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Erin Marie Martin

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ERIN MARIE MARTIN

Claiming Independence from the United States: The Ideal Solution to Maximize Native American Tribal Sovereignty

ABSTRACT

Sovereignty is vital for every nation. Essentially, sovereignty is ultimate political power that enables a nation to self-govern and self-determine. While Native American tribes were sovereign for a period of time, they slowly began to lose their sovereignty when European settlors arrived in North America. Moreover, when the United States became a nation, the Supreme Court issued decisions and the Federal Government passed legislation that further stripped the tribes of their autonomy. Even though recent cases, such as McGirt v. Oklahoma, have restored a small part of the tribes' sovereignty, the tribes are far from restoring the full sovereignty they once had. Consequently, the tribes need a solution where they can fully govern themselves without interference. Arguably, the United States is primarily responsible for stripping away the tribes' sovereignty and continuing to restrict their authority. Accordingly, the tribes should separate themselves from the United States and become their own nations.

AUTHOR

Articles and Books Editor, LIBERTY UNIVERSITY LAW REVIEW, Volume 16; J.D. Candidate, Liberty University School of Law (2022); B.A. English and Spanish, St. Olaf College (2019). The author would like to thank her parents, for reading all the drafts she sent them and listening to her many rants about this topic. The author would also like to thank her fiancé for supporting her throughout the writing process. The author would also like to thank her Grandma Martin for teaching her about her heritage, including taking her to powwows and teaching her about the history of their tribe: The Eastern Shawnee Tribe of Oklahoma. Finally, the author would like to thank whoever takes the time to read this article and hopes that the reader

considers the complex problem that is Native American tribal sovereignty with an open mind and with an empathetic heart.

COMMENT

CLAIMING INDEPENDENCE FROM THE UNITED STATES: THE IDEAL SOLUTION TO MAXIMIZE NATIVE AMERICAN TRIBAL SOVEREIGNTY

Erin Marie Martin†

I. INTRODUCTION

Ever since 1620 when the *Mayflower* arrived in Cape Cod, Native Americans have been in a constant and unnecessary fight for autonomy. What initially began as a fight for land and a few broken treaties, quickly evolved into centuries of oppression for Native American tribes who struggled to be recognized as independent entities capable of governing themselves. When the United States first became a nation, Chief Justice John Marshall was credited with giving Native American tribes their sovereignty and setting the parameters of their authority in a series of Supreme Court decisions. However, this interpretation of history and the law is misguided. Sovereignty is not something that can be given, but something that is declared by an entity or group of people evidenced by their ability to create laws, establish a political system, and govern themselves. Thus, Native American tribes were sovereign entities long before the Supreme Court declared the limitations of tribal sovereignty in the early 1800s.

While Native American tribes still retain some autonomy, the United States has continuously chipped away at tribal sovereignty by imposing legislation that restricts tribes' ability to govern themselves, such as the General Allotment Act[1] and the Major Crimes Act.[2] Since realizing the damaging effects these laws had on the Native American population, the

† Articles and Books Editor, LIBERTY UNIVERSITY LAW REVIEW, Volume 16; J.D. Candidate, Liberty University School of Law (2022); B.A. English and Spanish, St. Olaf College (2019). The author would like to thank her parents, for reading all the drafts she sent them and listening to her many rants about this topic. The author would also like to thank her fiancé for supporting her throughout the writing process. The author would also like to thank her Grandma Martin for teaching her about her heritage, including taking her to powwows and teaching her about the history of their tribe: The Eastern Shawnee Tribe of Oklahoma. Finally, the author would like to thank whoever takes the time to read this article and hopes that the reader considers the complex problem that is Native American tribal sovereignty with an open mind and with an empathetic heart.

[1] *See* General Allotment Act, 25 U.S.C. §§ 331–333 (1887) (repealed 2000).

[2] *See* 18 U.S.C. § 1153; CHARLES F. WILKINSON & CHRISTINE L. MIKLAS, INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 8 (1988).

Federal Government has been more willing to recognize tribal sovereignty, as evidenced in the recent Supreme Court case *McGirt v. Oklahoma*.[3] Even though there is a progressive push for more tribal autonomy, the process has been slow and gradual. Further, even if the Federal Government lifts many of the restrictions on tribes' ability to govern themselves, the tribes will never have the full freedom they enjoyed before white settlers arrived in North America. As a nation founded not only on Christian principles but one that prides itself on being the land of the free,[4] the United States has a moral obligation to give Native American tribes the opportunity to become their own independent nations apart from the United States.

II. BACKGROUND

The first Pilgrims, who were seeking an escape from economic hardship and religious persecution in England, arrived in Cape Cod, Massachusetts in 1620.[5] Unfortunately, the Pilgrims struggled to establish any sort of civilization due to the extremely cold winters and the spread of disease.[6] In addition, the Pilgrims starved because their supplies from England were cut off and they did not know how to grow their own food.[7] Hence, the famous Tisquantum, or Squanto for short, from the Patuxet Nation helped the Pilgrims survive by teaching them how to fertilize their cornfields and catch eels from the river.[8] As most people know, thanks to their elementary American history class, the Pilgrims decided to celebrate their successful harvest with a Thanksgiving feast. However, contrary to the sugarcoated version taught in history class, the Thanksgiving feast was not a festival of love and reconciliation between the Pilgrims and Native Americans.

In fact, there was a lot of tension between the Pilgrims and the surrounding Native American tribes. This is mainly because the Pilgrims believed that the Native Americans were savages and did not approve of their lifestyle.[9] Understandably, this made the Wampanoag tribe that attended the

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[3] *See* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[4] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.").

[5] ROBERT TRACY MCKENZIE, THE FIRST THANKSGIVING: WHAT THE REAL STORY TELLS US ABOUT LOVING GOD AND LEARNING FROM HISTORY 57, 67, 91–92, 110–11 (2013).

[6] *Id.* at 90–91.

[7] *Id.* at 92 (Weston, the man who allowed the pilgrims to use the Mayflower, was expecting a return of fish and furs. The pilgrims obviously were unable to provide this for him, so he cut off their supplies.).

[8] *Id.* at 93.

[9] *Id.* at 135–36.

Thanksgiving feast skeptical of the Pilgrims, especially since they witnessed many European fisherman kidnapping and murdering Native Americans.[10] Hence, it is not surprising that only a few days after the Thanksgiving feast, the Pilgrims were threatened by another tribe, the Narragansett Indians, and later went to war with the Massachusetts Indians.[11] Accordingly, the relationship between the Pilgrims and Native American tribes was complicated and best described as a constant struggle for power.

A. *Fighting Over Land*

The main source of this power struggle was ownership of land. The most rudimentary purpose of land ownership is simply to have a place to live. However, for a sovereign people or nation, ownership of land is essential because it allows people under the same sovereign to congregate together in one area and be governed by the same laws.[12] Likewise, land ownership demonstrates that a sovereign exists in a defined area.[13] Thus, landownership was, and still is, important for any sovereign.

Although Native Americans occupied the land in North America long before the European settlers arrived, the European settlers believed they had the proper claim to the land. As a result, the Europeans created an arbitrary rule called the "discovery doctrine."[14] Under this doctrine, any Christian nation that discovered land in North America became the property owner of that land.[15] While European settlers often occupied land that the Native American tribes abandoned, after the discovery doctrine was established the

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[10] *Id.* (Some historians speculate that the Wampanoag tribe was not even invited to the feast because of these tensions. This is supported by Governor Bradford's writings and his later pleas to the Wampanoags to stop showing up randomly at colonist homes.).

[11] MCKENZIE, *supra* note 5, at 137.

[12] *See* Denis Seguin, *What Makes a Country?*, THE GLOBE & MAIL (July 29, 2011), http://www.theglobeandmail.com/news/world/what-makes-a-country/article595868/; Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The law of Economics of Indian Self-Rule* 10 (Harvard Univ. John F. Kennedy Sch. of Gov't, Working Paper No. 04-016, 2004), http://ssrn.com/abstract=529084 (explaining that there are multiple coexisting sovereigns in the United States where state and national borders allow Americans to live in one area and be subjected to the laws established by the sovereign, i.e., the people of the United States.).

[13] For example, states are one of the sovereigns in the United States. They have borders and their own laws that govern the people residing within those borders.

[14] RICHARD B. COLLINS, 7 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 57.04(a) (2021), LEXIS.

[15] SMITHSONIAN INST., NATION TO NATION: TREATIES BETWEEN THE UNITED STATES & AMERICAN INDIAN NATIONS 68 (Suzan Shown Harjo ed., 2014) [hereinafter NATION]; *see also* COLLINS, *supra* note 14.

settlers began forcibly taking land occupied by Native American tribes.[16] They also claimed the exclusive right to transfer the land they stole from the Natives to other European powers without asking the Natives for permission.[17] Nonetheless, the Europeans quickly learned that the Native American nations were fairly strong as they began to fight against the Europeans and defend their territory.[18] Accordingly, the European powers, with Francisco de Victoria and Bartolome de las Casas being among the first, began to negotiate with the Native American tribes and to purchase land through treaties.[19] Not only did this promote more peaceful relations, but it also forced the Europeans to recognize Native American property rights.[20] The Europeans could not acquire legally valid title to the land without making these treaties,[21] and thus, the tribes established "sovereign status equivalent to that of the colonial governments in which they were dealing."[22] Consequently, treaty making became essential to the Native American tribes to prove their sovereign status. Nevertheless, the United States would eventually refuse to comply with the terms of these treaties and decline to make further treaties with the tribes,[23] which diminished tribal sovereignty.

B. *Formation of the United States*

Furthermore, when the colonists separated from Britain, many Native American tribes supported the British because they feared what would happen to them if the patriots won.[24] While the tribes were still treated as inferior by the British, they at least received recognition and protection from King George III under the Indian Country Proclamation in 1763.[25] The proclamation declared that Native Americans were to be treated with respect and dignity, that they were entitled to their own land, and that Great Britain would no longer take Indian land without the tribes' consent.[26] In contrast, if America became its own independent nation, the tribes potentially faced

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16 NATION, *supra* note 15, at 68; COLLINS, *supra* note 14.

17 NATION, *supra* note 15, at 68.

18 *Id.*

19 WILKINSON & MIKLAS, *supra* note 2, at 4; NATION, *supra* note 15, at 68; COLLINS, *supra* note 14.

20 NATION, *supra* note 15, at 68.

21 *Id.*

22 WILKINSON & MIKLAS, *supra* note 2, at 4.

23 25 U.S.C. § 71

24 *Revolutionary Limits: Native Americans*, U.S. HISTORY.ORG, https://www.ushistory.org/us/13f.asp (last visited Oct. 1, 2021).

25 Worcester v. Georgia, 31 U.S. 515, 547–48 (1832); COLLINS, *supra* note 14.

26 *Worcester*, 31 U.S. at 547–48.

losing their ability to govern themselves in peace.[27] Therefore, the Cherokees and Creeks in the South and four of the six Iroquois nations in the North provided extensive support to the British.[28] Nonetheless, a few tribes helped the patriots. For instance, the American military made a treaty with the Lenape Nation in 1778 which granted the patriots permission to cross Lenape Nation land from the Atlantic Coast to the Great Lakes.[29] Interestingly, in exchange for this clear passage, the patriots were supposed to recognize Lenape as its own nation and to consider granting the Lenape statehood once the patriots won the war.[30] Arguably, the tribes' primary concern in helping either the British or the patriots during the Revolutionary War was retaining their autonomy and being recognized as a sovereign entity.

Despite being an integral part of the Revolutionary War, no representatives from the tribes were present during the negotiation of the 1783 Treaty of Paris, which concluded the war.[31] This proved to be problematic for the tribes because other countries began negotiating over land the tribes already occupied.[32] For instance, the British granted the United States all the land between the Appalachian Mountains and the Mississippi River—land primarily inhabited by Native Americans.[33] Moreover, since the United States defeated the British, the United States believed that it defeated the Native American tribes that fought alongside the British as well.[34] Hence, the United States refused to recognize pre-war British treaties with Native American tribes.[35] For instance, in 1768, the British negotiated a treaty at Fort Stanwix that recognized Indian sovereignty over a huge area of land west of present-day Utica, New York.[36] When white settlers attempted to take the land in 1790, a war erupted and resulted in the Western Confederacy of United Indian Nations defeating the American army.[37]

Recognizing the tension between the United States and Native American tribes, George Washington believed that it was in the best interest of the new

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27 *Revolutionary Limits: Native Americans*, *supra* note 24.

28 *Id.*

29 NATION, *supra* note 15, at 34.

30 *Id.*

31 *Revolutionary Limits: Native Americans*, *supra* note 24.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*; NATION, *supra* note 15, at 50.

36 NATION, *supra* note 15, at 50.

37 *Id.*

and fragile country to make peace with the tribes.[38] This mentality is apparent in the Ordinance for the Regulation of Indian Affairs of 1786,[39] which was supposed to establish a plan for trading with the tribes. The document stated: "[T]he safety and tranquility of the frontiers of the United States, do in some measure, depend on the maintaining a good correspondence between their citizens and the several nations of Indians in Amity with them . . . ."[40] Although the majority of Americans wanted to seize tribal land for the country, Washington hoped to avoid further wars by obtaining Indian lands without force.[41] Thus, Washington began making treaties with the Iroquois Confederacy in New York and even presented peace medallions to the Indian leaders.[42] Shortly after the Constitution was ratified, Washington also pressured Congress to enact the Indian Trade and Intercourse Act, which restricted trade with Native American tribes.[43] Under the Act, no person or business could trade with a Native American tribe without a license from the Federal Government.[44]

At first, this would appear to restrict tribal sovereignty because it did not allow tribes to trade freely and forced them to trade directly with the Federal Government. However, Washington enacted the statute with the intent to protect Native Americans from being tricked into selling their land to greedy white settlers.[45] Unfortunately, Washington's effort in pursuit of peace and harmony did not last very long and the greedy white settler sentiment soon took over. In doing so, Native Americans experienced years of hardship as the Federal Government began to restrict the Native Americans' ability to govern themselves as tribal nations.

III. PROBLEM

A. *Sovereignty is Ultimate Political Power that Justifies a State to Govern Itself and its People*

In order to understand the significance and need for full Native American tribal sovereignty, it is vital to have a greater understanding of what the term

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[38] *Id.*

[39] ORDINANCE FOR THE REGULATION OF INDIAN AFFAIRS OF 1786, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 8 (Francis Paul Prucha ed., 3d ed. 2000).

[40] *Id.* at 8–9.

[41] NATION, *supra* note 15, at 50.

[42] *Id.* at 50–51.

[43] *Id.* at 66; Regulation of Trade and Intercourse with the Indian Tribes, ch. XXXIII, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177) [hereinafter Regulation of Trade].

[44] Regulation of Trade, *supra* note 43.

[45] NATION, *supra* note 15, at 66.

sovereignty actually means. Sovereignty is a political concept that enables an entity to have autonomy and exercise powers such as implementing laws and exercising eminent domain.[46] Moreover, in the context of Native American tribes, sovereignty does not simply mean tribal self-rule.[47] Rather, "[t]ribal sovereignty is the structured form of self-determination and self-governance . . . . Its normative purpose is the preservation and protection of the tribal freedom and internal flourishing, and pragmatically it functions through institutionalized government relations."[48] Essentially, there are two parts to tribal sovereignty. First, the ability to self-govern, which concerns implementing day-to-day policies.[49] This entails making decisions about how the tribe is run, how natural resources are used and developed, how the justice system operates, and who pays taxes.[50] Second, the ability to self-determine,[51] which is not a governmental process but is "the ability of tribes to construct and pursue their own goals."[52] Basically, tribes can create plans and goals for the future without interference from other societies.[53]

Arguably, Native American tribes were sovereign before white settlers began colonizing North America. However, as a result of interference from white settlers, the tribes began to lose part of their sovereignty. Not only did the tribes lose their land, but their way of life was under constant attack.[54] When the United States became a country, the tribes' sovereignty weakened even further. The tribes lost their ability to self-govern, had foreign laws imposed on their members, and were ultimately forced to become dependent on the Federal Government.[55] Accordingly, it is both inaccurate and problematic that the United States credits itself with giving Native American tribes their sovereignty.[56]

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[46] *Sovereignty*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Sovereignty*, LEGAL INFO. INST. CORNELL L. SCH., https://www.law.cornell.edu/wex/sovereignty (last visited Sept. 3, 2021).

[47] *See* KOUSLAA T. KESSLER-MATA, AMERICAN INDIANS AND THE TROUBLE WITH SOVEREIGNTY: STRUCTURING SELF-DETERMINATION THROUGH FEDERALISM 6 (2017).

[48] *Id.* at 8–9.

[49] *Id.* at 5.

[50] Kalt & Singer, *supra* note 12, at 1.

[51] KESSLER-MATA, *supra* note 47, at 5.

[52] *Id.*

[53] *Id.*

[54] *See* discussion *supra* Section II.

[55] *See* discussion *infra* Section III.B-D.

[56] COLLINS, *supra* note 14; Worcester v. Georgia, 31 U.S. 515, 544–45 (1832).

B. *The Marshall Trilogy Provided the Federal Government's Definition of Native American Tribal Sovereignty*

Once the United States was formed, there was considerable confusion regarding the Native American tribes' relationship to the United States. Were the tribes their own independent nations? Or were they part of the United States itself? In attempting to answer these questions, the Supreme Court issued three opinions in the early 1800s called the Marshall Trilogy.[57] However, in doing so, the United States began to assert its authority on the tribes and initiated the long and continual process of stripping away Native American tribal sovereignty.[58]

1. *Johnson v. M'Intosh*

The first case to address tribal sovereignty was *Johnson v. M'Intosh*.[59] In 1773 and 1775, chiefs from the Illinois and Piankeshaw nations conveyed land to private individuals who were not part of their tribes.[60] The Supreme Court questioned the validity of this transaction on two bases: whether Native American tribes had the authority to convey land and whether individuals were entitled to receive the land from the Native American tribes.[61] In answering this question, the Court examined the history of European relations with Native American tribes before the United States became a country.[62] Specifically, the Court discussed the discovery rule.[63]

As stated previously, European sovereigns were able to claim land and hold exclusive ownership of that land simply by discovering it.[64] Nonetheless, the same standard did not apply to Native American tribes despite the fact that Native Americans inhabited North America many years before the Europeans ever arrived. Instead, Native American tribes only had a right to possess the land they occupied.[65] According to the European nations, Native

[57] *Historical Tribal Sovereignty & Relations*, NATIVE AM. FIN. SERVS. ASS'N, https://nativefinance.org/historical-sovereignty-relations/ (last visited Sept. 3, 2021); Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM. INDIAN L. REV. 253, 254 (2012).

[58] COLLINS, *supra* note 14, at § 57.04(b); *see also Historical Tribal Sovereignty, supra* note 57.

[59] Johnson v. M'Intosh, 21 U.S. 543 (1823).

[60] *Id.* at 571–72.

[61] *Id.* at 572.

[62] *Id.* at 572–79.

[63] *Id.* at 573.

[64] *Id.*

[65] *M'Intosh*, 21 U.S. at 574.

Americans never actually owned the land they inhabited.[66] The Supreme Court applied this same flawed logic to the case of *Johnson v. M'Intosh* and ruled that although the Illinois and Piankeshaw Nations previously occupied the land, they did not have ownership rights to the land.[67] Rather, the tribes had a right of occupancy which did not allow them to transfer land to individuals.[68] Hence, the Court ruled the transactions were invalid and the individuals who bought land from tribes did not have valid title to the land.[69]

The *Johnson v. M'Intosh* decision was devastating for Indian tribes. Not only did the Court rule that tribes did not actually own the land they occupied, but it also opened the door for states to assert their power over the tribes. In 1830, under Andrew Jackson's presidency, Congress passed the Indian Removal Act.[70] The Act authorized the Federal Government to exchange occupied Native American land east of the Mississippi for land west of the Mississippi in present-day Oklahoma.[71] Moreover, even though the Act stated that the U.S. government would not move the Indian tribes without their consent, many tribes were not given a choice.[72]

As a result of the *Johnson v. M'Intosh* decision, Georgia claimed that it inherited the "British Crown's right of ownership" and owned the land that the Cherokees occupied in the state.[73] In essence, Georgians believed that its state sovereignty extended to all the land and people within it.[74] Consequently, in 1827, Georgia passed legislation that allowed the state to have ultimate title to Cherokee lands, meaning that it could take possession of those lands at any time.[75] Further, Georgia imposed its state laws on the Cherokee tribe.[76] Following Georgia's actions, Mississippi and Alabama also imposed their state laws on the Choctaw, Chickasaw, and Muscogee tribes.[77] These statutes definitively stripped the tribes of their autonomy and ability to self-govern.[78] Consequently, the tribes were given an ultimatum: stay

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[66] *Id.*

[67] *Id.* at 588.

[68] *Id.* at 591.

[69] *Id.* at 604.

[70] Indian Removal Act, ch. 148, 4 Stat. 411 (1830); NATION, *supra* note 15, at 73.

[71] Indian Removal Act, ch. 148, 4 Stat. 411 (1830).

[72] *Id.*; *See* NATION, *supra* note 15, at 75, 77.

[73] *See* NATION, *supra* note 15, at 73.

[74] DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880 39 (2007).

[75] *Id.*

[76] *Id.*; NATION, *supra* note 15, at 73.

[77] NATION, *supra* note 15, at 73.

[78] *See* ROSEN, *supra* note 74, at 39; NATION, *supra* note 15, at 73.

where they were and be subject to another sovereign, or move to Oklahoma under the Indian Removal Act and live under their own laws.[79]

On September 27, 1830, the Choctaw tribe and the Federal Government signed the Treaty of Dancing Rabbit Creek.[80] The treaty promised the Choctaw tribe three things.[81] First, "[A] tract of country West of the Mississippi River in fee simple, to them and their descendants" and $20,000 a year for the exchange of lands.[82] Second, protection for the journey from Mississippi to Oklahoma.[83] Third, "no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation."[84] Unfortunately, the trip for the Choctaws and many other tribes was miserable. There were many rain storms and even blizzards, which caused the Choctaw Indians to become ill because many did not have the proper clothing.[85] Appropriately, this was why one of the Choctaw Chiefs proclaimed the journey was a "trail of tears and death."[86]

While the Jackson administration was adamant about enforcing this legislation, some tribes fought back.[87] Only a few years before the Federal Government enacted the Indian Removal Act, the Cherokee Nation created its own constitution to protect its territory from white intruders.[88] Consequently, the Cherokee Constitution proclaimed that it was a self-governing, independent nation.[89] When Georgia threatened Cherokee

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[79] NATION, *supra* note 15, at 73, 77.

[80] Treaty of Dancing Rabbit Creek: Treaty With The Choctaw, Sept. 27, 1830, 7 Stat. 333; NATION, *supra* note 15, at 77; Len Greenwood, *Trail of Tears From Mississippi Walked by our Ancestors*, CHAHTA ANUMPA AIIKVNA SCH. OF CHOCTAW LANGUAGE, https://choctawschool.com/home-side-menu/history/trail-of-tears-from-mississippi-walked-by-our-ancestors.aspx (last visited Sept. 3, 2021).

[81] NATION, *supra* note 15, at 77.

[82] Treaty of Dancing Rabbit Creek: Treaty With The Choctaw, art. II, XVII, Sept. 27, 1830, 7 Stat. 333.

[83] *Id.*; Greenwood, *supra* note 80 (The Federal Government promised transportation by wagon or steamboat, an ample supply of corn and beef. In reality, many of the Choctaw Indians were bribed by the government to walk the journey in exchange for ten dollars of gold and a new rifle. Additionally, the food rations ran out quickly and many of the Choctaws starved.)

[84] Treaty of Dancing Rabbit Creek: Treaty With The Choctaw, art. IV, Sept. 27, 1830, 7 Stat. 333; NATION, *supra* note 15, at 77 (quoting INDIAN AFFAIRS: LAWS AND TREATIES 311(Charles J. Kappler ed., 1904)).

[85] Greenwood, *supra* note 80.

[86] *Id.*

[87] ROSEN, *supra* note 74, at 42–43.

[88] ROSEN, *supra* note 74, at 38–39 (the discovery of gold near Cherokee territory enticed whites to intrude and even settle on Cherokee land).

[89] *Id.*

sovereignty, Cherokee Chief John Ross was rightfully angry and wrote letters to Congress, the President, and Indian agents.[90] In one 1830 letter sent to a federally appointed Cherokee agent, Chief Ross pointed out that the United States previously acknowledged the Cherokee Nation as a separate nation from Georgia and, therefore, not under its jurisdiction.[91] Ross further argued that even though Indian tribes placed themselves under the protection of the United States, that did not mean they should lose their sovereignty.[92] To support this claim, Ross quoted a passage from *Goodell v. Jackson,* which states that although weaker states may seek the protection of stronger states, the weaker state does not lose its right to self-govern or forfeit its independent statehood.[93] Surprisingly, even Chief Justice John Marshall was dismayed at the state's coercion of the tribes.[94] Although Marshall was indirectly responsible for the state's actions, he denounced the Indian Removal Act in a letter he sent to Judge Dabeny Carr of Virginia.[95] Perhaps this is why Marshall ruled that the Indian tribes were capable of governing themselves in *Cherokee Nation v. Georgia,* only a week after the Treaty of Dancing Rabbit Creek was ratified.[96]

2. *Cherokee Nation v. Georgia*

The second case in the Marshall Trilogy, *Cherokee Nation v. Georgia*, goes even further than *M'Intosh* in determining the nature of tribal sovereignty because the Court actually questions what status and authority Native American tribes have in the United States.[97] Here, the Cherokee Nation asked the Court for an injunction against the state of Georgia, which would prevent Georgia from seizing Cherokee land and forcing the Cherokees to comply with state law.[98] In addressing this issue, the Court questioned whether it had jurisdiction to hear the case because the status of Native American tribes had never been clearly defined.[99]

In its jurisdictional analysis, the Court began with Article III of the Constitution which states the Supreme Court has jurisdiction over any case

[90] *Id.* at 41.

[91] *Id.* at 42–43.

[92] *Id.*

[93] ROSEN, *supra* note 74, at 42; Goodell v. Jackson, 20 Johns. 693, 711–12 (N.Y. Sup. Ct. 1823).

[94] NATION, *supra* note 15, at 73, 75.

[95] *Id.*

[96] Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831); NATION, *supra* note 15, at 77.

[97] Cherokee Nation v. Georgia, 30 U.S. at 16.

[98] *Id.* at 15.

[99] *See id.* at 15–16.

"between a state or the citizens thereof, and foreign states, citizens, or subjects."[100] Because Indian tribes were not considered states, the Court began by questioning whether Indian tribes should be considered foreign nations.[101]

Ironically, the Court claimed that Native American tribes were fully capable of maintaining their own establishments and governing themselves, evidenced by the treaties they made with the Federal Government.[102] Nonetheless, in its next breath, the Court undermined Native American tribal sovereignty by describing the Native American tribes as completely dependent on the United States for their well-being.[103] In fact, the Court compared the relationship between the tribes and the United States as "that of a ward to his guardian."[104] Likewise, the Court reasoned that the Native American tribes were in some way part of the United States itself.[105] According to the Court, the tribes could not be foreign nations because the tribes occupied land in United States territory, causing foreign nations to believe the tribes were under the control of the United States.[106]

There are a few problems with the Court's analysis. First, the Court stated that the Native American tribes were completely dependent on the United States for protection and their well-being.[107] This description is not only degrading, but also misleading. For instance, without the help of Native Americans, particularly Squanto, the Pilgrims would never have survived the first winter.[108] In fact, the Pilgrims were dependent on the Native Americans and would have starved or frozen to death without their guidance.[109] Further, the Native American tribes were a serious physical threat to the newly formed country after the American Revolutionary War.[110] Therefore, it is unlikely

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[100] *Id.* at 15 (citing U.S. CONST. art. III, § 2).

[101] *Id.* at 16.

[102] *Id.*

[103] Cherokee Nation v. Georgia, 30 U.S. at 17.

[104] *Id.*

[105] *See id.*

[106] *Id.*

[107] *Id.*

[108] MCKENZIE, *supra* note 5, at 93.

[109] *Id.*

[110] NATION, *supra* note 15, at 50–51 (After the Revolutionary War, fifteen hundred civilians died in what was called Harmar's defeat where the western confederacy of united Indian Nations defeated the American Army in 1790. Likewise, in 1791, about six hundred American soldiers were killed at the Battle of the Wabash. The devastating defeats prompted George Washington to make peace with the Native American tribes for fear that they would destroy the struggling new country.).

that the Native American tribes were dependent on the Federal Government. Rather, the Federal Government made the tribes dependent on the United States by refusing to treat them as their own independent nations and stripping away their political powers. Instead of adhering to normal legal standards, the Federal Government created a standard that suited its needs rather than simply recognizing the tribes for what they were: independent sovereign nations.

In addition to examining the Native American tribes' relationship with the United States itself, the Court also examined the Commerce Clause.[111] The clause states that Congress can "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[112] The Court reasoned that because "foreign nations" and "Indian tribes" are specifically mentioned in the Commerce Clause of the Constitution and are distinct from each other, the Framers did not intend to categorize them as the same thing.[113] Thus, the Court ruled that Native American tribes are not foreign nations and the Court did not have jurisdiction over the case.[114] In doing so, the Court indirectly ruled that Native American tribes were not to be considered states either because, if they were, the Court would have had jurisdiction under Article III, Section 2 of the Constitution.[115] Hence, while *Cherokee Nation v. Georgia* clarified that Native American tribes are not states or foreign nations, the Court provided little clarity in determining whether the tribes were actually a part of the United States. Likewise, the Court did not explicitly address the parameters of the tribes' political power and instead only asserted that the tribes were somehow wards of the Federal Government.

3. *Worcester v. Georgia*

Arguably the most important case in the Marshall Trilogy is *Worcester v. Georgia*.[116] First, the Court upheld a treaty made by the Cherokee Nation and the United States concerning land ownership.[117] This holding established a precedent that treaties between the United States and Native American tribes cannot be broken by states. Second, the Court implied that Native American tribes are their own nations and capable of governing themselves, which

[111] Cherokee Nation v. Georgia, 30 U.S at 18.

[112] *Id.* (citing U.S. CONST. art. III, § 8).

[113] *Id.* at 19–20; *see also* Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 89 (2017).

[114] Cherokee Nation v. Georgia, 30 U.S. at 20.

[115] *See id.* at 21.

[116] Worcester v. Georgia, 31 U.S. 515 (1832).

[117] *Id.* at 562.

confirmed that the tribes are in fact sovereign.[118] In *Worcester*, the plaintiff was a resident of Vermont who traveled to the Cherokee Nation in Georgia to preach the Gospel.[119] However, the state of Georgia charged him with illegally residing in the Cherokee Nation without a license and sentenced him to four years of hard labor in prison.[120] The plaintiff argued that he was authorized as a missionary, both by the Board of Commissioners for Foreign Missions and the President of the United States, to minister to the Cherokee Nation, and, therefore, should not be punished for residing in the Cherokee Nation.[121] Moreover, the plaintiff argued that Georgia did not have the authority to prosecute him because Georgia's laws did not extend to the territory occupied by the Cherokee Nation.[122]

In analyzing this case, the Court re-examined the status of Native American tribes in the United States. Although the Court previously implied that Native American tribes were part of the United States, the Court was still unsure of how much independent power the tribes should have apart from the Federal Government. On the one hand, the Court treated Native American tribes as foreign nations because it required U.S. citizens to have passports to enter tribal land.[123] On the other hand, states believed their laws were superior to those of the Indians and should be enforced on tribal lands, meaning the tribes did not have authority to govern themselves.[124] While the Court did not completely fix this issue, its decision that Georgia did not have the authority to prosecute the plaintiff helped Native American tribes retain their autonomy.[125] As the plaintiff pointed out, the United States recognized the Cherokee Nation as a sovereign nation by making multiple treaties with the tribe.[126] These treaties stated that Native American tribes were their own nations and were not subject to state laws, even though Native American tribes inhabited land in those states.[127] Further, because Great Britain considered the tribes to be their own nations with the ability to govern themselves, the Court reasoned that the United States should adopt the same

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118 *See id.* at 559–61.

119 *Id.* at 538.

120 *Id.* at 536.

121 *Id.* at 536.

122 *Worcester*, 31 U.S. at 539.

123 *See id.*

124 *See id.*

125 *See id.* at 562.

126 *Id.* at 538.

127 *Id.* at 538–39.

philosophy.[128] Thus, the Court came to the conclusion that because the Cherokee Nation created treaties with the Federal Government, it was a "distinct community occupying its own territory . . . in which the laws of Georgia can have no force."[129] The result of this decision meant that states could not impose their laws on tribes or take away tribes' ability to govern themselves. Nonetheless, like states, the tribes were still subject to the rule of the United States and bound by the decisions of the Supreme Court.[130]

After these three Marshall decisions, the tribes were in a new and difficult position. The Supreme Court essentially stated that Native American tribes were sovereign and able to govern themselves. Nevertheless, the Supreme Court did not want to give them the power of being a foreign nation, so the United States still asserted certain powers over the tribes. For instance, the tribes could not sue in the Supreme Court, were subject to federal laws, and were limited to trading solely with the Federal Government.[131] However, the United States also did not want the tribes to be directly part of the United States either. Tribes were not given the status of states nor did they have the same powers or responsibilities of the states. Thus, Native American tribes were given the ever confusing and problematic status of "domestic dependent nations."[132] This middle of the road status enabled the United States to uphold tribal sovereignty in *certain* circumstances, but also to strip that power when the tribes' sovereignty gets in the way of the Federal Government. Hence, this quasi-status is essentially the birthplace of the ongoing struggle for tribal self-rule.

C. *The Aftermath of the Marshall Trilogy*

Some may argue that the dual status of Native American tribes was a good compromise to a complicated situation. Tribes could be their own sovereign entities, but also subject to the rule of the United States. After all, states are both sovereign and subject to the Federal Government.[133] However, this dual status for Native American tribes was problematic. The United States was originally formed with the intention of creating sovereign states that coexist under a larger, over-arching sovereign. This is why the Framers explicitly delegated certain powers to the states and certain powers to the Federal

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[128] *Worcester*, 31 U.S. at 548–49.

[129] *Id.* at 561.

[130] *Id.* at 540.

[131] Regulation of Trade, *supra* note 43 (unless a person or entity had a license from the Federal Government, they could not trade with any Native American tribe).

[132] Cherokee Nation v. Georgia, 30 U.S at 17; *see* Alvin J. Ziontz, *Indian Self-Determination: New Patterns for Mineral Development*, 1976 ROCKY MT. MIN. L. INST. 13-1.

[133] Kalt & Singer, *supra* note 12, at 10.

Government in the Constitution.[134] In contrast, the Framers did not anticipate the Native American tribes becoming part of the United States. The Federal Government only decided that it wanted the Native American tribes to become part of the United States, and subsequently changed their status, when the tribes became an obstacle to westward expansion.[135] Therefore, the tribes' powers were never explicitly laid out like the powers of the states, which allowed the Federal Government to abuse its authority and take advantage of the tribes. This is especially apparent in the statutes passed and cases decided after the Marshall Trilogy.

While the Supreme Court stated in *Worcester v. Georgia* that Native American tribes were capable of governing themselves,[136] the Federal Government did not truly believe this. In 1846, the Court held that the Federal Government had authority to punish any offense committed in Indian territory.[137] In *United States v. Rogers*, a white man was indicted for the murder of another white man in Indian country.[138] Because the defendant and the victim lived with the Cherokee tribe and had been recognized as members by the tribe, the defendant argued he should only be prosecuted by the tribe.[139]

The Court ruled that the United States had jurisdiction over the defendant because he was not an Indian by birth.[140] In fact, the Court refused to recognize the defendant's status as a member of the Cherokee tribe because "[h]e was still a white man, of the white race."[141] By doing so, the Court essentially declared that it would not acknowledge the tribes' authority to admit new members, which severely undermined the tribes' power. Moreover, the Court ruled that even if he was an Indian, it did not matter.[142] According to the Court, because Native American tribes resided in the United States, they were automatically under its authority, despite what was written in the treaty.[143]

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[134] *Id.*

[135] *Historical Tribal Sovereignty & Relations*, NATIVE AM. FIN. SERVS ASS'N, https://nativefinance.org/historical-sovereignty-relations/ (last visited Sept. 8, 2021).

[136] *Worcester*, 31 U.S. at 548–49.

[137] United States v. Rogers, 45 U.S. 567, 573 (1846).

[138] *Id.* at 571.

[139] *Id.*

[140] *Id.* at 572–73.

[141] *Id.* at 573.

[142] *Id.*

[143] *Rogers*, 45 U.S. at 572.

Not only did the Court undermine the tribes' sovereignty by ignoring the terms of the treaty made between the government and the tribe, but it also invalidated the tribes' governmental decisions. By deciding the United States had jurisdiction over the case, the Court basically declared tribes could not accept or integrate new members into their tribes if the person was a United States citizen. Likewise, the Court implied that because the defendant was a white man, that the Cherokee tribe had no power over him, even though he voluntarily became a member of the tribe. Clearly, the United States was undermining the tribes' status as legitimate sovereigns while suggesting that the Federal Government could interfere in tribal affairs whenever it wanted to.

Another issue that Native American tribes ran into with their special status occurred in 1871 when the Federal Government passed a statute that stated the government would no longer make treaties with the tribes.[144] Although the government promised to recognize the treaties it made with tribes prior to the enactment of the statute, the government refused to make further treaties with the tribes because they were not independent nations.[145] This was yet another method the Federal Government employed to limit the tribes' sovereignty. Treaties were key because they recognized that each entity entering the treaty was its own nation that was negotiating on behalf of its members and territory.[146] Thus, by entering into treaties the Federal Government recognized the tribes' political power and ability to govern its people.[147] When the Federal Government stopped making treaties with the Native American tribes, it robbed the tribes of negotiating affairs on their own terms. Instead, Native Americans were now subject to federal legislation even though they were not considered citizens of the United States.[148] By defining Native American tribes as domestic dependent nations, the United States gave the tribes the illusion that they could govern themselves; but, in reality, the Federal Government retained all the power and control over them.

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[144] 25 U.S.C. § 71.

[145] *See id.*

[146] COLLINS, *supra* note 14, at § 57.04(b); Kevin Gover, *Nation to Nation: Treaties Between the United States and American Indian Nations*, AM. INDIAN, https://www.americanindianmagazine.org/story/nation-nation-treaties-between-united-states-and-american-indian-nations (last visited Sept. 2, 2021); *see also* Kalt & Singer, *supra* note 12, at 18 ("Sovereigns have power over territory, not just citizens.").

[147] Gover, *supra* note 146.

[148] Merrit Schnipper, *Federal Indian Law-Ambiguous Abrogation: The First Circuit Strips the Narragansett Indian Tribe of Its Sovereign Immunity*, 31 W. NEW ENG. L. REV. 243, 249–50 (2009).

D. *Losing Sovereignty by Losing Land*

As stated previously, control over one's territory is vital to a sovereign state.[149] Accordingly, it is no surprise that one way the Federal Government attempted to strip the tribes of their sovereignty was by gradually reducing the amount of land the tribes owned. The Federal Government employed various tactics to accomplish this. For example, one of the methods the government used was eminent domain.[150] Under the Fifth Amendment, the Federal Government has authority to take private property for public use so long as the private owner is provided just compensation.[151] In essence, a sovereign has authority to take private property without the consent of the property owner.[152]

In *Cherokee Nation v. Southern Kansas Railway Company*, the Federal Government attempted to exert eminent domain over the Cherokee Nation.[153] The Railway Company met with the Cherokee Nation in 1886 and requested to buy approximately one hundred forty-seven miles of land running through the Cherokee Nation to construct a railway.[154] Through an act of its National Council, the Cherokee Nation rejected the Railway Company's request.[155] Further, the Cherokee Nation's attorneys sent a letter to the President of the United States, proclaiming the Cherokee Nation held all rights and claims to its property and the United States did not have authority to grant people or corporations any of the Nation's property.[156] Instead of accepting the Cherokee Nation's decision, the Railway sued them; when the case reached the Supreme Court, the Cherokee Nation argued that the United States previously acknowledged the Cherokee Nation was a sovereign State through its various treaties.[157] Nevertheless, the Court ruled that the Cherokee Nation was not sovereign in the same way that the United States or the several states are sovereign.[158] Rather, the United States

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149 *See supra* Section II.A.

150 *See* Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890).

151 Zach Wright, Note, *Siting Natural Gas Pipelines Pose-PennEast: The New power of State-Held Conversation Easements*, 105 MINN. L. REV. 1053, 1056 (2020) (citing U.S. CONST. amend. V.).

152 *Id.*

153 *See* Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890).

154 *Id.* at 646.

155 *Id.* at 647.

156 *Id.* at 648.

157 *Id.*

158 *Id.* at 653.

considered tribes to be its wards, and as such, subject to eminent domain.[159] Consequently, the Court ruled in favor of the Railway Company and the Cherokee Nation was forced to give up part of its land.[160]

Not only is this an example of the Federal Government wrongfully taking Native American land, it is yet another example of the Federal Government using the tribes' dual status to its advantage. The Court reasoned that because the tribes were domestic dependent nations, they were not their own sovereigns.[161] Additionally, the Court concluded that it should have authority to exercise eminent domain in tribal territory because it is able to do so within the several states.[162] However, this reasoning is misguided. While the several states are sovereign, they are also part of the United States as a whole.[163] They are just inferior sovereigns to the Federal Government.[164] In reality, Native American tribes were their own independent nations. The only reason the tribes were considered wards of the United States was because the Supreme Court decided that for them in the Marshall Trilogy without considering any input from the tribes.[165] If the tribes were able to voice their opinions when that decision was made, they probably would not have agreed to it. This sentiment was evidenced by letters the Cherokee Nation sent to the President protesting the Railway's actions. Thus, the Federal Government wrongfully exercised eminent domain over the Cherokee Nation and, by doing so, damaged Native American tribal sovereignty.

Shortly after the Cherokee Nation was forced to relocate in the 1830s, the Federal Government concocted a new plan to reduce the amount of land the Native American tribes owned. In 1887, the Federal Government passed the General Allotment Act, also known as the Dawes Act.[166] This Act authorized the Bureau of Indian Affairs to allot land to individual Indians that was previously owned by the tribe as a collective.[167] Under the Dawes Act, the Federal Government held the allotted land in a trust for twenty-five years.[168] At the end of twenty-five years, the Federal Government conveyed the land

[159] Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. at 653.

[160] *Id.* at 658–59.

[161] *Id.* at 653.

[162] *Id.* at 656.

[163] *See* U.S. CONST. art. IV, §§ 3–4.

[164] *Id.*

[165] *See* discussion *supra* Section III.B.2.

[166] GENERAL ALLOTMENT ACT (1887), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 39, at 170 (referencing the General Allotment Act).

[167] *Id.*; WILKINSON & MIKLAS, *supra* note 2, at 8.

[168] GENERAL ALLOTMENT ACT (1887), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 39, at 171; WILKINSON & MIKLAS, *supra* note 2, at 8.

to individual Indians and his or her heirs and proclaimed them United States citizens.[169]

Similar to the Indian Removal Act, allotment was imposed on many Native Americans and was ultimately enforced for the benefit of the United States rather than the tribes.[170] For example, Indian families received 160 acres of land and each single person received 80 acres of land.[171] This allotment standard ensured that substantial land remained in the Indian reservation that was originally communally owned by the tribe.[172] However, instead of giving that land to individual Indians or other tribes that did not participate in allotment, that land was given to non-Indians.[173] Consequently, Indians went from owning 138 million acres in 1887 to only 48 million acres in 1934.[174]

Moreover, when the Federal Government allotted these lands to individual Indians, they employed the "checkerboard" pattern of ownership.[175] Instead of allotting parcels of land next to each other, the parcels were spread out and separated by non-Indian owned land.[176] The ultimate goal of the Federal Government was to disestablish the communal living of Native Americans which allowed the government to then abolish reservations.[177] As a result, the Federal Government was able to make Oklahoma a state in 1907.[178] Hence, the Federal Government more or less tricked the Native American tribes into giving up their communally owned land in exchange for a smaller amount of individually owned land and United States citizenship. Obviously, this had a significant effect on tribal sovereignty because the tribes were less politically powerful when spread out.

E. *Present Day Problems*

Although tribes ultimately established reservations within the states, tribes still struggled to maintain authority over the territory within those reservations. In 2019, a member of the Seminole Nation of Oklahoma

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[169] GENERAL ALLOTMENT ACT (1887), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 39, at 171–72.

[170] *See* WILKINSON & MIKLAS, *supra* note 2, at 9.

[171] *Id.* at 8.

[172] *See id.* at 8–9.

[173] *Id.* at 8.

[174] *Id.* at 9.

[175] *Id.*

[176] *See* WILKINSON & MIKLAS, *supra* note 2, at 9.

[177] McGirt v. Oklahoma, 140 S. Ct. 2452, 2463–65 (2020).

[178] *Id.*

committed a series of sexual offenses in Creek Reservation territory.[179] The defendant argued that he should be prosecuted by the Creek Nation rather than the State because he committed his crimes on the tribe's reservation and was a member of the Seminole Nation.[180] However, the State argued that the land in question was no longer Creek Reservation.[181] In 1832, the Creeks ceded their land east of the Mississippi for a reservation west of the Mississippi in Oklahoma.[182] After pressure from the Federal Government, the Creeks ceded part of that reservation to the United States in 1866 and, in 1901, were given allotments under the Dawes Act.[183] Accordingly, Oklahoma argued that the reservation no longer existed, and therefore, the defendant had to be prosecuted by the State rather than the Creek Nation.[184]

Surprisingly, the Supreme Court ruled in the Creek Nation's favor.[185] The Court reasoned that because the Federal Government not only promised the Creeks a permanent reservation in 1832, but also established fixed borders of that reservation in an 1833 treaty, a reservation still existed.[186] This decision was a huge win for Native American tribes. First, because it ruled that the state of Oklahoma lacked criminal jurisdiction, only the Creek Nation or the Federal Government could prosecute the defendant.[187] Second, land that Oklahoma once claimed was now returned to the Creek Nation.[188] The dissenting Justices in this case were concerned that if the land in question was considered Creek Reservation, then 1.8 million Oklahoma residents would

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[179] *Id.* at 2459.

[180] *Id.* at 2459; 18 U.S.C. § 1153 (The Major Crimes Act places certain crimes, such as murder and kidnapping, committed by Native Americans under the jurisdiction of the Federal Government rather than the tribes. This is true even if the crime was committed on Indian territory.).

[181] Brief for Respondent at 6–7, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

[182] *McGirt*, 140 S. Ct. at 2460.

[183] *Id.* at 2463–64.

[184] *Id.* at 2463.

[185] *Id.* at 2482.

[186] *Id.* at 2460–62 (Only Congress has the authority to break its promise and disestablish a reservation. While the State attempted to argue Congress divested the reservation through allotment in the 1900s, Congress never explicitly broke its promise. Thus, the Court ruled that the reservation still existed.).

[187] *Id.* at 2479; Troy A. Eid, McGirt v. Oklahoma*: Understanding What the Supreme Court's Native American Treaty Rights Decision is and Is Not*, GREENBERG TRAURIG (Aug. 12, 2020), https://www.gtlaw.com/en/insights/2020/8/mcgirt-v-oklahoma-understanding-what-the-supreme-courts-native-american-treaty-rights.

[188] Eid, *supra* note 187.

be living in Indian territory.[189] This is quite comical, considering that the land was supposed to be a permanent home for the Creek Nation before it belonged to Oklahoma or any of the private citizens occupying the land.[190] Nonetheless, the ruling does not affect land ownership.[191] The government allotted land within the Creek Reservation to non-Indians under the Dawes Act and the Oklahoma Enabling Act of 1906.[192] Hence, *McGirt* does not strip any private citizens of land ownership.[193] However, *McGirt* permits the tribe to exercise its sovereign power over the land within the Creek Reservation and to enforce its own criminal laws involving Indians.[194]

Perhaps more important than acquiring title to their land and imposing the tribe's laws over it, was the sense of pride the Creek Nation received from finally being recognized as sovereign. When asked about the Court's ruling in *McGirt*, Jonodev Chaudhuri claimed that it made many Creek members cry.[195] Chaudhuri talked about his ancestors, and how many of them died from "the direct or indirect effects of removal, whether it be poverty or lack of resources to health care."[196] He further emphasized that it did not matter that this decision would not change land ownership.[197] What was important was that the Creek Nation "[had] affirmation from the federal government's highest court that, despite our struggles, and because of the sacrifices of people who came before us, our nation remains whole and our reservation remains whole."[198] Being recognized as sovereign is important to Native American tribes and their identity. Arguably, if the colonists, and later the United States, had originally recognized Native American tribes as their own sovereign nations, Native Americans may not face as many struggles as they do today. Nonetheless, because history cannot be rewritten, it is morally imperative that the United States begin to remedy the situation.

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[189] *Id.*; *see McGirt,* 140 S. Ct. at 2500–02 (Roberts, C.J., dissenting).

[190] *See* Eid, *supra* note 187.

[191] *Id.*

[192] *See id.*

[193] *Id.*

[194] *Id.*

[195] Jeffrey Brown & Alex D'Elia, *What Supreme Court's* McGirt *ruling means for Oklahoma's Native tribes*, PBS (Sept. 16, 2020, 6:23 PM), https://www.pbs.org/newshour/show/what-supreme-courts-mcgirt-ruling-means-for-oklahomas-native-tribes.

[196] *Id.*

[197] *Id.*

[198] *Id.*

IV. PROPOSAL

How does one begin making amends for centuries of wrongdoing? How can one even begin to rectify stripping tribes of their land, forcing them to move across the country, and enforcing foreign laws on them? Simply apologizing is not sufficient. Nor will giving tribes money or implementing new programs fix the problem.[199] In fact, Vine Deloria, Jr. claimed that what Native Americans need is "a new policy by Congress acknowledging our right to live in peace, free from arbitrary harassment . . . What we need is a cultural leave-us alone agreement, in spirit and in fact."[200] If this is truly what the tribes want, then the best solution to this complex problem is to allow Native American tribes to become their own independent nations. While this may seem like an extreme proposition, it is the only ethical solution that will give tribes back the autonomy they once had as true independent sovereigns.

A. *Native American Tribes Should Have the Option to Become Independent Nations*

As one may imagine, starting a country is not simple. There are many requirements, such as a defined territory, an established government, and recognition from other nations.[201] Nonetheless, the tribes already have a great start on some of these requirements. For example, some of the tribes already own the land they live on.[202] Likewise, several of the treaties between the United States and the tribes establish clear borders of Indian territory. Thus, the tribes could claim that territory if they became their own countries.

1. A Defined Territory

One of the requirements for establishing a country is having a defined territory.[203] Because the tribes already negotiated with the Federal Government to occupy specific land in the United States, the easiest solution would be to simply allow the tribes to claim that land as their own. For example, after signing the treaty of Guadalupe Hidalgo in 1848, the United States acquired the territory of what is present day New Mexico and

[199] *See* discussion *supra* Section III.D.

[200] KESSLER-MATA, *supra* note 47, at 1 (quoting VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS (1988)).

[201] *See* Seguin, *supra* note 12; The Infographics Show, *Can You Start Your Own Country?*, 00:29, 03:33-03:56, 04:29-04:98, YOUTUBE (Dec. 27, 2018), https://www.youtube.com/watch?v=ZpblP61AYAc&t=230s.

[202] *Natural Resources Revenue Data*, U.S. DEP'T OF THE INTERIOR, https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/ (last visited Sept. 4, 2021).

[203] Seguin, *supra* note 12, at 3.

Arizona.[204] However, part of this land was occupied by the Navajo Nation, which did not want to give up their homeland.[205] This led to conflict between the Navajos and the Federal Government, which resulted in the Federal Government imprisoning the Navajo Indians and forcing them to abandon their homelands.[206] Ultimately, the Federal Government permitted the Navajo Indians to return to their home a few years later.[207] In 1868, the tribe and the Federal Government signed a treaty which established the Navajo Nation as a domestic dependent nation of the United States and also created a defined territory for the tribe to occupy.[208] The Navajo believe that they are safe within four sacred mountains that mark the territorial boundaries of their reservation: Mount Taylor, San Francisco Peak, Blanca Peak, and Mount Hesperus.[209]

In addition to the defined territory established in the Navajo treaty of 1868, the Navajo Nation expanded their reservation by purchasing land in fee simple. In 2017, the Navajo Nation bought approximately 16,350 acres of land in southern Colorado[210] and, in 2018, bought Boyer Ranch which brought the nation closer to the sacred mountains, Blanca Peak and Mount Hesperus.[211] Further, in 2020, the Navajo Nation purchased an additional 1,250 acres in Indian Wells, Arizona.[212] Present day, the Navajo Nation's land

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[204] NATION, *supra* note 15, at 120; *The Treaty of Guadalupe Hidalgo*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/guadalupe-hidalgo#background; *Reservations, Arizona: Navajo*, P'SHIP WITH NATIVE AMS., http://www.nativepartnership.org/site/PageServer?pagename=PWNA_Native_Reservations_Navajo (last visited Sept. 1, 2021).

[205] *See* NATION, *supra* note 15, at 120.

[206] *See id.* at 120–21; *see also Navajo Nation*, INDIAN HEALTH SERV., https://www.ihs.gov/navajo/navajonation/ (last visited Sept. 1, 2021) (explaining that more than ten thousand Navajo prisoners were forced to march to Bosque Redondo reservation at Fort Sumner in what is known as the Long Walk; there were approximately 53 marches from 1863 to 1866 which covered anywhere from 250 to 450 miles).

[207] *Navajo Nation*, *supra* note 206, at 2.

[208] *Id.*

[209] NATION, *supra* note 15, at 120, 130 (showing a visual representation of the reservation); *Reservations, Arizona: Navajo*, *supra* note 204, at 1.

[210] Noel Lyn Smith, *Navajo Nation Closes on Colorado Land Purchase*, FARMINGTON DAILY TIMES (Oct. 30, 2017, 8:29 PM), https://www.daily-times.com/story/news/local/navajo-nation/2017/10/31/navajo-nation-closes-colorado-land-purchase/815452001/.

[211] Ann Marie Awad, *Sacred Mountains, Ranching Boost Part of Navajo Nation's Colorado Land Buy*, CPR NEWS (Jan. 25, 2018), https://www.cpr.org/2018/01/25/sacred-mountains-ranching-boost-part-of-navajo-nations-colorado-land-buy/.

[212] *Navajo Nation Purchases Land that Includes Gravel Pit*, SALT LAKE TRIB. (Jan. 25, 2020, 5:29 PM), https://www.sltrib.com/news/nation-world/2020/01/25/navajo-nation-purchases/.

is a mix of land that a treaty permitted them to occupy and land legally bought in fee simple. Further, the land the Navajo Nation occupies is clearly defined by the treaty and its additional purchases. Thus, if the Navajo Nation were to become its own country, both the land that was promised to it in the treaty and land it bought would be the defined territory of the Navajo Nation's country. Likewise, this should be the standard for all tribes that wish to become their own independent nations. Not only does this permit the tribes to keep land that they legally bought and own, but it also allows the tribes to keep land that they have settled on for decades.

Some may argue that the tribes should not be permitted to use the land they occupy for their new country. After all, the tribes do not own most of the land they occupy.[213] Rather, the Federal Government owns tribal lands in trust and permits the tribes to live on it.[214] Uprooting the tribes from their homeland and forcing them to find unclaimed land in order to become their own countries would be completely immoral. When many of these treaties were negotiated, the United States forcibly took land the tribes were occupying, in order to serve its own interests. In an effort to compensate the tribes for giving up their homeland, the Federal Government promised the tribes *permanent homes* in a new area of the United States.[215] Although the Federal Government has broken many treaties before, it should not be permitted to continue manipulating the tribes by repeating this reprehensible conduct. For once, the Federal Government should actually keep its promise instead of taking tribal land or forcing removal on the tribes. This would allow tribes to use boundary lines that have been established for decades if they choose to become independent nations.

Furthermore, the Federal Government's decision to hold land in trust severely limits the tribes' economic growth.[216] While the Navajo tribe bought land in fee simple, other tribes are not so fortunate and lack the economic

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[213] *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR, https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/ (last visited Sept. 2, 2021).

[214] *Id.*

[215] *See McGirt*, 140 S. Ct. at 2460 (explaining that the Creeks ceded their land east of the Mississippi to the Federal Government in exchange for a permanent home west of the Mississippi).

[216] *See* John Koppisch, *Why Are Indian Reservations So Poor? A Look at the Bottom 1%*, FORBES (Dec. 13, 2011, 7:32 PM), https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/?sh=49bb650d3c07; *see also* Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, ATLANTIC (July 30, 2016), https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/.

resources to own land outside their reservations.[217] Because land ownership is directly related to accumulating wealth in the United States, those tribes are stuck in an impoverished state.[218] This is evidenced by the tribes' inability to build houses on the land owned in trust by the Federal Government. On the Crow and Northern Cheyenne Indian reservations, many tribe members live in trailer homes because they cannot afford to build houses.[219] Banks are unwilling to give Native Americans who live on reservations mortgages because they cannot foreclose on property that is in trust.[220]

The land many Native American reservations occupy contains a vast number of the United States' natural resources. However, the Federal Government does not permit Native American tribes to capitalize on the coal, uranium, oil, and gas reserves on their land.[221] Nonetheless, the Federal Government is allowed to run pipelines through Indian reservations, which destroys the land and the tribes' water sources.[222] Hence, Native Americans "may possess a certain amount of land on paper, but they can't put it to use by selling it, buying more to take advantage of economies of scale, or borrowing against it."[223] As a result, the Federal Government controls practically every aspect of the tribes. No wonder Conrad Stewart from the Crow tribe claimed that "[w]e are the highest regulated race in the world."[224]

Holding Native American land in trust has only caused the tribes problems. Accordingly, many have advocated for giving Native Americans legal property rights and urged private property ownership.[225] While this solution would help individual Native Americans and allow them to actually accrue and pass on their wealth, the tribes would not have the sovereign power they deserve and would still be forced to make many compromises. For instance, even if their land was privatized, studies show that Native

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[217] *See* Riley, *supra* note 216.

[218] *See id.*

[219] *Id.*

[220] *Id.*

[221] *Id. But see* Nina Lakhani, *No More Broken Treaties': Indigenous Leaders Urge Biden to Shut Down Dakota Access Pipeline*, GUARDIAN (Jan. 21, 2021), https://www.theguardian.com/us-news/2021/jan/21/dakota-access-pipeline-joe-biden-indigenous-environment (discussing that, while capitalizing on these resources could be beneficial to Native American tribes, it also may conflict with some of the tribes' environmental beliefs and traditions).

[222] *See* Lakhani, *supra* note 221; *see also Keystone XL Pipeline*, NATIVE AM. RTS. FUND, https://www.narf.org/cases/keystone/ (last visited Oct. 2, 2021).

[223] Riley, *supra* note 216.

[224] *Id.*

[225] *See* Koppisch, *supra* note 216; *see also* Riley, *supra* note 216.

Americans are less likely to receive loan applications from lenders if the tribe is not under the legal jurisdiction of its state.[226] This would make it difficult for Native Americans to receive loans to build homes or start businesses unless the tribe adopted the state's legal system. Since many tribes choose to use their own legal system rather than the legal system of the United States, this is an unfavorable option.[227] Moreover, privatizing land rather than owning it collectively would be contrary to the tribes' communal and codependent culture.[228]

Rather than keeping the tribal land in trust or privatizing it, which will not give the tribes full sovereignty, the tribes should completely own the land they are occupying and use it to become their own country. This way the tribes would be free from the Federal Government's interference and could decide what laws to implement and how the land should be divided. Further, the tribes would not need to worry about accruing wealth within the United States' economic system, which would take them generations to do. This solution would be beneficial for both wealthy and poor tribes, because they can maintain their communal way of life and greatly increase their sovereignty.

2. Self-Government

Another essential element to forming a nation is self-government. Before the United States became a country, the tribes were self-sufficient and governed themselves.[229] Nevertheless, when the United States became a country, it began to impose its own laws on the tribes and attempted to preside over them.[230] The Federal Government claimed it was the guardian of the tribes, charged with the task of overseeing and protecting them.[231] This concept derived from an inherent belief that Americans were morally and intellectually superior to Native Americans:

> [F]rom the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten

[226] Koppisch, *supra* note 216.

[227] *See id.*; *see also* McGirt v. Oklahoma, 140 S. Ct. 2452, 2460 (2020).

[228] *See* Koppisch, *supra* note 216; *see also* NATION, *supra* note 15, at 17 (explaining how historically, even though tribes had leaders, they still made their decisions as an entire tribe).

[229] *See* NATION, *supra* note 15, at 17, 19.

[230] *See id.* at 3–5; *see also* United States v. Rogers, 45 U.S. 567, 572 (1846).

[231] *See Rogers*, 45 U.S. at 572.

> their minds and increase their comforts, and to save them if possible from the consequences of their own vices.[232]

While the Federal Government alluded that this so-called guardianship benefited the tribes, in reality, it greatly interfered with the tribes' abilities to govern themselves and was detrimental to their identities.

a. Federal government interference

Instead of allowing tribes to govern themselves by their own laws, the Federal Government attempted to civilize Native Americans by forcing the tribes to follow United States law.[233] Many government officials believed Native Americans were unintelligent and that the "petty, ignorant tribes" needed United States laws to regulate their behavior.[234] Consequently, federal courts extended their jurisdiction over criminal acts committed in Indian Country under the Major Crimes Act of 1885.[235] This Act greatly restricted the tribes' authority because they could not even punish their own members according to their own laws.[236] Moreover, while Native Americans were permitted to be judges, instead of the tribes electing their own judges, they were appointed by the Commissioner of Indian Affairs.[237] Special preference was given to Native Americans that abandoned their culture, i.e., those who could read and write in English and dressed like civilized Americans.[238] Not only did these courts impose United States law, but they also outlawed numerous Native American traditions such as engaging in the sun dance and other feasts and the practice of medicine men.[239] Under the inescapable influence of the Federal Government, it was difficult for the tribes to maintain authority over themselves.

Likewise, the Federal Government impeded the tribes' ability to govern themselves by controlling how Native American children were educated. In pursuit of its goal to civilize Native Americans, the Federal Government removed children from their families and sent them to "federal Indian

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[232] *Id.*

[233] 18 U.S.C. § 1152; *see also* JOHN Q. SMITH, ANN. REPORT OF THE COMM'R OF INDIAN AFF. (1876), *reprinted in* DOCUMENTS OF U.S. INDIAN POLICY, *supra* note 39, at 146–48.

[234] JOHN Q. SMITH, ANN. REP. OF THE COMM'R OF INDIAN AFF. (1876), *reprinted in* DOCUMENTS OF U.S. INDIAN POLICY, *supra* note 39, at 148.

[235] 18 U.S.C. § 1153. Only recently did the tribes acquire the right to punish criminal acts committed within their territory. *See* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[236] *See* 18 U.S.C. § 1153.

[237] RULES FOR INDIAN COURTS (1892), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 39, at 185.

[238] *Id.*

[239] *Id.* at 185–86.

boarding school[s]."[240] When the children arrived at these schools, often their personal belongings such as clothes, moccasins, and medicine pouches were confiscated.[241] Likewise, their traditional long hair was cut short.[242] If the students acted in a so-called uncivilized manner, such as speaking their native language, they were whipped and beaten.[243] Tragically, their parents could do nothing to help them because it was a federal crime to interfere with the education of their children.[244] Consequently, the Federal Government's control of Native American education not only limited cultural expression, but also confiscated the tribes' right to establish their own educational curriculum and implement their own methodology of teaching.

b. Present day government

Despite decades of interference from the Federal Government, the tribes maintain their own governmental systems. For example, tribes now have the right to determine requirements for tribal membership, which includes the right to vote in tribal elections and hold tribal office.[245] The tribes also have the power to exclude individuals from their reservations.[246] However, this power is not absolute. The tribes are required to admit federal officials, and the Federal Government constructs publicly accessible roads throughout Indian country.[247] Further, the tribes enjoy police powers meaning that they are able to raise revenues through taxes, determine domestic rights, and regulate commercial and business relations.[248]

Additionally, many tribes have their own constitutions. Under the Indian Reorganization Act of 1934, the Federal Government ruled that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority of the

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[240] NATION, *supra* note 15, at 5–6, 9 (The first and arguably most famous was the Carlisle School in Pennsylvania, which opened in 1878. Although the school closed in 1904, Indian boarding schools continued to exist for decades afterwards.).

[241] *Id.* at 8.

[242] *Id.*

[243] *Id.* at 8–9.

[244] *Id.* at 4.

[245] WILKINSON & MIKLAS, *supra* note 2, at 37 (The Supreme Court ruled that tribes are not required to follow the legal concepts of equal protection and due process when determining membership.); *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978).

[246] WILKINSON & MIKLAS, *supra* note 2, at 38.

[247] *Id.*

[248] *Id.* at 37.

adult members of the tribe."[249] Thus, many tribes created constitutions that were based on sample documents of the Bureau of Indian Affairs and have governmental structures similar to the United States.[250] For instance, the Menominee Indian Tribe of Wisconsin has a Supreme Court with three judges that hear appeals from lower courts.[251] Likewise, the Eastern Shawnee Tribe of Oklahoma elects a Chief by a majority vote of the members.[252] The Chief serves for a term of four years and has veto power over all laws and ordinances passed by the Business Committee.[253] Even though the Federal Government authorized the tribes to create their own constitutions, the Federal Government also recognized that the power to create and implement these constitutions stem from the tribes' inherent sovereignty.[254]

c. Self-sufficiency

Because many tribes already have a democratic organization of government in place,[255] it would not be difficult to prove the tribes could be self-sufficient apart from the United States. In order to be self-sufficient, the tribes would need to create new departments to oversee foreign affairs and create an educational system. Some may argue that creating these departments would be too difficult for the tribes to do. Nonetheless, the United States was able to create a nation with an effective governmental system even when it was in enormous debt from the American Revolutionary War.[256] The tribes would actually be in a better position than the United States was at that time because the tribes already have decades of experience

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[249] WHEELER-HOWARD ACT OF 1934 (INDIAN REORGANIZATION ACT), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 39, at 224.

[250] WILKINSON & MIKLAS, *supra* note 2, at 39.

[251] CONSTITUTION & BYLAWS OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN art. V, § 1 (a)–(c), *Tribal Constitutions*, TRIBAL COURT CLEARINGHOUSE, https://www.tribal-institute.org/lists/constitutions.htm (last visited Sept. 8, 2021) (accessing Tribal Constitutions).

[252] CONSTITUTION & BYLAWS OF THE EASTERN SHAWNEE TRIBE OF OKLAHOMA art. VII, §§ 1, 3 (amended 1999), *Tribal Constitutions*, *supra* note 251; *see Shawnee Chiefs*, EASTERN SHAWNEE TRIBES OF OKLAHOMA, *https://estoo-nsn.gov/chiefs-past-and-present/* (last visited Sept. 8, 2021) (The current Chief is Glenna Wallace, who is also my great aunt. She is the first woman to be elected Chief of the Eastern Shawnee Tribe).

[253] CONSTITUTION & BYLAWS OF THE EASTERN SHAWNEE TRIBE OF OKLAHOMA art. VII, §§ 1, 3 (amended 1999), *Tribal Constitutions*, *supra* note 251.

[254] WILKINSON & MIKLAS, *supra* note 2, at 39 (citing Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 152–54 (1980)).

[255] *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, https://www.bia.gov/frequently-asked-questions (last visited Sept. 8, 2021).

[256] *Milestones: 1784-1800*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1784-1800/loans (last visited Sept. 8, 2021).

living by their constitutions and governmental systems. Moreover, if the tribes were completely free of interference from the United States, they would not be bound by certain restrictions[257] or worry about the Federal Government infringing on their liberties.[258] Although the tribes already have established governments, by becoming independent nations, they would acquire even more authority and would strengthen their sovereignty.

3. Relations with Other States

Another important aspect of sovereignty that is necessary to become an independent nation is the ability to enter into relations with other states. The tribes traditionally approached this by entering into treaties.[259] For Native Americans, treaty making meant much more than a mere transaction on a piece of paper.[260] Rather, it was a sacred process that symbolized friendship and a continual discussion between nations that needed to be affirmed and renewed periodically.[261] Thus, the tribes believed treaties could be entered into orally without the need for a written document.[262] Consequently, misunderstandings often arose between the tribes and the Federal Government, which is one of the reasons many treaties were not properly upheld.[263]

Nevertheless, treaties between the tribes and other nations were an exchange between sovereign powers which "navigate[d] shared interests, including land, resources, and military protection."[264] Before the United Sates even became a country, the tribes made several treaties with foreign nations. As previously mentioned, in the 17th Century, British and Spanish colonies formed treaties concerning boundaries.[265] Through these treaties, the

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[257] The United States refuses to make treaties with the tribes anymore and does not permit them to make treaties with individuals or other nations. *See* 25 U.S.C. § 71; Regulation of Trade, *supra* note 43; *Frequently Asked Questions*, *supra* note 255.

[258] Congress has given itself the authority not to recognize treaties made with Native American tribes. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 566–68 (1903)). Also, the States can exercise authority over Native American tribes if Congress gives it permission. *See Frequently Asked Questions*, *supra* note 255.

[259] *See* NATION, *supra* note 15, at 17.

[260] *Id.*

[261] *Id.*

[262] *Id.* at 3.

[263] *Id.* (Eventually, the Supreme Court developed a canon to remedy this problem which stated the treaties should be interpreted as the Indians understand them when they were negotiated.).

[264] KESSLER-MATA, *supra* note 47, at 71.

[265] WILKINSON & MIKLAS, *supra* note 2, at 4; COLLINS, *supra* note 14.

colonial powers recognized tribal ownership of land and inadvertently affirmed the tribes' sovereign status.[266] Further, many tribes agreed to fight with the British during the American Revolutionary War in exchange for land recognition and protection.[267] The tribes also entered into relations with the colonists. In 1682, the Lenape leaders and British Quakers negotiated the Penn Treaty using an exchange of gifts to validate the agreement.[268] Likewise, later when the United States was formed, the tribes entered into hundreds of treaties with the Federal Government.[269] Admittedly, most of these treaties concerned land disputes.[270] Nonetheless, the tribes and the Federal Government also entered into treaties to establish peaceful relations and even recognized some of the tribes as sovereign nations.[271]

Historically, Native American tribes had the ability to enter into relations with other states, but that ability was severely weakened by the Federal Government. For instance, when the tribes' military power weakened after the War of 1812, so did their ability to enter treaties on equal terms with the Federal Government.[272] Although treaties still needed the consent of the tribes to be ratified, the treaties began favoring the Federal Government and often coerced tribes to cede land.[273] One of the ways the Federal Government retained this power was by passing a statute in 1871 that stated Indian tribes were not independent nations.[274] Therefore, the United States refused to make any more treaties with the tribes and forbade other countries from entering into treaties with them as well.[275] Instead, Native American tribes made agreements with the Federal Government that needed the approval of

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[266] WILKINSON & MIKLAS, *supra* note 2, at 4.

[267] Worcester v. Georgia, 31 U.S. 515, 547 (1832); *Revolutionary Limits: Native Americans*, *supra* note 24.

[268] NATION, *supra* note 15, at 2.

[269] *See generally* DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 39.

[270] *Id.*

[271] *Id.* at 6–8, 109 (For example: In the 1785 Treaty of Hopewell, the Cherokee tribe and United States promised each other friendship and agreed to release their war prisoners back to their homes. In the 1868 Treaty of Fort Laramie, the United States pledged peace with the Sioux Nation of Indians and recognized the tribe's hunting rights in the Powder River area.); DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP 1790-1880, 42–43 (2007) (The Federal Government acknowledged the Cherokee tribe was not a part of the state of Georgia and was not under its jurisdiction and further acknowledged that the Cherokee tribe was capable of governing itself).

[272] KESSLER-MATA, *supra* note 47, at 71; NATION, *supra* note 15, at 23.

[273] KESSLER-MATA, *supra* note 47, at 71; NATION, *supra* note 15, at 23.

[274] 25 U.S.C. § 71; NATION, *supra* note 15, at 28.

[275] *See* 25 U.S.C. § 71.

Congress, not just the Senate.[276] This law meant that ratified agreements would become statutes.[277] In turn, this allowed Congress to unfairly amend the statute during the enactment process without the consent of the tribes.[278]

Even if the Federal Government negotiated treaties that unfairly benefited itself rather than the tribes, this does not diminish the tribes' sovereignty. What matters is that the tribes had the capacity at one point to create treaties with other nations. The definition of a treaty is an international political agreement between sovereign states.[279] Even if the treaties were unfair, or broken, the fact that the Federal Government entered into treaties with the tribes demonstrates that the tribes were separate from the United States. Likewise, these treaties demonstrate that the tribes were and still are sovereign. Felix Cohen in *Handbook of Federal Indian Law,* best describes how the tribes maintain their sovereign status despite the Federal Government's abuse of power:

> Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters, which in the judgment of Congress, these tribes could no longer be safely permitted to handle.[280]

Thus, even if many of the treaties between the Federal Government and the tribes were unfair and even harmful to the tribes, that does not mean tribes are not sovereign. Albeit their sovereignty was weakened, but it was never completely stripped from the tribes.

Because the tribes are capable of forming and entering into treaties, they already possess one of the key components for establishing nationhood: "[T]he capacity to enter relations with other states."[281] However, when the

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[276] *Id.*; NATION, *supra* note 15, at 28 (quoting 41st Cong., 3rd Sess. 1154 (1871)).

[277] NATION, *supra* note 15, at 29.

[278] *Id.*

[279] *What are Treaties and International Agreements?*, INT'L LEGAL RSCH., https://law.duke.edu/ilrt/treaties_2.htm (last visited Sept. 4, 2021).

[280] KESSLER-MATA, *supra* note 47, at 73–74 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942)).

[281] *See* Seguin, *supra* note 12.

tribes become their own nations, they would not be restricted by the United States. Instead of only entering into agreements with the Federal Government,[282] tribes would be free to enter into treaties, as is their custom, with other nations, tribes, and even individuals. If the United States and other countries *actually* abided by the terms in those treaties, tribes could develop economic sufficiency and promote their true interests.

B. *Pragmatic Considerations*

In order to be recognized as a nation by the rest of the world,[283] a tribe would need to apply to become a member of the United Nations. This is a somewhat detailed process. First, a tribe must submit an application to the Secretary General.[284] Second, the Security Council considers the application.[285] In order to pass this process, nine of the fifteen members of the Council must vote in favor of admission, constituting a two-thirds majority.[286] If the tribe receives a two-thirds majority, their application is passed to the General Assembly.[287] The General Assembly specifically considers whether the tribe is "a peace-loving State and is able and willing to carry out the obligations contained in the Charter."[288] If the General Assembly determines the tribe meets these credentials, the tribe becomes a member of the United Nations and more importantly, receives global recognition as a nation.[289]

One foreseeable issue that could arise is that the United States may not vote in favor of a Native American tribe becoming its own independent nation. According to the rules of procedure, when an application reaches the Security Council, it must receive approval from nine of the fifteen members sitting on the council.[290] Nonethless, if any of the five permanent members, i.e., China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States, vote against the

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[282] *See* 25 U.S.C. § 177.

[283] *About U.N. Membership*, UNITED NATIONS, https://www.un.org/en/about-us/about-un-membership (last visited Sept. 4, 2021) ("The recognition of a new State or Government is an act that only other States and Governments may grant or withhold.").

[284] *Id.*; *Rules of Procedure: Admission of New Members to the United Nations*, UNITED NATIONS, https://www.un.org/en/ga/about/ropga/adms.shtml (last visited Sept. 4, 2021).

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] *See id.*; *About U.N. Membership*, *supra* note 283.

[290] *About U.N. Membership*, *supra* note 283.

application, the applicant is automatically denied membership.[291] Considering that in the past the United States exploited the tribes for its benefit, forced them to obey its laws, greatly restricted their ability to govern themselves, and attempted to civilize their people, the United States may not favor of the tribes' gaining independence. Nonetheless, there are a few ways the tribes could circumvent this problem if it arises.

First, the tribes could write a letter to the United Nations in their application and ask them to exclude the United States' vote for prejudicial purposes. Second, the other members of the United Nations could convince the United States to vote in favor of admitting the tribes. Ultimately, the United Nations seeks to keep peace, combat international problems, and promote "fundamental freedoms."[292] Therefore, the other members of the United Nations may view the tribes gaining independence and separation from the United States as finally realizing these freedoms. Lastly, the United States may want to right its historical wrongs and actually vote in favor of the tribes becoming their own nations. After all, the United States maintains that the tribes are no longer wards of the Federal Government and are capable of governing themselves.[293] If United States officials and politicians truly mean this, then they should support the tribes if they decide to pursue nationhood.

Another potential issue is that once a State becomes a member of the United Nations, it is expected to contribute financially to the United Nations' working capital fund.[294] In 2020, the United Nations' working capital fund amounted to one hundred fifty million dollars.[295] Logically, some may be concerned that even if a Native American tribe acquired membership in the United Nations, the tribe would not be able to afford the required fees to be a member. Nevertheless, it appears that the United Nations calculates a percentage of how much each member should contribute.[296] Smaller states that have struggling economies are not expected to pay nearly as much as larger states with flourishing economies.[297] For instance, Belize and Saint Lucia are only responsible for contributing .001 percent of the annual budget

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[291] *Id.*

[292] *Protect Human Rights*, U.N., https://www.un.org/ourwork/sections/protect-human-rights/ (last visited Sept. 4, 2021).

[293] *Frequently Asked Questions*, *supra* note 255.

[294] *See Assessment of Member States' Advances to the Working Capital Fund for 2020 and Contributions to the United Nations Regular Budget for 2020*, U.N. DOC. ST//ADM/SER.B/1008 (Dec. 30, 2019).

[295] *Id.*

[296] *Id.*

[297] *Id.*

which equals only fifteen hundred United States dollars.[298] In contrast, the United States is responsible for twenty-two percent of the budget which equals thirty-three million dollars.[299] Even the poorest tribes would likely be able to scrape some money together either through using savings, raising taxes, or receiving a loan from another tribe or nation.

V. CONCLUSION

Conceivably, Native American tribes becoming their own independent nations would promote tribal sovereignty, but it would also be a difficult process. This Comment is unable to address all the concerns that follow this solution such as whether the Federal Government should continue giving aid to the tribes after they become their own nations, whether non-tribal members living within Indian country would have to relocate, and whether this solution is feasible for smaller tribes that do not own a lot of territory. These concerns and others should undoubtedly be considered in the future. Further, there is no guarantee that Native American tribes would want to become their own nations. The tribes may simply enjoy their dual status as citizens of the United States and citizens of their tribes. Nonetheless, because tribes were exploited by the Federal Government throughout history, they at least deserve the option to consider liberating themselves from the United States.

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[298] *Id.*

[299] *Id.*