THE MYTH OF *JOHNSON V. M'INTOSH*

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In this Comment, the author considers the popular critique of the Great Case of Johnson v. M'Intosh *as racist myth-making. After unpacking* Johnson's *uncomfortable marriage of conquest and discovery, Seifert juxtaposes the opinion with Virgil's* Aeneid, *western literature's most famous, and famously ambivalent, establishment narrative. This comparison compels a different theoretical approach to the case. That approach, based on David Hume's custom-based theory of property, shields* Johnson *from the Lockean rhetoric of many critics.* Johnson, *then, is a myth, mixing history with theory to precipitate a national narrative, but it is a myth birthed by sympathy and skepticism as much as by political pragmatism.*

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INTRODUCTION

"The activity of unearthing facts that spur the re-creative imagination tempts to taking these 'conditions' [that illuminate the subject] as sufficient and compelling, when they are only limiting or suggestive."

—Jacques Barzun[1]

Many treatises on Property, including the *Restatement*, begin with this unintuitive definition: "Property concerns legal relations among people regarding control and disposition of valued resources. Note well: Property concerns relations *among people*, not relations between people and things."[2] This definition is unintuitive because the notion of property naturally implies some *thing* owned. John Locke's theory of property iterates the common sense intuition that property involves a natural and essential relationship between owner and object. The influence of Locke on early American thought was no doubt strong, but the presumption of Lockean influence that we bring to bear on John Marshall's opinion in *Johnson v. M'Intosh*[3] makes that opinion more baffling than it should be. Consequently, *Johnson* continues as a source of debate,[4] often because critics cannot reconcile Locke's theory of "first occupancy" with Marshall's discussion of discovery and conquest.[5]

Though John Locke's explication of property in *Two Treatises of Government*[6] is highly regarded, even by Locke himself,[7] its description of property did not hold sway in Marshall's mind. Rather, in *Johnson* we find Marshall endorsing the arguments of David Hume's *A Treatise of Human Nature*[8] and earlier legal philosophers like Grotius and Pufendorf. Accepting the "moral quality" definition of property propounded by these writers, *Johnson* is best

1. JACQUES BARZUN, *The Imagination of the Real*, *in* A JACQUES BARZUN READER 26, 26 (Michael Murray ed., 2002).

2. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 2 (2001).

3. 21 U.S. (8 Wheat.) 543 (1823).

4. Seven hundred eighty-two law review articles have cited to the case since 1980 according to Westlaw Citing References. A Westlaw Locate Query shows that eighty-eight of those articles also cite to "John Locke," while only twenty cite to "David Hume." Thirteen cite to "Pufendorf," twelve to "Aeneid," and two to "Alexander Pope."

5. *See, e.g.*, Richard A. Epstein, *Property Rights Claims of Indigenous Populations: The View From the Common Law*, 31 U. TOL. L. REV. 1, 15 (1999).

6. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

7. *See* Peter Laslett, *Introduction* to LOCKE, *supra* note 6, at 3 (writing to a friend, Locke said, "Property I have nowhere found more clearly explained, than in a book entitled, Two Treatises of Government").

8. DAVID HUME, A TREATISE OF HUMAN NATURE (Ernest C. Mussner ed., Penguin Classics 1984) (1739–1740).

understood as an opinion guided by custom[9] rather than legal principle, an understanding that is only possible once we shed Locke's sense that property attaches through labor rather than through social acknowledgement. *Johnson*, with its rambling histories and high abstraction, extends far beyond formal discussions of procedure or statutory interpretation into cultural storytelling. It is the unofficial beginning of American property law.

Taking Hume's role seriously, and looking to custom and history as the foundation of *Johnson*'s argument, posits the opinion within the larger western literary tradition. "Custom" demands a historical narrative to establish it as a "tradition." "A legal tradition is . . . part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it."[10] Thus, when Marshall writes, "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits,"[11] it is too late. He is already knee-deep in the "controversy." To understand *Johnson*, one must acknowledge not only the narrative, but also its narrative context.

The power of the opinion comes from its story as much as its outcome, yet few have considered the opinion in the context of western literature.[12] This study is not exhaustive,[13] but it draws attention to the cultural context that explains some of Marshall's tones and overtures. This Comment is not prescriptive, then, but rather descriptive and explanatory,[14] and it answers

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9. "Custom" is "[a] practice that, by its common adoption and long, unvarying habit has come to have the force of law." BLACK'S LAW DICTIONARY 390 (7th ed. 1999).

10. Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

11. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823).

12. Milner S. Ball suggests such a reading in his seminal work, Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, but he does not consider the full extent of the parallels between *Johnson* and works like Virgil's *Aeneid*.

13. Indeed, Milton's *Paradise Lost* and *Samson Agonistes* are literary touchstones, but I omit discussion of those works for the sake of brevity.

14. I am not concerned with whether *Johnson*'s outcome was correct. Rather, I hope to unveil how and why Marshall decided the case in the manner that he did. *Johnson*, like almost any judicial opinion to varying degree, relies on cultural pragmatics, rather than objective efficiency. My tack is what Richard Posner calls the "straightforward" approach to law as a subject of literary criticism. *See* Richard A. Posner, *What Has Modern Literary Theory to Offer Law?*, 53 STAN. L. REV. 195, 196 (2000). Posner states:

> The imagery, narrative techniques, character portrayal, voice, tone, and other literary properties [are] studied, compared, assessed. The focus [is] on the text rather than on the theoretical apparatus that the analyst brought to it. The analysis [is] "literary" only in paying close attention to the features of the legal text that a literary critic would attend to in a work of imaginative literature.

Id.

one of the lasting questions about *Johnson*: Why this story? By writing the opinion as he did, Marshall became a nation's storyteller, explaining the legal and cultural relationship between Indians and Americans. Moralizing to a fault, Marshall appealed to aesthetic and moral sensibilities by invoking arguments that had as much place in western legal doctrines as in western literature. Thus, this Comment suggests why Marshall relied upon discovery and conquest, and in the process proposes a rethinking of criticisms that *Johnson* "preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples."[15]

In Part I of this Comment, I unpack the opinion's context and arguments to demonstrate its appeal to custom before law. Part II juxtaposes *Johnson*'s depiction of the conflict between Indian and American culture with western literary works to show that the mythical conflicts and conquests in *Johnson* are part of a larger literary tradition. With the juxtaposition in place, we can better parse the case's theoretical framework. Part III looks more closely at the discovery rule, what it meant, and why it was insufficient to solve the problem of American land claims. The purpose of Part IV is to explain how Marshall blended discovery with conquest to account for the unique nature of land claims in a colonial nation. Part V concludes, recognizes *Johnson* as a literary-social model, and highlights the strains of western culture that permeate the opinion in answer to Marshall's cultural critics. A formative work for the nation, *Johnson* is a prime example of Marshall's role in nation building: "[Marshall] hit the Constitution much as the Lord hit the chaos, at a time when everything needed creating."[16]

I. THE CASE

> "Wherever there is great property there is great inequality."
>
> —Adam Smith[17]

Marshall's desire to create a national narrative finds its legal expression in *Johnson v. M'Intosh*. By settling once and for all that private parties and

15. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 317 (1990). A Westlaw Locate Query also shows that in the 782 law review articles citing to *Johnson* since 1980, the word "racist" occurs 193 times.

16. JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 62 (Knopf 1958).

17. 2 ADAM SMITH, THE WEALTH OF NATIONS 199 (E.P. Dutton & Co. 1960) (1776). Please note that Smith uses "great inequality" rather than "injustice." You're probably thinking of Tolstoy's, "Where there's law, there's injustice." LEO TOLSTOY, WAR AND PEACE 857 (George Gibian ed., Alymer & Louise Maude trans., Norton 1996) (1869). That's a horse of a different color.

states could not purchase complete title from the Indian tribes, Marshall put the powers to obtain title to Indian lands exclusively in the hands of the federal government. In so doing, "Marshall's opinion [in *Johnson*] helped the United States continue to present a united political, military, and economic front."[18] *Johnson* told the story of the United States from discovery to Revolution, creating a myth of establishment that became part of our legal and cultural landscape.

A. *Fletcher v. Peck*

Before turning to *Johnson*, it is helpful to consider *Fletcher v. Peck*,[19] not only because *Fletcher* is the one case cited for precedent in the *Johnson* opinion,[20] but also because it created a conceptual rift with which *Johnson* had to contend. *Fletcher* involved a dispute over a land grant. Georgia granted lands in Indian Country to John Peck, who then conveyed title to Robert Fletcher. One year later, the Georgia legislature declared grants like the one to Peck null and void because the previous legislature had been corrupt.

The opinion considered whether the state could have made the grants in the first place because the land in question had not yet been incorporated into the United States; the land granted was in Indian Country. This was an issue that went to the foundation of the Union because, as Marshall wrote:

> The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.[21]

The judiciary could not pass judgment on the acts that created the union; the origin of its authority was nonjusticiable. Since the issue of vacant lands was part of the "compromise" that established the Union, the Court concluded that, according to a proclamation of 1763, the land in dispute did lie within the boundaries of the state of Georgia, and that Georgia had the power to grant it but did not have the power to take it back.[22]

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18. Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 L. & HIST. REV. 67, 113 (2001).
19. 10 U.S. (6 Cranch) 87 (1810).
20. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 592 (1823).
21. *Fletcher*, 10 U.S. at 142.
22. *Id.*

Since Georgia had not occupied these lands, and the Indian title to those lands had not been extinguished by the federal government, the conclusion that Georgia had anything to grant is counterintuitive. The fact that Marshall found himself on uneven ground is nowhere more evident than in his uncertain, tortured prose. For example, when answering whether a state "seised in fee" could grant a title by which the grantee could eject the Indian occupant, Marshall wrote: "The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."[23] Marshall was trying to have it both ways: A state could be "siesed in fee," but the Indian occupant could not be ejected. If ejectment was not available, then the state's title could not be anything like a fee simple. So what exactly did the state have? Marshall had no good answer. He stacked state title on Indian title, but the decision lacked principle. Questions lingered that arose in *Johnson*.

Justice Johnson, writing in dissent, argued vehemently against Marshall's creative justice. For Johnson, the interest of the state of Georgia in unincorporated lands "amounted to nothing more than a mere possibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seised to a use."[24] He was right. Since Georgia did not have the power to force the tribes off lands that had not been transferred to the United States by treaty or taken by the United States by force, Georgia could do nothing but wait for the United States to act. It might never acquire those lands. Thus, Georgia's interest was only an expectancy.

Johnson elaborated on the convoluted arguments in Marshall's decision when he wrote, "Can, then, one nation be said to be seised of a fee-simple in lands, the right of soil of which is in another nation?"[25] That is to say, could the United States grant lands in Canada—lands that it might one day acquire? Of course not.[26] In *Cherokee Nation v. Georgia*[27] and *Worcester v. Georgia*,[28] the Indian nations were deemed not to be the "absolute proprietors of their soil," given their dependent sovereignty, but Justice Johnson was on to something. It defies the customary constructions of property law to say that the tribes had full rights to their land, but that a state in the Union

23. *Id.* at 142–43.
24. *Id.* at 146 (Johnson, J., dissenting).
25. *Id.* at 147.
26. "In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it." *Id.*
27. 30 U.S. (5 Pet.) 1 (1831).
28. 31 U.S. (6 Pet.) 515 (1832).

could grant something more than a "possibility" of obtaining those lands in the future. According to Johnson, under the "compromise" that Marshall alluded to in his concluding paragraphs, "the state of Georgia ceded, to the United States, by the constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States."[29] For Justice Johnson, Georgia had no power to compel the purchase or conquest, so it held no vested interest in those lands that it could convey. He wrote in dissent, but his opinion foreshadowed the theoretical complications that *Johnson* sought to untangle.

B. The Facts

Justice Johnson noted in his dissent that the "controversy" in *Fletcher* was likely a contrived dispute: land-prospecting in court.[30] *Johnson* was a similarly elaborate fiction, beginning with the original complaint.[31] "The complaint, following the traditional formalities and fictions of ejectment, claimed that the plaintiffs had a lessee, Simeon Peaceable, who was ousted by a claimant, Thomas Troublesome, invoking the rights conferred by the defendant [M'Intosh]."[32] These fictions were commonplace in early property suits, yet they underscore the how this amorphous controversy put Marshall in a position to pronounce myth rather than apply law to fact. After all, the opinion discusses the facts for the case in the first two paragraphs, and does not mention the parties again for twenty-five pages.[33]

The facts are slight, but complex. In 1773 and 1775, the Illinois and Wabash Company, a private enterprise, purchased large tracts of land from the Illinois and Piankeshaw Indians in the Illinois Territory.[34] Thomas Johnson, a member of the company, obtained title to some of those lands, and, upon his death, devised the land to his son, Joshua.[35] Meanwhile, in 1778, Virginia took possession of the Illinois Territory, which included Johnson's land, by defeating British forces.[36] The state subsequently ceded the territory

29. *Fletcher*, 10 U.S. at 147 (Johnson, J., dissenting).

30. *See id.* ("I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties.").

31. *See* Lindsay Gordon Robertson, *Johnson v. M'Intosh*: Land, Law and the Politics of Federalism, 1773–1842, at 49–50 (1997) (unpublished Ph.D. dissertation, University of Virginia), *microformed on* UMI No. 9738854 (UMI Co.).

32. Kades, *supra* note 18, at 100–01.

33. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 571–72, 598 (1823).

34. *Id.* at 571–72.

35. *Id.* at 560–61.

36. *Id.* at 559.

to the federal government.[37] William M'Intosh purchased a tract of land in 1818 from the federal government, apparently the same land that Johnson had purchased nearly forty years earlier from the Illinois.[38]

Robert Goodloe Harper, who had represented Peck in *Fletcher*, was a member of the Illinois and Wabash Company. The company hoped to have its private purchases recognized as valid title within the United States, so Harper concocted a "dispute" between Johnson and M'Intosh to settle the issue: He approached M'Intosh to convince him to stand as the defendant in the ejectment action brought by Johnson.[39] Elaborate prestidigitation ensued, including Harper's handpicking of opposing counsel, which constituted an attempt to stack the deck in the company's quest to obtain a judicial imprimatur for private purchases. In fact, "[m]apping the United Companies' claims alongside [M'Intosh's] purchases as enumerated in the district court records shows that the litigants' land claims do not overlap. Hence there was no real 'case or controversy' between the parties and the federal courts lacked jurisdiction."[40] The fact that such a glaring flaw did not prevent the case from reaching the highest court indicates the Court's eagerness to expound on its views regarding Indian title.

This was an important issue, not only legally, but also politically and culturally. According to Felix S. Cohen, Marshall's articulation of discovery and conquest did two things: First, it saved the U.S. economy by validating land grants made by the federal government, even though the U.S. did not at that time own the lands, and second, it preserved the Indians' right to occupy their land.[41] *Johnson* created a superior right of purchase in the discovering sovereign that validated prospective grants, while maintaining a cognizable right—the right of occupancy—that the American Indians could use to seek redress in the courts of the United States.

C. The Opinion

The *Johnson* opinion was delivered on February 28, 1823, during Marshall's twenty-third year on the Court. Harper and Daniel Webster argued the case of the plaintiffs, Joshua Johnson, Jr. and the Illinois and Wabash

37. *Id.*

38. *Id.* at 560.

39. *See* Robertson, *supra* note 31, at 121. Robertson's dissertation provides a thorough discussion of all of the historical circumstances that generated the *Johnson* decision, analyzing not only the decision itself and Marshall's motivations, but also Harper, the Illinois and Wabash Company, and the political environment.

40. Kades, *supra* note 18, at 99.

41. Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 48 (1947).

Companies, against Winder and Murray for the defendant, M'Intosh. Putting aside certain unacknowledged factual inconsistencies,[42] the Court held, "[T]he plaintiffs do not exhibit a title which can be sustained in the Courts of the United States."[43] This was an obvious result. The British Royal Proclamation of 1763 had declared private purchases null and void, and that policy had been preserved in American law under the Indian Trade and Intercourse Acts of 1790, 1793, and 1802.[44] This could have been the end of the discussion, deciding the case on purely statutory grounds and eliciting the result that Marshall desired. Marshall went further, however, just as he so famously did in *Marbury*, reaching beyond the simple resolution to write about the nation's origins. Consequently, a case that never mentions the Constitution was listed in the Reporter as "Constitutional Law."[45] *Johnson* is not "constitutional," but it invoked the stuff of sovereignty and legitimacy.

Marshall began his *Johnson* opinion by stating the question at bar: Can title to Indian lands, purchased by private parties directly from the Indian tribes, "be recognized in the Courts of the United States?"[46] The question was not whether these purchases were valid in Indian Country, but rather whether the courts of the United States would honor them. "Thus, *Johnson* indicates that, in the absence of federal protection rooted in treaty or statute, non-Indians who enter Indian country must take tribal law as they find it."[47] This is key to understanding the opinion. Marshall did not, as he could not, restrict the Indians right to sell the land to private parties. Their sovereignty went unquestioned in that regard. They were free to sell the land to whomever they pleased, and if they subsequently sold those lands to the U.S. government, the private purchaser might have redress for their loss in the Indian courts. That was a question left to Indian authorities. For the courts of the United States, on the other hand, Marshall's holding is this: The United States will not recognize private purchasers as having valid title within the United States.[48]

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42. *See generally* Kades, *supra* note 18.

43. *Johnson*, 21 U.S. at 604–05.

44. *See* Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 356, 369 (1989).

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

46. *Id.* at 572.

47. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 13–14 (1999).

48. Marshall's property regime works from the top down: sovereign to subject. The conversion of a property from one regime to another, that is, from Indian to American, cannot take place on the level of the individuals but only via purchase, treaty, or conquest, by the sovereign, who then disseminates the property incumbent with the title of its disseminating regime.

Marshall reiterated the issue at the end of the second paragraph: "The inquiry, therefore, is, in a great measure, confined to the *power of Indians to give*, and of private individuals to receive, a title which can be sustained in the Courts of this country."[49] Notice the subtle shift in scope. Not only were the power and jurisdiction of the courts of the United States at issue, but also Indian power within the American regime. In order to discuss the validity of these grants, Marshall felt compelled to discuss the power of the granting party. It seems obvious that these Indians did not have the authority to grant title to U.S. land, and that the matters could have been decided by statute, but Marshall seized the opportunity to discuss matters that reached the integrity of U.S. land grants as a whole.

In the subsequent seven paragraphs, Marshall laid out his conception of the discovery principle before commencing on a country-by-country discussion of the principle and its long history. Marshall first discussed the matter in terms of abstract justice, suggesting that it was "the right of society, to prescribe those rules by which property may be acquired and preserved."[50] Since the rights of property are essential to the establishment of civil society, they cannot be called into question by a court that is simply an instrument of civil society. In other words, the justice of property principles is nonjusticiable; they are the foundations of justice rather than its exercise. This recalls Marshall's comment in *Fletcher* that the issue of Indian lands was a "momentous question" that implicates the formation of the United States.[51]

The skepticism that winds throughout the opinion frames the subsequent discussion. After the introduction, with his doubts expressed, Marshall introduced his understanding of the discovery principle. He wrote, "as between themselves . . . [t]his principle was, that discovery gave title to the government by whose subjects, or by whose authority, [discovery] was made, against all other European governments, which title might be consummated by possession."[52] Marshall was very clear that the rights of discovery applied to prevent conflicting claims by European nations, and, at least in their conception, had no effect on the native peoples. Marshall did note, however, that "the rights of the original inhabitants were . . . to a considerable extent, impaired."[53] But "impaired" is probably just an unfortunate choice of words, vague as it is and implying more in isolation than it meant in context. Impairment resulted from the Indians' inability to sell their property "to whomsoever they

49. *Johnson*, 21 U.S. at 572 (emphasis added).
50. *Id.*
51. *See supra* note 21 and accompanying text.
52. *Johnson*, 21 U.S. at 573.
53. *Id.* at 574.

pleased,"[54] that is, to whichever European sovereigns they chose. Under discovery, the Indian Nations could only sell their land to the "discovering" European sovereign.

Johnson stated that the Illinois could sell their lands to the Illinois and Wabash Company or to whomever else they pleased without any repercussions from the federal government, so claims by the company belonged under Indian jurisdiction rather than in the courts of the United States. The Indians in their sovereignty could sell the land any number of times before turning title over to the U.S. government, at which point all previous claims simply became void.

Milner S. Ball writes that "Marshall's version of the doctrine of discovery . . . has all the indicia of fee simple except this: unless a non-Indian purchaser is licensed by the discovering sovereign or that sovereign's successor, the non-Indian purchaser takes only the Indian's interest."[55] The non-Indian purchaser thus can take the Indian's *interest*, a right of occupancy, but it does not obtain *title*, that is, fee simple ownership in the Anglo-American system. Oddly, the Illinois were permitted to convey their rights of occupancy to the United States even if they had previously conveyed those rights to private purchasers. The United States would not recognize Indian title in the hands of anyone other than the Indians themselves.[56] Essentially, the rights of discovery vested "ultimate dominion" in the European "discoverer" as the final arbiter of who has cognizable title.[57]

After expounding the discovery rule and asserting its "universal recognition,"[58] Marshall provided pages and pages of colonial history in support of his argument. Since Marshall was deciding an issue that had not been brought by either party, these histories were entirely his own. To make matters worse, "Marshall is silent as to his sources for his history of British colonial policy. This is because, as to this period, the Chief Justice

54. *Id.*

55. Ball, *supra* note 12, at 25.

56. *See, e.g.*, Marsh v. Brooks, 49 U.S. (8 How.) 223, 232 (1850).

57. *Johnson*, 21 U.S. at 574. At the close of his discussion of discovery, Marshall alluded to U.S. territorial acquisition of Florida: "Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions, recognise and elucidate the principle which has been received as the foundation of all European title in America." *Id.* at 587. Marshall concludes, correctly, that all the United States had purchased from Spain was dominion by discovery, but had not thereby obtained the right to occupy those lands. *See* Cohen, *supra* note 41, at 35. Cohen points out that the United States paid Napoleon $15 million for the Louisiana Territory, but paid the individual tribes within that territory more than twenty times that figure to obtain title to those lands. *Id.* Essentially, with the Louisiana Purchase, all the United States bought was France's discovery rights.

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

was his own historian."[59] As Robertson demonstrates, Marshall borrowed from his introduction to *Life of Washington*, almost verbatim, in his *Johnson* opinion.[60]

After discussing discovery ad nauseum, Marshall turned to consider rights of conquest, a troubling addition to the case that is even further removed from the litigants' oral presentations and seemingly had little place in the case's history of the United States since, up to that point, conquest had played a small role in the possession of the continent. But it was necessary. Discovery was insufficient, on its own, to describe the relationship between the Indian nations and the European colonial government. Discovery was a matter of dominion, excluding other European sovereigns, but it lacked a principle that grounded American title claims in the land; discovery did not conceptualize acquisition, but only exclusion. The principle of conquest provided a conceptual justification for title acquisition, speaking not only of exclusion, but also of power. Blending conquest with discovery, Marshall created a complete conceptual framework.

Marshall suggested that "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[61] Conquest is "original justice," for it is by virtue of conquest that the courts of a given sovereign obtain jurisdiction.[62]

Marshall had a problem, however, since custom dictated that after conquest, "[t]he new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people"; they are "united by force."[63] The traditional conquest rule demanded a subsequent assimilation of the conquered peoples, but Marshall knew full well that no assimilation was taking place. He wrote, "That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances."[64] Since the rules of conquest could not be brought to bear on the American Indians—setting aside the question of whether they had in fact been conquered—the European sovereigns had to abandon the

59. Lindsay G. Robertson, *John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine*, 13 J.L. & POL. 759, 764 (1997).

60. Robertson, *supra* note 31, at 315–20.

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

62. *See id.* at 589 ("It is not for the Courts of this country to question the validity of [title by the sword], or to sustain one which is incompatible with it."); *see also infra* Part IV.D.

63. *Johnson*, 21 U.S. at 589.

64. *Id.* at 591.

customs of conquest and resorted to a rule somewhere between discovery and conquest:

> 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.[65]

Marshall basically argued that the European nations treated their discovery of the New World as a conquest; they "converted" their discovery into conquest, if only as a rhetorical matter, to justify assertions of title.

Marshall's presentation of the conquest argument is baffling, perhaps because of its factual inaccuracy, but more likely because he tried to maintain the possibility of coexistent, nonreducible systems of property in the United States.[66] He introduced the conquest rule by referencing the United States' enforcement of some claims "by the sword."[67] This is a type of conquest, at least to the extent that conquest is identified with force, but it is actually little more than an allusion to David Hume's skeptical reductionism, where force creates property rights.[68] On the other hand, Marshall stated that the European sovereigns used the rules of discovery because the old rules of conquest could not be applied due to failed assimilation. Well, which was it? Was there a conquest that invoked the principles of conquest, or was it just a convenient rule to ground the rights of discovery? Did the discovery rule prevent conflicts between European nations, or did it vest title in the European sovereign to accommodate the inapplicability of the traditional rules of conquest?

As it turns out, *Johnson* has two different discovery rules. First, there are the rights of discovery that prevent conflict between European sovereigns by bequeathing dominion, the rights discussed at the beginning of the opinion. Second, there are the rights of discovery incurred by conquest that delineate the colonial regime's relationship with the indigenous people. These two rules, pure discovery and discovery via conquest, constitute the broad themes of *Johnson*, preoccupying the vast majority of scholarship. But these rules are secondary to the broader cultural context and its impact on Marshall's opinion. It is the story in *Johnson* that gives the opinion its weight.

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65. *Id.*

66. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (describing Indian Nations as "domestic dependent nations"); *see also infra* Part V.C.

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

68. *See infra* Part IV.C.

II. THE LITERARY DEBT OF *JOHNSON V. M'INTOSH*

"Thus in the beginning all the World was *America*."

—John Locke[69]

Jean Edward Smith begins his biography of John Marshall by writing, "If George Washington founded the country, John Marshall defined it."[70] The first prominent American jurist, Marshall wrote in his opinions the official story of the United States, bringing a moderate Federalist's mind to the fledgling American law. His desire to create a united national character manifested itself in his novel insistence that the court deliver a single opinion,[71] but also in his famous attempts, in dicta, to iterate the official story of the United States.[72]

Little known today, and less often read, Marshall's *The Life of George Washington*[73] is where, "[i]n a sense, Marshall became America's first nationalist historian."[74] Accordingly, the first volume of Washington's biography is a history of colonial America, reaching back hundreds of years before the birth of the hero, because, as Marshall wrote:

> [T]he work appeared to the author to be most sensibly incomplete and unsatisfactory, while unaccompanied by such a narrative of the principal events preceding our revolutionary war, as would make the reader acquainted with the genius, character, and resources of the people about to engage in that memorable contest.[75]

Marshall wanted to be the nation's biographer. He frequently spun a compelling narrative in his opinions, and his craftsmanship is indebted to the fact that his library included the works of Livy, Horace, Pope, Dryden, Milton and Shakespeare.[76] Marshall was known for his wide reading of novels and poetry; he quoted Homer and other poets in passing conversation and kept an extensive collection of British poetry.[77] In fact, "the reading of poetry became his chief delight in youth and continued to be his solace and comfort throughout

69. LOCKE, *supra* note 6, at 301.

70. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 1 (1996).

71. *Id.*

72. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

73. JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON (Citizen's Guild of Washington's Boyhood Home, Fredericksburg, Va. 1926) (1804–1807).

74. SMITH, *supra* note 70, at 329.

75. 1 MARSHALL, *supra* note 73, at xvi.

76. *See* SMITH, *supra* note 70, at 33.

77. *See* 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 80 (Gaunt Inc. 1997) (1919). Beveridge's biographical sketch of Marshall is oppressively glib, casting the Chief Justice in a vast, though an almost unthinkably positive light, thus Smith's biography is favored).

his long life; indeed, Marshall liked to make verses himself, and never outgrew the habit."[78] Even Marshall's courtship of his wife, Polly, as told by the Chief Justice, echoes Alexander Pope's *Rape of the Lock*.[79]

Marshall once wrote to Joseph Story, "At the age of twelve I had transcribed Pope's essay on man, with some of his moral essays."[80] Even cursory consideration of Alexander Pope reveals Marshall's debt to the poet, not only in style, but also in sensibility. Pope often clouded the message of his works. In *An Essay on Man*, Pope wanted to adhere to certain a priori principles and traditions while maintaining the air of unfettered, undogmatic thought. Trying to accommodate religious tradition and scientific progress, he often failed entirely:

> Pope may have wished to have it both ways: that he had sympathies with the liberal theology which was stirring the great religious controversy of his time, and sympathies with an older view; that he wanted to be enlightened and tell the truth as he conceived it, without wanting to be un-Christian or start a fight.[81]

Marshall maintained the semblance of the traditional notions of discovery and conquest, but he subverted the European theory with skepticism that crippled the rules' clarity. Thus both master and student stand as prime examples of Pope's characterization of Man in the second epistle of the *Essay*: "Created half to rise, and half to fall; / Great lord of all things, yet a prey to all."[82]

A. Property and Poetry

Johnson takes a literary pose that emanates from the fact that property is generally regarded as the foundation for the scaffolding of legal principles.[83]

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78. 1 *id.* at 41 (footnote omitted).

79. *See* SMITH, *supra* note 70, at 85–86.

80. 11 JOHN MARSHALL, THE PAPERS OF JOHN MARSHALL 36 (Charles F. Hobson ed., 2002).

81. Maynard Mack, *Introduction* to ALEXANDER POPE, AN ESSAY ON MAN, at xi, xxv (Maynard Mack ed., Yale Univ. Press 1964) (1733–1734).

82. POPE, *supra* note 81, epistle II, ll. 15–16.

83. *Cf.* 2 SMITH, *supra* note 17, at 199 ("The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three days' labour, civil government is not so necessary."); *see also* FREDERIC BASTIAT, *Property and Law*, *in* SELECTED ESSAYS ON POLITICAL ECONOMY 97, 99 (George B. de Huzzar ed., Seymour Cain trans., 1965) (1848) ("[M]an *is born a proprietor* . . . . Hence, law is born of property . . . ."); JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE 309 (1843) ("Before the laws, there was no property: take away the laws, all property ceases."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 32 (4th ed. 1992) ("Unless defensive measures are feasible . . . the cultivation of land will be abandoned and society will shift to methods of subsistence (such as hunting) that involve less preparatory investment."); JEAN-JACQUES

Marx railed about property's significance in *The Communist Manifesto*.[84] And if we go as far back as the Hebrew Bible, we see property conflicts: The conflicts between hunter and farmer and the inconsistency of these modes of living were the foundation for legal necessity, because property disputes engendered animosity and caused brother to take up arms against brother. Though it might sound odd to modern ears, the violence of conquest has traditionally gone hand in hand with the violence of the agriculturalist. For example, consider the Genesis story of Cain and Abel:

> Cain brought of the fruit of the ground an offering unto the Lord. And Abel, he also brought of the firstlings of his flock and of the fat thereof. And the Lord had respect unto Abel and to his offering: But unto Cain and to his offering he had not respect. And Cain was very wroth, and his countenance fell. . . . And Cain talked with Abel his brother: and it came to pass, when they were in the field, that Cain rose up against Abel his brother, and slew him.[85]

Even if it was meant to show Yahweh's preference for the shepherd, the story also places the Mark of Cain on the farmer. The colonists imported the Mark of Cain to the New World, and age-old conflicts ensued.

There were two conflicting perceptions of the New World: on the one hand, the notion of an Edenic world free of original sin where Europe could begin anew, and on the other hand a reiteration of the various virtues and vices of the hunter versus the farmer. As "the *locus classicus* of the principles governing aboriginal title,"[86] the ur-text for all British colonial nations

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ROUSSEAU, DISCOURSE ON THE ORIGIN AND FOUNDATIONS OF INEQUALITY 141 (Roger D. Masters ed. & trans., St. Martin's Press 1965) (1755) ("The first person who, having fenced off a plot of ground, took it into his head to say *this is mine* and found people simple enough to believe him, was the true founder of civil society."). Jim Chen also notes that even "American agricultural prescriptions frequently invoke the Book of Genesis . . . ." Jim Chen, *Of Agriculture's First Disobedience and Its Fruits*, 48 VAND. L. REV. 1261, 1262 (1995).

84. KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 82, 83 (Joseph Katz ed., Samuel Moore trans., Washington Square Press 1964) (1848). Marx and Engels wrote:

> We Communists have been reproached with the desire of abolishing the right of personally acquiring property as the fruit of a man's own labor, which property is alleged to be the groundwork of all personal freedom, activity, and independence . . . . In one word, you reproach us with intending to do away with your property. Precisely so; that is just what we intend.

Id.

85. *Genesis* 4:3–:5, :8 (King James).

86. Calder v. Attorney-General, [1973] 34 D.L.R.3d 145, 193 (Can.).

and their dealings with native peoples, *Johnson* stands outside of pure constitutional law and ascends to the order of cultural myth.[87]

In his oft-cited article, "Constitution, Courts, Indian Tribes," Milner S. Ball brought Virgil's *Aeneid* to bear on Federal Indian Law. But the article's focus on Aeneas (a George Washington character who was identical to the state he founded), is less relevant to this story than Virgil himself. Ball wrote:

> Given the necessity for adaptation of the legends (alliance delayed), the American story in its basic outline—as provisionally adapted from Chief Justice Marshall—might seem to fit the pattern of such Western stories of founding as the *Aeneid*, where aboriginal crime in the event becomes the fountainhead of civilization confirmed in law.[88]

As Ball pointed out, "[a]lthough they are surrounded by much myth and propaganda, the American founding events were not concocted; the history is accessible."[89] But even the events of history require an organizer and storyteller, and Marshall took up the yoke.

Some critics have characterized Marshall as a blind participant in perpetuating an American myth of conquest and European superiority. As Wilkins wrote, "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 . . . ."[90] Though Wilkins appreciates Marshall's tone, he unfairly characterizes a man confronting a difficult, theoretical question, as being imbued with "ethnocentric" and "racist" impulses. In fact, Frickey's analysis is closer to the truth:

> Marshall's mediating approach essentially considered the historical realities of colonization to be beyond judicial reconsideration, but it addressed new questions of the unilateral displacement of indigenous peoples by approaching these constitutive documents through a complex interpretive calculus, represented by the canons of interpretation in federal Indian law, that attempted to preserve indigenous rights against all but clear congressional deprivations.[91]

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87. *See* SMITH, *supra* note 70, at 329 (explaining that as a consequence of writing Washington's biography, "[i]n a sense, Marshall became America's first nationalist historian"). Smith also notes that Marshall's outlook and phraseology come courtesy of Pope and Voltaire. *Id.*

88. Ball, *supra* note 12, at 9.

89. *Id.* at 10.

90. David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 311 (1998).

91. Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 38 (1996).

These were not questions left to Marshall's whim. He had to confront the "realities of colonization," or otherwise betray the history of colonization and the complex relationships that it had created. He was not blind; he knew that he was "rationalizing," as evidenced throughout the opinion. But he thought that the rationalization was necessary given the state of American politics and culture. Besides, he thought that he had a firm grasp of the subject from his work, *Life of George Washington*. He tried to elicit a pattern from the past, a custom from time immemorial that established and validated the United States in America.

B. Virgil's *Georgics* and *Aeneid*

Virgil's poetry offers a prime parallel to *Johnson*, fleshing out the turmoil of a writer with cultural as well as moral concerns. As a Roman poet, engaging and creating a history of Roman literary art, Virgil's poetry expounded on the same themes that dominate *Johnson*.

In the first of his *Georgics*, Virgil wrote:

> Allfather himself hath willed
> That the pathway of tillage be thorny. He first by man's art broke
> Earth's crust, and by care for the morrow made keen the wits of her folk,
> Nor suffered his kingdom to drowse 'neath lethargy's crushing chain.
> No husbandman tamed the savage fields before Jove's reign.
> To mark for one's own a plot of land, to divide the plain
> By a boundary-line, was a sin: all winnings in common were won.
> Earth of herself bore all things freely, and bidden of none.
> It was Jove who bestowed their deadly venom on serpents fell . . . .[92]

The *Georgics* are pastoral poems, standing in contrast to the heroic themes and rigid meter of the *Aeneid*. Instead of glory in warfare, the *Georgics* looked at common life, glorifying in some instances the life of the farmer, but often reveling in the regularity of it all. In these lines above, Virgil considered the role of agriculture in the course of civilization. Unlike the Golden Age of Saturn when the "savage fields" were un-"tamed," the delineation of property was "a sin," and "all winnings in common were won," Jove's victory introduced a world defined by hardship and competition. Thus, the farmer stood at the threshold of civilization, forcing his will on the stubborn soil. Before Jove and agriculture, man lived in harmony with nature. Afterwards, the serpents found their venom and man toiled.

92. VIRGIL, THE GEORGICS OF VIRGIL bk. I, ll. 121–29, at 9 (Arthur S. Way trans., Macmillan & Co., Ltd. 1912) (29 B.C.).

It is important to note that Virgil did not create a hierarchy between the days of the community and the subsequent days of struggle. Rather, the world simply would not relent to the new desires and needs of man and the agricultural sciences. This sense of man in conflict with nature, instead of harmony, is a recurrent theme in the West. Coupled with western notions of progress, it is not hard to understand the perspective of colonists confronting the American Indians for the first time. Here they saw people in a state similar to that which they had regarded as their own past.[93]

Later in the poem, Virgil wrote, "[n]ow named be the weapons meet for the sturdy yeoman's toil . . . ."[94] In the Latin, the line ends on the word *arma*, drawing further to the conception of the farmer's tools as "weapons." It was a conflict with nature, but it also underscores the violence of agricultural life, in stark contrast to the life of the hunter-gatherer. John Ragsdale contends: "[s]ocieties oriented toward the natural harvesting of plants and animals rather than the intensive exploitation of natural resource capital tend to be less aggregated and more decentralized, less internally competitive and more cooperative, less materially acquisitive, more egalitarian, more in tune with natural cycles and flows, and more resilient."[95] Ragsdale's depiction runs the risk of falling into the same mythology that engendered opinions such as *Johnson*, but he nevertheless demonstrates how colonists may have perceived American Indian culture as a way of life that was not precisely primitive, but one that had certainly seen its day.

Virgil's *Aeneid*, instead of the farmer, considered the life and struggle of the colonist. The *Aeneid* told the story of a people wandering the earth, looking to establish a new land of prosperity after falling to the trickery of the Greeks and the Trojan Horse. The characters were particularly bitter about the Greek fraud, disparaging the victory as the mere by-product of lies

93. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) ("[T]hey are in a state of pupilage.").

94. VIRGIL, *supra* note 92, bk. I, l. 160, at 11.

95. John W. Ragsdale, Jr., *Some Philosophical, Political and Legal Implications of American Archeological and Anthropological Theory*, 70 UMKC L. REV. 1, 19 (2001). Such a statement is generally illusory. Ragsdale describes the Native American culture in idyllic, Pre-Lapsarian terms of man in perfect harmony with nature, but the truth of this statement is inevitably undercut by its implausibility. That is to say: (1) some Native American methods might have conformed better to their eco-system, but those methods are not only determined by the eco-system but also the dynamics of the society within which they occur (hunting and gathering does not function so well with large populations, *see* JARED DIAMOND, GUNS, GERMS, AND STEEL 88 (1999) ("As a result, one acre can feed many more herders and farmers—typically, 10 to 100 times more—than hunter-gatherers.")), and (2) certainly we cannot merit a given culture's worthiness based upon popular science and anthropology. These are inevitably matters of taste, whereas the preservation of a culture cannot depend on such whimsical notions. Cultural hopscotch is patronizing at best, and vulture-like at worst.

rather than superiority.[96] To the extent that the American colonists and, afterward, the framers of the Constitution, envisioned the United States in the image of the Roman Republic, they frowned upon the idea of having built their land on fraud. Rather, they needed to believe that they had earned it. The notion of conquest satisfied that need.

Thus, at the close of the poem, when Aeneas slew Turnus, the native Italian, Virgil wrote: "Fierce under arms, Aeneas / Looked to and fro, and towered, and stayed his hand / Upon the sword-hilt."[97] Aeneas, with his opponent effectively disarmed, paused to listen to Turnus' plea for mercy. But, in a sudden fit of rage, Aeneas "sank his blade in fury in Turnus' chest. / Then all the body slackened in death's chill, / And with a groan for that indignity / His spirit fled into the gloom below."[98] The sheer violence of the poem's final lines indicates the poet's state of mind. Instead of giving his hero a victory unclouded by moral ambiguity, Virgil placed Aeneas in a position of clear strategic advantage by allowing Aeneas to pause to consider the violence that he was about to do. And yet, he continued, unmercifully killing Turnus. And the poem ended.

Virgil was torn about the foundation of the Roman state. It was his commission to write the Roman epic, yet he could not, in good conscience, endorse the conquest of the native Italians because of the injustice of Aeneas' conquest. The colonist stood in a position of strategic advantage, yet he murdered the disarmed native. And the Roman state stood upon the act. It was a foundation steeped in moral guilt, but nothing could be done.

The skepticism that permeated Virgil's *Aeneid* surrounding the justice of Trojan conquest mirrors the apologetic and skeptical tone in Marshall's *Johnson* opinion. Ball wrote of *Johnson*:

> I know of no comparable confession in the annals of the Supreme Court. This acknowledgement of the injustice of the American law has about it the sense of regrettable necessity but also of boundaries: So much but no more had to be done by the new nation and its law. It was fundamentally wrong, but it was done. This is the maximum permissible extent of it. This far and no farther.[99]

96. VIRGIL, THE AENEID, bk. II, l. 92, at 35 (Robert Fitzgerald trans., Vintage Books 1990) (19 B.C.) ("Greek deceptive arts: one barefaced deed / Can tell you of them all."); *id.* ll. 206–07, at 38 ("trained / In trickery"); *id.* l. 414, at 44 ("I knew then what our trust had won for us, / Knew the Danaan fraud"); *id.* l. 514, at 47 ("Trickery, bravery: who asks, in war?").

97. *Id.* bk. XII, ll. 1277–79, at 402.

98. *Id.* ll. 1295–98.

99. Ball, *supra* note 12, at 29.

Robert Williams instead contends that *Johnson* "merely provided a *post hoc* legal rationalization for the Revolutionary-era political compromise on the frontier lands question . . . vest[ing] superior title to the frontier Indian lands in the United States government."[100] That is probably true. But Williams does not appreciate that these were conscious rationalizations; Marshall knew that he was on shaky ground, and his skepticism seeped through every point. Marshall's perspective was essentially that history paints a sad picture of colonial treatment of American Indians, but it was not his place to right those wrongs. As he wrote to Joseph Story:

> It was not until after the adoption of our present government that respect for our own safety permitted us to give full indulgence to those principles of humanity and justice which ought always to govern our conduct towards the aborigines when this course can be pursued without exposing ourselves to the most afflicting calamities. That time however is unquestionably arrived; and every oppression now exercised on a helpless people depending on our magnanimity and justice for the preservation of their existence, impresses a deep stain on the American character.[101]

Robert Cover writes, "[l]aw may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative."[102] Given the parameters imposed by concepts such as "conquest" and "original justice," *Johnson*'s Indian Title was as far as Marshall could go without rewriting the reality of American sovereignty. Marshall incorporated literary motifs to tell a story that was beyond the law, to create a state of affairs high in concept that also reconfigured the terms of the debate.

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100. WILLIAMS, *supra* note 15, at 289.

101. 11 MARSHALL, *supra* note 80, at 178. Marshall wrote the above letter in 1828 in response to Story's having written "Everywhere, at the approach of the white man, they fade away. We hear the rustling of their footsteps, like that of the withered leaves of autumn, and they are gone forever. They pass mournfully by us, and they return no more." *Id.* at 179 n.2. Of course, some might criticize Story's poetic turn as participating in the myth of the "vanishing Indian," Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 80 (1993), but that would be so glum. It is difficult for one to deny that Story and Marshall had genuine sorrow and remorse for the loss of these peoples.

Marshall's letter also echoes Vattel: "[I]t is only by the treaty of peace, or the entire submission and extinction of the state, to which these towns and provinces belonged, that the acquisition is completed, and the property becomes stable and perfect." M.D. VATTEL, THE LAW OF NATIONS 451 (1820). Since this state had clearly arrived with the Native American tribes, Marshall thought that the time had come for support and reconciliation.

102. Cover, *supra* note 10, at 9.

The strain of skepticism in *Johnson*, difficult to muster in a voice that was supposed to dictate clean, hard reason, was a product of the time. As Tocqueville wrote, "In democratic ages . . . men's beliefs are sometimes as much in a state of flux as their laws. A time of skepticism brings poets' imaginations back to earth and shuts them away in the actual, visible world."[103] Marshall's tone exemplifies that psychology: firm language articulating infirm faith.

III. THE RIGHT OF DISCOVERY AND DOMINION'S MINIONS

These literary parallels change the typical reading of *Johnson* from that of a politically expedient manifesto to a text rich in literary and philosophical complexity. Returning now to the theoretical framework of the opinion, we begin with discovery. *Johnson*'s discovery principle is critical to establishing American property law, particularly in regard to Indian Title and the foundation of American title on Indian title.[104] The rule, as first articulated by the Aquinan disciple Franciscus de Victoria, is confused and complicated, but a brief analysis review provides a backdrop against which Marshall's creativity stands out.

A. Development of the Right of Discovery Argument

Marshall wrote in *Johnson*:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.[105]

Marshall's characterization of the "eager" European nations, their "ambition" and "enterprise," announced his skepticism, forcing Marshall to apologize for the European conception of the indigenous person. As Richard Epstein puts it, "Marshall's back-handed, ironic half tongue-in-cheek prose is very difficult

103. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 560 (Gerald E. Bevans trans., Penguin Books 2003) (1835).

104. *See* Epstein, *supra* note 5, at 6 ("But for Chief Justice Marshall the chain of title was perfectly coherent. An American title could rest on an Indian title, which in turn could rest quite comfortably on the principle of first possession. And, the one indisputable fact is the Indian tribes arrived first."). Epstein overemphasizes, however, the importance of first occupancy in Marshall's articulation of the discovery principle.

105. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572–73 (1823).

to capture unless you read the words aloud."[106] Though the Court could not question the foundation of discovery claims, it could express its discontent. Marshall did just that.

The right of discovery argument comes chiefly from the Spanish, a historical oddity considering that Marshall places the rights of discovery and conquest in counterpoise. As Montesquieu wrote, "The Spaniards considered these new-discovered countries as the subject of conquest; while others, more refined in their views, found them to be the proper subjects of commerce, and upon this principle directed their proceedings."[107]

Franciscus de Victoria was a Spanish theologian, educated in the Scholastic school. Even a cursory reading of *De Indis et de Ivre Belli Relectiones* quickly reveals his indebtedness to St. Thomas Aquinas. Delivered in 1532, Victoria's lectures on the titles that the Spanish might claim in the New World were the first complete discussion of the question of European rights in the Americas.[108]

Despite what is sometimes characterized as a sympathetic view towards the Indians, Victoria did not demand that the Spanish curb their conquest. He dubiously wrote of the discovery, "[A]s the Indians are not making a just war on the Spaniards (it being assumed that the Spaniards are doing no harm), it is not lawful for them to keep the Spaniards away from their territory."[109] The short quote reveals much about Victoria's view. First of all, it makes a big, bad assumption. Second, and more important, it makes little sense. Victoria characterized the Spanish explorers as tourists, minding their own business, just wanting to see the sights. But he knew that their intentions were much more akin to plunder than purview. Furthermore, Spanish explorers—*conquistadores*—were instruments of the Spanish crown and must be considered as government agents. The movement of government agents in

106. Epstein, *supra* note 5, at 7. For proof, consider the following: "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence." *Johnson*, 21 U.S. at 573.

107. 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 367 (Thomas Nugent trans., The Colonial Press 1900) (1650). *Cf.* 2 SMITH, *supra* note 17, at 122. Adam Smith hypothesized:

> At the particular time when these discoveries were made, the superiority of force happened to be so great on the side of the Europeans that they were enabled to commit with impunity every sort of injustice in those remote countries. Hereafter, perhaps, the natives of those countries may grow stronger, or those of Europe may grow weaker, and the inhabitants of all the different quarters of the world may arrive at that equality of courage and force which, by inspiring mutual fear, can alone overawe the injustice of independent nations . . . .

Id.

108. *See* Ernest Nys, *Introduction* to FRANCISCI DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 55, 83 (Ernest Nys ed., John Pawley Bate trans., William S. Hein & Co. 1995) (1557).

109. VICTORIA, *supra* note 108, at 151. An absurd statement, considering the outcome.

their official capacity onto foreign soil generally *is* considered unlawful. It was not a diplomatic visit. It was an invasion.

Accordingly, Victoria went on to address the potential riches held on Indian soil that might be retrieved for Spain:

> [I]nasmuch as things that belong to nobody are acquired by the first occupant according to the law of nations, it follows that if there be in the earth gold or in the sea pearls or in a river anything else which is not appropriated by the law of nations those will vest in the first occupant, just as the fish in the sea do.[110]

That first occupant can be none other than the Indians. However, Victoria suggested that these lands were not, as yet, appropriated and were not within the dominion of Indian kingdoms and tribes.[111] Therefore, the Spanish had untempered access to the New World's riches under Victoria's discovery principle. These prime examples of Victoria's theory show not only its contrast with Marshall, but also the general disregard or disavowal of any coherent system of ownership and title among the Indian nations. It is apparent throughout Victoria's writing that he was not only crafting a reliquary of natural rights for explorers, but that he also saw the discovery as giving a property interest to the Spanish people. If the Spanish took, the Indians had to give.[112]

It is important to remember that Victoria's discovery rule is not the same as the rule Marshall describes. Unlike the Spanish, who thought of discovery as granting certain rights to the discovering European sovereign relative to the native peoples, Marshall saw the right of discovery as apply-

110. *Id.* at 153 (citation omitted).

111. This argument is akin to the Norman notion of vacant lands explored at length in Robert A. Williams, Jr.'s *The American Indian in Western Legal Thought*, cited *supra* note 15. The trouble with Victoria's argument is obvious: The "vacancy" of the New World was as troubling a description as "discovery."

112. *See generally* MICHEL DE MONTAIGNE, *On Coaches*, *in* THE COMPLETE ESSAYS (M.A. Screech ed. & trans., Penguin Books 1991) (1580). It was not entirely lost on the Europeans what was happening in the New World. Montaigne reflects on the bravery of the Mexican and Peruvian kings, concluding with this story of the Spanish conquest:

> Instead of using coaches or vehicles of any kind they have themselves carried on the shoulders of men. The day he was captured, that last King of Peru was in the midst of his army, borne seated on a golden chair suspended from shafts of gold. The Spaniards in their attempts to topple him (as they wanted to take him alive) killed many of his bearers, but many more vied to take the places of the dead, so that, no matter how many they slaughtered, they could not bring him down until a mounted soldier dashed in, grabbed hold of him and yanked him to the ground.

Id. at 1036–37 (footnote omitted).

ing chiefly to the relationship between the European nations, with little effect on the indigenous populations.[113]

Samuel Pufendorf directly criticized Victoria's discovery rule in *Of the Law of Nature and Nations*. His criticisms, with which Marshall was familiar,[114] briefly but effectively underscored the most basic presumptions and pompous claims of Victoria's philosophy and discovery in general.

Pufendorf noted that "if any nation has no interest in visiting foreign peoples, there seems to be no law requiring it to admit those who come to it unnecessarily and without good reason."[115] Precisely. Simply because the Spanish had "discovered" the new world, that did not create a right to be welcomed with open arms.

Pufendorf's criticism was even more pointed, however:

> [I]t is crude indeed to try to give others so indefinite a right to journey and live among us, with no thought of the numbers in which they come, their purpose in coming, as well as of the question whether, in passing through without harm and visiting a foreign land, they propose to stay but a short time, or to settle among us permanently, as if upon some right of theirs. Moreover, whoever wishes to lay upon others such a requirement for hospitality, ought surely be rejected as too severe an arbiter.[116]

This passage illustrates just how ridiculous and outrageous any right by "discovery" would be. Of course, if the lands were vacant, that would be a different story. But they were not vacant; peoples with long traditions and established cultures and societies had populated those lands from time immemorial. To suppose that European colonizers had any rights among the indigenous people merely by landing on their shores, rights that allowed them to stay as long as they like, wherever they like, and to bring in new inhabitants without regard for the original inhabitants was preposterous. As everyone knew, the first occupant was higher in right.

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113. *See* Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations From Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 455 (2003) ("If the discovery doctrine generated or reserved authority for the U.S., it was not ownership. Rather it was a preemptive right of first purchase . . . .").

114. *See* 5 MARSHALL, *supra* note 80, at 300–07.

115. 2 SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS 364 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688).

116. *Id.* at 364–65.

B. Locke's "First Occupant" Rule

John Locke's "first occupant" rule takes Pufendorf's criticisms and turns them into positive theory. Locke was the father of liberal property law, democratic to a fault, but readers attribute to him a greater debt to common sense than his content admits. His theory of property and ownership began with an assumption, "[E]very Man has a *Property* in his own *Person*."[117] So followed the famous Lockean articulation: "Whatsoever then he removes out of the State of Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*."[118] It is by using some *thing* that an individual obtains ownership. Locke stated the intuitive sense of property, a relationship between a person and an object, rather than a social relationship between persons. That is to say, when I say I own something, I am not thinking about my relationship to the object as contrasted with your relationship to the thing. I am merely thinking about the thing and why it is mine. Locke's theory seems like common sense, though it is overly simplistic.[119]

Consequently, Locke implied a version of first-in-time ownership rights. Once ownership was had, it could not be eradicated because my labor "hath *fixed* my *Property* in them."[120] Latecomers, such as European explorers, thus had no property rights, because those rights were earlier and ineradicably "fixed" by the indigenous folk. This did two things. First, it eliminated serious consideration of Victoria's argument as a viable theory of obtainment. Pufendorf insinuated as much, but Locke's conceptualization of property went further to undermine even the basic assumptions of Victoria's Scholasticism. Second, however, Locke's theory called into question any assertion of European property rights in the New World. Marshall, then, had a difficult

117. LOCKE, *supra* note 6, at 287. Locke's view proceeds from this basic assumption. Thus the problem with a Lockean view of property is immediately apparent, for what could be more bizarre, more unnatural than saying, "I own myself." One simply does not say that. Nevertheless, Locke continues. It is important to note, however, Locke's use of the indefinite article "a." Scholastic Philosophy heavily influenced Locke. *See generally* JAY DAVID ATLAS, PHILOSOPHY WITHOUT AMBIGUITY 10 (1989) ("In any case Locke's views have been misunderstood by philosophers who ignore the Scholastic semantic tradition in which he was educated."). Much of Locke's importance in the history of philosophy in fact is due to his making the first sustained philosophical attack on Scholastic metaphysical realism. Thus, the indefinite article is part of Locke's seemingly colloquial but nevertheless highly technical language. Locke argues that each person has the property, in its philosophical sense, of belonging to the individual's ego, that is, the essence of the individual is imbued in everything that the individual does. This property is transferable to objects, making them the property and giving them "a" property of the agent.

118. *See infra* Part III.C.

119. *Cf.* LOCKE, *supra* note 6, at 288.

120. *Id.* at 289.

task. Discovery was often the principle that European nations used to justify their rights in the Americas, but it was undeniably, fundamentally flawed.

C. Marshall's Discovery Rule

Since *Johnson* is the "single most important textual interpretation of the law governing the rights of indigenous tribal peoples in the territories they occupied,"[121] the import of the discovery rule cannot be discounted, despite its crude articulation in the opinion. Marshall had a tradition and a vocabulary at his disposal,[122] but he had new circumstances before him that called for a new theory of property acquisition. The discovery rule needed the grounding principles of conquest.[123]

Thus, when Ali Friedberg criticizes Marshall's use of the rule because, "In *Johnson*, Marshall disregarded the principles announced by Victoria, and applied the Doctrine of Discovery as if the Indians were 'nobody,' under Victoria's thesis,"[124] it is an unfair assessment. The American Indians were not "nobody" in *Johnson*; they maintained a right of occupancy a property right that could be used to exclude unwanted settlers. They were certainly regarded more highly than Victoria's begrudging hosts.

Marshall's idea of discovery granted a power of preemptive purchase, but it did not require acceptance of colonial expansion that was not preceded by purchase or conquest. To avoid the Lockean problem of first occupancy, Marshall's discovery rule did not grant title, at least not in the conventional sense; it was merely an exertion of dominion. Though Marshall stated that the power of dominion by discovery allowed the discovering sovereign to "convey a title to the grantees,"[125] this "title" was nothing more than a possibility of acquisition if and when the sovereign purchased the land or took the land by the sword. Purchase and conquest spring vestment; discovery

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121. WILLIAMS, *supra* note 15, at 289.

122. Robert A. Williams criticizes Marshall's opinion because *Johnson* perpetuates "the discourse of the Norman Yoke and its fiction that European monarchs acquired feudally conceived rights of conquest upon their discovery of the infidel-held territories of America." *Id.* at 312–13.

123. *See id.* at 315 ("Thus in acknowledging 'conquest' as the basis of the United States' superior title to the lands of America, Marshall specifically incorporated into United States land law the Norman-derived feudal fiction that discovery was the basis of the English Crown's original assertion of prerogative rights of conquest in America."); *cf. infra* Part IV.A, discussing Blackstone's argument that "conquest" under Norman understanding merely meant "acquisition."

124. Ali Friedberg, *Reconsidering the Doctrine of Discovery: Spanish Land Acquisition in Mexico (1521–1821)*, 17 WIS. INT'L L.J. 87, 106 (1994). Of course, the Indians were not "nobody" under Marshall's thesis either.

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

springs nothing but a power of dominion as against other European sovereigns. Marshall's rule is a significant modification of not only Victoria's rule, but also Locke's. Instead of putting property's definition in the hands of the individual, à la Locke, Marshall makes discovery's dominion a socially determined property, consistent with Hume's theory, as we will see in the next part.

Marshall's sense of discovery was an important antecedent to title acquisition. Marshall could not deny American title *in toto*, as doing so would have undermined the very existence of American sovereignty. Thus, he turned to a modified assertion of conquest rights to complete the picture.

IV. THE RIGHT OF CONQUEST AND THE AMERICAN ACQUISITION

Discovery, as Marshall used it, only applied internationally; that is, between European states. A second step was necessary, then, to rationalize or justify the American acquisition of Indian lands. The doctrine of conquest, developed in Europe to systematize the formation of a new government, had the theoretical tools Marshall needed for his story: acquisition, abdication, and original justice. Conquest thus provided the intranational side of the story that described the relationship of Indian and American.

Conquest traditionally involved assimilation, however, and since no assimilation had occurred,[126] Marshall had to deviate from the traditional notion. This is where Marshall's debt to Hume becomes clear: Unlike Locke, who sought to revolutionize property theory, Hume's theory works within the tradition while turning that tradition inside-out. Essentially, Marshall was using the same old words to describe a new world.

A. The Conquest Rule

Blackstone explained in his *Commentaries* that the rights of conquest are based upon "[a] supposition, grounded upon a mistaken sense of the word *conquest*; which in its feudal acceptation, signifies no more than *acquisition*."[127] Though Marshall's contemporary usage likely included a sense of violence or

126. *See id.* at 590.

127. 2 WILLIAM BLACKSTONE, COMMENTARIES *48; *see also* 1 MONTESQUIEU, *supra* note 107, at 134 ("Conquest is an acquisition, and carries with it the spirit of preservation and use, not of destruction."). Robert Williams, Jr. might have a problem, then, to the extent he ascribes the notion of "conquest" as implying "victory over the infidels" to the Normans. WILLIAMS, *supra* note 15, at 312, 315. That critique is best left for another day.

force, it also had at its core the notion of acquiring sovereignty. Turning to the rights acquired by conquest, Blackstone continued:

> [T]he right of conquest . . . can mean nothing more, than that, in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies.[128]

Already we see one of the great problems with speaking about the United States's rights of conquest. Unlike the traditional European scenario—where the conqueror envelops the conquered—the Indian nations, though "dependent," were never "subjects" of the United States. No assimilation took place, as Marshall freely admitted,[129] so no official subjugation was possible.

The complexities that distinguished America and made European notions of conquest hard to apply were not lost on Marshall. Well versed in the law of nations, and an adherent to the early masters of international law, Marshall knew how the problems of conquest were traditionally solved.[130] In *Johnson*, he

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128. 1 BLACKSTONE, *supra* note 127, at *103.

129. *See Johnson*, 21 U.S. at 591. Blackstone was somewhat oblivious to this problem, however, when he wrote, "Our American plantations . . . being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire), or by treaties." 1 BLACKSTONE, *supra* note 127, at *107–08. Conquest, as Blackstone described it, would not have involved "driving out the natives," but rather only an assimilation of the conquered, so his commentary is confused.

Importantly, however, the idea of "natural justice" in Blackstone was a product of the Enlightenment that created a vast system of "natural" law, that is, laws claimed as the dictates of reason and objective analysis to which all rational people would ascribe. It was as pretentious a claim as that of discovery, but it was the course. Burlamaqui described natural law as,

> The system or assemblage of these rules considered as so many laws imposed by God on man, is generally distinguished by the name of *Natural Law*. This science includes the most important principles of morality, jurisprudence, and politics, that is, whatever is most interesting in respect as well to man as to society.

J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL LAW 1–2 (Thomas Nugent trans., London J. Nourse 1752). The step between natural law and the law of nations, with it the rights of conquest, is an easy step:

> We must therefore say, that the law of nations properly so called, and considered as a law proceeding from a superior, is nothing else, but the law of nature itself, not applied to men considered simply as such; but to nations, states, or their chiefs, in the relations they have together, and the several interests they have to manage between each other.

Id. at 195–96.

The law of nations thus elevated the law between persons to the national level, that is the law of nations, guided by reason, sought to establish equality and the greater good, happiness among nations and security in property. Like many of the writers of his day, Burlamaqui assumed—a great assumption—that states should be treated as persons, with desires to survive and to be free and to secure happiness. It was a Romantic generalization, a product of analytical reductionism, but it created a system of thought that persists today.

130. In his oral argument notes for *Ware v. Hyton*, Marshall cited on numerous occasions to Vattel, Grotius, and Pufendorf, the early masters of international law, to elucidate the nature of

went in a new direction, as circumstances demanded, yet a brief survey of the works of Grotius, Pufendorf, and Montesquieu provides a useful counterpoint to appreciate Marshall's Humean innovations.

Grotius, the progenitor, began his analysis of conquest by asserting that it created a master-servant relationship between nations. "If individuals can reduce each other to subjection, it is not surprising that states can do the same, and by this means acquire a civil, absolute, or mixed, dominion. . . . [V]ictory has often been the foundation of dominion."[131] Following Grotius, assuming assimilation, conquest would have allowed American Indians to pass title according to American property law.

This relational approach, seeing sovereignty in terms of force rather than a metaphysical right, underscores Pufendorf's sense of property: "[P]roprietorship and community are moral qualities which have no physical and intrinsic effect upon things themselves, but only produce a moral effect in relation to other men . . . ."[132] The rules of property are not fixed by nature, but are relative to the members of a society in a given circumstance. Furthermore, property title "impl[ies] an exclusion of others from the thing which is said to be common or proper, and therefore presuppose[s] more men than one in the world."[133] Again, ownership is a social property. The fact that property for these natural law philosophers depended upon relationships rather than some essential property of the thing, grants Marshall the kind of freedom to create new rules of property for new circumstances: property rights follow society's demands.

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international law and the law of war. 5 MARSHALL, *supra* note 80, at 300–05. And just two years before *Johnson*, Marshall wrote to Henry Wheaton in 1821, "Old Hugo Grotius is indebted to you for your defence of him & his quotations. You have raised him in my estimation to the rank he deserves." 9 *id.* at 148.

131. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 348 (A.C. Campbell trans., Hyperion Press, Inc. 1993) (1625).

132. 2 PUFENDORF, *supra* note 115, at 532. By way of example, one can consider modern conceptions of art to illustrate the notion of "moral" qualities. A couple of years ago, on my way home from high school, I found a small orange patch with "100% NRA" embroidered in white. At that point it was just a patch, one that I picked up because it was funny but one that soon found itself on my wall. It stands alone, a small 3" x 3" patch, on a broad white canvas of cinder block. Now, it is not *just* a patch. It is a "work of art," admittedly in the broadest sense because now it has aesthetic value. It always had a certain comic value for sure, but now it has artistic value and can be discussed in terms of orientation, the way it attracts the eye, its relationship to the artist, me, and so forth.

What makes my patch a work of art is calling it a "work of art," putting it on display, etc. The problem is that now it seems that the patch on my wall is a different patch from the one I found. It has obtained new intentional properties; it has become a new *type* of object altered by a socially determined property, but a property nonetheless. Nothing about its essence has changed, only how we talk about it.

133. *Id.* at 535.

Just as the law of property creates peace among competitive individuals, conquest seeks to quiet international disputes. These qualifications did not undermine the accepted notion that force was supreme in all events, however:

> States as well as individuals may lose their property by the laws of war: and even a voluntary surrender is in reality nothing more than giving up what might have been taken by force. For as Livy says, where all things submit to the power of arms, the conqueror may impose whatever terms, and exact whatever fines he pleases.[134]

The law of nations accepted that the rights demanded by superior force were unassailable.

European minds conceived the law of nations and its accordant code of conquest, however, with European-style states in mind. Montesquieu pointed out the problem: "[a]s [shepherds and hunters] are not possessed of landed property, they have many things to regulate by the law of nations, and but few to decide by civil law . . . . The institutions of these people may be called manners rather than laws."[135] The law of nations had difficulty appreciating a tribe because a tribe did not function according to the principles that underpin European statehood. Unlike in Europe, where the conqueror exercised sovereignty in essentially the same way as his predecessor, since all of those states were based upon similar systems of sovereignty, in the Americas, conquest would have been fundamentally different. A European conqueror could not simply "step into the shoes" of the predecessor because the systems did not embody the same theory of governance. It is no surprise then that assimilation, as assumed by conquest doctrine, did not occur in the Americas. If there was no assimilation, however, the traditional conquest rule starts to break apart.

B. Locke's Critique of Conquest

A further difficulty for Marshall lay on the justice side of the conquest equation. Locke's influential theory of "essential property" did not look kindly on the rights asserted by conquest. For Locke, "property" could only be forsaken by choice; that is to say, an individual could not be deprived of his property except by consent, e.g., sale, contract, etc. Locke argued that "[t]he *right* then *of Conquest extends only to the Lives* of those who joyn'd in

134. GROTIUS, *supra* note 131, at 349.
135. 1 MONTESQUIEU, *supra* note 107, at 329.

the War, *not to their Estates* . . . ."[136] What participates in the war effort can be taken, but no more. Thus, Locke puts much greater limitations on the conqueror. There is also no need to assimilate or anything of the kind because the conqueror has only obtained the rights of those who fought; the wives and children of the conquered remain free and in full possession.

Locke's problem—and the problem of applying Locke—is that for all its common sense, Locke's theory Platonically assumed a law above the participating nations that determined the rules of conquest; it begins to sound incredibly idealistic.[137] Locke found that the rights of conquest were contrary to natural law and that the "spoils" of conquest were only what was necessary to make the conqueror whole again. But that does not accurately describe what *happens*. Locke admitted that conquest might confer some "rights" to the conqueror, but only because "the Conquered, or their Children, have no Court, no Arbitrator on Earth to appeal to."[138] These are rights obtained by silencing opposition. This silencing was part and parcel of conquest.

C. Hume's Moral Rights and Custom

Eschewing the overly theoretical approach of Grotius and Pufendorf, Hume relied on custom and culture to reinstantiate the "moral" quality of property. Far more intuitive than his Grotius and Pufendorf, Hume elevated the custom aspect of property above the legal theory of property. Thus, utilizing Hume afforded Marshall greater flexibility in validating American title, allowing him to tell the story he needed to tell instead of sticking rigidly to a system: it was moral but unprincipled.

Hume was one of the most studied philosophers at Marshall's time, exposing many of the shortcomings of Lockean empiricism. In property, he reestablished the "moral" theory of Grotius and Pufendorf in Anglo-American thought. For Hume, property was "*such a relation betwixt a person and an object as permits him, but forbids any other, the free use and possession of it, without violating the laws of justice and moral equity.*"[139] Though the object-person

136. LOCKE, *supra* note 6, at 390.

137. *See* Epstein, *supra* note 5, at 4. "'Prior in time is higher in right' was the guiding principle in the legal response to the problem of social order." *Id.* Epstein considers the tension between the "prior in time" rule and the rule of conquest, sarcastically characterizing the argument as "[p]rior in time is higher in right only when it does not matter all that much . . . ." *Id.* Looking back on Roman law, Epstein phrases the Roman position as: "[t]itle to properties is acquired by nations through conquest—full stop, period." *Id.* The problem, for Epstein, is squaring the "prior in time" principle with that of the conqueror, who clearly came after.

138. LOCKE, *supra* note 6, at 386.

139. HUME, *supra* note 8, at 360.

relationship of Locke remained intact, Hume instantiated the "other" as a necessary element to ownership, for ownership was partly defined by exclusion.

Hume also reinstated the importance of passion in property acquisition and retention, an aspect all but lost on Locke. Hume wrote: "As our first and most natural sentiment of morals is founded on the nature of our passions, and gives the preference to ourselves and friends, above strangers; 'tis impossible there can be naturally any such thing as a fix'd right or property . . . ."[140] This approach stands Hume in stark contrast to Locke on the one hand and Grotius and Pufendorf on the other because it posits passion as the source of ownership, rather than reason. Be it relative or objective, property for the earlier theorists was a product of reason and legal justification. For Hume, passion controlled.

Hume thus offered a perfect characterization of Marshall's difficulty in crafting the *Johnson* opinion:

> [T]he study of history confirms the reasonings of true philosophy; which, shewing us the original qualities of human nature, teaches us to regard the controversies in politics as incapable of any decision in most cases, and as entirely subordinate to the interests of peace and liberty . . . 'tis certain, that the concurrence of all those titles, *original contract*, *long possession*, *present possession*, *succession*, and *positive laws*, forms the strongest title to sovereignty, and is justly regarded as sacred and inviolable. But when these titles are mingled and oppos'd in different degrees, they often occasion perplexity; and are less capable of solution from the arguments of lawyers and philosophers, than from the swords of the soldiery.[141]

Mixed title from mixed sovereignty grants mixed results; hence *Johnson* and its subsequent academic history. The Humean flexibility generated *Johnson*'s literary scope, but it also comported with Marshall's vision of Indian-American relations.

The best illustration of Hume's prevalence in *Johnson*—the reliance on moral norms rather than legal principles—is Marshall's use of custom in his decision. Kades argues: "Marshall never invokes the word custom, yet . . . it is a recurrent theme underlying the holding of the case."[142] "Custom" hearkens to the philosophy of Hume rather than Locke. Reliance upon custom grounds meaning and understanding in conduct, rather than theory. Thus, when Marshall traced colonial history, referring to discovery's "universal recognition"[143] or suggesting that discovery and conquest have "been received as

140. *Id.* at 543 (directly refuting Locke); *see supra* Part II.B.
141. HUME, *supra* note 8, at 613. Note the use of the word "sacred." *See infra* Part V.B.
142. Kades, *supra* note 18, at 109.
143. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

the foundation of all European title in America,"[144] he essentially relied on the custom that he asserts has gone unquestioned from time immemorial. The validity of the assumption was tenuous, but the strategy was pure Hume. Though he tried to honor first occupancy with Indian Title, Marshall was well aware of the shortcomings of Lockean thought in this regard. Thus, particularly in his conquest argument, Marshall used Lockean language to follow Humean thought.

D. Marshall's Conquest Rule: Acquisition, Abdication, and Original Justice

Despite Locke's critique of the conquest rule, Marshall could not undermine American sovereignty. Locke could not alleviate that tension; it was too rigid, too "fix'd." Hume, on the other hand, could alleviate the tension by making cultural pragmatics legitimate. Thus, he invented a Humean conquest rule, relying on custom and the relevant western literary tradition. The modified conquest rule did not require assimilation,[145] did not require that a robust sense of "statehood" be applied to the Indian nations, and did not suggest that Indian tribes were automatically stripped of their land. It simply used conquest-derived theories to found American title, despite the absence of actual conquest. Two holdovers from conquest completed the picture: original justice and judicial abdication.

To settle the tension between property rights derived from conquest and those derived from first occupation, we might consider Blackstone:

> What we call *purchase, perquisitio,* the feudists called *conquest, conquaestus,* or *conquisitio* . . . .[T]he Norman jurists . . . styled the first purchaser (that is, he who brought the estate into the family who at present owns it) the conqueror or *conquereur* . . . .William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled *conquaestus,* and himself *conquaestor* or *conquisitor;* signifying

144. *Id.* at 587.

145. In some ways, Indian Title was the first step toward assimilation. "[T]he reasons for maintaining [the right of individual Indian occupancy] would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life." Cramer v. United States, 261 U.S. 219, 227 (1923). A Lockean approach says that the tribes should be left to live independently with their property undisturbed. But Marshall's Humean turn appreciated the unlikelihood of peaceful co-existence without some reconciliation of cultures.

> that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived.[146]

Conquest, whether connoting mere acquisition or victory, rewinds the clock, so that all claims of "first occupation" in a given land begin at the moment of conquest.[147] Conquest, then, as "original justice" is the moment that starts the clock, eradicating old relationships and erecting new ones.

As original justice, violent conquest also has the effect of silencing the past, silencing all claims that the new regime refuses to reinvigorate. As Hannah Arendt noted in *On Revolution*: "Where violence rules absolutely . . . everything and everybody must fall silent."[148] Violent conquest is a destructive and generative event. It silences the old regime and selectively gives voice to the remnant as the conquering sovereign sees fit. The ascendancy of a new law is typically conceived as erecting order out of chaos, and the generating act is typically one of violence; chaos is indescribable and therefore characterizes a time of silence before the law. Revolutions regard themselves in terms of correcting the disorder and apparent injustice, inequality, and "chaos" of the preceding age.[149]

The Indian first occupation at issue in *Johnson* posed a difficulty to Marshall because the establishment of the American government in the New World did not require acts of specific violence toward the first occupiers who were only too willing to relinquish their lands for money. If there was no original disorder, what could justify the instantiation of the new government?

The most convenient justification was a conceptualized conflict of cultures and systems, a clash of ideologies rather than *actual* conflict. The European, agriculturalist system "won" because it was conceived of "superior

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146. 2 BLACKSTONE, *supra* note 127, at *243 (footnote omitted). Blackstone's sense that the common law was a product of custom is perfectly consistent with Hume's view. *See, e.g.*, Hon. Diarmuid F. O'Scannlain, *Rediscovering the Common Law*, 79 NOTRE DAME L. REV. 755, 758 (2004) ("For Blackstone, the common law was the product of what he called 'immemorial usage . . . [of which] judicial decisions are the principal and most authoritative evidence' . . . [c]omprised of established customs, rules, and maxims . . . ." (quoting 1 BLACKSTONE, *supra* note 127, at *68–69)).

147. Considering conquest and warfare as the origin of civilization, see THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 35 (Rex Warner trans., Penguin Books 1972) (400 B.C.) ("This was the greatest disturbance in the history of the Hellenes, affecting . . . the whole of mankind . . . . [A]fter looking back into [history] as far as I can, all the evidence leads me to conclude that these periods were not great periods either in warfare or in anything else."). Conquest starts the clock.

148. HANNAH ARENDT, ON REVOLUTION 9 (Viking Press 1973) (1963).

149. *See, e.g.*, LIVY, THE EARLY HISTORY OF ROME (Aubrey de Sélincourt trans., Penguin Books 1971) (29 B.C.). After a dispute, the particulars of which Livy is unsure, Romulus kills Remus. "This, then, was how Romulus obtained the sole power." *Id.* bk. 1.6.

genius."[150] Marshall was skeptical about this characterization, but he exempted himself from the argument, suggesting that it was a matter of course and custom, a necessary part of the rational narrative, that he was not at liberty to deny. If "conflict" created justice, then a "conflict" of some sort was needed for a coherent national story. That "conflict" and the subsequent "victory" of European "genius" was the origin.

As the instrument of the government, Marshall could only speak in terms that emanated from the creation of his duty. This duty had a European tradition in which Marshall couched his opinion, but its origin is found in the American Constitution and he cannot speak of any "law" that came before because it has no bearing on his judicial task; justice, to be just, can only confront what stands before it, not what stands in its past.[151] Thus, as Marshall wrote in *Foster v. Neilson*:[152]

> In a controversy between two nations concerning national boundary, it is scarcely possible that the Courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest.[153]

Nevertheless, Marshall attempted to give Indian voice and standing in the new regime with Indian Title. These claims cannot question the conquest itself, however, but only the aftermath. Thus, courts are silent as to the justice of conquest itself.

Essentially, the court has power, but cannot speak of the origins of its power, especially where that power originates in conquest. Marshall could not reach beyond his role as an instrument of the government. A Humean skeptic and a Humean realist, he speculated on the justice of these claims, but ultimately submitted to what was essentially culturally perceived "necessity."

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150. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

151. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) ("The past cannot be recalled by the most absolute power.").

152. 27 U.S. (2 Pet.) 253 (1829).

153. *Id.* at 306–07 (discussing a dispute over the power of either France or Spain to grant a tract of land in Louisiana, Marshall held that the powers gained by the United States from France by treaty compelled him to find the authority in the United States). Marshall went on to say:

> If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own Courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question . . . .

Id. at 309.

The conquest argument in *Johnson* thus has a strange result. On the one hand, conquest silenced the "conquered" (the fictions continue to frustrate clarity) following the tradition that by conquest they lost title and legal redress because the court cannot adjudicate the "original justice" that seized the land. On the other, the Court created and honored "sacred" rights, granting a legally cognizable moral claim to the conquered as a result of their refusal to assimilate.[154] This line of reasoning is unprincipled and often subject to whim. But it emanates from the cultural logic of *Johnson*, where Marshall acknowledged the early wrongs, but also knew that he had no way to make rights without upsetting the foundations of a government.

V. *JOHNSON* AS A LITERARY-SOCIAL MODEL

A. The Myth of *Johnson*

"Caesar, his enchanter!"

—Hermann Broch[155]

Johnson's strongest critics are Federal Indian law scholars like Robert Williams who think that *Johnson* "represents a point of closure, not a point of origin, in United States colonizing discourse."[156] Williams is right in part, if we consider Justice Reed's infamous remarks in *Tee-Hit-Ton Indians*:

> 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 return for blankets,

154. *See* Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 355 (1945) (Jackson, J., concurring). Justice Jackson wrote:

> Nothing is gained by dwelling upon the unhappy conflicts that have prevailed between the Shoshones and the whites—conflicts which sometimes leaves one in doubt which side could make the better claim to be civilized. The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing.

Id.; *see also* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 252–53 (1985) (holding that New York State, having obtained lands directly from the Oneida Nation, in violation of the 1793 Non-Intercourse Act, had illegally obtained those lands and, thus, nearly 200 years of illegal occupation was compensable); *cf. id.* at 273 (Stevens, J., dissenting) ("The Framers recognized that no one ought be condemned for his forefathers' misdeeds . . . .").

155. HERMANN BROCH, THE DEATH OF VIRGIL 22 (Jean Staff Untermeyer trans., Oxford Univ. Press 1983) (1945) (speaking in the voice of the Roman citizens who decried Virgil as the mere mouthpiece of Octavian).

156. WILLIAMS, *supra* note 15, at 231.

> food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[157]

In 1955, the notion of white superiority and Indian survival only by the white man's good graces held sway, as the Court acknowledged *Johnson* while ignoring its skepticism. Justice Reed proves his misreading of *Johnson* when he refers to "original Indian title or permission from the whites to occupy."[158] Reed envisioned widespread violent conquest and U.S. magnanimity in its wake, even conceiving of Indian title as a gift from the federal government rather than a "sacred" right. What's worse is that when Indian title was recognized as sacred, that did not stop divestment from time to time: "Now, it is true that in decisions of this court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands."[159] The Court in *Lone Wolf*, despite the invocation of "sacred," nevertheless held that Indian title could be divested by Congress because it is within the congressional plenary power over Indian nations.

The view of many of *Johnson*'s modern critics, the view that constitutes the myth *of Johnson*, is that the opinion is essentially an act of conquest itself, bringing into American law all of the Eurocentric prejudices that plagued much of colonial American thought. These criticisms are best aimed not at *Johnson*, but rather at subsequent opinions that failed to reckon Marshall's sarcasm, and the cultural pragmatics that drive *Johnson*.[160]

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157. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289–90 (1955). An unbelievable statement, really. Furthermore, as Cohen notes:

> The sale of Manhattan Island for $24 is commonly cited as a typical example of the white man's overreaching. But even if this were a typical example, which it is not, the matter of deciding whether a real estate deal was a fair bargain three hundred years after it took place is beset by many pitfalls. . . . Many acres of land for which the United States later paid the Indians in the neighborhood of $1.25 an acre, less costs of surveying, still remain on the land books of the Federal Government, which has found no purchasers at that price and is now content to lease the lands for cattle grazing at a net return to the Federal Government of one or two cents per annum per acre.

Cohen, *supra* note 41, at 38. Cohen's numbers are skewed given he wrote the article in 1947, but his point is well made. Though there were often differences in bargaining power between the tribes and the white settlers, in 1626, these differences were not so pronounced. No one could have foreseen the future value of Manhattan, so the story tells us little about the abuses of the white colonists or of the supposed simplicity of the tribes.

158. *Tee-Hit-Ton Indians*, 348 U.S. at 279. Justice Reed also argues that the sovereign "grants" the right of occupancy to the Indians, and that Indian title consists of "mere possession." *Id.*

159. Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903).

160. It is worth noting that there was no valid fear that recognizing right of occupancy as a federally cognizable, compensable title would proceed to bankrupt the federal government. Cohen, *supra* note 41, at 34. Cohen also notes, to defuse the conquest argument, that even after the Revolutionary War, when the U.S. population far outnumbered the Native American population,

For Williams, *Johnson* "preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples."[161] Williams overlooks the fact that Marshall's opinion appreciates the peculiarities of colonization rather than explicit conquest, and tries to alleviate, as best it can, the racism that often rode hand in hand with expansion.

Other critics typically fall into the liberal, problematic notion of "first occupancy" as the foundation of all property claims.[162] This is a Lockean perspective, common sense's legal articulation of "first come first serve," but it falls into the Lockean traps discussed in Part III. Epstein notes:

> The academic literature on the left makes its living attacking the primitive Lockean notion that individuals acquire property when they "mix" their labor with the land. That theory is often said to stand in the way of an equitable distribution of resources within society. But, it is just this theory of original acquisition that fuels the indigenous claims . . . . Now, every lawyer and anthropologist who testifies on the issue will emphasize the priority of possession of indigenous populations.[163]

As in *Johnson*, the rights of Locke's first occupant were subordinate to the conqueror's in the courts of the conqueror, but Locke's argument was too simple for postcolonial governments. It was simply not an option to assume that Indians had superior rights via first occupancy because doing so would have invalidated not only all American land claims, but also the legitimacy of the U.S. government. The difficulty dissipates if we limit Locke's theory to intranational disputes: Though Indian Title can be perceived as a prior-in-time

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and when the American military had just manifested its prowess, the federal government still favored treaty and purchase to conquest and war, which were available. *Id.* at 41. This contrasted to early colonization, however. *See* Valencia-Weber, *supra* note 113, at 421 ("The colonists chose treaty making to obtain what they needed from the Native Americans who had superiority over the Euro-Americans in population, military strength, possession of land, critical resources, and knowledge . . . ."). Of course, the colonists and the colonial governments may have preferred treaty simply because they preferred peace, but the bare point is sufficient.

161. WILLIAMS, *supra* note 15, at 317.

162. *See* Danaya C. Wright, *Foreword: Toward a Multicultural Theory of Property Rights*, 12 U. FLA. J.L. & PUB. POL'Y 2, 2–3 (2000). Jo Carillo writes: "[I]n the mythology of conquest, indigenous peoples represent nature, chaos, primitivism, animalism, communal property, and the like—all forces characterized by liberal ideology as ones that inevitably evolve into order." Jo Carrillo, *Disabling Certitudes: An Introduction to the Role of Mythologies of Conquest in Law*, 12 U. FLA. J.L. & PUB. POL'Y 13, 14 (2000). See *supra* note 95 for such a caricature, even if it has the pretense of solid anthropological study. This is ultimately the great problem in the historical mythologies of the United States and the desire to eradicate them. Sympathetic writers sometimes overemphasize the ecological serenity of Pre-Colonized America, to the detriment of the humanization of the indigenous peoples. On the other hand, more complex accounts necessarily garner less sympathy.

163. Epstein, *supra* note 5, at 15.

ownership right, Locke's sense of first occupancy matters *within* a nation, but the rights of conquest are applied from *without*.

Locke's intuitive approach is too abstract and simple for general application and is ill-suited for the realities that *Johnson* sought to describe. Nevertheless, it raised the issue of the justice of the conquest generally. Marshall tried to accommodate this concern in *Johnson* by conflating discovery and conquest, setting the stage for his eloquent conclusions in *Cherokee Nation*. Marshall faced the realities and problems of postcolonial government, appreciating the rights of the indigenous peoples, yet elucidating a rationale that justified American proprietorship. He side-stepped Locke's problems by resorting to Hume and custom. Basically, Marshall "elaborated a version of discovery to suit the needs of security of title in American real estate law. When Indian interests were directly presented to him, as they were in *Cherokee Nation* and *Worcester*, he confirmed the independence of Indian nations."[164]

B. The Myth in *Johnson*: "Sacred Right"

The myth in *Johnson* is one of conceptual conflicts that parallel real conflicts, but the moral is one of skepticism toward the histories we have been handed. That moral became a moral right, expounded in *Johnson*, and summarized in Justice Baldwin's paraphrase: "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."[165] "Sacred" is a religious term, incumbent with duties of respect and honor. The sanctity of Indian Title constitutes the value of *Johnson*, appreciated by the courts in numerous cases.[166] Looking briefly at some of *Johnson*'s subsequent history, we will see how the literary aspect of *Johnson* makes the opinion vital. The moral depth is lost on many of Marshall's critics who see the story, but mistake the man. *Johnson* is not just a social model for American-Indian legal interactions; it is also a literary-social model with subtleties in tone and purpose that question and encourage further questioning of the ability to do justice to the past.

164. Ball, *supra* note 12, at 43.

165. Mitchell v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

166. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 235 (1985); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 668 (1974); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 52 (1946); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 359 (1945) (Douglas, J., dissenting); United States v. Santa Fe Pac. R.R., 314 U.S. 339, 345 (1941); United States v. Kagama, 118 U.S. 375, 384 (1886); Catawba Indian Tribe v. South Carolina, 865 F.2d 1444, 1451 (4th Cir. 1989); United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1983); Oneida Indian Nation v. New York, 691 F.2d 1070, 1074 (2nd Cir. 1982); Alabama-Coushatta Tribe v. United States, No. 3-83, 2000 WL 1013532, at *10 (Fed. Cl. June 19, 2000).

C. *Cherokee Nation* and *Worcester*

Nearly 10 years after *Johnson*, Marshall delivered two decisions, *Cherokee Nation v. Georgia*[167] and *Worcester v. Georgia*,[168] which offered a more refined articulation of the relationship between American and Indian title. In *Cherokee Nation* Marshall famously annunciated that Indian tribes are "domestic dependent nations . . . in a state of pupilage."[169] Nevertheless, Marshall held that the Supreme Court was not the tribunal to determine whether Georgia had the authority to punish Indians who had committed crimes against Indians on Indian lands. "If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future."[170] Georgia's aggression might have been wrong, but the Court did not have the power to stop it.

Cherokee Nation faced Marshall with the ambiguities of *Johnson*, and he tried to step away. Instead of the discoverer "impairing" Indian rights in *Johnson*, *Cherokee Nation* described the relationship in cooperative terms: The Indian tribes were "under the protection of the United States"[171] and "any attempt to acquire their lands . . . would be considered by all as an invasion of [the United States'] territory, and an act of hostility."[172] At the same time, this Comment's discussion of *Johnson* demonstrates the consistency of *Cherokee Nation* and *Johnson*. The baffling phrase "domestic dependent nations" holds within it all of the complexities of *Johnson*. "Domestic nation" invokes Marshall's discovery rule with the United States exerting "dominion" over Indian lands. A "dependent nation," on the other hand, comports with *Johnson*'s articulation of the conquest rule, where Indian Nations were brought within the territory of the United States, but maintained sovereignty due to a lack of assimilation. Essentially, *Johnson* is the story and *Cherokee Nation* is the law.

Andrew Jackson appointee Justice Baldwin vehemently dissented from Marshall's holding in *Cherokee Nation*, arguing that the Indian tribes "occupy tracts of our vast domain,"[173] and overreading the discovery rule in *Johnson*. Justice Johnson, switching from sympathy in *Fletcher*, also dissented, arguing that "the law of nations would regard [the Indians] as nothing more than

167. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
168. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
169. *Cherokee Nation*, 30 U.S. at 17.
170. *Id.* at 20.
171. *Id.* at 17.
172. *Id.* at 17–18.
173. *Id.* at 32 (Baldwin, J., dissenting).

wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state."[174] Justice Johnson underread the qualifications on conquest inserted into *Johnson*.

But Marshall addressed these misreadings of *Johnson* in the second paragraph of the *Cherokee Nation* when he wrote:

> If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.[175]

Here Marshall offered another apology akin to *Johnson*'s. But unlike *Johnson*, *Cherokee Nation* is more direct, and its critique more biting. In passing the act at issue, Georgia had based its sovereignty on the discovery principles from *Johnson*,[176] but those assertions were reserved for the "discovering," "conquering" sovereign—that is, the federal government.

Worcester offers the best presentation of Marshall's matured views on property foundations and Indian title. Georgia, by bringing an action against a U.S. citizen for entering onto Indian lands, had crossed the line and created a cause of action ripe for Supreme Court review, the act "being repugnant to the constitution, treaties, and laws of the United States."[177]

As for *Johnson*, *Worcester* was clear:

> 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

174. *Id.* at 27–28 (Johnson, J., dissenting). Johnson also argues that the treaties contain language that is "certainly the language of sovereigns and conquerors, and not the address of equals to equals." *Id.* at 23. In *Fletcher* Johnson had argued against Georgia's assertion of any power over an expectancy, but now, when he saw conquest rather than expectancy as the foundation of rule, he conceded to Georgia its power.

175. *Id.* at 15.

176. *Id.* at 3 ("The foundation of this charter, the bill states is asserted to be the right of *discovery* to the territory granted . . . .").

177. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 541 (1832).

> discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors.[178]

Worcester put the discovery principle on its proper footing. Marshall did not deny that discovery granted rights to the discoverer, but he clearly asserted that discovery granted no rights "in the country discovered." Marshall explained that discovery dictated the relationship between European sovereigns, but said nothing about the rights of the inhabitants. Marshall also went on to disparage the "extravagant and absurd idea, that the feeble settlements made on the sea-coast"[179] won any legitimate power for the colonists, satirizing any factual allegation that violent conquest had taken place. Rather than entertain the elaborate fictions of *Johnson*, *Worcester* found Marshall unwilling to introduce cultural fictions that did not fully engage the facts.

In fact, Marshall's *Worcester* opinion created a method for interpreting Indian treaties, treating them as highly questionable contracts that should be read according to the probable understanding of the Indian signees, rather than the highly technical understanding of lawyers and diplomats. Again, Marshall addressed incompatible cultures, and the resulting judicial policy, consistent with *Johnson*, was one of great skepticism toward the motivations and assertions of the American claimants. As Robert Jackson wrote more than a century later, "The most elemental condition of a bargain was not present, for there was nothing like equality of bargaining power."[180] Marshall conjured the same doubt with his story in *Johnson*.

CONCLUSION

Hamstrung by legal tradition and an unseemly but undeniable history, *Johnson*'s justice is best described as creative. Marshall took dominion from discovery, but limited it to a preemptive right. Consequently, he needed a rule that would establish American title in the Americas. The conquest rule was the European justification for the establishment of a property regime, providing the doctrines that justified and organized new title systems in new lands. Using these rules together, Marshall concocted a nation's narrative, with subtleties of tone that questioned the justice of the past while nodding

178. *Id.* at 543.
179. *Id.* at 544.
180. Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 357 (1945) (Jackson, J., concurring) (concurring that the Indian rights at stake were "political" rather than common-law contractual rights, Jackson nevertheless sympathized with the Indian tribes whom he saw as victims "of the 'civilized'").

toward the inevitability of it all. Because Marshall did away with Locke and looked to Hume, custom became the focus, and custom, rather than pure law, demanded a story. *Johnson* was the story. Thus, in contrast to the frequent criticisms of *Johnson* as a Eurocentric invocation of racist myths, this Comment positions *Johnson* within western philosophical and literary traditions to show how it engaged those myths but also tried to do something new that would account for the unique relationship between the Americans and the American Indians.