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Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country

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RETRACING THE DISCOVERY DOCTRINE: ABORIGINAL TITLE, TRIBAL SOVEREIGNTY, AND THEIR SIGNIFICANCE TO TREATY-MAKING AND MODERN NATURAL RESOURCES POLICY IN INDIAN COUNTRY

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INTRODUCTION

One of the more misunderstood concepts of Anglo-American law is the discovery doctrine. That is unfortunate, since the discovery doctrine is the bedrock principle by which Europeans rationalized their presence in North America. Its misinterpretation led to unwarranted assumptions about the relationship between the federal government and the indigenous Indian tribes in the late nineteenth century and to misinterpretations abroad, most notably in Australia.[1]

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* Professor of Law, Lewis and Clark Law School. This Article originated in a presentation prepared for an aboriginal rights conference at Murdoch University in Perth, Australia, in June 2002. I thank Gary Meyers for the opportunity to explore these issues. I also thank the participants in a Lewis and Clark Law School faculty seminar, especially John Grant, Bob Miller, Joe Miller, and Dan Rohlf, for their helpful comments on a later version of this Article, which was delivered to the Lewis and Clark conference entitled "From the Corps of Disovery, to the Doctrine of Discovery, and Beyond: The Legacy of the Lewis and Clark Expedition in Indian Law, on May 6, 2004.

1. *See, e.g.*, Milirrpum v. Nabalco Pty. Ltd (1971) 17 F.L.R. 141, 200, 244 (concluding erroneously that Australia land title had been acquired by settling uninhabited lands; therefore,

The discovery doctrine was a principle of international law which sought to reconcile European notions of land ownership and sovereignty with aboriginal possession. When adopted as municipal law, it became the vehicle to validate transfers from Indian peoples to non-Indians in a country that was rapidly growing and consuming land.[2] Although it has been argued that the discovery doctrine "proved itself to be a perfect instrument of empire,"[3] it was the misinterpretation of the doctrine by judges and Congress in the late nineteenth and early twentieth centuries that produced this result. It was not an inevitable product of the doctrine itself.[4] Had the discovery doctrine been properly confined to the results of the cases that

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aboriginal people had no cognizable land rights); ALEX C. CASTLES, AN AUSTRALIAN LEGAL HISTORY 515–19 (1982) (discussing the widely held view at the time of Australia's colonization that Aborigines had no legally cognizable right to their tribal lands); R.D. Lumb, *Aboriginal Land Rights: Judicial Approaches in Perspective*, 62 AUSTRALIAN L.J. 273, 273–80, 283 (1988) (examining Australian High Court's opinions delineating the relationship between the colonizing government and the Aborigines). The *Milirrpum* decision was substantially overruled by the Australian High Court in *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. 1, 42. *See* Gary D. Meyers & John Mugambwa, *The* Mabo *Decision: Australian Aboriginal Land Rights in Transition*, 23 ENVTL. L. 1203, 1205 (1993) (noting that in *Mabo* the High Court of Australia "rejected the doctrine of *terra nullius*," which had effectively deprived Aboriginal peoples the full extent of their property rights in their tribal lands).

2. *See* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 93 (1993) [hereinafter Clinton, *Redressing the Legacy of Conquest*] (referencing the discovery doctrine as a requirement for the achievement of harmony between "aboriginal occupation and title with the English legal system of property").

3. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 325 (1990) (describing the discovery doctrine as "a racist, colonizing rule of law").

4. Professor Williams does not agree:

> The Doctrine of Discovery was nothing more than the reflection of a set of Eurocentric racist beliefs elevated to the status of a universal principle—one culture's argument to support its conquest and colonization of a newly discovered, alien world.
>
> . . . the Doctrine of Discovery must be rejected. It permits the West to accomplish by law and in good conscience what it accomplished by the sword in earlier eras: the physical and spiritual destruction of indigenous people.

Id. at 326. Professor Williams' chief contemporary objection to the discovery doctrine is that it makes indigenous peoples' claims for territory and self-government matters of exclusive national concern before domestic courts and legislatures, not as legitimate concerns for international legal and political forums. *Id.* at 327. This is not an insignificant criticism, as it basically asserts that the venue in which Indian title issues was all-important and, in light of developments after the Marshall Court decisions described in this Article, it is hard to quarrel with that assertion. Nevertheless, this Article maintains that those subsequent decisions are not the responsibility of the Marshall Court, which crafted the discovery doctrine, but rather that the responsibility for decisions like *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903) (upholding the unilateral abrogation of a treaty by Congress under the so-called federal plenary power doctrine) and *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288–89 (1955) (disallowing compensation for the extinguishment of Indian title), lies with the Courts (and generations), which produced them. *See also infra* notes 23, 172, 185, 299 (discussing *Lone Wolf*), 15, 185, 300, and accompanying text (discussing *Tee-Hit-Ton Indians*).

made it part of the common law, its legacy today would be considerably less pernicious.

The discovery doctrine, which received judicial ratification in a series of opinions over twenty-five years by Chief Justice John Marshall, had both proprietary and sovereign implications.[5] Failure to distinguish between these two dimensions can lead students of Indian law and history to overestimate the effect of the doctrine on Indian property rights. In fact, this paper maintains that the doctrine's interpretation by later Courts and Congresses had a much greater effect on Indian sovereignty than on Indian property rights.[6] The discovery doctrine restricted tribal sovereignty by giving the discovering nation the right to exclude European competitors, foreclosing relations between them and the resident Indians.[7] In the hands of the Marshall Court, this "actual state of things," in the words of Chief Justice Marshall, ripened into an exclusive federal control over Indian affairs.[8] Later Courts and Congresses used this precedent to erect a federal plenary power doctrine of questionable authority that allowed Congress to breach treaties and break up Indian lands.[9]

In contrast to the disastrous effects the discovery doctrine eventually had on tribal sovereignty, the doctrine's immediate effect on Indian proprietary rights was much less pernicious. The doctrine gave the discovering nation the sovereign right to establish rules regarding the acquisition of native proprietary rights.[10] Under the Anglo-American version of the doctrine, the discoverer gained the sovereign right to exclude other Europeans, and it also obtained the exclusive right to obtain native lands, the equivalent of an exclusive right of preemption, a proprietary right.[11] The government's right of preemption limited the Indians'

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5. *See* Clinton, *Redressing the Legacy of Conquest*, *supra* note 2, at 93–94 (describing how the discovery doctrine affected Indian property rights and essentially brought Indians under colonial sovereign power by limiting their ability to convey their property).

6. *See infra* notes 9–23, 212–216, 293–300, 391–407 and accompanying text.

7. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573–74 (1823); *see also infra* Part III.

8. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546, 557–60 (1832); *see also infra* notes 244–281 and accompanying text.

9. *See infra* notes 23, 292–98 and accompanying text.

10. *See* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 24 [hereinafter Ball, *Constitution*] (analyzing the discovery doctrine's effect on the sovereignty of Indian tribes); Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1074 (2000) [hereinafter Kades, *Dark Side*] ("[S]trictly speaking, this discovery rule applied only among European nations . . . ."); J. Youngblood Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75, 93–96 (1977) (noting that parties tracing title to a tribe have title enforceable only by that tribe).

11. Professors Ball, Kades, and Henderson, think that the discovery doctrine regulated only relations between Europeans regarding land claims. Ball, *supra* note 10, at 24; Henderson; *supra* note 10, at 93–96; Kades, *Dark Side*, *supra* note 10, at 1074. That interpretation does not seem faithful to

proprietary rights, imposing a partial restraint on the ability of the natives to alienate their lands. This restraint on alienation was, however, the only restriction the doctrine imposed on the proprietary rights of the natives; otherwise, they retained what they previously had held.[12] Their rights were, as the Supreme Court noted in 1835 and repeatedly reiterated, "as sacred and as securely safeguarded as is fee simple absolute title."[13] Thus, the federal government had to enter into numerous treaties with Indian tribes in order to secure land rights, and the vast majority of Indian titles were acquired by purchase, not conquest.[14]

Subsequent decisions—handed down over a century after the Marshall Court's decisions—which concluded that aboriginal title was not protected by a right of compensation for governmental takings,[15] and which ruled that

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Justice Marshall's statement that, in addition to diminishing the natives' "rights to complete sovereignty, as independent nations," the Indians' "power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave [the discoverer] exclusive title to those who made it." *Johnson*, 21 U.S. at 574. Therefore, it appears that Marshall thought the discovery doctrine included a restraint on Indian alienation, the scope of which would be determined by the discoverer's law. The Anglo-American rule he pronounced restricted alienation to the government, but the French recognized at least some private purchases of Indian lands. Kades, *Dark Side*, *supra* note 10, at 1075. Perhaps it is more accurate to state that while the international discovery doctrine concerned only relations among Europeans, the Anglo-American version of the discovery doctrine included a governmental right of preemption, while the French interpretation did not.

12. *See* David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 283 (1998) ("[T]he doctrine of discovery was merely an exclusive preemptive rule that limited the rights of the discoverers or their successors and entailed no limitation on the preexisting land title of tribes."). I agree with Professor Wilkins' characterization of the discovering European nation's proprietary interest as a right of preemption, but attached to this right of preemption was a partial restraint on the Indians' rights of alienation, which limited the scope of their pre-existing proprietary rights. And, as indicated in the text, I also think that the discovery doctrine granted the discoverers sovereign power over the natives, the exercise of which turned out to have a large effect on the natives' sovereignty.

13. United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938); *see also* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669 (1974); United States v. Alcea Band of Tilamooks, 329 U.S. 40, 46 (1946); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835) ("[T]heir right of occupancy is considered as sacred as the fee simple of the whites.").

14. Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 33–34 (1947) [hereinafter Cohen, *Original Title*] (claiming that "except for a few tracts of land in the Southwest, practically all of the public domain of the continental United States (excluding Alaska) has been purchased from the Indians"). *Compare id.* at 45–46 (noting that approximately $800 million was appropriated by Congress to purchase Indian land), *with id.* at 35 (noting that fifteen million dollars was paid to Napoleon for governmental authority over Louisiana, while more than twenty times that was paid to Indians to purchase their possessory rights). *See also infra* notes 197–98 (noting how exceptional instances of conquest were).

15. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); *see* Kenneth H. Bobroff, *Indian Law in Property:* Johnson v. M'Intosh *and Beyond*, 37 TULSA L. REV. 521, 530 (2001) (observing that in *Tee-Hit-Ton*, Justice Reed, writing for the Court, "stretched the holding in *M'Intosh* far beyond the facts in the case and deployed language from the opinion to justify a result that it never called for"); *see also infra* note 185.

aboriginal title amounted to no more than a defeasible usufructuary right,[16] were not rooted in the doctrine that the Marshall Court created. They were encouraged, however, by the rhetoric of Chief Justice Marshall, who mislabeled the property interests of the tribes and the government. This mislabeling, which occurred originally in *Fletcher v. Peck*—a case that was only incidentally about Indian property rights[17]—allowed later courts to fundamentally misconstrue the nature of the proprietary rights retained by the natives.

If the effects of the discovery doctrine on native property rights were greatly expanded generations after the Marshall Court, the doctrine's implications on native sovereignty were evident almost immediately after the Court handed down the most famous of its decisions, *Worcester v. Georgia,* in 1832.[18] *Worcester,* generally celebrated as a landmark victory for Indian tribes,[19] preempted state laws within Indian reservations and recognized exclusive federal control over Indian affairs.[20] However, this federal preemption did not benefit the Cherokee tribe—whose sovereignty was at stake in the case—at all, as the federal government simply pursued the same removal policies favored by the state.[21] Moreover, the federal authority recognized by *Worcester* was interpreted by the Supreme Court a half-century later to erect a doctrine of plenary federal power over natives.[22] This extra-constitutional authority[23] was subsequently employed to destroy tribal governments and territory, which is why this Article claims that the discovery doctrine, as laid down by the Marshall Court, ultimately had more pernicious consequences on tribal sovereignty than on tribal property rights.

This Article explores the discovery doctrine, its effect on aboriginal property rights and sovereignty, and the consequent impetus to treaty-

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16. *See Milirrpum*, 17 F.L.R. at 244–46, 263. The *Milirrpum* decision was effectively overturned by the Australia High Court in *Mabo*, 107 A.L.R. at 56 (recognizing the existence of native title, but denying that its extinguishment required compensation).

17. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142–43 (1810); *see also infra* notes 81–109 and accompanying text.

18. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

19. *See, e.g.*, CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 30–31, 55–59 (1987).

20. *See infra* notes 252–71 and accompanying text.

21. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 130 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN TREATISE].

22. *See infra* notes 292–98 and accompanying text.

23. *See* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 116–17 (2002) [hereinafter Clinton, *No Federal Supremacy*] (maintaining that the federal plenary power doctrine established by *Lone Wolf v. United States*, 187 U.S. 553 (1903), and other cases, had no basis in the text, history, or theory of the U.S. Constitution).

making. The Article contends that the discovery doctrine—an international law principle adopted into the common law by the Marshall Court—left Indian tribes with nearly all of their proprietary rights, although it did lay the groundwork for substantial future erosion of the tribes' sovereign authority through Chief Justice Marshall's mislabeling of Indian property rights and his reliance on federal control over Indian sovereignty. Later diminishment of those rights were not, however, a necessary product of the discovery doctrine articulated by the Marshall Court. While it may be true that the discovery doctrine instituted "a language of juridicial discourse that would . . . rationalize the process of 'manifest destiny' and provide the conceptual space for the forced extinguishment of Indian lands,"[24] this Article maintains that the Marshall Court's discovery doctrine did not by itself produce these results. Instead, it was subsequent Courts and Congresses that used the rhetoric employed by the Marshall Court to produce results that Chief Justice Marshall and a majority of his colleagues would not have endorsed.

Section I of this Article traces the origins of the discovery doctrine. Sections II through IV examine the Marshall Court's adoption of the doctrine, and the related concepts of aboriginal title and native sovereignty, as part of the common law in a series of early nineteenth century opinions. Although most of the attention of discovery doctrine scholars has been directed to what has become known as the Marshall Trilogy of Indian law cases,[25] section II maintains that the misidentification of the pertinent property interests possessed by the Indians and the discoverers occurred over a decade earlier, in the 1810 case of *Fletcher v. Peck*.[26] Section V proceeds to discuss the legacy of the Marshall Court's decisions, one of which—explored in section VI—was an impetus to treaty-making, in which tribes reserved important rights to natural resources. Section VII explains a modern alternative to the erosion of inherent tribal sovereignty, which the discovery doctrine initiated: delegated sovereignty under the federal pollution control statutes. The Article closes by drawing some conclusions about the importance of an accurate understanding of the discovery

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24. Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637, 655–56 (1978).

25. *See, e.g.*, Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) [hereinafter Frickey, *Marshalling*] (analyzing the interpretive approach adopted by Chief Justice Marshall in *Johnson*, 21 U.S. (8 Wheat.) 543, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester*, 31 U.S. (6 Pet.) 515, and comparing them to Marshall's interpretation of the U.S. Constitution); WILKINSON, *supra* note 19, at 24 (identifying the three Marshall decisions as the "Marshall Trilogy").

26. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

doctrine, aboriginal title, and native sovereignty in Indian Country in the twenty-first century.

I. THE ORIGINS OF THE DISCOVERY DOCTRINE

The roots of the discovery doctrine lie in the medieval Catholic Church's efforts to impose the authority of the Pope over non-Christian "heathens and infidels" who occupied the Holy Lands of the Middle East.[27] The papally directed Crusades of the eleventh through the thirteenth centuries were justified by the perceived need to replace the ruling infidels with Christian believers whose power would derive from, and be subject to, the Pope in Rome.[28] Although the Crusades proved to be military failures, they prompted a number of legal opinions justifying the assertion of papal authority over non-believers on the basis of Christian "natural law."[29]

These principles were soon applied to aboriginal peoples in newly discovered territories. For example, in 1436, the Pope granted Portugal exclusive authority to colonize all of Africa.[30] This monopoly caused other European colonizers to seek papal sanction for colonizing elsewhere, and, in 1493, Pope Alexander IV gave Spain the right to colonize and Christianize tribal peoples in the vicinity of Columbus's discoveries in the Western Hemisphere.[31] Spain's ensuing colonization devastated native populations.[32] For example, in Hispaniola, the indigenous population declined by around 95% within two decades, from 250,000 to fewer than 15,000.[33] Spanish colonial law invoked papal authority to announce to Indian tribes that if they did not submit to the power of the Catholic Church and its pope, Spanish conquistadors would wage war against them.[34] And they did; frequently, with devastating results.[35]

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27. Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51, 61 (1991) [hereinafter Williams, *Columbus's Legacy*].

28. WILLIAMS, *supra* note 3, at 15.

29. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 43 (4th ed. 1998) (quoting from Pope Innocent IV, explaining the circumstances under which the Pope could punish infidels, including declaring war against them).

30. Williams, *Columbus's Legacy*, *supra* note 27, at 61, 64.

31. GETCHES ET AL., *supra* note 29, at 46.

32. *Id.* at 47.

33. WILLIAMS, *supra* note 3, at 85.

34. GETCHES ET AL., *supra* note 29, at 47–48 (quoting from THE SPANISH TRADITION IN AMERICA 58–60 (Charles Gibson ed., 1968)).

35. *See* WILLIAMS, *supra* note 3, at 92–93 (describing Spain's justification for using military force against the Indians and characterizing the conquistadors' attacks as "acts of genocide").

In 1532, the Spanish theologian and jurist Franciscus de Victoria, professor of theology at the University of Salamanca and a frequent advisor to the Spanish Crown, challenged the prevailing orthodoxy. In a series of lectures entitled "On the Indians Lately Discovered," Victoria applied Thomas Aquinas's natural law theory to relations between countries.[36] He maintained that even heretics and sinners had natural law rights to property, which could not be taken simply because they refused to subscribe to the Christian religion.[37] Moreover, he contended that the Pope's attempt to grant America to Spain had no effect on native property rights.[38] Only transgressions of the Law of Nations by the natives could justify a war of conquest and the establishment of a colonial empire by a European power.[39]

To the notion that Europeans held land title by discovery, Victoria responded that the natives were actually the "true owners," and their failure to recognize the authority of the Pope was not grounds for waging war on them.[40] The Pope had no authority over Indians; all his division of the world between Portugal and Spain accomplished, according to Victoria, was to allocate trading and proselytizing areas.[41] But he maintained that the European civilizers owed a duty of guardianship under the Law of Nations, including bringing the message of Christianity to them, and that if "Indian princes" stood in the way of the message of missionaries, Spaniards would be justified in "seizing the land and territory of the natives and . . . setting up new lords . . . with an intent directed more to the welfare of the aborigines than to their own gain."[42] Victoria's notions were largely adopted five years later, in 1537, by Pope Paul III, who proclaimed:

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36. *Id.* at 98.

37. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 11–12 (1942) [hereinafter Cohen, *Spanish Origin*]; *see also* Gordon I. Bennett, *Aboriginal Title in the Common Law: A Stony Path Through Feudal Doctrine*, 27 BUFF. L. REV. 617, 619 (1978) (noting that Victoria was the first to apply to native lands the Roman principle that possessory title was a rule of natural law).

38. GETCHES ET AL., *supra* note 29, at 49 (citing FRANCISCUS DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 128, 137, 139 (Ernest Nys ed. & John Pawley Bate trans., 1917)).

39. WILLIAMS, *supra* note 3, at 97. Professor Williams provided a detailed analysis of Victoria's lectures. *See id.* at 98–108. The "law of nations" to which the natives were bound included the right of Spaniards to travel, to humane treatment as visitors, and the right to economically exploit native lands, so long as no damage was done to native rights. *See also* GETCHES ET AL., *supra* note 29, at 50–51.

40. *See* GETCHES ET AL., *supra* note 29, at 49–50 (citing VICTORIA, *supra* note 38, at 128, 137, 139).

41. *See* Cohen, *Original Title*, *supra* note 14, at 44.

42. *See* GETCHES ET AL., *supra* note 29, at 51 (citing Victoria, *supra* note 38, at 157–58); *see also* Wilkins, *supra* note 12, at 286 (noting that Victoria also asserted that the Indians had to allow the Spanish the right to travel through their lands and to trade with them).

> 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 . . .[43]

Victoria's theory of native rights, based on respect for native possession and native consent to European acquisition of title, became an accepted part of international law during the era of North American colonization. Felix Cohen, the great synthesizer of American Indian law, observed that Indian law originated in international law, noting that the 1933 Pan-American Conference proclaimed Victoria as the person who "established the foundations of modern international law."[44] Cohen traced to Victoria the American law notions of equality between Indians and whites, tribal self-government, federal sovereignty in Indian affairs, and governmental protection of Indians.[45]

Early English and Dutch settlements in North America largely adhered to Victoria's notion that Indian consent was required for land acquisition, and purchase through treaty was the common practice.[46] No doubt the reality that the Indian tribes were militarily strong and numerous contributed to this custom.[47] The practice of obtaining Indian consent through purchase proceeded, despite Crown grants "contain[ing] sweeping assertions of legal title," because it was understood that these grants functioned only to exclude other Europeans from purchasing Indian possessory rights.[48] Purchase through treaty reflected three important assumptions: (1) both parties were sovereigns; (2) the tribes had title to convey; and (3) the acquisition of Indian land was a governmental function.[49]

The British Crown left native affairs largely to the local or colonial level until the onset of the French and Indian War in 1754.[50] Most tribes

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43. *See* Cohen, *Original Title*, *supra* note 14, at 45 (citing BULL SUBLIMIS DEUS (1537)).

44. Cohen, *Spanish Origin*, *supra* note 37, at 17.

45. COHEN TREATISE, *supra* note 21, at 52–53, n.21.

46. *See id.* at 53–54. Some Puritans in Massachusetts believed that Crown grants abrogated Indian title, so that settlement could proceed in advance of Indian consent. But even those who held this view believed that the lands should be purchased from the Indians. *Id.* at 54.

47. *Id.* at 55 ("The necessity of getting along with powerful Indian tribes, who outnumbered the European settlers for several decades, dictated that as a matter of prudence, the settlers buy lands that the Indians were willing to sell, rather than displace them by other methods.").

48. *Id.* at 55–56.

49. *Id.* at 53.

50. *Id.* at 57.

sided with the French, due to encroachments on their lands by British American settlers and frequent fraudulent dealings through which the Indians lost their land.[51] In an effort to keep some tribes from aligning with the French, Britain prohibited colonists from settling on tribal land or hunting grounds west of the Appalachian Mountains, a policy that kept the strategically located Iroquois Confederacy in the British camp.[52] After the war was won, the Crown concluded that it could not trust the colonists to not encroach on Indian lands, so it promulgated King George III's Royal Proclamation of 1763.[53] The proclamation continued the wartime prohibition on settlement west of the mountains in an effort to avoid costly frontier wars.[54] In effect, the proclamation was the first declaration of Indian country.[55] Henceforth, no private land sales with Indians would be permitted without Crown approval, and all Indian traders had to be licensed.[56] This centralization of Indian affairs represented a sharp break from the Crown's previous tolerance of colonial initiatives concerning Indian lands. Clearly, London did not want to risk losing control over the Northwest lands that it had just won by allowing land speculators to continue to create friction on the frontier by purchasing Indian lands.[57]

The colonists resented this centralization of Indian affairs.[58] They viewed it as an infringement on their fundamental freedom to speculate on western lands, and the ban helped fan the fires of revolution.[59] Many prominent citizens who were land speculators ignored it, George Washington among them.[60] When London decided to finance a plan to implement the proclamation, which included staffing a number of forts along the frontier, with a stamp tax on legal documents, bills of lading, land grants, newspapers, and the like, the effect was to radicalize a generation of British Americans. A number of colonial legislatures denounced the Stamp

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51. GETCHES ET AL., *supra* note 29, at 58.

52. *Id.*

53. *Id.* at 58–59.

54. *Id.*; *see generally* Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 356 (1989) [hereinafter Clinton, *Proclamation*] (noting that the Proclamation of 1763 "represented the first legal demarcation of Indian country," or, "the crest of the Appalachian Mountains").

55. *See* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1090 (1995) [hereinafter Clinton, *Dormant Commerce*] ("[T]he crest of the Appalachian Mountains . . . established the first legal definition of Indian Country.").

56. *Id.* at 1091.

57. WILLIAMS, *supra* note 3, at 238.

58. GETCHES ET AL., *supra* note 29, at 59, 63–64.

59. *Id.* at 64

60. *Id.* at 59.

Act as an unlawful internal tax or as taxation without representation.[61] In Boston, there was rioting in the streets. Although Parliament soon repealed the Stamp Act, the proclamation remained in effect.[62]

Western land speculators claimed that the King lacked the authority to interfere with their freedom to purchase Indian lands.[63] Echoing Victoria, they argued that the proclamation was also inconsistent with the natural rights of the Indians to sell their lands, although it is clear that the natives' natural law rights mattered less to the speculators than their own self-interest.[64] Included among those speculators was William Murray, who had purchased prime lands directly from Indian chiefs and whose successors in interest would later bring the famous case of *Johnson v. M'Intosh*.[65]

Although the results of the Revolutionary War made the policies of the British Crown concerning Indian lands legally irrelevant to the settlement of the western lands, the war did not settle the central issue of whether speculators could purchase Indian lands. At the outset of the war, Virginia, which claimed western lands all the way to the Pacific Ocean under its royal charter, contended that its legislature had to approve all purchases of Indian lands, a policy threatening to speculators like Murray.[66] However, Maryland, a state without western land claims (but home to several prominent land speculators), refused to ratify the Articles of Confederation until the issue of western land purchases was resolved.[67] As a result, the Articles included a provision that gave Congress "the sole and exclusive right and power" to regulate trade and manage Indian affairs "provided that the legislative right of any State within its own limits be not infringed or

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61. WILLIAMS, *supra* note 3, at 242. Professor Williams estimated that the cost of maintaining British forces in America after the French and Indian War was nearly 500,000 pounds annually, while the annual interest on the national debt (which had ballooned from 73 to 137 million pounds) was five million pounds, at a time when Britain's annual budget averaged just eight million pounds. *Id.* at 241.

62. *Id.* at 245.

63. In their argument, the speculators cited the *Camden-Yorke* opinion, the 1757 commentary to the Privy Council by the Attorney General and the Solicitor General on colonists' rights to acquire frontier land from natives without the consent of the Crown, which maintained that individuals could purchase lands from native rulers without Crown authorization. Although the opinion dealt only with colonizing in India, British Americans edited it (removing specific references to India) and adapted it to their own situation to argue that they did not need the Crown's approval to obtain title to Indian lands. WILLIAMS, *supra* note 3, at 275–79.

64. *Id.* at 271–74, 279–80, 287, 298–300, 303–305.

65. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); *see also infra* Part III.

66. *See* WILLIAMS, *supra* note 3, at 290 (discussing Virginia's 1776 constitutional convention's resolution rejecting private purchases of Indian lands without legislative approval). Two years later, the Virginia legislature declared unlawful any previous Indian land purchases that did not have legislative approval. *Id.* at 294.

67. *Id.* at 294 (noting that Maryland refused to ratify the Articles unless Congress had the power to establish the boundaries of states with western land claims like Virginia).

violated."[68] This provision was later interpreted to allow states to control the purchase of Indian lands within their boundaries,[69] which made the states with expansive western land claims, like Virginia, quite powerful.

During the war, the Continental Congress attempted to maintain good relations with the Indian tribes. In this vein, like the British Crown, Congress centralized control over Indian affairs in the federal government.[70] The United States soon signed its first treaty with an Indian tribe: a 1778 treaty with the Delaware Indians, which guaranteed the Delawares and their heirs "all their teritoreal rights in the fullest and most ample manner."[71] After the war, Congress agreed to a series of treaties in which it promised the signatory tribes protective custody as dependent wards and stipulated that the tribes would not be disturbed in possession of their lands; one treaty even provided that any U.S. citizen who settled on Indian territory would forfeit federal protection.[72] Many of these early treaties contained provisions expressly giving the United States the first option to purchase Indian lands; that is, a right of preemption.[73] A notable treaty was the 1785 Treaty of Hopewell, which gave Congress the exclusive power of regulating trade with and controlling the affairs of the Cherokee

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68. U.S. ARTS. OF CONFED., art. IX, para. 4. The relevant portions of the paragraph read:

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

Id. For the legislative history of this provision, see Clinton, *Dormant Commerce*, *supra* note 55, at 1098–1105 (suggesting that the state proviso was likely intended to be a narrow exception for state jurisdiction over non-Indian state citizens and over activities not involving Indians but within Indian country, but acknowledging that a "precise meaning of this. . . clause may be illusory").

69. *See, e.g.*, Oneida Indian Nation v. New York, 860 F.2d 1145, 1154 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989). In *Oneida Indian Nation*, the Second Circuit held that Article IX of the Articles of Confederation gave "states the power to purchase Indian land within their borders and extinguish Indian title to such land so long as such activity did not interfere with Congress's paramount powers over war and peace with the Indians." *Id.* at 1154. Therefore, according to the court, congressional consent was not required for state purchases of Indian lands under the Articles. *Id.* at 1167. *But see* Clinton, *Dormant Commerce*, *supra* note 55, at 1104–05 (suggesting a narrower interpretation).

70. COHEN TREATISE, *supra* note 21, at 58.

71. *See id.* at 58–59 (quoting Treaty with the Delewares, Sept. 17, 1778, art. 6, 7 Stat. 13).

72. *See id.* at 60 & nn.99, 102, 104 (discussing the Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15 (Articles concluded at Fort Stanwix), the Treaty with the Wyandots, Etc., Jan. 21, 1785, art. 10, 7 Stat. 16, 18 (Articles concluded at Fort M'Intosh), and the Treaty with the Shawanoe, Jan. 31, 1786, 7 Stat. 26 (Articles concluded at at the Mouth of the Great Miami)). For a summary of state opposition to these treaties, see Clinton, *Dormant Commerce*, *supra* note 55, at 113–18.

73. *See* Wilkins, *supra* note 12, at 299–304 (discussing several treaties signed between 1789 and 1804, which Professor Wilkins suggests belie the claim that the United States thought discovery vested a fee simple in the federal government).

Nation.[74] As Chief Justice Marshall later made clear, however, Congress meant only to control the external affairs of the Cherokee, not the tribe's internal affairs.[75]

Two years before the Treaty of Hopewell, in 1783, Virginia agreed to cede its western lands to the federal government so long as such lands were used for the common benefit of all the states—this land cession effectively began to federalize the issue of Indian title in the West.[76] In 1787, the Continental Congress' most notable piece of legislation, the Northwest Ordinance, not only provided a three-stage process for creating new states out of the new federal lands of the Northwest, but also promised that the federal government would exercise "the utmost good faith . . . toward the Indians; their land and property" and would use western land sales (once lands were acquired from the Indians) to pay off the nation's Revolutionary War debt.[77] The Constitutional Convention of 1787 included an Indian Commerce Clause, which aimed to ratify this vesting of exclusive federal jurisdiction over Indian affairs.[78] Three years later, Congress exercised that constitutional authority when it enacted the first Trade and Intercourse Act of 1790, also known as the Nonintercourse Act.[79] The Act restricted trade

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74. *See* COHEN TREATISE, *supra* note 21, at 61. The Georgia state assembly protested the treaty negotiations, recommending that its congressional delegation seek to revoke federal authority to make treaties, and claimed that any treaties within the state violated state sovereignty. Clinton, *Dormant Commerce*, *supra* note 55, at 1115–16.

75. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 553–54 (1832).

76. WILLIAMS, *supra* note 3, at 305 (discussing the nature of the compromise between Virginia and Congress regarding Virginia's cession of claims to lands north of Ohio). Congress actively debated federal-state relations concerning Indian affairs in 1786, culminating in the Ordinance of August 7, 1786, which recognized that national authority over Indian affairs extended within states, although it also recognized an uncertain amount of concurrent state authority. *See* Clinton, *Dormant Commerce*, *supra* note 55, at 1121–24.

77. Act of Aug. 7, 1787, ch. 8, 1 Stat. 50, 52 (enacting "[a]n Act to provide the Government of the Territory North-west of the river Ohio"); *see* WILLIAMS, *supra* note 3, at 306. On this point Professor Clinton concluded:

> Thus, the evidence suggests that a majority view had also emerged in Congress during the period of the confederation that those tribes that had previously retained their tribal autonomy were in fact legally separate from and not subject to the laws of the states or to state efforts to regulate their internal affairs.

Clinton, *Dormant Commerce*, *supra* note 55, at 1142.

78. U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress to "regulate Commerce . . . with the Indian Tribes"). For detailed consideration of the legislative history, see Clinton, *Dormant Commerce*, *supra* note 55, at 1147–64, where Professor Clinton explains that James Madison was the primary architect of the Indian Commerce Clause, which Madison viewed as preventing state encroachments on the exclusive power of the federal government to regulate affairs with the Indian tribes.

79. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (codified as amended in part at 25 U.S.C. § 177 (2000)) ("An Act to regulate trade and intercourse with the Indian tribes."); *see* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 229 (1985).

with Indians to federal licensees and required that all sales of Indian land be as a result of federal treaty.[80]

Thus, by the turn of the nineteenth century the United States had followed Britain's path in centralizing Indian land title issues. Both the 1787 Constitution and the 1790 legislation made Indian affairs an exclusive federal function. The United States had also entered into several treaties in which it promised to respect Indian possession. Further, the Northwest Ordinance, which pledged that good faith would be a federal hallmark in negotiations with Indian tribes, made protection of Indian land possession a national policy. However, it was not clear if Indian land purchases by speculators prior to the Constitution were valid. That question was left for Supreme Court resolution.

II. JUDICIAL RECOGNITION OF INDIAN TITLE: *FLETCHER V. PECK*

The Marshall Court first discussed the nature of the title that Indian tribes possessed in an unlikely 1810 case, involving the Georgia legislature's 1795 authorization of a fraudulent sale of thirty-five million acres to four land companies in what is now Alabama and Mississippi for 1.5 cents an acre.[81] After it became widely known that virtually every member of the legislature, along with several judges and members of Congress, had been bribed, the election of 1796 saw most of the corrupted legislators defeated at the polls, and the new legislature immediately attempted to rescind the land grant and invalidate all land titles acquired pursuant to it.[82] One of the purchasers, John Fletcher, sued his seller, John Peck, in what amounted to a collusive suit,[83] alleging breach of warranty of title and seeking judicial invalidation of the legislative rescission.[84] By the time the issue reached the Supreme Court, the Yazoo land sale had been the subject of debate in Congress, in the nascent political parties, and in

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80. Ch. 33, §§ 1, 4, 1 Stat. 137, 137–138. For more background on the Trade and Intercourse Act, see COHEN TREATISE, *supra* note 21, at 109–17 (discussing ensuing Trade and Intercourse Acts, including the first permanent legislation in 1802, and the current version, enacted in 1834).

81. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 223 (2001).

82. *See generally id.* at 222–39 (noting that "[w]hat made the Yazoo case unique was the amount of land at stake and the magnitude and brazeness of corruption involved").

83. *See* CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789–1835, at 314 (1944) (describing how Fletcher, a New Hampshire resident, sued Peck, a Massachusetts resident, to gain diversity jurisdiction for the purpose of bringing the suit in federal court).

84. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 88 (1810) (invalid recission), 91 (breach of contract).

newspapers for a decade and a half.[85] The case invoked the great political issues of the era, including republicanism, state sovereignty, and the role of the courts in a democracy, and it also prompted enough concern over Indian relations—due to the fact that the lands at issue were Indian title lands—that President Washington asked for a Senate investigation into the legality of the sale.[86]

In *Fletcher v. Peck,* the Court ruled, 4-1, in an opinion by Chief Justice Marshall, that the state legislature could not rescind the grant without violating the Constitution's Contract Clause.[87] According to Marshall, Fletcher, as well as other purchasers, obtained "a title good at law" and was "innocent, whatever may be the guilt of others."[88] Thus, although Marshall acknowledged that fraud and legislative corruption were "circumstances most deeply to be deplored," and maintained that a court ordinarily would set aside a fraudulent conveyance, the sale of land from Peck to Fletcher involved a private transaction between innocent third parties, whom Marshall claimed had no notice that Georgia was about to rescind the statute authorizing the land sales.[89] Consequently, the Chief Justice concluded that the state legislature's attempt to rescind the corrupted statute amounted to an unconstitutional interference with private contracts, a decision which provoked allegations among Republicans that the Court favored land speculators at the expense of state sovereignty and public morality.[90]

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85. NEWMYER, *supra* note 81, at 226. In fact, the suit was "the centerpiece in a legal stratagem designed by the speculators in the New England Mississippi Land Company to strengthen their case" before a land claims commission established by Congress to sort out the land claims. *Id.* at 224. For information on the land claims commission, see *infra* note 95. The Company's attack on the Georgia legislature's attempted rescission was an effort to protect windfall profits of 650 percent on its initial investment. NEWMYER, *supra* note 81, at 224.

86. NEWMYER, *supra* note 81, at 224, 226. Republicans generally denounced the sale, the political corruption, and the land speculation; they thought the issue put "the question of morality in government . . . on the line." *Id.* at 226. The issue of federalism was also on the line, since the case involved the power of a state legislature to overcome the effects of corruption versus the judicial protection the federal courts gave to allegedly vested rights. *Id.*

87. *Fletcher*, 10 U.S at 136, 142.

88. *Id.* at 133.

89. *Id.* at 130–33. Professor Newmyer suggests that, with all the publicity concerning the Yazoo issue preceeding the Georgia elections of 1796, it was extremely unlikely that Fletcher was an innocent purchaser without notice of the imminent revocation of the 1795 statute. NEWMYER, *supra* note 81, at 227. Peck, the seller, was a member of the New England Mississippi Land Company, a large land speculation company, which surely was aware of the political uproar over the land sales. *Id.* at 227–28. Marshall's characterization of the case as one involving a private contract between individuals allowed him to avoid the bar of the recently enacted Eleventh Amendment, prohibiting federal court suits against states, as the real aim of Fletcher was to challenge the state law rescinding the land sales. *Id.* at 228.

90. *Fletcher*, 10 U.S. at 137–39. On the politics of the case, see *supra* note 86.

With public attention riveted on grand issues like political corruption, land speculation, republican virtues, state sovereignty, and the sanctity of private contracts, the *Fletcher* decision was not perceived to be centrally about Indian land rights. And yet the nature of the rights Indians possessed was in fact pivotal to the outcome of the case, for the initial state grant purported to convey lands occupied by Indians to speculators.[91] The attorneys for both Fletcher and Peck (represented by John Quincy Adams, among others) characterized Indian title as not inconsistent with fee title in either the State of Georgia or the federal government.[92] The Indians of course were not represented. Chief Justice Marshall agreed with the notion that Indian title could coexist with state title in a few brief, unreflective paragraphs, which clarified neither the nature of Indian title, nor how it could be legitimately extinguished.[93] Marshall stated only that Indian title was to be respected until legitimately extinguished, and that this native property interest was not inconsistent with "seisin in fee on the part of the state."[94] The ambiguities in the majority opinion were no doubt due to the fact that Marshall perceived the central issues in the case to be the constitutional protection afforded to private contract rights, and the Court's authority to overturn unconstitutional acts by a state legislature.[95]

The Chief Justice's characterization of the state's interest as a fee drew a partial dissent from Justice Johnson, who thought that the state's property interest was only "a mere possibility," while the Indians' interest was absolute proprietorship of the soil.[96] All the discovery doctrine gave the state, according to Justice Johnson, was "a right of conquest or of purchase, exclusively of all competitors."[97] According to Justice Johnson, the state's interest was not seisin in fee because it was not a present interest, but a future interest: "nothing more than a power to acquire a fee-simple by

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91. *Fletcher*, 10 U.S. at 88.

92. *See* Berman, *supra* note 24, at 639.

93. *Fletcher*, 10 U.S. at 142–43.

94. *Id.*

95. *See* Berman, *supra* note 24, at 642 (citing HAINES, *supra* note 83, at 323–28). The result was, according to Professor Newmyer, part of Marshall's campaign to protect vested rights from state legislative rescission, giving protection to commercial entreprenuers in dealings with states. NEWMYER, *supra* note 81, at 234–36 (noting that the *Fletcher* result corresponded with Marshall's personal interest as a land speculator). The ultimate resolution of the controversy involved Congress purchasing title to the disputed lands in 1798, setting aside five million acres for the investors and establishing a federal commission, which finally settled the conflicting land claims in 1814. *See id.* at 224.

96. *Fletcher*, 10 U.S at 146 (Johnson, J., dissenting in part, concurring in part). Justice Johnson disputed Marshall's notion that recognizing a fee simple in the state was compatible with Indian title because Johnson believed that fee simple was an exclusive concept. *Id.* at 146–147.

97. *Id.* at 147.

purchase, when the [present interest holder] should be pleased to sell."[98] Justice Johnson was surely more accurate in his assessment of the state's interest than Chief Justice Marshall: the state's interest was not possessory and, at most the state only retained the opportunity that it might become possessory at some point in the future.[99] As discussed below, this sort of future interest is properly classified as a right of preemption,[100] meaning that, as Justice Johnson indicated, the Indians would hold the fee.[101]

Perhaps Chief Justice Marshall was unwilling to concede that the Indians held a fee simple in their lands because, like Justice Johnson, he assumed that a fee simple was exclusive ownership, which could not be burdened with a future interest.[102] Under this assumption, if the Indians held a fee, the Georgia legislature's grant to the land companies would have been null-and-void, there would have been no property interest conveyed by Peck to Fletcher, and therefore no vested contract rights to uphold under the Constitution's Contract Clause.[103] In short, this celebrated case, with all the headline issues, would simply disappear if Georgia had no right in the initial legislation to convey any interest in Indian title lands to land speculators. Thus, the campaign to unseat the corrupted leglislators and the ensuing statute rescinding the give-away would have been unnecessary. Perhaps Marshall was unwilling to rule, fifteen years after the fact, that this longstanding controversy was much ado about nothing, due to the nature of Indian title.

The assumption of exclusivity of fee titles apparently led Marshall and the Court to declare that Georgia actually held the fee to Indian lands, despite its utter lack of possessory rights, which were actually held by the Indians, and which Marshall ruled were owed protection.[104] The conceptual incoherence of this approach caused Marshall to characterize the Indian property interest as being part of a separate tenurial system, wholly outside

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98. *Id.*

99. *See* Henderson, *supra* note 10, at 84–87 (discussing Justice Johnson's partial dissent).

100. *See infra* notes 108–09, 183–84 and accompanying text.

101. *See supra* note 96 and accompanying text. Justice Johnson did not recognize any property interest in the state or its grantees in the contested lands because he apparently thought that fees could not be defeasible in favor of parties other than the grantor. *See Fletcher*, 10 U.S. at 147 (Johnson, J., dissenting in part, concurring in part) ("A fee-simple estate may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple."). However, the state's interest could have been conceptualized as an executory interest. *See infra* note 162 and accompanying text.

102. *See supra* notes 96, 101.

103. U.S. Const. art. 1, § 10, cl. 1.

104. *See supra* text accompanying note 93.

the Anglo-American concept of fee simple ownership.[105] This duality enabled the Court to reach the constitutional issues in the case, but it also allowed subsequent courts to lose sight of the fact that holders of Indian title possessed nearly all the sticks in the property bundle of rights that fee simple owners held.[106] The consequences ultimately were tragic—a century and a half later, the Supreme Court held that because Indian title was a property interest outside the Anglo-American system, Congress could terminate Indian title without paying just compensation.[107] However, the underlying assumption of exclusivity of fee simple ownership was false: fees can in fact be burdened with future conditions, which can cut short their otherwise infinite length and make future interests possessory.[108] They can also be subject to rights of preemption,[109] or exclusive purchase, which is surely a better characterization of the government's interest in Indian title lands than the undefined, judicially malleable concept of Indian title that the Court created in the wake of the *Fletcher* decision. Although the long-term confusion over the nature of Indian title set in motion by *Fletcher* was regrettable, the decision did establish that there was such a property right as Indian title, and that this right could coexist with the state's proprietary interest, regardless of how each interest was ultimately defined.

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105. *See* Henderson, *supra* note 10, at 85 (noting that Marshall's opinion recognized that Indian title was a distinct tenurial system from the Anglo-American system, rejecting the "unitarian doctrine" espoused by Justice Johnson's dissent).

106. The only stick in the bundle of property rights the Indian title holders lack is the right of free alienation, but even that was not entirely clear at the time *Fletcher* was decided. *See infra* Part III (discussing the *Johnson* case).

107. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955);*see also supra* note 15 and *infra* notes 172, 185, 300 and accompanying text.

108. For example, defeasible fees are subject to possibilities of reverter or rights of entry in grantors, or executory interests in third parties. RESTATEMENT OF PROPERTY: INTRODUCTION FREEHOLD INTERESTS §§ 16, 23–25 (1936); RESTATEMENT OF PROPERTY: FUTURE INTERESTS PARTS 1& 2 §§ 154–55, 158 (1936); POWELL ON REAL PROPERTY §§ 13.02, 13.05, 20.02 to –.03, 20.05 (Michael Allan Wolf ed., 2003). These particular fees are created by grantors, and the grantors of the Indians are not evident from the facts. A better characterization of Indian title would be a fee simple subject to an exclusive right of preemption. *See* Henderson, *supra* note 10, at 86–87; Wilkins, *supra* note 12, at 283, 302. But even Justice Johnson, who characterized the state's interest in *Fletcher* as a future interest, *supra* note 98 and accompanying text, did not see a right of preemption as consistent with a fee simple interest on the part of the Indians. *See supra* note 101.

109. *See* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 4.4 (1983) (defining a preemptive provision as an interest subject to right of first refusal). The government's right of preemption imposed a disabling restraint on the Indians' right to alienate. The common law approved such restraints "if, under all the circumstances of the case and considering the purpose, nature, and duration of the restraint, the legal policy favoring freedom of alienation does not reasonably apply." *Id.* § 4.1(2). The national security reason for the government's right of preemption, *see infra* text accompanying and following note 203, certainly would support enforcement of the disabling restraint on alienation imposed on Indian title.

III. JUDICIAL RATIFICATION OF THE DISCOVERY DOCTRINE: *JOHNSON V. M'INTOSH*

In 1773, William Murray, an Indian trader and frontier land speculator, challenged British authority to enforce the Proclamation of 1763's ban on land purchases from Indians.[110] He argued to a local British commander that an opinion of the Attorney General and the Solicitor General supported his claim that he had a natural right to purchase Indian land, and the Indians had a natural right to sell.[111] Although the local British commander at Kaskaskia (in what is now southern Illinios) was unimpressed with the legal opinion and warned Murray against purchasing land from Indians, Murray proceeded to negotiate with them anyway.[112] The Illinois tribes with whom he dealt were receptive, having experienced a dramatic decline in their numbers due to European diseases and inter-tribal warfare.[113] Murray eventually purchased two strategically located tracts of land for his Illinois Company, one at the intersection of the Ohio and Mississippi Rivers and the other at the intersection of the Illinois and Mississippi Rivers, for a total of $24,000 worth of cloth, blankets, gunpowder, lead, gun flints, flour, horses, and cattle.[114] The transaction took place in July 1773.[115]

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110. WILLIAMS, *supra* note 3, at 288.

111. *Id.* For an explanation of the legal opinion on which Murray relied, see *supra* note 63. Murray was an agent for the Illinois Company, a company organized by a group of Philadelphia merchants. *See* Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 LAW & HIST. REV. 67, 81 (2001) [hereinafter Kades, *History*] (containing the most detailed explanation of the land transactions that led to the litigation in *Johnson v. M'Intosh.*) In the citations below, I rely heavily on Professor Kades' original research for the facts of the purchases at issue in the case, although I disagree with his characterization of the property interests that were purchased by the speculators and retained by the Indian tribes and the motivation he attributes to Justice Marshall in deciding the *Johnson* case. *Compare id.* (quoting *Johnson*, 21 U.S. at 574, for the proposition that purchasers of Indian lands were only subject to the "Indian right of occupancy"), *with* text accompanying *infra* notes 183, 216 (stating that the best characterization of the Indians' property interest is a fee simple subject to the government's right of preemption).

112. Kades, *History*, *supra* note 111, at 81.

113. *Id.* at 82 (explaining that the population of the Illinois tribes declined from "12,000 in 1680 to 1,720 in 1756, to [just] 500 in 1800").

114. *Id.* (noting that the company originally valued these goods at $37,000, but in the *Johnson* litigation stipulated their value at $24,000). Professor Kades supplies a useful map of the purchased lands in his article. *See id.* at 68.

115. *Id.* at 82. Professor Kades explains that, perhaps due to doubts about whether Murray had the authority to purchase land from the Indians, the deed contained an alternative conveyance to the King of England for the benefit of the Illinois Company. *Id.* These doubts were well-founded, as a year-and-a-half after the conveyance, the British commander at Kaskaskia declared that the purchases were invalid. *Id.* at 83.

After the initial purchase, the Illinois Company began to lobby for legislative ratification of the transaction.[116] After getting little support in Pennsylvania, the home state of most of the company's principals,[117] the company turned to the royal governor of Virginia, which claimed jurisdiction over Illinois under its royal charter.[118] To persuade the governor, the Company offered him stock in a new land speculation company, the Wabash Company, if he would support the Illinois Company's claim.[119] Murray then proceeded to recruit a prominent French fur trader, Louis Viviat, to negotiate the Wabash Company's land purchase from the Piankashaw tribe, which he did in October 1775.[120] These lands consisted of two large tracts bordering on the Wabash River along what is now the Indiana-Illinois border.[121]

In the years following these transactions, the two companies merged and recruited well-connected investors, such as James Wilson and Robert Morris, to lobby for legislative ratification of their purchases.[122] These efforts met with frustration. The Virginia legislature enacted a statute outlawing purchases from Indians in 1779, and then ceded to the federal government its western land claims, including those in what later became the States of Illinois and Indiana, in 1783.[123] The companies fared no better

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116. The Supreme Court would eventually ratify congressional ratifications of prior purchases of Indian title in *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 762–63 (1835). *See also infra* note 284 and accompanying text.

117. *See supra* note 111.

118. Kades, *History*, *supra* note 111, at 83.

119. *Id.* at 83–84. The governor, Lord Dunmore, was thus able to deny any connection to the Illinois Company in supporting the company's claim to the British Secretary of State, while also not mentioning his involvement in the new Wabash Company's efforts to purchase other Indian lands. *Id.*

120. *Id.* at 84 (noting that, like the Illinois, the Piankashaws, one of the six tribes of Miami Indians, had suffered severe population declines in the century before the transaction). Murray might have chosen Viviat to negotiate the Piankashaw purchase because he was French, and the French—almost alone among European colonizers—had recognized at least some private purchases of Indian lands. *Id.* at 71. A failure to recognize the purchase might be seen by the French as a threat to other land titles, which the English presumably did not want to threaten. *Id.* at 84.

121. For a map depicting the geographic relationships, see *id.* at 68. Like the 1773 purchase, the 1775 purchase contained an alternative grant to the King. *Id.* at 85. While reserving to itself the land between the two tracts, the tribe granted the Wabash Company a navigational easement on the Wabash River and tributaries. *Id.* at 84. The consideration paid by the Wabash Company was in the same sorts of goods paid by the Illinois Company, although slightly greater in value. *Id.* at 84–85 (noting that the company's original estimate was $42,000, later stipulated to be $31,000).

122. Wilson, later a drafter of the Constitution and a Supreme Court Justice, became Chairman of the United Illinois and Wabash Land Companies in 1779. *Id.* at 85. Morris was the principal financier of the Revolutionary War. *Id.* at 85–86.

123. *Id.* at 86–87 (noting that the Virginia statute was an effort to "restate the ancient rule against direct purchases from the Indians" and that in the cession of western lands "there was a tacit understanding" between the state and the federal government that the latter would reject land claims

before Congress, despite at least five memorials drafted by Wilson between 1781 and 1796, which invoked the "universal natural rights" of Indian tribes to sell land and speculators to purchase it, and included promises to cede a portion of the lands to the federal government.[124] Despite repeated efforts, the last of which occurred in 1816, the companies were unable to secure congressional ratification of their purchases.[125]

Meanwhile, in 1803, the federal government, largely through the efforts of General William Henry Harrison, began to negotiate treaties under which Indians on the Illinios-Indiana frontier would cede land in exchange for consideration and federal protection.[126] Land surveys began in 1804; Congress passed a preemption statute in 1814; and President Madison opened the market to land sales in 1816.[127] The year before the land sales began, William McIntosh, a Vincennes lawyer, who became the defendant in the Supreme Court case *Johnson v. M'Intosh*[128] and who represented preemptioners and French colonial claimants, filed a claim for a considerable amount of land—nearly 12,000 acres in 53 separate tracts—probably obtained in exchange for legal services provided to his clients.[129]

Four years later, in 1819, Thomas Johnson, one of the original investors in the Wabash Company, died, naming his son and grandson, Joshua Johnson and Thomas Graham, as the primary beneficiaries of his will, and Robert Goodloe Harper, a famous Supreme Court litigator and fellow investor in the joint companies, as his executor.[130] Harper

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based on Indian purchases); *see* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 559–60 (1823) (discussing Virginia's 1783 western land cession to the federal government).

124. Kades, *History*, *supra.* note 111, at 87, 89. The company argued that by accepting its offer of a land cession, Congress could avoid the prospect of the Indians obtaining a windfall by being paid twice for the lands. *Id.* at 89.

125. *See id.* at 92–93.

126. *Id.* at 93–94.

127. *Id.* at 95–96. Preemption statutes gave squatters and others who improved lands the exclusive right to purchase lands at statutory prices ($2.00 an acre in the case of the lands at issue), but limited the amount that could be purchased to 160 acres. *Id.* at 96. *See generally* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 75–76 (5th ed. 2002) (noting that Congress enacted twenty-four special preemption statutes, covering specific geographic areas, between 1790 and 1820 and that it did not enact a permanent generic statute authorizing both prospective and retroactive preemption until 1841).

128. The court reporter apparently misspelled William McIntosh's name.

129. Kades, *History*, *supra* note 111, at 97–98 (considering, but discounting, the possibility that McIntosh engaged in massive land fraud in collusion with the Kaskaskia land office); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

130. Kades, *History*, *supra* note 111, at 99 (noting that Thomas Johnson had been the first governor of the State of Maryland and a Supreme Court justice in 1791–92). Harper, who had successfully argued for the land speculators in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (holding that the Contract Clause barred the Georgia legislature from rescinding fraudulent grants; *see*

apparently saw the will as an opportunity to litigate the companies' claim, which had fallen on deaf congressional ears.[131] However, as Professor Kades has shown, there was no actual case or controversy to litigate an ejectment cause of action, since the Wabash Company land claims inherited by Johnson and Graham were at least fifty miles from the closest McIntosh holding.[132] The collusive nature of the suit is evidenced by the fact that the defendant stipulated to the erroneous facts, waived his right to force the plaintiffs to post an appeal bond after they lost before the federal district court in Illinois, and consented to the writ of error the plaintiffs filed in the Supreme Court in 1822.[133] The evidence overwhelmingly supports the conclusion that both parties wanted the Supreme Court to review and finally settle the land claims that Congress had consistently rejected for a quarter-century.[134]

In *Johnson*, the nature of Indian title and the state's concurrent interest were more squarely at issue than in *Fletcher v. Peck*, although again no tribes or individual Indians were before the Court. Johnson and Graham, the Wabash Company shareholders, were represented not only by Harper, but also by Daniel Webster. They argued that the Royal Proclamation of 1763 could not deprive the Indians of their natural law right to sell their lands, either because the Indians were not British subjects governed by the proclamation, or because the proclamation was a legislative act requiring the consent of Parliament.[135] They also maintained that a 1779 Virginia statute that prohibited private purchases of Indian lands could not, consistent with the Virginia constitution, take away the private, vested

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supra Part II), had submitted a memorial on the companies behalf to Congress in 1810, shortly after he became an investor. Kades, *History*, *supra* note 111, at 92 & n.48.

131. Kades, *History*, *supra* note 111, at 99.

132. Professor Kades suggested that Johnson and Graham's problems had to do with the fact that they inherited stock in the Wabash Company, but the only tract of land owned by McIntosh which conflicted with the joint companies' claims concerned land claimed by the Illinois Company. *Id.* at 99–100. Despite the merger of the two companies, they failed to execute deeds conveying mutual ownership interests to each other. Therefore, Johnson and Graham would have lacked standing to sue on the conflict between McIntosh and the Illinois Company claim. *Id.*

133. *Id.* at 100–02 (explaining that the requirements of an ejectment cause of action necessitated the creation by the plaintiffs of a fictitious lessee).

134. *See Johnson*, 21 U.S. at 562 (noting that the joint companies began petitioning Congress in 1791 and continued until 1816).

135. *Johnson*, 21 U.S. at 563–64. The precursors of *Johnson* were traced by Henderson, *supra* note 10, at 96–101. In his article, J. Youngblood Henderson noted, *inter alia*, the significance of an 1821 Attorney General's opinion that the *Johnson* opinion seemed to adopt without attribution concerning the distinct land tenure systems between the Indians and the settlers. *Id.* at 96 (quoting 1 Op. Att'y Gen. 466–67 (1821)).

property rights they possessed as shareholders of the Wabash Company.[136] And, further, they contended that a similar colonial statute, enacted in 1662, had either lapsed or been repealed.[137]

On the other hand, McIntosh, whose title to the land was based on a conveyance of a federal patent, claimed that the Indians lacked any natural rights to the land because they were not "independent communities, having a permanent property in the soil, capable of alienation to private individuals," but were instead "in a state of nature, and have never been admitted into the general society of nations."[138] McIntosh claimed that international law had "uniformly disregarded their supposed right" to land title, and that "[d]iscovery is the foundation of title, [which] overlooks all proprietary rights in the natives."[139] Even if international law considered the Indian tribes to be an independent foreign state (which McIntosh did not concede), Johnson and Graham, as grantees of the Indians, would have only a title recognized by Indian law, which did not include fee title.[140] McIntosh also alleged that the 1662 Virginia colonial statute forbidding private Indian land purchases had never been repealed, and the 1779 statute was merely a recodification of "what had always been regarded as the settled law," which held that Indian title to land was "a mere right of usufruct and habitation, without power of alienation."[141] According to this view, the law of nature, which measured property rights "by the extent of men's wants, and their capacity of using [land] to supply them," denied that Indians possessed any "proprietary interest in the vast tracts of territory which they wandered over."[142] McIntosh further maintained that under the

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136. *Johnson*, 21 U.S. at 565. Johnson and Graham also argued that the 1779 act was subsequently repealed by a statutory revision in 1794. *Id.* at 565–66.

137. Kades, *History*, *supra* note 111, at 103. This argument is not contained in the case summary prepared by the Court reporter, Henry Wheaton. Wheaton, the Court's third reporter (1816–27), has been called the ablest of the Court's reporters. OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 926 (Kermit L. Hall ed., 1992).

138. *Johnson*, 21 U.S. at 567. In *Johnson*, Chief Justice Marshall went on to note:

> According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators.

Id. at 570.

139. *Id.* at 567.

140. *Id.* at 568 ("The law of every dominion affects all persons and property situate within it; and the Indians never had any idea of individual property in lands.")

141. *Id.* at 569.

142. *Id.* at 569–70.

"first principle in colonial law . . . all titles must be derived from the crown."[143]

Chief Justice Marshall, writing for a unanimous Court, accepted neither the plaintiffs' nor the defendant's arguments. He perceived the issue of the case to be a narrow one: whether the Indians had the authority to sell land to private individuals.[144] To resolve this question, he refused to look exclusively at natural law "principles of abstract justice," which governed the rights of the inhabitants of civilized nations.[145] Nor would he decide "whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess."[146] Instead, he concluded that the case turned on "principles . . . which our own government has adopted in the particular case, and given us as the rule for our decision."[147] In short, Justice Marshall ignored principles of natural law and based his decision on what he perceived to be the prevailing practice with respect to Indian land rights[148]—what he termed "the actual state of things."[149]

Marshall agreed with McIntosh that the prevailing practice was grounded in the doctrine of discovery, but he did not agree that this doctrine recognized no native land rights.[150] He also agreed with McIntosh that the 1779 Virginia statute was simply a codification of the pre-exisiting

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143. *Id.* at 570. The notion that all valid land grants had to trace their origin to a royal grant was a product of feudal thinking, which replaced the earlier common law notion—grounded on Roman ideas of natural law—that simple possession was the basis of title. In the words of one commentator, this transformation was based on "tortuous logic." Bennett, *supra* note 37, at 619.

144. *Johnson*, 21 U.S. at 572 ("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.").

145. *Id.*

146. *Id.* at 588.

147. *Id.* at 572.

148. Here, I agree with Professor Kades, although I believe that what Marshall thought he was doing was interpreting the common law doctrine of discovery, not endorsing the concept of statutory custom. Kades, *History*, *supra* note 111, at 107–10. However, certainly the common law principle he was pronouncing was influenced by, and consistent with, a long history of statutory restrictions on private purchases of Indian title.

149. *Johnson*, 21 U.S. at 591 (noting that the discovery doctrine, as interpreted by the Court, was "adapted to the actual state of things"); *see infra* text accompanying note 175 (noting that the restraint on alienation imposed on Indian title was "adapted to the actual condition" of the Indians and the colonizers); *see also infra* note 252 (referring to the federal duty of protection due to the "actual state of things"). Professor Frickey has suggested that "[c]olonialism, *Johnson* seemed to say, raises almost exclusively nonjusticiable, normative questions beyond judicial authority and competence." Frickey, *Marshalling*, *supra* note 25, at 389 (emphasis removed).

150. *Compare supra* notes 138–139 and accompanying text (noting McIntosh's argument concerning the natives' lack of proprietary rights), *with Johnson*, 21 U.S. at 574 (explaining that natives' rights were not entirely disregarded, but rather, impaired by discovery).

discovery rule, and therefore the statute took no vested property rights.[151] Johnson and Graham's contention that the Royal Proclamation was ineffective or unlawful was rejected; Marshall upheld the ban on private purchases of Indian lands in the West.[152] The Chief Justice also endorsed McIntosh's view that whatever rights Johnson and Graham obtained from the Indians were perhaps protected by Indian law, but those rights were not cognizable in the "Courts of the United States."[153] The result validated McIntosh's claim that all freely alienable titles originated in the government.[154]

The heart of the opinion concerned the Chief Justice's interpretation of the discovery doctrine. According to Marshall, discovery gave the discovering nation land "title," which "might be consummated by possession."[155] What he meant by "title," however, is hardly clear.[156] Discovery operated to allocate rights among discoverers by giving the first discovering European nation the right to exclude other European nations. Marshall claimed that all the European powers agreed to this principle.[157]

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151. *See supra* note 141 and accompanying text.

152. *Johnson*, 21 U.S. at 594 ("The proclamation issued by the King of Great Britain, in 1763, has been considered, and, we think, with reason, as constituting an additional objection to the title of the plaintiffs."); *see also id.* at 597 (noting that "[t]he authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our Courts," and limiting the holding in *Campbell v. Hall*, 98 Eng. Rep. 1045 (1774), which Johnson and Graham argued recognized private land purchases from natives of the East Indies).

153. *Johnson*, 21 U.S. at 593. Private purchasers of Indian lands have

> a title dependent on [Indian] laws. . . . Courts of the United States cannot interpose for the protection of [Indian] title. The person who purchases lands from the Indians . . . holds their title under their protection, and subject to their laws. If [the Indians] annul the grant, we know of no tribunal which can revise and set aside the proceeding.

Id.; *see also id.* at 589 ("It is not for the Courts of this country to question the validity of [government-derived] title, or to sustain one which is incompatible with it.").

154. *See supra* note 143 and accompanying text.

155. *Johnson*, 21 U.S. at 573.

156. Later, in *Worcester*, discussed *infra* Part IV, Marshall would state that the only title that the King of England's colonial charters could convey was "the exclusive right of purchasing such lands as the natives were willing to sell." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 545 (1832).

157. *Johnson*, 21 U.S. at 573.

> [A]s [the European nations] were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. 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 . . . .

Id.

This exclusionary right ran only against other European discoverers and did not equip discoverers to oust the natives.

On the contrary, Marshall claimed that under the discovery doctrine, all European nations, including the British and their successors in the United States, "respected the right of the natives, as occupants," but "asserted the ultimate dominion" over Indian lands.[158] This meant that the United States had the "power to grant the soil, while yet in possession of the natives,"[159] as Georgia had done in *Fletcher v. Peck*.[160] The effect of such a conveyance gave "a title to the grantees, subject only to the Indian right of occupancy."[161]

Here is where the Chief Justice confused his property concepts. Federal grantees of Indian title lands received only a future interest, which would not become possessory until the federal government exercised its right of preemption. Such an interest is commonly known as an executory interest.[162] According to the Restatement of Property, "executory interests vest an estate in the holder of the interest [e.g., the federal grantees] upon the happening of a condition or event [e.g., exercise of preemption]. Until such happening, they are non-vested future interests."[163] This is a kind of "title," but it is hardly a fee simple title. Similarly, the "paramount title" that Marshall claimed the Europeans acquired was a future interest, an inchoate title that required other action to be perfected. In short, the discovery doctrine created a kind of split estate, leaving the Indians with a present estate that Marshall called occupancy title and giving the discoverer a future interest: a right of preemption in Indian lands.[164]

The discovery doctrine, which Marshall at one point labeled an "extravagant and absurd idea," diminished, but did not disregard the natives' natural law rights.[165] They lost the right to freely alienate their lands and also the right to govern themselves as independent nations. As Marshall explained:

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158. *Id.* at 574.

159. *Id.*

160. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 88 (1810).

161. *Johnson*, 21 U.S. at 574. Marshall maintained that Spain, France, Portugal, Holland, and England all based their territorial claims in the New World on the discovery doctrine. *Id.* at 574–79. *But see infra* note 198 and accompanying text, indicating that the discovery doctrine was no longer being used contemporaneously with the *Johnson* decision.

162. *See* RESTATEMENT OF PROPERTY: FUTURE INTERESTS PARTS 1 & 2, *supra* note 108, § 158; POWELL ON REAL PROPERTY, *supra* note 108, § 20.05.

163. POWELL ON REAL PROPERTY, *supra* note 108, § 20.05[2].

164. *Johnson*, 21 U.S. at 592 ("The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.").

165. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832).

> [T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.... [T]heir rights to complete sovereignty, as independent nations, were necessarily diminished, and 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.[166]

Thus, the discovery doctrine imposed a restraint on the Indians' right to convey their lands and some largely undefined restrictions on their ability to govern. The latter would not be clarified until the *Cherokee* cases, discussed below.[167] But the scope of the former—a restraint on the Indians' right to convey their lands—was critical to the outcome in *Johnson*.

The determination that the discovery doctrine imposed a restraint on the Indians' rights of alienation led the Court to rule against Johnson and Graham, as the Court concluded that the Indians could not convey a fee simple title to the Wabash Company.[168] Indian title was technically alienable, but only to the government, which alone could extinguish Indian title.[169] Consequently, all the Wabash Company obtained from the chiefs was what Marshall termed their right of occupancy, which was terminable by the subsequent conveyance from the chiefs to the government.[170]

Marshall's labeling of the Indians' proprietary interest as "occupancy" title turned out to be a tragic choice of words.[171] Subsequent Supreme Courts have relied on this characterization to marginalize native property

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166. *Johnson*, 21 U.S. at 574.

167. *See infra* Part IV.

168. *Johnson*, 21 U.S. at 591.

169. Marshall indicated that the natives were "incapable of transferring the absolute title to others." *Id.* He did suggest, however, that the Indians had the authority to transfer their possessory interest by sale to non-Indians. *Id.* at 593 ("The person who purchases lands from 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."). Professor Ball has noted that this means that Indian title is in fact alienable, although not very valuable. Ball, *Constitution*, *supra* note 10, at 25–26. Under this view, what the Wabash Company obtained was whatever property interest tribal law recognized.

170. When the treaty between the United States and the tribe extinguished the company's rights through a land cession from the tribe to the federal government, the only remedy the company's shareholders had was under tribal law, since under U.S. law those rights were validly extinguished as a result of the cession. In *Johnson*, Marshall acknowledged that the Indians "had an unquestionable right to annul any grant they had made to American citizens." *Johnson*, 21 U.S. at 594. This seems to be what they did by subsequently ceding the land to the United States.

171. *See id.* at 563 (noting that the tribes' "title by occupancy is to be respected"), 574 ("These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.").

rights,[172] where, in fact, his opinion was quite protective of their property rights. The only stick in the property bundle of rights they lost as a result of the decision was the right of free alienation. They retained all of the other sticks. Marshall clearly stated that they retained full rights of possession and use,[173] and he indicated that their possession could defeat an action in ejectment.[174] Nothing in the decision indicated that the tribes would not retain development rights as well. The loss of the right of free alienation was, in Marshall's words, "indispensable to that system [of land titles] under which the country has been settled, and . . . adapted to the actual condition of the two people[s]."[175] The reason why the restraint on Indian alienation was "indispensable" had to do with concerns over national security: the government's right of preemption was necessary to prevent the Indians from selling their land to citizens of hostile countries, a considerable concern along the North American frontier when the British Crown promulgated the Royal Proclamation in 1763, which the *Johnson* decision upheld.[176] As a subsequent Supreme Court interpreted the *Johnson* decision, the right of free alienation "was inherently lost to the overriding sovereignty of the United States"[177] In short, the sovereignty interest that caused the loss of the right of free alienation was in fact a national security concern.

The nature of the retained Indian proprietary interest under the discovery doctrine has been misunderstood over the years. The language of the opinion repeatedly referred to the retained native proprietary rights as mere "occupancy,"[178] and the pronouncement that the government possessed "ultimate title" or "seisin in fee,"[179] is at odds with the actual proprietary interests held by the Indians and the government. The Indians retained full present rights of possession, use, and development, while being burdened with a partial restraint on alienation.[180] True, the restraint on alienation was rather severe, allowing the natives to sell alienable title

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172. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285 (1955) (citing *Johnson* to conclude that "the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment").

173. *Johnson*, 21 U.S. at 574 ("[The Indians] 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.").

174. *Id.* at 592; *see also id.* at 591 (noting that the government owes holders of Indian title protection of the possession of their lands).

175. *Id.* at 591–92.

176. *Id.* at 594–97.

177. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).

178. *Johnson*, 21 U.S. at 574, 585, 587, 591–92.

179. *Id.* at 574 ("ultimate dominion"), 592 ("seisin in fee"), 603 ("ultimate title").

180. *See* text accompanying *supra* notes 172–77.

only to the federal government. But the government (and its grantees) had only a right of preemption, a mere future interest, and it owed the Indians a duty of protection concerning their present interest.[181] Therefore, referring to the government's interest as "seisin in fee" was hardly consistent with Chief Justice Marshall's professed attachment to the "actual state of things," at least in terms of the actual sticks in the property bundle of rights held by the Indians and the government.[182] A better description would have been to label the Indians' property interest as a fee simple subject to the government's right of preemption.[183] Such fees long have been recognized in Anglo-American law.[184] Unfortunately, Marshall did not describe the native proprietary interest in these terms. Had he done so, the worst interpretations of the *Johnson* opinion might have been avoided.[185]

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181. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 124 (1810).

182. Marshall analogized the Indian occupancy interest to a "lease for years," *Johnson*, 21 U.S. at 592, but terms for years require a grant from a landlord to the tenant for a fixed or computable period of time. *See* RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 1.4 (1977) (stating that "[a] landlord-tenant relationship may be created to endure for any fixed or computable period of time."). There of course was no grant attendant to discovery and no fixed or computable period of time by which the government had to exercise its right of preemption. In fact, the government did not do so in some cases until a century and a half after the *Johnson* opinion. *See, e.g.*, Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92–203, §§ 2(a), 4(a), 85 Stat. 688, 688–89 (codified as amended at 43 U.S.C. §§ 1601–1629h (2000)) (stating that there "is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska").

183. Professor Wilkins largely agrees, although he does not clearly acknowledge the severe restraint on alienation imposed on this fee. Wilkins, *supra* note 12, at 314 ("[I]f Indians held their lands with a sacred title, comparable to fee-simple, then they must also possess the power to sell those lands."). In maintaining the position that Indian title was a fee simple with a partial restraint on alienation and subject to the government's exclusive preemptory right, I disagree with most other commentators, such as Professor Kades, who describes the right of government purchasers of lands in Indian possession as being "'subject only to the Indian right of occupancy,' but otherwise . . . a full fee interest." Kades, *History*, *supra* note 111, at 75 (quoting *Johnson*, 21 U.S. at 574); *see also* the disagreement with my casebook co-author concerning the characterization of Indian title. JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: TEACHER'S MANUAL 42 (2002) (Royster maintaining that *Johnson* established "a form of 'title' in the United States, leaving the tribes with something less."). A property title without rights of possession, use, and development until the government acts on its right of preemption is a future interest, not a present interest. Not qualifying the non-Indian property interest in this manner seems to encourage the kind of misunderstandings or misrepresentations that produced the unfortunate results in later cases. *See* cases cited *supra* notes 15–16.

184. *See supra* note 109 and accompanying text.

185. *See, e.g.*, Milner S. Ball, *John Marshall and Indian Nations in the Beginning and Now*, 33 J. MARSHALL L. REV. 1183, 1189–90 (2000) (professing astonishment at the way *Johnson* was interpreted by subsequent Supreme Courts in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), and referring to the Court's interpretations as "performative utterance"); Ball, *Constitution*, *supra* note 10, at 25–26 (criticizing subsequent interpretations of *Johnson*); Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1244 (1980) [hereinafter Newton, *Whim of the Sovereign*]

Marshall looked to the practice of colonial charters and prior treaties to conclude that the exclusive power to extinguish Indian title lay "in that government which might constitutionally exercise it."[186] Citing the 1779 Virginia statute, which asserted that the state possessed an "exclusive right of pre-emption" of Indian title within the lands described in the state's charter, Marshall declared that this legislation was just evidence "of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government."[187] Thus, even though the conveyances at issue in *Johnson* antedated the statute, there was no taking of any of Johnson and Graham's property rights: Marshall would not attribute to the Virginia statute "the power of annulling vested rights."[188]

Chief Justice Marshall made no mention of the Indian Commerce Clause, which authorized federal control of Indian affairs in 1787,[189] or the Trade and Intercourse Act, which federalized Indian affairs in 1790.[190] Since the land purchases at issue took place long before either the Constitution or the statute, neither would necessarily govern those purchases.[191] However, Marshall construed the common law to produce the same result that the application of those provisions would have achieved if they had applied. Like the Virginia statute, they apparently merely codified pre-existing common law, which was that only the government could extinguish Indian title. Marshall did not clearly resolve, at least not in this case, which government possessed the extinguishment authority, the federal government or the states. He merely stated that "either the United States, or the several States . . . [had] the exclusive power to extinguish [Indian title]."[192] The lands at issue in the case were part of Virginia's western land claims, which it ceded to the United States in 1783 and, at least for these lands, the Chief Justice concluded that "the exclusive right of the United States to extinguish [Indian] title and, to grant the soil, has never, we believe, been doubted."[193] Whether that federal power would extend to lands within recognized state boundaries was left for another case to decide.

(asserting that "[t]he only sovereign act that can be said to have conquered the Alaska native was the *Tee-Hit-Ton* opinion itself").

186. *Johnson*, 21 U.S. at 585.

187. *Id.*

188. *Id.* All Johnson and Graham acquired were proprietary rights cognizable in Indian courts, of which there were none at the time. *See supra* notes 153, 169–70 and accompanying text.

189. U.S. CONST. art. I, § 8, cl. 3.

190. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (2000)).

191. Recall that the lands were purchased in October 1773 and 1775. *Johnson*, 21 U.S. at 562.

192. *Id.* at 585.

193. *Id.* at 586.

A good deal of criticism of the reasoning of *Johnson v. M'Intosh* has concerned Marshall's indication that Indian title could be extinguished "either by purchase or by conquest."[194] Later, he noted that "[c]onquest gives a title which the Courts of the conqueror cannot deny."[195] Why Chief Justice Marshall was moved to include conquest as a means to terminate Indian title has never been quite clear; the facts of the case concerned a private purchase of Indian lands and a treaty ceding those same lands to the United States. Moreover, the treaty negotiations by which the lands in question were acquired by the United States expressly repudiated the theory of conquest.[196] And the reality is that the United States acquired the overwhelming preponderance of Indian titles by purchase, not conquest.[197] Even in the late eighteenth and early nineteenth centuries, the discovery doctrine was regarded as "increasingly archaic."[198] This ahistorical suggestion, that conquest could terminate Indian title, might have been because Marshall wanted to justify his decision not to attempt to use judicial power to overturn the discovery doctrine, even though he thought the restriction on the Indians' rights of alienation "may be opposed to natural right, and to the usages of civilized nations."[199] However inconsistent with natural law, the discovery doctrine could not be overturned by "the Courts of justice;"[200] the doctrine was apparently a non-

194. *Id.* at 587. Professor Williams' critique was particularly vigorous: "The Doctrine of Discovery was nothing more than the reflection of a set of Eurocentric racist beliefs elevated to the status of a universal principle—one culture's argument to support its conquest and colonization of a newly discovered, alien world." WILLIAMS, *supra* note 3, at 326; *see also id.* at 317 ("*Johnson*'s acceptance of the Doctrine of Discovery into United States law preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples.").

195. *Johnson*, 21 U.S. at 588.

196. *See* Berman, *supra* note 24, at 648–49 n.50 (noting that in negotiations with the tribes of the Northwest in 1793, the United States claimed that the treaty between the King of England and the United States only conveyed to the latter the right to exclude other nations from purchasing or settling Indian lands—a right of preemption; the Indian negotiators, however, denied the existence of such a right).

197. *See* Cohen, *Original Title*, *supra* note 14, at 35–43 (detailing the purchase of over two million square miles of Indian land by the United States); *see also* Kades, *History*, *supra* note 111, at 74 (noting the rare instances of conquest, including the Pequot War (1637) and King Phillip's War (1675–77) in New England).

198. *See* Berman, *supra* note 24, at 651 (discussing the 1790 Nootka Sound controversy between England and Spain and the 1826 controversy between the United States and Britain over the Oregon Territory, in which both countries agreed that discovery alone was insufficient to grant sovereignty).

199. *Johnson*, 21 U.S. at 591.

200. *Id.* at 592.

justiciable political question. It may have seemed to Marshall that characterizing the issue in military terms justified judicial acquiescence.[201]

There was another reason why the Court decided that the discovery doctrine was beyond judicial reversal: since settlement, the country's land conveyance system had assumed that a government grant was a valid conveyance.[202] To rule otherwise in 1823 would have unsettled land titles throughout the country. Thus, as Marshall sarcastically observed:

> 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.[203]

In other words, for hundreds of years people had relied on government grants as conveyances of secure title, and it was simply too late in the day for the Court to unsettle those long-established reliance interests. As a practical matter, if the Court had ruled that Indian title included all natural law rights, Congress, which had control over the Court's appellate docket,[204] could have restricted the Court from reviewing cases involving Indian affairs, or established a special court for such issues. Marshall was clearly unwilling to place his Court's jurisdiction in that sort of jeopardy.

Perhaps Marshall's realization of the overwhelming practical difficulties of ruling that the Indians possessed all natural law property rights accounted for the opinion's tone, which dripped with unmistakable irony. For example, in referring to the "pompous claims" of the Europeans to the New World, Marshall noted that "whites were not always the aggressors"[205] in warfare with the Indians, and mentioned the "extravagant . . . pretension of converting the discovery of an inhabited country into

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201. *See id.* at 588 (explaining that "[c]onquest gives a title which the Courts of the conqueror cannot deny"). Marshall emphasized that the British maintained their discovery doctrine claims "as far west as the river Mississippi, by the sword." *Id.* He apparently was referring to the French and Indian War, but that was a war fought over which European nation was entitled to discoverer rights; it was not a war to terminate Indian title, a fact Marshall seemed to acknowledge. *See id.* at 583–84.

202. *Id.* at 603.

203. *Id.* at 591.

204. U.S. CONST. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

205. *Johnson*, 21 U.S. at 590.

conquest."[206] The sarcasm may have reflected Marshall's personal feelings about the plight of the Indians,[207] but those feelings were not enough to persuade him to unsettle reliance on the great majority of land titles, which could be traced to government grants.

Some of the ambiguities remaining after *Johnson v. M'Intosh* had to await clarification in the *Cherokee* cases, discussed in the next section.[208] But one question was clearly resolved: the issue of Indian title was a matter of domestic law, not international law. According to the Chief Justice, "the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie."[209] Thus, although the discovery doctrine was a common law rule derived from international law, after discovery, relations between the discovering nation and the natives were exclusively matters of domestic law—an issue on which Chief Justice Marshall would elaborate on in *Cherokee Nation v. Georgia*.[210] The significance of this aspect of the *Johnson* decision should not be overlooked: it essentially meant that "the Courts of the conqueror" would be the venue in which subsequent conflicts between Indians and settlers would be resolved.[211]

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206. *Id.* 591; *see also id.* at 573 ("The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity.").

207. Later, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831), Marshall allowed some of his feelings to show:

> If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue.

Id. Marshall revealed similar sentiments in a letter he wrote to to his colleague Joseph Story in which he reflected that the dispossession of Indian tribes under the Jackson Administration produced a "deep stain on the American character." G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 714 (Oxford Univ. Press, abr. ed., 1991) (1988) (quoting Letter from Justice Marshall, to Justice Story (Oct. 29, 1828)).

208. *See infra* Part IV.

209. *Johnson*, 21 U.S. at 572.

210. *See infra* notes 292–300 and accompanying text. Confining the tribal-U.S. relations to domestic law is one of Professor Williams' chief criticisms of the *Johnson* decision. *See supra* note 4; *see also* Clinton, *Redressing the Legacy of Conquest*, *supra* note 2, at 116 (opining that "emerging notions of customary and positive international law seek to protect the political, property, and cultural rights of tribal and indigenous peoples and to prevent them from being subject to the political whim or mercy of the independent nation in which such peoples are located").

211. *Johnson*, 21 U.S. at 588.

The record shows that this was perhaps the most enduring result of the *Johnson* decision.[212]

While the discovery doctrine left Indian affairs to domestic law, the doctrine itself had relatively little effect on tribal property rights. All it did, according to the *Johnson* opinion, was to create a right of preemption in the government and impose a partial restraint on alienation of Indian title, such that only conveyances to the government could convey fee title. This certainly served the important function of legitimizing the existing land title system. But it also left most native property rights intact, especially their rights of possession and use. As Marshall indicated, under the discovery doctrine, the Indians "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."[213] The discovery doctrine did not, and could not "annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession."[214] Thus, Indian title is a product of native possession antedating discovery; it did not depend on acknowledgment or recognition by a European discoverer. Later decisions, which relied on Marshall's use of the term "occupants" to diminish the property rights of aboriginal peoples, misconstrued the limited nature of the *Johnson* decision.[215] *Johnson's* recognition of the discoverer's right of preemption created only a kind of future interest in discovered lands that could become possessory in the future; it did not disturb the natives' pre-existing right of possession, or any other property rights other than their right to convey to their grantees alienable title to their lands.[216]

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212. This decision on venue authorized Chief Justice Marshall's successors to hand down rulings like those cited in *supra* notes 15–16.

213. *Johnson*, 21 U.S. at 574.

214. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832).

215. *See supra* notes 15–16 and accompanying text; *see also* Bennett, *supra* note 37, at 622–27 (discussing other English and Commonwealth decisions denying the property rights of indigenous peoples).

216. Cohen, *Original Title*, *supra* note 14, at 48–49. The Cohen treatise refers to the government's future interest as a reversionary interest. COHEN TREATISE, *supra* note 21, at 489 (describing the discoverer's interest as "naked fee title"). However, the characterization of the government's interest as a reversionary interest is inapt, for that suggests that the government had a property interest prior to the natives' possessory interest, which clearly did not exist. The government's interest is instead a right of preemption. *See supra* notes 108, 213, *infra* notes 250, 254, and accompanying text.

Professor Kades has suggested that the effect of the restraint on alienation imposed by the government's right of preemption was to reduce the cost of expropriating Indian lands by giving the government monopsony power, excluding other potential purchasers and stifling market competition for Indian lands. This monopsony enabled the government to purchase the lands at bargain prices, which was even cheaper than conquest. Kades, *Dark Side*, *supra* note 10, at 1103–05, 1189. There is a certain

IV. CLARIFYING ABORIGINAL RIGHTS AND FEDERALIZING INDIAN AFFAIRS: THE *CHEROKEE* CASES

The Marshall Court returned to the issues of Indian property and sovereignty eight years after it decided the *Johnson* case.[217] The impetus was a bitter conflict between the Cherokee Nation and the State of Georgia. The 1791 Treaty of Holston between the federal government and the Cherokee "solemnly guarantee[d] to the Cherokee nation, all their lands not herbey ceded [to the United States]," amounting to some five million acres

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intuitive appeal of this law and economics explanation of *Johnson*'s interpretation of the right of government preemption inherent in Indian title, but there is no evidence that advancing efficient appropriation of Indian lands was part of Marshall's thinking. In fact, he privately noted to his colleague Story that he thought his country's treatment of the Indian tribes impressed a "deep stain on the American character." WHITE, *supra* note 207, at 714 (quoting Letter from Justice Marshall, to Justice Story, (Oct. 29, 1828)); *see also infra* note 221 (explaining his opposition to the removal of the Creeks and Cherokee from Georgia).

It is more likely that Marshall perceived his recognition of the government's right of preemption as a protective ruling. NEWMYER, *supra* note 81, at 445. In this respect, the opinion seems in line with the 1787 Northwest Ordinance, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 (promising "[t]he utmost good faith" in negotiating for Indian lands and pledging not to take "their land and property . . . without their consent"), the 1790 Nonintercourse Act, Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (codified as amended in part at 25 U.S.C. § 177 (2000)) (asserting exclusive federal jurisdiction over Indian lands and prohibiting state treaty-making to acquire Indian lands), and treaties like that with the Creek Nation in 1790, Treaty with the Creeks, Aug. 7, 1790, 7 Stat. 35 (ratifying first treaty negotiated by the Washington Administration, which promised federal protection of the Creeks and their reservation). ROBERT V. HINE & JOHN MACK FARAGHER, THE AMERICAN WEST: A NEW INTERPRETIVE HISTORY 120–21 (2000). Marshall, a man who deeply distrusted state governments and was a great admirer of Washington and also his biographer, *see* NEWMYER, *supra* note 81, at 235, 440, would likely have thought that a federal right of preemption (which admittedly was not clarified until the *Cherokee cases*) would curb probable abuses of the tribes by states and private parties. And it is hard to imagine that most Indian tribes would have fared better had they possessed the authority to sell lands to the states or the unscrupulous characters who populated the American frontier in the eighteenth and nineteenth centuries. *See* HINE & FARAGHER, *supra*, at 113 (quoting Richard Henry Lee of Virginia, who called for a strong federal presence inthe old Northwest Territory, due to the "uninformed and perhaps licentious people" settling there). Certainly the history of Indian affairs in the 180 years after the *Johnson* decision hardly suggests that a freewheeling market for Indian lands would have produced a better result for the tribes than the world of federal preemptory rights. On the contrary, tribes have usually been better served with a distant sovereign, since both settlers and their immediate governments wanted their land; most tribes preferred the French to the British, the British to the colonists, and the federal government to the states.

217. *Compare* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (describing the vestigal property rghts attributable to native Americans in the wake of the discovery doctrine), *with* Cherokee Nation v. Georgia 30 U.S. (5 Pet.) 1 (1831) (holding that the Court had no jurisdiction over the controversy between the Cherokee tribe and the State of Georgia because the tribe was neither a state nor a foreign nation. Marshall further analogized the tribe's standing to be that of a ward under the guardianship of the federal government) *and* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (rejecting Georgia's argument that the discovery doctrine effectively terminated Indian property rights and holding that the discovery doctrine only provided the discoverer with the right, above all others, to purchase land). The latter two cases are collectively referred to as the *Cherokee cases*.

of land inside the border of Georgia.[218] The Cherokee proceeded to adopt many actions that made evident their intention to make the lands recognized by the 1791 treaty their permanent homeland. They practiced agriculture instead of hunting and adopted a written constitution in which they asserted sovereignty over their territory.[219]

The federal government, however, had promised the state, as a condition of Georgia's cession of its western land claims (the last state to do so, in 1802), that it would make efforts to extinguish Indian title within the state "as soon as it could be done peaceably and on reasonable terms."[220] Beginning in 1824, the federal government carried out a brutal campaign to remove Creek Indians in Georgia.[221] But when it failed to extinguish Cherokee title (which technically was no longer Indian title, but treaty-derived title) by the late 1820s, Georgia, anxious to settle and mine Cherokee lands, took action.[222] In 1828, in the wake of the successful presidential campaign of Andrew Jackson, an old Indian fighter, the state passed the first of two laws, which appropriated most of the Cherokee lands, extended state law to Cherokee country, annulled Cherokee laws, and required white persons residing in Cherokee country to have a permit from the state.[223] The state even executed one Cherokee man for murder committed in Cherokee country, ignoring an order of the Supreme Court, signed by Marshall, granting the Indian's petition for *habeas corpus*.[224] All

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218. Treaty with the Cherokees, July 2, 1791, art. VII, 7 Stat. 39, 40; *see also* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 729 (rev. ed. 1947) (estimating that, until the period of 1805–1819 when the federal government bought approximately one million acres of land from them, the Cherokee nation owned about five million acres of land in Georgia).

219. FRANCIS PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 227, 231 (1962).

220. *Id.* at 227.

221. NEWMYER, *supra* note 81, at 442. The Creek campaign prompted Marshall's letter to Story. *See* WHITE, *supra* note 207, at 714 (quoting Letter from Justice Marshall, to Justice Story (Oct. 29, 1828)), which was a response to a published speech by Justice Story in which Story defended the Indians' right to their lands. *Id.* Chief Justice Marshall's response noted, "I often think with indignation on our disreputable conduct (as I think) in the affair of the Creeks of Georgia; and I look with some alarm on the course [we are] now pursuing [against the Cherokee]." NEWMYER, *supra* note 81, at 441–42.

222. ROBERT N. CLINTON, ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 145 (3d ed. 1991).

223. *Id.* The first statute was enacted on December 20, 1828, just nine days before Marshall wrote to Story about his concerns over the threatened removal of the Cherokees, *see* WHITE, *supra* note 207, at 714 (quoting Letter from Justice Marshall, to Justice Story (Oct. 29, 1828)), and the second a year later, on December 19, 1829. NEWMYER, *supra* note 81, at 442. Several states, including Georgia, Alabama, Mississippi, and Tennessee, enacted what were known as "Indian laws" in the 1820s, requiring Indians to pay state taxes, serve in the state militia, and work on state highways. The object of these laws was to encourage the Indians to relocate to the West, across the Mississippi River. WHITE, *supra* note 207, at 711 & n.130.

224. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 512 (1969); NEWMYER, *supra* note 81, at 447 (discussing the execution of Corn Tassel in

of these actions appeared to be inconsistent with the 1791 treaty, but the Cherokee could expect no help from the federal government: with the support of the Jackson Administration, Congress enacted the Indian Removal Act in 1830, which required the Indians to agree to relocate west of the Mississippi River or submit to state law.[225] With no prospects of help in Congress or the Jackson Administration, the Cherokee filed an original action in the U.S. Supreme Court, hoping to enjoin the state's actions.[226]

Georgia ignored the suit, failing even to appear before the Court, and made clear its intent to ignore any adverse ruling from the Court.[227] Certainly, the Jackson Administration was unlikely to enforce such a ruling. Jackson himself was well aware of the strategy of the Cherokee's attorney, William Wirt, to make the case part of the presidential campaign of 1832, and therefore denounced the Court proceedings.[228] The politically charged atmosphere induced Congress to consider repealing section 25 of the Judiciary Act of 1789,[229] which would have revoked the Supreme Court's jurisdiction over state court decisions.[230]

As he did in *Marbury v. Madison* three decades earlier,[231] Marshall delivered an opinion that established foundational principles while avoiding political controversy by denying that the Court had jurisdiction over the controversy.[232] Wirt argued that the Cherokee were a foreign nation, and

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December 1830) (citing JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS 95–98 (1996)).

225. Indian Removal Act of 1830, ch. 148, 7 Stat. 411, 411; CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 171 (1996); *see also* WHITE, *supra* note 207, at 715–17 (discussing the debates on the Indian Removal Act).

226. Professor Newmyer has suggested that the reason for filing an original action in the Supreme Court was political. The Cherokee's lead attorney was William Wirt, a well-known member of the Supreme Court bar (who later was the principal speaker at Gettysburg the day Lincoln delivered his memorable address), and who would run against Jackson in the 1832 election on the Antimason Party ticket. NEWMEYER, *supra* note 81, at 445–46. Wirt saw Cherokee removal as a campaign issue, as did several other members of an informal group of Cherokee advisors, several of which were running for president or vice-president in 1832 (including Henry Clay, Daniel Webster, and John Sargeant) and wanted a decision of the Supreme Court quickly, before the election, which was unlikely if he filed suit first in state court, where delay was likely. *Id.* at 446–47; *see also* WHITE, *supra* note 207, at 719 (detailing Wirt's fear that Georgia would refuse to create a record necessary to file a writ of error and that he rejected a suit in federal district court due to the opposition of William Johnson, in whose circuit the case would be filed).

227. WHITE, *supra* note 207, at 730–31. Georgia also failed to appear in the *Worcester* case to follow. *Id.* at 731; NEWMYER, *supra* note 81, at 447.

228. HOBSON, *supra* note 225, at 174; *see also supra* note 226.

229. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 88.

230. HOBSON, *supra* note 225, at 174.

231. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review of executive and congressional actions).

232. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831). The decision was handed down only four days after oral argument. WHITE, *supra* note 207, at 724. Professor Frickey has noted the

thus the Court would have original jurisdiction over a suit between the tribe and Georgia.[233] But only two of the six justices agreed.[234] Marshall's opinion rejected the notion that the Cherokee tribe was either a state or a foreign nation.[235] He acknowledged the tribe "as a distinct political society . . . capable of managing its own affairs."[236] But instead of a state or a foreign nation, Marshall claimed that the Cherokee were a "domestic dependent nation[]," one that had lost control over its external affairs, was dependent on the United States for protection, and reduced to "a state of pupilage."[237] He described the tribe's relationship with the federal government as "resembl[ing] that of a ward to his guardian."[238] Like Marshall's statements about conquest in *Johnson*,[239] this statement about the dependence of the Cherokee on the United States was completely ahistorical, made up out of whole cloth. In fact, until around 1830 the

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unusual nature of the *Cherokee Nation* opinion, which began by discussing the merits of the case, "rather than the analytically anterior question of jurisdiction," of which the Court ultimately decided there was none. Frickey, *Marshalling*, *supra* note 25, at 391.

233. U.S. CONST. art. III, § 2, cl. 1–2 (defining Supreme Court original jurisdiction to include suits between a state and foreign states).

234. Justices Thompson and Story concluded that the tribe was a foreign nation which possessed, according to Thompson's dissent, "the right of self government, according to their own usages and customs; and with the competency to act in a national capacity. . . . [T]here is as full and complete recognition of their sovereignty, as if they were the absolute owners of the soil." *Cherokee Nation*, 30 U.S. at 55. Thompson noted that the only limitation on Indian ownership was "the right of the Indians to transfer the absolute title of their lands to any other than ourselves." *Id.* Story, who signed on to Thompson's opinion but did not write one himself, was apparently among a group of informal advisors to the Cherokee, which included the politicians mentioned *supra* note 226, and Chancellor James Kent. NEWMYER, *supra* note 81, at 446.

235. *Cherokee Nation*, 30 U.S. at 19.

236. *Id.* at 16. In this regard, Marshall wrote:

> [The Cherokee] have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them . . . recognize them as a people capable of maintaining the relations 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.

Id. Despite this recognition of the Cherokee as a separate "state," the tribe was not one of the United States, for the reasons given *infra* note 241.

237. *Cherokee Nation*, 30 U.S. at 17; *see also id.* at 19 ("We perceive plainly that the [Commerce Clause of the] constitution . . . 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.").

238. *Id.* at 17. This language, which was unnecessary *dicta* in this opinion, would later be viewed as the wellspring of the federal government's "plenary" power over dependent tribes. *See* Clinton, *Redressing the Legacy of Conquest*, *supra* note 2, at 110–25 (arguing that the plenary power doctrine is an extra-constitutional source of authority over Indian tribes, which has undermined tribal sovereignty); Clinton, *No Federal Supremacy*, *supra* note 23, at 144 (interpreting an agreement with the Sioux nation to reinforce an "extant tribal–federal intergovernmental relationship").

239. *See supra* notes 194–98, 201 and accompanying text.

United States and the Indian tribes had treated each other largely as foreign states and dealt with each other largely through treaties, as the two dissenters pointed out.[240]

Nevertheless, there was no Supreme Court jurisdiction over the dispute because the Court determined that the tribe was neither a state nor a foreign government,[241] and therefore it could not invoke the Court's original jurisdiction. In so ruling, Marshall restated the discovery doctrine, omitting language related to conquest. He asserted that "the Indians are acknowledged to have an unquestionable . . . right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."[242] Thus, the decision avoided a constitutional confrontation between the state and the Supreme Court, while reaffirming the independent nature of Indian tribes, softening the discovery doctrine by dropping the conquest language, and suggesting that the federal government owed the tribes a duty of protection similar to that which guardians owe wards.

Only a year later, the issue of state versus tribal sovereignty was back before the Court in the case of *Worcester v. Georgia*.[243] Two missionaries, Samuel Worcester and Eliza Butler, were convicted in Georgia courts of residing in Cherokee country without a state license and sentenced to four

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240. *Cherokee Nation*, 30 U.S. at 54 (Thompson, J., dissenting). The dissent was not published simultaneously with the decision on March 18, 1831, but instead, was published later at the suggestion of Marshall, who also collaborated in the publication of a pamphlet making public all of the opinions in the case. WHITE, *supra* note 207, at 730.

Justice Johnson wrote a separate concurrence in which he criticized Marshall for discussing the merits of the case when there was no jurisdiction and insulted the Indians by referring to them as "a people so low in the grade of organized society" that they were insignificant. *Cherokee Nation*, 30 U.S. at 21, 25 (Johnson, J., concurring) ("Must every pretty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?"). Johnson also suggested that the Indians had forfeited their natural rights to land, due to their "inveterate habits," which resisted assimilation into republican culture, and he noted the "restless, warlike, and signally cruel" actions of the Indians during the Revolutionary War. *Id.* at 23–24.

241. *Cherokee Nation*, 30 U.S. at 19. Marshall observed that the Cherokee's own counsel had demonstrated that the tribe was not a state. *Id.* at 16. Nor were the Indians a foreign nation, since they were "so completely under the sovereignty and dominion of the United States" that were they to ally with a foreign country, such an action would be considered "by all as an invasion of our territory, and an act of hostility." *Id.* at 17–18. Moreover, the Constitution singled out tribes from the "several states" and "foreign nations" in the Commerce Clause, giving a textual justification for the conclusion that Indian tribes could not invoke the Supreme Court's original jurisdiction. *Id.* at 18. "We perceive plainly that the [Commerce Clause of the] constitution . . . 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." *Id.* at 19. Note, however, that this passage seems to indicate that the tribes were in fact sovereigns, just not foreign sovereigns. *See* Frickey, *Marshalling*, *supra* note 25, at 392.

242. *Cherokee Nation*, 30 U.S. at 17.

243. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

years of hard labor.[244] The defendants appealed their convictions to the U.S. Supreme Court, which agreed to reenter the controversy that it avoided the year before. Wirt again argued the case, contending that the Georgia law violated the Cherokee's treaty-guaranteed property rights,[245] even though the case was clearly about the liberty of the missionaries and the sovereign authority of the State of Georgia to restrict that liberty. In *Worcester v. Georgia,* handed down almost exactly one year after the decision in *Cherokee Nation,* Marshall upheld the Court's jurisdiction over the case[246] and wrote an opinion for the Court that has been called "the clearest, most complete articulation of the concept of aboriginal rights to be found in the American legal system."[247] *Worcester* resolved ambiguities about the nature of Cherokee sovereignty, while repudiating the language concerning conquest in the *Johnson* decision.

Although the basic issue in *Worcester* concerned the applicability of Georgia laws in Cherokee country, Marshall revisited Indian title questions as well, perhaps assuming that if the Cherokee possessed no property rights, Georgia sovereignty over the area would be unquestioned. Georgia's argument that discovery terminated Cherokee property rights was squarely rejected by the Court, which noted that the tribe continued to exercise sovereignty over a land base without (until recently) state interference.[248] The Indians were "a distinct people" who "govern[ed] themselves by their own laws," and discovery did not "give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors."[249] Discovery instead gave the discoverer only "the exclusive

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244. Worcester and Butler were initially released by the Georgia Superior Court because "they were federal employees, who were exempt from the [state] law." WHITE, *supra* note 207, at 730–31. But apparently wishing to test the law, they refused to leave Cherokee country, and Worcester resigned his position as federal postmaster. *Id.* at 731. Arrested again, convicted, and sentenced, they refused a pardon and instead appealed to the U.S. Supreme Court, claiming that the superior court decision was the highest court in the state "in which a decision could be had" in the case. *Id.* The clerk of the state superior court surprisingly forwarded the records of the trial (unsigned by the trial judge), but the state ignored the appeal and made clear that it would ignore any Court decision overturning the convictions. *Id.* at 730–31.

245. *See* NEWMYER, *supra* note 81, at 451.

246. Marshall noted that the missionaries were imprisoned under a state law alleged to be in violation of federal treaty rights. *Worcester*, 31 U.S. at 540. The Court therefore had jurisdiction under section 25 of the Judiciary Act, Marshall noting that "[t]hose who fill the judicial department have no discretion in selecting the subjects to be brought before them." *Id.* at 541.

247. Berman, *supra* note 24, at 660. Justice McLean concurred in the result. *Worcester*, 31 U.S. at 563 (McLean, J., concurring); *see also infra* note 278. Justice Baldwin dissented, but wrote no opinion. Justice Johnson, whose concurrence in *Cherokee Nation* denied the governmental status of the Cherokee, *Cherokee Nation*, 30 U.S. at 21–31 (Johnson, J., concurring), was absent due to health reasons. WHITE, *supra* note 207, at 732. *See also supra* note 240 (discussing Johnson's concurrence).

248. *Worcester*, 31 U.S. at 559–60.

249. *Id.* at 542–43.

right to purchase;"[250] therefore, there was no conflict between the possessory rights of the natives and the discovery rights of Europeans.

As for the suggestion in *Johnson* that discovery included a theory of conquest,[251] Marshall engaged in a lengthy reconsideration of the history of Indian relations from the colonial charters to British policies and to treaties made by the United States after independence.[252] He was now convinced that the contention that the colonial charters gave sovereign rights over the natives in possession of the land was an "extravagant and absurd idea . . . [which] did not enter the mind of any man."[253] All the charters conveyed was that which the King had to give: his "exclusive right of purchasing such lands as the natives were willing to sell."[254] Further, the charters authorized no wars of conquest; they contemplated only defensive wars.[255] Invasions of native territory required "just causes."[256] The charters thus gave no rights against the native possessors, merely rights against competing Europeans discoverers.

According to Marshall, colonial practice confirmed his view of the colonial charters.[257] The British government avoided interfering with native self-government—its interest was in excluding foreign powers and forbidding foreign land sales.[258] The Crown "purchased [native] alliance

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250. *Id.* at 544.

251. *See supra* notes 194-95, 201 and accompanying text.

252. *Worcester*, 31 U.S. at 542–52. According to Professor White, this historical exegesis was the vehicle by which Marshall convinced himself that whatever natural law rights of property and self-determination the Cherokee once possessed were lost to the superior power and civilization of the Anglo-Americans, which now, under the Constitution, treaties, and statutes, owed a federal a duty of protection to the dependent tribes. WHITE, *supra* note 207, at 733–35. This "actual state of things," in Marshall's words, *Worcester*, 31 U.S. at 560, was central to his constitutional analysis, which Professor White maintains was a "fascinating exercise in converting the natural law argument to arguments based on the sovereign powers of the Union and of his Court." WHITE, *supra* note 207, at 732.

Professor Newmyer substantially agrees with Professor White, concluding that in Marshall's view "law followed history . . . divest[ing] the Indians of all innate claims to their homeland By preserving the distinction between 'is' and 'ought,' . . . denying the innate morality of law, [and] . . . tying Native American law to the outcome of history, to 'the actual state of things,' to 'power, war, [and] conquest.'" NEWMYER, *supra* note 81, at 452. I do not quarrel with these observations concerning the loss of the Indians natural law property rights, but I maintain that, whether derived from natural law or from positive law, the proprietary rights of the Indians were significant in the wake of the *Worcester* decision.

253. *Worcester*, 31 U.S. at 544–45.

254. *Id.* at 545. "The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood." *Id.*

255. *Id.*

256. *Id.*; *see also id.* at 547 ("[O]ur history furnishes no example . . . of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances.").

257. *Id.* at 517–18.

258. *Id.* at 547.

and dependence by subsidies; but never intruded into the interior of [native] affairs."[259] The Proclamation of 1763, Marshall maintained, was recognition of native sovereignty within Indian country and operated to ban settler purchases of Indian title there.[260] Other colonial authorities fostered trade between the settlers and the natives while attempting "no claim to their lands, [and] no dominion over their persons."[261] Rather, the colonial authorities merely provided the sort of protection that an ally would supply, "without involving a surrender of [native] national character."[262]

This state of affairs, according to the Chief Justice, was not materially altered when the United States succeeded to the claims of the British crown.[263] In the 1783 peace treaty, the British did not purport to convey to the United States what the Crown never had: sovereign control over the native tribes.[264] The new nation proceeded to sign many treaties with the Indians in which it promised the tribes military protection. Two such treaties were the Treaties of Hopewell and Holston with the Cherokee, which included provisions recognizing a right of Cherokee self-government.[265] Marshall maintained that the treaty promises of United States protection coexisted with promises of tribal self-government; the former was not thought to be inconsistent with the latter.[266] These sovereign promises of federal protection, which Marshall emphasized rather than recognizing any remaining Indian natural law rights, diminished Indian sovereignty, but left their property rights, as acknowledged by the discovery doctrine, intact.

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259. *Id.* Marshall admitted that, had the colonists been "sufficiently powerful," they might have attempted to seize Indian lands "without negotiation or purchase from the native Indians. But this course is believed to have been nowhere taken. A more conciliatory mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbours." *Id.* at 579–80.

260. *Id.* at 548. On the proclamation, see Clinton, *Proclamation*, *supra* note 54.

261. *Worcester*, 31 U.S. at 552.

262. *Id.*

263. *Id.*

264. *Id.* at 560 ("[T]he king of Great Britain, at the treaty of peace, could cede only what belonged to his crown."). The British policy consistently "recogniz[ed the Indians'] title to self government." *Id.*

265. *See, e.g.*, *id.* at 560–61 (noting that protection provided to a weaker power by a stronger power did not mean the weaker relinquished its independence).

266. National policy was to "consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries." *Worcester*, 31 U.S. at 557. Cohen's treatise maintained that "*Worcester* . . . concluded that the guardian-ward relationship did not abolish preexisting tribal powers or make the tribes dependent upon federal law for their powers of self-government." COHEN TREATISE, *supra* note 21, at 233–34.

The federal protection Marshall found in the Constitution, statutes, and treaties was critical to the outcome in *Worcester* because the issue concerned whether state laws could operate in Indian country, and thereby deprive the Cherokee of their sovereignty.[267] Marshall concluded that the treaties between the federal government and the Cherokee Nation "mark[ed] out the boundary that separate[d] the Cherokee country from Georgia; guarant[eed] to [the tribe] all the land within their boundary; solemnly pledge[d] the faith of the United States to restrain their citizens from trespassing on it; and recognize[d] the pre-existing power of the nation to govern itself."[268] Consequently, the attempt by Georgia to extend its laws over Cherokee country violated the territorial and sovereign rights recognized by the treaties, which were the supreme law of the land. The state laws also conflicted with the Constitution's Indian Commerce Clause[269] and the federal Trade and Intercourse Act, which reserved Indian affairs to the federal government.[270] Consequently, the Court held that the applicable Georgia laws were "void, as being repugnant to the constitution, treaties, and laws of the United States," and thus the Court ordered Worcester released from jail.[271]

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267. *Worcester*, 31 U.S. at 590–91.

268. *Id.* at 561–62; *see also id.* at 557 (noting that federal law treated Indian tribes as "distinct political communities, having territorial boundaries, within which . . . is not only acknowledged, but guarantied by the United States.").

269. U.S. CONST. art. I, § 8, cl. 3.

270. Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (codified as amended in part at 25 U.S.C. § 177 (2000)). The original version of the Act read as follows:

> no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, *or to any state, whether having the right of pre-emption to such lands or not*, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Id. (emphasis added). This provision has remained substantially the same. *Compare* § 4, 1 Stat. at 138, *with* 25 U.S.C. § 177 (2000).

271. Worcester, 31 U.S. at 562–63. However, Georgia refused to release the missionaries, and eight months after the *Worcester* decision, they authorized their lawyer to press ahead with an appeal to the Supreme Court to notify President Jackson that the state was frustrating a decree of the Court. However, shortly thereafter, the missionaries decided to drop their appeal and seek a pardon from the Georgia governor, which was granted in January 1833. The result allowed the recently reelected Jackson to avoid the prospect of possible expansion of the nullification crisis, involving South Carolina's objections to the protectionist federal tariff, to Georgia and other southern states over Indian affairs and failure to abide by Supreme Court orders. WHITE, *supra* note 207, at 737–38. In 1992, over 160 years later, the State of Georgia issued another pardon, calling the *Worcester* incident "a stain on the history of criminal justice in Georgia" and expressing regret over usurping the Cherokee's sovereignty and ignoring the Supreme Court. JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 53 (2002) (citing *Georgia to Pardon 2 in Indian Land Case*, N.Y. TIMES, Nov. 23, 1992, at A13).

The *Worcester* Court's decision to uphold the territorial sovereignty of the Cherokee Nation became a bedrock principle of federal Indian law,[272] sharply limiting state authority over Indian tribes, at least until the era of the Rehnquist Court.[273] The decision also had an important effect on Indian proprietary rights by denying states the authority to extinguish Indian title,[274] an issue left undecided in *Johnson v. M'Intosh.*[275] *Johnson* involved western lands not within a state, and the governmental right of preemption the Court recognized could have been interpreted as extending to either the federal government or to states, or to both.[276] In contrast, *Worcester* concerned Indian lands within the boundaries of one of the original thirteen states.[277] Notwithstanding these distinctions, Chief Justice Marshall's answer was an emphatic "no" to the possibility of state extinguishment.[278]

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272. *See, e.g.*, WILKINSON, *supra* note 19, at 158 n.126 (noting that *Worcester* was the fourth most cited pre-Civil War case by federal and state courts between 1970 and 1985); Frickey, *Marshalling*, *supra* note 25, at 402–17 (maintaining *Worcester* laid the foundation for (1) the reserved rights doctrine, the notion that Indian treaties were grants of rights from tribes to the federal government, not vice versa, and (2) the clear statement rule, requiring Congress to clearly and unambiguously terminate tribal sovereignty).

273. *See, e.g.*, Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 4–6 (1999) [hereinafter Frickey, *Common Law*] (explaining the Rehnquist Court's steady erosion of tribal sovereignty over nonmembers, which Professor Frickey claimed is usurping the congressional role of implementing the ongoing process of colonialism); Ralph W. Johnson, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 7, 24–25 (1995) (accusing the Rehnquist Court of pursuing a "termination policy" inconsistent with *Worcester* by authorizing state regulation in Indian country).

274. *See, e.g.*, City of Oneida v. Oneida Indian Nation, 470 U.S. 226, 240 (1985) (rejecting a treaty between the tribe and the state as extinguishing Indian title).

275. *See generally* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 569 (1823); *see supra* text preceeding, accompanying, and following notes 192-93.

276. *See id.* at 585 (stating that "either the United States, or the several states . . . [had] the exclusive power to extinguish [Indian title]"); *see also supra* note 186 and accompanying text.

277. The original thirteen states were Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia.

278. *Worcester*, 31 U.S. at 557 ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."). Marshall further delineated the extent of Cherokee sovereignty, writing:

> The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Id. at 561.

Justice McLean concurred in the judgment, disputing the assumption in Marshall's opinion that tribes were enduring political bodies with a geographical base. He considered the tribes to be temporary settlements "always subject . . . to encroachments from the settlements around them." *Id.* at

In the wake of the *Worcester* decision, it was apparent that under the discovery doctrine[279] Indian tribes retained important possessory and governance rights. There was a territorial division between states and Indian country: tribes possessed territorial sovereignty within the latter, where state laws did not govern. Tribes were owed federal protection, and only the federal government could extinguish Indian title through purchase. However, Marshall's interpretation of an exclusive federal authority over Indian affairs benefited the Cherokee Nation very little in the hands of the Jackson Administration which, under the 1830 Indian Removal Act,[280] proceeded to carry out a federal removal policy, which led to the "trail of tears" and near genocide.[281]

In 1835, three years after the *Worcester* decision, the Marshall Court considered Indian title for the final time, in what turned out to be the Chief Justice's last year.[282] *Mitchel v. United States* concerned title to Florida lands acquired by a settler from an Indian tribe prior to the United States' acquisition of Florida from Spain in 1819.[283] The Court, in an opinion by Justice Baldwin, ruled that Indian title purchased by non-Indians could become fee title if the federal sovereign ratified the transaction.[284] The

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594 (McLean, J., concurring). Where tribal self-government would be "inconsistent with the political welfare of the states, and the social welfare of the advancement of its citizens," state law would trump tribal sovereignty. *Id.* This view would culminate in the enactment of the General Allotment Act in 1887. *See* ROYSTER & BLUMM, *supra* note 271, at 40–41 (discussing the General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (repealed 2000)); *see also infra* note 297 and accompanying text.

279. However, Marshall and others' political agenda of making the treatment of the Cherokee and other tribes a political issue in the 1832 election, *see supra* note 226 and accompanying text, came to naught, as President Jackson was easily reelected, frustrating Marshall's effort to have a president other than Jackson installed, who might appoint his colleague, Story, as his successor. *See* NEWMYER, *supra* note 81, at 456 (claiming that Marshall "hurried the litigation" and encouraged the publication of dissents in *Cherokee Nation* in an effort to help defeat Jackson).

280. Indian Removal Act of 1830, ch. 148, 7 Stat. 411.

281. In the words of Professor White, "the federal government simply stepped in and itself continued the [state's] policy of dispossession." WHITE, *supra* note 207, at 736. Jackson's alleged response to the case, "John Marshall has made his decision, now let him enforce it," is probably apocryphal. *See* HOBSON, *supra* note 225, at 179. The aftermath of the *Worcester* decision is explained in Burke, *supra* note 224, at 500–32.

282. Chief Justice Marshall died of an illness "that had plagued him for many years" on July 6, 1835, at age 79. NEWMYER, *supra* note 81, at 461.

283. Mitchel v. United States, 34 U.S. (9 Pet.) 711, 725 (1835). The acquisition of Florida from Spain by treaty in 1819 was prompted by Indian raids on Georgia from Spanish Florida, which in turn induced General Andrew Jackson to invade Florida and defeat the Creek Nation. Spain subsequently agreed to cede Florida to the United States in return for payment of claims and a guarantee of protecting its Texas border. *See* COGGINS ET AL., *supra* note 127, at 38.

284. *Mitchel*, 34 U.S. at 758–59. This result in effect justified the Illinois and Wabash Company's continuous (but unsuccessful) efforts to obtain congressional ratification of their purchases in the years prior to the *Johnson* decision. *See supra* notes 122–25 and accompanying text.

Court described Indian title as being a "perpetual right of possession" and noted the existence of a "uniform rule" from the first British settlement: "friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them . . . as their common property, from generation to generation."[285] The fact that the Indians used their lands as a commons for hunting was irrelevant, for "their hunting grounds were as much in their actual possession as the cleared fields of the whites"; they retained exclusive possession "until they abandoned them, made a cession to the government, or an authorized sale to individuals."[286] However, a private purchase of Indian title required federal ratification if the purchaser was to obtain freely alienable title.[287] Thus, the discovery doctrine protected Indian possession of communally held lands unless abandoned, and terminating that possession required federal purchase and Indian consent. According to the Court, Indian title was "as sacred as the fee."[288]

The *Mitchel* Court also squarely rejected the notion that conquest could extinguish Indian title. According to Justice Baldwin, in the treaties with the Indians, "the king [of England] waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve."[289] Because it stood in the same position as the English monarch, the United States could not assume a right of conquest renounced by its predecessor.[290]

V. THE LEGACY OF THE MARSHALL COURT DECISIONS

Over a quarter-century, in five different opinions, the Marshall Court outlined the contours of the discovery doctrine and the related concepts of Indian title and native sovereignty. Discovery gave discoverers only an exclusive right to purchase, excluding other European competitors. It simultaneously imposed a partial restraint on alienation on the Indian tribes, forbidding fee sales to anyone but the discovering sovereign or its successors. Except for this restraint, Indian title—which is based on pre-

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285. *Mitchel*, 34 U.S. at 745. Private purchases without federal ratification amount to purchases of Indian title, which, like the land titles purchased in *Johnson*, could be extinguished by a subsequent cession from the Indians to the federal government. *See supra* note 162 and accompanying text (describing private purchases of Indian title as executory interests).

286. *Mitchel*, 34 U.S. at 746.

287. *See id.* at 758 ("The Indian right to lands as property, was . . . that of alienation . . . subject only to ratification from the governor representing the king.").

288. *Id.* at 746.

289. *Id.* at 749.

290. *Id.* at 754.

existing possession, not governmental recognition—was as sacred as the fee. The self-governing status of Indian tribes was left largely unaffected by the discovery doctrine. Tribes entered into treaties to obtain federal protection, but except for losing the ability to conduct foreign relations, tribal sovereignty was unimpaired. Further, tribal sovereignty was buffered from state laws by the Indian Commerce Clause, treaties, and the federal Trade and Intercourse Act.[291] Federal supremacy over Indian affairs foreclosed state extinguishment of Indian title.

Over the years, subsequent courts and Congresses misinterpreted the Marshall Court's language and undermined the principles it laid down. In particular, the guardian/ward language in the *Cherokee Nation* case[292] was transformed from a concept protective of tribal prerogatives into one that gave Congress virtually unbridled power over Indian affairs.[293] This "plenary power" authority, described by one commentator as a "mystique"[294] and by another as "extra-constitutional,"[295] became the vehicle to justify federal policies undermining tribal self-government in ways never imagined by the Marshall Court. These policies included extending federal criminal jurisdiction throughout Indian country[296] and

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291. U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (codified as amended in part at 25 U.S.C. § 177 (2000)); *see also supra* note 72 (citing several treaties).

292. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (describing the tribe's relationship with the federal government as "resemble[ing] that of a ward to his guardian"); *see also supra* note 238 and accompanying text.

293. *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 198 (1984) [hereinafter Newton, *Federal Power*] (concluding that the courts should apply an intermediate standard of review to "legislation affecting Indians"); Clinton, *Redressing the Legacy of Conquest*, *supra* note 2, at 110–25 (discussing the effect of Congress's claimed plenary power over tribal sovereignty); *see also* the colloquy between Professor Williams, Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonization and Americanizing the White Man's Indian Law*, 1986 WISC. L. REV. 219 (1986), and Professor Laurence, Robert Laurence, *Learning to Live with the Plenary Power of Congress over Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413 (1988); the reply by Professor Williams, Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439 (1988); and the rejoinder by Professor Laurence, Robert Laurence, *On Eurocentric Myopia, the Designated Hitter Rule, and "The Actual State of Things,"* 30 ARIZ. L. REV. 459 (1988).

294. Newton, *Federal Power*, *supra* note 293, at 199.

295. Clinton, *Redressing the Legacy of Conquest*, *supra* note 2, at 99; *see also* Clinton, *No Federal Supremacy*, *supra* note 23, at 118.

296. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (Major Crimes Act) (codified at 18 U.S.C. § 1153 (2000)) (giving the federal government the authority to prosecute murder and other serious crimes by Indians against Indians on-reservation). This Act was enacted in response to *Ex parte Crow Dog*, 109 U.S. 556, 571–72 (1883), where the Court recognized exclusive tribal jurisdiction over crimes committed on-reservation by and against Indians, despite treaty language subjecting the Sioux

physically breaking up reservations into individual parcels (which often were made available to non-Indians) in an effort to foster agrarianism and Christianity through the allotment program.[297] In upholding the latter, the Court ruled that Congress possessed the authority to unilaterally abrogate treaty promises.[298] Later, the Court would misconstrue the language of "occupancy title" in *Johnson v. M'Intosh*[299] to deny compensation for government takings of Indian title land.[300]

This does not mean, however, that subsequent courts completely eroded U.S aboriginal title and native sovereignty. For example, the Supreme Court has held that acts of Congress terminating Indian title must be "clear and plain."[301] Thus, a series of executive and congressional actions that mistakenly assumed that tribal aboriginal title lands were public lands did not terminate Indian title.[302] Neither was Indian title terminated by the issuance of a lease,[303] nor a federal land patent,[304] nor a treaty

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Tribe to federal laws. *See also* United States v. Kagama, 118 U.S. 375, 381 (1886) (upholding the Major Crimes Act based on the plenary power doctrine).

297. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, 390 (General Allotment Act (Dawes Act)), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007 (codified at 25 U.S.C. § 2201 note (2000)); *see also* COHEN TREATISE, *supra* note 21, at 130–34; FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920, at 49–50 (1984) (downplaying the importance of Indian rights in favor of settlers); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9 (1995) (noting that the allotment policy resembled in many respects the goals of the former reservation policy).

298. Lone Wolf v. Hitchcock, 187 U.S. 553, 565–68 (1903); *see Symposium: Lone Wolf v. Hitchcock*: One Hundred Years Later, 28 TULSA L. REV. 1-157 (2002).

299. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823); *see also supra* notes 161, 178 and accompanying text.

300. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955); *see also* Newton, *Whim of the Sovereign*, *supra* note 185, at 1244 (criticizing the decision's distinction between recognized aboriginal title and suggesting that the result was due to fiscal and political considerations, not legal precedent). Government takings of title recognized by treaty or statute are of course compensable. *See* United States v. Sioux Nation, 448 U.S. 371, 373 (1980) (holding that government taking of the Black Hills requires payment of just compensation).

301. United States *ex rel.* Hualpai Indians v. Sante Fe Pac. R.R., 314 U.S. 339, 353 (1941); *see also* Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) (stating that there needs to be an "explicit statement" to terminate treaty rights, which would not "be lightly imputed to the Congress"); Washington v. Wash. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) (determining that "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights").

302. *Hualpai Indians*, 314 U.S. 339 (holding that aboriginal title was not extinguished by a railroad grant), 348–49 (by land grants to individuals), 351 (by a surveyor's report), 353 (by establishing an Indian reservation), 354–56 (by actions of the U.S. Department of the Interior in moving Indians onto the reservation). *See generally* Frickey, *Marshalling*, *supra* note 25, at 412–17 (discussing so-called "clear statement rules," as part of the canon of Indian document construction).

303. Jones v. Meehan, 175 U.S. 1, 32 (1899).

304. Cramer v. United States, 261 U.S. 219, 229 (1923).

between a tribe and a state.[305] Aboriginal title also enables the possessors to maintain common law actions of trespass and ejectment.[306] Moreover, the Supreme Court repeatedly recognized that because Indian tribes were not created by the United States, their sovereignty is not restrained by the constitutional limits that burden other governments.[307]

An overlooked legacy of the discovery doctrine, as enunciated by the Marshall Court, is the impetus it gave to treaty-making. Since discovery only gave an exclusive right to purchase, it became incumbent upon the federal government to negotiate treaties with Indian tribes to gain title to lands for settlement. The following section examines some of the results of those negotiations, especially as they relate to natural resources.

VI. A CONSEQUENCE OF THE DISCOVERY DOCTRINE: TREATY RIGHTS TO NATURAL RESOURCES

The treaty-making period extended from the founding of the United States until 1871, when the House of Representatives successfully objected to being excluded from the treaty-making process and effectively ended the treaty era.[308] Thereafter, Indian policy was made, and Indian reservations established, only through statutes and actions of the executive.[309] This established a new framework for making Indian policy, but these "treaty substitutes" were considered to be the functional equivalents of treaties by the government and reviewing courts, so the end of treaty-making had very little actual substantive effect on the tribes.[310]

Treaties are compacts among sovereigns. Thus, the federal government's policy of entering into treaties was an implicit acknowledgment of the sovereign status of the tribes. The Supreme Court

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305. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 240 (1985).

306. *See Johnson*, 21 U.S. at 592 (noting that Indian title was a defense to an ejectment action); COHEN TREATISE, *supra* note 21, at 523–24 (citing cases recognizing Indian claims for trespass and ejectment).

307. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 329–30 (1978) (stating that the constitutional bar on double jeopardy is not applicable to tribal governments); Talton v. Mayes, 163 U.S. 376, 384 (1896) (finding that the constitutional requirement of indictment by a grand jury for criminal prosecution is not applicable to tribal courts).

308. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2000)). Under the Constitution, of course, only the Senate may ratify treaties. U.S. CONST. art. II, § 2, cl. 2. The objection of members of the House, which refused to appropriate money to carry out treaty obligations until it was given an equal voice in Indian affairs, led to the termination of treaty-making. The 1871 law did, however, validate existing treaties. *See* COHEN TREATISE, *supra* note 21, at 107 (detailing the events that led up to the 1871 Appropriations Act).

309. COHEN TREATISE, *supra* note 21, at 107.

310. *See* GETCHES ET AL., *supra* note 29, at 152 (noting, however, that Indian reservations set aside by executive order might be subject to governmental taking without compensation).

has accorded Indian treaties the same dignity as treaties with foreign nations.[311] There are at least two differences, however: (1) Indian treaties can be abrogated with the clear and specific intent of Congress; and (2) there are special rules of interpretation that courts use to interpret Indian treaties.[312] These interpretative rules favor tribes, since courts assume that the federal "guardian" has a trust relationship with its Indian "wards."[313] Thus, courts construe treaties as tribes would understand their terms;[314] ambiguities are resolved in favor of the tribes;[315] and treaties are liberally construed in their favor.[316] But courts will not inquire into the adequacy of a tribe's representation in treaty negotiations and will not attempt to ascertain whether a treaty was procured by fraud or duress.[317]

Many treaties, especially the ones early in the treaty-making era, resembled foreign treaties by emphasizing "peace and friendship," calling for exchanges of prisoners, and often including "mutual assistance pacts."[318] Later, treaties frequently included promises of federal protection of tribes and exclusive federal regulation of trade.[319] Of course, the chief treaty-making goal of the United States was to extinguish Indian title, which, because of the discovery doctrine, required consensual cessions of land from the tribes.

In return for the land cessions, the tribes bargained for government recognition of homelands. These land reservations formed the lion's share

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311. United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876) ("[T]he power to make treaties with Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations.").

312. *See* COHEN TREATISE, *supra* note 21, at 63 (explaining the process courts employ to interpret Indian treaties).

313. *See* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601, 620–22 (1975) (referencing the differential treatment of Indian and international treaties).

314. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938).

315. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930).

316. Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943); Choate v. Trapp, 224 U.S. 665, 675 (1912).

317. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903) (concluding that the Court will not attempt to determine if the tribe signed the agreement because of "fraudulent misrepresentations [or] concealment"); United States v. N.Y. Indians, 173 U.S. 464, 469–70 (1899) (determining that "the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can behind an act of Congress" (quoting Fellows v. Blacksmith, 60 U.S. (19 How.) 336, 372 (1857)).

318. COHEN TREATISE, *supra* note 21, at 64–65.

319. *Id.* at 65.

of what came to be called Indian country,[320] within which most state laws are preempted, even if the treaty or treaty-substitute establishing the reservation did not expressly make state laws inapplicable.[321] Express preemption was unnecessary because the courts ruled that the overriding purpose of promoting tribal self-government would have been compromised if state law governed in Indian country.[322] Thus, in light of the favorable rules of interpretation,[323] treaties and statutes are usually construed "in favor of retained tribal self-government and property rights as against competing claims under state law."[324]

In addition to islands of self-government, Indian country was established to provide the tribes a means to a livelihood. But because their reservations left the tribes with only a fraction of the lands they commanded prior to the treaties or treaty-substitutes, their prospects for maintaining their economic independence were poor.[325] Moreover, government policy transformed nomadic hunting and gathering tribes into settled agrarians.[326] In the West, farming required water for irrigation, yet hardly any treaties or statutes mentioned water. In order to avoid the prospect of having Indian reservations become barren dust bowls, the Supreme Court used the rules of interpretation to imply federal intent to reserve sufficient water for the tribes to fulfill the purposes of their land reservations.[327] Since most reservations have early priority dates under the West's "first in time, first in right" system of water allocation, this judicial interpretation reserved for the tribes considerable amounts of the arid West's most precious natural resource.[328]

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320. Indian country includes reservation lands, allotted lands held in trust, and dependent Indian communities (mostly pueblos in New Mexico, which are owned by tribes in fee). 18 U.S.C. § 1151(a) (2000) (defining the term "Indian country"); *see also* COHEN TREATISE, *supra* note 21, at 34–38 (defining and discussing terms used in § 1151(a)).

321. *See* COHEN TREATISE, *supra* note 21, at 270–71.

322. *See id.* at 273 (explaining that "broad preemption of state laws in Indian country has been consistently recognized as a necessary implication from the federal policy protecting tribal sovereignty").

323. *See supra* notes 312–316 and accompanying text.

324. COHEN TREATISE, *supra* note 21, at 274.

325. *Id.* at 274–75.

326. Winters v. United States, 207 U.S. 564, 576 (1908) ("It was the policy of the Government, it was the desire of the Indians, to change those [nomadic] habitats and to become a pastoral and civilized people.").

327. *Id.* (ruling that the tribes' cession of land to the United States was not intended to include a relinquishment of all the waters, using the interpretive rule that ambiguities in agreements with Indians should be resolved in their favor); *see also* 4 WATERS AND WATER RIGHTS § 37.01(b)(2),at 227 (Robert E. Beck ed., 1996 ed.) (noting that the Supreme Court reserved water for the Indians, employing the rule of resolving ambiguities in favor of the tribes).

328. *See generally* 4 WATERS AND WATER RIGHTS, *supra* note 327, § 37.02, at 234 (providing historical explanation of Indian reserved water rights). Two significant cases in which tribes were

Tribal reserved water rights are not governed by state law,[329] although state courts may obtain jurisdiction over reserved rights.[330] Moreover, reservation water rights may include the right to restrain other individuals holding water rights from impairing reservation water quality.[331]

Reservations include natural resources other than water. The Supreme Court has consistently ruled that other resources are part of the reservation. Thus, timber and minerals, what the Supreme Court referred to as "constituent elements of the land," are part of a tribe's beneficial ownership.[332] Submerged lands may be a part of a reservation's resources, depending on congressional intent.[333] Reservation groundwater is currently the subject of disagreement among state courts, which have reached conflicting results as to whether reservation groundwater is tribally owned or subject to state control.[334]

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awarded a total of over a million and a half-million acre-feet of water are *Arizona v. California*, 373 U.S. 546, 596, 600 (1963), and *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 77 (Wyo. 1988).

329. Tribal reserved rights are federally created rights. Therefore, they are not subject to state rules requiring diversions of water for beneficial use and making water rights defeasible if they are not used. *See* 4 WATERS AND WATER RIGHTS, *supra* note 327, § 37.01(c), at 232 (explaining the problems federally created rights create for state administrators and water rights holders).

330. Under the McCarran Amendment, 43 U.S.C. § 666(a) (2000), the federal government may be required to participate in streamwide adjudications conducted by state courts. Although state courts must respect federal law, several Supreme Court rulings have affirmed state court jurisdiction, and state courts have usually interpreted the scope of federal water rights quite narrowly. 4 WATERS AND WATER RIGHTS, *supra* note 327, § 37.04(a), at 273. For a critical discussion of the McCarran Amendment, see Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 HARV. ENVTL. L. REV. 433 (1994).

331. United States v. Gila Valley Irrigation Dist., 920 F. Supp. 1444, 1445 (D. Ariz. 1996).

332. United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116 (1938). Reservation resources are owned beneficially because the United States retains legal ownership, or what the *Shoshone Tribe* Court called "only the naked fee." *Id.* This split estate imposes on the federal government a fiduciary responsibility to ensure that tribal resources are not wasted. *See infra* notes 352–56 and accompanying text. Further, under the Trade and Intercourse Act, the federal government must approve conveyances of all tribal property, including leases. 25 U.S.C. § 177 (2000).

333. Submerged lands are subject to conflicting state claims under the equal footing doctrine, which presumes, in part, that submerged lands are conveyed to state ownership upon statehood. *See* Montana v. United States, 450 U.S. 544, 544–45 (1981) (holding that submerged lands bisecting a reservation were owned by the state). *But cf.* Idaho v. United States, 533 U.S. 262, 276 (2001) (reiterating the district court's holding that submerged lands are owned by the tribe due to congressional recognition of an executive action recognizing the lands as tribally owned); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (reasoning that submerged land was owned by the tribe due to treaty language granting reservation lands in fee and promising that they would not become part of any state).

334. *Compare In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 99 (Wyo. 1988) (holding that groundwater was not a reserved water right), *with In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 989 P.2d 739, 745 (Ariz. 1999) (considering and rejecting the *Big Horn* court's holding, finding its reasoning unpersuasive, and

Some tribes have rights to off-reservation resources. For example, tribes in the Pacific Northwest and Great Lakes negotiated express treaty provisions giving them the right to hunt, fish, and gather on lands off their reservations.[335] These off-reservation usufructuary rights[336] can either be location-specific—for example, at "usual and accustomed" fishing locations—or generic—for example, at all "open and unclaimed lands."[337] The Supreme Court has interpreted the "right of taking fish in common with" white settlers contained in many Pacific Northwest treaties to include a right to harvest up to half of the available fish.[338] Treaties in the Midwest not containing the "in common with" language have also been interpreted to assure the tribes half the harvest.[339] Fishing rights include implied water

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ruling that groundwater can be a reserved water right if necessary to fulfill a reservation's purpose). *See also* United States v. Wash. Dep't of Ecology; No. C01-0047Z, at 8 (W.D. Wash. Feb. 24, 2003) (unpublished order denying the Washington Department of Ecology's Motion for Summary Judgement) (holding that "as a matter of law the Court concludes that the reserved water rights doctrine extends to groundwater even if groundwater is not connected to surface water"); Confederated Salish & Kootenai Tribes of the Flatland Reservation v. Stultz, 59 P.3d 1093, 1099 (Mont. 2002) (prohibiting the Montana Department of Natural Resources and Conservation from processing or issuing "beneficial water use permits on the Flathead Reservation until such time as the prior pre-eminent reserved water rights[, including groundwater,] of the Tribes have been quantified").

335. *See, e.g.*, United States v. Winans, 198 U.S. 371, 378 (1905) (interpreting a treaty with the Yakima Indians that gave them "the right of taking fish at all usual and accustomed places"); COHEN TREATISE, *supra* note 21, at 444–45 (explaining how tribes secured fishing rights via treaty); Menominee Tribe v. United States, 391 U.S. 404, 405–06 (1968) (concluding that "to be held as Indian lands are held" in the Menominee Treaty "includes the right to fish and to hunt").

336. The Supreme Court has referred to usufructuary rights as "right[s] in land" and "servitude[s]" burdening lands ceded to the United States, including private property. United States v. Winans, 198 U.S. 371, 381 (1905). Usufructuary rights include hunting, fishing, and gathering. These activities were central to the tribes' pre-colonial economy. *See* MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 65 (2002) (discussing the native conception that natural resources, like salmon, are not for individual ownership, but are gifts to be passed to subsequent generations), *available at* http://www.salmonlaw.net (last visited June 14, 2004).

337. *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) (discussing a treaty provision reserving fishing rights at "usual and accustomed" fishing locations); Crow Tribe v. Repsis, 73 F.3d 982, 983 (10th Cir. 1995) (explaining that national forest lands are open to hunting so long as they are "unoccupied" lands); Lac Court Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 760 F.2d 177, 182 (7th Cir. 1985) (stating that public schools, highways, and hospitals are not open and unclaimed lands); United States v. Hicks, 587 F. Supp. 1162, 1166 (W.D. Wash. 1984) (holding that national parks are not "open and unclaimed lands"); Washington v. Buchanan, 978 P.2d 1070, 1082 (Wash. 1999) (noting that a treaty provision reserving hunting and gathering rights on "open and unclaimed land" includes public lands managed for purposes not inconsistent with the tribal usufructs). Open and unclaimed lands may include areas outside of lands ceded by a treaty if they were historically subject to tribal usufructs. Seufert Bros. v. United States, 249 U.S. 194, 198–99 (1918).

338. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 658, 686 (noting that the scope of the fishing right is tied to the right to "a livelihood—that is to say, a moderate living").

339. *See* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 775 F. Supp. 321, 323 (W.D. Wis. 1991) (holding, in part, that the "moderate living" standard is incapable of

rights,[340] the right to harvest commercially,[341] and the right to harvest hatchery as well as spawning fish.[342] But it is not yet clear whether the treaty fishing right entitles the tribes to a right to restrain habitat-damaging activities.[343]

Off-reservation usufructuary rights are durable. The Supreme Court has ruled that they are not terminated by executive orders or treaties which cede "all right, title, and interest" in lands without specifically mentioning the usufructs.[344] Moreover, a usufructuary right lasting "[d]uring the pleasure of the President" does not give the President a unilateral right to terminate the treaty right if the tribes caused no disturbances among white settlers, since that is how the tribes interpreted the provision.[345] Usufructs are not terminated by statehood, since such proprietary rights are not

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determining the tribe's share of the harvest and that the "harvestable natural resources to which [the tribe] retain[s] a usufructuary right . . . [must] be apportioned equally between the [tribe] and all other persons"); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1240 (W.D. Wis. 1987) (recognizing absence of "in common" language in treaty with Midwestern tribe and that the tribe's allocation is determined instead by the "moderate living standard," but refusing to allocate resource at that time); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1434 (W.D. Wis. 1987) (noting "in common" language employed in western treaties and holding that Chippewa's usufructuary rights entitled the tribe to enough of the resource "to provide them with a moderate living").

340. *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1410, 1414 (9th Cir. 1983) (explaining that reserved water rights to preserve fishing rights have a "time immemorial" priority date).

341. *See* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1430 (W.D. Wis. 1987) (concluding that the tribe has the right to harvest off-reservation resources to which it has usufructuary rights and to dispose of them commercially). Tribes may employ new harvest technologies, *Lake Superior Chippewa Indians*, 775 F. Supp. at 322, but engaging in new uses not practiced at treaty time, like commercial timber harvests, is not within the treaty right. Lac Courte Oreilles Band of Lake Superior Indians v. Wisconsin, 758 F. Supp. 1262, 1271 (W.D. Wis. 1991).

342. United States v. Washington, 506 F. Supp. 187, 198–99 (W.D. Wash. 1980), *aff'd*, 759 F.2d 1353, 1360 (9th Cir. 1985). However, the existence of a hatchery does not make reserved water for spawning fish unnecessary. Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981).

343. One district court ruled that implied in the treaty fishing right is a right to restrain activities damaging fish habitat, but that ruling was vacated on appeal. United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash. 1980), *vacated*, 759 F.2d 1353 (9th Cir. 1985). Another court upheld a lower court order to alter dam operations necessary to protect fish. Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1035 (9th Cir. 1985). *See generally* Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection: A Property Rights Approach*, 69 U. COLO. L. REV. 409, 489 (1998) (discussing *Washington*, 506 F. Supp. 187, and the uncertain scope of the right of habitat protection).

344. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195–98, 200, 206 (1999) (employing the rules of treaty interpretation, especially the rules of interpreting ambiguities in the tribes' favor and according to what the tribes likely understood).

345. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 356 (7th Cir. 1983), *cert. denied sub nom.*, Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians, 464 U.S. 805 (1983).

inconsistent with state sovereignty.[346] States may not, however, charge license fees for the exercise of treaty rights[347] or impose discriminatory regulations under the pretext of resource conservation.[348] Legitimate state conservation and health and safety regulation is permissible, but must pass heightened judicial scrutiny.[349] Moreover, effective tribal regulation can preempt state regulation.[350]

Management of reservation resources has long been the responsibility of the federal government, the legal landowner, for the benefit of the equitable owner, the tribes.[351] Under the Indian trust doctrine,[352] federal mismanagement of timber and oil and gas leases has led courts to award money damages because of the existence of comprehensive federal regulatory schemes.[353] Of course, alleged mismanagement of money trust

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346. *Mille Lacs*, 526 U.S. at 204–05.

347. Tulee v. Washington, 315 U.S. 681, 684–85 (1942).

348. Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 46–48 (1973) (striking down a facially nondiscriminatory ban on net fishing, since it in fact discriminated against tribal fishing).

349. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1239 (W.D. Wisc. 1987).

350. *Id.* at 1241. However, state promotion of tourism is not a valid basis for regulating the "tribes' exercise of their usufructuary rights." *Id.* at 1238.

351. This split-estate concept—with the federal government holding legal title, and the tribes owning the beneficial, or equitable estate—arose out of the trust relationship between the federal government and the tribes. *See* United States v. Shoshone Tribe of Indians, 304 U.S. 111, 115 (1938) (announcing that "although the United States always had legal title . . . it did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe"); ROYSTER & BLUMM, *supra* note 271, at 131 (showing that the split estate concept is important for separating title questions from usufructuary rights).

352. *See* COHEN TREATISE, *supra* note 21, at 220–28 (explaining the history and limitations of the Indian trust doctrine).

353. United States v. Mitchell, 463 U.S. 206, 207, 211 (1983) (awarding damages for mismanagement of timber resources); Jicarilla Apache Tribe v. Supron, 479 F. Supp. 536, 547, 551, 553–54 (D.N.M. 1979), *aff'd and rev'd in part by* 728 F.2d 1555, 1560 (10th Cir. 1984), *rev'd en banc per curiam* 782 F.2d 855, 857 (10th Cir. 1986) (adopting Judge Seymour's dissent from the panel decision below). In his dissent, Judge Seymour would have affirmed the district court's decision finding a breach of trust concerning oil and gas leases because:

> [S]tricter standards apply to federal agencies when administering Indian programs. When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable" choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe.

Jicarilla Apache Tribe, 728 F.2d at 1567 (Seymour, J., concurring in part and dissenting in part) (citations omitted).

In *United States v. Navajo Nation*, the Supreme Court overturned a decision of the Federal Circuit that awarded damages to the Navajo Tribe in connection with coal leases because the tribe had the "lead role" in negotiating the leases and the Secretary of the Interior had no comprehensive management role. Navajo Nation v. United States, 263 F.3d 1325, 1332–33 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488, 502, 506–08 (2003). The Court implicitly distinguished the *Jicarilla Apache Tribe* case by noting that the Indian Mineral Leasing Act and its implementing regulations "address oil and gas leases

accounts is the subject of an ongoing multi-billion dollar lawsuit.[354] However, there is no trust obligation concerning water rights, since the federal government has conflicting obligations to tribes and irrigators under the Reclamation Act.[355] But there is authority for the proposition that the federal government has a duty to protect tribal usufructuary rights affected by public land management decisions.[356]

There is no generic authority for federal regulation of land use on reservations. Tribal land use authority over non-Indian reservation lands has been crippled by Supreme Court interpretations of the continuing effects of allotting reservations into individual parcels under the nineteenth century assimilationist impulse.[357] This impulse, which dominated the late nineteenth and early twentieth century, sought to assimilate tribal members into mainstream American life by encouraging them to become agrarians.[358] Under the allotment policy, there was a dramatic erosion of the Indian land base: from 138 million acres to around 48 million acres, of which some 20

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in considerably more detail than coal leases." *Navajo Nation*, 537 U.S. at 507 n.11. On the same day it decided *Navajo Nation*, the Court held that the United States breached its trust responsibilities to the White Mountain Apache Tribe in *United States v. White Mountain Apache Tribe*, even though there was no comprehensive regulatory scheme, because the language of the relevant statute indicated that Fort Apache was to be held "in trust," and the government had actually occupied and used the land. United States v. White Mountain Apache Tribe, 537 U.S. 465, 474–76 (2003). This, according to the Court, gave the government at least as much control over the trust property as it has over timber harvesting and required the government "to preserve the property improvements." *Id.* at 475.

354. Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001); *see also* John Gibeaut, *Another Broken Trust*, A.B.A. J., Sept. 1999, at 40, 40–43 (chronicling the story that led to one of the biggest lawsuits brought against the United States).

355. Nevada v. United States, 463 U.S. 110, 128 (1983). *See generally* Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 371–383 (2000)).

356. Kandra v. United States, 145 F. Supp. 2d 1192, 1204 (D. Or. 2001) (concerning federal timber harvests and their effects on treaty hunting rights).

357. COHEN TREATISE, *supra* note 21, at 127–43 (providing detailed explanation of the period of assimilation).

358. In the General Allotment Act of 1887 (Dawes Act)—one of the first statutes that attempted to make Indian policy on a nationwide, rather than on a reservation, basis—Congress responded to the poverty in Indian country (as well as to those who wished to obtain tribal lands) by breaking up communally held reservation lands into individual parcels. The individual parcels could be sold to non-Indians after the expiration of a trust period (usually twenty-five years), and many were sold or repossessed for failure to pay state property taxes (which became due after the expiration of the trust period). General Allotment Act of 1887, ch. 119, 24 Stat. 388, 390 (Dawes Act), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007 (codified at 25 U.S.C. 2201 note (2000)). Other land was sold to non-Indians as "surplus lands" immediately after reservations were allotted into parcels for individual Indians. Although allotment was national policy for nearly a half-century, the allotment policy was terminated by the Indian Reorganization Act of 1934, ch. 576, § 1, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 (2000)). Its implementation took effect on a reservation-by-reservation basis according to individual statutes. *See generally* Royster, *supra* note 297, at 77 (explaining the history and current state of allotment and concluding that allotment must be "excised . . . from Indian Law").

million acres were desert or semi-desert.[359] Moreover, today more reservations are burdened with a "checkerboard pattern" of alternate tribal and non-tribal land ownership, which complicates land management and has undermined tribal regulatory authority.[360]

Judicial concern over the fairness of subjecting non-Indian, on-reservation landowners to tribal regulatory control has produced several Supreme Court opinions that have denied tribes the ability to regulate all non-Indian activities in Indian country.[361] Initially, the Court ruled that a tribe did not have the inherent authority to regulate non-Indian hunting and fishing on non-Indian lands on-reservation unless: (1) there was a contractual relationship between the non-Indians and the tribe; or (2) the non-Indian activity "threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe."[362] Although tribes may not usually regulate hunting and fishing on non-Indian lands, states may not regulate hunting and fishing of non-Indians on Indian-owned lands.[363] Where allotment has destroyed the Indian character of a reservation, tribes may not regulate non-Indian land uses on-reservation.[364] Nor can they regulate non-Indian activities on former Indian lands that are now federal lands opened to the public.[365]

Tribal taxation and court jurisdiction generally track the limits the Supreme Court has imposed on tribal regulatory powers. Thus, tribes may not generally tax non-Indian activities on non-Indian lands on-reservation,[366] and states may tax tribal lands unless they are in trust status

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359. *See* Royster, *supra* note 297, at 8.

360. *See, e.g.*, HRI, Inc. v. Envtl. Prot. Agency, 198 F.3d 1224, 1231, 1234 (10th Cir. 2000) (clarifying application of environmental laws "in the 'checkerboard' area of the Eastern Navajo Agency").

361. *See generally* Frickey, *Common Law*, *supra* note 25, at 43–48 (explaining the Rehnquist Court's solicitude for the right of nonmembers of tribes to be free of tribal civil regulation); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1620, 1626–31 (1996) (claiming that the Rehnquist Court employs equitable balancing to resolve Indian law cases that is sensitive to modern social, political, and economic conditions—and which is especially sensitive to non-Indian expectations—rather than Indian law precedent). *See also* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 360–61 (2001) (criticizing the Rehnquist Court for applying inappropriate legal principles, often used in other types of cases, to Indian law cases).

362. Montana v. United States, 450 U.S. 544, 566 (1981).

363. New Mexico v. Mescalero Apache Tribe,462 U.S. 324, 325 (1983).

364. Brendale v. Confederated Tribes ofthe Yakima Indian Nation, 492 U.S. 408, 430 (1989).

365. South Dakota v. Bourland, 508 U.S. 679, 689 (1993).

366. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650–59 (2001) (indicating that the two exceptions authorizing tribal regulation or taxation of non-Indians on non-Indian reservation lands, *see supra* text accompanying note 362, are to be narrowly construed).

and subject to restraints on alienation.[367] Tribal courts have no jurisdiction over tort claims between non-Indians concerning an on-reservation automobile accident, which occurred on a state highway open to the public.[368] Perhaps most surprisingly, tribal courts lack jurisdiction over a damages claim against state officials conducting a search on-reservation trust lands concerning an alleged crime committed off-reservation.[369] Except under the rather unusual factual circumstances of the latter case, tribal regulation, taxation, and court jurisdiction over non-Indians seems to extend to all tribal lands held in trust.

VII. DELEGATED AUTHORITY TO MANAGE THE RESERVATION ENVIRONMENT

Unlike land use controls, environmental regulations are the product of congressional delegation. All the major federal environmental statutes, except the Resource Conservation and Recovery Act (RCRA),[370] enable the Environmental Protection Agency (EPA) to approve tribal programs to function as states for the purpose of implementing pollution control programs.[371] But the pollution control statutes vary in terms of how they authorize the tribes to assume implementation authority.

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367. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 (1998).

368. Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

369. Nevada v. Hicks, 533 U.S. 353, 369 (2001). The search had been authorized by a tribal court. *Id.* at 356. The tribal member subject to the search alleged that the state officials exceeded the limits of the authorized search and sued in tribal court. *Id.* at 357. The Supreme Court ruled that the tribal court lacked jurisdiction to hear the claim. *Id.* at 369.

370. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2000). RCRA was subsequently amended in 1984. *See* The Hazardous and Solid Waste Act Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984) (codified as amended at 42 U.S.C. §§ 6901–6992k (2000)); that same year, EPA instituted its policy of encouraging tribes to assume control over pollution control programs on-reservation and began to curb state regulatory authority on-reservation. *See* Mary Christina Wood, *Fulfilling the Executive's Responsibility Towards the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 756–57 (1995). These amendments, however, did not authorize tribes to implement hazardous or solid waste management programs. *See* Backcountry Against Dumps v. Envtl. Prot. Agency, 100 F.3d 147 (D.C. Cir. 1996) (holding that EPA lacks the authority to approve solid waste permitting plans by Indian tribes because under RCRA the tribes are considered municipalities, not states). However, proposed amendments to the statute include a "tribes as states" provision. ROYSTER & BLUMM, *supra* note 271, at 248. In the meantime, state-approved programs under the statute may not regulate on-reservation, where EPA retains regulatory authority. Wash. Dep't of Ecology v. Envtl. Prot. Agency, 752 F.2d 1467–68 (9th Cir. 1985).

371. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1377(e) (2000); Safe Drinking Water Act, 42 U.S.C. § 300j-11 (2000); Clean Air Act, 42 U.S.C. § 7601(d) (2000); Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §§ 9604(d)(1)(A), 9626 (2000).

The Clean Water Act (CWA) directs EPA to treat tribes as states for the purpose of implementing water quality programs.[372] To qualify to implement a CWA program,[373] a tribe must: (1) be a federally recognized tribe with a governing body capable of carrying out substantial governmental duties; (2) be capable of carrying out its statutory responsibilities; and (3) have jurisdiction over the water resources it seeks to regulate.[374] According to EPA, fulfilling the latter criterion requires a tribe to show that it possesses inherent authority to regulate the water resource in question if the activity is conducted by a non-Indian on reservation.[375] This requires a demonstration that the activity has a "serious and substantial" effect[376] on "the political integrity, the economic security, or the health or welfare of the tribe."[377] Although the Supreme Court has construed this phrase narrowly,[378] EPA's policy of avoiding checkerboarded jurisdiction over reservation resources and treating water as a unitary resource in which the actions of one user can adversely affect another have led the agency to interpret the phrase in favor of delegating implementation of CWA programs to tribes.[379]

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372. 33 U.S.C. § 1377(a).

373. Programs that tribes may administer include several grant programs, water quality standards, permit programs for point sources and discharges of dredged or fill material, and nonpoint sources. *See* ROYSTER & BLUMM, *supra* note 271, at 228 (explaining three major programs under the CWA).

374. 33 U.S.C. § 1377(e). The statutory language concerning tribal jurisdiction—"water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation," *id.* § 1377(e)(2)—is quite similar to the Clean Air Act (CAA) language, *see infra* note 384. Nevertheless, EPA has interpreted the two statutes quite differently, requiring a showing of inherent tribal regulatory authority under the CWA, but not under the CAA. *Compare* 40 C.F.R. § 131.8(b)(2)(iii) (2003) (CWA regulations) (requiring the tribe to "[d]escribe the types of governmental functions currently performed by the Tribal governing body"), § 131.8(b)(2)(iii) (requiring the tribe to "[i]dentify the source of the Tribal government's authority to carry out the governmental functions"), § 131.8(b)(3)(ii) (requiring "statement by the Tribe's legal counsel . .. which describes the basis for the Tribes assertion of authority"), *with* 40 C.F.R. § 49.6(b) (2003) (CAA regulations) (requiring the tribe only to establish, in part, that it "has a governing body carrying out substantial governmental duties and functions").

375. 40 C.F.R. §§ 131.8(b)(3), (b)(3)(ii).

376. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991) (promulgating final rule codified at 40 C.F.R. pt. 131).

377. *Id.* (construing Montana v. United States, 450 U.S. 544, 566 (1981)).

378. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650–59 (2001) (indicating that the two exceptions authorizing tribal regulation or taxation of non-Indians on non-Indian reservation lands are to be narrowly construed).

379. *See* ROYSTER & BLUMM, *supra* note 271, at 234 (discussing EPA's policy against checkerboarding Indian land for the purpose of permitting control), 238 (recounting EPA's position that water on tribal lands is a unitary resource).

Once EPA approves tribal CWA implementation, tribal standards may be stricter than federal standards and may curb pollutant discharges from off-reservation point sources, even ones with federal permits.[380] Tribes may require non-Indian dischargers on non-Indian lands on-reservation to obtain discharge permits.[381] In the latter case, a court agreed with EPA that the tribe had inherent sovereign authority over water pollution because it substantially threatened the health and welfare of the tribe.[382]

In contrast to the CWA, where tribes must demonstrate to EPA that they possess inherent sovereign authority to regulate, tribes seeking authority to implement Clean Air Act (CAA) programs can do so without making such an affirmative showing.[383] This anomalous result is due to the fact that apparently only in the CAA did Congress intend to delegate to qualified tribes the authority to regulate all reservation sources of pollution, including those from non-Indian sources on non-Indian lands.[384]

In the pollution control statutes, Congress recognized what Chief Justice Marshall articulated over a century and a half ago: Indian tribes are independent sovereigns. They are, in Marshall's words, "domestic dependent nations,"[385] now subject to the plenary power of the federal government, but insulated in important ways from state control. The pollution control statutes give tribes the opportunity to exercise that sovereignty to protect the reservation environment. It is true that this sovereignty is exercised by virtue of congressional delegation, not by the inherent sovereignty that Chief Justice Marshall articulated. Nonetheless, functionally—at least in the pollution control area—tribes are essentially treated the same as states.[386]

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380. Albuquerque v. Browner, 97 F.3d 415, 423–24 (10th Cir. 1996).

381. Montana v. Envtl. Prot. Agency, 137 F.3d 1135, 1141 (9th Cir. 1998), *cert. denied*, 521 U.S. 921 (1998).

382. *Id.*

383. Ariz. Pub. Serv. Co. v. Envtl. Prot. Agency, 211 F.3d 1280, 1288 (D.C. Cir. 2000).

384. The apparent distinction between the CWA and the CAA is hard to see from a comparison of the text of the statutes. The CAA, which EPA and the courts have interpreted to be a direct delegation to EPA to approve tribal regulatory programs governing reservation air pollution regardless of land ownership, authorizes tribal air programs operating "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B) (2000). The CWA, under which EPA requires tribes to demonstrate inherent regulatory authority, *see supra* text accompanying note 382, authorizes tribal water pollution programs for waters "held by an Indian tribe, held by the United States in trust for the Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation." 33 U.S.C. § 1377(e)(2) (2000). Both statutes seem to envision that qualified tribes would regulate all reservation resources, regardless of landownership.

385. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

386. Like states, tribes are subject to federal oversight. For example, under the CWA tribal permits are subject to potential federal veto. *See* 33 U.S.C. § 1342(c)(3) (discussing EPA's overall

CONCLUSION

The discovery doctrine, as articulated by Chief Justice Marshall and his colleagues, has been misunderstood. The doctrine allocated rights among European "discoverers" to the New World, but left the Indian tribes in possession of their lands with, in Marshall's words, "a legal as well as just claim to retain possession of [them]."[387] Although Marshall did refer to the Indians as occupants,[388] the natives held Indian title, which, according to the Supreme Court, is as "sacred as the fee."[389] Sometimes disparaged as a mere "right of occupancy,"[390] in truth, aboriginal title included all ownership rights except the right to transfer alienable title to any person other than the discovering government. All the government obtained from discovery was an exclusive right of preemption: the right to purchase Indian title.

However, by conceptualizing Indian title as a proprietary interest foreign to the Anglo-American tenurial system, Chief Justice Marshall sowed the seeds of misunderstanding. Indian title—with all rights of use, possession, and development—should have been identified as a fee simple. But it is true that this fee simple was burdened with the government's right of preemption, imposing a severe, but partial restraint on alienation. Yet this sort of property interest is well within the confines of traditional Anglo-American law.[391] Marshall's failure to embrace Indian title as part of Anglo-American law equipped subsequent courts with the discretion to misconstrue the nature of Indian title and, for example, to deny tribes just compensation for its seizure.[392] Chief Justice Marshall did not write those later opinions and would not likely have endorsed them,[393] for the Marshall Court decisions left all the Indians' property rights intact, except the right of free alienation. The discovery doctrine denied the natives this stick in the property bundle of rights for national security reasons[394] and because,

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authority to approve the program). EPA may also promulgate water quality standards for waters under tribal jurisdiction that fail to meet the CWA's requirements, *id.* § 1313(b), and may also promulgate air quality implementation plans that fail to meet the CAA's requirements. 42 U.S.C. § 7410(c)(1)(A).

387. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

388. *Id.*; *see also supra* notes 158–61, 164, 173 and accompanying text.

389. Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835); *see also* cases cited *supra* notes 13, 288 and accompanying text.

390. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

391. *See supra* notes 183–84 and accompanying text.

392. *See* cases cited *supra* notes 15, 172, 185, 300 and accompanying text.

393. *See supra* notes 207, 221 and accompanying text (noting Chief Justice Marshall's sympathies with the plight of the Indians).

394. *See supra* notes 176–77 and accompanying text.

by the time the Marshall Court addressed the issue, there was widespread reliance on land titles derived from the government.[395]

Had the Chief Justice not embraced a dual tenurial system in *Fletcher v. Peck*[396]—which made Indian title a kind of *sui generis* property right that could be interpreted by other courts unrestrained by Anglo-American property rules—the Indians' property interest would have been described as a fee simple subject to a right of preemption of the government because, functionally, that is what it was.[397] Chief Justice Marshall's mischaracterization of the Indian property rights ultimately led to unfortunate results, but those infringements on tribal rights were the product of jurists who were not members of the Marshall Court.[398]

In addition to the discovery doctrine's proprietary implications, the doctrine had significant, if not immediately apparent, effects on tribal sovereignty. The common law discovery doctrine, as interpreted by the Marshall Court, excluded all competing European nations except the discovering nation from dealing with the resident Indians.[399] The Anglo-American version of discovery forbade private purchases of Indian lands.[400] Later, Chief Justice Marshall ruled that the federal Constitution, statutes, and treaties, reserved the power to terminate Indian title and regulate Indian affairs exclusively to the federal government.[401] States and settlers could not terminate Indian title; only negotiations between the federal government and the tribes could. This encouraged a century of federal Indian treaties, bilateral agreements aimed at clarifying both Indian rights and governmental obligations. Many tribes were able to employ the treaty-making process to reserve significant rights to lands and natural resources, including water rights and off-reservation harvest rights.[402]

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395. *See* quoted text accompanying *supra* note 203.

396. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142–43 (1810); *see supra* note 105 and accompanying text.

397. *See supra* notes 11, 109, 164, 213, 216, 250, 254 and accompanying text.

398. *See, e.g.*, cases cited *supra* 15–16 (no compensation for governmental takings), 293–94 (federal plenary power) notes 362–69 (Rehnquist and Burger Court decisions restricting tribal regulation of non-members).

399. *See supra* notes 155–157 (exclusion of European competitors); *infra* note 401 (common law nature) and accompanying text.

400. *See supra* notes 56, 80, 123–25, 168–69, 285 and accompanying text.

401. The lands at issue in *Johnson v. M'Intosh* were originally sold by the Indian chiefs in 1773 and 1775, well before the Constitution was ratified in 1787. Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 571 (1823); TERRY JORDAN, THE CONSTITUTION: AND FASCINATING FACTS ABOUT IT 30 (7th ed. 2001). Thus, the federalization of Indian affairs worked by the Constitution's Indian Commerce Clause did not apply to the transactions at issue in *Johnson*. Instead, Marshall relied on the common law doctrine of discovery to produce the same result had the land transactions been subject to the Indian Commerce Clause and the 1790 Nonintercourse Act. *See supra* text between notes 190 and 192.

402. *See supra* notes 335–43 and accompanying text.

The discovery doctrine's effects on tribal sovereignty turned out to be considerably more pernicious than its effects on tribal property rights. The common law doctrine only prohibited the Indians from engaging in foreign affairs with nations other than the discoverer-nation. In the *Cherokee cases*, the Marshall Court interpreted the Constitution, statutes, and treaties of the United States to restrict tribal sovereign relations to dealings with the federal government.[403] This was done to protect the Cherokee, denominated by the Court as a "domestic dependent nation[]," from the termination policies of the State of Georgia.[404] But in erecting this buffer against the states, Chief Justice Marshall described federal-tribal relations as a guardian-ward relationship,[405] laying the seeds of what was to become the federal plenary power doctrine in a later generation, a doctrine that ultimately would prove disastrous for both tribal sovereignty and proprietary rights.[406] Moreover, the poisoned fruit of the federal guardianship prescribed by the Marshall Court was almost immediately apparent, as the Jackson Administration embraced and carried out the State of Georgia's policies by removing the Cherokee to lands west of the Mississippi, along what became known as the trail of tears.[407]

The end of treaty-making, the rise of the plenary power doctrine, and the onset of allotment in the late nineteenth century had long-lasting effects that even the rejection of the allotment policy after a half-century did not curb.[408] Most tribes now have checkerboarded reservations, on which non-Indian landowners are sometimes predominant. As a consequence, the Rehnquist Court has undermined the inherent tribal sovereign authority over Indian country that the Marshall Court recognized, and thus has moved toward limiting inherent tribal sovereignty to tribal members.[409] This has frustrated tribal efforts to regulate and tax all land uses on their reservations.

The decline of inherent sovereignty over non-Indians on-reservation, however, has been countered by congressional recognition of tribal sovereignty in the federal pollution control statutes.[410] These statutes delegate authority to qualified tribes to control the reservation environment.

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403. *See supra* notes 267–71 and accompanying text.

404. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *see also supra* note 237 and accompanying text.

405. *Id.* at 17; *see also supra* note 238 and accompanying text.

406. *See supra* notes 238, 293–300, 357–69 and accompanying text.

407. *See supra* note 281 and accompanying text.

408. *See generally* Royster, *supra* note 297, at 77 (commenting that the "allotment [period of] Indian law seems buried too deeply, imbedded too permanently to simply disappear of its own accord").

409. *See supra* notes 364–69 and accompanying text.

410. *See supra* Part VI.

In effect, tribes are treated for pollution-control purposes as the functional equivalent of states. In this respect, over the last quarter-century, Congress has been much more protective of tribal sovereignty than has the Supreme Court.

Thus, while the discovery doctrine may have indeed been a reflection of Eurocentric ideology that afforded legal cover for colonization of the New World, it left the natives with substantial legal rights, both proprietary and sovereign. Those rights were diminished during the late nineteenth and early twentieth centuries, but they have not been eliminated.

The discovery doctrine has been called "nothing more than the reflection of a set of Eurocentric racist beliefs elevated to the status of a universal principle"[411] and "a brilliant compromise."[412] It may have been both. There is no denying that the *Johnson* opinion included racist references to Indians as uncivilized savages.[413] But in light of the fact that the vast majority of the land titles in this country originated in the federal government and the British Crown, and given long-term reliance on this state of affairs, Chief Justice Marshall hardly could have been expected to produce a decision in favor of the land speculation companies who ignored the proscription against individual purchases from the Indians, which would have destroyed those settled expectations. The restraint on alienation the discovery doctrine imposed on Indian title did limit the Indians to federal land sales, but left all other proprietary rights intact. Despite the federal monopsony power,[414] the tribes were able to employ the federal treaty-making process to obtain recognition of important proprietary rights that have survived through the centuries. The discovery doctrine's limit on the sovereign authority of Indians to deal with governments other than the discovering government laid the foundation for buffering tribes from state laws, while authorizing federal plenary power. The latter would prove to make a mockery of the guardianship the Marshall Court envisioned. The

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411. WILLIAMS, *supra* note 3, at 326.

412. Newton, *Whim of the Sovereign*, *supra* note 185, at 1223.

413. *See Johnson*, 21 U.S. at 573 ("[T]he character and religion of [the native] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency."), 590 ("But the tribes of Indians inhabiting this country were fierce savages . . . .").

414. A monopsony is a market where there is only one buyer. Kades, *Dark Side*, *supra* note 10, at 1105 n.167. Professor Kades claims that the federal government's right of preemption "facilitated low-cost acquisition of Indian lands by stifling bidding by Americans for Indian land." *Id.* at 1105. As I explained above, *see supra* note 216, I question whether the tribes would have been better served by a free-wheeling market whose participants would have included land-hungry settlers, miners, and speculators. At any rate, I am quite convinced that Chief Justice Marshall did not endorse the rule of exclusive federal purchase to reduce the costs of acquiring Indian lands; he viewed the rule as one protective of Indian land rights.

current Supreme Court seems intent on dismantling most of what remains of tribal sovereignty over non-Indians, even as Congress, through many of the pollution control laws, delegates important sovereign authorities to tribes to regulate comprehensively the environment of Indian reservations.

The discovery doctrine, nearly two centuries after the Marshall Court articulated it, has left American Indian tribes with important proprietary rights and tenuous sovereign powers, at least concerning non-Indians in Indian country. Understanding its origins, scope, and legacy remains foundational for articulating the nature and scope of native rights in the modern world.