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THE CONCEPT OF ABORIGINAL RIGHTS IN THE EARLY LEGAL HISTORY OF THE UNITED STATES

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INTRODUCTION

Until recently, the concept of aboriginal rights has attracted little notice in the international community. Aside from old treatises on the law of nations, no coherent body of law or theory has emerged to give shape to the conflict between indigenous peoples and the civilized world. At the present time, indigenous peoples are entering various legal systems, both national and international, to assert their claims for a land base and sovereign independence. A substantial body of analysis and documentation from the perspective of native peoples is urgently required to authenticate these claims in these often alien forums.

One of the more fertile areas for research is in the early legal history of the United States. Buried in the treaties, statutes, reports, and case law is a wealth of documentation that forms a potential basis for the articulation and litigation of aboriginal rights. The court cases are particularly valuable, in that they provide the earliest incorporation of aboriginal rights in the legal system of a nation-state.[1] These materials are difficult to work with, however, because they require almost an archeology to restore the historical and cultural context that is almost universally ignored in legal writing. Common law concepts are easily disembodied and manipulated. The record of United States Indian law is unusually complex because of the ad hoc self-serving nature of many of the decisions.

Many of the early cases that established important precedents in the development of Indian law were not litigated by the Indian nations. Often, the analyses and dicta concerning aboriginal rights were tangential to the issues in controversy. Nevertheless, these cases form the foundation of a legal system that presently engages Indian people and their land rights, and have application to other indigenous peoples throughout the world in their conflict with nation-states.

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1. The term nation-state is used to avoid later confusion. Many of the Supreme Court cases analyzed in this study concern states of the United States.

The purpose of this article is to trace the evolution of a doctrine of aboriginal rights that was developed in the United States Supreme Court during the tenure of John Marshall as Chief Justice.[2] The cases under consideration often involve issues of national sovereignty. Since a domestic judicial system is an arm of the sovereign, it is beyond the power of a domestic court to render an independent judgment on the scope of national sovereignty. Any judicial determination, therefore, in favor of the concept of aboriginal rights in a domestic setting must be given great weight.

I. Fletcher v. Peck

The question of aboriginal rights first reached the judicial forum in 1810 with the case of *Fletcher v. Peck*.[3] One of the central elements of this case was whether the State of Georgia had the power to convey a property interest in western lands that were in part held under "Indian title." As in *Johnson v. McIntosh*,[4] another of the early cases that shaped the nature of aboriginal rights in United States law, the issues were litigated by parties other than the Indian nations, and involved controversies that were far removed from actual conflict between Indians and other sovereigns over jurisdiction of the soil.

In 1795, the Georgia Legislature conveyed the state's interest in certain western lands in fee simple to the Georgia Company. Allegations of bribery and other corruption, however, resulted in the voiding of the contract of sale by a subsequent legislature.[5] In spite of this action, the interest in the lands successively changed hands, culminating in a conveyance from Peck to Fletcher. This transaction and the litigation that it produced were widely regarded as feigned[6] in order to gain clarification of the validity of title through the judicial process, a clarification that had been impossible to obtain through the United States Congress.[7]

The provisions of the contract of sale and the pleadings of the parties in the case were carefully drawn to thoroughly litigate all possible issues that lent ambiguity to land titles under the original

2. Chief Justice Marshall served from 1801 to 1835.

3. 10 U.S. (6 Cranch) 87 (1810).

4. 21 U.S. (8 Wheat.) 543 (1823).

5. C. Haines, The Role of the Supreme Court in American Government and Politics, 1789-1835, at 310-11 (1944).

6. 10 U.S. (6 Cranch) at 147.

7. C. Haines, *supra* note 5, at 314.

Georgia conveyance.[8] In his deed to Fletcher, Peck covenanted that " 'the state of Georgia aforesaid was, at the time of the passing of the act of the legislature thereof . . . legally seised in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon.' "[9] Both parties pleaded that the fee simple title to the lands existed apart from and compatible with the Indian title, either in the State of Georgia or in the United States.[10] Arguments for Peck, the defendant, attempted to define the Indian title by the common law rules of real property. In this view aboriginal tenures were not recognizable under the common law and had to be established by the law of nations:

> What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. *Vattel, b.* 1. § 81. *p.* 37 and § 209. *b.* 2. § 97. *Montesquieu, b.* 18. *c.* 12. *Smith's Wealth of Nations, b.* 5. *c.* 1. It is a right not to be *transferred* but *extinguished.* It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.[11]

The law of nations, as cited in the pleadings, expressed a cultural definition of land tenure based on European institutions. The writings of Vattel concerning land tenures, in particular, were consistent with European designs of empire and the later notions of "manifest destiny."[12] John Quincy Adams, one of the attorneys for Peck, had been elaborating on these themes for some time. In an 1802 "Oration on the Anniversary Festival of the Pilgrims," he discussed the scope of the Indians' possessory rights:

> The Indian right of possession itself stands, with regard to the greatest part of the country, upon a questionable foundation. Their cultivated fields, their constructed habitations, a space of ample sufficiency for their subsistence, and whatever they had annexed to themselves by personal labor, was undoubtably *by the laws of nature* theirs. But what is the right of a huntsman[?] . . . Shall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world? Shall he forbid the wilderness to blossom like the rose? Shall he forbid the oaks

8. *Id.* at 314-15.
9. 10 U.S. (6 Cranch) at 88.
10. *Id.* at 121.
11. *Id.*
12. *See* 3 E. DE VATTEL, THE LAW OF NATIONS §§ 77-82 (C. Fenwick trans. 1916) (1st ed. Neuchatel 1758).

> of the forest to fall before the ax of industry and rise again transformed into the habitations of ease and elegance?[13]

Adams argued that the Indian title was not a "municipal right" that could be recognized by the laws of the United States. His view was that by virtue of the cultural superiority of European institutions, the law of nations characterized the transfer of lands from aboriginal peoples to the European settler colonies as a natural law transaction that should not be impeded.

In the majority opinion written by John Marshall, the Court in large part ignored the pleadings as to the nature of the Indian title. Marshall, always sensitive to the political currents of his time, saw the primary issue as a potential conflict between the United States and Georgia over jurisdiction of the lands.[14] The cession of western land claims to the United States was a difficult political controversy for many years until the Georgia claims were finally ceded in 1802.[15] The question of the right of the state to sell an interest in these lands was resolved by the Court in favor of Georgia, but the precise nature of the state's interest in the lands was difficult to conceptualize within the legal framework established by the parties. The concept of fee simple was urged to define a relationship to the land that was largely inchoate and dependent on the extinguishing of the Indian title by the federal government. To Marshall,

> [s]ome difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a state can be seised in fee of lands, subject to the Indian title, and whether a decision that they were seised in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.[16]

Under the Anglo-American common law, the owner of a fee simple interest could utilize legal procedures to gain actual possession.

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13. [1867] REPORT OF SECRETARY OF THE INTERIOR, part 2, 40th Cong. 2d Sess., ANNUAL REPORT ON INDIAN AFFAIRS BY THE ACTING COMMISSIONER 144, *quoted in* Royce, *Indian Land Cessions in the United States,* 18 BUREAU OF AM. ETHNOLOGY ANN. REP. 527, 536 (1899).

14.

> The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

10 U.S. (6 Cranch) at 142.

15. R. BILLINGTON, WESTWARD EXPANSION 206 (2d ed. 1960).

16. 10 U.S. (6 Cranch) at 142.

This process would have subverted the established sovereign rights of the United States to extinguish the Indian title. The Court surmounted this problem with the simple assertion that "the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."[17]

Remarkably, in this one phrase, Marshall was able to recognize the existence of the Indian title, reaffirm the role of the United States as the sovereign entity empowered to extinguish that title, and give the paramount property right to the lands in question to the State of Georgia. The Court thus validated the disputed covenant of the land conveyance,[18] but at the expense of any clear definition of the nature of the Indian title or the meaning of "fee simple" in this context. Despite this imprecision, the use of the concept of fee simple to express a right of preemption set forth an idiom of discourse that would later serve, of itself, as a serious qualification of aboriginal land rights.

Justice Johnson, in his dissent, argued powerfully against the compatibility of fee simple ownership by the state with the Indian title. In his view, the tribes of Georgia were "the absolute proprietor[s] of their soil," a condition incident to their status as "independent people" as expressed in "innumerable treaties formed with them."[19] Fee simple ownership was an exclusive concept, the substance of which lay with the Indian nations. "In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it." "What, then, practically," he asked, "is the interest of the states in the soil of the Indians within their boundaries?"[20] The answer was a very clear articulation of aboriginal national rights and of the historical relationship of the European governments to the Indian nations:

> Unaffected by particular treaties, [the interest of the states] is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty

17. *Id.* at 142-43.
18. *See id.* at 88.
19. *Id.* at 146-47 (Johnson, J., dissenting).
20. *Id.* at 147.

> amounts to the right of governing every person within their limits except themselves.[21]

Johnson perceived that "[i]t is awkward to apply the technical idea of a fee-simple to the interests of a nation."[22] National rights are not the same thing as estates in lands but involve issues of sovereignty and jurisdiction that are inseparably wedded to questions of land tenure. He clearly recognized the full scope of aboriginal rights as established and memorialized through the treaty making process between the sovereigns of the settler colonies and the Indian nations.

It is apparent, however, that John Marshall and the majority were unwilling to burden this opportunity to expand the national legal system with questions of aboriginal rights. The primary focus of the decision concerned the constitutional protection of the obligation of contract and the right of the courts of the United States to overturn unconstitutional acts of the state legislatures.[23] In fact, the Indian question is rarely mentioned in the commentaries on this case. Chancellor Kent, in his comment on the majority statement on the Indian title, called the statement "a mere naked declaration, without any discussion or reasoning by the court in support of it."[24]

Despite the semantic play and doctrinal ambiguity of *Fletcher v. Peck,* it is an important case to the study of aboriginal rights. It provides a first statement in the evolution of a doctrine of aboriginal rights in the Marshall Court. There is here a definite recognition of something called the "Indian title." Marshall's concept that this title is compatible with an interest in the same lands by another sovereign would eventually be used to form a hierarchy of land rights.[25] Justice Johnson's guileless definition of native land rights as an attribute of the independence and sovereignty of the Indian nations would also form part of the continuing debate within the Court as events required greater precision in the definitions of Indian rights.

II. JOHNSON V. MCINTOSH

The Supreme Court was again given the opportunity to comment on the nature of Indian rights in 1823 with the case of *Johnson v.*

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21. *Id.*
22. *Id.*
23. C. HAINES, *supra* note 5, at 323-28.
24. 3 J. KENT, COMMENTARIES ON AMERICAN LAW 379 n.(c) (rev. ed. New York 1889) (1st ed. New York 1826).
25. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

McIntosh.[26] Although the doctrines propounded in the case were severly modified in later rulings of the Marshall Court,[27] *Johnson v. McIntosh* has been selected as a significant precedent by courts in the United States and other common law jurisdictions in decisions that have substantially reduced the scope of, or denied entirely, aboriginal rights to land.[28] It is therefore important to examine this case closely, to critically analyze the reasoning of the Court, and to locate it historically in the development of the judicial recognition of aboriginal rights.

The actual controversy concerned the recognition of title to vast tracts of land originally within the claimed limits of the Virginia Colony and later ceded to the United States as part of the Northwest Territories. In 1773 and 1775, a group of land speculators purchased lands directly from the Illinois and Piankeshaw nations respectively.[29] The lands in question were subsequently ceded by the Indian nations through treaty to the United States who granted a title to a portion of the lands to William McIntosh. In an action of ejectment against McIntosh, the devisees of a member of the original land company sought to establish title to the lands. "The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country."[30]

The simplicity of the issue thus stated, and the clarity of the factual situation, belies the far ranging and intricate analysis of land tenures that underlies the decision of the case. Marshall seized upon this controversy to establish a judicial mythology that would rationalize the origin of land titles in the United States.[31]

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26. 21 U.S. (8 Wheat.) 543 (1823).

27. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

28. Tee-Hit-Ton Indians v. United States. 348 U.S. 272 (1955), and Milirrpum v. Nabalco Pty. Ltd., [1971] 17 F.L.R. 141 (Aust. Sup. Ct. N. Terr.), are two important examples of the utilization of *Johnson v. McIntosh* concepts. *See also* Lester & Parker, *Land Rights: The Australian Aborigines Have Lost a Battle, But . . .*, 11 ALBERTA L. REV. 189 (1973).

29. The claims of rival land speculation companies to western lands were a serious issue in the Continental Congress. Maryland, in 1778, announced that it would never ratify the Articles of Confederation until all western lands were ceded by the states to the central government. *See* R. BILLINGTON, *supra* note 15, at 200-01.

30. 21 U.S. (8 Wheat.) at 572.

31. An important dimension to Marshall's reasoning involved an Americanization of the law of real property. In the early years of the Constitution there was an effort to create a legal system independent of the restrictions of status relationships in European feudalism. While a law of personal or movable property had emerged as an independent body of law within Europe in response to the requirements of an expanding mercantile class, the law of real property was securely grounded in feudal tenures. By qualifying the issues raised in cases concerning land acquisition from Indian nations in real property

If this project were the sole legacy of the case, *Johnson v. McIntosh* would be of only minor interest to the study of aboriginal rights; however, the reasoning of the case created a theory of conquest that stands as a centerpiece for the judicial diminution of native rights. It is curious that a theory of conquest should derive from a dispute in which one party claimed title to lands under a right of purchase from the Indians and the other party under a grant resulting from a formal treaty between the United States and the Indian nations.

The ultimate decision of the case was in fact based on the primacy of a federal treaty with an Indian nation. Although obscured by the ponderous dicta of the opinion, *Johnson* stands for the principle that the extinguishment of the Indian title in North America was the sole prerogative of the appropriate Euro-American sovereign through either a purchase or conquest, and that the sole means by which jurisdiction over Indian lands could be legally transferred was through a formal acquisition by the United States directly from an Indian nation.

Marshall began his analysis of the power of the Indian nations to grant title to lands within the United States with the observation that "the right of society to prescribe those rules by which property may be acquired and preserved is not, and cannot, be drawn into question." The Court therefore based its conclusions not only on the "principles of abstract justice" reflected in the law of nations, but also on principles "which our own government has adopted in the particular case, and given us as the rule for our decision."[32]

Title to lands in North America was rooted in the European discovery. This "doctrine of discovery" provided an organizing principle

terms, Marshall was able to create a law of real property that arose directly from territorial claims within the United States, which could be interpreted according to principles derived from the "natural law" philosophy of John Locke. The entire section on real property in Kent's *Commentaries*, an early treatise on American jurisprudence, is devoted to an analysis of Marshall Court cases involving the acquisition of Native American lands. *See* 3 J. KENT, *supra* note 24, at 377.

Marshall's formulation of Indian land tenure in terms of "occupancy" rights was conceptually identical to Locke's description of land holding in the state of nature as a "tenancy in common." The implication of Locke's phrase is that the actual property right is inchoate and only arises at the point at which individual possession with a right of exclusion is acknowledged. The reality of a nation or community inhabiting territory cooperatively, with land usage rooted in principles other than exclusivity, was apparently beyond the scope of 17th century English thought. The result is an Anglo-American legal system with an inherent cultural bias that attributes an anomalous and inferior status to non-European forms of land tenure. *See* J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 16-30 (T. Peardon ed. 1952) (1st ed. 1690).

32. 21 U.S. (8 Wheat.) at 572.

through which the European nations articulated claims against each other to spheres of control within the western hemisphere.

> This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
>
> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it.[33]

The nature of the titles thus established included the right of European nations to grant the soil.

> 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 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.[34]

At this stage of the Court's reasoning, the doctrine of discovery amounted to no more than a distributional principle that created a potential interest in the lands. This interest has been termed a "perfectable entitlement"[35] that could be made complete only by extinguishing the Indian title through a purchase or conquest.[36] As a regulating principle for the conduct of European nations, the doctrine recognized the Indian title and provided a mechanism by which that title might be acquired by the Europeans.

This principle was adequate to establish a framework for the orderly derivation of land titles in the United States. The right of exclusion against European nations could be readily traced through a chain of sovereign succession beginning with the British Crown and culminating with the formation of the United States.[37] The exclusive right to extinguish the Indian title, combined with the now judicially-recognized sovereign power to establish land titles coterminous with the Indian title, set forth sufficient grounds to determine the validity of land holdings within the United States.

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33. *Id.* at 573.
34. *Id.* at 574.
35. Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L.J. 75, 90-91 (1977).
36. 21 U.S. (8 Wheat.) at 587.
37. *Id.* at 574-87.

Marshall was not content to rest the Court's decision solely on these grounds. He proceeded to explore the nature of the relationship that discovery created between the Indian nations and the United States. It is here that "principles of abstract justice" are left behind. As a juridical principle derived from the conduct of nations, discovery concerned only the European nations. The occurrence of discovery, however, created a continuing relationship with the indigenous peoples of the continent, the legal consequences of which remained to be mapped.

Discovery, then, must be viewed in its dual aspects; first as a rule of exclusivity to determine which European nation was entitled to acquire the Indian title through a purchase or conquest, and second as an event that established a relationship between the European nations and the Indian nations. Surprisingly, it is under the first aspect of discovery that the only concrete expression of a limitation on Indian sovereignty occurs in this case. Under the rule of exclusivity, "their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[38] Thus the Indian sovereignty, which was complete before the European discovery, was qualified in this case only by the limitation on the scope of alienability.

It is strange that Marshall should analyze the Indian-European relationship under the rights adhering to discovery. An extensive literature on the law of nations existed concerning the rights of non-European peoples.[39] It cannot be assumed that Marshall was ignorant of the law of nations as it had been conceived up to his time. The writings of such classical publicists as Vattel, Grotius, Puffendorf, and others were introduced in the pleadings of *Fletcher v. Peck* and *Johnson v. McIntosh* to argue the validity of Indian sovereignty.[40] Moreover, these writings were well known to legal scholars of his day. It is clear that this omission was by deliberate choice and reflected his intention to base his analysis on other grounds.

At the outset, Marshall announced his intention to ratify a specific historical process that resulted in the transfer of vast areas of land

38. *Id.* at 574.

39. M. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 11-23 (1926).

40. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) at 563, 567-68; Fletcher v. Peck, 10 U.S. (6 Cranch) at 121.

to the jurisdiction of the United States.[41] He ruled that "[t]hose relations which were to exist between the discoverer and the natives were to be regulated by themselves."[42] The actual historical record of the relationship as memorialized in the treaty process provided ample opportunity to derive legal principles. Moreover, the Chief Justice revealed more than a passing familiarity with the historical antecedents of the controversies before the Court in the texts of his decisions. He chose, however, also to omit the treaty process from his analysis. Instead he presented what might be termed a political standard based on the creation of a myth of conquest[43] that was rooted in the judicial power to define, rather than in historical reality. It is on this point that the opinion becomes confusing and occasionally incoherent.

In the middle of the opinion Marshall restated the doctrine of discovery, but with an important addition. He stated that "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."[44] While this assertion of sovereignty is given without explanation and is otherwise left undefined, it hints at a political standard that would make Indian lands vulnerable to forced extinguishment. The restatement is followed in the text by a disclaimer that the issues were not being decided according to theories of cultural superiority, but that the Court was bound to ratify the end results of the political process whatever its ideological roots.

> We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.[45]

The Court here introduced the language of conquest for the first time, combined with perhaps the earliest articulation of the "political question" doctrine as applied to the issue of aboriginal rights. There is no immediate hint in the text as to the source of the conquest theory.

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41. 21 U.S. (8 Wheat.) at 572.

42. *Id.* at 573.

43. For a contrary view denying the existence of a theory of conquest in *Johnson,* see Henderson, *supra* note 35, at 92.

44. 21 U.S. (8 Wheat.) at 587.

45. *Id.* at 588.

The description of British claims to a right of extinguishment that "have been maintained and established as far west as the river Mississippi, by the sword"[46] quite apparently refers to the war with the French,[47] and does not provide a basis for a theory of conquest of the Indian nations.

It is only later in the opinion that the source of the conquest theory is revealed to lie in the mere act of discovery:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[48]

The equation of discovery to conquest amounts to a nimble transmutation of definition that itself stands as a conquest by judicial fiat. The historical record is quite clear that most of the lands alienated to the United States were acquired by purchase rather than by warfare.[49] Marshall provided no historical context for the derivation of the conquest theory.[50] He simply characterized the status quo, without analy-

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46. *Id.*

47. Henderson, *supra* note 35, at 92.

48. 21 U.S. (8 Wheat.) at 591.

49. Cohen, *Original Indian Title,* 32 MINN. L. REV. 28, 34-35, 45-46 (1947).

50. The conquest theory was not even credible in a political context. At a Council in 1793 with the confederated tribes of the Northwest Territory at war with the United States, the United States Commissioners, appointed by the President to negotiate a treaty of peace, unequivocally repudiated the theory of conquest and the notion that Great Britain enjoyed a right of sovereignty over the Indian nations and their territories that passed to the United States in the Treaty of Paris. The Commissioners were instructed to "carefully guard the rights of pre-emption of the United States to the Indian country . . . ." 1 AMERICAN STATE PAPERS, INDIAN AFFAIRS 341.

> Brothers: The Commissioners of the United States have formerly set up a claim to your whole country, southward of the great lakes, as the property of the United States, grounding this claim on the treaty of peace with your father, the King of Great Britain, who declared, as we have before mentioned, the middle of these lakes, and the waters which unite them, to be the boundaries of the United States.
>
> Brothers: We are determined that our whole conduct should be marked with openness and sincerity. We, therefore, frankly tell you, that we think that the Commissioners put an erroneous construction on that part of our treaty with the King. As he had not purchased the country of you, of course he could not give it away; he only relinquished to the United States his claim to it. That claim was founded on right acquired by treaty, with other white nations, to exclude them from purchasing, or settling, in any part of your country; and it is this right which the King granted to the United States.

Id. at 353. In reply, the Confederated Council denied even this right of pre-emption:

> Brothers: You have talked, also, a great deal about pre-emption, and

sis, as resulting from a conquest incident to discovery; a characterization rooted solely in the pretentious rhetoric of European notions of empire.

Despite the rhetoric of conquest, the consequences flowing to the status of Indian lands from this theory were nonexistent. Virtually every expression of "conquest," "sovereignty," or "ultimate dominion," is followed in the opinion by either a declaration of the exclusive right of the United States to extinguish the Indian title, or a repetition of the limitation of the right of alienation of Indian lands. The theory of conquest under discovery then, created no greater rights than the doctrine of discovery as it was initially articulated. Although the use of terms such as "absolute title" to describe the rights of the United States, and "occupancy" to describe the rights of the Indian nations[51] seems to indicate a hierarchy of land tenures, a careful reading of the text reveals that these characterizations of property interests did nothing to affect the essential relationships described by Marshall in this case. Whether the Indian interest was termed "title" or "occupancy," it stood as a legal right that was only qualified by a limitation over which European nations might acquire the interest. The natives "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion," and their rights to complete sovereignty were only diminished by the distributional preference of the discovery principle.[52] The European right, whatever its label, remained a right to extinguish the Indian title by established procedures of

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your exclusive right to purchase Indian lands, as ceded to you by the King, at the treaty of peace.

Brothers: We never made any agreement with the King, nor with any other nation, that we would give to either the exclusive right of purchasing our lands; and we declare to you, that we consider ourselves free to make any bargain or cession of lands, whenever and to whomever we please. If the white people, as you say, made a treaty that none of them but the King should purchase of us, and that he has given that right to the United States, it is an affair which concerns you and him, and not us; we have never parted with such a power.

Id. at 356.

51.

An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

21 U.S. (8 Wheat.) at 588.

52. *Id.* at 574.

purchase or conquest. It is unfortunate that the rhetoric of the opinion, as dicta, has often obscured these basic principles.

The parallel interests in land identified but left undefined in *Fletcher v. Peck*[53] are given no greater clarity under either the doctrine of discovery or its derivative theory of conquest. The dicta of conquest, however, do provide some concepts of interest to the study of aboriginal rights. As Marshall pointed out, the people of a conquered land are usually "incorporated with the victorious nation and become subjects or citizens of the government with which they are connected." When this occurs, "the rights of the conquered to property should remain unimpaired."[54] This right to property is a well settled principle under the law of sovereign succession.[55] The political independence and military power of the Indian nations, however, rendered it impossible to either assimilate them into the settler colonies or to govern them "as a distinct society."[56]

As a result, expressions of European dominion and sovereignty under the doctrine of discovery extend only to an interest in land. In English feudal theory, the dominion of the King includes both the right of government and the right of property.[57] In this case, the concept of sovereignty is fragmented in a novel fashion to conform to the political reality of the Indian nations. Although discovery initiated a continuing limited legal relationship to the lands of North America, it did not extend any legal status to the Indians as political communities. With the single exception of the right of alienability of land, the original, indeed aboriginal, sovereignty of the Indian nations is unimpaired by, and not included in, the concept of discovery.

Justice Marshall apparently viewed the conquest as foreclosing a judicial review of the discovery relationships articulated in this case.[58] There is evidence throughout the opinion that he regarded discovery rights as a political principle originating in the royal patents of the British Crown;[59] these royal documents, with their rhetoric of empire,

53. *See* 10 U.S. (6 Cranch) at 142-43.

54. 21 U.S. (8 Wheat.) at 588.

55. P. CUMMINGS & N. MICKLENBERG, NATIVE RIGHTS IN CANADA 18 n.31 (2d ed. 1972).

56. 21 U.S. (8 Wheat.) at 589.

57. "The word *dominium* . . . came into the law with the Normans and is one of those protean terms of eleventh-century feudalism. It is definitive not merely of proprietory or possessory rights in land but also of the governmental and contractual incidents of tenure." Goebel, *Introduction* to J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS at xxi-xxii (1950).

58. 21 U.S. (8 Wheat.) at 588.

59. *Id.* at 576-80.

are the only concrete historical sources given by the Court in support of the decision. Under Marshall's limitation of the scope of judicial review, the Court could only ratify the political process of land acquisition and the various theories of entitlement that were used historically to justify the taking. He recognized that even the restrictions on the right of free alienability of the Indian nations were contrary to the law of nations,[60] but perhaps equally recognized that "manifest destiny" was not a justiciable issue.

The source of much of the confusion in *Johnson* is the attempt to extend the discovery principle into the political realm. M. F. Lindley, an authority on the international law of aboriginal peoples, has succinctly summed up this problem:

> What the discoverer's State obtained, as against other European Powers, was the right *to acquire* the lands discovered—what in later times might have been called a "sphere of influence"—and questions dealing with the *mode* of acquisition had no place in a statement of the grounds upon which one European Power based its claims as against the others.[61]

The conquest theory of the Chief Justice was a heavy burden to lay on the fragile concept of discovery rights. At the time that the doctrine of discovery was elevated by the Court to a central place in the determination of the United States dominion over Indian lands, it was regarded as increasingly archaic in the relations of states. In 1790, in a dispute known as the Nootka Sound Controversy,[62] England and Spain agreed to the principle that areas of Northwest North America not actually occupied were open to free access by the traders of both states. In the dispute over the Oregon Territory between the United States and Great Britain, both sides agreed by 1826 that mere discovery could not grant a complete title.[63]

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> So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

Id. at 591-92.

61. M. LINDLEY, *supra* note 39, at 29.

62. Simsarian, *The Acquisition of Legal Title to Terra Nullius,* 53 POL. SCI. Q. 111, 123 (1938).

63. The British Commissioners argued:

> Upon the question of how far prior discovery constitutes a legal claim to sov-

By the early 19th century, therefore, discovery alone was no longer valid as a distributional principle. Indeed, it is questionable if it ever was totally accepted as a sufficient basis for dominion. As a distributional principle it was given limited recognition and various definitions by the European states. The early publicists of the law of nations were in basic agreement that title was dependent on actual possession in addition to discovery.[64] It is not surprising then that John Marshall avoided a discussion of the law of nations in *Johnson*. The English charters granting the lands of North America "into the land throughout from sea to sea,"[65] were given at a time when only a few small settlements existed on the Atlantic coast.[66]

Even England, characterized by Marshall as an unequivocal supporter of the discovery principle,[67] departed from the principle when it suited its national purpose. In response to Spanish claims to the New World based on the Papal Donation resulting from the Spanish discovery, Queen Elizabeth announced that

> [t]his donation of what does not belong to the donor and this imaginary right of property ought not to prevent other princes from carrying on commerce in those regions or establishing colonies there in places not inhabited by the Spaniards. Such action would in no way violate the law of nations, *since prescription without possession is not valid.*[68]

Often the taking of possession was merely symbolic. Francis Drake took symbolic possession of the Straits of Magellen "with Turfe and Twigge, after the English manner."[69] While these acts were viewed as establishing title to uninhabited lands or *terra nullius,*[70] under the law of nations they could not create a title to inhabited lands, the

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ereignty, the law of nations is somewhat vague and undefined. It is, however, admitted by the most approved writers that mere accidental discovery, unattended by exploration—by formally taking possession in the name of the discoverers sovereign—by occupation and settlement, more or less permanent—by purchase of the territory, or receiving sovereignty from the natives—constitutes the lowest degree of title.

M. LINDLEY, *supra* note 39, at 134.

64. *Id.* at 131.

65. 21 U.S. (8 Wheat.) at 578.

66. M. LINDLEY, *supra* note 39, at 130.

67. "No one of the powers of Europe gave its full assent to this principle more unequivocally than England." 21 U.S. (8 Wheat.) at 576.

68. Cheyney, *International Law Under Queen Elizabeth,* 20 ENG. HIST. REV. 660 (1905) (emphasis added).

69. A. KELLER, O. LISSITZYN & F. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS 1400-1800, at 57 (1938).

70. *Id.* at 3-5. This study was based on the premise that the lands of the western hemisphere were *terra nullius,* that is, legally uninhabited. It relies almost exclu-

natives of which were generally regarded as possessing some form of sovereignty.[71]

The Dutch bolstered their claims to New Netherlands with formal agreements of purchase from the Indian nations. They argued against the Spanish and the English that the Indian nations were the owners of the land, and that title must be acquired by a purchase or grant from the natives.[72] The Dutch also followed this practice in their colony on the Cape of South Africa, but not in South America. Sweden adopted the purchase theory and recognized Dutch territorial claims based on Indian deeds.[73] In reaction to Dutch expansion into the region of Connecticut, the English colonies of New England hurried to sign their own agreements with the Indians.[74] In sum, although usually invoking the discovery principle, the European states based their claims against each other on whatever theory was most appropriate to their interests. Discovery, even combined with symbolic possession, could be nothing more than a reservation of rights to effect future attempts at actual possession.

Having established the principle that extinguishing the Indian title to lands was the exclusive right of the sovereign, questions still remained concerning the proper means by which this event was to occur, and the status of land transactions between individual citizens of the United States and an Indian nation. Marshall framed the issue in terms of the power of "private individuals to receive, a title, which can be sustained in the Courts of this country."[75] One of the more fundamental principles of the common law is that all titles to land derive from the sovereign. In *Johnson,* lands were purchased directly from the Indian nations. The Court was confronted with a situation in which it was asked to locate within the legal system a recognition of title to land that originated outside of the legal system in a private transaction with another sovereign. In its analysis, the Supreme Court recognized the validity of aboriginal title and of the complete prerogative of the Indian nations to determine their own tenures:

> Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the

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sively on the rhetoric of empire of the European states. It is this author's opinion that this study is erroneous in total, and conforms neither to the writings of the contemporary publicists of the law of nations nor to the actual practice of nations.

71. M. LINDLEY, *supra* note 39, at 12-17.
72. W. MACLEOD, THE AMERICAN INDIAN FRONTIER 195 (1928).
73. *Id.* at 196.
74. F. JENNINGS, THE INVASION OF AMERICA 172-74 (1975).
75. 21 U.S. (8 Wheat.) at 572.

> common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding.[76]

Thus the case provides a common law precedent for the recognition of aboriginal usage based on aboriginal possession. The rights adhering to the Indian title, as presented above, derive from a distinct tenurial system outside of the federal law[77] and based on Indian sovereignty. This recognition is in conformity with the statement of the Court at the beginning of the opinion that "the right of society to prescribe those rules by which property may be acquired and preserved . . . cannot be drawn into question"[78] and with the description of the right of occupancy as "a legal as well as just claim to retain possession of [land] and *to use it according to their own discretion.*"[79] The disclaimer of jurisdiction by the Court was a clear acknowledgment that the sovereign authority of the United States did not extend to the Indian territories.

The sovereign right of the United States to extinguish Indian title was symbolic of its sovereignty over individual citizens and the constituent states. The actual transfer of the jurisdiction over lands is a mutual act of ultimate sovereigns. Marshall's presentation of the status of an individual purchase of lands from an Indian nation was not different from the status of land purchased by an American citizen in, for example, Canada.

In *Johnson,* the Indian nations ceded the lands in question to the United States without a reservation of the title of the land companies in the treaty.[80] This was a transaction between two sovereigns. The Court ruled that the Indian nations had "an unquestioned right to annul any grant they had made to American citizens"[81] and that the land companies could not set up their title against the United States.

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76. *Id.* at 593.
77. Land tenure theory is discussed in Henderson, *supra* note 35, at 93-96.
78. 21 U.S. (8 Wheat.) at 572.
79. *Id.* at 574 (emphasis added).
80. *Id.* at 594.
81. *Id.*

Johnson v. McIntosh is perhaps one of the most misunderstood cases in the Anglo-American law. A great deal of the confusion that this case has inspired is due to the Court's difficulty in finding a language to adequately express, in legal concepts, the politically sensitive relationship of the Indian nations with the United States. A careful reading of the case, however, will reveal certain principles that are important to the study of aboriginal rights.

The doctrine of discovery is a distributional principle by which the European nations determined which of them possessed the exclusive right to extinguish the Indian title by purchase or conquest. It was a theory for the acquisition of property only and it was applied to the external relations of the Europeans with the Indian nations. The doctrine affected the complete, original sovereignty of the Indian nations only insofar as it limited the scope of the alienability of land to Europeans. There is nothing either explicit or implicit in the doctrine that could create a trust relationship over Indian lands.

The Indian right of occupancy is a legal right based on aboriginal possession that carries with it complete discretion for tribal tenures in Indian territory. These tenures certainly included traditional and communal usage.

Fee simple is an ambiguous concept in this case. The interpretation that the European discovery of the continent instantly brought into being a fee simple property right in the common law sense to all the lands in the western hemisphere was justly ridiculed in *Worcester v. Georgia.*[82] It is clear that these words had a special meaning in the context of Indian law. The concept stands for what was also termed a "right of preemption," that is to say, an exclusive right to acquire against other European nations and nothing more. Later courts, with a superficial recitation of the familiar words "fee simple," interpreted *Johnson* as standing for the principle that the United States possesses a paramount property right over Indian lands, and that Indian occupancy is at sufferance. This notion is not supported by the text and was explicitly contradicted in *Worcester.*

The theory of conquest is a legal fiction that had no immediate consequences. It was not based on any historical reality other than the wording of Royal Charters granting feudal rights to North America. It did, however, establish a language of juridical discourse that would potentially rationalize the process of "manifest destiny" and provide

82. 31 U.S. (6 Pet.) 515 (1832).

the conceptual space for the forced extinguishment of Indian lands. The concept of conquest created in this case was repudiated by the Court only nine years later in *Worcester*.

It should be noted that the judgment in *Johnson* had no immediate impact on the sovereign rights of any Indian nation. The lands in question had been alienated decades prior to the litigation, first by purchase, and eventually by treaty. John Marshall was formulating principles in an abstract environment, principles that would acquire clarity only in the later cases that actually involved Indian issues. The legal concepts first articulated in *Johnson v. McIntosh* should be viewed as part of an evolving doctrine of aboriginal rights in the Marshall Court.

III. The Cherokee Cases

The Cherokee cases[83] presented the Supreme Court with an actual controversy over the scope of Indian rights to territorial integrity and national sovereignty. The conflict arose from rival claims between the State of Georgia and the Cherokee Nation over lands guaranteed to the Cherokee by a treaty with the United States. In the Treaty of Holston in 1791, the Cherokee Nation ceded certain lands to the United States which in turn "solemnly guarantee[d] to the Cherokee Nation, all their lands not hereby ceded."[84] Under the treaty, some five million acres remained to the Cherokee within the borders of the State of Georgia.[85]

In 1802, Georgia ceded all of its claims to western lands in what is now Arkansas and Mississippi to the United States on the express condition that the United States would extinguish the Indian title to the lands within the borders of the state "as soon as it could be done peaceably and on reasonable terms."[86] As decades passed without much of the Cherokee title being extinguished, Georgia began to press the federal government to implement a policy of removing the Indians from the state. The state regarded the Cherokee as tenants at will with only a temporary right to use the lands.[87]

By the 1820's, the Cherokee had adopted many of the cultural

83. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

84. Treaty with the Cherokees, 7 Stat. 40 (1791).

85. 1 C. Warren, The Supreme Court in United States History 729 (1926).

86. *Id. See* F. Prucha, American Indian Policy in the Formative Years 227-28 (1962).

87. F. Prucha, *supra* note 86, at 228.

patterns of their white neighbors, including European forms of agriculture, and were reluctant to cede any of the remaining lands.[88] In 1827, the Cherokee Nation adopted a written constitution "which asserted that the Cherokee were one of the sovereign and independent nations of the earth with complete jurisdiction over their own territory."[89] Georgia responded by enacting a series of laws in 1828 and 1829 that extended the laws of the state to the Indian lands, and established new counties to administer the acquisition.[90] These laws were clearly in conflict with the treaty of 1791.

The Cherokee Nation brought suit in the United States Supreme Court seeking to enjoin the State of Georgia from enforcing these laws. *Cherokee Nation v. Georgia*[91] was commenced in the midst of considerable political turmoil in the United States involving sectional rivalries and state claims to a right of nullification over federal laws.[92] In *Georgia v. Tassel,* Georgia had already defied a writ of error from the United States Supreme Court and executed a Cherokee man convicted of a murder committed in the Indian territory.[93] Georgia also refused to send a representative to litigate the *Cherokee Nation* case.[94]

The substantive issue in *Cherokee Nation* concerned the national status of the Cherokee Nation. The case was decided on jurisdictional grounds that nevertheless touched on the national question in a very definite way. Article III of the Constitution defined the scope of the judicial power to include controversies " 'between a state . . . and foreign states.' "[95] The jurisdictional issue, therefore, was whether the Cherokee Nation constituted a foreign state "in the sense in which that term is used in the Constitution."[96] The Court majority, speaking through John Marshall, acknowledged that the Cherokee were a state possessing political independence and full powers of self government:[97]

> They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations

88. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality,* 21 STAN. L. REV. 500, 503 (1969).
89. F. PRUCHA, *supra* note 86, at 231.
90. Burke, *supra* note 88, at 531.
91. 30 U.S. (5 Pet.) 1 (1831).
92. C. WARREN, *supra* note 84, at 743.
93. Burke, *supra* note 88, at 512.
94. *Id.* at 513.
95. 30 U.S. (5 Pet.) at 15 (quoting U.S. CONST. art. III, § 2).
96. *Id.* at 16.
97. *Id.*

> of peace and war, of being responsible in their political character for any violation of their engagements . . . . The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.[98]

The difficulty, however, was over the term "foreign."

> 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.[99]

Although this language has been viewed as establishing a wardship or trust relationship between the Indian nations and the United States government, it is more likely an attempt at a semantic resolution of a difficult conceptual problem. If the Indian nations are states, but not foreign states, how could their actual character be described? Most of the statement quoted above is simply a repetition of the doctrine of discovery.[100] In any event, this language is merely dicta, as the issue was decided on geography rather than wardship: "the constitution in this article does not comprehend Indian tribes in the general term 'foreign nations;' not we presume because a tribe may not be a nation, but because it is not foreign to the United States."[101]

By this reasoning, the Court was able to refuse jurisdiction in the case, thereby avoiding the political consequences of a decision, while at the same time affirming the national character of the Indian nations. This result was unsatisfactory to four of the justices of the Court who felt that the case should have been decided on other grounds. Justices Johnson and Baldwin agreed with Marshall that the Cherokee had no standing before the Court, but based that opinion on the idea that the Cherokee did not constitute a state. Baldwin, in particular, interpreted the history of Indian-white relations as proving that the Indian tribes were not nations.

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98. *Id.*
99. *Id.* at 17.
100. Henderson, *supra* note 35, at 102.
101. 30 U.S. (5 Pet.) at 19.

In his concurring opinion, Baldwin quoted extensively from the Court's decision in *Johnson* to support the principle that the Indians had no national rights. Specifically, he identified the use of the phrase "ultimate dominion" as indicating a complete sovereignty in the British Crown, subject only to the natives' right of occupancy. He viewed *Johnson* as

> clearly establishing that from the time of discovery under the royal government, the colonies, the states, the confederacy and this Union, [the Indians'] tenure was the same occupancy, their rights occupancy and nothing more; that the ultimate absolute fee, jurisdiction and sovereignty was in the government, subject only to such rights; that grants vested soil and dominion, and the powers of government, whether the land granted was vacant or occupied by Indians.[102]

Justice Thompson, in his dissent, recognized the Cherokee to be a foreign nation and urged a remedy against the State of Georgia. Strangely, this opinion was written at the request of Marshall[103] to answer the arguments of Baldwin and Johnson. Thompson, joined by Story, agreed with the majority that the Cherokee were a sovereign state[104] with an unquestionable right to their lands. His interpretation of the right of occupancy was the polar opposite of Baldwin's:

> And notwithstanding we do not recognize the right of the Indians to transfer the absolute title of their lands to any other than ourselves; the right of occupancy is still admitted to remain in them, accompanied with the right of self government, according to their own usages and customs; and with the competency to act in a national capacity, although placed under the protection of the whites . . . . But the principle is universally admitted, that this occupancy belongs to them as a matter of right, and not by mere indulgence. . . .
>
> In this view of their situation, there is as full and complete recognition of their sovereignty, as if they were . . . absolute owners of the soil.[105]

It is obvious that the ambiguity of the Court's reasoning in *Johnson* on the nature of aboriginal rights was fundamental and extreme. Although Marshall was obviously sympathetic to the national rights of the Cherokee, the Court's refusal to accept jurisdiction in the *Cherokee Nation* case did nothing to resolve the wide disparity in

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102. *Id.* at 48.
103. Burke, *supra* note 88, at 516.
104. 30 U.S. (5 Pet.) at 37-39, 46.
105. *Id.* at 55.

the interpretation of aboriginal rights set forth in the concurring and dissenting opinions. What the Chief Justice did accomplish was the avoidance of involving the Court too deeply in an explosive political situation.

These issues, however, refused to disappear. Georgia continued to enforce its laws in the Indian country. One of these laws required all white persons residing in the Cherokee country after March 11, 1831, to obtain a license from the state.[106] Two missionaries, Samuel A. Worcester and Elizer Butler, refused to obtain this license and also refused to leave the country when ordered to do so by the state. They were arrested, convicted, and sentenced to four years imprisonment at hard labor. On an appeal to the Supreme Court, Worcester based his argument on the sovereign rights of the Cherokee Nation. Georgia once again declined to appear.[107] Thus in 1832, only one year after the Court had successfully sidestepped this controversy, it was compelled to face directly the issues raised by the Georgia-Cherokee dispute.

Worcester v. Georgia[108] provides the clearest, most complete articulation of the concept of aboriginal rights to be found in the American legal system. The ambiguities created by the previous tentative attempts by the Court to formulate principles for the adjudication of disputes involving issues of aboriginal rights were directly addressed and resolved. *Worcester* is the only case decided on the substantive merits by the Marshall Court that actually involved a live issue of Indian rights. It may be viewed as the culmination of an evolving doctrine of aboriginal rights first addressed by the Court in *Fletcher v. Peck.*

Worcester stands for the principle of complete sovereign rights of the Cherokee Nation, and for the categorical repudiation of the notion of conquest advanced in *Johnson.* Marshall began his opinion with a discussion of the rights adhering to discovery:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the

106. C. WARREN, *supra* note 85, at 753.
107. Burke, *supra* note 88, at 521.
108. 31 U.S. (6 Pet.) 515 (1832).

> discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.[109]

This language describes the sovereign condition of the Indian nations prior to the European discovery. Discovery, as an exclusive principle, regulated the conduct of the European nations,

> but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.[110]

This reasoning left no room for the idea that the act of discovery established rights in the European nations that could be set against the rights of the indigenous peoples of North America. The confusing equation of discovery with conquest advanced in *Johnson* is untenable when read in the light of these principles. Marshall not only repudiated the theory of conquest, but he undercut the entire historical foundation for the theory described in that case. In *Johnson,* the sole historical reference for the concept of conquest was to the Royal Charters granting the rights of soil and government to the settler colonies.[111]

In a careful re-examination of these Colonial Charters, Marshall could find no basis for the granting of rights of sovereignty over the Indian nations. He noted that although these documents purported to convey the soil from sea to sea, the lands were actually occupied

> by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.[112]

These documents could only convey whatever title was possessed by the Crown and this amounted to nothing more than an exclusive right of purchase. "The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood."[113]

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109. *Id.* at 542-43.
110. *Id.* at 544.
111. 21 U.S. (8 Wheat.) at 588.
112. 31 U.S. (6 Pet.) at 544-45.
113. *Id.* at 545.

The charters, as specific delegations of royal authority, did not empower the colonies to engage in wars of conquest. The power to make war was included in the grants "but *defensive* war alone seems to have been contemplated."[114] The right to invade the natives and other enemies was dependent on "just cause."[115] The Court viewed these war-making provisions as evidence that the natives were not the subjects of the English, but were rather independent entities and potential enemies. Royal Charters "asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."[116]

The Court could find no evidence in the history of the British relations with the Indian nations of an interference in the right of the Indians to self-government. The interest of the Crown was to keep out agents of foreign powers and to purchase lands when the Indians were willing to sell.[117] Moreover, the Proclamation of 1763 set a boundary between the English colonies and the Indian country and forbid purchase or settlement west of the line.[118]

The United States in its formative years was eager to make agreements of peace and alliance with the Indian nations. A number of treaties were signed with the western tribes. The language of many of these treaties included statements that placed the Indian nation under the protection of the United States. Justice Baldwin, concurring in *Cherokee Nation,* based his arguments against the national sovereignty of the Cherokee in large part on the language of these treaties. One of the more ambiguous statements in the majority opinion of that case concerned the language of dependence.[119] In its analysis of the history of Indian relations, the Court proceeded to clarify the meaning of this concept and to provide a framework by which these treaties were to be construed.

The colonial authorities were a source of trade goods for the Indians and restrained their own citizens from encroaching on Indian lands.

> The Indians perceived in this protection only what was beneficial to themselves . . . . It involved, practically, no claim to their lands,

114. *Id.*
115. *Id.*
116. *Id.* at 546.
117. *Id.* at 547. "[The King] also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs . . . ." *Id.*
118. *Id.* at 548.
119. 30 U.S. (5 Pet.) at 37-39, 46.

> no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.[120]

Marshall stated that these relationships must be viewed through the understanding of the natives rather than the formal, and often self-serving language of diplomatic documents.[121]

Marshall's construction of the Treaty of Holston provides a detailed model for the interpretation of Indian treaties with the United States.[122] In the peace treaty with Great Britain, the King could only cede to the American Government what belonged to the Crown. These cessions did not include a right of sovereignty over the Indian nations. When the Indian nations that were formerly under the protection of the British Crown agreed to the protection of the United States they had every reason to expect that the relationship would be the same.[123] Marshall pointed out that the articles of the Indian treaties that spoke of protection must be construed in the context of other provisions of the treaties and of the treaty-making process itself. Many of the other treaty provisions recognized a right of self-government.

Claims by the state or by other grantees from the Crown to Indian lands could not stand against the aboriginal right. These claims were based on the colonial charters and of the practice of the Crown and its successors to grant title to lands yet remaining under aboriginal possession. While the practice of granting these titles was recognized in *Fletcher* and *Johnson,* no rights were created that could be set against the Indian nations. Nor were such rights created by the language of protection in the treaties.

> The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not sur-

120. 31 U.S. (6 Pet.) at 552.

121. *Id.* at 552-53.

122. *Id.* at 555-59.

123. "This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master." *Id.* at 555.

> render its independence—its right to self-government, by associating with a stronger, and taking its protection.[124]

Relationships of dependence or protection, then, did not imply or create any limitation on the national sovereignty or territorial integrity of the Indian nations.

The Court also considered the status of treaties made with the Indian nations:

> The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[125]

The Indian treaties are therefore the law of the land. The laws of Georgia that extended over the Indian country were in clear violation of the territorial rights and rights to self-government guaranteed to the Cherokee Nation in treaties with the United States.[126] The Court ruled on these grounds and others that the Georgia laws were "void, as being repugnant to the constitution, treaties, and laws of the United States" and ordered Samuel Worcester released.[127]

The Court in *Worcester* went far beyond the question of land rights. The decision recognized the Cherokee Nation as a distinct entity separate from both the State of Georgia and the United States, and

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124. *Id.* at 560-61. Although the principles of the law of nations were studiously avoided in the earlier Marshall Court cases, many of the concepts of Vattel are incorporated into the *Worcester* decision. *See* AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP 99-111 (1977). The unique importance of *Worcester,* however, lies in its analysis of the *customary* international law of aboriginal rights in the North American experience.

125. 31 U.S. (6 Pet.) at 559-60.

126. The rights guaranteed to the Cherokee Nation in its treaties with the United States were summarized by the Court. The treaties "mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; *and recognize the pre-existing power of the nation to govern itself.*" *Id.* at 561-62 (emphasis added).

127. *Id.* at 562-63. The decision was strongly grounded on the primacy of the federal treaty with the Cherokee Nation. However, the Court also ruled that the Georgia laws were in violation of the Non-Intercourse Act and the exclusive power of the United States over Indian affairs vis-a-vis the states.

possessed of the full rights and attributes of sovereignty. These rights were neither qualified nor compromised by the rights of the British Crown and its grantees, by treaties with the United States, by the laws of any state, *or by previous decisions of the United States Supreme Court.*

While *Worcester* demonstrates the capacity of the common law to recognize a complete spectrum of aboriginal rights, it also underscores the vulnerability of aboriginal rights to the political process. The State of Georgia refused to acknowledge the power of the Supreme Court to annul its Indian laws.[128] President Andrew Jackson, who favored the policy of Indian removal, did nothing to enforce the ruling of the Court. The dispute was only "resolved" with the forced expulsion of the Cherokee from Georgia, known as the Trail of Tears, which resulted in the death of thousands of Cherokee people.

IV. MITCHEL V. UNITED STATES[129]

In 1835, the Supreme Court considered the Indian title for the last time in the Marshall years. The controversy concerned the recognition of title to lands in Florida acquired from an Indian nation prior to the purchase of Florida by the United States. For a period of twenty years, Florida was a dominion of Great Britain. In its analysis of the rights adhering to the land transaction, the Court used some interesting language in its description of the British understanding of the Indian title.

Although the opinion of the Court did not expand or contract the scope of aboriginal rights beyond those recognized in the *Worcester* decision, it did provide added clarity to the concept of occupancy rights:

> One uniform rule seems to have prevailed, from [Britain's] first settlement, as appears 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 . . . .[130]

The Court went on to state:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much

128. C. WARREN, *supra* note 85, at 768-69.
129. 34 U.S. (9 Pet.) 711 (1835).
130. *Id.* at 745 (emphasis added).

> 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 authorized sale to individuals.[131]

These two statements of the Court represent a definite recognition of native rights to land based on aboriginal usage. Occupancy rights are described to explicitly include communal tenures. Territorial rights are acknowledged that involve "modes of life" and land usage that do not conform to the tenures of the European cultures. While it may be conceptually impossible to derive aboriginal usage from the feudal structures underlying the common law of real property, *Mitchel* provides a clear example of how aboriginal tenures have been recognized in Anglo-American legal systems, based on preexisting rights.

CONCLUSION

Over a period of twenty-five years, the Marshall Court evolved a conceptual framework for the recognition of aboriginal rights in the American legal system. Beginning with an undefined recognition of the "Indian title," the Court ultimately developed a complete recognition of the national sovereignty and territorial integrity of the Indian nations. It is important to read these cases as manifesting an evolving doctrine. The concepts advanced in the early cases were tentative and ambiguous, as the Court attempted to formulate a language that would give legal coherence to the relationship between the European and Indian societies.

The language of "discovery," "occupancy," "conquest," and "dominion" put forth in *Johnson,* and of dependency in *Cherokee Nation,* when read in the light of the *Worcester* decision, created no rights in the United States other than the exclusive right to accept a voluntary cession of Indian lands. *Worcester* stands for a repudiation of the judicially created limitations of aboriginal rights that could be extracted from the ambiguities of the earlier cases. Aboriginal rights were identified by the Court as originating in the pre-existing rights and usage patterns of the Indian nations, and were recognized in, rather than derived from the legal system.

For the most part, however, this legal history offers only one side of the transaction. The cases represent an internal regulation of conduct of Indian affairs from the point of view of the United States. For

131. *Id.* at 746.

a bilaterial view of aboriginal rights, it is necessary to look to the treaties and the treaty-making process. It is there that the actual substance of aboriginal rights is to be found.

This need is underscored by the political context in which most Indian cases occur. As previously noted, the judicial system is an aspect of the national authority. It is less than surprising that the conquest theory of *Johnson* was frequently cited by later courts as a decisive precedent for the limitation of aboriginal rights. The court system and the selection process of the common law have often been used as an instrument of power in the relations between the United States and the Indian nations. Thus while the Marshall Court cases provide a significant affirmation of aboriginal rights in the American legal system, they offer little hope for indigenous peoples attempting to achieve recognition of their rights in municipal legal systems. It is only in the international recognition of these principles, perhaps through a United Nations Covenant on Aboriginal Rights, that some protection may be offered.