THIS LAND IS YOUR LAND, THIS LAND IS MY LAND:
INDIAN LAND CLAIMS

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I. PURPOSE .................................................................................................... 1
II. Pre-Constitution Era ................................................................................ 2
III. The Confederation and Constitution Era ................................................. 6
IV. The Indian Trade and Intercourse Acts .................................................. 9
V. The Marshall Trilogy ............................................................................. 10
VI. The Modern Era ..................................................................................... 14
VII. Federal Recognition ............................................................................. 15
VIII. Federal Land Claims Settlement Acts .............................................. 15
IX. Origin of the Acts ................................................................................... 16
X. The Modern Era: The Oneida Claims I and II....................................... 17

I would have been better pleased if you had never made such promises
than that you should have made them and not performed them. . .
Shinguacsonse (“Little Pine”)1

I. PURPOSE

The purpose of this paper is to provide a basic understanding of the history
and process of Indian land claims in the eastern states. When necessary, a brief
history of the parties or the question in issue will be presented. While this paper
concentrates on claims in the United States, the issue of Indian land claims is not
so limited. For example, “The Mississaugas of the New Credit, a band of 1,500,
are seeking retroactive compensation from Ottawa for Toronto Purchase, a quarter
million acres covering the whole of Toronto and into the suburbs . . . . The Indian
Claims Commission, a federal agency, says it is handling 480 land claims cases.
There are dozens more in the courts.”2 The government of Canada has agreed to
payments of $5 billion (Can) to fund various claims but after the recent shift from
the Liberal to Conservative the payments appear to be cut back to about $450
million.3

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1 Indigenous Peoples Literature, http://www.indigenouspeople.net/ipl_final.html
2 Ruth Walker, Indian Land Claims Flood Ottawa, THE CHRISTIAN SCIENCE
3 April Lindgren, Aboriginal Leaders Push for Accord: Premiers Back Agreement as
The road to understanding Indian land claims is not an easy one to follow. As one author remarked concerning the holdings of two United States Supreme Court cases—the answer is yes and no. What follows is an outline of the development of the policies for governmental dealing with Indians in the colonies of Great Britain and subsequently the United States.

II. THE PRE-CONSTITUTION ERA

The basic legal tenets concerning the treatment of Indians in the United States were first established in the pre-colonial days and are generally attributed to the Spanish intellectual Francisco de Victoria. Victoria had been requested by the ruler of Spain in 1532 to comment on the Spanish rights in the New World. The subsequent writings of Victoria established the principle that Europeans could not exercise political dominion over Indians nor could the land of the Indians be acquired absent the assent of the Indians. It is interesting to note that Victoria is considered by many to be the founder of international law and it is therefore not surprising that dealings between the Indians and the European governments and eventually the United States government are based on a sovereign to sovereign relationship. The principles of Victoria relating to the acquisition of land involved three assumptions: (1) that both parties to treaties were sovereign powers; (2) that Indian tribes had some form of transferable title to the land; and, (3) that acquisition of Indian lands was solely a governmental matter, not to be left to individual colonists. These principles were not limited to the Spanish dealings with the natives in the New World. As early as 1630 the Dutch colonies were instructed by the government in the Netherlands to deal with the Indians in a manner consistent with the tenets of Victoria and it is reported that the Dutch settlers did generally adhere to these instructions.

Within the colonies of Great Britain, there was considerable variation in the application of Royal policy vis-à-vis the native population. Generally, the colonial government was the representative of the Crown and, in the presence of the governor, was responsible for carrying out all policy: including diplomatic, military, economic and land. Those responsible for the fair and just application of the policies of the Crown were the same individuals who were most likely to benefit from a less than fair application. It is therefore not surprising that disputes

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8 COHEN'S HANDBOOK, supra note 6, at 47.
arose between the Indians and the colonies, and ultimately the English government. The established policy of the government in London was not dissimilar to that contained in the writings of Victoria, i.e. the Indians tribes were distinct sovereign governments and, as such, all dealings were to be on a government-to-government basis. By 1651, the Puritan colonies which consisted of Connecticut, Massachusetts Bay, Plymouth Colony and Rhode Island had all acquired settlement land by purchase from the Indians and such purchases were conducted in a manner somewhat similar to a sovereign to sovereign principle. However, numerous violations of the established policy by the colonists led to Indian complaints being communicated to the government in London. In 1664, King Charles II appointed a royal commission to investigate these complaints. The findings of the Commission resulted in instructions to the colonial governments regarding the acquisitions of Indian lands, among other requirements that Indian lands could be taken by conquest only if the conquest was just and resulted from the protection of validly occupying colonists.

At the beginning of the 18th century, a case was heard in Connecticut that is considered by many to be one of the most important cases from the pre-revolution period. Mohegan Indians v. Governor of Connecticut was brought in 1703 and continued until 1773. In this case, the Mohegans were seeking return of a large tract of land that had been signed over to a Major Mason, who eventually became the Deputy Governor of the colony. Court documents state that on the 14th of January 1638, the English in Connecticut entered into articles of government and on the 15th of August 1659, Uncas and Wawequa, Sachems of the Mohegans, conveyed to Major Mason all the lands belonging to them, with the caveat that the Indians should always have a right to lands sufficient to plant on. In this case, the Mohegans were seeking the return of a large tract of land that they felt was unjustly taken from them. Although the Mohegans lost their claim for a major portion of the land, the case did establish two important points: 1) the Indians were separate nations not under the political control of Great Britain and therefore it was the central government in London, and not the colonial government, that

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9 Id. at 54.
11 Id. at 335. Although this case is often referred to as “unpublished,” the case in some form was included as Exhibit 287 in the Mohegan Land Claim case against the State of Connecticut. See Mohegan Tribe v. Conn., 528 F. Supp. 1359, (D. Conn. 1982). According to Clinton, while there are several references to this case in various historical documents, the source of the information in the Mohegan case is not known. Although important in the general discussion of Indian land claims, the case was especially important to the modern Mohegan claim since an act of the General Council “on 11th of May 1721 effectually, and for ever, secured a tract of between 4 and 5,000 acres of land situate on the Mohegan River, between New London old line and Norwich, for the use of the Mohegan Indians; and said lands being reputed good and valuable lands, that the land is sufficient for the tribe or nation of the Mohegans to plant on for their subsistence.”
was responsible for establishing policy relating to Indians, and 2) the Indians owned the land and it could be acquired only by fair and honest purchase approved by the government. The Court of Commissioners stated:

The Indians, though living amongst the king's subjects in these countries, are a separate and distinct people from them, they are treated with as such, they have a polity of their own, they make peace and war with any nation of Indians as they think fit, without controul from the English . . . . [I]t is plain . . . that the crown looks upon the Indians as having, the property of the soil . . . and that their lands are not [colonial territory] till [the colonists] have made fair and honest purchases of the natives . . . .[This] matter of property lands in dispute between the Indians as a distinct people . . . and the English subjects, cannot be determined by the law of our land, but by a law equal to both parties, which is the law of nature and nations.12

In the pre-Revolutionary era the colonists developed a tendency to ignore the principles of Victoria and as a result, dealings with Indians had generally degenerated into individual transactions.13

During the French and Indian War, the British government in London once again attempted to take control of relations with the Indians in the colonies. This may have had as much to do with punishing the tribes that allied with the French and rewarding the tribes that remained loyal to the British as it did with any application of the laws of nature or of nations. In any event, two superintendents of Indian affairs were appointed to act as ambassadors with the various Indian tribes. On several occasions, the British government, to the detriment of the colonists, supported the sanctity of the treaties made with the Indians.14

During much of this time, most of the policy of the government was controlled by the Board of Trade, known by various titles including the Lord of

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12 Majority opinion of Comm'r Horsmanden, Aug. 1, 1743, quoted in Kronowitz, supra note 7, at 513-14 (emphasis in original); the case was brought in 1703, the opinion issued in 1743 and finally affirmed in 1773 by the Privy Council.

13 It should be noted that not all of the English Colonies acquired land in the same manner. Cohen attributes this to the anarchic conditions in some of the colonies. It would seem that the lifestyle and ethic of the Puritan colonists lent themselves to the stricter application of rules. By the early 1700s, these colonies were well established and land transactions with the Indians were minimal. Some of the colonies, however, were still in what could be considered a “frontier” status. The “frontier” life of the Carolinas led to different ideas on how rules were to be followed. This frontier attitude led to purchases of Indian land by individual settlers rather than by the representatives of the sovereign, and in many cases the forceful expulsion of Indians and the subsequent occupation of the land by settlers. Although these actions did not necessarily lead to the development of legal principles, they can surely be seen in many of the actions taken by the United States government in the mid and latter 1800's.

14 COHEN’S HANDBOOK, supra note 6, at 57.
Trades, the Council of Trade or the Lord Commissioners of Trade and Plantations. This group had been established by William III to centralize trade and commerce. With the French having a formidable presence to the west of the English colonies in the early to mid 1700s, the Board began to take a more active role in the governance of Indian affairs as a means of countering the French commercial influence with the various Indian tribes. Much of the concern came from merchants in London who were being monetarily impacted by the fur trade between the Indians and the French. After cessation of hostilities between the French and the British in 1748, the method of dealing with Indians in the colonies was in general disarray, being divided and inadequate. The conditions led to the Board of Trade urging that a convention be called to address the problem of the fractured policy within the colonies. Finally, the Albany conference convened in 1754. A draft report which called for a Plan of Union was composed by Benjamin Franklin. The plan called for a centralization of the governance of Indian affairs.

In 1758, a treaty conference was held in Easton, Pennsylvania, and resulted in a new set of arrangements that ceded land from the Delawares to the Six Nations of the Iroquois Confederacy. This was exactly what the Crown wanted, but was against the interests of the colonies hosting the conference, Pennsylvania and New Jersey. Since the interests of the Crown were the same as some of the northern colonies, the results of the conference pitted colony against colony and colony against the crown. These problems, among others, resulted in the publication of what was probably the most important proclamation of the Crown regarding Indian policy in the colonies. This was the Proclamation of 1763.

The Proclamation was based on four basic precepts: 1) definite boundaries were established between the colonies and the “Western Tribes,” 2) no governor could subsequently grant survey rights or title to land that had been ceded to or purchased by the Crown, 3) British subjects could not take possession of Indian lands without a permit from the Crown and if any were in such possession they were to be removed, and 4) any lands east of the western demarcation line were to be purchased only by the Crown. All dealings with the Indians were centralized.

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15 Clinton, supra note 10, at 337 n.21.
16 Id. at 344.
17 Id. at 346.
18 Id.
19 Id. at 352.
20 See Clinton, supra note 10, at 382 (For a complete discussion of the Proclamation of 1763, included as an appendix to this article is a copy of the Proclamation which is only a few pages long. Clinton points out that if it weren’t for the fact that the Proclamation was a product of the hated King George III it might have been assumed in great part into the policy of the new government of the United States of America. Much of the document deals with areas outside of the colonies, especially in Canada, which explains why the Proclamation has such an important place in the Indian claims presently being considered in Canada. The Proclamation became part of Canadian law).
21 Id.
in officials appointed by the Crown. “In United States Indian policy, the Proclamation of 1763 is a critical—perhaps the critical element . . . [it] emerged from over a century of colonial confusion, mismanagement, and greed in the implementation of Indian policy, and it sought to resolve such problems by restructuring relations between local Euro-American colonial governments and Indian Tribes.”

After 150 years, the policy of the British government vis-à-vis the Indians had finally been formalized, only 13 years before the War for Independence.

III. THE CONFEDERATION AND CONSTITUTION ERA

The Revolutionary War was the next important era for Indian relations and the governments of the Americas. As noted earlier, the draft of the Plan of Union that was a product of the Albany Conference in 1754 was penned by Benjamin Franklin. It must be assumed that he, along with other members of the Continental Congress, carried the ideas of a central responsibility for Indian relationships forward to the Articles of Confederation. A section of the fourth paragraph of Article IX of the Articles of Confederation states:

The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all the affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated . . . .

A review of the proceedings of the Continental Congress indicates that there was a great deal of debate over the question of the relationship. The final draft was undoubtedly a compromise and an attempt to be acceptable to those who wanted a strict states rights clause and those who believed in the federalist approach of retaining the power of dealing with the Indians in the central government. The meaning of certain of the provisions of the article has never been conclusively defined. For example, the definition of Indians “not members of any of the States” is unclear. After the drafting of the original Article 14 (subsequently appearing as Article 9) of the Articles of Confederation, a proposal was made on October 27, 1777, to strike out the term “not members of any of the States”.

22 Id. at 357.
23 Id. at 381.
states," and replace it with “not residing within the limits of any of the United States.” Obviously this motion was never acted upon in the affirmative, but is does indicate that there was doubt about the actual meaning of the original term. If the term meant inhabitants of the states, then the clause must be read to mean that the central government would henceforth be responsible for dealings with Indians outside the boundaries of the original colonies. However, if that meaning is to be ascribed, the remainder of the clause is meaningless. What would not be the rights of the state legislatures within their own limits? The term “members of any of the States” probably referred to Indians who had been assimilated into the white community, a practice that was common in the northern colonies.

Similarly, the clause “retaining in the states their legislative rights” caused considerable disagreement. A large amount of Indian territory was in land that was claimed by the various states, who held that the clause reserved to them the power to deal with Indians within those territories. The final resolution of this question did not appear until September of 1783 when the Congress issued a proclamation which stated:

[I]t is essential to the welfare and interest of the United States as well as necessary for the maintenance of harmony and friendship with the Indians, not members of any of the states, that all cause of quarrel or complaint between them and the United States, or any of them, should be removed and prevented: Therefore the United States in Congress assembled have thought proper to issue their proclamation, and they do hereby prohibit and forbid all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular State, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and directions of the United States in Congress Assembled . . . . And it is moreover declared, that every such purchase or settlement, gift or cession, not having the authority aforesaid, is null and void, and that no right or title will accrue in consequence of any purchase, gift, cession or settlement.

The actions of the Continental Congress were not only to insure the interest of the Indians, it was also “to treat with the Indians . . . in order to preserve peace and friendship with the [said] Indians and to prevent their taking any part in the present commotions.” In one of its earlier actions, it created departments to be

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26 See id., Volume IX at 844.
28 Id. at 25.
29 JOURN. OF THE CONT. CONG., supra note 26, Volume XXV at 602.
30 COHEN’S HANDBOOK, supra note 6, at 58 (quoting JOURN. OF THE CONT. CONG., Volume II at 175 (1775) (emphasis added)).
responsible for the Indian affairs in various geographic areas. The departments were not entirely successful and Indians joined both sides during the war. After the war, treaties were entered into with several Indian tribes. The first Indian treaty entered into by the government of the United States was with the Delaware Tribe, which had allied with the colonists during the war. In 1778, they were invited to “join the present confederation and to form a state . . . and have a representation in Congress.” In 1785, the Cherokees, who had sided with the British during the war, entered into a separate peace treaty with the United States whereby the Cherokee “shall have the right to send a deputy . . . to Congress.” Although George Washington believed, and the Continental Congress instructed, that the tribes that had supported the British had forfeited their lands, this policy was never carried out.

Recognition of, and relations with, Indians was acknowledged by the framers of the Articles of Confederation as well as the Constitution. Recognition occurs in the Constitution in Article I, Section 8, clause 3 giving Congress the power “to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes.” Article I, Section 2, clause 3 excludes Indians not taxed from the count to determine representative districts. Also, Article II, Section 2, clause 2 applies the treaty power to Indians. The Fourteenth Amendment adds slaves to the count for representation but once again excludes Indians. Much has been written concerning the intent of the framers with respect to the references to Indians. The Commerce clause seems to give the Indian Tribes status at least equal to the states and possibly status equal to foreign nations. The exclusion of Indians from the count for representation might indicate that the Indians were to be considered separate and distinct for purposes of representation. This point of view can be supported by the treaties with the Delawares and the Cherokees previously discussed, in that both speak to separate and specific representation, a situation that never occurred. Some observers apply a rather explicit definition. Consider the following:

During the framing of the Articles of Confederation and the Constitution, the only real debate regarding Indians concerned the division of power between the state and federal governments in the conduct of Indian relations. The lack of debate or consideration of the

31 COHEN'S HANDBOOK, supra note 6, at 58.
33 Id. (quoting Treaty with the Cherokees at Hopewell, Art. XII, Nov. 28, 1785, 7 Stat. 18, 20). The Cherokee refused to recognize the Treaty of Paris ending the American Revolution and insisted on the separate treaty at Hopewell.
34 COHEN'S HANDBOOK, supra note 6, at 59.
exercise of power over Indian nations reveals the Framers' acceptance of the idea that no federal or state authority over the Indians existed without their consent. The Constitution, in providing for the negotiation of treaties with the Indians and the regulation of commerce with them, as with other foreign nations, incorporated the sovereign and independent conception of Indian nations held by the Framers. The conduct of relations with Indian nations by treaty up until the late nineteenth century illustrates the continuing international character of the relationship between the sovereign nations of America. The true intention of the Constitution was to serve as a framework for United States-Indian relations, and not as a source of United States power.36

Whether the lack of debate on this topic is evidence that the Framers’ acceptance of the idea that no federal authority existed without the consent of the Indians is a debatable point. The Treaty of Hopewell mentioned earlier gave Congress the right of “. . . managing all their affairs in such manner as they think proper.”37 With the knowledge of the content of the Treaty, the Framers' may not have debated the point for any reason other than that proposed by Kronowitz. Cohen comments on the same sections of the Constitution with a very different conclusion. “The historic notion of tribal independence, subject to paramount authority in the United States, was reflected in the original Constitution's mention of Indians in two contexts . . . the Commerce clause . . . (and) Indians not taxed.”38 Perhaps there was no debate because the question of power, the absolute power of the United States, was never in question.

IV. THE INDIAN TRADE AND INTERCOURSE ACTS

Immediately after the approval of the Constitution, Congress moved to pass legislation that became the basis for our modern policy for alienation of Indian land. On July 22, 1790, “An Act to Regulate Trade and Intercourse With the Indian tribes”39 was passed. The Act contained seven sections, the first three dealing with licensing of those persons allowed to trade with the Indians; the fourth dealt with the sale of lands and provided:

That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption of such lands or

36 Kronowitz et al., supra note 7, at 514 (internal citations omitted).
37 COHEN'S HANDBOOK, supra note 6, at 61.
38 COHEN’S HANDBOOK, supra note 6, at 232–33 (emphasis added).
not, unless the same shall be made and duly executed at some public
treaty held under the authority of the United States. 40

The fifth and sixth sections of the act dealt with crimes and trespasses against
Indians and the seventh declared that the act was to be in force for a period of two
years. The act was modified in minor detail in 1793, 1796 and 1799, remaining as
temporary legislation.41 In 1802, the legislation was made permanent and finally,
in 1834 it was codified in the United States Code as follows:

No purchase, grant, lease, or other conveyance of lands, or any title or
claim thereto, from any Indian nation or tribe of Indians, shall be of any
validity in law or equity, unless the same be made by treaty or
convention entered into pursuant to the Constitution. Every person who,
not being employed under the authority of the United States, attempts to
negotiate such treaty or convention, directly or indirectly, or to treat with
any such nation or tribe of Indians for the title of purchase of any lands
by them held or claimed, is liable to a penalty of $1,000. The agent of
any State who may be present at any treaty held with Indians under
the authority of the United States, in the presence and with the approbation
of the commissioner of the United States appointed to hold the same,
may, however, propose to, and adjust with, the Indians the compensation
to be made for their claim to lands within such State, which shall be
extinguished by treaty.42

Although it was the 1834 Act that was finally codified, and the Act is titled
the Trade and Intercourse Act, the common reference is to the 1790
Nonintercourse Act.43 While the enforcement of the statute has been lax during
extended periods of U.S. history, it is the basis for most of the claims being made
in the modern era. As is normal in the Common Law system, it is left to the
courts to explain and develop the law when disputes arise among interested
parties. Much of our understanding of this law is a result of the opinions of Chief

V. THE MARSHALL TRILOGY

For most of the history of the United States, the government policy regarding
Indians has been based on the interpretation of the Constitution by Chief Justice
John Marshall in three cases that were decided between 1823 and 1832. These

40 1 Stat. 137.
730).
43 The Supreme Court has referred to the Act as the “Nonintercourse Acts.” See
Oneida Indian Nation, 414 U.S. at 667.
cases dealt with the issues of Indian land and the equally important issue of Indian sovereignty. There is, however, a real danger in attempting to apply a purely legal analysis to the holdings in these cases. As each of the cases in the trilogy is discussed, it will become evident that the point of view of the observer is of great importance. “Confusing questions and answers arise when the state and federal governments and commentators seek resolution based on a viewpoint which ignores the uniqueness of American Indian sovereignty . . . [a] critically different cultural perspective operates on the Indian side of the encounters.”

While these perspectives undoubtedly operate on both sides, it is of equal importance to remember that these perspectives change over time, again on both sides. Those that operated in 1823, when Marshall wrote the first opinion in the trilogy, may not have been the same that operated on one side or the other, or both, when he penned the final decision in 1832. Charles Wilkinson goes farther, stating "the concept of sovereignty carries with it an aura that transcends technical considerations of political science and law.”

The first of the cases to be decided by the Marshall Court relating to Indian land was Johnson v. McIntosh, decided in 1823. The first thirty or so pages of this case catalog the ascendency of title to certain lands in what was to become the area of Ohio and Illinois. The case involved two pretenders to some of the land, one who acquired title from the United States and another who acquired title indirectly from an Indian tribe. Marshall goes on at great length to discuss how the United States in general came into possession of the land. Within the text is the elaboration of the “discovery doctrine.”

This doctrine has had a history of controversy and has been condemned by many. “The discovery doctrine is an ethnocentric view, that white colonists purchased land in America from other foreign nations for absolute title subject only to the occupancy by Indian people.” The doctrine is well defined and articulated in the opinion and goes on to form the basis for the holdings in subsequent cases. In what is probably the biggest property case in history, Marshall states “. . . all nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the

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45 For a detailed look at the differences in these perspectives and the impact that they have in the modern tribal courts systems see Frank Pommersheim, Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence, 1992 WIS. L. REV. 411 (1992). Prof. Pommersheim is a recognized expert in the judicial systems and courts of Native Americans.
47 21 U.S. (8 Wheat) 543 (1823).
Indians.”49 Since Britain had therefore acquired titles to specific lands and by treaty ending the war had ceded all British rights to the United States, “... the right to soil, which had previously been in Great Britain, passed definitively to these States.”50 This may be put into perspective by a passage somewhat earlier in the case wherein Marshall states that the doctrine “... necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives...”51

In a statement that is not at all as clear as it purports to be, Marshall goes on,

[i]t has never been doubted, that either the United States, or the several States, had a clear title to all the Lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.52

Perhaps the doctrine can be put into historical perspective by this quote from Secretary of War Henry Knox, who stated,

the Indians being prior occupants, possess the right of the soil. It cannot be taken away from them except by their free consent or by the right of conquest in the case of a just war. To dispossess them on any other principle would be a gross violation of the fundamental laws of nature.53

What is made clear in this case is that the land holdings of the Indians have a status within the legal system of the United States. Marshall recognized that the Indians had a right to determine their own affairs, save only the powers of the United States and their right of alienation. This was the first of the steps toward the recognition of sovereignty of the Indians in America.

The second case in the trilogy was Cherokee Nation v. State of Georgia.54 The case was brought after the state of Georgia passed several laws, the intended effect of which was to bring the lands of the Cherokee under the laws of Georgia and to absorb such lands into the state and to apply certain other laws to the Cherokee people.

The effect of these laws, and their purpose, are stated to be, to parcel out the territory of the Cherokees; to extend all the laws of Georgia over the same; to abolish the Cherokee laws, and to deprive the Cherokees of the protection of their laws... and finally, declaring that no Indian, or

49 Johnson, 21 U.S. at 584.
50 Id.
51 Id. at 573 (emphasis added).
52 Id. at 584-85.
53 Kronowitz et al, supra, note 7, 515 n.35.
54 30 U.S. (5 Pet.) 1 (1831).
descendants of any Indian, residing within the Cherokee nation of Indians, shall be deemed competent witnesses in any court of the state of Georgia, in which a white person may be a party...55

The question in the case for Marshall was not necessarily the actions of the state of Georgia but one of the Court's jurisdiction. Article III of the Constitution deals with the jurisdiction of the Court and original jurisdiction is conferred in cases between states and foreign nations.56 The Cherokees put forth, through deductive reasoning, the argument “... that they are not a state of the union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.”57 While Marshall found this proposition intriguing, his analysis brought forth the doctrine of the “domestic dependent nation.”

[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward and his guardian.58

Marshall and other members of the court did however find a compelling argument to support the independent status of the Cherokee nation. “So much of the argument as was intended to prove the character of the Cherokee as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful.”59

The final case in the Marshall trilogy again concerns the state of Georgia, Worcester v. Georgia.60 Worcester was a citizen of the state of Vermont who was residing on the lands of the Cherokee nation within the boundaries of the state of Georgia. The state of Georgia had passed another series of laws and among them was the requirement that any white man residing on Cherokee lands apply for and receive a license from the state of Georgia. Worcester was one of four missionaries preaching to the Cherokee and residing on their lands with their permission. After his arrest for failure to obtain such a license, he was tried and

55 Id. at 8.
56 U.S. CONST. art. III §2.
57 30 U.S. (5 Pet.) at 16.
58 Id. at 17.
59 Id. at 16.
60 31 U. S. (6 Pet.) 515 (1832).
convicted of the offense and was sentenced to four years of hard labor at the Georgia State Penitentiary.\textsuperscript{61} Marshall's decision in the case held

[t]hat the Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, \textit{in which the laws of Georgia have no force}, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokee themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.\textsuperscript{62}

The three Marshall cases established the basic principles of federal Indian law. The “domestic dependent Nation” status of the Indian tribes indicated that they were under the protection of the federal government and, consequently, lacked sufficient sovereign authority for complete political independence. They did possess, however, sufficient sovereignty to exclude state incursion into their affairs.\textsuperscript{63} Since the codification of the Indian Trade and Intercourse Act of 1834 came after the last of the decisions in the Marshall trilogy, his reasoning is important in determining land claims arising prior to the 19th century.

\section*{VI. The Modern Era}

The dominant theme in the time between Marshall and the modern era was detailed in 1886. In \textit{United States v. Kagama},\textsuperscript{64} the court upheld broad powers of Congress in the form of the Major Crimes Act which extended federal jurisdiction to Indian lands for specified crimes. Instead of simply stating that Congress had broad powers to pass legislation over the dependent sovereigns, the Court recognized the superior sovereignty of both the federal and state governments. No reference to states was necessary since the Act had nothing to do with state jurisdiction.\textsuperscript{65} While Congress did have far reaching power over the affairs of Indians, the power was not absolute; there were still Constitutional requirements that had to be met, such as the prohibition against uncompensated takings.\textsuperscript{66}

Since there seemed to be a rather ambiguous policy concerning Indian sovereignty and land during the early years of the 20th century, it is rather fortuitous that one individual decided to produce a treatise on Indian law. In 1942, Felix S. Cohen's \textit{Handbook of Indian Law} was first published. This scholarly work has become the hallmark for Indian Law. Cohen’s scholarly explanation of Marshall’s trilogy and solid support of the doctrines contained

\begin{itemize}
\item \textit{Id. at} 536.
\item \textit{Id. at} 561 (emphasis added).
\item 118 U.S. 375 (1886).
\item Wilkinson, \textit{supra} note 46, at 57.
\item Cohen \textit{Handbook}, \textit{supra} note 6, at 217.
\end{itemize}
therein have had a tremendous effect on legal educators, practitioners, and the courts ever since the first publication. “Cohen's view—the Marshall-Cohen formulation—effectively stemmed the tide of opinions that threatened to bury the doctrine of tribal sovereignty in the name of changed circumstances.”

VI. FEDERAL RECOGNITION

Perhaps one of the most important questions to be considered when addressing any issue concerning Indians is that of federal recognition. While federal recognition is not a prerequisite for sustaining a land claim, it is sometimes a hurdle that proves insurmountable. In Vermont v. Elliot,68 the Supreme Court of Vermont recognized a protected right of occupancy by aboriginal title that can only be extinguished by abandonment or act of the sovereign.69 The right is not dependent on any form of governmental recognition.70 The stumbling block, however, is in the last portion of the discourse. The group making the claim must prove that they have constituted a tribe throughout relevant history.71

Recognition originally could be the result of congressional action, executive action or federal treaty.72 Since 1975, the Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI) has been responsible for recognition (acknowledgment)73 of Indian Tribes. The criteria for recognition were first proposed by Felix Cohen, the first solicitor of the BIA.74 The criteria are now formalized in the Code of Federal Regulations, Part 83—Procedures for Establishing That an American Indian Group Exists as an Indian Tribe.75 Annually the BIA is required to publish a list—Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs. As of March 22, 2007, there are 561 recognized tribes.76

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67 WILKINSON, supra note 46, at 58.
71 Mashpee Tribe v. New Seabury, Corp., 592 F. 2d. 575, 586-87 (1st Cir. 1979).
73 The terms “recognition” and “acknowledgment” are used interchangeably as seen in the title of the previous footnote. In current usage, the acknowledgment process leads to federal recognition.
74 COHEN'S HANDBOOK, supra note 6, at 674-75.
75 25 CFR §83.7 (2007).
76 Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs. 72 Federal Register 13,648 (Mar. 22, 2007).
VIII. THE FEDERAL LAND CLAIMS SETTLEMENT ACTS

Within Chapter 19 of Title 25 of the United States Code, there are 13 individual Settlement Acts addressing land claims of various Indian tribes. Of these, six relate to the New York and New England States. Each of the Acts was a result of acts of Congress and relates to specific issues arising out of claims that Indians made on lands within the individual states. They are:


Of note in each of these code sections is the fact that they are all a result of lawsuits to recover lands previously inhabited by Indian Tribes.

IX. ORIGIN OF THE ACTS

As stated earlier, and noted at the beginning of each of the Land Claims Acts, a lawsuit preceded the final Congressional action. In 1969, Thomas Tureen, upon completion of law studies at George Washington University, accepted a position with Pine Tree Legal Assistance, Indian Legal Services Unit. Attorney Tureen appears to be one of the first to interpret the 1790 Nonintercourse Act as applying to the land transactions between the Indian Tribes of New England that were not approved by Congress. In 1794, the Passamaquoddy entered into a treaty with

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78 JEFF BENEDICT, WITHOUT RESERVATION: HOW A CONTROVERSIAL INDIAN TRIBE ROSE TO POWER AND BUILT THE WORLD'S LARGEST CASINO, 6-7 (HarperCollins Publishers 2001).
79 It should be noted that the reference to “original Colonies” Indian land is usually regarded as the original thirteen colonies; Maine was originally part of the colony of Massachusetts. Vermont is similar in that it is often described as an “independent colony,” made part of the Union after considerable disagreement between New York and New Hampshire.
the state of Massachusetts, ceding certain lands to the state without the required approval of Congress. In 1972, Tureen sought to have the Justice Department intervene on behalf of the Passamaquoddy Tribe in a suit against the state of Maine. Within a very short period of time, several other New England tribes heard of the suit and the Penobscot Nation joined the suit based on a similar treaty entered into in 1796. The total land claimed under consideration in the combined suit represented well over one half of the total land of the state of Maine. Included in this land were considerable holdings of several major U.S. paper companies.

Although the Passamaquoddy and Penobscot cases were the first to be instituted, they did not result in the first Land Claims Settlement. That distinction belongs to the Narragansett Indians of Rhode Island. Similar to the Maine Act, the Rhode Island Indian Claims Settlement was preceded by a lawsuit. In Narragansett v. Southern Rhode Island Land Development Corp. et al., the Narragansett Tribe laid claim to the land in and around the town of Charlestown, Rhode Island. Obviously, no state action will be taken without the threat that courts will take action against the states or private land owners within the states. It should be noted, however, that even if the Indian tribes were to be successful in their suits, there would be little or no chance of actually receiving title to the contested lands.

X. THE MODERN ERA: THE ONEIDA CLAIMS I AND II

In one of the more notorious cases involving land claims, the Oneida Indian Nation in New York had claimed approximately one quarter million acres in central New York. The land in question consisted of several towns and private as well as public property. There has been a proposal that the claims be settled for $500 million, partially funded by the state of New York and partially by the federal government, paid to the three major tribes involved in the case. The funds would be used in part to purchase approximately 35,000 acres from willing sellers.

In 1970, the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin and the Oneida of the Thames (the Oneidas) instituted suit against two

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81 COHEN’S HANDBOOK, supra note 6, at 210 n. 22 (stating that a special trust existed between the Indian tribes and the federal government and that established a national obligation for the protection of the Indians).
82 See Benedict, supra note 78, at 24-25.
83 Id. at 25.
85 See 25 U.S.C. § 1701(c) (referencing the case in the Congressional findings and declaration of policy of the Settlement Act).
counties in New York. These two counties encompassed the aboriginal homelands of the tribes and the suit claimed that title to the land was transferred in violation of the Trade and Intercourse Act of 1793.87

There were actually three cases referred to as Oneida I, Oneida II and finally Oneida III. These cases traveled through the courts for over thirty years with the Tribes coming ever closer to success. The history of this case is the subject of another paper by the authors and the detail is much too voluminous to include here. The ultimate outcome of the case, however, is possibly the final chapter of the history. Oneida III involved the city of Sherrill, which had begun eviction proceedings on land owned by the Oneida Tribe. The land had been purchased by the Tribe in a normal real estate transaction. The Tribe was asking the court to find that the land was Indian land and not subject to local property taxes. Instead, the Court reversed direction and held that the claims of Indians in New York were barred due to the passage of time.

. . . [t]he distance from 1805 to the present day, the Oneida’s long delay in seeking equitable relief against New York or its local units, and the developments in the city of Sherrill spanning several generations evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.88

The remaining suits, Oneida I and Oneida II were reversed and the Tribes gained nothing from the State.

The next chapter in the history waits to be written by the courts or, perhaps, the legislature. They certainly will have a plethora of cases and issues to address. Is the question moot because of Oneida III? Will an alternative be found to compensate for aboriginal claims to land? These questions remain unanswered, but the claims do not disappear because of a Supreme Court decision.

87 Act of July 22, 1790, Ch. 33, 1 Stat. 137 (codified as amended at 25 U.S. § 177 (2000)).
88 Sherrill v. Oneida Indian Nation, 544 U.S. 197, 221 (2005); see also Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, 126 S.Ct. 2022 (2006).