The John Marshall Law Review

Volume 53 | Issue 1 Article 1

2020

The Cherokee Nation, John Marshall, and the Stadial Theory of Development, 53 UIC J. Marshall L. Rev. 1 (2020)

James Muldoon

THE CHEROKEE NATION, JOHN MARSHALL, AND THE STADIAL THEORY OF DEVELOPMENT

JAMES MULDOON*

I. INTRODUCTION

In recent years, some legal historians examining the European conquest and acquisition of the Americas have argued that European states claimed the right to seize the lands of the indigenous populations and to govern the inhabitants on the grounds that by not being Christians, such people did not have the same right to possess property and self-govern that Christians enjoyed. These historians called this the Doctrine of Discovery, according to which:

> "[W]hen [a] European, Christian nation first discovered new lands the discovering country automatically gained sovereign and property rights in the lands of the non-Christian, non-European nation even though, obviously, the natives already owned, occupied, and used these lands."[1]

---

* James Muldoon, Professor of History (Emeritus) at Rutgers University is an Invited Research Scholar at the John Carter Brown Library, and the author of several books including *Popes, Lawyers, and Infidels* and *Empire and Order: The Concept of Empire, 800-1800* as well as articles on canon law and European expansion.

1. ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 3 (2010) (quoting Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 5 (2005) [hereinafter *The Doctrine of Discovery*]); Robert J. Miller, Lisa Le Sage, & Sebastián López Escarcena, *The International Law of Discovery, Indigenous Peoples, and Chile*, 89 NEB. L. REV. 819, 820-83 (2010); Robert J. Miller, *Brazil, Indigenous Peoples, and the International Law of Discovery*, 37 BROOK. J. INT'L L. 1 (2011) [hereinafter *International Law of Discovery*]; ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C.1500–C.1800 46-47 (1995); JILL NORGREN, THE CHEROKEE CASES 56-57 (2004). Alexander VI did not, however, make such a claim. James Muldoon, *Papal Responsibility for the Infidel: Another Look at Alexander VI's Inter caetera*, 64 CATH. HIST. REV. 168, 168-84 (1978), *reprinted in* JAMES MULDOON, CANON LAW, THE EXPANSION OF EUROPE, AND WORLD ORDER IV (1998).

Under the principle of Discovery, "non-Christian peoples did not possess the same human and natural law rights to land, sovereignty, and self-determination as Christian peoples."[2]

According to those who have advanced the theory, this claim originated in claims that medieval popes had advanced for a thousand years, as far back as the fifth century AD. The papal goal was to create a "'universal Christian commonwealth[,]'" a goal that led to the crusades and the creation of the theory of the holy war in order to achieve its fulfillment.[3] The fullest statement of this program came in 1493 in Pope Alexander VI's three bulls, known collectively as *Inter caetera*, which according to these historians, "granted European monarchs ownership rights in newly discovered lands" as well as other economic and governmental rights and privileges.[4]

The final stage of the development of the Doctrine of Discovery came in three U.S. Supreme Court decisions that Chief Justice John Marshall issued in the 1820s and 1830s regarding the legal status of the Cherokee Indians in Georgia.[5] According to its proponents, when Marshall issued his famous decision in 1823, *Johnson v. M'Intosh*, concerning the status of the Cherokee Indians in Georgia, the long-established Doctrine of Discovery became the legal basis for European, and later American, possession of the lands occupied by the indigenous peoples of the United States; this doctrine was subsequently employed in Canada, Australia, and New Zealand.[6] Two other of his decisions in related cases, *Cherokee Nation v. Georgia* decided in 1831, and *Worcester v. Georgia* decided in 1832, completed the application of the Doctrine of Discovery in American law.

In recent years, interest in the Doctrine of Discovery has led to calls on the current pope to revoke or annul *Inter caetera* and similar papal documents as part of a process of reconciliation between the Catholic Church and the indigenous peoples of the United States. These calls, often by religious leaders, assume that the Doctrine of Discovery is an accurate statement of the legal basis employed to justify the European conquest of the Americas.[7] It also assumes that

---

2. MILLER ET AL., *supra* note 1.

3. *The Doctrine of Discovery*, *supra* note 1, at 8 (quoting WILLIAMS, JR., *supra* note 1, at 29).

4. MILLER ET AL., *supra* note 1, at 12.

5. The term Indians that Marshall employed is no longer employed. The term Native Americans is used.

6. MILLER ET AL., *supra* note 1, at 26-65; *see also* 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, 507-51 (2011)(discussing the application of this doctrine in other Anglophone countries).

7. *See* LAURENCE BEHRENS & LEONARD J. ROSEN, WRITING AND READING ACROSS THE CURRICULUM 280 (5th ed. 1994) (citing *Resolution of the National Council of Churches of Christ in the U.S.A.*, 278-82 (May 18, 1990). The various

Marshall employed this doctrine in *Johnson v. M'Intosh* and is, therefore, the basis for American law with regard to the indigenous peoples of the United States to this day.[8]

II. STADIAL THEORY

But did Marshall base *Johnson v. M'Intosh* on the Doctrine of Discovery and the theory that, because they were non-Christians, the Indians did not have the same rights as Christians? While Marshall did refer to discovery as a fundamental element of the developing legal regime that accompanied the conquest of the Americas,[9] he did not discuss the religious status of the indigenous inhabitants of the United States at any length in *Johnson v. M'Intosh* or in either of the other related cases. He never claimed that non-Christians had no right to possess land and self-govern simply because they were not Christians.

A careful reading of Marshall's decisions in the cases involving the Cherokees in Georgia demonstrates that he saw the indigenous population not in terms of their religious status, but in terms of their cultural and social level of development; that is in terms of the stadial or four-stage theory of development that emerged in the eighteenth century, especially among Scottish thinkers such as Adam Smith.[10] In Smith's *Wealth of Nations* and, in more detail, in his *Lectures on Jurisprudence*, he outlined what he saw as the stages through which human societies passed throughout the course of social development.[11] Each stage involved the occupation and development of property. This was not a universal and inevitable course of development; however, and Smith was not an economic determinist.[12] Such stages of development depended on "suitable

positions on this issue are conveniently presented in this volume. On the moral and religious issues, see James Axtell, *Moral Reflections on the Columbian Legacy*, THE HISTORY TEACHER 407-25 (1992).

8. *See generally* Johnson v. M'Intosh, 21 U.S. 543, 587 (1823) (stating "[t]he United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.").

9. *Id.* at 574-84 (describing "[t]he history of America, from its discovery to present day" in 1823, and how this "proves . . . the universal recognition of these [discovery] principles").

10. *See, e.g.,* ADAM SMITH, LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS 107 (Oxford: Clarendon Press, 1896) (stating "[t]he four stages of society are hunting, pasturage, farming, and commerce").

11. PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 29-46 (1980) (first citing ADAM SMITH, WEALTH OF NATIONS (1776); then citing SMITH, LECTURES ON JURISPRUDENCE (1763)).

12. SEE ANTHONY BREWER, ADAM SMITH'S STAGES OF HISTORY 2 (DEP'T

conditions", physical and social, for its success.[13] As one modern scholar has observed: Smith "seems to have seen the success of Europe not as inevitable but as a remarkably lucky special case[,]" that is, a region in which all the necessary conditions for full development existed.[14]

The numerous European voyages of exploration that began with Columbus sparked interest in the varieties of human social development that the explorers had encountered.[15] How did these other societies develop and why were there so many varieties of society? Were there "certain universal legal principles which were binding on all men, irrespective of the time and place in which they lived"; that is, the natural law, and a universal course of development that could be "regarded as the basis of an international law" and relations?[16] Or, did human societies evolve over time in a variety of ways, and with their own sets of laws, as groups of people developed ways of life shaped by the unique circumstances in which they lived? One response to these questions was the stadial theory that outlined a course of human development, from primitive to fully civilized existence. The first proponent of what was to become the four-stage, that is the stadial, theory of development, was Sir John Dalrymple (1726-1810). He presented it in his book on the feudal law of property where the "stages of society appear as an introduction to the history of the alienation of property in land[.]"[17] Societies passed from being composed of "hunters and fishers" to the "discovery of pasturage" and the herding of animals, to the creation of "new arts of life and particularly the art of agriculture" and ultimately to "the alienation of property in land[.]"[18] He also "mentions the importance of commerce" but, as a modern author pointed out, "he does not identify" commerce as "a specific 'state'" [or stage of development] as later writers such as Adam Smith were to do.[19]

It is worth noting at this point that European writers were using the Iroquois of North America as an example of hunter-gatherer societies. A Jesuit missionary, Joseph-François Lafitau (1681-1746), had pointed out "the similarity of certain Indian customs to those he had read about in classical writings[,]"

ECON., UNIV. BRISTOL Discussion Paper No. 08/601, 2008), pdfs. semanticscholar.org/a317/9eac8db97b67c88800aa792a5881c96f03f6.pdf (discussing the conflicting opinions over whether Smith was an economic determinist). This article takes the position that Smith was not an economic determinist.

13. ANTHONY BREWER, ADAM SMITH'S STAGES OF HISTORY at 20.

14. Id. at 21.

15 *See* MARGARET T. HODGEN, EARLY ANTHROPOLOGY IN THE SIXTEENTH AND SEVENTEENTH CENTURIES 8-9 (1964).

16. STEIN, *supra* note 11, at 3.

17. *Id.* at 24 (citing John Dalrymple, AN ESSAY TOWARDS A GENERAL HISTORY OF FEUDAL PROPERTY IN GREAT BRITAIN, 76-77 (1757)).

18. *Id*. (citing Dalrymple, *supra* note 17, at 76-77).

19. *Id*. at 25 (citing Dalrymple, *supra* note 17).

suggesting that the ancient Greeks had evolved from the primitive state of existence.[20] Lafitau's work suggested that the Iroquois and other indigenous peoples of North America could develop as the Greeks had done.[21]

Adam Smith produced the fullest version of the stadial theory of development, building on the work of a number of earlier scholars, legal thinkers such as Hugo Grotius (1583-1645) and Samuel Pufendorf (1632-1694), philosophical authors such as Baron Montesquieu (1689-1755) and Francis Hutcheson (1694-1746), historians such as David Hume (1711-1776), and missionaries such as Lafitau. "All these influences blended to produce the philosophical history of legal institutions" that many scholars had sought.[22] The key issue in all of these discussions of social development was how land was possessed and controlled. What interested Smith was the conclusion that "changes in control of land and changes in form of government" provided a "neat cyclical pattern which it gave to the major periods of European history."[23] The course of development involved in such changes was not, however, "entirely inevitable" because the "citizens of a state could themselves determine their future, provided that they had the will."[24] This would explain why some societies did not develop to a more advanced state of existence.

In the *Wealth of Nations*, Adam Smith "made frequent use of the stages of society — hunters, shepherd nations, and so forth", but "it was in his *Lectures on Jurisprudence* that his full exposition of the four-stage theory, again with increasingly developed property law as society progresses, was recorded. In his telling, increased regulation of property becomes necessary as competition over resources increases[.]"[25] In the *Lectures*, Smith summed up his theory thus:

> There are four distinct states which mankind pass thro [sic]: -- 1st, the Age of Hunters; 2dly, the Age of Shepherds; 3dly, the Age of Agriculture; and 4thly, the Age of Commerce. It is easy to see that in these severall [sic] ages of society, the laws and regulations with regard to property must be very different[.][26]

---

20. *Id*. at 17.

21. *See id.* at 17-18 (explaining that when Joseph-François Lafitau compared Iroquois and Greek customs in his novel, Moeurs des Sauvages Amériquains Comparées aux Moeurs des Prémiers Temps (1724), he "revealed to the world the simple truth that also the Greeks had once been savages"); PROFESSOR A.D. MOMIGLIANO, STUDIES IN HISTORIOGRAPHY 141 (1966).

22. STEIN, *supra* note 11, at 30.

23. *Id.* at 32.

24. *Id.*

25. *Id.*

26. David B. Schorr, *The Tragedy of the Commons at 50: Context, Precedents, and Afterlife: Savagery, Civilization, and Property: Theories of Societal Evolution and Commons Theory*, 19 THEORETICAL INQUIRIES. L. 507, 512 (2018) (citing ADAM SMITH, LECTURES ON JURISPRUDENCE 27, 32-35 (R.L. Meek et al.

Stadial theory described the development of human societies from the hunter-gatherer level to the commercial and trading level that Europeans had attained. Each level of development that an individual society attained had an impact on neighboring societies that had not developed. For example, pastoralists drive their herds over lands occupied by hunter-gatherers; pastoralists in turn find their ranges limited by fence-building, land-owning farmers; finally, agriculturalists create commercial cities.[27] In other words, the more advanced peoples, as defined by the theory, come to dominate the less advanced who either assimilated, moved on, or died out. One scholar summed up Smith's theory this way:

> The four stages theory served Smith in two different ways. First, it had a static, or comparative, function in accounting for the form of law and government in different societies. Thus, hunters live in small groups with little need for a concept of property, pastoral peoples need a concept of property in herds of animals but not necessarily in land, and so on. In a lecture course on jurisprudence, that is, on the forms of law and government, this clearly bulks large, but it is not, as it stands, a theory of history. It becomes a theory of history when the stages are placed in order, with a claim that each stage, given suitable conditions, evolves into or is replaced by the next.[28]

III. JOHNSON V. M'INTOSH

A central question in *Johnson v. M'Intosh* was the relation between people who existed at different levels of development.[29] The specific issue was whether or not an individual or private corporation could purchase land from the Piankeshaw Indians and have the title to the land recognized by American courts.[30] Did the Indians own the land they occupied and could they, therefore, sell or otherwise alienate it to anyone they wished? In this decision, Marshall examined the history of the land involved and concluded that when Englishmen arrived in North America, the land "was held, occupied, and possessed, in full sovereignty by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil[,]" a point that he repeated throughout his judicial career.[31]

Having recognized the sovereignty of the Indians, Marshall then began to qualify his statement. From "time immemorial, and always up to the present time, all the Indian tribes, or nations of

---

eds., 1982)).

27. Brewer, *supra* note 12, at 2-4.

28. *Id.* at 20.

29. *Johnson*, 21 U.S. at 543.

30. *Id.* at 571.

31. *Id.* at 545. However, it is unclear what Marshall meant by sovereignty.

North America . . . held their respective lands and territories each in common" and there was "no separate property in the soil[.]"[32] This meant that for "certain chiefs of the tribe[,] selling . . . represent[ed] the whole tribe in every part of the transaction[,]" that is the sale of the land, and then dividing the "money or commodities" received among the individuals of the tribe.[33]

The question that *Johnson v. M'Intosh* was designed to answer, therefore, was not whether the Indians owned the land but could they alienate it, to whom, and under what circumstances. The plaintiffs, Johnson and Graham's lessee, claimed the land based on purchase directly from the Indians while the defendant, William M'Intosh, claimed a title based on purchase from the United States government that "had purchased the same land of the same Indians" at some earlier point.[34]

From Marshall's position, it would seem, therefore, to be unnecessary, and merely speculative, to discuss the question respecting the sort of title or ownership, which may be thought to belong to savage tribes, in the lands on which they live."[35] Their "title by occupancy is to be respected, as much as that of an individual, obtained by the same right, in a civilized state."[36] In addition, he added that the circumstance "that the members of the society held in common, did not affect the strength of their title by occupancy."[37] Therefore, the Indians had the right to sell their lands. Consequently, the "only question in this case must be, whether it be competent to *individuals* to make such purchases, or whether that be the exclusive prerogative of government."[38] A related issue was who represented the community in the sale of communal lands, and were they the legitimate representatives of the community.[39]

In stadial theory, collective ownership of land is a lower level of development than individual ownership.[40] Furthermore, Marshall's reference to the Indians as "savage tribes" and to their right of occupancy as less than the full right of possession, but equal to the similar right that an individual "in a civilized state"

---

32. *Id.* at 549.
33. *Id.* at 549-50.
34. *Id.* at 562.
35. *Id.* at 562-63.
36. *Id.* at 563.
37. *Id.*
38. *Id.* (emphasis added).
39. *Id.* at 562-63. Sir William Blackstone defined occupancy as "the taking possession of those things, which before belonged to nobody." This occurred when land was "common to all mankind" and not possessed by individuals. If individuals took "any thing to his own use, and . . . actually took it into possession[,]" then he "should thereby gain the absolute property of it[.]" William Blackstone, *Book the Second: Of the Rights of Things*, *in* 1 COMMENTARIES ON THE LAWS OF ENGLAND 258 (1765-69).
40. STEIN, *supra* note 11, at 36.

possessed, indicates that he saw them at a level that twentieth century observers might term underdevelopment.[41] Nevertheless, they possessed a "*right of soil*" that was recognized in various European treaties including a "memorial, or manifesto, of the British government, in 1755[.]"[42] The Indians "were not British subjects, nor in any manner bound by the authority of the British government[.]"[43] Consequently, no "mere act of the executive government," including the act of 1755, could divest them of "their rights of property[.]"[44]

According to the plaintiffs, the British imperial government could not deny the rights of the Indians, neither could any of the other European imperial governments, and neither could their successor states such as the United States.[45] The Indians possessed their lands and could alienate them to whomever they wished, so the original colonists could and did purchase land directly from Indian tribes as the plaintiffs argued. The defendants, however, argued to the contrary, asserting that:

> [T]he uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals.[46]

According to Marshall, the reason for this was that the Indians "remain in a state of nature, and have never been admitted into the general society of nations."[47] Here, he was underscoring the place of the United States within the civilized, that is European, legal order, unlike the Indians who did not qualify. Consequently, all "the treaties and negotiations between the civilized powers of Europe and of this continent . . . have uniformly disregarded their supposed right to the territory included within the jurisdictional limits of those powers[,]" a position the defendants argued rests on "the hypothesis, that the Indians had no right to soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives."[48]

---

41. *Johnson*, 21 U.S. at 563.

42. *Id.* (emphasis added). Marshall pointed specifically to the treaties of Utrecht (1713) and Aix la Chapelle (1748). *Id.* This was a reminder that the entry and then actions of Europeans in the Americas must be understood in the context of the European military and diplomatic situation within Europe and along its borders with the expanding Ottoman Empire. *Id.*

43. *Id.* at 564.

44. *Id.* at 563-64.

45. *Id.* at 563.

46. *Id.* at 567.

47. *Id.*

48. *Id.* Not until the nineteenth century was any non-European state included in the international regime. B.V.A. Röling, *Are Grotius' Ideas Obsolete in an Expanded World?*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 291-92 (Hedley Bull et al. eds., 1992).

Furthermore, even "if it should be admitted that the Indians were originally an independent people, they have ceased to be so" because in the course of time they had "passed under the domination of" other, that is European, states.[49] In effect, the Indians were a conquered people and subject to the conqueror's laws.

As if the foregoing arguments were not enough, Marshall then presented the defendant's argument that the Indians possessed their lands and explained the consequences of that argument on this case. The argument was that while the Indians did originally possess their lands, they "never had any idea of individual property in lands."[50] Therefore, those who purchased the Indians' lands "could not take the sovereignty and eminent domain to themselves."[51] The Indians were, according to Marshall, "that class who are said by jurists not to be citizens, but perpetual inhabitants with diminutive rights" and they are treated "as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government."[52] In terms of "the law of nature, they had not acquired a fixed property capable of being transferred."[53] Thus,

> [according] to every theory of property, the Indians had no individual rights to land: nor had they any collectively, or in their national capacity . . . [because] 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. All the proprietary rights of civilized nations on this continent are founded on this principle. The right derived from discovery and conquest, can rest on no other basis . . . [so that] all existing titles depend on the fundamental title of the crown by discovery."[54]

Admittedly, in some colonies, New England in particular, "some lands have been held under Indian deeds. But this was an anomaly arising from particular local and political causes."[55]

Having presented the positions of the two sides in the case, Marshall gave his decision, opening with a clear statement of what was at stake. Could land purchased from the "Piankeshaw nations" be held by a "title [that] can be recognised [sic] in the Courts of the United States?"[56] Did the Indians have the power "to give, and of private individuals to receive, a title which can be sustained in the Courts of this country[?]"[57]

Marshall observed that every society has the right "to prescribe

---

49. *Johnson*, 21 U.S. at 568.
50. *Id.*
51. *Id.*
52. *Id.* at 569.
53. *Id.* at 570.
54. *Id.* at 569-70.
55. *Id.* at 571.
56. *Id.* at 571-72.
57. *Id.* at 572.

those rules by which property may be acquired and preserved is not, and cannot, be drawn into question[.]"[58] There is therefore no need to examine "those principles of abstract justice . . . which are admitted to regulate, in a great degree, the rights of civilized nations . . . but [only] those principles also which our own government has adopted in the particular case, and given us as the rule for our decision."[59]

Marshall then turned to the situation in the New World when Europeans first arrived. He asserted that "the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire."[60] They justified their territorial claims on the "character and religion of its inhabitants" because these "afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."[61] Europeans justified their claims by "convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence."[62] To regulate relations among the competing European empires, their rulers agreed, "that discovery gave title to the government" whose subjects first entered a region and therefore "the sole right of acquiring soil from the natives."[63] Each European nation was, therefore, responsible for relations between colonists and the indigenous population in the lands they acquired.[64]

In Marshall's opinion, the rights "of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired."[65] He stated that:

> [The Indians were] the rightful occupants of the soil, with a legal as well as just claim to retain possession of it . . . 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.[66]

According to Marshall, all of the states of Europe agreed with these principles, and they were expressed in the treaties dealing with the Americas that they signed among themselves in the centuries following Columbus's first voyage.[67] In effect, he saw the European

---

58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 572-73.
62. *Id.* at 573. In fact, the initial charters did not involve a search for land to colonize. *Id.* They were designed to find a route to the Asian spice markets. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 574.
66. *Id.*
67. *Id.*

acquisition of land in the Americas not in terms associated with papal theories but in terms of Hugo Grotius's conception of international law. That is, the law is found in the treaties, conventions, traditions, and customs of the European states.[68] Although some of the language and concepts employed in these documents had roots in various papal documents, they were understood and employed within the Grotian framework and not as the popes and canon lawyers had understood and employed them.[69]

The newly created United States, deriving its jurisdiction over the Indians from the British government from which it had separated, thereby "unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country."[70] That is, the United States dealt with the Indian population on the same basis as the European states operated: "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest[.]"[71] In asserting the American claim to acquisition by the long-established principle of discovery, Marshall was again making an important point: the United States participated in the civilized world legal order as an equal of the old European states, unlike the Indian nations. In fact, although Marshall is most famous for his decisions in constitutional cases, "he authored more than twice as many decisions on international law as he did on constitutional law."[72]

Having justified the claims of the United States government to jurisdiction over the lands of the Indians by using the discovery claims that European states had developed earlier, Marshall was able to avoid any lengthy discussion about "whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits."[73] "Conquest gives a title which the Courts of the conqueror cannot deny . . . [regardless of] the original justice of the claim which has been successfully asserted."[74]

Conquest, in turn, however, created a new situation: what would be the relation between the conquerors and the conquered? As a general rule, Marshall argued, the conquered "are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected[,]" eventually forming

---

68. Hedley Bull, *The Importance of Grotius in the Study of International Relations*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 75-77 (Hedley Bull et al. eds., 1992).

69. James Muldoon, *Colonial Charters: Possessory or Regulatory?*, 36 L. & HIST. REV. 355, 357-64 (2018).

70. *Johnson*, 21 U.S. at 587.

71. *Id.*

72. JOEL RICHARD PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 262 (2018).

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

74. *Id.*

"one people[,]" blending conquerors and conquered.[75] An obvious historical example was the creation of the English people out of the Saxons and the Normans as a result of William the Conqueror's victory at Hastings in 1066.

If such blending was not possible, however, what would be the result? According to Marshall, the original inhabitants of the United States were "the tribes of Indians . . . [who] were fierce savages . . . whose subsistence was drawn chiefly from the forest."[76] To allow them to retain possession of the lands they occupied "was to leave the country a wilderness[;]" but, "to govern them as a distinct people, was impossible, because . . . they were ready to repel by arms every attempt on their independence."[77] The United States faced the dilemma of how to deal with "a people with whom it was impossible to mix, and who could not be governed as a distinct society[.]"[78] Furthermore, as "the white population advanced, that of the Indians necessarily receded."[79] In time, the "game fled into thicker and more unbroken forests, and the Indians followed."[80] The soil "being no longer occupied by its ancient inhabitants" was divided among the subjects of the European ruler who claimed the region by discovery, because the "law which regulates, and ought to regulate in general, the relations between the conqueror and the conquered, was incapable of application to a people under such circumstances."[81] The American situation required "some new and different rule[,]" one that would be "better adapted" to the American situation.[82]

Marshall went on to argue that it was a recognized principle that if adventurers acting "under the authority of an existing government" discovered a vacant land and took possession of it, the government that authorized their venture has the right to dispose of the discovered land in the same way as it can "dispose of the national domains" in the mother country.[83] As far as the English were concerned, "no distinction was taken between vacant lands and lands occupied by the Indians" because the Indians had only a "right of occupancy[,]" not to absolute possession.[84] The situation of the Indians under the British was "peculiar" because "in some

---

75. *Id.* at 589.
76. *Id.* at 590.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 590-91.
81. *Id.* at 591.
82. *Id.*
83. *Id.* at 595.
84. *Id.* at 596; On the issue of what constituted vacant land (terra nullius): see Andrew Fitzmaurice, *The Genealogy of Terra Nullius*, *in* AUSTRALIAN HISTORICAL STUDIES 1-15 (2007); Bruce Buchan & Mary Heath, *Savagery and Civilization: From Terra Nullius to the 'Tide of History'*, 6 ETHNICITIES 5-26 (2006).

respects, [they acted] as a dependent, and in some respects as a distinct people . . . too powerful and brave not to be dreaded as formidable enemies[.]"[85]

The description of the Indians and their way of life in *Johnson v. M'Intosh* presents a complex picture of Indian-White relations. On the one hand, the Indians were capable of asserting some rights in the land they occupied, especially the right to alienate it under some circumstances.[86] This right was restricted, however, by the claim of European governments to limit the purchase of specific Indian lands to the subjects of those rulers whose adventurers had first discovered the lands.[87] Indian lands could also be acquired by conquest.[88] Presumably, the anticipated result would be the gradual blending of the conquered and the conquering peoples into a single nation. This had been the historical experience of Europeans: German barbarians occupied the Roman world and created the various peoples of Europe; the Normans and the conquered Saxons became the English.[89] Why would that that not happen in the Americas? The answer was that it would not happen because the Indians were too fierce and savage to accept the domination of the White population readily.[90] Furthermore, the Indians were hunter-gatherers, a population inevitably destined to yield as the agriculturalists advanced.

IV. CHEROKEE NATION v. GEORGIA

Johnson v. M'Intosh was a stage in the development of Marshall's position of the status of the Cherokees and, by extension, Indians throughout the United States. A few years later, he issued two more decisions involving the state of Georgia and its Indian population that further developed his picture of the Cherokees and their way of life. In 1831, the Cherokees brought a case, *Cherokee Nation v. Georgia*, that asked the court:

> [T]o restrain the State of Georgia from the execution of certain laws of that State which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia,

85. *Johnson*, 21 U.S. at 596.

86. *Id.*

87. *Id.*

88. *Id.*

89. MARJORIE CHIBNALL, THE DEBATE ON THE NORMAN CONQUEST 92-93 (Manchester University Press: Manchester, 1999).

90. *See Johnson*, 21 U.S. at 590 (stating "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence").

> the lands of the Nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.[91]

The case itself focused on two issues: the relation of the state of Georgia to the federal government and the question of the status of the Cherokees. Did they form a "foreign state in the sense in which that term is used in the Constitution?"[92] Article I of the Constitution assigned to Congress the authority to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."[93] The decision would determine whether or not the Cherokees could seek redress in the federal courts as a foreign state could.[94] If they could not seek the protection for their society and its rights from the federal courts, what would prevent Georgia from annihilating them "as a political society"[95] and as a people?

At the beginning of the decision, Marshall exhibited some compassion for the plight of the Cherokees. He described them as:

> 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[.][96]

The gradual decline of these people occurred in spite of the numerous treaties that guaranteed their possession of the lands that they occupied.[97] By now, "they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence" and this remnant is what they sought to protect from the state of Georgia.[98] The remnant would be the amount of farmland required to maintain an agricultural population.[99]

Marshall's description of the Cherokee's plight has a tone of romantic melancholy. The Cherokees now live within the narrow, shabby ruins of their once powerful society.[100] The acts of the federal government "plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts."[101] In fact, although the Indians formed a state, it was not a foreign state in constitutional terms. The Indian tribes may "be denominated domestic dependent nations[,]" and their inhabitants "are in a state of pupilage" with regard to the United States, a status similar to that "of a ward to

---

91. Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831).
92. *Id.* at 16.
93. U.S. CONST. art. I, § 8.
94. U.S. CONST. art. III.
95. *Cherokee Nation*, 30 U.S. at 15.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 5-6.
100. *Id.* at 16.
101. *Id.*

his guardian."[102] The result is that the Cherokee Nation cannot obtain protection from the Court on the grounds that they alleged because it was not a foreign state in constitutional terms.[103]

The portrait of the Cherokees that Marshall painted in this decision modified, to some degree, a position he had taken in *Johnson v. M'Intosh*. In the earlier decision, he declared that he would not consider the argument that agriculturists have the right to occupy the lands over which pastoralists travelled in the course of the year because agriculture is a higher and more productive use of the land.[104] That is, he avoided the stadial theory in his discussion of the Cherokees at that point. In the next case, however, without explicitly saying so, he saw the situation of the Indians in stadial terms. The Indians, once powerful and independent, were now "gradually sinking beneath our superior policy, our arts and our arms" and they "have yielded their lands by successive treaties" to the United States.[105] They have retained only the amount of land "deemed necessary for their comfortable subsistence."[106] In other words, the Indians must themselves become farmers in order to survive alongside the Americans who were seizing their hunting grounds and sowing them. The Indians faced three futures: acculturation, exile, or, as stated in the opening of the decision, annihilation as a people.[107] Development along stadial lines is a natural process and those who fail to accept it will be gone.

V. WORCESTER V. GEORGIA

The final decision in Marshall's trilogy of decisions involving the Cherokees and the State of Georgia was *Worcester v. Georgia*, the longest of the three decisions and the most forceful presentation of the federal government's position on relations with the Indian tribes. It also provided the fullest discussion of the future development of the Cherokees under the guidance of the federal government. The case involved a Vermonter named Samuel Worcester, a Protestant missionary, who entered the Cherokee lands in Georgia in order to preach Christianity.[108] State officers arrested him on the grounds that he had violated a state law that required Whites to obtain permission from the state before entering the Cherokee lands.[109] Worcester pleaded that "under the authority of the president of the United States" and with the permission and approval of the Cherokee Nation he was "engaged in preaching the

102. *Id.* at 17.
103. *Id.* at 52.
104. *Johnson*, 21 U.S. at 588.
105. *Cherokee Nation*, 30 U.S. at 15.
106. *Id.*
107. *Id.*
108. Worcester v. Georgia, 31 U.S. 515 (1832).
109. *Id.* at 529-31.

gospel[.]"[110] He was doing this "in accordance with the humane policy of the government of the United States for the civilization and improvement of the Indians[.]"[111]

The Georgia Court rejected the missionary's claim that he was properly authorized to preach to the Cherokees, however, and sentenced him to four years hard labor in prison.[112] The case was appealed to Supreme Court on the grounds that the Georgia law authorizing the missionary's conviction was "repugnant to the Constitution, laws, and treaties of the United States."[113] In effect, the indictment and subsequent conviction of the missionary questioned "the validity of the treaties made by the United States with the Cherokee Indians" that authorized the missionary's activities.[114] In doing this, Georgia had "exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States." [115] The Georgians, therefore, had no right to require "all white persons, residing within the limits of the Cherokee Nation" to obtain "a license or permit from his excellency the governor" or other authorized officer of the state.[116]

In order to explain why the state of Georgia had no right to prevent the missionary, or any other "white persons[,]"[117] from entering the Cherokee lands, as the Georgia law effectively did, Marshall turned to the history of European expansion into the Americas. When the Europeans first arrived, America "was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[118] To the argument that discovery enabled Europeans to "claim dominion" over "the inhabitants of either quarter of the globe[,]" Marshall responded it was difficult to comprehend that discovery "should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors."[119] He pointed out, again, that "'discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.'"[120] The result was that "the nation making the discovery, as its inevitable consequence, [gained] the sole right of acquiring the soil and of making settlements on it."[121]

---

110. *Id.* at 538.
111. *Id.*
112. *Id.* at 532.
113. *Id.* at 536.
114. *Id.* at 541.
115. *Id.* at 536.
116. *Id.* at 542.
117. *Id.* at 520.
118. *Id.* at 542-43.
119. *Id.* at 543.
120. *Id.* at 543-44 (quoting *Johnson*, 21 U.S. at 573).
121. *Id.* at 544.

This in turn "shut out the right of competition among those who had agreed to it" and "regulated the right given by discovery" in order to reduce, if not eliminate, potential imperial conflicts.[122] This in no way affected "the rights of those already in possession" because it gave not possession of the discovered lands to Europeans, but "the exclusive right to purchase" the lands of the "aboriginal occupants," and did not deny "the right of the possessor to sell."[123]

The right of the English government to regulate the acquisition of the Indians' lands by Europeans in specific parts of North America by purchase, as a consequence of discovery, had passed to the United States government as a result of the American Revolution. These rights and claims had been first articulated in royal "charters to companies of his subjects" who were to implement the royal policy of "planting colonies in America . . . and of enriching themselves."[124] What did the charters provide? According to Marshall, the charters

> purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. [That being the case, t]he extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.[125]

That is, the charters did not provide a claim to possess the lands of the indigenous population, only "the exclusive right of purchasing such lands as the natives were willing to sell."[126] The English did not "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."[127] The English purchased lands "but never coerced a surrender of them . . . [and] purchased their alliance and dependence by subsidies . . . [but] never interfered with their self government, so far as respected themselves only."[128] This kind of dependent relationship continued after the American Revolution with the United States, as the Treaty of Hopewell (1785) with the Cherokees demonstrated.[129] "[F]or the benefit and comfort of the Indians . . . the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think

---

122. *Id.*

123. *Worcester*, 31 U.S. at 544. Marshall wrote a history of the English colonization as the first volume of his 5-volume life of George Washington. JOHN MARSHALL, A HISTORY OF THE COLONIES PLANTED BY THE ENGLISH ON THE CONTINENT OF NORTH AMERICA (1824).

124. *Worcester*, 31 U.S. at 544.

125. *Id.* at 544-45.

126. *Id.* at 545.

127. *Id.* at 547.

128. *Id.*

129. *Id.* at 551.

proper."[130] Marshall admitted, however, that the treaty had "a few terms capable of being used in a sense which could not have been intended at the time" and could be misconstrued to the detriment of the Indians.[131] Nevertheless, the "essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war" and of other actions indicating their independent status.[132] At the same time, however, "the Cherokee Nation is under the protection of the United States of America, and of no other sovereign whatsoever."[133]

Clearly, according to Marshall, the United States succeeded to the powers and jurisdictions claimed by the British government and the individual states did not. Consequently, the state of Georgia had no right to prevent anyone from entering the Cherokee Nation to trade with the inhabitants or, as in this case, to preach the Christian Gospel to them. In his initial plea, Samuel Worcester had argued that he had "entered the aforesaid Cherokee Nation in the capacity of a duly authorised [sic] missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States[.]"[134] His activities, including "translating the sacred Scriptures into their language" were performed with the "permission and approval of the said Cherokee Nation, and in accordance with the humane policy of the Government of the United States for the civilization and improvement of the Indians[.]"[135]

Marshall then went on to describe the society that Europeans encountered when they arrived in North America. The enterprising European adventurers, "guided by nautical science[,]" found a land "in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing."[136] Did the European adventurers:

> [B]y sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil . . . or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?[137]

As Marshall had observed earlier, theoretical questions about levels of development and the rights of mankind were not useful in examining the European occupation of America.[138] In other words,

130. *Id.* at 553.
131. *Id.* at 554.
132. *Id.*
133. *Id.* at 555
134. *Id.* at 538.
135. *Id.*
136. *Id.* at 543.
137. *Id.*
138. *Id.* at 544.

he would not discuss the stadial theory that described how more advanced societies acquired the lands of less developed societies. What did matter was the fact that "power, war, conquest, give rights, which, after possession, are conceded by the world" as the bases for the acquisition of land.[139] So, as he wrote: "We proceed, then, to the actual state of things, having glanced at their origins; because holding it in our recollection might shed some light on existing pretensions."[140]

What struck Marshall as important in discussing the European acquisition of land in America was the problem of the size of America. It "was too immense for any one of the[] [European states] to grasp the whole, and the claimants were too powerful" to allow "any single potentate" to claim it so to "avoid bloody conflicts [over the possession of land] which might terminate disastrously to all."[141] The European colonizing nations had to establish "some principle" to resolve differences "between themselves" peacefully.[142] The principle upon which these states decided was that "discovery gave title to the government by whose subjects or by whose authority, it was made against all other European governments, which title might be consummate by possession."[143] This principle was "acknowledged by all Europeans" because recognizing the discovering nation having "the sole right of acquiring the soil and of making settlements on it" prevented competition and armed conflict among European states in America.[144] In making this point, Marshall made clear that this principle authorized only an "exclusive right to purchase" land from its Indian possessors if they wished to sell, but it in no way denied that the Indians owned the land they occupied.[145] In fact, these motives for planting the new colony "are incompatible with the lofty ideas of granting the soil, and all its inhabitants from sea to sea. They demonstrate the truth, that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."[146] The charters demonstrate that one goal of the colonization process was to ensure "the civilization of the Indians, and their conversion to Christianity – objects to be accomplished by conciliatory conduct and good example; not by extermination."[147]

According to Marshall, the "power of making war [was] conferred by these charters on the colonies, but *defensive* war alone seems to have been contemplated."[148] The colonists were not

139. *Id.* at 543.
140. *Id.*
141. *Id.* (alteration in original).
142. *Id.*
143. *Id.*
144. *Id.* at 543-44.
145. *Id.* at 544.
146. *Id.* at 546.
147. *Id.*
148. *Id.* at 545 (emphasis in original).

authorized to engage in wars of conquest against the Indians, only wars of defense, if attacked. The history of the early colonies demonstrated that they "have been frequently ravaged by Indian enemies," by "neighbouring savages," and "laid waste by fire and sword" in spite of their peaceful intentions.[149] The colonists, after all, were anxious to civilize, Christianize, and trade with the Indians – not fight them.[150]

However, in spite of the attempts to regulate the entry of Europeans into America in order to avoid conflict, the claims of the competing European nations "unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim any other," but "the extent of that discovery was the subject of unceasing contest."[151] These conflicts, in turn, involved the Indians, as all the European parties competed "for their friendship and their aid" in the imperial conflicts rather than "rousing their resentments, by asserting claims to their lands or to dominion over their persons . . . ." What the European governments did not do was to "interfere with the internal affairs of the Indians farther than to keep out the agents of foreign powers . . . ."[152]

There was, however, in Marshall's decision, a suggestion that the Indians would have to yield before the advancement of the White population. He pointed to a speech given by the Superintendent of Indian Affairs, Mr. Stuart, at Mobile in 1763, to the Indians, after the close of the wars with France.[153] Stuart stated that "all individuals are prohibited from purchasing any of your lands;" so that Indian ownership was recognized by the English government.[154] On the other hand, however, he stated that "your white brethren cannot feed you when you visit them unless you give them ground to plant" so "it is expected that you will cede lands to the King for that purpose."[155] When such agreements are entered into there shall be "a public meeting of your nation," so that "the consent of all your people" is obtained to the transaction.[156]

Stuart's speech neatly summed up the situation of the Indians with regard to the British and the American governments. The Indians' right to the lands they occupied was recognized, although such land was owned collectively by the tribe and not its individual members. The Indians could therefore alienate any or all of the land. Due to the discovery doctrine, such alienation could be made only to the European state whose subjects first entered the land.[157]

149. *Id.* at 546.
150. *Id.*
151. *Id.*
152. *Id.* at 546-47.
153. *Id.* at 547-48.
154. *Id.* at 547.
155. *Id.*
156. *Id.*
157. *Id.* at 547-48.

The European government could then sell the land to its subjects and provide legal title, which would be recognized in its courts.[158] The boundaries of the Indian tribal lands would be respected in light of any alienation of land and "the boundaries of [their] hunting grounds will be accurately fixed, and no settlement permitted to be made upon them."[159]

Buried within this speech defending the rights of the Indians was a hint at the future course of events; one not favorable to the Indians. Implicit in Stuart's presentation was the theme of stadial development. The agricultural White population would be expanding at the expense of the Indians' hunting grounds. The "fixed boundaries" promised in the speech would guarantee only the amount of land required for a settled population.[160] The Indians would be expected to cede land to the expanding White population.[161] Furthermore, White individuals could not purchase Indians lands, only the discovering government could do that and then in turn sell the land to individuals.[162] Obviously, as the White population increased, there would be increasing pressure on the government to acquire more Indian lands for settlement, thus reducing the land reserved for hunting even further. The Indians would have to assimilate, move on, or die out.

After the Revolution, the United States took over the responsibility for Indian relations that the British government had formerly assumed, including the likelihood of stadial development affecting the Indians and their way of life.[163] At this point, Marshall raised the question of whether the Indians fully understood the language of the treaties that they made with the United States.[164] After all, presumably, they could neither read nor write and "certainly were not critical judges of our language" so that they might not have appreciated the terms to which they had agreed.[165] This did not, however, invalidate any agreements with Indians.[166]

The policy of the United States government with regard to the Indians was, according to Marshall, two-fold. In the first place, "[C]ongress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations" that are recognized "as distinct political communities, having territorial boundaries, within which their authority is exclusive" and "guarantied [sic] by the United States."[167] On the other hand, Congress also passed an act designed to provide "against the further decline and final extinction

158. *Id.* at 544.
159. *Worcester*, 31 U.S. at 547.
160. *Id.* at 548.
161. *Id.*
162. *Id.* at 547-48.
163. *Id.* at 552-53.
164. *Id.*
165. *Id.* at 552.
166. *Id.* at 554.
167. *Id.* at 556-57.

of the Indian tribes" by "introducing among them the habits and arts of civilization" and "employ[ing] capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic . . . ."[168] These policies contemplate "the preservation of the Indian nations . . . [by] civilizing and converting them from hunters into agriculturists," a process that had already begun and shown results.[169] Under this plan, the Indians would remain as a people but their traditional way of life would have to go. Marshall added that "the Cherokees had already made considerable progress in this improvement," and this progress "encouraged perseverance in the laudable exertions still farther to meliorate their condition."[170]

To some extent, the two-fold goals of these federal programs were at odds. The territorial rights of the Indians were guaranteed and protected, while the people were to be transformed into Christian farmers.[171] The Indians would lose some of the land they occupied and lose the characteristic elements of their traditional way of life. The policies of the United States were designed to move the Indians along the stadial line of development, through the natural course of human development.[172] The power to do this and to otherwise regulate White relations with the Indians belonged to the federal government as the successor to the British Empire, which had made the same claims.[173] The European nations had always recognized the "Indian nations . . . as distinctly independent political communities, retaining their original natural rights," and "as the undisputed possessors of the soil" they occupied.[174] The "only exception" to this principle was "that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians."[175]

The various treaties with Indian tribes stretching back to the earliest English colonizing endeavors in America recognized the independence of the tribes: an independence not lost when the leaders of tribes, recognizing the need for assistance, associated the tribe by treaty "with a stronger [state], and taking its protection."[176] Such Indian nations "do not thereby cease to be sovereign and independent states" as long as they are "left in the administration"

168. *Id.* at 557.
169. *Id.* at 556-57.
170. *Id.* at 557.
171. *Id.*
172. *Id.* at 559.
173. *Id.* at 560-61.
174. *Worcester*, 31 U.S. at 519.
175. *Id.*
176. *Id.* at 520.

of the internal operation of the state.[177] In support of this position, Marshall quoted the words of the international law writer Emer de Vattel (1714-1767).[178] He wrote that "[t]ributary and feudatory states" in Europe accept the "protection" of more powerful states because "[a] weak State in order to provide for its safety . . . without stripping itself of the right of [self] government, and ceasing to be a State" needed the support of a powerful ally.[179] The "Cherokee Nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force" so that the sentencing of Samuel Worcester by the Georgia Court "was pronounced by that Court under colour of a law which is void, as being repugnant to the Constitution, treaties, and laws of the United States, and ought, therefore, be reversed and annulled."[180]

VI. THE CIVILIZED AND THE UNCIVILIZED

In the cases involving the Cherokees, Marshall had to deal with three sets of social relationships involving the relation of the Cherokees to White Europeans and to the American population. These relationships can be expressed in a hierarchical order. Each involved balancing a pair of conflicting claims to reach a resolution. The first pair involved the respective claims of civilized and uncivilized peoples to the occupation and possession of land.[181] The second involved the right of the Cherokees to possess the lands they occupied and the claim of European rulers and their American successors to regulate who could purchase the lands of Indians.[182] The final pairing involved the competing claims of a state, Georgia, and the federal government.[183] In each case, a lesser form of social, economic, or political development yielded to a superior one.[184] In the American cases, the uncivilized hunter-gathers had to give way to the civilized states that regulated relations between their own subjects and the Indians; a power that the United States federal government acquired from the British Empire.[185] This was and is the natural course of human development. The Cherokees would

177. *Id*.

178. EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY, edited and with an Introduction by Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008).

179. *Id*. For a discussion of this relationship in Vattel, Grotius, and Pufendorf, all writers with whom Marshall was familiar, *see* Wallwyn P.B. Shepheard, *Suzerainty*, 1 J. SOC'Y COMP. LEGIS. 432, 433-36 (Dec. 1899).

180. *Worcester*, 31 U.S. at 561-63.

181. *Id.* at 582.

182. *Id.* at 582-83.

183. *Id.* at 583-84.

184. *Id.* at 582-83.

185. *Id.* at 582.

have to assimilate, move on, or die out. Finally, Marshall asserted the superior authority of the federal government over the states.

VII. CHANCELLOR KENT

Marshall was not alone in seeing history in stadial terms. Contemporary legal scholars commenting on the development of American law supported that position as well. The most important scholars were James Kent (1763-1847), Chancellor of the New York State judicial system and the author of *Commentaries on American Law* (1826-1830), and Joseph Story (1779-1845), a colleague of Marshall on the Supreme Court (1811-1845), who published the *Commentaries on the Constitution of the United States* (1833).[186] Both commentators dealt with the fundamental issue facing Marshall, the basis of legal tenure in land in the United States, and both discussed *Johnson v. M'Intosh*. Like Marshall, the commentators were also anxious to demonstrate that the United States was, by way of England, a part of the European Christian legal order that shaped international law and relations, and that underlay the legitimate tenure of land in the United States. Both commentaries were reprinted regularly throughout the nineteenth century. Kent's "went through fourteen editions and found its way onto almost every American lawyer's bookshelf in the nineteenth century."[187] The *Commentaries* of Story,[188] "perhaps the most creative judge of his time," went through five editions in the nineteenth century.[189]

Kent opened his *Commentaries* with a forceful statement of the place of the United States in the civilized European Christian legal order. He wrote:

> When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom

186. JAMES KENT, COMMENTARIES ON AMERICAN LAW (John M. Gould ed., Boston, Little, Brown, and Company, 14th ed. 1896) (1833) [hereinafter "KENT, COMMENTARIES"]; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (Boston, Little, Brown, and Company, 5th ed. 1891)(1833) [hereinafter "STORY, COMMENTARIES"]; David W. Raack, *To Preserve the Best Fruits: The Legal Thought of Chancellor James Kent*, 33 AM. J. LEGAL HIST. 320-66 (1989); John H. Langbein, *Chancelor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547-94 (1993); Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377-424 (2009); Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of Statutory Interpretation*, 77 MD. L. REV. 712-73 (2018).

187. Daniel Hulsebosch, *Debating the Transformation of American Law: James Kent, Joseph Story, and the Legacy of the Revolution* 5 (N.Y. Univ. School of Law, Public Law & Legal Research Paper Series, Working Paper No. 08-44, 2008).

188. STORY, COMMENTARIES, *supra* note 186.

189. *Id*.

> had established among the civilized nations of Europe, as their public law.[190]

The Congress of the new country "professed obedience to that law" that "defines the rights and prescribes the duties of nations, in their intercourse with each other," that is "the law of nations . . . ."[191]

Kent did not discuss the origin of this legal system, pointing out that scholars have offered several opinions on this issue. One school of thought identified the system with the law of nations while others saw it "as a mere system of positive institutions, founded upon consent and usage . . . ."[192] He did not choose between these two positions but, instead, argued that he would not "adopt either of these theories as exclusively true" because the "most useful and practical part of the law of nations is, no doubt instituted on positive law, founded on usage, consent, and agreement" but should not be separated from "natural jurisprudence" and "right reason" either.[193] Furthermore, "the science of public law" should not be separated from "ethics" nor should it be asserted that "governments are not so strictly bound by the obligations of truth, justice, and humanity in relation to other powers as they are in the management of their own local concerns."[194]

According to Kent,

> [The]law of nations . . . is equally binding in every age, and upon all mankind. But the Christian nations of Europe, and their descendants on this side of the Atlantic, [have] by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government truths . . . which Christianity has communicated, and, above all, by the brighter light, the more certain truths . . . which Christianity has communicated . . . have established a law of nations peculiar to themselves.[195]

These factors have created a community of nations capable of "forming alliances and treaties with each other" that regulate international relations.[196]

To demonstrate the importance of the impact of Christianity on the development of the rules of international relations, Kent surveyed the limited experience of the Greeks and the Romans at creating such rules.[197] Kent then turned to the state of relations among the societies that emerged out of the ruins of the Roman Empire.[198] In those centuries, amidst the collapse of all orderly society, "the law of nations remained in a rude and most

---

190. KENT, COMMENTARIES, *supra* note 186, at I:1.
191. *Id.*
192. *Id.* at I:2.
193. *Id.*
194. *Id.* at I:2-3.
195. *Id.* at I:3.
196. *Id.* at I:3-4.
197. *Id.* at I:6-7.
198. *Id.* at I:7-8.

uncultivated state, down to the period of the 16th century" when the situation improved.[199]

During the Middle Ages, the "alliance of the great powers as one Christian community" gradually led to "the introduction of a better and more enlightened sense of right and justice among the governments of Europe."[200] To a great extent, this improvement was due to the efforts of the Church to control and to limit violence, replacing it with "a system of morals, which inculcated peace, moderation, and justice" that brought the contending powers of Christian Europe into a kind of "confederacy of the Christian nations" to regulate their relations.[201]

The flaw that Kent found in the medieval conception of international order, one that had serious consequences for the overseas expansion of Europe, was that it "became a general principle of belief and action, that it was not only a right, but a duty to reduce to obedience, for the sake of conversion, every people who professed a religious faith different from their own" so that "war upon infidels was, for many ages, a conspicuous part of European public law" but it was a "gross perversion of the doctrines and spirit of Christianity . . . ."[202]

This belief, that it was legal "to invade and subdue Mahometan and Pagan countries, continued very long to sway the minds of men" on into the early modern world.[203] Kent pointed out, however, that the revival of Roman law in universities provided a basis for developing "more correct and liberal views of the rights and duties of nations."[204] Above all, he pointed to the revival of commerce in the early modern world as an important element in the creation of a rational body of law in support of the expanding world of international trade.[205] This law was articulated in treaties, "conventions, and commercial associations" that Europeans made among themselves.[206] This reflected the Grotian conception of a world order created by the nations involved and not one directed by any central authority such as the papacy. [207] It required the "revival of commerce, and with it a sense of the value of order" to create the modern international legal order not "papal bulls, and the excommunication of the church" to do so.[208] Kent then praised Hugo Grotius as "the father of the law of nations" who imparted "light and security, to the intercourse of nations."[209]

---

199. *Id.* at I:9.
200. *Id.* at I:10.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at I:11.
205. *Id.*
206. *Id.* at I:12.
207. *Id.*
208. *Id.* at I:14.
209. *Id.* at I:15.

In Lecture 50 of the *Commentaries*, "Of the Law of Real Property," Kent turned to the specific issue with which Marshall had wrestled in *Johnson v. M'Intosh*. The law of real property, he wrote, is governed by rules of "a technical and very artificial system" that although "it has felt the influence of the free and commercial spirit of modern ages, it is still very much under the control of principles derived from the feudal policy."[210] The fundamental principle of this law is "that the king was the original proprietor of all the land in the kingdom, and the true and only source of title."[211] The United States accepted this principle "and applied it to our republican governments," from "local governments, or from the United States, or from that of the crown, or royal chartered governments established here prior to the revolution."[212] The consequence of this legal position is that "Indian title is reduced to mere occupancy."[213]

According to Kent, the basis of the European and American government's claims to possess lands in North America and "to dominion over the Indian tribes" has been largely discussed and explicitly asserted by American courts.[214] In *Johnson v. M'Intosh*, it was set forth "as an historical fact, that on the discovery of this continent by the nations of Europe, the discovery was considered to have given to the government by whose subjects or authority it was made . . . the sole right of acquiring the soil from the natives against all other European powers."[215] Each of these European nations "claimed the right to regulate for itself . . . the relation which was to subsist between the discoverer and the Indians."[216] In practice, the relation "necessarily impaired . . . the rights of the original inhabitants" because "the superior genius of the Europeans, founded on civilization and Christianity, and . . . their superiority in the means, and in the art of war" provided a basis for their "ascendancy" over the Indians.[217] The United States acquired this "ascendancy" from the British Empire after the American Revolution.[218]

One justification of the claim that discovery gave Europeans and Americans "a qualified dominion over the Indian tribes" was that if the land was left to the Indians, the country would remain "a wilderness" because their state of "relative condition," that is their level of development, "rendered them incapable of sustaining any other relation with the whites than that of dependence and

210. *Id.* at III:307.
211. *Id.* at III:377.
212. *Id.* at III:378.
213. *Id.* at III:308.
214. *Id.* at III:379.
215. *Id.* at III:379-80.
216. *Id.* at III:380.
217. *Id.* at III:309.
218. *Id.* at III:380.

pupilage."[219] In his opinion, it was not possible "to govern them as a distinct people, or to mix with them, and admit them to an intercommunity of privileges . . . ."[220] As a consequence, the only way to deal with the Indians would be to keep "them separate, subordinate, and dependent, with a guardian care thrown around them for their protection."[221] After all, the "weak and helpless condition in which we found the Indians," a sharp contrast to "the immeasurable superiority of their civilized neighbors," would not allow for any other solution.[222]

Kent pointed out that although the principle of discovery was originally employed to regulate relations among the competing European empires, the reality of the situation in America, the underdeveloped state of Indian society, converted "the discovery of the country into a conquest" and it was "too late" to undo the situation.[223] "The country has been colonized and settled, and is now held by that title. It is the law of the land, and no court of justice can permit the right to be disturbed by speculative reasonings on abstract rights."[224] Nevertheless, the lands of the Indians are "not to be taken from them, or disturbed, without their free consent, by fair purchase" or by "a just and necessary war."[225]

If, however, one wished to discuss on a broad basis Indian title to land, "the reasonableness" of the White acquisition of Indian lands

> might be strongly vindicated on broad principles of policy and justice, drawn from the right of discovery; from the sounder claim of agricultural settlers over tribes of hunters, and from the loose and frail, if not absurd title of wandering savages to an immense continent, evidently designed by Providence to be subdued and cultivated, and to become the residence of civilized nations.[226]

At this point, following a brief discussion of contemporary thought on this issue, Kent contrasted the situation of the indigenous population in North America with that found in Latin America. Following the work of Emer de Vattel, he pointed out that while "the conquest of the half civilized empires of Mexico and Peru was a palpable usurpation, and an act of atrocious injustice, the establishment of the French and English colonies in North America was entirely lawful" because the inhabitants were not even half civilized.[227] From Kent's position, the European conquest of North

---

219. KENT, COMMENTARIES, *supra* note 186, at III:380-81.
220. *Id.* at III:310.
221. *Id*.
222. *Id.* at III:3-4.
223. *Id.* at III:310.
224. *Id.* at III:310-11.
225. *Id.* at III:311-312.
226. *Id.* at III:312.
227. *Id.* at III:313; EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS

America was accomplished "with as little violence and aggression, on the part of the whites, in a national point of view, as were compatible with the fact of the entry of a race of civilized men into the territory of savages," especially since the invaders had more powerful weapons and better organization.[228] Kent admitted that "there were, at times, acts of fraud and violence" and other evil acts committed by the colonists, but these actions do not invalidate the acquisition of Indian lands.[229] Overall, the United States government has "pursued a steady system of pacific, just, and paternal policy towards the Indians," the goals of which included protecting "the Indians from wars with each other, from their own propensity to intemperance, from the frauds and injustice of the whites, and to impart to them some of the essential blessings of civilization . . . ."[230]

According to Kent, the result of this history of White-Indian relations since the sixteenth century is "the melancholy contrast between the original character of the Indians, when the Europeans first visited them, and their present condition. We found them a numerous, enterprising, and proud spirited race; and we now find them, a feeble and degraded remnant, rapidly hastening to annihilation."[231] He concluded with the pessimistic observation: "the Indians of this continent appear to be destined, at no very distant period of time, to disappear with those vast forests which once covered the country, and the existence of which seems essential to their own."[232]

Kent's position on land tenure was in line with Marshall's, although his *Commentaries*, like Marshall's decisions, show a certain melancholy sympathy for the decline and eventual annihilation of the Indian people. Such, however, is the fate of those who do not advance to the civilized level of existence. Kent assumed the inevitable end of tribal, hunter-gatherer societies in the steady advance of the settled agricultural and then commercial populations.[233] He was also quite aware that the original purpose of the principle of discovery was to regulate relations among the competing European empires, but the application of this principle had obvious consequences for the Indians as well.[234]

AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY (Béla Kapossy & Richard Whitmore eds., Indianapolis, Liberty Fund 2008) (1797).

228. *Id.* at III:313.

229. *Id*.

230. *Id.* at III:317.

231. *Id.* at III:399.

232. *Id.*

233. *Id* at III:387

234. *Id*. At III:380-81.

VIII. JOSEPH STORY

Joseph Story, Marshall's colleague on the Supreme Court, a well-known author of legal treatises and a noted novelist,[235] supported Marshall's position in *Johnson v. M'Intosh* not only on the Court but in his *Commentaries on the Constitution of the United States*. This remained in print for a century and went through several editions.[236] The first volume opened with the "History of the Colonies," the first chapter of which went directly to the fundamental issue in *Johnson v. M'Intosh*, the "Origin of the Title to Territory of the Colonies."[237] Story based this chapter on William Robertson's *History of America* and Marshall's *History of the Colonies Planted by the English on the Continent of North America*.[238] He asserted that the voyages of Columbus encouraged

> adventurous enterprises, the object of which was to found colonies, or to search for precious metals or to engage in trade with the people of the New World. The English moved quickly to engage in these adventures when Henry VII (1485-1509) commissioned John Cabot (c.1450-c.1500) to subdue and take possession of any lands unoccupied by any Christian Power, in the name and for the benefit of the British Crown.[239]

This voyage "is the origin of the British title to the territory composing these United States" and is founded "on the right of discovery," a theory which all European nations agreed "was a just and sufficient foundation on which to rest their respective claims to the American continent."[240] Although Story argued that discovery justified taking possession of the lands of non-Christians, he also recognized that the principle of discovery "was probably adopted by the European nations as a rule . . . by which to regulate their respective claims" in order to reduce, if not eliminate conflict among them overseas."[241]

Story recognized, however, "in respect to countries then inhabited by the natives, it is not easy to perceive how, in point of justice or humanity, or general conformity to the law of nature, it[s]

---

235. STORY, COMMENTARIES, *supra* note 186.

236. *Id.*

237. *Id.* at I:1-39. JOHN MARSHALL. HISTORY OF THE COLONIES PLANTED BY THE ENGLISH ON THE CONTINENT OF NORTH AMERICA, FROM THEIR SETTLEMENT, TO THE COMMENCEMENT OF THAT WAR WHICH TERMINATED IN THEIR INDEPENDENCE (1824); WILLIAM ROBERTSON, D.D., THE HISTORY OF AMERICA (1803).

238. *Id.* at I:4; R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985); GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970).

239. STORY, COMMENTARIES, *supra* note 186, at I:5.

240. *Id.* at I:6.

241. *Id.*

[seizure of their lands] can be successfully vindicated."[242] The law of nations, however, could have "no authority over the aborigines of America whether gathered into civilized communities or scattered in hunting tribes over the wilderness."[243] He argued that the indigenous population did have a "right, whatever it was, of occupation or use, [that] stood upon original principles deducible from the law of nature, and could not be justly narrowed or extinguished without their own free consent."[244] The Indians in fact, however, have lost their lands "by the superior force of conquest, or transferred by a voluntary cession."[245] Story did not believe, however, there was any point in discussing "the actual merits of the titles claimed by the respective parties upon principles of natural law."[246] Such a discussion would deal with many "nice and delicate topics" but would be more suitable "for a treatise on natural law" than with a treatise dealing with "the law of a single nation." In other words, Story wanted to focus on the realities of the British colonization of North America, not the theoretical basis for colonization. [247]

As far as Story was concerned, the European imperial nations had "little difficulty in reconciling themselves to the adoption of any principle which gave ample scope to their ambition" and therefore "employed little reasoning to support it."[248] The basis for their actions was obvious: the "Indians were a savage race, sunk in the depths of ignorance and heathenism."[249] Perhaps their "want of religion and just morals" would lead to their being "extirpated" or they might be "reclaimed from their errors."[250] In any event, the Indians "were bound to yield to the superior genius of Europe" and exchange their "wild and debasing habits for civilization and Christianity" if they wished to survive.[251]

At this point, Story introduced the role of the papacy in the work of conquest, observing that the "Papal authority, too, was brought in aid of these great designs . . . for the purpose of overthrowing heathenism, and propagating the Catholic religion."[252] As evidence of this, he pointed to Alexander VI's bull *Inter caetera* that, so he claimed "granted to the Crown of Castile the whole of the immense territory" that Columbus had discovered, or would "be discovered . . . as far as it was not then possessed by

242. *Id.*(alteration in original).
243. *Id.*
244. *Id.* at I:4.
245. *Id.* at I:5.
246. *Id.*
247. *Id.* at I:6-7.
248. *Id.* at I:7.
249. *Id.* at I:5.
250. *Id.*
251. *Id.* at I:7.
252. *Id.*

any Christian prince."[253] In presenting this information as he did, Story reversed the elements of the theory of discovery as usually presented. He placed the responsibility for European overseas expansion on the actions of European monarchs who then used the papacy to provide a legal rationale for the European conquest of the Americas.[254] In contrast, the Doctrine of Discovery places the responsibility on the papacy for developing the legal rationale for the conquest of the Americas and then authorizing secular rulers to implement it.[255] Story's version placed the conquest of the Americas in a Grotian framework whereby international law and relations are the product of the treaties and other legal documents that the participating produced to regulate their relations with one another instead of relying on the papacy to regulate such relations.[256]

Once the act of discovery became the established principle of access to America, each European government could exclude "all other persons [than their own subjects] from any right to acquire the soil by any grant whatsoever from the natives."[257] Furthermore, it "was deemed a right exclusively to the government in its sovereign capacity to extinguish the Indian title" to the land and then to "dispose of it according to its own good pleasure."[258] The result was to create "a peculiar relation between themselves and the aboriginal inhabitants" who retained a "right of occupancy, or use in the soil" but that right "was subordinate to the ultimate dominion of the discoverer."[259] At this point, Story turned to *Johnson v. M'Intosh* for a "summary of the historical confirmations adduced in support of these principles [of discovery], which is more clear and exact than has ever been in print."[260] What followed was a series of chapters dealing with the discovery and settlement of the early colonies.[261]

IX. CONCLUSION

John Marshall's decision in *Johnson v. M'Intosh* "set the standard and the baseline principle for how the United States would deal with American Indians and their lands, rights, and governments."[262] Almost 200 years later, this case is still "a very influential and important precedent around the world," especially

253. *Id*.
254. *Id.* at I:8-10 (citing *Johnson*, 21 U.S. at 574-77).
255. MILLER ET AL., *supra* note 1, at 9-15.
256. Bull, *supra* note 68, at 65, 71-75.
257. STORY, COMMENTARIES, *supra* note 186, at I:8 (alteration in original).
258. *Id*.
259. *Id*.
260. *Id*. (alteration in original).
261. *Id*. (citing Chief Justice Marshall, pp. 574-589 with some minor variations in language).
262. *The Doctrine of Discovery*, *supra* note 1, at 3-4.

in Canada, New Zealand, and Australia where it played an important role "in devising, and developing their laws, policies, and opinions regarding Indigenous peoples.[263] Specifically, this decision set the standard for determining the legitimacy of title to property acquired from indigenous peoples throughout much of the English-speaking world. The decision and its interpretation reached a wide audience of students, practicing lawyers, and judges through the numerous editions of the commentaries of Marshall's contemporaries James Kent and Joseph Story.[264]

Some legal historians have asserted that in *Johnson v. M'Intosh*, Marshall and those who followed in his tradition, based the legitimacy of title to land in the United States and other Anglophone nations on the Doctrine of Discovery. This Doctrine asserts that those European rulers whose subjects first reached a point on the shores of North America could claim possession of the land and domination of the indigenous population on the grounds that they were not Christians. [265]

These writers traced the origin of the Doctrine of Discovery to several papal bulls of the fourteenth and fifteenth centuries and have pointed to the use of language from these bulls in a variety of documents associated with the European conquest of the Americas.[266] In fact, however, it is clear that these writers have misunderstood and misused the papal texts to advance their argument. Marshall did briefly cite and quote elements of the papal literature, especially Alexander VI's *Inter Caetera*, but he did not base his position in *Johnson v. M'Intosh* on the papal teaching or on the theory that the Indians being non-Christians did not possess the same rights as Christians. [267] Furthermore, Marshall, Kent, and Story all agreed that the Indians' right to the lands they occupied would be recognized, not discussed and debated. It was a given. This was quite unlike the Spanish conquest of South America, which generated an extensive debate about the legitimacy and justice of the conquest involving theologians, philosophers, and lawyers.[268]

---

263. *Id.* at 4; For an interesting discussion of these issues in the contemporary legal order, see K. W., *What sovereignty means for America's Indian tribes*, ECONOMIST (July 16, 2018), www.economist.com/the-economist-explains/2018/07/16/what-sovereignty-means-for-americas-indian-tribes.

264. It might be interesting to examine the several editions of these commentaries to see of the later editions reflect any significant changes in the views of Kent and Story.

265. For a survey of recent work ,see:Kent McNeil, "The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies …", OSGOODE HALL LAW JOURNAL 53(2016): 699-728.

266. Muldoon, *supra* note 69, at 355-81 (2018).

267. MILLER ET AL., *SUPRA* NOTE 5.

268. The fundamental work on this theme is that of LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA (Dallas, TX, Southern Methodist University Press, 2002) (1949); for the text of the bull, see Lewis Hanke, *Pope Paul III and the American Indians,* 30 HARV. THEOLOGICAL

The North American lawyers focused on the legal relationship between Indians and White settlers who had actually settled in the United States in the early nineteenth century and demonstrated how White-Indian relations had developed since Columbus's first voyage.[269]

These writers were historical not prescriptive, by describing the specific situation that brought this case to the Supreme Court, rather than outlining what should have been or ought to be the relationship between the two peoples. International law for them therefore was positive law; the doctrines and principles were contained in the treaties and conventions that European states had constructed, and in longstanding customs and traditions to which they adhered, not in academic treatises.[270]

The decisions containing Marshall's opinion rested on two distinct but related premises. In the first place, he saw the issue in historical terms; the stadial theory of development that described how less developed societies gave way before the advance of the more developed societies.[271] In the second place, he wanted to demonstrate that the United States was a civilized nation and participated in the European international law regime that regulated relations among the European Christian states.[272]

Thus, the legal principles involved in the process of discovery that had been created by the European imperial nations and were linked to efforts to regulate relations among the warring nations of Europe throughout the seventeenth and eighteenth centuries were relevant to the American situation. It was in effect, settled law. According to Marshall, the Indians had lost their lands because they had not developed from a primitive hunter-gatherer way of life to a settled, agricultural existence.[273] In making this argument, he was placing the Indigenous peoples of North America within the stadial theory of development.

As the more advanced societies expanded, they encountered the less-developed societies. Needing more land to feed their growing populations, the advanced societies restricted the space that hunter-gatherer and pastoral societies required to feed their

---

REV. 65, 71-72 (1937).

269. Marshall did write about the medieval development of Christian relations with non-Christian peoples in the first volume of his LIFE OF WASHINGTON (1803), but this work played no role in *Johnson v. M'Intosh*.

270. *See e.g.,* Treaty of Paris (1763), Art. II, THE AVALON PROJECT, avalon.law.yale.edu/18th_century/paris763.asp (last accessed Apr. 10, 2020).

271. *See supra* pp. 26-27 (describing how Marshall applied the stadial theory to *Cherokee Nation*).

272. *See Johnson*, 21 U.S. at 587 (stating the United States accepts and maintains the discovery principles Europe has maintained over acquiring title to land).

273. In fact, of course that is exactly what the Cherokees were doing by admitting missionaries, taking up agriculture and settled life and becoming Christians.

smaller populations.[274] This process forced the less-developed societies to adapt to the superior settled way of life, to move on to more open land, or to die out as a people. In the course of the process of adaption and assimilation, the Indians would have to give up most or all of their traditional way of life. The stadial theory justified this process on the grounds that those who make the most productive use of land have the right to take it from those who are less productive when the need for more farmland arises.[275] This was the inevitable course of human history.

The more advanced societies, the civilized peoples with their superior technology and organizational skills, what these legal writers call their "genius," will overpower the less developed peoples.[276] In fact, however, unlike some other Indian tribes where "resistance to acculturation persisted," the Cherokees had had begun the process of "conscious acculturation . . . carried out by the leadership" so that they would appear to be developing as the stadial theory dictated.[277] In this process, the Indians discovered the value of the lands they occupied "and refused to surrender them."[278]

In the United States, according to Marshall, as a consequence of the American Revolution, the federal government acquired the claims of the English government with regard to the New World. Late fifteenth- and early sixteenth-century English kings laid claim to regulate European access to any lands discovered by their subjects who possessed royal commissions authorizing the acquisition of land not already subject to Christian rulers.[279] Such lands were surrendered to the king who then granted them to the explorers and settlers to be in held in soccage from him.[280] The king also claimed a monopoly of access of Europeans into any specific lands his subjects discovered.[281] Only subjects of the English king or aliens authorized by him could engage in trade with and purchase land from the inhabitants of such discovered regions.[282] The legitimacy of title for lands acquired from the Indians rested therefore in the king, not in individual purchases directly from the Indians.

Marshall argued that all the European nations engaged in overseas exploration and colonization accepted the principle that

---

274. Brewer, *supra* note 12, at 3-4; *Cherokee Nation*, 30 U.S. at 16.

275. Brewer, *supra* note 12, at 14-15; *Johnson*, 21 U.S. at 590-91.

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

277. NORGREN, *supra* note 1, at 78.

278. *Id.*

279. *Johnson*, 21 U.S. at 576-77.

280. FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES AND TERRITORIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, COMPILED AND EDITED BY FRANCIS NEWTON THORPE (1909)(referencing the Charter of Massachusetts Bay in 1629)

281. *Johnson*, 21 U.S. at 576-77.

282. *Id.* at 572-73.

discovery justified a monopoly of access to the land and people so discovered, and a monopoly of European access to such lands.[283] The purpose was to recognize the legitimacy of the claims of the various competing imperial states to access to specific lands and then to have jurisdiction over all Europeans who enter those lands. Legitimate title to lands acquired from the indigenous population could only be obtained from the European ruler who had a recognized monopoly of access to the land.[284]

The primary purpose of what is labeled the Doctrine of Discovery was not to justify seizing the lands of the Indians, but to reduce, if not eliminate, conflicts among the expanding European imperial powers by recognizing monopolies of access to specific regions of North America for the purpose of trade.[285] In this sense, the European imperial states and John Marshall were engaging in the same policy as Alexander VI had acted on when he issued *Inter caetera*.

For Marshall, in the American situation, his goal was to end conflict between the federal government and the states by attributing to the federal government jurisdiction with regard to the lands of Indians and therefore the source of title to lands acquired from Indians. Marshall's decisions in these cases provided another assertion of the superiority of the federal government over the states, one of his main themes.

There are two fundamental inter-related problems with the papal documents from the thirteenth and the fourteen centuries that the proponents of the Doctrine of Discovery rely on. In the first place, they were produced in the context of the longstanding conflict with the expanding Ottoman Empire, not with the European expansion into the Americas. By focusing on the Americas and applying language and concepts derived in the wars against the Ottoman Turks in isolation from the larger context of relations among nations within Europe and overseas, legal historians have misunderstood and misused the texts that they cite. In order to understand the documents, papal and royal, associated with overseas expansion in those centuries, it is important to see them against the background of the series of wars among the European states from the late fifteenth century until 1763, wars that involved European overseas possessions but in which they did not play a major role. The wars among the leading states within Europe led to the creation of the overseas empires, but this was not the original goal. As John Robert Seeley pointed out about the English imperial experience, we "seem, as it were, to have conquered and populated

283. *Id.*

284. *Id.* at 576-77.

285. In this, the European powers were emulating the papal goal in issuing *Inter Caetera*, assigning a monopoly of access to specific regions to the Spanish and the Portuguese in return for supporting missionary efforts in the assigned regions. The goal was to reduce conflict between the two kingdoms.

half the world in a fit of absence of mind."[286] It was after all, only after 1763, the end of the Seven Years War in Europe, the French and Indian War in North America, that the English government began to take a serious interest in the North American colonies.

The documents that the proponents of the Doctrine of Discovery present to demonstrate that the papacy authorized the Christian seizure of the lands and persons of all non-Christians do not provide such authorization. They belong to a series of papal bulls designed to regulate relations between and among European Christian states. From the papal perspective, the intra-European conflicts were weakening the defense of Latin Christendom in the face of Ottoman expansion into eastern Europe, eventually as far as Prague and Vienna as late as 1683.[287] The popes saw in the voyages of exploration a means of uniting with the Christians of Asia in a last great crusade against the Ottomans. The European monarchs who initially authorized overseas voyages were not interested in colonization, but in trade with Asia by sea routes that would evade the Ottoman domination of the older land routes. Much of the silver acquired in the Americas went for paying "for luxuries from India and the East," the original goal of the early explorers and for financing Spanish political endeavors in Europe.[288] Silver the Spanish acquired in the Americas also went to support Habsburg military efforts in eastern Europe where Ottoman expansion was a direct threat to Habsburg lands.[289]

From the English perspective, beginning with Henry VII's charter to John Cabot, the goal of overseas voyages was trade with Asia, not colonization. English merchants were much more interested in finding a route to Asia through the Baltic and Russia than in colonizing the Americas.[290]

Seen from Rome, Madrid, and London, the Americas were the outer edge, the distant periphery, of Latin Christendom. The overseas ventures were designed to enrich and support European nations, the core of these empires.[291]

The principles articulated in the so-called Doctrine of Discovery were not, for the most part, contained in medieval papal documents. They were developed from the subsequent experience of European states overseas, although the language in which they were expressed sometimes came from the papal letters but misunderstood or misapplied. The basic concepts dealing with international law and relations were developed and applied in the

286. JOHN ROBERT SEELEY, THE EXPANSION OF ENGLAND 10 (1883).

287. TIM BLANNING, THE PURSUIT OF GLORY 543 (2008).

288. JOHN H. ELLIOT, SPAIN AND ITS WORLD (1990).

289. J.H. ELLIOT, SPAIN, EUROPE & THE WIDER WORLD 1500-1800 240-45 (NEW HAVEN: YALE UNIVERSITY PRESS, 2009)

290. DAVID BEERS QUINN, ENGLAND AND THE DISCOVERY OF AMERICA, 1481-1620 157 (1974).

291. ELLIOTT, *supra* note 288, at 18-25.

numerous treaties among the warring European states within Europe over the fifteenth to the eighteenth centuries. In effect, the law was based on the customary practices of the European nations involved and it was within that legal regime that John Marshall operated. What the creators of these documents shared with the papacy was a desire to regulate European international relations home and abroad to bring a peaceful international order to Christendom. In practice, however, to paraphrase a famous line attributed to Andrew Jackson, neither the pope nor Grotius nor John Marshall could enforce their conception of a just world order.[292]

292. In response to Marshall's holding in *Worcester*, Andrew Jackson responded, "John Marshall has made his decision; now let him enforce it." Laura Ellyn Smith, *"Now Let Him Enforce It": The Long History of the Imperial Presidency*, NAT'L COUNCIL ON PUBLIC HISTORY (Mar. 27 2017), ncph.org /history-at-work/now-let-him-enforce-it-the-long-history-of-the-imperial-presidency/.