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Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal

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The discovery doctrine is one of the baseline legal concepts that has worked to seriously disadvantage the land rights of indigenous nations in the United States because it asserts, as one of its definitions, that the "discovering" European nations and their successor states, gained legal title to Indian lands in North America. The author argues, using comparative colonial and early American treaty, legislative, and other historical data, that this definition is a legal fiction. In historical reality, discovery was merely an exclusive and preemptive right that vested in the discovering state the right of first purchase.

"Again, were we to inquire by what law or authority you set up a claim [to our land], I answer, none! Your laws extend not into our country, nor ever did. You talk of the law of nature and the law of nations, and they are both against you."[1]

Ownership of land was, of course, the basic question at issue between Indians and Europeans in North America, as it was between the Europeans who contended with each other for possession. There was a fundamental difference in these two contests, however. The Europeans agreed on the conditions and prerogatives of ownership, and fought over the right to exercise them.

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1. Excerpted from a speech by Corn Tassel, an elder Cherokee leader, delivered to the United States commissioners who sought a peace treaty with the Cherokee in 1785, *in* NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-1992, at 122-23 (Peter Nabokov ed., 1991).

> The Indians not only opposed the Europeans' efforts, they denied utterly the validity of the underlying concepts.[2]

INTRODUCTION

The European doctrine of discovery principle, recognized as recently as 1986 by a federal district court as "a legal fiction,"[3] nevertheless remains one of the most entrenched and baffling legal doctrines undergirding federal Indian policy and law. Its continuing legal and perceptual force perpetuates a second class national status for tribal nations and relegates individual Indians to a second class citizenship status with regards to their incomplete property rights. This doctrine holds, under its most widely understood and debilitating definition, that European explorers' "discovery" of land in the Americas gave the discovering European nation—and the United States as successor—absolute legal title and ownership of American soil, reducing Indian tribes to being mere tenants with a lesser beneficial interest in their aboriginal homelands.

Although this bizarre doctrine has come under increasing and well-deserved scrutiny by indigenous[4] and non-indigenous[5] scholars and commentators, the discovery principle, along with the doctrine of plenary power[6] and the trust principle,[7] represents one of the essential

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2. DOROTHY V. JONES, LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA 18 (1982).

3. *See* Oneida Indian Nation v. State, 649 F. Supp. 420, 424 (N.D.N.Y. 1986).

4. *See* Vine Deloria's co-authored study, *American Indians, American Justice* 2-6 (1983); FRANKE WILMER, THE INDIGENOUS VOICE IN WORLD POLITICS 1 (Francis A. Beer & Ted Robert Gurr eds., 1993) (quoting Robert T. Coulter, Indian Law Resource Center Director); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 99, 201 (1990); David E. Wilkins, Johnson v. M'Intosh *Revisited: Through the Eyes of* Mitchel v. United States, 19 AM. INDIAN L. REV. 159, 159-81 (1994).

5. *See* Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Revisited*, 31 HASTINGS L. J. 122 (1980); Milner S. Ball, *Constitution, Court, Indian Tribes*, AM. B. FOUND. RES. J. 1, 24-26 (1987).

6. Complete in all aspects or essentials. However, in federal Indian policy and law the term plenary has three distinct meanings: 1) exclusive—Congress, under the Commerce Clause, is vested with sole authority to regulate the federal government's affairs with tribes; b) preemptive—Congress may enact legislation which effectively precludes state government's acting in Indian related matters; c) unlimited or absolute—Congress is held to have virtually boundless authority and jurisdiction over Indian tribes, their lands, and their resources.

7. The trust doctrine, also known as the trust relationship, has historical roots in several sources: in treaties and agreements with tribes; in the international law doctrine of trus-

paradigmatic legs on which is constructed the federal government's allegedly superior political and territorial standing vis-à-vis indigenous nations.[8] Like these other important contemporary and equally problematic[9] legal rules, discovery has more than one definition. When it is defined as conquest or as benevolent paternalism, it belittles the autonomy of tribes and leaves them in a relatively powerless political and economic position vis-à-vis the federal government. It deprives tribal nations, even as they approach the twenty-first century, of full legal ownership of lands they have inhabited since time immemorial. However, and to use Chief Justice John Marshall's phrase, when we view the "actual state of things"[10] that developed during the colonial and early American period, discovery is understood as doing nothing more than granting an exclusive and preemptive right to the discovering nation. The exclusive right they gained was simply to be the first purchaser of Indian land should the tribe agree to sell any of its territory. It is this "actual state of affairs" this Article attempts to recall.

DISCOVERY AS CONQUEST

In its most brazen and negative sense—discovery as a legal weapon for a colonial juggernaut—as shown in *Tee-Hit-Ton v. United States*,[11] the discovery principle is used to deny utterly that the aboriginal title of indigenous nations is a legal title that is compensable under the Constitution's Fifth Amendment if that title is taken by the United States. In *Tee-Hit-Ton*, the Supreme Court ruled that "Indian occupation of land

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teeship; and in constitutional clauses, executive orders, and statutory case law. Broadly, this doctrine entails the unique legal and moral duty of the federal government to assist Indian tribes in the protection of their lands, resources, and cultural heritage. The federal government, many courts have maintained, is to be held to the highest standards of good faith and honesty in its dealings with Indian peoples.

8. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); New Mexico *ex rel.* Reynolds v. AaModt, 618 F. Supp. 993 (D.N.M. 1985); Bear v. United States, 611 F. Supp. 589 (D. Neb. 1985); Oneida Indian Nation v. State, 649 F. Supp. 420 (N.D.N.Y. 1986); Oneida Indian Nation v. New York, 860 F.2d 1145 (2d Cir. 1988); Alabama-Coushatta Tribe v. United States, 1996 U.S. Claims LEXIS 128 (Fed. Cl. July 22, 1996). State courts have also grappled with the doctrine: *see, In re* Wilson, 634 P.2d 363 (Cal. 1981); *In re* Rights to Use Water in Big Horn River System, 753 P.2d 76 (1988); State v. Elliott, 616 A.2d 210 (Vt. 1992).

9. *See* David Wilkins, *The U.S. Supreme Court's Explication of "Federal Plenary Power:" An Analysis of Case Law Affecting Tribal Sovereignty, 1886-1914*, 18 AM. INDIAN Q. 349, 349-68 (1994); David Wilkins, *Convoluted Essence: Indian Rights and the Federal Trust Doctrine*, 14 NATIVE AM. 24, 24-31 (1997).

10. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543 (1832).

11. 348 U.S. 272 (1955).

without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."[12] This conclusion is wholly without merit and represents the extreme application of the political interpretation of the discovery doctrine four hundred and fifty years after the fact.

The discovery principle, in this instance, is symbiotically linked with the equally problematic doctrine of conquest, another European-derived legal principle, which theoretically entails the acquisition of territory by a victorious state from a defeated state in warfare. The conquest doctrine has been utilized by European colonial powers to justify their territorial acquisition to much of Africa, parts of Asia, and portions of the Western hemisphere throughout the last half-millennium.

However, as Milner Ball showed in his analysis of *Johnson v. M'Intosh*,[13] "in the case of the Europeans and Indians, however, incorporation—the humanitarian rule after conquest—was impossible. The Indians had not been conquered, and they would not mingle."[14] While acknowledging that Marshall used some language in the *M'Intosh* opinion which can be construed to mean that the idea of conquest was applied to indigenous-European/American relations, Ball points to other more persuasive language employed by Marshall both in *M'Intosh* and in *Worcester v. Georgia*,[15] which showed that the conquest doctrine had to do with the way Europeans dealt with one another "as they attempted to assert and defend territorial claims."[16] Notwithstanding this, and the fact that the federal government disavowed use of the conquest doctrine when it chose to pursue a policy of purchasing Indian lands via treaties and agreements, some Justices have disputably drawn upon conquest as a basis upon which the federal government derives its title to Indian Country.

For example, Justice Reed described the American's alleged conquest of Indians in *Tee-Hit-Ton v. United States*:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in

12. *Id.* at 285.
13. 21 U.S. (8 Wheat.) 543 (1823).
14. Ball, *supra* note 5, at 27.
15. 31 U.S. (6 Pet.) 515 (1832).
16. Ball, *supra* note 5, at 28 n.132.

> return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[17]

This statement is one of the most glaring misrepresentations of fact ever uttered by a Supreme Court Justice. There is little in the historical record to corroborate Justice Reed's contention. Federal Indian policy and the history of treaty-making give ample evidence to the contrary. Article three of the 1787 Northwest Ordinance[18] was one of the first major congressional policy pronouncements which stated that good faith, justice, and humanity, not military conquest, were to be the underpinning political and moral principles guiding the federal government's dealing with tribal nations.

The Supreme Court also, early in the nation's history, disavowed the conquest doctrine as a method by which the federal government gained any territorial rights to land. As John Marshall stated in *Worcester v. Georgia*:[19]

> In this view perhaps our ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native Indians. But this course is believed to have been nowhere taken. A more conciliatory mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbours.[20]

In other words, treaty negotiation, not military coercion, was the primary basis on which United States Indian policy operated. This non-conquest view was upheld by the Supreme Court in *Mitchel v. United States*,[21] where Justice Baldwin declared that "[b]y thus holding treaties with these Indians, accepting of cessions from them with reservations, and establishing boundaries with them, the king [of England] waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve . . . ."[22]

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17. Tee-Hit-Ton v. United States, 348 U.S. 272, 289-90 (1955).
18. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.
19. 31 U.S. (6 Pet.) 515 (1832).
20. *Id.* at 579-80.
21. 34 U.S. (9 Pet.) 711 (1835).
22. *Id.* at 749.

The United States, said Baldwin, could not assume the right of conquest because it had renounced such a policy when it chose to continue the treaty relationship with tribes that Great Britain, Spain, and France had followed.[23]

DISCOVERY AS BENEVOLENT PATERNALISM

Conversely, *Cherokee Nation v. Georgia*[24] crafted a definition of discovery as benevolent paternalism. In this application, which some have likened to the federal trust doctrine, it is posited that indigenous nations are ward-like entities incompetent to fully manage their own territorial affairs. Such tasks of land management, consolidation, and even sales, are to be left to the federal "guardian," which is empowered to act on behalf of the tribal wards because of their alleged technical and cultural incapacities.

Although it can be forcefully argued that the so-called guardian-ward relationship is not synonymous with the more commonly asserted trustee-beneficiary relationship, there is one crucial element both descriptions share; according to much contemporary federal court precedent, tribal nations do not possess full legal title[25] to their territory but have merely a possessory or occupancy interest. Generally, the Indian occupancy or possessory right, whether recognized or established by aboriginal possession, treaty, congressional act, executive order, purchase, or by action of some other sovereign, is held to involve an exclusive right of occupancy but only rarely involves the ultimate fee to the land.[26]

The federal government is presumed, under contemporary judicial interpretation, because of the discovery principle, to hold the ultimate fee subject to the Indian right of occupancy. Although federal case law vacillates on the precise content of the Indian possessory title, with some opinions holding that it is a "mere" right of occupancy, while others refer to it as a "sacred" right of occupancy, there is a general consensus that

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23. *See id.* at 754.

24. 30 U.S. (5 Pet.) 1 (1831).

25. Also known as fee-simple ownership, which is an estate in land of which the inheritor has unqualified ownership and sole power of disposition of a parcel of land.

26. Two exceptions here would be the various Pueblo peoples who hold fee simple title to their lands under grants from the Spanish and Mexican governments (it was later placed under trust by the federal government); and the Eastern Band of Cherokee of North Carolina who purchased land with individual funds that were at first held under single title, next by a private trustee, then by the Band itself when it incorporated, and finally by the federal government when it was asked by the Cherokee to place the land under federal trust status.

while Indian title is an exclusive right, it does not involve an ultimate fee to the land.[27] Until such time as the federal government grants the actual fee-title to a tribe or individual Indian, the Indian's title, it is said by those who support this perspective, cannot be sold without explicit authorization by the federal government.

DISCOVERY AS AN EXCLUSIVE & PREEMPTIVE RIGHT OF FIRST PURCHASE

Notwithstanding these previous definitions which have come to form the dominant paradigm on Indian title vis-à-vis federal title that has arisen over the last one hundred years, a critical reading of European and early American land policies, the literal language of European and early American treaties, United States congressional directives, and specific comments from American officials vividly shows that the doctrine of discovery was merely an exclusive preemptive rule that limited the rights of the discoverers or their successors and entailed no limitation on the preexisting land title of tribes.

Ownership of the North American continent rested, quite evidently, in the hands of the indigenous peoples as it always had. And contrary to the later and now prevailing assumptions about the "ultimate fee" being placed in the hands of the discovering European nation-state or the United States as successor, the historical record shows that legal ownership of what became known as the United States resided fully in the hands of tribal nations, and not in the United States, which eventually succeeded each of the other European sovereigns who had been jockeying for control of North America. Indian tribes retained complete ownership of their respective territories until such time as they formally ceded their claims to land in a consensual treaty arrangement with one of the competing European nations or, later, with the Americans.

Although the United States Supreme Court in *Johnson v. M'Intosh* in 1823, would articulate a definition of discovery which allegedly vested a superior legal title in the United States, this Article argues that such a characterization directly clashes with the tribal understanding of their rights to land. Moreover, it runs contrary to the practice and perspectives of the previous European sovereigns and later of the views of the political and judicial branches of the federal government. Before and after *M'Intosh*, the premise was that Indian Country was just that, Indian Country, with title resting in the particular tribes inhabiting a given territory.

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27. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 293 (1972).

Finally, this Article argues that because the political branches are constitutionally charged with establishing and maintaining the treaty relationship and overseeing federal Indian policy, it is time for an important and long overdue correction to be issued. It is time for the discovery principle, when defined as conquest, and benevolent paternalism to be explicitly disavowed by the federal government.

INDIGENOUS LAND TITLE: AS RECOGNIZED BY EUROPEAN POWERS

Of the various European nation-states which colonized North America, the three with the most lasting influence upon tribes and federal Indian policy were Spain, France, and Great Britain. Without elaborating in great detail about the respective Indian policies of each of these imperial powers, since these have been chronicled sufficiently elsewhere,[28] suffice it to say that each of these European powers crafted its Indian policy based on its own unique mix of religious, cultural, economic, and political factors. It is equally accurate, and just as compelling, to note that "Indian cooperation was the prime requisite for European penetration and colonization of the North American continent."[29]

This is not to say that the competing European powers always sought out the cooperation of indigenous peoples, or that the level of violence was not high. It certainly was. It is really an acknowledgement

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28. For Spanish policy see generally JACK D. FORBES, APACHE, NAVAJO, AND SPANIARD (1960); LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA (1949); EDWARD H. SPICER, CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960 (1962); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990). For French policy see JOHN H. KENNEDY, JESUIT AND SAVAGE IN NEW FRANCE (1950); DENYS DELÂGE, BITTER FEAST: AMERINDIANS AND EUROPEANS IN NORTHEASTERN NORTH AMERICA, 1600-64 (Jane Brierley trans., 1993); Mason Wade, *French Indian Policies*, *in* 4 HISTORY OF INDIAN-WHITE RELATIONS 20-28 (Wilcomb E. Washburn ed., 1988). For Great Britain's Indian policy see WILBUR R. JACOBS, DISPOSSESSING THE AMERICAN INDIAN: INDIANS AND WHITES ON THE COLONIAL FRONTIER (1972); FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST (1975); *see also* EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 20 vol's projected (Alden T. Vaughan ed., 1979 forward) which is an excellent compilation not only of British and early American treaties, but which also contain a number of Dutch treaties with northeastern tribes.

29. ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE, 1600-1800, at 20 (1997) (quoting FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE: THE COVENANT CHAIN CONFEDERATION OF INDIAN TRIBES WITH ENGLISH COLONIES FROM ITS BEGINNING TO THE LANCASTER TREATY OF 1744 (1984)).

that had tribes been unwilling and unable to negotiate a plethora of diplomatic arrangements with the various intruding competitors, the amount of violence would have been much worse, and the important and extant treaty legacy of each of these states with tribal nations would not have evolved to the degree it did.

As Williams shows in his recent study,

> [i]n the seventeenth- and eighteenth-century Encounter era, European colonists often found themselves outnumbered and outflanked with a bare foothold on the North American continent. During much of this period, whites in their small colonial settlements were not the dominant power on the continent. They soon learned that their survival, flourishing, and expansion could be better secured through cooperative relationships with surrounding Indian tribes rather than through wars and conflict.[30]

SPANISH RECOGNITION OF INDIAN TITLE

Francisco de Vitoria, a prominent Spanish theologian, was asked in the 1530s by his Catholic monarch, the King of Spain, to address what the rights of the Spanish were in the New World and, by extension, what rights, if any, the indigenous peoples retained in the face of Spanish colonialism. Spanish administrators had already introduced and were reaping the political and economic benefits of destructive policies like the requerimiento (a formal document of conquest), the encomienda system (a policy of enslavement of indigenous people—encomienda—assigned to the enslaver—the encomendero), and the related repartimiento (a system of wage assessments the Spanish Crown levied on Indian communities).[31]

When Vitoria delivered his lecture in 1532 entitled *On the Indians Lately Discovered*, this confirmed not only that the indigenous peoples possessed natural rights, but also that as free people they were the "true owners" of the land they inhabited. The doctrine of discovery, in other words, which had been used by Spanish explorers as justification—with the Pope's blessing—for denying the Indians' aboriginal claims to their

30. WILLIAMS, *supra* note 29, at 20-21. *See also* Dorothy Jones, *British Colonial Indian Treaties*, *in* 4 HISTORY OF INDIAN-WHITE RELATIONS 185-94 (Wilcomb E. Washburn ed., 1988).

31. *See* Charles Gibson, *Spanish Indian Policies*, *in* 4 HISTORY OF INDIAN-WHITE RELATIONS 96-102 (Wilcomb E. Washburn ed., 1988).

lands, was jettisoned as a basis on which the Spanish thereafter could claim legal title to inhabited Indian land.

Victoria's lectures were not entirely a pro-Indian manifesto, however. He also asserted that Indians also had duties under the Law of Nations, including allowing the Spanish the right to travel through their lands and to trade with them.[32] But for purposes of this Article, it was Victoria's comments on the discovery doctrine which merit attention. Since Indians owned the land, the Spanish Crown could not claim title through discovery because title by discovery was valid only where property was without ownership. In the absence of a just war, only the voluntary consent of the Indians could justify the confiscation of Indian land.[33]

The most practical manner, at least in North America, by which the Spanish and other European nations proceeded to secure the goodwill and consent of tribes for the establishment of peace and friendship, trade, military alliance, the delineation of territorial boundaries, land cessions, and to secure their foothold on the frontier against other European competitors, was through the negotiation of treaties. And as Jones and Williams show in their works, the majority of these treaty arrangements—regardless of the European nation doing the negotiating—were steeped in indigenous understandings of diplomacy:

> The protocols and ceremonies of this indigenous North American language of diplomacy were rarely European, because it was a language grounded in indigenous North American visions of law and peace between different peoples. The hierarchical, feudal symbols of seventeenth-and eighteenth-century European diplomacy simply did not translate well on the North American colonial frontier.[34]

Spain, for example, negotiated a multitude of treaties with southeastern (Choctaw, Creek, and Seminole) and southwestern (Navajo and Apache) tribal nations from the early 1700s through the first part of the nineteenth century. The Navajo signed four treaties with the Spanish, from 1706 to 1819, and six with the Mexican government, from 1822 to 1844. The primary purpose of these diplomatic arrangements were peace and friendship, trade, military alliance, exchange of prisoners, and

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32. *See* WILLIAMS, *supra* note 4, at 101-02.

33. *See* VINE DELORIA, JR., & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 2-3 (1983); WILLIAMS, *supra* note 4, at 96-108.

34. WILLIAMS, *supra* note 29, at 31.

recognizing the territorial boundaries of the indigenous nations.[35] There was, in fact, in these negotiations no recognition of Spanish proprietorship (land ownership) over Indian lands, though the Crown did claim sovereignty or dominion (jurisdiction or control) vis-à-vis other European nations and sometimes over indigenous peoples as well. A claim of sovereignty, however, does not equate with a claim of ownership.

A treaty negotiated on May 31 and June 1, 1784, between Spain and the Talapuchy (Seminole), Natchez, and Chickasaws verifies this. The preamble stated that the parties desired

> unanimously to obliterate the remembrance of the evils caused by the last war, and to make all the subjects of his Catholic Majesty enjoy the fruits of peace, to conclude and cement, on the most solid foundations, the friendship and good union which the Spanish nations proffers to the Talapuchy tribes . . . .[36]

Contained within the first few articles were the major points of the treaty: 1) maintain an "inviolable peace and fidelity," 2) encourage "commerce permanent and unalterable," and 3) establish a firm military alliance, with the Talapuchy agreeing to arrest any person who entered their country "with the insidious idea of inducing us [the Talapuchy] to take up arms" against the King of Spain. The concluding provision, article thirteen, dealt specifically with Indian title, and the Spanish negotiators unequivocally acknowledged the Indians territorial rights:

> As the generous mind of his Catholic Majesty does not exact from the nations of Indians any lands to form establishments, to the prejudice of the right of those who enjoy them, in consequence, and with a knowledge of his paternal love towards his beloved nations, we promise, in his royal name, the security and guarantee of those which they actually hold, according to the right of property with which they possess them, on condition that they are comprehended within the lines and limits of his Catholic Majesty, our sovereign.[37]

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35. *See* DAVID E. WILKINS, DINÉ BIBEEHAZ'ÁANII: A HANDBOOK OF NAVAJO GOVERNMENT 11 (1987).

36. 1 DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES, 13TH CONGRESS, AMERICAN STATE PAPERS 278 (Washington, Gales & Seaton 1832) [hereinafter AMERICAN STATE PAPERS].

37. *Id.* at 279.

With the exception of the ubiquitous paternalistic language where the Indians were asked to acknowledge the sovereignty of the Spanish King, this article evidences the Spanish recognition of full indigenous ownership of their lands.

The Spanish Crown in 1790 negotiated a treaty of friendship with the Chickasaw and Choctaw in which the three nations mutually promised to "love one another reciprocally" and to act as staunch allies should any other party attempt to interfere in their relationship. This treaty also contained provisions demarcating the boundaries of the Spanish Crown in the Floridas and Louisiana and the two tribes' territory. Article four stated that "the Spanish nation declares and acknowledges that all the lands to the east of the said dividing line of the 2d article belong lawfully and indisputably to the Chickasaw and Choctaw nations, promising to support them therein with all their power."[38]

FRENCH RECOGNITION OF INDIAN TITLE

France's policy towards tribal nations and their lands differed substantively from those of both Spain and Great Britain. In 1897 Frances Parkman gave a pithy, if generalized, summation of the three competitors' views toward Indian tribes: "Spanish civilization crushed the Indian; English civilization scorned and neglected him; French civilization embraced and cherished him."[39] On the whole, this assessment is largely accurate according to most commentators, particularly as it relates to the French willingness to closely interact with Indian peoples. As Wade described it: "The French, with their lack of racial prejudice, were able to achieve a much closer relationship with the Indians than any other European colonists in North America."[40]

The French were active in North America from the time of Jacques Cartier's travels in the Northeast in 1534 to their defeat at the hands of the English in the French and Indian War that ended in 1763. In the Treaty of Paris, which contained the terms of the war's cessation, French Canada and lands east of the Mississippi were ceded to Great Britain.[41]

French fur traders, Jesuit missionaries, and soldiers, who probably never totaled more than 70,000 as late as 1759, inhabited the vast area

38. *Id.* at 280.

39. Wade, *supra* note 28, at 20.

40. *Id.*

41. *See* Walter Nugent, *Comparing Wests and Frontiers, in* THE OXFORD HISTORY OF THE AMERICAN WEST 817 (Clyde A. Milner, II, et al. eds., 1994).

from Quebec to the Great Lakes and south to New Orleans, Louisiana. In part because of their small numbers, but more by concerted governmental policy and their emphasis on trade rather than permanent settlement, the French tended to get along well with most tribes. A major payoff of this generally peaceful coexistence was that there were few contentious encounters over land. As Cyrus Thomas noted in his analysis of French policy towards Indian lands: "A somewhat thorough examination of the documents and histories relating to French dominion in Canada and Louisiana fails to reveal any settled or regularly defined policy in regard to the extinguishment of the Indian title to land."[42]

This is evident, on a local level, in one land transaction that took place between a Frenchman and a married French couple. The purchaser of the French couple's deeded property was advised that the deed was valid unless the Indians—the original owners—decided to retake the property. A caveat such as this would most likely not have been found in land exchanges among the English.[43]

The French, throughout the territory they explored, trapped, and sparsely settled, apparently made no recorded efforts to claim Indian land based on the doctrine of discovery. In their treaty negotiations, they, like the Spanish, usually encouraged the signatory tribes to refer to them as their "sovereign," and tried, unsuccessfully, to place the tribes in a subject status. They were desperately in need of the tribe's aid as trade, political, and military allies in their economic wars—most notably the fur trade—against their primary European competitors, the British, and usually did not insist on maintaining the false belief that tribes were their subjects. These circumstances, in fact, compelled the French in the late 1500s and early 1600s into a number of unrecorded trade and military pacts with the tribes of Northeastern North America (the Abenaki, Micmac, Nipissing, Huron, Montagnais, Maliseet, Passamaquoddy, and Algonquian) against the powerful Iroquois Confederacy whose tribes traded first with the Dutch and later with the English from their territory in Northern New York.[44]

By the 1660s, the Iroquois, although weakened by diseases, had become the dominant indigenous peoples in the Northeast and had

42. Cyrus Thomas, Introduction, *in Indian Land Cessions in the United States*, EIGHTEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION, 1896-97, pt. 2, 545 (Charles C. Royce comp., 1899).

43. *See* Jay Gitlin, *Empires of Trade, Hinterlands of Settlement*, *in* THE OXFORD HISTORY OF THE AMERICAN WEST 108 (Clyde Milner, II, et al. eds., 1994).

44. *See* DELÂGE, *supra* note 28, at 95.

vanquished the Huron, Petun, Neutral, and Erie Nations. They had also driven the Algonquian-speaking nations out of the eastern Great Lakes, the Michigan Peninsula, and the Ohio Valley.[45] The extant treaty record between the French and indigenous nations is, unfortunately, quite slight.[46] A majority of the early French and indigenous alliances were conducted in the traditional manner. That is to say, these delicate multicultural negotiations were usually prolonged conferences where the leaders of both parties discussed, in great detail and at great length, the key points, exchanged presents and other items, and participated in tribally-appropriate cultural ceremonies to informally and yet profoundly seal the arrangement.

Fortunately, however, a few treaties were formally recorded in French and later translated into English. On December 13, 1665, Governor Chevalier Seigneur de Tracy and others, representing France, signed a treaty of peace with leaders of several member nations of the Iroquois Confederacy (Onondaga, Cayuga, Seneca, and Oneida). The treaty was negotiated at Quebec. None of the treaty's provisions involved any French claims to Indian lands. Its primary purpose was the renewing of the friendship between the Iroquois and the French in the wake of a battle in which the Iroquois had killed a number of French citizens. It also contained a provision where the Iroquois promised not to harass or make war on France's allies—the Hurons and Algonquians. Other provisions focused on an exchange of prisoners (article 3), the Iroquois requesting two Jesuit missionaries to live among them (article 4), the French securing the right to hunt and fish in Indian country (article 5), and the Iroquois agreeing to send two of their prominent families to live among the French "in order to render the desired union of the Iroquois and French Nations the stronger and more stable . . . ." (article 6).[47]

In an attached note entitled *Ratification by the Senecas of the preceding treaty*,[48] it was stated that the French had "discovered their

45. *See* Neal Salisbury, *Indian-White Relations in North America Before 1776*, *in* ENCYCLOPEDIA OF NORTH AMERICAN INDIANS 286 (Frederick E. Hoxie ed., 1996).

46. There is evidence that the French negotiated written treaties with tribes in 1622, 1653, 1665, and 1701. For reference to several of these, see the index of THE JESUIT RELATIONS AND ALLIED DOCUMENTS: TRAVELS AND EXPLORATIONS OF THE JESUIT MISSIONARIES IN NEW FRANCE, 1610-1791, 73 vols. (Reuben Gold Thwaites ed. & trans., 1896-1901). For a verbatim transcript of a treaty between the French and the Iroquois, see 3 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 121-25 (E.B. O'Callaghan ed., 1853) [hereinafter DOCUMENTS]. *See also* 9 DOCUMENTS at 44-47 (providing for the records of several other treaties with the Iroquois (1853-1855)).

47. 3 DOCUMENTS, *supra* note 46, at 121-25.

48. *See id.* at 125.

Country" and that the Senecas were to be considered "faithful subjects."[49] But this was immediately counterbalanced by the statement that "it might please his Majesty to continue it [their lands] to them."[50] In other words, the French wanted the Indians to consider themselves French subjects for alliance purposes, but knew that any attempt to claim title to Indian lands would have been met with disbelieving tribal ears and fierce resistance.[51]

Some years later in 1688, the Onondaga, Cayuga, and Oneida consented to declare their neutrality in the latest war that had erupted between the French and the English. This "declaration of neutrality" contains impressive language describing these tribal nations' title to their lands. To show their willingness to maintain the peace, these nations stressed that "they held their country directly of God, and had never been conquered in war, neither by the French nor the English, and that their intention was only to observe a perfect neutrality . . . ."[52]

BRITISH RECOGNITION OF INDIAN TITLE

We close our discussion of the colonial era, appropriately, with a brief analysis of the Indian policies of Great Britain, the Mother Country from which the American colonies grew and would later revolt against, and in whose legal, political, and cultural traditions the Americans largely followed. Unlike the French, the British and her American colonies were more intent on permanent settlement in North America than in simple trade and political alliances with the tribes. Commerce, of course, played a crucial role in tribal/British affairs, but it was intimately connected to the colonization goals of the English.

While there was a measure of intermixture between tribes and the British, particularly insofar as their diplomatic affairs evolved, the broad goal of the British was the replacement of the tribes on their land by Whites who always seemed to be clamoring for more territory to meet the voracious land appetite of their ever increasing human population.[53] Such a goal, however, was not easily realized, and British policy towards tribal nations evolved in unpredictable and ad hoc ways over a two hundred-year period.

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49. *Id.*
50. *Id.*
51. *See id.* at 125.
52. *Id.*; *see also* 9 DOCUMENTS, *supra* note 46, at 384-85 (1855).
53. *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, at 6 (1962).

The one aspect of British Indian policy that was somewhat predictable was that it "allowed no special place for the American Indian, who was regarded as a kind of nonperson."[54] Notwithstanding this ethnocentric perspective, as Dorothy Jones points out in her article, *British Colonial Indian Treaties*,[55] of the 175 treaties negotiated between Britain and the British colonies with Indian tribes from 1607 (with the Powhatan Confederacy of Virginia) to a treaty in 1775 (between the Iroquois of Ohio, the Shawnee, and the Delaware and the Virginia colony), when the British and the tribes met on the frontier in treaty negotiations, a "new kind of diplomacy took shape." This was a diplomacy "that developed its own protocols and ceremonies, and these were rarely European."[56]

These treaties generally centered on the establishment of peace and friendship, alliance, trade, return of captives or exchange of hostages, boundary establishment or revision, or land cessions. The establishment of peace and alliance or the negotiation of military or trade alliances, however, were by far the most common reasons the British had for negotiating treaties with tribes. This was especially the case from 1700 to 1763 when the French and Spanish still had designs on North America. Those treaties devoted to Indian land cessions confirmed the reality that the negotiating tribes were the true owners of the soil. The British and the colonists' "purchase" of Indian territory via treaties or deeds was a clear acknowledgement that the doctrine of discovery was not a limitation of Indian land rights but was simply a constraining device governing inter-European claims in North America.

For example, in a peace treaty between Governor Richard Nicolls of New York and the Esopus Indians, dated October 3, 1665, there is a provision in which the tribe ceded a tract of land to the Governor in exchange for blankets, powder, and other implements. Article five stated that

> the said Sachems and their Subjects now present do for and in the names of themselves and their heirs forever, give, Grant, alienate and confirme all their Right and Interest, Claime or demand to a certaine Parcell of Land, . . . to bee given, granted and confirmed unto the said Richard Nicolls . . . to hold and Enjoy the same as his free Land and Possession against any Clayme

54. Wilbur R. Jacobs, *British Indian Policies to 1783*, *in* 4 HISTORY OF INDIAN-WHITE RELATIONS 5 (Wilcomb E. Washburn ed., 1988).

55. *See id.* at 185-94.

56. *Id.* at 185.

> hereafter to bee made by the said Sachems or their Subjects . . . .[57]

A multitude of troubles, however, marred the smooth transfer of Indian land title to the English. This was largely the result of the chaotic mix of English economic, moral, and political motives, conflicting policies of different colonial governments, and the active international competition the British were always cognizant of from Spain and France. The fact that individual colonists, land speculating companies, colonial governments, and the actions of the Crown herself rarely had common interests or attitudes about the tribes only served to complicate matters.

With chaos reigning supreme, the British government decided it was time to impose more structure on Indian affairs by centralizing Indian policy in the hands of the Crown. Furthermore, tribes had been consistent in their complaints to British and colonial political figures about the unmasked pressures they had been enduring regarding their lands. Thus, when Iroquois leaders met the colonial delegates at the Albany Conference in June 1754, they candidly stated their grievances. While the sale of liquor was troublesome to the Iroquois Confederacy, of greatest concern was the fact that their land was being taken by unscrupulous means. "We understand that there are writings for all our lands, so that we shall have none left but the very spot we live upon and hardly that . . . ."[58]

The Albany delegates' response was a structured plan written by Benjamin Franklin but heavily influenced by the Iroquois Confederacy's system of government. It called for the uniting of the colonies under a general government, with a President General and Grand Council, which would manage the affairs of the United States in matters of defense and commerce with the Indians. The plan, however, was premature and failed because the colonial assemblies were not yet prepared to surrender a measure of their sovereignty to establish a central government.[59]

BRITAIN CENTRALIZES CONTROL OF INDIAN POLICY

It was clear to British officials that there was a pressing need for more centralized authority vis-à-vis Indian tribes if the tribes were to

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57. VII EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 (Alden T. Vaughan ed., 1985); NEW YORK AND NEW JERSEY TREATIES, 1609-1682, at 307-10 (University Publications of America, 1985).

58. DAVID HOROWITZ, THE FIRST FRONTIER: THE INDIAN WARS AND AMERICA'S ORIGINS, 1607-1776, at 169 (1978).

59. *See id.*

remain allied with the English. Thus, from 1755 to 1756, the British Crown created a northern and southern department of Indian affairs, manned respectively by superintendents William Johnson and Edmond Atkin. The superintendents, rather than individual colonies, had full command of political relations with Indian tribes. Johnson, who had within his jurisdiction the powerful Iroquois Confederacy, was expected to ease the concerns of the Indians "with respect to the Lands which have been fraudulently taken from them" and to address other grievances such as including traders.[60]

The year 1763 proved to be of great significance for British, French, and Indian relations. By the Treaty of Paris, ending the Seven Year War with France, the English claimed all of French Canada and North America east of the Mississippi, as well as Spanish Florida. England was now the dominant European power in Eastern North America. Tribal nations, many of whom had been allies with the French, however, were wary of this expansion of English power. In the spring of 1763, Indians throughout the Ohio Valley and the Great Lakes region launched a number of assaults against the British and captured a number of British forts. This was

> traditionally attributed to the ambition of the Ottawa leader Pontiac, was in fact a wide-ranging attempt to establish a native position of power at a time of uncertainty and change, and although the British retook their posts by 1765, the natives' point was made. In later calculations, the English would weigh Indian perceptions and demands more heavily.[61]

A direct result of this flexing of indigenous military muscle was the Crown's enunciation of the Royal Proclamation on October 7, 1763. The Proclamation recalled all settlers from west of the crest of the Appalachian Mountains, forbade emigration there until further notice, and authorized trade with Indians, but only by licensed government agents.[62] For our purposes, the most important measure in the Proclamation was the establishment of a boundary line—a clear delineation of Indian ownership of Indian Country. This boundary to separate Indian land from Anglo settlements, immediately nullified, if such a nullification was even necessary, the preposterous "sea to sea"

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60. *Id.* at 179.

61. Elliot West, *American Frontier*, *in* THE OXFORD HISTORY OF THE AMERICAN WEST 188 (Clyde A. Milner, II, et al. eds., 1994).

62. *See* Jacobs, *supra* note 54, at 10.

land claims based on the colonial charters dating back to the early 1600s.[63]

The Royal Proclamation and, in particular, the land boundary were difficult to enforce. Colonists, land speculators, and fur traders continued their agitation for access to and eventual ownership of more Indian territory so that in the 1768 Treaty of Fort Stanwix, a modification of the Proclamation, the Iroquois nations ceded a great deal of land to Britain. Despite this treaty, Britain was intent on slowing frontier expansion. In 1773, an act was passed which forbade any new grants to speculators. In 1774, with the passage of the Quebec Act, all the land north of the Ohio River was closed to all but the most limited trade and settlement. Thus, the idea of a boundary line, though breached many times by American colonists, was a fundamental concept of both British and later American policymakers in their efforts to recognize tribal lands and assure the tribes that their remaining territory would be protected from intrusion. It remains an important concept of federal Indian policy and law even today.

When the thirteen colonies declared their independence from Great Britain on July 4, 1776, claiming, as one of their reasons for revolting that the King of England had "endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions," they were acknowledging in a graphic way tribal sovereignty and independence and were recognizing the unwelcomed fact that virtually all Indian nations were in alliance with Great Britain against the rebellious colonies.

The Americans' defeat of the British, and many of her Indian allies, was confirmed at the peace arrangements at the Treaty of Paris, drawn up in 1782 and signed on September 3, 1783. In signing this treaty, Great Britain granted the new nation not only its independence, but also ceded its jurisdictional claims and preemptive rights to a tremendous expanse of land stretching in the north from the St. Lawrence River and the Great Lakes, in the west to the Mississippi River, and in the south to the thirty-first parallel.[64]

But what of the tribal nations who had not participated in the treaty negotiations? The Americans realized that they needed to be appeased, and steps were taken to assure the Indians that their lands were to be protected. As evidence that the fledgling nation had not gained immediate ownership to this territory, but had merely assumed Britain's

63. *See id.*

64. *See* West, *supra* note 61, at 123.

obligations as the preeminent European sovereign with the right of first purchase of Indian land, is a congressional proclamation issued less than three weeks after the signing of the Treaty of Paris. This document formally forbade White settlement on Indian lands outside state jurisdiction. This measure also contained a provision regarding the sale of Indian land. Like the Royal Proclamation of 1763, Congress declared that no Indian land purchased by states or individuals would be valid without the express sanction of Congress. This action was meant to reassure the tribes that their preexisting land rights were to be protected from persons or companies bent on their appropriation.[65]

The federal government, of course, did not treat tribes uniformly. Factors which contributed to inconsistent policy included the size and strength of a tribe from a military perspective, the geo-political position of a tribe in relation to other European competitors and tribes, and the perceived cultural status of a tribe—with some being perceived as more civilizable than others. In fact, for a brief period, from 1784 to 1787, the federal government spoke haughtily of claiming the Indians country by "right of conquest," especially those tribes who had sided with Great Britain in the war.[66]

Despite such claims, the tribes maintained that they had not been conquered and that their lands rightfully remained in their possession. In 1786, the Shawnee Chief, Kekewepellethe, after hearing the Americans' outrageous demands and claims, emphatically said "and as to the land, God gave us this country, we do not understand measuring out the land, it is all ours."[67] Ultimately, the fear of war with tribes—including fear of its actual costs in real dollars, the probable loss of much human life, and fear of world opinion about the character of the United States for waging war against tribes—compelled American policymakers to abandon their pretentious claims to Indian soil based on the spurious doctrine of conquest. The combination of anticipated expenses and intense tribal resistance, and Secretary of War Henry Knox's views that the United States should operate its Indian policy from principles of humanity and honorable intentions and not conquest—discovery was not even part of the discourse—are largely responsible for the treaty relationship which ensued.

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65. *See* PRUCHA, *supra* note 53, at 32.

66. *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 42-54 (1994) (discussing the Treaty of Fort Stanwix and treaties with the Western Indians).

67. *Id.* at 51.

DISCOVERY AS PERCEIVED BY THE U.S. CONGRESS AND THE EXECUTIVE: PREEMPTION NOT OWNERSHIP

A close reading of recorded statements of indigenous leaders, an examination of the literal language of the early treaty record from the 1780s through the War of 1812 and beyond, and the policy pronouncements of congressional committees, the president, and various high-placed federal officials, demonstrates that although the United States initially preferred to act as if it were the actual legal owner of all of America, the historical record draws a radically different picture. In reality, the federal government's dealings with tribes amounted to exercising an exclusive preemptive right to be the first purchaser of any lands that tribes might choose to sell.

In fact, during the American Republic's formative and fragile years, the central government was most keenly interested in establishing and maintaining peace with tribal nations, in clarifying its title to land actually occupied, and in providing assurances to tribes that their territorial rights and boundaries would be respected, lest the tribes be drawn to align with Spain or Great Britain.

Tribal nations during this same period, at a minimum, worked to maintain a fixed boundary between their lands and those of European nation-states and the Americans; they worked to secure formal acknowledgments of their independent status and of their right to control the disposition of their aboriginal territories; and they worked to pursue an unimpeded flow of European manufactured goods.[68]

As already shown, there is certainly some evidence that a segment of American policymakers, in the period immediately after the Revolutionary War terminated, felt that they were in a strategic position to dictate terms to those tribes who had aligned militarily with Great Britain and against the United States during the war. This is subtly evident in a letter from George Washington to James Duane on September 7, 1783. In the letter, Washington chastised several tribes for having joined with Great Britain, but he hastened to add that the federal government was magnanimous enough to forgive them:

> But as we prefer Peace to a State of Warfare, as we consider them [tribes] as a deluded People; as we pers[u]ade ourselves that they are convinced, from experience, of their error in taking

68. *See* JONES, *supra* note 2, at 44.

> up the Hatchet against us, and that their true Interest and safety must now depend upon our friendship . . . .[69]

Even in this mild rebuke of tribes, Washington still articulated the need for a boundary line to separate Indian territory from that belonging to the Americans. Nevertheless, it is apparent that Washington wanted the Indians to understand that the Americans would eventually be approaching them with a request for additional land cessions to accommodate the land-hungry population and the increasing flow of European immigrants.

Washington understood that peaceful and orderly westward expansion depended upon peaceful dealings with the tribes. "I am clear in my opinion," noted Washington, "that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country . . . ."[70]

Besides facing significant indigenous resistance to any unilateral federal efforts bent on claiming territory under the doctrines of discovery and conquest after the Revolutionary War, the federal government, surprisingly, was also confronted by Great Britain, which had adopted a position of diplomatic support for indigenous land rights. As Jones noted:

> When the northern and western Indians asserted that the [1768] Fort Stanwix line was the only proper boundary between their land and that of white America, British officials backed the assertion. The officials assured the Indians that *Americans had no claim whatsoever to land beyond the Ohio, since King George would not and could not have given to the Americans what he had no right to give.*[71]

THE CONFIRMATION OF INDIGENOUS LAND RIGHTS IN AMERICAN INDIAN TREATIES

As distinctive sovereigns exercising inherent sovereign powers, the negotiation, ratification, and proclamation of Indian treaties confirmed the separate political status of indigenous nations. It is a well known, if

69. DOCUMENTS OF UNITED STATES INDIAN POLICY 1 (Francis Paul Prucha ed., 2d ed. 1990).

70. *Id.* at 2.

71. JONES, *supra* note 2, at 142 (emphasis added).

little appreciated, fact that no other racial or ethnic group in America signed treaties with the federal government. This treaty relationship means that tribal nations enjoy an extra-constitutional, nation-to-nation relationship with the United States.

The unique triumvirate of corporate (self-government), individual (eligibility for allotments, special reservations), and property (hunting, fishing, and gathering) rights articulated in treaties further distinguish Indians in a fundamental way from all other groups and individuals in the United States.[72] Indian treaties are, of course, susceptible to the political machinations of the political branches (and sometimes even the judiciary), but they remain, under the Constitution, the supreme law of the land until they are expressly disavowed by Congress. Therefore, they provide the core foundation of rights enjoyed by tribal nations.

Most of the treaties negotiated between tribes and the United States after the Revolutionary War concluded were amity treaties designed to restore some modicum of peace on the frontier and in the interior—Treaty with the Six Nations (October 22, 1784);[73] Treaty with the Wyandot (January 21, 1785);[74] Treaty with the Cherokee (November 28, 1785);[75] Treaty with the Choctaw (January 3, 1786);[76] Treaty with the Chickasaw (January 10, 1786);[77] and the Treaty with the Shawnee (January 31, 1786).[78]

The first major Indian land cession treaty was the Treaty with the Wyandot and other tribes at Fort Harmar on January 9, 1789.[79] This treaty was negotiated by the sachems and warriors of the assembled tribes, on the one part, and by Commissioner Arthur St. Clair, Governor of the Northwest Territory, for the United States. Article II established a permanent boundary line between the tribes and the United States, and the Indians ceded a tract of land in exchange for federal protection and $6000 worth of goods. According to the treaty, the tribes "release, quit claim, relinquish and ceded to the said United States all the land . . .

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72. *See* Vine Deloria, Jr., *Treaties*, *in* NATIVE AMERICA IN THE TWENTIETH CENTURY: AN ENCYCLOPEDIA 646-49 (Mary B. Davis ed., 1994).

73. *See* Treaty with the Six Nations, Oct. 22, 1784, U.S.-Sachems and Six Nations, 7 Stat. 15.

74. *See* Treaty with the Wiandot, Jan. 21, 1785, U.S.-Sachems, Wiandot, Deleware, Chippawa and Ottawa Nations, 7 Stat. 16.

75. *See* Treaty with the Cherokee, Nov. 28, 1785, U.S.-Cherokee Nation, 7 Stat. 18.

76. *See* Treaty with the Choctaw, Jan. 3, 1786, U.S.-Choctaw Nation, 7 Stat. 21.

77. *See* Treaty with the Chickasaw, Jan. 10, 1786, U.S.-Chickasaw Nation, 7 Stat. 24.

78. *See* Treaty with the Shawnee, Jan. 31, 1786, U.S.-Shawnee Nation, 7 Stat. 26.

79. *See* Treaty with the Wiandot, Jan. 9, 1789, U.S.-Sachems, Wiandot, Deleware, Ottawa, Chippewa, Pattawatima, and Sac Nations, 7 Stat. 28.

above described, so far as the said Indians formerly claimed the same; for them the said United States to have and to hold the same in true and absolute propriety forever."[80]

In article III, the United States announced that it was relinquishing and quit claiming all the lands the tribes reserved to themselves under the previous article. The only claims the United States had to the retained Indian lands, of course, were based on the doctrine of discovery; but here discovery entailed preemption, not ownership. This is manifest in the language of the closing section of article III:

> But the said nations, or either of them, *shall not be at liberty to sell or dispose of the same, or any part thereof, to any sovereign power, except the United States; nor to the subjects or citizens of any other sovereign power, nor to the subjects or citizens of the United States.*[81]

This portion of the article harbors an interesting juxtaposition. If the United States had actually "owned" full legal title to Indian lands under the doctrine of discovery and was simply relinquishing those claims to the tribes, why did the government's negotiators insist on including language in the treaty that the tribes sell to no other sovereign "except the United States?"

Several months later, on June 15, 1789, Secretary of War Henry Knox wrote a report to President Washington concerning the Northwestern Indians.[82] In it, Knox forcefully advocated that justice and dignity rather than force of arms should be the guiding principles of federal Indian policy. Included also is a remarkably unclouded statement acknowledging the Indians' ownership rights to their property:

> The Indians being the prior occupants, possess the right of soil. It cannot be taken from them unless by their free consent, or by the right of conquest in a case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation.
>
> . . . .
>
> The principle of the Indian right to the lands they possess being thus conceded, the dignity and interest of the nation will be

80. *Id.* at art. II, 7 Stat. 28-29.

81. *Id.* at art. III, 7 Stat. 29 (emphasis added).

82. *See* 7 AMERICAN STATE PAPERS, *supra* note 36, at 12-14. Knox was referring in this report chiefly to the Wabash Indians who lived northwest of the Ohio.

> advanced by making it the basis of the future administration of justice towards the Indian tribes.[83]

Scholars like Francis P. Prucha contend that the "right of soil" Knox acknowledged here was little more than a right of occupancy, "which permitted occupants to enjoy the usufruct of the land as long as they occupied it."[84] The United States, Prucha asserts, held the fee-simple right of absolute dominion over the land based on the discovery principle.

The historical evidence shown above does not support these contentions. More realistically, the United States, as Jones's study showed, by the post-Revolutionary period was forced to acknowledge that it had a curtailed sovereignty and that this was a result of limitations prescribed by the preexisting territorial rights of the tribes.[85]

Corroborating treaty proof of the invalidity of the discovery principle is found in a September 27, 1792, Treaty of peace and friendship between the Wabash and Illinois tribes and the United States. Rufus Putnam, a brigadier general, negotiated the treaty on behalf of the federal government. After the two tribal nations agreed to perpetual peace and placed themselves under the protection of the United States, article IV focused on their unabridged land rights.

> The United States solemnly guaranty to the Wabash, and the Illinois nations, or tribes of Indians, all the lands to which they have a just claim; and no part shall e[v]er be taken from them, but by a fair purchase, and to their satisfaction. *That the lands originally belonged to the Indians; it is theirs, and theirs only. That they have a right to sell, and a right to refuse to sell. And that the United States will protect them in their said just rights.*[86]

This provision contains language showing that the United States was fully cognizant of the Indians' unencumbered title to their territory, save the preemptive right of the federal government. When President Washington communicated this treaty to the Senate for ratification on February 13, 1793, he sent an accompanying letter, in which he urged the Senate to consider adding an exclusive preemption statement to the fourth article that would grant the United States first opportunity to purchase any lands the Indians might decide to sell in the future. A

83. *Id.* at 13.
84. PRUCHA, *supra* note 66, at 226.
85. *See* JONES, *supra* note 2, at 147.
86. 7 AMERICAN STATE PAPERS, *supra* note 36, at 338 (emphasis added).

Senate committee recommended postponing the treaty until the next session of Congress. It was also suggested that the president should negotiate a new article with the tribes that would give the federal government the preemption right it desired. The United States soon learned, however, that a number of the Wabash chiefs who had negotiated the treaty had died of smallpox.[87]

Finally, in 1794, when the Senate ratification process was renewed, a vote was taken on the treaty with an amendment that would have provided for preemption. The Senate voted the treaty down, however, twenty-one to four.[88] Shortly thereafter, war erupted with the two tribes and the treaty issue was mooted.

The powerful Iroquois Confederacy also participated in treaties that confirmed their undivided title to their lands. The Treaty with the Six Nations[89] in the fall of 1794 is one such document. In article II, the United States acknowledged the lands reserved to the Cayuga, Onondaga, and Oneida in their treaties with New York State

> to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: *but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.*[90]

The federal government, as this article shows, secured the right of preemption it had been unable to gain in the earlier Wabash and Illinois treaty. What exclusive preemption meant was explained by Thomas Jefferson:

> I considered our right of preemption of the Indian lands, not as amounting to any dominion, or jurisdiction, or paramountship whatever, but merely in the nature of a remainder after the extinguishment of a present right, which gave us no present right whatever, but of preventing other nations from taking possession, and so defeating our expectancy; *that the Indians had the*

87. *See* PRUCHA, *supra* note 66, at 91.
88. *See id.*
89. *See* Treaty with the Six Nations, Nov. 11, 1794, U.S.-Six Nations, 7 Stat. 44.
90. *Id.* at art. II, 7 Stat. 45.

> *full, undivided and independent sovereignty as long as they choose to keep it, and that this might be forever.*[91]

The right of exclusive preemption expressed in these and other treaties, as endorsed by Congress and the President, is a wholly different entity from that of absolute proprietorship or fee-simple title based on Marshall's judicially generated construction of the doctrine of discovery.

Critical analysis of a pivotal treaty—the Treaty of Greenville[92]—provides another burst of historical and political data which, when read with the previous information, effectively defangs the doctrine of discovery. Although the treaty was negotiated in the wake of the Indians' defeat by American troops led by General Anthony Wayne at the Battle of Fallen Timbers on the Maumee River, and with the Indians having learned that their ally, Great Britain, would no longer provide patronage, the literal language of the treaty reveals that the federal government wielded no absolute sovereignty or proprietorship over the lands retained by the Indian nations. Although the signatory tribes—the Wyandot, Delaware, Shawnee, Ottawa, Chippewa, Potawatomie, Miami, Eel River, Wea, Kickapoo, Piankeshaw, and Kaskaskia—ceded an enormous amount of land to the United States, including the southern part of Ohio and some land in present-day Indiana, a permanent boundary line was established between the tribes' reserved lands (north of the Ohio, east of the Mississippi, and south of the Great Lakes) and those of the Americans.

More important, the language of article V continues to reflect the reality that the tribes were the only legitimate proprietors of their remaining territory and that the United States merely sought assurances that it would have preemptive rights to purchase tribal lands in the future:

> The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons

91. PRUCHA, *supra* note 66, at 227 (quoting THE WRITINGS OF THOMAS JEFFERSON 17:328-29 (1903-1904) (emphasis added).

92. *See* Treaty of Greenville, Aug. 3, 1795, U.S.-Wyandots, Delawares, Shawnees, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Wea's, Kickapoos, Piankashaws, and Kaskaskias, 7 Stat. 49.

> who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.[93]

The previous article, IV, does contain a passage in which the United States promised to relinquish its claim to remaining tribal lands, but the government was relinquishing nothing more than its exclusive right of preemption, not ownership of the Indians' land. The United States, to reassure the tribes about what exactly they were relinquishing, made this statement in the first sentence of article V: "To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article [the lands retained by the tribes], it is now explicitly declared, that the meaning of that relinquishment is this . . . ."[94]

To reiterate the central thesis: if, under the doctrine of discovery, the United States literally "owned" all of America, then why did the government in this and the previous treaties analyzed insist on inserting a preemptive clause giving them the first option to purchase tribal lands? It can only be because the doctrine of discovery, although effective as an international principle at regulating affairs between competing foreign powers and the American nation, had no direct bearing on the tribes' actual property rights. The best the United States could hope for, and sometimes insisted upon, was that the signatory tribes would consent to giving the federal government first purchase rights. As we have seen, the tribes agreed to this clause on a number of occasions.

There is one other treaty before the War of 1812 in which this exclusive purchase provision is found. In an agreement with the Sac and Fox on November 3, 1804,[95] article IV states emphatically that the United States would never interfere with the Indians' land rights and that the government would "protect" the tribes in the enjoyment of their lands against all others. "And the said tribes," it was declared, "do hereby engage that they will never sell their lands or any part thereof to any sovereign power, *but the United States*, nor to the citizens or subjects of any other sovereign power, nor to the citizens of the United States."[96]

By 1800, land cession treaties had become a more common type of diplomatic arrangement between tribes and the federal government. And when the United States purchased France's jurisdictional position in that

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93. *Id.* at art. V, 7 Stat. 52.

94. *Id.*

95. *See* Agreement with Sac and Fox, Nov. 3, 1804, U.S.-Sac and Fox Nations, 7 Stat. 84.

96. *Id.* at art. IV, 7 Stat. 51 (emphasis added).

massive territory known as the Louisiana Purchase in 1803, this created new opportunities for national development, western expansion, and Indian policy experimentation. It also opened up a Pandora's box of uncertainties relating to the actual extent of the territory and the number and orientation of the tribes inhabiting the region. And although President Jefferson proposed removal of eastern Indian tribes to lands west of the Mississippi, he was more keen on their being assimilated or civilized into western culture.[97]

Tribes, on the contrary, were increasingly willing to engage in war in their efforts to stem the growing tide of Whites into their country. By 1805, Indians in the Ohio Valley, the Great Lakes Country, and the Old Southwest, led by two Shawnees, the Prophet, Tenskwatawa, and his brother, Tecumseh, sought to form a united indigenous front to stifle Anglo advancement and restore traditional Indian life. Most of the Indians ultimately joined forces as allies with Great Britain in the War of 1812 against the United States. Tecumseh's followers fought in at least 150 engagements against the Americans. The United States, however, again emerged victorious from the war. Tecumseh's death at the Battle of the Thames in October 1813 signaled the end of effective Indian resistance between the Ohio and the Mississippi River.[98]

In the old southwest (Mississippi and Alabama), the Upper Creeks, many of whom had taken to the Prophet's message, also fought valiantly to protect their lands from further intrusions. They, too, were defeated, however, in 1814, at the Battle of Horseshoe Bend by a combined force of American troops, led by Andrew Jackson with Creek and Cherokee allies. In the subsequent Treaty of Fort Jackson, concluded on August 9, 1814, the Creeks, both the Upper and even the lower Creeks who had remained neutral or sided with Jackson's forces, were forced to cede more than twenty-two million acres of land that included parts of western Georgia and much of Alabama.[99] This enormous land cession was considered by the United States as "an equivalent for all expenses incurred in prosecuting the war to its termination."[100]

Notwithstanding the British and Indians defeat in 1814, Great Britain, in negotiating the terms of the Treaty of Ghent with the United

97. *See* Reginald Horsman, *United States Indian Policies, 1776-1815*, *in* HISTORY OF INDIAN-WHITE RELATIONS 36 (Wilcomb E. Washburn ed., 1988).

98. *See* R. David Edmunds, *Tecumseh*, ENCYCLOPEDIA OF NORTH AMERICAN INDIANS 621 (Frederick E. Hoxie ed., 1996).

99. *See* Treaty of Fort Jackson, Aug. 9, 1814, U.S.-Creek Nation, 7 Stat. 20.

100. *Id.*

States,[101] insisted as a "sine qua non" (an indispensable condition) of a treaty of peace that "the peace be extended to the Indian allies of Great Britain, and that the boundary of their territory be definitively marked out as a permanent barrier between the dominions of Great Britain and the United States."[102]

The United States treaty delegation, led by John Q. Adams, initially and throughout the early months of negotiations, refused to concede the Indian territorial boundary delineation as laid out by the British. The Americans argued that recognition of such an amount of territory "would comprehend a great number of American citizens; not less, perhaps, than a hundred thousand."[103] The British delegation, led by Gambier, retorted that they were not "prepared to abandon the Indian nations to their fate"[104] and that their Indian allies should also be directly involved in the peace negotiations as a "principle of public law."[105]

Adams responded by describing what he termed the "humane and liberal policy" of the United States towards tribes. A policy, however, which would not extend to involving the tribes as participants in these particular treaty negotiations:

> Under that system the Indians residing within the United States are so far independent that they live under their own customs, and not under the laws of the United States; that their rights upon the lands where they inhabit or hunt, are secured to them by boundaries defined in amicable treaties between the United States and themselves; and that whenever those boundaries are varied, it is also by amicable and voluntary treaties, by which they receive from the United States ample compensation for every right they have to the lands ceded by them. They are so far dependent as not to have the right to dispose of their lands to any private persons, not to any Power other than the United States, and to be under their protection alone, and not under that of any other Power. Whether called subjects, or by whatever name designated, such is the relation between them and the United States.[106]

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101. *See* Treaty of Ghent, Dec. 24, 1814, U.S.-Great Britain, 8 Stat. 218.
102. 3 AMERICAN STATE PAPERS, *supra* note 36, at 708.
103. *Id.* at 709.
104. *Id.* at 714.
105. *Id.*
106. *Id.* at 716.

The British rejoined two weeks later by noting their desire to sign a treaty but emphatically maintained that they would sign only if "the Indian nations are included in it, and restored to all the rights, privileges, and territories which they enjoyed in the year 1811 . . . ."[107] The United States remained unwilling to recognize the rights of tribes as "independent nations" out of fear that the tribes might be willing to realign with the British. Such action, said the Americans, "would place them [the tribes] effectually and exclusively under her protection, instead of being, as heretofore, under that of the United States."[108]

The British delegation quickly responded and challenged the American's "novel and alarming pretension," a pretension that Britain herself had used on occasion in its direct dealing with tribes: that Indian nations were to be considered the subjects of the United States whose territory was subject to the disposal of the federal government. "Pretensions such as these," said the British delegation, "Great Britain can never recogni[z]e."[109] Britain had to finally concede, however, that the United States would not consent to having the tribes as direct parties in the peace negotiations. Instead, she settled for an article requiring that the United States recognize the preexisting rights, possessions, etc., of tribes prior to 1811. This, the Americans accepted.

Hence, article 9 of the Treaty of Ghent, dated December 24, 1814, states that:

> The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification, and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges which they may have enjoyed, or been entitled to, . . . provided always, that such tribes or nations shall agree to desist from all hostilities against the United States of America, their citizens and subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly . . . .[110]

Although tribes had not participated as a separate sovereign in these negotiations, the above discussion demonstrates that their preexisting

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107. *Id.* at 718.
108. *Id.* at 720.
109. *Id.* at 722.
110. *Id.* at 747-48.

rights, including their territorial rights, were to be honored by both the United States and Great Britain. In one of the first post 1812 treaties negotiated between the United States and Indian tribes, concluded at Portage des Sioux on the Mississippi, we find tribes and the federal government agreeing to end hostilities, establish perpetual peace, and the United States providing reassurances to the tribes that their preexisting treaties were recognized and reconfirmed.[111]

In a series of treaties with the Potawatomie, the Piankeshaw, the Teton and the Yankton Sioux, among others, the United States and the tribes, anxious to reestablish peace and friendship, agreed that "every injury or act of hostility by one or other of the contracting parties against the other, shall be mutually forgiven and forgot" and that the parties "recognize, re-establish, and confirm, all and every treaty, contract, or agreement, heretofore concluded."[112]

The federal attitude of mutual peace and friendship espoused in the Portage des Sioux treaties conform with the other basic tenets of federal Indian policy that had been established and would remain firmly in place into the 1830s and beyond: 1) recognition of Indian land rights by the establishment of clear boundaries for Indian Country; 2) the use of formal treaties with tribes as the principal means of dealing with tribal nations; 3) regulation of Indian trade by the federal government as a means of maintaining an exclusive relationship with the tribes, but also to protect the Indians from being defrauded; 4) expenditures by the United States designed to promote the civilization and education of Indians; and 5) a series of trade and intercourse acts—first enacted in 1790 and made permanent in 1834—which were aimed at restraining the actions of whites and providing justice to the Indians.[113]

Importantly, the federal government, not only in the treaties discussed above, but also in the trade and intercourse acts, included specific provisions relating to Indian land which recognized tribal ownership. The United States, rather than being a proprietor of all of America under the doctrine of discovery, served primarily as a protector of Indian interests in their lands and stood first in line should a tribe choose to sell any of its lands. Section 12 of the 1834 Trade and Intercourse Act declared that "no purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same shall be made by treaty or convention entered into pursuant to

111. *See* S. DOC. NO. 57-452, at 79-85 (1903).
112. Treaty with the Piankishaw, July 18, 1815, U.S.-Piankishaw, 7 Stat. 124.
113. *See* PRUCHA, *supra* note 53, at 2-3.

the Constitution."[114] Hence, in the 1834 law, the permanent codification of the previously temporary laws, it was stated in the first section that "Indian Country" consists of all the land west of the Mississippi and not within the states or Missouri or Louisiana or the territory of Arkansas and include lands east of the Mississippi "not within any state to which the Indian title has not been extinguished."[115]

JUDICIAL MISCONSTRUCTION OF DISCOVERY

In 1823, the United States Supreme Court rendered a stunning ruling in *Johnson v. M'Intosh*[116] that attempted to dramatically redefine the political contours of the indigenous and federal relationship in a way that would elevate the federal government to a superior proprietary position relative to tribal nations. The principal question in the case was whether the Indian title which had been ceded by the Illinois and Piankeshaw tribes to the plaintiffs (Johnson, et al.,) under two separate land transactions in 1773 and 1775 could be recognized in the federal courts, or whether the defendant's (M'Intosh's) title, which had been purchased from the United States in 1818—territory that was part of Johnson's original purchase from the tribes—was valid. In short, Marshall asked whether tribes had a title that could be conveyed to whomever they chose. But this was not the question raised by the facts. The question should have been whether private individuals could purchase Indian land, or whether only the national government had that authority.

Marshall and the Court, however, for reasons purely political, refused to recognize, as the previous actions of the United States government in its treaties attested, as well as those of the European sovereigns, that tribes held a title equal to the fee-simple title of Whites that was largely unaffected by the claims of the European and United States "discoverers." The Court apparently feared that such a holding would have nullified state and federal grants derived from Indians.

But neither did the Court hold that the doctrine of discovery completely vanquished Indian title, since this would have left the tribes with no enforceable interests whatsoever. Instead, Marshall craftily reached a political and legal compromise that avoided both of these visions of Indian title.

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114. Trade and Intercourse Act of 1834 § 12, 4 Stat. 729, 730.
115. *Id.*
116. 21 U.S. (8 Wheat.) 543 (1823).

At the heart of the decision was Chief Justice John Marshall's distorted, historically inaccurate, and legally fictitious discussion of the doctrine of discovery. According to Marshall, the principle meant that the "discovering" European nation, and the United States as successor in interest to Great Britain's rights of discovery in North America, had gained a superior title to both unoccupied and occupied indigenous lands. "Thus," said Marshall, "has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees."[117]

Marshall, however, was re-writing history to suit the federal government's needs here. As the preceding doctrinal analysis has shown, none of the previous sovereigns, including Great Britain, had acted as if it had a superior title to Indian land. They did claim to be the "sovereign," in the sense of being the premier political entity vis-à-vis other competitor states, and, at times, even in their relationship to tribes, but the treaty and statutory analysis showed that this did not translate into their being the sole proprietor or land owner of all land. The evidence showed that Indian title, while understood as being substantively different from the fee-simple title of Europeans, nevertheless was a recognized Indian ownership of the soil that rested in the tribes until they chose to sell the same to the bidding European sovereign. This was especially true from the standpoint of the British as the discussion of the Treaty of Ghent evidenced.

Marshall's articulation of the doctrine of discovery in *M'Intosh* allowed that tribes were the "rightful occupants of the soil," retaining a lesser legal claim to their lands, but also suggested that their "complete sovereignty" as independent nations was held to be significantly "impaired" by the imperious claims of the federal government. Tribes were also informed in this decision that they no longer possessed the power to sell their lands to others. In short, the Marshall Court had reduced indigenous groups to being possessors of an inferior occupancy title. Capping off his largely imaginative opinion, Marshall ruled that the United States, by stepping into Great Britain's shoes after the Treaty of Paris was signed on September 3, 1783, ending the Revolutionary War, had gained an exclusive and "absolute" legal title to all of America.[118] The historical record shows that in reality, what the United States had actually gained after the 1783 Paris treaty and the 1814 Treaty of Ghent, contrary to Marshall's creative assertions, was merely an exclusive status vis-à-vis other European sovereigns. It only gained title to those lands

117. *Id.* at 579.
118. *See id.* at 588.

Great Britain had already purchased from the Indians; it had not secured the "absolute" title to the rest of America.

Even a cursory reading of *M'Intosh* uncovers the ethnocentric and racist tone of the Justices. Marshall himself seemed well aware of the absurdity of wielding the discovery principle from a factual standpoint, but he found it expedient to rationalize its use from a policy and philosophical perspective:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[119]

As Dorothy Jones's opening quotation indicates, the discovery principle as an international rule was not questioned by the competing foreign powers because they shared imperial and cultural premises and had devised the principle as a mechanism to eliminate or at least reduce international conflicts. It was certainly questioned, however, and openly defied, by indigenous nations who had occupied their lands for millennia. Sir William Johnson learned this directly in his dealings with the Iroquois: "The Indians were sometimes bitter, sometimes cynical, and frequently outspoken about the European assumption that unceded Indian land could be bartered back and forth at European conference tables."[120] The Indians were amused, said Johnson, by the actions of both the French and the British "with stories of their upright intentions, and that they made War for the protection of the Indians' rights, but that they plainly found it was carried on to see who would become masters of what was the property of neither the one nor the other."[121]

HISTORICALLY APPROPRIATE JUDICIAL CONSTRUCTIONS OF DISCOVERY

As the previous pages point out, the fairly consistent actions of Spain, France, Great Britain, and even the United States, both before and after the *M'Intosh* ruling, strongly suggests that these governments only sometimes attempted to force the view that tribes were simply occupants with a diminished title to their ancestral lands. On the contrary, the treaty record, legislative actions, and sovereign and presidential

119. *Id.* at 591.
120. JONES, *supra* note 2, at 72.
121. *Id.*

pronouncements indicate that tribes were the actual owners of the soil and that the European and American sovereigns in order to gain Indian title went to great lengths to peacefully purchase said title before claiming ownership.

Furthermore, because tribal nations were not parties in the *M'Intosh* litigation—though they were indirectly involved, having sold the land to both the non-Indian parties—an argument can be made that the precedent is not binding on Indian tribes since by their nonparticipation they had not consented to be bound by the Court's holding. The fact that tribal nations were extra-constitutional sovereigns at this time adds further proof of its nonapplicability to their proprietary rights.

M'Intosh is sandwiched between ample treaty precedent, statutory law, and sovereign pronouncements which point to a more accurate understanding that the discovery doctrine merely gave the alleged "discoverer" the right to be the exclusive purchaser of any land tribes were willing to sell. In fact, it is this theory of discovery as an exclusive preemptive right which appears in the next two major Supreme Court cases, *Worcester v. Georgia*[122] and *Mitchel v. United States*.[123] In *Worcester*, also authored by Marshall, the Court made clear that discovery did not restrict the rights of Indians to their territory.

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the preexisting rights of its ancient possessors.[124]

Marshall, went further, however, in his historical analysis of discovery in an effort, seemingly, to correct the effrontery he had issued in the *M'Intosh* ruling:

> The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object

122. 31 U.S. (6 Pet.) 515 (1832).
123. 34 U.S. (9 Pet.) 711 (1835).
124. *Worcester*, 31 U.S. (6 Pet.) at 542-43.

> was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession."
>
> *This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it.* It was an *exclusive principle* which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those [like tribes] who had not agreed to it. *It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.*[125]

Marshall continued his analysis by challenging one of the basic myths about the discovery era. Some commentators maintain that the King of England's charters to the original colonies entailed a conveyance of the actual soil to the newly established colony. Marshall explicitly denied this. He declared that:

> The extravagant and absurd idea, that the feeble settlements made on the seacoast, 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. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. *This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what*

125. *Id.* at 543-44 (emphasis added) (citations omitted).

> *the crown did not affect to claim, nor was it so understood . . . . These colonial grants and charters merely asserted a title against Europeans only, and were considered as blank paper so far as the rights of the native were concerned.*[126]

Three years later, in *Mitchel v. United States*,[127] the Supreme Court added further judicial tinder to the *Worcester* precedent disavowing the doctrine of discovery as a doctrine vesting absolute ownership of America in the discovering states. Although not explicitly disclaiming the doctrine as Marshall had done, Justice Baldwin, in describing Indian title, used language that easily supported Marshall's *Worcester* views. For instance, Baldwin noted that "friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them . . . ."[128]

Baldwin continued by declaring what he thought the status of Indian title was: "it is enough to consider it as a settled principle, that their right of occupancy is considered as sacred as the fee simple of the whites."[129] It then logically followed that if Indians held their lands with a sacred title, comparable to fee-simple, then they must also possess the power to sell those lands. In a statement directly at odds with the *M'Intosh* holding that Indians lack the power to convey their lands, the *Mitchel* court held that "the Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected, and guarantied by Great Britain and Spain . . . ."[130]

CONCLUSION

Congress is identified in the Constitution as being the branch of government empowered to exercise plenary and exclusive authority in the policy field of Indian affairs. It fulfills its constitutional mandate by generating legislation and establishing tribal specific and general policies that will democratically guide the political relationship between tribal nations and the federal government—a relationship rooted in treaty arrangements. Alongside Congress, the executive branch, at least until 1871,[131] had at least a minor role in negotiating and certainly in

126. *Id.* at 546 (emphasis added).
127. 34 U.S. (9 Pet.) 711 (1835).
128. *Id.* at 745.
129. *Id.* at 746.
130. *Id.*
131. Congress, via an appropriation rider (16 Stat. 566), questionably terminated the

proclaiming the treaty arrangements that provide the ongoing diplomatic linkages between tribes and the United States.

The Supreme Court's role in Indian affairs is, therefore, restrained by the force of congressional plenary power. One of the Court's primary roles in Indian affairs, especially insofar as Indian land rights are involved, should be to broadly interpret treaty language, especially ambiguous language, in a way that comports with both the tribes' and the United States' understanding of how the two peoples' affairs can best be carried out in a perpetual state of fairness, justice, and informed consent.

The doctrine of discovery, when defined as an exclusive principle designed to regulate European and American affairs, is a colonial metaphor that gave the quickest and usually the most powerful European nations the upper hand in their efforts to colonize various parts of the world, including North America. The doctrine of discovery, however, when defined as benevolent paternalism or, as it was in the *M'Intosh* decision, to mean that the federal government holds the fee-simple title to all the Indian lands in the United States, is a clear legal fiction that needs to be explicitly stricken from the federal government's political and legal vocabulary.

Discovery as entailing the instantaneous ownership of Indian lands, thereby reducing Indians to being simple tenants in their aboriginal homelands, runs contrary to the force and continued vitality of tribal sovereignty, is inimical to prior and later congressional and executive policy pronouncements and subsequent Supreme Court precedent, and is directly at odds with the bulk of extant European and United States treaty provisions, which abundantly demonstrate that tribes possessed full and complete legal title to their lands. Federal abandonment of such a demeaning and unjust legal fiction by congressional, presidential, and judicial action would be a significant first step towards the reformulation of an Indian policy based on justice, humanity, and the "actual state of things."

President's capacity to negotiate further treaties with tribes in 1871, although existing treaties were to remain legally binding.