

THE INFLUENCE OF EUROPEAN POLITICAL WRITINGS IN THE DEVELOPMENT AND EMERGENCE OF FEDERAL INDIAN LAW©

Judge Silver Cloud Musafir, November 21, 2013, Los Angeles.

The accolade *The Marshall Trilogy* was bestowed upon Chief Justice John Marshall's first three major United States Supreme Court decisions concerning Native Americans in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, (1832). Marshall cleverly and cunningly developed some innovative jurisprudence (judicial activism) in these three seminal cases.

The reasons behind Marshall's thinking impelled me to go into history to see what motivated this "great chief justice," who had six weeks of legal training under the legendary George Wyeth, to seek and apply international law principles upon indigenous peoples that became settled federal Indian law immune from judicial overruling or legislation. Marshall did not refer to the U.S. Constitution because the inalienable rights of indigenous peoples are inherent in their being and existence reposed somewhere between cosmic truth, natural rights and God's Law. His only guide was The Commerce Clause (Article 1, section 8, clause 3, U.S. Constitution) with which he spun, weaved, innovated and discovered new patterns of interpretation from which emerged a principle of law well suited to American expansionist policies involving land and soil. Judicial activism was already born with Marshall's *Marbury v. Madison* ruling when judicial review became a settled doctrine, a sound principle. Article III of the U.S. Constitution does not even hint at the need or justification for judicial review.

The atrocities unleashed upon indigenous peoples of the New World soon after Christopher Columbus arrived with his "call of discovery laced with manifest destiny" is well documented by two Dominican clerics, **Bartolome de las Casas** (1474-1566), and **Francisco de Vitorio** (1486-1547). These two clerics criticized the Spanish *encomienda* system which granted Spanish conquerors and colonists great parcels of lands and the right to the labor of indigenous peoples living on them. Punishment for disobedience was severe and lethal by those Christian masters of discovery and destiny.

Pope Alexander VI purported to grant the Spanish monarchs all territories discovered as if it established legal title to the New World lands. Vitorio

held that neither emperor nor pope possessed lordship over the whole world probably because he believed that God's Word in **Psalms 24:1** was being perverted by pope and emperor alike (*"The earth is the Lord's, and the fullness thereof; the world, and they that dwell therein."*) Pope and emperor, as if allied in conspiracy, probably justified their ecclesiastical and royal edicts taking comfort in **Psalms 24:4-5** which mentions equity and fair dealings.

Vitorio further elaborated and explained that discovery of Indian lands alone could not confer title in the Spaniards *"anymore than if it had been they who had discovered us."* Meanwhile King Ferdinand, relying on papal edict (*Inter caetera*) declared indigenous peoples' loyalty to Christianity **without their consent** even it meant the invocation of force, coercion and punishment. Vitorio wrote in his 1532 Treatise, *"On the Indians Lately Discovered,"* that indigenous people were not of unsound mind; that they used reason; they believed in the laws of marriage; they had magistrates, overlords; laws; a system of exchange; and a kind of religion. Not savages as others made them out to be. Nobody took notice. There is no cure for the bite of a false accuser. Savages are savages if the written untrue word says so.

Niccolo Machiavelli's (1469-1527) *Prince* (1523) set the stage for a modern political theory with the encouragement of Pope Leo X in 1519. Church and State seemed inseparable during these tumultuous times in post-Dark Ages Europe. *"If the State's policies, programs, and procedures accuse us, let the reasons and rationale excuse us,"* was the call sign of the *Prince*. Might is right. Police power makes all the difference.

Vitorio's writings and lectures inspired **Hugo Grotius** (1583-1645), a 17th century Dutch political philosopher often called the "father of international law" who realized the concept of "dictate of right reason." Reason can be subjective disguised as objective depending on who is in power. Reason, however, is the most naïve of all superstitions, but reason begat justification; and reason is taught and accepted to be far more superior than faith. People fall for it. Grotius, too, rejected the concept of title by discovery as to all lands inhabited by humans in his 1625 Treatise *"On the Law of War and Peace."* Unfortunately, sadly, and unwittingly, Grotius too subscribed to "just war." Another nail in the coffin of indigenous peoples. The written word, it would appear, as if written in stone, was enough to set outrageous results in motion to marginalize these original tenders, tillers, workers,

farmers, occupiers, possessors and owners of the land and soil in the New World who needed no theodolites, no charts, no titles, no liens, no taxes except the **right to be left alone**. The "right to be let alone is the most comprehensive of rights, and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438 (1928), Justice Louis Brandeis in dissent. Maybe the Christian adventurers of 1492 had a different take on what "civilized men" meant. The Hebrew Old Testament and the Greek New Testament of 1492 is still, very much, the same with no additions, corrections, amendments or interpretations in 2013.

Other writers who came on the pro-State scene included **Francisco Suarez** (1548-1617), **Domingo de Soto** (1494-1560), **Balthasar Ayala** (1548-1584), and **Alberico Gentilis** (1552-1608). These theorists and trendsetters supported the theory of "just war" in the event the indigenous peoples revolted or challenged Spanish authority. Just war was predicated upon the European need (read: greed) for *defense, recovery of property and punishment*. It were these early writers, *agent provocateurs* and theorists who influenced the development of policies in politics, and legal prescriptions handed down by European sovereigns which significantly affected the future treaty making patterns with Native Americans by the United States government.

The turning point of western thought and civilization was spawned with the **1648 Treaty of Westphalia** when Church and State went their separate ways. 1648 created a bifurcated regime of natural rights of individuals and natural rights of States (read: government). The Church went on to solidify and galvanize ecclesiastical functions, duties, obligations, privileges, immunities, and rights in tandem with canonical law while ignoring its police powers. The infant State quickly realized that sovereignty meant enforcement through a police power (read: militia, army, police and security forces) which the Church strangely abrogated.

Thomas Hobbes (1588-1679) took up the slack with his monumental *Leviathan* (1651) firmly establishing the State as an entity possessing natural rights. Hobbes influenced others like **Samuel Pufendorf** (1632-1694), and **Christian Wolff** (1679-1754) who accepted Hobbes's vision of humanity as a dichotomy of individuals and States with the former in a weaker bargaining position. These thinkers and writers, impelled by subjective reason, developed the Law of Nations. The Englishman **John Locke** (1632-1704) soon published his *Second Treatise on Government*, which formed the

leading edge of European legal philosophy and political concepts and doctrines of government and governance.

Christian Wolff influenced **Emmerich de Vattel** (1714-1769) who further elaborated the idea of a body of law concerned exclusively with States with his “*Law of Nations, or the Principles of Natural Law*, (1758). Vattel, the archetypal European, concluded that “*once a people . . . has passed under the rule of another it is no longer a State, and does not come directly under the Law of Nations. Of this character were the Nations and the Kingdoms which the Romans subjected to their Empire.*”

Whether European thinking would have developed in another direction if the indigenous peoples of the New World discovered Europe to colonize it is a different adventure in conjecture and hazardous thinking. The works and writings of **Jean-Jacques Rousseau** (1712-1778) influenced the French Revolution of 1789 that petrified the power of the majority in the minds of **James Madison, Alexander Hamilton** and **Thomas Jefferson** who were busily compiling their *Federalist Papers* under nom de plumes. **Voltaire** (1694-1778) burst on the scene attacking the Catholic Church with this take on freedom of religion, freedom of speech and the separation of Church and State.

It seems that American founders and framers were not able to think for themselves while allowing European concepts to infiltrate their minds, and influence their political thinking. Alarming, nothing original emanated from their minds. Everything that was thought, uttered and written had a European slant. These founders and framers claimed to be well-versed with Christian Scriptures, yet they seldom found refuge in scriptural wisdom.

Legal writings, scholarly articles and archival records indicate that Chief Justice Marshall was *influenced* by Emmerich de Vattel’s take, version, and practical philosophy of international law. In *Johnson v. McIntosh*, Marshall developed the theory that discovery bestowed superior title on the discoverer/colonizer. No reference to *usucapion* (Latin: ownership of any commodity due to lengthened possession) based on ancient law that did not quite fit with the European concept of amassing other peoples’ lands, but just a Vattelian impeller.

In *Cherokee Nation v. Georgia*, Marshall developed the theory that Indians were “domestic dependant nations with qualified nationhood status.” Ironing out a wrinkle in the fabric, or creating new cloth?

Subsequently in *Worcester v. Georgia*, Marshall nailed home the point when he compared Indian tribes to European “tributary and feudatory states.” He grudgingly accepts the fact that the U.S. Constitution contains no Bill of Rights for indigenous peoples who are to considered, pursuant to The Commerce Clause, as **foreign nations**. That absent Bill of Rights would come in 1968 with the passage of the Indian Civil Rights Act.

In the Trilogy, Marshall may have looked at, read, examined, analyzed, pondered, wondered and gathered from Article 1, Section, 8, clause 3 (The Commerce Clause) that Congress had the power to regulate commerce *with* Indian Tribes just as it would *with* foreign nations while regulating commerce *among* the several states. The preposition “*with*” did it in for all time. But, Marshall regulated and articulated the dubious law for the Trilogy.

The frustration, if not flirtation, with settled law, albeit wrongly decided and carelessly carved in stone as *res judicata*, based on a **principle**, often one that is uncertainly evolving, is a constitutional circumcision by a butcher. What if a wrong principle was used and applied to a particular case influenced by political persuasion? What if the legislature played along and decided not to overrule that decision with newer legislation knowing the decision was wrong, yet politically correct, in the totality of circumstances and facts? What if the executive also tagged along and refused an executive order or presidential veto? Machiavelli is probably having a whale of a time in his grave!

Since our law was imported from England when the Pilgrims arrived with copies of Blackstone’s *Commentaries On the Laws of England* (1765-1769), I explored some English cases as my manifest destiny to find the source of thinking of our judges’ decisions and the mystery called the “rule of law.” Here are some enlightening cases:

“The **principle** is the thing we are to extract from cases and to apply it in the decision of other cases,” said Lord Kenyon, C.J. in *Lord Walpole v. Earl of Cholmondeley* (1797), 7 T.R. 138, at p.148. But what if that **principle**

extracted from that case did not fit other cases because of different facts which then required a different **principle** to be extracted?

In *Merry v. Nickalls* (1872), L.R. 7 Ch. 733, at pp.750, 751; 41 L.J. Ch. 767, at p.771, Sir W.M. James, L.J. declared that:

“It is the **principle** of the decision by which we are bound, not a mere rule that in exactly the same circumstances we are to arrive at the same conclusions. Therefore to say that the decisions are wrong in point of **principle**, if that **principle** was clearly laid down, does not relieve us from the obligation of following the **principle** of the decision.” This judge got it right. The only thing in a decision binding as an authority is the right **principle** upon which the case was decided, and not the application of the **principle**. Once this not so subtle distinction is understood, law can become a bastion of consistency and certainty.

In *Osborne v. Rowlett* (1880), 13 Ch. D. 774, at p. 785; 49 L.J. Ch.310, at p.313, Jessel, M.R. (Master of the Rolls) declared that:

“The only thing in a judge’s decision binding as authority upon a subsequent judge is the **principle** upon which the case was decided; but it is not sufficient that the case should have been decided on a **principle** if that **principle** is not itself a right **principle** or one not applicable to the case.” The Master of the Rolls did some dna analysis here !!

In *Henty v. Wrey* (1882), 21 Ch.D. 332, at p. 340, Jessel M.R. again enunciated that:

“Now, when a rule of law which is against **principle** is alleged to be established, there are two points to be considered; the first, was any such rule of law ever laid down by any judge? Second, if it was so laid down, has it passed into a binding rule of law? That is, has it been so recognized and dealt with by subsequent judges as to prevent a judge from saying that the decision is contrary to the course of law, and is not binding upon him?” If the principle was accepted, albeit wrong, as a rule of law, Heaven forbid we have not encouraged and developed a jurisprudence of doubt and uncertainty. Common law had its pitfalls without the consent of the citizenry in the sense that statutory law was drafted and enacted by peoples’ representatives sitting as a voice of the people in a legislature.

It is a fact that Chief Justice Marshall looked toward international law to find justification for circumventing and circumscribing inherent indigenous sovereignty and associated rights. Truth and history could never hide the fact that when the first explorers, adventurers, fortune-seekers, discoverers and settlers arrived in the Americas, it was not *terra nullius* (nobody's land) that they could lay a claim to because somebody had already occupied these lands.

There was no reference point locally (in the United States Constitution, federal laws, state laws, or decided cases) for Marshall to find and extract a principle, a rule of law, a statute or a constitutional provision that encompassed Indigenous Peoples' rights. He had to innovate and develop one based on his rendition of judicial review after *Marbury v. Madison*. But, while he was busy inventing rights for Indigenous Peoples, the **War of 1812** settled the score to the detriment of Indigenous Peoples because they had sided with the British against the American colonists. General Andrew Jackson (later President Andrew Jackson) had witnessed first-hand where these Indians loyalty lay. In time to come Jackson would unleash the Trail of Tears when the infamous forced diaspora of Indians began.

Johnson, Cherokee Nation and *Worcester* represented a skewered and twisted logic of, in, under, at, and by, law because the underlying attraction was **indigenous lands**. Marshall must have fretted and sweated knowing that ancestral customary land title can only be extinguished by express legislation. But Marshall unabashedly legislated from the Bench. Judicial restraint and judicial activism were both sides of the same coin.

Marshall's Trilogy decisions had an obviously very strong affinity to the **Yazoo land scandal** - a massive fraud perpetrated in the mid-1790s by several Georgia governors and the state legislature. They sold large tracts of indigenous lands (Yazoo lands), what is now portions of Alabama and Mississippi, to political insiders at very low prices in 1794. Although the law enabling the sales was overturned by reformers the following year, its ability to do so was challenged in the courts, eventually reaching the US Supreme Court. In the landmark decision in *Fletcher v. Peck* (1810), the Court ruled that the contracts were **binding** (read: no sovereign tribal courts to overturn ancestral aboriginal land fraud under the "rule of law") and the state could not retroactively invalidate the earlier land sales. They relied on the convenient constitutional provision that "no State shall impair the obligation of a contract," conveniently found in Article 1, section 10 of the U.S.

Constitution which is permanently silent about fraudulent acts, actions, commissions or omissions. It was one of the first times the Court had overturned state law, and it justified many claims for the land. It is said that Marshall's family had vested interests in the Yazoo lands. He did not, however, recuse himself in *Fletcher*.

Some of the lands sold by the state in 1794 had been shortly thereafter resold to innocent third parties, greatly complicating the litigation. In 1802, because of the ongoing controversy, Georgia ceded all of its claims to lands west of its modern border to the federal government, in exchange for which the federal government paid cash and assumed the legal liabilities. Claims involving these purchasers were not fully resolved by the U.S. government until legislation passed in 1814 established a fund for resolving them.

One of the first **principles** of law enshrined in the Latin maxim *usucapio constituta est ut aliquis litium finis esset* - *usucapio* **was instituted that there might be an end to lawsuits**; the right of property conferred by lengthened possession was introduced, or made law, in order that after a certain term no question should be possible concerning the *ownership* of property. This squares with *boni iudicis est lites dirimere* – the duty of a good judge is to prevent litigation (4 Coke 15).

So, in the context of Indigenous Peoples' ancient law and the Code of Conduct, what good is Anglo-American law and jurisprudence when principles of law weaved within the fabric of the rule of law is often wrinkled and unsightly when courts with politically motivated judges refuse to iron out the wrinkles, and instead insist on replacing the fabric itself.

The future for Indian rights, and Indians' standing as separate sovereigns, is somewhat uncertain and bleak in light of the reality of the farce called "federal recognition" of Indian tribes although most of the tribes, clans and bands have concluded treaties with the U.S. government.

Treaties are also very much the supreme law of the land under Article VI, section 2 of the U.S. Constitution. The power and authority of treaties are very clear, and free of ambiguity. There is no constitutional doubt as to its claim that treaties are to be treated as the supreme law of the land. So, what's with the constitutional-doubt canon that Justice Antonin Scalia mentions in his *Reading Law* at page 247? The canon is captioned "A statute should be **interpreted** in a way that avoids placing its constitutionality in doubt." I believe the legislature ought to plan, strategize

and subsequently **write** a statute in a way that places or presents its constitutionality in doubt. Why *write* a statute if it does not sit squarely with the Constitution to avoid, encourage or entertain a broad or narrow *interpretation* by the judiciary? The constitutional-doubt canon was assailed as “noxious” and “wholly illegitimate” by Frank H. Easterbrook in *Do Liberals and Conservatives Differ in Judicial Activism?* 73 U. Colo. Rev. 1401, 1405-06 (2002).

A 1909 decision *United States ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366 was distinguished and vacated in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) using the constitutional-doubt canon described by the high court as “beyond debate.” But, surely not beyond constitutional amendment, overruling legislation, or judicial overruling.

Unless and until Indian tribes have enforcement powers with their very own police powers, Indians will have limited sovereignty, tainted autonomy, and half-cocked authority. When tribes look askance to the federal government for funding, understandably and regrettably the giver takes advantage of the receiver by imposing limitations, caveats, restrictions and unnecessary conditions. The federal government, as *usufructuary*, gave no rent to the rightful owners of ancestral aboriginal customary lands, and yet they impose their will on Indians. That is the sad, inexorable truth of the matter. The constitutional standoff is real. The supreme law of the land is always placed in doubt when the legislator’s will carved in stony legislation, as representative of the peoples’ will, is challenged by the judiciary when statutory interpretation takes a wrong turn at an awkward bend. The legislators know and understand that writing and passing new legislation is less cumbersome than bringing constitutional amendment to fruition. It appears they pass new laws without exacting or extracting constitutional limitations and strictures. This forces the judiciary to shed and shun judicial restraint in favor of judicial activism.

Our Constitution is, sadly, still evolving as a living Constitution in the minds of scholars, lawyers, legislators and judges. It should not be so because the Constitution is a reference point, a template, a blueprint, a fountainhead from which principles, doctrines and maxims may spring forth to tackle the numerous vagaries of our times, trends and patterns of sociological flux. The Necessary and Proper Clause (Article 1, Section 8, Clause 18, U.S. Constitution) gives Congress sweeping powers to make laws necessary and

proper for the changing trends, vagaries and patterns of modern life
PROVIDED they do not crowd the Bill of Rights to affect and influence
fundamental human rights, privileges and immunities.

We are still growing. Political maturity may end in a utopian scheme of
things where peace, tranquility, comfort and safety may once again reign
supreme. Maybe we ought to hit the reset button and arrive, again, back in
the Garden of Eden minus the snake, minus the contact dialogue.