WHY ABORIGINAL TITLE IS A FEE SIMPLE ABSOLUTE

by
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The Supreme Court's 1823 decision in Johnson v. M'Intosh *is a foundation case in both Indian Law and American Property Law. But the case is one of the most misunderstood decisions in Anglo-American law. Often cited for the propositions of the plenary power of the U.S. Congress over Indian tribes and of the uncompensated takings of Indian-title lands, the Marshall Court decision actually is better interpreted to recognize that Indian tribes had fee simple absolute to their ancestral lands. This Article explains why the "discovery doctrine" should have been interpreted to be a fee simple absolute subject to the federal government's right of preemption. Had the doctrine laid down by* Johnson *been properly interpreted, its national and international effects today would have been much less pernicious.*

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I. INTRODUCTION

Johnson v. M'Intosh, a case that introduces many law students to property law,[1] has been badly misunderstood. The decision of Chief Justice John Marshall brought the discovery doctrine to American law and applied it for the first time to a case and controversy.[2] According to Marshall, discovery required the creation of a new property law concept which became known as "aboriginal" or "occupancy" title.[3] Thus, discovery left the Native American tribes with a land title that protected their possession but drastically limited their ability to convey their property to others,[4] a sui generis concept previously unknown in Anglo-American law. The unusual nature of native title allowed jurists in the late nineteenth and twentieth centuries to both question whether natives

[1] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). *Johnson* is the first case in several popular Property casebooks, including JESSE DUKEMINIER, ET AL., PROPERTY 3 (7th ed. 2010); PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 9 (2006); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 4 (4th ed. 2006). *Johnson* is the second case in ALFRED BROPHY ET AL., INTEGRATING SPACES: PROPERTY LAW AND RACE 16 (2011) and the third case in JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 28 (2009). Two other popular casebooks, JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 63 (8th ed. 2002) and THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 110 (2007), feature *Johnson* prominently in introductory chapters.

[2] The discovery doctrine arguably originated with the Crusades and the legal thinking accompanying that effort to extend Papal authority to the Holy Land during the eleventh through the thirteenth centuries, which produced Christian "natural law" philosophy. *See* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 15 (1990). Later, in 1436, the Pope granted Portugal exclusive authority to colonize Africa and in 1493 gave Spain authority to colonize native populations in the vicinity of Columbus' discoveries in the Western Hemisphere. *See* Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 719 (2004). In 1537, under the influence of Spanish theologian and jurist Francisco de Victoria, Pope Paul III proclaimed that native peoples discovered by Christians "are by no means to be deprived of their liberty or the possession of their property." Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 45 (1947). Felix Cohen attributed to Victoria the international law notions of equality between natives and whites, federal sovereignty over native affairs, and government protection of natives. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1], at 13–14 (Nell Jessup Newton et al. eds., 2005). This was the body of international law that Chief Justice Marshall drew upon in applying the doctrine of discovery for the first time in U.S. caselaw. *See* Blumm, *supra*, at 719–26.

[3] *Johnson*, 21 U.S. (8 Wheat.) at 574, 585, 587, 591–92 (repeated references to "occupancy" title).

[4] By restricting the tribes' ability to convey their property to the federal government, the *Johnson* decision created a monopsony—a market where there is only one buyer. *See* Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1105 & n.167 (2000).

could protect their lands from trespass[5] and to deny natives just compensation from government seizures.[6]

The latter results were inconsistent with the principles laid down by the Marshall Court in a series of cases, of which the *Johnson* decision was only the centerpiece. From the 1810 decision of *Fletcher v. Peck*,[7] through the 1835 decision of *Mitchel v. United States*,[8] the Marshall Court produced five decisions that Americanized the law of discovery.[9] The discovery doctrine laid down by the Marshall Court 1) gave discoverers an exclusive right to purchase Indian lands; 2) simultaneously imposed a partial restraint on alienation of native lands that prohibited land sales to parties other than the discovering sovereign or its successors while considering native land title to be as "sacred as the fee"; 3) left tribal self-governance intact except for foreign affairs; and 4) encouraged treaties between tribes and the United States by which the federal government could acquire land title and which promised federal protection of remaining native lands.[10]

Yet commentators have regularly chastised the discovery doctrine. For example, Professor Williams has referred to the American discovery doctrine as a "racist, colonizing rule of law," supporting "conquest and colonization" of a newly discovered world.[11] Professor Miller considers the discovery doctrine the means by which Europeans justified their ethnic and religious superiority over non-European cultures and races.[12] Professor Watson claims that the discovery rule not only diminished native rights in the United States but also in Australia, Canada, and New Zealand.[13] Professor Purdy charges that, as described by Marshall, the doctrine amounted to an apology for "an agentless ethnic cleansing" that, although opposed to natural law, was both inevitable and lawful.[14]

Without wishing to necessarily challenge any of these assertions, I contend that, even if accurate, they are the consequence of erroneous

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[5] *See Johnson*, 21 U.S. (8 Wheat.) at 592 (observing that occupancy title would give natives a defense to an ejectment cause of action); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, § 4.01[2][e], at 219–20 (citing cases recognizing tribal trespass and ejectment claims).

[6] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285 (1955) ("[T]he taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment.").

[7] 10 U.S. (6 Cranch) 87 (1810).

[8] 34 U.S. (9 Pet.) 711 (1835).

[9] *See* Blumm, *supra* note 2, at 726–58 (discussing all five decisions).

[10] *Id.* at 758–61.

[11] WILLIAMS, *supra* note 2, at 325–26.

[12] ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 1–2 (2006).

[13] Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507, 508 (2011).

[14] Jedediah Purdy, *Property and Empire: The Law of Imperialism in* Johnson v. M'Intosh, 75 GEO. WASH. L. REV. 329, 330–31 (2007).

interpretations or unwarranted expansions of the discovery doctrine laid down by the Marshall Court, especially in its *Johnson* decision. I maintain that, had the *Johnson* opinion been properly interpreted within the Anglo-American system of property law—to leave the tribes with a title in fee simple absolute—the damage wrought by the American discovery doctrine to American Indian tribes would have been much less pronounced.

My argument is in three parts. Part I briefly reviews all five decisions of the Marshall Court bearing on the discovery doctrine. Part II examines *Johnson v. M'Intosh* more closely in light of all the Marshall Court's discovery doctrine decisions, explaining what the decision did and did not hold. Part III explains why a proper interpretation of *Johnson* would have prevented some of the more egregious results that ensuing courts and scholars have attributed to the discovery doctrine.

II. THE DISCOVERY DOCTRINE ACCORDING TO THE MARSHALL COURT

The Marshall Court's discovery doctrine drew on international law principles, but was also the product of the struggle of American settlers to obtain access to, and ownership of, frontier lands, particularly along the trans-Appalachian backwoods of the eighteenth century.[15] In the wake of the end of the French and Indian War,[16] the Royal Proclamation of 1763 forbade American colonists from purchasing Indian lands which, while helping to avoid conflicts, infuriated colonial land speculators, including George Washington,[17] who claimed that the proclamation

[15] *See* Blumm, *supra* note 2, at 719–26. However, the international law of discovery, as modernly understood, actually did not apply to lands that were occupied by natives, so the Court's invocation of the discovery rule was inappropriate. *See* INDIAN LAW RES. CTR., DRAFT GENERAL PRINCIPLES OF LAW RELATING TO NATIVE LANDS AND NATURAL RESOURCES 14, 16–17 (lawyers ed. 2010) (citing 1 OPPENHEIM'S INTERNATIONAL LAW 678–79, 686–87 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992), and the International Court of Justice's decision in the Western Sahara case, Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 79 (Oct. 16)).

[16] Prior to the war (also known as the Seven Years War), the British Crown left native affairs largely to local authorities. But during the war most tribes sided with the French due to encroachments on native lands by British settlers, which often included fraudulent land dealings. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, § 1.02[1], at 18–19. During the war, the British began to prohibit settlements on native hunting grounds west of the Appalachians, a policy that kept the strategically important Iroquois Confederacy aligned with the British. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 60 (6th ed. 2011).

[17] Royal Proclamation of October 7, 1763, *reprinted in* DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA, 1759–1791, at 163, 166–67 (Adam Shortt & Arthur G. Doughty eds., 2d ed. 1918). Implementing the proclamation required new forts along the Western frontier, which the Crown proposed to finance through a stamp tax on the colonists, fueling the first fires of the Revolution. *See* Robert A. Williams, Jr., *Jefferson, The Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165, 171–73 (1987); *see generally* GETCHES ET AL., *supra* note 16, at 59–61 (discussing

violated the natural rights of natives to sell their lands to willing buyers.[18] In effect, the Royal Proclamation established the first legal definition of Indian Country as the crest of the Appalachian Mountains.[19]

During the Revolutionary War, the Continental Congress continued the British Crown's policy of centralizing native affairs in the federal government.[20] Although the ensuing Articles of Confederation were ambiguous about the relation of the federal government and the states concerning native affairs, the Confederation Congress began making treaties with tribes which gave the federal government the first option to purchase Indian lands and promised to exercise "the utmost good faith" toward natives and their lands in the 1787 Northwest Ordinance.[21] The same year, the Constitution decided the issue of Indian affairs squarely in favor of central control by the federal government.[22] This allocation of authority made clear that the federal government would control Western development and Indian affairs from 1790 onward.[23] Thus, all sales of native land would require federal approval.[24] But there remained many questions about the nature of the property rights possessed by the tribes, which were left to the judiciary to resolve. The following five cases addressed some of the unanswered issues and substantially clarified the effect of the American version of the discovery rule.

A. Fletcher v. Peck[25]

The first notable case implicating native land rights concerned the Yazoo land-fraud scheme, in which the governor and nearly every

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the history of British policies surrounding the proclamation and American resentment). Chief Justice Marshall discussed the Royal Proclamation in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 547–48 (1832). *See also* 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, 364–65, 369–70 (1989). On Washington's opposition to the Proclamation, which helped to drive him from British Loyalist to American Revolutionary, see RON CHERNOW, WASHINGTON: A LIFE 148 (2010).

[18] WILLIAMS, *supra* note 2, at 275–79.

[19] *See* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1090 (1995).

[20] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, § 1.02[2], at 20.

[21] *See* Blumm, *supra* note 2, at 723–25 (discussing ambiguous language in the Articles, treaties with the Delaware in 1778 and the Cherokee in 1785, and the Northwest Ordinance Act of Aug. 7, 1787, ch. 8, § 1, 1 Stat. 50, 52).

[22] *See id.* at 725 (citing the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3).

[23] The first Congress enacted the Trade and Intercourse Act of 1790 (Indians), ch. 33, § 1, 1 Stat. 137, 137, which confirmed the federalization of Indian affairs. An 1834 amendment to this statute is codified in part at 25 U.S.C. § 177.

[24] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, § 1.03[2], at 37–38.

[25] 10 U.S. (6 Cranch) 87 (1810). This discussion is adapted from Blumm, *supra* note 2, at 726–30, which contains more detailed documentation and historical context.

member of the Georgia legislature was bribed to authorize cheap sales of some 35 million acres in what is now Alabama and Mississippi.[26] After an election in which most of the corrupt representatives were defeated, a new legislature attempted to rescind the sales, but in a collusive suit arranged by land speculators, the Marshall Court upheld the land sales.[27] In a four-to-one decision written by Chief Justice Marshall, the Court ruled that rescinding the sales would violate the Constitution's Contracts Clause.[28]

Since the lands in question were aboriginal title lands, the relationship between native land rights and the land-fraud scheme was critical to the result of the case.[29] Lawyers for both the sellers and the buyers claimed that the sales were not inconsistent with native land rights (the Indians, of course, were not represented in the case), and the Chief Justice agreed, writing that Indian title existed until validly extinguished, and it was not inconsistent with "seisin in fee on the part of the state."[30] Thus, the legislature possessed the authority to convey an interest in Indian-title lands to speculators. The Chief Justice did not explain how a proper extinguishment of Indian title could occur, nor who could extinguish it, nor what he meant by "seisin in fee."[31]

The majority opinion drew a dissent from Justice William Johnson, who thought that the Chief Justice misinterpreted the discovery doctrine which, according to Justice Johnson, gave the state only "a right of conquest or of purchase, exclusively of all competitors."[32] Thus, the state's property interest was "a mere possibility," while the natives' interest was "absolute proprietorship" in the soil.[33] Consequently, Justice Johnson objected to Marshall's characterization of the state's interest as seisin in fee because it was not a present interest, since it was "nothing more than a power to acquire a fee-simple by purchase, when the [seller] . . . should be pleased to sell[.]"[34] He also disputed the Chief Justice's claim that the state's title was consistent with Indian title because he believed that a fee simple title meant exclusive rights.[35] Justice Johnson's dissent is worth careful consideration because I believe that Chief Justice Marshall, who discouraged publication of dissents,[36] found it

[26] *Fletcher*, 10 U.S. (6 Cranch) at 87–89.

[27] *Id.* at 89–90, 142–43.

[28] *Id.* at 87, 142–43. *See* U.S. CONST art. I, § 8, cl. 3.

[29] *Fletcher*, 10 U.S. (6 Cranch) at 142.

[30] *Id.* at 142–43.

[31] "Seisin" means possession of a freehold estate. 1 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 20, at 26 (Basil Jones ed., 3d ed. 1939) (equating seisin with possession of a freehold).

[32] *Fletcher*, 10 U.S. (6 Cranch) at 147 (Johnson, J., dissenting).

[33] *Id.* at 146.

[34] *Id.* at 147.

[35] *Id.* at 146–47.

[36] Edward M. Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583, 593 (1994).

persuasive enough to implicitly adopt it thirteen years later in the second of the important discovery doctrine cases of the Marshall Court.

B. Johnson v. M'Intosh[37]

There have been quite a few recent additions to the scholarship explaining this seminal case.[38] We now know, for example, that, like *Fletcher v. Peck*, *Johnson* was a collusive suit, contrived to settle the issue of whether pre-Revolutionary grants from Indians to speculators were valid.[39] Congress had refused to affirm the sales despite nearly a half-century of lobbying from the land companies.[40] The case that eventually reached the Supreme Court pitted Joshua Johnson and Thomas Graham, who inherited the interest of one of the original speculators, who in turn acquired rights that William Murray purchased from Indian chiefs in 1773 and 1775, against William McIntosh (whose name was misspelled by the court reporter), a lawyer who represented landowners who had purchased from the federal government under preemption statutes roughly forty years after the original transactions between Murray and the Indians.[41]

Johnson and Graham, represented by famed Supreme Court advocates Robert Goodloe Harper and Daniel Webster,[42] argued that the Court should recognize that the Royal Proclamation and the discovery doctrine were inconsistent with the natural rights of natives and other

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[37] 21 U.S. (8 Wheat.) 543 (1823). This discussion is adapted from Blumm, *supra* note 2, at 731–46, which contains more detailed documentation and considerably more history related to the case.

[38] *See, e.g.*, the scholarship cited *supra* in notes 12–14; STUART BANNER, HOW THE INDIANS LOST THEIR LAND (2005); LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005); Hope M. Babcock, *The Stories We Tell, and Have Told, About Tribal Sovereignty: Legal Fictions at their Most Pernicious*, 55 VILL. L. REV. 803 (2010); Jen Camden & Kathryn E. Fort, *"Channeling Thought": The Legacy of Legal Fictions from 1823*, 33 AM. INDIAN L. REV. 77 (2008–2009); Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627 (2006); Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579 (2008); Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1 (2010); Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763 (2011); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651 (2009).

[39] *See* Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 LAW & HIST. REV. 67, 99–102 (2001).

[40] *See id.* at 92–93.

[41] *See id.* at 95–101. Preemption statutes gave squatters and others improving land the exclusive right to purchase at a statutorily prescribed price (usually below market value). The statutes followed treaties in the early nineteenth century negotiated by William Henry Harrison which ceded land to the federal government in exchange for federal protection. *Id.* at 93–94.

[42] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 562 (1823).

statutory and constitutional rights.[43] McIntosh argued that the natives had no right to sell to the speculators because the discovery doctrine recognized no proprietary rights in people who lived in a state of nature, and that the first principle of British colonial law was that all land titles were derived from the Crown.[44]

Writing for a unanimous Court, Chief Justice Marshall adopted neither perspective; although, in the end, he sided with McIntosh, as successor to a federal grantee.[45] He framed the issue narrowly: did the Indians have the right to sell to private individuals?[46] He concluded that they did not, due to the Royal Proclamation, the discovery doctrine, and the principle that all freely alienable land titles originated in government grants.[47]

Marshall's view of the discovery doctrine was that it enabled a discoverer to exclude competing European nations, giving the discoverer a "title" which "might be consummated by possession."[48] But the doctrine also "respected the right of the natives, as occupants."[49] The U.S. federal government, which had inherited discoverer's rights from England, thus had the right to grant McIntosh and other federal grantees "the soil,"[50] as had been done in *Fletcher v. Peck*.[51] Unlike in *Fletcher*, however, the Indian right of occupancy had been apparently extinguished as a result of treaties with the federal government.[52] Under the discovery doctrine, Johnson and the speculators obtained no alienable property interest from the Indians, and thus McIntosh and the federal grantees prevailed in the case.[53]

Although the Indians were not represented before the Court, and although Marshall's characterization of the tribes' property right as "right of occupancy" proved to be a tragic choice of words, his opinion was quite protective of native property rights, perhaps influenced by Justice

[43] *Id.* at 562–67.

[44] *Id.* at 567–71.

[45] *Id.* at 587–88, 592–95, 604–05.

[46] *Id.* at 572.

[47] *Id.* at 592–604.

[48] *Id.* at 573.

[49] *Id.* at 574.

[50] *Id.*

[51] 10 U.S. (6 Cranch) 87 (1810). *Fletcher* remains problematic in that the government that conveyed "the soil" was the state government, even though the land sales were in 1794, four years after Congress enacted the first Trade and Intercourse Act, which federalized Indian land transactions. *See supra* note 23.

[52] *Cf. supra* notes 25–36 and accompanying text (discussing *Fletcher*). The *Johnson* opinion suggested that Indian title could be extinguished by conquest as well as purchase. *Johnson*, 21 U.S. (8 Wheat.) at 587. But that proposition was abandoned by the Court in *Worcester* eight years later, *infra* note 87, and expressly rejected in *Mitchel* a dozen years later, *infra* note 104.

[53] *Johnson*, 21 U.S. (8 Wheat.) at 592–95, 604–05.

Johnson who had dissented in *Fletcher*,[54] but who concurred in *Johnson*. Marshall proclaimed that the discovery doctrine did not disregard native rights, although it did restrict them.[55] In language recalling Justice Johnson's dissent in *Fletcher*,[56] he announced that the natives were "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."[57] Thus, under the discovery rule that he articulated, the tribes retained a present protectable interest in the possession and use of their lands. Possession and use are two sticks in the property bundle of rights commonly associated with a fee simple absolute.[58]

The rights that the tribes lost through the discovery doctrine were two, according to Marshall: 1) "their rights to complete sovereignty, as independent nations"; and 2) "their power to dispose of the soil at their own will, to whomsoever they pleased."[59] The former is a sovereignty concept—the tribes' ability to conduct foreign affairs—and was clarified by the Court in the *Cherokee Nation* case eight years later.[60] The latter, a property concept, is a restraint on alienation, and it was that issue that decided the *Johnson* case, for the tribes had no right to convey property to private, non-tribal individuals, only to the government.[61] The reason for loss of the right of free alienation was similar to the limit on tribal sovereignty to conduct foreign affairs: national defense. It would have been extremely destabilizing if tribes along the Western frontier could sell their lands to foreign powers.

But Marshall, unfortunately, sowed the seeds of misunderstanding by stating that the reasons for the two limitations on tribal rights had to do with "the original fundamental principle, that discovery gave exclusive title to those who made it."[62] He could not have intended the phrase "exclusive title" to mean exclusive property rights because that would

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[54] *Fletcher*, 10 U.S. (6 Cranch) at 147.

[55] *Johnson*, 21 U.S. (8 Wheat.) at 574 ("[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.").

[56] *See supra* notes 32–35 and accompanying text.

[57] *Johnson*, 21 U.S. (8 Wheat.) at 574.

[58] *See* 2 THOMPSON ON REAL PROPERTY § 17.02 (David A. Thomas ed., 2d Thomas ed. 2000).

[59] *Johnson*, 21 U.S. (8 Wheat.) at 574.

[60] *See infra* notes 71–83 and accompanying text.

[61] On conveyances to tribal members, see *infra* note 67. Professor Kades has suggested that this monopsony made it cheaper for the government to purchase Indian lands. Kades, *supra* note 4, at 1105. I have argued that this monopsony also protected the tribes from probable abuses of the tribes from states and private parties, and that is how Marshall likely viewed the effect of his decision. *See* Blumm, *supra* note 2, at 746 n.216, 776 n.414.

[62] *Johnson*, 21 U.S. (8 Wheat.) at 574. *See also id.* at 573 (explaining that the discovery rule was aimed at avoiding "conflicting settlements" among European colonialists; the doctrine "gave title [to the first discoverer] against all other European governments, which title might be consummated by possession").

contradict the tribes' "legal as well as just" rights to possession and use that he articulated earlier in the same sentence.[63] Later in the opinion, Marshall acknowledged that "[a]n absolute title to lands cannot exist, at the same time, in different persons, or in different governments" because "[a]n absolute, must be an exclusive title," and there were no exclusive rights in Indian title cases.[64] Consequently, Marshall's references to "exclusive title" and "absolute title" must have meant sovereignty,[65] particularly external sovereignty. Similarly, references to "ultimate title" and "seisin" in his opinion had to do with sovereign authority, not proprietorship.[66]

The only property right the tribes lost as a result of the *Johnson* decision was the right of free alienation;[67] they retained all other present property interests. The government's "title" in Indian lands was actually a governance interest in external affairs and an exclusive right to purchase—or right of preemption.[68] The latter is a future interest and would not be described by any modern property lawyer as a fee simple. Nor did the federal government actually hold seisin in Indian lands,

[63] *Id.* at 574 ("They 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; but their 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.").

[64] *Id.* at 588.

[65] Marshall seemed to acknowledge that he was referring to sovereign authority in the following passage: "All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." *Id.*

[66] *Id.* at 592, 603. *See also id.* at 588 (explaining why "[a]n absolute title to lands cannot exist" in different individuals or governments, since "[a]n absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it").

[67] Nothing in the *Johnson* opinion suggests that tribal members could not transfer title to other tribal members under tribal law, or that tribal law could not authorize transfers to white purchasers like Murray. But *Johnson* does make clear that whatever rights such transferees obtained under tribal law would not be respected under U.S. law after the land was conveyed by the tribe to the federal government. Thus, as Professor Eric Freyfogle pointed out to me, the *Johnson* decision had the effect, perhaps intended, of vesting tribal governments with significant power by making them the only sellers of clear title, just as the federal government was the only buyer. Email from Eric Freyfogle to Michael Blumm (Sept. 9, 2011) (also comparing the limitations on tribes under *Johnson* with those imposed on the U.S. when purchasing land in a foreign country) (on file with the author).

[68] Marshall, in fact, cited with approval a 1779 Virginia statute that declared that the state had an "exclusive right of pre-emption" as evidence that the government had exclusive rights to purchase. *Johnson*, 21 U.S. (8 Wheat.) at 565 n.a, 569. Of course, the government, through its eminent domain power, always retains something similar to a right of preemption, so perhaps Indian title is not distinctive in this regard. But federal grantees, like McIntosh, were dependent on the exercise of this governmental interest; they possessed what might be referred to as an executory interest, a non-vested future interest in a third party. *See* Blumm, *supra* note 2, at 738.

since that term means possession of a freehold interest,[69] and the *Johnson* decision made clear that it was the tribes who had possessory rights.

Despite this confusion in property concepts, *Johnson* established several important principles. First, by recognizing the possessory rights of tribes, the case made clear that these rights were not a function of government recognition but in fact predated colonial governments. Second, it legitimized the existing land tenure system under which all freely alienable land titles were traceable to the federal government, thus rewarding years of landowner reliance and keeping the federal government in charge of Western land settlement. Third, it protected national security by forbidding land sales to foreign governments and not recognizing the sovereignty of Indian tribes to conduct foreign affairs. Fourth, it was consistent with Marshall's earlier decision in *Fletcher* allowing the government to transfer private future interests in Indian-title lands that remained subject to Indian title.[70] Finally, and of considerable long-term significance, the decision assumed that Indian title issues were matters of domestic federal law, not international law, an assumption that would prove disastrous to tribal proprietary rights and sovereign authority over the next century and a half.

C. Cherokee Nation v. Georgia[71]

This case was the fruit of a bitter conflict between the tribe and the state, in which the latter attempted to appropriate tribal lands, annul tribal laws, extend state law into Cherokee country, and require permits of non-Indians residing there.[72] The tribe claimed that all these initiatives were inconsistent with its federal treaty of 1791 that recognized some five million acres as their homeland.[73] Since Congress, with the support of the Jackson Administration, passed the Indian Removal Act in 1830,[74] essentially endorsing the state's position, the tribe appealed to the only remaining branch of government, filing an original petition in the U.S. Supreme Court.[75]

The case foundered on jurisdictional grounds, for the tribe needed to show itself to be either a state or a foreign nation to obtain original

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[69] 1 TIFFANY, *supra* note 31, § 20, at 26.

[70] This is Professor Williams' chief complaint about the discovery doctrine as interpreted in the *Johnson* decision, as he argues that indigenous claims for territory and self-government should be legitimately before international political and legal fora. WILLIAMS, *supra* note 2, at 327.

[71] 30 U.S. (5 Pet.) 1 (1831). This discussion is adapted from Blumm, *supra* note 2, at 747–51, containing more detailed documentation and historical context.

[72] *See* Blumm, *supra* note 2, at 747–51.

[73] Treaty of Peace and Friendship, U.S.-Cherokee Nation, art. 4, July 2, 1791, 7 Stat. 39, 39–40. *See also* Blumm, *supra* note 2, at 747–48.

[74] Act of May 28, 1830, ch. 148, §§ 1–8, 4 Stat. 411, 411–12.

[75] *Cherokee Nation*, 30 U.S. (5 Pet.) at 2.

jurisdiction in the Supreme Court.[76] In a decision with two dissents,[77] the Court dismissed the suit. Chief Justice Marshall ruled that the tribe was neither a state nor a foreign nation, but instead was a "domestic dependent nation[]," which had lost control over foreign affairs, was dependent on the federal government for protection, and was reduced to "a state of pupilage."[78] However ahistorical the tribe's dependence on the federal government actually was,[79] the decision reinforced the interpretation that the limitations the Court recognized on tribal authority in *Johnson* had to do with external affairs.[80] Marshall acknowledged that the Cherokee Tribe was "a distinct political society . . . capable of managing its own [internal] affairs."[81] His opinion also reiterated the discovery doctrine, recognizing 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."[82] But although Marshall recognized that the tribe possessed internal sovereignty and proprietary rights, he concluded that it was neither a state nor a foreign country, and therefore could not obtain original jurisdiction in the U.S. Supreme Court.[83]

D. Worcester v. Georgia[84]

Only a year after the Court dismissed the Cherokee's original jurisdiction suit, it addressed some of the same issues in an appellate decision involving Georgia's jailing of Samuel Worcester, a missionary convicted in state court for residing in Cherokee country without a state

[76] *Id.* at 6, 20. *See also* U.S. CONST. art. III, § 2, cl. 2, which limits the Court's original jurisdiction to, *inter alia*, "[c]ases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."

[77] *See Cherokee Nation*, 30 U.S. (5 Pet.) at 20, 50 (Johnson, J. and Thompson, J. dissenting, respectively).

[78] *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. The Court also, without evidence, described tribal-federal relations as "resembl[ing] that of a ward to his guardian," *id.*, language that would later be unfortunately used by the Supreme Court of the late nineteenth century to erect the arguably illegitimate "plenary power" of the federal government over Indian tribes. *See, e.g.*, Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 175 (2002).

[79] Justice Thompson's dissent, published after the majority decision with the encouragement of Chief Justice Marshall, claimed that the tribe and the federal government had always treated each other largely as foreign nations. *Cherokee Nation*, 30 U.S. (5 Pet.) at 53–54 (Thompson, J., dissenting).

[80] *See supra* notes 59–61 and accompanying text.

[81] *Cherokee Nation*, 30 U.S. (5 Pet.) at 16 (also noting that federal treaties and statutes uniformly recognized the Cherokee as a "state" with a separate "political character," but not as a member of the United States).

[82] *Id.* at 17.

[83] *Id.* at 20.

[84] 31 U.S. (6 Pet.) 515 (1832). This discussion is adapted from Blumm, *supra* note 2, at 751–57, which contains more detailed documentation and context.

license.[85] Although the case involved whether state laws applied in Cherokee country, Justice Marshall's opinion revisited property issues,[86] perhaps on the assumption that the tribe's sovereign authority depended on its property rights. The Court rejected the state's argument that discovery terminated the Cherokee's property rights, ruling after a lengthy discussion of colonial charters that the King had the power to convey to the colonials only that which he had: an "exclusive right of purchasing such lands as the natives were willing to sell."[87] Consequently, there was no conflict between discovery and the possessory rights of the natives.

Nor did discovery terminate the Cherokee's sovereign authority. The Indians were "a distinct people . . . governing themselves by their own laws."[88] Marshall drew on colonial practice in reaching this conclusion, noting that "our history furnishes no example . . . of any attempt on the part of the crown to interfere with the internal affairs of the Indians, [other] than to keep out the agents of foreign powers."[89] Moreover, U.S. policy after the Revolution did nothing to change this state of affairs. The federal government signed treaties promising the tribes not only military protection but also self-government, considering "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."[90] Federal treaties with the Cherokee "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 [Cherokee] nation to govern itself."[91] With this sort of geographic separation between the state and Cherokee country, Georgia had no jurisdiction to enforce its laws against Worcester, state laws being void as "repugnant to the constitution, laws, and treaties of the United States."[92]

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[85] *Worcester*, 31 U.S. (6 Pet.) at 515.

[86] *See id.* at 520.

[87] *Id.* at 545. Discovery did not "give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors," *id.* at 543, but instead gave the discoverer only "the exclusive right to purchase." *Id.* at 544. In *Worcester*, Marshall abandoned the notion, mentioned in *Johnson*, that discovery included conquest. *See supra* note 52. Instead, he now concluded that colonial charters authorized no wars of conquest, contemplating only "defensive" and "just" wars. *Worcester*, 31 U.S. (6 Pet.) at 545.

[88] *Id.* at 542–43.

[89] *Id.* at 547. Marshall thought it an "extravagant and absurd idea," *id.* at 544, that colonial settlements had the right to govern or occupy Indian lands, which "did not enter the mind of any man." *Id.* at 545.

[90] *Id.* at 557.

[91] *Id.* at 561–62.

[92] *Id.* at 562. Although the Court ordered the release of Worcester and another missionary from jail, the state refused to do so until the Georgia governor granted a pardon a year later. In 1992, some 160 years later, the state issued another pardon

The territorial sovereignty recognized in the *Worcester* decision denied states the right to extinguish Indian title,[93] an issue left ambiguous in the *Johnson* case. In the wake of *Worcester*, not only did state laws have no applicability within Indian country, but the only means to extinguish Indian title was through federal purchase.[94] Whatever "title" the federal government held to Indian lands, it was not a "title" that included possessory or use rights, and its acquisition required compensation to the tribes.

E. Mitchel v. United States[95]

The final case in which the Marshall Court considered the issues of Indian proprietary rights concerned whether purchasers of Indian-title lands could obtain alienable, fee simple title through subsequent federal ratification.[96] The lands involved in the case were acquired by a settler before Florida was ceded by Spain to the United States in an 1819 treaty. In the course of upholding fee title in the settler, the Court, in an opinion by Justice Henry Baldwin,[97] described Indian title as a "perpetual right of possession,"[98] while the government's interest was now accurately characterized as a future interest: an "ultimate reversion in fee."[99]

Justice Baldwin claimed that recognition of these rights was a "uniform rule" from the onset of British settlement, as "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."[100] The fact the Indians used the lands as a hunting commons did not reduce their possessory and use rights; they retained exclusive rights "until they abandoned them, made a cession to

and an apology, calling the incident "a stain on the history of criminal justice in Georgia" and expressing regret over usurping the tribe's sovereignty and ignoring the Supreme Court's order. *See* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 69 (2d ed. 2008).

[93] *Worcester*, 31 U.S. (6 Pet.) 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."). *See also id.* at 520 ("The whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States.").

[94] *See supra* note 68 and accompanying text.

[95] 34 U.S. (9 Pet.) 711 (1835). This discussion is adapted from Blumm, *supra* note 2, at 757–58, which contains additional documentation and historical analysis.

[96] *Mitchel*, 34 U.S. (9 Pet.) at 718.

[97] Justice Marshall was ill in 1835 and died before the year was out. Harold H. Burton, *John Marshall, The Man*, 104 U. PA. L. REV. 3, 7 (1955).

[98] *Mitchel*, 34 U.S. (9 Pet.) at 745.

[99] *Id.* at 756. Later Supreme Court decisions would describe the government's interest as a "naked fee," Beecher v. Wetherby, 95 U.S. 517, 525 (1877), which conveyed "no beneficial interest." United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116 (1938).

[100] *Mitchel*, 34 U.S. (9 Pet.) at 745.

the government, or an authorized sale to individuals."[101] A sale authorized by the federal government would produce alienable title in a grantee, and such authorization could result from a federal treaty, like the Florida treaty.[102]

But even though Indian title without federal ratification was alienable only to the federal government, that property interest was "as sacred as the fee simple of the whites."[103] The *Mitchel* opinion considered this analogy to be a "settled principle," even though the Court again described the Indian land right as one of "occupancy."[104] This was an apt description, for the only difference between Indian title and a fee simple absolute at the time of the *Mitchel* decision was free alienability.

III. *JOHNSON* IN LIGHT OF ALL THE MARSHALL COURT'S DISCOVERY DOCTRINE DECISIONS

In view of all five of the Marshall Court's discovery doctrine decisions, it is now possible to more precisely evaluate just what *Johnson* decided. *Fletcher*, which preceded *Johnson* by thirteen years, allowed the state to authorize sales of Indian-title lands to purchasers because the state allegedly held "seisin in fee" to the lands.[105] But Chief Justice Marshall's opinion made no attempt to explain what these terms meant, while at the same time claiming that they were consistent with native land rights. Justice Johnson's dissent in the case maintained that the Chief Justice had inaccurately described "seisin"—which traditionally meant possession of a freehold[106]—because a freehold was a present possessory interest, and the present possessory interest in *Fletcher* was held by the Indian possessors.[107]

Johnson, of course, followed, ruling that Indian title was burdened with a partial restraint on alienation, albeit a considerable restraint: tribes could sell only to the federal government.[108] Marshall's decision included

[101] *Id.* at 746. The Court noted that tribal hunting grounds "were as much in their actual possession as the cleared fields of the whites." *Id.*

[102] Thus, with federal ratification, Indian title was freely alienable: "The Indian right to the lands as property, was not merely of possession, that of alienation was concomitant, both were equally secured, protected, and guaranteed by Great Britain and Spain, subject only to ratification . . . ." *Id.* at 758.

[103] *Id.* at 746.

[104] *Id.* The *Mitchel* decision also expressly rejected the notion that conquest could extinguish Indian title, as in 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." *Id.* at 749. Since the United States stood in the position of the English monarch, the federal government could not assume a right of conquest renounced by its predecessor. *Id.* at 754.

[105] *See supra* text accompanying note 31.

[106] *See supra* note 31.

[107] *See supra* notes 32–35 and accompanying text.

[108] *See supra* notes 4, 61 and accompanying and following text.

unfortunate but quickly discarded language about conquest,[109] which always catches disproportionate student attention. Marshall also unfortunately described the discoverer's rights as providing "exclusive title," although it is hard to know what he meant, since he also affirmed the tribes' "legal as well as just" rights to possession and use in the same sentence.[110] "Exclusive title" obviously did not mean rights to possess or use. Instead, it meant an exclusive right to purchase Indian title and a sovereign right to control foreign affairs.[111] This is an awkward way to describe "title," but it is apparently what Chief Justice Marshall meant.

The *Cherokee Nation* case reinforced the notion that, except for the restraint on alienation, the *Johnson* decision's limitations on aboriginal title were sovereignty limits, having to do with protecting national security.[112] *Worcester* made clear that, in addition to proprietary rights, the natives had substantial sovereign authority.[113] And *Mitchel* declared that the native proprietary right was "as sacred as the fee."[114] That declaration was accurate, if lost in the confusion about the meaning of the discovery doctrine,[115] since the only stick in the property bundle that the Marshall Court denied to Indian title was the right of free alienation. A property law professor would not conclude from that restriction that Indian title was not a fee simple absolute.

Fee simples can exist with restraints on alienation, even severe ones, so long as they are reasonable.[116] The nature of the restraint articulated in *Johnson* was the federal government's exclusive right to purchase—a right of preemption.[117] The possessor of a right of preemption, a future

[109] *See supra* notes 87, 104 and accompanying text.

[110] *See supra* note 63 and accompanying and following text.

[111] *See supra* notes 59–61 and accompanying text.

[112] *See supra* notes 80–81 and accompanying text.

[113] *See supra* notes 88–93 and accompanying text.

[114] *See supra* note 103 and accompanying text.

[115] ROBERTSON, *supra* note 38, at x ("Discovery converted the indigenous owners of discovered lands into tenants on those lands."); Knauer, *supra* note 38, at 30 ("The doctrine of discovery, as announced in *Johnson v. M'Intosh*, justified title to all land in the United States . . . ."); Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 5 (2005) ("In a nutshell, the Doctrine of Discovery . . . came to mean that when European, Christian nations first discovered new lands the discovering country automatically gained sovereign and property rights in the lands . . . .").

[116] Preemptory rights are valid if reasonable. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 4.4 (1983). *See, e.g.*, Ink v. Plott, 175 N.E.2d 94, 95–98 (Ohio Ct. App. 1960) (preemptory rights may restrain alienation if the right is reasonable and not against public policy); Drayson v. Wolff, 661 N.E.2d 486, 493 (Ill. App. Ct. 1996) (purpose of the preemptory right is a factor in determining reasonableness of the restraint on alienation).

[117] The Second Circuit, in one of the *Oneida* cases, recognized the government's right of preemption: "Thus, the concept of fee title in the context of Indian lands does not amount to absolute ownership, but rather is used interchangeably with 'right of preemption,' or the preemptive right over all others to purchase the Indian title or right of occupancy from the inhabitants." Oneida Indian Nation v. New York,

interest, does not have "seisin in fee," as Marshall claimed, because a preemptory right is not possession of a freehold.[118] Similarly, federal grantees like John Peck and William McIntosh had a future interest that could not become a present possessory interest without the exercise of the federal government's preemptory right. This kind of future interest in third parties is equivalent to an executory interest.[119]

Chief Justice Marshall made no attempt to fit the proprietary rights created by his interpretation of the American discovery rule into these familiar Anglo-American property rights. Had he done so, he would have been forced to reconsider his statements about "ultimate title" and "seisin" in the government,[120] for it was the Indians who held the fee simple absolute. They had present possessory and use rights, the right to sell to the government, and the right to compensation from sales.

Marshall's reluctance to classify the property rights resulting from discovery in Anglo-American law terms prevented him from seeing that the tribes possessed a fee simple subject to a governmental preemptory right.[121] By assuming that discovery created a sui generis and unfortunately labeled right of "occupancy," Marshall sowed the seeds of misinterpretation that was to come over the next century and a half.

IV. THE UNFORTUNATE LEGACY OF MISCONSTRUING THE DISCOVERY DOCTRINE

Perhaps arguing over the meaning of the discovery doctrine as laid down by *Johnson v. M'Intosh* and the other Marshall Court decisions is much ado about nothing. Perhaps, nearly 190 years later, it is too late to set the record straight. But first—even if stare decisis makes improbable a reinterpretation of the American law of discovery, as Professor Miller and others have shown—the discovery doctrine has had quite an effect

691 F.2d 1070, 1075 (2d Cir. 1982) (citing Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 670 (1974)). Even Thomas Jefferson in purchasing Louisiana recognized that all the United States acquired was the preemptive right to buy land from the "native proprietors." *See* Miller, *supra* note 115, at 83.

[118] 2 TIFFANY, *supra* note 31, § 363, at 114; JOHN A. BORRON, JR., THE LAW OF FUTURE INTERESTS § 1154 (3d ed. 2004).

[119] *See* BORRON, *supra* note 118, § 1154. The Restatement (Third) distinguishes preemptory rights from executory interests by suggesting preemptory rights should not be subject to the rule against perpetuities. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.3 (2000). A majority of jurisdictions consider preemptory rights executory interests. *See* Cont'l Cablevision of New England, Inc. v. United Broad. Co., 873 F.2d 717, 722 n.11 (4th Cir. 1989).

[120] *See supra* notes 30–31, 65–66 and accompanying text.

[121] Eric Freyfogle commented that Marshall did not use the term of fee simple because "that term only makes sense under Anglo-American law. It is not a term that has any meaning under international law." Freyfogle, *supra* note 67. Freyfogle also suggested that the occupancy title Marshall created for the tribes could be thought of as larger than a fee simple interest, since it was immune from state and local regulation and taxation. *Id.*

beyond the United States,[122] where the precedential value of American decisions presumably is limited or nonexistent.

Second, the legacy of the misunderstood American law of discovery is substantial. Failure to understand that the sovereignty limits imposed by the doctrine were limited to foreign affairs[123] allowed the 1903 Supreme Court to erect the "extra-constitutional" plenary power doctrine,[124] which authorized Congress to exercise virtually unbridled authority to eviscerate treaty obligations in the infamous *Lone Wolf v. Hitchcock* decision.[125] Moreover, in probably the most regrettable of many misguided Supreme Court Indian law decisions, the 1955 Court misconstrued "occupancy title" to deny compensation for government takings of Indian land in *Tee-Hit-Ton Indians v. United States*.[126] Perhaps a better understanding of the original American discovery doctrine would lead courts to temper their interpretation of those decisions.[127]

So, a reinterpretation of what the Marshall Court actually meant is not a wholly academic exercise. My hope is that courts and commentators revisit these decisions to scrutinize what they actually decided, and to recognize that decisions like *Lone Wolf* and *Tee-Hit-Ton* were not only badly reasoned, but were completely inconsistent with the origins of the American rule of discovery as articulated by the Marshall Court.

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[122] Larissa Behrendt, *The Doctrine of Discovery in Australia*, *in* ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 171 (2010); MILLER, *supra* note 12, at 24 (discussing the discovery doctrine in the Philippines); Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VA. L. REV. 849 (2009); Robert J. Miller et al., *The International Law of Discovery, Indigenous Peoples, and Chile*, 89 NEB. L. REV. 819 (2011). *See also* Blumm, *supra* note 2, at 713 n.1 (references to the influence of the American law of discovery on Australian law); Watson, *supra* note 13 (exploring the doctrine in Australia, Canada, and New Zealand).

[123] *See supra* notes 59–61, 78–80 and accompanying and following text.

[124] Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 99 (1993).

[125] Lone Wolf v. Hitchcock, 187 U.S. 553, 564–68 (1903). *See* BLUE CLARK, LONE WOLF V. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 71 (1994); *Symposium,* Lone Wolf v. Hitchcock*: One Hundred Years Later*, 38 TULSA L. REV. 1 (2002).

[126] 348 U.S. 272, 281, 285 (1955). *See* Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1216 (1980); Joseph William Singer, *Well-Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 492 (1994).

[127] The Indian Law Resource Center maintains that the Supreme Court over the years has not departed from the Marshall Court's rulings on the doctrine of discovery. INDIAN LAW RES. CTR., *supra* note 15, at 30–35 (citing several cases, including City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 n.1 (2005)).

V. CONCLUSION

One time-honored principle of Anglo-American property law is that of *numerus clausus*—the idea that courts should not create new property interests on their own motion because property interests, as in rem rights, have widespread third-party effects extending well beyond the particular parties in cases.[128] This rule was violated by Marshall's opinion in *Johnson*, and the other decisions discussed above, because the Court endorsed a wholly new kind of proprietary interest,[129] one previously unknown in Anglo-American law. Coupled with the fact that the *Johnson* decision assumed that the proper forum for resolving Indian-title land disputes was in U.S. federal courts,[130] the sui generis nature of Indian title gave the Marshall Court's successors virtual carte blanche to deny tribes compensation for government land seizures,[131] and create out of whole cloth the plenary power doctrine.[132]

Marshall's mistake in *Johnson* was in not attempting to fit Indian title concepts into time-honored principles of Anglo-American property law. Had he done so, he would have recognized that Indian title was a fee simple subject to a governmental right of preemption.

[128] *See, e.g.*, Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S378–79, S409–10 (2002); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 43–45 (2000).

[129] *See supra* notes 48–70 and accompanying text.

[130] *See supra* note 70 and following text.

[131] *See supra* note 126 and accompanying text.

[132] *See supra* notes 124–125 and accompanying text.