No. ___

IN THE

Supreme Court of the United States

MAHICAN TRIBE AND MI'KMAQ TRIBE,
Complainants,

v.

CANADA, FRANCE, NETHERLANDS, PORTUGAL, RUSSIA, SPAIN, UNITED KINGDOM AND UNITED STATES,
Respondents.

Bill of Complaint

(Art. III, §2, ¶2 and r. 17)

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(1). JURISPRUDENCE OF THE COMPLAINT. In the absence of higher external authority to sanction this Court's dereliction of its duty to uphold the constitution the only preventative sanction is, the internal compulsion of personal ethics.

The major premise is, in a constitutional democracy under the rule of law each judge of the court of last resort ethically is bound to implement the words used by the constitution, settled as to their meaning by that court's original, authoritative and therefore constitutive interpretive precedents.

The minor premise is, in the course of interpreting the constitutional word "treaty" such precedents irrefutably and overwhelmingly have in fact settled the legal consequence of one contracted between native and newcomer bodies politic is to transfer the previously established territorial sovereignty of the one to the other.

The conclusion is, this Court labors under the ethical obligation and none other to declare the constitutionally-presumptive continuity of the Indian tribal sovereignty herein identified pending its transfer either by treaty or by constitutional amendment.

(2). ETHIC OF THE REVOLUTION. Americans did not justify their War of Independence as a re-distribution of property but rather in terms of legal ethics.

> When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of

> mankind requires that they should declare the causes which impel them to the separation.
>
> 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. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed . . . .

(3). ETHIC OF THE DISCOVERY. Neither did 1492 result in a debate over the redistribution of the natives' property. The controversy in Europe was intellectual and moral, over the terms of equity, that branch or aspect of "the law" whose concern is with fairness, originally the domain of the ecclesiastical courts. The question was whether natives were human with souls and therefore the human right to govern themselves and possess their land, as such. The resolution was promulgated by the papal *bulla* entitled *Sublimus Dei*, *1537*.

> To all faithful Christians to whom this writing may come, health in Christ our Lord and the apostolic benediction.
>
> The sublime God so loved the human race that He created man in such wise that he might participate, not only in the good that other creatures enjoy, but endowed him with capacity to attain to the inaccessible and invisible Supreme Good and behold it face to face; and since man, according to the testimony of the sacred scriptures, has been created to enjoy eternal life and happiness, which none may obtain save through faith in our Lord Jesus Christ, it is necessary that he should possess the nature and

faculties enabling him to receive that faith; and that whoever is thus endowed should be capable of receiving that same faith. Nor is it credible that any one should possess so little understanding as to desire the faith and yet be destitute of the most necessary faculty to enable him to receive it. Hence Christ, who is the Truth itself, that has never failed and can never fail, said to the preachers of the faith whom He chose for that office "Go ye and teach all nations." He said all, without exception, for all are capable of receiving the doctrines of the faith.

The enemy of the human race, who opposes all good deeds in order to bring men to destruction, beholding and envying this, invented a means never before heard of, by which he might hinder the preaching of God's word of Salvation to the people: he inspired his satellites who, to please him, have not hesitated to publish abroad that the Indians of the West and the South, and other people of whom We have recent knowledge should be treated as dumb brutes created for our service, pretending that they are incapable of receiving the Catholic Faith.

We, who, though unworthy, exercise on earth the power of our Lord and seek with all our might to bring those sheep of His flock who are outside into the fold committed to our charge, consider, however, that the Indians are truly men and that they are not only capable of understanding the Catholic Faith but, according to our information, they desire exceedingly to receive it. Desiring to provide ample remedy for these evils, We define and declare by these Our letters, or by any translation thereof signed by

> any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and have no effect.
>
> By virtue of Our apostolic authority We define and declare by these present letters, or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, which shall thus command the same obedience as the originals, that the said Indians and other peoples should be converted to the faith of Jesus Christ by preaching the word of God and by the example of good and holy living.

(4). INTERNATIONAL TREATY ETHIC. This principle of equity informed the agreement contracted between the great maritime powers of Europe, no less than did the self interest of minimizing war, as was held by this Court in the constitutive precedent of the constitutional protection accorded to Indian tribal sovereignty: *Worcester v. Georgia*, 6 Pet. 515 (1832).

It also informed the constitutional incapacity of this Court to abrogate that protection: *Scott v. Sandford*, 19 How. 393 (1857).

This expressly and explicitly was reiterated as the legislative intent of the *Royal Proclamation of 1763*, which was the omnibus constitution of all the colonies before the Revolution, the force and effect of which was saved and continued by the overwhelming consensus of judicial opinion in the generations of judges that were contemporaries of the *Constitution, 1789*:

> *Royal Proclamation of 1763*. And whereas it is just and reasonable and essential to our Interest and the Security of our Colonies that the several Nations or Tribes of Indians with whom We are connected and who live under our Protection should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as not having been ceded to or purchased by Us are reserved to them or any of them as their Hunting Grounds—We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure that . . . .
>
> *Marshall v. Clark*, 1 Kentucky R 77, 80-81 (1791). The old claim of the crown, by the treaty of 1763, extended to, and was limited by the Mississippi including the land in dispute, which gave a right to the crown as against other European nations, and fixed the limits of titles to be derived from that source to the citizens of Virginia. The dormant title of the Indian tribes remained to be extinguished by government, either by purchase or conquest, and when that was done, it inured to the benefit of the citizens who had previously acquired a title from the crown, and did not authorize a new grant of the lands as waste and unappropriated. This being the case at the time of revolution, when the

commonwealth succeed to the royal rights . . . in the opinion of the court, the Indian title did not impede either the power of the legislature to grant the land to officers and soldiers, or to the location of the lands on treasury warrants, the grantee in either case must risk the event of the Indian claim, and yield to it if finally established, or have the benefit of a former or future extinction thereof.

Weiser v. Moody, 2 Yeat's 127, 127-8 (Penn. SC) (1796). The court declared their opinion to the jury, that if the late proprietaries, or their officers, knew that the lands surveyed for Conrad Weiser, lay out of the then Indian purchases, and granted them under full knowledge thereof, the patent would enure for the benefit of the grantee, when the lands came afterwards to be purchased from the Indians; and the proprietaries could not pass the title to a stranger . . . . [But] it cannot be presumed that the proprietary officers knew the lands surveyed for Conrad Weiser to be without the limits of their purchases [from the Indians] . . . . If the King is deceived in his grant, it will be avoided. Any contract or deed will be vitiated by a *legatio falsi sive suppressio veri.*

Sherer v. McFarland, 2 Yeat's 124, 225, 226 (Penn. SCR 1797). We are no enemies to *bona fide* improvements, restricted within rational limits. But these were never deemed to extend beyond land purchased from the Indians. Such a system would be wild, as well as highly impolitic, and would tend to deluge the country in blood, by provoking the savage nations to hostilities . . . . It must be admitted, that the lords of the soil had

the exclusive right of disposing of their lands in their own mode.

But if this were doubtful now, when the lands purchased from the Indians are distributed among His Majesty's Subjects at a Fee hardly exceeding the prime cost of them, it cannot possibly remain so when the Indians discover as they unquestionably will, that the purchases made from them are to be converted into a source of Revenue to ourselves—slow as their progress is towards civilization they are perfectly apprised of the value of money and of its use in maintaining them in those habits of indolence and intemperance to which most of them are more or less inclined.

In order therefore to exercise that foresight which our Indian neighbours are beginning to learn, and in which it certainly cannot be our interest to promote their improvement, we submit for your Honour's consideration the propriety of suspending the promulgation of the plan which has been laid down for us until we can make a purchase sufficiently large to secure for us the means of extending the population and increasing the strength of the Provinces so far as to enable us before our stock is exhausted to dictate instead of soliciting the terms on which future acquisitions are to be made.

Fletcher v. Peck, 6 Cranch's 87, 142-3 (1810). The majority of the Court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it has been legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.

Johnson v. McIntosh, 8 Wheat. 543, 574, 585, 588, 591, 592, 596 (1823). [The different nations of Europe] claimed and exercised, as a consequence of their ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy . . . . They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, according to their own discretion . . . . While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been well understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy . . . . It 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 . . . . All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy . . . . [T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession their lands, but to be incapable of transferring the absolute fee to others . . . . [T]he Indian title, which, although entitled to the respect of all Courts until it

should be extinguished, was declared not to be absolutely repugnant to a seisin in fee on the part of the State . . . . The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to that title. The lands, then, to which this proclamation referred, were lands which the king had had a right to grant, or to reserve for the Indians.

Danforth v. Wear, 9 Wheat. 673, 675, 677 (1824). As to lands surveyed within the Indian boundary, this Court has never, hesitated to consider all such surveys and grants as wholly void . . . [although it was argued that the State grant] was only suspended by the Indian title, and attached legally and effectually to the soil, as soon as the interposing title of the Indians was removed . . . the inviolability of the Indian territory is fully recognized.

Cornet v. Winton, 2 Yerger Tenn. CA 129, 149 (1826) . . . the Indian nation was no party to this grant; its usufructory title was not thereby affected. North Carolina had no right to take it from the Indians for Stuart's benefit, without their consent; this consent they have not given, and therefore no right to prosecute this action to recover the possession of the land has ever vested in Stuart; hence he must fail upon the weakness of his own title.

Cherokee Nation v. State of Georgia, 5 Pet. 1, 17, 49, 76 (1831). Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it 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 a territory to which we assert a title independent of their will which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian . . . . While the different nations of Europe respected the rights of the natives as occupants they asserted the ultimate dominion to be in themselves; and claimed and exercised as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy . . . . They have not stipulated to part with that right (of occupancy); and until they do, their right to the mines stands upon the same footing as the use and enjoyment of any other part of their territory.

Mitchell v. United States, 9 Pet. 711, 745, 746, 749, 755 (1835). We come now to consider the nature and extent of the Indian title . . . Indian possession or occupation was considered with the reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an autho-

rized sale to individuals . . . One uniform rule seems to have prevailed . . . by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in the possession of the Indians, though possession could not be taken without their consent. Individuals could not purchase Indian lands without permission or licence from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such licence, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the licence, the title of the purchaser became complete . . . . The King waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property they could cede or reserve, and that the boundaries of his territorial rights should be such, and such only, as were stipulated by these treaties. This brings into practical operation another principle of law settled and declared in the case of *Campbell v. Hall*, that the proclamation of 1763, which was the law of the provinces ceded by treaty of 1763, was binding on the king himself, and that a right once granted by a proclamation could not be annulled by a

subsequent . . . [L]and were of two descriptions: such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee; and those reserved and secured to the Indians, in which their right was perpetual possession, and his the ultimate reversion in fee, which passed by the grant, subject to the possessory right . . . This proclamation was also the law of all the North American colonies in relation to crown lands.

New Orleans v. Armas, 9 Pet. 224, 236 (1835). [I]t is a principle applicable to every grant, that it cannot affect pre-existing title.

New Orleans v. United States, 35 US 662, 730 (1836). It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee.

US v. Fernandez, 35 US 303, 305 (1836). Nor does there appear to have been any restriction on the powers of the governor to make grants of land under Spain, other than those imposed upon the governors of Great Britain: both made grants without regard to the land being in the possession of the Indians: they were valid to pass the right of the crown, subject to their right of occupancy: . . .

Clark v. Williams, 36 Mass. R 499, 500, 501 (1837). The object of this statute manifestly was, to secure the Indians from being deceived and imposed upon, and to enable the government to

avail themselves of the full benefit of the crown grant of the lands to themselves and their grantees, by giving them the exclusive privilege of extinguishing and acquiring the Indians' right of occupancy . . . [W]e think it manifest, that this law was made for the personal relief and protection of the Indians, and it is to be limited in its operation. It is to be used as a shield, not as a sword.

Godfrey v. Beardsley, 2 McLean 412, 416 (Ind.) (1841). The Indian right is that of occupancy; and, until this right shall be extinguished by purchase, no possession can be taken. It is also admitted, that a mere reservation of the Indian right to a certain part, within the described boundaries, leaves the right reserved, as it stood before the cession.

Balliot v. Bauman, 5 Penn. 150, 154, 155 (1843). A patent is not operative against the rights of a third person existing before the issuing of the patent. He may show that his right is better than the one who obtained the patent and for that purpose may inquire into the prior title of the patentee . . . [and] show his own equitable title is better. The patent conveys the full legal title of the state.

Brown v. Wenham, 10 Metcalf 496, 498 (Mass. SC) (1843). The provincial St.13 Wm 3, (1701,) entitled "an act to prevent and make void clandestine and illegal purchases of lands from the Indians," rendered void, as the foundation of title, all deeds made by Indians, without the license or approbation of the legislature, after the year 1633. ["St.13 Wm 3, (1701,)" is an alternative citation for *An Act to prevent and make void*

clandestine and illegal purchases of lands from the Indians, Stat. Prov. Mass. Bay 1701-02, c. 11.]

Coleman v. Tish-Ho-Mah, 4 S&M 40, 48 (Miss. HCEA) (1844). Theirs was a right to retain possession, and to use it according to their own discretion, though not to dispose of the soil except to the government. That claimed the ultimate dominion, and the exclusive right to grant the soil, subject to the Indian right of occupancy.

Ogden v. Lee, 6 Hill's 546, 548, 549 (NYSC) (1844). The European governments whose people discovered and made settlements in North America, claimed the sovereignty of the country, and the ultimate title, but not the immediate right of possession, to all lands within their respective limits. Upon the principle laid down by Vattel, (B. 1, & 81, 209,) they might have asserted a larger right; for the natives lived by fishing and hunting, without converting to the purposes of agriculture any considerable portion of the of the vast tracts of the country over which they wandered. But the Europeans pursued the more just and politic course of acquiring the Indian title by purchase. The claim which they set up and asserted amounted to little more than a right of preemption, or the right of purchasing from the Indians all the lands within the bounds of their respective discoveries, to the exclusion of all other nations. It is true that the British crown granted charters and issued patents for large tracts of land before the Indian right had been extinguished; and these instruments purported to convey the property in fee. It was so of the grant made by Charles the second to his brother the duke of York in 1664, which included all the

territory now constituting the states of New-York and New-Jersey. But these grants were not intended to convey, and the grantees never pretended that they has acquired an absolute fee in the land. They neither took nor claimed any thing more than the ultimate fee, or the right of dominion after the Indian title should be extinguished. And so far as the state of New-York is concerned, I am happy to say, that beyond what may have been acquired by conquest in lawful war, the Indians have never been deprived of a single foot of land without their voluntary consent. Their title by occupancy has been uniformly acknowledged, both by the colonial and state governments, from the first settlement of the country down to the present day; and it cannot now be successfully questioned in the judicial tribunals.

Stockton v. Williams, 1 Mich. R 546, 560 (SC) (1845). The power of the government to grant the soil while in the possession of the Indians, and subject to their right of occupancy, is a proposition which has long since been settled by a series of decisions of authority.

Fellows v. Lee, 5 Denio 628 (NYCE) (1846) . . . . the Indian title to lands is an absolute fee, and that the pre-emption right conceded to Massachusetts, was simply a right to acquire by purchase from the Indians their ownership of the soil, whenever they should chose . . .

Montgomery v. Ives, 13 S&M 161, 174-5 (Miss. HCEA) (1849). Let us refer to the proclamation of George III . . . "that it is just, and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of

Indians, with whom we are connected, and who live under our protection, should not be disturbed in the possession of such parts of our dominions and territories, as not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds." It then goes on to declare, that no governor, in any of the said provinces, shall presume, "upon any pretence whatever, to grant warrants of survey, or pass any patents for lands, beyond the bounds of their respective governments, as described by their commissions." It farther declares, "that, for the present, all the lands not included within the limits of said new governments, shall be reserved to under the sovereignty, protection and dominion of the crown, and forbids all purchases and settlements beyond those limits without special leave and license first obtained." It goes on still farther to declare a principle which seems to have been adhered to ever since, "that no private person do make purchase of any land from any Indians, but that the same shall be purchased only for the government, in the name of the sovereign, at some public meeting of the Indians." This principle, the offspring of a just and enlightened policy, became incorporated into the intercourse of England, with the Indian tribes, and has been adopted and pursued by our own government, in all its transactions with them . . . . On this part of the proclamation of 1763, the Supreme Court of the United States say, "This reservation is a suspension of the powers of the royal governor, within the territory reserved." *Fletcher v. Peck*, 6 Cranch, 142. It is because of this suspension, which existed at the date of this grant, that we

think it has no intrinsic validity. It is an established principle in our jurisprudence, that a grant of land on which the Indian title has not been extinguished, is void. *Danforth v. Wear*, 9 Wheat. 676.

Breaux v. Johns, 4 Louisiana R 141, 143 (1849). These grants convey a title to the grantees, subject only to the Indian right of occupancy.

Gaines v. Nicholson, 9 How. 356, 365 (1850). No previous grant of Congress could be paramount, according to the rights of occupancy which this government has always conceded to the Indian tribes within her jurisdiction. [The reservation] was so much carved out of the Territory ceded, and remained to the Indian occupant, as he never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the government in the act of agreeing to the reservation.

Marsh v. Brooks, 49 US 223, 232 (1850) . . . Indian title consisted of the usufruct and right of occupancy and enjoyment; and, so long as it continued, was superior to and excluded those claiming the reserved lands by patents made subsequent to the ratification of the treaty; they could not disturb the occupants under the Indian title. That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question.

People v. Dibble, 18 Barbour's NYSCR 412, 418 (1854). The object of the law, with various other laws of the state, was to protect the indians to quiet them and render them secure.

Fellows v. Denniston, 23 NY 420, 423, 428, 431 (CA) (1861). The nature of the aboriginal title, and that of the State within which the lands lie, has been so often defined by judicial determination that no time need now be spent on it. (*Johnson v. McIntosh*, 8 Wheat., 543; *Fellows v. Ellsworth*, 6 Hill, 546; S.C., 5 Denio, 528.) The Indian nation, in a collective or national capacity, has the right of occupancy of the land, but no power to sell or in any way dispose of it to others, except to the State, or to persons authorized by it to purchase; and the government of the State has the ultimate right of the soil, or title in fee simple, subject to the Indian right of occupancy. The right to purchase the Indian claim, or, in the language usually employed, to extinguish the Indian title, thus existing in the State or in its grantees, is usually called the right of preemption . . . . If the purchaser acquires no right to interfere with the Indian occupancy, the subject of his purchase is limited to the title of the grantees under the State of Massachusetts; and he acquires nothing more. This, we have seen, is the right of preemption, and perhaps it embraces also a technical fee; but, as it does not embrace the Indian right of occupancy, but expressly excludes it, and that is the only right which the Indians had, it is clear that they are not prejudiced by the tax or by any sale which may take place pursuant to it. The title of the grantees under Massachusetts to these lands, before the extinguishment of the Indian title, subject as it was to the right of possession remaining in the Indians for an indefinite period, was not liable to taxation and sale under the general laws of the State relative to the

assessment of taxes . . . . Each of the three Constitutions successively adopted by the people of the State has contained a provision like that in the first Constitution, which was in these words: "No contracts or purchases for the sale of lands made since the 14th day of October, A.D. 1775, or which may be hereafter made with or of the said Indians, within the limits of this State, shall be binding on the said Indians, or be deemed valid, unless made either under the authority and with the consent of the Legislature of this State."

US v. Foster, 2 Bissell's 377, 377 (Wisc. Cir. Ct.) (1870). It may be doubted whether this reservation can be sold by the United States in the present condition of the title, even by act of Congress, without the consent of the Indians themselves, but it is certain that it cannot be without an express law; and if the precedents which have always existed in such cases should be followed, it cannot, and ought not to be sold by the Government, until the rights of the Indians are purchased, and with their free consent.

Minter v. Shirley, 3 Miss. 376, 381, 382 (1871). The right to acquire and extinguish their title pertained exclusively to the United States, therefore purchases, made from them separately, or as tribes, were null and void . . . The several acts of congress, in reference to the survey and sale of the public lands, distinctly keep in view the fact "that the Indian title must first have been extinguished, and acquired by the United States, before individual right to any part of the soil can be derived and vested."

Holden v. Joy, 84 US 211, 244 (1872). Obviously this principle regulated the right conceded by

discovery among the discoverers, but it did not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a more ancient discovery. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell . . . Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs.

US v. Cook, 19 Wall. 591 (SC) (1873). The right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion.

US v. Shoshone Tribe, 304 US 111, 116, 117, 118 (1938). Minerals and standing timber are constituent elements of the land itself. *United States v. Cook*, 19 Wall. 591. *British American Oil Co. v. Board*, 299 US 159, 164-165. For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which only had the naked fee, would transfer no beneficial interest. *Leavenworth, L. & G.R. Co. v. United States*, 92 US 517, 742-743. *Beecher v. Whetherby*, 95 US 517, 525. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee. *See Holden v. Joy*, 17 Wall. 211, 244. *Western Union Tel. Co. v. Pennsylvania R. Co.*, 95 US 540, 557 . . . . As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of

> lands, minerals or timber would be resolved in favor of the tribe . . . . Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of holding otherwise than in common, that right is as sacred and securely safeguarded as is fee simple absolute title. *Cherokee Nation v. Georgia*, 5 Pet. 1, 48. *Worcester v. Georgia*, supra, 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to the Indians, undisturbed possessors of the soil from time immemorial . . . . The lower court did not err in holding that the right of the Shoshone Tribe included the timber and minerals within the reservation.

(5). MODERN ETHIC. The judicial way of thinking and feeling about Indian tribal sovereignty in the 18th century when the *Constitution* was enacted continued in the 19th century until its latter half in the aftermath of 16 Stat. 566, codified at 25 USC §71 (1871), after which the secondary precedents in similar vein pretty much disappear, out of sight and out of mind.

This change corresponds to the era in which the Indian tribes' military potency and significance waned and the pursuit of profit suborned equity as the preeminent jurisprudential value.

Ralph Waldo Emerson epitomized the old way era value in his 1844 "Essay on Character" saying, "'Truth is the summit of being: justice is the application of it to affairs . . . . ; and it is the privilege of truth to make itself believed."

By the 1920s that had morphed into the value "the business of America is business" falsely attributed to

President Calvin Coolidge in consequence of a speech delivered in 1925 entitled "The Press Under a Free Government." What he actually said was:

> After all, the chief business of the American people is business . . . . Of course the accumulation of wealth cannot be justified as the chief end of existence . . . American newspapers have seemed to me to be particularly representative of this practical idealism of our people . . . . We make no concealment of the fact that we want wealth, but there are many other things that we want very much more. We want peace and honor, and that charity which is so strong an element of all civilization. The chief ideal of the American people is idealism. I cannot repeat too often that America is a nation of idealists. That is the only motive to which they ever give any strong and lasting reaction.

Similarly President Eisenhower in his farewell speech to the nation in 1961 in his so-called military-industrial complex speech noted the danger but also prized the ethical idealism that existed to safeguard against it.

> We now stand ten years past the midpoint of a century that has witnessed four major wars among great nations. Three of these involved our own country. Despite these holocausts America is today the strongest, the most influential and most productive nation in the world. Understandably proud of this pre-eminence, we yet realize that America's leadership and prestige depend, not merely upon our unmatched material progress, riches and military strength, but on how we use our power in the interests of world peace and human betterment . . . .

> In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.
>
> We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together . . . .
>
> Another factor in maintaining balance involves the element of time. As we peer into society's future, we—you and I, and our government—must avoid the impulse to live only for today, plundering, for our own ease and convenience, the precious resources of tomorrow. We cannot mortgage the material assets of our grandchildren without risking the loss also of their political and spiritual heritage. We want democracy to survive for all generations to come, not to become the insolvent phantom of tomorrow.

Despite the reminders and warnings that constitutional democracy under the rule of law hangs in the balance, the modern jurisprudential ethic culminated in the apparent success of a counter-revolution in virtue of the *per incuriam*, perversely misleading, *ultra vires* obiter dictum of this Court in *US v. Lara*, 541 US 193, 200 (2004) that:

> . . . the central function of the Indian Commerce Clause, as we have said, is to provide Congress with plenary power to legislate in the field of Indian affairs.

This bespeaks an ethic the opposite of that which informs the constitution, which needs rescuing from it.

(6). AFFIDAVIT. The attestation to the truth of this Bill of Complaint is made in the accompanying Motion for Leave to File a Motion for Leave to File a Document in Excess of Word Limits in Most Extraordinary Circumstances and Related Relief.

(7). ARGUMENT. The public importance of the constitutional question of tribal sovereignty is inestimable. The danger, not only to the applicants but to the People of the United States and the world they influence, of getting it wrong lurks in neglecting the overarching perspective in favor of focusing one aspect of the *Constitution* or of the nature and character of the rule of law and *stare decisis* or of the blindness and deafness attributable to ethnocentrism and temperocentrism, that inexorably results from focusing some factual or legal detail in isolation, such as for example occurred in *US v. Lara*, 541 US 193 (2004) without regard for the set of precedents that taken together expressly constitute the constitutionally-protected right of Indian tribal sovereignty and, by necessary implication of law alone, its constitutional remedy of third-party adjudication pursuant to this Court's original jurisdiction. *Marbury v. Madison*, 5 US 137 (1803); *Worcester v. Georgia*, 6 Pet. 515 (1832); and *Scott v. Sandford*, 19 How. 393 (SC 1857).

For this reason the applicants submit it is essential that the accompanying Motion for Leave to Increase the Permitted Word Count, the Motion for Leave to File a Bill of Complaint and this Bill of Complaint be read and comprehended contemporaneously and *in pari materia*. The Motion for Leave to Increase the

Permitted Word Count records the way in which what this Court does not do, which the Motion for Leave to File a Bill of Complaint identifies, and this Bill of Complaint which records to jurisprudential attitude that underlies that judicial inactivity, taken together at a glance constitute "good cause" in "most extraordinary circumstances," which is both the preliminary and the final argument.

The applicants' case on the merits therefore rests without further argument.

(8). CONCLUSION. Therefore the applicants ask this Court to affirm the constitution's protection of their Indian tribal sovereignty relative to their ancestral territories the Hudson River drainage basin and the Restigouche River and south Gaspé Peninsula drainage except as to such portions in due course proven to have been ceded by them by treaty and, furthermore, the corresponding constitutional remedy is third-party adjudication by means of this case of first instance in this Court, subject, as to such portion if any as lies within Canada, to review of the same constitutional question *mutatis mutandis* by the Judicial Committee of the Privy Council, the European Court of Human Rights and/or the International Court of Justice.

February 11, 2011.

/s/ "Rick Van Guilder"
Per: Mahican Tribe by Public Minister

"Gary Metallic"
/s/ "Gary Metallic"
Per: Mi'kmaq Tribe by Public Minister

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