cyclic history of Indian rights in this country, no period has witnessed such a radical "change in direction" as in Indian law and policy. This radical change "was due," so the writings of the leading scholars in the field tell us, "to the efforts of a new generation" of white men,[15] people like John Collier, the researchers of the 1928 Meriam Report on "The Problem of Indian

14. Ch. 576, 48 Stat. 984 (codified as amended in scattered sections of 25 U.S.C.). On the Act, see Cohen, *supra* note 11, at 147–51.

15. Cohen, *supra* note 11, at 144.

Administration,"[16] and the great white creators of the seminal treatise on Federal Indian Law, Nathan Margold and Felix Cohen.[17]

The story of the White Man's Indian Law as the salvation of the Indian in North America has exercised an unshakable hold on the legal imagination of generations of Indian law scholars. They have told and retold its various chapters in their committed and important efforts to understand and perpetuate tribalism's survival in the United States. Given the hero worship of the great white saviors of Indian law, it is not surprising to find a law review article that was published recently in the *Georgetown Law Journal* entitled in part "What Would John Marshall Say?"[18]

That John Marshall's posthumous declarations on our modern day Indian law still matter so much to the traditional story of Indian rights told by the White Man's Indian law is a testament to why multiculturalists like myself dread the power still exercised by famous dead white males in a western settler-state like the United States. It will always be a White Man's Indian Law that these scholars write about, and it will always only tell one side of the whole story.

The Master's House

The fact that the current Supreme Court pays virtually no attention to these scholars serves to remind us how unreliable the White Man's Indian Law has been in protecting Indian rights throughout history. The idea that the White Man's Indian Law has served over time as a positive, purposive force in tribalism's persistence in this country makes a fine story, but unfortunately it's never been true, and it's not true today. The scholars' own concessions to a cyclic theory of "good" and "bad" periods for Indian law, and their decrying of the present Supreme Court's inability to grasp the elegance of the Marshallian paradigm of Indian rights, demonstrates that the story is full of holes in a number of ways.

When we closely examine this provocative story of the White Man's Indian Law serving as a positive, purposive force in tribalism's persistence in this country, we immediately confront a most difficult complication in the plot line. It is the unresolvable complication that inevitably arises from the very nature of the colonial situation and the relations of power between the colonizer and colonized. We are talking, remember, about the legal system of one of the modern world's most efficient colonizing powers. The United States began as a loose and disorganized confederation of thirteen Atlantic seaboard British colonies, expanding its federated sovereignty over the vast, prime midsection of North America in less than a century of frontier conquest. In the process, the United States basically eliminated Indian tribalism as a potent political or cultural force on the continent. Given its history, how does this system of colonizing law so potently imposed on the Indian by the United States—this

16. *See* INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam ed., 1928).

17. *See* Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963 (1996).

18. Kathleen M. O'Sullivan, *What Would John Marshall Say? Does the Federal Trust Responsibility Protect Tribal Gambling Revenue?*, 84 GEO. L.J. 123 (1995).

White Man's Indian Law—manage to transcend the genocidal and ethnocidal threat it has historically posed to the perpetuation of Indian cultural identity, existence, and sovereignty in this country? How can such a unilaterally-imposed system of colonizing law and power ever manage to assist Indian peoples in their struggles for cultural survival and achieve justice?

We may never be able to develop satisfactory answers to these problematic, perplexing questions by focusing solely on the onanistically-told story of the White Man's Indian law. For there is something vital missing in this tired old story. As the African-American poet Audre Lord has tried to teach us, the Master's tools have not been designed to dismantle the Master's house.[19] A deeper, more complex understanding of the protective principles which have enabled tribalism to survive under our federal system of government in the United States will begin to emerge only when we begin to listen seriously to the Indian side of the story of Indian rights and federalism.

"Deadliest Enemies"

This conference's topic of federalism presents us with a unique opportunity for telling the Indian side of the story of how Indian tribalism's continuing survival in America is something other than a gift bestowed by a benign conqueror's courts and legislature. Federalism is a theme which figures prominently in the Indian side of the story of Indian rights. According to this side of the story, Indians have long-recognized that "the people of the states where they are found...are often their deadliest enemies."[20] History teaches Indian peoples that in a federal system of government, the white racial power organized through state governments represents the gravest and most persistent threat to Indian rights and cultural survival on this continent.[21]

In telling the Indian side of the story of the source of the principles in our Indian law that have protected tribes from their deadliest enemies—"the people of the states"—we resituate Indians, rather than just their lawyers, or those mandarins in the scholarly community who rule and jurisprudentialize over them, as a dynamic force in the perpetuation of the core protective principles of Indian rights in America. This story, in other words, attempts to rewrite Indians back into Indian law.

Developing a greater appreciation for the contributions of American Indians to their own persistence opens up new vistas for understanding and explaining how United States law works and does not work to assure the cultural survival and development of Indian tribal peoples in modern American society. It becomes possible to imagine and theorize new visions of law which can work to assure Indian cultural survival in the future. Just as significant, we begin to understand how United States law is enabled to achieve racial justice more generally in a federalist system of government for a multicultural society.

---

19. Audre Lord, *The Master's Tools Will Never Dismantle the Master's House, in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110 (1984).

20. 118 U.S. 375, 384 (1886).

21. The history of my own tribe, the Lumbee Indians of North Carolina, amply illustrates this lesson. *See* W. MCKEE EVANS, TO DIE GAME: THE STORY OF THE LOWRY BAND, INDIAN GUERRILLAS OF RECONSTRUCTION (1971).

The Classical Era Treaty Period

The Indian side of the story of Indian rights in our federal system of government begins with a much earlier set of legal precedents than the *Cherokee Cases* of the 1830's. The Indian side of the story focuses on the colonial era treaty period of the seventeenth and eighteenth centuries, or what I shall be calling in this talk the Classical Era of Indian-white treaty diplomacy.

As the noted historian Francis Jennings writes, throughout this period of Indian-white diplomatic relations, "Indian *cooperation* was the prime requisite for European penetration and colonization of the North American continent."[22] This, of course, runs counter to the more familiar stories of our national history, with their starkly drawn images of violent and brutal race wars and cutthroat competition for territory between Indians and whites during the early centuries of contact. Yet, throughout the nearly two centuries-long period of their initial multicultural encounter, Indians and whites negotiated hundreds of treaties, and engendered a set of legal traditions that today, at least according to the Indian side of the story of Indian rights in this country, forms much of the core of our Federal Indian Law.

In eastern North America particularly, where the major European colonial powers concentrated a great deal of their efforts and capital in establishing a beachhead for their imperial ambitions in the New World, Indians entered into numerous long-term treaty relationships with European-Americans. Necessity as well as convenience dictated that invading Europeans learn how to sustain economic, political, and military relations with the sometimes large and powerfully organized tribal groups on the frontiers of their tiny colonial settlements. In eastern North America, most of the initial relationships that Europeans developed with Indian tribes were organized around the immensely valuable fur trade of the eastern woodlands. The frontier trading tribes controlled the fur supplies and related commerce of the regions bounding the European colonies. They acted as buffers to the expansion and penetration of rival European powers onto that frontier. They could be called on to counter and even war against less cooperative tribes that might be causing difficulties for a colony. Politically and economically shrewd, the support of the frontier trading tribes, as Professor Stephen Cornell has written,

> was often critical in intra-European conflicts. They came to the Europeans, but the Europeans, equally, came to them. Thus the trade produced more than furs. Politics and pelts were intertwined; at one time or another, success or failure for the various European powers, whatever the object, depended substantially on Indian alliance.[23]

Because of the fur trade, the tribes of eastern North America during the Classical Era of Indian-white treaty diplomacy were often treated in fact, if not wholly regarded in theory, as rough political, economic, and military equals by their European trading partners. In this unique period of increasing interdependence between the different cultural and racial groups engaged in the commerce and politics of accommodation and conflict that surrounded the

---

22. FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE 367 (1984).
23. STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 17 (1988).

trade, Europeans came to regard Indian cooperation as vital to the success of the new type of society that was emerging in colonial North America.

Understood in this sense, this Classical Era of Indian-white treaty diplomacy in North America can be re-imagined as an extended story of cultural group negotiations in selected areas of intercultural cooperation. Adapting John Rawls' famous philosophical construct to the unique conditions that actually existed on the North American multicultural frontier, Indians and Europeans were in an original position of a rough equality on the continent. The new kind of society that was emerging from this unique cultural landscape made racial, class, and social status largely irrelevant to the process of cultural group negotiations. Both groups approached cultural group negotiations with each other with little knowledge of what each side's future fortunes would be in this radically different and new type of multicultural society. Each negotiated behind a veil of ignorance. Each was similarly situated to propose the principles of justice that should govern the type of society envisioned by their agreements.[24]

Multicultural Jurisgenesis

Law-creation was, therefore, central to the emerging society that was being constructed by Indians acting in concert with Europeans on the multicultural frontiers of colonial era North America. For Europeans, long-held legal notions about the diminished rights of "savage" and "barbarian" peoples were forced to yield to the reality of formidable and well-organized Indian tribes, with their own deeply ingrained traditions of law for governing relations between different peoples.[25] For Indians, accommodation of the

---

24. In philosopher John Rawls' famous text, A THEORY OF JUSTICE (1971), the "original position," is described as follows:

> This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice. Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.

Id. at 12.

Rawls states that his original position of equality is a philosophical construct. It corresponds, he says, "to the state of nature in the traditional theory of the social contract." *Id.* Rawls also states that the principles of justice selected by the parties in this original position are chosen behind a veil of ignorance.

> This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.

Id.

Rawls' construct generates a number of interesting applications in trying to understand the unique historical situation of Indian-white relations on the North American Encounter era multicultural frontier. The treaties negotiated between Indians and whites in the seventeenth and eighteenth centuries can be seen as early developmental points of the principles of justice agreed upon by two radically divergent cultural groups for the basic structure of a multicultural society.

25. On European conceptions regarding Indian rights during this period, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

strange newcomers to their lands required adapting their long-held traditions to the challenges of survival in their rapidly changing world. Out of this process of multicultural legal encounter there emerged innumerable stories of what Robert Cover has called "jurisgenesis"—the creation of new legal meanings. Through these meanings, Indian tribes and colonial Europeans sought to define a *nomos*—a normative world.[26] This world was held together by the jurisgenerative force of the common interpretive commitments to a law created and shared together by the different peoples seeking survival in North America. This was a world of Indian-white treaty-making, and according to the Indian side of the story, this world is the source of the original understandings of the rules and principles of the bicultural jurisprudence that lies at the heart of our Federal Indian Law.

The Language of Indian Diplomacy

Concededly, the classic philosophical construction of the original position by Professor Rawls hypothesizes a world of isolated human individuals without opinions or prejudices negotiating over the principles of justice each would select for structuring their social relations. This was not, however, the *actual* original position of the human individuals who contended for survival on the North American colonial era frontier. All of these individuals were already active participants in a distinct human culture. Indians and whites each brought to their treaty negotiations a clear sense of their identity as individuals belonging to uniquely constituted cultural groups. To be English or Iroquois, French or Huron meant that treaty negotiations with other peoples took place within the particular context of one's own culturally mediated vision of justice. Each cultural group sought to act upon its own long-held cultural traditions in establishing relations with other groups. Each cultural group encountered limits in trying to do so.

European diplomatic traditions may have worked fine in the Old World crucible of consolidating nation-states with defined territorial borders under the sovereignty of absolute monarchs. The language of treaty diplomacy that developed on North America's colonial frontiers, however, had no use for inflexible idioms that were non-indigenous to the unique conditions that emerged during the seventeenth and eighteenth centuries. As the historian Dorothy V. Jones notes, North American colonial era diplomacy "was not centralized; it was diffuse. It was not conducted by trained diplomats but by anybody and everybody: by orators, civil leaders, village and provincial councils, missionaries, speculators, traditionalists, dissidents, those with authority and those without."[27]

The language of colonial era treaty diplomacy developed its own protocols and ceremonies, borrowing and adapting from cultural traditions that, as Professor Jones notes, "were rarely European."[28] The protocols and ceremonies of this language of diplomacy "were rarely European" because the

---

26. Robert Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4–11 (1983) (discussing jurisgenesis as the "creation of legal meaning," occurring "always through an essentially cultural medium," *id.* at 11).

27. *See* Dorothy V. Jones, *British Colonial Indian Treaties*, *in* 4 HANDBOOK OF NORTH AMERICAN INDIANS, 185, 185 (Wilcomb E. Washburn ed., 1988).

28. *Id.*

hierarchical, feudal symbols of seventeenth and eighteenth century European diplomacy simply did not translate well on the North American multicultural frontier.

The "language" of diplomacy used among eastern North America Indian peoples was spoken in symbols, metaphors, stories, and rituals. It was a language which continuously appropriated, blended, and reconstructed the diverse narrative traditions of the tribal cultures of indigenous North America. This indigenous North American language of law and peace between different peoples is recorded in the earliest meetings between Indians and Europeans during the Classical Era of treaty-making. Indian and Euro-American diplomats constantly adapted themselves to the challenges of a rapidly changing multicultural frontier through this language.

Throughout the Classical Era treaty literature, Indians can be witnessed inviting Europeans to make known the "good thoughts" of peace, to smoke the sacred pipe, to clear the path, to bury the hatchet, to link arms together and unite as one people, to eat out of the same bowl together, and to remove the clouds which blind the Sun which shines peace on all peoples of the world. These and a host of other intricately related sets of recurring metaphors and sacred Indian rituals are part of a North American indigenous language of law and peace between different peoples that made diplomacy possible and effective on the multicultural frontiers of North America during the Classical Era. According to the Indian side of the story, the original understanding of the principles of our Federal Indian Law are to be found in these complex sets of symbols, metaphors, ceremonies, and rituals used in Indian-white treaty negotiations.

Indian Legal Traditions: Treaties as Sacred Texts

First and foremost with Indians of the Classical Era (and even today) a treaty is a sacred text. It fulfills a divine command for all the peoples of the world to unite as one. As the Prophet Deganawidah declared to the Iroquois in ancient, sacred time, "Make the Tree of Peace" prevail among all the peoples of the world.[29]

This is one reason why throughout the Classical Era, treaty conferences were routinely opened by Indian speakers who invoked a higher power's sanction and intent in the proceedings. Joseph Brandt, the great Iroquois leader of the Revolutionary era, opened a 1793 meeting with the United States and British representatives with the solemn declaration: "We are glad to have the meeting, and think it is by the appointment of the Great Spirit."[30] When the Lower Creeks in 1736 explained to Governor Oglethorpe of Georgia their intention of maintaining their treaty relationship with the English, they declared that "it is the Great God above that gave us the knowledge to do so."[31]

---

29. *See* Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981, 1001–06 (1994).

30. The July 7, 1793 meeting is reprinted in 18 NATIONAL STATE PAPERS OF THE UNITED STATES, 1789–1817, at 24 (1985).

31. *See* 5 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789, *Virginia Treaties, 1723–1775*, at 272 (Alden T. Vaughan & W. Stitt Robinson eds., 1989).

For Indians of the Classical Era—making a sure and lasting peace after the shedding of blood, quelling the desire for revenge, being assured that a military ally would respond quickly to a call for help, trusting a trading partner over the course of many dealings—these were the types of weighty concerns, many of them life and death matters, that a treaty relationship was designed to address. No wonder that Edmond Atkin, the southern Indian superintendent for Great Britain in the Revolutionary period and a person of long experience in dealing with the tribes, could say of the Indian nations he knew: "'[T]he Indians...[are] more faithful to the terms of treaties than any other people on earth. In the making of treaties'...'no people are more open, explicit, and Direct.'"[32] This was because, according to American Indian traditions of law and peace, treaties created a sacred relationship of trust between two peoples.

Treaties as Protection

We must read all of the promises made in a treaty between Indians and whites, therefore, against this sacred backdrop. No promise was infused more thoroughly with this sacred sense of obligation than the promise made by treaty partners to protect each other in times of war, need or crisis.

This promise, in fact, was the core organizing principle of Indian treaty diplomacy; it called for certain types of normative acts and practices directed toward one's treaty partners in a number of different contests. A Choctaw "king" who visited Savannah in 1734 explained his primary reasons for seeking a treaty with Georgia: "We are surrounded with White People and the French are building Forts which we do not like. We are come to see who are our friends and whose Protection we may rely on."[33]

Indians regarded the duty to provide protection to a treaty partner, like all of the sacred bonds of a treaty relationship, as a continuing legal and moral obligation. Changes in circumstance or the original bargaining positions of the parties were therefore irrelevant as far as Indians were concerned. If anything, because a treaty connected the two sides together literally as relatives, a treaty partner who had grown stronger over time was under an increased obligation of protection toward its now weaker partner.

The Nanticoke Indians carefully explained the nature of these continuing obligations of "brotherly" assistance owed them by Governor Horatio Sharpe under their long-standing treaty with the Maryland colony in a 1759 council:

> [A]s we love to Travel the Roads and other Places to seek the Support of life and as you are our Brother therefore beg and hope and beg you will not Suffer us to be troden down quite for we are as a child Just beginning to Walk we are so reduced and Deminished and Even as nothing...[W]hen there were great numbers of us Indians & but few white People in this Nation we Enjoyed our Priviledges Profits, and customs in quiet but it is quite to the contrary now, then [we] were not deprived of our Freedom and Customs for we had the whole Nation once under our Jurisdiction but now there is but a Spot laid out for us not even enough for Bread for us Indians...[I]f you our Trusty Brother suffers us thus to be evilly treated we shall soon be quite Destroyed and

32. *See* WILBUR R. JACOBS, DISPOSSESSING THE AMERICAN INDIAN 113 (1972).

33. 11 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS 1607–1789, *Georgia Treaties, 1733–1763*, at 36 (Alden T. Vaughan & John T. Juricek eds., 1989).

> Totally Pushed out of this Nation but hope you our Brother will never Suffer us thus to be Treated....[34]

As the Nanticokes' remonstrance to Maryland's governor illustrates, the different peoples connected by a treaty were expected to abide steadfastly by the protective principles sustaining their original agreement. As far as Indians were concerned, the connections created by a treaty were a form of assurance and security, which could be steadfastly relied on in times of crisis or need, as a matter of the most sacred trust between two peoples.

Treaties as Relationships of Protection and Sacred Trust

These two core principles of Classical Era Indian treaty diplomacy—a treaty creates a relationship of sacred trust; the most sacred promise contained in a treaty is the promise of protection given a treaty partner in times of need or crisis—help us in reconstructing the indigenous North American legal traditions that have contributed to tribalism's cultural survival under our federal system of government.

In a 1735 meeting with William Penn's son, Thomas, Civility led a group of Conestoga chiefs to renew his people's sacred treaty relationship with the Pennsylvania colony.[35] Civility explained the original understanding of the treaty first agreed upon between Thomas' father, William Penn, and the Conestogas. In that first great charter document, Governor Penn had solemnly agreed to purchase the Indians' lands before allowing any "White people" to possess them. But the sale of these lands, according to the parties' original understanding of the treaty relationship, was not intended to ever lead to the separating of the two peoples. As Civility explained to Thomas Penn, when the Indians gave their lands to his father, they told him that "he and they should live on those Lands like Brethren, in Love and Friendship...whereby they became all as one People and one Nation, joyned together so strongly that nothing should ever disunite them, but that they should continue one People for ever."[36] Civility continued explaining the terms of that first treaty:

> That it was further agreed between Willm. Penn and the Indians, that each should bear a share in the other's Misfortunes. That this Country, thought it Might be filed with People of different Nations, yet Care should be taken that Justice should be done to every Person, and no Mischief happen without Satisfaction being given when it was necessary.[37]

Civility finished his speech by laying down three bundles of valuable fur skins "to bind their Words." He declared, "[t]hat they were now come hither to see Willm. Penn's Sons, to take them by the hand and renew with them the League of Friendship made with their Father."[38]

---

34. 6 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789, *Maryland Treaties*, 1632–1775, at231–32 (Alden T. Vaughan & W. Stitt Robinson eds., 1987).
35. 1 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789, *Pennsylvania and Delaware Treaties, 1629–1737*, at 400 (Alden T. Vaughan & W. Stitt Robinson eds., 1979).
36. *Id.*
37. *Id.*
38. *Id.*

The legal tradition of a treaty as creating a relationship of sacred trust and protection between two different peoples is encountered throughout the treaty literature of the Classical Era. The Iroquois diplomat, Hendrick, for example, expected unqualified acceptance of the principle that a treaty created this type of special relationship between two peoples in offering a large grant of land to the English at the Albany Congress of 1754:

> What We are now going to say is a Matter of great moment, which We desire you to remember as long as the Sun and Moon lasts. We are willing to sell You this large Tract of Land for your People to live upon, but We desire this may be considered as Part of our Agreement, that when We are all dead and gone, your Grand Children may not say to our Grand Children, that your Forefathers sold the Land to our Forefathers, and therefore be gone off them. This is wrong. Let Us be all Brethren as well after as before of giving you Deeds for Land. After We have sold our Land, We in a little time have nothing to shew for it, but it is not so with You, Your Grand Children will get something from it as long as the World stands, our Grand Children will have no advantage from it. They will say We were Fools for selling so much Land for so small a matter, and curse Us: therefore let it be a Part of the present Agreement that We shall treat one another as Brethren to the latest Generation, even after We shall not have left a foot of land.[39]

Confident Example Setting

The themes of protection and trust in the language of Indian diplomacy teach us many important lessons about American Indian visions of law and peace. For Indians of the Classical Era, treaty relationships with different peoples were essential to survival and flourishing on the multicultural frontiers of North America. The language of Indian forest diplomacy reflected this basic understanding in a richly evocative vocabulary describing the paradigms for behavior which Indians believed nurtured trust and reliable protective treaty relationships. Granting land settlement rights to stranger groups, agreeing to watch for each other's safety over time, sharing the meaning of sacred stories and rituals with a treaty partner; in Indian diplomacy, such acts of "confident example-setting," to use the philosopher Annette Baier's term, signified the commitment of treaty partners to behave as close relatives towards each other.[40] These acts, according to American Indian treaty traditions of law and peace, initiated the process by which different groups learned to build justice in a multicultural world.

The Treaty Tradition and Early United States Indian Law and Policy

This Indian legal tradition of regarding a treaty as a relationship of trust and protection provides an important interpretive backdrop for understanding the Indian side of the story of the first treaties negotiated between the Cherokees and the United States. The decades following the Revoluntionary

---

39. 2 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1606–1789, *Pennsylvania Treaties, 1737–1756*, at 335–36 (Alden T. Vaughan & W. Stitt Robinson eds., 1984).

40. ANNETTE C. BAIER, A PROGRESS OF SENTIMENTS: REFLECTIONS ON HUME'S TREATISE 232 (1991).

War were a period of great suffering and chaos for those majority of tribes in eastern North America that had sided with the losing English side during the Revolutionary War.[41] It was a particularly hard time for the Cherokee Indians. When the southern states sent their militias to war on the Cherokees, their methods were genocidal. They attacked the Cherokees by burning their towns, destroying their crops, and killing Cherokee men, women, and children.[42]

The Cherokees' response to their dilemma followed tradition; they signed a treaty of sacred trust and protection with the highest sovereign power recognized among the whites, the United States government. What the Cherokees sought protection from were the people of the states surrounding their reserved territories, most particularly Georgia.

The first treaty signed by the Cherokees with the United States, the Treaty of Hopewell in 1785,[43] was part of a series of agreements negotiated with the frontier tribes following the end of the colonists' War for Independence. On its face, the treaty does not seem all that extraordinary. In fact, it generally follows many of the traditions of seventeenth and eighteenth century Indian diplomacy. The only differences are that rather than the King of England or a royally favored colonial proprietor, the United States is pledging itself to protect the Cherokee Indians and the protection the Indians expect is from the white people of the state of Georgia, their deadliest enemies. "The Commissioners Plenipotentiary of the United States, in Congress assembled," the Treaty of Hopewell opens, "give peace to all the Cherokees, and receive them into the favor and protection of the United States of America...."[44] The Cherokees acknowledge themselves "under the protection of the United States of America, and of no other sovereign whosoever."[45] A boundary line is agreed upon by the Cherokees, establishing their reservation. Beginning six months after the treaty ratification, if any white man from the United States tries to settle on any of the reserved Cherokee lands, "such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please."[46] These traditional articles of agreement were followed by terms defining criminal jurisdiction for interracial crime[47] and promises of congressional control over trade and intercourse "[f]or the benefit and comfort of the Indians."[48] The traditional pledge, as spoken in the language of Indian diplomacy, to serve as eyes and ears for a treaty partner is here made by the Cherokees to the United States, as follows in the treaty: "The said Indians shall give notice to the citizens of the United States, of any designs which they may know or suspect to be formed...by any person whosoever, against the peace, trade or interest of the United States."[49]

---

41. *See* WILLIAM G. MCLOUGHLIN, CHEROKEES AND MISSIONARIES, 1789–1839, at 13–15 (1995).
42. *Id.* at 6.
43. Treaty of Hopewell with the Cherokees, Nov. 28, 1785, U.S.–Cherokee, *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 6–8 (Francis Paul Prucha ed., 2d ed. 1990).
44. *Id.*
45. *Id.* art. III, at 7.
46. *Id.* art. V, at 7.
47. *Id.* art. VI–VII, at 7.
48. *Id.* art. IX, at 7.
49. *Id.* art. XI, at 7–8.

The treaty concluded with one of the favored metaphors from the language of Classical Era Indian diplomacy: the hatchet shall be forever buried.[50] A "universal" friendship was declared to subsist between the Cherokees and the white peoples.[51] The United States' first treaties with the Cherokees affirmed one of the oldest and most venerable multicultural legal traditions in North America. These treaties reflected the anciently professed and practiced Indian belief that a treaty was a sacred relationship of protection and trust.

Marshall's opinions in the Cherokee cases simply affirm this traditional Indian understanding of a treaty relationship. In *Cherokee Nation v. Georgia*,[52] Marshall wrote that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."[53] The guiding principles of our Indian law, the Chief Justice explained, derived from the fact that the Indians recognize a relationship of trust arising out of their treaties with the United States: "They [the Indians] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."[54]

The next year in the second of the *Cherokee Cases, Worcester v. Georgia*, Marshall elaborated further on the United States' unique trust responsibilities arising out of its treaties with the Indian tribes of America. Specifically analyzing the late Classical Era treaties between the United States and the Cherokee Nation, Marshall held that the status of the Indians under these agreements "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."[55]

The United States, therefore, under Marshall's legal analysis, had a duty of protection of Cherokee rights. This duty arose under the express and implied terms of the treaty relationship between the tribes and United States. These terms, of course, were terms of sacred trust. And, as we have come to understand, these terms were derived from Indian understandings of their treaty rights with the United States.

Thus, according to this version of the story, Chief Justice Marshall's opinions in the *Cherokee Cases* are not the foundational sources of the original principles guiding our Federal Indian Law. Marshall was simply perpetuating the principles of a much older legal tradition originating in the Classical Era of treaty negotiations between Indians and whites on the continent, a tradition which regarded a treaty as a relationship of sacred trust and protection.

The *Cherokee Cases* represent the first formal recognition by the United States Supreme Court of the Trust Doctrine as a source of protection for Indian rights under our law. Under this doctrine, the United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians,

---

50. *Id.* art. XIII, at 8.
51. *Id.*
52. 30 U.S. (5 Pet.) 1 (1831).
53. *Id.* at 16.
54. *Id.* at 17.
55. 31 U.S. 515, 555 (1832).

should therefore be judged by the most exacting fiduciary standards."[56] Confirmed by numerous subsequent court decisions, congressional statutes, and executive action, the Trust Doctrine has served, at important times in our history, as a positive, purposive force in protecting and promoting Indian tribalism's rights to cultural survival in United States society.

The themes of sacred trust and protection in the language of Indian diplomacy show us that the White Man's Indian Law was not the sole source of the legal principles which spoke to the importance of protecting Indian rights under United States law. By recognizing the central principles of Classical Era Indian diplomacy that a treaty is a relationship of sacred trust and protection, we begin the complex process of rendering a more complete accounting of the importance of Indian ideas and values in protecting Indian rights under United States law. The Trust Doctrine was not the exclusive by-product of the Western legal tradition brought to North America from the Old World. This central protective principle of Indian tribal rights under our law has deep roots in Classical Era Indian visions of law and peace. There is an important contemporary lesson to be learned from this vital legacy generated out of a bicultural jurisprudence of Indian rights. As Chief Justice Marshall himself was wise enough to recognize in the *Cherokee Cases*, these original Indian understandings of their treaty relationships with the United States are absolutely necessary to protect Indians from the people of the states, their deadliest enemies, in our federal system of government.

---

56. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).