"Johnson v. M’Intosh, Plenary Power, and Our Colonial Constitution" by Alexandra Fay

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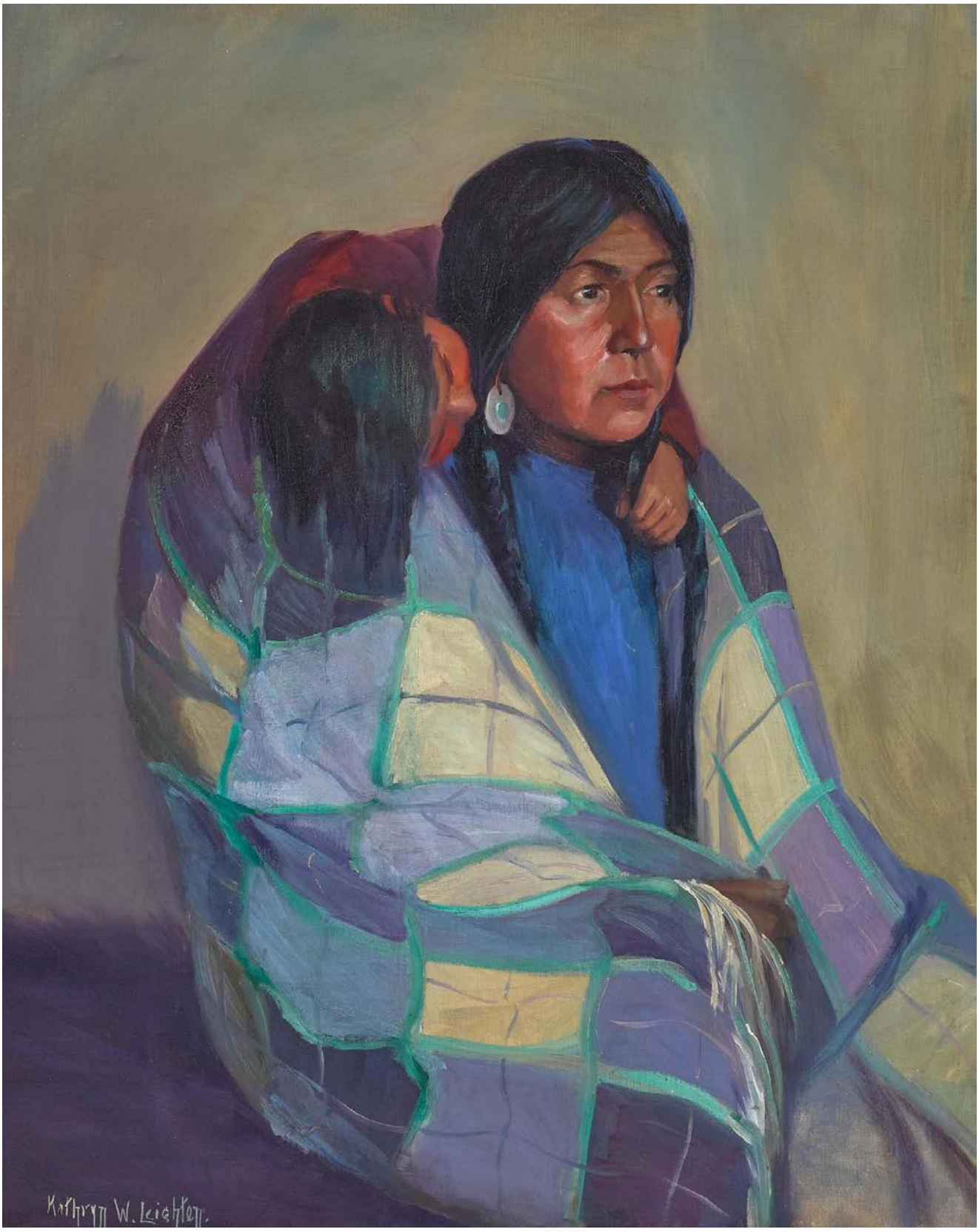

Johnson v. M'Intosh, Plenary Power,

and Our Colonial Constitution

Alexandra Fay

“Wife and Child of Bull Plume” by Kathryn Woodman Leighton (Wikimedia PD-US)

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In *Johnson v. M’Intosh,* Chief Justice John Marshall articulated the doctrine of discovery as a justification for the legal subordination of Native people and their rights. In European international law, the doctrine of discovery gave European empires the legal right to settle whichever parts of the New World they “discovered.” Inherent to this idea was the presumption that Native lands were available for settlement and civilization by the Christian nations of Europe. By importing this doctrine into American law, the Supreme Court justified American claims over Native lands, disregarding Native Nations’ rights to their sovereign territory. Even in that 1823 decision, the Supreme Court demonstrated discomfort with the pretensions of empire — the brazen assertions of colonial claims at odds with the reality of a continent already settled by Indigenous civilizations. Two hundred years later, legal principles derived from conquest maintain their hold on federal Indian law. To this day, the doctrine of discovery and its progeny remain glaring examples of the colonial commitments of American law. Thus, via the doctrine of discovery, the United States owned title to all the lands it won in the Revolutionary War, subject only to the Indian right of occupancy. Moreover, according to the Court, the United States retained exclusive power to extinguish that Indian right of occupancy.

This essay considers the legacy of *Johnson v. M’Intosh.* You can find *Johnson* in the first pages of every federal Indian law textbook. All Indian law students (and some well-educated constitutional law students) are versed in the Marshall Trilogy, comprising *Johnson* and two other John Marshall decisions, *Cherokee Nation v. Georgia*(1831) and *Worcester v. Georgia* (1832). The Marshall Trilogy constitutes the foundation for American law governing relations between tribes, the states, and the federal government. In recent generations, American law has aspired toward justice for Native nations through the recognition of tribal sovereignty and self-determination. Nonetheless, the basic framework of federal Indian law remains inextricably tied to notions of European racial, cultural, and spiritual superiority. Ultimately, these colonial ideas have justified an unsettling doctrine that should disturb anyone who treasures fairness, due process, and limited government: the plenary power doctrine. The plenary power doctrine, which still reigns over Indian law today, grants the federal government essentially unmitigated power over Indian affairs.

> *Johnson v. M’Intosh* was a land dispute, where multiple parties brought competing claims of title. Marshall boiled the case down to one question: can an Indian sell their land to a settler? Of course, this question begot another: can Indians own land at all? To answer these questions, Marshall recounted a story of colonization.

Greedy for new land and resources — and angling to justify and protect their new gains — European nations devised a formal means to facilitate the distribution of the New World among the Old World empires. They invented the doctrine of discovery. This doctrine gave the European power that made first contact with a territory the exclusive right to settle that territory, to negotiate with its Native inhabitants, and to make their claims by whatever force they deemed necessary. The doctrine of discovery assumed that the land and its resources were available for appropriation. Native Nations' claims were necessarily impaired, their sovereignty diminished in the eyes of the conquerors. As Marshall described, Indian title was reduced to the right of occupancy: to use the land as they had customarily, but never to truly own it.

Chief Justice Marshall made no grand endorsement of this doctrine's legitimacy. He recognized the doctrine of discovery as a product of Old World politics, prompted by intra-European competition, rather than any natural right. Nonetheless, Marshall upheld that doctrine and claimed its benefits for the United States. According to Marshall, the United States had taken up Britain's role in the New World and inherited Britain's imperial rights under the law of nations. Thus, via the doctrine of discovery, the United States owned title to all the lands it won in the Revolutionary War, subject only to the Indian right of occupancy. Moreover, according to the Court, the United States retained exclusive power to extinguish that Indian right of occupancy.

Beyond his pragmatic acceptance of the doctrine of discovery, Marshall also embraced some of the narratives that gave it power. He remarked that Indians were "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest." Their dispossession was necessary for progress: "[t]o leave them in possession of their country, was to leave the country a wilderness." These narratives — enabled by blinding ethnocentrism — worked to disregard and erase Indigenous law, politics, and economies. They justified the expansion of Anglo-American power in the name of civilization. By definition, "plenary" means unqualified and absolute. When it comes to Native people, the federal government is basically unconstrained.

In 1831, the Supreme Court revisited the topic of tribal sovereignty in *Cherokee Nation v. Georgia.* When the State of Georgia illegally implemented state laws on tribal land, Cherokee Nation petitioned the Supreme Court, asking for federal intervention. This petition relied on the Court's authority to hear original cases between foreign states and states in the Union, thus presenting a crucial question: are tribes "foreign states" under the terms of the Constitution?

To answer this question, Marshall drew upon his reasoning in *Johnson.* Since tribes occupy territory to which the United States claims ownership, they could not be characterized as foreign entities. Rather, tribes should be understood as "domestic dependent nations." According to Marshall, Indians were in "a state of pupilage," and the relationship between tribes and the United States was like that of "a ward to his guardian." The concept of Indian

title, derived from the doctrine of discovery in *Johnson*, enabled the Court to make this next step to the condescending characterization of domestic dependent nations. Cherokee Nation's petition would not be heard, and the federal government would sit by as Georgia violated the Nation's sovereign borders.

A year after *Cherokee Nation,* Marshall penned the final decision in the Trilogy. In *Worcester v. Georgia*, Marshall's skepticism of the doctrine of discovery was on full display. He wrote:

> It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors. . . . But power, war, conquest, give rights, which after possession, are conceded by the world. . .

Exactly a decade after *Johnson,* Marshall clarified his assessment of the doctrine of discovery, recognizing it as a brazen claim made law through power and concession. He remarked that "holding [this history] in our recollection might shed some light on existing pretensions."

Worcester is remembered as a victory for tribal sovereignty, not because it altered any part of the ward-guardian relationship between tribes and the federal government, but because it limited the power of states in relation to tribes. *Worcester* did not change the category of domestic dependent nations, nor the Indian right of occupancy. Instead, the decision set clear boundaries between tribes and states. The State of Georgia had no authority to enforce its laws on tribal land. Only the federal government had the power to intervene in tribal governance.

While *Worcester* may be celebrated as the most enlightened of the Marshall Trilogy, the legal principles set out in *Johnson* and *Cherokee Nation* have proved to be the most enduring. In *United States v. Kagama*(1885), the Supreme Court built off the Marshall Trilogy to further define the ward-guardian relationship. Kagama contested the constitutionality of the Major Crimes Act, which Congress passed to claim greater federal criminal jurisdiction over Indians. Kagama argued that there was no constitutional basis for the law. The Court disagreed. Although it could not trace the supposed power to any particular section of the Constitution, the Court nonetheless found that such power was necessary given the unique relationship between tribes and the national government.

According to the Court: "From [Indians'] very weakness and helplessness, so largely due to the course of dealing of the federal government with them. . . there arises the duty of protection, and with it the power." This remarkable power, untethered to any text of the Constitution, "must exist in [the federal] government, because it has never existed anywhere else. . . because it has never been denied." This ruling would come to be known as the origin

of the plenary power doctrine: the assertion that Congress has practically unbounded power over tribes. Congress can authorize federal prosecutions of Indians who, like Kagama, commit crimes against other Indians on reservations. Congress can intervene in internal tribal affairs. Congress can diminish reservations, terminate tribes, and violate its own treaties.

The Court reiterated the plenary power doctrine a couple decades later, in *Lone Wolf v. Hitchcock*(1903). In *Lone Wolf,* Congress unilaterally abrogated a treaty it made with the Kiowa and Comanche tribes. When Kiowa leader Lone Wolf brought a lawsuit, the Supreme Court refused to intervene. According to the Court, Congress can violate its own treaties. Congress has plenary power over Indian affairs, just as it has plenary power over international affairs. In its defense of plenary power, the Court relied on *Chae Chan Ping v. United States*, the 1889 case upholding the racist Chinese Exclusion Act in violation of international treaty promises.

Generally speaking, our national government is one of limited powers — with the exception of the plenary power doctrine. Typically, Congress has to tie its legislation to specific sections of the Constitution, such that its actions must relate to Constitutional provisions regarding powers of taxation, spending, and the regulation of interstate commerce. But Indian law operates on an entirely different constitutional plane. By definition, "plenary" means unqualified and absolute. When it comes to Native people, the federal government is basically unconstrained.

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This disquieting contrast recently occupied a national spotlight in *Brackeen v. Haaland,* the case considering the constitutionality of the Indian Child Welfare Act (ICWA). The Indian Child Welfare Act established minimum standards for the removal of Indian children from their parents, and it instituted rules for the placement of Indian children with foster and adoptive families. These rules include preferences for family members, tribal community members, and other Indians. Congress passed ICWA to address the long, devastating history of Indian family separation in the United States. And nowadays, ICWA is often considered to be the gold standard for child custody policy. Yet the opponents to ICWA argued, among other claims, that ICWA is unconstitutional because Article I of the Constitution does not authorize Congress to pass such a law. In doing so, they assert that the plenary power doctrine does not extend to the domain of family law.

When the Supreme Court heard the case in 2022, advocates for the United States and tribes found themselves in the awkward position of defending a far-reaching account of plenary power. Justice Alito dogged Deputy Solicitor General Edwin Kneedler on the extent of plenary power, commenting: "if plenary means plenary, Congress can do whatever it wants . .

. But, if there are limits, it's hard for me to see where the limits are." To be sure, Kneedler offered a basic limitation that requires Congressional action to be rationally related to the fulfillment of Congress' trust relationship with tribes. He later added that there can be external limitations provided by other parts of the Constitution, such as the equal protection clause of the Fourteenth Amendment. Nevertheless, the plenary power he described was frighteningly broad. This breadth was made painfully clear when Justice Alito pointedly asked whether Congress had the power to force Native kids into the federal boarding school program that abused generations of children across the 19th and 20th centuries. Mr. Kneedler conceded that yes, Congress did.

Two centuries after John Marshall formally incorporated the doctrine of discovery into American Indian law, our modern Court sits uneasily with its legacy. In that time, tribal advocates and their allies have worked to make the most of our colonial legal inheritance. Those who strive to push Indian law toward justice are determined realists. We understand that the law is imbued with colonial commitments and we work to maximize tribal sovereignty within these constraints. But we cannot ignore the following: from the doctrine of discovery to the doctrine of plenary power, the right of conquest remains the law of the land.♦

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